No. 25-1779

In The

Supreme Court of the United States

Pact Against Censorship, Inc., et al.,

Petitioners,

v.

Kids Internet Safety Association, Inc., et al.,

Respondents.

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

No. 25-1779

Brief for Petitioners

Team 01
Attorneys for Petitioners

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine when it granted the Kids Internet Safety Association its enforcement powers when the Federal Trade Commission can only modify rules to change its investigatory and subpoena enforcement, perform post-enforcement judicial review of its civil sanctions, and has no direct oversight of its power to bring civil suits?

II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment when it restricts adults' fundamental right to access non-obscene material and uses age verification when there are alternative means available?

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The decision of the United States Court of Appeals for the Fourteenth Circuit affirming the United States District Court for the District of Wythe's decision on the nondelegation issue and reversing the injunction on the free speech issue can be found in the Record, R. at 1-15

JURISDICTIONAL STATEMENT

The jurisdictional statement has been omitted in accordance with the Tournament Rules for the Fifty-Fourth Annual William B. Spong, Jr. Moot Court Tournament at William & Mary Law School.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. CONST. art. I, § 1

U.S. CONST. art II, § 1

U.S. CONST. art III, § 1

U.S. CONST. amend. I

55 U.S.C. §§ 3053-58

55 C.F.R. §§ 1-4

STATEMENT OF THE CASE

Statement of the Facts

Congress passed the Keeping the Internet Safe for Kids Act ("KISKA" or the "Act") to address growing criticism that the government was not doing enough to protect children from inappropriate and obscene internet material. R. at 2. The Act became effective in January 2023. *Id.* The Act's purpose "is to provide a comprehensive regulatory scheme to keep the [i]nternet accessible and safe for American youth." 55 U.S.C. § 3050. To develop and implement that regulatory scheme, the Act recognizes a "private, independent, self-regulatory, nonprofit corporation" called the Kids Internet Safety Association ("KISA" or the "Association"). *Id.* at § 3052(a).

Congress granted KISA extensive powers. *See id.* §§ 3054-57. KISA has rulemaking powers related to children's access and safety on the internet. *Id.* § 3054(c). It has the authority to enforce those rules and the Act. *See id.* §§ 3054-57. KISA has national authority over children's internet safety. *Id.* § 3054(a)(2). It has investigatory and subpoena power for any civil violations committed under its jurisdiction. *Id.* § 3054(h). KISA is empowered to issue civil penalties and civil sanctions against technology companies in violation. *Id.* §§ 3054(i)-(j) 3055(f)(B), 3056(b). It can also initiate civil actions for injunctions and restraining orders against tech companies in federal court. *Id.* § 3054(j).

The Act includes provides for Federal Trade Commission oversight of KISA. *Id.* § 3053. The FTC must approve KISA's rules so long as they are consistent with the Act and existing rules. *Id.* § 3053(c)(2). The Act also enables the FTC to "abrogate, add to, and modify" KISA's rules to ensure KISA's fair administration, conform the rules to the Act's requirements, or further the Act's purpose. *Id.* § 3053(e). Congress has enabled the FTC to review KISA's final civil sanctions. *Id.*

§ 3058. The FTC can request an administrative law judge review any sanctions, after which it can finally review the ALJ's decision. *Id.* § 3058(b)-(c).

KISA was up and running by the end of February 2023. R. at 3. It first considered the potential negative effects of early exposure to pornography. *Id.* After hearing expert testimony, KISA passed Rule ONE—the regulation at issue here. *Id.* Rule ONE requires any entity to use reasonable age verification if it knowingly publishes material online, more than one-tenth of which is sexual material harmful to minors. 55 C.F.R. § 2. The rule defines reasonable age verification methods as those using either (1) government-issued identification or (2) another commercially reasonable method relying on transactional data. *Id.* § 3. It defines "sexual material harmful to minors" as material that:

> (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
> (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:
> (i) a person's pubic hair, anus, or genitals or the nipple of the female breast;
> (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or
> (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 1(6).

Rule ONE became effective in June 2023. R. at 4. It caused major disruptions to the adult entertainment industry. *Id.* Similar state laws have caused traffic drops as high as eighty percent. *Id.* Rule ONE therefore stands to have significant impacts on the industry. *Id.*

The Pact Against Censorship ("PAC") provided evidence that most websites subject to Rule ONE publish a great deal of material that is not definable as "sexual material harmful to minors" under § 1(6). *Id.* It also stressed that children can easily bypass age verification. *Id.* at 4-

5. In one instance, a six-year-old child spent more than $16,000 on in-app purchases. *Id.* at 5. PAC also submitted expert testimony that filtering and blocking software effectively prevent child access to adult content. *Id.*

Procedural History

Plaintiffs filed suit on August 15, 2023, to enjoin Rule ONE and KISA's operation. *Id.* The District Court for the District of Wythe held that KISKA does not violate the private nondelegation doctrine, reasoning that it sufficiently subordinates KISA to the FTC. *Id.* On the First Amendment issue, the district court found that Rule ONE does violate the First Amendment because it restricts more speech than necessary. *Id.* Therefore, the court granted the injunction. *Id.* Defendant-appellant KISA appealed the district court's decision on the First Amendment issue, and plaintiff-appellee PAC cross-appealed on the nondelegation issue. *Id.*

The Court of Appeals for the Fourteenth Circuit affirmed the district court's holding that the Act does not violate the private nondelegation doctrine. *Id.* at 10. It reasoned that the FTC's ability to "abrogate, add to, or modify" KISA rules would allow it to set enforcement standards, thereby adequately controlling KISA. *Id.* at 7. The court of appeals reversed the district court's holding on the First Amendment issue. *Id.* at 10. First, it found that rational basis review applies, relying on *Ginsberg v. New York*, 390 U.S. 629 (1968) to determine that it is lawful to restrict non-obscene material for adults that was obscene for children. *Id.* at 8. Then, the court held that Rule ONE survives rational basis review. *Id.* at 9. It found that the government has an interest in protecting minors from obscenity, and KISA's rule is rationally related based on its evidence that early access to pornography harms children. *Id.* at 9.

SUMMARY OF THE ARGUMENTS

This Court should reverse the lower court's decision on both issues. First, this Court should hold that Congress violated the private nondelegation doctrine by granting KISA expansive enforcement powers with limited, post-enforcement oversight from the FTC. Second, this Court should hold that KISA's Rule ONE violates the First Amendment because it unnecessarily restricts adult access to non-obscene material and is not narrowly tailored to further the government's interest by the least restrictive means.

Our Constitution vests power in three branches of government. For private persons to wield federal power erodes the public accountability essential to our system of government. This Court has recognized a limited capacity for private delegation, only a public authority holds pervasive authority over the private entity. The FTC does not so control KISA. KISA leads in launching investigations, issuing subpoenas, enforcing sanctions, and bringing civil suits. Congress granted the FTC only post-enforcement rule-modifying powers and the ability to review enforcement after-the-fact. The FTC's only power amounts to placing obstacles in KISA's way. It is KISA who decides how to run the course. The Act impermissibly delegates power to KISA.

The Framers placed free speech first among the amendments. The First Amendment's purpose is to protect unpopular speech from government suppression. KISA's Rule ONE violates that principle. It regulates non-obscene material and infringes on adults' fundamental right to access protected content, and must therefore be reviewed under strict scrutiny. There is no doubt that protecting children online is a compelling state interest, but Rule ONE is anything but narrowly tailored to that interest. It is both overinclusive and underinclusive. Rule ONE is overinclusive because it restricts access to protected speech—adults have a right to access all the content on targeted websites and children have a right to access up to eighty-nine percent of it.

Rule ONE is also underinclusive because it fails to prevent children from accessing websites with ten percent or less sexual material harmful to minors.

ARGUMENT

Standard of Review

The first issue before the Court is a constitutional question of private nondelegation. R. at 16. The second issue is also a constitutional question under the First Amendment. *Id.* Constitutional issues are reviewed *de novo*. *United States v. Shamsid-Deen,* 61 F.4th 935, 944 (11th Cir. 2023).

I. CONGRESS VIOLATED THE PRIVATE NONDELEGATION DOCTRINE BY GRANTING KISA ITS ENFORCEMENT POWERS BECAUSE KISA DOES NOT FUNCTION SUBORDINATELY TO THE FTC AND IS NOT SUBJECT TO SIMILAR LEVELS OF OVERSIGHT AS CONSTITUTIONAL SROS.

The United States Constitution is unambiguous on vested powers. "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. "The executive power shall be vested in a President of the United States of America." U.S. CONST. art II, § 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." U.S. CONST. art III, § 1. These vesting clauses bar unchecked delegation of power from each branch. Delegating power to private entities creates even more tension with our governing principles. This Court has described private delegation as "unknown to our law, and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

Congress here violated the private nondelegation doctrine because it drafted the Keeping the Internet Safe for Kids Act ("KISKA") to create a private entity—the Kids Internet Safety

Association, Inc. ("KISA" or the "Association")—and grant it vast executive powers with minimal oversight from a government agency. KISA has enormous discretion to employ investigatory powers and issue subpoenas, while the FTC can only modify rules to guide how KISA wields its powers. KISA can sanction companies, and the FTC can only perform post-enforcement review. KISA can bring civil suits against those it finds in violation of its rules, and the FTC can do nothing to stop it. The FTC lacks the direct subordinating authority characteristic of a valid power delegation.

A. KISKA Violates the Private Nondelegation Doctrine by Empowering KISA to Launch Investigations, Issue Subpoenas, Enforce Sanctions, and Bring Civil Suits With Only Limited Post-Enforcement Oversight by the FTC.

Private entities may aid a public agency in executing the law only when that agency retains authority over the execution. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). A private entity may only wield executive power if it functions subordinately to a government agency that has pervasive surveillance and authority over it. *See Nat'l Horseman's Benevolent and Protective Ass'n v. Black* (*Black II*), 107 F.4th 415, 428 (5th Cir. 2024); *see also Nat'l Horseman's Benevolent and Protective Ass'n v. Black* (*Black I*), 53 F.4th 869, 880 (5th Cir. 2022). Private entities cannot be principal decision makers in using federal power *Pittston Co. v. United States,* 368 F.3d 385, 394 (4th Cir. 2004). An agency may not alter Congress's statutory scheme through rulemaking. *Biden v. Nebraska*, 600 U.S. 477, 494 (2023).

1. The Act is Unconstitutional Because KISA's Broad Subpoena and Investigatory Functions are Not Meaningfully Subordinate to the FTC.

Private entities may aid a government agency in executing the law, but only when the agency retains complete authority over that execution. In 1937, Congress passed the Bituminous Coal Act of 1937. *Adkins*, 310 U.S. at 387. Congress delegated price-fixing powers to a public Coal Commission. *Id.* at 388. It delegated the role of aiding the Coal Commission to private boards

formed from coal producers. *Id.* The private boards proposed pricing based on statutory guidelines. *Id.* The boards could make proposals to the Commission of their own accord, or the Commission could direct the boards to do so. *Id.* The Court found that this arrangement sufficiently subordinated the private entity to the public Commission. *Id.* at 399. The Commission set prices. *Id.* The Commission directly oversaw the private entity's actions and surveilled its operation. *Id.* Since the private entity held only the power to advise and make proposals, the Court upheld the 1937 Coal Act. *Id.*

A private entity may only wield federal power if it functions subordinately to a government agency. The Horseracing Integrity and Safety Act of 2020 ("HISA") empowered a private Horseracing Authority to develop and enforce horseracing rules nationwide. *Black II*, 107 F.4th at 420. Initially, the FTC had no rulemaking authority over the private entity. *Id.* The Fifth Circuit reviewed two challenges to HISA in a series of cases. *See Black I*, 53 F.4th at 872; *Black II*, 107 F4th at 420. First, the court held HISA facially unconstitutional because the Horseracing Authority could create rules without any oversight from the FTC. *Black I*, 53 F.4th at 890. Congress then amended HISA to cure the legislative power problem. *Black II*, 107 F.4th at 424.

As with legislative power, so with executive power—private entities may not hold government power outside the pervasive supervision of a government agency. Post-amendment, HISA still granted the Authority power to investigate, subpoena, and sanction. *Id.* at 421. HISA's sanctions were reviewable by the FTC after the fact. *Id.* at 426. The Authority decided whether to launch an investigation or subpoena records. *Id.* The FTC itself possessed neither power. *Id.* The FTC could only steer the Horseracing Authority's enforcement by modifying a rule *Id.* at 431. The Horseracing Authority could sanction. *Id.* at 429. The FTC could not. *Id.* Only after sanctions were enforced, challenged, and reviewed by an ALJ could the FTC finally step in and review. *Id.* at 430.

The Horseracing Authority could sue. *Id.* at 429. The FTC could not. *Id.* The FTC didn't even have review power on civil actions. *Id.* at 434. Therefore, the "inescapable conclusion [was] that the Authority [did] not 'function subordinately' to the FTC when enforcing HISA." *Id*. at 429. *But see Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023) (holding that the FTC's review power and power to "abrogate, add to, and modify" Authority-created rules sufficiently subordinated the Authority because the FTC *could* mold rules to prevent the Authority from performing undesirable enforcement).

The Act grants KISA extensive investigatory and subpoena powers within its broad jurisdiction. KISA's jurisdiction spans all of online safety for children. 55 U.S.C. § 3054(a). The Act grants it national authority. 55 U.S.C. § 3054(a)(2). It can also form partnerships with non-profit organizations to investigate and enforce potential violations. 55 U.S.C. § 3054(e)(A). The Act also offers a broad grant of subpoena and investigatory authority in the event of any violations committed within KISA's jurisdiction. 55 U.S.C. § 3054(h). The abilities to subpoena and investigate are fundamentally executive powers. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 695-96 (1988) (reasoning that intrusions on the power to investigate are intrusions on the Executive's power); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 504 (2010) (discussing the "power to start, stop, or alter . . . investigations" as executive powers); *Collins v. Yellen*, 594 U.S. 220, 254 (2021) (identifying the power to issue subpoenas as a reason "the FHFA clearly exercises executive power").

The FTC's only authority over KISA's executive power is through convoluted rulemaking. Section 3053 governs the FTC's oversight and concerns only its role in rulemaking, without reference to overseeing KISA's enforcement. *See* 55 U.S.C. § 3053. Section 3058 provides the FTC power to review the Association's final decisions, but not with respect to any investigations

or subpoenas. *See* 55 U.S.C. § 3058. The FTC's only power under the Act that allows it any authority over KISA's investigations and subpoenas is its power to "abrogate, add to, and modify" KISA's rules. 55 U.S.C. § 3053(e). Therefore, if the FTC doesn't like the way KISA is investigating, it can modify a rule to govern how KISA investigates. For instance, the FTC could modify a rule stating that KISA must not issue overbroad subpoenas. *See Oklahoma*, 62 F.4th at 231 (The Sixth Circuit opining that the FTC's ability to issue a rule instructing how the Horseracing Authority issues subpoenas is a form of subordination). This amounts to the FTC saying, "No, not like that!"

KISA does not serve as an aid to the FTC in executing the law. It is KISA that executes the law. *See* §§ 3054(a), (e), (h). The FTC does not retain authority over that execution. *See* §§ 3053(e); 3058. At best, the FTC can guide KISA's execution. Consequently, Congress violated the private-nondelegation doctrine when it granted KISA its enforcement powers because KISA is not subordinate to a public authority in executing those powers.

2. The Act is Unconstitutional Because KISA's Ability to Issue Civil Sanctions is Only Subject to Judicial Review by the FTC.

Private entities may not be principal decision-makers when using federal power. With another coal act challenge, the court in *Pittston* addressed whether the Coal Industry Retiree Health Benefits Act of 1992 ("1992 Coal Act") violated nondelegation. 363 F.3d at 389. The 1992 Coal Act empowered a private entity—the Combined Fund—to aid the Social Security Commissioner in administering benefits to retired coal workers. *Id.* at 395. The court stressed that governmental power must be exercised by the Department upon which it is conferred. *Id.* at 394. It cannot be delegated to private entities in a way that frustrates constitutional government structure. *Id.* at 394. The Combined Fund's powers included internal governance, ministerial functions for receiving governmental money, and the ability to refer delinquent entities to the Treasury Department. *Id.* at

396-97. The court held that these powers were "far from unfettered" and constituted ministerial and advisory tasks only. *Id.* at 398. In other words, the Combined Fund was not a principal decision-maker with any federal power.

KISA's power to issue civil sanctions is subject to even less FTC surveillance and authority than its investigatory and subpoena powers. And unlike the Combined Fund in *Pittston*, it is the principal decision-maker in issuing those civil sanctions. KISA can issue civil sanctions under its Stop Internet Child Trafficking Program and its Computer Safety Program. *See* §§ 3055-56. It can issue sanctions against any technological company that violates KISKA or any KISA rules. *See* § 3054(j)(1)-(2). KISA can even preemptively sanction companies it believes are *about to* violate a rule. *Id.*

The FTC's only authority over KISA's sanction powers amounts to judicial review. Under § 3058, the FTC can apply for an administrative law judge to review final civil sanctions KISA imposed. § 3058 (b)(1). This power is not exclusive to the FTC—any party aggrieved by KISA's sanctions can apply. *Id.* Only then can the Commission notify KISA that it intends to review the ALJ's decision. *See* § 3058(c)(1).

KISA's civil sanction enforcement powers are not subordinate to the FTC. In *Black II*, the private authority sanctioned members by barring certain racetracks from broadcasting horseraces. 107 F.4th at 427. The Fifth Circuit stressed that enforcement occurred whether or not The FTC later reversed it. *Id.* at 430. As in *Black II*, KISA is free to issue civil sanctions as it sees fit within its jurisdiction. *See* § 3054-56. The FTC may reverse those sanctions, but only after a review process. *See* § 3058(c)(3)(A)(i). Therefore, KISA is no more subject to the FTC's authority regarding its civil sanctions than the President is subject to this Court. The Fifth Circuit correctly points out that police officers enforce traffic laws—a review of that enforcement by the police

department, the mayor's office, or anyone else does not change the fact that it is the *officers* who enforce. *See Black II*, 107 F.4th at 431; *see also* R. at 11.

KISKA violates the private nondelegation doctrine because it grants KISA the power to enforce civil sanctions, not subject to the surveillance and authority of the FTC, but subject only to its judicial review. KISA is the principal decision-maker in issuing civil sanctions, and that violates the nondelegation doctrine.

3. The Act Violates the Private Nondelegation Doctrine Because It Grants KISA Unrestrained Power to File Civil Suits Without Any FTC Oversight.

KISA's power to file civil suits is the clearest example of its insufficient subordination to public authority. Private entities like KISA may only aid a public agency in executing the law, and only when that agency retains authority over the execution. *Adkins*, 310 U.S. at 388. Private entities cannot be principal decision-makers in using federal power. *Pittston*, 368 F.3d at 394. A private entity may only wield executive power if it functions subordinately to a government agency with pervasive surveillance and authority over it. *See Black II*, 107 F.4th at 428. For KISA's power to bring civil suits, none of these conditions are met.

Section 3054(j) empowers KISA to "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 [it]." § 3054(j)(1) It can seek injunctions and restraining orders without bond. § 3054(j)(2). Meanwhile, the Act grants the FTC no oversight. Unlike KISA's sanction powers, the FTC has no review authority for KISA's civil suits. *See* § 3058. The power to bring civil suits is quintessentially executive. *See Buckley v. Valeo,* 424 U.S. 1, 138 (1976). This Court has specified that "a lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the

responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. CONST. Art. II, § 3.).

Congress violated the private nondelegation doctrine when it granted KISA its enforcement powers. Those powers are not subject to direct oversight by the FTC or any other public agency. *See, e.g.,* § 3054-58; *Black II*, 104 F.4th at 429. KISA's investigatory and subpoena powers are subject only to convoluted rulemaking control from the FTC, which cannot cure the unconstitutional scheme Congress created. *See* § 3053; *Biden,* 600 U.S. at 494. Its civil sanction powers are only subject to judicial review by the FTC. *See* § 3058.

The scheme Congress created with KISKA violates the private nondelegation doctrine because it granted KISA the unrestrained power to bring civil suits. It does not matter what KISA or the FTC do with the powers they were granted—the grant of power itself is unconstitutional.

4. Congress Violated the Private Nondelegation Doctrine When it Drafted KISKA and No FTC or KISKA Action Can Cure That Defect.

An agency may not alter Congress's statutory scheme through rulemaking. In 2022, the Secretary of Education established a comprehensive student loan program under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). *See Biden,* 600 U.S. at 482. The HEROES Act authorizes the Secretary of Education to waive or modify any provision applicable to student financial assistance programs. *Id.* at 494. This Court provided that the ability to "modify" means "to change moderately or in minor fashion," "to limit or restrict," or "to make somewhat different; to make small changes to." *Id.* at 494-95. Therefore, this Court held that the power to "modify" regulations allowed for "modest adjustments and additions to existing provisions, not [transformations]." *Id.* at 495.

Even if such post-enforcement rulemaking did effectively control KISA's executive power, the outcome would not change. First, the FTC's rule modification powers have limits. The

Commission may abrogate, add to, and modify KISA's rules. *See* § 3053(e). But it must find such modifications or additions necessary either (1) to ensure fair administration of KISA, (2) to ensure KISA's rules conform to the Act's requirements, or (3) to further the purpose of the Act. *Id.* Though admittedly broad, these are still real limits on the FTC's ability to modify rules. Still, the issue is whether Congress violated the private nondelegation doctrine when it granted KISA expansive executive power, not whether the FTC can amend a rule to prevent KISA from acting in certain ways.

The FTC cannot cure a statutory defect with a rule. In *Black II*, the FTC's only ability to subordinate the Horseracing Authority's investigation powers was to modify rules to govern *how* the Authority investigated. *See Black II*, 107 F.4th at 432. The Fifth Circuit held that a "mere agency cannot alter [the] statutory division of labor." *Id.* In KISKA, Congress chose to divide the work of ensuring internet safety for children by granting KISA investigation and subpoena power, while granting the FTC rule modification power. *See* 55 U.S.C. §§ 3053-54. While the FTC may steer KISA's investigations or subpoenas through rule modifications, this does not cure the statute of unconstitutional private delegation.

Some courts have reasoned that post-enforcement rulemaking authority is sufficient to sustain a facial challenge to enforcement-based private nondelegation violation claims. The Sixth Circuit opined that the Horseracing Integrity and Safety Act was constitutional because the FTC *could*, for example, issue rules governing how the Horseracing Authority used its enforcement powers. *See Oklahoma*, 62 F.4th at 231. Indeed, facial challenges require establishing that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, KISKA is still facially unconstitutional even if the FTC modifies rules so that KISA cannot exercise executive power unchecked. Congress's scheme is unconstitutional,

not how the agencies execute it. This Court has clearly stated that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Biden*, 600 U.S. at 494 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). Therefore, KISKA is unconstitutional because it grants KISA unsubordinated enforcement powers.

The FTC-KISA structure violates the private nondelegation doctrine because KISA does not aid the FTC, it leads in enforcement. KISA is the principal decision-maker in issuing sanctions and bringing civil suits. When the FTC has any role to play, it is post-enforcement review or convoluted rule-modifying, and it is insufficient to survive a nondelegation challenge.

B. FTC Lacks the Pervasive Surveillance and Authority Over KISA Characteristic of Constitutional Private Delegation.

Statutory authority may only be delegated to a private entity if the entity functions subordinately to a government agency that retains authority and surveillance over all entity functions. *See Consumers' Rsch., Cause Based Com., Inc. v. FCC*, 88 F.4th 917, 926 (11th Cir. 2023); *see also, Adkins*, 310 U.S. at 399. Only the federal government can freely exercise federal power. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

1. The Act is Unconstitutional Because KISA Does Not Function Subordinately to a Government Agency.

Congress may only delegate power to a private entity if the entity functions subordinately to a government agency that retains pervasive authority and surveillance over it. In *Consumers' Research*, the Eleventh Circuit considered a private-nondelegation challenge to the Telecommunications Act of 1966 with respect to powers delegated to the Universal Service Administrative Company (USAC). 88 F.4th at 921. USAC's powers included issuing projections for quarterly contributions to the FCC. *Id.* at 927. The FCC approved or altered those projections

however it saw fit. *Id.* USAC filed mandatory annual reports with the FCC and Congress. *Id.* USAC collected contributions for the FCC and distributed them according to statute and FCC regulations. *Id.* What limited discretion USAC had in distributing funds was subject to FCC review. *Id.* In any doubt about USAC's functions, it was required to seek direction from the FCC. *Id. at* 926; *see also*, 47 C.F.R. 54.702(c) (stating that the USAC administrator may not make policy or interpret unclear provisions, but must instead seek guidance from the Commission where the Act or any Rules are unclear). The FCC also selected all of USAC's directors. *Consumers' Rsch.*, 88 F.4th at 928. USAC was under "deep and meaningful" control from the FCC, and not in violation of the private nondelegation doctrine. *Id.*

Congress delegated KISA statutory authority, but did not subordinate it to a government agency. In *Consumers' Research*, USAC was a valid private delegation because it reported extensively to the FCC, served only in an advisory capacity, issued projections subject to FCC approval, created no policy, and carried no enforcement powers. *Id.* at 926-28. KISA, on the other hand, is only ever required to report to the FTC to inform it that KISA has issued civil sanctions. *See* § 3058(a). It is never required to report to Congress. *See generally*, §§ 3053-59. KISA is not only advisory—it launches investigations, issues subpoenas, sanctions companies, and brings civil suits of its own accord. *See* §§ 3054(h), (j). It also creates policy through its rulemaking, and the FTC *must* approve those rules in most circumstances. *See* §§ 3053(a), (b)(2).

2. The Act Violates the Private Nondelegation Doctrine Because KISA Freely Exercises Government Power.

Only the federal government can freely exercise federal power. In 1935, Congress passed the Bituminous Coal Conversion Act to provide cooperative marketing, levy taxes, and regulate the coal industry for the public interest. *Carter*, 298 U.S. at 278. The Coal Act formed a Coal Commission with the power to "hear evidence and find facts upon which its orders and actions

may be predicated." *Id.* at 280. It delegated authority to coal producers and miners to set minimum wages and hours. *Id.* at 310. In striking down the law, the Court termed this the most "obnoxious form" of delegation. *Id.* at 311. Congress did not simply delegate authority, but delegated it to private persons whose interests are often adverse to others in the same industry. *Id.* Some private coal producers favored the Act, while others did not. *Id.* Conditions in the industry varied by location. *Id.* "One person may not be [e]ntrusted with the power to regulate the business of another," said the Court. *Id.* That power is necessarily a government function. *Id.* On that reasoning, the Court struck down the Coal Conversion Act. *Id.*

KISA freely exercises federal executive power granted to it by KISKA. In *Carter*, this Court stressed that private entities cannot be entrusted with governmental power over businesses because their interests will inevitably conflict. *Id.* at 311. Yet Congress granted KISA precisely such power. It enforces rules against private companies at its discretion through investigations, subpoena power, civil sanctions, and civil suits. *See* 55 U.S.C. §§ 3054-56. It does so with minimal supervision. *See* §§ 3053, 3058.

The SEC-FINRA relationship exemplifies the legitimate delegation of federal power to a private entity. FINRA exercises federal power, but it does not do so *freely*. Courts have found the SEC-FINRA structure constitutionally valid time and again. *See, e.g., R.H. Johnson & Co. v. SEC*, 192 F.2d 690, 695 (2d Cir. 1952) ("We see no merit in the contention that the Act unconstitutionally delegates power to the association"); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977) (agreeing with the Court of Appeals for the Second Circuit in an identical nondelegation challenge); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (finding no merit in an argument that the Maloney Act is an unconstitutional delegation because the SEC has substantial direct authority over the private institution).

The SEC can revoke FINRA's enforcement powers. 15 U.S.C § 78s(g)(2). The SEC can revoke FINRA's registration as a regulatory entity, censure it, and impose limits upon it. § 78s(h)(1). The SEC can "supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps." *In re NYSE Specialists Secs. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007) (citing *DL Cap. Grp., LLC v. Nasdaq Stock Mkt.*, 409 F.3d 93, 95 (2d Cir. 2005)). The SEC can also remove FINRA members and its board. § 78s(h). The FTC cannot do any of these things with KISA.

Congress violated the private nondelegation doctrine when it granted KISA its enforcement powers. KISA has sweeping executive powers, including launching investigations, issuing subpoenas, leveling sanctions, and bringing civil suits. The FTC lacks meaningful authority over KISA. KISA does not "function subordinately" to a public agency.

II. RULE ONE REGULATES INDECENT MATERIAL THAT IS NOT OBSCENE, AND THEREFORE IS ENTITLED TO CONSTITUTIONAL PROTECTIONS, THIS AMOUNTS TO CONTENT-BASED REGULATION WHICH IS PRESUMPTIVELY INVALID AND FAILS A STRICT SCRUTINY ANALYSIS.

The First Amendment entitles every citizen to freedom of speech, without fear of government suppression. U.S. Const. amend. I. "Sexual expression which is indecent but not obscene" is speech that is entitled to the constitutional protections of "the First Amendment." *Sable Commc'ns of Cal., Inc. v. FCC* 492 U.S. 115, 126 (1989). Obscene speech is exempted from First Amendment protections; however, this exception is incredibly narrow and does not encompass content that is vulgar or indecent. *Miller v. California*, 413 U.S. 15, 20 (1973). Indecent speech does not enjoy absolute First Amendment protection, and it may be regulated in furtherance of a legitimate government interest. *FCC v. Pacifica Found*, 438 U.S. 726, 728 (1978). However, when the government regulates speech based upon the primary effects on the audience, the government engages in content-based regulation. *Reno v. ACLU*, 521 U.S. 844, 868 (1997). Content-based

regulation is presumptively invalid and must survive a strict scrutiny analysis. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). Content-based regulation must be evaluated under strict scrutiny because "it is important to ensure that legitimate speech is not chilled or punished." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). strict scrutiny requires that a law: "(1) serve[s] a compelling government interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v.* Mukasey, 534 F.3d 18, 190 (3rd Cir. 2008) (citing *Sable*, 492 U.S. 115, 126 (1989)). It is not enough to show that there is a compelling government interest; suppression of speech cannot stand unless it survives strict scrutiny. *Sable*, 492 U.S. at 126.

This Court should hold that regulating speech on the internet through age verification must be evaluated under a strict scrutiny analysis, which it fails. The content regulated under Rule ONE is not obscene and is entitled to constitutional protection. Here, the government has a legitimate interest in protecting children from viewing this content. However, that interest alone does not justify a content-based regulation. Rule ONE is presumptively invalid and must survive strict scrutiny. Rule ONE is neither narrowly tailored nor the least restrictive alternative. Thus, it fails strict scrutiny.

A. Rule ONE Utilizes Content-Based Regulation to Suppress Speech that is Entitled to the Protections of the First Amendment, thus it must face a Strict Scrutiny Analysis.

"Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable*, 492 U.S. at 126. However, there is a legitimate government interest in preventing minors from accessing indecent material which is not obscene to adults. *Ginsberg v. New York*, 390 U.S. 629 (1968)**.** When the government regulates a "particular category" of an adult's speech to protect children from its adverse effects, the government is engaging in content-

based regulation. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Content-based regulation is only valid if it survives strict scrutiny. *Playboy*, 529 U.S. at 804.

1. Rule ONE Regulates Speech that is not Obscenity, Therefore, that Speech is Entitled to the Protections of the First Amendment.

Obscenity is a rare and narrow exception to the protections of the First Amendment. In *Miller*, this Court established a test to determine whether the content is obscene and therefore not entitled to First Amendment protection. 413 U.S. at 24. The *Miller* Test for obscenity requires that: (1) "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct"; and (3) "the work taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

Rule ONE was modeled after the *Miller* Test for obscenity, but broadens its scope and inevitably suppresses speech protected by the First Amendment. *Id.* Rule ONE uses the *Miller* Test, *id.*, to define "sexual material harmful to minors," but modifies the test so that each of the three prongs are evaluated "with respect to minors." R. at 17. Further, Rule ONE's definition of obscenity is broader than that of the *Miller* Test. Rule ONE explicitly regulates depictions of indecent images, including genitalia, sexual intercourse, or "any other sexual act." *Id.* It is not necessary to evaluate every individual work to determine if it falls under Rule ONE but passes the *Miller* test. Because Rule ONE is broader than the *Miller* test, it encompasses not only obscenity, but also speech that is not obscene and therefore entitled to protection. Regulations that restrict access to non-obscene speech must pass strict scrutiny analysis. Rule ONE unavoidably regulates speech that adults have a constitutional right to engage with. Therefore, adults have a constitutional right to access the content Rule ONE regulates.

2. Rule ONE Employs Content-Based Regulation on Constitutionally Protected Speech, Which Subjects it to a Strict Scrutiny Analysis.

The regulation of speech due to its effects on viewers is a content-based regulation, which is subject to strict scrutiny. In *Playboy*, the government enacted a law that required networks that primarily engage in "sexually explicit adult programming or other programming that is indecent" to air only between the hours of 10 p.m. and 6 a.m. 529 U.S. at 811. This requirement did not apply to other networks. *Id.* The programs were considered indecent but not obscene. *Id.* There was a legitimate government interest in regulating this programming to prevent children from stumbling upon it. *Id.* However, this Court held that this was a content-based regulation. *Id.* at 812. Therefore, in order to regulate the speech, it needed to survive a strict scrutiny analysis. *Id.*

Content-neutral regulations are not presumptively invalid and are not subject to the same review that content-based regulations are. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). In *Renton*, a city adopted zoning ordinances that limited where adult entertainment theaters could be located. *Id.* at 44. The city adopted these ordinances to protect areas from high crime rates and lowered property values that were associated with adult theaters. *Id.* at 48. The Court held that this was a content-neutral regulation because it did not ban the theaters altogether or attempt to limit speech based on its content. *Id.* Rather, the regulation aimed at the secondary effects these theaters were associated with. *Id.* at 47. Therefore, the regulation was not presumptively invalid. *Id.*

Rule ONE seeks to regulate websites based on how their content affects child users, which is presumptively invalid. In *Playboy*, the regulation only applied to broadcast channels that primarily aired "sexually explicit adult programming" and did not apply to others like "HBO or the Disney Channel." 529 U.S. at 811 (citing *Playboy Ent. Grp., Inc. v. United States,* 945 F. Supp. 722, 785 (D. Del. 1996)). Likewise, Rule ONE only places restrictions on websites that contain

more than one-tenth sexual material harmful to minors and requires no form of age verification on other websites. R. at 4. Both here and in *Playboy*, the "overriding justification for the regulation is concern for the effect of the subject matter on young viewers." 529 U.S. at 811. In *Playboy*, the Court held that because the restrictions were triggered by the primary effects young users experienced when viewing this material, it was a content-based regulation and subject to strict scrutiny. *Id.* at 804. Although the government has a legitimate interest in protecting children from indecent material, here, as in *Playboy*, the law must survive a strict scrutiny analysis because it is a content-based regulation. *Id.* at 811.

Rule ONE is a content-based regulation because it limits access to speech based on the primary effects viewers sustain. In *Renton*, a city adopted zoning ordinances that limited where adult entertainment theaters could be located. 475 U.S. at 44. Here, Rule ONE requires websites that contain more than one-tenth sexual material harmful to children to use age verification technology to access the content. R. at 4. The city in *Renton* adopted the zoning ordinance to curtail conditions associated with the locations of the theater, such as high crime and lower property values. 475 U.S. at 48. Here, Rule ONE is regulating speech based on how it impacts viewers, particularly children. R. at 4. The Court in *Renton* held that because the ordinance was aimed at the secondary effects of speech, it was a content-neutral regulation and was not presumptively invalid. 475 U.S. at 47-48. Here, however, the regulation aims to curb the primary effects of speech and is, therefore, a content-based regulation. R. at 3. Consequently, Rule ONE is a content-based regulation that is presumptively invalid because it regulates speech based on how the content impacts viewers.

3. It is only Appropriate to use Rational Basis to Determine if There is a Legitimate Government Interest as it Pertains to Regulation of a Child's Speech, but Rule ONE Regulates an Adult's Speech.

It does not offend the First Amendment to reduce the speech of minors to further a legitimate government interest. A New York State statute prevented the sale of "girly magazines" to minors even though they were not considered obscene to adults. *Ginsberg*, 390 U.S. at 635. This statute was challenged by a man who sold a "girly magazine" to a minor and faced prosecution for it. *Id.* at 631. The only question the Court addressed was whether "it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults." *Id.* at 637. Consequently, the Court opted to use a rational basis review because "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate." *Id.* at 639. The government's legitimate interest in protecting minors from harmful content allows the modification of what speech a child is constitutionally entitled to view. *Id.* at 637.

Although a law may be designed to limit a child's speech, if the operative effect of the law limits an adult's constitutionally protected speech, it must be evaluated under strict scrutiny. The Communications Decency Act (CDA) restricted internet access that was "indecent" and "patently offensive." *Reno*, 521 U.S. at 844. The regulation of the CDA "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive." *Id.* at 874. The Court recognized that there was a legitimate government interest in preventing minors from viewing this content. *Id.* at 875. However, the Court held "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* Thus, the Court subjected the CDA to a strict scrutiny analysis because the law implicates adults' speech in addition to minors.

Rule ONE is not controlled by the analysis applied in *Ginsberg* because it poses an entirely different constitutional question. In *Ginsberg*, the constitutionality of a statute was challenged

because it limited what speech children had access to. 390 U.S. at 631. Here, the constitutionality of a statute is being challenged because it limits what speech adults have access to. R. at 4. When a legitimate government interest is at play, the government may reduce a child's access to speech if it survives a rational basis review. *Ginsberg*, 390 U.S. at 639. However, here, the government is impacting an adult's access to speech he is constitutionally entitled to. R. at 3-4. *Ginsberg* makes no assessment as to how the constitutionally protected speech of adults may be regulated. 390 U.S. at 636. It does not address the nuances of regulating a minor's speech that incidentally infringes on an adult's protected speech. This question is better assessed under precedent that addresses an adult's impaired access to speech in order to further a legitimate government interest. *See, e.g.*, *Sable*, 492 U.S. at 126 (analyzing hours that dial-a-porn could operate to protect children from accessing indecent speech); *Ashcroft*, 542 U.S. at 666 (Analyzing a content-based statute regulating indecent material using strict scrutiny); *Reno*, 521 U.S. at 874 (analyzing the constitutionality of a statute which burdens adult speech to protect children); *Playboy*, 529. U.S. at 804 (evaluating whether indecent material could be barred from cable during daytime hours to protect children from viewing).

Precedent demands that Rule ONE face a strict scrutiny analysis to determine if it unnecessarily impacts adult speech. In *Reno*, the CDA placed restrictions on "indecent" and "patently offensive" speech on the internet. 521 U.S. at 844. Here, the government is seeking to place age verification restrictions on indecent speech that is not obscene. R. at 4. The Court in *Reno* recognized that the CDA impacted a large amount of adult speech that was constitutionally protected. 521 U.S. at 875. Here, Rule ONE's age verification requirement applies to indecent speech that adults are constitutionally entitled to. R. at 4. Both here and in *Reno,* the government has a legitimate interest in preventing minors from viewing indecent content. 521 U.S. 875.

However, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* To determine its constitutionality, Rule ONE must be subjected to strict scrutiny to assess whether the law is designed to "accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'" *Id.* at 876 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)).

B. Age-Verification Fails Strict Scrutiny, Because it is not Narrowly Tailor, nor is it the Least Restrictive Alternative.

The government is empowered to make laws that regulate constitutionally protected speech, but that regulation must survive strict scrutiny. *Sable*, 492 U.S. at 126. To survive strict scrutiny, "a statute must (1) serve a compelling government interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU*, 534 F.3d at 190 (citing *Sable*, 492 U.S. at 126). There is a legitimate government interest in preventing minors from accessing materials that are indecent, but not obscene to adults. *Ginsberg*, 390 U.S. at 636. However, the regulation of speech must be narrow so that it does not restrict speech any further than necessary to achieve the government's interest. *Sable*, 492 U.S. at 127. Additionally, "if a less restrictive means is available for the government to achieve its goals, the government must use it." *Playboy*, 529 U.S. at 815.

1. Age Verification is Not Narrowly Tailored, Because it is both Overinclusive and Under Inclusive of the Speech it Attempts to Regulate.

The government must narrowly tailor any regulation of constitutionally protected speech so that it does not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Butler*, Michigan enacted a statute that criminalized adult possession or sale of books containing material "tending to incite minors to violent or depraved or immoral acts." *Id.* at 381. The statute prevented both minors and adults from

possessing, purchasing, or selling materials that were indecent. *Id.* This Court held that the statute was in violation of the First Amendment because it precluded adults from accessing constitutionally protected speech. *Id.* at 383. The statute was "not reasonably restricted to the evil with which it is said to deal." *Id.* Because the statute prevented minors as well as adults from accessing indecent materials, it was not narrowly tailored and infringed on the First Amendment rights of adults. *Id.*

A law is not narrowly tailored when it is both overinclusive and underinclusive of the legitimate interest it is attempting to further. *Carlin Commc'ns, Inc. v. FCC*, 749 F.2d 133, 121 (2d Cir. 1984). In *Carlin*, the government created a regulation that prohibited the operation of "dial-a-porn" except for the hours of 9:00 p.m. to 8:00 a.m. *Id.* at 117. The government enacted this regulation in accordance with its compelling interest to prevent minors from accessing indecent material. *Id.* at 120. However, the effect of the regulation denied access to all "dial-a-porn: during the day regardless of age, making it overinclusive. *Id.* Additionally, the regulation did nothing to prevent a minor from accessing the service during the evening hours of operation. *Id.* at 121. The court further noted that during daytime hours – when children are more likely to be under the supervision of adults – the speech is not accessible for anyone to access; while in the evening, when children are more likely to be unsupervised, the regulation did nothing to prevent a minor's unfettered access. *Id.*

The level of constitutional protection that speech is entitled to depends on the medium within which it is conveyed. In *Pacifica*, the government censured a twelve-minute comedic monologue that aired on broadcast media because it was "vulgar," "offensive," and "shocking." 438 U.S. at 729, 747. The monologue was deemed to be indecent, but not obscene. *Id.* at 729. This Court held this speech was not entitled to "absolute constitutional protection[s] under all

circumstances, [but that it] must consider its context in order to determine whether the . . . action was constitutionally permissible." *Id.* at 747-48. Broadcast media is subject to lesser constitutional protections because prior warnings cannot completely protect a viewer from unwanted content, and it reaches inside the home. *Id.* at 748. Additionally, this Court gave weight to the reality that broadcast media is "uniquely accessible to children, even those too young to read." *Id.* at 749. This Court "emphasiz[ed] the narrowness of [the] holding," and maintained that "context is all-important." *Id.* at 750.

A law is not narrowly tailored when it has the operative effect of creating a complete ban on speech that adults are constitutionally entitled to. In *Butler*, Michigan enacted a statute that imposed criminal penalties on adults who possessed or sold material that had negative effects on youth. 352 U.S. at 383. Here, Rule ONE requires that websites collect government ID or other personal data for adults to access websites whose content contains more than one-tenth of material that is "sexual material harmful to minors." R. at 4.

This Court in *Butler* held that restrictions on constitutionally protected speech must be narrowly tailored so they do not "reduce the adult population . . . to reading what is only fit for children." 352 U.S. at 383. Although Rule ONE does not explicitly ban adult access to indecent material, it has the operative effect of chilling the speech of adults. R. at 4. Jane and John Doe have been unable to visit websites that utilize age verification because they are weary of giving out personal information that may ostracize them should their personal information be leaked. *Id*. It is not only Jane and John who fear a data leak that would lead to backlash in their community. The industry at large has seen a dramatic drop in online traffic after similar state bans have been enacted. *See, e.g.*, Marc Novicoff, *A Simple Law Is Doing Impossible, It's making the Online Porn Industry Retreat*, POLITICO (Aug. 8, 2023, 4:30 PM) ("[T]raffic in Louisiana has dropped 80

percent."). Like the statute in *Butler*, Rule ONE is "not reasonably restricted to the evil with which is said to deal." 352 U.S. at 383. Neither Rule ONE nor the statute in *Butler* are narrowly tailored. They both create a society where an adult's rights are reduced to those of infancy under the guise of protecting children.

Rule ONE is both overinclusive and underinclusive of the population it seeks to regulate and is not narrowly tailored to legitimate a government interest. In *Carlin*, the government prohibited the operation of dial-a-porn services except for during the hours of 9:00 p.m. and 8:00 a.m. 749 F.2d at 121. Here, Rule ONE mandates that websites whose content is comprised of more than one-tenth sexual material harmful to minors must use reasonable age verification methods. R. at 4. The regulation enacted in *Carlin* created a system that barred adult access to protected speech for thirteen hours a day and allowed children to access the service so long as it was at night. 749 F.2d at 121. The court found that because this content is both underinclusive and overinclusive, it is not narrowly tailored. *Id.* Likewise, Rule ONE bars adults from accessing websites unless they provide government ID, but does nothing to prevent minors from viewing harmful content on websites that are comprised of less than one-tenth of this material. R. at 4. Further, Rule ONE blocks children from speech that they do have a constitutional right to engage with. R. at 4. Under Rule ONE, when a minor is blocked from accessing a website, they are not only being blocked from harmful sexual material, but also up to eighty-nine percent of a website that they have a constitutional right to view. *Id.* Similarly to *Carlin*, Rule ONE is not narrowly tailored to a legitimate government interest because it both tramples on adults' access to free speech and blocks minors from speech they have a right access, all without suitably protecting children to genuinely harmful content.

Content on the internet should not be subject to the diminished constitutional protections of broadcast media. In *Pacifica*, this Court allowed the government to censure a twelve-minute comedic monologue that was indecent but not obscene, which aired on broadcast media. 438 U.S. at 729. Here, the government is attempting to regulate an adult's access to indecent, but not obscene, speech on the internet. R. at 4. In *Pacifica*, this Court allowed the censure, but "emphasize[d] the narrowness of [its] holding." 438 U.S. at 750. Speech on the internet should not be subject to diminished constitutional protections because the context is not the same as broadcast media. First, the internet is not pumped into the home in the same way broadcast media is. *Id.* at 748. Unlike broadcast media, where users constantly tune in and out and may miss a warning, websites can effectively flag content for users to avoid unintended viewing of indecent material. *Reno*, 521 U.S. at 867. Further, internet content is not reaching "children, even those too young to read, " *Pacifica*, 438 U.S 749, but rather, as the Court noted in *Reno*, "'odds are slim' that a user would come across a sexually explicit sight [on the internet] by accident." 521 U.S. at 869 (quoting *ACLU v. Reno*, 929 F.Supp 824, 845 (D. Pa. 1996)). Rule ONE is not narrowly tailored and fails a strict scrutiny analysis.

2. Age Verification is not the Least Restrictive Plausible Alternative

Strict scrutiny requires the use of the least restrictive alternative unless the government can prove that such an alternative would be ineffective. *Ashcroft*, 542 U.S. at 666. In *Ashcroft*, this Court considered whether age verification was the least restrictive alternative in protecting children from sexual material on the internet. *Id.* Both blocking content, which allowed adults to opt out, and content filtering, which places adult controls on a device, were found to be less restrictive alternatives and likely more effective in protecting minors. *Id.* at 666-67. This Court held that the government bore the burden of proving that a less restrictive alternative would be

ineffective in reaching the goal of protecting minors. *Id.* at 665. However, the Court noted, "it unambiguously found that filters are more effective than age verification requirements." *Id.* at 668.

Strict scrutiny requires the use of the least restrictive alternative unless the government can prove that such an alternative would be ineffective. *Playboy*, 529 U.S. at 824. In *Playboy*, a statute required cable providers to "fully scramble or otherwise fully block" channels that primarily aired "sexually oriented" programming. *Id.* at 806. Most cable providers opted to fully block the channels from viewers until the evening hours to protect themselves from potential penalties. *Id.* at 809. This Court held that this was not the least restrictive alternative, so it failed strict scrutiny. *Id.* at 806. This Court found that because a separate section of the statute required cable providers to block any channel a subscriber had upon the request of the subscriber, there was a less restrictive alternative. *Id.* at 807. This allowed a household to block sexually explicit channels at their discretion and impeded the rights of other households to view the content at the times of their choosing. *Id.* at 809.

Content filtering is a less restrictive alternative than age verification and is capable of protecting minors from harmful content, potentially even more than age verification. This Court has repeatedly held that when a less restrictive alternative exists, content-based restriction fails strict scrutiny. *See, e.g.*, *Id.* at 815; *Sable*, 492 U.S. at 126. In *Ashcroft*, this Court considered the precise question of whether there was a less restrictive alternative to age verification to protect children from harmful content on the internet. 542 U.S. at 666. This Court held that content blocking and content filtering are not only plausible alternatives, but possibly more effective ones. *Id.* at 666-67. Likewise, experts here have also testified that content filtering and blocking software could be effective in preventing minors from accessing harmful content. R. at 5. This Court in

Ashcroft emphasized that it is the government's burden to prove why a less restrictive alternative would not satisfy the legitimate government interest. 542 U.S. at 665. As in *Ashcroft*, the government has failed to provide enough evidence to prove that these plausible alternatives are insufficient solutions. Therefore, Rule ONE flunks strict scrutiny because there is a less restrictive alternative.

Requiring internet providers to block content until adults opt out is less restrictive than fully blocking access to content. In *Playboy*, this Court found that there was a less restrictive alternative to fully blocking sexual material on cable networks. 529 U.S. at 807. By allowing individual households to block content from their home entirely, other homes were still able to have free access to the channels. *Id*. Similarly, here, there is a viable alternative to age verification by requiring internet providers to block content until adult users opt out and elect to view the content. R. at 5. An opt-out feature prevents unwanted content from being immediately available to users until they choose to view the content. *Id.* Content blocking does not impede a user's access to speech to which they are entitled, yet is still potentially effective in preventing a child from viewing inappropriate materials. *Id*. The existence of a plausible less restrictive alternative necessarily means that Rule ONE fails strict scrutiny.

This Court should hold that Rule ONE is a content-based regulation that impedes upon an adult's right to access indecent, but constitutionally protected, speech and is therefore subject to a strict scrutiny analysis. This Court should hold that Rule ONE does not prevail under strict scrutiny.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Fourteenth Circuit Court of Appeals.

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Respectfully submitted,

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