No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

BRIEF FOR PETITIONER

Team Number 21
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Does KISKA unlawfully delegate executive enforcement powers to the private corporation, KISA—making it functionally insubordinate to the FTC—violating the private nondelegation doctrine?

2. Does an age verification law for pornographic websites create a content-based speech restriction that demands strict scrutiny because of a presumption of a First Amendment violation on regulations that attempt to regulate the content of speech?

OPINION BELOW

The opinion for district court for the District of Wythe is omitted, but the ruling is included in the Procedural History of the opinion for the majority of the Court of Appeals for the Fourteenth Circuit. R. at 5. The Pact Against Censorship, Inc. (PAC) moved for a preliminary injunction. R. at 5. The injunction was granted by the district court and they held the (1) KISA did not violate the private nondelegation doctrine, but (2) Rule One did violate the First Amendment because "it affected more speech that it needed." R. at 5. KISA, the appellant at the Fourteenth Circuit, appealed on the First Amendment issue, and PAC cross-appealed on the non-delegation issue. R. at 5.

In their majority opinion, the Fourteenth Circuit upheld the district court's ruling on the private nondelegation doctrine, that KISA is functionally subordinate to the FTC. R. at 6. Acknowledging the circuit split, the Fourteenth Circuit agreed with the Sixth Circuit's interpretation in *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) that functionally subordinate means delegation is constitutional when the FTC could supervise every aspect of enforcement. R. at 6. They reasoned since section 3053(e) permits the FTC to "abrogate, add to, or modify" KISA's rules, it can pre-clear enforcement standards – providing adequate control. R. at. 7. They rejected the Fifth Circuit's interpretation in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Horseman II)*, 53 F.4d 869, 421 (5th Cir. 2024) that functionally subordinate means reviewing KISA's actions where "a good deal of enforcement [occurs] without supervision." R. at. 6.

The majority also overruled the district court's decision on granting the injunction on the First Amendment grounds. R. at 7. The Fourteenth Circuit disagreed with the standard of review the district court used. R. at 7-8. They believed the proper standard should have been rational

basis, not strict scrutiny. R. at 7-8. The Fourteenth Circuit largely agreed with the Fifth Circuit opinion on a similar case in *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (2024) that the controlling case is actually *Ginsberg v. New York*, 390 U.S. 629 (1968), and not the other Supreme Court decisions calling for strict scrutiny analysis. R. at 7-8. As rational basis merely requires the law to not be "irrational" it easily passes muster. R. at 9.

The dissenting opinion in the Fourteenth Circuit disagrees with majority on both issues. R. at 10. "Whatever the wisdom of KISA and its actions, the Constitution does not simply disappear because someone has stumbled upon a good policy. Rather our charter document demands a faithful adherence to its basic structure and liberties." R. at 10.

In his dissenting opinion, Marshall believes that the majority errs because the FTC does not have actual supervision. R. at 10. Instead, actual supervision requires the FTC have authority to reverse all enforcement actions KISA makes similar to, as *Horsemen II* reasons, checking the day-to-day decisions of police officers pulling people over – to ensure neither exceed their authority. R. at 11. Additionally, KISA is not functionally subordinate since any FTC pre-clearance power to control it would unlawfully change the statute's substantive language – just as in *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023). R. at 11-12. Finally, comparison to the SEC-FINRA relationship is defeated because SEC, unlike FTC, has authority to make independent investigations, sole subpoena power, and authority to revoke FINRA's ability to enforce rules seen in 15 U.S.C.§ 78(s)(g). R. at 12-13.

The dissent like the district court believes that the proper standard of review for the First Amendment issue is strict scrutiny. R. at 13. The dissent points to the similarities in laws and the regulation at issue in some of the previous Supreme Court rulings in *Reno v. ACLU*, 521 U.S. 844 (1997) and *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004) dismissed by the majority

where the Supreme Court held the standard to strict scrutiny as well as striking down the law. R. at 14. The dissent does not disagree that *Ginsburg* is good law, just that it is not applicable in this situation as the law at bar is about restrictions on adults accessing content that is First Amendment protected for them. He also agrees with assessment that Rule One would fail strict scrutiny as the "presence of [less restrictive] alternatives alone is fatal to Rule One". R. at 14-15.

CONSTUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. At 2. § 1 cl. 1 provides:

> The executive Power shall be vested in a President of the United States of America. . . .

U.S. Const. amend. I provides:

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

15 U.S.C.A. § 41 (West), in relevant parts, provides:

> [T]he President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

15 U.S.C.A. § 77s (West), in relevant parts, provides:

> (c) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subp[o]ena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry . . . .

15 U.S.C.A. § 78o-3 (West), in relevant parts, provides:

> (h) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the association to impose a disciplinary sanction shall be supported by a statement setting forth . . . .

15 U.S.C.A. § 78s (West), in relevant parts, provides:

> (e)(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.
>
> (g)(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

15 U.S.C.A. § 78u (West), in relevant parts, provides:

> (a)(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated . . . The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter . . . .
>
> (c) In case of contumacy by, or refusal to obey a subp[o]ena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records . . . .

15 U.S.C.A. § 3053 (West), in relevant parts, provides:

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

15 U.S.C.A. § 3054 (West), in relevant parts, provides:

(a)(1) Beginning on the program effective date, the Commission, the Authority, and the Ant-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter . . . shall . . . implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program . . .

(e)(1)(A) The Authority shall seek to enter into an agreement with the United States Anti-Doping Agency under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(h) The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

(i) The Authority shall develop a list of civil penalties with respect to the enforcement of rules for covered persons and covered horseraces under its jurisdiction.

(j)(1) In addition to civil sanctions imposed under section 3057 of this title, the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Authority may be entitled.

(j)(2) With respect to a civil action commenced under paragraph (1), upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C.A. § 3057 (West), in relevant parts, provides:

(d)(1) The Authority shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against covered persons or covered horses for safety, performance, and anti-doping and medication control rule violations.

The texts of the following statutes relevant to the determination of the present case are set forth in the Appendix: Sections 3052(b)(1)(A), 3053(e), 3054(a) (1), 3054(e)(A), 3054(h), 3054(i), 3054(j), 3058(c)(A) and 3058(c)(B) of the Keeping the Internet Safe for Kids Act. 55 U.S.C. §§ 3052(b)(1)(A), 3053(e), 3054(a) (1), 3054(e)(A), 3054(h), 3054(i), 3054(j), 3058(c)(A) and 3058(c)(B).

The texts of the following regulations relevant to the determination of the preset case are set forth in the Appendix: sections 1(6), 2(a), 3(a), 5(a), and 5(b) of Rule One. 55 C.F.R. §§ 1(6), 2(a), 3(a), 5(a)-(b).

STATEMENT OF THE CASE

Congress, in an attempt to regulate the internet with safety regulations for minors, passed the Keeping the Internet Safe for Kids Act (KISKA), which was effective as of January 2023. R. at 2. KISKA created a private entity, the Kids Internet Safety Association, Inc., to be able to create rules with the purpose to "monitor and assure children's safety online." R. at 1-2. KISA is similar to another delegation creation of Congress, the Horseracing Integrity and Safety Authority. R. at 2. KISA is a "private, independent, self-regulatory nonprofit corporation [that is] subject to the oversight of the Federal Trade Commission." R. at 2. Specifically, KISA is able to "regulat[e] the Internet industry" in regards to child safety and access. R. at 3. It also has the ability to "enforce its rules through liberal investigation powers and through the imposition of civil sanction or the filing of civil actions for injunctive relief." R. at 3.

About two months after KISA was created, it had a "governing board of citizens from around the country." R. at 3. The first few meeting specifically focused on the "deleterious effects that easy access to pornography has on minors" and the negative impacts it can have on their mental health, physical health, and education. R. at. 3. KISA's solution was to create what is known as "Rule One." R. at 3. Rule One requires that "certain commercial pornographic websites age verify users." R. 1, 3. Rule One claims to require websites use "reasonable age verification measures to verify that only adults access explicit material." R. at 3. The types of "reasonable" age verification measures include government-issued ID or another "reasonable method that uses transactional data." R. at. 4. The entity performing the age verification may retain the "identifying information of the individual." R. at 4. Violations of Rule One's regulations also include a range of fines from up to $10,000 to $250,000. R. at. 4.

Members of the adult entertainment industry and adults who used these websites had visceral reactions to the news. R. at 4. Adults who used the websites feared identification even though one woman noted she "believes there is nothing wrong with her interest in obtaining adult information from theses sites. . . ." R. at. 4. As for the industry itself, they already knew what could happen from "similar laws passed on a state level." R. at 4. They had a legitimate fear their "livelihood[s]" and "liberty [were] at stake . . . ." R. at 4. Members of the adulty entertainment industry decided to file this suit in response to these overreaching acts and challenged the law. R. at 1, 4.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit improperly concluded that the preliminary injunction should be stopped, allowing for KISA's unconstitutional Rule One for the following reasons: (1) KISA exercise overbroad enforcement powers not constitutionally delegated to it and with little oversight; and (2) the Rule One regulation prohibits protected material for adults – undermining Supreme Court's jurisprudence.

First, the court should have properly held that that the KISKA unlawfully delegated to KISA enforcement powers where it is not functionally subordinate nor in aid to its overseeing public authority, the Federal Trade Commission (FTC). Here, the statute authorizes KISA, a private corporation to make investigations, issue subpoenas, file civil suits and seek injunctions. Rather than delegate these executive powers to a proper public official, it limits review authority of the FTC to wait after a company challenges a KISA enforcement action and it goes through an administrative law judge.

Additionally, FTC cannot preclear KISA's statutory provided enforcement powers through its review of proposed rules as it would unlawfully change the law's substance. Finally,

any comparison to its model legislation, the Maloney Act, for constitutional grounds fails since the SEC is provided its own independent investigative authority and the FTC is not. Thus, the exercise of KISA's enforcement is not in aid to the FTC trying to enforce the statute prohibitions – making it an unconstitutional delegation.

Second, the Fourteenth Circuit was mistaken in applying rational basis to the First Amendment analysis at issue with the Rule One regulation. Rule One is a classic content-based regulation that restricts speech on the basis of content. Supreme Court precedent has been abundantly clear, all content-based restrictions of this kind must withstand strict scrutiny. It is irrelevant to the analysis that some of the content may be obscene for minors. The Rule One regulation specifically restricts material that may be obscene to minors. What may be obscene to minors is not obscene for adults and cannot be burdened by restrictions absent passing muster through strict scrutiny.

Once strict scrutiny is properly applied to the Rule One analysis, the regulation cannot survive. Strict scrutiny requires that the government show that they have a compelling interest, the regulation is narrowly tailored to achieve that interest, and it is done in the least restrictive means possible. While it is conceded that there is a compelling interest in the protection of minors from harm, the Rule One regulation fails on both narrow tailoring and providing the least restrictive means for achieving the regulation's purpose.

ARGUMENT

While review of a preliminary injunction determination is done under the abuse of discretion standard, courts have de novo review of "decisions grounded in erroneous legal principles." *Mock v. Garland,* 75 F.4 563, 577 (5th Cir. 2023). Presently, this court only needs to

determine whether PAC has proven a substantial likelihood of success on the merits as three of the four preliminary injunctions have been stipulated. *Id.*

Reversing the Fourteenth Circuit's decision to deny the preliminary injunction, enjoining the KISA's Rule One, is the proper legal conclusion because KISA does not act functionally subordinately to the FTC in the exercise of its enforcement powers over companies in the adult film industry. If permitted to exercise KISA broad enforcement powers, its Rule One regulation would fail under the proper standard of strict scrutiny under as it is a content-based restriction that is presumed invalid under the Supreme Court First Amendment precedent.

I. KISA DOES NOT AUTHORIZE THE FTC SUFFICENT OVERSIGHT TO MAKE IT HAVE EQUAL TO OR GREATHER AUTHORITY THAN THE KISA's ENFORCMENT POWERS OF MAKING INVESTIGATIONS, ISSUING SUBPOENAS, IMPOSING FEES, OR FILING SUITS – THUS THE KISA IS NOT FUNCTIONALLY SUBORDINATE.

The Constitution vests executive power in the Presidency. U.S. Const. Art II. § 1. Generally, the delegation of legislative power is barred. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023) (citation omitted); *Gundy v. United States*, 588 U.S. 128, 135 (2019) (quotation omitted). However, it is permitted where there is a "necessity of adapting legislation to complex conditions [that] the national Legislature cannot directly address." *A.LA Schechter Poultry Crop. v. U.S.*, 295 U.S. 495, 529-30 (1935); *Oklahoma,* 62 F.4th at 221. Congress must have "flexibility and practicality" to create laws that empower other branches of government, or private entities if required, with legislative authority; otherwise, it would become a futility. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (citation omitted).

While Congress may obtain assistance from other branches, conferring discretion to executive agencies to enforce law, *Mistretta v. U.S.*, 488 U.S. 361, 361 (1989), delegation of core constitutional authority—specifically to private corporations over public officials—provides

unchecked powers that are "inconsistent with the constitutional prerogatives and duties of Congress." *A.LA Schechter Poultry Crop.,* 295 U.S. at 537; *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (describing the delegation of legislative power to private entities as its most obnoxious form). Therefore, this Court has been concerned with delegation of federal power to private corporations because it deprives the public of government accountability and liberty. *U.S. Dep't of Transp. v. Ass'n of Am. R.R. (Amtrak II)*, 575 U.S. 43, 62 (2015) (Alito J., concurring). Essential principles that guide the nondelegation doctrine's application to modern issues are old but are nevertheless precedential. *Consumer Rsch. v. FCC*, 109 F.4th 743, 768 (5th Cir. 2024).

Balancing these principles requires private corporations empowered with federal power to be functional subordinate to a public official which holds pervasive authority and surveillance over it. *Sunshine Anthracite Coal Co.,* 310 U.S. at 399. Better put, a public official must have power to "approve[], disprove[], or modify[]," a private corporations decisions affecting the people—thus, to make the business providing aid to the public official. *Id.* at 388. However, this doctrine has scant modern application while being extensively discussed academically. Paul J. Larkin, *The Private Delegation Doctrine*, 73 Fla. Rev. 31, 45 (2021). Public officials must be the wielders of federal authority—not self-interested corporations. *Consumer Rsch.* 109 F.4th at 769. Therefore, for private nondelegation claims to be constitutional, lower courts have determined that the following must be met: (1) public officials must have final decision-making power, [1] (2) private actors must always remain subject to pervasive surveillance and authority of entity

[1] Larkin, *The Private Delegation Doctrine* at 50-51 (noting in all supreme court cases upholding delegation to private entities, final decision-making authority was held by public officials); see also *Pittson Co. v. U.S.*, 368 F.3d 385, 394-95 (4th Cir. 2004); *Consumer Rsch.* 109 F.4th at 757-58 (holding congress unlawfully delegated its taxing power to a private corporation).

lawfully vested public official,[2] and (3) public officials must actually exercise their authority.[3] *Id.* at 769-70 (see footnotes 1-3).

Private corporations are prohibited from having core executive powers without public official's final decision-making authority. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Horseman II*), 53 F.4d 869, 421 (5th Cir. 2024). In *Horseman* II, the appellate court held that the Horseracing Integrity and Safety Act (HISA) unconstitutionality delegated executive enforcement powers to the Horseracing Integrity and Safety Authority (Authority). *Id.* at 428-30. There, Congress empowered the Authority to govern doping, medication control and racetrack safety in thoroughbred racing nationwide and provided rulemaking and enforcement powers – specifically, the abilities to issue subpoenas, make investigations, impose civil sanctions, and file civil actions seeking injunctions or enforcing sanctions. *Id.* at 421.[4] While the Federal Trade Commission had the authority to "abrogate, add to and modify" the Authority's proposed rules, this did not apply to enforcement actions. *Id.* at 429-30. The court reasoned that these enforcement powers were quintessentially executive functions unlawfully delegated to a private corporation because the FTC, an executive public agency, did not have immediate review of these powers nor an ability to exercise them. *Id.* Thus, the Authority could act on its own, not just in aid to the FTC—disturbing precedent preferring public officials exercise these powers. *Id.* at 428 n.9, 429.

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[2] *Sunshine Anthracite Coal Co.,* 295 U.S. at 388; see also *Cospito v. Heckler*, 742 F.2d 72 (3rd Cir. 1984); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982).
[3] *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *Tex. v. Rettig,* 987 F.3d 518, 531 (5th Cir. 2021), cert denied, *Tex. v. Comm'r of Internal Revenue*, 142 S.Ct. 1308 (2022) (Mem) (Alito and Thomas J., dissenting) (arguing the nondelegation doctrine must be assessed in modern times).
[4] See 15 U.S.C.A. § 3053(e) (West); 15 U.S.C.A. § 3054(h)-(j) (West); 15 U.S.C.A. § 3057(d)(1) (West); see also § 3054(e)(1)(A) (delegating to the U.S. Anti-Doping Agency powers to make and enforce anti-doping programs via investigations, charges, and adjudications).

Further, a public official must have authority over a subordinate which it can actually exercise rather than "reflexively rubber stamp" a private corporation's acts. *Ass'n of Am. R.R.s v. U.S. Dep't of Transp*. (*Amtrak I)*, 721 F.3d 666 (DC. Cir. 2013), vacated and remanded on different grounds, *Amtrak II,* 575 U.S. at 135 (holding Amtrak is a public entity). The appellate court held that the delegation of joint regulation-setting is unconstitutional. *Amtrak I,* 721 F.3d at 670-74. There, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) to address issues with the nation's railway coordination problems in track sharing; it directed the Federal Railroad Administration (FRA) and Amtrak to jointly create new metrics and minimum standards to measure the performance and service of intercity passenger trains. *Id.* at 669. Further, it created the Surface Transportation Board (STB) where an appointed arbitrator would resolve disagreements between FRA and Amtrak over promulgated metrics and standards and enforce decisions against inadequate intercity passenger trains through STB investigations. *Id*.[5] The court reasoned if Amtrak is a private entity, section 207 does not make it functionally subordinate to FRA since both share equal regulatory power and FRA could not actually exercise review over Amtrak's metrics and standards when only the STB had review authority. *Id.* at 672-74.

Finally, the overseeing public official must have pervasive surveillance and authority over its subordinate private corporation, - in essence, a private corporation is acting in a ministerial role. *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1011-13 (3d Cir. 1977). In Todd & Co., the appellate court held that the delegation of disciplinary powers to the private National Association of Securities Dealers (NASD)—now FINRA—was constitutional. *Id.* There, the

[5] While not finding the STB as unconstitutional, the court expressed concerned that a private arbitrator could be appointed since the language was ambiguous and thus, exercise undelegated executive power. *Id.* at 670.

Maloney Act of 1937 provided for the self-regulation of the over-the-securities-market by authorizing the Securities and Exchange Commission (SEC) to register the NASD, a private securities regulatory agency, to make set disciplinary rules and enforce its rules against violators. *Id*.; 15 U.S.C.A. § 78o-3(h) (West). Todd & Company violated NASD's rules when it sold stock to public without disclosing it dominated the market and "[e]xecuted the transactions 'at prices and realized profits." *Todd & Co., Inc.,* 557 F.2d at 1011-12. It appealed NASD's decisions to the SEC where it may determine if the Association's rules were violated or reduce, cancel, or leave any NASD penalties imposed. *Id*.; 15 U.S.C.A. § 78s(e) (West). They argued NASD authority violated the nondelegation doctrine. *Todd & Co., Inc.,* 557 F.2d at 1012. The court reasoned that NASD was sufficiently subordinate because the statue made reasonable standards to review NASD rules, SEC had de novo review, and emphasized, SEC had independent investigative powers. *Id.* at 1012-13.[6]

A. *KISA unlawfully delegates to private corporations' quintessential executive functions—better exercised by public officials—because the FTC does not have its own enforcement authority nor has sufficient immediate oversight authority*.

The Constitution's vesting clause prohibits the unchecked delegation of executive power to private corporations because the power is not overseen by the President and subsequently accountable to the public. *Amtrak II*, 575 U.S. at 62. Nonetheless, the statute undermines this principle where it authorizes the KISA to enforce executive rules rather than empowering the FTC to do so or have immediate review—just like in *Horseman II.*

[6] Congress modeled HISA after the Maloney Act. *Oklahoma* at 229. Appellate courts have held that its statutory scheme as constitutional under the nondelegation doctrine while the Supreme Court has never addressed the issue. See generally *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982). Without binding precedent, FINRA's enforcement power is still questionable under the Constitution. see *Alphine Sec. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307, (DC Cir. 2023) (per curiam) (Walker J., concurring).

There, HISA authorized the Authority to investigate members of the horse racing industry, issues subpoenas, impose civil sanctions and penalize horseracing corporations it determined violated the rules and regulations. 15 U.S.C.A. § 3054(h)-(i). Modeled after HISA, Congress copied and pasted the same language in KISA providing the Association with subpoena power, investigative authority and the ability to promulgate "civil penalties with respect to enforcement of rules." App. at 24. This Court has recognized that these powers are fundamental executive powers – exercised by public officials. *Morrison v. Olson,* 487 U.S. 654, 696 (1988) (reasoning investigations are executive powers subject to the Attorney General's review); *Collins v. Yellens*, 594 U.S. 220, 254 (2021) (issuing subpoenas and imposing fines are executive powers). The FTC is not actually exercising any executive power here as both HISA and KISKA vest only these enforcement powers in private corporations.

Further, as HISA requires the Authority to contract enforcement of doping and medication rules with the U.S Anti-Doping Agency in *Horsemen II*, KISA is similarly encouraged and authorized to partner with a nonprofit—further delegating the same enforcement powers—to implement the Stop Internet Child Tracking Program rules. 15 U.S.C.A. § 3054(e) (West); App. at 24. In each, the statutes provide only de novo review after an administrative law judge, but no actual executive authority for the FTC to enforce doping and medication rules or the Stop Internet Child Tracking Program rules.

Finally, in *Horsemen II,* congress provided only the Authority powers to impose civil sanctions, seek injunctions, and commerce civil actions against person or racetracks who violate the statutory prohibitions or regulations promulgated. Similarly, congress authorized KISA impose civil sanctions, seek injunctions, and commerce civil against "technological companies that has engaged, is engaged, or is about to engage" violations of the statute or rules. App. at 24-

25. Such enforcement powers are quintessential executive powers which is not exercised by a public official. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). The FTC cannot in *Horsemen II* or here decide "whether [to] charge [entities] with a violation, [whether to seek an injunction,] or whether to sanction or sue." *Horsemen II*, 107 F.4th at 429. While the FTC can review both private corporation's enforcement actions after an administrative law judge rules or may try to control it by "abrogat[ing], adding to and modify[ing]" KISA enforcement rules when proposed, neither option allows for immediate oversight and control, as the *Horseman II* court determined. App. at 22-23,29-30.

Vesting proper executive authority in a non-government entity potentially undermines precedent finding executive power exclusively vested in Article II officials. *Amtrak II,* 575 U.S. at 67 (Thomas J., concurring in judgment) (citing *Free Enter. Fund v. Public Acct. Oversight Bd*., 561 U.S. 477, 496-497 (2010)). If the statute vested these enforcement powers with the FTC, there would be no constitutional issues—public accountability would be present. The FTC is a public authority, for example, where the President has authority to remove appointed and senate confirmed commissioners for inefficiency, neglect of duty or malfeasance in office. 15 U.S.C.A. § 41 (West); upheld in *Humphry's Ex'r v. United States*, 295 U.S. 602, 621-22 (1935). In contrast, KISKA provides no mechanism to remove undemocratically chosen board members from the technological industry for cause. 55 U.S.C. § 3052 (no reference to removal mechanism).

As the appellate court reasonably concluded in *Horsemen II* that a private entity exercising quintessential executive powers not controlled or sufficiently reviewed by a public official constitutes a nondelegation violation, this court would benefit jurisprudence by holding the delegation of these enforcement powers to KISA as unconstitutional. Consistency with the

Constitution requires that executive power is exercised by public officials – not private corporation with their own interests. Otherwise, public officials with vesting executive power would not be principal decision makers.

B. *FTC' cannot pre-clear proposed KISA rules to have actual pervasive surveillance and authority because it would unlawfully change the statute's language.*

The lower court held that FTC has pervasive review and authority because the FTC has may "abrogate, add to, or modify", pre-clear, the Associations rules after determining such rules would be overbroad or unfair. R. at 11. However, this would be an unfortunate and unintended consequence under the nondelegation doctrine if maintained.

To abrogate, add to, or modify the rules would inadequately control KISA's power to make investigations or issue subpoenas against suspected violators—as it is beyond FTC's control just as in *Amtrak I.* There, both the FRA and Amtrak had authority to jointly establish metrics and standards to address the nation's railway coordination issue in track sharing while not providing the FRA review power—both had equal regulation making authority. Similarly, KISA and the FTC have equal, mutually exclusive authority over each other's enforcement powers because each entity may only "'implement and enforce' . . . KISKA 'within the scope of their powers and responsibilities under this chapter.'" R. at 12; App. at 23. Additionally, the court reasoned that Amtrak and FRA's relationship was distinct from *Adkins* and *Currin* because public officials could unilaterally change the private corporations' regulations. *Amtrak I,* 721 F.3d at 671. KISA and FTC's relationship is also distinct from the binding precedent because the FTC cannot unilaterally change how the Association exercises its enforcement powers.

Changing KISA's enforcement power would allow the FTC to amend the statute itself. If the FTC could change how the statute would operate, it would provide oversight on how KISA utilizes its injunction power, ability to file suits, and investigative powers to avoid broad and

unfair issue. See *Horsemen II,* 107 F.4th at 432. However, this Court in *Biden v. Nebraska* soundly rejects the idea that an executive agency could change statutory language. There, the Supreme Court held the President's interpretation of the word "modify" did not authorize him to change the law's fundamental framework designed by Congress. *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023). Therefore, Congress passed a statute specifically authorizes only KISA exercise its enforcement power while saying nothing about the FTC involvement beyond its review authority. Similarly, Congress must have considered this too when it passed PRIIA because it provided the STB authority to appoint an arbitrator to make decisions on disputed regulations between Amtrak and FRA while once more providing not oversight to FRA.

Notably, If the FTC lack pre-clearance authority, KISA enforcement power must be greater than the FTC. In *Amtrak I*, the court determined that "[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority. Such entities may, however, help a government agency make its regulatory decisions. . ." under the Constitution. *Amtrak I,* 721 F.3d at 671. Thus, just like *Amtrak I*, if a private company, cannot wield equal regulatory power to make metric and standards, KISA cannot wield greater enforcement powers than the FTC.

Additionally, Congress did not add language specifying FTC involvement in the enforcement powers and thus, it must be concluded that Congress purposefully omitted it from the statutory framework. *Russello v. United States*, 464 U.S. 16, 23 (1983). Likewise, in *Amtrak I,* Congress added language authorizing the STB to oversee jointly the FRA and Amtrak's regulations and must have purposefully omitted FRA from oversight power. Hence, this court should find that the FTC lacks any pre-clearance authority over the Association's enforcement actions – similar to *Amtrak I,* where FRA lacked any actual oversight authority over Amtrak.

C. *In contrast to the FTC, the SEC retains equal or greater enforcement authority over FINRA – meaning it retains pervasive authority exercise direct oversight.*

The *Oklahoma* court made a compelling argument that HISA must be constitutional because it was modeled after SEC and FINRA relationship. Appellate courts have held the SEC and FINRA structure constitutional numerous times, but the Supreme Court has address the relationship. It would seem, on its face, HISA's delegation is constitutional. That is true regarding delegation of legislative power but not with its enforcement power delegation when comparing both statutory schemes and reviewing relevant case law.

KISKA provides oversight authority to FTC through only its review power. App. at 29-30. While it provides de novo review where the FTC may affirm, reverse, modify the ALJ's decision, this is substantially different from the appellate court's consistent determination of the SEC's review over FINRA's actions. *Horsemen II,* 53 F.4d at 434. As *Horsemen II* shows a SEC-FINRA and FTC-Authority comparison, the Maloney's Act provides the SEC with equal or greater oversight authority over FINRA than the FTC control over the Association. *Id.* at 434.

Under the Maloney Act, the SEC has the power to make its own "investigations as it deems necessary to determine[e]" potential violators of the securities law, seek crimination sanctions or injunctions, and issues subpoenas. 15 U.S.C.A. § 78u(a)(1) (West); § 78u(c); 15 U.S.C.A. § 77s(c) (West). More importantly, the SEC may revoke FINRA's ability to enforce its own rules while both HISA and KISKA do not delegate any immediate revocation power to the FTC. 15 U.S.C.A. § 78s(g)(2). Essentially, the SEC is empowered to "supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps." *Horsemen II,* 53 F.4d at 435 (citing *In re NYSE Specialist Se. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007)). In distinction, Congress does not permit, in fact omits, any revocation or independent investigative power to the Authority or to KISA. Therefore, comparing the FTC's oversight over the Association—and

characterize it as pervasive—to the greater level of oversight that SEC has over FINRA would be a gross application of the law.

The SEC-FINRA line of cases cannot support FTC's oversight as sufficient. It interprets "pervasive surveillance and authority" to mean that the SEC has the same or greater enforcement powers than FINRA or other self-regulated organizations in the securities world. This way, FINRA, due to the level of oversight from the SEC, does not go uncheck to public accountability in the use of its regulatory powers—therefore, FTC's lackluster oversight cannot keep the Association in check for the public based on the statutory scheme.

The *Oklahoma* court argues that FTC's administrative adjudications act as its final decision to approve or disapprove the Authority's actions. To support their argument, they rely on *Todd & Co* where the appellate court held that the SEC had lawfully delegated oversight power because the statue provided reasonable standards to approve or disapprove the NASD's promulgated securities rules and it had de novo review. *Oklahoma*, 62 F.4th at 231.

However, in *Todd & Co.*, the appellate court also reasoned the delegation to be constitutional because the SEC could make "independent investigations and decisions." In contrast, the FTC lacks authority to make independent investigations and decisions. With this independent authority, the court in *Todd & Co.* determined the NASD is subject to "full review by the S.E.C., a whole public body." 557 F.2d at 1013. The SEC did not have to wait on NASD fact or rules but could execute its own enforcement power and even fact check NASD's determinations beyond its provided record. The FTC's review authority is distinctly less powerful than KISA enforcement powers of the KISA since it cannot make its own independent investigations.

In essence, the FTC acts more in aid to KISA—simply justifying or vetoing its actions but that does not make it a final decision. Unless a public body retains equal to or greater than executive power, public accountability and individual liberty are at risk of harm from private corporations. *Amtrak II*, 575 U.S. at 62. Therefore, unlike in *Todd & Co.,* where the SEC's independent investigation power was not a nondelegation issue, this Court should conclude that KISA has unchecked and unlawful delegated authority because the FTC lacks "pervasive authority" power to make independent investigations.

D. *Actual Supervision over KISA is not found in the FTC's de novo review but rather through power to take actions against a subordinate private corporation*.

The government argues that the FTC must have actual supervision over KISA when it has de novo review in its administrative proceedings because it is free to determine its own outcomes on KISA's actions. In other words, so long as the public official may look to its own reasoning based on additional information it may obtain beyond the record to affirm or deny KISA's enforcement actions makes KISA functionally subordinate. *Oklahoma*, 62 F.4 at 243-44 (Cole, J., concurring). Further, it reasons since the SEC shares de novo review over FINRA and the Supreme Court has never distributed this principle, it must make the delegation constitutional. *Id*.

However, their argument's conclusion and with KISKA's framework, would increase chances for a private corporation to immediately harm or infringe upon the substantive due process rights of the technological companies. *Carter*, 298 U.S. at 311 (a statute "confer[ring] such [oversight power] undertakes an intolerable and unconstitutional interference with personal liberty . . . .") Authorizing private corporations with government power is constitutionally dangerous since it removes public accountability as a response to harmful acts done to people's rights.

While de novo review is a mechanism to remedy these harms, it cannot prevent those issues immediately nor address any if parties settle matters before it reaches the FTC. *Horseman II*, at 107 F.4th at 430. Moreover, while the SEC share de novo review like the FTC, that is one tool in its arsenal to control FINRA executive actions. In distinction, the SEC may make independent investigations, issues subpoenas, seek criminal sanctions, seek injunctive relief, and even revoke FINRA's ability to enforce rules. *Id*. at 434-35. Therefore, these oversight powers ensure the FTC would keep pervasive surveillance and authority over the unchecked KISA.

In conclusion, the FTC cannot keep KISA functionally subordinate because KISA has enumerated executive authority while omitting any to the FTC, any pre-clearance approach would unconstitutionally change the statute, and the FTC lack independent investigative power. Considering the statutory scheme in its entirety, KISA does not aid the FTC in regulating technological companies nor does the FTC have pervasive surveillance and authority to control KISA – thus, it violates the private nondelegation doctrine.

II. THE RULE ONE REGULATION REQUIRING AGE VERIFICATION FOR PORNOGRAPHIC WEBSITES IS A FIRST AMENDMENT CONTENT-BASED RESTRICTION THAT REQUIRES REVIEW UNDER STRICT SCRUTINTY BECAUSE REGULATIONS THAT RESTRICT FIRST AMENDMENT PROTECTED CONTENT ON THEIR FACE ARE PRESUMED INVALID AND UNCONSTITUTIONAL.

In a familiar tale that now spans decades, the government is once again attempting to "shield juvenile innocence . . . [in] exercising its power to promote the general welfare." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Then as now, the state was attempting to protect minors from content that would be obscene for them but not necessarily for adults. *Id.* The sentiment that "this is to burn the house to roast the pig" also remains the same. *Id.* The First Amendment is clear in its mandate that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The Supreme Court's precedents have also made clear that the government

using their power to "restrict expression because of its message, its ideas, its subject matter, or its content" is unacceptable. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

"Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Court in *Miller* determined "guidelines" that separated unprotected obscene material from works that merely show or describe sexual conduct. *Miller v. California*, 413 U.S. 15, 23-24, 29 (1973). By doing this, the Court acknowledged that there were "inherent dangers" in attempting to regulate content, even that which was considered obscene. *Id*. at 23. There have always historically been some limitations on what content the First Amendment has protected and has "permitted restrictions upon the content of speech in a few limited areas." *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (quotations omitted). Even in the Court's holding in *Roth* that obscenity is one of those areas that has never been traditionally protected, the Court distinguishes "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 484-485, 487 (1957). However, the Court has been unwavering that "where obscenity is not involved . . . the fact that protected speech may be offensive to some does not justify its suppression." *Reno v. ACLU*, 521 U.S. 844, 874-875 (1997) (quotation omitted).

During the decade when *Sable* was litigated, there were a series of attempts to regulate the "dial-a-porn" industry. *Sable*, 492 U.S at 118-119. The service provided allowed adults to pay to call in and hear a "sexually oriented prerecorded telephone message[]." *Id.* at 118. Congress eventually got involved in the attempt to regulate what "obscene or indecent" material a minor could get access to with criminalization penalties, but "did not criminalize sexually oriented messages to adults, whether . . . obscene or not." *Id.* at 119-120. Congress amended the Communications Act to completely "prohibit indecent as well as obscene interstate commercial

telephone communications directed to any person regardless of age." *Id.* at 122-123. Sable Communications brought this action to challenge the constitutionality of the amended Act.

The *Sable* Court upheld previous Court's rulings that "[s]exual expression which is indecent but not obscene is protected by the First Amendment. . . ." *Id*. at 126. Since it is content that is protected, any attempt to regulate it must withstand strict scrutiny. *Id.* The Court does recognize that "shielding minors from the influence of literature that is not obscene by adult standards" is a compelling interest, but it "must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.*

The precedents the Supreme Court has set surrounding content-based regulation are clear, that the standard must strict scrutiny and that "[c]ontent based regulations are presumptively invalid." *United States v. Playboy Ent. Grp. Inc.*, 529 U.S. 803, 814, 817 (2000). This is true even when the compelling interest is to protect children. *Id.* at 814. There is an "extraordinary cost" if a mistake is made in suppressing constitutionally protected speech versus that which "may be legitimately be regulated, suppressed or punished. . . ." *Id.* at 817. The protections afforded in the Constitution "exist precisely so that opinions and judgment, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." *Id.* at 818. Ideas and content are left to the judgment of the individual, not the government. *Id.* The line the Supreme Court has set for First Amendment protected content when it involves "sexual expression" is obscenity. *Reno*, 521 U.S. at 874. If the content involved is merely "indecent" and not obscene, the Court has consistently held that the content is "protected by the First Amendment." *Id.* The standard for a content-based restriction is strict scrutiny. *Reed*, 576 U.S. at 163-64.

The Playboy Entertainment Group challenged section 505 of the Telecommunications Act 1996 that required cable companies to either "fully scramble or otherwise fully block" their channels that showed "sexually-oriented programming," or they had to limit the viewing hours of those channels between ten p.m. and six a.m. to avoid being seen by children. *Playboy*, 529 U.S. at 806. Scrambling was what was used most often by the cable companies, however, a "phenomenon known as signal bleed" caused imperfections in this technology allowing non-paying customers and potentially, children to see the adult channels. *Id.* at 806. Most companies opted to "eliminate . . . targeting programming outside of the safe harbor period. . . ." *Id.* at 807. The Supreme Court affirmed the lower court ruling that this was an "unnecessarily restrictive content-based legislation violative of the First Amendment." *Id.* at 807.

The Court in *Playboy* made it a crucial point that even though "many adults themselves would find the material highly offensive . . . [and] unwanted into homes where children might see or hear . . . there are legitimate reasons for regulating it." *Id.* at 811. However, it is undisputed that "adults have a constitutional right to view it." *Id.* "The speech in question is defined by its content; and the statute which it seeks to restrict it is content based." *Id.* Speech based regulations that are content-based "can stand only if it satisfies strict scrutiny." *Id.* at 813. Additionally, the effects of the statute are to "silence the protected speech for two-thirds of the day." *Id.* at 812. It is a "significant restriction of communication" and it is of no consequence that the law does not completely ban the content in question. *Id.* "The distinction between laws burdening and laws banning speech is but a matter of degree . . . content-based burdens must satisfy the same rigorous scrutiny." *Id.*

The next iteration of content restrictions of sexual material protected for adults happened during when the Internet was experiencing "extraordinary growth." *Reno*, 521 U.S. at 850. The

Supreme Court in *Reno* determined that two statutes, that had the goal of protecting minors from "indecent" and "patently offensive" content on the Internet, violated the First Amendment. *Id.* at 849. One of the provisions in the Communications Decency Act of 1996 (CDA) "prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18." *Id* at 859. The other CDA provision "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* Both provisions allowed for criminal penalties. *Id.* The CDA also had two affirmative defenses. *Id.* at 860. The first was "good faith, reasonable, effective, and appropriate actions" to ensure that minors could not access the restricted indecent and obscene content. *Id.* The second affirmative defense "cover[ed] those who restrict[ed] access . . . [by] designated forms of age proof, such as a verified credit card or adult identification number or code." *Id.* at 861.

Ultimately, the *Reno* Court determined that the "CDA [was] a content-based blanket restriction on speech." *Id.* at 868. The Court distinguished their holding in *Ginsberg v. New York*, 390 U.S. 629 (1968) because those were not laws that concerned content. *Id.* at 864. "A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA." *Id.* The Court is clear that even the affirmative defenses are not "narrowly tailor[ed]" that could save an otherwise "invalid unconstitutional provision" in this case. *Id.* at 882. They commented that even in *Sable* the restriction there "amounted to 'burning the house to roast the pig' [but,] [t]he CDA cast[s] a far darker shadow over free speech, threaten[ing] to torch a large segment of the Internet community." *Id.*

After the Supreme Court invalidated the CDA in *Reno* because it was "not narrowly tailored to serve a compelling interest", Congress decided to try again with the Child Online Protection Act (COPA). *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656, 659-61 (2004). In COPA,

Congress criminally penalized with a $50,000 fine and six months in prison "for the knowing, posting, 'for commercial purposes' of World Wide Web content that is 'harmful to minors.'" *Id.* at 661. "Harmful to minors" is defined as:

> "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or 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 is designed to pander to, the prurient interest;
> "(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> "(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Id*. at 661-62 (citing § 231(e)(6)).

Additionally, much like law in *Reno*, COPA has an affirmative defense by "allowing a person to escape conviction by demonstrating that he:

> "has restricted access by minors to material that is harmful to minors—
>
> "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> "(B) by accepting a digital certificate that verifies age; or
>
> "(C) by any other reasonable measures that are feasible under available technology." *Ashcroft II,* 542 U.S. at 662 (citing § 231(c)(1)).

The *Ashcroft II* Court recognized the considerations that Congress gave "their earlier decision in *Reno* . . . and must be cautious before invalidating the Act." *Ashcroft II,* 542 U.S. at 660. However, "well-established First Amendment principles . . . must hold the Government to its constitutional burden of proof." *Id.* In affirming the lower court's ruling to enjoin the law and remand it, the Supreme Court held that the standard most on point was from their earlier precedent in *Playboy*. *Id.* at 670. "[L]ike this case, [it] involved a content-based restriction

designed to protect minors from viewing harmful materials." *Id.* In both cases, the more restrictive options imposed by Congress "could not survive strict scrutiny." *Id.*

In the modern era of content-based restrictions, the District Court in *Rokita* thoroughly looked at the record of the Act passed by the Indiana legislature that sought to protect minors and imposed and "age verification requirements on websites that contain at least one-third content deemed to be harmful to minors." *Free Speech Coal., Inc. v. Rokita*, No. 1:24-CV-00980-RLY-MG, 2024 WL 3228197, at *1 (S.D. Ind. June 28, 2024). The punishment for violations can "reach as high as $250,000." *Id.* The case in *Rokita* is strikingly similar to that in *Ashcroft II*, which ultimately did not survive strict scrutiny. *Id.* at 8. Like the previous attempts, "[o]nce it becomes clear a statute chills constitutionally protected speech" strict scrutiny is the correct standard to apply if . . . regulations . . . refer to the content of the speech or regulate based on the direct impact that speech has on its listeners." *Id.* at 12. The Indiana legislature's Act is without a doubt a content-based regulation because of the imposition of the age verification requirements "if at least one-third . . . of the images and videos published on the website depict material harmful to minors." *Id.* at 13. It is a "direct reference to the content of the speech to be burdened . . . and the standard must be strict scrutiny."

The regulation at issue in Rule One has some slight differences from the cases establishing strict scrutiny as the proper precedent for a content-based regulation. The definitions in Section 1(6) that define "Sexual material harmful to minors" goes into some details in language that is comparable to COPA as well as the *Miller* test, it is still defined as material that is harmful to *minors*. R. at Appendix A. From the Supreme Court's precedents in *Roth, Miller,* and *Sable*, what is obscene or harmful to minors is not necessarily for adults and is protected content.

Also similar to the regulations in COPA and in *Rokita*, Rule One specifically targets entities that in Section 2 of the regulation that have more than one-tenth of their content that is harmful to minors. R. at Appendix A. As in *Rokita*, this is a regulation that directly refers to content that refers to speech and the regulation can chill constitutionally protected speech.

The majority opinion in the Fourteenth Circuit mistakenly believed that rational basis was the proper view because of the Supreme Court's ruling in *Ginsburg*. However, this is inaccurate. While the majority is correct in their statement that *Ginsburg* is still good law, the dissent is correct in their interpretation that the holding is merely that minor's speech can be restricted when it comes to sexual content. The Supreme Court also distinguished *Ginsburg* in their holding in *Reno* that strict scrutiny was in fact the correct standard of review.

Each case through the decades of attempting to regulate the adult entertainment industry's First Amendment rights through various regulatory schemes and changing technology has shown three important points. The first point is that content-based regulations demand the highest judicial scrutiny because of the serious dangers posed by them toward the first amendment. Second, in each era the regulations have been presumptively invalid and unconstitutional, and government bears the burden of proving they are not. And finally, to prove they are not unconstitutional, the regulations must survive the rigors of strict scrutiny.

III. THE RULE ONE REGULATION REQUIRING AGE VERIFICATION CANNOT SURVIVE STRICT SCRUTINY BECAUSE IT IS NEITHER NARROWLY TAILORED NOR IS IT THE LEAST RESTRICTIVE WAY TO ACHIEVE THE COMPELLING INTEREST THE REGULATION WAS ENACTED TO REALIZE.

Under strict scrutiny the Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. This also applies to "shielding minors from literature that is not obscene by adult standards." *Id.* For a

regulation to withstand a strict scrutiny analysis, is must "(1) serve a compelling governmental 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 181, 190 (3d Cir. 2008).

The Petitioners concede that KISA has a compelling interest in this case in protecting minors from physical and psychological harm, however, that is not enough to pass the rigors of strict scrutiny.

A. *The age restriction in Rule One is not narrowly tailored to achieve the compelling governmental purpose.*

A law will generally fail to be narrowly tailored if it is underinclusive. *Rokita*, WL 3228197, at *14. This happens when "they regulate one aspect of the problem while declining to regulate other aspects of the problem. *Id.* While the government must have a compelling purpose, this alone is not enough; it "must be carefully tailored to achieve" that purpose. *Sable*, 492 U.S. at 126.

In *Rokita*, the district court points out various ways for minors to "circumvent the Act" and access the material that would be harmful. *Rokita*, WL 3228197, at *15. Websites such as "Reddit, which is roughly 24% sexually explicit material and thus not required to verify its user's age." *Id.* Additionally, the Indiana legislature did not create any restrictions on "children receiv[ing] content from Google, Bing, any newspaper, Facebook, Reddit, or the multitude of other websites not covered." *Id.* Not only are these facts fatal to the law being narrowly tailored, it also points to other deficiencies in it as well. *Id.* at *16. If the legislature had truly wanted to "sufficiently advance the government's interests in protecting minors from obscene speech" they would have targeted the images instead of "selectively determining which websites displaying adult content present the most danger." *Id.*

The court in *Rokita* also points out that the government has not met their burden that the law is narrowly tailored by explaining how "age verification would prohibit a single minor from viewing harmful materials." *Id.* at *16. The law in question requires age verification at the 33% threshold, so why is a site with 32% pornographic material "not as deleterious to a minor?" *Id.* Why also can a news website also display as many pornographic images as it wants, as long as they are not obscene for adults? *Id.* The court declares the law unconstitutional.

Virginia was another state that attempted to enact a statute to protect minors from "dissemination of material that was harmful . . . over the Internet." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 229 (4th Cir. 2004). Virgina had already successfully amended their statutes to cover "brick and mortar" entities that dealt with commercial sales of adult materials. *Id.* at 230. The legislature then amended the statute again to cover Internet providers. *Id.* at 230-231. In its analysis, the case hinged on whether "the Act [was] narrowly tailored so that it [would] pass strict scrutiny." *Id.* at 234. Both sides acknowledged that the Act is not narrowly tailored if its "effects a total ban. . . ." *Id.* The Constitution protects "from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Id.* The *PSINet* Court examined the record of the District Court and found that there was "no way of prevent[ing] Virginia juveniles from accessing" the adult oriented content the government was attempting to ban. *Id.* at 235. The "chilling" effect this would be to "effectively suppress a large amount of speech that adults have a constitutional right to receive . . . ." *Id.* This is the exact kind of overbroad unconstitutional speech that has been consistently struck down. *Id.*

The "PIN number solution to the statute's First Amendment problems creates First Amendment problems." *Id.* at 236. The attempt to create an affirmative defense does not successfully narrowly tailor the statute for the compelling purpose. *Id.* It in fact creates its own

"stigma associated with the content of these Internet sites" further deterring adults for accessing protected content and therefore further chilling speech. *Id.*

The statute in *PSINet* does not survive strict scrutiny as it is not narrowly tailored because the law itself is "unconstitutionally overbroad" and the proposed solution does nothing to fix the problem except to create an "impermissible regulation of speech under the First Amendment." *Id.* at 239.

The majority opinion by the Fourteenth Circuit never reached the issue of whether the regulation was narrowly tailored sufficiently to pass muster in strict scrutiny. *Rokita* is particularly inciteful due to how similar the language in the Indiana law and the Rule One regulation is. While there is a difference in percentages of pornographic material that triggers the age verification requirements, this is irrelevant. Regardless of the percentage or whether it is a total ban as in many of the earlier attempts to regulate the porn industry, the Supreme Court made it clear that bans and burdens both must pass the full gamut of strict scrutiny. And even a ten percent or more trigger to age verification is not narrowly tailored.

As the District Court points out in *Rokita*, if a site publishes news, but their site would normally trigger the age verification, or they are search engine like Google, they are not subject to the penalties of the law. This same provision is included in Rule One in Section Five:

> (a) This Rule does not apply to a bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.
>
> (b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this Rule solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the

> creation of the content that constitutes sexual material harmful to minors. R. at Appendix A.

This is a classic example of a provision being underinclusive by selectively imposing the age verification rules on some groups and not others. Why would the same exact images be less harmful to minors if they were seen on one website and not the other? By this standard alone Rule One would fail strict scrutiny.

Rule One does not have an affirmative defense like in *PSINet*, it has the same concept by building the age verification directly into the law as a requirement if you have a certain threshold to operate the content you provide on your website. It is also vulnerable for the same reasons. According to Section 3, the age verification technology is incredibly burdensome, requiring the entry of a government issued ID or other commercially reasonable method that relies on public or private transactional data to verify the age of an individual." R. at Appendix A. As addressed by the Court in *PSINet*, this type of burden acts as a ban and a chilling effect creating its own set of First Amendment problems. These burdens are unacceptable for narrowly tailoring a regulation and also render a regulation unconstitutional under strict scrutiny.

B. ***Rule One also does not survive strict scrutiny because the least restrictive means of advancing the government's compelling interest is not being utilized.***

The final test to pass strict scrutiny must be the "least restrictive alternative to advance the Government's compelling interest in its purpose. *Mukasey*, 534 F.3d at 198. An Act will fail the third leg of strict scrutiny if there is a "less restrictive alternative[]" and it would be "at least as effect in achieving the legitimate purpose that the state was enacted to serve." *Rokita*, WL 3228197, at *17.

In *Playboy* the Court looked at some of the alternative technology available at the time for the signal bleed problem as well as the record of the "severity of the problem" in determining

the statute imposes a severe burden on speech. *Playboy*, U.S. 803 at 821. Playboy pointed out at trial that current technology allowed for programable VCR's that eliminated the signal bleed problem without restricting the content at all. *Id.* There was also mention of "blocking technology" vaguely in the legislative record, but only in the context that "time channeling" was considered to be the "superior" method. *Id.* at 822. There was no mention or very little about its effectiveness. *Id.*

In holding the least restrictive means in achieving the purpose of eliminating the signal bleed was not used, the court articulated it was for the government to bear the burden to "present[] a plausible, less restrictive alternative." *Id.* at 823-824. The government failed on this argument because they assumed that there would not be a sufficient number of households who would install the blocking technology or that the cost would be too high to install them. *Id.* at 824. The court noted there was not any evidence in the record to support either position, and that Playboy was willing to advertise the blocking device as well as incur the cost. *Id.* "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.*

In *Rokita*, the Act also failed to be the least restrictive means in achieving the purpose of the Act is meant to serve. In this case, the Court actually pointed out two less restrictive alternatives. Rokita, WL 3228197, at *17. The first possibility is to only prompt for an age verification when one is attempting to "access obscene content, instead of whenever a user enters a website that has obscene content." *Id.* This would clearly be less restrictive, as the statute significantly "narrows" to content to the "harmful to minors test." *Id.*

The next alternative is filtering and blocking applications. *Id.* While the technology is not perfect is has come a long way in the twenty years since it was first introduced. *Id.* at 18. This

technology also has the benefit filtering out and blocking video and pictures, but would not block otherwise protected content such as blog posts. *Id.* at 17.

The record in the current case also shows significant concerns with age verification technology as a least restrictive means to achieving the stated purpose of Rule One. Petitioners submitted evidence showing how easily minors can evade age verification technology, much like the issue with signal bleeding in *Playboy*. The Government has not produced an alternative to the age verification and has not met their burden. The signal blocking in *Playboy* was also not perfect, but the government made assumptions and did not even attempt to try something less restrictive. This is a familiar theme. This is not the first time Congress has attempted to pass a content-restrictive law, and they keep trying the same familiar restrictions based on assumptions that age verifications must work best.

The Petitioners also provided expert testimony that internet filtering and blocking software methods could be more effective. The dissent pointed out the District Court pointed to the findings in their ruling that "their presence alone is fatal to Rule One." R. at 15. This is similar in *Rokita* as well as *Playboy*. The government should not make assumptions that parents would not be involved in attempting to monitor the content their children are accessing. As this technology would be a significantly less burden on adults and access to protected speech, Rule One is also invalid based on failing to use the least restrictive means to achieve the purpose of the compelling interest.

Content-based restrictions are meant to be tough hurdles to overcome and are meant to be held to high standards. We may not like the speech that is protected, but that is all the more reason why to protect it. It is always the easier path to protect the ideas and content we like, but those protections get chipped away under circumstances you might prefer to turn your nose up at.

Rule One should be held invalid as a facial content-based restriction under the First Amendment that fails to survive the rigors of strict scrutiny.

CONCLUSION

The Fourteenth Circuit decision should be reversed in regard to the private nondelegation doctrine. KISA should not survive as it was improperly granted enforcement powers better exercised by public officials. The FTC was not sufficient authority due to having no independent investigative authority nor ability to revoke KISA's enforcement powers. Rhus, KISA is not functional subordinate. Additionally, the Fourteenth Circuit decision should also be reversed on the question of the First Amendment. The proper standard of review should have been strict scrutiny and not rational basis, as the rule promulgated by KISA is a facially content-based restriction and presumed invalid. Under the proper standard of strict scrutiny, Rule One does not survive and should be declared unconstitutional. For the foregoing reasons we ask this Honorable Court to grant the preliminary injunction on Rule One as the Petitioners have demonstrated a substantial likelihood of success on the merits.

APPENDIX

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

> (b)(1)(A) The Association shall be governed a board of directed . . . comprised of nine members: . . . Five members of the from outside the technological industry.

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

> (e). The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds necessary 23 or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

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

> (a) (1) The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall implement and enforce the Anti-Crime Internet Safety Agenda . . . .
>
> (e)(A) When necessary, the Association is authorized to seek to enter into an agreement with non-profit child protection organizations to assist the Association with investigation and enforcement.
>
> (h) The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.
>
> (i) The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.
>
> (j) (1) Civil Actions. In general. In addition to civil sanctions imposed under section 3057 of this title, the Association may commence a civil action against a technological company that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.
>
> (j) (2) With respect to a civil action temporary injunction or restraining order shall be granted without bond.

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

> (c) (3) (A) In matters reviewed under this subsection, the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.
>
> (c) (3) (B) The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

55 C.F.R. § 1 provides:

> (6) Sexual material harmful to minors includes any material that: (A))the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B)) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or 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.

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

> (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

55 C.F.R. § 3, in relevant parts, provides:

> (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using . . . (1) government-issued identification; or . . . (2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual.

55 C.F.R § 5 provides:

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

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