No. 25-1779

In the

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

January 20, 2025
Team 24
Counsel for Respondent

QUESTIONS PRESENTED

I. Under the private nondelegation doctrine, is granting enforcement power to a private entity constitutional when the private entity is subordinate to an independent agency and operates as an aid?

II. Under the First Amendment, is a regulation constitutional when it requires the implementation of reasonable age verification measures that are rationally related to the government's legitimate interest in protecting minors from accessing obscene materials harmful to their welfare?

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The record provides the published opinion of the United States Court of Appeals for the Fourteenth Circuit in *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024), cert. granted, No. 25-1779. R. 1-15. The opinion of the United States District Court for the District of Wythe is unreported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of the following statutory provisions: the "Keeping the Internet Safe for Kids Act," codified in Title 55 of the United States Code, and "Rule ONE," codified in Title 55 of the Code of Federal Regulations, which are reproduced in the Appendix. The relevant constitutional provision is the First Amendment to the United States Constitution, U.S. Const. amend. I.

INTRODUCTION

As technology has quickly evolved, the question of how to protect children online has become more urgent. The era of a single-family computer in the living room is over, replaced by young children's easy, independent access to the internet through smartphones and tablets. Now, children can consume unregulated harmful content anytime and anywhere. Research indicates that early exposure to pornography is detrimental to our nation's youth, underscoring the critical importance of implementing safeguards to prevent minors from accessing explicit materials. R. 3.

In response to widespread concerns regarding the lack of regulations that protect children online, Congress took action and, through the Keeping the Internet Safe for Kids Act ("KISKA"), created the Kids Internet Safety Association, Inc. ("Association")–a private nonprofit–to ensure the development and implementation of regulations that promote "safety for children online" and provide "rules of the road for adults interacting with children online." 55 U.S.C. § 3052(a). KISKA grants the Association the power to promulgate and enforce rules under the supervision of the

Federal Trade Commission ("FTC"). In a hearing before the Association, experts testified to the horrifying and detrimental impact obscene and pornographic content has on children. R. 3. In response, the Association enacted Rule ONE, which requires reasonable age verification measures to be implemented by certain commercial entities. *Id.*

Pact Against Censorship ("PAC"), the largest trade association for the American adult entertainment industry, challenges the constitutionality of the Association's enforcement power of Rule ONE and the age verification requirement in Rule ONE. PAC is wrong on both counts.

The Association does not violate the private nondelegation doctrine because its enforcement powers are subordinate to the FTC. Furthermore, Rule ONE's age verification does not violate the First Amendment because requiring reasonable age verification to prevent children from accessing pornographic content is rationally related to the government's legitimate interest in protecting children.

STATEMENT OF THE CASE

Statement of the Facts

This case involves Congress's response to the growing concern over the lack of regulations regarding readily accessible obscene and pornographic content on the Internet, which is detrimental to America's youth in the ever-increasing age of technology. R. 3. To protect children from being bombarded with offensive and obscene content online, Congress enacted KISKA, effective in January 2023. R. 2. KISKA provides a broad regulatory framework to "keep the Internet accessible" while also making it "safe for the American youth." 55 U.S.C. § 3050(a). Because "internet issues evolve rapidly," Congress purposefully refrained from creating strict rules under KISKA to prevent the laws from becoming ineffective. H. Rep. No. 92-544, at 1 (2022) (Conf. Rep.). Since the internet has advanced rapidly, Congress chose a structure that allows flexibility in developing and enforcing regulations. *Id.*

Through KISKA, the Association was entrusted with "monitor[ing] and assur[ing] children's safety online." 55 U.S.C. § 3054(a). To fulfill this purpose, Congress delegated to the Association the important task of developing and implementing regulations that set "standards of safety for children online." 55 U.S.C. § 3052(a). Modeled after the structure of the Horseracing Integrity and Safety Authority ("HISA"), the actions of the Association are subject to the oversight of the FTC. R. 2; *see generally* 55 §§ 3052, 3053, 3054. To fulfill the goals of Congress, the Association may engage in rulemaking as well as the enforcement power to investigate, impose civil penalties, file lawsuits, and issue subpoenas and civil sanctions to enforce compliance with regulations created to promote children's safety online. *See generally* 55 U.S.C. §§ 3054(a)-(j), 3057.

However, the Association's power is not absolute, as under the supervisory role, the FTC may "abrogate, add to, or modify" rules and procedures created by the Association. 55 U.S.C. § 3053(e). The Association's rulemaking and enforcement duties do not limit the FTC's authority. 55 U.S.C. § 3054(b). Additionally, the FTC wields the power to perform a *de novo* review of any enforcement action the Association brings before an administrative law judge. 55 U.S.C. § 3058(c)(3).

Shortly after KISKA became effective, the Association's Board of Directors was established and immediately began holding meetings to consider the detrimental effects access to pornography has on children. R. 3. Experts testified to the horrors and impact of early access to pornography. *Id.* Early exposure not only results in a greater probability of engaging in "deviant pornography" but may also cause children to suffer from "gender dysphoria, insecurities, and dissatisfactions about body image, depression, and aggression." *Id.* Moreover, the higher a child's

use of pornography, the greater the likelihood of a drop in grades. *Id.* To prevent this detrimental impact on the welfare of children, the Association passed Rule ONE. *Id.*

To prevent children from accessing sexually explicit materials, Rule ONE requires websites to implement reasonable age verification measures to verify that only adults access explicit content. 55 C.F.R. § 3. Reasonable verification methods include government-issued ID or any other reasonable method that uses "transactional data." 55 C.F.R. § 3(a)(1)-(2). However, Rule ONE only applies to commercial entities and specific websites that knowingly and intentionally publish or distribute "material on an Internet website . . . more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a). If an industry member breaches the regulation, the Association has the power to seek injunctive relief, impose daily fines of up to $10,000 for non-compliance, and penalize violators with fines reaching a maximum of $250,000 each time a minor accesses a site with explicit material due to non-compliance with Rule ONE. *See generally* 55 C.F.R. § 4(a)-(b).

Since Rule ONE became effective in June 2023, the adult film industry and its members, represented by PAC, went "into a frenzy." R. 4-5. The industry was concerned that requiring reasonable age verification to protect children might affect their livelihoods. R. 4. Despite concerns that personal information will be compromised, Rule ONE states that no commercial entity should retain the identifying information of any individual accessing a regulated website to safeguard individuals' identities. 55 C.F.R. § 2(b).

Procedural History

In August 2023, PAC filed this suit in the United States District Court for the District of Wythe, seeking to permanently enjoin Rule ONE and the Association, alleging two claims. R. 5. First, PAC alleged that Congress violated the private nondelegation doctrine when it delegated enforcement power to the Association, and second, that Rule ONE's age verification requirement

violated the First Amendment. R. 2. PAC moved for a preliminary injunction, which the U.S. District Court of Wythe granted. R. 5. After hearing evidence, the court held that the Association did not violate the private nondelegation doctrine, reasoning that the FTC has sufficient oversight. *Id.* However, the court held that Rule ONE violated the First Amendment, reasoning that the law affects more speech than needed under strict scrutiny review. *Id.*

The Association timely appealed the injunction to the United States Court of Appeals for the Fourteenth Circuit. *Id.* PAC timely cross-appealed on the constitutionality of the Association's enforcement power. *Id.* The Fourteenth Circuit affirmed the Association's enforcement powers under the private nondelegation doctrine and reversed the district court's holding that Rule ONE violated the First Amendment. R. 9-10. The Fourteenth Circuit reasoned that the Association was properly subordinate because the FTC could "abrogate, add to, or modify" the Association's rules; therefore, the delegation of enforcement powers did not violate the private nondelegation doctrine. R. 7; 55 U.S.C. § 3053(e). Additionally, the court found Rule ONE was constitutional because the controlling standard of review was rational basis—which Rule ONE satisfies—not strict scrutiny, as the district court improperly applied. R. 7-10.

Accordingly, the Fourteenth Circuit vacated the injunction. R. 10. PAC filed a timely petition for a writ of certiorari, which this Court granted to determine (1) whether Congress complied with the private nondelegation doctrine in granting the Association its enforcement powers and (2) whether age verification requirements to access pornographic websites complies with the First Amendment. R. 16.

SUMMARY OF THE ARGUMENT

As technology continues to evolve, the law must adapt accordingly. Congress needs the ability to fulfill its duty efficiently and effectively. Congressional efficiency and effectiveness is especially crucial when internet safety regulations are lacking in an age where nearly every

American child has internet access at their fingertips. Thus, Congress established the Association, which was explicitly tasked with developing and implementing regulations to safeguard children online. Congress also permissibly delegated enforcement powers to the Association to ensure compliance with these regulations. The Association passed Rule ONE, which requires commercial entities posting obscene content online over a certain threshold to use reasonable age verification measures to prevent children's access. Therefore, this Court should affirm the Fourteenth Circuit's holding for two reasons. First, the Association's enforcement power is subordinate to the FTC's oversight. Second, Rule ONE is a reasonable exercise of constitutional regulation of obscene content that is harmful to children's welfare.

I.

This Court should affirm the Fourteenth Circuit's holding that Congress's delegation of enforcement powers to the Association was proper under the private nondelegation doctrine. The Association's enforcement power does not violate the private nondelegation doctrine for two primary reasons. First, the structure of authority provides adequate accountability. Second, the Association enforcement tasks are subject to the full authority and oversight of the FTC.

The Association is a private entity overseen by the FTC, an independent agency established by Congress and subject to legislative oversight and accountability. The Board of Commissioners of the FTC is also accountable to the President through the Appointments Clause in Article II. Within KISKA, Congress created a structure of authority that authorized the Association to promulgate and enforce rules to help keep the internet safe for kids, subject to the FTC's oversight. The Constitution requires private entities to be subordinate to an independent agency or government entity, regardless of whether Congress delegated rulemaking or enforcement powers.

Here, the Association's enforcement powers are subordinate to the FTC. When considering the entirety of the act, the structure of authority in KISKA grants the FTC power to review and

modify all actions of the Association on both the front and back end. On the front end, the FTC can abrogate, add to, and modify enforcement procedures proposed by the Association. And on the back end, the FTC can review *de novo* any civil sanctions imposed by an administrative law judge.

Finally, delegations are necessary so Congress can effectively and efficiently carry out its constitutional duties. The Association has expertise and knowledge in the technological field, so it is the most capable of regulating and enforcing KISKA's purpose. In response to the authority granted by Congress, the Association promulgated Rule ONE and can also oversee its enforcement to fulfill its purpose of promoting children's safety online.

II.

This Court should affirm the Fourteenth Circuit's holding that Rule ONE's age verification measures are constitutional under rational basis review. The First Amendment does not protect speech when any slight benefit the speech may confer "is outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Accordingly, the First Amendment does not protect obscene content. Thus, obscene content, because it is not constitutionally protected, can be categorically regulated or restricted. Rule ONE regulates only content obscene for children, material that is unequivocally beyond First Amendment protections. Thus, Rule ONE is a permissible form of content regulation.

When courts consider First Amendment claims for unprotected speech, rational basis review is the proper standard. This is further reinforced by *Ginsberg*, which requires that where the government regulates access to material obscene for minors, rational basis review applies. Rational basis review is proper here. *Ginsberg v. New York*, 390 U.S. 629 (1968). Rational basis review requires a law—the means—to be rationally related to serving a legitimate government interest—the end. This Court has held that protecting children from exposure to obscene,

pornographic content is more than a legitimate interest; it is a compelling one. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). Expert testimony reflects that early or frequent exposure to pornography has a detrimental impact on children, resulting in the potential for gender dysphoria, insecurities, body image issues, depression, and aggression. The Association passed Rule ONE to minimize children's access to pornography, which is unequivocally obscene for children, to prevent these deleterious effects through the use of reasonable age verification measures.

Here, the means are Rule ONE's reasonable age verification requirements, and the ends are protecting the welfare of children. Since the government has a legitimate interest in protecting children's welfare, and Rule ONE seeks to prevent children from accessing pornographic content harmful to them, the means and ends rationally relate. Thus, Rule ONE survives rational basis review.

ARGUMENT

Protecting children has been at the forefront of legislative and judicial concerns since this country's inception. Alongside this established duty to safeguard the nation's most vulnerable, Congress also has a responsibility to enact laws that reflect the will of the people. As technology advances faster than regulations can adapt, Congress's ability to implement reasonable regulatory schemes effectively and efficiently is vital. In response to public calls for stronger protections against children's access to explicit material, Congress acted swiftly, empowering the Association to establish regulations that ensure a safer online environment for children.

Congress's delegation of enforcement powers to the Association to enforce these regulations does not violate the private nondelegation doctrine for two reasons. First, the delegation is permissible because the Association is fully accountable to the FTC, ensuring proper oversight. Second, the delegation grants Congress the flexibility necessary to effectively carry out its

constitutional duties. Furthermore, the creation and promulgation of Rule ONE is constitutional for two reasons. First, Rule ONE is a permissible form of content regulation because it targets only constitutionally unprotected obscene material without posing a significant risk of content discrimination against protected speech. Second, it survives rational basis review because requiring reasonable age verification to access obscene material is rationally related to the government's compelling interest in protecting children.

I. THIS COURT SHOULD AFFIRM THAT THE DELEGATION OF ENFORCEMENT POWERS TO A PRIVATE ENTITY IS WITHIN THE SCOPE OF THE PRIVATE NONDELEGATION DOCTRINE WHEN THE ENTITY IS PROPERLY SUBORDINATE TO AN INDEPENDENT AGENCY.

Private nondelegation is a controversial doctrine; nevertheless, its roots are deeply embedded in American history and continuously upheld by this Court. Our Constitutional structure rightly demands accountability by separating the powers of government into three branches. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). However, these separation of power principles do not deny Congress the ability to delegate. *Id.* Thus, courts have placed constitutional limitations on delegation to maintain accountability between the people and their elected officials, as well as maintain proper separation of powers between the branches of government. *See, e.g.*, *Mistretta*, 488 U.S. at 371-72; *Ins v. Chadha*, 462 U.S. 919, 928 (1983) (Self-delegation of veto powers is an unconstitutional encroachment by Congress on the Executive Branch.); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (Delegating authority to a private party without public accountability is unconstitutional.); *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Delegation to a "for-profit" company is constitutional when the entity is accountable.).

This Court has continuously upheld the constitutionality of the nondelegation doctrine that allows Congress to delegate legislative function to the executive so long as Congress provides guidelines through an intelligible principle. *Gundy v. United States*, 588 U.S. 128, 135 (2019) (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (An intelligible

principle is when Congress provides the delegee sufficient guidance for how to use their discretion.). This Court has also upheld the delegation of legislative, judicial, and executive tasks to independent agencies. *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935) (recognizing Congress's authority to create the Federal Trade Commission–an independent agency). Independent agencies are organizations created by Congress to operate free from executive control, tasked with quasi-legislative and quasi-executive functions, and overseen by a Board of Commissioners. *Id.*

Furthermore, this Court permits delegation to independent agencies as long as the agency maintains independence from the different branches of government and the heads of the independent agencies are subject to proper appointment and removal procedures. *See Humphrey's*, 295 U.S. at 625-26 (The agency must be "free to exercise its judgment without the leave or hindrance of any other official or any department of the government."); *see also Buckley v. Valeo*, 424 U.S. 1, 135-43 (1976) (acknowledging the necessity of properly appointed superior officers).

Through KISKA, Congress entrusted the Association with ensuring the safety of children's online interactions under the FTC's supervisory authority. 55 U.S.C. § 3052(a). Delegations from Congress must first be properly accountable and, second, allow Congress the flexibility to carry out its constitutional duties effectively.

A. Private delegation is subject to the same constitutional accountability constraints as public delegations.

Congress can delegate to private entities overseen by an independent agency if the delegation conforms with the following accountability structure: (1) the agency is accountable for fulfilling the principles given to them by Congress, (2) the superior officers of those agencies are subject to appointment and removal procedures, and (3) private entities are subject to the authority and oversight of the agencies.

Delegations are subject to accountability through Constitutional structures that provide checks and balances. *Mistretta*, 488 U.S. at 371-72. The Constitution vests each branch of government with different functions. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. Congress complies with core separation of powers guarantees as long as it does not delegate unchecked legislative or executive authority. *Mistretta*, 488 U.S. at 371-72; *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). Therefore, delegations are permissible when they are subject to proper accountability structures. *J.W. Hampton*, 276 U.S. at 406.

When Congress provides an intelligible principle in its statutory delegation, the intelligible principle provides accountability by giving clear guidance to the delegee in exercising the delegated authority. *Gundy*, 588 U.S. at 135; *J.W. Hampton*, 276 U.S. at 409. Additionally, Congress can repeal, modify, or amend the statutory delegation. *Rivers v. Roadway Express*, 511 U.S. 298, 305 (1994). Further, when Congress delegates power to independent agencies, the President and Congress can hold them accountable through proper appointment and removal procedures. *See Humphrey's*, 295 U.S. at 629-30 (To keep the FTC independent, Congress can limit the President's removal power of superior officers who are not performing solely executive functions.); *cf. Buckley*, 424 U.S. at 124, 135 (president alone has appointment power of superior agency officers; agencies that exercise executive functions must conform to Article II Appointments Clause). These structural constraints uphold the separation of powers and provide accountability.

Delegation of authority to a private entity is proper when it is subordinate to an independent agency in accordance with the accountability structure.

1. Congress can delegate power to private entities overseen by independent agencies.

In every instance this Court has addressed private delegation of legislative power, it upheld the delegation as long as the government official or agency had ultimate responsibility. *See, e.g.,*

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (Court upheld statute because the private entity was (1) subordinate to the federal agency and (2) the federal agency had authority and surveillance of the private entities decisions); *Currin v. Wallace*, 306 U.S. 1, 15-18 (1939) (Court upheld statute authorizing the Secretary of Agriculture to approve regional tobacco quality standards if two-thirds of the affected growers recommended them); *cf. Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 n.6 (1984) (private parties permitted to exercise eminent domain power). This Court has reasoned there is no true delegation of government authority when the government, not the private entity, maintains ultimate control.

In contrast, this Court struck down private delegations when Congress delegated full and final authority to the private entity. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912) (ordinance gave government no discretion to reject or modify the decision of the private parties); *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121-22 (1928) (ordinance gave property owners unreviewable discretion to deny a variance); *see generally Carter*, 298 U.S. at 238. This Court's jurisprudence has struck down unfettered delegations but has upheld delegations that give government officials or agencies the final say. Therefore, Congress may delegate legislative power to a private entity as long as the private entity (1) "function[s] subordinately" to the independent agency and (2) the agency "has authority and surveillance over their activities." *Adkins*, 310 U.S. at 399.

a. It makes no difference whether Congress delegates rulemaking power or enforcement power.

Although this Court has yet to address the constitutionality of delegating enforcement power to a private entity, the test for delegating legislative power mentioned *supra* should also apply to delegating enforcement power because (1) delegating enforcement power in this context

does not violate any constitutional structure, and (2) private entities exercise enforcement power in other contexts.

Congress can delegate enforcement powers to independent agencies as long as those powers are collateral to their primary duties. *Humphrey's*, 295 U.S. at 628. Thus, private delegation of enforcement power does not violate Article II Section 1 of the Vesting Clause, which vests enforcement power in the Executive branch. *See* U.S. Const. art. II § 1. However, when Congress delegates to the independent agency—specifically the FTC— the enforcement powers are collateral to discharging and effectuating the agency's quasi-legislative or quasi-judicial powers. *Humphrey's*, 295 U.S. at 628. Nor does it violate the Appointments Clause when the President properly appoints the agency's superior officers. *Buckley*, 424 U.S. at 135. Here, the FTC superior officers are appointed by the President. 15 U.S.C. § 41; *Humphrey's*, 295 U.S. at 621.

Moreover, this Court has allowed private entities to exercise limited enforcement power in other contexts. *See PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 495 (2021) ("For as long as the eminent domain power has been exercised [in] the United States, it has [] been delegated to private parties."); *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 333 (2001) (common law recognized arrest power of private citizens). The Constitution itself contemplates that private individuals can exercise enforcement power during wartime. *See* U.S. Const. art. I § 8, cl. 11 (allowing Congress to "grant Letters of Marque and Reprisal;" a government license authorizing private individuals to attack and capture enemy ships). Thus, private parties can exercise enforcement power collateral to legislative and judicial tasks. However, delegating enforcement powers to a private entity is only proper if the entity is subject to the oversight of an independent agency.

Here, KISKA grants the Association the enforcement power to investigate, impose civil penalties and sanctions, file lawsuits, and issue subpoenas to enforce compliance with regulations that promote children's safety online. *See generally* 55 U.S.C. §§ 3054, 3057. These enforcement actions are collateral to KISKA's main goal of developing a regulatory framework that makes the internet safer for kids. 55 U.S.C. § 3050(a).

2. Private entities must be subordinate to an agency.

A private delegation inquiry should focus on the authority structure between the agency and the private entity. *Adkins*, 310 U.S. at 399. Constitutional limitations do not bar delegation to private entities; they merely require a structure of authority in which the private entity is subordinate to the agency. *Id.*

The relationship between private entities and an independent agency can be understood through the analogy of a CEO and a manager. In this analogy, the subordinate private entity represents the manager, while the independent agency functions like the CEO. While managers are given leeway to deal with the day-to-day, they are still fully accountable to the CEOs, who have the ultimate authority and say over what goes on in the company. CEOs entrust and task their managers with the authority to hire and fire employees, manage the workplace environment and client relations, and propel the company's goals forward. Managers handle various tasks independently, without constant supervision from their CEOs. Nevertheless, they must report back to the CEOs regarding their performance and the fulfillment of their responsibilities. A manager is fully accountable and subordinate to the CEO.

In the context of the private nondelegation doctrine, a private entity is accountable when it is subordinate to an independent agency, *Adkins*, 310 U.S. at 399, and when the overseeing agency takes an active rather than passive role when exercising control, *Consumers' Rsch. v. FCC*, 88 F.4th 917, 937 (11th Cir. 2023) (Newsom, J., concurring). Further, a private entity is subordinate

to an independent agency if the agency retains the ability to "approve[], disapprove[], or modify[]" the regulation that the private entity is enforcing. *Adkins*, 310 U.S. at 388.

This Court provided a framework for proper accountability in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). There, Congress passed The Bituminous Coal Act of 1937, which delegated to private entities in the coal industry the power to establish minimum coal prices. *Id.* at 388. The Court upheld the statute's constitutionality because the private entity was (1) subordinate to the federal agency and (2) the federal agency had authority and surveillance over the private entity's decisions. *Id.* at 399. The Court found that the private entity was subordinate because Congress had the power to approve, disapprove, or modify the regulations proposed by the private entity. *Id.* at 388.

Thus, the test for subordination is not whether a private entity exercises some level of legislative or enforcement function; the test is whether the private entity acts without oversight or merely aids the independent agency. *Oklahoma*, 62 F.4th at 228. Private entities can propose regulations, *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), and collect fees, *Pittston Co. v. United States*, 368 F.3d 385, 395-97 (4th Cir. 2004). Although a private entity cannot have the final say or be equal to the agency, it can still wield a great deal of power. *Oklahoma*, 62 F.4th at 229; *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *rev'd on other grounds*, 575 U.S. 43 (2015) (holding private delegation of enforcement power was unconstitutional because the private entity was equal to the independent agency).

Here, Congress labored over the drafting of KISKA to ensure that the delegation of enforcement powers to the Association was proper by requiring accountability to the FTC. *See generally* 55 U.S.C. §§ 3053 (FTC oversight), 3054 (FTC jurisdiction).

3. The Association's enforcement function is subordinate to the FTC.

The Association's enforcement power is properly accountable because it functions subordinately to the FTC. Through KISKA, Congress empowered the FTC to exercise quasi-legislative and quasi-judicial functions. *See* 55 U.S.C. § 3053(a) (the FTC prescribes rules); *see generally* 55 U.S.C. § 3054 (FTC oversees implementation and enforcement of the Act). KISKA further established the Association to assist the FTC in carrying out its functions, subject to the FTC's oversight. *See generally* 55 U.S.C. §§ 3052, 3053.

However, the Fourteenth Circuit's dissent claimed the FTC-Association relationship is improperly subordinate using the same misguided logic of the Fifth Circuit in *National Horsemen's Benevolent & Protective Association v. Black*, 107 F.4th 415 (5th Cir. 2024), which downplays the FTC's oversight of enforcement powers and mischaracterizes the test for subordination. R. 11-12. The KISKA statutes at issue are nearly identical in section number and substance to the Horseracing Integrity and Safety Act ("HISA") in *Horsemen's*; thus, the Fifth and Fourteenth Circuit analyses can be compared by referencing the same section number.

In *Horsemen's*, the court analyzed the delegation structure between the FTC and the Horseracing Integrity and Safety Authority ("Authority"), created by HISA. *See generally* 107 F.4th at 415. The court found that the Authority's enforcement power was not subordinate to the FTC because the FTC's "back end" review was insufficient, and the FTC's rulemaking power does not fix the division of power issues inherent in HISA's structure. *Id.* at 435.

However, the Fifth Circuit did not apply *Adkins*. 310 U.S. at 399 (delegation is proper when a private entity is (1) subordinate to the federal agency and (2) the federal agency has authority over the private entity's decisions.). For Judge Duncan, writing for the court, it was not enough for HISA to delegate authority to the FTC to "abrogate, add to, and modify" any rules created by the Authority. 15 U.S.C. § 3053(e). Or that the Authority was required to submit notice

of any civil sanctions they impose. 15 U.S.C. § 3058(a). Or even that HISA empowers the FTC to review any and all decisions by the administrative law judge 15 U.S.C. § 3058(c)(1). Nor did Judge Duncan address that all enforcement procedures developed by the Authority are subject to approval by the FTC. 15 U.S.C. § 3054(c)(2).

Without directly saying so, Judge Duncan effectively created his own test instead of following *Adkins*. *Horsemen's*, 107 F.4th at 429. According to Judge Duncan, if the private entity exercises *any* enforcement powers without immediate approval by an agency, it is not properly subordinate to the agency. *Id.* This test is essentially a per se bar on enforcement delegation. Judge Duncan reasoned that since HISA allowed the Authority to investigate, issue subpoenas and sanctions, etc, "the Authority does not 'function subordinately' to the FTC" in its enforcement duties. *Id.* However, this Court has never required an agency to be a micromanager. A CEO does not have to micromanage the daily activities of their managers to prove he is superior. The authority structure is inherent in who has the final say. Further, Judge Duncan downplays the "back end review" power of the FTC and ignores the front end power to modify or add to rules. *Id.* at 430.

Here, the Association's enforcement power does not exist in a vacuum. The "rulemaking" and "enforcement" actions cannot be bifurcated, as Judge Duncan asserts, because the enforcement actions take place collaterally to the "rulemaking" authority. Under KISKA, the proper way to conceptualize the FTC's power to modify enforcement procedures in 55 U.S.C. § 3053(e) and power to review civil sanctions in 55 U.S.C. § 3058(c) is to consider them in the totality of the entire Act rather than in isolation. For instance, 55 U.S.C. § 3054(c)(1)(A)(ii)-(iii) provides that the Association shall develop rules and procedures authorizing the issuance and enforcement of subpoenas and other investigatory powers. Most importantly, those provisions are subject to 55

U.S.C. § 3054(c)(2), which says the FTC must approve all the rules and procedures for enforcement selected by the Association. While the Association has subpoena and investigatory authority under 55 § 3054(h), the FTC must first approve those procedures and authorizations. 55 U.S.C. § 3054(c)(2) . Additionally, the Association can bring civil actions, but if a sanction is imposed by an administrative law judge, the FTC can review that sanction *de novo*. 55 U.S.C. § 3058(c)(3)(B).

Judge Marshall, dissenting for the Fourteenth Circuit, took a line out of Judge Duncan's playbook, employing the same faulty reasoning to the FTC-Association relationship. He stated that KISKA "plainly grants enforcement power to a private entity" because under 55 U.S.C. § 3054, the Association "has power to launch investigations, levy sanctions, and file suit." R. 11. But these functions are just as easily characterized as aiding the FTC. The test for subordination under *Adkins* is not whether a private entity has any enforcement-related tasks but whether it is acting as an aid to the independent agency that has full authority to approve, disapprove, or modify the decisions of the private entities exercising enforcement tasks. *Adkins*, 310 U.S. at 388, 399.

The Financial Industry Regulatory Authority ("FINRA") (formerly known as "NASD") and the Securities and Exchange Commission ("SEC") is one example of a subordinate relationship between a private entity and an agency. FINRA is overseen by the SEC and operates almost autonomously with broad rulemaking and enforcement power. *See Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. v. Nat'l Asso. of Sec. Dealers, Inc.*, 616 F.2d 1363, 1367-68 (5th Cir. 1980) (FINRA's enforcement power to investigate, discipline, and sanction members of the securities market for rule violations is properly subordinate under the SEC's supervision). Circuit courts have upheld the delegation of enforcement power to FINRA as proper due to the SEC's oversight and accountability. *See, e.g., Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982)

(investigation and sanction of a member violating FINRA's implemented rules was a proper exercise of enforcement power with SEC guaranteeing fairness); *Todd & Co. v. Sec. & Exch. Com.,* 557 F.2d 1008, 1012 (3d Cir. 1977) (FINRA has autonomy to create rules, enforce fines, and suspend member's licenses for violations when subject to SEC's review). The SEC-FINRA relationship is one possible way agencies can exercise oversight. While the SEC micromanages FINRA's enforcement power more than the FTC micromanages the Association, the test is subordination–not micromanagement.

Here, the FTC's oversight does not take a backseat in the Association's execution of duties. The FTC is in the driver's seat. Any proposed rule or modification requires a stamp of approval from the FTC within sixty days before the rule is published to the general public. 55 U.S.C. § 3053(b)-(c). The Association drafts regulations and enforcement actions. 55 U.S.C. § 3054(c). Then, the FTC approves or disapproves these actions. 55 U.S.C. § 3054(c). Additionally, the Association must notify the FTC of any civil sanctions initiated, and the FTC can review the administrative law judge's decision and "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part." 55 U.S.C. § 3058(c). Finally, the FTC has the final say on the Association's bylaws, which determine the removal process of Board or committee members. 55 U.S.C. § 3053(a)(1). This indicates that the FTC is actively exercising the oversight powers delegated to them over the private entity. The FTC directs each step the Association takes.

KISKA does not just provide a little bit of power to the FTC on the "back end." It provides the FTC ultimate control on the front and back end–and everything in between.

a. The FTC's power to abrogate, add to, or modify the rules cures any enforcement defects.

Congress gave the FTC potent power within KISKA's structure. Congress structured the FTC-Association relationship so that the FTC can "abrogate, add to, or modify" rules proposed by

the Association. 55 U.S.C. § 3053(e). The FTC can exercise this power for essentially any reason it "finds necessary." *Id.* This includes subpoenas and investigatory procedures the Association is tasked with developing. 55 U.S.C. § 3054(c)(1)(A)-(B). Not only does the FTC have approval power before the enforcement rules are promulgated, 55 U.S.C. § 3054(c)(2), but they also have the power to change them once enforcement commences, 55 U.S.C. § 3053(e).

Congress granted the FTC the power to cure any potential enforcement defects. Judge Marshall, dissenting for the Fourteenth Circuit, mischaracterized this as usurpation of power, saying no court should allow an agency to "alter the face of a statute simply to save it." R. 12. Judge Marshall's reliance on *Biden v. Nebraska*, 600 U.S. 477 (2023) is unfounded because the scope of the statutory authority in Biden is fundamentally different from KISKA. R. 12. In *Biden*, the Court struck down the Secretary of Education's ("Secretary") attempt to implement a massive loan forgiveness program under the Higher Education Relief Opportunities for Students Act ("HEROES Act"). 600 U.S. at 487. There, the HEROES Act only authorized the Secretary to "waive or modify" financial assistance programs, not to grant mass loan forgiveness. *Id.* at 494. The Court held that the power to "modify" did not authorize the Secretary to make "basic fundamental changes in the scheme." *Id.*

The power authorized in the HEROES Act is distinguishable from KISKA. Making enforcement changes retroactively is neither a usurpation of power, as Judge Marshall suggests, R. 12, nor does it alter the face of the statute, as in *Biden*. The plain reading of 55 U.S.C. § 3053(e) gives the FTC the ability to alter enforcement power retroactively. Congress gave the FTC more than the power to "modify"–they can also "add to." *Id.* Exercising post-enforcement power is not a fundamental change to the scheme but a power inherent to the structural authority Congress designed. Each entity is authorized to "implement and enforce" KISKA "within the scope of their

power." 55 U.S.C. § 3054(a)(1). Retroactive modifications or additions to the enforcement procedures are plainly within the scope of the FTC's power.

Judge Marshall asserts that the Association's ability to commence civil actions has no FTC oversight or accountability. R. 11. However, this assertion is baseless for two reasons.

First, nothing in KISKA can be "construed to limit the [FTC's] authority" over the Association. 55 U.S.C. § 3054(b). Additionally, the FTC's power to "add to" enforcement rules and procedures saves any potential issues with the Association's ability to commence civil actions. 55 U.S.C. § 3054(j)(1)-(2). Thus, the FTC can easily add a provision that requires approval before the Association can initiate a civil action. Therefore, the FTC's power to retroactively modify enforcement rules is sufficient to sustain the authority structure of KISKA as a whole and leads to the conclusion that the FTC's oversight of the Association provides accountability. Second, this is a facial challenge. Because the Association did not commence a civil action against PAC, R. 5, the question of whether the Association's enforcement ability is subject to sufficient oversight is not before this Court. Thus, this Court cannot rule on that issue.

Moreover, a private entity is accountable if it is properly subordinate to the independent agency, *Adkins*, 310 U.S. at 399, and, additionally, Congress cannot delegate to a private entity with a conflict of interest, *Carter*, 298 U.S. at 311.

4. KISKA board membership requirements account for conflicts of interest.

A key concern with private delegations is to ensure that private entities "are not able to use their position for their own advantage [and] to the disadvantage of their fellow citizens." *Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004) (upholding a statute that allowed a private entity to decide whether to refer a coal company to the Secretary of Treasury for enforcement action). This critical concern is evident in the foundational private delegation case of *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There, Congress created an Act that allowed private parties

within the coal industry to set wage standards, among other things, for the entire industry without any congressional oversight. *Id.* at 310. The Court had two related concerns with the Act's distribution of power. *Id.* at 310-11. First, there was no oversight for these private parties, and second, the private parties regulated their industry competitors, creating a conflict of interest. The Court described this power as allowing a subset of the coal industry "to regulate the affairs of an unwilling minority" in that same industry. *Id.* To the Court, this delegation was legislative delegation "in its most obnoxious form." *Id.* at 311.

Courts and scholars have disputed the validity and force of the Court's analysis and holding in *Carter*. Still, the Court's following statement further emphasizes that the Court's main concern was the conflict of interest, which created a massive accountability issue. *Id.* at 311. The delegation was "obnoxious" because it was a delegation to "private persons whose interest may be and often are adverse to the interests of others in the same business." *Id.* Thus, *Carter* proves that Congress cannot delegate to an unaccountable entity with personal interests at stake.

Here, the abuse of power concerns are baseless. Not only does the delegated power to the Association require FTC review and oversight, but the board members cannot have conflicts that might compromise their judgment. First, KISKA requires four out of seven board members to be from outside the industry, called independent members. 55 U.S.C. § 3052(d). Further, KISKA screens out conflicts of interest by mandating that no acting board member can have a present financial interest in any entity the Act regulates. 55 U.S.C. § 3052(e) (financial interest does not include merely employment).

Here, Congress was purposeful in creating the Association by carefully considering potential conflicts of interest that the *Carter* court was concerned about. The initial nominating committee comprised business leaders from outside the technology industry tasked with setting

up the initial Board of Directors. 55 U.S.C. § 3052(d)(A)-(B). The Association's board then installs any vacancies on the Board or committees, the majority of which are leaders outside the technology industry. 55 U.S.C. § 3052(d)(C). Additionally, for any matter requiring Board approval, the Board "shall have present a majority of independent members." 55 U.S.C. § 3052(g). The construction of KISKA clearly indicates that Congress wanted to avoid allowing opportunities for abuse and conflicts of interest to keep the Association properly accountable.

Therefore, there is no difference in whether Congress delegates rulemaking or enforcement authority to a private entity. The Association, like a manager, is subordinate to the oversight of the FTC—the CEO. This division of authority complies with the constitutional structures of accountability while granting Congress the flexibility to delegate and effectively carry out its constitutional duties.

B. Delegations offer Congress the flexibility required to perform its duties effectively.

Necessity and common sense enable coordination and flexibility among the branches of government to fulfill their constitutional duties. *J.W. Hampton*, 276 U.S. at 406. Given Congress's extensive lawmaking responsibilities, it is appropriate for Congress to rely on executive branch officers to implement and enforce the intended effects of legislation within specified limits. *Id.* Moreover, courts have allowed superior officers to exercise a great degree of discretion when executing legislation. *Id.* Such as the authority to establish rules that interpret and implement a law, including the power to define penalties for violations. *Id.*

The Necessary and Proper Clause allows Congress to delegate to fulfill its constitutional duties. *McCulloch v. Maryland*, 17 U.S. 316, 353 (1819). In *McCulloch*, the Court recognized that Congress has the implied power to exercise discretion regarding the methods through which the powers conferred by the Constitution are to be executed. *Id.*

Congress's need for flexibility is the same for private delegations. The Constitution does not deny Congress "the necessary resources of flexibility and practicality" in fashioning statutory schemes that involve private parties. *Currin*, 306 U.S. at 15. Private delegations allow Congress to utilize organizations with more knowledge and expertise to carry out Congress's policy interests. Further, legislators are not expected to be subject-matter experts in every "wise and useful" subject; often, legislation depends on "inquir[ies] and determination[s] outside of the halls of [Congress]." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) (Congress delegated power to the executive to suspend trade imports from countries who applied unreasonable tariffs on American exports.). Additionally, private delegations allow Congress to be more efficient. *J.W. Hampton*, 276 U.S. at 408 (reasoning it would be impossible for Congress to exercise its power if it had to be involved in every minor decision).

Finally, private organizations are better suited to carry out congressional tasks because private organizations are more likely to have their "finger on the pulse" of the industry they are overseeing. *See generally Adkins,* 310 U.S. at 381 (Court permitted members of the coal industry to collaborate with the government, due to the need for expertise); *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577 (1939) (Court acknowledged the expertise of industry groups and the importance of their role in developing regulations).

Given how rapidly technology advances and its complexity, the Association board members are the most suited to enforce Congress' interest in protecting children from obscene content online. As previously mentioned, the Board and standing committees comprise members inside and outside the technology industry. 55 U.S.C. § 3052(b). Industry members are selected to represent various individualized interests within the technological industry. 55 U.S.C. § 3051(5) (individualized interests such as web designers or executives). This ensures that various parties

with expert knowledge and experience design, regulate, and enforce regulations aimed at protecting children's safety online.

Furthermore, the Association's enforcement powers allow them to quickly and accurately respond to rapidly evolving technology. KISKA was created in response to growing demands for Congress to regulate commercial access to harmful, obscene pornography readily available to minors online. R. 2. Congress has a compelling interest in protecting the welfare of America's youth and future generations. To carry out this mandate, Congress needs the flexibility to delegate to the Association, under the FTC's oversight, and allow the private entity to implement and enforce the intended legislation to carry out this critical constitutional duty. *J.W. Hampton*, 276 U.S. at 406.

Therefore, delegating enforcement powers to the Association was a proper exercise of the private nondelegation doctrine because KISKA ensures accountability, and Congress has the flexibility to fulfill its duties.

II. THIS COURT SHOULD AFFIRM THAT RULE ONE COMPLIES WITH FIRST AMENDMENT FREE SPEECH BECAUSE IT IS A REASONABLE REGULATION OF OBSCENE MATERIALS HARMFUL TO CHILDREN'S WELFARE.

The First Amendment protects individuals' rights to free speech from governmental interference, particularly in matters of public concern, while permitting reasonable regulations in specific situations. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 811 (2019); *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("[N]ot all speech is of equal First Amendment importance . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous."). This protection, therefore, is not absolute. *R. A. V. v. St. Paul*, 505 U.S. 377, 387 (1992). The First Amendment prevents the government from making laws that abridge the freedom of speech. U.S. Const. amend. I. The First Amendment was intentionally fashioned to assure an "unfettered interchange of ideas for the bringing about of political and social changes

desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). This objective of free speech protections was "made explicit as early as 1774 in a letter of the Continental Congress." *Id.* Thus, unfettered access to pornographic material is not what the Framers intended to guarantee with First Amendment protections. *Roth*, 354 U.S. at 485 (The prevention and punishment of lewd and obscene utterances has "never been thought to raise any Constitutional problem.").

The First Amendment allows the government to restrict the content of speech when the speech offers "such slight social value" that any potential benefit from the speech "is clearly outweighed by the social interest in order and morality." *Virginia v. Black*, 538 U.S. 343, 358-59 (2003). Obscenity, defamation, and incitement are several types of speech unprotected by the First Amendment. *Counterman v. Colorado*, 600 U.S. 66, 78 (2023). The *Miller* obscenity rule defines obscene material as material that (1) appeals to the prurient interest, (2) depicts sexual content in a patently offensive way, and (3) lacks any serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24-25 (1973). Material appeals to the prurient interest if it "simply seeks a sexual response," *Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004), and is likely patently offensive if it involves "hard core" sexual conduct, like representations or descriptions of sexual acts, masturbation, and lewd exhibition of genitals, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).

The government exists to protect and serve its constituents by developing and implementing laws that reflect the needs and best interests of society, which is exactly what it has done with Rule ONE. Rule ONE promotes the welfare of children by requiring commercial entities to use reasonable age verification measures to ensure that only adults access obscene material. 55 C.F.R. § 2(a). "Sexual material harmful to minors" is defined in Rule ONE as material that, in relation to minors, (1) appeals to the prurient interest, (2) depicts sexual content in a patently

offensive way, and (3) lacks serious literary, artistic, political, or scientific value. 55 C.F.R. § 1(6)(A-C). Thus, Rule ONE conforms with the standard for obscenity this Court established in *Miller*. 413 U.S. at 24-25. Further, Rule ONE requires the compliance of only commercial entities that knowingly and intentionally publish and distribute material of which one-tenth or more is obscene to comply with the age verification measure. 55 C.F.R. § 2(a) .

Rule ONE's age verification regulation is constitutional for two reasons. First, it is a permissible content regulation of unprotected speech. Second, it survives rational basis review.

A. Rule ONE is a permissible categorical regulation of content because it regulates solely obscene, unprotected speech and poses no threat of content discrimination.

Under the First Amendment, Rule ONE permissibly regulates unprotected obscene content, safeguarding societal interests without threatening protected speech. Since 1791, American society has allowed restrictions on the content of speech in specific areas "where the social interest in order and morality" clearly outweighs any marginal benefit the speech may provide. *R. A. V.*, 505 U.S. at 382-83. The freedom of speech "does not include a freedom to disregard these traditional limitations." *Id.* Accordingly, some categories of speech "can be regulated *because of their constitutionally proscribable content*" as long as they are not used to discriminate against otherwise protected categories of speech. *Id.* at 383-84 (emphasis added). A category of speech is proscribable when it may be regulated or banned under the First Amendment. *Black*, 538 U.S. at 363. The government can regulate obscene content because the overriding societal interests in maintaining order and upholding moral standards outweigh the negligible benefits such content offers. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

While courts have imposed limitations on regulations that are content-based and content-neutral, those limitations do not apply to speech when (1) it is proscribable and (2) the regulation does not discriminate against any other classes of protected speech. *R. A. V.*, 505 U.S. at 390. A

content-based regulation applies to "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content-based regulations on unprotected speech are permissible when the government has a neutral basis for regulating the content. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A regulation is considered "content-neutral" if its intended purpose is anything other than simply restricting the substance of speech. *Hill v. Colorado*, 530 U.S. 703, 720 (2000) (upholding a statute regulating unconsented third-party actions or communications to prevent confrontational or harassing conduct towards individuals within one hundred feet of entering healthcare facilities). However, the government can regulate content even without articulating a neutral basis for the regulation in certain situations. *R. A. V.*, 505 U.S. at 390. For example, the government can regulate proscribable content if there is no realistic possibility that it will impact protected speech. *Id.* at 390.

Therefore, because Rule ONE regulates only obscene content—constitutionally unprotected speech—it is irrelevant whether it is a content-based or content-neutral regulation. *R. A. V.*, 505 U.S. at 389-90. Obscene content is proscribable; hence, Rule ONE is a permissible form of content regulation. Thus, Rule ONE can categorically require reasonable age verification measures without violating the First Amendment protections.

1. <u>The government can categorically regulate obscene content as long as it does not content discriminate.</u>

Since obscenity is not constitutionally protected, categorical prohibitions on such speech are permissible. *See R. A. V.*, 505 U.S. at 388-90 (stating that there are valid bases for treating categorical regulations on proscribable speech differently than protected speech). A categorical regulation on unprotected speech is permissible as long as it does not "content discriminate" against protected classes of speech. *See id.* at 383-84 (The government can regulate proscribable content as long as it does not impede on protected speech.). Content discrimination occurs if the

government regulates protected speech and restricts discussion of a specific "subject matter or topic." *Vidal v. Elster*, 602 U.S. 286, 292-93 (2024). Content discrimination of *protected* speech raises the concern that the government might "effectively drive certain ideas or viewpoints from the marketplace." *R. A. V.*, 505 U.S. at 387-88. However, when the government regulates obscene content based solely on its obscene qualities, there is no significant danger of idea or viewpoint discrimination because obscene content has minimal social or moral value. *See id.* at 387-88.

Judge Marshall, dissenting for the Fourteenth Circuit, improperly emphasized underinclusiveness, relying on a standard this Court has specifically rejected. R. 14. Judge Marshall found Rule ONE was underinclusive because it failed to ban all the material necessary to fully "prevent children from accessing obscene materials," ultimately concluding that Rule ONE is unconstitutional. R. 14. However, the First Amendment imposes not an underinclusiveness limitation, but a "content discrimination" limitation when the government regulates proscribable speech, such as obscenity. *R. A. V.*, 505 U.S. at 387 (rejecting the concurring opinion that when regulating constitutionally unprotected speech, the government "must either proscribe *all* speech or no speech at all") (emphasis added). Therefore, Judge Marshall's focus on underinclusiveness lacks merit because this Court has affirmed that regulations on proscribable speech need only avoid content discrimination. *Id.* (stating that regulating obscenity in only certain media or markets would be permissible because "although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content").

Rule ONE properly regulates obscene content without discriminating on the basis of protected content. The regulation only applies to commercial entities that knowingly and intentionally publish or distribute "sexual material harmful to minors" to use reasonable age verification measures to restrict children's access online. 55 C.F.R. §§ 1(6), 2(a). In effect, Rule

ONE is limited in application to only content considered obscene to minors. *Miller*, 413 U.S. at 24-25. Since Rule ONE regulates content based solely on its obscenity, there is no realistic possibility of suppressing protected speech.

First Amendment protections of free speech do not extend to obscene material lacking societal value. Therefore, the government can categorically regulate obscenity under Rule ONE because the regulation (1) is confined to what makes the content obscene and (2) does not discriminate against otherwise protected classes of speech. *See R. A. V.*, 505 U.S. at 388-89 (giving the example that the government can prohibit obscenity that is the "most patently offensive in its prurience" but cannot prohibit obscenity that contains offensive political messages). Furthermore, Rule ONE survives rational basis review because it is rationally related to the government's legitimate interest in protecting children by regulating obscene content.

B. Requiring reasonable age verification measures to access obscene material withstands rational basis review because the regulation is rationally related to a legitimate interest in protecting children's welfare.

Rational basis is the proper standard of review for evaluating regulations on content obscene for children. Courts traditionally use three levels of scrutiny when assessing the constitutionality of laws related to First Amendment claims: rational basis review, intermediate scrutiny, and strict scrutiny. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). When courts review First Amendment claims unprotected by the First Amendment, rational basis review is the proper standard. *Ginsberg v. New York*, 390 U.S. 629, 641 (1968). Rational basis review requires a law, the means, to be rationally related to a legitimate governmental purpose, the end. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Rational basis review gives deference to the legislature by presuming the legislation is valid. *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988).

Intermediate scrutiny may apply in First Amendment cases when the regulation in question is content-neutral, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-27 (2010), restricts speech on a time, place, and manner basis, *Ward*, 491 U.S. at 798-99, or incidentally burdens protected expression while regulating conduct, *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). A statute can survive intermediate scrutiny by proving a law is substantially related to an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). To prove a law is substantially related to such an objective, the government must show that the harms it presents are real and requires a reasonable fit between the law's ends and means. *Silvester v. Becerra*, 583 U.S. 1139, 1144 (2018).

Only fundamental constitutionally protected rights qualify for strict scrutiny. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003). Strict scrutiny requires the government to prove that the law is narrowly tailored to achieve a compelling governmental interest. *Id.* A statute is narrowly tailored if it is no more broad than necessary to achieve the compelling government interest at stake. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Rational basis review controls when courts review First Amendment claims for speech that is not constitutionally protected. *Ginsberg*, 390 U.S. at 641. The First Amendment generally protects expressive speech and conduct. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Miller*, 413 U.S. at 23. Indecent material—material that merely fails to conform to accepted moral standards—is protected by the First Amendment. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). Obscene material, on the other hand, is not protected by the First Amendment for either minors or adults because it is "utterly without redeeming social importance" and is considered offensive to community standards. *Miller*, 413 U.S. at 23; *Roth*,

354 U.S. at 484-85 (stating that the prevention and punishment of lewd and obscene utterances raises no constitutional concerns); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

Rule ONE survives constitutional scrutiny for three reasons: (1) only rational basis review is proper under *Ginsberg,* (2) reasonable age verification methods are rationally related to the government's legitimate interest in safeguarding children's welfare, and (3) strict scrutiny is not the proper standard of review.

1. Rational basis is the proper standard of review because *Ginsberg* is controlling.

Regulating obscene content is rationally related to the government's interest in safeguarding the welfare of children. *Ginsberg*, 390 U.S. at 643. In *Ginsberg*, Congress passed a statute that prohibited the sale of materials that were obscene to minors. *Id.* at 634-35. This Court upheld the constitutionality of that statute even though the content was considered merely indecent by adult standards. *Id.* Further, this Court applied rational basis review in *Ginsberg* despite the fact the statute intruded on adults' privacy to purchase indecent content. *See Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024) (The Fifth Circuit acknowledged that the statute in *Ginsberg* intruded on adults' privacy when purchasing merely indecent magazines, yet the Supreme Court still applied rational basis review.). Thus, regulating children's access to obscene materials is permissible, even if it causes adults to hesitate in accessing those materials. *See Ginsberg*, 390 U.S. at 634-35.

It is "altogether fitting and proper" for the legislature to use special standards to regulate the distribution of pornography to children. *Id.* at 639. The statute in *Ginsberg*, in pertinent part, defined obscene material as "harmful to minors" when that material appealed to the prurient interest of minors and depicted sexual content in a patently offensive manner. *Id.* at 632-33. Five years after *Ginsberg*, the Court revised the standard for obscenity, modifying the third prong to create the modern *Miller* standard for determining whether material is obscene. *Miller*, 413 U.S.

at 24-25. According to the *Miller* standard, materials are considered obscene when, in addition to meeting the first two elements *Ginsberg* used (1) by appealing to the prurient interest and (2) being patently offensive—it also (3) "lacks serious literary, artistic, political, or scientific value for minors." *Miller*, 413 U.S. at 24-25.

Rule ONE seeks to do precisely what this Court upheld in *Ginsberg*: to protect the welfare of children by preventing minors from accessing obscene content. *Ginsberg*, at 640-41. Rule ONE follows this Court's *Miller* obscenity standards to define "sexual material harmful for minors." *Miller*, 413 U.S. at 24-25; 55 C.F.R. § 1(6)(A-C). In doing so, Rule ONE ensures that it regulates only material obscene to minors. Since Rule ONE applies only to obscene material, rational basis review is proper because the First Amendment does not protect obscenity. *Ginsberg*, 390 U.S. at 641. Further, limiting access to such materials is rationally related to a compelling governmental interest in protecting America's youth. *Id.*

2. Rule ONE rationally relates to the government's compelling interest in promoting children's welfare.

The government has a compelling interest in limiting access to obscene materials that are harmful to minors, and rational basis review merely requires that the law be rationally related to a legitimate interest. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Children's welfare is not only a legitimate interest but a "compelling" interest. *Sable*, 492 U.S. at 126. The government has a strong interest in protecting the "welfare of children," and the Constitution permits the government to heavily regulate the "distribution to minors of materials obscene for minors." *Free Speech*, 95 F.4th at 269. Thus, the government can restrict children's access to obscene materials, even if it restricts adults' rights. *See Ginsberg*, 390 U.S. at 634-35.

This Court "hardly ever strikes down a policy as illegitimate under rational basis" review. *Trump v. Hawaii*, 585 U.S. 667, 705 (2018). In the few occasions where it has, the "common

thread has been that the laws at issue lack any purpose other than a bare . . . desire to harm a politically unpopular group." *Id.* Further, a regulation that does not concern fundamental rights is presumptively valid. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Thus, if a law does not restrict a fundamental right, then this Court will uphold the law as long as it rationally relates to a legitimate end. *Romer*, 517 U.S. at 631.

Here, Congress has more than just a rational basis for enacting Rule ONE: it has a compelling interest in protecting the welfare of children. *Sable*, 492 U.S. at 126. Moreover, no fundamental right to access obscene content exists. *Counterman*, 600 U.S. at 78. Experts testified at the Association's initial meetings about precisely how detrimental exposure to pornography is for children. R. 3. Such early exposure may result in "a higher likelihood of later engagement with 'deviant pornography.'" *Id.* Further, children who frequently accessed such content were more likely to suffer from "gender dysphoria, insecurities, and dissatisfactions about body image, depression, and aggression." *Id.* Heavier use of pornography is also correlated with falling grades. *Id.* The Association passed Rule ONE to serve the government's "compelling" interest in "protecting children from harmful materials to combat the many detrimental effects early exposure and access to pornography have on children." R. 3-4; *Sable*, 492 U.S. at 126; *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

In an increasingly digital age, when access to obscene material has shifted from availability in only brick-and-mortar stores to being readily accessible on every smartphone, regulating access to that material creates a compelling interest, which Rule ONE serves by protecting children's welfare from such detrimental effects. *See Sable*, 492 U.S. at 126. As the Fourteenth Circuit stated, since Rule ONE serves a legitimate interest and serves that interest by limiting such detrimental exposure to pornographic content by "prohibiting minors' access to those harms," the means and

ends rationally relate. R. 9. Thus, Rule ONE survives rational basis review, and strict scrutiny is not applicable when regulating unprotected categories of speech.

3. Strict scrutiny does not apply to restricting children's access to obscene material.

PAC's reliance on *Reno* and *Ashcroft*—both distinguishable from this case—is misguided because this Court applies rational basis review, not strict scrutiny, to assess the constitutionality of limiting children's access to obscene material. *Ginsberg*, 390 U.S. at 643. Strict scrutiny is reserved only for assessing direct violations of a constitutionally protected right. *Lawrence*, 539 U.S. at 593. Obscenity, however, is indisputably beyond the scope of such constitutional protections. *Counterman*, 600 U.S. at 78.

In *Reno*, the Communications Decency Act ("CDA") criminally prohibited the knowing transmission of "obscene or indecent" communications to any minors. *Reno*, 521 U.S. at 849. The CDA then established an affirmative defense against violations for those who used certain designated forms of age verification, like credit card or adult identification. *Id.* Among several concerns of this Court, the *Reno* statute prohibited materials that were not even obscene. *Id.* at 865-68. To make matters worse, the prohibition extended beyond commercial transactions, applying also to non-commercial transactions. *Id.* Moreover, *Reno* was before this Court in 1997, before the age of the smartphone, when the Court felt that the "existing [age verification] technology . . . failed to accurately distinguish minors from adults." *Id.* at 876. The final chief concern of this Court in *Reno* was that the statute did not consider whether the material at issue contained scientific, educational, or other redeeming social value, which rendered the statute overly broad. *Id.* at 881.

Here, Rule ONE is limited to requiring only *commercial* entities to use "reasonable age verification methods." R. 17-18. Additionally, Rule ONE has been drafted narrowly to apply to only obscene content, not merely indecent material, by using the modern *Miller* obscenity test to

define when Rule ONE demands reasonable age verification. *Id.* at 17. The Fourteenth Circuit correctly noted that the technology available today contains verifiable technology, emphasizing that "Rule ONE permits the use of state driver's licenses, and . . . that the average age verification platform is 91% effective at screening out minors' fake IDs." R. 9. Moreover, 55 C.F.R. § 1(6)(C) of Rule ONE specifies that regulation will not apply to any material with serious literary, artistic, political, or scientific value for minors. Thus, this Court's concerns in *Reno* are alleviated by the narrow scope of Rule ONE.

In *Ashcroft*, this Court assessed the constitutionality of the Child Online Protection Act ("COPA"), which made it a federal crime for commercial entities to knowingly make available materials harmful to minors. *Ashcroft*, 542 U.S.at 659. The question before this Court there was simply whether COPA survived strict scrutiny. *Id. Ashcroft* provided a limited ruling focused solely on the issue presented to the Court without analyzing COPA under the controlling rational basis review *Ginsberg* requires, or even considering if strict scrutiny was proper. *Id.* The question before this Court is not whether Rule ONE survives strict scrutiny but whether it survives rational basis review under the controlling precedent outlined in *Ginsberg*. Thus, *Ashcroft* does not control to demand strict scrutiny here.

PAC's attempts to analogize Rule ONE to *Ashcroft* and *Reno* to force the application of strict scrutiny must fail because those cases are readily distinguishable from this case. Thus, Rule ONE is subject to and survives rational basis review under *Ginsberg*, and only regulates obscene content not protected under the Constitution.

Requiring reasonable age verification methods to access unprotected material serves a legitimate government interest to protect America's youth from exposure to harmful obscene content, and thus, Rule ONE survives rational basis review. Therefore, Rule ONE is constitutional,

as First Amendment protections of free speech do not extend to obscene material lacking societal value and survives rational basis review.

CONCLUSION

Safeguarding the welfare of children has been recognized as paramount throughout American history and jurisprudence. As technology evolves, so must the means of protecting the children. To effectively serve this country's children, Congress must be allowed to exercise its constitutional authority and duty to develop and implement reasonable statutory schemes to address these concerns. Congress's delegation of enforcement powers to the Association did not violate the private nondelegation doctrine, and Rule ONE's reasonable age verification measures did not violate the First Amendment. Thus, this Court should uphold laws that seek to protect children online and affirm the Fourteenth Circuit.

Dated January 20, 2025.

Respectfully submitted,

/s/ *Team 24*
Counsel for Respondent

APPENDIX

FROM TITLE 55 OF THE CODE OF FEDERAL REGULATIONS ("RULE ONE")

SECTION 1. DEFINITIONS

(1) "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.
(2) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.
(3) "Minor" means an individual younger than 18 years of age.
(4) "News-gathering organization" includes:
    (A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source;
    (B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment;
(5) "Publish" means to communicate or make information available to another person or entity on a publicly available Internet website.
(6) "Sexual material harmful to minors" includes any material that:
    (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
    (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:
        (i) a person's pubic hair, anus, or genitals or the nipple of the female breast;
        (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or
        (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
    (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

SECTION 2. PUBLICATION OF MATERIALS HARMFUL TO MINORS.

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

(b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

SECTION 3. REASONABLE AGE VERIFICATION METHODS.

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using:
    (1) government-issued identification; or
    (2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual

SECTION 4. CIVIL PENALTY; INJUNCTION

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.
(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:
    (1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;
    (2) $10,000 per instance when the entity retains identifying information in violation of Section 2(b); and
    (3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.
(c) The amount of a civil penalty under this section shall be based on:
    (1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;
    (2) the history of previous violations;
    (3) the amount necessary to deter a future violation;
    (4) the economic effect of a penalty on the entity on whom the penalty will be imposed;
    (5) the entity's knowledge that the act constituted a violation of this chapter; and
    (6) any other matter that justice may require.
(d) The Kids Internet Safety Association, Inc., may recover reasonable and necessary attorney's fees and costs incurred in an action under this Rule.

SECTION 5. APPLICABILITY OF THIS RULE.

(a) This Rule does not apply to a bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.
(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this Rule solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission, downloading, intermediate storage, access software, or other services to the extent the

provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.

KEEPING THE INTERNET SAFE FOR KIDS ACT
Codified in Title 55 of the United States Code

55 U.S.C. § 3050. PURPOSE

a. The purpose of this Act is to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth.

55 U.S.C. § 3051. DEFINITIONS.

1. Association. The term "Association" means the Kids Internet Safety Association, Inc., designated by section 3052(a).
2. Commission. The term "Commission" means the Federal Trade Commission.
3. Technological Industry. The term "technological industry" refers to the sector of the economy that develops, researches, and distributes advancements in computers and other electronics.
4. Technological Company. The term "technological company" refers to a business that operates in the technological industry—especially internet-based companies.
5. Technological Constituency. The term "technological constituency" refers to an individualized interests (such as web designers or executives) within the technological industry.

55 U.S.C. § 3052. RECOGNITION OF THE KIDS INTERNET SAFETY ASSOCIATION

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.

b. Board of Directors.

1. Membership. The Association shall be governed a board of directors (in this section referred to as the "Board") comprised of nine members as follows:

A. Independent members. Five members of the Board shall be independent members selected from outside the technological industry.

B. Industry members.

i. In general. Four members of the Board shall be industry members selected from among the various technological constituencies

ii. Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.

2. Chair. The chair of the Board shall be an independent member described in paragraph (1)(A).

A. Bylaws. The Board of the Association shall be governed by bylaws for the operation of the Association with respect to—

i. The administrative structure and employees of the Association;

ii. The establishment of standing committees;

iii. The procedures for filling vacancies on the Board and the standing committees; term limits for members and termination of membership; and

iv. any other matter the Board considers necessary.

c. Standing Committees.

1. Anti-trafficking and exploitation prevention committee

A. In general. The Association shall establish an anti-trafficking and exploitation prevention standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the Stop Internet Child Trafficking Program.

B. Membership. The anti-trafficking and exploitation prevention standing committee shall be comprised of seven members as follows:

i. Independent members. The majority of the members shall be independent members selected from outside the technological industry.

ii. Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies and shall include not more than one industry member from any one technological constituency.

iii. Qualification. A majority of individuals selected to serve on the anti-trafficking and exploitation prevention standing committee shall have significant, recent experience in law enforcement and computer engineering.

C. Chair. The chair of the anti-trafficking and exploitation prevention standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

2. Computer safety standing committee

A. In general. The Association shall establish a computer safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of safe computer habits that enhance the mental and physical health of American youth.

B. Membership. The computer safety standing committee shall be comprised of seven members as follows:

i. Independent members. A majority of the members shall be independent members selected from outside the technological industry.

ii. Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies.

C. Chair. The chair of the computer safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

d. Nominating committee

1. Membership

A. In general. The nominating committee of the Association shall be comprised of seven independent members selected from business, sports, and academia.

B. Initial membership. The initial nominating committee members shall be set forth in the governing corporate documents of the Association.

C. Vacancies. After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Association.

2. Chair. The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

3. Selection of members of the Board and standing committees

A. Initial members. The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

B. Subsequent members. The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

e. Conflicts of interest. Persons with a present financial interest in any entity regulated herein may not serve on the Board. Financial interest does not include receiving a paycheck for work performed as an employee.

f. Funding

1. Initial Funding.

A. In general. Initial funding to establish the Association and underwrite its operations before the program effective date shall be provided by loans obtained by the Association.

B. Borrowing. The Association may borrow funds toward the funding of its operations.

C. Annual calculation of amounts required

i. In general. Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Association shall determine and provide to each technological company engaged in internet activity or business the amount of contribution or fees required.

ii. Assessment and collection

I. In general. The Association shall assess a fee equal to the allocation made and shall collect such fee according to such rules as the Association may promulgate.

II. Remittance of fees. Technological companies as described above shall be required to remit such fees to the Association.

2. Fees and fines. Fees and fines imposed by the Association shall be allocated toward funding of the Association and its activities.

3. Rule of construction. Nothing in this chapter shall be construed to require—

A. the appropriation of any amount to the Association; or

B. the Federal Government to guarantee the debts of the Association.

g. Quorum

1. For all items where Board approval is required, the Association shall have present a majority of independent members.

55 U.S.C. § 3053. FEDERAL TRADE COMMISSION OVERSIGHT.

a. In general. The Association shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Association relating to-

1. the bylaws of the Association;
2. a list of permitted and prohibited content for consumption by minors;
3. training standards for experts in the field;
4. standards for technological advancement research;
5. website safety standards and protocols;
6. a program for analysis of Internet usage among minors;
7. a program of research on the effect of consistent Internet usage from birth;
8. a description of best practices for families;
9. a schedule of civil sanctions for violations;
10. a process or procedures for disciplinary hearings; and
11. a formula or methodology for determining assessments under section 3052(f) of this title.

b. Publication and Comment

1. In general. The Commission shall—

A. publish in the Federal Register each proposed rule or modification submitted under subsection (a); and

B. provide an opportunity for public comment.

2. Approval required. A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

c. Decision on proposed rule or modification to a rule

1. In general. Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

2. Conditions. The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—

A. this chapter; and

B. applicable rules approved by the Commission.

3. Revision of proposed rule or modification

A. In general. In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Association to modify the proposed rule or modification.

B. Resubmission. The Association may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

d. Proposed standards and procedures

1. In general. The Association shall submit to the Commission any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee.

2. Notice and comment. The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

e. Amendment by Commission of rules of Association. The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds necessary

or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

55 U.S.C. § 3054. JURISDICTION OF THE COMMISSION AND THE KIDS INTERNET SAFETY ASSOCIATION

a. In general. The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall—

1. implement and enforce the Anti-Crime Internet Safety Agenda; and
2. exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.

b. Preemption. The rules of the Association promulgated in accordance with this chapter shall preempt any provision of law or regulation with respect to matters within the jurisdiction of the Association under this chapter. Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

c. Duties

1. In general. The Association—
   - A. shall develop uniform procedures and rules authorizing—
     - i. access to relevant technological company websites, metadata, and records as related to child safety on the internet;
     - ii. issuance and enforcement of subpoenas and subpoenas duces tecum; and
     - iii. other investigatory powers; and
   - B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action.
2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

d. Registration of technological companies with Association

1. In general. As a condition of participating in internet activity or business that is potentially accessible by children, a technological company shall r Association in accordance with rules promulgated by the Association and approved by the Commission in accordance with section 3053 of this title.

2. Agreement with respect to Association rules, standards, and procedures. Registration under this subsection shall include an agreement by the technological company to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

3. Cooperation. A technological company registered under this subsection shall, at all times--
   - A. cooperate with the Commission, the Association, all federal and state law enforcement agencies, and any respective designee, during any civil investigation; and
   - B. respond truthfully and completely to the best of the knowledge of the technological company if questioned by the Commission, the Association, all federal and state law enforcement agencies, or any respective designee.

4. Failure to comply

A. Any failure of a technological company to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

e. Partnership programs

A. Use of Non-Profit Child Protection Organizations. When necessary, the Association is authorized to seek to enter into an agreement with non-profit child protection organizations to assist the Association with investigation and enforcement.

B. Negotiations. Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for protecting children and the integrity of technological companies and internet access to all.

C. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets. Elements of agreement. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets

f. Procedures with respect to rules of Association

1. Anti-Trafficking and Exploitation

A. In general. Recommendations for rules regarding anti-trafficking and exploitation activities shall be developed in accordance with section 3055 of this title.

B. Consultation. If the Association partners with a non-profit under subsection (e), the standing committee and partner must consult regularly.

2. Computer safety. Recommendations for rules regarding computer safety shall be developed by the computer safety standing committee of the Association.

g. Issuance of guidance

1. The Association may issue guidance that—

A. sets forth—

i. an interpretation of an existing rule, standard, or procedure of the Association; or

ii. a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

B. relates solely to—

i. the administration of the Association; or

ii. any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

2. Submittal to Commission. The Association shall submit to the Commission any guidance issued under paragraph (1).

3. Immediate effect. Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

h. Subpoena and investigatory authority. The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

i. Civil penalties. The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.

j. Civil actions

1. In general. In addition to civil sanctions imposed under section 3057 of this title, the Association may commence a civil action against a technological company that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.

2. Injunctions and restraining orders. With respect to a civil action temporary injunction or restraining order shall be granted without bond.

k. Limitations on authority

1. Prospective application. The jurisdiction and authority of the Association and the Commission with respect to (1) anti-trafficking and exploitation and (2) computer safety shall be prospective only.

2. Previous matters

A. In general. The Association and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the anti-trafficking and computer safety programs that occurs before the program effective date.

B. State enforcement. With respect to conduct described in subparagraph (A), the applicable State agency shall retain authority until the final resolution of the matter.

C. Other laws unaffected. This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, computers, technology, or other law.

55 U.S.C. § 3055. Stop Internet Child Trafficking Program

a. Program required

1. In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish the Stop Internet Child Trafficking Program.

b. Considerations in development of program. In developing the regulations, the Association shall take into consideration the following:

1. The Internet is vital to the economy.
2. The costs of mental health services for children are high.
3. It is important to assure children socialize in person as well as online.
4. Crime prevention includes more than education.
5. The public lacks awareness of the nature of human trafficking.
6. The statements of social scientists and other experts about what populations face the greatest risk of human trafficking.
7. The welfare of the child is paramount

c. (c) Activities. The following activities shall be carried out under Stop Internet Child Trafficking Program:

1. Standards for anti-trafficking measures control. Not later than 120 days before the program effective date, the Association shall issue, by rule--

A. uniform standards for—

i. assuring the technological industry can reduce the potential of trafficking; and

ii. emergency preparedness accreditation and protocols; and

B. a list of websites known to engage in prohibited acts.

d. Prohibition of Video Chatting. This Association shall make sure that no technological company permits minors from video chatting with strangers in an obscene way.

e. Agreement possibilities. Under section 3054(e), this is a good opportunity to try to partner with other nonprofits.

f. Enforcement of this Provision

A. Control rules, protocols, etc. When the Association opts to partner with a nonprofit under section 3054(e), the nonprofit shall, in consultation with the standing committee and consistent with international best practices, develop and recommend anti-trafficking control rules, protocols, policies, and guidelines for approval by the Association.

B. Results management. The Association shall assure compliance with its anti-trafficking agenda, including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the Association or its partnering nonprofit under this subparagraph shall be the final decision or civil sanction of the Association, subject to review in accordance with section 3058 of this title.

C. Testing. The Association shall perform random tests to assure that websites covered under this act comply with standards.

D. Certificates of compliance. The Association shall certify which websites most comply with their regulations

2. Anti-trafficking and exploitation standing committee. The standing committee shall regularly consider and pass rules for enforcement consistent with this section and its goals.

g. Prohibition. Any website caught violating these provisions or the regulations of the Association will be prohibited from operating for an equitable period of time.

h. Advisory committee study and report

1. In general. Not later than the program effective date, the Association shall convene an advisory committee comprised of anti-trafficking experts to conduct a study on the use of technology in preventing such crimes.

2. Report. Not later than three years after the program effective date, the Association shall direct the advisory committee convened under paragraph (1) to submit to the Association a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

3. Modification of prohibition

A. In general. After receipt of the report required by paragraph (2), the Association may, by unanimous vote of the Board, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification

shall apply to all States beginning on the date that is three years after the program effective date.

B. Condition. In order for a unanimous vote described in subparagraph (A) to affect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

i. That the modification is warranted.
ii. That the modification is in the best interests of most children.
iii. That the modification will not unduly stifle industry.
iv. That technology is a benefit to our society.

i. Baseline anti-trafficking and exploitation rules.

1. (1) In general. Subject to paragraph (3), the baseline anti-trafficking and exploitation l rules described in paragraph (2) shall--

A. constitute the initial rules of the anti-trafficking and exploitation standing committee; and

B. remain in effect at all times after the program effective date.

2. Baseline anti-trafficking and exploitation control rules described

A. In general. The baseline anti-trafficking and exploitation control rules described in this paragraph are the following:

i. The lists of preferred prevention practices from Jefferson Institute
ii. The World Prevent Abuse Forum Best Practices
iii. Psychologists Association Best Practices

B. Conflict of rules. In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

3. Modifications to baseline rules

A. Development by anti-trafficking and exploitation standing committee.

B. Association approval.

55 U.S.C. § 3056. COMPUTER SAFETY PROGRAM

a. (a)Establishment and considerations

1. In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish a computer safety program applicable to all technological companies.

2. Considerations in development of safety program. In the development of the computer safety program, the Association and the Commission shall take into consideration existing safety standards, child development standards, existing laws protecting children, and relevant advances in technology

b. Plans for implementation and enforcement.

1. A uniform set of safety standards and protocols, that may include rules governing oversight and movement of children access to the internet.

2. Programs for data analysis.

3. The undertaking of investigations related to safety violations.

4. Procedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations.

5. A schedule of civil sanctions for violations.

6. Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.
7. Management of violation results.
8. Programs relating to safety and performance research and education.

c. In accordance with the registration of technological companies under section 3054(d) of this title, the Association may require technological companies to collect and submit to the database such information as the Association may require to further the goal of increased child welfare.

55 U.S.C. § 3057. RULE VIOLATIONS AND CIVIL ACTIONS

a. Description of rule violations

1. In general. The Association shall issue, by regulation in accordance with section 3053 of this title, a description of safety, performance, and rule violations applicable to technological companies.

2. Elements The description of rule violations established may include the following:

A. Failure to cooperate with the Association or an agent of the Association during any investigation.

B. Failure to respond truthfully, to the best of a technological company's knowledge, to a question of the Association or an agent of the Association with respect to any matter under the jurisdiction of the Association.

C. Attempting to circumvent a regulation of the Association.

i. the intentional interference, or an attempt to interfere, with an official or agent of the Association;

ii. the procurement or the provision of fraudulent information to the Association or agent; and

iii. the intimidation of, or an attempt to intimidate, a potential witness.

D. Threatening or seeking to intimidate a person with the intent of discouraging the person from reporting to the Association.

3. The rules and process established under paragraph (1) shall include the following:

A. Provisions for notification of safety, performance, and anti-exploitation rule violations;

B. Hearing procedures;

C. Standards for burden of proof;

D. Presumptions;

E. Evidentiary rules;

F. Appeals;

G. Guidelines for confidentiality

H. and public reporting of decisions.

b. Civil sanctions

1. In general. The Association shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.

2. Modifications. The Association may propose a modification to any rule established under this section as the Association considers appropriate, and the proposed

modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

55 U.S.C. § 3058. REVIEW OF FINAL DECISIONS OF THE ASSOCIATION

a. Notice of civil sanctions. If the Association imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Association, the Association shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

b. Review by administrative law judge

1. In general. With respect to a final civil sanction imposed by the Association, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

2. Nature of review

A. In general. In matters reviewed under this subsection, the administrative law judge shall determine whether--

i. a person has engaged in such acts or practices, or has omitted such acts or practices, as the Association has found the person to have engaged in or omitted;

ii. such acts, practices, or omissions are in violation of this chapter or the anti-trafficking and exploitation control or computer safety rules approved by the Commission; or

iii. the final civil sanction of the Association was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Conduct of hearing. An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of Title 5.

3. Decision by administrative law judge

A. In general. With respect to a matter reviewed under this subsection, an administrative law judge--

i. shall render a decision not later than 60 days after the conclusion of the hearing;

ii. may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Association; and

iii. may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

B. Final decision. A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

c. Review by Commission

1. Notice of review by Commission. The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Association and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

2. Application for review

A. In general. The Association or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

B. Effect of denial of application for review. If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

C. Discretion of Commission

i. In general. A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

ii. Matters to be considered. In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that--

I. a prejudicial error was committed in the conduct of the proceeding; or

II. the decision involved--(aa) an erroneous application of the anti-exploitation or computer safety rules approved by the Commission; or (bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

3. Nature of review

A. In general. In matters reviewed under this subsection, the Commission may--

i. affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

ii. make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

C. Consideration of additional evidence

i. Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.

ii. Motion by a party

I. In general. A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that--(aa) such additional evidence is material; and (bb) there were reasonable grounds for failure to submit the evidence previously.

II. Procedure. The Commission may—(aa) accept or hear additional evidence; or (bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

d. Stay of proceedings. Review by an administrative law judge or the Commission under this section shall not operate as a stay of a final civil sanction of the Association unless the administrative law judge or Commission orders such a stay.

55 U.S.C. § 3059

Creating false advertisements to lure unsuspecting persons to a website shall be considered an unfair or deceptive act or practice.