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 PETITIONER

TEAM 29
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

QUESTIONS PRESENTED

1. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association its enforcement powers.
2. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe is unreported and not reproduced in the record.

The opinion of the United States Court of Appeals for the Fourteenth Circuit, written by Circuit Judge Bushrod Washington, is also unreported but is reproduced in the record. R. 1-10.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. art. I, §1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

55 U.S.C. §§ 3050-3059

55 C.F.R. §§ 1-5 (2023)

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Amidst the increasing centrality of the internet as a primary venue for speech, expression, work, and entertainment—and amid mounting public concern over minors' access to explicit online materials—Congress enacted the Keeping the Internet Safe For Kids Act (KISKA). *See* R. at 2. While KISKA purported to provide a "comprehensive regulatory scheme" for protecting children online, Congress declined to set forth the scheme in detail. Instead, it created the Kids Internet Safety Association (KISA), a private nonprofit entity tasked with crafting and enforcing rules to shield minors from harmful content. 55 U.S.C. §§ 3050, 3052 (2023).

KISA's organizational structure and posture relative to the federal government is unusual. It is led by a nine-member Board of Directors with five members drawn from outside the technology industry and four members selected from "various technological constituencies" in the technology industry. *Id.* § 3052(b)(1). Despite its status as a private, nongovernmental body, KISA wields substantial governmental powers under KIKSA. KISA is empowered to develop binding regulations governing activity on the internet—including rules that apply to a broad array of technology companies responsible for a substantial portion. *Id.* § 3054 (b)-(g). KISA may also enforce those rules through investigations, subpoenas, fines, and civil suits for injunctive relief. *Id.* § 3054(g)-(j).

The Federal Trade Commission is charged with oversight of KISA's rulemaking, and is required to approve or disapprove KISA's proposed rules within 60 days of their publication in the Federal Register. *Id.* § 3053(c). The FTC reviews KISA's rules for consistency with KIKSA and existing FTC rules. *Id.* Additionally, the FTC has the authority to "abrogate, add to, or modify" KISA's proposed rules. *Id.* § 3053(e). At its discretion, the FTC may review KISA's

adjudicatory actions. *Id.* § 3058(c). KISKA does not provide for FTC oversight of KISA's power to bring civil actions against tech companies for violations of KISA-issued regulations. *Id.* § 3054(j)(1)-(2).

In 2023, KISA promulgated Rule ONE, requiring covered websites and social media platforms to implement "reasonable age verification methods" if more than 10% of the content they host is "sexual material harmful to minors." 55 C.F.R. §2 (2023). Violators are subject to fines of up to $10,000 per day and up to $250,000 for each instance of a minor's access to sexual material that results from noncompliance with Rule ONE's age verification provisions. *Id.* §4(b).

II. PROCEDURAL HISTORY

Petitioners—including Pact Against Censorship, Inc. ("PAC"), the largest trade association representing the American adult entertainment industry, as well as two adult performers and one film studio—filed suit in the District of Wythe, seeking a preliminary injunction against enforcement of Rule ONE. R. at 5. Petitioners argued that KISA's status as a private entity and its sweeping regulatory and enforcement powers violates the private nondelegation doctrine and that Rule ONE impermissibly burdens lawful speech in violation of the First Amendment. R. at 5. Petitioners Jane and John Doe attested to the chilling effect of forcing users to provide personally identifying information to access adult materials online, a fear of public identification and scorn driven in part by the frequency of high-profile data breach and misuse scandals at seemingly secure institutions like universities and hospitals. R. at 4. Petitioners demonstrated that most sites subject to Rule ONE contain significant amounts of non-objectionable material. *Id.* Petitioners additionally submitted expert testimony as to the inadequacy of age verification technology in preventing minors' access to adult materials and proposed alternative filtering and blocking approaches which could more effectively prevent

minors' access to adult materials without the collection of personally identifying information. R. at 4-5.

The district court granted Petitioners' motion for preliminary injunction, holding that, while KISA does not violate private nondelegation doctrine because the Association is sufficiently supervised by the FTC, Rule ONE violated the First Amendment because it regulated more speech than was necessary to further the government's purposes. R. at 5. KISA appealed, and the 14th Circuit Court of Appeals reversed in part, affirming the district court's nondelegation holding but reversing its determination that Rule ONE failed First Amendment scrutiny. R. at 9-10. Petitioners appealed, and this Court granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

KISKA violates the private nondelegation doctrine because it vests broad executive powers, including investigative authority, subpoena power, penalty assessments, and the ability to seek injunctive relief, in a private organization that is inadequately overseen by the federal government. Under the well-established test for private nondelegation in *Carter Coal* and *Adkins*, Congress may involve private entities in regulatory and enforcement schemes only if the private body remains subordinate to a public agency that exercises "pervasive control and surveillance" over the private body's operations and decisions and retains final control over regulatory and enforcement functions. KISA's structure fails this test. Though the FTC retains post hoc and discretionary power to review and overturn some of KISA's enforcement decisions, this limited review leaves KISA free to undertake significant and burdensome enforcement actions without any guarantee of federal supervision or review. More troubling, KISA's authority to seek injunctions against alleged violators of the Association's rules is not subject to any FTC

control. These defects in supervision cannot be adequately addressed through FTC rulemaking requiring preclearance of enforcement actions or limiting the scope of KISA's enforcement tools.

Rule ONE, as promulgated by the KISA, represents an unconstitutional violation of the First Amendment rights of American Adults. While the court below applied *Ginsberg* to articulate why rational basis review ought to apply to Rule ONE, this misconstrues the heart of the issue at bar here: the First Amendment rights of adults. In contrast, the issues in *Ginsberg* included (the potential) burdens on the First Amendment rights of minors. Rule ONE targets a certain kind of speech because of the viewpoint it expresses, and as such, is a content-based restriction on the protected free speech and expression of American adults, for which strict scrutiny is the proper standard of review. The test that Rule ONE must survive is (1) the statute is in service of a compelling governmental interest, (2) the statute is narrowly tailored to achieve that interest, and (3) the statute is crafted in the least restrictive means possible of achieving it. While Rule ONE passes the first prong of the test as the protection of the welfare of the American youth has long been a compelling government interest, Rule ONE is neither narrowly tailored nor confined to the least restrictive means of furthering this interest and, therefore, will fail both prongs (2) and (3) as well as strict scrutiny review as a whole. It is important to note that the intermediate scrutiny review is not applicable in this case. Finally, when correctly applied, Rule ONE may still fail the rational basis review as the means proposed to protect American children are not functionally rational enough to meet this purpose. For these reasons, KISA's Rule ONE unconstitutionally infringes on the First Amendment rights of millions of Americans.

ARGUMENT

I. The Kids Internet Safety Association's Exercise of Federal Authority Unconstitutionally Violates the Private Nondelegation Doctrine.

In the interests of preserving democratic principles and accountability, the Constitution vests federal power only in hands of the federal government, requiring that legislative power be exercised only by the Congress and that executive power be exercised only by the President. U.S. Const. art. I, §1, cl. 10; U.S. Const. art. II, §1, cl. 1. The Keeping the Internet Safe for Kids Act (KISKA, or "the Act") improperly contravenes the constitutionally ordered separation of powers by delegating federal executive authority to a private entity—the Kids Internet Safety Association (KISA, or "the Association")—without the meaningful government supervision required by the private nondelegation doctrine. Congress may not delegate federal power to a private entity without meaningful standards to guide their actions and substantial oversight by a public body. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Gundy v. United States*, 588 U.S. 128, 145-146 (2019). While this Court has recognized that Congress may, in limited circumstances, involve private entities in the development, implementation, and enforcement of federal legislation, those arrangements are constitutionally valid only if the private body remains subordinate to a public agency that retains final authority and control over the legislative or executive function. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 310-312 (1936); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398-400 (1940).

Here, KISA wields sweeping authority under the act to enforce its own rules, conduct investigations, assess fines, and file civil suits against violators of the Association's rules. Although the Federal Trade Commission (FTC) nominally oversees KISA's rulemaking and enforcement authorities through a discretionary, post hoc review, that mechanism is insufficient

to ensure KISA "functions subordinately" to a federal agency as required by this Court's private nondelegation jurisprudence. *See Carter Coal*, 298 U.S. at 310-312; *Adkins*, 310 U.S. at 398-400; *Nat'l Horsemen's Benevolent and Protective Ass'n v. Black* (*Black II*), 107 F.4th 415, 430-433 (5th Cir. 2024) (holding that discretionary enforcement review after the fact does not constitute sufficient federal oversight for purposes of the private nondelegation doctrine inquiry). Additionally concerning, and fatal to the Act's constitutionality, is the fact that KISA's most powerful enforcement tool, the authority to file civil suits to enjoin violators of Association-promulgated rules, is not subject to any check or oversight by the FTC as set forth in the Act. *See* 55 U.S.C. § 3054(j)(1)-(2). This Court should reverse the Fourteenth Circuit and find that these shortcomings render the Act facially unconstitutional.

A. FTC Statutory Oversight of KISA's Enforcement Actions Does Constitute Adequate Supervision of the Private Association's Exercise of Federal Power

KISKA grants the Association broad enforcement powers, including subpoena and investigatory authorities as well as the power to impose civil sanctions or file suit for injunctive relief against violators of the Association's promulgated rules. 55 U.S.C. § 3054(c). These are quintessentially executive powers subject to important limitations on their delegation. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218-220 (2020); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law"). Although the Act grants the FTC power to oversee the Association's adjudicatory enforcement actions after the fact, it does not render KISA properly subordinate to the FTC's supervision and oversight. *See* 55 U.S.C. §§ 3053(e), 3058.

1. Post Hoc and Discretionary FTC Review of KISA's Enforcement Actions Fails to Satisfy the Subordination Test Established in Carter Coal and Adkins.

In order for a private entity to satisfy this Court's private nondelegation doctrine jurisprudence and be properly subordinated to a federal agency, the entity's primary functions exercising government power must be subject to pervasive control and surveillance by a supervising public body, rather than mere discretionary post hoc review. *See Carter Coal*, 298 U.S. at 310-312; *Adkins*, 310 U.S. at 398-400; *Assn. of Am. Railroads v. U.S. Dept. of Transp.* (*Amtrak I*), 721 F.3d 666, 673-674 (D.C. Cir. 2013); *Black II*, 107 F.4th at 430-433. In *Carter Coal*, the Court established that a private board consisting of coal industry members empowered by the Bituminous Coal Act of 1935 to set prices and craft regulatory measures for the coal industry without oversight by a federal agency was "delegation in its most obnoxious form" because it granted the immense power of the federal government to an unaccountable group of "private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311. The regulatory structure struck down in *Carter Coal* was modified by the Bituminous Coal Act of 1937 to resolve the issue of federal oversight, bringing the private advisory group under the "pervasive surveillance and authority" of a federal Commission, which retained for itself the power to set minimum and maximum prices in accordance with the statute. *Adkins*, 310 U.S. at 387-389. In *Adkins*, the Court affirmed the constitutionality of the revised statutory structure, in which industrial players provided advice, guidance, and expertise to the Commission while the actual legislative and executive functions were performed by government officials accountable to the democratically elected representatives of the people. *Id.* at 399. Taken together, *Carter Coal* and *Adkins* establish the private nondelegation doctrine's subordination test: private entities, even those with pecuniary

interests in the outcomes of regulatory processes, may provide assistance and guidance to government regulators and adjudicators. *See Id.* at 388. They may not, however, subsume final control over the regulatory product or make adjudication decisions outside the surveillance, oversight, and ultimate authority of an arm of the federal government. *See Carter Coal*, 298 U.S. at 311; *Schechter*, 295 U.S. at 537. The D.C. Circuit affirmed these principles in *Amtrak I*, in which the court deemed the Passenger Investment and Improvement Act's (PRIIA) delegation of rulemaking authority to a partnership between Amtrak and the Federal Railroad Administration (FRA) constituted improper private delegation because, under certain circumstances, Amtrak could enact rules without them every being approved or reviewed by the FRA. *Amtrak I*, 721 F.3d at 674 (later reversed in *Amtrak II*, 575 U.S. 43, 46 (2015), on the grounds that Amtrak is properly understood as a government entity for purposes of private nondelegation doctrine analysis).

The Fifth Circuit has applied these principles to an entity nearly identical to KISA, holding in *Black II*, that discretionary, post hoc review of a private entity's enforcement decisions did not constitute sufficient federal oversight for purposes of the private nondelegation doctrine inquiry. *Black II*, 107 F.4th at 430-433. The entity in question in *Black II*, the Horseracing Integrity and Safety Act created the Horseracing Integrity and Safety Authority (HISA) to promulgate and enforce rules governing medication control and racetrack safety in the thoroughbred racing industry. *Id.* at 421. HISA's enforcement powers, which served as the statutory model for KISA, also permit post hoc, discretionary FTC review of adjudication decisions. 15 U.S.C. § 3058(c). The Fifth Circuit held that this type of review was inadequate supervision under the private nondelegation doctrine, because each discrete enforcement action undertaken by HISA, including subpoenas, searches, charges, and adjudication proceedings, is unsupervised by the

FTC up until the point it can be challenged, with no provision for a stay of enforcement pending appeal. *Black II*, 107 F.4th at 430; *see also* 16 C.F.R. § 1.148(a). The unsupervised enforcement actions constitute impermissible private delegation of executive power. *See Black II*, 107 F4th at 430.

KISKA's delegation of enforcement authorities to KISA similarly fails to satisfy the subordination requirement established in *Carter Coal* and *Adkins*. Under KISKA, KISA is the primary body responsible for investigation and enforcement of the violations of the rules it develops. *See* 55 U.S.C. §§ 3054(c), 3057. The tools KISA wields in its investigation and enforcement efforts are substantial, including the power to initiate investigations, issue subpoenas, and levy sanctions. *Id.* at § 3054. Although the Act nominally provides for FTC review of KISA's enforcement action, that oversight is done on a post hoc and discretionary basis, leaving the day-to-day enforcement of KISA's rules largely in the body's private hands. *See Id*. The FTC relies on KISA to serve as the primary regulator responsible for both rulemaking and enforcement under KISKA. *See Id.* at §§ 3054(c), 3057 (providing KISA power to "exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children" and to undertake enforcement duties related to rules created under § 3054).

Although the FTC may step in to review and reverse particular KISA enforcement actions, it is under no obligation to do so. 55 U.S.C. § 3058(c) ("The Commission *may*, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3)...." (emphasis added)). Even in cases where the FTC choses to become involved, by the time the agency intervenes, KISA's investigative or adjudicative decisions would likely already have taken effect. *See Id.* at § 3058(c)(2). Such a delay—a gap during which a private entity's unfettered use

of executive power is allowed to interfere with the rights and interests of the public—clearly violates the private nondelegation doctrine. *See Black II*, 107 F.4th at 432-33 (holding that post hoc FTC oversight did not cure the constitutional defect inherent to a private entity's unfettered enforcement discretion).

The essential purpose of the private nondelegation doctrine is to avoid allowing private entities to wield federal power outside the accountability mechanisms provided by direct federal supervision. *See Amtrak I*, 721 F.3d at 675. A demanding private nondelegation inquiry is especially important in cases where "both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity." *Id.* (citing *National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 737 F.2d 1095, 1143 n. 41 (D.C. Cir. 1984)). KISA is charged with regulating a complex and controversial sphere of American economic, social, and creative life. The FTC may allow KISA's exercise of executive power to go unchecked, either because of tacit FTC approval of the Association's activities or because of reluctance to intervene in a politically sensitive area of regulation. The fact that the statute has left this gap, through which potentially controversial enforcement action with significant bearing on Americans' core constitutional rights and economic interests may pass uncontested or even unreviewed, is precisely the situation *Carter Coal* deemed "delegation in its most obnoxious form" and should be fatal to the constitutionality of KISKA's delegation of enforcement power to the Association. *Carter Coal*, 298 U.S. at 311.

2. Preclearance of KISA's Enforcement Actions by the FTC Would Improperly Modify KISKA's Congressionally Intended Structure.

In proceedings below, Respondents incorrectly suggested that any constitutional defect in how KISA uses its enforcement powers could be cured through FTC rulemaking requiring KISA

to preclear its enforcement actions. *Kids Internet Safety Ass'n v. Pact Against Censorship, Inc.*, R. 12 (Marshall, J., dissenting). This suggestion fails to account for both the text of the statute and this Court's recent holding in *Biden v. Nebraska*, which clearly established that regulatory agencies' power to modify their own structure and authorities must be limited by the text of the statute in question. *See* 55 U.S.C. §§ 3053(c)-(e), 3058(c); *Biden v. Nebraska*, 143 S. Ct. 2355, (2023); *MCI Telecomms. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994); *See also Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)). In *Biden v. Nebraska*, the Court struck down the Biden Administration's student loan forgiveness program, which relied on the terms of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to issue "waivers and modifications" forgiving billions of dollars of existing debt for millions of federal borrowers. *Biden v. Nebraska*, 143 S. Ct. at 2362, 2368-2369. The Court found that the terms in the statute, "waive or modify," describing the Secretary's authority with respect to public student loan borrowers' debts, suggested making only "minor changes" or making something "somewhat different" rather than fundamentally altering through issuing blanket forgiveness. *Id.* at 2368-2369, quoting Black's Law Dictionary 1203 (11th ed. 2019).

Here, the text of KISKA is similarly moderate in its empowerment of the FTC to modify the division of labor envisioned under the Act. While § 3053(e) authorizes the FTC to "abrogate, add to, or modify the rules of the Kids Internet Safety Association," that provision merely allows the FTC to modify regulations promulgated by KISA. *See* 55 U.S.C. at § 3053(e). It does not give the FTC the power to reorder KISA's statutory role as primary enforcer of its rules under §

3054(c)-(j). *See Id.* Additionally, § 3058(c) provides only that the FTC may review and "affirm, reverse, modify, set aside, or remand for further proceedings" any adjudication decision made pursuant to KISA's authority. *Id.* at § 3058(c)(3)(A). The statutorily granted power to review or modify KISA's enforcement actions is predicated on KISA first engaging in enforcement and the FTC choosing to intervene in the already-initiated action. Any effort to change KISA's status as primary enforcer, such as by requiring preclearance of any potential enforcement action, would be a drastic revision of the Act's Congressionally provided structure, inverting the division of labor envisioned by Congress. Such a drastic change is not justified by the text of the statute and should not be viewed by this Court as proper in its own right, let alone adequate to cure the Act's constitutional defects.

B. KISA's Exercise of Certain Enforcement Authorities Outside FTC Oversight is Fatal to the Act's Constitutionality.

Even if this Court deems the FTC's limited supervision of KISA's enforcement powers constitutionally valid, the absolute lack of FTC oversight over KISA's most potent enforcement tool should doom this statutory scheme. This court has held that the power to file civil suits, "the ultimate remedy for a breach of the law," is a "quintessential executive function" entrusted to the President by Article II and subject to strict limitations on its delegation. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Seila Law*, 591 U.S. 197, 212 (2020). These powers, like the others discussed above, must be subject to pervasive government control and surveillance in order to satisfy the nondelegation doctrine's requirements. *See Carter Coal*, 298 U.S. at 310-312; *Adkins*, 310 U.S. at 398-400; *Amtrak I*, 721 F.3d at 673-674.

Here, KISA may file civil suits in federal court to enjoin technological companies alleged to have violated KISA's rules without prior approval or post hoc review by the FTC. 55 U.S.C. §

3054(j)(1). This arrogation of executive authority by the private Association is strongly analogous to *Carter Coal's* improper delegation of price-setting authority to an industrial board without federal oversight. *See Carter Coal*, 298 U.S. at 310-312. Regardless of any enforcement provisions over which the FTC does retain some review authority, § 3054(j) gives KISA vast power to modify the behavior of large American companies and internet users while shielding its exercise of that power from supervision by democratically-accountable organs of the federal government. It is clearly a violation of the private nondelegation doctrine and the principles of accountability and constitutional government it exists to protect.

C. A Facial Challenge to KISKA's Insufficient FTC Oversight Structure is Appropriate for Determination Under This Court's Axon Standard.

Petitioners bring this claim as a facial challenge to the constitutionality of KISKA's delegation of federal power to a private entity. This Court has held in *Axon Enterprises, Inc. v. Federal Trade Commission* that regulated parties in a traditional, public administrative law context need not wait until they have suffered an enforcement action before challenging the constitutionality of the law granting enforcement authority to an agency. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 180 (2023). In *Axon*, the Court addressed a challenge to an FTC adjudication proceeding in which the administrative law judges were insulated from executive supervision by tenure protections in violation of the proper separation of powers. *Id.* at 181. Axon Enterprises challenged the proceeding on grounds that the decision maker, and thus the proceeding itself, were constitutionally illegitimate. *Id.* The Court held that Axon's claim's warranted immediate judicial consideration, rather than Article III judicial review after the completion of the proceeding, because the questions raised went to the legitimacy of the enforcement scheme itself. *Id.* at 192.

So too do Petitioners' claims. This nondelegation challenge to the propriety of KISA's statutory structure turns on a pure question of law that goes to the legitimacy of KISA's enforcement actions. Requiring Petitioners to await a KISA enforcement proceeding before pursuing review of their claims would be to require a compounding injury—KISKA permits aggrieved parties to request FTC review of their adjudication proceedings only after the completion of KISA's adjudicatory enforcement decisions. *See* 55 U.S.C. § 3058(c)(2)(A). The injury is made more noxious by the fact that KISA is a private entity, rather than a public one like in *Axon*. The Court's holding in *Axon* recognized that litigants need not endure unconstitutional proceedings merely to test the lawfulness of a public agency's power. Neither should they be forced to endure such proceedings at the hands of a private enforcement body.

II. Rule ONE Unconstitutionally Infringes On The First Amendment Rights Of American Adults

A. Rule ONE's Age Verification Requirement Is Subject to Strict Scrutiny

1. The Lower Court Erred in its Application of Ginsberg

The court below erred in reasoning that the appropriate standard of review was rationale basis under *Ginsberg*. Since that decision, this Court has repeatedly distinguished between access to material harmful to minors in the physical and digital space. *Ginsberg v. State of New York*, 390 U.S. 629, 638 (1968). While it is true that in *Ginsberg,* the Court acknowledged a state interest in keeping material obscene to children out of the hands of minors, it is also true that since Ginsberg, the Court has reiterated at least four times that strict scrutiny applies to the regulation of materials obscene for minors when the regulating statute additionally suppresses access to a large amount of speech that adults have a constitutional right to in the digital sphere where "affirmative steps" and "a level of sophistication" is required to seek out that information.

Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 854 (1997); *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656 (2002); *Ashcroft v. Am. Civ. Liberties Union,* 545 U.S. 450, 455 (2004) (hereinafter *Ashcroft II*); *United States v. Playboy Entm't Group*, 529 U.S. 803, 808 (2000).

In *Ginsberg,* the Court upheld a New York statute that criminalized knowingly providing materials obscene materials for minors to minors because obscene material enjoys no First Amendment protection, and thus, rationale basis review applied. *Ginsberg*, 390 U.S. at 638; R at 8 (discussing the applicability of *Ginsberg*). As technology progressed, however, the Court found that laws targeted at child welfare in the digital space were sufficiently distinct from the physical space and required strict scrutiny review. In *Reno,* the Court found that the burdens placed on adults' right to access legitimately protected speech in cyberspace were distinct and unduly infringed upon by overly broad enforcement provisions of the Communications Decency Act of 1996 (CDA). *Reno*, 521 at 868; Communications Decency Act of 1996 (CDA) 47 U.S.C.S.§ 223. The Court reiterated this logic in *Ashcroft* when it held that the amended Child Online Protection Act ("COPA") was again overly broad because its definition of speech harmful to minors encompassed non-obscene speech otherwise protected for adults and placed an undue burden on protected adult access to speech. *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564 (2002); Child Online Protection Act, 47 U.S.C. § 231 (1998).

Like the CDA and COPA, the KISA suppresses access to speech through Rule ONE that adults would otherwise have a constitutional right to receive by requiring verification for any site containing over ten percent objectionable material. R at 4. This is quite different from *Ginsberg,* where the physical space being regulated required no substantially larger burden to either providers or those adults seeking to access speech non-obscene to them but obscene to minors. *Reno*, 521 U.S. at 870 (citing *Ginsberg* 390 U.S. at 639 (discussing the fundamental differences

in burdens placed on speech in the physical and digital space)). Nothing in *Ginsberg* challenges the contention that adults may have a right to access material that may be obscene for a child and acknowledged that said right ought not to be overly chilled. Despite the majority below's contention, *Ginsberg* stands for the proposition that placing a burden on the unprotected speech of a child in the physical space does not place an unreasonable burden on an adult with the right to access the speech. *Ginsberg*, 390 U.S. at 641. While the majority below correctly highlights *Ginsberg* as good law, decades of interceding technological innovation and subsequent precedent indicate that it is not applicable as a guiding light for the review. The court below erred in its application of *Ginsberg* to Rule ONE, as a statute governing the in-person distribution of pornography to minors (like the statute in *Ginsberg*) has long been seen as significantly different than chilling the expression of adults in the digital space at issue here.

2. Rule ONE is Content-Based Moderation of Speech

Rule ONE represents a content-based regulation of *adult* speech in the interest of protecting minors. The First Amendment protects even that speech and conduct that some may find morally objectionable; this includes the content frowned upon "because of its message, its ideas, its subject matter, or its content." *Nat'l Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018). While not all speech is included in these protections, the Court has for decades held that pornographic material is not necessarily synonymous with obscenity. *Roth v. United States*, 354 U.S. 476, 487 (1957) (holding that there was a three-pronged test for regulating speech as obscenity outside the protection of the First Amendment). When regulating the expression of children, a law is content-based if it is targeted at speech because of what it expresses, and the government must take care to ensure that in regulating children, they do not practically "reduce the adult population" to consuming "only what is fit for children." *Butler v.*

Michigan, 352 U.S. 380, 383 (1957); *United States v. Playboy Entm't Group*, 529 U.S. 803, 808 (2000). There is no dispute that the content-based restrictions on speech may be more permissible; the government, when acting in the valid interest of child welfare, may not so burden speech that it potentially "chill[s] or burden[s] speech outside [the] boundaries" of the minor population. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023).

By setting a clear threshold of "one-tenth of all content" to trigger the need for age verification, Rule ONE represents a content-based regulation of *adult* speech in the interest of protecting minors. 55 C.F.R. § 2(a). Section 1(6) of Rule ONE explicitly defines the content being regulated as "sexual material harmful to minors" and goes into non-exhaustive detail as to what that content may entail. *Id.* at § 1(6). In addition, Section 2(a) imposes an age verification requirement on commercial entities that knowingly or intentionally publish or distribute material more than one-tenth of what is described in Section 1(6). *Id*. Similar to the overly broad requirements of the COPA in *Ashcroft II,* Rule ONE has effectively "reduced the adult population" to consuming "only what is fit for children. *Ashcroft II* 542 U.S. at 670 (quoting *Butler v. Michigan* 352 U.S. at 383). The record indicates that at least two individuals have expressed concern that age verification will result in the outing of their engagement in speech that, while protected, is seen as normatively troublesome in a way that would impact their standing in the larger community. R at 4. As a result, they have stopped accessing relevant sites. *Id.* Individuals point to leaks of similarly positioned personal data from hospitals and schools' servers. *Id.* Individuals' fears seem to be shared by a not unsubstantial portion of the American adult population, as when similar laws have been passed at the state level, a marked drop in traffic to sites covered has been well documented. In some instances, the sites have gone dark, all together. *See e.g.*, Madison Iszler, *Texas Blocks Access to Pornhub for Failing to Comply with*

Age Verification Law, Austin American-Statesman (Mar. 15, 2024) (In the days since Texas age verification law traffic to sites plummeted, but VPN searched soared); Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, POLITICO (Aug. 8, 2023) ("[T]raffic in Louisiana has dropped 80 percent."). Plaintiffs have contended that this fear will sometimes lead to the diminishment of their businesses and, in some cases, even closures altogether. R at 4-5.

The record also clearly indicates that Rule ONE "chill[s] [and] burden[s] speech outside [the] boundaries" of the minor population purely based on the content of that speech, as both it and similarly formatted laws have significantly impeded. *Counterman*, 600 U.S. at 75. By setting a clear threshold of "one-tenth of all content" to trigger the need for age verification, Rule ONE creates a content-based restriction impinging the protected speech of adults for which strict scrutiny ought to apply.

3. Strict Scrutiny Applies

Because Rule ONE regulates speech based on its content, strict scrutiny is the correct standard of review. When a statute regulates speech in a manner that is content-based, strict scrutiny applies. *Reed v. Town of Gilbert*, 76 U.S. 155, 164 (2015). While there are several exceptions where intermediate scrutiny may apply to regulating protected speech, none apply here. *See* discussion of intermediate scrutiny *infra* at 25. When it comes to non-obscene speech, Rule ONE's Sections 1(6) and 2(a) defining sexually explicit material for minors and mandating barrier to view such content for all people creates a clear content-based restriction on the speech of adults for which decades of Court precedent demand strict scrutiny as the standard of review in order to ensure adults are not regulated as children. *See e.g.*, *Reno*, 521 U.S. at 870. Because

Rule ONE regulates speech based on content that is deserving of First Amendment protections when accessed by adults, it must survive strict scrutiny.

B. Rule ONE Fails Strict Scrutiny and is Subsequently Unconstitutional

The test that Rule ONE must survive is (1) being in service of a compelling governmental interest, (2) being narrowly tailored to achieve that interest, and (3) being the least restrictive means possible of achieving it. *Sable Commc'ns of Cal. Inc v. Fed Commc'n*, 492 U.S. 115, 126 (1989) (holding that Congress may prohibit obscene but not merely indecent materials and regulation of indecent materials must pass strict scrutiny). While it is clear that precedent indicates the government has a compelling interest in the protection of minors, Rule ONE is neither narrowly tailored nor does it set out the least restrictive means of advancing the interest. Consequently, Rule ONE will fail strict scrutiny review, and the preliminary injunction ought to be reinstated.

1. The Purposive Protection of Children is a Compelling State Interest

Petitioners do not contend that the government has an interest in the protection of children and that said interest is compelling. As far back as *Ginsberg,* this court has articulated that the state may regulate the sale of pornography to children as it is generally inappropriate. *Ginsberg*, 390 U.S. at 630. However, the precedential strength of the interest is insufficient for Rule ONE to survive strict scrutiny. The purpose of the KISA and the promulgation of Rule ONE is made clear in 55 U.S.C. § 3050 as making the internet safe for American youth. R at 19. However, the court below erred in reasoning that the agreement infers that the review of Rule ONE stops before it has substantively begun. R at 9. *Sable* has made it clear that a compelling interest in protecting minors alone does not dissipate the remaining requirements to pass strict scrutiny.

Sable Commc'ns of Cal. Inc v. Fed Commc'n, 492 U.S. at 126. While Rule ONE's purpose, as outlined in 55 U.S.C. § 3050, is important, that alone is insufficient to survive strict scrutiny.

2. Rule ONE is Not Sufficiently Tailored to Pass Strict Scrutiny

Rule ONE is not sufficiently tailored to pass strict scrutiny for two reasons. First, Rule ONE is underinclusive in that it only nominally prevents minor's access to pornography but, in reality, contains several functional exemptions through which minors will be able to access the regulated material. Second, Rule ONE is overly inclusive in even its most conservative reading and contains language nearly identical to that in *Ashcroft II*. *Ashcroft II*, 542 U.S. at 656 (holding that language identical to Rule ONE Section 1(6) defining material harmful to minors was unconstitutionally broad).

Rule ONE is underinclusive in that its restrictions only nominally prevent minors' access to pornography, and research indicates that age verification of identified websites will do little to limit the ability of minors to access inappropriate material functionally. A statute is underinclusive of speech regulated when it functionally fails to serve the stated purpose. *See e.g.*, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2015); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448-449 (2015); *Free Speech Coalition v. Paxton*, 95 F.4th 263, 301 (5th Cir. 2024). In *Brown v. Ent. Merchants,* the Court found that while prohibiting the sale of violent video games to minors was in service of a compelling state interest in the protection of children, the law was unconstitutionally flawed in that barring only direct sale to children did not stop children from using violent video games in reality, and therefore it was insufficiently tailored. *Brown v. Ent. Merchants*, 564 U.S. at 800-802 (citing *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. at 573). Similarly, Rule ONE attempts to prevent a minor who in earnest attempted to access material moderated; however, nothing in the rule functionally fails to prevent access to similar or the

same content on new sites, sites that contain less than one-tenth of content listed or news-gathering organizations or search engines. 55 C.F.R. § 5. Functionally, this creates a gateway through which minors will still be able to access the material regulated easily. This was pointed out in Judge Marshall's dissent below. R at 14. As this Court has noted, not only is a vast gateway a tailoring failure but "underinclusiveness" can raise doubts about whether the government is, in fact, pursuing the interest it invokes." *Williams-Yulee*, 575 U.S. at 448-49. Subsequently, Rule ONE is both so underinclusive that it is non-functioning, and that lack of functionality raises serious questions about Rule ONE's true purpose, which may actually be restricting access to pornographic or normatively impolite materials for all.

Rule ONE is also overly broad in its construction, even when read in the narrowest possible interpretation. The definition of "harmful to minors," which has routinely been found insufficiently broad when regulating speech on the internet because it, in effect, regulates adults as if they were children, comes from *Miller v. California*. *Miller v. California*, 413 U.S. 15, 23 (1973) (defining "harmful to minors as "includes any material that 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"); *See e.g.*, *Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003); *Am. Civ. Liberties Union v. Johnson*, 194 F.3d 1149, 1158-60 (10th Cir. 1999); *Am. Civ. Liberties Union v. Mukasey*, 534 F.3d 181 (3d. Cir. 2008).

The language of Section 1(6) is nearly identical to that in the COPA, which was found to be unconstitutionally broad by this Court. *Compare* COPA, 47 U.S.C. § 231 (1998) (defining "material harmful to minors" as: 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 is designed to pander to, the prurient interest; depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.") *with*, Section 1(6) ("Sexual material harmful to minors" includes any material that 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; 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… taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.). The Court struck down the relevant language of the COPA in *Ashcroft II,* holding that the impact was far too broad in the context of the internet, where speech is necessarily broadcast widely in a way the magazines of *Ginsberg* were not. *Ashcroft II* 542 U.S. at 656.

The definition of "material harmful to minors in Section 1(6) is unique in that it adds a specific but non-exhaustive list of what types of content may meet the definition; however, this alone is insufficient to save the statute. 55 C.F.R. § 1(6). Section 1(3) defines a minor as "[any] individual under the age of 18," which is identical to language struck down as too vague in the COPA. *Id.* at § 1(3); *Ashcroft II* 542 U.S. at 656. The term "under the age of 18" has routinely been found to be overly broad in the context of Internet speech because, as the Court recognized in *Am. Civ. Liberties Union v. Ashcroft*: "[t]he term minor as Congress has drafted it, thus applies in a literal sense to an infant, a five-year-old or a person just shy of seventeen in the same manner." *Am. Civ. Liberties Union v. Ashcroft* 322 F.3d at 254. While the court below suggested the application of *Sable* and argued that the protection of child welfare permits for such a

sweeping law, this would be a patent disregard of the reality of Rule ONE's near-certain effects. R at 9-10 (citing *Sable* 492 U.S. at 126 (holding that the FCC may moderate obscene but not indecent speech specifically over the telephone). The record clearly indicates that Sections 1(3) and 1(6), as currently written, will moderate speech not intended to be covered and chill adult expression as if they were minors. R at 4-5. The striking down of nearly identical language by this Court in *Ashcroft* and *Reno* necessitates that Rule ONE be found overly restrictive on speech and insufficiently tailored to conform with the demands of the First Amendment.

3. Rule ONE is Overly Restrictive in Its Application

Ensuring a statute can survive strict scrutiny requires proof that the statute employs the least restrictive means possible, a requirement that Rule ONE will fail as compelled age has been demonstrated to chill protected speech and less restrictive alternatives are available. Restrictions on speech fail strict scrutiny as unacceptable when "less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. Am. Civ. Liberties Union* 542 U.S. at 669; *Reno*, 521 U.S. at 874. The first issue is that Rule ONE's age verification chills the protected speech of adults. As far back as *Ashcroft v. Am. Civ. Liberties Union,* this Court has acknowledged that requiring recipients of moderated speech to identify themselves before gaining access to normatively disfavored speech will significantly have a significant chilling effect on the adults with a right to access said speech. *Id*. This is born out in the record in this case, where states with similar laws have seen a notable dip in traffic to relevant sites and adults with a right to the speech have forgone access for fear of their most intimate interests being broadcast to the world. R at 4. The majority below has dismissed these concerns by pointing to the two decades of technological advances since *Ashcroft* and Rule ONE's requirement that identification data be disposed of negates the concerns. R at 9-10.

However, the majority failed to account for the reality that in the intervening decades, privacy breaches have become more frequent, not less frequent. (*see* discussion of the practical chilling effects of famous data breaches on access to age-verified speech *supra* at 17). The record reflects that adult users with a right to speech will be excluded even if Rule ONE functions as intended based on a practical understanding of the reality of data breaches in the digital age. R at 4. Because Rule ONE already has chilled speech, there is no reason to believe it will not have an increasingly chilling effect for which less restrictive means could more practically achieve the legitimate ends of supporting the welfare of American children.

Secondly, many less restrictive means are available to protect child welfare without requiring access to sensitive identifying information, most notably filtering and blocking. In 2000, this Court recognized that "parent-led" content moderation through filtering comports with the notion that while the government is interested in child welfare, it should be up to parents to decide how their children are raised, an assertion that has been re-affirmed. *United States v. Playboy Ent. Grp. Inc.*, 529 U.S. 803, 824-25 (2000); *Am. Civ. Liberties Union* 542 U.S. at 669. In *Playboy*, it was a violation of adults' First Amendment rights to time restrict the broadcast of content potentially obscene to minors because it over-regulated the expression rights of adults. *Playboy*, 529 U.S. at 806. Furthermore, in *Ashcroft v. Am. Civ. Liberties Union*, this Court articulated that the government has "ample means" of encouraging content filtering, which does not preclude it as a reasonable, less restrictive means. *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. at 669-70. The record reinforces that content filtering, in many cases, is a more effective solution in this context as well. R at 4. The court below skirted this issue by pointing to how much more effective I.D. verification has become since *Ashcroft*. R at 9. However, this negates the reality that software workarounds like VPNs often thwart these safeguards, and even when they do not,

children still manage to access material they ought not to. R at 15; Nicole Pelletiere, *iPad Games and Unauthorized Purchase Issues*, ABC13 (Dec. 10, 2022) (a six-year-old child spent $16,000 on unauthorized in-app purchases). What is clear despite the majority's contention to the contrary is that time has made age verification *less* reliable as technology has advanced to provide a multitude of alternatives to prevent children from accessing speech to which they have no rights while not burdening the protected rights of adult Americans. Because decades of precedent make it clear that content filtering is not only potentially more effective but clearly less restrictive, Rule ONE as it currently stands cannot pass the less restrictive means requirement of strict scrutiny constitutional review.

C. Intermediate Scrutiny Does Not Apply

It is worth noting that in between the strict scrutiny review that ought to be applied and the rational basis review applied below, there is a tertiary option: intermediate scrutiny; it is only worth noting in this brief to clearly state that it does not apply. Intermediate scrutiny applies only to protected speech when reviewing speech for its secondary effects, broadcast exceptions, commercial speech or a substantial privacy interest. Cases of potentially profane Internet or similar digital speech have received intermediate scrutiny review once in *Fed. Comm'n Comm. v. Pacifica Fond. Fed. Comm'n Comm. v. Pacifica Fond.*, 438 U.S. 726 (1978) (hereinafter *Pacifica*). In *Pacifica*, the Court found that the FCC was within its rights to regulate indecent radio broadcasts without violating the First Amendment rights of listeners. *Pacifica*, 438 U.S. at 731. However, as articulated in *Reno,* the internet, by virtue of the affirmative steps needed and the level of sophistication required to access specific sites, is sufficiently different from the radio (where one turns the dial with limited to no warning as to what is next). *Reno*, 521 U.S. at 872. As no facts in the record substantively change the distinctions between the internet and the radio

in *Reno*, it stands to reason that intermediate scrutiny does not apply. For that reason, intermediate scrutiny has no bearing on the constitutionality review of Rule ONE, which targets only providers of speech on the Internet.

D. Rational Basis Ought Not Be Applied, but Rule ONE may still fail it.

The court below erred in applying rational basis review. *See* discussion of the misapplication of *Ginsberg supra* at 14-16. However, even if this court applied rational basis review, Rule ONE, in all likelihood, would still fail. A statute's enforcement mechanism must bear a rational relationship to legitimate means to pass a rational basis review. *Ashcroft II*, 542 U.S. at 656; *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024). The court below articulated that "because the government has such a strong interest in 'the welfare of children, ' the Constitution permits the government to regulate 'the distribution *to minors* of materials obscene *for minors*.'" R at 7 (citing *Free Speech Coal., Inc. v. Paxton*, 95 F.4th at 269). However, even if this Court were to accept that this fundamental shift in the assumption of the obligations of child welfare falls first with the government and then with parents is valid, the clear evidence that the purpose and means of Rule ONE are insufficiently rationally related bars the statute from passing rational basis review. Rule ONE was promulgated with the express purpose of limiting early exposure to pornography in order to reduce issues of body and gender dysphoria, depression and aggression, as well as a correlated drop in grades. R at 3. While there is nothing normatively wrong with the goals of Rule ONE, the means being exclusively age verification is, in practice, not a rationally related means to achieve those goals as, firstly, data indicates it will be largely unsuccessful and secondly, medical research indicates that while there may be correlations between the viewing of content listed in Rule ONE Section 1(6) and problems in development, they correlations are attenuated at best. Firstly, the record indicated

that most sites that would be subject to Rule ONE offer a significant amount of non-objectionable and often times helpful material (examples include educational websites). R at 4. Additionally, the record and other expert studies indicate that the use of age verification, while successfully blocking the use of fake I.D.s, can be easily skirted by VPNs. R at 15 (discussing how VPNs thwart Rule ONE); Madison Iszler, *Texas Blocks Access to Pornhub for Failing to Comply with Age Verification Law,* Austin American-Statesman (Mar. 15, 2024) (discussing how easy it was to get around a nearly identical Texas law). Finally, medical research casts doubt on Rule ONE's purposive contention that the totality of the content being regulated is harmful to the totality of America's non-adult population. *See e.g.*, Grace B. Jhe et al., *Pornography Use Among Adolescents and the Role of Primary Care*, 11 Fam. Med. Com. Health e001776 (2023) (discussing how Primary Care Providers can ensure that if adolescent patients are viewing pornographic material, it is not impeding their cognitive development and may aid it). While Rule ONE has yet to be enforced, the evidence indicates that its sweeping effect on all Americans under eighteen and limited yet flawed enforcement mechanisms will functionally handicap and rationally support the law to stand in service to the protection of American youth. Even under the most liberal standard of review, Rule ONE is too irrational and potentially harmful to stand for the purpose it contends to serve.

CONCLUSION

For the foregoing reasons, the Pact Against Censorship Association and its associated parties respectfully requests this Court to reverse the decision of the Court of Appeals for the Fourteenth Circuit.