No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET. AL.,

***PETITIONERS*,**

v.

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

***RESPONDENTS*.**

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team 25

Counsel for Petitioner

QUESTIONS PRESENTED

I. Under the private non-delegation doctrine, is Congress delegating enforcement powers to the Kids Internet Safety Association ("KISA") unconstitutional when KISA has extensive investigation powers, can impose civil sanctions, file civil actions for injunctive relief on its own, and the Federal Trade Commission ("FTC") can only review KISA's enforcement actions?

II. Under the First Amendment, does KISA's creation of Rule ONE infringe on freedom of expression when it requires websites with at least ten percent adult content to verify the ages of all vistors?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

Statement of Facts 2

Procedural History 4

OPINIONS BELOW 4

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 5

SUMMARY OF THE ARGUMENT 5

I. PRIVATE NONDELEGATION DOCTRINE 5

II. FIRST AMENDMENT 8

ARGUMENT 10

I. CONGRESS GIVING ENFORCEMENT POWER TO KISA BLATANTLY VIOLATES THE PRIVATE NONDELEGATION DOCTRINE BECAUSE IT IS NOT UNDER THE AUTHORITY AND SURVEILLANCE OF THE FTC. 10

A. The FTC's Lack of Surveillance over KISA's Enforcement Powers Fails to Subordinate KISA to the FTC Because the FTC Can Only Review KISA's Decisions and Has No Influence over KISA's Power to File Civil Suits, Injunctions, and Restraining Orders in Any Way. 12

1. The FTC's Direct Review of KISA's Adjudicative Decisions Is Inconsequential... 13

2. KISA's power to file civil suits, injunctions, and restraining orders is unfettered... 15

B. The FTC Cannot Use Its Rulemaking Authority to Subordinate KISA's Enforcement Actions Because the FTC's Ability to Modify Does Not Allow It to Meaningfully Supervise KISA, and the Relationship Between the FTC and KISA Is Unlike Other Valid Enforcement Schemes. 17

1. The FTC Cannot Use Its Ability to Modify KISKA to Make Fundamental Changes to Save the Statute's Defects Regarding Enforcement Oversight. 19

2. The FTC Has Substantially Less Supervisory Power over KISA Than the SEC Has over FINRA. 21

II. UNDER STRICT SCRUTINY, RULE ONE'S REQUIREMENT OF AGE VERIFICATION FOR WEBSITES WITH AT LEAST TEN PERCENT ADULT CONTENT VIOLATES FREEDOM OF EXPRESSION. 23

A. Strict Scrutiny Is the Correct Standard to Apply to Rule One Because It Regulates Material Protected by the First Amendment. 25

1. Rule One Regulates Material Protected by the First Amendment Because It Goes Beyond the Test Laid Out in Miller. 27

2. Reno and Ashcroft Provide the Correct Framework to Apply to Rule One Because They Are Both Content-Based Laws and They Regulate Internet Access. 28

B. Rule One Is an Impermissible Regulation of Speech Under Strict Scrutiny Because It Is Not Narrowly Tailored and Does Not Utilize the Least Restrictive Means. 31

1. KISA Did Not Narrowly Tailor Its Law as It Prevents Adults from Accessing Speech That They Have a Constitutional Right to Receive. 31

2. Rule One Is Not the Least Restrictive Means to Regulate Minors' Access to Sexual Material. 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Supreme Court Cases

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 10, 11

Ashcroft v. Am. Civ. Liberties Union,
542 U.S. 656 (2004) 8, 9, 26, 28, 29, 30, 33, 34, 35

Ayotte v. Planned Parenthood,
546 U.S. 320 (2006) 19

Biden v. Nebraska,
600 U.S. 477 (2023) 20, 21

Buckley v. Valeo,
424 U.S. 1 (1976) 16

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 11, 22

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002). 25

Currin v. Wallace,
306 U.S. 1 (1939) 11

Dep't of Transp. v. Ass'n of Am. RRs.,
575 U.S. 53 (2015) 11

DOT v. Ass'n of Am. R.R.,
575 U.S. 43 (2015) 13

F.C.C. v. Pacifica Found.,
438 U.S. 726 (1978) 24

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,
528 U.S. 167 (2000) 16

Generally Police Dep't City of Chicago v. Mosley,
408 U.S. 92 (1972) 25

Ginsberg v. State of New York,
390 U.S. 629 (1968) 9, 26, 28, 29, 30

Gundy v. United States,
588 U.S. 128 (2019) 10

Miller v. California,
413 U.S. 15 (1973) 8, 26, 27, 30

Mistretta v. United States,
488 U.S. 361 (1989). 11

Pan. Refin. Co. v. Ryan,
293 U.S. 388 (1935) 11

Police Dept. City of Chicago v. Mosley,
408 U.S. 92 (1972) 23

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 25, 31

Reed v. Town of Gilbert Arizona,
576 U.S. 155 (2015) 23, 24, 28

Reno v. Am. Civ. Liberties Union,
521 U.S. 844 (1997). 8, 9, 24, 26, 28, 29, 30, 31, 32

Roth v. United States,
354 U.S. 476 (1957) 23

Russello v. United States,
464 U.S. 16 (1983) 20

Sable Commc'n of California, Inc. v. F.C.C.,
492 U.S. 115 (1989)..... 23, 24, 28

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

Turner Broad. System, Inc. v. F.C.C.,
512 U.S. 622 (1994)..... 23, 26

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000)..... 23, 24, 25, 26, 28, 31, 33

United States v. Stevens,
559 U.S. 460 (2010)..... 32

Wayman v. Southard,
10 Wheat. 1 (1825) 10

Circuit Court Cases

Am. Civ. Liberties Union v. Mukasey,
534 F.3d 181 (3rd Cir. 2008) 25, 31, 33

Cospito v. Heckler,
742 F.2d 72 (3d Cir. 1984)..... 17

First Jersey Secs. Ins. v. Bergen,
605 F.2d 690 (3d Cir. 1979)). 21

Free Speech Coalition, Inc. v. Paxton,
95 F.4th 263 (5th Cir. 2024) 24, 25, 26

Nassau Sec. Serv. v. Sec. & Exch. Comm'n.,
348 F.2d 133 (2d Cir. 1965)..... 21

Nat'l Horseman's Benevolent and Protective Ass'n v. Black,
107 F.4th 415 (5th Cir. 2024) 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22

Nat'l Horseman's Benevolent and Protective Ass'n v. Black,
53 F.4th 869 (5th Cir. 2022) 11, 12, 17, 18

Oklahoma v. United States,
62 F.4th 221 (6th Cir. 2023) 10, 11, 12, 16, 17

Pittston Co. v. United States,
368 F.3d 385 (4th Cir. 2004) 14, 17

R.H. Johnson & Co. v. SEC,
198 F.2d 690 (2d Cir. 1952)..... 21

Ripplinger v. Collins,
868 F.2d 1043 (1989)..... 24

Sierra Club v. Lynn,
502 F.2d 43 (5th Cir. 1974) 10, 17

Sorrell v. SEC,
679 F.2d 1323 (9th Cir. 1982) 21

Texas v. Rettig,
987 F.3d 518 (5th Cir. 2021) 17

Todd & Co. v. SEC,
557 F.2d 1008 (3d Cir. 1977)..... 17, 21

STATUTES

15 U.S.C. § 78(s)(g)..... 22

55 C.F.R. § 1 ..... 3, 32

55 C.F.R. § 2(b) 3

55 C.F.R. § 3 3

55 C.F.R. § 5(a)..... 3

55 C.F.R. § 5(b) 3, 34

55 U.S.C. § 3052(a) 2

55 U.S.C. § 3053 2

55 U.S.C. § 3053(a). 18

55 U.S.C. § 3053(a)(3)-(4). 18

55 U.S.C. § 3053(a)(9)-(10); 18

55 U.S.C. § 3053(e) 2, 18

55 U.S.C. § 3054 ..... 2, 14

55 U.S.C. § 3054(a)(1) 20

55 U.S.C. § 3054(e)(A) 2

55 U.S.C. § 3054(e)(A). 22

55 U.S.C. § 3054(g)(1)(A)-(B) 2, 15

55 U.S.C. § 3054(g)(2) 2, 15

55 U.S.C. § 3054(h). 2, 22

55 U.S.C. § 3054(j)(1) 2, 17

55 U.S.C. § 3054(j)(1)-(2) 2, 16, 22

55 U.S.C. § 3055(e) 2, 22

55 U.S.C. § 3057 ..... 2, 15

55 U.S.C. § 3058(3)(A)-(B) 14, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1 10

U.S. Const. art. II, § 1, cl. 1 13

U.S. Const. art. II, § 2 10

U.S. Const. art. III, § 1 10

U.S. Const. Amend I 23

OTHER AUTHORITIES

Alexander Volokh,
The Myth of Federal Private Nondelegation Doctrine, 99 Notre Dame L. Rev. 203, 211 (2023) 12

Benjamin Franklin,
On Freedom of Speech and the Press, Pennsylvania Gazette, Nov. 1737 23

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The Federalist No. 47 (1788) 23

Ronald Cass,
Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 148-49 (April 2017) 10

INTRODUCTION

An unchecked government, caused by a lack of accountability, leads to a breakdown of personal liberties. The Constitution intentionally vested power in three separate branches to protect the people from government encroachment on personal liberties. Those branches are not permitted to delegate their duties and responsibilities to one another except in a limited fashion. Based on this revered separation of powers principle, the private non-delegation doctrine prevents Congress from delegating its powers to private entities without sufficient accountability.

The Keeping the Internet Safe for Kids Act ("KISKA") is not only a gross violation of the private nondelegation doctrine, but KISKA's child, KISA, has proceeded to completely flatten and ignore the express limitations of the First Amendment. KISA's creation and adoption of Rule ONE, which was designed to regulate material on the internet deemed to be obscene for minors, drastically increases the government's regulation of online materials and vastly oversteps the limitations placed on the government by the First Amendment. Those limitations were designed over two hundred years ago to protect Americans from the tyranny of a type of government that can tell its citizens what to think, say, do, and see. However, KISKA, KISA, and Rule ONE ignore those limitations and provide no accountability at the expense of one of the most treasured rights and principles--freedom of speech and separation of powers.

Reversing the Fourteenth Circuit will not only place common sense limitations back on any government delegations of power but will also reaffirm the same decision that this Court has made so many times already upholding the strong protections afforded the American people.

STATEMENT OF THE CASE

Statement of Facts

This case is about what happens when good intentions are allowed to override long established safeguards of personal liberty. To protect children from sexual material deemed harmful to minors, Congress enacted the Keeping the Internet Safe for Kids Act which became effective in January 2023. R. at 1. To implement and enforce KISKA, Congress created a private entity, KISA, and delegated rulemaking and enforcement authority to KISA. R. at 2. As a private, independent, self-regulatory nonprofit corporation, KISA is only subject to the oversight of an agency, the FTC. 55 U.S.C. §§ 3052(a), 3053 (2022). The FTC may "abrogate, add to, and modify the rules" of the Association as it deems necessary. 55 U.S.C. § 3053(e). However, the FTC has only reviewed an enforcement action once, and in that case, the FTC declined to take any action after its review. R. at 3.

KISA can launch investigations, levy sanctions, and file suits. *See* 55 U.S.C. § 3054. It can also file civil suits against technological companies for violations without *any* FTC control or oversight. 55 U.S.C. § 3054(j)(1)-(2). KISA can issue a temporary injunction or restraining order without bond. 55 U.S.C. § 3054(j)(1). It can subpoena and investigate civil violations committed under its jurisdiction. *Id.* at § 3054(h). KISA can issue guidance on an interpretation of an existing rule or a policy or practice about enforcement of such an existing rule, as well as guidance that relates solely to the administration of KISA. *Id.* at § 3054(g)(1)(A)-(B). It is only required to submit the guides to the FTC. *Id.* at § 3054(g)(2). KISA can enter into an agreement with non-profit organizations to assist in investigation and enforcement. *Id.* at § 3054(e)(A); § 3055(e). KISA determines the description of rule violations, hearing procedures, standards of proof, and evidentiary rules. 55 U.S.C. § 3057.

In February 2023, KISA heard testimony from experts regarding the effects that adult content has on minors. R. at 3. And in June 2023, KISA passed the regulation known as "Rule ONE" to limit easy access to adult content for minors. R. at 3. Rule ONE requires "any commercial entity that knowingly and intentionally publishes and distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors" to use age verification methods to prohibit minors from accessing the material. 55 C.F.R. § 1. Rule ONE specifies that acceptable age verification methods include either a "government-issued identification; [] "or a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." 55 C.F.R. § 3. The regulation requires that no personal information may be retained after the verification process. 55 C.F.R. § 2(b). Rule ONE does not apply to news-gathering organizations. 55 C.F.R. § 5(a). An internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider will not violate this Rule solely for providing access or connection to of from a website. 55 C.F.R. § 5(b).

The adult film industry responded with ardent protesting to the adoption of these strict controls on public access to their products. R. at 4. Petitioners John and Jane Doe stated that they had quit visiting any websites that required the verification because of concern over the safety of their personal information due to the commonality of data breaches and leaks. R. at 4. The adult film industry also emphasized the previous detrimental effects of other similar state laws. R. at 4. Therefore, Pact Against Censorship, Inc. ("PAC")–along with John and Jane Doe and Sweet Studios, L.L.C.–filed this lawsuit to protest the strike against their liberty and livelihoods. R. at 4.

While seeking an injunction, PAC provided evidence that Rule ONE would mostly affect websites that offer very little objectionable content and offer significant beneficial opportunities such as discussion boards about business, job, and educational postings. R. at 4. PAC also submitted expert affidavits testifying to the ease of bypassing age verification methods. R. at 4–5. Finally, some experts asserted that filtering and blocking software could be effective tools to prevent minors from accessing sexual material. R. at 5.

Procedural History

Following the launch of Rule ONE in June 2023, Plaintiffs filed suit in the United States District Court for the District of Wythe asking the court to find KISKA to be an unconstitutional delegation of authority and to grant an injunction against Rule ONE for violating the First Amendment's right of free speech. R. at 2, 5. The district court held that the delegation was proper, but granted the injunction because under strict scrutiny Rule ONE attempted to oversee more speech that it needed to regulate to achieve its goal. R. at 5. KISA appealed to the United States Court of Appeals for the Fourteenth Circuit to reverse the injunction and PAC cross-appealed on the issue of nondelegation. R. at 5. The Fourteenth Circuit affirmed on the issue of nondelegation and reversed the injunction after applying Rational Basis Scrutiny to Rule ONE. R. at 2, 7-10. PAC filed a petition for certiorari to the Supreme Court which was granted. R. at 16.

OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit is set forth on pages 1-10 of the Record.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of 55 U.S.C., 55 C.F.R., along with the relevant constitutional provision, the First Amendment to the United States Constitution, U.S. Const. amend. I.

SUMMARY OF THE ARGUMENT

Liberty stands on the foundation of accountability; thus, an unchecked government erodes the very fiber of freedom. In this case, unchecked government actions will destroy two pillars of liberty and indeed of the Constitution itself: separation of powers and freedom of speech. This Court is called to protect the foundational principles of the Constitution and uphold the scared liberties.

Despite these principles, Congress violated the private nondelegation doctrine by awarding KISA with enforcement powers that its supervisor, the FTC, has little to no control over. Additionally, the enforcement of Rule ONE violates Freedom of Speech by preventing access to online material that is protected by the First Amendment.

Therefore, the Petitioners respectfully request that this Honorable Court reverse the decision of the Fourteenth Circuit to find that KISKA is an unconstitutional delegation of power and in the alternative reverse the denial of the injunction of Rule ONE.

I. PRIVATE NONDELEGATION DOCTRINE

In granting KISA its broad enforcement power, preventing the FTC from having any meaningful authority or surveillance over KISA, Congress violated the private nondelegation doctrine for two reasons: first, the FTC has no surveillance over KISA because it can only review its enforcement decisions, and second, the FTC cannot use its rulemaking ability to meaningfully subordinate KISA's enforcement actions.

First, Congress violated the private non-delegation doctrine because KISKA only gives the FTC review of KISA's decisions prohibiting any meaningful oversight from the FTC. A private entity must be subordinate to the governmental agency in the delegation of executive powers. The conventional executive powers such as the power to launch an investigation, search for evidence, sanction, and sue, must be under the surveillance of the agency. Having the ability to simply review decisions after the private entity has already exercised majority of the enforcement power is insufficient surveillance. True surveillance requires agency oversight at every step of the way. Additionally, a statute unconstitutionally empowers the private entity to file suits, investigate, subpoena, adjudicate violations, or levy sanctions when the it does not require agency oversight in the process. A statute cannot facially delegate unsupervised enforcement power to private actors.

Here, KISKA plainly grants enforcement power to a private entity. KISA has the power to launch investigations, levy sanctions, and file suits. But KISKA merely gives the FTC a review of KISA's decisions. KISA determines the description of rule violations, hearing procedures, standards of proof, and evidentiary rules. KISA can file civil suits against technological companies for violations without *any* FTC control or oversight. KISA can issue a temporary injunction or restraining order without bond. KISA can file civil suits against technological companies for violations without *any* FTC control or oversight. This profound power can only be delegated from the executive branch.

While the FTC can "affirm, reverse, modify" the ALJ's decision, its so-called power to review the ALJ's decisions underscores that KISA's decisions are not subordinate to the FTC. By the time the FTC is involved in some manner, KISA has already exercised enforcement powers

without any FTC surveillance or pre-approval, rendering any response by the FTC as inconsequential.

Relying on the fact that the agency *could* potentially exercise authority over a private entity defeats the purpose of having an agency overseeing an unelected private entity that is not beholden to the public. If it is not required by statute, there is neither an incentive nor a guarantee that the agency will vigilantly oversee the private entity. For example, the FTC has exercised its ability to review KISA's enforcement only once.

Second, Congress violated the private nondelegation doctrine because the FTC's ability to modify does not allow it to meaningfully supervise KISA, and the relationship between the FTC and KISA is unlike other valid enforcement schemes. A private entity cannot be the predominant decision-maker. An agency must have "pervasive" oversight *and* control of a private entity's activities. The ability to modify rules is only helpful if the private entity does not possess other powers that are equally impactful as the agency's ability to modify. This is important because ability to modify rules to subordinate enforcement power would inevitably require the agency to change the statute. However, a court must not allow an agency to alter the face of a statute simply to save it.

Here, KISKA does not make any rules nor give that ability to the FTC; instead, KISA is responsible for rulemaking. Examples include training standards for experts in the field and technological advancement research. KISA, not the FTC, makes the schedule of civil sanctions for violations and a process or procedures for disciplinary hearings. The ability to modify rules; however, this would require the FTC to radically change the scope of the FTC's powers allotted in KISKA to something completely different. Congress gave the FTC oversight over some aspects of KISA's enforcement, but it failed to specify FTC oversight of all enforcement

activities. Additionally, the FTC's ability to modify does not make its relationship with KISA like that between other valid enforcement schemes, such as the SEC and FINRA, because KISA can act independently without requiring oversight from the FTC. The primary difference is that KISA–not the FTC–dominates enforcement powers. For example, KISA can file civil suits against technological companies for violations without *any* FTC control or oversight.

This Court should find KIKSA to be an unconstitutional delegation of power because the FTC, as the supervisor over KISA's enforcement powers, has no supervisory authority.

II. FIRST AMENDMENT

The Fourteenth Circuit erred for two reasons. First, the Fourteenth Circuit did not apply the correct standard of strict scrutiny; and second, under strict scrutiny Rule ONE is an impermissible regulation of speech.

The First Amendment provides protection for expression of one's own ideas and Rule ONE infringes on those protections. A content-based law is regulating ideas expressed and that is exactly what Rule ONE intends to do when it requires websites with at least ten percent adult content to verify ages. Content based laws that are trying to regulate content protected by the First Amendment require that strict scrutiny be applied to determine if they are constitutional. Rule ONE attempts to hide behind the shield of obscene material as that category is not protected by the First Amendment. The standard in *Miller v. California*, 413 U.S. 15 (1973), specifies the test required for obscenity which does not include a provision specifically applying it from the viewpoint of minors. By requiring "sexual material harmful to minors" it goes beyond the *Miller* test and considers something obscene from the viewpoint of minors.

First, because Rule ONE falls outside the scope of simply regulating obscene material, the cases of *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844 (1997), and *Ashcroft v. Am. Civ.*

Liberties Union, 542 U.S. 656 (2004), demonstrate the need to apply the standard of strict scrutiny. Both cases show the Court restricting the government from regulating the internet. The statutes in *Reno* and *Ashcroft* just like Rule ONE are content-based and had to be evaluated under strict scrutiny. Furthermore, despite any claim that *Ginsburg* should apply to age verification laws, *Ginsburg* has several issues that show its inapplicability. *Ginsburg* was focused on access to physical materials and did not require adults to take any steps that would burden their speech. Rule ONE directly affects every single person that wants to access a website containing at least ten percent adult content to input personal information. Therefore, *Reno* and *Ashcroft* apply and this Court should apply strict scrutiny to evaluate Rule ONE's constitutionality.

Second, under the strict scrutiny standard, the government has the burden of proving three things the law must (1) have a compelling interest, (2) be narrowly tailored, and (3) use the least restrictive means. Rule ONE is not narrowly tailored because it prevents adults from accessing speech they have a constitutional right to receive. Rule ONE also leaves much discretion to the website hosts in determining whether it applies. Thus, website hosts will be left in confusion for how to apply this standard. Moreover, requiring websites with at least ten percent adult content to apply age verification will mean regulating sites that are harmless such as those advertising employment or educational opportunities. In addition to not being narrowly tailored, Rule ONE also does not use the least restrictive means to achieve its goal. The government did not consider other means in regulating online content such as content filtering. Content filtering would be more effective in preventing minors from seeing harmful material and it does not burden adults speech as it only requires restrictions on computers that minors have access to.

This Court should apply strict scrutiny and evaluate this rule under *Reno* and *Ashcroft*. Additionally, under strict scrutiny this Court should find that Rule ONE violates free speech because it is not narrowly tailored, nor does it use the least restrictive means. This Court should reverse the Fourteenth Circuit's reversal of the district court's grant of the injunction against Rule ONE.

ARGUMENT

I. CONGRESS GIVING ENFORCEMENT POWER TO KISA BLATANTLY VIOLATES THE PRIVATE NONDELEGATION DOCTRINE BECAUSE IT IS NOT UNDER THE AUTHORITY AND SURVEILLANCE OF THE FTC.

An unchecked government with limited accountability violates the careful framework provided by the Constitution to safeguard our foundational liberties. When discussing the separation of powers, James Madison stated, "[n]o political truth is certainly of greater intrinsic value" than the separation of powers. The Federalist No. 47.

The Constitution has made it abundantly clear that only those in whom it has vested power can exercise that power. U.S. Const. art. I, § 1; art. II, § 2; art. III, § 1. The Vesting Clauses emphasize an unwavering commitment to prevent the three branches from exchanging powers among themselves and allocating power to a non-federal entity without adequate control or accountability. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). *See* Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol'y 147, 148-49 (April 2017). Stemming from these ideas, the private non-delegation doctrine prevents Congress from delegating its powers to private entities. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) (holding that a federal agency may not "abdicate its statutory duties" by delegating them to a private entity); *Gundy v. United States*, 588 U.S. 128, 135 (2019); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)

(*Schechter*); *Wayman v. Southard,* 10 Wheat. 1, 42–43 (1825). A central purpose of this doctrine is to assure "accountability" in exercising governmental powers. *Dep't of Transp. v. Ass'n of Am. RRs.*, 575 U.S. 53, 61 (2015) (Alito, J., concurring). *See Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (*Black I*). The *Oklahoma* court emphasized that "transferring unchecked federal power to a private entity not elected, nominated, removable, or impeachable undercuts representative government at every turn." 62 F.4th at 228. Congress cannot hide behind the guise of using "necessary resources of flexibility and practicality" in its delegations but must remain within "prescribed limits." *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935). Therefore, unchecked delegations to private authorities violate the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989).

This Court has determined that the proper test for determining if the delegation is unchecked is whether the private entity "functions subordinately" to a government agency with "authority and surveillance" over the private entity. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940) (*Adkins*); *Black I* at 880. *See generally Schechter*, 295 U.S. at 537; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939). However, circuit courts have interpreted "subordination" in two different ways. For example, the Fifth and Sixth Circuit came to different conclusions about the Horseracing Safety and Integrity Act ("HISA")–the act on which Congress nearly identically modeled the KISKA. R. at 6.

According to the Sixth Circuit, the governmental agency must be capable of subordinating *every* aspect of the private entity's enforcement. *Oklahoma*, 62 F.4th at 231 (emphasis added). The Fifth Circuit scrutinized HISA twice. In *Black I*, the Fifth Circuit held that HISA is unconstitutional because it gave Horseracing Safety and Integrity Authority ("Horseracing Authority"), a private entity, sweeping rule making power. 53 F.4th at 882. Then,

Congress amended HISA and gave Horseracing Authority the ability to modify HISA. *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415, 424 (5th Cir. 2024) (*Black II*). After the amendment, the Fifth Circuit held that HISA's rulemaking powers did not violate private nondelegation doctrine. *Id.* at 424-25. However, the Fifth Circuit held HISA's enforcement power did not have sufficient oversight from the FTC.[1] *Id.* at 428. The Fifth Circuit requires that the agency's actions be subject to review and reversal before and after the enforcement. *Id.* at 427.

Both approaches are unanimous in requiring substantial oversight of *all* the private entity's enforcement actions. *See id.*; *see also Oklahoma*, 62 F.4th at 231. This Court should hold that Congress violated the private nondelegation doctrine in granting KISA its enforcement powers for two reasons. First, the FTC's lack of surveillance over KISA's enforcement powers fails to subordinate KISA to the FTC. Second, the FTC cannot use its rulemaking authority to oversee KISA's enforcement actions.

A. The FTC's Lack of Surveillance over KISA's Enforcement Powers Fails to Subordinate KISA to the FTC Because the FTC Can Only Review KISA's Decisions and Has No Influence over KISA's Power to File Civil Suits, Injunctions, and Restraining Orders in Any Way.

The FTC's meaningless direct review of KISA's decisions and KISA's unfettered power to file civil suits, injunctions, and restraining orders leave KISA as an independent entity with negligible and dubious oversight that fails to subordinate KISA to the FTC.

[1] Alexander Volokh, *The Myth of Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 211 (2023) (explaining that Appointments Clause would render the Horseracing Authority unconstitutional because it boasts of substantial federal power, its members must be appointment by the president and confirmed by the Senate).

The true meaning of surveillance is that the agency has oversight over the private entity's activities at every step of the way. *Black II*, 107 F.4th at 430. The private nondelegation doctrine forbids unaccountable delegations of executive power. *Black II*, 107 F.4th at 428; *See also Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 62 (2015) (*Amtrak II*) (Alito, J., concurring) ("Private entities are not vested with . . . 'executive Power,' Art. II, § 1, cl. 1, which belongs to the President."). The conventional executive powers include the power to launch an investigation, search for evidence, sanction, and sue. *See Black II*, 107 F.4th at 428.

KISA has unchecked enforcement powers, rendering them insubordinate to the FTC because the FTC's direct review is inconsequential. Additionally, KISA has unconstrained power to file civil lawsuits, injunctions, and restraining orders.

1. *The FTC's Direct Review of KISA's Adjudicative Decisions Is Inconsequential.*

A mere post-review by an agency of a decision made by a private entity, such as investigating potential violations, issuing subpoenas, and levying sanctions, is insufficient to meet the surveillance standard. *See Black II*, 107 F.4th at 429-30. The overseeing agency's ability to review decisions *after* the private entity has exercised its enforcement powers is not consequential in "any meaningful sense," as the private entity has already exercised significant powers without any involvement from the overseeing agency. *See id* at 429-31.

In *Black II*, the court found that the Horseracing Authority enforcement powers violated the private nondelegation doctrine because the Horseracing Authority was the primary decision maker, and the FTC had no involvement in enforcing HISA. 107 F.4th at 429. The Horseracing Authority was responsible for investigating potential rule violations, including issuing subpoenas, levying sanctions, and suing violators for injunctive relief or to enforce sanctions. *Id.* at 428. HISA did not empower the FTC to take actions such as investigate a covered entity,

subpoena its records, search its premises, charge it with a violation, or sanction or sue it. *Id*. at 429. By its plain terms, HISA did not require the Horseracing Authority to seek the FTC's approval before investigating, searching, charging, sanctioning, or suing. *Id*. All these enforcement actions could have been done by the private entities, without the FTC's involvement, constituting a violation of the private nondelegation doctrine. *Id*.

Here, Congress "nearly identically" modeled KISKA after HISA. R. at 6. KISKA plainly grants enforcement power to KISA, a private entity. *Black II*, 107 F.4th at 429-30. Like the Horseracing Authority, KISA is crowned with the powers to launch investigations, levy sanctions, and file suits. *See* 55 U.S.C. § 3054. Notably, KISKA merely gives the FTC a review of KISA's decisions, revealing KISA as superior to the FTC. *See id.* § 3058; *see also Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (holding private entities cannot be the principal decision-makers). Even though the FTC can unilaterally reverse KISA's decisions, it is not enough to make KISA subordinate to the FTC because such power is only potential power. R. at 11 (Marshall, C.J., dissenting). To date, the FTC has utilized its authority to review a case only once. R. at 3 fn. 3. In that instance, even after a thorough review of the case, the FTC declined to act. *Id.* This "power" is insufficient to discourage the abuse of power. R. at 11 (Marshall, C.J., dissenting).

In KISKA, the FTC's ability to review sanctions after the Administrative Law Judge ("ALJ") review is also insufficient to subordinate KISA to the FTC because of all the powers that KISA would have utilized up until that point. 55 U.S.C. § 3058(3)(A)-(B). To help understand the reason why, the court in *Black II* posed the following question: If the Horseracing Authority sanctioned a horse owner for a doping violation, but the FTC reversed the sanction, would that make the Horseracing Authority's enforcement power subordinate to the agency? 107

F.4th at 430. The answer was blunt: "No, it does not." *Id.* The Horseracing Authority would have utilized a litany of powers up to that point: launching an investigation into the owner, subpoenaing his records, searching his facilities, charging him with a violation, adjudicating it, and fining him. *Id.* Each one of those actions would be "enforcement" of HISA and could occur without any supervision by the FTC. *Id.*

Similarly, here, while the FTC can "affirm, reverse, modify" the ALJ's decision, its so-called power to review the ALJ's decisions underscores that KISA's decisions are not subordinate to the FTC. 55 U.S.C. § 3058(b)(3)(A)-(B). KISA determines the description of rule violations, hearing procedures, standards of proof, and evidentiary rules. 55 U.S.C. § 3057(a)(3). By the time the FTC is involved in some manner, KISA has already exercised enforcement powers without any FTC surveillance or pre-approval, rendering any response by the FTC as inconsequential. This is also important because it makes it obvious that KISA is the one at the helm.

Additionally, KISA can issue guidance on an interpretation of an existing rule or a policy or practice about enforcement of such an existing rule, as well as guidance that relates solely to the administration of KISA. *Id.* at § 3054(g)(1)(A)-(B). KISA is only required to ceremonially submit the guides to the FTC, which concludes the FTC's role in this regard, leaving KISA with the power to interpret its own rules without any oversight. *Id.* at § 3054(g)(2).

Thus, the FTC's inconsequential review of KISA's adjudicative decisions does not put the FTC in a superior position or allow surveillance but instead highlights KISA's unchecked power over its adjudicative decisions.

2. *KISA's power to file civil suits, injunctions, and restraining orders is unfettered.*

A statute unconstitutionally empowers the private entity to file suits to charge violations, investigate, subpoena, adjudicate violations, or levy sanctions when the statute does not grant sufficient agency oversight in the process. *Black II*, 107 F.4th at 432. A statute cannot facially delegate unsupervised enforcement power to private actors. *Id.* at 433. Also, these enforcement powers cannot be saved by an agency promulgating a rule or by a private entity pre-clearing these powers with the agency. *Id.* at 432.

In upholding HISA, the *Oklahoma* court reasoned that the FTC could supervise the Horseracing Authority by making rules determining *how* the Horseracing Authority enforces HISA. *Oklahoma*, 62 F.4th at 231. The court added that the agency could issue rules against "overbroad subpoenas or onerous searches" or "provid[ing] a suspect with a full adversary proceeding and with free counsel." *Id.* The FTC's potential to subordinate every aspect of the Authority is sufficient to defeat a facial challenge. *Id.*

However, *Black II* clarified that the foundational issue was about where the enforcement power was lodged, not *how* the Horseracing Authority exercised its power. 107 F.4th at 433. On its face, HISA allowed private entities to enforce it and permitted agency oversight only after the enforcement process, even then only concerning fines, not injunctions. *Id.* The plaintiffs contended that HISA facially delegated unsupervised enforcement power to private actors, and the court agreed. *Id.* Altering HISA's precise division of enforcement power between the FTC and the Horseracing Authority through rulemaking would have only been helpful in case of an as-applied challenge. *Id.*

Here, KISA can file civil suits against technological companies for violations without *any* FTC control or oversight. 55 U.S.C. § 3054(j)(1)-(2) (emphasis added). This profound power can only be delegated from the executive branch. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A

lawsuit is the ultimate remedy for a breach of the law, and it is to the President ... that the Constitution entrusts [this] responsibility"); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (noting that "fundamental" questions are raised when private entities exact fines and if that is permissible in light of the responsibilities given to the Executive). Additionally, regarding civil actions, KISA can issue a temporary injunction or restraining order without bond. 55 U.S.C. § 3054(j)(1). Without any involvement from the FTC, KISKA awards KISA with an overly generous grant of enforcement authority. Giving the FTC enforcement powers through rulemaking would only be helpful if KISKA had not given unfettered enforcement power to KISA on its face. Hence, a complete absence of the FTC's surveillance over KISA's authority to file civil lawsuits, injunctions, and restraining orders constitutes the most apparent failure of KISA's to be subordinate to the FTC.

B. The FTC Cannot Use Its Rulemaking Authority to Subordinate KISA's Enforcement Actions Because the FTC's Ability to Modify Does Not Allow It to Meaningfully Supervise KISA, and the Relationship Between the FTC and KISA Is Unlike Other Valid Enforcement Schemes.

The interplay between the FTC's ability to modify and KISA's enforcement powers is not meaningful, making the relationship between the FTC and KISA is not similar to other valid enforcement schemes.

Private entities are only permitted to serve as advisors in proposing regulations. *See Sierra Club*, 502 F.2d at 59; *Cospito v. Heckler*, 742 F.2d 72, 87–89 (3d Cir. 1984); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977) (*Todd & Co.*). Thus, a private entity is prohibited from being the predominant decision-maker. *Pittston*, 368 F.3d at 395–97. *See generally Texas v. Rettig*, 987 F.3d 518, 533 (5th Cir. 2021) (clarifying a private entity cannot create federal law). A private entity also cannot "regulate unilaterally." *Black I*, 53 F.4th at 872. There must be

evidence of a "clear hierarchy" between the federal agency's ability to edit the private entity's rules and the private entity's response. *Oklahoma,* 62 F.4th at 230.

In *Black I*, the court decided that HISA violated the private nondelegation doctrine because the Horseracing Authority had "sweeping" power to create rules. 53 F.4th at 882. For example, HISA did not make rules on anti-doping, medication, or racetrack safety and did not allow the FTC to do that either. *Id.* Instead, the power to make those rules lay entirely with the Horseracing Authority. *Id.* The FTC only had the ability to review rules proposed by the Horseracing Authority to see if they were consistent with HISA or prior rules. *Id.* at 884. The FTC also had no power to review the rules for general policy and could only make recommendations, while the Horseracing Authority retained the power to accept those recommendations. *Id.* at 884, 886.

KISA's powers resemble those allotted to pre-amended HISA. Like pre-amended HISA, KISKA does not make any rules nor give that ability to the FTC; instead, KISA is responsible for rulemaking. 55 U.S.C. § 3053(a). Examples include training standards for experts in the field and technological advancement research. *Id.* § 3053(a)(3)-(4). KISA, not the FTC, makes the schedule of civil sanctions for violations and a process or procedures for disciplinary hearings. *Id.* § 3053(a)(9)-(10); *Black I*, 53 F.4th at 882 (explaining that the Horseracing Authority's ability to issue descriptions of rule violations and establish sanctions for them is included in the sweeping rulemaking power).

Congress amended HISA by borrowing the modification provision from the Maloney Act and empowered the FTC to modify the Horseracing Authority's rules. *Black II*, 107 F.4th at 424. The Maloney Act, divides he authority between the Securities and Exchange Commission (SEC) and private, self-regulatory organizations such as the Financial Industry Regulation Authority

(FINRA). *Id.* Section 3053(e) of KISKA permits the FTC to "modify" KISA, giving rise to KISA's claim that it operates like FINRA. R. at 12.

However, the FTC's power to modify does not grant it the right to fundamentally change the statute, and the FTC's relationship with KISA does not resemble the one between the SEC and FINRA.

1. *The FTC Cannot Use Its Ability to Modify KISKA to Make Fundamental Changes to Save the Statute's Defects Regarding Enforcement Oversight.*

The FTC may not attempt to save *KISKA* by awarding itself new powers that Congress did not choose to vest in the FTC.

For a private entity to be subordinate to the agency, the agency must have oversight over all the enforcement actions of the private entity. *See Black II*, 107 F.4th at 430. However, the FTC does not have oversight over any suits that KISA decides to file, nor does the FTC have any oversight over the enforcement actions of any non-profits with whom KISA decides to partner. *See id.*

The Sixth Circuit argued that, to fix any defects in the framework of the statute in regard to enforcement, the oversight agency could simply require the private entity to pre-clear every enforcement action. 107 F.4th at 432. However, the Fifth Circuit found this argument to be less than compelling as this would require the agency (endowed by the judicial powers of the court instead of the legislative powers of Congress) to rewrite a statute. *Black II*, 107 F.4th at 432–33. Even the federal courts themselves do not engage in rewriting a statute to save it due to judicial restraint. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). This principle represents the separation of powers doctrine, where the judiciary interprets the law–but does not create or amend it. *Id.* (Kennedy, J., concurring) ("It is axiomatic that a court may not rewrite a law to

conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain . . . .").

This Court emphasized this principle in preventing the Secretary of Education from modifying the HEROES Act. *Biden v. Nebraska*, 600 U.S. 477, 499-505 (2023). The HEROES Act authorized the Secretary to "waive or modify any statutory or regulatory . . . as the Secretary deems necessary." *Id.* at 495. The court concluded that the ability to "modify" is equivalent to making "fundamental changes" in the Congressional design. *Id.* The Secretary purported to "modify" the provisions of two statutory sections and three related regulations. *Id*. This Court held that the Secretary's changes were to the statute what the French Revolution was to the French nobility—they annihilated the provisions and replaced them with something completely different. *Id.* at 496.

To modify KISKA to allow the FTC to pre-clear KISA's actions would be to radically change the scope of the FTC's powers to something completely different. By allowing the FTC to modify KISKA radically, the FTC would be stepping outside powers allotted to it when Congress required each entity in KISA to "implement and enforce" KISKA only "*within the scope of their powers and responsibilities*." 55 U.S.C. § 3054(a)(1); *Black II*, 107 F.4th at 431. Congress gave the FTC oversight over some aspects of KISA's enforcement, but it failed to specify FTC oversight of all enforcement activities. Despite arguments that FTC oversight could be assumed: "when Congress wanted to put the FTC in charge of enforcement, it knew how." *Black II*, 107 F.4th at 432-33. KISKA had many sections that explicitly call for FTC oversight of enforcement actions, but did not include FTC oversight over ever enforcement action. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed

that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). A court must not allow an agency to alter the face of a statute simply to save it. *See Biden*, 600 U.S. at 498-99. The Fifth Circuit has further emphasized this by saying that a mere agency cannot alter a statutory division of labor. *Black II*, 107 F.4th at 431.

Therefore, the defects in KISKA cannot be cured through the FTC fundamentally changing KISKA to allow the FTC to perform duties that Congress did not grant it authority to perform.

2. *The FTC Has Substantially Less Supervisory Power over KISA Than the SEC Has over FINRA.*

The FTC's ability to modify does not make its relationship with KISA like the relationship between the SEC and FINRA because KISA can act independently without requiring oversight from the FTC.

The Maloney Act gives the SEC the power to approve or disapprove a private entity's rules based on reasonably fixed statutory standards, make de novo findings aided by additional evidence if necessary, and make an independent decision on the violation and penalty. *Todd & Co.*, 557 F.2d at 1012. The private entity's rules and disciplinary actions must be subject to full review by the SEC, which must base its decision on its findings. *Id.* at 1012-13 (citing *Nassau Sec. Serv. v. Sec. & Exch. Comm'n.*, 348 F.2d 133 (2d Cir. 1965)).

The courts have recognized the validity of FINRA, including other self-regulatory organizations like the National Association of Securities Dealers (NASD) because of the SEC's sharp-eyed supervision of those organizations. *Sorrell v. SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (validating the NASD because the SEC is the primary decision-maker over its enforcement actions (citing *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *First Jersey Secs. Ins. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979)). SEC shares enforcement power

with FINRA, but the SEC alone has the power to subpoena. *Black II*, 107 F.4th at 434. The "SEC can also revoke FINRA's ability to enforce its rules." 15 U.S.C. § 78(s)(g). Additionally, the SEC can fire FINRA members and bar members from FINRA. *Black II*, 107 F.4th at 435.

Here, KISKA is only modeled after but not identical to the Maloney Act. R. at 12 (Marshall, C.J., dissenting). The relationship between the SEC and FINRA does not resemble the relationship between the FTC and KISA. The primary difference is that KISA–not the FTC–dominates enforcement powers. For example, KISA can file civil suits against technological companies for violations without *any* FTC control or oversight. 55 U.S.C. § 3054(j)(1)-(2) (emphasis added). Further, KISKA only gives the FTC a review of KISA's decisions. *See id.* § 3058. KISA–not the FTC–has the power to subpoena and investigate when it comes to civil violations committed under its jurisdiction. *Id.* at § 3054(h).

Additionally, KISA can arbitrarily enter into an agreement with non-profit organizations for the organizations to assist in investigation and enforcement. *Id.* at § 3054(e)(A). This partnership is again encouraged in § 3055(e), but the FTC's role is not mentioned in either section. There are no accountability measures provided for the partner non-profits assisting in enforcing KISKA. There are no provisions that outline the role of the FTC's oversight. This means KISA and a non-profit may enter into a partnership and promulgate rules and regulations that are beyond any liability. This is the most "obnoxious form" of delegation that this Court warned against in *Carter*. 298 U.S. at 311. With the FTC possessing powers inferior to those of KISA, the FTC-KISA relationship fails to resemble the relationship between SEC-FINRA, where the SEC has the final say over the enforcement powers.

This Court should find that the unchecked delegation of enforcement powers through KISKA to KISA violates the private nondelegation doctrine because KISA does not function subordinately to the FTC, enjoining KISA and granting the injunction.

II. UNDER STRICT SCRUTINY, RULE ONE'S REQUIREMENT OF AGE VERIFICATION FOR WEBSITES WITH AT LEAST TEN PERCENT ADULT CONTENT VIOLATES FREEDOM OF EXPRESSION.

Just as allowing unchecked delegation limits the accountability of the government, unchecked regulation of the First Amendment also limits accountability. "Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, Nov. 1737. This is one of the many reasons why the Founding Fathers understood the importance of including the First Amendment and ensuring the government cannot make any law restricting freedom of speech. U.S. Const. amend I. This Court precedence has safeguarded freedom of speech by limiting the government's ability to make laws restricting access to free speech. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Sable Commc'n of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *Reed v. Town of Gilbert Arizona*, 576 U.S. 155, 163 (2015). The First Amendment allows people to decide for themselves "the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The government cannot restrict expression because of its message, idea, subject matter, or content. *Police Dept. City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This Court has established that all ideas, including those that are unorthodox, controversial, or even hateful to the current public opinion, have social importance, even if

slight, and deserve the protections of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484 (1957). Even sexual expression, which is often considered controversial, is categorically protected by the First Amendment. *Sable Commc'n of California, Inc.*, 492 U.S. at 126.

When the government wants to regulate material protected by the First Amendment, such as sexual expression, courts will evaluate any regulation under strict scrutiny. *Id.* Strict scrutiny requires the law to be narrowly tailored to promote a compelling government interest. *Playboy Entm't Group*, 529 U.S. at 813. Furthermore, strict scrutiny is also the standard applied to content-based laws, which are laws that apply to "particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. For categories outside those protected by the First Amendment, the courts shall use a rational basis test that requires the statute to have a legitimate state interest and a rational connection between the statute's means and goals. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 267 (5th Cir. 2024).

Generally, the strict scrutiny test has been applied in determining the constitutionality of media regulations. *Sable Commc'n of California, Inc.*, 492 U.S. at 127. For decades the government has tried to make regulations for various forms of media, and the courts have given each form of media, such as broadcast and telecommunications, a different level of First Amendment protection. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (Broadcast media receives the most limited First Amendment protection); *Sable Commc'n of California, Inc.*, 492 U.S. at 126 (applying strict scrutiny to telephone communications). Specifically, with the internet, the Court has given it a higher First Amendment protection than broadcast media. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 879 (1997). Since the birth of the internet age, the government has set out to regulate access to harmful material for minors. *See Reno*, 521 U.S.

at 867. Several states have also drafted legislation aimed at that same goal. *Free Speech Coal., Inc.*, 95 F.4th at 267; *Ripplinger v. Collins*, 868 F.2d 1043 (1989). The most common attempt at restricting access is implementing age verification for websites with controversial material. *Free Speech Coal, Inc.*, 95 F.4th at 267. As these laws often result in litigation, the circuit courts have differed on the standard that it thinks are applicable to age verification laws. *Free Speech Coal., Inc*, 95 F.4th at 267 (Applying rational basis to a state regulation of the internet); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 186 (3rd Cir. 2008) (Applying strict scrutiny to a federal regulation of the internet).

The lower court erred for two reasons, First, the lower court applied the incorrect standard to Rule ONE. Second, it incorrectly found that Rule ONE was a valid regulation of speech under the First Amendment even though it is not narrowly tailored or using the least restrictive means

A. Strict Scrutiny Is the Correct Standard to Apply to Rule One Because It Regulates Material Protected by the First Amendment.

This Court places a great importance on protecting our freedom of speech from government overreach and that requires holding the government to a high standard. *See Generally Police Dep't City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Playboy Entm't Group, Inc.*, 529 U.S. at 813. Using a rational basis standard to determine Rule ONE's constitutionality limits the control the people have on the government. This is why strict scrutiny must apply as it is the highest standard of review that a court can use to evaluate the constitutionality of a government action. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002).

Strict scrutiny automatically applies to content-based laws, which regulate the ideas being expressed. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). These laws are always presumed to be unconstitutional because the government cannot regulate an idea simply because the government disagrees with what is being expressed. *Id*. Courts have three guidelines to determine whether a law is a permissible regulation of speech under strict scrutiny. *Playboy Entm't Group, Inc.*, 529 U.S. at 803. First, the regulation must serve a compelling governmental interest; second, the regulation is narrowly tailored to reach that end; and third, the regulation achieves the interest through the least restrictive means. *Id.* And the government bears the burden of showing that it followed these guidelines. *Id.* The focus of strict scrutiny is to ensure that speech is not restricted any further than necessary, even if the government does not meet its goal. *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 660 (2004). Courts shall also consider whether the statute chills free speech. *Reno*, 521 U.S. at 871. When a statute is overly broad or vague, it can cause individuals to refrain from engaging in free expression because they fear repercussions from violating the statute. *Id.*

In those few circumstances where the government can regulate speech, it is "subject to narrow and well-understood exceptions." *Turner Broadcasting System, Inc.*, 512 U.S. at 641. One example is materials such as those that are lewd and obscene. *Miller v. California*, 413 U.S. 15, 20 (1973). When material is classified as obscene, courts use a rational basis test that requires it to establish that the statute has a legitimate state interest and there is a rational connection between the statute's means and goals. *See Ginsberg v. State of New York*, 390 U.S. 629, 640 (1968); *Free Speech Coal.*, 95 F.4th 263, 267.

Strict scrutiny is the correct standard by which to evaluate Rule ONE because Rule ONE regulates materials that are protected by the First Amendment; and thus, *Reno* and *Ashcroft* provide the correct framework to apply to Rule ONE.

1. *Rule One Regulates Material Protected by the First Amendment Because It Goes Beyond the Test Laid Out in* Miller.

Rule ONE regulates materials that do not fall in the scope of obscene material and, therefore, is protected by the First Amendment.

This Court in *Miller* laid out the test for determining obscenity and specified that if the material is lewd or obscene, the rational basis standard will apply. 413 U.S. at 20. First, determine whether "the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest." *Id.* Second, "whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and third, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*

Here, Rule ONE uses the same wording as the three-part test found in *Miller*, but at the end of each sentence, the statute adds the phrase "for minors." R at 17. With that phrasing anything and everything could be considered harmful when applied from the viewpoint of minors. For example, a "minor" could mean a one-year-old or a seventeen-year-old, and what is considered obscene to those vastly different ages is exceedingly divergent. PAC also submitted evidence that the requirement of ten percent would mean that a high amount of non-objectionable material would require age verification, such as discussion boards about business, job, and educational opportunities. R. at 4.

Lastly, *Miller* requires for material to be considered obscene if the courts apply contemporary community standards to find if "the work, taken as a whole, appeals to the prurient interest." But the internet has no contemporary community standards or at least none that the government can realistically point out. Billions of people access the internet every day, which means that there is a vast array of opinions on what is obscene. It is an unworkable and confusing standard to apply to such a large area like the internet.

Therefore, Rule ONE will inevitably end up restricting access to non-obscene material. This takes Rule ONE beyond the objective scope of obscenity and oversteps into regulating sexual expression which is protected by the First Amendment.

2. *Reno and Ashcroft Provide the Correct Framework to Apply to Rule One Because They Are Both Content-Based Laws and They Regulate Internet Access.*

Rule ONE is unconstitutional under the precedence of *Reno* and *Ashcroft*. Numerous cases have resulted in this Court needing to rein in the government's overreach in seeking to restrict the people's fundamental rights. *See Playboy Entm't Group, Inc.*, 529 U.S. at 803; *Sable Commc'n of California, Inc.*, 492 U.S. at 126; *Reed*, 576 U.S. at 163. The government's attempt at regulating sexual expression in its endeavor to protect minors is one area where the Court has had to prevent this overreach. *Reno*, 521 U.S. at 867. Three foundational cases are used to evaluate restrictions the government has attempted to create on minors' access to sexual expression: *Reno v. American Civil Liberties Union*, *Ashcroft v. American Civil Liberties Union*, and *Ginsburg v. State of New York*.

In *Reno*, the Court reviewed a statute titled the Telecommunications Act of 1996 that had a specific section called Communications Decency Act ("CDA") and it restricted internet usage

focusing on indecent and obscene material being transmitted to minors. 521 U.S. at 857. CDA was a content-based statute because it applied broadly to the internet and specifically focusing on protecting Minors from "indecent" and "patently offensive" material. *Id.* at 868. Thus, this Court reviewed the statute under strict scrutiny. *Id.* at 865. The Court held the statute to be unconstitutional as the "vagueness of such a regulation raises special First Amendment concern because of its obvious chilling effect on free speech." *Id.* at 871. This vagueness meant that CDA was not narrowly tailored. *Id.* at 879. In an attempt to deny minors access to harmful content, the statute suppressed a substantial amount of speech that adults had a constitutional right to access. *Id.* at 875. Such a burden on adult speech is unacceptable if less restrictive means are available in helping the government reach its legitimate purpose. *Id.* at 874.

The government's second attempt at making the internet safe was through the Child Online Protection Act or COPA. *Ashcroft*, 542 U.S. at 659. Once again, this was a content-based restriction that required strict scrutiny. *Id.* at 660. Therefore, under strict scrutiny, the government had the burden of establishing the statute's constitutionality by proving that COPA was narrowly tailored and used the least restrictive means, which it failed to do. *Id.* The government not only failed to meet its burden but also failed to rebut opposing counsel's suggestions for the least restrictive means. *Id.* Although not rendering a final opinion on the statute, the Court found that it was likely unconstitutional. *Id.* at 671.

Another case with the goal of protecting minors is *Ginsburg v. State of New York.* *Ginsburg* focused on the constitutionality of an obscenity statute that prohibited the sale of obscene materials to minors under seventeen. 390 U.S. at 631. Because this was focused on obscenity, the Court evaluated this rule using a rational basis test. *Id.* at 639. The specific

controversy was a minor trying to buy "girlie" magazine, and the Court found that this was a proper regulation under a rational basis test. *Id.* at 631. The case took place in 1968, no part of the statute regulated internet access for minors. *Id.* at 641. The statute also explicitly regulated minors' access to material and had no extra steps for adults wanting to buy any material. *Id.* at 631.

Reno and *Ashcroft* are clearly applicable to online verification laws while several problems present themselves in using *Ginsburg*. First, *Ginsburg* was not burdening adults with their access to speech while *Reno* and *Ashcroft* were found to be invalid because of its burden on adult speech. *Ginsburg* prohibited minors from buying "harmful" material, but adults could buy whatever they wanted with no invasive inquiries into their actions. Second, *Ginsburg* was decided before the age of the internet and was specifically regulating physical materials while *Reno* and *Ashcroft* are directly regulating the internet. Applying *Ginsburg* to online age verification would cause problems because of how vast the internet is compared to the products *Ginsburg* was regulating. Thirdly, *Reno* and *Ashcroft* are directly analogous to Rule ONE because they are both concerned with federal laws being drafted, while *Ginsburg* was focused on what the state could do. Lastly, *Reno* and *Ashcroft* apply to Rule ONE because this statute is not only a content-based law that is protected by the First Amendment but because Rule ONE regulates beyond obscenity while *Ginsburg* is focused on obscenity.

Reno and *Ashcroft* provide the basis for why strict scrutiny applies in this situation. When a statute is overly broad and attempts to regulate speech under the guise of obscene material, *Reno* and *Ashcroft* have to be at the forefront of evaluating the statute. Here, the government attempts to use the *Miller* test as a shield for its agenda in regulating freedom of expression. By

applying strict scrutiny this Court can prevent the government's infringement and further protect freedom of expression.

Therefore, Rule ONE must be analyzed under strict scrutiny because Rule ONE regulates materials that are protected by the First Amendment.

B. Rule One Is an Impermissible Regulation of Speech Under Strict Scrutiny Because It Is Not Narrowly Tailored and Does Not Utilize the Least Restrictive Means.

The government must narrowly tailor its law to serve its compelling interest. *R.A.V.*, 505 U.S. at 382. As this Court in *Reno* pointed out, if a law has the potential to chill speech it likely will not be considered narrowly tailored. 521 U.S. at 865. To achieve a narrowly tailored law, the least restrictive means need to be used, and the government bears the burden of showing both. *Playboy Entm't Group, Inc.*, 529 U.S. at 803.

Rule ONE is an impermissible regulation of speech because it is not a narrowly tailored law and the government did not meet its burden of proving it is the least restrictive means available.

1. *KISA Did Not Narrowly Tailor Its Law as It Prevents Adults from Accessing Speech That They Have a Constitutional Right to Receive.*

The government cannot be held accountable if it is allowed to create laws that have the primary effect of preventing access to constitutionally protected speech. If the government intends to regulate freedom of speech, the law must be narrowly tailored to support a legitimate government interest. *Mukasey*, 534 F.3d at 186.

Here, Rule ONE is not narrowly tailored as it will "chill" speech, just like the statute in *Reno*. In fear of persecution for using these sites, adults will refrain from accessing material they have a constitutional right to view. PAC has already introduced evidence that patrons of adult

websites are refusing to access the website due to Rule ONE. Two of these patrons, Jane and John Doe, have both expressed discomfort in revealing personal information on these sites. Both know there is nothing wrong with wanting to access this information, as they know it is constitutionally protected, but they fear ridicule from their peers if a personal data leak were to occur.

Additionally, website hosts wanting to adhere to this statute will be left in confusion about what is actually considered harmful to minors. For example, if the child is a younger minor, such as a toddler, practically everything and anything is considered obscene. On the other hand, if the minor is a teenager, the standard for obscenity is lower. As this Court said in *Stevens* that if every time a statute is applied, it is found to have been violated, that statute is unconstitutional. *United States v. Stevens*, 559 U.S. 460, 473 (2010). Because this statute is from the lens of a child, every application will be within the categories of what Rule ONE considers obscene because virtually all sexual material is obscene to some minors.

This is not just an imagined fear of overly broad application; there will be an overly broad application. Rule ONE requires a vast reach over all internet content, requiring regulation of any "commercial entity that knowingly and intentionally publishes and distributes material on an internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. §1. The ten percent threshold is going to allow regulation for material that is not harmful at all, as ten percent is vague and difficult to measure in a website layout. A website with mostly harmless material will have to infringe on people's freedom of expression out of fear of violation of Rule ONE. This type of regulation is not limited to restricting only obscene material but also results in chilling the speech of those who view content

that Rule ONE has deemed inappropriate for everyone to view. And the government may not institute guardrails designed to childproof society. *Reno*, 521 U.S. at 875.

Allowing Rule ONE's restriction on expression disregards the importance of free speech and allows the government to use its agenda however it sees fit, limiting the people's ability to hold the government accountable. "The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the government." *Playboy United States v. Playboy Ent. Group, Inc.*, 529 U.S. at 830 (Thomas, J., Concurring). Allowing such a rule promotes confusion about what freedom of expression truly means.

2. *Rule One Is Not the Least Restrictive Means to Regulate Minors' Access to Sexual Material.*

Narrowly tailoring requires using the least restrictive means in creating a regulation. *Mukasey*, 534 F.3d at 186. PAC gave two methods of content filtering in the district court that would be less restrictive than Rule ONE. The first method would be to require internet providers to block content unless adults "opt-out." R. at 15. The second method is that the government could require content filtering software to be installed on children's devices that provide adult control settings. *Id.* Content filtering provides the ability to restrict the receiving end. *Ashcroft*, 542 U.S. at 667. Both methods would be more effective because they will not have the primary effect of chilling speech or of deciding what is obscene for each minor. This means that adults without children will not have to use verification methods and that adults with children will still be able to access the information by turning off the software on their computers. *Id.*

Here, content filtering protects children even more than age verification. One reason is that it will apply to websites with obscene material that Rule ONE does not currently apply to

such as international websites and websites with less than ten percent obscene content. Rule ONE does not apply to internet providers and internet providers will not be held in violation of Rule ONE solely for providing access or connection to a website. 55 C.F.R. § 5(b). Rule ONE cannot force international websites to implement age verification methods. By instead requiring internet providers to implement content filtering, all obscene content can be blocked. Rather than burdening adults access to protected speech, content filtering provides an alternative where they can "opt-out" of content filtering without providing personal information.

Additionally, by using content filtering software, parents will easier time protecting their children from obscene content. The age verification methods required by Rule ONE can be evaded by minors to gain access to obscene material. It is not difficult for minors to use their parents' identification information to bypass current age verification software. All Rule ONE requires is a "(1) government-issued identification (ID); or (2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." R. at 18. Minors are very capable of accessing this data from their parents because all they would need to do is find an ID or credit card.

Not only does content filtering better protect minors from potentially harmful material, but it also puts the control back into the parents' hands. Age verification software places the power completely in the government's control when deciding what is harmful to minors. But parents have varying degrees of what they might consider harmful to each of their children, so requiring software on a computer would allow parents to decide for themselves what their children need access to.

In *Ashcroft*, the government did not explain why content filtering would be ineffective. 542 U.S. at 668. As *Ashcroft* explains, the government does not have the burden of showing that the alternatives have some flaws, but it must show that any alternatives would be less effective than the government's preferred method. *Id.* at 669.

Here, the government has failed to prove that content filtering would be less effective than age verification. And the government has also withheld any explanation of why content filtering would be ineffective. The discussion in the lower court makes no mention of the government discussing other means of regulation. While the government is allowed to regulate harmful material for minors, all potential solutions need to be evaluated as the First Amendment does not allow for such negligence in drafting legislation. The attention to detail required by the government when infringing on the First Amendment is lacking.

This Court should find that, under the strict scrutiny standard, Rule ONE is a violation of the First Amendment. Furthermore, this Court should reverse the circuit court as Rule ONE is unconstitutional.

CONCLUSION

Preserving liberty without accountability is like trying to breathe without oxygen. The overwhelming precedent of this Court stands for the foundational principles such as separation of powers and the right to free expression. The Constitution and this Court has made it no secret that Congress may *only* delegate its powers after necessary accountability measures have been set up. A governmental agency subdelegating its powers to a private entity must ensure that the private entity operates subordinately by retaining authority and surveillance over it.

Additionally, the backbone of this country is freedom of speech and the idea that this freedom will be protected against oppressive government overreach. The Court has emphasized

time and time again that the government does not have unbridled power to infringe on the First Amendment.

Therefore, the Petitioners respectfully request that this Honorable Court reverse the decision of the Fourteenth Circuit to find that KISKA is an unconstitutional delegation of power and in the alternative reverse the denial of the injunction of Rule ONE.

Dated: January 20, 2025.

Respectfully submitted,

/s/ Team 25
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