

No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC.,

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.,

Respondent.

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

BRIEF FOR PETITIONER

Team 13

Counsel for Petitioner

QUESTIONS PRESENTED

1. The Constitution gives sole legislative powers to Congress, which may be delegated to private agencies so long as the agency acts subordinate to a public administrative agency. The Kids Internet Safety Association has legislative powers but is not subordinate to the Federal Trade Committee. Did Congress therefore violate the private nondelegation doctrine by granting them enforcement powers?
2. Rule ONE is a content-based regulation of First Amendment speech. This Court has held that regulations that target the content of speech and effectively chill speech are subject to strict scrutiny. Does Rule ONE survive strict scrutiny if it is not narrowly tailored to a compelling government interest?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit has been reported at *Kids Internet Safety Ass’n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024) and reprinted in the Record on Appeal (“Record”) at 1–15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

“Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I.

“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.

“The private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Kids Internet Safety Association’, is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.”
55 U.S.C § 3052(a).

“The Commission . . . abrogate, add to, and modify the rules of the Association . . . as the Commission finds necessary or appropriate to ensure . . . fair administration . . . to conform the rules of the Association to requirements of this chapter . . . or otherwise in furtherance of the purposes of this chapter.” 55 U.S.C § 3053(e).

“The Association is created to monitor and assure children’s safety online . . . the Commission and the Association, each within the scope of their powers and responsibilities . . .

shall—1. Implement and enforce the Anti-Crime Internet Safety Agenda; and 2. exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.” 55 U.S.C § 3054(a)(1)–(2).

“The rules of the Association . . . shall preempt any provision of law or regulation with respect to matters within the jurisdiction of the Association.” 55 U.S.C. § 3054(b).

“The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.” 55 U.S.C. § 3054(h).

“The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.” 55 U.S.C. § 3054(i).

“In addition to civil sanctions . . . the Association may commence a civil action . . . to enforce any civil sanctions imposed.” 55 U.S.C. § 3054(j)(1).

“The Association shall establish uniform rules . . . imposing civil sanctions against technological companies.” 55 U.S.C. § 3057(b)(1).

“If the Association imposes a final civil sanction . . . the Association shall promptly submit to the commission notice of the civil sanction.” 55 U.S.C. § 3058(a).

“The Commission may, on its own motion, review any decision . . . The Association or a person aggrieved by a decision . . . may petition the Commission for review . . . A decision with respect to whether to grant an application for review . . . is subject to the discretion of the Commission.” 55 U.S.C. § 3058(c)(1)–(2).

“[T]he Commission may--i. affirm, reverse, modify, set aside, or remand . . . in whole or part, the decision of the administrative law judge.” 55 U.S.C. § 3058(c)(3)(A)(i).

“Review . . . by the Commission . . . shall not operate as a stay of a final civil sanction of the Association unless the administrative law judge or Commission orders such a stay.” 55 U.S.C § 3058(d).

“‘Commercial entity’ includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.” 55 C.F.R. § 1(1).

“‘Sexual material harmful to minors’ includes any material that: the average person . . . would find . . . is designed to appeal to . . . the prurient interest; in a manner patently offensive with respect to minors . . . taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” 55 C.F.R. § 1(6)(a)–(c).

“A commercial entity that . . . publishes or distributes material on an Internet website . . . more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods . . . A commercial entity . . . may not retain any identifying information of the individual.” 55 C.F.R. § 2(a)–(b).

“A commercial entity that publishes . . . on an Internet website . . . shall require . . . a commercial age verification system . . . using: government-issued identification; or a commercially reasonable method that relies on public or private transactional data” 55 C.F.R. § 3(a)(1)–(2).

“The amount of a civil penalty . . . shall be based on . . . the seriousness of the violation . . . the history of previous violations; the amount necessary to deter . . . the economic effect of a penalty . . . the entity’s knowledge of the act . . . [as] justice may require.” 55 C.F.R. § 4(c)(1)–(6).

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Pact Against Censorship, Inc. (“PAC”) is the largest trade association representing the adult film industry. (R. at 5.) Members of PAC were harmed when a private entity known as Kids Internet Safety Association, Inc. (“KISA”) limited the accessibility of adult websites by forcing them to implement age verification measures. (R. at 3–4.) Under the Keeping the Internet Safe for Kids Act (“KISKA”) that was passed in 2023, Congress created KISA and allowed it to act independently of Congress under the oversight of the Federal Trade Commission. (R. at 2.) Congress delegated to KISA the broad authority of investigating and enforcing the rules it passes. (R. at 2–3.) KISA enforces its rules through civil sanctions and the filing of injunctions. (R. at 3.)

Shortly after it was formed, KISA passed Rule ONE which required any commercial entity who publishes material on a website or social media platform to implement “reasonable age verification measures” if more than one-tenth of the material is sexual in nature. (R. at 3–4.) “Reasonable age verification measures” include government IDs or other methods that log transactional data. (R. at 4.) However, the websites that implement age verification are not allowed to keep identifying information of individuals who visit their platform. (R. at 4.) Under Rule ONE, KISA threatens to fine non-compliant websites \$10,000 per day plus \$250,000 each time a child accesses one of these websites resulting from the website’s noncompliance with age verification measures. (R. at 4.)

As a result of Rule ONE, online traffic has decreased on websites that KISA forced to use age verification. (R. at 4.) Many adults were deterred from visiting the websites over fear of having their personal information leaked. (R. at 4.) Accessing adult websites often carries a stigma, and individuals have publicly stated that they fear being publicly ostracized if their information was

leaked. (R. at 4.) Additionally, age verification laws have already been passed at the state level, and they have significantly reduced traffic by adults on these websites. (R. at 4.) Finally, evidence suggests that age verification measures may not stop children from accessing adult websites because there are ways security software can be bypassed. (R. at 5.)

B. Procedural History

On August 15, 2023, PAC filed a lawsuit against KISA, seeking to permanently enjoin Rule ONE and KISA's operations. (R. at 5.) PAC was joined in its lawsuit by three of its members: two adult performers and an adult studio. (R. at 5.) The District of Wythe granted PAC's preliminary injunction and found that KISA did not violate the private nondelegation doctrine but found that KISA violated the First Amendment because the age verification procedures failed strict scrutiny by overregulating speech. (R. at 5.) KISA appealed on the free speech violation and PAC cross-appealed on the nondelegation issue. (R. at 5.)

On appeal, the Fourteenth Circuit reviewed the preliminary injunction *de novo* because it believed the lower court decision was grounded in erroneous legal principles. (R. at 5.) The court found that three of four factors supporting a preliminary injunction were present. (R. at 6.) The court focused its attention on the final factor involving whether PAC demonstrated that it would likely be successful on the merits. (R. at 6.)

First, the Fourteenth Circuit found that KISA did not violate the private nondelegation doctrine. (R. at 6–7.) The court stated that the principle of public accountability prevents the government from delegating unchecked power to a private party. (R. at 6.) The government is not prevented from engaging in all acts of delegation, only those which are “unchecked.” (R. at 6.)

However, the court noted there is currently a circuit split on the issue of nondelegation. (R. at 6.) The court explained that KISA was modeled after the Horseracing Safety and Integrity Act, which was upheld by the Fifth Circuit and invalidated by the Sixth Circuit. (R. at 6.) The

circuits disagreed on the issue of “subordination,” with one circuit finding that the entity merely needed to be “constitutionally supervised,” and the other finding that this supervision must extend to control all forms of enforcement. (R. at 6.)

Ultimately, the Fourteenth Circuit found that KISA satisfied the Sixth Circuit’s requirement of control because the FTC had the ability to add “pre-enforcement standards” to KISA’s rules. (R. at 7.) The court explained that pre-enforcement standards give the FTC control over KISA’s rulings before they are enforced. (R. at 7.) Additionally, the court found that Congress gave the FTC authority to “review and completely overrule” KISA’s enforcement of its rules. (R. at 7.) The court found that, by retaining control over the “final product,” the government properly delegated its power to a private entity. (R. at 7.)

Next, the Fourteenth Circuit applied a rational basis standard to the free speech issue instead of strict scrutiny. (R. at 8.) Prior Supreme Court precedent held that the government was permitted to restrict children from accessing obscene material even though the restrictions affected adults too. (R. at 8.) This is because the government’s regulation of obscenity was rationally related to the protection of children. (R. at 8.) The court reasoned that Rule ONE had a similar purpose, so rational basis applied. (R. at 8.)

The court acknowledged there are multiple Supreme Court cases that have held strict scrutiny applies to the regulation of adult content, even when the regulations serve to protect children. (R. at 9.) However, the court did not think those cases were similar enough to the facts here. (R. at 9.) Ultimately, the court concluded that it was not likely that PAC would be successful in having Rule ONE declared unconstitutional. (R. at 9.) Therefore, the Fourteenth Circuit remanded the case to the district court with instructions to vacate the injunction. (R. at 10.)

However, one justice from the Fourteenth Circuit dissented. (R. at 10.) The dissent pointed out that Congress violated multiple sections of the Constitution requiring only people vested with power by the Constitution to be allowed to exercise that power. (R. at 10.) The dissent explained that finding otherwise allows private entities to wield unchecked power. (R. at 10.)

First, the dissent disagreed with the majority's test that power is properly delegated to a private entity when it functions subordinately to a government agency. (R. at 11.) The dissent argued that the proper test should revolve around what enforcement powers were plainly given to the private entity. (R. at 11.) While the FTC technically has the power to unilaterally invalidate actions taken by KISA, that type of power is rarely ever exercised. (R. at 11.) Furthermore, the FTC has no oversight over KISA's ability to file civil suits. (R. at 11.) The power to file civil suits is so important that the Supreme Court has already held that it cannot be delegated away from the executive. (R. at 11.)

Next, the dissent took issue with KISA's argument that the FTC had the power to cure defects with KISA's rules after they were passed. (R. at 11–12.) The dissent found this to conflict with recent Supreme Court precedent that ruled against the Secretary of Education when she tried to modify a statute to save it. (R. at 12.) Allowing the FTC to create rules altering KISA's enforcement power does not fix the problem because it does not remove the non-delegation issue. (R. at 12.)

Although, the dissent recognized that KISKA is modeled after a valid regulatory agency, it distinguished the concepts of “modeled after” and “identical.” (R. at 12.) One agency may be modeled after a valid one, but the different circumstances surrounding the creation and implementation may make the forementioned agency invalid. (R. at 12.) The court noted that Financial Inventory Regulatory Authority (“FINRA”) — the agency that KISA was modeled after

— operates differently because its enforcement power is shared with the SEC. (R. at 12–13.) FINRA is entirely subordinate to the SEC because the SEC can control who is in FINRA and can revoke FINRA’s power, while the same cannot be said about the FTC and KISA. (R. at 12–13.)

Furthermore, the dissent found that KISA violated freedom of speech guaranteed under the First Amendment. (R. at 13.) The Supreme Court has stated numerous times that expressive speech is protected and protection extends to the message, ideas, subject, and content of the expression. (R. at 13.) The dissent explained that any speech falling under this category was entitled to strict scrutiny, while all other speech was entitled to rational basis review. (R. at 14.)

Here, the dissent believed that the district court properly applied strict scrutiny. (R. at 14.) The dissent reasoned that KISA suppressed speech spanning the entire internet, speech that adults had the constitutional right to receive. (R. at 14.) Furthermore, the dissent recognized that some of the speech suppressed was speech suitable for adults and children. (R. at 14.) The dissent acknowledged that Supreme Court precedent allows the government to regulate minors in ways it cannot regulate adults, but believed the majority misapplied the case. (R. at 14.)

Finally, the dissent explained that strict scrutiny is satisfied when the law satisfies a compelling interest and is narrowly tailed in the least restrictive means possible. (R. at 14.) Here, KISA did not satisfy strict scrutiny because it did not ban the processes children can use to circumvent age verification systems. (R. at 14–15.) Finally, the dissent identified multiple alternatives such as requiring internet service providers to automatically block adult content until an adult opts out or applying content filtering to a child’s device. (R. at 15.) Ultimately, the dissent believed the presence of viable alternatives to KISA showed strict scrutiny was not met. (R. at 15.)

SUMMARY OF THE ARGUMENT

First, KISA violates the private non-delegation doctrine. The separation of powers principle vests federal authority in the three branches of government that are accountable to each other and to the public. Congress is permitted to delegate some of its power to private agencies; however, these agencies must act subordinately to a public administrative agency, and the private agency must not engage in any functions determined to be legislative or executive in nature.

In this situation, Congress provides significant latitude to KISA which allows KISA to engage in the legislative function of rulemaking. Unlike in prior cases dealing with other agencies, Congress did not provide detailed guidelines for KISA. Congress allowed KISA to act in a manner which furthers the purpose of improving the safety of children online. Although this is a noble purpose, it is not a sufficient justification to violate the Constitution by improperly delegating power to a private agency.

Furthermore, KISA recognizes that Congress granted it rulemaking and enforcement powers. Yet, KISA claims that since the FTC is permitted to review KISA's decisions and unilaterally reverse them, the FTC is the one exercising enforcement power. This argument fails to recognize that the FTC is not permitted to review or overturn KISA's actions until after those actions have been enforced. Additionally, it neglects to consider that the FTC does not concurrently share with KISA investigative powers or the ability to file lawsuits. This power is held solely by KISA. However, it would be unrealistic to expect the FTC to consistently overturn decisions made by KISA; this is a power that is sparingly used because its overuse would eliminate the need for KISA.

Moreover, the FTC's ability to abrogate and modify the operation of KISA is not sufficient to cure this improper delegation of power. This Court has held that a government agency may not play the role of Congress by using its ability to modify its rules as an avenue to alter its enabling

legislation. Doing so allows the agency to exercise legislative powers that are held by Congress alone. KISA's interpretation of its enabling legislation conflicts with canons of construction within statutory interpretation. Congress granted KISA wide authority to make and enforce rules. It would not make sense for Congress to say that the FTC could alter and remove the authority given to KISA. Instead, this Court should interpret the provision to mean that the FTC can alter KISA's structure to ensure its operation aligns with the purpose Congress outlined.

Finally, KISA attempts to paint the picture that since it is modeled after FINRA, an already approved private agency, KISA is equally as constitutional. However, KISA's argument is misleading. In many respects, KISA's structure is like the structure of FINRA. But KISA fails to explain the few — but significant — ways in which KISA is different. Namely, FINRA does not have wide ranging investigative and subpoena power like KISA has. Unlike KISA, FINRA must have written permission to issue a subpoena.

Further, the enforcement structure of FINRA is different than KISA. The SEC plays an intimate role in FINRA's investigative process and can relieve FINRA of investigative authority during the enforcement of cases. Here, the FTC is not permitted to exercise this level of control over KISA. The FTC has no role in the investigative and enforcement process until the administrative judge renders a decision. The FTC is not even aware that an investigation took place until after a civil action is filed.

Therefore, this Court must reverse the decision of the Fourteenth Circuit because KISA violates the private non-delegation doctrine.

Second, Rule ONE violates the First Amendment. This Court has long recognized that the First Amendment grants wide latitude for people to engage in activities and express themselves in ways that some may find offensive. The expression of the adult entertainment industries is such

an expression that some find offensive. However, the First Amendment protects them all the same. In order for Rule ONE to stand, it must be narrowly tailored to a compelling government interest because it is a content-based restriction.

Laws passed by the legislature are facially content based when it targets speech or expression based on the communicative content of that expression. If that piece of legislation applies to a particular form of expression because of its topics or ideas, it is facially content based. Rule ONE is content based because it regulates the intake of “adult content”.

Furthermore, this Court has found that when legislation has a chilling effect on speech, that particular legislation warrants strict scrutiny. Rule ONE has a chilling effect on speech because adults are now afraid to access “adult websites” in fear of their identities being exposed.

Because Rule ONE is content based, and its effect chills speech, it can only survive if it passes strict scrutiny. Rule ONE does not survive strict scrutiny because it is not narrowly tailored to a compelling government interest. There are three elements that courts have adopted in order to meet the narrow tailoring of legislation.

First, the regulation must be the least restrictive means. Rule ONE is not the least restrictive means of obtaining the government’s objective. A multitude of individualistic solutions have been proposed throughout legislative history and case precedent that shows a blanket restriction on all commercial adult websites is not the least restrictive.

Second, Rule ONE is an underinclusive piece of legislation. Rule ONE attempts to limit a minor’s ability to access adult content. The government believes the best way to do this is to only restrict commercial entities’ ability to post “adult content” while allowing private individuals to post whatever they so choose with no regulation. This Court has found that such under inclusion fails strict scrutiny. Under its own definition, Rule ONE does not regulate any private individual

or private groups of people, and while the government claims that their interest is to stop minors from viewing all adult content, their actions do not align with their strong rhetoric.

Third, Rule ONE is simultaneously overinclusive, failing the narrow tailoring element of strict scrutiny. Rule ONE is overinclusive because it causes non-objectionable content to be caught in the crossfire on their war against pornography. Courts have found that when analyzing whether legislation is narrowly tailored, the regulation of content that would fall outside of the legislation's parameters would be overinclusive, thus showing that the legislation does not meet strict scrutiny. Commercial entities that post even just a little "adult content" as defined by the statute must implement age verification measures and some of these websites fall outside of the parameters of which Rule ONE attempts to regulate. The inclusion of these websites show that Rule ONE is overinclusive and not narrowly tailored to meet the government's interest.

ARGUMENT

I. KISA Violates the Private Non-Delegation Doctrine.

Articles I, II, and III of the United States Constitution emphasizes the separation of powers among the three branches of government. Included among these powers is the legislative power given to Congress. U.S. Const. art. I, § 1. Congress, alone, has the power to create laws. Congress may lawfully delegate its power to a private entity, but the entity may not exercise governmental authority over others.

This Court should reject KISA's claim that Congress did not violate the private nondelegation doctrine when granting KISA its enforcement powers. KISA argues that Congress properly delegated its power by making KISA functionally subordinate to the FTC. KISA claims that since its structure is modeled after FINRA, a validly recognized self-regulating agency, its own structure must be equally as valid. This Court should reject KISA's line of reasoning because

KISA is given broad discretion and independence from the FTC's scrutiny and because KISA is distinctly different than FINRA.

A. Constitutional Principles Prohibit Unfettered Delegations of Power to Private Agencies.

The Constitution vests power in three branches of government to pass, execute, and interpret laws. *See* U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. The Founding Fathers spread power among multiple branches because men are not angels, so devices must be put in place to “control the abuses of government.”¹ Power was delegated to multiple branches to keep each branch accountable to each other and to the public. Unfettered delegations of power to private entities violates the principle of accountability because a private entity cannot face scrutiny the same way as a public entity. The private non-delegation doctrine exists to prevent private entities from usurping power that the Constitution gave Congress.

According to federal courts, Congress lawfully delegates its power to a private entity when the private entity serves an advisory or ministerial function, but not when the private entity exercises governmental authority over others. *See e.g., Pittston Co. v. United States*, 368 F.3d 385, 394–95 (4th Cir. 2004) (holding that private entities cannot exercise core governmental power over others); *United States v. Frame*, 885 F.2d 1119, 1129 (3rd Cir. 1989) (finding that power is not unlawfully delegated when private entities are given specific standards); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) (explaining that government agencies must actively participate in independent review and are not permitted to “rubber stamp” actions taken by the private entity).

KISA is not functionally subordinate to the FTC. The FTC does not have oversight over all consequential actions taken by KISA. Additionally, while FTC can unilaterally reverse KISA's rulemaking decisions, this power is never exercised. Finally, the FTC's “pre-enforcement

¹ The Federalist No. 51 (James Madison).

standards” are not adequate because they go beyond the statutory authority Congress granted in KISKA. Therefore, KISA violates the private non-delegation doctrine.

1. KISA is Not Functionally Subordinate to the FTC.

A private entity is not considered functionally subordinate when Congress delegates legislative authority to it. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). In *Sunshine Anthracite*, this Court examined a private non-delegation case involving the Bituminous Coal Act of 1937. *Id.* at 387. The Act authorized the National Bituminous Coal Commission (“The Commission”) to work with the coal industry to eliminate unfair competition. *Id.* The Commission accomplished this by developing specific taxes that were levied against coal companies who violated the Act. *Id.* at 388–89.

This Court did not find a violation of the private non-delegation clause. *Id.* at 397. The Court reasoned that the standards Congress created for The Commission “far exceed[ed] in specificity” other private delegations of power that the Court has already upheld. *Id.* at 398. The Court found this to be significant because it demonstrated Congress did not delegate its legislative power. *Id.* at 399. Congress still retained authority over The Commission and kept its law-making power, meaning The Commission was subordinate to Congress. *Id.* Therefore, the private non-delegation doctrine was not violated. *Id.*

In contrast to what Congress did in *Sunshine Anthracite*, Congress’s delegation of power in KISKA lacks specificity and gives significant deference to KISA by allowing it to engage in rulemaking. Congress created KISA for the purpose of developing online safety standards for children. 55 U.S.C § 3052(a). KISA has the power to “implement and enforce the Anti-Crime Internet Safety Agenda” and “exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.” 55 U.S.C § 3054(a)(1)–(2).

Unlike in *Sunshine Anthracite* where The Commission was given specific standards by Congress, here, Congress gave KISA no such standards, only a list of public policy guidance. KISA's endeavor may be noble, however, noble public policy goals are no excuse for Congress to violate deeply rooted constitutional principles. KISA can implement and enforce its own internet safety agenda and is given sole authority over the agenda. This is rulemaking.

Here, Congress does not retain its rule-making power like it did in *Sunshine Anthracite*. Congress delegates its rule-making power to KISA and even allows KISA's rules to preempt any conflicting law within its jurisdiction. 55 U.S.C. § 3054(b). By allowing KISA to preempt conflicting federal laws, Congress impassibly gave its legislative power to a private entity who cannot be held directly accountable to the public. Therefore, KISA violates the private non-delegation clause.

2. The FTC's ability to unilaterally reverse KISA's decisions is meaningless because KISA controls most of the KISKA's enforcement power.

KISA concedes that Congress gave it enforcement powers. However, despite recognizing this, KISA asks this Court to determine that there was no improper delegation of authority. KISA claims that since the FTC can unilaterally reverse its rulings, it is not usurping power from the government. KISA's argument is flawed because it confuses the presence of this power with the idea that the FTC exercises the power. The FTC's ability to unilaterally reverse KISA's decisions is a mirage. There is no evidence in the record that the FTC has ever used this power. Therefore, KISA has unchecked enforcement power which violates the private non-delegation doctrine.

The ability of a government agency to review and reverse actions taken by private entities does not lessen or remove the private entity's enforcement powers. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 430 (5th Cir. 2024); *but see Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). Additionally, this Court has explicitly stated that

the improper authorization of enforcement powers falls under the private non-delegation doctrine. *See DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015)². The Fifth and Sixth Circuit disagree about enforcement; however, the Fifth Circuit's view is more satisfactory.

In *Black*, the private entity (the Authority) could investigate potential violations of the Horseracing Integrity and Safety Act (HISA), levy sanctions, and bring lawsuits for injunctive relief or to enforce the sanctions. 107 F.4th at 429. The FTC had the ultimate power to review the Authority's decisions *de novo* or in response to another party's challenge. *Id.* Despite the FTC's ability to review and reverse the Authority's rulings, the Fifth Circuit found the Authority — not the FTC — was the one exercising enforcement powers. *Id.*

The Fifth Circuit explained that Congress did not enable the FTC to launch investigations or charge a party for violating HISA, nor was the FTC's approval required for the Authority to do so. *Id.* This meant the Authority could enforce HISA without any involvement from the FTC. *Id.* The court pointed out that while the FTC had the power to review decisions by the Authority, the mere presence of this power did not negate the Authority's ability to enforce HISA. *Id.* Therefore, the Fifth Circuit found Congress improperly delegated enforcement powers to the Authority. *Id.*

In *Oklahoma*, the Sixth Circuit examined a case involving HISA and the same private Authority examined in *Black*. *See* 62 F.4th at 225. However, the Sixth Circuit did not find an improper delegation of power. *Id.* at 231. The Sixth Circuit held that since the FTC had the power to independently review the Authority's decisions and reverse them, enforcement rested with the FTC and not the Authority. *Id.* Therefore, the Sixth Circuit found Congress properly delegated enforcement powers to the Authority. *Id.*

² “When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with ‘legislative Powers.’ Art I, § 1. Nor are they vested with the “executive Power,” Art. II, § 1, cl. 1, which belongs to the President.”

Here, KISKA is like HISA in many respects. KISKA enables KISA to subpoena and investigate alleged violators of the Act. 55 U.S.C. § 3054(h); 55 C.F.R. § 4(a). Next, KISA develops civil penalties for tech companies who violate its rules. 55 U.S.C. § 3054(i); 55 U.S.C. § 3057(b)(1); 55 C.F.R. § 4(c)(1)–(6). Additionally, KISA can file civil actions against violators of the Act. 55 U.S.C. § 3054(j)(1); 55 C.F.R. § 4(a). Once a civil proceeding commences, the FTC is given notice and may review the final decision rendered, either on its own or on appeal. 55 U.S.C. §§ 3058(a), 3058(c)(1)–(2). Review by the FTC does not automatically trigger a stay of the final sanctions, unless explicitly stated by the FTC or the administrative judge. 55 U.S.C. § 3058(d). Finally, the FTC is permitted to “affirm, reverse, modify, set, aside, or remand” the final decision. 55 U.S.C. § 3058(c)(3)(A)(i).

This Court should follow the logic used by the Fifth Circuit in *Black* and find that KISA violates the non-delegation doctrine. The Fifth Circuit pointed out that HISA did not grant the FTC the power to investigate or charge a party nor did it require its approval to do so. 107 F.4th at 429.

Similarly, KISKA implies that KISA acts wholly independent of the FTC when exercising its power to investigate tech companies and file civil actions against them. *See* 55 U.S.C. §§ 3054(h); 55 U.S.C. § 3054(j)(1); 55 C.F.R. § 4(a). The FTC is not even made aware of a possible violation of KISKA until after KISA files a civil action against the offending party. *See* 55 U.S.C. §§ 3058(a). KISA holding the sole power to file civil actions demonstrates that it acts like a governmental entity, not a private one.

This Court has already recognized the power inherent in being able to sue someone on behalf of the government. In *Buckley v. Valeo*, this Court found 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 [this] responsibility” *Buckley v. Valeo*, 424 U.S. 1, 137 (1976). KISA

civilly sues other parties when it enforces its rules and regulations. This is an impermissible government action taken by a private entity. Therefore, KISA violates the non-delegation doctrine.

The Fourteenth Circuit correctly pointed out that the FTC can unilaterally reverse actions taken by KISA. (R. at 7.) This belief is supported by KISA's enabling legislation. *See* 55 U.S.C. § 3058(c)(3)(A)(i). However, as the Fifth Circuit noted in *Black*, the mere presence of this power does not invalidate the private agency's enforcement powers. 107 F.4th at 429. The FTC's power to unilaterally overturn KISA's decisions is a power that is used sparingly, if at all. If the FTC unilaterally overturned all KISA's decisions, KISA would be irrelevant.

This logically shows that KISA must be engaged in some level of enforcement. It is true that all decisions and rules made by KISA are able to be reviewed by the FTC. However, a review by the FTC does not automatically trigger a stay of the final sanctions, unless requested by the FTC or the administrative judge. 55 U.S.C. § 3058(d). This standard is highly deferential to the decisions made by KISA. By automatically deferring to KISA, the FTC is allowing KISA to exercise enforcement powers. Therefore, KISA violates the non-delegation clause.

3. The FTC's "pre-enforcement standards" are not adequate because they go beyond the statutory authority that Congress granted in KISKA.

In addition to recognizing that it was given enforcement powers, KISA claims that the FTC's "pre-enforcement standards" demonstrate that the FTC is in control of the enforcement power, not KISA. The heart of this argument should be dismissed by this Court. If the FTC utilized its power to change the enforcement functions of KISA, the FTC would be changing the statute. The FTC is not Congress. Therefore, the FTC's pre-enforcement standards are not adequate to save KISA from violating the non-delegation doctrine.

Traditionally, this Court has found that "an agency interpretation that is 'inconsistent[t] with the design and structure of the statute as a whole,' does not merit deference." *Util. Air Regul.*

Grp. v. EPA, 573 U.S. 302, 320 (2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). An agency is not Congress and is not entitled to create, alter, or strike laws like Congress can.

In the text of KISKA, Congress allows KISA to monitor, implement, and enforce KISKA's safety agenda, while providing the FTC power to "abrogate, add to, and modify the rules of the Association . . . as the Commission finds necessary or appropriate to ensure . . . fair administration . . . to conform the rules of the Association to requirements of this chapter . . . or otherwise in furtherance of the purposes of this chapter." *See* 55 U.S.C §§ 3053(e), 3054(a)(1).

In *Oklahoma*, the Sixth Circuit found that a similar provision in HISA that gave the FTC power to "abrogate, add to, and modify" the rules granted the FTC a "comprehensive" oversight role that prevented an unlawful delegation of authority. 62 F.4th 221, 230. The Sixth Circuit's reasoning should not be extended to this case. Interpreting KISKA as both allowing KISA to enforce the statute, while giving the FTC the power to remove KISA's enforcement power does not make sense and conflicts with the Harmonious-Reading Canon of Construction.

Under the Harmonious Reading Canon, the "provisions of a text should be interpreted in a way that renders them compatible, not contradictory."³ If KISA is interpreted this way, the FTC can usurp congressional authority by eliminating the power Congress gave to KISA. Instead, the two portions of KISKA should be interpreted harmoniously. A harmonious interpretation says that KISA has the power to enforce KISKA, and the FTC has the power to alter the structure of KISA if KISA attempts to go beyond the scope of the statute.

Under this interpretation of the statute, the FTC cannot remove KISA's enforcement powers, even if this would eliminate the unconstitutional delegation of authority. According to this

³ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

Court, agencies are not permitted to rewrite statutes. *See Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (holding that power given to the Secretary of Education under Title IV of the Education Act to waive or modify statutory or regulatory provisions did not allow him to cancel student loan debt). Thus, the Fourteenth Circuit’s ruling must be reversed.

B. KISA is Distinctly Different Than FINRA

KISA asserts that because its structure is modeled after the Financial Industry Regulatory Authority (FINRA), this Court should not find KISA violates the private non-delegation doctrine. (R. at 12.) KISA’s argument is misguided because it relies on the assumption that KISA is identical to FINRA. It is not. Under FINRA, the SEC shares enforcement powers with FINRA. The FTC does not exert this level of control over KISA. Therefore, KISA violates the private non-delegation doctrine.

FINRA (formerly known as NASD) is not engaged in an improper delegation of power because the Securities and Exchange Commission (SEC), a public entity, exercises enforcement authority independent of FINRA. *See Todd & Co. v. Sec. & Exch. Comm’n.*, 557 F.2d 1008, 1012–13 (3rd Cir. 1977) (internal citations omitted). FINRA is permitted to bring civil proceedings against another party — but FINRA cannot widely investigate and issue subpoenas — only FINRA arbitrators have this authority.⁴ Additionally, the SEC is engaged in the entire civil disciplinary process and can relieve FINRA of its enforcement responsibilities. *See* 15 U.S.C. § 78s(g)(2). This is significant restraint of power compared to KISA’s enabling legislation.

KISA’s enabling legislation states that KISA has “subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.” 55 U.S.C. § 3054(h). Unlike

⁴ FINRA Rule 12512 Subpoenas, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12512> (last visited Jan. 7, 2025) (“Arbitrators shall have the authority to issue subpoenas . . . a party may make a written motion requesting that an arbitrator issue a subpoena”)

FINRA, KISA does not need written authorization to issue a subpoena. The ability to issue a freely investigate and issue subpoenas carries significant weight. This Court should not view KISA's power lightly. Despite its claims, KISA carries substantially more enforcement power than FINRA. Thus, this Court should find that KISA violates the private non-delegation doctrine.

Furthermore, the SEC exercises significant power over FINRA's operations compared to the FTC's relationship with KISA. As previously mentioned, the SEC is fully involved in the investigative and enforcement process and can relieve FINRA of its enforcement power over cases. *See* 15 U.S.C. § 78s(g)(2). Here, the FTC exercises nowhere near this level of authority over KISA. First, the FTC is not involved in investigations and the initial enforcement of KISKA. The statute explicitly states that KISA has the power to investigate, subpoena, and enforce civil penalties, with the FTC not becoming aware of KISA's actions until a civil action is filed. *See* 55 U.S.C. §§ 3054(h)–(j), 3058(a).

Instead of actively participating in the initial investigation and enforcement of KISKA, the FTC is absent. There is no provision in KISKA that allows the FTC to relieve KISA of its enforcement powers regarding a particular case. Sure, the FTC can exercise its unilateral reversal power. However, practically speaking, the FTC like any other government agency, will rubber stamp the decisions made by KISA if there are no glaring issues. Overall, the FTC allows KISA to run wild with full investigative and subpoena power that is not remotely present in FINRA. Therefore, since KISA is given significantly more power than FINRA, this Court should reverse the ruling of the Fourteenth Circuit and find that KISA violates the private non-delegation doctrine.

II. Rule ONE Violates the First Amendment's Freedom of Speech.

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. Const. amend. I. The Founding Fathers believed that free speech was essential

to America’s flourishing as a free society, with some like Benjamin Franklin stating that free speech “is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved.”⁵ The freedom of speech exists to protect speech that is not popular. America is full of diversity, especially diversity of thought. The freedom of speech allows this diversity to flourish in the marketplace of ideas.

This Court should reject KISA’s argument that Rule ONE does not violate the First Amendment’s freedom of speech. KISA argues that in the interest of protecting minors from accessing adult content, KISA must be allowed to force numerous websites to implement age verification measures. Indeed, KISA claims that this speech poses such a risk to children that adults must have their speech regulated. This Court should reject KISA’s line of reasoning because Rule ONE is a content-based restriction that creates a chilling effect on speech through the broad implementation of policies that censor adults. Furthermore, Rule ONE is not narrowly tailored because there are other less-restrictive means to prevent children from accessing adult websites other than through the arbitrary and confusing standards present in Rule ONE.

A. Rule ONE Must Be Subject to Strict Scrutiny.

This Court has long recognized that freedom of speech grants wide latitude for people to engage in activities some may find offensive. *See e.g., Tex. v. Johnson*, 491 U.S. 397 (1989) (holding that burning an American flag is protected speech under the First Amendment); *Cohen v. Cal.*, 403 U.S. 15 (1971) (finding that expletives printed on a jacket are protected under the First Amendment even though the words are offensive); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (ruling that students’ armbands worn in protest of the Vietnam War were

⁵ 2 Jared Sparks, *The Works of Benjamin Franklin Containing Several Political and Historical Tracts Not Included in Any Former Edition, and Many Letters Official and Private Not Hitherto Published; with Notes and a Life of the Author* 285 (1840).

protected speech even if some found them offensive). The art and expression that the adult entertainment industry creates, while some may find it offensive, is such protected speech. *See Reno v. ACLU*, 521 U.S. 844 (1997). It is this expression that Rule ONE attempts to restrict.

Rule ONE's restriction of speech must be subject to strict scrutiny, not rational basis review that the Fourteenth Circuit applied. Rule ONE must be subject to strict scrutiny because it is a content-based restriction on speech. Next, Rule ONE must be subject to strict scrutiny because it creates a chilling effect on speech. Finally, Rule ONE must be subject to strict scrutiny because it broadly censors speech over the internet. Therefore, Rule ONE violates the First Amendment's freedom of speech.

1. Rule ONE is a content-based restriction on speech which warrants strict scrutiny.

In order to safeguard the protections granted by the First Amendment, this Court has repeatedly interpreted that a regulation that is facially content based is automatically deserving of the strictest scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Particularly, regulations of speech are “facially content based under the First Amendment if it ‘targets speech based on its communicative content’ that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed’”. *City of Austin v. Regan Nat’l Adver. of Austin, LLC*, 596 U.S. 61, 69 (2022) (quoting *Reed*, 576 U.S., at 163). Basically, if a reader of the piece of legislation must ask who the speaker is and what that speaker is saying, it is a content-based regulation. *Regan Nat’l*, 596 U.S., at 61

Content-based regulations on speech are presumed to be invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (internal citations omitted). Regulations are “content based” when they draw distinctions based on the speaker’s message. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (internal citations omitted). In *Reed*, the town of Gilbert’s sign code imposed additional restrictions

upon certain public signs depending on the content of the sign. *Id.* at 159. This Court found the sign code was a content-based restriction because it targeted specific signs because of the information they conveyed. *Id.* at 163. Since the regulation singled out specific content, this Court found that strict scrutiny must be applied. *Id.* at 164.

Rule ONE requires age verification for commercial entities. More specifically commercial entities who publish material on websites or social media platforms where more than one-tenth of the material is sexual material harmful to minors. 55 C.F.R. §§ 2(a), 3(a). Sexual activity harmful to minors includes material designed to appeal to prurient interests in a manner intended to display or depict various manners of pornographic content that lacks any serious value to minors. *See* 55 C.F.R. § 1(6)(a)–(c).

In *Reed*, the local government was found to engage in content-based restrictions because its regulations targeted specific instances of speech. So too here. Here, KISA targets specific websites and forces them to implement age verification measures. Under Rule ONE, not all websites are subject to age verification. The only websites subject to age verification are ones that contain more than one-tenth of sexual activity harmful to minors. These websites are being regulated because the government wants to exert a parental influence over children and prevent them from accessing adult content online. If the targeting of websites because of their adult content is not a content-based restriction on speech, nothing is. Thus, strict scrutiny applies here.

2. Rule ONE creates a chilling effect on speech which warrants strict scrutiny.

The “chilling effect” a government regulation may have on speech is a legitimate First Amendment concern because many people will choose to abstain from protected speech. This imposes social costs and harms society by limiting the expression of ideas. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (finding Virginia’s trespass policy did not violate the First Amendment

because it punished the defendant's unlawful entry, not his speech). In many situations, a "chilling effect" arises when an individual refuses to engage in lawful conduct due to direct or indirect effects of a government regulation. *See also Laird v. Tatum*, 408 U.S. 1, 10 (1972) (holding that civilians demonstrated a justiciable controversy when they stopped engaging in protected speech when the Army started surveilling them).

The Respondent contends that Rule ONE was created with the intent to prevent children from accessing adult websites. *See* 55 U.S.C. § 3050. While this may be true, KISA compelling certain websites to implement age verification effectively chills the speech of adults. (R. at 3.) Here, the record indicates that KISA likely was aware that Rule ONE would lead to this chilling effect on speech because similar age verification laws at the state level led to a significant decrease in traffic to adult websites. (R. at 4.)

Like the civilians in *Laird* who had their speech chilled by government actors, here, KISA's forced implementation of age verification to adult websites also has a chilling effect on speech. Age verification requires adults to provide identifying information, chilling their speech. *See* 55 C.F.R. § 3(a)(1)–(2); (R. at 4.) When a person accesses an adult website, they usually do so in private because of the controversial material that is on the website. Adult websites have become more popular than brick and mortar adult stores because adults do not have to risk exposing themselves to acquaintances or the public. *See* (R. at 4.)

By forcing an adult to provide identifying information, the privacy provided by the website is stripped away. Data leaks are common in today's society. However, a data leak from an adult website could create social consequences for adults who visit the website. As the record shows, adults have stated that this fear has stopped them from visiting adult websites after the passage of

Rule ONE. (R. at 4.) Rule ONE explicitly states that websites may not retain identifying information. 55 C.F.R. § 2(b).

However, just because Rule ONE applies this requirement does not mean this requirement is followed in practice. If there are websites that violate Rule ONE by not implementing age verification measures, there are likely also websites that retain identifying information. Identifying information allows websites to better appeal to and track users and can be sold to other websites. The potential upsides websites can experience by retaining personal identifying information likely outweighs the downsides of a civil sanctions because the website must be caught violating the law before it can be penalized.

Additionally, adults accessing these websites likely have a low risk tolerance when it comes to their identities being unmasked to the public. If it is revealed that someone visits an adult website, they are likely to experience pushback from their spouse, family, friends, co-workers, and faith community. These facts demonstrate that Rule ONE causes a significant chilling effect on the protected speech of adults. Therefore, Rule ONE must be subject to strict scrutiny.

3. Rule ONE is distinctly different than the state obscenity statute upheld in *Ginsberg*.

The Fourteenth Circuit ruled that the First Amendment issue must be decided under rational basis review instead of strict scrutiny. However, the cases that the court cited such as *Paxton*, are misapplications of this Court's ruling in *Ginsberg*. See *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that states could pass stricter obscenity laws under their police powers); *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024) (finding that *Ginsberg* requires federal courts to apply rational basis review to age-verification statutes). Here, the appellate court's reasoning is incorrect because *Ginsberg* does not apply to KISA or Rule ONE. Thus, *Ginsberg* is not controlling.

In *Ginsberg*, the defendant was convicted of violating a section of New York’s Penal Code criminalizing the selling and distribution of “obscene” material to minors under seventeen. 390 U.S. at 631. The Penal Code’s definition of “obscene” was narrower than federal obscenity this Court defined in *Roth* because it viewed the material from the perspective of a child, not an adult. *See Id.*; *Roth v. United States*, 354 U.S. 476, 487 (1957) (“Obscene material is material which deals with sex in a manner appealing to prurient interest.”). The Court determined the material the defendant sold was not “obscene” under *Roth*, was “obscene” under the Penal Code. *Ginsberg*, 390 U.S. at 634.

KISA claims *Ginsberg* forces this Court’s hand to apply rational basis review. (R. at 8.) KISA, the Fourteenth Circuit, and cases like *Paxton* misapply this Court’s reasoning from *Ginsberg*. In *Ginsberg*, this Court addressed whether it was “constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right . . . what sex material they may read or see.” *Ginsberg*, 390 U.S. at 637. It is true that this Court upheld New York’s stricter obscenity law. *Id.* However, this law was not upheld for the reason KISA believes.

This Court did not find that the New York Penal Code was constitutional because speech or expression was not violated. Instead, the Court found the statute was constitutional because New York had police powers to regulate the health, safety, and welfare of its children. *Id.* at 639. The Court noted that “[t]he well-being of its children is of course a subject within the *State’s* constitutional power to regulate . . .” *Id.* (emphasis added). The obscenity statute in *Ginsberg* was upheld under principals of federalism, not because it aligned with the First Amendment.

Unlike the New York Penal Code in *Ginsberg*, Rule ONE is a federal regulation. *Ginsberg* is not controlling this case because it would require the reversal of *Ashcroft*, *Reno*, and a multitude of lower court cases which correctly follow that federal content based First Amendment

restrictions receive strict scrutiny. Overall, *Ginsberg* remains good law but should not be applied to this case because state police powers are not invoked. Therefore, strict scrutiny applies.

B. Rule ONE Does Not Survive Strict Scrutiny.

To survive strict scrutiny, this Court has found the government must demonstrate that its legislation is “narrowly tailored” to achieve a compelling government interest. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995). The concept of “narrow tailoring” is not explicitly found in the Constitution but is an important “formula” relied on by this Court to determine whether government regulations survive strict scrutiny. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. R. 1267, 1268–69. The following three elements must be met for the regulation to be “narrowly tailored” and survive strict scrutiny: (1) The regulation must be the least restrictive alternative; (2) it must not be underinclusive; and (3) it must not be overinclusive. *Id.* at 1326–29. Here, the government does not satisfy a single element. Therefore, Rule ONE is not narrowly tailored, which means it does not survive strict scrutiny.

1. Rule ONE is not narrowly tailored because there are less restrictive ways to prevent minors from accessing adult content.

KISA concedes that Rule ONE regulates speech. However, despite recognizing this, KISA asks this Court to determine that Rule ONE does not violate the First Amendment. KISA claims that the government’s interest in preventing children from accessing adult websites outweighs the any free speech protections. KISA’s argument is flawed because it fails to recognize less restrictive ways it can prevent minors from accessing adult content, such as internet filtering and blocking software. Since there are less restrictive ways to prevent minors from accessing adult websites, Rule ONE is not narrowly tailored. Since Rule ONE is not narrowly tailored, it does not survive strict scrutiny. Therefore, Rule ONE violates the First Amendment’s Freedom of Speech.

When speech is indecent and enters someone's home, the government's interest in protecting children does not support a blanket ban if there are less restrictive alternatives. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000). In *Playboy*, Section 505 of the Telecommunications Act of 1996 was challenged. *Id.* at 806. Section 505 required channels that primarily provided sexual oriented program to be fully scrambled, blocked, or only transmitted during the night when children would be least likely to watch. *Id.* This Court struck down Section 505 because it was not narrowly tailored. *Id.* at 827.

The Court found that Section 505 both singled out specific programming and programmers. *Id.* at 812. This is because Section 505 did not restrict all channels, only those that were sexually oriented. *Id.* The Court explained that laws "intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles" because they have the effect of a penalty. *Id.* The Court found that this content-based restriction was not narrowly tailored allowing individuals to block the channel is a less restrictive alternative than a blanket ban by the government. *Id.* at 816.

Rule ONE requires that a commercial entity who publishes material on the internet, more than one tenth of which is sexual material harmful to minors, must use age verification that uses government issued identification or a method that relies on the use of transactional data. *See* 55 C.F.R. §§ 2(a)–(b), 3(a)(1)–(2). Additionally, the record demonstrates that some experts testified that internet filtering and blocking software could be used to prevent minors from accessing adult websites. (R. at 5.)

Like in *Playboy*, where this Court invalidated Section 505 because individuals could take individual steps to have the cable providers block adult content, here, individuals could have filtering and blocking software installed on their computer. There are numerous filters that can

easily be installed on a computer to prevent children from accessing adult content.⁶ Additionally, filters are easier to install on computers than they are on cable television.

Here, instead of having to call a cable provider to manually block adult content, all a concerned parent must do is go on one of the numerous internet filters and install it on the computer. Adults regularly install new software on their phones, computers, and other devices, so installing a filter would not pose any trouble for the average adult. This targeted blocking of adult content is less restrictive than a blanket ban and allows adults to exercise their First Amendment right of consuming controversial content within their own homes. Since the individual installation of internet filters is less restrictive than a blanket ban, Rule ONE does not survive strict scrutiny.

2. Rule ONE is not narrowly tailored because it fails to restrict adult content published by non-commercial entities.

Rule ONE regulates a minor's ability to access adult content. KISA believes the best way to regulate a minor's access to adult content is to regulate commercial websites. But KISA's intense focus on safeguarding commercial adult websites cause it to miss the forest for the trees. KISA's argument is unsound because it fails to account for websites ran by individuals. Since websites not run by commercial entities are not forced to implement age verification measures, KISA's adult website regulations are underinclusive and not narrowly tailored. Because Rule One is an underinclusive regulation, it is not narrowly tailored. Therefore, since Rule ONE is not narrowly tailored, it does not survive strict scrutiny.

⁶ The website Canopy provides a list of fifteen internet filters that it ranks the highest. These filters include Canopy, Kidslox, NetNanny, Microsoft Family Safety, Qustodio, FamiSafe, OurPact, Mobicip, Norton Family, Safe Lagoon, SelfControl, FamilyTime, CleanBrowsing, OpenDNS Family Shield, and TP-Link Homecare. These filters can be installed by simply downloading the software on a computer. See Ben Goodey, *15 Best Internet Filters for Families in 2025*, Canopy (July 15, 2024), <https://canopy.us/blog/internet-filters/>.

When applying strict scrutiny, this Court has found that the regulation in question must not be underinclusive at protecting the government's interest. *See e.g., Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (“[The State] must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793 (1978) (“The underinclusiveness of the statute is self-evident . . . The fact that a particular kind of . . . question has been singled out for special treatment undermines the likelihood of a genuine state interest”)

Rule ONE only requires “commercial entities” who publish or distribute material on the internet to adopt age verification measures. 55 C.F.R. §§ 2(a), 3(a)(1)–(2). Commercial entities include “a corporation, limited liability partnership, limited partnership, sole proprietorship, or other legally recognized business entity.”

Under its own definition, Rule ONE does not regulate any private individual or group of people who host a website who are not part of a private entity. The government claims that Rule ONE was created to serve the compelling interest of protecting children from adult websites. (R. at 2–4.) The government claims that adult websites must be regulated and forced to use methods of age verification because of a “host of horrors” that may befall minors if they so much as catch a glimpse of internet pornography. But the government's actions do not align with this strong rhetoric.

If the government was interested in protecting children from adult websites, it would have to regulate commercial and non-commercial websites alike. Instead of applying its age verification requirement evenhandedly, KISA lets non-commercial websites run wild. This under inclusiveness raises the question of whether the government truly seeks to protect children from *all* forms of sexual activity harmful to minors. Instead, it seems like the government has the goal of trying to

financially harm the adult film industry. As the record reflects, adult traffic on these commercial websites has gone down in part because people are scared to have their information accessed or leaked. (R. at 4.) Rule ONE could have required all websites publishing adult content to be subject to age verification. It did not. Rule ONE is not narrowly tailored because it is underinclusive. Therefore, Rule ONE fails strict scrutiny.

3. Rule ONE is not narrowly tailored because it regulates more speech than just adult content.

Rule ONE seeks to prevent children from accessing adult content online. KISA believes it necessary to compel all websites that publish more than one-tenth of adult content to use age verification. But KISA's zeal in regulating online speech causes non-objectionable content to be caught in the crossfire. Rule ONE is flawed because it regulates some forms of speech that are not harmful to minors. Since websites can be forced to implement age verification even though the vast majority of their content is not sexual in nature, KISA's adult website regulations are overinclusive and not narrowly tailored. Therefore, since Rule ONE is not narrowly tailored, it does not survive strict scrutiny.

When applying strict scrutiny, this Court has found that the regulation in question must not be overinclusive but must be fully necessary for protecting the government's interest. If a regulation *See e.g., Simon & Schuster, Inc. v. Members of the N.Y State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (“[T]he . . . law is significantly overinclusive . . . [the] two provisions combine to encompass a potentially very large number of works . . . the statute is, to say the least, not narrowly tailored to achieve the State's objective”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (“The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.”) (internal citations omitted).

Rule ONE requires that any commercial entity who publishes material on a website or social media platform, “more than one-tenth of which is sexual material harmful to minors,” must implement age verification measures. 55 C.F.R. § 2(a). The record reflects that Rule ONE has been enforced against websites who publish information about business, job, and educational opportunities, and other things unrelated to adult content. (R. at 4.)

Like the regulations in *Simon & Schuster* and *J.A. Croson*, Rule ONE broadly applies to regulate activities that do not serve a compelling government interest. The government believes that it can regulate a wide breadth of internet content under the guise of protecting children. Strict scrutiny principles require that the government narrowly tailor its regulation to protect the free speech rights of adults. Rule ONE is not narrowly tailored because it has already been shown to regulate websites that contain significantly more material than adult content.

Additionally, Rule ONE is overly broad because its language is vague. Rule ONE does not define what publishing material “more than one-tenth of which is sexual content harmful to minors” actually means. *See* 55 C.F.R. §§ 1, 2(a). Nor does Rule ONE provide any guidance on how websites are supposed to measure this “one-tenth” of sexual content. And other than providing general data on the potential risks of pornography exposure, KISA provided no evidence as to why it chose the one-tenth standard. What is special about a website whose content is one-tenth sexual content? What differentiates a website with one-tenth of adult content from a website with one-eleventh of adult content? Nothing. Rule ONE is purely arbitrary and its one-tenth standard affects speech well beyond adult content. Rule ONE cannot be considered narrowly tailored because its standards are confusing, arbitrary, and broad. Therefore, Rule ONE fails strict scrutiny.

CONCLUSION

For the foregoing reasons, we respectfully ask that this Court reverse the Fourteenth Circuit's decision to vacate the injunction permanently, enjoining KISA and Rule ONE from operation because KISA violates the private non-delegation doctrine and Rule ONE violates the First Amendment's freedom of speech.

Respectfully submitted,

Team 13

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