Brief on the Merits

No. 25-1779

# In the Supreme Court of the United States

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**PACT AGAINST CENSORSHIP, INC., ET AL.,**

*Petitioner,*

v.

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

*Respondent.*

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

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# BRIEF FOR RESPONDENTS

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**TEAM 32**
Attorneys for Respondents

## 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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The opinions of the United States District Court for the District of Wythe are reported in *Pact Against Censorship, Inc.* v. *Kids Internet Ass'n, Inc.* (U.S.D.C. Wythe 2023). The opinions of the United States Court of Appeals for the Fourteenth Circuit are reported in *Kids Internet Ass'n, Inc. v. Pact Against Censorship, Inc.*, (14th Cir. 2024), and can be found in the Record beginning on page 1.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Articles I, § 1; II, § 2; III, § 1; amend. I; the Keeping the Internet Safe for Kids Act (KISKA), 55 U.S.C. §§ 3050 et seq.; and Rule ONE, 55 C.F.R., are relevant to this appeal. Rule ONE and KISKA are reprinted, in pertinent part, in Appendices A and B, respectively.

## STATEMENT OF THE CASE

The Keeping the Internet Safe for Kids Act (KISKA) went into effect in January 2023 and was intended to protect children from the inappropriate, offensive, and obscene material flooding the internet. R. at 2. KISKA aimed to provide a regulatory scheme to keep the internet safe and accessible for children. R. at 2. Congress did not impose strict standards, but rather, via KISKA, created an entity separate from Congress, whose purpose would be to monitor and assure child safety online. R. at 2. This new entity was the Kids Internet Safety Authority (KISA) – a "private, independent, self-regulatory nonprofit corporation," subject to the "oversight" of the Federal Trade Commission. R. at 2.

KISA was delegated Congress's authority to protect child welfare. Under the close supervision of the FTC, KISA can make rules and regulations for the internet industry regarding child access and safety. R. at 3. KISA has the power to enforce its rules through investigation,

the imposition of civil sanctions, or the filing of civil action for injunctive relief. R. at 3. The FTC can engage in rulemaking of its own and abrogate, add to, and modify KISA's rules. R. at 3. KISA's enforcement actions are also subject to FTC oversight. R. at 3. At any time, the FTC can ask to review such an enforcement action de novo before an Administrative Law Judge ("ALJ"). R. at 3.

By February 2023, KISA's governing board, composed of citizens nationwide, convened to address the harmful effects of minors's access to pornography. R. at 3. Expert testimony revealed that early exposure to pornography increases the likelihood of later engagement with deviant pornography; contributes to gender dysphoria, body image insecurities, depression, and aggression; and correlates with declining academic performance. R. at 3. Based on these expert findings, KISA created Rule ONE, the regulation at issue in this case. R. at 3.

Rule ONE requires certain websites and commercial entities to use reasonable measures to verify user ages and ensure that only adults access explicit materials. R. at. 3. Rule ONE applies to any commercial entity that knowingly and intentionally publishes and distributes material on an internet website, including social media platforms, if more than ten percent of that material is sexual content harmful to minors. R. at 3. Rule ONE also states that reasonable verification measures may include government-issued identification or other reasonable methods that utilize transactional data. R. at 4. To protect user privacy, Rule ONE requires that any entity that performs verification does not retain any of the sensitive information. R. at 4. In addition to seeking injunctive relief, KISA may penalize those who violate Rule ONE by imposing fines of up to $10,000 for each individual day of noncompliance and up to $250,000 for each instance where a minor accessed a site due to noncompliance. R. at 4.

Despite expert testimony claiming children could bypass Rule ONE's verification measures, other experts showed that the average age verification platform is ninety-one percent effective at screening out fake IDs. R. at 5, 9. The adult film industry strongly opposed Rule ONE because of the detrimental effect it believed the rule would have on adult access to pornography. R. at 4. Jane and John Doe claim that they stopped using these websites due to hacking concerns and the possibility of data breaches. R. at 4. These adults expressed concern about the embarrassment and backlash they might face if their data was publicized – controverting the anonymity generally provided by the internet. R. at 4. In response, Pact Against Censorship (PAC), the largest trade association for the American adult entertainment industry, filed suit to permanently enjoin both KISA and Rule ONE. R. at 4.

After briefing and argument, the District of Wythe held that KISA did not violate the private nondelegation doctrine, but the court issued a preliminary injunction against the enforcement of Rule ONE because it found that the rule violated the First Amendment. R. at 5. On appeal, the Fourteenth Circuit affirmed the district court's holding as to KISA's constitutionality, but reversed the Rule ONE holding, finding it to also be constitutional. R. at 10. This Court granted certiorari to review both issues. R. at 16.

## SUMMARY OF THE ARGUMENT

The district court properly rejected Petitioner's claims under the private-nondelegation doctrine and the First Amendment. Petitioner's claim that KISKA's enforcement scheme violates the private nondelegation doctrine fails as a matter of law because, under the Act, KISA functions subordinately to the Federal Trade Commission. KISKA grants the FTC absolute power over the promulgation of binding rules because no rule shall have legal effect unless the

proposed rule or modification has been approved by the commission. The Commission may approve a proposed rule only if it finds, after its own independent review, that the proposal is consistent with the applicable rules, factors, goals, considerations, and principles set forth by Congress. The Commission also has unilateral power to abrogate, add to, and modify the rules promulgated by the Association. Further, the Commission can engage in interim rulemaking sua sponte as it deems necessary to ensure the fair administration of the Association and to conform the rules of the Association to requirements of the chapter. KISKA's framework requires that KISA yield to the FTC throughout the rulemaking process, thus mirroring the framework of the Maloney Act – which has repeatedly been upheld as constitutional. Congress's delegation of rulemaking power adheres to the Vesting Clauses of the Constitution, aligns with this Court's jurisprudence, and creates a subordinate relationship between KISA and the FTC.

The Authority's enforcement power follows suit: KISA's adjudicatory decisions are subject to two layers of de novo review and plenary oversight by the FTC, thus establishing a subordinate relationship between KISA and the FTC. Therefore, the inescapable conclusion follows: Petitioner's facial challenge of KISKA's enforcement scheme fails as a matter of law. The FTC's sweeping oversight is analogous to the longstanding framework between the Securities Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA) which KISKA was modeled after and that this Court indisputably upheld. KISA's ability to bring civil suits, or other enforcement actions, against violators of Rule ONE is more akin to that of a "recommendation" than that of a final determination, thus the enforcement scheme is constitutional, does not violate the Vesting Clauses of the Constitution, and conforms to this Court's jurisprudence regarding permissible delegations. Petitioner's facial challenge is therefore vitiated because it is the FTC which has preeminence in all acts derived from KISKA. A facial

challenge to a legislative Act is the most difficult challenge to mount successfully, because the challenger must establish that no set of circumstances exist under which the Act would be valid. Petitioner fails to meet this heavy burden.

Rule ONE, promulgated by KISA, should also be upheld. The technological age has created new challenges in preserving child welfare, an undisputed compelling government interest. Petitioner's claim that Rule ONE violates the First Amendment fails, as a matter of law, because Rule ONE is narrowly tailored to protect children by least restrictive means available. The rule is an explicit codification of obscenity, a form of unprotected expression which does not contribute to the marketplace of ideas. Rule ONE permissibly regulates sexual material harmful and obscene to minors because, regardless of whether the same content would be obscene to adults, material obscene to minors is within the government's constitutional authority to regulate. Therefore, the rational basis test is applicable because Rule ONE applies only to unprotected expression. The identification of severe, long-term consequences caused by childhood exposure to pornography forms the rational basis by which the government may address the otherwise widespread availability of harmful content, meaning Rule ONE passes rational basis review.

Strict scrutiny is inapplicable because Rule ONE does not stray from the definition of obscenity, impose criminal penalties, supersede parental authority, or capture more protected speech than necessary. Even if strict scrutiny is applied, Rule ONE should still be upheld because it furthers a compelling interest by the least restrictive means available. Rule ONE's reach is limited to websites posting a substantial amount of sexual material harmful to minors. For those sites, Rule ONE requires only reasonable age verification measures which do not excessively burden protected speech and allow users to remain anonymous. The alternative approaches of internet filtering and blocking proposed by Petitioner do not adequately advance

the compelling interest at hand because of the widespread availability of online pornography and contamination of popular social media sites with this harmful material. Almost three-quarters of children thirteen-to-seventeen-years-old have been exposed to pornography, with nearly one-third exposed unwillingly. Rule ONE is a crucial response and withstands any level of scrutiny.

## ARGUMENT

### I. KISKA'S ENFORCEMENT SCHEME IS PERMISSIBLE UNDER THE PRIVATE NON-DELEGATION DOCTRINE BECAUSE KISA OPERATES SUBORDINATELY TO THE FTC.

Under the Keeping the Internet Safe for Kids Act (KISKA), the Kid's Internet Safety Authority (KISA) is subject to the Federal Trade Commission's (FTC) pervasive surveillance and unilateral power to oversee *all* of the Authority's rulemaking and enforcement actions, thus the inescapable conclusion follows – KISA functions subordinately to the FTC. "[I]f people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion. . . . This commonsense principle has come to be known as the 'private non-delegation doctrine.'" *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022). The private nondelegation doctrine is not violated, so long as: (1) the private entity operates subordinately to an agency; and (2) the agency has authority and surveillance over the entity. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 389 (1940). Conversely, if the private entity does not function subordinately to the supervising agency, creates the law, or retains full discretion over any regulations, then there is an unconstitutional delegation of federal power. *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936) (overruled on other grounds); *see Oklahoma v. United States*, 62 F.4th 221, 228-29 (6th Cir. 2023). Thus, the private nondelegation doctrine necessitates that this Court answer

the dispositive question: "Does KISKA establish a subordinate relationship between the private entity, KISA, and the agency, the FTC?" The answer is emphatically yes.

### A. KISKA Does Not Impermissibly Delegate Rulemaking Power Because the FTC Has the Final Say Over the Promulgation of Binding Rules.

KISKA grants the FTC absolute power over the promulgation of binding rules. 55 U.S.C. § 3053(b)(2). A proposed rule, or modification to a rule, submitted by the Association "shall not take effect unless the proposed rule or modification has been approved by the commission." *Id.* at § 3053(a)-(d). In *Carter Coal,* this Court held that the law at issue impermissibly conferred lawmaking power on private entities to regulate an industry due to: (1) an absence of government surveillance; and (2) the agency's inability to modify or add to proposed rules. *Carter Coal,* 298 U.S. at 310-11. Both are concerns that KISKA comprehensively addresses, making the statute in this case analogous to the amended statute in *Adkins*, which this Court held was "unquestionably valid." *Adkins,* 310 U.S. at 388-89. In *Adkins,* upon Congress subordinating private coal producers to an agency with the power to modify or reject their proposals, to wit: proposed wages for coal miners, the Court held that the statute did not impermissibly delegate "legislative authority to the industry." *Id.* at 399. *Adkins* established that a private entity may "aid a public entity that retains authority over the implementation of federal law." *Id.* at 388. This Court should extend the reasoning of *Adkins* here.

#### 1. The FTC's Interim Rulemaking Power Prevents the Unchecked Exercise of Power by the Authority.

KISKA does not impermissibly delegate rulemaking power to a private entity because KISA is subordinate to the FTC. Although 55 U.S.C. § 3053(d) allows KISA to submit to the FTC "any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee," mere private party "involvement" in the

rulemaking process does not qualify as an impermissible delegation of legislative authority so long as the agency retains control over the final product. *Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984); *Loving v. United States*, 517 U.S. 748, 758 (1996). The Commission has the power to modify a proposed rule by rejecting it and directing the Authority to resubmit a revised version that incorporates the modifications recommended. 55 U.S.C. § 3053(c).

The Commission serves as the *exclusive gate keeper* for proposed rules submitted by the Authority and may only approve these rules if they are consistent with applicable rules approved by the Commission. *Id*. at § 3053(c)(2). The Commission can engage in interim rulemaking sua sponte as it deems "necessary or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission . . . ." *Id*. at § 3053(e); *cf. Biden v. Nebraska*, 600 U.S. 482, 494 (2023) (holding that the Secretary of Education exceeded her limited authority to only "modify" certain statutory provisions because she "abolished" those provisions and "supplanted them with a new regime entirely."). Unlike the Commission in *Biden*, KISKA gives the FTC greater authority to "add to" existing rules of the Authority, not merely to "modify" them. *See National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 424 (5th Cir. 2024) ("*Black II*") (holding that an amendment permitting the Commission to "abrogate, add to, and modify" the Authority's rules rectified the previous unconstitutional private delegation of rulemaking power). Moreover, the Commission can subordinate the Authority's enforcement and rulemaking activity by working within the structure of the Act as designed, as opposed to creating an entirely new statutory regime.

### 2. The FTC's Consistency Review Under KISKA Mirrors the SEC's Consistency Review Under the Constitutionally Permissible Maloney Act.

KISKA allows the FTC to revoke the Authority's decision or place procedural and substantive conditions on *any* such decision. *Cf. Oklahoma*, 62 F.4th 221 at 232 ("[t]he FTC's new discretion to adopt and modify rules correctly places the private Horseracing Authority in a subordinate position to the public FTC."). Similarly, the Maloney Act, whose statutory scheme has been repeatedly upheld as constitutional, *see R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co.*, 557 F.2d 1008, 1012–13 (3d Cir. 1977); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); *see also Association of Am. R.Rs. v. U.S. Dep't of Transp.,* 721 F.3d 666, 670 (D.C. Cir. 2013) ("*Amtrak I*") (vacated and remanded on other grounds); *Department. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015) ("*Amtrak II*") (describing the Self-Regulatory Organization's ("SRO") role as "purely advisory or ministerial,") closely mirrors that of KISKA. The FTC, like the SEC, *must* review the Authority's proposed rules to ensure they are consistent with "this chapter" and "applicable rules approved by the Commission." *Id*. at § 3053(c)(2). The FTC also has the power to disagree with a policy choice made by KISA, and in response can "abrogate, add to, and modify the rules of the Association . . . as the Commission finds necessary or appropriate to ensure the fair administration of the Association . . . ." *Id.* at § 3053(e).

Additionally, Congress has provided a multitude of substantive requirements and considerations that the FTC must adhere to when choosing to approve or disapprove a proposed rule from KISA. *Id*. at § 3055(b). The chief concern for the FTC in evaluating a proposed rule is whether it furthers the welfare of adolescent children and addresses their profound vulnerability to exploitation, human trafficking, and other abhorrent practices that KISKA boldly confronts.

The government is answering the clarion call to protect the health and safety of adolescent Americans, especially those affected by the dissemination of sexual material harmful to minors at issue in this case. This Court should give effect to the statutory scheme passed by Congress here.

### B. KISA's Limited Enforcement Power Is Subject to the FTC's Pervasive Surveillance and De Novo Review.

At first glance, Congress's delegation of enforcement powers to KISA may appear problematic under the private nondelegation doctrine, however these concerns are put to rest by way of the FTC's unilateral power to review *de novo* any enforcement actions brought by KISA before an ALJ. 55 U.S.C. § 3058. Similar to the authority in *Adkins* and the securities SRO's, KISA does not wield independent regulatory power, but rather "function[s] subordinately to the Commission," *Adkins,* 310 U.S. at 399, which exercises "oversight" over the Authority, 55 U.S.C. § 3053, and has the power to "approve or disapprove" any proposed rules and to review disciplinary actions. *Id.* at §§ 3053(c)(1); 3058(c). Further, the Commission may only approve a proposed rule or enforcement action if it finds, in its own judgment, that the proposal or action "is consistent with" the Act and other "applicable rules approved by the Commission." *Id.* at § 3053(c)(2). Similar to the decisions of securities SROs, the Authority's initial decisions in disciplinary proceedings are "subject to plenary review" by the Commission. *See National Ass'n of Sec. Dealers v. SEC,* 431 F.3d 803, 807(D.C. Cir. 2005).

#### 1. The FTC Has the Final Word on All Enforcement Actions and Disciplinary Proceedings Initiated by KISA.

KISKA delegates an appropriate level of power to the Authority and satisfies the requirements of U.S. Const. art. I, § 1; art. II, § 2; and art. III, § 1 because any initial decision of the Authority imposing a civil sanction for a rule violation is subject to two (2) layers of de novo

review by the Commission. This framework set forth by KISKA ensures that HISA cannot wield unfettered executive power. First, an aggrieved person may petition the Commission for review of such a decision. 55 U.S.C. § 3058(b)(1). Following a hearing and upon considering a variety of factors, such as whether the final civil sanction of the Association was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the administrative law judge may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part" after making "any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record." *Id.* at § 3058(b)(3)(A).

Second, the Commission in this case "on its own motion" may "review de novo the factual findings and conclusions of law made by the administrative law judge." *Id*. at § 3058(c)(3)(B). The Commission may also "allow the consideration of additional evidence." *Id*. at § 3058(c)(3)(C). Finally, KISKA allows the Commission to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole, or in part, the decisions of the administrative law judge" and "make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record." *Id*. at § 3058(c)(3)(A). Thus, initial adjudicatory decisions by the Authority are "subject to plenary review" by the Commission. *Cf. National Ass'n of Sec. Dealers v. SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (upholding the SRO's power to bring disciplinary actions because they were subject to "plenary review" by the SEC). As a final backstop, the Commission retains the power to stay any sanction pending review. *Id*. at § 3058(c)(3)(D). The enforcement scheme in KISKA, which includes two levels of de novo review and that allows the FTC to review evidence not in the record, ensures that KISA is "soundly in the company of previously upheld enforcement mechanisms, and is thus not an unconstitutional delegation of power to a private authority." *Oklahoma v. United States*, 62 F.4th 221, 244 (6th Cir. 2023).

### 2. The FTC's Supervision over the Investigatory and Disciplinary Functions of KISA Closely Parallels Other Valid Enforcement Schemes and Self-Regulatory Organizations.

KISA's ability to investigate and adjudicate rule violations is analogous to other valid enforcement schemes, most pertinently, the relationship between FINRA and the SEC, which was established by the Maloney Act, and after which KISA was modeled. FINRA's investigatory and enforcement power, which is conditional upon the SEC's final approval, *see, e.g.*, FINRA Rule 8210(a), has routinely been upheld as constitutional. "[E]very court to consider the non-delegation challenge to the Maloney Act has concluded that there is 'no merit in the contention that the Act unconstitutionally delegates power to' a private entity." *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982). The same outcome is warranted here.

This Court should reject the Fifth Circuit's flawed approach in *Black II*. In *Black II*, the Fifth Circuit took issue with the Horse Racing Integrity and Safety Act (HISA) because the Act empowered the Authority to initially utilize its enforcement power and only permitted agency review "on the back end," i.e., after the initial enforcement process was over. *Black II*, 107 F.4th at 430. However, this interpretation is erroneous and overlooks analogous enforcement schemes that have been repeatedly upheld as constitutional. *See National Ass'n of Sec. Dealers v. SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005). In this case, the fact that Agency review occurs after the Authority's initial use of its enforcement power does not give rise to a private nondelegation issue and is precisely the scheme established by the constitutional Maloney Act. *See Oklahoma v. United States*, 62 F.4th 221, 229-30 (6th Cir. 2023) ("The SROs propose rules for the industry . . . initially enforce[d] . . . through internal adjudication. The SEC oversees both the rulemaking and the enforcement. . . . In case after case, the courts have upheld this arrangement . . . .").

Whether the supervising agency reviews the Authority's enforcement preemptively or curatively is not dispositive, but rather if such review occurs at all. Whether Congress prescribes conditions for private-party involvement on the back end, as in *Currin*[1] and *Turfway Park*[2], or on the front end, as in *Adkins*, "law-making is not entrusted to the industry." *Adkins*, 310 U.S. at 399 (citing *Currin v. Wallace*, 306 U.S. 1 (1939)).

KISKA's enforcement scheme is constitutional, and KISA operates subordinately to the FTC as required by the private nondelegation doctrine. The Fifth Circuit's holding in *Black II* that such enforcement powers under HISA, e.g., investigating, searching, charging, sanctioning, or suing, could be levied by the Authority "without the FTC's involvement" is inaccurate, and applying such reasoning to this case and KISA is inappropriate. *Black II*, 107 F.4th at 429; *see* 55 U.S.C. § 3054(h)-(k). In this case, *all* enforcement decisions by KISA are subject to two layers of de novo review and the FTC's plenary oversight is analogous to the longstanding SEC-FINRA framework on which KISKA was modeled and that this Court upheld as "unquestionably valid." *Adkins*, 310 U.S. at 399; *see also* Verkuil, *Public Law Limitations*, at 451 n.302 (noting "[d]elegations to private hands seem to require only a formal set of oversight mechanisms."). The statutory framework at issue in this case falls well within established limits set forth by the private nondelegation doctrine and creates a subordinate relationship between KISA and the FTC.

### 3. KISA's Power to Bring Civil Suits Against Violators of Rule ONE Does Not Violate the Vesting Clauses of the Constitution.

KISA's ability to bring civil suits against violators of Rule ONE under KISKA is more akin to that of a "recommendation" than that of a final determination, thus the enforcement

[1] Currin v. Wallace, 306 U.S. 1 (1939).
[2] Kentucky Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406 (6th Cir. 1994).

scheme is constitutional, does not violate the Vesting Clauses of the Constitution, and conforms to this Court's jurisprudence regarding permissible delegations. 55 U.S.C. §§ 3053(c), 3058(a); *cf. Buckley v. Valeo*, 424 U.S. 1, 139 (1976) ("[u]nless expressly granted or incidental to its powers, the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection."). The FTC alone has the power to determine the finality of civil actions initiated by KISA as all enforcement acts are subject to de novo review by an ALJ as well as de novo review by the Commission. 55 U.S.C. § 3058. When the Authority imposes a civil sanction for a violation committed by a covered person, KISKA requires that the Authority "promptly submit to the Commission notice of the civil sanction in such form as the Commission may require." *Id*. at § 3058(a). Following submission, the two-tiered level of de novo review takes place.

Although the power to commence civil suits is reserved expressly to the executive department and cannot be delegated, *Valeo*, 424 U.S. at 138, under KISKA's scheme, the Authority's power to initiate civil enforcement actions must yield to the agency's preeminence, as section 3054(k)(2)(B) provides that "with respect to [enforcement actions] . . . the applicable State agency shall retain authority until the final resolution of the matter." Thus, KISKA adheres to, rather than defies *Valeo*. KISA's power to investigate and adjudicate rule violations can be likened to FINRA's investigatory powers under the rules and procedures approved by the SEC, used to compel testimony and the production of evidence. *See* FINRA Rule 8210(a). KISA's ability to issue subpoenas is also subject to the limitations, rules, and procedures approved by the Commission. 55 U.S.C. § 3054(h). Further, section 3055(f)(B) states "[a]ny final decision or civil sanction of the Association or its partnering nonprofit . . . shall be the final decision or civil sanction of the Association, *subject to review* in accordance with section 3058 of this title."

(emphasis added). It is also worth noting that the concerns discussed by Justice Alito in his concurrence in *Amtrak II* are not present concerning the FTC's delegation of power to KISA. *See Dep't of Transp. v. Ass'n of Am. Railroads,* 575 U.S. 43, 62 (2015) ("Private entities are not vested with . . . the 'executive power,' art. II, § 1, cl. 1, which belongs to the President.").

### C. A Facial Challenge of KISKA's Enforcement Scheme on the Basis That It Delegates Power to a Private Entity Fails as a Matter of Law.

Petitioner's facial challenge that KISKA's enforcement scheme impermissibly delegates power to a private entity falls flat in light of this Court's strong pronouncement that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, KISKA confines the Authority's discretion through a clearly defined policy, narrow boundaries for exercising authority, and a myriad of considerations, topics, and elements that guide rulemaking and enforcement determinations. 55 U.S.C. §§ 3054(k), 3055(b), 3058(a)-(c).

Additionally, the less stringent substantial overbreadth doctrine established in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) is not applicable to this case. The challenge regarding the private nondelegation doctrine and the constitutionality of KISKA's enforcement scheme is not derived from First Amendment jurisprudence, but rather constitutional structure, to wit: the Vesting Clauses and Appointments Clause. U.S. Const. art. I, § 1; art. II, § 2; art. III, § 1; *see Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law."). The same result is warranted here.

### 1. Since the Earliest Days of the Republic, Congress Has Delegated Power to Private Parties and This Court Has Explicitly Upheld Such Acts as Constitutional.

All private delegations of power are not per se unconstitutional – only unchecked ones. This Court has routinely declined to strike down Congress's private delegations of rulemaking and enforcement power pursuant to the Article I nondelegation doctrine, and has done so on at least four (4) separate occasions: *Butte City Water Co. v. Baker* (1905),[3] *St. Louis. v. Taylor* (1908),[4] *Currin v. Wallace* (1939),[5] and *United States. v. Rock Royal Co-Coop., Inc.* (1939).[6] This Court held in *Rock Royal* that:

> From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied.

*Rock Royal*, 307 U.S. at 574. This Court's decision in *Rock Royal* came just a few months after *Currin*, which also upheld a private delegation.[7] These holdings have not been abrogated, and this Court has exercised its power to "emphatically . . . say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Therefore, in the present case, the inescapable conclusion follows: KISKA's enforcement scheme fits squarely within this Court's jurisprudence, establishes a subordinate relationship between KISA and the FTC, and does not give rise to a private nondelegation concern. Petitioner's facial challenge fails as a matter of law.

[3] 196 U.S. 119 (1905).
[4] 210 U.S. 281 (1908).
[5] 306 U.S. 1 (1939).
[6] 307 U.S. 533 (1939).
[7] Currin, 306 U.S. at 15.

## II. RULE ONE IS A PERMISSIBLE GOVERNMENT REGULATION OF CONTENT OBSCENE ONLY TO MINORS.

The First Amendment of the United States Constitution prevents the government from curtailing freedom of speech. U.S. Const. amend. I. Certain forms of expression, however, are excepted from the reach of the First Amendment and do not enjoy the same level of protection. Obscenity is one such unprotected category. *E.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973). Rule ONE is a critical countermeasure in the technological age, restricting access to material obscene to minors which otherwise would continue to inflict severe harm. It is undisputed that the government may regulate to advance the compelling interest of child welfare. *Sable Comm'cs. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Contested is the applicable level of scrutiny and whether Rule ONE survives the relevant test. Here, rational basis review is applicable because Rule ONE only regulates access to unprotected obscenity without curtailing fundamental rights. *Ginsberg v. New York*, 390 U.S. 629 (1968). Even if Petitioner can claim some modicum of abridgement, Rule ONE's narrow tailoring and minimal effects on protected speech allow it to withstand intermediate and even strict scrutiny.

### A. Rule ONE Passes the Rational Basis Test Because It Codifies the *Miller* Prongs and is Rationally Related to a Legitimate Government Interest.

The rational basis test is the proper standard of review in this case and is satisfied by Rule ONE. This Court has long held that obscene content is categorically unprotected by the First Amendment. *Roth v. U.S.*, 354 U.S. 476, 481 (1957); *Miller v. California*, 413 U.S. 15, 22 (1973); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 847 (1997). Rule ONE is subject to the rational basis test because it explicitly adopts this Court's definition of obscenity in *Miller* and because it regulates obscenity without imposing an outright prohibition. Rule ONE satisfies the rational basis test because it regulates sexual material harmful to minors to protect child welfare,

a well-established legitimate interest of the government, and its ends are rationally related to its means. *Ginsberg v. New York*, 390 U.S. 629, 641 (1968).

### 1. Rational Basis Is the Proper Standard of Review Because Rule ONE's Regulations Target Only Unprotected Obscenity.

Rule ONE does not abridge protected speech because its regulations are tailored to this Court's definition of obscenity. *Miller* established a three-prong test to determine whether material is obscene, asking whether: (a) in applying contemporary community standards an average person would find the material as a whole appeals to the prurient interest; (b) the material depicts or describes, in a patently offensive way, sexual conduct as defined by applicable state law; and (c) the material as a whole has no serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). All three prongs of the test must be met for the material in question to be obscene. *Id*.

This Court confirmed that the *Miller* prongs apply to federal regulations like Rule ONE, *United States. v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 (1973), and that those regulations may still utilize the "contemporary community standards" language of prong (a), provided that the regulation is sufficiently narrowed by a "serious value" prong and a "prurient interest prong." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 580 (2002). All of these prongs have been explicitly codified in Rule ONE's definition of "sexual material harmful to minors." 55 C.F.R. § 1(6). As in *Miller*, all three prongs must be satisfied for Rule ONE to take effect, evidenced by use of the word "and" after the second prong. *Id*. at § 1(6)(B). The only material differences between *Miller* and Rule ONE are the added qualifiers "with respect to minors," or "for minors," included within each prong of the regulation, meaning the material regulated by Rule ONE is content specifically obscene to minors.

While content obscene to minors is not necessarily obscene to adults, obscenity can be regulated specifically as it pertains to children, reviewable under the rational basis standard. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975) (reiterating this particular rule from *Ginsburg*). *Ginsberg*, though decided before *Miller*, concerned a New York criminal statute with a strikingly similar obscenity definition. New York Penal Law s 484-h prohibited the sale of sexual materials which: (i) predominantly appealed to the prurient interests of minors; (ii) were, as a whole, patently offensive to adult community standards as to suitable material for minors; and (iii) lacked redeeming social value for minors. *Ginsberg* at 633. Thirty years later, this Court distinguished but did not overrule *Ginsberg* to hold certain provisions of the Communications Decency Act of 1996 (CDA) unconstitutional. *Reno v. ACLU*, 521 U.S. 844 (1997). *Reno* imposes an upper limit on permissible governmental restrictions of speech under *Ginsberg*, disallowing definitions of obscenity vaguer than *Miller*'s.

*Ginsberg* upheld a New York law which prohibited the sale of pornographic magazines to underage children, even if that required shopkeepers to ascertain the age of purchasers. These magazines, like the websites regulated by Rule ONE, were not necessarily obscene to adults. *Id.* at 634. The defendant's specific contention was that s 484-h's denial of sexual material to minors themselves was objectionable under the First Amendment, not that its incidental effects on adults were unconstitutional. *Id*. at 636. This distinction, however, did not mean that the law had no effect whatsoever on the adult population. The law's threat of criminal liability may require a distributor to make "a reasonable bona fide attempt to ascertain the true age" of an adult, *Id.* at 644, "implicat[ing] and intrud[ing] upon the privacy of those adults." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (citing *Ginsberg*). In context, adults purchasing these magazines were obtaining protected, non-obscene material. To uphold government power to

exclude material obscene to minors, however, "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors," and does not demand "a showing of the circumstances . . . in its application to protected speech." *Ginsberg* at 641. "For that reason, regulations of the distribution to minors of materials obscene for minors are subject only to rational-basis review." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (citing *Ginsberg* at 641).

Just last year, the Fifth Circuit in *Paxton* analogized the *Miller* test to a Texas law nearly identical to Rule ONE. *Paxton* at 267. Texas H.B. 1181 required commercial entities who published or distributed content online, more than one-third of which was sexual material harmful to minors, to implement age verification measures and display health notices about the risks of pornography consumption. *Id*. at 267. Like Rule One, H.B. 1811 allowed regulated entities to use "commercially reasonable" age verification measures; including, but not limited to, government ID; allowed outsourcing of verification to third parties, and did not permit the retention of identifying information. *Id*. Also like Rule ONE, H.B. 1181 applied the *Miller* test for obscenity to the phrase "sexual material harmful to minors" by adding "with respect to minors" or "for minors" to each prong. *Paxton* at 267. Finally, Rule ONE and H.B. 1181 both carry civil, not criminal penalties. *Id*. at 268.

Free Speech Coalition, Inc., an adult industry trade association, brought a facial challenge alleging in part that H.B. 1181's age-verification and health warning requirements violated their First Amendment rights. Dispositive to the Fifth Circuit was the holding in *Ginsberg*, bolstered by a particular inference the court drew from *Erznoznik*. *Paxton* at 270. *Erznoznik* explained that a City of Jacksonville ordinance, s 330.313, aimed at protecting minors from harmful sexual material, could have incidentally burdened protected speech insofar as it was aimed only at

prohibiting underage access to sexually *explicit* content. 422 U.S. 205 at 213. While the ordinance there prohibited public display of *all* films containing nudity, "*Erznoznik* suggests that if the ordinance had been tailored to material obscene for minors, the Court stood ready to accept Jacksonville's contention that the ordinance was a reasonable means of protecting minors from this type of visual influence." *Paxton* at 270 (cleaned up). For those reasons, "regulations of the distribution to minors of materials obscene for minors are subject only to rational-basis review." *Id*. at 269.

While *Erznoznik* invalidated an overbroad regulation of child welfare, vague regulations may also be invalidated. The CDA in *Reno* prohibited *any* person from knowingly sending or displaying to a minor patently offensive sexual material. 521 U.S. 844 at 844. Unlike Rule ONE, or the statutes in *Ginsberg* and *Paxton*, the CDA's reach was not limited to commercial transactions and applied to the distribution of sexual material to children by their own parents, superseding their authority to choose whether exposure to such material was appropriate. *Id*. at 845. Neither did the CDA include any provisions by which patently offensive material could be protected by its socially redeeming value. *Id*. Therefore, even if a parent desired to share "patently offensive material" with their child because of its socially redeeming value, the parent would still be in violation of the CDA. The CDA was a content-based, blanket restriction on "patently offensive" displays, and as this Court explained, it was not enough to merely excerpt the second prong of *Miller* without including each of the other two prongs, both of which "critically limit[] the uncertain sweep of the obscenity definition." *Id*. at 845-46. The vagueness of the CDA's prohibitions, "coupled with its increased deterrent effect as a criminal statute . . . raise[d] special First Amendment concerns because of its obvious chilling effect on speech." *Id*.

at 845. These concerns, along with ineffective age verification technology at the time, prompted this Court to apply strict scrutiny rather than the rational basis test. *Id*. at 870.

Rule ONE mimics the *Miller* obscenity prongs to permissibly advance the well-established government interest of child welfare, as did the statutes in *Ginsberg* and *Paxton*. Its adoption of all three *Miller* prongs means that, unlike the CDA and the Jacksonville ordinance, it is both specific and narrowly tailored, providing an exception for socially redeeming value and limiting its reach to content obscene and harmful to minors. Rule ONE is also limited to commercial transactions. It requires *commercial entities* to employ reasonable age verification methods to regulate access to the material and does not prohibit parents from sharing restricted material with children. Furthermore, Rule ONE is even less imposing than s 484-h, the law upheld in *Ginsberg*, because it provides for civil, not criminal penalties. Today, 28 years after this Court's decision in *Reno*, age verification technology is extremely effective, R. at 9, and comes at a crucial time when the internet is now accessible to practically every child.[8] Rule ONE's indiscriminate approach to sexual material obscene to minors and its minimal impact on adults warrant rational basis review.

### 2. Rule ONE's Regulation of Obscenity Is Rationally Related to the Harms Caused by Childhood Exposure to Sexual Material.

The frequency of underage exposure to sexually explicit material and the severe harms it causes make Rule ONE a rational response to the government's interest in child well-being. Under the rational basis test, regulations of sexual material harmful to minors are upheld so long as the government's ends are rationally related to its means. *Ginsberg v. New York*, 390 U.S.

[8] *Children's Internet Access at Home*, Nat'l Ctr. for Educ. Stat., Aug. 2023, https://nces.ed.gov/programs/coe/indicator/cch/home-internet-access.

629, 641 (1968). Rational basis review of statutes comes with "a strong presumption of validity." *F.C.C.* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 307 (1993).

*Ginsberg* recognized two separate government interests in protecting children from obscenity. These interests are the ends justifying Rule ONE. First, while parents assume primary responsibility for their children's well-being, they are "entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*. at 639. Second, the government "has an independent interest in the well-being of its youth," particularly in protecting them from abuses and ensuring healthy development. *Id*. at 640 (citing *Prince v. Massachusetts*, 321 U.S. 158 at 165 (1944)). With these interests in mind, this Court upheld the *Ginsberg* statute because "at least if it was rational for the legislature to find that minors's exposure to such material might be harmful," the well-being of children is a "subject within the State's constitutional power to regulate." *Ginsberg*. at 639.

In application of the rational basis test to Rule ONE, child welfare is advanced by means of reducing the alarming rate at which children are exposed to pornography. Of a survey of thirteen-to-seventeen-year-olds, *seventy-three percent* reported seeing pornography online.[9] Fifty-four percent were first exposed at the age of thirteen or younger, and twenty-nine percent were unwillingly subjected.[10] Childhood exposure to pornography increases the likelihood of: (1) later engagement with deviant pornography; (2) gender dysphoria; (3) body dysphoria; (4) depression; (5) aggression; and (6) a drop in grades. R. at 3. At the very least, Rule ONE passes the rational basis test because mitigation of these effects increases child welfare. This direct link,

[9] Supreet Mann, *Teens Are Watching Pornography, and It's Time to Talk About It*, Common Sense, Jan. 10, 2023, https://www.commonsensemedia.org/kids-action/articles/teens-are-watching-pornography-and-its-time-to-talk-about-it.
[10] *Id*.

however, also means that Rule ONE's obscenity-focused approach withstands all levels of scrutiny.

### B. Even If This Court Applies Strict Scrutiny, Rule ONE Survives Because It Furthers a Compelling Governmental Interest by the Least Restrictive Means Available.

Rule ONE satisfies strict scrutiny because it takes an obscenity-focused approach to harmful material, advancing the compelling interest of child welfare by the least restrictive means available. "The government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Comm'cs. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). This Court has explicitly stated that the interest in protecting the physical and psychological well-being of minors is compelling, *Id*., and therefore application of strict scrutiny to this case turns on whether this compelling interest was advanced by the least restrictive means available. In screening out obscenity for its harmful effects, content discrimination poses "no significant danger of idea or viewpoint discrimination." *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992), and when protected expression is coupled with unprotected obscenity, the material can be regulated for its unprotected aspects. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976). Finally, this Court's review of a preliminary injunction, like the one sought in this case, is always under the abuse of discretion standard. *E.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004) ("*Ashcroft II*").

Unprotected obscenity covered by Rule ONE can be regulated regardless of intermingling with protected speech. In 1972, the City of Detroit passed zoning ordinances that imposed restrictions on the locations of adult movie theaters displaying sexual material. *Young* at 50. These ordinances required that these theaters not be located within 1,000 feet of other adult

theaters, adult bookstores, cabarets, bars, taxi dance halls, and hotels, or within 500 feet of residential areas. *Id*. The theater owners alleged in part that the ordinances were invalid under the First Amendment as prior restraints on protected communication, specifically because the ordinances regulated certain theaters who displayed films protected by the First Amendment *in addition* to any unprotected obscene material. *Id*. at 62. In upholding the ordinance, this Court emphasized that all theaters were subject to zoning and licensing laws, regardless of the showcased material, and held that "the city's interest in planning and regulating the use of property for commercial purposes [was] clearly adequate" to support the regulation. *Id*. The ordinance's regulation of the place where sexual material could be shown "[did] not offend the First Amendment." *Id*. at 63.

Notably, Court in *R.A.V.* explained that the First Amendment's prohibition on content discrimination is "not absolute," and that content discrimination was instead concerned with the notion "that the government may effectively drive certain ideas or viewpoints from the marketplace," a concern alleviated by Rule ONE's indiscriminate approach. 505 U.S. 377 at 388. *R.A.V.* concerned a City of St. Paul ordinance which prohibited the display of burning crosses as "fighting words," among other specific acts. *Id.* at 379-80. This Court found the St. Paul ordinance to be unconstitutional because of its basis for content-discrimination, applying only to "racial, religious, or gender-specific symbols." *Id*. at 393. However, this Court was also careful to construe its holding to content-specific approaches that do not focus on the "very reason the entire class of speech at issue is proscribable." *Id*. at 388. A permissible content-based regulation of obscenity, on the other hand, might "prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual

activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. *Id*.

Another example of impermissible content discrimination occurred in the early 1980's after Sable Communications, Inc., began offering sexually explicit pre-recorded phone messages for a special fee charged through the Pacific Bell telephone network, a far cry from the easily accessible and graphic pornography available today. 492 U.S. 115 at 118. Congress responded aggressively, amending the Communications Act of 1934 to impose an outright ban on indecent and obscene interstate commercial phone messages. *Id.* at 117. Sable brought suit challenging the constitutionality of amended § 223(b) of the Communications Act under the First and Fourteenth Amendments, which criminalized commercial transmission of sexually oriented communications to minors. *Id.* at 118-20. The flaw with Congress's approach in *Sable* was 223(b)'s overbreadth, "enact[ing] a total ban on both obscene and indecent telephone communications." *Id*. at 129. Crucially, because the FCC's *technological age verification* approach was an "extremely effective" alternative to an outright ban, 223(b) was not narrowly tailored despite the "compelling interest" in preventing minors from accessing this material. *Id*. at 130-31. Like Rule ONE, the FCC's *less restrictive* regulations permitted the use of transactional data as a defense to prosecution, as children were less likely to have access to a credit card. *Id*. at 121.

*Ashcroft II* applied strict scrutiny, rather than the rational basis test, to another overbroad law, the Child Online Protection Act (COPA). This Court heard *Ashcroft II* in 2004 after the district court granted, and the Third Circuit affirmed, a preliminary injunction against the enforcement of COPA because it was found unlikely to be the least restrictive means available to further the government interest in child welfare. *Ashcroft II* at 656. COPA criminalized the knowing posting of *any* material harmful to minors for commercial purposes, regardless of the

quantity of material, while providing an affirmative defense for reasonable age verification methods. *Id*. Therefore, because COPA did not establish a threshold for sexual material like Rule ONE, it followed that if even one percent of a website's content contained sexual material harmful to minors the publisher would be subject to criminal penalties. This Court agreed that this meant COPA was likely not narrowly tailored, nor was it likely to be the least restrictive means with filtering software as an alternative. *Id*. at 667-69. It also argued that filtering software could have been more effective given the availability to minors of foreign websites outside COPA's jurisdiction.

Here, the district court abused its discretion, not only by applying strict scrutiny rather than the rational basis test, but also by finding that Respondent would be unlikely to satisfy the narrowly tailored requirement of strict scrutiny. Rule ONE furthers the same compelling interest of child welfare repeatedly validated by this Court, but remains narrowly tailored, unlike 223(b) in *Sable* and COPA in *Ashcroft II*. Both laws imposed criminal penalties—Rule ONE does not. 55 C.F.R. § 4. Rule ONE by no means prohibits sexual material outright, as did 223(b), but instead requires reasonable age-verification measures to prevent children from accessing it. *Id*. at § 2(a). Neither does Rule ONE apply to any posting of sexual material harmful to minors, as COPA did, only to sites posting a substantial quantity of it. *Id*. The verification requirements of Rule ONE are flexible, allowing consumers to provide either their government ID or transactional data evidencing their adult financial activities. R. at 17. Rule ONE practically mirrors this Court's example in *R.A.V.* of a permissible content-based regulation of obscenity, regulating sexual material not on the basis of its message, but due to its negative impact on society, "the very reason the entire class of speech at issue is proscribable." *R.A.V.* at 388.

Relevant to the least restrictive means analysis is the fact that Rule ONE prohibits the publication or distribution of material on a website, "including a social media platform, more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a). The largest possible incidental impact of Rule ONE is where a website contains up to nine-tenths of protected material, with only one-tenth obscene to minors. For example, a report by Reuters in 2022 estimated that thirteen percent of Twitter's website (now called "X") was adult content.[11] Therefore, Rule ONE would require X to employ "reasonable age verification methods . . . to verify that an individual attempting to access the material is eighteen years of age or older." *Id.* at § 2(a). The remaining eighty-seven percent of X's content undoubtedly contains protected speech in some form. X attempts somewhat to limit underage access to sexual material by requiring users to register for an account and enter a date of birth certifying they are older than eighteen.[12] While this might screen out the most honest of children, it permits more curious kids to simply click "I am eighteen," the same lackluster barrier utilized by most adult websites. Websites such as X, therefore, appear either unwilling or unable to impose any greater restriction, an issue directly remedied by Rule ONE. The fact that the amount of harmful material on a website may be limited to ten percent of all content is no excuse for exemption, especially considering that nearly one-in-three children are unwillingly exposed to pornography.[13]

The availability of filtering and blocking software, which can only be encouraged, not required by the government, has not adequately addressed the problem faced in this case. R. at 5.

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[11] Shelia Dang, *Exclusive: Twitter is losing its most active users, internal documents show*, Reuters, Oct. 26, 2022, https://www.reuters.com/technology/exclusive-where-did-tweeters-go-twitter-is-losing-its-most-active-users-internal-2022-10-25/.
[12] *Adult Content*, X, May 2024, https://help.x.com/en/rules-and-policies/adult-content.
[13] Mann, *supra*.

While filtering software may have been a more effective solution in the past when household internet access was largely limited to one desktop computer, today it would be impractical for parents to install this software on every computer, smartphone, tablet, and video game console a child has access to the internet through. Additionally, just because Rule ONE cannot prevent all forms of circumvention does not mean that it inadequately increases child welfare. Rule ONE is a logical step by the government to prevent underage access by requiring some form of evidence of adult age, both to prove that an individual is older than eighteen and to minimize accidental exposure. Age verification methods, like those required by Rule ONE, are ninety-one percent effective at screening out even the most determined children who provide fake IDs to attempt to access adult content. R. at 9. Rule ONE also only requires "reasonable" age verification measures, allowing for an alternative to ID submission in the provision of transactional data consistent with the financial activities of an adult. R. at 3.

This verification process represents a mere inconvenience to adults wishing to access sexual material or websites containing a significant amount of it. Rule ONE does not require that users be reverified upon every visit, meaning adults need only create an account and submit evidence of their age once. Much like the geographic restrictions in *Young*, which might require an adult to travel slightly further to access an adult theater, Rule ONE's regulations require adults to expend minimal effort in accessing regulated material. The decrease in age-verified traffic to adult websites is a permissible consequence of the compelling interest at hand and can be attributed in part to a substantial reduction in underage traffic and the use of bypass options like VPNs to access the same material through unregulated jurisdictions. R. at 4. While devious children could use similar technologies to circumvent verification, a regulation preventing every method of access would not be narrowly tailored and would cause more incidental effects. For

adults concerned about the privacy implications of age verification, Rule ONE specifically provides that verifying entities "may not retain any identifying information." 55 C.F.R. § 2(b). Expert testimony has emphasized the ease with which anonymity may be maintained, even when age verification is required. R. at 4-5. Therefore, Rule ONE is a permissible content-based regulation of obscenity which satisfies strict scrutiny, and it follows that the application of any less stringent standard, such as the rational basis test or intermediate scrutiny, produces the same result.

## CONCLUSION

For the preceding reasons, Respondents respectfully request this Court to affirm the United States Court of Appeals for the Fourteenth Circuit as to both issues.

No. 09-278

# In the Supreme Court of the United States

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**PACT AGAINST CENSORSHIP, INC., ET AL.,**

*Petitioners,*

v.

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

*Respondents.*

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

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# APPENDICES TO RESPONDENT'S BRIEF ON THE MERITS

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**APPENDIX A**



**APPENDIX B**

# APPENDIX A

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

55 U.S.C. § 3050. PURPOSE

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

55 U.S.C. § 3051. DEFINITIONS.

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

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

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.
b. Board of Directors.
    1. Membership. The Association shall be governed a board of directors (in this section referred to as the "Board") comprised of nine members as follows:
        A. Independent members. Five members of the Board shall be independent members selected from outside the technological industry.
        B. Industry members.
            i. In general. Four members of the Board shall be industry members selected from among the various technological constituencies
            ii. Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.
    2. Chair. The chair of the Board shall be an independent member described in paragraph (1)(A).
        A. Bylaws. The Board of the Association shall be governed

by bylaws for the operation of the Association with respect to—

i. The administrative structure and employees of the Association;

ii. The establishment of standing committees;

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

iv. any other matter the Board considers necessary.

c. Standing Committees.

1. Anti-trafficking and exploitation prevention committee

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

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

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

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

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

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

2. Computer safety standing committee

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

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

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

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

technological constituencies.

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

d. Nominating committee

1. Membership

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

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

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

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

3. Selection of members of the Board and standing committees

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

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

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

f. Funding

1. Initial Funding.

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

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

C. Annual calculation of amounts required

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

ii. Assessment and collection

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

promulgate.

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

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

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

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

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

g. Quorum

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

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

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

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

b. Publication and Comment

1. In general. The Commission shall—

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

B. provide an opportunity for public comment.

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

c. Decision on proposed rule or modification to a rule

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

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

is consistent with—

A. this chapter; and

B. applicable rules approved by the Commission.

3. Revision of proposed rule or modification

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

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

d. Proposed standards and procedures

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

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

e. Amendment by Commission of rules of Association. The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

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

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

1. implement and enforce the Anti-Crime Internet Safety Agenda; and

2. exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.

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

c. Duties

1. In general. The Association--

A. shall develop uniform procedures and rules authorizing—

i. access to relevant technological company websites,

metadata, and records as related to child safety on the internet;

ii. issuance and enforcement of subpoenas and subpoenas duces tecum; and

iii. other investigatory powers; and

B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action.

2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

d. Registration of technological companies with Association

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

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

3. Cooperation. A technological company registered under this subsection shall, at all times--

A. cooperate with the Commission, the Association, all federal and state law enforcement agencies, and any respective designee, during any civil investigation; and

B. respond truthfully and completely to the best of the knowledge of the technological company if questioned by the Commission, the Association, all federal and state law enforcement agencies, or any respective designee.

4. Failure to comply

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

e. Partnership programs

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

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

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

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

f. Procedures with respect to rules of Association

1. Anti-Trafficking and Exploitation

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

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

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

g. Issuance of guidance

1. The Association may issue guidance that—

A. sets forth—

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

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

B. relates solely to—

i. the administration of the Association; or

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

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

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

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

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

j. Civil actions

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

of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.

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

k. Limitations on authority

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

2. Previous matters

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

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

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

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

a. Program required

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

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

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

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

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

A. uniform standards for—

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

ii. emergency preparedness accreditation and protocols; and

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

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

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

f. Enforcement of this Provision

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

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

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

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

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

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

h. Advisory committee study and report

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

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

3. Modification of prohibition

A. In general. After receipt of the report required by paragraph (2), the Association may, by unanimous vote of the Board, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date that is three years after

the program effective date.

B. Condition. In order for a unanimous vote described in subparagraph

(A) to affect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

i. That the modification is warranted.

ii. That the modification is in the best interests of most children.

iii. That the modification will not unduly stifle industry.

iv. That technology is a benefit to our society.

i. Baseline anti-trafficking and exploitation rules.

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

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

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

2. Baseline anti-trafficking and exploitation control rules described

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

i. The lists of preferred prevention practices from Jefferson Institute

ii. The World Prevent Abuse Forum Best Practices iii.Psychologists Association Best Practices

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

3. Modifications to baseline rules

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

B. Association approval.

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

a. (a)Establishment and considerations

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

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

b. Plans for implementation and enforcement.

1. A uniform set of safety standards and protocols, that may include rules

governing oversight and movement of children access to the internet.

2. Programs for data analysis.

3. The undertaking of investigations related to safety violations.

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

5. A schedule of civil sanctions for violations.

6. Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.

7. Management of violation results.

8. Programs relating to safety and performance research and education.

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

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

a. Description of rule violations

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

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

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

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

C. Attempting to circumvent a regulation of the Association.

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

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

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

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

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

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

B. Hearing procedures;

C. Standards for burden of proof;

D. Presumptions;

E. Evidentiary rules;

F. Appeals;
G. Guidelines for confidentiality
H. and public reporting of decisions.

b. Civil sanctions

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

2. Modifications. The Association may propose a modification to any rule established under this section as the Association considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

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

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

b. Review by administrative law judge

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

2. Nature of review

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

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

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

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

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

3. Decision by administrative law judge

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

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

ii. may affirm, reverse, modify, set aside, or remand for further

proceedings, in whole or in part, the final civil sanction of the Association; and

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

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

c. Review by Commission

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

2. Application for review

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

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

C. Discretion of Commission

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

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

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

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

3. Nature of review

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

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

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

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

C. Consideration of additional evidence

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

ii. Motion by a party

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

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

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

55 U.S.C. § 3059

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

# APPENDIX B

## FROM TITLE 55 OF THE CODE OF FEDERAL REGULATIONS

## ("RULE ONE")

### SECTION 1. DEFINITIONS

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

### SECTION 2. PUBLICATION OF MATERIALS HARMFUL TO MINORS.

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

18 years of age or older.

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

**SECTION 3. REASONABLE AGE VERIFICATION METHODS.**

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

**SECTION 4. CIVIL PENALTY; INJUNCTION**

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.

(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:
   (1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;
   (2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and
   (3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:
   (1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;
   (2) the history of previous violations;
   (3) the amount necessary to deter a future violation;
   (4) the economic effect of a penalty on the entity on whom the penalty will be imposed;
   (5) the entity's knowledge that the act constituted a violation of this chapter; and
   (6) any other matter that justice may require.

(d) The Kids Internet Safety Association, Inc., may recover reasonable and necessary attorney's fees and costs incurred in an action under this Rule.