**No. 25-1779**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**October Term 2025**

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

**v.**

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

**On Writ of Certiorari to the Supreme Court**

# BRIEF FOR PETITIONER

**Team 3**

**ATTORNEYS FOR PETITIONER**

## QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine in tasking a private nonprofit, the Kids Internet Safety Association, with enforcing rules of conduct upon the Internet.

II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

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## OPINIONS BELOW

The opinion below appears in the record at pages 2 – 15, and in the Federal Reporter as *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024).

## CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

This case is a facial challenge to 55 U.S.C. § 3050-59 and "Rule ONE," 55 C.F.R. § 1-5. This case implicates Articles I, II, and III and the First Amendment of the United States Constitution. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

***KISKA.*** This case is about a flawed attempt to regulate the internet. In 2023, concerned that children have undue access to adult material online, Congress passed the "Keeping the Internet Safe for Kids Act" (hereinafter "KISKA.") R. at 2. KISKA purports to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. To administer the statute, Congress created the Kids Internet Safety Association (hereinafter "KISA," "the Association"), a "private, independent, self-regulatory nonprofit corporation" tasked with both "developing *and implementing* standards of safety for children online and rules of the road for adults interacting with children online." § 3052 (emphasis added).

KISA may create rules pertaining to child access and safety across the Internet industry subject to the approval of the Federal Trade Commission. See § 3054. Yet, KISA also has the power to enforce these rules. KISA may investigate civil violations, compel the appearance of

witnesses, and adjudicate civil sanctions. *Id.* This private corporation may also sue to enforce its rules. *Id.* Although the FTC may elect to review any of KISA's enforcement decisions *de novo*, this option only becomes available *after* the Association issues a "final civil sanction." § 3058(b)(1). And although the FTC may "abrogate, add to, and modify" any KISA rule, the record contains no evidence that the FTC has involved itself in any of KISA's internal operations. Thus, KISAK grants a private nonprofit broad discretion to sue, sanction, investigate, and subpoena Internet producers.

***Rule ONE.*** Shortly after its creation, KISA promulgated 55 C.F.R. § 1, commonly referred to as "Rule ONE." Citing the deleterious effects of pornography on minors, Rule One requires any commercial website that promulgates content "more than one-tenth of which is sexual material harmful to minors" to take "reasonable age verification measures . . . to verify that an individual attempting to access [sexual material] is 18 years of age or older." § 2(a). Reasonable age verification measures must depend either on a user's government-issued identification or a "commercially reasonable method that relies on public or private transactional data that [verifies age]." § 3(a). Commercial enterprises are admonished not to retain a user's identifying information. § 2(b). Nevertheless, under Rule One, any adult who wishes to enter a website whose offerings are one-tenth adverse to children's eyes must identify themselves to the provider.

## II. NATURE OF PROCEEDINGS

***Petitioner's Suit.*** Petitioners are American citizens threatened by KISA's coercive powers and extraordinary rules. Petitioners sued KISA and its alleged supervisor, the FTC, in the United States District Court for the District of Wythe to permanently enjoin this rule and KISA's continued operation. R. at 5. Against KISA's operation, Plaintiffs argued that Congress's grant

of enforcement power to an unaccountable private organization violated the nondelegation doctrine. *Id.* Against Rule ONE, Plaintiffs argued that Rule ONE impermissibly burdened the rights of American adults to navigate the internet freely.

In support of their First Amendment claims, Plaintiffs averred to the chilling effect Rule ONE has on their speech. For example, Plaintiffs John and Jane Doe, aware that no website can guarantee their identifying data will not be abused by malicious third parties, have stopped visiting Rule ONE websites altogether. R. at 4. Furthermore, Petitioner Pact Against Censorship, Inc., representing members of the adult entertainment industry, knows that internet ID laws can effectively restrict their speech – and their livelihoods – in one fell swoop. *Id.*

***Opinions below.*** The district court preliminarily enjoined enforcement of Rule ONE but declined to enjoin KISA's operation. R. at 5. The Court of Appeals for the Fourteenth Circuit affirmed the district court as to Petitioner's private nondelegation claim and reversed the district court's injunction against Rule ONE. R. at 10. The Fourteenth Circuit held that the statute did not violate the private nondelegation doctrine, reasoning that the FTC's power to change KISA's rules, in tandem with its discretionary power to review its enforcement actions, kept its authority within constitutional boundaries. R. at 6-7. The Fourteenth Circuit further applied rational basis review to hold that Rule ONE was rationally related to protecting children's welfare. R. at 7-10.

***The dissent.*** Judge Marshall dissented. R. at 10. Judge Marshall argued that the FTC's reactive role in KISA's independent enforcement power failed to make KISA meaningfully answerable to this people's government, and that the FTC's *rulemaking* authority would not allow the FTC to subordinate KISA's *statutory* power. R. at 10-12. Of Rule ONE, Judge Marshall argued that strict scrutiny should apply, and that the regulation's failure to consider less burdensome alternatives violated strict scrutiny. R. at 13-15.

Undeterred, Petitioner sought review, which this Court granted. R. at 16.

## SUMMARY OF THE ARGUMENT

***Private Nondelegation***. The Constitution vests the legislative, executive, and judicial powers into three distinct branches of government, such that no law may presume to place regulatory authority in the hands of private actors. See U.S. Const. art. I, § 1; art. II, § 2; art. III, § 1; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Yet, Congress may also seek the aid of private actors in administering its laws "in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398. (1940). Thus, private actors may assist in administering the law, provided they are exercised under the pervasive surveillance and authority of the government. *Id.* In line with this rule, Federal courts of appeals have since upheld delegations that either restrict private actors to advisory roles, or so tightly control their activities as to make their authority ministerial. See *United States v. Frame*, 885 F.2d 1119 (3d. Cir.1989) *abrogated on other grounds by* 521 U.S. 457 (1997); *Pittston Co. v. United States.*, 368 F.3d 385 (4th Cir. 2004); *Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984).

KISKA's attempt to place an independent nonprofit at the head of its enforcement mechanisms flagrantly delegates power outside the constitutional design. KISA's alleged supervisor, the FTC, has statutory role in KISA's jurisdiction to make investigations, subpoena witnesses, sanction alleged offenders, and sue Internet producers. KISA may do all of this at will, without government approval, and the FTC cannot limit its powers should KISA abuse them. To twist the knife further, KISKA entrusts these powers to an independent nonprofit; the FTC does not control its membership, and the record contains no evidence that the FTC disciplines or even monitors KISA's operation.

The court below, following the Sixth Circuit's lead in holding otherwise, see *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), advances two mistaken presumptions. The Sixth Circuit argues that the FTC's power to review KISA's enforcement actions *de novo* subordinates their enforcement; but this review power does not meaningfully curb KISA's substantial powers to *bring about* the final civil sanctions FTC may review. Furthermore, the Sixth Circuit's reliance on the FTC's power to modify KISA's rules fails, because no amount of rulemaking can limit KISA's statutory jurisdiction to enforce KISA.

Congress has instructed an independent nonprofit to enforce its laws upon the Internet. The Constitution recognizes no such role for private actors; the judgement of the Fourteenth Circuit should be reversed.

***Free Speech.*** The First Amendment is meant to protect speech and expression from government overreach, "mean[ing] that government has no power to restrict expression because of its message, its idea, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Under the First Amendment, content-based restrictions are subject to strict scrutiny. *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000). Under strict scrutiny, the regulation must be narrowly tailored to serve a compelling government interest. *Id.* at 813. The Government bears a heavy burden to prove its regulation is at least as effective if not more effective than less restrictive alternatives to its proposed regulation. *Reno v. ACLU*, 521 U.S. 844, 879 (1997). In considering the least restrictive alternatives, the Court "ensure[s] speech is restricted no further than necessary to archive the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Rule ONE is a content-based restriction because it targets all websites and social media platforms that publish more than one-tenth of "sexual material harmful to minors," therefore

subjecting it to strict scrutiny. R. 17; *Playboy*, 529 U.S. at 814. Additionally, Rule ONE overreaches into constitutionally protected speech which "is unacceptable if less restrictive alternatives would be at least as effective." *Reno,* 521 U.S. at 847.

The Fourteenth Circuit improperly applied *Ginsberg* and rational review to Rule ONE. The holding in *Ginsberg* and its use of rational review only applies to the conduct of children, and "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). The Court's later decision in *Sable* clarified that strict scrutiny applies to statues that overreach in protect speech, stating that "the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages." *Sable Commc'ns v. FCC*, 492 U.S. 115, 131 (1989). As such, strict scrutiny applies to Rule ONE.

Rule ONE cannot withstand strict scrutiny—the proper standard of review—because it is neither narrowly tailored to protect children's welfare nor more effective than less restrictive alternatives in achieving the same interest. Indeed, Petitioner does not dispute this Court's longstanding recognition of the government's compelling interest in protecting minors from sexually harmful materials. R. 9; *Sable*, 492 U.S. at 126. But Rule ONE fails in at least three respects to regulate that legitimate interest in a manner capable of withstanding strict scrutiny.

First, Rule ONE is not narrowly tailored because it is underinclusive. By exempting other mediums "which would, in fact, prevent children from accessing obscene materials[,]" R. 14, Rule ONE enables the curious minor to access the very materials the Act purports to regulate. By explicitly excluding search engines, among other mediums, 55 C.F.R. § 5(b), from its applicability, Rule ONE offers no protection against the curious minor utilizing a simple Google

Images search for sexually harmful material. Because such serious underinclusiveness is independently fatal, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011), Rule ONE fails strict scrutiny.

Second, Rule ONE is not narrowly tailored because it is overinclusive. Recognizing as much, the district court properly held that "Rule ONE violated the First Amendment, in part, because it affected more speech than it needed." R. 5. As the Fourteenth Circuit applied rational-basis review—the incorrect standard—it supplied this Court with no further insight as to Rule ONE's overinclusiveness. But this Court need not look further than to its own precedents for guidance, and those that control here deem overinclusiveness as fatal. *See Brown*, 564 U.S. at 805. By restricting adults' access to websites and social media platforms whose content is more than one-tenth sexually harmful to minors, 55 C.F.R. § 2(a), Rule ONE restricts access to those websites and platforms that contain even a miniscule amount of sexual material. That incredibly low threshold is lower than that ever presented before this Court or the courts of appeals. *See, e.g., Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 277 (5th Cir. 2024) (upholding a law that regulated access to websites and social media platforms containing over one-third of salacious material).

Finally, Rule ONE cannot withstand strict scrutiny, because it fails to adopt less restrictive and more effective alternatives already identified and accepted by the district court. R. 15. The presence of those less restrictive and more effective alternatives—content-filtering and content-blocking—independently dooms Rule ONE. Because Respondent fails to meet its burden in proving that these less restrictive alternatives will not be as effective in protecting children's welfare than Rule ONE, this Court should reverse, in part, the Fourteenth Circuit's holding as to the First Amendment issue.

## ARGUMENT

### I. KISKA violates the private nondelegation doctrine because it grants near-unilateral enforcement powers to an independent nonprofit.

This Court's holding in *Sunshine Anthracite Coal Co. v. Adkins* makes clear that a delegation of public duties to private entities, with all its attendant perils to our democratic form of government, is acceptable only where the power is exercised under the public's surveillance and authority. This private nondelegation doctrine has since been used to uphold advisory and ministerial roles, where private actors propose regulatory conduct to a government superior, or administer the government's agenda in tightly-controlled scenarios that belie the assumption of executive power. *See Frame*, 885 F.2d 1119; *Pittston Co.*, 368 F.3d 385; *Cospito*, 742 F.2d 72. These delegations have all shared a common theme – that private entities must exercise their duties under the pervasive surveillance and authority of accountable government actors.

KISKA blatantly disregards this rule. Congress has given KISA jurisdiction to investigate, sanction, subpoena, and sue internet producers without the FTC's involvement. KISA may exercise these powers without FTC approval. No statutory guardrails limit KISA's discretion in the use of these powers on internet producers. And the FTC cannot suspend, modify, or displace KISA's powers should it see fit. To add insult to injury, KISA is an independent nonprofit devoid of any accountability to the public. The FTC does not appoint or remove directors, and the record does not include any evidence that the FTC has given itself disciplinary or supervisory role in its operation. Divested of all disguise, KISA is exercising government powers meant for the legislative and executive branches.

The Fourteenth Circuit's reliance on *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), to hold to the contrary is misplaced. The FTC's passive authority to review *some* of KISA's enforcement actions after they have occurred does not confer the control and supervision

*Adkins* requires. In addition, the FTC's power to change KISA's *rules* cannot allow the FTC to limit KISA's *statutory* enforcement powers as *Adkins* would require. The judgment below should therefore be reversed.

### A. KISKA has failed to place KISA under the authority and surveillance *Adkins* requires.

This Court held in *Adkins* that private entities may only administer the law under the government's "pervasive surveillance and authority." *Adkins*, 310 U.S. at 388. In the following decades, federal courts of appeals have faithfully applied *Adkins* to uphold various "ministerial or advisory" given to private actors holding both legislative and executive functions. *See, e.g.*, *Frame*, 885 F.2d 1119; *Pittston Co.*, 368 F.3d 385; *Cospito v. Heckler*, 742 F.2d 72. These precedents make clear that any private role in legislative or executive functions must be directly subordinate to a supervisory agency, or risk treading upon the separation of powers.

KISKA's enforcement scheme departs from this rule in many respects and endangers the constitutional design. For one, the FTC's supervisory role is limited, while leaving KISA the freedom to subpoena, sanction, and sue without any public involvement. Furthermore, KISA's status as an independent nonprofit prevents the FTC from keeping KISA accountable. That KISA enjoys extraordinary enforcement powers heightens the constitutional issues. Because Congress has given KISA colossal enforcement powers without meaningful oversight, the Fourteenth Circuit's contrary holding should be reversed.

#### 1. Private entities must administer laws under the government's actual authority and supervision.

The Constitution vests the power to make, enforce, and interpret law into three coordinate branches of government, each accountable to the other and to the American people. *See* U.S. Const. art. I, § 1, art. II, § 2, art. III, § 1. Private delegation challenges this constitutional design

by placing public powers outside the government and into the hands of private actors, endangering accountability. Indeed, "[o]ne way the Government can regulate without accountability is by passing off a Government operation as an independent private concern." *Department of Transp. v. Assoc. of American Railroads*, 575 U.S. 43, 57 (2015) (Scalia, J. concurring). Thus, this Court has consistently struck down unfettered delegations of public powers to private parties as "unknown to our law, and . . . inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935); *see also Carter Coal. Co.*, 298 U.S. at 311. Congress may, however, empower private actors to assist their legislative design "in order that the exertion of legislative power does not become a futility." *Adkins*, 310 U.S. at 398.

The *Adkins* rule holds that Congress may seek the aid of private actors in administering laws provided they act under the government's "pervasive surveillance and authority." 310 U.S. at 388. In *Adkins*, the Court considered the Bituminous Coal Act of 1937, which allowed a Coal Code staffed with coal producers to *"*propose minimum prices" which could be "approved, disapproved, or modified" by the government's Coal Commission. *Id.* (emphasis added); *see* Bituminous Coal Act of 1937, ch. 127, §§1–22, 50 Stat. 75–91, 77 (codified 15 U.S.C. §§830-834). The Court held that this was not an unconstitutional delegation of law-making power because the Code "function[s] subordinately to the Commission." *Id.* at 399.

The Court's reasoning emphasized both the Code's advisory role and the "pervasive authority and surveillance" the Commission had over its operation. *Id.* at 398-99. For one, the Code engaged in no law-making, the Court reasoned, as none of its fact-finding crystalized into binding rules until the Commission approved its rules: "[The Commission], not the code authorities, determines the prices." *Id.* at 399. Moreover, the Court examined the statutory design

and concluded that the Commission keep a close eye on the Code's conduct. *Id.* at 388. Of note, the court observed that the Commission could "revoke the code membership of any coal producer" to discipline abuse. *Id.* at 388; *see* 50 Stat. at 76. Because the Code merely served as an advisor under the government's strict supervision, the Court upheld the delegation.

Since *Adkins*, federal courts of appeals have upheld Acts that have delegated power in a "ministerial" or "advisory" way. *Frame*, 885 F.2d at 1123. Consider *United States v. Frame*, where the Beef Promotion Act allowed cattle producers to collect and spend assessments on cattle. *Id.* at 1123-24; *see* 7 U.S.C. § 2904. The Third Circuit upheld the producers' "advisory" power to propose expenses because only the supervisory agency's approval allowed the associations' budgets, projects, and contracts to move forward. *Id.* at 1128-29; *see* § 2904(4)(C), (6)(A)-(B). Although the producers did not need government approval to collect assessments, the court dubbed this power "ministerial" because Congress decided when, how, and on whom assessments would be collected. *Id.*, *see* § 2904(8)(C). Moreover, the court noted the supervisory agency strictly supervised the producers' operation: the agency could appoint and remove association members, required notice of association meetings so its representatives could be present, and made the association's expenses public. *Id.* at 1129, *see* § 2904(1), 7 C.F.R. §§ 1260.150(m),(l), 169(h). Thus, the Third Circuit held the associations were subject to the government's "pervasive surveillance and authority." *Id.*, quoting *Adkins*, 310 U.S. at 388. *See also Pittston Co*, 368 at 393-94 (upholding a scheme where a private trustee could collect premiums without government approval, but pursuant to statutory criteria and comprehensive fiduciary duties).

On another tack, courts have also upheld schemes where supervisory agencies can review a private entity's public duties. In *Cospito v. Heckler*, the Third Circuit upheld the Joint

Commission on Accreditation of Hospitals's (hereinafter "JCAH") authority to award Medicare or Medicaid accreditation to hospitals. *Cospito*, 742 F.2d at 88. Even though the JCAH could unilaterally decertify hospitals, the court concluded the supervisory agency held "ultimate authority" because the agency could subordinate the JCAH with "distinct part" review. *Id.* This power allowed the agency to initiate its own decertification process *at any time*, acting as a proverbial sword of Damocles over JCAH's powers. *Id.*, *see* 42 U.S.C. § 1995bb(a)(4). Because the agency could displace the private administrator's powers at any time, the court upheld the delegation.

A common thread unites all these cases: the government must have control and supervision over any private delegation of power, such that its exercise remains within the bounds of the Constitution's system of public accountability. "It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Department of Transp. v. Assoc. of American Railroads*, 575 U.S. at 61 (Scalia, J. concurring). KISKA breaks this rule for a simple reason: it has placed the power to enforce rules for online conduct well outside the government's reach.

**2. KISKA's enforcement powers are neither subject to the FTC's authority nor meaningfully supervised.**

KISKA lacks any of the safeguards integral to this court's holding in *Adkins*. 55 U.S.C. § 3054 divides the KISA and the FTC's jurisdiction "each within the scope of their powers and responsibilities," and it is KISA alone who has the power to launch investigations, issue subpoenas, impose civil sanctions, and initiate civil lawsuits. This freedom of action stands in stark contrast to the advisory scheme in *Adkins*, where the Code's rules did not become effective until the Commission approved it. *See Frame*, 885 F.2d at 1123 (same); *Pittston*, 368 at 393-94 (same). Nor does the statute grant KISA powers that leave all decision-making in the hands of

the government. *See Frame*, 885 F.2d at 1123; *Pittston*, 368 at 393-94 (same). The FTC therefore cannot be said to actually have authority over KISA's enforcement actions as *Adkins*, if not also basic principles of accountable government, require.

What scant authority the FTC has over KISA do not pass muster. KISA's sole advisory role pertains to enforcing violations of § 3059, in that KISA may "*recommend* that the Commission commence an enforcement action" in those cases. § 3054(c)(1)(B) (emphasis added). That Congress gave KISA an advisory role in one respect, but not the others, highlights the glaring absence of FTC authority over KISA's conduct. Moreover, KISKA has the power of de novo review over enforcement actions – but this power is only available after KISA has made a "final civil sanction," § 3058(a), and thus leaves KISA's preceding enforcement conduct – investigations, subpoenas, and hearings – outside the FTC's control. This distinction is important; if Congress had granted the FTC the power to displace any of this conduct by assuming these powers on itself like in *Cospito*, the subordinate relationship could look different. *See Cospito,* 742 F.2d at 88. Instead, the FTC plays a passive role: "[s]uch backend review by the FTC does not subordinate the Authority." *Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415, 435 (5th Cir. 2024)

Moreover, the FTC lacks many of the supervisory tools critical to keeping KISA accountable. Unlike in *Adkins*, where the Code's members were subject to removal and their activities were tightly monitored, KISA is a "private, independent, self-regulatory nonprofit." § 3052(a). The bylaws Congress provided in § 3052 give the FTC no role in selecting, disciplining, or removing KISA's Directors or other members of the Board. True, the FTC may modify the bylaws, *see* § 3053(e), (a)(1), but the record contains no evidence that the FTC has attempted to do so. The situation could be different if the FTC had modified KISA's bylaws to

give itself such a role, or, like in *Frame*, keep close tabs on KISA's conduct by requiring notice of its meetings and reports on its activities. This *optional*, and markedly absent disciplinary scheme stands in stark contrast to the statutory surveillance role Congress gave to the Commission in *Adkins*.

KISA's zealous enforcement powers heightens all of these issues. "[N]ovely may, in certain circumstances, signal unconstitutionality." *Assoc. of American Railroads v. U.S. Dept. of Transportation*, 721 F.3d 666, 673 (D.C. Cir. 2013). Here, KISA carries powers that have traditionally remained outside of private hands. *See Frame*, 885 F.2d 1124 (Noting secretary, not associations, empowered to investigate violations, subpoena witnesses, enforce subpoenas, recommend civil suits to Attorney General), 7 U.S.C. § 2909; *Pittston*, 368 F.3d at 396 (observing trustees referred delinquent operators to Treasury; power to sue limited to collecting debts owed to the trust), 26 U.S.C. § 2907. The unsupervised exercise of these novel powers, free from meaningful public authority or oversight, wants a basis in the Constitution. As a delegation "unknown to our law, and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress," KISKA is unconstitutional. *A.L.A. Schechter Poultry Corporation*, 295 U.S. at 537 (1935).

### B. FTC rulemaking and post-facto review does not subordinate KISA and authorities to the contrary lack merit.

The Fourteenth Circuit misunderstands the FTC's actual supervisory role over KISA. Its reliance on *Oklahoma v. Untied States*, 62 F.4th 221 (6th Cir. 2023) to hold so is misplaced. *See Nat'l Horseman's Benevolent and Protective Ass'n*, 107 F.4th at 431. The power to review does not give supervising agencies the degree of authority and surveillance *Adkins* and its circuit progeny require. Nor are KISA's enforcement actions preliminary until reviewed; the plain text of the statute defeats this reading. Furthermore, the FTC only has the power to modify *rules*,

which cannot equate to the power to rewrite the statutory structure responsible for KISA's problematic enforcement powers. None of these arguments solve KISKA's delegation of power outside the Constitutional design of this government.

**1. The power to review enforcement actions after they have already occurred is inadequate.**

The Fourteenth and Sixth Circuits' first error in reasoning is their unjustified faith in the power of *de novo* review. Multiple courts of appeals, including the court below, have construed the power of review government action as enough to confer oversight. *See Oklahoma*, 62 F.4th at 231 (characterizing adjudication decisions as "not final until the FTC has the opportunity to review them"); *see also Walmsley v. Federal Trade Commission*, 117 F.4th 1032 (8th 2024). These courts rely upon cases reviewing the Maloney Act, see *Todd & Co., Inc. v. SEC*, 557 F.2d at 1012-14; *R.H. Johnson & Co v. S.E.C.*, 198 F.2d 690 (2d Cir. 1952), or the JACH's power of accreditation under Medicare and Medicaid. *See Cospito v. Heckler,* 742 F.2d 72 (3d Cir. 1984).

But the power to review does not equate to authority and supervision over KISA's sanction process. The FTC's power of review only becomes available after an administrative law judge has reviewed KISA's final sanctions against an internet entrepreneur. *See* 55 U.S.C. § 3058(a).[1] This is deeply problematic because a great deal of enforcement can take place before the power of review becomes available. *See Natl Horsemen's Benevolent and Protective Ass'n*, 107 F.4th at 430. KISA can investigate internet enterprises, compel the appearance of witnesses, adjudicate the sanctions, and at long last impose penalties before the FTC may overturn the

[1] What is curious is that the Sixth circuit describe HISA's enforcement actions as preliminary until FTC review. See *Oklahoma*, 62 F.4th at 231. But this is not so with KISA. § 3058's plain language makes clear that civil sanctions are final unless a party petitions for review or the FTC initiates review ab initio. See § 3058. KISA's sanctions are thus not preliminary, like the Coal Code's power to merely "propose" prices in *Adkins*, 310 U.S. at 388.

sanction. There is even the danger that the defendant could reach an agreement with KISA before a final decision – which removes the FTC from the picture entirely. This reactive scheme cannot be expected to keep KISA accountable to government actors.

Furthermore, the cases upon which the Fourteenth and Sixth Circuits rely are distinguishable. In *Cospito v. Heckler*, the court emphasized that the Secretary could engage in distinct part review at any time, giving it authority over the *entire* JCAH's accreditation process – not just the final result. 742 F.2d at 88. And while the Maloney Act gives the SEC the power of de novo review over the disciplinary proceedings of self-regulatory organizations, *see Nat'l Horsemen's Benevolent and Protective Ass'n*, 107 F.4th at 435 (discussing the SEC's power over SROs), this power is but one of many avenues of authority that subordinates the SROs. The SEC may make investigations by itself, prevent any person from joining an SRO, remove SRO board members for cause, and even derecognize FINRA's regulatory role entirely. *Id.*, *see* 15 U.S.C. § 78u(c)-(d), 77s(c), u(c), g(2), o(b)(4). The SEC thus has complete control over each SRO's operation in the manner *Adkins* demands. In this scheme, the power to review is not a cure-all to delegation; KISA's reliance on the power to review cannot save it.

**2. Rulemaking cannot undo KISA's over-broad statutory powers.**

The Fourteenth, Sixth, and Eight Circuits' second error is their belief that the FTC could subordinate KISA's enforcement powers through rulemaking. This argument fails because the FTC may not instigate "basic and fundamental changes in the scheme" which gives KISA its problematic enforcement powers. *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023). *Adkins* requires actual authority over a private actor's powers, and no amount of rulemaking affecting *how* KISA uses that power can solve this problem. The FTC cannot displace this "definite enforcement scheme," *Nat'l Horseman's Benevolent and Protective Ass'n*, 107 F.4th at 431, and

thus cannot exercise the "pervasive authority and surveillance" the constitutional design of this people's government requires. *Adkins*, 310 at 388.

Both the Sixth and Eight Circuits have concluded that KISA's statutory twin, HISA, allows the FTC to subordinate the Horseracing Authority's conduct. *See Oklahoma*, 62. F4th at 231; *Walmsley*, 117 F.4th at 1049. The *Oklahoma* court reasoned that FTC rules could solve due process problems by limiting subpoenas, improving the hearing's due process elements, or regulating investigations. *See Oklahoma*, 62. F4th at 231. But the Eight Circuit took it a step further, proposing that the FTC could also require the Authority to secure its consent before issuing civil suits. See *Walmsley*, 117 F.4th at 1049.

As an initial matter, the Eight Circuit is incorrect: basic principles of administrative law make clear that the FTC cannot "rewrite [the] statute from the ground up" to disrupt KISA's unilateral power to issue civil suits. *Biden*, 143. S. Ct. at 2368. In *Biden v. Nebraska*, this Court considered the Secretary of Education's authority to suspend federal student loan programs using the HEROES act. *Id.* The act allowed the Secretary to "waive or modify any *statutory* or regulatory provision" affecting student loans under exigent circumstances. *Id.*, quoting 20 U.S.C. § 1098bb(a)(1) (emphasis added). The Court rejected the Secretary's changes as, even where Congress *does* authorize the Executive to "waive or modify" statutory regulations, that "[cannot] authorize 'basic and fundamental changes in the scheme' designed by Congress." *Id.*, quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994). Thus, the Secretary could not undermine Congress's statutory designs, even when given some authority to waive or modify statutory provisions.

Here, Congress has left no room for doubt: the FTC cannot modify KISKA's grant of authority to KISA. 55 U.S.C. § 3054(a)(1) limits the FTC and KISA's jurisdiction as "within the

scope of their powers and responsibilities under this chapter." KISA alone has jurisdiction to investigate, subpoena, sanction, and engage in civil suits to enforce the law. *See* § 3054(c)(1)(A), (j). Thus, the FTC is powerless to subordinate KISA in any of the ways *Adkins* requires; it could not make their use ministerial by giving the FTC discretion for when KISA may use them. Any such rulemaking would constitute a "basic and fundamental change to the statutory design" granting KISA jurisdiction alone. *Biden*, 143 S. Ct. at 2368 (citation omitted),

Moreover, to the extent the FTC can make rules that modify *how* KISA applies the law, this would not create the supervision *Adkins* and its progeny require. To have the kind of "pervasive surveillance and authority" that cures the accountability issues at the core of a private delegation of power, a supervisory agency must prevent private actors from engaging in "law-making," not exercising due process. *Adkins*, 310 U.S. at 399. This argument conflates this challenge to KISA's power with a complaint against due process. *See Nat'l Horsemen's Benevolent and Protective Association*, 107 F.4th at 433 ("The Horsemen are not complaining about *how* the Authority exercises its enforcement power. They are complaining about *where* the enforcement power is lodged.") The Sixth Circuit's supposition that the FTC may restrain KISA's enforcement *process* is irrelevant to the fundamental and difficult question posed by this near-unsupervised delegation of enforcement power.

Congress has entrusted its agenda to regulate the Internet to a private corporation. The Constitution forbids this. The judgment of the Fourteenth Circuit to the contrary should be reversed.

## II. Rule ONE's Age Verification Requirement Violates The First Amendment.

Rule ONE is subject to strict scrutiny, fails under that standard, and therefore violates the First Amendment. The First Amendment guards against government abridgment of the freedom

of speech. U.S. Const. amend. I. Rule ONE does exactly the opposite of the freedoms the First Amendment was meant to protect. It overreaches into Constitutionally protected speech and is a content-based, immediately requiring this Court to apply strict scrutiny. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000).

### A. Rule ONE Is Subject to Strict Scrutiny.

Under the First Amendment, content-based restrictions are subject to strict scrutiny. *Playboy Entertainment Group, Inc.*, 529 U.S. at 814. "The First Amendment means that government has no power to restrict expression because of its message, its idea, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Where content-based restrictions are subject to strict scrutiny, the regulation must be narrowly tailored to serve a compelling government interest. *Playboy Entertainment Group, Inc.*, at 813. When Plaintiff's challenge a content-based restriction, a heavy burden is on the government to prove that proposed alternatives to the regulation are not as effective as the regulation itself. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997). The purpose of this test, weighing the less restrictive alternatives, is to, "ensure speech is restricted no further than necessary to archive the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

#### 1. Strict scrutiny applies to Rule ONE because it overreaches into and burdens speech that is constitutionally protected for adults.

Rule ONE is subject to strict scrutiny because it overreaches into speech that is constitutionally protected. When a statute suppresses a large amount of speech that is constitutionally protected for adults, "That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that

statute was enacted to serve. *"Reno,* 521 U.S. at 847. Rule ONE burdens the constitutionally protected speech of adults and is therefore subject to strict scrutiny.

In *Reno*, the Court affirmed the grant of an injunction in favor of Plaintiffs challenging the Communications Decency Act (CDA). There, the Court was also confronted with an age verification scheme put into place by the CDA to prevent minors from accessing sexually explicit content and other content harmful to minors. The Court applied strict scrutiny and held the CDA unconstitutional because in its effort to prevent minors from accessing this material, the CDA, "suppresses a large amount of speech that adults have a constitutional right to receive," which "is unacceptable if less restrictive alternatives would be at least as effective …" *Id.* at 874.

In its reasoning in *Reno*, the Court emphasized that the CDA placed such an unacceptably heavy burden on protected speech it could not satisfy the narrow tailoring required under strict scrutiny. *Id.* at 882. "In *Sable*, 492 U.S. at 127, we remarked that the speech restriction at issue there amounted to "'burn[ing] the house to roast the pig.'" The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the internet community." *Id*. at 882. The same concerns the Court had then should also be raised with Rule ONE which is triggered when a website or social media platform has more than one-tenth of material harmful to minors. This provision of Rule ONE is a dark shadow and a house burning to roast the pig. As such, strict scrutiny applies.

The holding in *Reno* was further cemented in *Ashcroft.* Strict scrutiny was again applied, in invalidating the Child Online Protection Act (COPA). There, strict scrutiny was applied because COPA was overbroad and was infringing on speech that was protected for adults. The government failed to meet its burden in establishing that COPA was more effective than less restrictive alternatives. 542 U.S. 656, 669. The Court evaluated several other less restrictive

alternatives, including filtering technology, in their evaluation of COPA and upholding the District Court's decision to grant Plaintiff's injunction. *Id.* at 666.

In evaluating COPA as a content-based restriction, the Court determined if COPA was the least restrictive means among other effective alternatives. *Id.* at 666. Looking to the least restrictive means ensures that the statute is narrowly tailored to achieve the Government's compelling interest. "The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Id.* at 666. The Government failed to ensure speech was restricted no further than necessary and therefore had also failed to satisfy strict scrutiny. *Id.* at 670; *see also U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) (Where the Court struck down a provision of the Telecommunications Act because the most restrictive option preferred by Congress could not survive strict scrutiny). There are less restrictive alternatives to Rule ONE that were accepted by the District Court: (1) Required blocking of content by internet providers until adults "opt out" and (2) content filters that allow adults to control what their children can access on their devices. *Record* at 15. Following *Ashcroft* and *Playboy Entertainment Group, Inc.*, these less restrictive alternatives must be considered and demonstrate that Rule ONE is not narrowly tailored to ensure protected speech is not punished or chilled.

The same that was true in *Reno* and *Ashcroft*, is true here with Rule ONE. Rule ONE is content based and in an effort to prevent minors from accessing explicit material, it substantially overreaches, chilling speech that is constitutionally protected for adults. For these reasons, strict scrutiny is the proper standard to applied to Rule ONE.

### 2. Rule ONE is subject to strict scrutiny because it is content-based and therefore presumed unconstitutional.

"The Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality." *R.A.V. v. St. Paul*, 505 U.S. 377, 282 (1992); *see also U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000).

Rule ONE is a content-based restriction, subject to strict scrutiny, and is valid only if it determined to be narrowly tailored to further a compelling interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2005). While protecting the welfare of minors has long been acknowledged as a compelling government interest by the Supreme Court, Rule ONE is not narrowly tailored to further this interest. *Reno* at 875. Further, "as we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny." *Playboy Entertainment Group, Inc.*, 529 U.S. at 803 (2000).

The plain language of Rule ONE makes it clear that it is a content-based regulation. Rule ONE only applies to websites with content, "more than one-tenth of which is sexual material harmful to minors." Rule ONE only applies to a particular kind of speech, making it content based, and subject to strict scrutiny. *Id.* at 811.

### 3. Rational review does not apply to Rule ONE, and the Fourteenth Circuit improperly applied *Ginsberg*.

In *Ginsberg v. State of N.Y.*, the court applied rational review to a New York State statute that prohibited the sale of explicit materials to minors which was challenged under the First Amendment with Petitioner arguing that the statute violated the free speech rights of minors. The Court disagreed, reasoning that, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." 390 U.S. 629, 638, *quoting Prince v.*

*Commonwealth of Massachusetts*, 321 U.S. 158 170 (1944). The Court found the law at issue rationally related to the States's interest in protecting minors. *Ginsberg* remains good law in that the well-being of children is within the state's power to regulate and the state has power over the conduct of minors that reaches beyond its authority over adults.

As made clear through the cases following *Ginsberg*, rational review is not the proper standard in evaluating laws that regulate the conduct of minors that also overreach and invade upon the constitutionally protected conduct of adults. In 1989 the Court cited *Ginsberg* acknowledging that the federal government has a compelling interest in protecting the well-being minors however statutes aimed at that interest must be narrowly tailored to achieve that interest. *Sable Communication of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The Court in *Sable* applied strict scrutiny to the Communications Decency Act of 1934, striking it down because, "the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages." *Id.* at 131. In short, when a statute that regulates the conduct of minors while reaching too far into the constitutionally protected conduct of adults, it is subject to strict scrutiny and fails strict scrutiny because it is not narrowly tailored.

This same holding and rationale have been continued since *Sable* through *Reno, Playboy*, and *Ashcroft*, and it is for good reason that the Fourteenth Circuit and Respondent cannot cite to any other Supreme Court case since *Ginsberg* applying rational review to these kinds of statutes. No Supreme Court precedent applying rational review to similar facts exists.

The Fifth Circuit has relied upon *Ginsberg* and applied rational review to a Texas statute (H.B. 1181) requiring age verification to access explicit materials—much like Rule ONE. *Paxton*, 95 F.4th at 278. However, for the same reasons as it is the inappropriate standard for

Rule One, rational review was the inappropriate standard for H.B. 1181. The Texas statute, like Rule ONE, is a content-based restriction and overreaches into constitutionally protected speech for adults. The Texas statute and Rule ONE both are subject to strict scrutiny. As the partial concurrence stated, "The Supreme Court has consistently applied strict scrutiny to content-based restrictions that impair adults' access to protected speech … [the Texas statute] imposes a content-based restriction on speech that burdens adults' access to that speech. Bound by *Sable, Reno, and Ashcroft II*, this Court must apply strict scrutiny." *Id.* at 297 (Higginbotham, J., concurring in part and dissenting in the judgment in part).

It should also be noted that a lesser, intermediate scrutiny such as that applied in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), does not apply to this case. *Renton* was a zoning case where the regulations were targeting the effects caused by adult movie theaters opening and operating in neighborhoods. *Id.* at 44. Rule ONE has no relation to zoning but rather is a content-based regulation, and "We have made clear that that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property value has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny." *Playboy*, 529 U.S. at 815 (citations omitted). Rule ONE is subject to strict scrutiny.

*Ginsberg* only speaks to the State's ability to regulate the conduct of minors and that laws regulating the conduct of minors are subject to rational review. *Ginsberg* cannot be read, as Respondent improperly contends, to allow laws that are content-based restrictions of protected speech to be subject to rational review. "The 'starch' in our constitutional standards cannot be scarified to accommodate the enforcement choices of the Government." *Playboy*, 529 U.S. at 830. It is clear, then, that strict scrutiny is the proper standard applicable to Rule ONE.

### B. Rule ONE's Age Verification Requirement Fails Strict Scrutiny.

To withstand strict scrutiny, Rule ONE must be "narrowly tailored to promote a compelling [g]overnment interest," *Playboy*, 529 U.S. at 813, and employ the least-restrictive means of protecting minors. *See Reno*, 521 U.S. at 874. Rule ONE, which must neither be "seriously underinclusive nor seriously overinclusive," *Brown*, 564 U.S. at 805, must actually serve that interest. *Reno*, 521 U.S. at 874. The burden rests on the government to show "not merely . . . that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." *Ashcroft*, 542 U.S. at 669. Because Rule ONE is both underinclusive and overinclusive, it is not narrowly tailored to withstand strict scrutiny. Likewise, because Respondent fails to carry its burden to prove that Rule ONE is the least-restrictive means of protecting minors, this Court should "uphold the injunction" when "the underlying constitutional question is close[.]" *Id.* at 664.

#### 1. Rule ONE is not narrowly tailored because it is underinclusive.

At the outset, Rule ONE's design renders it fatally underinclusive in its purported interest to protect minors, "because it fails to ban all the material which would, in fact, prevent children from accessing obscene materials." R. 14. From afar, Rule ONE seems to pass muster, as it applies to any "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[.]" 55 C.F.R. § 2(a). But a closer examination of the text shows that Rule ONE excludes a plethora of mediums through which minors may bypass the Act's age-verification requirements and view sexually harmful material. Given this Court's recognition that "underinclusive[ness] when judged against [a law's] asserted justification . . . is alone enough to defeat it[,]" *Brown*, 564 U.S. at 802, Rule ONE, by design, fails strict scrutiny.

This Court has consistently found that underinclusive laws fail strict scrutiny. *See, e.g., Brown* at 805; *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 105 (1979) (finding underinclusive a law that permitted publication of juvenile offenders' names by electronic media but not by newspaper). In *Brown*, this Court struck down a California law restricting the sale or rental of violent video games to minors. *Brown*, 564 U.S. at 789. That California law applied to games "in which the range of options available to a player include[d] killing, maiming, dismembering, *or sexually assaulting* an image of a human being[.]" *Id.* (citation omitted) (emphasis added). Considering that the California law excluded other portrayals of similar violence, this Court held that it failed strict scrutiny. *Id.* at 801-02 ("Of course, California has (wisely) declined to restrict morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns."). The law also "singled out the purveyors of video games . . . at least when compared to booksellers, cartoonists, and movie producers[.]" *Id.* at 802. Such exclusions, this Court reasoned, rendered the California law "wildly underinclusive when judged against its asserted justification [of protecting children's welfare][.]" *Id.* Such underinclusiveness, this Court emphasized, was "alone enough to defeat [the law]." *Id.*

Rule ONE's underinclusiveness, like that of the law considered in *Brown*, is independently enough to fail strict scrutiny. Indeed, Rule ONE applies to a vast array of mediums through which minors could access sexually harmful material, 55 C.F.R. § 2(a) (applying coverage to websites and social media platforms), but the coverage ends there. By design, Rule ONE exempts from its age-verification requirement an equally vast array of mediums through which minors could access those same materials, such as search engines and social media platforms, like Reddit, which maintain entire communities devoted to posting pornography but may fall outside the prohibited one-tenth threshold. R. 14-15. Rule ONE cannot prevent a minor, for example, from utilizing a

video or image search on Google to yield sexually harmful material sourced from prohibited platforms or otherwise. *See id.*

But Rule ONE's exemptions do not end there. Rule ONE also explicitly exempts a "bona fide news or public interest broadcast, website video, report, [] event[,] [a]n internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider" from its applicability. 55 C.F.R. § 5(a)-(b). For example, Rule ONE cannot prevent a minor, then, from using a virtual private network (VPN) to circumvent its restrictions. R. 15. Plainly, as the California law in *Brown* exempted other mediums through which minors could readily view violent material, *Brown*, 564 U.S. at 801-03, Rule ONE also exempts numerous other mediums through which minors could view sexually harmful material. Rule ONE—by exempting from its coverage a seemingly innumerable amount of Internet search inquiries—is equally, if not more, underinclusive than the law this Court struck down in *Brown*.

Respondent may attempt to argue that *Brown* defies application to the present case because it concerned violence and not obscenity*, Brown*, 564 U.S. at 793 ("[S]peech about violence is not obscene[.]"), but that argument fails. Indeed, as Respondent may wisely acknowledge, Rule ONE only pertains to sexual material harmful to minors. This sort of factual distinction (and distraction) is immaterial as to whether Rule ONE survives strict scrutiny; this Court in *Brown* nevertheless applied strict scrutiny, which the California law failed. Respondent's main thrust in distinguishing *Brown*, instead, speaks to a question already resolved by this Court—whether the First Amendment protection of free speech exempts obscenity. *See, e.g., Roth v. United States*, 354 U.S. 476, 483 (1957); *Miller v. California*, 413 U.S. 15, 23-25 (1973). Although this Court has reaffirmed "that obscene material has no protection under the First Amendment[,]" *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973), this Court has also repeatedly held, as explained above, that strict scrutiny

applies to laws burdening adults' access to sexual expression. *See, e.g., Ashcroft*, 542 U.S. at 665-66; *see* p. 20, *supra*. Thus, the proper thrust of *Brown*'s reasoning, that an underinclusive law fails strict scrutiny, similarly dooms Rule ONE.

Respondent's reliance on *Paxton* is also flawed. There, as explained above, the Fifth Circuit erroneously applied the wrong standard of review—rational-basis review—to a Texas Law (H.B. 1181) almost identical to Rule ONE. *Paxton*, 95 F.4th at 277-78 ("[W]here [the government] chooses to regulate a specific kind of medium, that selection does not necessarily implicate strict scrutiny based on viewpoint discrimination."); p. 24, *supra.* However, in erroneously dismissing the proper standard of review, the Fifth Circuit supplied in *Paxton* little explanation as to why a nearly identical law to Rule ONE, H.B. 1181, was underinclusive despite its exemption of "search engines . . . and social-media platforms . . . that display the same content." *Paxton*, 95 F.4th at 277. If the Fifth Circuit had properly applied Supreme Court precedent, H.B. 1181 would fail strict scrutiny notwithstanding its regulation of a medium. *See Brown*, 564 U.S. at 801-06 (a California law was seriously underinclusive in its regulation of a medium and therefore was not narrowly tailored to survive strict scrutiny). This Court should adhere to precedent, not an erroneously decided Fifth Circuit decision.

**2. Rule ONE is not narrowly tailored because it is overinclusive.**

Equally fatal to Rule ONE is its overinclusiveness, because a compelling government interest "must be pursued by means that are *neither* seriously underinclusive *nor* seriously overinclusive." *Brown*, 564 U.S. at 805 (emphasis added). Although this Court has never articulated a test, amorphous or otherwise, to determine what constitutes underinclusive or overinclusive, *Brown* nevertheless remains instructive in striking down laws categorized as such.

*See id.* And as the district court properly held that "Rule ONE violated the First Amendment, in part, because it affected more speech than it needed," R. 5, so, too, should this Court.

Rule ONE broadly applies to any website or social media platform, in their entirety, when more than *one-tenth* of the material published or distributed therein is sexual material harmful to minors. 55 C.F.R. § 2(a). Consequently, for example, a social media platform that displays even 11% sexually harmful material to minors would be entirely subject to Rule ONE's age-verification regime, even if the remaining 89% of that platform's material were not salacious. By restricting far more speech than necessary to serve the government's compelling interest—protecting children's welfare—Rule ONE's age-verification requirement is not narrowly tailored. *Brown*, 564 U.S. at 804.

Because Rule ONE is simultaneously underinclusive and overinclusive, it is not narrowly tailored to protect children's welfare. By consequence, Rule ONE cannot withstand strict scrutiny. *Brown*, 564 U.S. at 805 ("[T]he overbreadth in achieving one goal is not cured by the underbreadth in achieving the other.").

### 3. Rule ONE cannot withstand strict scrutiny, because it fails to employ the least restrictive means of protecting children's welfare.

As the district court properly accepted, two less-restrictive alternatives to Rule ONE exist: (1) requiring Internet providers to block content until adults "opt out" and (2) "content filtering" that places adult controls on children's devices. R. 15. And as the dissenting opinion below properly recognized, "The presence of these alternatives alone is fatal to Rule ONE." *Id.* Under the correct standard of review entirely dismissed by the Fourteenth Circuit, this Court's First Amendment jurisprudence warrants reversal on the First Amendment challenge.

As this Court's most recent encounter with a federal law regulating the Internet in an attempt to protect minors from sexually harmful material, *Ashcroft* is not only instructive but

controlling. A law that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose . . . ." *Ashcroft*, 542 U.S. at 665 (quoting *Reno*, 521 U.S. at 874). The burden rests on Respondent "to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* In short, the test, then, is "whether [Rule ONE] is the least restrictive means among available, effective alternatives." *Id.* at 666.

In *Ashcroft*, this Court considered whether a federal statute enacted by Congress, the Child Online Protection Act (COPA), violated the First Amendment. *Id.* at 660. COPA imposed, among other things, "criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for commercial purposes, of [Internet] content that is harmful to minors." *Id.* at 661 (internal quotation marks omitted). Convinced by the district court's acceptance of a less restrictive alternative to COPA—blocking and filtering software—this Court concluded that the government failed to meet its burden in showing that any of those alternatives was less effective. *Id.* at 666-69. In filtering software, this Court acknowledged it as an "[im]perfect solution to the problem of children gaining access to harmful-to-minors materials[,]" but nevertheless found such software to be less restrictive and more effective than COPA, because "[filters] impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Id.* at 666-68. The presence of this less restrictive alternative, coupled with the government's failure to show that content-filtering software was less effective than COPA in protecting minors, doomed the government. *Id.* Here, the same holds true.

Precisely the same fatal flaw inherent in COPA's design is present in that of Rule ONE: less restrictive alternatives. Just as blocking and filtering software was an alternative less

restrictive than COPA, *Ashcroft*, 542 U.S. at 666-67, the same or similar software in today's technological age presents an alternative less restrictive than Rule ONE. *See* Adam Szafranski, Piotr Szwedo, & Malgorzata, *Comparative Perspectives of Adult Content Filtering: Legal Challenges and Implications*, 68 Cath. U. L. Rev. 137, 144-46 (2019). For example, with modern Internet Service Provider (ISP) filtering—which requires ISPs to block content until adults opt out—minors "are kept safe from content inappropriate for their age, unless their parents or guardians decide otherwise." *Id.* Because Rule ONE leaves available this less restrictive ISP-filtering alternative, R. 15, and because it "seems to be the most effective," Szafranski et al., *supra*, at 145, Rule ONE fails strict scrutiny. Moreover, because Rule ONE also leaves available content-filtering software, R. 15, the type of alternative this Court has recognized as a less restrictive alternative to age verification regimes, *Ashcroft*, 542 U.S. at 663-73, Rule ONE fails strict scrutiny. Content filtering, as this Court has recognized, preserves adults' right to access sexual material while simultaneously restricting minors' access to the same. *Id.* at 667. Given the Court's instruction in *Ashcroft* and Respondent's failure to meet its burden "not merely to show that a proposed less restrictive alternative has some flaws . . . [but] to show that it is less effective[,]" i*d.* at 669, this Court should hold that Rule ONE fails strict scrutiny.

Respondent may attempt to echo the Fourteenth Circuit's opinion below in arguing that *Ashcroft* does not control, but that argument and the authority on which it stands lack efficacy. In erroneously concluding that *Ashcroft* does not control, the Fourteenth Circuit explained no further than stating the obvious: "The [*Ashcroft*] Court was not asked whether strict scrutiny was the proper standard; it merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny." R. 9. In its cursory dismissal of *Ashcroft*, the Fourteenth Circuit put all of its eggs in one basket; it presumed that, because rational basis applies, R. 8, it need not determine

whether Rule ONE withstands strict scrutiny. However, as explained above, the Fourteenth Circuit applied the wrong standard of review. *See* pp. 19-25, *supra*. Under the correct standard of strict scrutiny, *Ashcroft* instructs that Rule ONE is fatally flawed.

In a last-ditch effort, Respondent might also argue that *Ashcroft* cannot control for a separate reason altogether—that due to the rapidly-evolving pace of the Internet, "the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet." *Ashcroft*, 542 U.S. at 671. That argument also fails. Indeed, the Internet has rapidly evolved over the twenty years since this Court decided *Ashcroft*, but "[i]t is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time," producing "[m]ore and better filtering alternatives[.]" *Id.; see also* Szafranski et al., *supra*, at 143-45. The district court properly recognized and accepted that the presence of less restrictive alternatives alone was fatal to Rule One; this Court should, too.

## CONCLUSION

The government has attempted to control how adults use the Internet in two fatally flawed ways. First, Congress has sought to control the internet with a nonprofit corporation far removed from the checks and balances that define this people's government. Second, KISA has obstructed the freedom of American adults to navigate the internet without fear when more reasonable alternatives abound. The Constitution tolerates neither. The judgment of the Fourteenth Circuit should be reversed.