No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC.,

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM NUMBER 31

Attorneys for the Petitioner

QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association its enforcement powers.

II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit, affirming in part and reversing in part the opinion of the District Court, is unreported but reproduced on pages 1–10 of the record. R. at 1–10. The dissenting opinion of Judge Marshall of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced on pages 10–15 of the record. R. at 10–15 (Marshall, J., dissenting).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I § 1

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

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U.S. Const. art. II, § 1, cl. 1

> The executive Power shall be vested in a President of the United States of America.

***

U.S. Const. art. II, § 2, cl. 2

> and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

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U.S. Const. art. II, § 3, cl. 5

> he shall take Care that the Laws be faithfully executed

***

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED (Cont'd)

U.S. Const. amend. I

> 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.

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5 U.S.C. § 553(a)(2)

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
>
> (2) A matter relating to agency management or personnel to public property, loans, grants, benefits, or contracts.

***

15 U.S.C. § 78s(a)(3)

> (3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED (Cont'd)

15 U.S.C. § 78s(h)(1)

> (1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance
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> ***

55 U.S.C. §§ 3050–59.

> These provisions are set out in the appendix to the record. R. at 19–32.

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55 C.F.R. §§ 1–5.

> These provisions are set out in the appendix to the record. R. at 17–18

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STATEMENT OF THE CASE

In 2022, Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), which sought to "protect children from being bombarded with inappropriate, offensive, and, at times, obscene sexual material" whilst on the Internet. R. at 2. Pursuant to KISKA, Congress created and empowered a private entity, the Kids Internet Safety Association ("KISA"), with enforcement powers as a solution for keeping children safe online. R. at 1–2. This case arises from that private entity's subsequent regulation and enforcement of an age verification requirement for websites with materials deemed harmful to minors. R. at 1–2.

Congress created KISA for the purpose of creating and enforcing rules designed to protect children online. R. at 2. KISA is a private entity governed by a nine-member board, of which four of the members are insiders of the "technological industry." 55 U.S.C. § 3052. Congress delegated to KISA the power to enforce KISA's own rules through a variety of means, including broad investigative powers, the power to bring civil actions for injunctive relief, and the power to impose civil sanctions. R. at 3. Congress provided KISA with some supervision in the form of the Federal Trade Commission ("FTC"), which "can do a little rulemaking of its own and 'abrogate, add to, and modify' KISA's rules." R. at 3 (quoting 55 U.S.C. § 3053(e)). While the FTC has the ability to review *de novo* enforcement actions brought by KISA before an ALJ, it cannot force KISA to take an enforcement action, nor can the FTC independently bring an enforcement action. R. at 3. Furthermore, "[t]o date the FTC has exercised its authority to review and [sic] enforcement action only once." R. at 3 n.3.

In June 2023, KISA released the regulation at issue today. R. at 4; *see also* 55 C.F.R. §§ 1–5 ("Rule ONE"). Rule ONE requires certain websites and commercial entities to use "reasonable age verification measures . . . to verify that an individual attempting to access the [material deemed

harmful to minors] is 18 years of age or older." 55 C.F.R. § 2(a). Rule ONE applies to any "commercial entity that knowingly and intentionally publishes and distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors." *Id.* Rule ONE also provides hefty sanctions for violations—KISA may impose fines of $10,000 per each day a company is in violation, and an additional fine of up to $250,000 if the violation enabled a minor to access harmful materials. 55 C.F.R. § 4(b).

Although Rule ONE maintains that any entity that facilitates age verification "may not retain any identifying information of the individual," 55 C.F.R. § 2(b), multiple individuals averred that they stopped visiting sites with mandatory verification out of fear that their personal information might be leaked, R. at 4. These individuals noted that their newfound abstinence from such websites was inspired by the "number of instances where seemingly safe websites, such as hospitals and schools, have been hacked and personal information was stolen," as well as a desire to avoid the backlash that might befall them in the aftermath of such a leak. R. at 4. As a result of this chilling effect, the adult entertainment industry, with fear for their livelihood and their liberty, took action by filing suit. R. at 4.

The Pact Against Censorship, Inc. ("PAC") is the "largest trade association for the American adult entertainment industry," and three of its members filed suit to "permanently enjoin Rule One and KISA from operation." R. at 5. PAC moved for a preliminary injunction on the basis of two alleged constitutional violations: "[F]irst, that Congress violated the private nondelegation doctrine when creating KISA and granting it essentially unfettered power and, second, that the age verification rule violates the First Amendment." R. at 2. Although the United States District Court for the District of Wythe did not find that Congress's delegation to KISA was improper, it granted the injunction because "it was likely that the [petitioners] would succeed on their First Amendment

claim." R at 2. In particular, the District Court found that two less restrictive alternatives to Rule ONE exist: "(1) requiring Internet providers to block content until adults 'opt out' and (2) 'content filtering' that places adult controls on children's devices." R. at 15.

On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the injunction, finding no violation of the First Amendment and affirming the lower court's finding that the delegation was proper. R. at 15. PAC petitioned for certiorari on both issues and this Court granted the petition for review. R. at 16.

SUMMARY OF THE ARGUMENT

1. KISKA's delegation of enforcement powers to KISA violates the private nondelegation doctrine. The private nondelegation doctrine prohibits private actors from wielding the "executive Power." U.S. Const. art. II, § 1, cl. 1. A private actor may not wield government enforcement powers unless it is subordinate to a government body. KISA's enforcement powers are only reviewable after its enforcement has injured the public, and it alone can initiate civil actions to enforce its rules. In neither case does the FTC subordinate KISA. Under both the function and every-aspect based analyses of subordination, KISA does not merely assist the FTC in enforcement, but is itself the enforcer.

KISA is functionally non-subordinate to the FTC because it actually wields executive power. Regardless of *ex post* administrative procedure, KISA's ability to issue sanctions and immediately injure the public with its government power makes it functionally non-subordinate. The FTC's review is functionally meaningless, as it cannot control KISA's enforcement priorities. Nor could the FTC meaningfully review KISA's actions—the FTC lacks the relevant expertise to review online safety regulations. Further, KISKA deprives the Executive Branch of the core executive power to initiate civil actions and redistributes it to KISA. The FTC cannot even

indirectly control KISA, as its power over KISA's board is limited to promulgating delayed bylaw amendments.

Even under the constitutionally disfavored every-aspect based analysis, KISA is not subordinate to the FTC because it has been deprived of the power to initiate civil actions. KISA alone decides whether to exercise that core executive power, and the FTC has no statutory authority to review those decisions. Flouting this Court's precedent holding the power to file suit cannot be delegated away from the Executive Branch, KISKA transfers that power to an unaccountable private actor.

2. Rule ONE is an overbroad regulation that impermissibly infringes upon adults' constitutionally protected speech under the First Amendment. Through its expansive regulation of the entire Internet, Rule ONE chills adults' consumption of protected speech by threat of identity leak. Regulations like Rule ONE that moderate according to the content of media are subject to strict scrutiny and presumptively unconstitutional.

Although *Ginsberg v. New York*, 390 U.S. 629 (1968), applied rational-basis review to a content-based regulation restricting physical media for minors, this Court's precedent distinguishes *Ginsberg* from regulations which affect both minors and adults, as well as regulations of digital media. Regulations, like Rule ONE, which affect the general public cannot apply obscenity standards for minors to all persons. Additionally, First Amendment analysis of a regulation governing sales of magazines cannot apply to regulations of the Internet, which are far broader with more sinister implications. Because Rule ONE restricts the access of both minors and adults' access to websites based on their content, it impermissibly chills adults' access to constitutionally protected speech and must survive strict scrutiny.

Rule ONE fails strict scrutiny because it is neither narrowly tailored nor the least restrictive means of achieving its goals. Rule ONE is not narrowly tailored because it would simultaneously reduce adults to consuming only speech fit for children and fail to protect children from speech harmful to minors. Further, Rule ONE is not the least restrictive means of protecting children: two less restrictive alternatives exist. An overly restrictive regulation that fails to accomplish its own goals and overexpansively limits constitutionally protected speech necessarily fails strict scrutiny.

Even if Rule ONE were content-neutral and subject to intermediate scrutiny, it fails such scrutiny because it unreasonably limits alternative avenues of communication. Rule ONE applies to the entirety of the Internet, leaving no time, place, or manner where the regulation would not apply. As such, Rule ONE's chilling effect on constitutionally protected speech is inescapable. Under either standard of heightened scrutiny, Rule ONE violates adults' First Amendment rights.

ARGUMENT

I. PRELIMINARY INJUNCTIONS ARE REVIEWED *DE NOVO*.

A preliminary injunction must be granted "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "[D]ecisions grounded in erroneous legal principles" must be reviewed *de novo*. *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023) (citations omitted). Because the parties agreed three of the four preliminary injunction factors are satisfied, R. at 6, this Court need only find there is a "substantial likelihood of success on the merits" that KISA's enforcement powers and Rule ONE are unconstitutional, *Mock*, 75 F.4th at 577.

II. KISKA UNCONSTITUTIONALLY DELEGATES THE EXECUTIVE POWER TO A NON-SUBORDINATE PRIVATE ENTITY.

In derogation of the text and spirit of the Constitution, KISKA allows a private actor to wield executive power with functionally no check from a public authority. KISKA is only a valid private delegation if the private actor "functions subordinately" to a government body that has "authority and surveillance" over the entity. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, (5th Cir. 2024) (*Black II*) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). Yet, Congress granted KISA numerous executive powers, including the power to impose sanctions and initiate civil lawsuits for injunctions, without making KISA function subordinately to the FTC. 55 U.S.C. §§ 3054(h)–(j). KISKA allows "a private entity to lord the powers of the state" and this Court must issue a preliminary injunction to prevent KISA from continuing to do so. R. at 10 (Marshall, J., dissenting).

A. KISA's Enforcement Powers Violate the Private Nondelegation Doctrine.

KISKA unconstitutionally provided KISA with the power to take executive actions such as the imposition of sanctions; as a result, KISA dangerously wields executive powers that the Constitution vests solely in the Executive Branch. *See U.S. Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 62 (2015) (*Amtrak II*) (Alito, J., concurring) (explaining that "executive Power" is vested in the President, not private actors" (quoting U.S. Const. art. II, § 1, cl. 1)). The private nondelegation doctrine, which stems from the Vesting Clauses, prohibits delegation of executive power to private entities unless the private entity functions subordinately to a government body. *See Black II*, 107 F.4th at 430 (invalidating on private nondelegation grounds similar enforcement provisions of the Horseracing Safety and Integrity Act, after which Congress modelled KISKA). KISKA delegated numerous executive powers to KISA, a private corporation with no public

accountability. Because KISA is not subordinate to a government agency, this unconstitutional delegation of executive power to a private actor must be stopped.

1. The Private Nondelegation Doctrine Applies to Delegations of Executive Power.

This Court has long held that the private nondelegation doctrine prohibits private entities from wielding government power. *See, e.g.*, *Adkins*, 310 U.S. at 399 (upholding a regulation because Congress had not delegated legislative power to a private entity); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down a regulation because Congress had delegated legislative power to a private entity). The Courts of Appeals that have addressed the issue are unanimous that the private nondelegation doctrine extends to delegations of executive power. *See, e.g.*, *Walmsley v. FTC*, 117 F.4th 1032, 1039–40 (8th Cir. 2024) (applying the nondelegation doctrine to enforcement powers); *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (same); *Black II*, 107 F.4th at 431 (5th Circuit holding the same); *Sartain v. SEC*, 601 F.2d 1366 (9th Cir. 1979) (same). Private actors cannot wield executive powers because "the Constitution requires that only those 'in' whom the Constitution has vested power exercise that power." R. at 10 (Marshall, J., dissenting) (citing U.S. Const. art. I, § 1; art. II, § 2; art. III, § 1).

That the private nondelegation doctrine prohibits KISA from wielding enforcement powers is necessitated by the text and principles of the Constitution. *See Carter Coal*, 298 U.S. at 311 (describing private delegation as "delegation in its most obnoxious form."). Though the source of the private nondelegation doctrine is vague, broad private delegations implicate multiple constitutional provisions. *See, e.g.*, *Oklahoma*, 62 F.4th at 237 (Cole, J., concurring) (arguing that "[t]he private nondelegation doctrine is rooted in both due process and separation of powers concerns); Paul J. Larkin, Jr., *The Private Nondelegation Doctrine*, 73 Fla. L. Rev. 31, 75–76

(2021) (arguing that private delegations flout the Article II Appointments, Executive Power, Impeachment and Removal Clauses).

Delegations of executive power to private entities like KISA violate a core principle behind these constitutional provisions: government accountability. *See, e.g.*, *Black II*, 53 F.4th at 880 ("[I]f people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion."). For a regulation or rule to be a valid exercise of legislative power, it must derive from a public entity accountable to the people. *See Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting) (condemning a delegation to the U.S. Sentencing Commission as "an undemocratic precedent . . . not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government."). Unlike KISA, the Executive Branch is entitled to wield executive power because it is designed to be accountable to the public. *See* The Federalist No. 68 (Alexander Hamilton) ("[T]he Executive should be independent for his continuance in office on all but the people themselves."); *see also* Larkin, *supra*, at 84 (explaining that private nondelegation "vests governmental power in private parties that may not be political responsible, directly or indirectly, to the federal electorate."). The use of executive power and enforcement priorities are policy judgements that the Founders understood required public accountability. *See* The Federalist No. 70 (Alexander Hamilton) ("[T]he plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraint of public opinion . . . and, secondly, the opportunity of discovering . . . misconduct."). As explained below, Congress here has delegated the enforcement power, which is constitutionally vested in the President, to KISA, a private entity not subject to any method of public control.

2. KISA Unconstitutionally Wields Executive Power.

Congress empowered KISA, a private entity, with numerous quintessentially executive powers. *See* 55 U.S.C. §§ 3054(h)–(j). KISKA provides KISA with the power to impose sanctions, initiate a civil action, and to investigate possible violations through subpoenaing private individuals. *See id.* In addition to its executive power to enforce the rules, KISA can make rules regarding safety on the Internet and define the penalties for violation as well. *Id.* § 3054. Although the FTC can modify the rules adopted by KISA, *id.* § 3053(e), the rules currently allow KISA to impose hefty sanctions for violations, 55 C.F.R. § 4. These executive powers have been delegated to a private entity unaccountable to constitutional requirements and democratic will.

KISA, a private corporation wielding executive powers, is not accountable to the American people—and by its very nature as a private entity cannot be held accountable. *See Nevada v. Hall*, 440 U.S. 410, 426 (1979) ("In this Nation each sovereign governs only with the consent of the governed."), *overruled on other grounds by Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019). Although the initial nominating committee selected in the corporate documents was selected by members of Congress, the public has no lever for changing the ongoing management of KISA despite KISA's wielding of executive power. *See* 55 U.S.C. § 3052 (defining the membership and selection procedure for the board and nominating committee). Congress, and as a result the American people, cannot exert control over KISA through funding either as KISA is self-funded by the fees and fines that it collects. *See id.* § 3052(f). In short, KISA's unelected bureaucrats exercise government power against American citizens which undermines American democracy. *See Consumers' Rsch. v. FCC*, 109 F.4th 743, 788 (5th Cir. 2024) (Ho, J., concurring) ("There's no point in voting if the real power rests in the hands of unelected bureaucrats—or their private delegates.").

Further, KISA's board members are exempt from the constitutional safeguards limiting public actors who wield government power. *See* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 237–38 (2023) ("[P]rivatization will often mean that certain procedures are no longer mandatory . . . . [T]hat lack of procedures . . . would also make a delegation broader."); *see also Alpine Secs. Corp. v. Fin. Indus. Reg. Auth.*, 2023 WL 4703307 at *1 (D.C. Cir. July 5th, 2023) ("Because the entire executive Power belongs to the President alone, it can only be exercised by the President and those acting under him."). To ensure democratic accountability and supervision, executive branch officers are subject to the Appointments and Take Care Clauses. *See* U.S. Const. art. II, § 2, cl. 2; *id.* § 3, cl. 5.

This Court has emphasized that unaccountable executive officials are antithetical to the idea of unitary executive power. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010) (striking down removal protections where "[n]either the President, nor anyone directly responsible to him, nor even an officer [with removal protections] has full control over the Board."). Congress has stripped executive power from the Executive Branch and redistributed it to a private actor. Congress seeks to go one step further and shield these actors from any executive supervision. *See Alpine*, 2023 WL 4703307 at *3–4 ("It would be odd if the Constitution *prohibits* Congress from vesting significant executive power in an unappointed and unremovable government administrator but *allows* Congress to vest such power in an unappointed and unremovable private hearing officer. . . . To so hold could create a constitutional loophole.") (emphasis in original). This cannot be. Any exerciser of public power must be accountable to the public.

This delegation of power to a private entity not accountable to the people would nevertheless be permissible if KISA was subordinate to a government agency. *See Oklahoma*, 62

F.4th at 229 (explaining that courts uphold private delegation of enforcement powers to the Financial Industry Regulatory Authority ("FINRA") because the SEC retains ultimate control over enforcement). At least then there would still be some accountability for how government power is exercised. However, Congress failed to make KISA's enforcement powers subordinate to the FTC.

B. KISA's Enforcement Powers Are Not Subordinate to the FTC.

Despite KISA not being accountable to the public, Congress could still have got away with granting KISA executive powers if it made KISA subordinate to a government agency. *See Adkins*, 310 U.S. at 399 (upholding a statute delegating government power to a private entity "function[ing] subordinately to the Commission"). But Congress did not. As a result, KISA must be prevented from continuing to unconstitutionally exercise executive power. This is because, although the Fifth and Sixth Circuits have split over exactly when a private entity wielding government power is subordinate to a government body, under a proper application of either approach KISA is not subordinate to the FTC. *Compare Black II*, 107 F.4th at 415 (taking a functional approach and finding that the private entity wielding enforcement powers is not subordinate), *with Oklahoma* 62 F.4th at 221 (focusing on whether every aspect of the private entity's enforcement powers is subordinate).

The Fifth Circuit's Functional Test—which looks at whether the private entity can immediately impact the public with its government power—is the approach most in line with the constitutional principles underlying the nondelegation doctrine. *See Black II*, 107 F.4th at 425; *Alpine*, 2023 WL 4703307 at *1. This is because a functional analysis recognizes the potential harms that a private entity wielding government power can inflict, even if there is the opportunity for later review. *See Black II*, 107 F.4th at 431 (explaining that a wrongful stop later subject to review is still an exercise of enforcement power). Under the Functional Test, KISA is not at all

subordinate to the FTC as the FTC's review of KISA is functionally meaningless and the FTC has no control over the membership and internal decisions of KISA. *See id.* at 433.

Even if the court below was correct to apply the Sixth Circuit test focusing on whether "the FTC *could* subordinate every *aspect* of . . . enforcement[,]" the result comes out the same. *See* R. at 12 (Marshall, J., dissenting) (explaining how the restraints the FTC possesses are not sufficient to subordinate every aspect of KISA's enforcement power) (emphasis in original). Regardless of the proper test for subordination, KISA is not subordinate to the FTC. Even if the FTC attempted to use its rulemaking powers to make KISA subordinate, it could not do so without exceeding its statutory authority. *See* R. at 12 (Marshall, J., dissenting); *see also Biden v. Nebraska*, 600 U.S. ___, 143 S. Ct. 2355, 2368 (2023) (holding that a public agency cannot seize power beyond its statutory authority to make a statute constitutional).

1. KISA's Enforcement Powers Are Not Subordinate to the FTC Under a Functional Analysis.

KISA is not subordinate because it can take enforcement actions, like the imposition of sanctions, which are only subject to potential review by the FTC after the fact. *See Black II*, 107 F.4th at 430–33.

i. The correct test for whether a private entity is subordinate is the Functional Test.

The Fifth Circuit's Functional Test—which examines whether a private entity merely functions as an aid to enforcement or as an enforcer wielding government power—best aligns with the constitutional principles that underlie the private nondelegation doctrine. *See id.* at 425; *cf. Alpine*, 2023 WL 4703307 at *1 ("Because the entire executive Power belongs to the President alone, it can only be exercised by the President and those acting under him."). This approach actually takes into account whether unaccountable government power is being wielded by a private

actor that could harm the public, even if the power could later be reviewed. *See Black II*, 107 F.4th at 430–33 ("It is no answer to say that the FTC can come in at the tail end of this adversarial process and review the sanction.").

The Sixth Circuit's Every Aspect Test merely looks at whether the aspects of the private entity's power can eventually be controlled by a government body, even if it is unlikely to have any supervision in practice. *See Oklahoma*, 62 F.4th at 231. Both tests come to the same result in the legislative context because the supervising agency can review the rules before they take effect. *See id.* at 228 (finding the private entity's legislative powers subordinate because the agency can review them before they take effect). When an agency reviews rules before the private entity affects the public, the private entity merely aids the agency's rulemaking and is subordinate. *See Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) ("Congress may employ private entities for *ministerial* or *advisory* roles.") (emphasis in original).

Settlements demonstrate the issue with the Sixth Circuit's Every Aspect Test. *See Black II*, 107 F.4th at 430. Even if all official enforcement actions could eventually be controlled by the agency, settlements would nevertheless be unreviewable. *See id.* This is because no official action is taken. This raises the question: who is enforcing the action that led to the settlement where a private party accepted liability? It would not make sense if it was the agency because they have taken no action. Yet under the Every Aspect Test, it could not be the private entity because all aspects of their official actions remain reviewable. *Id.* at 430–31 ("[T]he settlement scenario . . . underscores that it is the private entity that acts as [] enforcer in any meaningful sense.").

The Fifth Circuit further illustrated the issue with post-enforcement review of a private entity's use of executive power in a hypothetical. *See Black II*, 107 F.4th at 431. Suppose a city enacted a speeding law that delegated to a private group of car enthusiasts the power to monitor

speeds with their own radar guns, pull speeders over, and ticket them. *Id.* Even if the fines were eventually reviewed by the police, "[a]nyone would say the private group" is enforcing the law. *Id.* This would still be true even if the police added rules regulating the private group's enforcement. *Id.* Consequently, in analyzing whether a private entity wielding executive power is subordinate, courts should look to whether the private entity functionally is itself *enforcing* the law or is merely assisting a public agency. *See id.* at 429.

ii. The FTC review that exists is functionally meaningless.

Because the FTC's review of KISA's enforcement power is functionally meaningless, KISA functions as an enforcer of the law, not merely an aid to the FTC. *See* R. at 11 (Marshall, J., dissenting). The FTC's statutory power to review KISA's enforcement actions is unmeaningful for three reasons: (1) it occurs after enforcement actions are already taken by KISA, (2) the agency does not have the expertise to meaningfully supervise, and (3) there is no ability to review the executive power of deciding to not enforce the rules. *See* 55 U.S.C. §§ 3050–59.

The FTC's review is meaningless for those subject to unaccountable enforcement by private entities like KISA. *See Black II*, 107 F.4th at 431. As explained above, that is because KISA's enforcement actions have an immediate effect and harm. *See id*. This is true regardless of how quickly or effectively the FTC provides review. KISA does not need to preclear its enforcement decisions with the FTC, *see* R. at 11–12, making those decisions unaccountable to the public, s*ee* R. at 6.

The FTC cannot meaningfully supervise KISA as it lacks any relevant expertise with which to review KISA's enforcement actions. *See Nat'l Horsemen's Benevolent & Protective Assoc. v. Black*, 596 F. Supp. 3d 691, 718 (N.D. Tex. 2022) ("Historically, valid private-public partnerships have involved agencies that possess independent expertise over the industry they are tasked with

regulating.") (citing *Adkins*, 310 U.S. at 387–88; *Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, 844 F.3d 414 (4th Cir. 2016)). The FTC's mission is "[p]rotecting the public from deceptive or unfair business practices and from unfair methods of competition." *About the FTC*, Federal Trade Commission, https://www.ftc.gov/about-ftc (last visited Jan. 16, 2024). It is not general online safety or the protection of minors. Congress could have written a statute that assigned an agency with the expertise to provide meaningful review of KISA's enforcement actions such as the FCC. *See About the FCC*, Federal Communications Commission, https://www.fcc.gov/about/overview (last visited Jan. 16, 2024). But it did not. The fact that the FTC has only reviewed one KISA enforcement action is evidence of their incapability of providing meaningful review. *See* R. at 3 n.3.

The FTC has no ability to review KISA's decision to not enforce its rules. *Cf. Black II*, 107 F.4th at 434 (explaining that FINRA's enforcement powers are subordinate to the SEC because the SEC "can revoke FINRA's ability to enforce its own rules, and step in and enforce any written rule itself"). Although the FTC can review KISA's enforcement actions after the fact, inaction is entirely unreviewable. *See* R. at 12–13. KISA retains sole authority to initiate any enforcement actions. *See* R. at 12–13. This denies the FTC the ability to make important policy decisions. *See Black II*, 107 F.4th at 434. As a result, KISA, a private entity, has the sole ability to make key enforcement priorities, which are important Executive Branch policy decisions that must be accountable to the people. *See Seila L. LLC v. CFPB*, 591 U.S. 197, 225 (2020) (requiring "meaningful supervision" for a director with the power to unilaterally set enforcement priorities).

iii. The FTC has no control over KISA's membership and organization.

Neither the FTC nor Congress are able to fire, hire, replace or make any decisions concerning KISA's board or internal decisions. See 55 U.S.C. §§ 3050–59 (providing no

mechanism for controlling KISA's board); R. at 12–13 (Marshall J., dissenting) (noting the absence of such mechanism). This distinguishes KISA from valid enforcement schemes like FINRA. FINRA's enforcement scheme is valid not only because the SEC shares enforcement power with FINRA, but also because FINRA as an organization is subordinate to SEC oversight. *See Black II*, 107 F.4th at 435. The FTC has none of the oversight powers over KISA that the SEC has vis-à-vis FINRA. *Compare* 15 U.S.C. §§ 78s(a)(3), (h)(1) (providing the SEC with the powers to derecognize FINRA powers, remove FINRA board members and members, and bar people from FINRA membership), *with* 55 U.S.C. §§ 3050–59 (providing the FTC with none of these powers).

Although under KISKA the FTC is able to make changes to KISA's bylaws, this is insufficient to control KISA's board—and consequently its enforcement powers. 55 U.S.C. § 3053 (allowing the FTC to modify the bylaws). The FTC can use its powers to amend the bylaw to influence selection of future management. *See* 55 U.S.C. § 3053(a)(1). However, this does not remedy the FTC's inability to control the current management. *Cf. Black II*, 107 F.4th at 435. The FTC is also limited to modifying or adding to the bylaws only in accordance with the purpose and requirements of KISKA. *See* 55 U.S.C. § 3053(e); *see also id.* § 3050 (outlining KISKA's purpose). Furthermore, any FTC modification of the bylaws must go through notice and comment rulemaking. *See id.* § 3053(e) (requiring FTC modifications to comply with the Administrative Procedures Act). As a separate and private entity, KISA's management cannot be changed unless the FTC give notice through the Federal Register and allows interested parties to comment. *See* Administrative Procedures Act, 5 U.S.C. § 553(a)(2) (allowing an exception to notice and comment rulemaking only applied to "*agency* management or personnel") (emphasis added); *id.* §§ 553(b)–(c) (requiring notice and comment). As a result, the current management remains entrenched and unaccountable to the American public.

Consequently, KISA is not subordinate to the FTC. Under current law, KISA can wield government power without any meaningful review by the FTC. Further, the FTC lacks meaningful control over KISA's management and enforcement priorities. KISA does not merely aid the FTC in enforcing the law, KISA *is* enforcing the law and unconstitutionally wielding the executive power.

2. KISA's Enforcement Powers Are Not Subordinate to the FTC Under an Every Aspect Analysis

The proper method for analysing whether a private entity is subordinate to a government body is the Fifth Circuit's Functional Test, under which KISA is not subordinate to the FTC. But even if the Sixth Circuit's Every Aspect Test were used to determine if a private entity is subordinate to a government body, KISA would still not be subordinate. This is because not every aspect of KISA's enforcement powers is subordinate to the FTC.

KISA's power to bring suit is one aspect of its enforcement powers that is not subject to any restraint from a government agency. *See Oklahoma*, 62 F.4th at 231 (holding a private delegation is valid if and only if a government body could "subordinate every aspect of the [private entity's] enforcement"). The FTC does not have the power to initiate a civil action and has no discretion over whether KISA brings suit. *See* 55 U.S.C. § 3054(j) (providing KISA, but not the FTC, with the power to initiate civil suits). Moreover, the FTC does not even have any ability to review or restrain KISA's civil actions! *See* R. at 11 (Marshall, J., dissenting) (emphasizing that "at least one of KISA's enforcement powers fails to have *any* FTC restraint"—the power to file civil suit) (emphasis in original). *Compare* 55 U.S.C. § 3054(j) (entitling KISA to initiate civil actions), *with id.* § 3058 (granting the FTC power only to review KISA's sanctions). Consequently, the power to file suit is one aspect of KISA that the FTC has no control over—a power so

fundamental that this Court has held it cannot be delegated away from the President. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility.")

3. The FTC Cannot Use Its Rulemaking Powers to Make KISA Subordinate Without Going Beyond Its Statutory Authority.

KISKA's unconstitutional delegation of enforcement powers cannot be remedied by the FTC's rulemaking powers. KISKA allows the FTC to modify or add to any regulation made by KISA. *See* 55 U.S.C. § 3053(e). However, if the FTC attempted to impose a meaningful restriction such as a preclearance requirement on KISA taking enforcement actions, the FTC would be going beyond its constitutionally allotted statutory authority. *See Biden v. Nebraska*, 600 U.S. ___, 143 S. Ct. 2355, 2368 (2023). Furthermore, the types of regulations that would be permissible, such as limiting the scope of subpoenas, would merely constrain the scope of government power that KISA has, and would not subordinate its exercise to the FTC. *See* 55 U.S.C. § 3053(e).

Although the FTC's rulemaking powers provide some oversight over KISA, the FTC cannot make KISA's enforcement powers subordinate by adding a rule to require a preclearance procedure because this would exceed the FTC's statutory authority. *See Biden v. Nebraska*, 143 S. Ct. at 2368; *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) ("Courts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority."). KISA nevertheless argues that the FTC could use this power to cure any defect with KISA's enforcement powers, but as Judge Marshall explains, "this will not do!" R. at 12 (Marshall, J., dissenting). Despite a preclearance rule being preferable in that it would prevent KISA from unilaterally imposing massive fines, *see, e.g.*, 55 C.F.R. § 4(b), allowing a federal agency to make such a rule without statutory authority would run amok of the Constitution. This is because without

statutory authority from Congress, an agency cannot just add new jobs for itself. *Biden v. Nebraska*, 143 S. Ct. at 2368. The congressional intent here is clear: KISKA requires that the FTC and KISA "implement and enforce" KISKA only "within the scope of their powers and responsibilities under this chapter." 55 U.S.C. § 3054(a)(1). As this Court recently stated in *Biden v. Nebraska*, courts cannot allow an agency to alter a statute to expand its power beyond its statutory authority. 143 S. Ct. at 2368.

But even if KISKA did allow the FTC to add a preclearance requirement, that would not fully remedy the constitutional defect with KISA's enforcement powers because its enforcement priorities would still be unsupervised by the FTC. *See Seila L. LLC v. CFPB*, 591 U.S. 197, 225 (2020). Again, this is because the FTC is unable to either bring an enforcement action on its own, or to instruct KISA to bring sanctions. See 55 U.S.C. §§ 3050–59.

Other attempts to remedy KISA's enforcement powers by constraining their scope would be equally insufficient to cure the constitutional defects with KISA's enforcement powers. For example, KISA argues that the FTC could issue a rule prohibiting overbroad subpoenas; however, this would not resolve the constitutional defects. *See* R. at 12 (Marshall, J., dissenting). Constraints on a private entity's exercise of enforcement powers do not transform those powers into something other than government power. *See Black II*, 107 4th at 431. If a state gave one neighbor the power to arrest another neighbor for poor landscaping, it would not matter if the power were constrained to only egregiously poor landscaping; a private actor would still be wielding government police power. *See* R. at 12 (Marshall J., dissenting) As Judge Marshall explains in his dissent, "[a] private nondelegation doctrine violation does not simply go away because the private actor acts nicely with his government power." R. at 12 (Marshall, J., dissenting).

III. RULE ONE IMPERMISSIBLY INFRINGES UPON THE FIRST AMENDMENT.

PAC brings this action as a facial challenge to the constitutionality of Rule ONE. Although this Court has recognized that "facial challenges [are] hard to win," a less demanding standard is applied in cases involving the First Amendment. *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). In this "second type of facial challenge," a regulation, such as Rule ONE, "may be invalidated as overbroad if a substantial number of its applications are unconstitutional," judged in relation to its plainly legitimate sweep. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) ("*Prosperity*"). This Court has justified this doctrine as providing "breathing room for free expression" by guarding against the potentiality that "[o]verbroad laws may deter or 'chill' constitutionally protected speech," to the detriment of the societal "marketplace of ideas." *See United States v. Hanson*, 599 U.S. 762, 769–70 (2023) (internal quotation marks omitted) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). Rule ONE is such an overbroad regulation that it impermissibly creates such a chilling effect on constitutionally protected speech.

As a result of Rule ONE's content-based restrictions upon adults' consumption of constitutionally protected sexual expression, the regulation is subject to strict scrutiny. *See Reno v. ACLU*, 521 U.S. 844, 867–68 (1997). Although this Court previously applied rational-basis review to assess the constitutionality of a statute in *Ginsberg v. New York*, 390 U.S. 629 (1968), that case is distinguishable due to differences in the respective mediums regulated, as well as the effect upon adults' First Amendment rights, or lack thereof, when compared to Rule ONE. *See Reno*, 521 U.S. at 869–70, 875. To satisfy strict scrutiny, the Government must demonstrate that Rule ONE is both "narrowly drawn" to serve a compelling state interest and "the least restrictive means to further the articulated interest." *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Rule ONE is not narrowly tailored, *see Reed v. Town of Gilbert*, 576 U.S. 155, 172–73 (2015), nor is it

the least restrictive means of accomplishing the provided interest, *see Ashcroft v. ACLU*, 542 U.S. 656, 666–67 (2004) (*Ashcroft II*). Likewise, even if Rule ONE were subject to intermediate scrutiny instead, it would not satisfy that standard either. *See Reno*, 521 U.S. at 867–68; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

A. Rule ONE Is Subject to Strict Scrutiny Because It Restricts Constitutionally Protected Speech.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Government actions that undermine this ideal contravene an essential, constitutional right upon which "[o]ur political system and cultural life" rests. *Id*. When a content-based regulation, like Rule ONE, infringes upon the protected speech of adults, strict scrutiny presumptively applies. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (*NIFLA*). The rational-basis review prescribed by *Ginsberg* is inapplicable, as it occurred in a completely different context. The law upheld in *Ginsberg* did not interfere with the First Amendment rights of adults. Additionally, *Ginsberg* is distinguishable because of the stark differences between the printed medium regulated in that case and the expanse of cyberspace which Rule ONE affects. Thus, Rule ONE should be reviewed under strict scrutiny. *See, e.g.*, *Ashcroft II*, 542 U.S. at 665; *Reno*, 521 U.S. at 874.

1. The First Amendment Prohibits Regulations Which Impermissibly Chill Adults' Consumption of Protected Sexual Expression.

Rule ONE's attempt to regulate constitutionally protected speech for adults "arbitrarily curtails . . . those liberties of the individual" enshrined in the First Amendment. *See Butler v. Michigan*, 352 U.S. 380, 384 (1957). The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This constitutional protection

extends to "[s]exual expression which is indecent but not obscene." *Sable*, 492 U.S. at 126. While the "State has an interest to protect the welfare of children and to see that they are safeguarded from abuses," this power to "control the conduct of children reaches beyond the scope" of government authority over adults. *Ginsberg*, 390 U.S. at 638–40 (internal quotation marks omitted). The State thereby cannot enact legislation, like Rule ONE, which would "reduce the adult population" to consuming "only what is fit for children." *See Butler*, 352 U.S. at 383; *see also Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (recognizing "[p]rohibitions on speech have the potential to chill, or deter, speech" outside their intended boundaries, in effect undermining constitutionally protected expression).

By moderating adults to "that which would be suitable for a sandbox," age verification requirements, like those in Rule ONE, create an impermissible chilling effect upon adults' consumption of otherwise protected speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983). Rule ONE requires age verification methods, like virtual submission of government-issued identification, before users may access sexual content online. 55 C.F.R. § 3. Although Rule ONE maintains that any entity that facilitates age verification "may not retain any identifying information of the individual," 55 C.F.R. § 2(b), assurances of confidentiality do not eliminate legitimate fears associated with mandated disclosure, *see* R. at 4 (noting such a chilling effect has already occurred out of fear of users' identity being leaked); *cf. Prosperity*, 594 U.S. at 616 (finding mandatory disclosures burden freedom of association). Rather, age verification requirements stifle adults' engagement with speech that is otherwise protected by the First Amendment. *See, e.g.*, Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, Politico (Aug. 8, 2023, 4:30 AM), www.politico.com/news/magazine/2023/08/08/age-

law-online-porn-00110148 (noting Pornhub traffic in Louisiana dropped eighty percent following the passage of an analogous law).

In the context of sexual content, adults are assured the right to "judge and determine for themselves what sex material they may read or see," provided it is not obscene. *See Ginsberg*, 390 U.S. at 637. As this Court held in *Miller v. California*, 413 U.S. 15 (1973), "the permissible scope of regulation to works which depict or describe sexual conduct" is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. While Rule ONE incorporates the *Miller* standard, this language is qualified according to what is harmful "with respect to minors." *See* 55 C.F.R. § 1(6). That which is obscene as to minors is not necessarily obscene as to adults. *See, e.g.*, *Ginsberg*, 390 U.S. at 636. As such, Rule ONE effectively "burn[s] the house to roast the pig," *see Butler*, 352 U.S. at 383, by chilling access to content that is constitutionally protected for adults despite being properly denied to minors, *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

2. The Constitutionality of Rule ONE's Content-Based Moderation is Presumptively Subject to Strict Scrutiny.

Rule ONE undermines the First Amendment's protections against state infringement on constitutionally protected speech. *See NIFLA*, 585 U.S. at 766 (emphasizing that the First Amendment "reflects the fundamental principle" that the Government cannot "restrict expression because of its message, its ideas, its subject matter, or its content"). "It is well established that, except for several narrow categories of speech deemed unworthy of First Amendment protection, all speech is protected by the First Amendment and infringement upon protected speech receives heightened scrutiny." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 289 (5th Cir. 2024)

(Higginbotham, J., concurring in part and dissenting in part), *cert. granted*, 144 S. Ct. 2714 (2024). In light of the First Amendment, this Court has distinguished between "content-based and content-neutral regulations of speech." *NIFLA*, 585 U.S. at 766. Unlike content-neutral laws that are "justified without reference to the content of the regulated speech," *Playtime Theatres*, 475 U.S. at 48, content-based laws, like Rule ONE, "target speech based on its communicative content," *see Reed*, 576 U.S. at 163.

Because Rule ONE moderates content by requiring age verification for specific material, it is presumptively subject to strict scrutiny. *See, e.g.*, *NIFLA*, 585 U.S. at 766; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). According to its plain language, Rule ONE applies to websites with content "more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a). Rule ONE is therefore a content-based restriction, as it does not regulate all speech irrespective of its content, but instead regulates sexual expression "defined by its content." *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811 (2000). As this Court held in *Playboy*, the appropriate standard for reviewing the constitutionality of "[l]aws designed or intended to suppress or restrict the expression of specific speakers" is strict scrutiny. *Id.* at 814–16. Because Rule ONE is "presumptively unconstitutional," *see Reed*, 576 U.S. at 163, the Government must therefore demonstrate both that the law is "narrowly drawn" to serve a compelling state interest "without unnecessarily interfering with First Amendment freedoms" and that Rule ONE is "the least restrictive means to further the articulated interest." *See Sable*, 492 U.S. at 126; *NIFLA*, 585 U.S. at 766.

3. Ginsberg's Rational-Basis Review Is Inapplicable to the Constitutionality of Rule ONE.

In *Ginsberg*, this Court upheld as constitutional a New York statute ("*Ginsberg* Statute") that prohibited the knowing sale to minors of magazines containing sexual materials harmful to

minors. *Ginsberg*, 390 U.S. at 645. Although this Court applied rational-basis review in *Ginsberg*, the distinct circumstances of that case make it inapplicable for analogy to the constitutional analysis of Rule ONE. *See Reno*, 521 U.S. at 875. The *Ginsberg* Statute only restricted the access of minors to materials deemed unacceptable for children, and, as a result, did not interfere with adults' consumption of content protected under the First Amendment. *See Ginsberg*, 390 U.S. at 637. *Ginsberg* also did not reckon with a medium of communication as idiosyncratic as that regulated by Rule ONE, which provides a separate basis for distinguishing the application of rational-basis review in the former. S*ee Reno*, 521 U.S. at 869–70; *Sable*, 492 U.S. at 127–28. Rule ONE should therefore be reviewed under strict scrutiny. *See Reno*, 521 U.S. at 870; *Ashcroft II*, 542 U.S. at 665.

i. As Rule ONE regulates adults, in addition to minors, it is distinguishable from the statute in Ginsberg.

"It is well settled that a state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults," *Erznoznik*, 422 U.S. at 212, but this does not extend so far as to permit the State to "reduce the adult population" to consumption of "only what is fit for children," *see Butler*, 352 U.S. at 383. As this Court recognized in *Ginsberg*, "the power of the [S]tate to control the conduct of children reaches beyond the scope of its authority over adults," so the Court need only resolve the question of whether the Constitution permitted the challenged law to "accord minors under a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." 390 U.S. at 629, 637. Ultimately, this Court concluded the *Ginsberg* Statute did not impermissibly invade the "area of freedom of expression constitutionally secured to minors." *Id.* at 637.

Unlike Rule ONE, the *Ginsberg* Statute was challenged on the basis of the "broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor." *See id.* at 636. This Court rejected that proposition, instead holding that, because the Government has a strong interest in "protect[ing] the welfare of children," regulations restricting the access of minors alone to content "harmful to minors" need only be rationally related to that interest to survive constitutional review. *Id.* at 641. The *Ginsberg* Statute was not an "unnecessarily broad suppression of speech addressed to adults," *see Reno*, 521 U.S. at 875, nor did it meaningfully burden the ability of commercial entities to stock and sell the magazines to "persons 17 years of age or older," *see Ginsberg*, 390 U.S. at 634–35. As such, this Court found rational-basis review appropriate because the regulation affected only minors' access to sexual content harmful to minors, and did not infringe upon adults' consumption of material that, for adults, was constitutionally protected speech. *See id.* at 637.

Although *Ginsberg* remains good law, *see, e.g.*, *Reno*, 521 U.S. at 865–68, its prescription of rational-basis review is inapplicable here as a result of the differences between Rule ONE and the *Ginsberg* Statute. These regulations are similar in that the material restricted by each is "harmful to minors" despite not being obscene to adults, *see* 55 C.F.R. § 1(6); *Ginsberg*, 390 U.S. at 634, but the *Ginsberg* Statute notably did not interfere with the First Amendment rights of adults, *see Ginsberg*, 390 U.S. at 637. Rule ONE goes beyond *Ginsberg* because online age verification requirements deter adults' consumption of constitutionally protected speech, thereby creating a chilling effect that impermissibly curtails the First Amendment. *See* R. at 4; *Butler*, 352 U.S. at 384. Even to the extent the *Ginsberg* Statute required age verification, the virtual submission of identification evidence required by Rule ONE presents risks of consumers' personal information

being stored, leaked, or exploited that are not posed by in-person verification. *See* R. at 4. Therefore, Rule ONE is fundamentally different than the *Ginsberg* Statute, and the appropriate standard of review is not rational-basis review, but rather strict scrutiny. *See, e.g.*, *Ashcroft II*, 542 U.S. at 665; *Playboy*, 529 U.S. at 813–14.

ii. The idiosyncratic demands of the Internet distinguish Rule ONE from the Ginsberg *Statute.*

The sprawling, dynamic nature of the Internet differentiates it from printed magazines sold over a lunch counter, and, as such, *Ginsberg* is inapposite as to the constitutional review of Rule ONE. *See Reno*, 521 U.S. at 870. As this Court held in *Reno*, cases predating the advent of the Internet "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.*; *see also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). While rational-basis review was deemed appropriate vis-à-vis the knowing, in-person sale of magazines to minors, *Ginsberg*, 390 U.S. at 641, this Court has recognized that existing precedent may be distinguished from emergent cases based on differences in the mediums of communication regulated, *see Reno*, 521 U.S. at 869–70; *Sable*, 492 U.S. at 127–28. Instead, this inquiry is best informed by *Reno* and *Ashcroft II*, both of which directly considered the constitutionality of content-based restriction on virtual speech. *See Reno*, 521 U.S. at 874; *Ashcroft II*, 542 U.S. at 665.

The distinctions between "cyberspace" and traditional mediums of expression were key to this Court's decision in *Reno*, with the "series of affirmative steps" required to access sexual material being identified as a justification for heightened scrutiny for restrictions on virtual speech. *See Reno*, 521 U.S. at 867–70. Although the statute in *Reno*, the Communications Decency Act of

1996 ("CDA"), differs slightly from Rule ONE, that does not undercut this Court's clear holding that *Ginsberg*'s prescription of rational-basis review did not dictate the "level of First Amendment scrutiny that should be applied" to Internet sources. *See id.* at 864–66, 870. *Reno* was fundamentally rooted in the recognition of inherent differences between in-person and online communications. *See id.* at 867–70. As a result, this Court subjected to strict scrutiny those regulations that—like the CDA or Rule ONE—burden "speech that adults have a constitutional right to receive and to address to one another" for purposes of "deny[ing] minors access to potentially harmful speech." *See id.* at 874.

Reno's conclusion was reaffirmed in *Ashcroft II*, where, as with Rule ONE, the Government sought to "make the Internet safe for minors" by penalizing online content deemed "harmful to minors." *See Ashcroft II*, 542 U.S. at 660–61. As this Court held in *Ashcroft II*, "the Government bears the burden of proof on the ultimate question" of such regulations' constitutionality, so parties challenging these restrictions "must be deemed likely to prevail" unless the Government demonstrates that its regulation is the "least restrictive means among available, effective alternatives." *See id.* at 666. While *Ashcroft II* focused on whether a lower court abused its discretion by enjoining the Child Online Protection Act ("COPA"), this Court ultimately resolved that question through applying strict scrutiny. *See id.* at 667–70; *see also Paxton*, 95 F.4th at 299 (Higginbotham, J., concurring in part and dissenting in part) ("In *Ashcroft II*, the Supreme Court simply treated it as a self-evident proposition that strict scrutiny applied."). Therefore, Rule ONE should be reviewed according to that same standard under which the idiosyncratic demands of cyberspace prompted this Court to assess the constitutionality of the CDA and COPA. *See Reno*, 521 U.S. at 870; *Ashcroft II*, 542 U.S. at 665.

B. Rule ONE Does Not Satisfy Strict Scrutiny.

As this Court held in *Reno*, "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Reno*, 521 U.S. at 875 (citing *Sable*, 492 U.S. at 129). For Rule ONE to satisfy strict scrutiny, the Government must demonstrate that the regulation is both "narrowly drawn" to serve a compelling state interest, and that Rule ONE is "the least restrictive means to further the articulated interest." *See Sable*, 492 U.S. at 126. While Rule ONE serves the compelling interest of protecting children from material harmful to minors, it is not narrowly tailored due to its underinclusive and overbroad nature. *See Reed*, 576 U.S. at 172–73; *United States v. Williams*, 553 U.S. 285, 292–293 (2008). Likewise, Rule ONE is not the least restrictive means of accomplishing that interest, as the District Court found that less restrictive alternatives exist. *See* R. at 15 (Marshall, J., dissenting). Rule ONE therefore cannot satisfy strict scrutiny.

1. Rule ONE Is Not Narrowly Tailored Because It Is Both Underinclusive and Overbroad in Its Efforts to Protect Minors from Harmful Content.

As this Court held in *Sable*, the Government may regulate adults' consumption of "constitutionally protected speech in order to promote a compelling interest," but, to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *See Sable*, 492 U.S. at 126 (quoting *Vill. of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)). As Rule ONE is both underinclusive and overbroad in its restriction of adults' access to constitutionally protected speech, it is not so narrowly tailored. *See Reed*, 576 U.S. at 172–73; *Williams*, 553 U.S. at 292–293; William J. Rich, 5 Treatise on Const. L. § 20.61(b)(i) (3d ed. 2023). This Court has recognized that the "State has an interest to protect the welfare of children and to

see that they are safeguarded from abuses," which extends to shielding minors from material that is not obscene as to adults. *See Ginsberg*, 390 U.S. at 640–43 (internal quotation marks omitted). "It is not enough to show that the Government's ends are compelling" however, as the means taken must still be "carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126.

Rule ONE is not narrowly tailored because it is underinclusive in its efforts to protect children from content harmful to minors. The regulation applies to commercial entities 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). Although this threshold is more inclusive than comparable laws that only regulate websites for which more than one-third is such content, *cf. Paxton*, 95 F.4th at 267, the one-tenth mark still leaves ample opportunity for pornographic material to reach minors, R. at 14 (Marshall, J., dissenting). Rule ONE expressly overlooks "visual search[es], much of which [are] sexually explicit or pornographic" and may be "easily accessed by children after a simple misspelled search." *See Paxton*, 95 F.4th at 300–01 (Higginbotham, J., concurring in part and dissenting in part); 55 C.F.R. § 5(b). The regulation does not reckon with the prevalence of virtual private networks ("VPNs"), even though VPNs allow minors to circumvent Rule ONE entirely. *See* R. at 15 (Marshall, J., dissenting); *see also* Mack DeGeurin, *Online Porn Restrictions are Leading to a VPN Boom*, Yahoo! Tech (Apr. 3, 2024, 3:00 PM), www.yahoo.com/tech/online-porn-restrictions-leading-vpn-190000006.html.

As established above, Rule ONE is also overbroad because it effectively reduces adults only to "that which would be suitable for a sandbox" through the creation of an impermissible chilling effect upon adults' consumption of otherwise protected speech. *See Bolger*, 463 U.S. at 74. This Court emphasized in *Reno* that the strict-scrutiny analysis reflects an "overarching

commitment" to ensuring government action is designed to accomplish its compelling purpose "without imposing an unnecessarily great restriction on speech." *Reno*, 521 U.S. at 876. Because Rule ONE "reduce[s] the adult population" to consuming "only what is fit for children," it is impermissibly overbroad. *See Butler*, 352 U.S. at 383–84. Rule ONE also overlooks that "[t]he type of material that might be considered harmful to a younger minor is vastly different . . . than material that is harmful to a minor just shy of" the age of majority. *See ACLU v. Ashcroft*, 322 F.3d 240, 268 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004). As such, it is an underinclusive and overbroad regulation that is not narrowly tailored to the compelling interest of protecting children from harmful online content.

2. Rule ONE is Not the Least Restrictive Means of Protecting Minors from Harmful Content Among All Available, Effective Alternatives.

Even if Rule ONE were narrowly tailored to serve the Government's compelling interest, it also fails strict scrutiny on the separate basis that it is not the least restrictive means of accomplishing that interest. *See Ashcroft II*, 542 U.S. at 665 (internal quotation marks omitted) ("A statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."). Rule ONE is not the "least restrictive means among available, effective alternatives" for protecting minors from harmful virtual content because the District Court found that two less restrictive alternatives exist. *See* R. at 15 (Marshall, J., dissenting); *Ashcroft II*, 542 U.S. at 666. The Government's compelling interest could be accomplished through either "requiring internet service providers, or ISPs, to block specified content until adults opt-out of the block" or content filtering. *See Paxton*, 95 F.4th at 304 (Higginbotham, J., concurring in part and dissenting in part);

R. at 15 (Marshall, J., dissenting). The existence of these less restrictive alternatives alone is fatal to the ability of Rule ONE to survive under strict-scrutiny analysis.

The "least restrictive means" requirement is meant to "ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Ashcroft II*, 542 U.S. at 666. "For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest." *Id.* Instead, Rule ONE must be the least restrictive regulation vis-à-vis all available alternatives, which the District Court correctly recognized it is not. R. at 15 (Marshall, J., dissenting). In particular, "[b]locking and filtering software is an alternative that is less restrictive" than age verification requirements like those in Rule ONE, while also "likely [being] more effective as a means of restricting children's access to materials harmful to them." *See Ashcroft II*, 542 U.S. at 666–67. Because Rule ONE is not the least restrictive means of furthering the Government's compelling interests, nor narrowly tailored to "serve those interests without unnecessarily interfering with First Amendment freedoms," it does not satisfy strict scrutiny. *See Sable*, 492 U.S. at 126.

C. Even if Rule ONE Were Not Subject to Strict Scrutiny, the Regulation Also Does Not Satisfy Intermediate Scrutiny.

As established above, content-based restrictions on constitutionally protected, virtual speech by the Government—like the CDA or Rule ONE—cannot be "properly analyzed as a form of time, place, and manner regulation" because their purpose is to "protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." *See Reno*, 521 U.S. at 868; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience" are assessed under strict

scrutiny, not intermediate scrutiny). To the extent that Rule ONE can be characterized as a content-neutral law that is "justified without reference to the content of the regulated speech" though, such regulations are acceptable only "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *See Playtime Theatres*, 475 U.S. at 46–47. Rule ONE does not satisfy the requirements of this intermediate standard.

While Rule ONE aims to serve the substantial state interest of protecting children from material that is harmful to minors despite being protected as to adults, the regulation is not "narrowly tailored to serve" that interest, nor does it "leave open ample alternative channels for communication" of the restricted information. *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). As established above, Rule ONE is not narrowly tailored because its restrictions are both underinclusive and overbroad. Rule ONE's restriction upon adults' access to constitutionally protected, virtual expression likewise precludes all channels for communication of such speech because the regulation "applies broadly to the entire universe of cyberspace." *See Reno*, 521 U.S. at 867–68. There exists no time, place, or manner on the Internet where the affected information would not be subject to the chilling effect created by Rule ONE's age verification requirements.

As this Court held in *Reno*, restrictions of virtual speech are not analogous to permissible zoning actions where, as in the case of Rule ONE, alternative avenues of communication are not preserved. *See id.* This Court has previously upheld zoning ordinances affecting purveyors of material harmful to minors where such regulations "sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community

at large by preventing those theaters from locating in other areas." *See Playtime Theatres*, 475 U.S. at 54. Rule ONE does not constitute a form of comparable "cyberzoning" though, because it broadly affects the entirety of the Internet, rather than sectioning off portions of cyberspace within which adults may freely exercise their First Amendment rights. *See Reno*, 521 U.S. at 868. As such, Rule ONE "unreasonably limit[s] alternative avenues of communication" beyond that which satisfies intermediate scrutiny. *See Playtime Theatres*, 475 U.S. at 47.

CONCLUSION

Because KISA was unconstitutionally delegated enforcement powers that are not subordinate to the FTC, and because Rule ONE impermissibly chills adults' access to constitutionally protected sexual expression under the First Amendment, Petitioner respectfully requests this Court reverse the decision of the Court of Appeals for the Fourteenth Circuit.