**NO. 25-1779**

---

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**FEBRUARY TERM 2025**

---

**PACT AGAINST CENSORSHIP**

***Petitioner,***

**v.**

**KIDS INTERNET SAFETY ASSOCIATION, INC.**

***Respondent.***

---

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

---

# BRIEF FOR PETITIONER

---

**TEAM 5**

***Counsel for Petitioner***

## TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

*Page(s)*

**UNITED STATES SUPREME COURT CASES:**

**UNITED STATES CIRCUIT COURT OF APPEALS CASES:**

**CONSTITUTIONAL AND STATUTORY PROVISIONS:**

## QUESTIONS PRESENTED

I. Whether the private nondelegation doctrine prohibits Congress from empowering a self-regulated private entity to enforce internet access rules for minors through investigative authority, civil penalties, and injunctive relief—all without meaningful input from the FTC.

II. Whether Rule ONE's age verification requirement violates adults' First Amendment right to receive protected speech by forcing them to upload government-issued identification before accessing websites where just one-tenth of the content consists of sexual material harmful to minors.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but appears on pages 1–10 of record. The district opinion for United States District Court for the District of Wythe is unreported.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This case involves several provisions of the Constitution: Article I Section I, Article II Section I Clause I, Article II Section II, and Article III Section I. These statutory provisions are reprinted in Appendix A. This case also involves the First Amendment of the Federal Constitution, which is reprinted in Appendix A.

The following statutes are relevant to this case: 15 U.S.C. §§ 77a–78rr; 15 U.S.C. § 3053; 20 U.S.C. § 1098bb(a)(1); 55 U.S.C. § 3052–3058; These statutes are reprinted in Appendix B.

The following provisions of the Code of Federal Regulations are relevant to this case: 55 C.F.R. § 1–5. These provisions are reprinted in Appendix C.

## STATEMENT OF THE CASE

This case concerns important delegation of powers and First Amendment questions. Petitioner, Pact Against Censorship, ("PAC")—the largest trade association for the American adult entertainment industry—brought this appeal, as a last resort to protect the liberty of the American people. R. at 4.

### I. STATEMENT OF FACTS.

***Legislation by Congress*.** Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), which has been in effect for the last two years. R. at 2. KISKA was passed in response to public criticism that the government was doing too little to protect children from obscene material on the internet. R. at 2. In response to this criticism, Congress delegated their responsibility to Respondent—a private, independent, self-regulatory nonprofit corporation—the Kids Internet Safety Association, Inc. ("KISA"). R. at 2.

***Enforcement by Agency*.** In this transfer of power, Congress enabled KISA to make rules regulating the Internet industry as it relates to child access and safety. R. at 3. Every member of KISA's organization is chosen by the nominating committee or the board of directors. 55 U.S.C. § 3052(b)(2). All of whom are private actors from business, sports, academia or the various technological industries. 55 U.S.C. § 3052(b)(2). More importantly, Congress gave KISA the unfettered power to enforce its rules through civil action, injunctive relief, and other investigatory powers. R. at 3. The only restriction imposed on KISA's enforcement power is through the Federal Trade Commission (the "FTC"), who can review any enforcement action that KISA brings before an administrative law judge (an "ALJ"). R. at 3. It is noteworthy, that since KISA has been in power, the FTC has chosen to review KISA's enforcement decisions once. And decided not to

take any action. R. at 3.

***Rule One Enforced***. While in power, KISA passed Rule ONE. R. at 3. This regulation requires certain websites to use age verification methods to verify that only adults access explicit material. R. at 3. Rule ONE applies to any commercial entity that knowingly and intentionally publishes and distributes material on an Internet website that is sexual material harmful to minors. R. at 4. The content covered by Rule ONE includes significant amounts of non-objectionable material. R. at 4. Any violators of the rule are subject to the following disciplinary actions, enforced by KISA: (1) up to $10,000 of fines per day of noncompliance and (2) up to $250,000 for every time a minor has access to a site because of a site's noncompliance. R. at 4.

***The Public Reaction***. Despite Rule ONE's intrusive methods to stop Internet access to sexual materials, experts have found that children can easily bypass security measures. R. at 4–5. In fact, in 2022 a six year old child spent over $16,000 on internet filtering and blocking software. R. at 5. Rule ONE also changed the behavior of adults. R. at 4. Specifically, Jane and John Doe, like many other Americans, stopped visiting sites that required such intrusive identifying information. R. at 4. And for good reason; there have been number of instances where seemingly safe websites are hacked, and personal information is stolen. R. at 4. Even though there is nothing wrong with viewing adult content, American adults are fearful of receiving backlash from their communities. R. at 4.

## II. NATURE OF PROCEEDINGS.

***The District Court***. On August 15, 2023, PAC filed suit in the United States District Court for the District of Wythe to permanently enjoin KISA's operation and Rule ONE's enforcement. R. at 5. PAC alleges two Constitutional violations: first, that Congress violates the private

nondelegation doctrine because KISKA grants unchecked power to KISA, and second, that the age verification requirement violates adults' First Amendment rights. R. at 2. PAC and KISA stipulate to all the preliminary injunction factors except whether PAC demonstrated a "substantial likelihood of success on the merits." R. at 6. The District Court for the District of Wythe held that KISA did not violate the private nondelegation doctrine. R. at 5. But the district court granted the preliminary injunction against KISA because Rule ONE chilled more speech than necessary. R. at 5. PAC appealed the nondelegation ruling and KISA cross-appealed the First Amendment ruling. R. at 5.

***Fourteenth Circuit Court of Appeals***. The Court of Appeals for the Fourteenth Circuit affirmed the district court's nondelegation decision and reversed the First Amendment decision, both in favor of KISA. R. at 10. The circuit court remanded the case to the district court with an order to vacate the preliminary injunction. R. at 10. Circuit Judge Marshall filed a dissenting opinion, arguing that Congress cannot allow a private entity to lord the powers of the government without any supervision. R. at 10. PAC appealed, and the United States Supreme Court granted certiorari. R. at 21.

## SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erred in vacating the preliminary injunction. PAC established a likelihood of success on the merits of its claim that KISA's enforcement powers are unconstitutional under the private non-delegation doctrine and that Rule ONE violates the First Amendment.

### I.

The Fourteenth Circuit erred in failing to find a violation of the private non-delegation

doctrine. There is an unconstitutional exercise of federal power if a private entity is empowered to exercise unchecked legislative or executive authority. When it comes to executive authority, the power to enforce rules, this Court has always been stringent with who can wield such potent power. This Court has held that the Federal Constitution allows only "Officers of the United States", those "in" power, to exercise executive authority.

Yet, if this Court rules in favor of KISA today, a self-regulated private entity, that is unimpeachable and unelected, will be allowed to investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the input of the federal government. Even in the context of legislative authority, where delegations of rulemaking power have generally been held as constitutional, this Court has been unwilling to allow delegation when the transfer of power is to private persons whose interests may be adverse to the interests of others in the same business.

KISA's enforcement powers violate the private nondelegation doctrine because it has sole enforcement power under KISKA. Under the current division of labor in KISKA, KISA's enforcement decisions are effectively unreviewable by the FTC because the FTC only has the right to review final adjudication decisions. KISA can start investigations, subpoena records, and levy injunctions to get settlements all without input from the FTC. The FTC cannot subordinate KISA's enforcement decisions through its rulemaking power because, as this Court has held, the right to "modify" has limits. A federal agency cannot alter the structural division of labor by Congress. Finally, this Court should also reverse the Fourteenth Court of Appeals and reinstate the injunction against KISA because KISKA's statutory scheme does not analogize to any other valid statutory schemes.

This exceeds Congress' power to delegate. This Court should reverse the court of appeals' judgment because Congress violated the private non-delegation doctrine in enacting KISKA.

## II.

The Fourteenth Circuit erred in applying rational basis review to Rule ONE. Rule ONE invokes strict scrutiny review. PAC's First Amendment claim must be reviewed under strict scrutiny because Rule ONE expressly discriminates against content and speaker. Content-based regulations on protected speech are subject to strict scrutiny because of the danger regarding overbreadth. Although obscene material is generally not afforded First Amendment protection, there are different obscenity standards for minors and adults. Rational basis does not apply here because Rule ONE broadly restricts adults from seeing material that is obscene to a minor, but not obscene to an adult. If this Court used rational basis here, it would disregard decades of precedent establishing strict scrutiny as the correct standard for laws that aim to restrict minors' rights but result in burdening adults' rights.

Rule ONE fails strict scrutiny review. Moreover, strict scrutiny applies because Rule ONE regulates all "sexual material harmful to minors," a type of speech that lends itself to overinclusivity. Here, speaker discrimination is more egregious than content discrimination. Rule ONE discriminates against speakers by allowing minors and adults to view explicit material on search engines and news broadcasts but barring them from viewing that same explicit material on websites like PAC's. Rule ONE ultimately fails strict scrutiny because it restricts more speech than what is obscene to a minor, is not the least restrictive means to achieve KISA's goal and allows minors to view explicit material on certain distinguished websites.

This Court should reverse the Fourteenth Circuit's judgment because Rule ONE implicates and fails strict scrutiny.

## ARGUMENT AND AUTHORITIES

***Standard of Review.*** This Court reviews a district court's conclusions of law *de novo*. *See USA, Inc. v. Sandoz, Inc*., 574 U.S. 318, 328 (2015) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995)). The abuse of discretion standard applies to a review of a preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). To earn a preliminary injunction, the district court must consider whether a plaintiff demonstrates that they are likely to prevail on the merits. *Doran v. Salem Inn, Inc*., 422 U.S. 922, 931 (1975). Granting a preliminary injunction is not an abuse of discretion if the record provides "a number of plausible, less restrictive alternatives to [a] statute." *Ashcroft*, 542 U.S. at 666. Even when the underlying constitutional question is close, this Court should uphold the injunction and remand for a trial on the merits. *Id*. at 664.

Though the Fourteenth Circuit affirmed and reversed the District Court for the District of Wythe in favor of KISA on both questions, this Court should reverse in favor of PAC after finding that (a) KISA's enforcement power violates the private nondelegation doctrine because the FTC's powers to review and modify are inadequate to hold KISA accountable, and (b) Rule ONE violates the First Amendment because it burdens adults' rights to protected speech.

### I. CONGRESS' DELEGATION OF ENFORCEMENT POWER TO KISA VIOLATES CONSTITUTIONAL LIMITS ON PRIVATE DELEGATION.

The Federal Constitution separates the powers of the National Government into three branches. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). Legislative power is vested in Congress, the executive in the President, and the judicial in the federal courts. U.S.

Const. art. I, § 1; id. art. II, § 1; id. art. III, § 1. Indeed, the Federal Constitution, by careful design, prescribes a process for making and enforcing law, and with that process there are many accountability checkpoints. *Dep't of Transp. v. Ass'n of Am. Railroads* ("Amtrak"), 575 U.S. 43, 61 (2015) (Alito, J., concurring). Given that those who govern the People ***must be accountable*** to the People. *United States v. Arthrex, Inc.*, 594 U.S. 1, 27 (2021). Thus, completely transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn. *Oklahoma*, 62 F.4th at 228.

The private nondelegation doctrine holds that if a private entity is empowered to exercise unchecked legislative or executive authority, then there is an unconstitutional exercise of federal power by private actors. *Oklahoma*, 62 F.4th at 229; *see Carter v. Carter Coal*, 298 U.S. 238, 311 (1936) (differentiating between producing coal and regulating its productions because former is a private activity, and latter is necessarily a governmental function). Federal power includes not only the power to make rules—legislative authority—but also the power to enforce those rules—executive authority. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 429–30 (5th Cir. 2024). Just as it does legislative authority, the private nondelegation doctrine forbids unaccountable delegations of executive authority. *Amtrak*, 575 U.S. at 62 (Alito, J., concurring). Thus, private entities cannot wield executive power—which belongs solely to the President. Art. II, § 1, cl. 1; *see Buckley v. Valeo*, 424 U.S. at 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]") (superseded by statute).

However, a delegation of federal authority may survive a private nondelegation challenge only if the private entity, in the exercise of its enforcement power, is subordinate to a federal

actor. *Oklahoma,* 62 F.4th at 229; *see Black,* 107 F.4th at 423. Here, the delegation would only be constitutional if, when enforcing KISKA, the private entity, KISA, acts as an aid to the FTC which retains the discretion to approve, disapprove or modify KISA's enforcement actions. But the FTC is not given such discretion. Rather, Congress only grants the FTC the power to approve, disapprove or modify the rules enacted by KISA. 55 U.S.C. § 3053(e). Further, KISA's enforcement decisions are effectively unreviewable. And the FTC is limited in its rulemaking and modifying power. Therefore, KISA's enforcement power is unconstitutional, and this court should reverse because KISKA allows a private entity to investigate violations of federal law, and file suit for both sanctions and injunctive relief.

### A. The Keeping the Internet Safe for Kids Act Unconstitutionally Delegates Federal Law Enforcement Power to a Private Entity.

The power to launch an investigation, to search for evidence, to sanction, to sue—these are all typical executive functions. *Black,* 107 F.4th at 428–29. And they have been considered so from this Nation's founding. *Id.* Yet, the text of KISKA plainly grants enforcement power to KISA, a private entity. In contrast, KISKA only grants the FTC backend review of KISA's enforcement decisions. Thus, KISA is made up of private actors wielding state power without any input from the government. 55 U.S.C. § 3052(b)(2)(A). KISA is self-regulated. *Id.* KISA hires its own members, fires its own members, and replaces its own members. *Id.* There is no public accountability when it comes to the make-up of KISA.

More importantly, there is no public accountability for KISA's enforcement decisions. Under KISKA, KISA is responsible for (1) investigating potential violations, including issuing subpoenas (§ 3054(h)); (2) levying sanctions (§§ 3054(j)(1), 3057(b), 3058(a)); and (3) bringing suit against violators for injunctive relief or to enforce sanctions (§ 3054(j)). In fact, at times KISA

has the power to delegate its executive authority to other private actors. 55 U.S.C. § 3054(e). All of these actions represent enforcement power, and, by the plain terms of the Act, they can be done by KISA and other private entities without any involvement or supervision from the FTC. Hence, there is no accountability.

A private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the input of the federal government—is not subordinate. *Black,* 107 F.4th at 429–30. Rather, with respect to enforcement, KISKA's plain terms show that KISA does not merely act "as an aid" to the FTC because the FTC has no discretion to approve, disapprove, or modify KISA's enforcement actions. *Black,* 107 F.4th at 430. Even in the context of legislative authority, where generally delegations of rulemaking power have been upheld, this Court had no problem striking delegations to private actors whose interests "may be and often are adverse to the interests of others in the same business". *Carter*, 298 U.S. at 311.

In contrast, this Court has upheld Congress' delegation of executive authority to the Amtrak under the supervision of the Federal Railroad Administration ("FRA"), a division of the United States Department of Transportation ("DOT"). *Amtrak,* 575 U.S. at 53. Because unlike KISA—a private entity that is self-regulated by hiring, firing, and replacing its own members—Amtrak is not an autonomous private enterprise. 55 U.S.C. § § 3052(b)(1), 3052(b)(2)(A); *Amtrak,* 575 U.S. at 53. In fact, majority of Amtrak's Board is appointed by the President and confirmed by the Senate and is understood by the Executive Branch to be removable by the President at will. *Id*. This Court had no problem upholding Amtrak's enforcement power as constitutional because Amtrak was created by the Government, controlled by the Government, and operated for the Government's benefit. *Amtrak,* 575 U.S. at 53–54. But KISA cannot be analogized to Amtrak.

KISA's board of directors is chosen by KISA, fired by KISA, and replaced by KISA. *See* 55 U.S.C. § § 3052(b)(1), 3052(b)(2)(A). The unique features of Amtrak and its significant ties to the Government do not exist here. For that reason alone, this Court should hold that KISA's enforcement power is unconstitutional.

The FTC does have some power; the right to review any sanction *de novo*. 55 U.S.C. §§ 3058(b)(1), 3058(c). Technically, KISA's decisions are not final until the FTC has an opportunity to review them because KISKA gives the FTC the authority to review and overrule final adjudication decisions. R. at 7; 55 U.S.C. §§ 3058(b)(1), 3058(c). In fact, the Fourteenth Circuit ruled in favor of KISA, relying on *Oklahoma*, because the court believed KISA's adjudication decisions are not final until the FTC has an opportunity to review such decisions. R. at 7. But this power is seldom used. The FTC has exercised this right to review once, in the last two years, before deciding not to take any action. R. at 3. Once again, leading to no accountability for KISA's enforcement decisions.

Compare the FTC's limited review power to the enforcement power of the SEC under the Maloney act. Unlike in KISKA, Congress also empowered the SEC to enforce FINRA's rules. *Id.* The SEC can "in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" the Maloney Act. 15 U.S.C. § 78u(a)(1). The SEC can also, on its own accord, seek criminal sanctions, injunctive relief, or disgorgement. *Id*. §§ 78u(c), (d), (d)(4). The FTC cannot. *See* 55 U.S.C. §§ 3054(c)(1)(A)(iii), 3054(c)(2) (granting KSIA investigatory power) (granting FTC veto power over rules enacted by KISA); § 3054(e)(a) (granting KISA and non-profit child protection organizations enforcement responsibility).

The SEC has the power to issue subpoenas, *see* §§ 77s(c), 78u(c), while KISKA gives KISA that power, § 3054(h), (c)(ii). The SEC can also revoke FINRA's ability to enforce its rules, § 78s(g)(2), and step in and enforce any written rule itself, § 78o(b)(4). KISKA gives the FTC none of these tools. The SEC alone has the power to bring civil suits, §§ 78u-1(a), 78u(d)(1), **while KISKA gives that power exclusively to KISA**, § 3054(j)(1). As the Fifth Circuit held, giving a private entity the sole power to sue in federal court to enforce a statute cuts to the core of executive power. *Black*, 107 F.4th at 434–35. And as this Court held, five decades ago, the Federal Constitution entrusts only in the President the responsibility to bring lawsuits as the remedy of a breach of federal law. *Buckley*, 424 U.S. at 138.

Moreover, the FTC's right to review KISA's enforcement decisions do not negate the delegation of executive authority to KISA. This delegation is unconstitutional because the Federal Constitution allows only those "in" whom the Constitution has vested power to exercise that power. *See* U.S. Const. art. I, § 1; art. II, § 2; art. III, § 1. Private actors are not "in" power because they are not elected by the people of this country. And cannot be held accountable for wielding government power. Neither can KISA, whose organization only includes private actors. 55 U.S.C. § 3052(b)(1)(B). The ability to reverse KISA's enforcement decisions is not enough control to prevent the private party from abusing its power because up to that point KISA has already exercised several enforcement decisions without any input from the FTC. R. at 11**;** *Black*, 107 F.4th at 435.

KISKA's explicit division of enforcement responsibility empowers KISA with executive authority and gives the FTC limited oversight until after enforcement has already occurred. This backend review by the FTC does not subordinate KISA. And therefore, KISA's enforcement

power is unconstitutional.

### B. The FTC's Oversight Powers Cannot Salvage the Unconstitutional Delegation of Enforcement Authority to KISA, a Private Entity.

KISA's enforcement power is unconstitutional because it is able to enforce—without any input from the FTC—rules related to minor access to the internet through liberal investigation powers, imposition of civil actions for sanctions and for injunctive relief. This same statutory division of labor is also seen in the Horseracing Integrity and Safety Act ("HISA"). R. at 6. Three circuits have addressed whether giving sole enforcement power to a private entity, Horseracing Integrity and Safety Association ("Association"), is constitutional under the private nondelegation doctrine. *Black,* 107 F.4th at 435 (finding HISA's statutory scheme unconstitutional because FTC's ability to hold Association accountable can only happen in reviewing private parties actions), *cf. Oklahoma,* 62 F.4th at 231 (upholding statutory scheme as constitutional because FTC can subordinate every aspect of enforcement through rulemaking), *Walmsley v. Federal Trade Comm'n*, 117 F.4th 1032, 1039 (8th Cir. 2024) (upholding statutory scheme because FTC's rulemaking power gives it pervasive oversight and control).

This Court should answer the circuit split in favor of PAC. And this Court should hold that the Federal Trade Commission's powers to review KISA's final adjudication decisions and right to modify KISA's rules are not enough to subordinate and hold KISA accountable for its enforcement actions.

#### 1. The FTC's backend review process is ineffective at holding KISA accountable, as KISA can enforce rules regarding minors' internet access without FTC oversight or input.

Private entities cannot wield government power without the supervision of a government agency. *Oklahoma,* 62 F.4th at 229. The Sixth Circuit in *Oklahoma* believed that the private entity

was using executive authority but being held accountable because the FTC retained the right to review the final adjudication decisions made by the private entity. *Oklahoma*, 62 F.4th at 231. But this optional final review by the FTC does not negate that the private entity, up until the final adjudication decision, has already wielded government power without any supervision.

The Fifth Circuit illustrates this point best. Imagine a city delegated to a group of private car enthusiast the power to enforce speeding laws by monitoring speeds with their own radar guns, pull speeders over, and ticket them. *Black*, 107 F.4th at 431. Ultimately, the final decision to fine for a violation is reviewed by the police department or the mayor. *Id*. But this backend review does not change the fact that it was the group of private individuals that enforced the city's speeding laws. *Id.* (finding HISA's statutory scheme unconstitutional).

The same conclusion is true here. R. at 6 (KISKA is "nearly identical" to HISA). Under the basic structure of KISKA, KISA has the exclusive power to enforce Rule ONE. Not the FTC. Here, executive authority is in the hands of private, unelected, and unimpeachable individuals. 55 U.S.C. § 3052(b)(1). And the FTC's backend review is not enough oversight[1] to subordinate KISA because the private entity is permitted to exercise government authority without any input from a government agency. *Black*, 107 F.4th at 431. KISKA's statutory scheme is unconstitutional because it delegates executive authority solely to a private entity. 55 U.S.C. §§ 3054(h), 3054(j). And this private entity is not held accountable for its enforcement decisions because it has the power to—without consulting the FTC once—launch an investigation into an internet company, subpoena records, search offices, file an injunction, and fine any violators. *Id*. Each of these

[1] The FTC has never reversed a final adjudication decision made by KISA. The FTC has reviewed KISA's final adjudication decision once since KISKA was enacted. R. at 3.

actions are enforcement mechanisms used by KISA. Each of these actions occur under KISKA without any supervision by the FTC. *Black*, 107 F.4th at 431.

The logic imposed by the Sixth Circuit and KISA falls further apart when considering a settlement scenario. If an internet company, facing a fine by KISA, opts to settle for a lower fine instead of fighting the process then, under KISA's theory, no one enforces Rule ONE. This type of settlement would not be subject to review by the FTC because there was no final adjudication decision. § 3058(c)(1). But, nevertheless, Rule ONE is being enforced because KISA can file an action in court, levy that action to achieve a settlement and do so without any input from the FTC. As this Court is aware, a private entities use of enforcement power without any accountability has always been unconstitutional. *Oklahoma*, 62 F.4th at 229 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter*, 298 U.S. at 311).

Also, KISKA gives the FTC no role in issuing permanent or temporary injunctions or restraining orders without bond. § 3054(j)(2). KISKA exclusively empowers KISA to sue internet companies to enjoin past, present, or impending violations. *See* § 3054(j)(1) (providing "KISA 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 . . . to enjoin such acts or practices, to enforce any civil sanction imposed"); § 3054(j)(2) (allowing issuance of "a permanent or temporary injunction or restraining order . . . without bond"). The FTC has no role in this process, either before or after the fact.

For the sake of argument, if the Fourteenth Circuit and KISA were correct—and they are not—that the FTC's after-the-fact supervision of final adjudication decisions subordinates KISA's enforcement power. *See* § 3058(a); R. at 7. Then, KISA remains unsubordinated when it comes

to suing violators for injunctions. *Black,* 107 F.4th at 429–30. This potent enforcement power is plainly an unsupervised delegation of executive power that the Constitution does not tolerate. *Black,* 107 F.4th at 430; *see Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]").

Also, the Fourteenth Circuit, relying on *Oklahoma*, refused to hold KISA's enforcement power as unconstitutional because the FTC can add certain pre-enforcement standards since KISKA permits the FTC to "abrogate, add to, or modify" KISA's rules. R. at 7; *see Oklahoma,* 62 F.4th at 231(finding that FTC could supervise Authority through a slightly different kind of rulemaking—that is, by issuing rules governing how Authority enforces HISA.)

But PAC is not complaining about how KISA exercises its enforcement power. PAC brings a facial challenge against KISKA. R. at 5. On its face, KISKA empowers private entities to enforce it and permits government oversight ***only after*** the enforcement process is over. *Black,* 107 F.4th at 433. As the Fifth Circuit discussed, PAC is not objecting only to overbroad subpoenas, unwarranted searches, or lack of free counsel. *Id.* (holding that perhaps such complaints can be addressed through rulemaking or as-applied challenges.) The complaint here is different. It is PAC's position that KISKA facially delegates unsupervised enforcement power exclusively to private actors. *Black,* 107 F.4th at 433–34.

KISKA's explicit division of enforcement responsibility empowers KISA with executive authority and gives the FTC scant oversight until enforcement has already occurred. Such backend review by the FTC does not subordinate KISA's enforcement power. Thus, this Court should

reverse the Fourteenth Circuit, and instead, hold that KISKA's delineation of enforcement authority to KISA and other third-party entities is unconstitutional.

**2. The FTC's rulemaking authority does not constitute adequate supervision, as federal agencies cannot alter Congress' fundamental division of regulatory authority.**

KISKA is structurally designed to grant KISA legislative and executive authority. 55 U.S.C. §§ 3054(h), 3054(j). Under the same act, FTC is only delegated legislative authority. *Id.* § 3054(b). However, the FTC's general rulemaking power provides no accountability over KISA's enforcement decisions because rulemaking cannot amend the plain division of enforcement power laid out in KISKA's text. *See Biden v. Nebraska*, 600 U.S. 477, 495 (2023) (holding that statutory permission to "modify" does not authorize "basic and fundamental changes in scheme" designed by Congress).

The Fourteenth Circuit believed that the FTC could, by rulemaking, make every enforcement action by KISA subject to FTC approval. R. at 7. However, this type of rulemaking would alter the basic and fundamental structure and scheme of KISKA. And this Court has already established, in *Biden*, that this type of modification to statutory schemes is unconstitutional. *Biden*, 600 U.S. at 496.

In *Biden*, the Secretary of State, tried to modify the Health and Economic Recovery Omnibus Emergency Solutions Act ("HEROES Act") to allow for mass student loan cancellation. *Biden*, 600 U.S. at 493. Similar to the FTC's legislative power under KISKA, the HEROES Act authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1). But this Court held that the power "to waive or modify" clearly had limits.

*Biden*, 600 U.S. at 494. This Court reasoned that the authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them. *Biden*, 600 U.S. at 495.

In fact, the term "modify" carries with it a connotation of limitation[2]. *Biden*, 600 U.S. at 495. Referring to the original meaning of the word, this Court in *Biden*, held that the term "modify" must be read to mean "change moderately or in minor fashion." *Id*. Thus, this Court held that the HEROES Act allows the Secretary of State to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up. *Biden*, 600 U.S. at 494. In other words, under the HEROES Act, the authority to "modify" statutes and regulations allowed the Secretary to make modest adjustments and additions to existing provisions, not transform them. *Id.*

The same is true here. The FTC, through its legislative authority, cannot require KISA to preclear any enforcement action because this would modify the basic and fundamental structure of KISKA. Of course, the FTC has the ability to modify, waive or abrogate the rules imposed by KISA. But when it comes to the process of enforcement, FTC cannot create jobs for itself—by requiring KISA to preclear any enforcement decisions with FTC—because enforcement authority under KISKA was given solely to KISA. Thus, the FTC through its rulemaking power is unable to subordinate KISA's enforcement power. Which is why, this delegation of enforcement power to KISA by Congress is unconstitutional. *Black*, 107 F.4th at 431.

[2] The legal definition is no different. *Biden*, 600 U.S. at 495; Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping".)

If the Fourteenth Circuit and KISA were correct in their rulemaking argument, then the FTC could rewrite the statute in its entirety. But Congress has already set out an enforcement scheme, delegating that responsibility to KISA and Non-Profit Child Protection Organizations. *See* 55 U.S. C. §§ 3054(e)(2), 3054(c)(1), 3054(e). KISKA is clear about this; KISKA empowers KISA to file suit to enjoin violations, while saying nothing about FTC involvement in the process. *Id.* § 3054(j)(1).

The Eight Circuit in *Walmsley* rejected to follow this Court's precedent in *Biden*, and instead held that the HISA's statutory scheme was constitutional because, unlike the Secretary of State's power to only "modify" under the HEROES Act, HISA's statutory scheme also gave the FTC the right to "add". *Walmsley v. FTC*, 117 F.4th 1032, 1039 (8th Cir. 2024) (reasoning that FTC would only work within Act as designed, not create a new statutory regime).

But the Eight Circuit overlooks that the plain text of the HEROES Act gave the Secretary of Education the power to waive or modify the statute itself, as opposed to the plain text of the HISA which allows the FTC to "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. § 3053(e); *Walmsley,* 117 F.4 at 1043 (Gruender, J., dissenting). Despite the fact that the HEROES Act goes even further than the HISA and KISKA in allowing the Secretary of Education to waive or modify the statute itself, this Court rejected the government's attempt to rewrite the statute. *Biden,* 600 U.S. at 493. Just as this Court held that the language "waive or modify any statutory or regulatory provision" could not authorize the kind of exhaustive rewriting of the statute that had taken place in *Biden*, here, the language "abrogate, add to, and modify the rules" of KISA cannot authorize the FTC to subordinate KISA's enforcement role when that role has been expressly granted to KISA by statute. 55 U.S. C. § 3054(a); *Walmsley,* 117 F.4 at 1043 (Gruender,

J., dissenting) (arguing that Fifth Circuit's reliance on *Biden* in *Black* was proper because allowing FTC to modify HISA would subvert text of the statute as written.)

The same is true for investigatory and subpoena power: KISKA unqualifiedly gives that power to KISA, *see* § 3054(h), and then instructs KISA to delegate it to Non-Profit Child Protection Organizations, *see* § 3054(e) (KISA is "authorized" to contract with non-profit child protection organizations to assist KISA with investigation and enforcement). Congress enacted this scheme and division of labor. The FTC cannot amend it by promulgating a rule. *Black,* 107 F.4th at 432; *see Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (refusing to defer to an agency interpretation that is inconsistent with design and structure of statute as a whole.)

Also, Congress acts intentionally and purposefully in the disparate inclusion or exclusion of a provision. *Russello v. United States*, 464 U.S. 16, 23 (1983). Specifically, this occurs when Congress includes some language in one section of a statute but omits it in another section of the same act. Thus, when Congress wanted to put the FTC in charge of enforcement, it knew how to. *Black*, 107 F.4th at 433.

For example, in Section 3054 of KISKA, with respect to a violation of false advertisements, KISA only has the power to recommend that the FTC commence an enforcement action. 55 U.S.C. § 3054(c)(1)(B). Only here did Congress choose to limit the private entity's enforcement discretion to "recommending" agency enforcement. *cf. Id*. § 3054(j)(1) (allowing private entity to commence a civil action seeking an injunction without input from FTC.) Thus, Congress, when it wanted the FTC to subordinate the private entity's enforcement power, it knew how to do so. Congress' explicit refusal to include such a provision in the rest of KISKA is clear indication to

this Court that Congress meant to grant executive authority to KISA. Resulting in a private entity having and wielding unchecked government enforcement power.

The FTC cannot work within the structure of KISKA as designed because the plain text of KISKA empowers KISA, and not the FTC, with broad enforcement power. *See Black*, 107 F.4th at 433. The FTC cannot rewrite the statutory scheme that Congress enacted. *See Id.* This Court should hold that KISA's enforcement power is unconstitutional after finding that the FTC's right to modify is limited under *Biden*.

Also, KISKA and the HISA's statutory scheme do not analogize to the Maloney Act. *See Walmsley*, 117 F.4th at 1042 (Gruender, J., dissenting) (analogizing Association and its relationship with FTC under HISA to Financial Industry Regulatory Agency ("FINRA") and Securities and Exchange Commission ("SEC") under Maloney Act). The FINRA assists the SEC in enforcing securities laws. *Black*, 107 F.4th at 433–35. In *Walmsley*, the Eighth Circuit and the Association believed that HISA was constitutional, just as the Maloney Act was, because the Maloney Act provided that the SEC "may abrogate, add to, and delete from" the rules of FINRA, 15 U.S.C. § 78s(c), and so does HISA. *See Walmsley*, 117 F.4th at 1042 (Gruender, J., dissenting); *see also Oklahoma*, 62 F.4th at 229, 232 (gathering cases) (emphasizing constitutionality of HISA by showing support in circuit cases concluding that FINRA's enforcement role presents no private nondelegation problem).

However, as the dissenting opinion in *Walmsley* points out, despite the inclusion of this single sentence in KISKA, the FTC-KISA relationship materially differs from the relationship between the SEC and FINRA. *Walmsley*, 117 F.4th at 1042 (Gruender, J., dissenting) (citing *Black*, 107 F.4th at 434–35). Indeed, the Maloney Act empowers the SEC with, among other

things, investigatory authority, 15 U.S.C. § 78u(a)(1), the power to seek criminal sanctions, injunctive relief, or disgorgement, *id*. § 78u(c), (d), and the ability to step in and enforce any written rule itself, *id*. § 78o(b)(4); *see Black*, 107 F.4th at 434–35. But KISKA gives the FTC none of these tools. 55 U.S. C. §§ 3054(e)(2), 3054(c)(1), 3054(e).

Even though Congress may have purportedly modeled KISKA using HISA, and HISA using the Maloney Act—that has been widely approved as constitutional—the inclusion of a single sentence that is similar in the HISA and KISKA alone does not make KISA's enforcement role identical or even substantially similar to the role of FINRA in the securities context. R. at 6; *Walmsley*, 117 F.4th at 1042 (Gruender, J., dissenting).

KISA's enforcement power is unconstitutional because it exclusively empowers a private entity with executive authority and gives the FTC oversight only until enforcement has already occurred. The FTC's backend review does not adequately hold KISA accountable because the private entity, up until a final adjudication decision, is allowed to wield government power without any input from the FTC. Also, the FTC's general rulemaking power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in KISKA's text. KISKA is not analogous to other valid statutory schemes because the relationship between KISA and the FTC differs materially from the SEC-FINRA relationship because the FTC lacks any enforcement authority of its own. KISA's enforcement power thus violates the private nondelegation doctrine and this Court should reverse in favor of PAC.

## II. RULE ONE, WHICH REQUIRES WEBSITES TO VERIFY AGES, VIOLATES THE FIRST AMENDMENT BECAUSE IT IS SUBJECT TO, AND FAILS, STRICT SCRUTINY.

The First Amendment prohibits the government from abridging expressive speech and conduct, especially when the purpose is to push the government's morality. *Hurley v. Irish-Am.*

*Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (holding that law cannot interfere with speech to promote an approved message or discourage a disfavored one, no matter the value of either reason). Rule ONE's age verification requirement violates this core principle. KISA's goal to keep sexual content out of children's hands is imperative to the health and wellbeing of American youth. R. at 2. But the First Amendment does not allow that goal to be met through means that burden the rights of adults. *See Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (holding that government cannot restrict one kind of speech to extent restriction burdens or chills another kind of speech); R. at 13.

Here, this is a facial overbreadth challenge that requires strict scrutiny. R. at 7, 13. When the government restricts speech based on its' content, ideas, subject matter, or message, strict scrutiny applies. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, (1972). On the other hand, rational basis applies when the government restricts unprotected speech. *See e.g., Ginsberg v. New York*, 390 U.S. 629, 641 (1968); *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Therefore, rational basis applies to speech restrictions on minors that effect *only* minors; strict scrutiny applies when those restrictions "reduce the adult population to consuming only what is fit for children." R. at 13; *Butler v. Michigan*, 352 U.S. 380, 384 (1957). This Court has exclusively applied strict scrutiny to cases like the present.

### A. Strict Scrutiny Applies Because Rule ONE Restricts Expression Based on its' Content.

Rule ONE's age verification requirement demands web users show their government ID or allow a third party to comb through their mortgage, employment, or education records to access a website or social media platform where one-tenth of the total content is "sexual material harmful

to minors." 55 C.F.R. §§ 2, 3. Search engines and news broadcasts are exempt; both may post unlimited amounts of sexual content without having to verify ages. *Id*. at § 5.

Here, strict scrutiny applies because KISA is regulating, burdening, and chilling speech based on speaker and content. Rule ONE fails strict scrutiny because it is simultaneously overinclusive and underinclusive and is not the least restrictive means available. *See Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004); R. at 16. This Court should reverse the Fourteenth Circuit's decision. Doing so would uphold the purpose of the First Amendment, and this Court's precedent, by carving a clear path to protecting children from harmful material while preserving adults' right to freedom of expression without government interference.

Lower courts cannot overrule Supreme Court precedent. *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) ("[I]t is this Court's prerogative alone to overrule one of its' precedents."). The Fourteenth Circuit resisted this Court's precedent, and instead applied rational basis, relying on the Fifth Circuit's decision in *Free Speech Coalition v. Paxton*. R. at 8. In *Paxton,* the Fifth Circuit upheld a Texas law like Rule ONE. *Free Speech Coal., Inc. v. Paxton,* 95 F.4th 263 (5th Cir. 2024) (citations omitted). There, the Fifth Circuit openly interpreted this Court's decision in *Ginsberg v. State of N.Y.* and disregarded more recent precedent directly speaking to the issue. *Paxton,* 95 F.4th at 271.

The *Ginsberg* decision is an exception to the general rule that minors and adults have the same constitutional protections; this Court has never applied *Ginsberg* beyond that. *Ginsberg* 390 U.S.at 638; *see also Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, 511 (1969) (holding that minors possess same fundamental constitutional rights as adults). In *Ginsberg*, this Court upheld a state law that criminalized the knowing sale of obscene material to

minors. *Ginsberg*, 390 U.S. at 633, 645. There, the appellant violated the law by selling "girlie magazines" to a 16-year-old. *Id*. at 631. The magazine was not obscene by adult standards but was obscene with respect to minors. *Id*. at 634. So, *Ginsberg* empowered states to create different standards of obscenity for minors—not to revoke constitutional protection of non-obscene material for adults. *Id*. at 636.

Four cases from this Court establish strict scrutiny as the applicable First Amendment standard for communication of explicit material through mediums like phones, television, and the internet. R. at 14. S*able Commc'ns of California, Inc. v. F.C.C*., 492 U.S. 115 (1989) (applying strict scrutiny to a law that criminalized "dial-a-porn" and overturning law because it was not narrowly tailored to compelling interest of preventing children from being exposed to messages); *Reno v. ACLU*, 521 U.S. 844 (1997) (rejecting application of *Ginsberg*, applying strict scrutiny to law criminalizing knowing transmission of obscene or indecent content to minors on internet, and overturning law because it was overbroad and infringed on adults' rights); *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803 (2000); (applying strict scrutiny to a statue regulating sexual television channels to protect children, and overturning law because it was not least restrictive means to protect children); *Ashcroft*, 542 U.S. 656 (applying strict scrutiny to a law requiring age verification by credit card or commercially reasonable means, and overturning law because it was not least restrictive means and did not advance government's interest in protecting children from sexual material).

**1. The First Amendment protects adults' right to access non-obscene explicit material.**

Rational basis is not appropriate when the government regulates protected speech. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 793–94 (2011). In every case above, strict

scrutiny was triggered because the laws that regulated obscene speech for minors burdened indecent or other protected speech for adults, much like Rule ONE's blanket application to websites where most of the content is protected speech. *Ginsberg*, 390 U.S. at 637 (holding that minors have more restricted free speech rights than adults); *Reno*, 521 U.S at 875 (holding that indecent, but not obscene, sexual expression is protected by the First Amendment for adults). KISA cannot argue that Rule ONE is valid because it applies to websites where all the content is sexual. Because even in that situation, adults have a protected right to that content which requires Rule ONE to answer to strict scrutiny. *Brown*, 564 U.S. at 793–94.

Moreover, Rule ONE expressly prohibits more than obscene speech. This Court established the constitutional definition of obscenity in *Miller v. California*. 413 U.S. 15, 24–25 (1973) (defining obscenity as (1) applying contemporary community standards, appeals to prurient interest (2) depicts or describes sexual conduct in a patently offensive way and (3) lacks serious literary, artistic, political, or scientific value when taken as a whole). Rule ONE defines "material harmful to minors" as what is "patently offensive with respect to minors." 55 C.F.R. § (1)(6)(B). Material that is obscene to a minor is not obscene under *Miller*, meaning that Rule ONE "places a burden on speech that is constitutionally protected but not appropriate for children." *Free Speech Coal., Inc. v. Rokita*, No. 1:24-CV-00980-RLY-MG, 2024 WL 3228197 at *10 (S.D. Ind. June 28, 2024). Relying on the plain text of the statute disregards the real-life application of the statute; an unconstitutional burden on adults' access to protected speech.

Finally, KISA cannot argue that Rule ONE merely burdens speech and therefore escapes strict scrutiny. Distinguishing laws that burden or ban protected speech "is but a matter of degree." *Playboy*, 529 U.S. at 874. Rule ONE expressly regulates "sexual material harmful to minors,"

which is a particular type of speech. 55 C.F.R. § 1(6). Rule ONE then burdens adults by hinging access to websites with a nominal amount of that content on the adults' willingness to give up sensitive information. 55 C.F.R. § 2(a)–(b) (requiring adults to give websites their government ID or allow a third party to access adults' mortgage, employment, or education records). In fact, Rule ONE may ban content for some adults altogether if that adult does not have an ID or records to prove their age. Above all, a burdening law must satisfy strict scrutiny if it is a content-based regulation, even if that content is sexual. *Playboy*, 529 U.S. at 874.

**2. Rule ONE's restrictions on expression, while intended to protect children, improperly limit and constrain constitutionally protected speech for adults.**

PAC and the district court correctly relied on *Reno* and *Ashcroft* and applied strict scrutiny. R. at 14. Both cases concerned a preliminary injunction on a law enacted to protect children, but burdened adults' protected expression. *Reno*, 521 U.S. at 874; *Ashcroft*, 542 U.S. at 661. The Fourteenth Circuit's rationale for disregarding this precedent is baseless.

The Fourteenth Circuit renounced this Court's decision in *Reno* because the Communications Decency Act (CDA) "was materially different than the 'statute upheld in *Ginsberg*.'" R. at 9. Using this logic, *Ginsberg* does not apply here because Rule ONE is also materially different than the *Ginsberg* law, but materially similar to the CDA. *Reno* applied a strict scrutiny review to a preliminary injunction on the CDA because it "effectively [suppressed] a large amount of speech that adults have a constitutional right to receive and address one another." *Reno*, 521 U.S. at 874. Like Rule ONE, the CDA punishes those who knowingly post obscene messages to minors on the internet, unless the poster verifies the age of the web user through a credit card or adult identification number. *Reno*, 521 U.S at 859-860. The Fourteenth Circuit distinguished *Reno* from *Ginsberg* in three ways: (1) the CDA did not permit parental consent, (2) the CDA

applied to more than commercial transactions, and (3) the CDA prohibited material that was not obscene to minors. R. at 9. Yet, Rule ONE is not distinguishable from the CDA in these respects, so *Ginsberg* has no basis here.

First, Rule ONE does not permit parental consent. The *Ginsberg* law did not prevent parents from purchasing "girlie magazines" for their children, even if their children were present at the sale. *Ginsberg*, 390 U.S. at 639. By contrast, Rule ONE does not exempt situations where parents allow their children to see content on websites subject to Rule ONE. R. at 14. Rule ONE employs a blanket restriction on certain websites, leaving parents with no say in what their child can freely view on the internet. *See Reno*, 521 U.S. at 865 ("Under the CDA ... neither the parents' consent—nor even their participation—in the communication would avoid application of the statute."). This unrelenting burden on parents is enough to trigger strict scrutiny and sets *Ginsberg* apart from the CDA and Rule ONE. *Playboy*, 529 U.S. at 812 (holding that content-based burdens and bans are subject to strict scrutiny.)

Second, Rule ONE applies to more than commercial transactions. *Ginsberg* burdened actual sales of material obscene to minors. *Ginsberg*, 390 U.S. at 647; *Reno*, 521 U.S. at 865 ("[*Ginsberg*] applies only to commercial transactions."). By contrast, Rule ONE burdened not just the sale, but the advertising, posting, or communication of sexual material between adults. *See* R. at 4 (evidence that most sites subject to Rule ONE include discussion boards); 55 C.F.R. § 1(2) (applying Rule ONE to websites that "sell, give, provide, deliver, transfer, transmute, circulate, or disseminate" sexual content); 55 C.F.R. § 1(5) (applying Rule ONE to websites that "communicate or make information available" on internet to another person). The CDA was similarly overbroad, applying to communications between adults over the internet. *Reno*, 521 U.S. at 865 (CDA is not

limited to commercial transactions). Moreover, *Ginsberg* did not require age verification in every transaction, unlike Rule ONE. *Ginsberg*, 390 U.S. at 633–34 (banning only knowing sales to minors). If a buyer in *Ginsberg* did not look like a minor, no age verification was needed. That is wholly opposite to Rule ONE's, and the CDA that apply to every user in every situation if they are triggered. *Reno*, 521 U.S. at 844 ("CDA is a content-based blanket restriction on speech,"). *Ginsberg* applied to a narrow set of interactions, whereas the CDA and Rule ONE are sweeping restrictions on speech which are presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

Third, Rule ONE burdens more than sexual material. *Ginsberg* concerned "a prohibition on the sale to minors of sexual material." *Brown*, 564 U.S. at 794; *see also Ginsberg*, 390 U.S. at 633–34 (recognizing that law only burdened minors from accessing sexual material obscene to minors). By contrast, Rule ONE extends to any website where one-tenth of the **total** content is sexual material. R. at 17. Meaning websites with "significant amounts" of material about business, jobs, and educational opportunities are subject to Rule ONE. R. at 4. Like the CDA, Rule ONE burdens adults in communicating non-sexual and non-obscene materials. *Ginsberg* is far more cabined.

Finally, the Fourteenth Circuit insisted that *Reno* could not apply because of differences in "existing technology." R. at 9. To the Fourteenth Circuit, the single fact that "the average age verification platform is 91% effective at screening out minors' fake IDs" is enough to render Rule ONE successful despite the numerous existing ways users can dodge age verification. R. at 9. Screening out fake IDs does not combat minors that show real IDs that are not theirs, or minors that use proxy servers, virtual private networks (VPNs) or other easy ways web users remain

anonymous online. R. at 4–5, 15. Being in a "substantially different technological world" than the world of *Reno* means both methods to verify and avoid have evolved. R. at 9. The Fourteenth Circuit's logic in disregarding *Reno* is flawed because it failed to consider if and how this case is distinguished from *Ginsberg*. Rule ONE and the CDA are materially different from *Ginsberg*. Strict scrutiny applies here under *Reno* and *Ashcroft.*

Again, the Fourteenth Circuit defied this Court's precedent in *Ashcroft* because "the Court was not asked whether strict scrutiny was the proper standard; it merely ruled on the issue the parties presented." This argument was borrowed from the Fifth Circuit, whose reading of *Ashcroft* is wrong. *Paxton,* 95 F.4th at 274; R. at 9. In *Ashcroft,* this Court applied a strict scrutiny review of a preliminary injunction against the Children's Online Protection Act ("COPA"), a law that was materially identical to the CDA. *Ashcroft*, 542 U.S. at 661 ("COPA is second attempt by Congress to make internet safe for minors by criminalizing certain Internet speech; the first attempt was the [CDA]). Instead of age verification, *Ashcroft* established filtering software as the passable alternative. *Ashcroft*, 542 U.S. at 667–669. The Court did not need to rehash the issue of what standard to apply because the COPA was a direct response to the *Reno* decision. *Ashcroft*, 542 U.S. at 661. Not even the *Ashcroft* dissent contended that rational basis applied. *Ashcroft*, 542 U.S. at 677–691.

Thus, *Reno* provided the "necessary instruction for complying with First Amendment principles" by requiring strict scrutiny; whereas *Ashcroft* told Congress that filtering software, not age verification, would pass strict scrutiny and was a better way to regulate obscene content for minors. *Playboy,* 529 U.S. at 814; *Ashcroft,* 542 U.S. at 669 ("Congress undoubtably may act to encourage use of filters."). Although the parties in *Reno* pointed out that filtering software was a

less restrictive yet more effective means of shielding minors from harmful content a trial on the merits would have to establish such. *American Civil Liberties Union v. Reno*, 31 F.Supp.2d 473, 497 (E.D.Pa.1999). *Ashcroft* was the chance to establish that. Filtering software is "more effective than age verification requirements" in preventing minors from seeing adult content and less restrictive to adults. *Ashcroft*, 542 U.S. at 666 (holding that filtering software imposes selective restrictions on receiving end rather than universal restrictions at source).

When precedent clearly establishes the standard, the lower courts have no power to ignore it or even anticipate the Supreme Court will change precedent in their favor. *Bosse*, 137 U.S. at 3. The Fourteenth and Fifth Circuit stick out against the Third and Fourth Circuits, and district courts in Pennsylvania, who correctly applied this Court's precedent.[3] Content and speaker-based restrictions like Rule ONE are subject to strict scrutiny and require the government to use the least restrictive means available. *Playboy*, 529 U.S. at 813. No case from this Court suggests otherwise.

**3. Legal precedents concerning minors' access to explicit material should not be used to determine the constitutional standards for cases involving adults' rights.**

Despite clear precedent, the Fourteenth Circuit based its' holding on a misunderstanding of *Ginsberg*. The Fourteenth and Fifth Circuits insist *Ginsberg* stands for the government's ability to restrict minors from obscene material on a rational basis review, even if the restriction implicated and intruded upon adults' lawful rights to that material. R. at 8; *Paxton*, 95 F.4th at 271. It does not. *Ginsberg* concerned a "prohibition on the sale to minors of sexual material," not burdens on communication of non-obscene materials between adults. *Brown*, 564 U.S. at 793–94.

[3] *See Psinet, Inc. v. Chapman*, 362 F.3d 227, 234 (4th Cir., 2004); *Free Speech Coal., Inc. v. Sessions*, 314 F. Supp. 3d 678, 696 (E.D. Pa. 2018); *Rokita*, 2024 WL 3228197 at *10.

The Fourteenth and Fifth Circuit's incorrect interpretation transgresses decades of established strict scrutiny precedent.

First, the *Ginsberg* challenge is distinct from here. *Ginsberg* was an as-applied challenge to a criminal statute. *Rokita*, 2024 WL 3228197 at *11. Here, this is a facial challenge to the constitutionality of a law that burdens adults in visiting websites that may host some objectionable material. If PAC violated Rule ONE because "they communicated obscene materials to a minor during a commercial transaction without consent of the minors' parents," and were now defending themselves in an action against them, then *Ginsberg* "might be applicable." *Rokita*, 2024 WL 3228197 at *11. But that is not the case. The record does not show that PAC violated Rule ONE and is now asserting a First Amendment defense. Rather, the record shows KISA violated PAC's First Amendment rights by enacting a facially unconstitutional federal law. R. at 4, 13.

Second, the Fourteenth and Fifth Circuits misrepresent the issue in *Ginsberg*. The crux of the issue in *Ginsberg* was the rights of minors, not adults. *Ginsberg*, 390 U.S. at 637. The appellant in *Ginsberg* argued that the constitutional right to read or watch sexual things should not depend on whether someone is an adult or minor. *Ginsberg*, 390 U.S. at 636. The Court rejected this argument and held that states have the power to impose greater restrictions on minors than adults and that the law at issue **did not violate the freedom of expression given to minors**. *Ginsberg*, 390 U.S. at 637–38 (holding that the law did not invade minors' First Amendment rights, but instead adjusted the definition of obscene to what is obscene to minors). Therefore, the *Ginsberg* court held that rational basis applied because minors have more limited First Amendment rights. *See Paxton*, 95 F.4th at 293 (Higginbotham, J., dissenting) (finding that statute at issue in

Ginsberg did not burden free speech interest of adults, so justification for rational basis there did not apply to challenges on an adult's ability to access protected speech).

Here, *Ginsberg* cannot be reconciled because it does not answer the central issue in this case: whether Rule ONE's content-based restriction violates **adults'** First Amendment rights. R. at 14. If the answer is yes, (it is) then strict scrutiny applies. *Playboy*, 529 U.S. at 813. PAC does not want minors to have greater access to sexual content, unlike the *Ginsberg* appellant. R. at 14; *Ginsberg,* 390 U.S. at 636. PAC simply wants adults' free speech rights protected. R. at 14.

Third, the Fourteenth and Fifth Circuits further distort *Ginsberg* by claiming "the statute at issue in *Ginsberg* necessarily implicated and intruded upon" adults' privacy. *Paxton*, 95 F.4th at 271; R. at 8. It did not, and *Ginsberg* confirms this. *Ginsberg,* 390 U.S. at 639 (finding that adults could still purchase magazines for themselves). *Ginsberg* hardly touches on adults' rights at all because that was not the concern of the case.

Even if the Fourteenth and Fifth Circuit's reading is correct (it is not), *Ginsberg* would still not apply because of stark factual differences. *See United States v. Massey*, 79 F.4th 396, 401 (5th Cir. 2023) ("factual differences will make authority easily distinguishable"). In-person age verification is categorically different than online age-verification and the risks associated with it. A bartender, store owner, or bouncer's quick glance at an ID presents no possibility for them to keep a copy of, or data associated to that ID, or check mortgage, employment, or education records to otherwise verify age. Moreover, if a patron appears to be an adult, they may not have to identify themselves at all. In person age verification negates any circumstance where personal information is retained and later hacked. Rule ONE's prohibition against websites keeping information does nothing to placate storing and hacking concerns considering "the number of instances where

seemingly safe websites, such as hospitals and schools, have been hacked and personal information was stolen." R. at 4. Online age verification is undoubtably more invasive, intricate, and concerning than in person. The Fourteenth Circuit refused to confront any of these important distinctions. *See* R. at 15.

Finally, and crucially, the Fourteenth Circuit did not cite a single case since *Ginsberg* that applied rational basis to regulations infringing on adults' rights because no such case exists. Since *Ginsberg*, this court has consistently applied strict scrutiny to content-based regulations that affect adults. *Ginsberg* is far different from strict scrutiny cases in fact and issue and does not change the analysis here. This Court should not dismiss clear precedent, especially when there are more effective and less restrictive alternatives to age verification.

### B. PAC is Likely to Succeed on the Merits Because Rule ONE Fails to Satisfy Strict Scrutiny.

Rule ONE is properly subject to strict scrutiny, so PAC is likely to succeed on the merits of this case and earn a preliminary injunction. *Ashcroft*, 542 U.S. at 665–66. PAC and KISA have stipulated to all other preliminary injunction factors. R. at 6.

#### 1. Rule ONE is underinclusive, as it fails to regulate enough forms of expression to accomplish the stated interest.

Underinclusivity raises serious "doubts about whether [KISA] is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown,* 564 U.S. at 793–94. Discriminating against certain speakers in the marketplace is an "independent fatal deficiency." *Rokita*, 2024 WL 3228197 at *16.

Here, Rule ONE targets the online pornography industry while leaving the same sexual content up for grabs if it was posted by an individual, or a news or public interest broadcast, or appears on a search engine. 55 C.F.R. §§ 1, 5. Minors can freely visit Google, Yahoo, or Bing,

type in any slightly suggestive phrase, then view plenty of pornographic images. 55 C.F.R. § 5. KISA has offered no explanation as to why explicit material on a personal blog, search engine or news source is somehow less harmful to minors than explicit material on a commercially owned website. More importantly, KISA did not explain why their speaker discrimination "necessary to or supportive of" their compelling interest. *Rokita*, 2024 WL 3228197 at *16. The government may not silence speakers in favor of what the government thinks is moral; restricting the expression of specific speakers contradicts basic First Amendment principles. *Playboy*, 528 U.S. at 812. The Fourteenth Circuit cannot enable KISA to selectively censor speakers, even if the Fourteenth Circuit thinks sexual content is the "seedier side of the web" or that the First Amendment does not "allow people to be so bold" in seeking out sexual content. R. at 7.

Moreover, children and web users generally can easily bypass security measures. R. at 5. While KISA testified that age verification requirements were 91% effective at spotting fake IDs, that does not cover instances where minors provide a real ID that is not theirs. R. at 9. Additionally, minors can access harmful content without an ID at all through proxy servers, virtual private networks, and other special browsers. *Rokita*, 2024 WL 3228197, at *15. All of which are often free and easy to use. Proxy servers and VPNs obscure the web user's location, allowing minors to access harmful materials by pretending they are in another state or even country. *Id*. at *15. In accordance with these issues, PAC also provided expert testimony explaining how any web user could be anonymous, even when age verification is required. R. at 5. This alone proves that "existing technology" is not foolproof now, just like it was not in *Reno*. R. at 9.

As written, KISA is willing to leave material that inflicts minors with a "host of horrors" in minors' hands so long as it comes from a noncommercial source, search engine, the news, or

through a VPN or proxy server. R. at 3, 15. If KISA "was truly interested in protecting minors from seeing adult content," they would have considered a more encompassing alternative to age verification. Yet KISA and the Fourteenth Circuit did not entertain either alternative PAC proposed. R. at 16.

**2. Rule ONE is overinclusive by restricting speech beyond what is necessary to serve the stated interest.**

Rule ONE is overinclusive because it prohibits more speech than necessary to achieve KISA's interests. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993). The First Amendment does not allow KISA to be so imprecise. *Rokita*, 2024 WL 3228197 at *18.

Here, Rule ONE's purpose is to curb the "deleterious effects that easy access to pornography has on minors." R. at 3. But Rule ONE's one-tenth requirement triggers age verification regardless of the content the user wants to access. R. at 16 (evidence that age verification burdens adults and minors from seeing "significant amounts of non-objectionable content"). R. at 4. Even if most of the website hosts protected speech, whether political, religious or otherwise, Rule ONE burdens adults from accessing it. To achieve its' goal, KISA burdens "a large amount of speech that adults have a constitutional right to receive and address one another." *Reno*, 521 U.S. at 874. This renders Rule ONE unconstitutional. As written, Rule ONE is "vastly overinclusive" by restricting far more speech than necessary to keep children safe from harmful material.

Faced with the same issue, *Ashcroft* and others endorsed filters because they were not overinclusive, universal restrictions on websites themselves. *Ashcroft*, 542 U.S. at 667. Rather, filters apply per device. Unlike filters, age verification is an impermissible blanket restriction with no way for adults to opt-out and protect their private information. Filters may not affect adults'

devices at all and "may block obscene videos but not blog posts," and other valuable, protected speech. *Rokita*, WL 3228197 at *18. Filters impact less speech, therefore are not overinclusive, and KISA has not shown that age verification is effective, considering the multitude of ways to circumvent it, nor do they "engage in any comparative analysis." *Id*. at *17. Filters are more accurate in identifying and blocking adult content, more difficult to avoid, and gives parents autonomy in raising their children. *Id*.

**3. Rule ONE is neither the least restrictive nor the most effective means of regulation, as content filters block explicit material more effectively while giving adults the choice to opt out.**

To pass strict scrutiny, Rule ONE must be narrowly tailored to a compelling government interest and be the least restrictive means available. *Sable*, 492 U.S. at 126; *Playboy*, 529 U.S. at 803. Rule ONE meets neither standard.

At the outset, KISA must provide evidence to prove the alternatives are less effective than Rule ONE. *Ashcroft*, 542 U.S. at 670. PAC offered, and the district court accepted, content filtering software as a less restrictive alternative to age verification. R. at 15. The record does not show any evidence from KISA proving that filters are less effective than age verification. This alone is fatal. *Ashcroft*, 542 U.S. at 670 (holding that absent a showing that proposed less restrictive alternative is less effective than statute, statute cannot survive strict scrutiny). Consistent with KISA's lack of evidence, Congress has found that filters are unambiguously more effective than age verification, solving Rule ONE's underinclusivity issue. *Ashcroft*, 542 U.S. at 667.

KISA, Congress, and the Fourteenth Circuit were concerned with rapidly evolving technology. R. at 2, 9. But filters have kept pace. *Rokita* 2024 WL 3228197 at *4. AI and other free technologies continue to be more effective at spotting harmful content and keeping children

from getting around the filter. *Id*. Filters apply to every corner of the Internet, meaning children will not be exposed to the one-tenth of harmful material KISA is content with minors seeing. *Ashcroft,* 542 U.S. at 667; R. at 17.

Moreover, filters are narrowly tailored to each minor. *Mukasey*, 534 F.3d at 192. Rule ONE does not recognize that what is obscene to a younger minor is not obscene to an older minor. R. at 17. Filters solve this issue by allowing parents to adjust what their children can see, protecting parent's autonomy to raise their children without government interference. *Rokita*, 2024 WL 3228197 at *4: *see also Ginsberg*, 390 U.S. at 641 (holding that parents could still purchase and show prohibited content to their children if they wanted to). KISA "presumes that parents lack the ability, not the will, to monitor what their children see" by deciding what is fit for every minor without parental input. *Ashcroft,* 542 U.S. at 670. Filters protect parental rights and the rights of adults generally.

PAC shares in the Fourteenth Circuit and KISA's concern for the effects of explicit material on children. But the First Amendment does not allow for regulations on children's rights to burden adults, which is why this Court insists strict scrutiny applies and approved the use of filters rather than age verification. This Court should follow the decades of precedent it has set and reverse the Fourteenth Circuit's ruling on this issue.

## CONCLUSION

This Court should REVERSE the judgment of the Unites States Court of Appeal for the Fourteenth Circuit.

Respectfully submitted,

_____

COUNSEL FOR PETITIONER

## APPENDIX TABLE OF CONTENTS

# APPENDIX A

CONSTITUTIONAL PROVISIONS

**Article I Section 1**

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.

**Article II Section I Clause I**

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . .

**Article II Section 2**

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**Article III Section 1**

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Amendment I**

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

## APPENDIX B

STATUTORY PROVISIONS

Health and Economic Recovery Omnibus Emergency Solutions ("HEROES") Act,
20 U.S.C. § 1098bb(a)(1)

**1098bb. Waiver Authority for Response to Military Contingencies & National Emergencies**

(a) Waivers and modifications
(1) In general

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education (referred to in this part as the "Secretary") may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

Horseracing Safety and Integrity Act ("HISA"),
15 U.S.C. §§ 3051–3060

**3053. Federal Trade Commission Oversight**

(e) Amendment by Commission of rules of authority

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

Keeping the Internet Safe for Kids Act ("KIKSA"),
55 U.S.C. §§ 3050–59

**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.

**3053. Federal Trade Commission Oversight**

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.

**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.

**3057. Rule Violations and Civil Actions**

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.

**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.

Maloney Act,
15 U.S.C. §§ 77a–78rr

**77s. Special Powers of Commission**

(c) Production of evidence

For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

**78s. Registration, Responsibilities, and Oversight of Self-Regulatory Organizations**

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(g) Compliance with rules and regulations

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

**78u. Investigations and Actions**

(a) Authority and Discretion of Commission to Investigate Violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(c) Judicial Enforcement of Investigative Power of Commission; Refusal to Obey Subpoena; Criminal Sanctions

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there

to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction Proceedings; Authority of Court to Prohibit Persons From Serving as Officers and Directors; Money Penalties in Civil Actions; Disgorgement

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action 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, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(4) Prohibition of Attorneys' Fees Paid From Commission Disgorgement Funds

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

**78u-1. Civil Penalties for Insider Trading**

(a) Authority to Impose Civil Penalties

(2) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement while in possession of material, nonpublic information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission—

(2) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1), bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

**78o. Registration and Regulation of Brokers and Dealers**

(2) Manner of Registration of Brokers and Dealers

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated . . .

# APPENDIX C

REGULATORY PROVISIONS

Rule ONE,
55 C.F.R. §§ 1–5

**Section 1. Definitions**

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

(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:

(2) 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.

**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 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.