No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

I. Under federal law, does Congress violate the private nondelegation doctrine when granting the Kids Internet Safety Association its enforcement powers?

II. Under federal law, does a law infringe on the First Amendment when it requires pornographic websites to verify ages?

OPINIONS BELOW

The court of appeal's opinion is reported at 345 F. 4th 1. The district court opinion granting Petitioner's preliminary injunction is unreported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Given the numerous statutory provisions relevant to this case, an appendix reproducing each has been affixed.

I. STATEMENT OF THE CASE

A. The delegation of enforcement powers to KISA.

The Keeping the Internet Safe for Kids Act (KISKA) became effective in January 2023 and created the Kids Internet Safety Association (KISA), a private entity tasked with investigating, penalizing, and regulating websites that host adult content. *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc. (KISA)*, 345 F.4th 1 (14th Cir. 2024). KISA issues subpoenas, imposes fines, and files civil lawsuits without first obtaining approval from the Federal Trade Commission (FTC), allegedly its supervising agency. 55 U.S.C. §§ 3054, 3057. Although the district court ruled that Congress's delegation of authority to KISA was proper, and the Fourteenth Circuit affirmed that decision on appeal, this arrangement violates the private nondelegation doctrine because KISA operates with full regulatory authority and minimal real-time oversight by the FTC. *Consumers' Research v. FCC*, 67 F.4th 773, 780 (6th Cir. 2023). Mere after-the-fact review of fines and sanctions cannot establish meaningful federal control over a private organization's enforcement powers. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black II)*, 107 F.4th 415, 430 (5th Cir. 2024).

Unlike self-regulatory organizations such as The Financial Regulatory Authority (FINRA)—where the Securities and Exchange Commission maintains continuous, active supervision—KISA conducts searches, initiates legal actions, and levies penalties without any requirement to secure the FTC's preclearance. 55 U.S.C. §§ 3054, 3057. This structure resembles the improper delegation identified in *Carter v. Carter Coal Co.*, in which private actors received unchecked regulatory authority. 298 U.S. 238, 310–11 (1936). Absent a statutory mechanism for meaningful, ongoing FTC involvement, KISA's power exceeds the scope of permissible private delegation. *See Black II*, 107 F.4th at 430.

B. Rule ONE's age-verification requirements and the First Amendment.

KISA released Rule ONE in June 2023. *KISA*, 345 F.4th at 4. Rule ONE mandates age-verification for any "commercial entity that knowingly and intentionally publishes and distributes material on an Internet website, more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2. Further, Rule ONE provides that "reasonable" age-verification methods include providing copies of government-issued ID or a "commercially reasonable method that relies on public or private transactional data to verify the age of an individual." 55 C.F.R. § 3. This measure imposes a content-based burden on sexually explicit speech that is fully protected for adults. *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004). By conditioning access to lawful content on the disclosure of sensitive personal information, Rule ONE chills constitutionally protected expression. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). Therefore, Rule ONE must be reviewed under strict scrutiny.

On August 15, 2023, Pact Against Censorship (PAC) filed suit in the District of Wythe to permanently enjoin Rule ONE and KISA from operation. *KISA*, 345 F.4th at 5. The District of Wythe correctly granted the requested injunction because it held that Rule ONE violated the First Amendment as it is not narrowly tailored as required under strict scrutiny review. *KISA*, 345 F.4th at 5. The Fourteenth Circuit Court of Appeals reversed the district court's holding regarding the First Amendment challenge. *KISA*, 345 F.4th at 10.

The Fourteenth Circuit attempts to use *Ginsberg v. New York* to analyze Rule ONE under rational-basis review, but their reliance on *Ginsberg* is misguided because the statute at issue in that case did not constrain adults' ability to purchase non-obscene materials. 390 U.S. 629, 640 (1968); *KISA*, 345 F.4th at 7–9. In contrast, Rule ONE forces adults to complete intrusive verification to view content they are constitutionally permitted to access. *KISA*, 345 F.4th at 4. Further, this approach is underinclusive because it fails to regulate comparable websites where

minors can still find explicit material, while at the same time being overinclusive by regulating vast amounts of constitutionally protected speech on sites exceeding the ten-percent threshold. 55 C.F.R. § 2. A compelling interest in protecting children does not, by itself, satisfy strict scrutiny; the law must also be narrowly tailored and employ the least restrictive means. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Therefore, Rule ONE extends well beyond what is necessary to shield minors and thus fails the requisite strict scrutiny review. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

II. SUMMARY OF THE ARGUMENT

This case involves two distinct constitutional issues arising from KIKSA. First, KISKA impermissibly grants KISA—a private organization—regulatory and enforcement authority without meaningful government oversight. *KISA*, 345 F.4th at 2–3. KISA investigates, issues subpoenas, levies fines, and files lawsuits, yet is only nominally supervised by the Federal Trade Commission after actions have been taken. 55 U.S.C. §§ 3054, 3057. This structure runs afoul of the private nondelegation doctrine by granting KISA with sweeping regulatory powers that properly belong to government agencies. No statutory mechanism exists for real-time review or restraint of KISA's decisions, which undermines the constitutional requirement that lawmaking or law enforcement remain in public hands. *Id.*

Second, KISA's Rule ONE imposes a broad, content-based age-verification requirement for any Internet website, including social media platforms, which contains sexually explicit material constituting more than one-tenth of the website's content. 55 C.F.R. § 2(a). Sexually explicit material does not fall under "obscene speech" as defined by *Miller v. California* and adults are granted full protection under the First Amendment to access this material. 413 U.S. 15, 24 (1973). Therefore, Rule ONE must be subjected to strict scrutiny and the Government must show

that the law is narrowly tailored towards advancing a compelling governmental interest. *Sable*, 492 U.S. at 126.

Although protecting minors *is* a compelling purpose, Rule ONE fails strict scrutiny by sweeping in vast amounts of lawful content while leaving other avenues of explicit material unregulated. 55 C.F.R. § 2. This underinclusive-and-overinclusive design is not narrowly tailored and forces adults to disclose personal information to access speech that remains legal for them to view. *Id.* Because less restrictive means to advance the Government's interest exist—such as parent-controlled filtering—Rule ONE's burden on lawful adult expression is unjustified. The Constitution demands more precise tailoring to protect children without suppressing the rights of adults.

III. ARGUMENTS AND AUTHORITIES

KISKA unconstitutionally grants KISA, a private entity, governmental enforcement power without real-time FTC oversight, violating the private nondelegation doctrine. U.S. CONST. art. I, § 1; *Consumers' Research*, 67 F.4th at 780. KISA investigates, fines, and files lawsuits—hallmarks of executive authority—yet exercises these powers without meaningful federal oversight. 55 U.S.C. §§ 3054, 3057; *Black II*, 107 F.4th at 430. Allowing KISA to continue unchecked not only upsets constitutional balances but also threatens arbitrary enforcement against law abiding corporations. This Court should reverse the Fourteenth Circuit, restrict KISA's enforcement powers, and require Congress to implement adequate oversight to preserve the separation of powers and protect the public.

A. KISA is not subordinate to the FTC and operates without meaningful oversight.

The delegation of enforcement power to KISA violates the private nondelegation doctrine because it empowers a private entity, KISA, with unchecked regulatory authority that belongs in a

public agency's hands. The private nondelegation doctrine stems from Article I of the Constitution that provides "all legislative powers herein granted shall be vested in a Congress . . .." U.S CONST. art. I, § 1. The private nondelegation doctrine bars the government from unchecked delegations of power to private entities. *Consumers' Research*, 67 F.4th at 780 (citing *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023)). However, power may be delegated to a private entity only if the private entity is "subordinate to a federal actor" meaning the federal actor has "authority and surveillance" over the actions of the private entity. *Consumers' Research*, 67 F.4th at 795. Subordination means that private entities with delegations of power may not exercise independent regulatory power by creating or enforcing laws, interpreting ambiguous provisions of rules, or interpreting the intent of Congress. 47 C.F.R. § 54.702(b); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black I)*, 53 F.4th 869, 881 (5th Cir. 2022). Instead, private entities that are subordinate to federal agencies are merely there to provide a*Id. Black I*, 52 F.4th at 881. The federal agencies must retain the power to "approve, disapprove, or modify" any regulations. *Id.* Private entities may provide ministerial functions to the federal agency such as fact gathering, advising on or proposing policy recommendations, and fee collection. *Oklahoma*, 62 F.4th at 229.

Although KISKA nominally places KISA under FTC oversight, that oversight is illusory. *See* 55 U.S.C. §§ 3053, 3054(c)(1), 3054(j)(1)–(2). The Fifth Circuit condemned a similar arrangement in *Black II.* 107 F.4th at 429–30. In that case, the Circuit Court held that a private entity's enforcement powers are unconstitutional when it can investigate violations, issue subpoenas and sanctions, and conduct independent investigations—all without prior approval from the FTC. *Id.* The court explained that allowing a private entity to search premises, levy fines, and seek injunctions—without the FTC's real-time consent—denies an agency its essential authority to "approve, disapprove, or modify" private enforcement actions. *Id.* The mere stipulation that the

FTC could come in after the fact and review an issued sanction was not enough to establish that the private entity was a subordinate. *Id.*

This Court should follow the reasoning in *Black II* and hold that KISA is not subordinate to the FTC and operates without meaningful oversight. *See Id. Black II* frames "subordination" as the key standard for constitutional private delegation of powers. *See Consumers' Research*, 67 F.4th at 795. Like *Black II*, where the private entity had the ability to investigate violations, issue subpoenas, levy fines, and file lawsuits, here, KISA has identical powers. 55 U.S.C. §§ 3054, 3057; *Black II*, 107 F.4th at 429. In fact, KISA's power to file civil suits does not have *any* FTC restraint as KISA's initiation of civil litigation does not require any preclearance from the FTC. 55 U.S.C. §§ 3054(j)(1)–(2). KISA has near-plenary enforcement powers that lack preemptive governmental direction and approval or denial of specific actions. *Id.* at § 3054(e). For example, KISA may initiate independent investigations where it decides who and when someone should be investigated. *Id.* at § 3054(h). KISA is also allowed to perform typical government functions such as issuing subpoenas and searching premises without agency approval. *Id.* In addition, KISA has independent authority to file civil lawsuits and seek injunctions which are considered hallmarks of executive powers and federal agencies. *Id.* at § 3054(j)(1)-(2). The lack of real-time checks by the FTC and KISA's executive-like power places KISA outside of the subordinate role necessary for lawful private delegation. *See Black II*, 107 F.4th at 429.

The Fifth Circuit Court also held that the fact that just because a federal agency, such as the FTC, may come in at the end and review the processes and sanctions issued by the private entity does not mean that the private entity is a subordinate which has been granted a proper delegation of powers. *See Black II*, 107 F.4th at 429. The *Black II* court also noted that when there are no up-front limitations on a private entity's authority, there is no lawful arrangement or

subordination. *Id.* at 421. Here, the FTC can only review KISA's actions *after* KISA has issued subpoenas or imposed sanctions. 55 U.S.C. § 3058. KISA is not required to obtain preclearance from the FTC before certain actions such as issuing subpoenas or violations. 55 U.S.C. §§ 3054(h), 3058. This goes beyond "merely" providing the FTC "aid." *See Black I*, 52 F.4th at 881 (clarifying that private entities that are subordinate to federal agencies are there merely to provide aid). In addition, in *Black II*, where the private entity could only provide general policy advice or make recommendations, here, the FTC cannot directly veto KISA's actions in real time. *Black II*, 107 F.4th at 429–33. Therefore, the FTC lacks authority to stop KISA's actions, like investigations, in real time which is the exact flaw that the court highlighted in *Black II*.

Accordingly, KISA's responsibilities allow it to unconstitutionally act as an independent regulator—rather than a subordinate merely providing aid to the FTC.

1. KISA is far from a self-regulatory organization.

The Fourteenth Circuit Court mistakenly analogizes KISA to a self-regulatory organization (SRO). *KISA*, 345 F.4th at 7; *See First Jersey Secs. Inc. v. Bergen*, 605 F.2d 690, 698 (3d Cir. 1979). KISA cannot stand as an SRO because the FTC does not retain ultimate control over KISA. *Id.* Courts have traditionally upheld the validity of SROs. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952) (explaining that there was no unconstitutional delegation because NASD could approve or disapprove of rules before the rules became final); *See also First Jersey*, 605 F.2d at 697.

In *R.H. Johnson & Co.*, the court held that the SEC's review of the disciplinary action did not constitute an invalid delegation of power. 198 F.2d at 695. In that case, the SEC was asked to review a disciplinary action from NASD regarding a complaint about excessive trading. *Id.* At the time, the Maloney Act allowed the SEC to conduct their own findings of fact, hold hearings, and determine whether certain disciplinary actions of the NASD were valid or invalid. *Id.* The SEC

was required to conduct an elaborate "de novo" review of the NASD's action. *Id.* In addition, the SEC was required to act within "reasonably fixed statutory standards." *Id.* The court reasoned that there was a valid delegation of authority to the SEC to conduct disciplinary reviews. *Id.* The court noted that the SEC properly considered their own independent findings before the NASD's actions took effect and retained the ability to widely approve or disapprove NASD's actions. *Id.*

Additionally, this Court should consider *First Jersey*. In *First Jersey*, the Third Circuit held that the self-regulation framework granted to NASD from the Maloney Act was not unconstitutional. 605 F.2d at 699. In that case, a brokerage firm claimed that the NASD was given disciplinary authority on unconstitutional grounds. *Id.* Under the Maloney Act, the NASD was granted a scheme for self-regulation. *Id.* The scheme was established to allow the industry to "set its own standards of proper conduct and permits their members to discipline themselves applying their own expertise and experience." *Id.* at 698. The court reasoned that as long as the SEC retained active and robust supervision that is statutorily required, there is no unchecked power in the NASD's hands, as the SEC could intervene at any time. *Id.* Therefore, SROs are upheld if the federal agency retains ultimate oversight. *See R.H. Johnson & Co.*, 198 F.2d at 695; *See also First Jersey*, 605 F.2d at 698.

Judge Marshall's dissent notes that the relationship between FINRA and the SEC are distinct from KISA and the FTC's relationship. *KISA*, 345 F.4th at 12–13. For example, the record notes that the "SEC shares enforcement power with FINRA, and the SEC alone has the power to subpoena." *R.H. Johnson & Co.*, 198 F.2d at 695. In contrast, KISA shares subpoena power with the FTC. 55 U.S.C. § 3054(h). Additionally, the SEC can revoke FINRA's rule enforcement abilities and "fire members of FINRA and bar members from FINRA." *R.H. Johnson & Co.*, 198 F.2d at 695. In comparison, the cases *R.H. Johnson* and *First Jersey* upheld SROs only where there

was a federal agency maintaining robust oversight over the SROs actions. *See R.H. Johnson & Co.*, 198 F.2d at 695; *See also First Jersey*, 605 F.2d at 697.

Here, the key difference is that the FTC can only review KISA's actions *after* the occurrence. 55 U.S.C. § 3053. This means that the FTC cannot immediately intervene or direct the actions of KISA. *Id.* KISA is free to create and enforce rules, perform independent investigations, and issue fines and subpoenas without any preclearance from the FTC—which is clearly outside the powers of SROs. *Id*; *See Buckley v. Valeo,* 424 U.S. 1, 138 (1976). In addition, KISA may interpret existing rules and procedures. 55 U.S.C. § 3054(g)(1). KISA's responsibilities reflect those of traditional federal agencies, including approving or disapproving rules and reviewing enforcement decisions. *See R.H. Johnson & Co.*, 198 F.2d at 695. Additionally, the FTC is not allowed to fire board members of KISA as the power to fire is up to the internal board governance rules set by KISA. 55 U.S.C. § 3052(b)(1)(iii). Here, there is a mere possibility that the FTC may come in after KISA has acted and review such actions. 55 U.S.C. § 3058(b). In contrast to *R.H. Johnson* and *First Jersey*, where the SEC had final authority over the RSOs and NASD was subject to immediate supervision from the SEC, here, KISA operates with the mere possibility that the FTC *might* review their decisions. *See* 198 F.2d at 695; *See also* 605 F.2d at 697; *Id.* at § 3058. In addition, KISA is not continuously supervised during its actions in real time. 55 U.S.C. §§ 3052(b), 3054, 3058.

Accordingly, there is an unconstitutional delegation of authority to KISA as a private entity. *See R.H. Johnson & Co.*, 198 F.2d at 695; *See also First Jersey*, 605 F.2d at 697.

2. <u>There are no structural safeguards in place to prevent abuse from KISA.</u>

The lack of mandatory review or supervision of KISA creates a major risk of abuse as there are no adequate safeguards in place. In *Carter,* the court held that there was an unconstitutional delegation of power to the coal miners as there were no safeguards in place to prevent abuse of

power. 298 U.S. at 310–311. In that case, most coal miners were delegated the power to regulate the competition in the coal industry. *Id.* The coal miners with regulatory responsibilities were comprised of more than two-thirds of the industry workers. *Id.* In addition, the coal miners were able to set minimum wages and working hours for other coal miners across various districts. *Id.* The court reasoned that there was an invalid delegation of power because the coal miners were acting as regulators within their own industry. *Id.* at 311. The court emphasized that some coal miners favored certain rules while others clearly opposed them. *Id.* The court deemed this as " . . . delegation in its most obnoxious form." *Id.* The issue here is that the delegation of power to the coal miners empowered private individuals—with conflicting interests—to regulate their own operations and business competitors. *Id.* This created an issue with the diverse number of viewpoints, which led to bias and abuse of power in regulating other coal miners in the industry. *Id.* Further, the court noted that private workers were performing a traditional governmental function of regulation. *Id.* The court stated that, ". . . one person may not be entrusted with the power to regulate the business of another, and especially of a competitor" due to the lack of safeguards and risk of abuse. *Id.*

The delegation to KISA is like the one in *Carter*. Like *Carter*, where the coal miners were regulating their own industry, here, KISA, a coalition of members from the adult entertainment industry, regulates other adult entertainment companies and websites. *Carter*, 298 U.S. at 311; 55 U.S.C. § 3054. In fact, the main purpose of KISA is to "develop . . . and implement . . . standards of safety for children online and rules of the road for adults interacting with children online." *Id.* While KISA's Board requires five members to be from outside of the industry, this superficial safeguard does not cure the unconstitutional delegation of authority to KISA as a private entity comprised, in part, of industry members. 55 U.S.C. § 3052(b)(1)(A)–(B). Therefore, like *Carter*,

there is a diverse set of views that creates a problem for KISA. *See Carter*, 298 U.S. at 311. These industry members are regulating other industry members by performing a traditional function of the government and federal agencies. *See* 55 U.S.C. § 3054. *Carter* recognizes that private entities as regulators may act in addition, KISA is allowed to levy fines, file lawsuits, and issue subpoenas. 55 U.S.C. §§ 3054, 3057. This goes beyond the "ministerial functions" standard set forth in *Oklahoma* where private entities act as fact gatherers, advise on or propose policy recommendations, and collect fees. *See* 62 F.4th at 229. KISA as a regulator is not an attempt to prevent any risk of abuse or impose safeguards for regulation of the industry. Here, KISA is assuming the role of a regulator without adequate safeguards in place such as immediate oversight, real-time supervision, or other remedies to ensure fairness and mitigate bias. 55 U.S.C. §§ 3054, 3058. *Carter* emphasizes the need for public accountability and oversight of private entities acting as regulators. *See* 298 U.S. at 310–311. KISA clearly lacks accountability and other abuse prevention mechanisms. *See* 55 U.S.C. §§ 3054, 3058. KISA's ability to conduct investigations and levy fines could lead to overbroad and arbitrary enforcement as the only remedy available is "after-the-fact" review from the FTC. 55 U.S.C. § 3058. The current oversight mechanism from the FTC is not enough. *Id; See Carter*, 298 U.S. at 311.

Biden v. Nebraska illustrates how important oversight and control are when determining whether an entity is subordinate to a government entity. 600 U.S. 477, 491–94 (2023). In *Biden*, the Supreme Court emphasized that the Missouri Higher Education Loan Authority's (MOHELA) board consisted of state-appointed officials and that MOHELA was answerable to Missouri through required annual financial reporting. *Id.* at 491–92. The Court noted MOHELA existed to serve a public purpose, performed a governmental function, and remained subject to dissolution by state law. *Id.* at 491–93. These indicators confirmed that MOHELA acted as a true

"instrumentality of the State," such that any injury to MOHELA was necessarily "a direct injury to Missouri itself." *Id.* at 492–94.

Here, KISA lacks equivalent government direction or mandatory reporting to the FTC that would support meaningful FTC oversight. Unlike *Biden*, where the Court recognized Missouri's ongoing supervisory role in MOHELA's affairs, no statute provides the FTC power to dissolve KISA, remove or approve its board members, or require KISA to submit financials. 600 U.S. at 491–3; 55 U.S.C. § 3052(b)–(f). Instead, KISA "independently investigates, penalizes, and regulates" adult-content websites, with the FTC relegated to subsequent review of rules rather than real-time supervision. 55 U.S.C. §§ 3053(a)–(c), 3053(e), 3054(h)–(j). Because KISA's structure does not exhibit the features of governmental supervision recognized in *Biden*, it "operates without meaningful oversight," confirming it is not subordinate to the FTC. *See Biden*, 600 U.S. at 491–92.

Because KISA's delegation of power is unconstitutional, the Fourteenth Circuit's ruling should be reversed. KISA wields executive-like powers without any actual federal supervision, depriving the public of the checks and balances the Constitution demands. Therefore, this Court should remand with instructions to enjoin KISA from exercising its enforcement functions unless and until Congress provides adequate safeguards to ensure genuine government oversight.

B. A law requiring pornographic website to verify ages infringes upon the First Amendment because it fails the requisite strict scrutiny standard.

The First Amendment of the United States Constitution was crafted with the intent to provide protection for fundamental individual freedoms. U.S. CONST. amend. I; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246 (2017). The First Amendment provides that the Government "shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This Court has interpreted the First Amendment to mean that speech may not be

regulated solely "because of its message, its ideas, its subject matter, or its content." *Nat'l Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018). By upholding Rule ONE and its provisions, the First Amendment will become eroded by governmental overreach and Americans will not be protected from a potential sweep of regulations infringing upon their right to free expression. Therefore, this Court should grant PAC a preliminary injunction to enjoin Rule ONE and KISA from operation.

1. Rule ONE must be analyzed under strict scrutiny review.

Although the Constitution offers broad protections for free speech, these protections do not extend to obscene speech. *Miller*, 413 U.S. at 24. Speech is obscene if it: "(1) appeals to the prurient interest, using contemporary community standards of an average person; (2) describes sexual conduct as defined by state law, that is patently offensive; and (3) taken as a whole, lacks serious literary, artistic, or scientific value." *Id.* Pornography, and an adult's ability to access this form of speech, has historically been defined as "sexual expression which is . . . not obscene [and] is protected by the First Amendment." *Sable*, 492 U.S. at 126.

The Fourteenth Circuit mistakenly applies rational-basis review to Rule ONE and defers almost entirely to the legislature. *KISA*, 345 F.4th at 7. Although *Ginsberg* recognized that sexually explicit material might be treated as "obscene" for minors, that decision does not license the Government to impose blanket burdens on speech intended for adults without strict scrutiny review. 390 U.S. 629 at 641; *KISA*, 345 F.4th at 7. The Fourteenth Circuit's reasoning in utilizing rational-basis review overlooks the chilling effect Rule ONE imposes on adult access to constitutionally protected content. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023).

By using the protection of children as justification for applying rational-basis scrutiny, the Fourteenth Circuit's majority opinion disregards this Court's well-established approach to addressing content-based regulations of speech. *See Reno*, 521 U.S. at 879; *See also Sable*, 492

U.S. at 126; *KISA*, 345 F.4th at 7. When a statute imposes content-based restrictions on speech, such as those proposed by Rule ONE's age verification requirements, the statute is presumed invalid, and the Government bears the burden of rebutting this presumption. *Ashcroft*, 542 U.S. at 667. Even if a statute or regulation is only placing "content-based burdens" upon speech, the burdens can only "stand if [they] satisfy strict scrutiny." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000). Furthermore, statutes regulating speech based on content have traditionally been analyzed under the strict scrutiny standard and there has been no need for this Court to consider "the Government's justifications or purposes for enacting the [regulation] to determine whether it is subject to strict scrutiny." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

Here, the District of Wythe correctly held that Rule ONE must be subject to strict scrutiny review. *KISA*, 345 F.4th at 5. The Fourteenth Circuit Court went against the lower court and argued that *Reno* and *Ashcroft II*, both cases concerning proposed laws with striking similarities to Rule ONE, are distinguishable this case and held that *Ginsberg* demands a rational-basis review. 390 U.S. 629 at 641; *KISA*, 345 F.4th at 7–9. The Fourteenth Circuit's opinion lacks precedent and should be overturned, as PAC has a "substantial likelihood of success on the merits" when the proper standard—strict scrutiny—is applied. *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023).

2. The law analyzed in *Ginsberg* is highly distinguishable from Rule ONE.

The Fourteenth Circuit's reliance on *Ginsberg* is misplaced. The Government lacks the authority to regulate the publication and distribution of sexual materials that are protected by the First Amendment without evidence that the materials are being directly distributed to minors. In *Ginsberg*, the defendant operated a store in which he sold pornographic magazines. 390 U.S. at 632. The defendant sold magazines to a 16-year-old boy and was found guilty of violating a New York statute that made it unlawful to "knowingly sell to a minor under 17 any magazine . . . which

taken as a whole is harmful to minors." *Id.* This Court reasoned in *Ginsberg* that the magazines were "not obscene for adults" and the statute in question did not bar the defendant from "stocking the magazines and selling them to person 17 years of age or older." *Id.* at 635. This Court further reasoned that the materials defined as being "obscene" may change based upon the potential viewer of the material and this Court held that the statute did not "invade . . . the area of freedom of expression constitutionally secured to minors." *Id.* at 637. This Court concluded that the New York statue was constitutional because there was a rational relation between the legitimate governmental interest in safeguarding minors from harm and "defining obscenity of material on the basis of its appeal to minors under 17." *Id.* at 643.

This Court in *Ginsberg* did not address the central issue before the Court today. The New York Statute did not place any burdens upon adults attempting to purchase pornographic magazines. *Id.* at 641–43. The rational-basis review that was employed by this Court focused upon whether sexually explicit material that, while not obscene to adults, may be regulated as obscene when sold to minors. *Id.* The provisions of Rule ONE and the decision of this Court are highly distinguishable from those of *Ginsberg* and, as such, there is no reason that Rule ONE should be subject to the same rational-basis review given to the New York legislature in 1968. *Id.*

Unlike *Ginsberg*, which merely banned knowing sales of sexual materials to minors, Rule ONE requires every "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website" to verify the user's age before granting access. 390 U.S. at 632; 55 U.S.C. § 2(a). The Fourteenth Circuit misinterprets *Ginsberg* to say that "the Government [may] restrict children's access . . . on a rational-basis review even where such restrictions may inconvenience an adult's lawful . . . access." *KISA*, 345 F.4th at 8. Not so. In *Ginsberg*, the New York statute did not add any *additional* burden to adults attempting to purchase magazines

containing sexually explicit material. 390 U.S. at 641–43. Furthermore, this Court in *Ginsberg* merely concluded that obscenity may differ when being sold or distributed to a minor, but this Court did not analyze the impact the New York statute would have upon an adult's ability to purchase constitutionally protected material. *Id.* Indeed, this Court acknowledged that the New York statute being analyzed in *Ginsberg* did not "bar the appellant from stocking the magazines and selling them to persons 17 years of age or older." *Id.* at 635. Here, Rule ONE adds additional burdens and requirements that legitimately hinder an adult's ability to access and view materials under full protection of the First Amendment. 55 U.S.C. § 2(a). Requiring adults to provide sensitive personal information to websites when there are documented "instances where seemingly safe websites, such as hospitals and schools, have been hacked and personal information was stolen" creates an additional hurdle that was not discussed by this Court nor presented by the New York statute discussed in *Ginsberg*. *KISA*, 345 F.4th at 4; 390 U.S. at 632.

Therefore, this Court should not be required to review Rule ONE's broad stipulations to both adults and minors under a rational-review basis when *Ginsberg*, by mere implication, only analyzed the Government's ability to freely regulate an act where sexual materials were knowingly and intentionally distributed directly to minors.

3. <u>This Court applied strict scrutiny review in multiple cases involving laws furthering the protection of children against exposure to sexual materials.</u>

This Court should follow *Reno*, *Ashcroft II*, *Playboy*, and *Sable* and hold that strict scrutiny is the proper standard when analyzing a content-based regulation of speech concerning sexual material and a minor's ability to access such material. Both *Reno* and *Ashcroft* dealt with strikingly similar statutes to Rule ONE, the Communications Decency Act (CDA) and the Child Online Protection Act (COPA), respectively. 521 U.S. at 874; 542 U.S. at 673. *Playboy* applied strict scrutiny to an act requiring cable companies to block or limit signals for sexually explicit

programming when there was a risk of children viewing the material and *Sable* dealt with a similar act imposing an outright ban on sexually explicit phone messages created because Congress could not properly screen callers under 18 years of age. 529 U.S. at 803; 492 U.S. at 199.

In *Reno*, this Court held that the CDA was unconstitutional because it acted as a blanket restriction on speech and violated First Amendment protections. 521 U.S. at 885. In that case, Congress was attempting to protect minors from exposure to sexually explicit material on the Internet. *Id.* at 855. This Court reasoned that the CDA "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and address to one another" and was therefore a content-based restriction on speech subject to utilizing the least restrictive means possible. *Id.* at 874. This Court ultimately held that the CDA was a blanket restriction on speech and failed to meet constitutional muster under a strict scrutiny standard. *Id.* at 879.

The Fourteenth Circuit attempts to utilize this Court's analysis of the CDA in *Reno* to justify the use of *Ginsberg* and rational-basis review. *KISA*, 345 F.4th at 9. The Fourteenth Circuit highlights the differences between the New York statute in *Ginsberg* and the CDA, namely that the CDA "(1) did not permit parental consent, (2) extended past commercial transactions, and (3) prohibited some material that was simply not obscene for minors." *Id.* This analysis is disingenuous because the CDA and Rule ONE have strikingly similar characteristics. Rule ONE requires that commercial entities "*including* a social media platform" will be subjected to age-verification processes. 55 C.F.R. § 2 (emphasis added). This provision of Rule ONE mirrors the CDA in extending beyond commercial transactions, as social media platforms like X, Reddit, and Instagram—despite not requiring paid subscriptions or purchases—would still fall under its scope if more than 10% of their content includes "sexual material harmful to minors." *Id.* Additionally, requiring age verification on these social media sites and banning minors from viewing *any*

material on these sites would make Rule ONE analogous with the CDA in prohibiting material that is not obscene for minors.

Here, the Fourteenth Circuit claims that today's more accurate age-verification technology undermines *Reno*'s rationale. *KISA*, 345 F.4th at 9. Unlike *Reno*, where this Court found technology to screen minors would hinder adults' access to sexual material, here the Fourteenth Circuit claims that requiring government ID's is highly effective at verifying age. 521 U.S. at 885; *Id.* However, this argument overlooks the double-edged sword of modern tools: VPNs and similar services allow minors (or anyone) to bypass age verifications with ease. *KISA*, 345 F.4th at 4–5. That reality cannot justify reverting to *Ginsberg*'s rational-basis approach, especially when considering how easily minors can bypass Rule ONE. 390 U.S. at 632.

In *Ashcroft*, this Court held that COPA was unconstitutional under strict scrutiny because it was not narrowly tailored. 542 U.S. at 673. In that case, COPA was an attempt by Congress to make the Internet safe by employing filtering software as a method to prevent minors from viewing pornography. *Id.* at 666. COPA included a provision allowing a person to escape conviction if it could be demonstrated they "accept[ed] a digital certificate that verifies age." *Id.* at 661. Additionally, the proposed filtering software was "unambiguously found [to be] more effective than age-verification requirements" by a commission created by Congress in COPA itself. *Id.* at 667. Despite these findings, this Court still reasoned that filter software was not the least restrictive means for preventing minors from viewing pornography because adults may be hindered from gaining access to speech that they have a constitutionally protected right to see. *Id.* This Court further reasoned that content-based prohibitions must not be overly restrictive as these prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Id.*

at 660. Ultimately, this Court remanded for a preliminary injunction to be granted against COPA. *Id.* at 673.

The Fourteenth Circuit argues that *Ashcroft* is not persuasive because this Court was "not asked whether strict scrutiny was the proper standard." *KISA*, 345 F.4th at 9. However, in *Ashcroft*, this Court had no reason to question whether COPA was subject to rational-basis review rather than strict scrutiny as the act on its face was a content-based restriction on constitutionally protected speech. 542 U.S. at 673. Here, like in *Ashcroft*, Rule ONE is a content-based restriction on speech on its face. 55 C.F.R. § 2(a). For this reason, *Ashcroft* should still be considered when weighing the proper standard of review for Rule ONE.

Playboy confirms that a law regulating adult content to protect minors is subject to strict scrutiny. 529 U.S. at 813. There, Section 505 of the Telecommunications Act required cable operators to scramble adult channels at certain hours—leading this Court to conclude that *any* content-based speech restriction hinging on viewers' sensibilities must be narrowly tailored. *Id.* at 806, 813. This Court justified a strict scrutiny standard of review because "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Id.* at 814. This Court concluded that "special consideration or latitude is not accorded to the Government merely because the law can somehow be described as burden rather than outright suppression" and Section 505 was held to have violated the First Amendment. *Id.* at 827.

Here, the Fourteenth Circuit emphasized that the Government should be afforded rational-basis review as it has a compelling interest in protecting children. This would allow the Government to heavily regulate the distribution of sexual materials under Rule ONE. *KISA*, 345 F.4th at 7. However, this contradicts the notion established in *Playboy* that strict scrutiny is the

appropriate standard for a content-based restriction on speech even if the objective of the regulation or statute is to shield children from sexual materials. 529 U.S. at 814. *Playboy* highlights that the purpose and design of a statute "to regulate speech by reason of its content" outweighs the governmental intent behind the law. *Id.* at 826.

Finally, in *Sable*, this Court held that Section 223(b) of the Communications Act of 1943 unconstitutionally banned indecent telephone messages. 492 U.S. at 131. This Court reasoned that the Government had a serious and compelling interest in preventing minors from being exposed to indecent telephone messages. *Id.* Furthermore, this Court reasoned that despite having a compelling interest, the total ban on indecent commercial telephone communications would result in creating a heavy burden upon adults that were attempting to access constitutionally protected speech. *Id.* at 128. For this reason, this Court held that § 223(b) was a content-based restriction of constitutionally protected speech and was subject to strict scrutiny review. *Id.* at 126.

Here, like in *Sable*, the Government does have a compelling interest in protecting minors from exposure to sexual material. *Id.* However, this Court should use the same line of reasoning as in *Sable*; a burden upon adults to access constitutionally protected speech warrants strict scrutiny. *Id.* at 128. Here, Rule ONE creates an additional burden—age-verification with sensitive personal information—upon adults attempting merely to *access* constitutionally protected speech. 55 C.F.R. § 2(b). This Court should look to the reasoning in *Sable* to extend the same treatment to Rule ONE and hold it is a content-based restriction requiring strict scrutiny review. 492 U.S. at 126.

These cases are a sample of precedent laid down by this Court. While *Ginsberg* may be a case that tackles an adjacent issue, whether the definition of obscene material may change when children or minors are involved, this Court should follow *Reno*, *Ashcroft II*, *Playboy*, and *Sable*

and apply strict scrutiny to review Rule ONE. Like the numerous statutes addressed in prior rulings, Rule ONE is a content-based restriction of speech and creates an additional burden on adults attempting to access constitutionally protected materials. 55 C.F.R. § 2–3. Additionally, despite the Government possessing a compelling interest to protect children that promulgated the legislation in question in *Reno*, *Ashcroft II*, *Playboy*, and *Sable*, this Court still utilized strict scrutiny. This Court should continue to rely on precedent regarding Rule ONE and hold that there is no need to consider "the Government's justifications or purposes for enacting the [regulation] to determine whether it is subject to strict scrutiny." *Reed*, 576 U.S. at 165.

4. Rule ONE fails under strict scrutiny.

Rule ONE implements an underinclusive and overly restrictive regulation upon "any commercial entity that knowingly and intentionally publishes and distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a). This content-based regulation is only constitutional under strict scrutiny if the Government can show that the law is narrowly tailored towards advancing a compelling governmental interest. *Sable* at 492 U.S. 126. A law is considered narrowly tailored when no less restrictive means exist that would accomplish the compelling Government interest. *Id.* Governments may have a legitimate, or even a compelling, interest in safeguarding minors from obscene material on the internet, but "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id*; *Reno*, 521 U.S. at 866.

The Fourteenth Circuit claims that *Free Speech Coal., Inc. v. Paxton* allows the government free reign to regulate "the distribution to minors of materials obscene for minors." 95 F.4th 263, 269 (5th Cir. 2024). This analysis is flawed because first, *Paxton* has been granted certiorari by this Court and has not reached a final judgment, and second, it ignores the additional burdens

imposed on constitutionally protected speech for adults, as well as the deficiencies in Rule ONE's implementation. *Id.* Admittedly, the Government's interest in safeguarding minors from harmful sexual material is undoubtedly compelling. *Sable* 492 U.S. at 126. However, Rule ONE is not "narrowly tailored" as it does not effectively target all avenues through which minors might encounter explicit content. For instance, it leaves certain platforms and social media outlets beyond its purview, despite those sites featuring an equally large volume of sexual material that minors can easily access. *KISA*, 345 F.4th at 8. At the same time, Rule ONE is over-inclusive and restricts adult access to vast amounts of otherwise lawful speech merely because the site exceeds a ten-percent threshold for content deemed "harmful to minors." 55 C.F.R. § 2(a). By covering such a broad range of speech—much of which is protected for adults—Rule ONE goes beyond what is necessary to advance the stated goal.

Rule ONE's enforcement scheme compounds these problems by empowering KISA to fine violators up to $100,000 per day and assess $250,000 for each minor's access. 55 C.F.R. § 4(b). But websites hosting billions of user-generated posts—like Reddit or Instagram[1]—change content by the minute, making it impossible to track precisely whether "more than one-tenth" of that content is harmful to minors at any given time. *ACLU v. Gonzalez*, 478 F.2d 775, 788 (E.D. Pa. 2007). Attempting to enforce Rule ONE thus wastes judicial and administrative resources on a constantly shifting target while punishing lawful sites that cannot keep pace with never-ending user uploads.

[1] Makai Macdonald, *The Impact of Instagram: 50 Statistics You Should Know in 2024*, PROD. LONDON (Feb. 19, 2024), https://productlondondesign.com/the-impact-of-instagram-50-statistics-you-should-know-in-2024/.

Even though the government may legitimately protect children from harmful materials online, constitutional strict scrutiny does not end with a showing of compelling interest; the law must also be narrowly tailored to not unduly burden lawful adult expression. *Ashcroft*, 542 U.S. at 673. A statute is underinclusive when it fails to address comparably harmful content that minors can readily access elsewhere, suggesting the regulation was not finely drawn to meet its objective. It is overinclusive when it denies adults a substantial amount of protected speech or compels them to divulge sensitive information that is unnecessary to achieve the law's child-protection aim. *Reno*, 521 U.S. at 874; *Counterman*, 600 U.S. 66, 75. Rule ONE suffers from both defects, rendering its broad, content-based net unconstitutional even considering the government's important interest. Furthermore, the district court accepted two more narrowly tailored options to Rule ONE that PAC offered: "(1) requiring Internet providers to block content until adults "opt out" and (2) 'content filtering' that places adult controls on children's devices." *KISA*, 345 F.4th at 15. The Fourteenth Circuit did not consider either of these less intrusive options.

For the foregoing reasons, there is a "substantial likelihood of success on the merits" and a preliminary injunction should be granted to prevent Rule ONE from abrogating First Amendment protections. *Garland*, 75 F.4th at 577.

IV. CONCLUSION

Because KISA, a private entity composed of industry members, is delegated sweeping regulatory and enforcement powers and violates the private nondelegation doctrine. Additionally, because Rule ONE is not narrowly tailored and fails under the requisite strict scrutiny standard for a content-based restriction on free speech protected by the First Amendment this Court should reverse the Fourteenth Circuit Court's ruling and grant the preliminary injunction to enjoin the operation of Rule ONE.

APPENDIX

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

SECTION 1. DEFINITIONS

(1) "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.

(2) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.

(3) "Minor" means an individual younger than 18 years of age.

(4) "News-gathering organization" includes:

(A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source;

(B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment;

(5) "Publish" means to communicate or make information available to another person or entity on a publicly available Internet website.

(6) "Sexual material harmful to minors" includes any material that:

(A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;

(B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:

(i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

SECTION 2. PUBLICATION OF MATERIALS HARMFUL TO MINORS.

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

as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

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

SECTION 3. REASONABLE AGE VERIFICATION METHODS.

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using:

(1) government-issued identification; or

(2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual

SECTION 4. CIVIL PENALTY; INJUNCTION

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

(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 2(b); and

(3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

(5) the entity's knowledge that the act constituted a violation of this chapter; and

(6) any other matter that justice may require.

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

SECTION 5. APPLICABILITY OF THIS RULE.

(a) This Rule does not apply to a bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.

(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a

cloud service provider may not be held to have violated this Rule solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.

FROM TITLE 55 OF THE UNITED STATES CODE ("KEEPING THE INTERNET SAFE FOR KIDS ACT")

U.S.C. SECTION 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" (the "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 by a Board of Directors ("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 represent 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 as described in subsection (b)(1)(A).

(3) Bylaws. The Board shall establish bylaws governing the operation of the Association, including:

(i) The administrative structure and employees of the Association; (ii) The establishment of standing committees; (iii) Procedures for filling vacancies on the Board and standing committees; term limits for members; and termination of membership; (iv) Any other matters deemed necessary by the Board.

(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 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 representing various technological constituencies, with no more than one industry member from any one constituency.

(iii) Qualification. A majority of members shall have significant, recent experience in law enforcement and computer engineering.

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

(2) Computer Safety Standing Committee.

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

(B) Membership. The 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 representing various technological constituencies.

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

(d) Nominating Committee.

(1) Membership.

(A) In General. The nominating committee shall be comprised of seven independent members selected from business, sports, and academia.

(B) Initial Membership. The initial nominating committee members shall be appointed as set forth in the governing corporate documents of the Association.

(C) Vacancies. Subsequent 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 its members.

(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 vacancies on the Board or standing committees.

(e) Conflicts of Interest. Persons with a present financial interest in any entity regulated under this Act 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 prior to the program effective date shall be provided by loans obtained by the Association.

(B) Borrowing. The Association may borrow funds for its operations.

(C) Annual Calculation of Amounts Required.

(i) In General. Not later than 90 days before the program effective date, and annually by November 1 thereafter, the Association shall determine and notify each technological company engaged in internet activity or business of the amount of contribution or fees required.

(ii) Assessment and Collection. The Association shall assess and collect fees according to its promulgated rules.

(iii) Remittance of Fees. Technological companies shall remit fees as required by the Association.

(2) Fees and Fines. Fees and fines imposed by the Association shall fund the Association's activities.

(3) Rule of Construction. Nothing in this chapter shall be construed to require:

(A) Federal Government appropriation of funds to the Association; or

(B) Federal Government guarantee of the Association's debts.

(g) Quorum. A majority of independent members must be present for Board approval of any items.

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

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.

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;

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.