No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC.

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.

Respondent.

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

BRIEF FOR PETITIONER

TEAM NUMBER 09

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES....iv

QUESTIONS PRESENTED....viii

OPINIONS BELOW....1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED....2

STATEMENT OF THE CASE....5

I. STATEMENT OF FACTS....5

II. PROCEDURAL HISTORY....7

SUMMARY OF THE ARGUMENT....8

ARGUMENT....10

I. CONGRESS'S GRANT OF BROAD, UNSUPERVISED AUTHORITY TO KISA IS FACIALLY UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PRIVATE NONDELEGATION DOCTRINE....10

A. *KISA's Unilateral Ability to Enforce Internet Regulations is Not Adequately "Subordinate" to the FTC*....12

1. KISA is a Private Entity, Making it Properly Subject to the Private Nondelegation Doctrine....13

2. KISA Has Far Too Much Freedom to Enforce Internet Regulations Without Government Supervision....14

3. The FTC's Supervisory Power Over KISA is Insignificant and Cannot be Cured by its Rulemaking Authority....17

B. *KISA's Enforcement Abilities are Not Comparable to Widely Approved Regulatory Schemes*....18

C. *Congress's Delegation of Authority to KISA is Averse to the Constitution's Fundamental Mandate Requiring Separation of Powers*....21

II. RULE ONE'S AGE VERIFICATION REQUIREMENT IS OPPOSED TO THE SPEECH PROTECTEDS GUARANTEED BY THE FIRST AMENDMENT AND MUST BE STRUCK DOWN AS UNCONSTITUTIONAL....22

A. *Rule ONE Imposes a Content-Based Censorship Scheme by Design*.....24

1. Rule ONE's Age Verification Requirement Imposes a Content-Based Speech Regulation on Adults by Design.....24

2. Rule ONE's Age Verification Requirement is Not a Content-Neutral Speech Regulation, Thus Time, Place, Manner Restrictions are Inapplicable.....26

B. *Rule ONE's Content-Based Speech Restriction Regime is Unconstitutional Under Strict Scrutiny*.....28

1. Rule ONE is Presumptively Unconstitutional Under Strict Scrutiny..... 29

2. Rule ONE Cannot Withstand the Rigors of Strict Scrutiny Review.....29

i. Rule ONE Withstands the First Prong of Strict Scrutiny Review, But the Analysis is Not Over.....30

ii. Rule ONE Fails the Second Prong of Strict Scrutiny Review Given its Highly Restrictive Means Rendering it Unconstitutional.....30

3. The Fourteenth Circuit Erred in Applying Rational-Basis Review to Rule ONE's Age Verification Requirement.....33

C. *Rule ONE is Overinclusive of Protected Speech and Underinclusive of Harmful Speech, Thus Petitioners are Likely to Succeed on the Merits*....37

1. Rule ONE's Arbitrary Enforcement Scheme is Underinclusive of Equally Harmful Internet Speech.....37

2. Rule ONE is Underinclusive by Design and Restricts More Protected Speech Than Necessary.....39

CONCLUSION 40

TABLE OF AUTHORITIES

United States Supreme Court Cases

Ashcroft v. American Civil Liberties Union,
542 U.S. 656 (2004).....*passim*

Boos v. Barry,
485 U.S. 312 (1988) 25–26, 28

Brown v. Ent. Merchants Ass'n,
564 U.S. 786 (2011) 9, 24, 35, 38

Butler v. Michigan,
352 U.S. 380 (1957) 23, 35

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 11, 21

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 41 (1986) 27

City of Ladue v. Gilleo,
512 U.S. 43 (1994).....9, 25, 28

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 26, 28–29

Cohen v. California,
403 U.S. 15 (1971) 22–23, 29

Dep't of Transp. v. Ass'n of Am. R.R.,
575 U.S. 43 (2015) 9, 12, 14, 21–22

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 26, 29

Forsyth Cnty., Ga. v. Nationalist Movement,
505 U.S. 123 (1992) 25

Ginsberg v. New York,
390 U.S. 629 (1968) 34–36

Grayned v. City of Rockford,
408 U.S. 104 (1972) 27

Gundy v. United States,
588 U.S. 128 (2019) 13

J.W. Hampton, Jr. & Co. v. United States,
276 U.S. 394 (1928) 10–11

LeBron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 14, 22

MCI Telecomm. Corp. v. Am. Tel & Tel. Co.,
512 U.S. 218 (1994) 18

Mistretta v. United States,
488 U.S. 361 (1989).....10

Nat'l Inst. of Fam. and Life Advocs. v. Becerra,
585 U.S. 755 (2018) 22–23

Packingham v. North Carolina,
582 U.S. 98 (2017).....27

Police Dep't of City of Chicago v. Mosley,
408 U.S. 92 (1972) 23, 29

Ramos v. Louisiana,
590 U.S. 83 (2020) 33

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 29, 38

Reed v. Town of Gilbert, Ariz.,
576 U.S. 155 (2015) 22, 25

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) .....*passim*

Roth v. United States,
354 U.S. 476 (1957) 23, 25, 30, 34, 38

Sable Commc'ns of California, Inc. v. F.C.C.,
492 U.S. 115 (1989) .....*passim*

Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 11, 21

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940).....8, 11–12

Texas v. Johnson,
491 U.S. 397 (1989) 22–23, 26

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969).....23

United States v. Playboy Ent. Grp., Inc.,
529 U.S. 803 (2000).....*passim*

United States v. Stevens,
559 U.S. 460 (2010) 22, 25

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 25–26

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008).....10

United States Court of Appeals Cases

Free Speech Coalition, Inc. v. Paxton,
95 F.4th 263 (5th Cir. 2024).....15, 20, 34–36, 39

In re NYSE Specialists Sec. Litig.,
503 F.3d 89 (2d Cir. 2007) 19

Mock v. Garland,
75 F.4th 563 (5th Cir. 2023).....10, 22

Nat'l Horsemen's Benevolent and Protective Ass'n. v. Black,
107 F.4th 415 (5th Cir. 2024).....*passim*

Oklahoma v. United States,
62 F.4th 221 (6th Cir. 2023).....13, 18, 21

PSINet, Inc. v. Chapman,
362 F.3d 227 (4th Cir. 2004) 27

United States District Court Cases

Free Speech Coal., Inc. v. Rokita,
No. 1:24-CV-00980-RLY-MG, 2024 WL 3228197 (S.D. Ind. June 28, 2024).....35

Kim v. Fin. Indus. Regul. Auth., Inc.,
698 F. Supp. 3d 147 (D.D.C. 2023).....19

Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.,
678 F. Supp. 3d 88 (D.D.C. 2023).....12, 19

Weslowski v. Zugibe,
96 F. Supp. 3d 308 (S.D.N.Y. 2015).....27

Statutes & Regulations

Securities Exchage Act of 1934, 15 U.S.C. § 78s.....19–20

Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051–60.....15–16

47 U.S.C. § 223.....30, 36

Child Online Protection Act, 47 U.S.C. § 231.....30, 32, 35–37

Keeping the Internet Safe for Kids Act, 55 U.S.C. § 3050–3059.....*passim*

Rule ONE, 55 C.F.R. §§ 1–5.....*passim*

H.B. 1181, Tex. Civ. Prac. & Rem. §§ 120B.001–129B.006.....34–35

Constitutional Provisions

U.S. Const. amend. I.....23

Other Authorities

Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*,
45 Vt. L. Rev. 43 (2020).....32–33

Digital Economy Act 2017, c. 30, Part 3 § 16 (Eng.).....32

Jillian Andres Rothschild et al., *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge* (2024).....33

Kalen Youtsey, *Hold Your Horses: The Horseracing Integrity and Safety Act of 2020 is in its Own Race to Beat Constitutional Invalidity*,
47 Okla. City U. L. Rev. 383 (2023).....11

QUESTIONS PRESENTED

1. Under the Keeping the Internet Safe for Kids Act, 55 U.S.C. §§ 3050–3059, did Congress unconstitutionally violate the private nondelegation doctrine when it endowed the Kids Internet Safety Association, Inc. with unilateral enforcement authority over the internet?
2. Under Rule ONE, 55 C.F.R. §§ 1–5—the Kids Internet Safety Association, Inc.'s regulation—does the First Amendment forbid the use of a restrictive age verification process when adult-age individuals attempt to access constitutionally protected commercial pornography websites?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at 345 F.4th 1 and is reproduced in full on pages 1–15 of the appellate record. R. at 1–15. The opinion and order of the United States District Court for the District of Wythe are unreported, though the case was assigned a docket number at 5:22-cv-7997. R. at 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I, in relevant parts, provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

55 U.S.C. § 3050(a), in relevant parts, provides:

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

55 U.S.C. § 3052(a), in relevant parts, provides:

> 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 . . . .

55 U.S.C. § 3052(d)(1)(C), in relevant parts, provides:

> Vacancies. After the initial committee members are appointed . . . vacancies shall be filled by the Board . . . .

55 U.S.C. § 3052(f)(1)(A), in relevant parts, provides:

> Initial Funding . . . to establish [KISA] . . . shall be provided by loans obtained by [KISA].

55 U.S.C. § 3052(f)(2), in relevant parts, provides:

> Fees and fines. Fees and fines imposed by [KISA] shall be allocated toward funding of [KISA] and its activities.

55 U.S.C. § 3053(e), in relevant parts, provides:

> Amendment by Commission of the rules of Association. The [FTC] . . . may abrogate, add to, and modify the rules of [KISA] . . . as the [FTC] finds necessary . . . .

55 U.S.C. § 3054(h), in relevant parts, provides:

> Subpoena and investigatory authority. [KISA] shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

55 U.S.C. § 3054(i), in relevant parts, provides:

> Civil penalties. [KISA] shall develop a list of civil penalties with respect to enforcement of rules for technological companies covered under its jurisdiction.

55 U.S.C. § 3054(j)(1), in relevant parts, provides:

> In general . . . [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 . . . .

55 U.S.C. § 3058(c)(1), in relevant parts, provides:

> The [FTC] may, on its own motion, review any decision of an [ALJ] . . . .

55 U.S.C. § 3058(c)(2)(A), in relevant parts, provides:

> In general. [KISA] or a person aggrieved by a decision issued . . . may petition the [FTC] for review of such decision by filing an application for review . . . .

55 U.S.C. § 3058(d), in relevant parts, provides:

> Stay of proceedings. Review by an [ALJ] or the [FTC] . . . shall not operate as a stay of a final civil sanction of [KISA] unless the [ALJ] or [KISA] orders such a stay.

55 C.F.R. § 1(6)(A), in relevant parts, provides:

> "Sexual material harmful to minors" includes any material that: the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest[.]

55 C.F.R. § 1(6)(C), in relevant parts, provides:

> "Sexual material harmful to minors" includes any material that: taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

55 C.F.R. § 2(a), in relevant parts, provides:

> A commercial entity that knowingly and intentionally or 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 . . . to verify that an individual attempting to access the material is 18 years of age or older.

55 C.F.R. § 3(a)(1)–(2), provides:

> 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.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The primary petitioner in this matter, Pact Against Censorship (hereinafter "PAC" or "Petitioners"), is an American trade association for the adult entertainment industry. R. at 1, 4. PAC is composed of individual performers and production studios and aims to protect expressive freedoms while maintaining the livelihoods of those within the adult entertainment industry. R. at 4. Despite its membership, PAC does not explicitly represent the commercial pornography industry. *Id.* Rather, PAC works to safeguard essential individual liberties, promotes public policy favoring personal autonomy, and fights to uphold the right to earn a living. *Id.*

In January 2023, Congress passed the Keeping the Internet Safe for Kids Act (KISKA), 55 U.S.C. §§ 3050–3059. R. at 2. In enacting KISKA, Congress intended to "provide a comprehensive regulatory scheme to keep the internet accessible and safe for the American youth." *Id.* (citing 55 U.S.C. § 3050). Despite its stated aims, Congress did not intend to regulate the internet on its own. R. at 2. Instead, Congress delegated its constitutional lawmaking authority by creating a private, self-regulatory corporation, termed the Kids Internet Safety Association, Inc. (hereinafter "KISA" or "Respondent"), to enact and enforce regulations for the internet. *Id.* (citing 55 U.S.C. § 3052).

As a private corporation in possession of Congressional regulatory authority, the Federal Trade Commission (FTC) technically oversees KISA, though such supervisory powers are minimal when compared to the considerable powers that KISA wields. R. at 2–3 (citing 55 U.S.C. §§ 3053, 3054). For instance, Congress granted KISA the "exclusive national authority" to enact and enforce regulations on the internet that affect the "safety, welfare, and integrity of internet access to children." 55 U.S.C. § 3054(a)(2). In exercising its unilateral authority to

enforce its regulatory agenda, KISA has "liberal investigation powers" that are accompanied by the power to issue subpoenas, file civil actions for injunctive relief, and impose civil sanctions upon violators of its proposed regulations. R. at 3 (citing 55 U.S.C. §§ 3054(h)–(j)).

In effect, KISA can enforce its internet regulations entirely on its own power. *Id.* In contrast, the FTC's supervisory powers over KISA are fully retroactive in nature. R. at 3. Notably, the FTC does not have the power to enact regulations from scratch, but can merely "abrogate, add to, and modify" KISA's proposed rules for the internet. *Id.* (citing 55 U.S.C. § 3053(e)). Further, the FTC cannot initiate enforcement actions against technological companies in violation of KISA's enacted rules. R. at 3 (citing 55 U.S.C. § 3058). Instead, the FTC can only require an administrative law judge (ALJ) to review *de novo* the propriety of any enforcement action that KISA has already initiated against a technological company. *Id.* To date, the FTC has only utilized its power to require ALJ review one time in its history of supervising KISA. *Id.*

In February 2023, just one month after Congress created KISA, the corporation enacted Rule ONE, 55 C.F.R. §§ 1–5, to limit minors' access to adult content on the internet. R. at 3. Rule ONE requires *individuals* attempting to access websites containing more than 10% of content that KISA deems to be "sexual material harmful to minors" to submit to a commercial age verification process. R. at 3–4 (citing 55 C.F.R. § 2(a)). If KISA determines that a website is unsafe for minors, the *owner of the website* must implement a commercial age verification system. *Id.* To comply with KISA's mandate, an age verification system must confirm that an individual attempting to access the website is at least 18 years of age or older. R. at 4 (citing 55 C.F.R. § 3). To check a website visitor's age, compliant commercial age verification systems are only permitted to rely on a government issued identification or public or private transactional data. *Id.* If KISA, in its sole discretion, deems a website out of compliance with Rule ONE, it can

punish an alleged violator severely by levying fines and initiating an action to enjoin the site's operation altogether. R. at 4 (citing 55 C.F.R. § 4).

Realizing that Rule ONE dramatically altered the freedoms adults enjoyed on the internet, PAC—along with countless private citizens—voiced their concerns about the scope of the regulation. R. at 4–5. Members of the adult entertainment industry saw Rule ONE and KISA's continued operation as a threat to the industry's very existence. *Id.* Private citizens expressed worries that Rule ONE's age verification procedures would fundamentally end their ability to remain anonymous online. *Id.* Considering the ease with which internet hackers have accessed supposedly secure sites containing private records, objectors expressed concern with how Rule ONE ties an individual's personal information to something as sensitive as their preferences for adult content. R. at 4. With these worries in mind, PAC, along with two private citizens and a film studio, filed a lawsuit against KISA to safeguard their liberty. *Id.*

II. PROCEDURAL HISTORY

On August 15, 2023, PAC filed a lawsuit seeking a permanent injunction to enjoin both Rule ONE and Respondent from operating. R. at 5. The United States District Court for the District of Wythe guaranteed Petitioners' standing, which was contested by neither party. *Id.*

At trial, Petitioners moved for a preliminary injunction. *Id.* First, the district court held that Congress's delegation of its authority to KISA was proper under the private nondelegation doctrine. R. at 2, 5. In particular, the district court upheld Congress's enactment of KISKA, 55 U.S.C. §§ 3050–3058. R. at 2. Second, the district court held that Rule ONE, 55 C.F.R. §§ 1–5, violated the First Amendment and was thus unconstitutional. R. at 2, 5. As a result, the district court granted the Petitioners' requested injunction as to Rule ONE after finding that the regulation failed the required application of strict scrutiny. *Id.*

Respondent appealed the district court's decision on the free speech claim, and Petitioners cross-appealed on the private nondelegation issue. R. at 5. The Fourteenth Circuit affirmed the district court's ruling regarding the nondelegation doctrine issue, holding that Respondent sufficiently operates subordinately to the FTC given its adjacent rulemaking ability. R. at 6–7. However, the Fourteenth Circuit reversed the district court's holding on the First Amendment claim, ruling that rational-basis review, not strict scrutiny, should apply to Petitioners' Rule ONE challenge. R. at 7–9.

SUMMARY OF THE ARGUMENT

This Court should resolve the two questions posed in this case by reversing both decisions by the United States Court of Appeals for the Fourteenth Circuit. First, Congress improperly delegated enforcement authority to Respondent, thereby violating the private nondelegation doctrine. Second, Rule ONE's age verification process, a content-based speech restriction, violates the First Amendment and should be struck down as unconstitutional under strict scrutiny. Consequently, this Court should restore the district court's grant of a preliminary injunction enjoining Rule ONE from operation, while also granting a preliminary injunction restricting KISA's operation, and remand this case to the district court for further proceedings.

Congress's delegation of authority to KISA violates the private nondelegation doctrine for three distinct reasons. First, Respondent is ultimately not subordinate to the FTC. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Rather, Respondent has unfettered power to enforce the regulations it may draft with minimal oversight from the FTC. 55 U.S.C. §§ 3053(e), 3054(h)–(j), 3058(2)(c). Moreover, the FTC's feeble review power following the enforcement of Respondent's regulations occurs much too late and is ultimately insignificant. 55 U.S.C. § 3054(h)–(j); *See Nat'l Horsemen's Benevolent and Protective Ass'n. v. Black*, 107

F.4th 415, 430 (5th Cir. 2024) (*Horsemen's II*). Second, Respondent is distinguishable from other commonly accepted regulatory schemes, like the Financial Industry Regulatory Authority (FINRA), and thus cannot be properly compared to such organizations. 55 U.S.C. § 3054(h)–(j); *See* 15 U.S.C. § 78s(h)(4); *Horsemen's II*, 107 F.4th at 434. Third, Congress's delegation to Respondent of unchecked authority over the internet violates the Constitution's core mandate requiring separation of powers. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57 (Alito, J., concurring in judgment). Upon this assessment of the merits, this Court should enjoin KISA from further operation.

Next, this Court should restore the district court's grant of a preliminary injunction enjoining Rule ONE, as its age verification process facially violates the guarantees afforded by the First Amendment. First, this Court must determine that Rule ONE is a content-based speech regulation. *See City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring in judgment). Upon properly classifying Rule ONE as regulating speech based on its communicative content, this Court must apply strict scrutiny, not rational-basis review, to the regulation. *Id.*; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000). Consequently, this Court should find that Rule ONE fails strict scrutiny—and thus constitutes an unconstitutional abridgement of freedom of speech—given its use of highly restrictive means for verifying adults' ages. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665–66 (2004) (*Ashcroft II*). Finally, because Rule ONE is both overinclusive of protected speech and underinclusive of speech it purports to regulate, this Court should strike down Rule ONE on its merits. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

ARGUMENT

Generally, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In considering whether the Fourteenth Circuit's decisions on appeal were "grounded in erroneous legal principles," this Court will review *de novo* their findings. *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023) (citations omitted). Here, since the parties have stipulated to three of the four preliminary injunction factors, this Court need only decide whether Petitioners have demonstrated a "substantial likelihood of success on the merits" of each of their two claims. *Winter*, 555 U.S. at 20; R. at 5–6. As the district court correctly concluded with respect to the First Amendment claim, they have. R. at 5. For the reasons stated below, this Court should also find that Petitioners are likely to succeed on the merits regarding the private nondelegation claim.

I. CONGRESS'S GRANT OF BROAD, UNSUPERVISED AUTHORITY TO KISA IS FACIALLY UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PRIVATE NONDELEGATION DOCRTINE.

In plainly granting power to the Kids Internet Safety Association, Inc. to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth" without prior Federal Trade Commission (FTC) constraint, Congress violated the private nondelegation doctrine. Keeping the Internet Safe for Kids Act, 55 U.S.C. §§ 3050(a), 3054(h)–(j), 3058(c); *see Horsemen's II*, 107 F.4th at 423. Generally, the nondelegation doctrine forbids Congress from delegating its legislative powers to another branch of government. *See Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). However, courts traditionally permit intragovernmental delegations if Congress incorporates an "intelligible principle" that properly guides the delegee in performing its specified activity. *J.W. Hampton, Jr., & Co. v. United States*,

276 U.S. 394, 406–08 (1928). This simple analysis, which is known as the public nondelegation doctrine, is limited to intragovernmental delegations; however, its counterpart, the private nondelegation doctrine, is much more complex. *See* Kalen Youtsey, *Hold Your Horses: The Horseracing Integrity and Safety Act of 2020 is in its Own Race to Beat Constitutional Invalidity*, 47 Okla. City U. L. Rev. 383, 391 (2023).

Under the private nondelegation doctrine, Congress is not permitted to delegate its legislative powers to nongovernmental entities, like private, self-regulating organizations. *Horsemen's II*, 107 F.4th at 423. Although not explicitly mentioned in the Constitution, the private nondelegation doctrine has been staunchly enforced in caselaw since the 1930s. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). Since that time, courts have restricted Congress's delegation of its lawmaking abilities to private corporations unless the delegee remains "subordinate" to a government agency. *See Adkins*, 310 U.S. at 399. To be properly subordinate, the overseeing government agency must maintain "pervasive surveillance and authority" over the private entity delegee. *Id.* at 388. Thus, a private entity shall not have the final "say so" regarding rulemaking or enforcement of regulations without vigilant review from an overseeing agency. *Horsemen's II*, 107 F.4th at 421.

Despite its obligations, Congress's delegation of rulemaking and enforcement authority to Respondent are anything but subordinate to its designated supervisory agency, the FTC. 55 U.S.C. §§ 3053; *see Horsemen's II*, 107 F.4th at 431. First, Congress vested far too much unilateral authority in Respondent to enforce regulations it makes for the internet. 55 U.S.C. §§ 3054(h)–(j); 3058(c)(1). Second, this Court cannot uphold the constitutionality of KISKA by relying on cases upholding factually distinct regulatory schemes. *See Horsemen's II*, 107 F.4th at

434-35; *see also Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, 678 F. Supp. 3d 88, 94–95 (D.D.C. 2023). Third, Congress's delegation of authority to Respondent, a self-regulating corporation, violates the Constitution's core precept requiring separation of powers, and thus should be struck down to keep the government accountable to the people. *See Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring in judgment). Ultimately, this Court must reverse the United States Court of Appeals for the Fourteenth Circuit's holding and give instructions to the district court to permanently enjoin Respondent from its continued operation.

A. KISA's Unilateral Ability to Enforce Internet Regulations is Not Adequately "Subordinate" to the FTC.

By allowing Respondent to enact and enforce "a comprehensive regulatory scheme" to police the internet, 55 U.S.C. § 3050, Congress did not vest the FTC with the necessary "pervasive authority and surveillance" over Respondent to make its delegation of authority constitutional. *Adkins*, 310 U.S. at 388; *see also* 55 U.S.C. § 3054(h)–(j). In doing so, Congress has given Respondent a blank check to regulate the internet. *Id.* § 3054(a)(2) (describing the scope of KISA's jurisdiction as "independent and exclusive national authority over the safety, welfare, and integrity of internet access to children"); *see also id.* § 3054(k) (describing the only meaningful limitations on KISA's authority as arising from its prospective application and conflicts with state laws). Thus, the plain language of KISKA demonstrates Congress's failure to implement a meaningful subordinating principle for Respondent's regulatory enforcement powers. *See Adkins*, 310 U.S. at 388.

First, Congress's delegation of its lawmaking authority is subject to the private nondelegation doctrine because KISA is a private, non-government entity. 55 U.S.C. § 3052. Second, Congress improperly provided unconstitutionally vast enforcement power to Respondent. *Id.* §§ 3054(h), 3054(j)(1). Third, Congress's appointed "watchdog," the FTC,

possesses a practically meaningless review power over Respondent's ability to enforce its regulatory agenda. *Id.* § 3053; R. at 3.

1. KISA is a Private Entity, Making it Properly Subject to the Private Nondelegation Doctrine.

To be subject to the private nondelegation doctrine, Respondent must be a private entity that has received some delegation of Congressional authority. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). Prior to reaching this conclusion, the threshold inquiry for a nondelegation analysis begins with a statutory interpretation that considers whether Congress has supplied an "*intelligible principle* to guide the delegee's use of discretion." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (emphasis added). Thus, the intelligible principal inquiry is used by courts to consider if Congress's statutory delegation of authority provided explicit guidelines about "what task it delegates and what instructions it provides" to the delegee. *Id.* at 136.

Here, Congress has provided an intelligible principle in KISKA—albeit an extremely broad one—which satisfies its initial requirement for endowing Respondent with its authority. 55 U.S.C. § 3050. In KISKA's purpose, Congress declared that the statute was designed "to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." *Id.* Congress then specified exactly what Respondent can do, how it is to be funded, who it is to be comprised of, its rulemaking power, and many other limitations. *Id.* §§ 3052, 3054, 3058. While Petitioners have serious concerns about the massive scope of Respondent's delegated authority, KISKA's inclusion of a proper purpose, combined with specific instructions for Respondent and the FTC, indicates that there is an intelligible principle to permit the delegation generally. *Gundy*, 588 U.S. at 136.

Upon clearing this initial hurdle, Respondent must be a private entity to be subject to the private nondelegation doctrine. *Dep't of Transp.*, 575 U.S. at 50. To determine whether an entity is private, courts will consider who makes up its membership, where its funding comes from, and whether the entity responds to and serves the government specifically. *Id.* at 51–53; *see also LeBron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–98 (1995).

Here, Respondent is unequivocally a private entity. From the onset, KISKA's text notes that Congress intended for Respondent to be considered a "private, independent, self-regulatory nonprofit corporation." 55 U.S.C. § 3052(a). Further, Respondent is composed entirely of nongovernmental board members who are nominated by an independent "nominating committee." *Id.* § 3052(b)–(d). Respondent's independence from the government means that neither Congress, the President, an executive agency, nor the judiciary are responsible for appointing members of its board or committees. *Id.* Likewise, Respondent's funding is wholly subsidized by private loans and the fines it levies against violators of its enacted rules, not by tax dollars. *Id.* § 3052(f)(1)–(2). Consequently, Respondent is a private entity and is thus subject to the limitations of the private nondelegation doctrine.

2. KISA Has Far Too Much Freedom to Enforce Internet Regulations Without Proper Government Supervision.

As an independent private entity, it is problematic that Congress was willing to endow Respondent with nearly unfettered enforcement powers over the internet, a critical means of communication and expression for virtually all Americans. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 852 (1997). Despite this, the plain language of KISKA granted Respondent practically unchecked enforcement powers against violators of regulatory schemes Respondent enacts. *Id.* § 3054(h)–(j). As the Fourteenth Circuit's factual summary described, "KISA holds the power to enforce its rules through *liberal* investigation powers and through the imposition of

civil sanctions or the filing of civil actions for injunctive relief." R. at 3 (citing 55 U.S.C. § 3054) (emphasis added). The placement of such broad authority, typically wielded by elected officials like state attorneys general or district attorneys, in the hands of a private corporation is itself cause for concern. *Cf. Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 268 (5th Cir. 2024) (describing the Texas attorney general's investigation and enforcement authority in upholding a regulatory scheme). The situation is even more dire upon realizing that Respondent can initiate the use of such broad powers prior to the FTC realizing such enforcement has occurred. 55 U.S.C. § 3054(h)–(j).

Given the problematic nature of this liberal delegation of enforcement authority to Respondent, this Court fortunately has guidance in considering KISKA's constitutionality. *See Horsemen's II*, 107 F.4th at 429. As the Fourteenth Circuit properly pointed out, Congress modeled Respondent's entity "nearly identically" off another piece of private delegation legislation—the Horseracing Integrity and Safety Act (HISA) of 2020, 15 U.S.C. §§ 3051–3060. R. at 6. In delegating its authority to "develop[] and implement[] a horseracing anti-doping and medication control program" and a "racetrack safety program," Congress established a direct parallel to Respondent's entity in the Horseracing Integrity and Safety Authority. *Id.* at § 3052.

It is noteworthy that Congress decided to endow Respondent with the exact same liberal enforcement powers given to the Horseracing Authority despite such powers being declared facially unconstitutional in *Horsemen's II*, 107 F.4th at 429–30. *Compare* 15 U.S.C. § 3054(h) (endowing the Horseracing Authority with "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction"), *with* 55 U.S.C. § 3054(h) (endowing KISA with identical "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction").

Aside from the textual similarities between KISKA and HISA, the direct applicability of the Fifth Circuit's holding in *Horsemen's II* is bolstered by the fact that the FTC is responsible for supervising both Respondent and the Horseracing Authority. 55 U.S.C. § 3054; 15 U.S.C. § 3054. In KISKA and HISA, Congress stated that the FTC was only able to review sanctions imposed by the private entities *after* enforcement had begun. 55 U.S.C. § 3054; 15 U.S.C. § 3054. Importantly, the FTC's review of both entities' enforcement actions is not mandatory. *See* 55 U.S.C. § 3058(c)(1) (describing that the FTC "may," but need not, review an enforcement action initiated by KISA); *see also* 15 U.S.C. § 3058(c)(1). As the Fifth Circuit reasoned in *Horsemen's II*, such an enforcement power is, for all intents and purposes, solely held by the delegee, not the FTC. 107 F.4th at 429. By its nature, this relationship creates the "inescapable conclusion" that the delegee "does not function subordinately to the FTC" when enforcing its regulatory agenda. *Id.*

Here, Respondent has the power to initiate a regulatory enforcement proceeding and carry it from start to finish without any FTC involvement. 55 U.S.C. § 3054(h)–(j). With direct enforcement powers like issuing subpoenas, launching investigations, and initiating civil suits, Respondent is not merely "acting as an aid" to the FTC; they have assumed undivided control of the enforcement proceedings. *Id*; *Horsemen's II*, 107 F.4th at 430. Moreover, KISKA does not grant the FTC power to halt or prevent Respondent from enforcing a violation until after a sanction has already been issued. *See* 55 U.S.C. § 3058(c)(1)–(2). Ultimately, this Court should apply the unambiguous holding issued by the Fifth Circuit in *Horsemen's II* to the case at bar, as Congress's delegation of enforcement authority to Respondent is unconstitutional given its lack of subordination to the FTC. 107 F.4th at 429–30.

3. The FTC's Supervisory Power Over KISA is Insignificant and Cannot be Cured by its Rulemaking Authority.

Rather than vest meaningful supervisory authority in the FTC, KISKA allows Respondent to impose irreparable reputational and financial harm on alleged violators of its regulations. *See* 55 U.S.C. § 3058(c). While the FTC can review Respondent's self-initiated actions, this review comes far too late in the enforcement process. *Horsemen's II*, F.4th at 430. Respondent may argue that the ever-changing nature of the internet warrants such a swift response, though history proves that the FTC does not actually use this review power meaningfully. R. at 3 (describing that the FTC has "exercised its authority to review an enforcement action only once," resulting in an ultimate decision not to take action).

In KISKA, Congress grants the FTC limited retrospective authority, enabling the Respondent to effectively test enforcement actions by presenting them without overly compelling evidence or cause. *See* 55 U.S.C. § 3057(a)(2) (describing the low bar required for KISA to initiate an enforcement proceeding against a technological company). As KISKA lays out, penalties imposed by Respondent's enforcement actions are presumptively valid unless the FTC or an ALJ exercises its discretionary review powers. *Id.* § 3058(b)–(c). This allows Respondent, which financially supports itself from the fines it imposes, to initiate prosecutions and levy sanctions against technological companies that might never have violated a regulation in the first place. *Id.* § 3057(a)(2). Although an entity targeted by Respondent may appeal an imposition of sanctions to an ALJ or the FTC, this appeal does not immediately stay a final civil sanction imposed by Respondent. *Id.* § 3058(d). In most cases, this means that Respondent will have the *first* and *last* word on whether sanctions will be thrust on a technological company.

Respondent may argue, as the Fourteenth Circuit held, that the FTC can use its rulemaking authority to 'write in' rules governing how Respondent enforces its regulatory

agenda. 55 U.S.C § 3053(e) (allowing the FTC to "abrogate, add to, and modify" rules crafted by KISA); *Horsemen's II*, 107 F.4th at 433 (citing *Oklahoma*, 62 F.4th at 231); R. at 6–7. Such an action is improper because it substantively modifies Congress's statutory delegation of its authority. *Horsemen's II*, 107 F.4th at 431–32. Both the Sixth Circuit in *Oklahoma* and the Fourteenth Circuit in the present case improperly concluded that because the "FTC can add certain pre-enforcement standards" to a delegee's proposed rules that Congress's delegation of authority is itself properly constrained. R. at 7 (citing *Oklahoma*, 62 F.4th at 231).

This reasoning is illogical on its face. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (stating an agency's permission to "modify" regulations does not authorize it to make "basic and fundamental changes" to the delegatory scheme designed by Congress). As the Fifth Circuit correctly pointed out, this exercise of rulemaking powers by a government agency cannot "alter [the] statutory division of labor" that results from Congress's failure to place enforcement powers in the right party's hands. *Horsemen's II*, 107 F.4th at 432. The Fourteenth Circuit's dissent bolsters this reasoning by noting that "[n]o court can or should allow an agency to alter the face of a statute simply to save it, and no court has." R. at 12. The dissent goes on by noting that "[a] private nondelegation doctrine violation does not simply go away because the private actor acts *nicely* with his government power." *Id.* On this principle, KISKA does not impose sufficient subordination required by the private nondelegation doctrine.

B. KISA's Enforcement Abilities are Not Comparable to Widely Approved Regulatory Schemes.

While Respondent compares itself to other widely affirmed entities relying on a Congressional delegation of power, such a position has no merit. R. at 12. Respondent argues in large part that it bears a close similarity to the Financial Industry Regulation Authority (FINRA), a private, self-regulatory entity that is supervised by the Securities and Exchange Commission

(SEC). *Id.*; *see also Scottsdale*, 678 F.Supp.3d at 94–95. As the Fourteenth Circuit's dissent properly observes, there are stark differences between Respondent's vast, unchecked internet enforcement power and FINRA's limited financial enforcement power. R. at 12. Considering such differences, this Court should not interpret prior court approvals of FINRA as requiring similar approval for KISA. *Id.*

Just like in KISKA, Congress's legislation delegating authority over securities industry regulation to FINRA allows the SEC to "abrogate, add to, and delete" rules proposed by FINRA. *Scottsdale*, 678 F.Supp.3d at 107 (citing 15 U.S.C § 78s(c)). At this point, the meaningful and operational similarities between Respondent and FINRA end. In particular, significant differences abound between Respondent and FINRA, with the most notable variances arising from each entity's enforcement abilities. 55 U.S.C. § 3053(e); 15 U.S.C § 78s(h)(1).

Unlike in KISKA, which vests regulatory enforcement authority solely in Respondent, such powers are shared between the SEC and FINRA. *Kim v. Fin. Indus. Regul. Auth., Inc.*, 698 F. Supp. 3d 147, 166 (D.D.C. 2023). In this respect, the SEC "retains authority to suspend or revoke" FINRA's operation and has its own ability to initiate and enforce sanctions against violators of FINRA's regulations. *Id.* More specifically, the SEC can "supervise, investigate, and discipline" violating entities "for any possible wrongdoing or regulatory missteps" against FINRA's regulations. *Horsemen's II*, 107 F.4th at 435 (citing *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007)). In contrast, the FTC is merely able to review Respondent's enforcement actions *after* they have impacted the alleged violator. 55 U.S.C. § 3058(c). Moreover, KISKA's language provides no indication that the FTC can strip Respondent of its enforcement abilities should it prove to wield its delegated authority improperly. Thus, the SEC

can properly oversee and subordinate FINRA's enforcement actions far more practically than the FTC can for Respondent. *Id.*

As just one example, Respondent's Rule ONE gives it the sole, unchecked power to commence civil suits and issue subpoenas against potential violators of its internet age verification regulations. *Compare* Rule ONE, 55 C.F.R. § 4 (reasoning that only "the Association [sic] may bring a suit for injunctive relief or civil penalties"), *with Paxton*, 95 F.4th at 268 (describing how Texas's nearly-identical internet age verification law vests the ability to initiate civil actions solely in the hands of the state attorney general). In contrast, the SEC has the sole power to commence civil suits against violators of FINRA's regulations. *See Horsemen's II*, 107 F.4th at 434 (describing the differences between FINRA and HISA). In keeping enforcement authority in the hands of the government, FINRA ensures that Congress's power is not wielded improperly. *Id.*

The differences between the FINRA-SEC and KISA-FTC relationships are even more apparent when considering who holds the power to alter the composition of each corporation. *Id.* For example, the SEC can remove FINRA's board members "for cause." 15 U.S.C. § 78s(h)(4); *Horsemen's II*, 107 F.4th at 434 (cleaned up). In contrast, Congress did not give the FTC any power to remove board members from KISA. Further, the FTC holds no power to decide how vacancies are filled on the board after a director leaves their post. 55 U.S.C. §§ 3052(b)(2)(iii), 3052(d)(1)(c). Unlike FINRA, Respondent operates as any other private, for-profit corporation would with respect to its internal governance, appointing directors and board members with no statutorily required administrative oversight. *Id.* at § 3052(d).

All told, the differences between FINRA and Respondent only lend themselves to one conclusion: these entities operate on vastly different planes. R. at 12. As a result, this Court should enjoin Respondent's operation, as it is not properly subordinate to the government.

C. Congress's Delegation of Authority to KISA is Averse to the Constitution's Fundamental Mandate Requiring Separation of Powers.

While Congress's desire to delegate its legislative authority over the internet to Respondent arose from good intentions, such consideration does not permit Congress to cast aside its obligations to the Constitution. As this Court has described, delegations of Congress's power to private entities are "legislative delegation in its most obnoxious form." *Carter*, 298 U.S. at 311.

Under the principles governing separation of powers, the federal government is comprised of three distinct branches for good reason. *Schechter*, 295 U.S. at 529. Each branch was designed to have its own vested powers, and those powers were not to be delegated to other branches. *Id.* This requirement takes on a heightened importance when considering delegations of authority to those who do not take an oath to the United States Constitution like private corporations. *See Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring in judgment) (reasoning that "there is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States"). In fact, members of this Court have gone as far as to say that private entities like Respondent do not have "a fig leaf of constitutional justification." *Id.* at 62 (Alito, J., concurring in judgment).

As a result, private entities are ultimately not accountable to the American public in making rules or enforcing them. *Oklahoma*, 62 F.4th at 228. Rather, they are self-regulating organizations that nominate their own members, fill vacancies, and ultimately draft and enforce rules that govern the everyday lives of American citizens. *Schechter*, 295 U.S. at 537. This kind

of self-governance is antithetical to the very idea of separation of powers, and thus it is clear that "everyone should pay close attention when Congress 'sponsor[s] corporations that it specifically designates not to be agencies or establishments of the United States government.'" *Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring in judgment) (citing *LeBron*, 513 U.S. at 390).

Here, Respondent is a private entity that has been given Congressional power to dictate decisions that will have a lasting impact on America's youth. R. at 10. An average citizen may find it bizarre that a private corporation possesses virtually unchecked abilities to dictate what sort of internet content constitutes "art" or what has "literary value," though Respondent is endowed with this very power. 55 C.F.R § 1(6)(C); *see also Reno*, 521 U.S. at 852 (describing that the content on the internet is "as diverse as human thought"). Ultimately, those who fail to take an oath of loyalty to the Constitution, like Respondent, should not be the ones who decide the fate of a protected liberty. *See Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring in judgment); *see also Playboy*, 529 U.S. at 811.

As a result, Respondent's power should be deemed facially unconstitutional under the private nondelegation doctrine and thus, Petitioners are likely to "succeed on the merits" regarding this claim. *See Mock*, 75 F.4th at 577.

II. RULE ONE'S AGE VERIFICATION REQUIREMENT IS OPPOSED TO THE SPEECH PROTECTIONS GUARANTEED BY THE FIRST AMENDMENT AND MUST BE STRUCK DOWN AS UNCONSTITUTIONAL.

Throughout this Court's recent history, virtually no form of government regulation has been as widely scorned as content-based speech censorship. *See, e.g., Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (*NIFLA*); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Ashcroft II*, 542 U.S. at 665–66; *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Cohen v. California*, 403 U.S. 15, 24–26

(1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). As a hallmark of a free society, freedom of speech "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted); *see also NIFLA*, 585 U.S. at 766. This Court has repeatedly and explicitly adhered to the "bedrock principle underlying the First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414; U.S. Const. amend. I.

The Court has long applied protections to content-based restrictions of speech involving sex. *See Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (reasoning that "sexual expression which is indecent but not obscene is protected by the First Amendment"); *see also Roth v. United States*, 354 U.S. 476, 487 (1957) (reasoning that sexual activity is a "motive force in human life" which has "indisputably been a subject of absorbing interest to mankind through the ages"). Wary of "reduc[ing] the adult population" to consuming "only what is fit for children," this Court has been careful to continually protect adults' rights to speech about sex. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Despite this justified reverence for free speech, Respondent has cast aside the First Amendment's fundamental protections with its Orwellian age verification scheme effectuated by Rule ONE, 55 C.F.R. §§ 1–4.

Consequently, this Court must restore the district court's grant of a preliminary injunction of Rule ONE and remand the case with instructions to permanently enjoin the regulation from operation. R. at 5. First, this Court must properly classify Rule ONE as a content-based regulation of protected speech. *See Playboy*, 529 U.S. at 811–13. Second, given the content-based speech regulation that Rule ONE imposes, this Court must apply strict scrutiny, not

rational-basis review, to Rule ONE. *See Ashcroft II*, 542 U.S. at 665–70. Third, Rule ONE is underinclusive of identically harmful speech and overinclusive of protected speech, thus rendering it incapable of achieving its stated aims. *See Brown*, 564 U.S. at 802.

A. Rule ONE Imposes a Content-Based Censorship Scheme by Design.

The Fourteenth Circuit erred for two reasons when it overturned the district court's grant of a preliminary injunction to Rule ONE. R. at 5. First, the Fourteenth Circuit did not properly consider that Rule ONE is a content-based speech regulation, which is among the most disfavored of laws in this Court's jurisprudence. R. at 7–9. Second, in failing to classify Rule ONE as a content-based censorship regime, the Fourteenth Circuit functionally reviewed Rule ONE as a content-neutral speech restriction. *Id.*

1. Rule ONE's Age Verification Requirement Imposes a Content-Based Speech Regulation on Adults by Design.

Respondent's imposition of an internet censorship regime through Rule ONE is a content-based speech restriction by design. R. at 3–4. Respondent's precise goal was to impose an administrative fence around protected speech. *Id.* Rule ONE was enacted to restrict lawful, protected access to adult content, demonstrated by Respondent's nearly immediate, one-sided exploration of the "deleterious effects" that "easy access to pornography had on minors." R. at 3. Ultimately, Respondent enacted Rule ONE to alleviate concerns about minors' future engagements with "deviant pornography," mitigate harms associated with "gender dysphoria, insecurities and dissatisfactions about body image, depression, and aggression," and alleviate the supposed correlation between a "higher use of pornography" and a "drop in grades." *Id.* Respondent's aims are manifestly grounded in restricting the content of protected speech. *See Playboy*, 529 U.S. at 811–13.

Generally, government regulation of speech is "content-based" if a law applies to particular speech because of a topic, message, subject matter, or idea expressed. *Reed*, 491 U.S. at 163; *Stevens*, 559 U.S. at 468. A speech regulation is "facially content based" if the law targets speech based on its communicative content, regardless of the legislators' intent. *Reed*, 491 U.S. at 163, 169. Alternatively, a facially neutral law may be deemed an "as-applied" content-based restriction if it cannot be justified without reference to the content of the regulated speech, was adopted due to the government's disagreement with a viewpoint the speech conveys, or if it bans an entire medium of expression. *Gilleo*, 512 U.S. at 55; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

With respect to adult content, this Court has established that a government's desire to "prevent the psychological damage" associated with "viewing adult movies" is decisively characterized as a content-based burden on speech. *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (holding that a listener's reaction to speech "is not a content-neutral basis for regulation").

Here, Rule ONE is a paradigmatic example of a content-based speech regulation. 55 C.F.R. §§ 1(6), 2(a). Rule ONE targets particular speech, namely "sexual material harmful to minors," based entirely on Respondent's judgments about the degree of harmfulness associated with the imagery, themes, and communicative contents of speech. *Id.*; *Reed*, 491 U.S. at 163. This targeted enforcement, which sweeps in gargantuan amounts of pornographic material not obscene for adults, comes even though such speech is constitutionally protected for adults. *See Roth*, 354 U.S. at 487–88; R. at 4. By definition, Rule ONE requires Respondent to determine if the communicative content of speech "is designed to appeal to . . . the prurient interest," takes on a "patently offensive" depiction of human sexual activity, or "lacks serious literary, artistic,

political, or scientific value for minors." 55 C.F.R. § 1(6)(A)–(C). This exercise, which requires a government regulator to classify the merits of speech, is precisely the sort of action that the First Amendment was enacted to prohibit. See *Johnson*, 491 U.S. at 414.

The context associated with Rule ONE's enactment provides similarly compelling justifications for the content-based nature of the regulation. R. at 3–4. Respondent's initial inquiry prior to enacting Rule ONE was occupied by experts testifying to the "host of horrors" associated with a minor's exposure to one particular type of content: pornography. R. at 3. Such a task wholeheartedly regulates the content of protected speech by attempting to "prevent the psychological damage" associated with minors viewing pornography. *Boos*, 485 U.S. at 321. Thus, even if this Court were to deem Rule ONE as "facially neutral," the regulation's very function is altogether unachievable without at least some reference to the adult content it seeks to censor. *Id.*; *Ward*, 491 U.S. at 791. As such, Rule ONE is an exemplary model of a content-based speech regulation.

2. Rule ONE's Age Verification Requirement is Not a Content-Neutral Speech Regulation, Thus Time, Place, and Manner Restrictions are Inapplicable.

The second category of regulations restricting speech are comprised of "content-neutral" laws. *See Reno*, 521 U.S. at 867–68. A law restricting speech is deemed to be content-neutral if it targets only the manner or method a speaker uses. *Ward*, 491 U.S. at 791 (holding that a municipal noise regulation was content-neutral), the "secondary effects" of speech, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding a zoning regulation that kept adult movie theatres away from residential neighborhoods in an effort to maintain property values), or if it applies regardless of or without reference to the speech's message, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Most content-neutral laws fall into the category of "time, place, and manner" regulations, which dictate when, where, or how speech must be

conveyed, regardless of the message. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (reasoning that the "crucial question" is "whether the manner of expression is . . . incompatible with the normal activity of a particular place at a particular time"). Thus, for a law to be deemed content-neutral, the government has the heavy burden of proving that the law is likely to cause a significant decrease in the negative externalities or secondary effects of speech (crime, blight, traffic, property values, etc.) and a trivial decrease in the quantity of speech. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring in judgment). Even upon proving this, the government may not regulate the secondary effects of speech by suppressing the speech itself. *Id.*

Attempts to apply such spatial or temporal restrictions on internet speech have been thoroughly rejected by this Court, especially when applied to content that adults have a protected right to view. *Packingham v. North Carolina*, 582 U.S. 98, 108 (2017); *Reno*, 521 U.S. at 868. The Court's reservations for applying time, place, and manner restrictions to internet speech are well-founded given that "cyberspace" is "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Reno*, 521 U.S. at 851. Though various restrictions on where adults may access sexually explicit material have been upheld, such laws are distinct from a regulation like Rule ONE that seeks to limit adults' access to protected content on the internet in its entirety. *Compare Weslowski v. Zugibe*, 96 F. Supp. 3d 308, 324 (S.D.N.Y. 2015) (holding that employees do not have an unfettered right to download and watch pornography in the workplace), *with PSINet, Inc. v. Chapman*, 362 F.3d 227, 239 (4th Cir. 2004) (striking down a state age verification law as overbroad in its attempt to limit minors' access to internet pornography arising from within the geographic boundaries of Virginia).

While Respondent may attempt to argue that Rule ONE is a content-neutral restriction on speech subject to the time, place, and manner analysis in *Renton*, this argument has no merit. *See Reno*, 521 U.S. at 867–68 (describing *Renton*, 479 U.S. at 49). In *Renton*, this Court upheld a municipal zoning ordinance restricting pornographic movie theatres from leasing property near residential areas. 479 U.S. at 49. The ordinance in *Renton* was upheld because it was explicitly aimed at regulating the "secondary effects" of speech, namely crime and declining property values, associated with living next to pornographic movie theatres. *Id.* Unlike Rule ONE, the ordinance in *Renton* did not regulate the content of the speech being disseminated by the theatres, *Id.*, nor did it seek to mitigate the "psychological damage" associated with viewing sexual content. *See Boos*, 485 U.S. at 321. Thus, while Respondent may contend that Rule ONE imposes a form of "cyberzoning" on commercial pornographic sites like that upheld in the real estate context in *Renton*, this argument was rejected outright in *Reno*, 521 U.S. at 867–68.

Given Rule ONE's classification, this Court's precedents have uniformly established that content-based regulations of speech must withstand strict scrutiny to be upheld.

B. Rule ONE's Content-Based Speech Restriction Regime is Unconstitutional Under Strict Scrutiny.

After determining that Rule ONE is a content-based speech restriction, the second step of a First Amendment challenge is to determine the proper level of scrutiny a reviewing court should apply to the law. *Gilleo*, 512 U.S. at 59 (O'Connor, J., concurring in judgment). First and foremost, as a content-based speech regulation, Rule ONE is presumptively unconstitutional. *See Reno*, 521 U.S. at 867. Second, this Court must apply strict scrutiny's two-pronged analysis to Rule ONE. *See Playboy*, 529 U.S. at 814. Third, this Court must disregard the Fourteenth Circuit's application of rational-basis review to Rule ONE as plainly inconsistent with relevant caselaw. *See Ashcroft II*, 542 U.S. at 666.

1. Rule ONE Is Presumptively Unconstitutional Under Strict Scrutiny.

As the Fourteenth Circuit's dissent properly pointed out, Rule ONE—a content-based speech restriction—can only stand if it satisfies strict scrutiny. R. at 13–14; *See Playboy* 529 U.S. at 813; *Sable*, 492 U.S. at 126. This is because laws imposing content-based restrictions on speech are presumptively invalid and violate the First Amendment's quintessential protections. *See, e.g., Ashcroft II*, 542 U.S. at 665–66; *Reno*, 521 U.S. at 867 (1997); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Renton*, 475 U.S. at 46–47; *Mosley*, 408 U.S. at 95. The use of strict scrutiny, as an exacting and burdensome standard of review, for content-based speech regulations is well-settled. *Playboy*, 529 U.S. at 814 ("As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny."). Thus, an application of strict scrutiny to Rule ONE renders Respondent's oppressive regulatory scheme presumptively unconstitutional. *Id.* at 817; 55 C.F.R. §§ 1–4.

2. Rule ONE Cannot Withstand the Rigors of Strict Scrutiny Review.

In applying strict scrutiny, courts give deference to the rights of speakers like Petitioners, not regulators. *See Erznoznik*, 422 U.S. at 210–11; *Cohen*, 403 U.S. at 21. Once a reviewing court determines that strict scrutiny is the appropriate standard of review, the burden of persuasion shifts to the government regulator to show that its proposed regulation is constitutional. *Playboy*, 529 U.S. at 817. To overcome this arduous presumption, "the Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. This heavy burden exists for good reason, as the aim of a strict scrutiny analysis "is to ensure that speech is restricted no further than necessary" to achieve the government's goal by ensuring that "legitimate speech is not chilled or punished." *Ashcroft II*, 542 U.S. at 666.

In this respect, Respondent must prove two distinct things to withstand strict scrutiny review of Rule ONE. *Id.* First, the Respondent must prove that it, as a proxy for the government, has a "legitimate interest" in regulating minor's access to pornography. *Id.* Second, Respondent must prove that it has taken the "least restrictive means" of regulating protected speech. *Id.*

i. Rule ONE Withstands the First Prong of Strict Scrutiny Review, But the Analysis is Not Over.

As the Fourteenth Circuit pointed out, a consideration of Rule ONE's objectives under the first prong of the strict scrutiny analysis is effectively a nonissue in this case. R. at 9–10. Under the first prong, the government must prove that it has a "compelling" or "legitimate interest" in regulating the content of speech that is otherwise constitutionally protected. *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126.

While this Court has emphasized that the "portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech," *Roth*, 354 U.S. at 487, it has also recognized that the government has a legitimate interest in limiting minors' exposure to sexually explicit materials. *See, e.g.*, *Ashcroft II*, 542 U.S. at 675 (Stephens, J., concurring in judgment) (reasoning that the Child Online Protection Act (COPA), 47 U.S.C. § 231, had a legitimate aim but failed strict scrutiny on the second prong); *Sable*, 492 U.S. at 126 (reasoning that 47 U.S.C. § 223(b) had a legitimate aim but failed strict scrutiny on its second prong). As the Fourteenth Circuit correctly pointed out, in the case at bar "all agree that children's welfare" is a legitimate interest grounding the enactment of Rule ONE. R. at 9.

ii. Rule ONE Fails the Second Prong of Strict Scrutiny Review Given its Highly Restrictive Means, Rendering it Unconstitutional.

Even though Respondent can convince that Rule ONE was enacted to achieve a legitimate government interest, the second prong of strict scrutiny review imposes a nearly

insurmountable burden upon Respondent. *See Playboy*, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."). Under the second prong of strict scrutiny, "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity" under the second strict scrutiny prong. *Reno*, 521 U.S. at 875 (referencing *Sable*, 429 U.S. at 129). The government regulator must prove that it has "narrowly tailored" its regulation of protected speech by choosing the "the least restrictive means" of achieving its legitimate end. *Sable*, 492 U.S. at 126. Thus, "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813 (citing *Reno*, 521 U.S. at 874). Adding to the rigors of this prong, "when a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816.

As applied to Rule ONE's age verification procedure, the "least restrictive means" prong of strict scrutiny review deals a fatal blow to Respondent's proposed regulation. 55 C.F.R. §§ 2–3. As enacted, Rule ONE provides that a "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification" requires the use of a "commercial age verification system" that uses either a "government-issued identification" or "a commercially reasonable method that relies on . . . transactional data." 55 C.F.R. § 3(a). Thus, to uphold this provision under strict scrutiny, Respondent must prove that both of its approved age verification techniques provide the least restrictive means of preventing children from accessing internet pornography.

Respondent does not come close to proving this. R. at 14–15. As the Fourteenth Circuit's dissent pointed out, Petitioner offered two less restrictive alternatives to Respondent's age verification system that were accepted as valid by the district court at trial: "(1) requiring Internet providers to block content until adults 'opt out' and (2) 'content filtering' that places adult controls on children's devices." R. at 15. The dissent goes on to correctly conclude that "[t]he presence of these alternatives alone is fatal to Rule ONE." *Id.* The dissent's assertion is wholly supported by caselaw. *See Ashcroft II*, 542 U.S. at 668–69; *Reno*, 521 U.S. at 877. In *Ashcroft II*, this Court found that the availability of filtering software and parental controls implemented on minors' devices supplied more than enough justification to strike down Rule ONE's direct precursor, the Child Online Protection Act (COPA), 47 U.S.C. § 231. *Ashcroft II*, 542 U.S. at 668–69. This, paired with the fact that numerous experts have "testified that internet filtering and blocking software could be effective methods of preventing juvenile access to adult materials," delivers a knockout punch to Rule ONE. R. at 5.

A cursory consideration of available commercial age verification mechanisms used outside the United States similarly proves that ample, less restrictive methods exist than those adopted by Rule ONE. *See* Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 Vt. L. Rev. 43, 64–85 (2020) (describing commercial age verification methods used to bar minors from internet pornography in the United Kingdom, Germany, France, New Zealand, and Australia, among other nations). For example, to restrict minors' access to commercial pornographic sites, the United Kingdom enacted a law like Rule ONE which requires adult users to complete a commercial age verification process prior to accessing restricted content. *See* Digital Economy Act 2017, c. 30, Part 3 § 16 (Eng.). Under the United Kingdom's age verification regime, "there is no single

proscribed way of verifying age" because "many privacy concerns are implicated by a system" that requires individuals to give "identifying information directly to a commercial pornography provider." Romney, *supra*, at 68.

Recognizing this, the U.K.'s scheme provides several age verification options for those who "do not have, or do not wish to share, identity documents." *Id.* at 69; *see also* Jillian Andres Rothschild et al., *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge* 4–5 (2024) (finding that over 15% of American adult citizens, or over 34.5 million people, do not have a driver's license or state identification document). For those with government issued identifications, the U.K. has allowed individuals "to purchase a hard copy Age Verification Card (nicknamed a 'porn pass') from a local store where the cashier will check the user's ID." Romney, *supra*, at 69.

At the very least, the mere presence of low-cost, minimally intrusive means of verifying an individual's age online indicates that Rule ONE must fail strict scrutiny.

3. The Fourteenth Circuit Erred in Applying Rational-Basis Review to Rule ONE's Age Verification Requirement.

The Fourteenth Circuit erred when it applied rational-basis review to Rule ONE. R. at 7–9. As a threshold matter, the doctrine of "vertical *stare decisis*" imposes an absolute "constitutional obligation" on "the state courts and the other federal courts" to follow Supreme Court precedent "unless and until it is overruled by this Court." *Ramos v. Louisiana*, 590 U.S. 83, 124, n.5 (2020) (Kavanaugh, J., concurring in part). Rather than adhere to its obligation under vertical *stare decisis* and apply strict scrutiny to Rule ONE—as required by this Court's unambiguous precedents in *Sable*, 492 U.S. at 126, *Reno*, 521 U.S. at 874–79, *Playboy*, 529 U.S. at 813–14, and *Ashcroft II*, 542 U.S. at 665–70—the Fourteenth Circuit instead opted, with

minimal explanation, to apply rational-basis review as was done in *Ginsberg v. New York*, 390 U.S. 629, 643 (1968). This choice was plainly incorrect. *See* R. at 10, 13–15.

When Respondent appealed the district court's grant of a preliminary injunction on Petitioner's First Amendment challenge, the Fourteenth Circuit came to a crossroad. R. at 5. On one hand, the Fourteenth Circuit could observe its obligations under vertical *stare decisis* and adhere to this Court's unambiguous precedents by applying strict scrutiny to Rule ONE. R. at 7–8. On the other hand, the Fourteenth Circuit could choose to effectively overturn the decisions of this Court by applying rational-basis review. *Id.* Evidently, the Fourteenth Circuit opted for the latter. *Id.*

The cornerstone of the Fourteenth Circuit's choice rests in its mistaken reliance on *Ginsberg*, 390 U.S. at 643. In *Ginsberg*, this Court upheld a New York statute that prohibited the in-person sale of obscene materials to minors under 17, even though the material was not obscene for adults under the *Roth* standard. *Id.* at 634–36 (describing *Roth*, 354 U.S. at 481). In reviewing the New York law, the Court applied rational-basis review because one could "rationally conclude" that the law satisfied the legitimate interest "to protect the welfare of the child." *Ginsberg*, 390 U.S. at 640–41. As the Fifth Circuit remarked, "*Ginsberg*'s central holding—that regulation of the distribution to minors of speech obscene for minors is subject only to rational-basis review—is good law and binds this court today." *Paxton*, 95 F.4th at 270 (applying *Ginsberg*'s rational-basis review to Texas's H.B. 1181, Tex. Civ. Prac. & Rem. Code Ann. §§ 129B.001–129B.006, a law that is effectively identical to Rule ONE in all meaningful ways relating to adult speech). The Fourteenth Circuit echoed this sentiment nearly verbatim in its ardent conclusion that "*Ginsberg* Remains Good Law." R. at 9.

Despite its insistence to the contrary, the Fourteenth Circuit's majority misinterpreted the scope and applicability of *Ginsberg*'s increasingly narrow holding. *See* R. at 14 (citing *Paxton*, 95 F.4th at 293 (Higginbotham, J., dissenting in part and concurring in part)). Correctly interpreted, *Ginsberg*'s holding stands for the important but limited proposition that states can define obscenity, and thus limit speech rights, more extensively for children than for adults. *Brown*, 564 U.S. at 793–94 (declining to extend *Ginsberg*'s holding beyond the narrow factual circumstance from which it arose). From this, Rule ONE does far more than regulate "the distribution to minors of speech obscene for minors." *Paxton*, 95 F.4th at 270. Just like its textual precursors in *Ashcroft II*'s COPA and *Paxton*'s H.B. 1181, Rule ONE's age verification process at 55 C.F.R. §§ 2–3 also regulates the distribution to adults of protected speech for adults. In requiring adults and minors to age-verify, Rule ONE "burn[s] the house to roast the pig" by effectively "reduc[ing] the adult population ... to [viewing] only what is fit for children." *Butler*, 352 U.S. at 383.

In relying solely on *Ginsberg*, the Fourteenth Circuit's majority fails to uphold a veritable Mount Rushmore of precedent established in the fifty-six years since its decision was handed down. R. at 9. From *Ginsberg*'s decision in 1968 to the present, no court, aside from the Fifth Circuit in *Paxton*, has applied rational-basis review to a content-based restriction on adult speech like that seen here. *Paxton*, 95 F.4th at 270. Even more strikingly, only one case on this issue has been decided since *Paxton*'s holding was handed down in March 2024, though, even it rejected the Fourteenth Circuit and *Paxton*'s untenable application of rational-basis review. *See Free Speech Coal., Inc. v. Rokita*, No. 1:24-CV-00980-RLY-MG, 2024 WL 3228197, at *6, *17 (S.D. Ind. June 28, 2024) (rejecting the reasoning in *Paxton* in favor of an application of strict scrutiny in accordance with *Reno*, *Ashcroft II*, and Judge Higginbotham's *Paxton* dissent).

The Fourteenth Circuit's rebuke of *Reno* is similarly insufficient. R. at 9. In *Reno*, this Court struck down key provisions of the Communications Decency Act (CDA) of 1996, 47 U.S.C. § 223, which sought to regulate "indecent" and "patently offensive" material on the internet to protect minors. 521 U.S. at 860, 881. Applying strict scrutiny, this Court held that the CDA's content-based regulatory scheme, including its proposed age verification process, was an unconstitutional abridgment of free speech under the First Amendment. *Id.* at 881. In addressing *Reno*'s unambiguous mandate requiring courts to apply strict scrutiny to a content-based, internet censorship law requiring age verification like Rule ONE, the Fourteenth Circuit merely contended that the laws contemplated in *Ginsberg* and *Reno* were "materially different." *Id.* at 865–68; R. at 9. The Fourteenth Circuit stakes its disregard of *Reno*'s use of strict scrutiny in favor of *Ginsberg*'s rational-basis review on the fact that "we are in a substantially different technological world than the world of *Reno*." R. at 9.

This conclusion is plainly incorrect. The Fourteenth Circuit's analysis omits a consideration of *Reno*'s identification of the unique concerns posed by the government's regulation of protected, non-obscene adult speech on the internet. *Reno*, 521 U.S. at 868–71. Recognizing the unique potential for unfettered human expression on the internet, this Court concluded in *Reno* that its prior holdings—including *Ginsberg* chief among them—"provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium" and "are fully consistent with the application of the most stringent review" of statutory provisions. 521 U.S. at 868, 870.

Further casting doubt on the Fourteenth Circuit's application of rational-basis review, Rule ONE's statutory provisions are functionally identical to those that this Court struck down in *Ashcroft II*, 542 U.S. at 661, when it applied strict scrutiny to COPA, 47 U.S.C. § 231. The

Fourteenth Circuit attempts to waive away *Ashcroft II*'s concrete prescription to employ strict scrutiny by asserting that the Court "was not asked whether strict scrutiny was the proper standard" and "merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny." R. at 9 (citing *Paxton*, 95 F.4th at 274). Reaffirming *Playboy*'s mandate that content-based speech regulations designed to protect minors from viewing harmful materials requires strict scrutiny, the Court observed in *Ashcroft II* that it was required to apply the same rigorous standard in its consideration of COPA. *Ashcroft II*, 542 U.S. at 670 (referencing *Playboy*, 529 U.S. at 826). As the Court indicated, "[t]o do otherwise would be to do less than the First Amendment commands." *Id.*

Ultimately, a proper application of strict scrutiny requires this Court to restore the district court's preliminary injunction prohibiting the continued operation of Rule ONE.

C. Rule One is Overinclusive of Protected Speech and Underinclusive of Harmful Speech, Thus Petitioners are Likely to Succeed on the Merits.

By any measure, Rule ONE will cause irreparable harm to the civil discourse, academic freedom, and artistic expression virtually every American engages with on the internet. R. at 10. As Respondent argues, this is a small cost to keep pornography out of the hands of minors. R. at 3, 10. This Court should ignore such sophistry and instead adhere to its precedents in striking down Rule ONE for two reasons. First, even with its colossal scope, Rule ONE is still incapable of protecting America's youth from the harms of internet pornography. R. at. 14–15. Second, along the same lines, Rule ONE will be vastly overinclusive of websites that contain protected speech fit for both *minor* and *adult* consumption. R. at 4–5.

1. Rule ONE's Arbitrary Enforcement Scheme is Underinclusive of Equally Harmful Internet Speech.

Although Rule ONE is incomprehensibly vast in its scope, it still manages to fail at its stated aim: keeping children from accessing harmful adult content on the internet. R. at 14–15.

This underinclusiveness is by design, as Rule ONE only requires "commercial enti[es]" which "knowingly and intentionally publish material to an internet website, including social media," to age verify visitors to a site. 55 C.F.R. § 2(a).

As this Court concluded in *Brown*, when a regulation limits minor's access to speech otherwise protected for adults, the fact "that its regulation is wildly underinclusive when judged against its asserted justification" is "alone enough to defeat it." 564 U.S. at 802. In this regard, "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* Thus, underinclusiveness in regulation is generally seen as a covert way of regulating particular entities based on the viewpoint they espouse, something that this court has facially rejected in virtually all contexts. *See R.A.V.*, 505 U.S. at 391.

This issue arises in the present case, as the regulation itself seems to target one particular type of business: commercial pornography websites. 55 C.F.R. §§ 1(1), 2(a). Despite the fact that many might find such sites "shabby, offensive, or even ugly," *Playboy*, 529 U.S. at 826, this Court has continually reinforced that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection" of the First Amendment. *Roth*, 354 U.S. at 484.

As a result, Rule ONE impermissibly targets commercial pornography websites while critically omitting other, perhaps more accessible sources of adult content like search engines, images generated by artificial intelligence, and sites where less than 10% of the content is deemed to be "sexual material harmful to minors." 55 C.F.R. §§ 1(6)(A)–(C), § 5(b). The Fourteenth Circuit's dissent readily identifies this deficiency in Rule ONE, noting that "[f]or every major pornographic website that the law bans, there is a website that teens can flock to that

contains at least some pornographic material." R. at 14 (citing *Paxton*, 95 F.4th at 301). Further, the dissent points out that "the prevalence of VPNs—and Rule ONE's lack of attempt to deal with them—also allows children to circumvent the rules." R. at 15.

This viewpoint discrimination is, on its own, enough for this Court to find in favor of Petitioners on the merits of this case.

2. Rule ONE is Overinclusive by Design and Restricts More Protected Speech Than Necessary.

Rather than protect minors from accessing obscene content, Rule ONE instead installs a nationwide web-filter that will inevitably sweep in more speech than is necessary given its arbitrary nature. *See* 55 C.F.R. § 2(a) (describing that any commercial entity that publishes content to an internet website wherein "more than one-tenth" of the site's content "is sexual material harmful to minors" will be subject to Rule ONE's age verification requirement). Although in *Reno* this Court "repeatedly recognized the governmental interest in protecting children from harmful materials," it concluded that this "interest does not justify an unnecessarily broad suppression of speech addressed to adults." 521 U.S. at 875.

Rule ONE's requirement for age verification is not concerned with any content on a site outside of that which is deemed to be harmful to minors—a concerning fact when considering that many websites presenting potentially objectionable material for minors also provide huge quantities of non-objectionable material that is *not* harmful for minors. R. at 4–5. Under Rule ONE's enforcement threshold requiring at least 10% of a website's content to be deemed "sexual material harmful to minors," it is not outside the realm of possibility that the other 90% of content on a website is material which presents "serious literary, artistic, political, or scientific value" for minors and adults alike. 55 C.F.R. §§ 1(1)(6)(C), 2(a). Despite this, Rule ONE's provisions would censor 100% of the content on such a website and would be rendered

inaccessible to individuals under age 18. *Id.* To analogize, this would be like restricting minors from accessing the entirety of a grocery store just because a small portion of the store, perhaps the customer service counter, sold lottery tickets to individuals aged 18 and older. Such over-inclusivity is, by its nature, illogical.

CONCLUSION

For the foregoing reasons, this Court should reverse both of the Fourteenth Circuit's holdings established on appeal. In doing so, this Court should grant a preliminary injunction with respect to Respondent's continued operation and should reinstate the district court's grant of a preliminary injunction as to Rule ONE. Accordingly, this Court should remand this case to the district court with instructions to permanently enjoin Respondent and Rule ONE from operation.

This twofold holding arises upon a consideration of the merits of this case. Concerning the private nondelegation issue, this Court should find that Respondent: (A) is not subordinate to the FTC, (B) is not comparable to other commonly accepted regulatory schemes, and (C) is averse to separation of powers principles. Concerning the First Amendment issue, this Court should find that Rule ONE's age verification measure: (A) is properly classified as a content-based speech restriction, (B) fails an application of strict scrutiny, and (C) is both overinclusive of protected speech and underinclusive of harmful speech. Ultimately, this case proves that good intentions alone cannot justify the deprivation of other essential rights.