No. 25-1779

In the Supreme Court of the United States

October Term 2024

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

v.

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

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

BRIEF FOR PETITIONERS

Team 33

Brief for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

I. United States Supreme Court

II. United States Court of Appeals

Constitutional Provisions

Statutes

Other Authorities

QUESTIONS PRESENTED

I. Under the private nondelegation doctrine, does Congress improperly delegate federal power to a private entity when the enforcement scheme operates with inadequate supervision under a government agency, the agency retains only the potential to review entity decisions, and some private enforcement powers are not subject to review at all?

II. Under First Amendment precedent and *de novo* review, did the Fourteenth Circuit err by vacating a preliminary injunction of Rule ONE and applying the rational basis test instead of strict scrutiny, given that Rule ONE imposes a content-based restriction on adults' constitutional right to access commercial internet sources?

OPINIONS BELOW

The Fourteenth Circuit's decision is reported at 345 F.4th 1 (14th Cir. 2024) and is reproduced on pages one though fifteen in the record. R. at 1-16. The United States District Court for the District of Wythe's decision has not been published, but it is identified by case number USDC No. 5:22-cv-7997 and summarized on page five of the record. R. at 5.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I, § 1, provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. 2, § 1, provides:

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

U.S. Const. art. 3, § 1, in part, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. amend. I, in relevant part, provides:

> Congress shall make no law ... abridging the freedom of speech ....

55 U.S.C. § 3052 provides:

> (a) The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.

55 U.S.C. § 3053, in part, provides:

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

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

> (h) The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.
>
> (i) The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.
>
> (j) [T]he Association may commence a civil action against a technological company that engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter . . . .

55 U.S.C. § 3057(b)(1), in relevant part, provides:

> The Association shall establish uniform rules . . . imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.

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

> (b)(1) With respect to a final civil sanction imposed by the Association, on application by the Commission or a person aggrieved by the civil sanction . . . the civil sanction shall be subject to review by an administrative law judge.
>
> (c)(1) The Commission may, on its own motion, review any decision of an administrative law judge . . .
>
> (c)(2)(A) The Association or a person aggrieved by a decision . . . may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.
>
> (c)(3)(A) [T]he Commission may
>
> (i) affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

(ii) make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record.

(c)(3)(B) The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

(d) Review by an administrative law judge or the Commission under this secion shall not operate as a stay of a final civil sanction of the Association unless the administrative law judge or Commission orders such a stay.

55 C.F.R. § 1 provides:

(1) “Commercial entity” includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.

(2) “Distribute” means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.

(3) “Minor” means an individual younger than 18 years of age.

(4) “News-gathering organization" includes:

(A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source;

(B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment;

(5) “Publish” means to communicate or make information available to another person or entity on a publicly available Internet website.

(6) “Sexual material harmful to minors” includes any material that:

(A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;

(B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:

(i) a person’s pubic hair, anus, or genitals or the nipple of the female breast;

(ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

(iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

55 C.F.R. § 2 provides:

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

(b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

55 C.F.R. § 3 provides:

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using:

(1) government-issued identification; or

(2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual

55 C.F.R. § 4, in relevant parts, provides:

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.

> (b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:
>
> (1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;
>
> (2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and
>
> (3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

55 C.F.R. § 5 provides

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

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

To balance protecting children on the internet with maintaining accessibility, Congress enacted the Keeping the Internet Safe for Kids Act (KIKSA) in January 2023. R. at 2. Instead of embedding detailed regulations within the statute, Congress delegated rulemaking authority to the Kids' Internet Safety Association, Inc. (KISA), a private nonprofit entity. R. at 2. KISA is tasked with rulemaking and enforcement powers "to monitor and assure children's safety online[,]" while its decisions are subject to oversight by the Federal Trade Commission (FTC). R. at 2-3. Furthermore, KISA is authorized to investigate rule violations and enforce compliance through civil sanctions or injunctions. R. at 3.

After several KISA board meetings discussing the negative effects of easily accessible online pornography on minors, KISA passed "Rule ONE," to ensure only adults can access sexual material harmful to minors online. R. at 3. The regulation mandates "reasonable age verification measures" for commercial entities and websites where content harmful to minors constitutes more than ten percent of the overall material. R. at 3-4.

The age verification requirements apply to entities that knowingly and intentionally publish or distribute material harmful to minors on websites or social media platforms. R. at 4. Acceptable methods of age verification include checking government issued IDs or employing any other reasonable measures. R. at 4.

Violations of Rule ONE are subject to strict penalties, including injunctions and fines of up to $10,000 per day of non-compliance, and up to $250,000 if a minor gains access to harmful content because of the violation. R. at 4.

Following the enactment of Rule ONE, the adult entertainment industry came to a standstill. R. at 4. Entities that complied with Rule ONE experienced a significant loss of patrons, as users expressed concerns about privacy breaches when identifying themselves online and feared being recognized by their peers. R. at 4.

In response, patrons argued the internet was the ideal forum for consuming pornography due to its privacy. R. at 4. Additionally, PAC offered evidence showing entities providing non-objectional material would also be impacted, that the age verification requirement can be easily circumvented, and that alternative methods exist to effectively restrict minors from accessing sexually harmful material. R. at 4-5.

II. PROCEDURAL HISTORY

On August 15, 2023, PAC sued KISA in the United States District Court for the District of Wythe ("District Court"), seeking to enjoin KISA and Rule ONE from operation. R. at 5. PAC moved for a preliminary injunction, which the District Court partially granted. R. at 5. The District Court held (1) KISA's regulatory scheme did not violate the private nondelegation doctrine, and (2) that Rule ONE imposed excessive restrictions on speech, violating the First Amendment. R. at 5. Both parties appealed their respective issues in the United States Court of Appeals for the Fourteenth Circuit. R. at 5. The Fourteenth Circuit incorrectly affirmed the District Court's holding on the nondelegation issue and reversed the District Court's holding on the First Amendment challenge. R. at 10. The Fourteenth Circuit remanded the case to the District Court with instructions to vacate the injunction. R. at 10.

However, the Fourteenth Circuit panel issued a divided opinion, with Judge Marshall dissenting on both issues. R. at 10-15. In her dissent, Judge Marshall stressed that granting any federal power to a private entity blatantly violates the Constitution. R. at 10. She concluded that KISA's enforcement powers violate the nondelegation doctrine because the entity lacks proper FTC supervision. R. at 11-13. Judge Marshall also firmly asserted that the majority erred in their Rule ONE analysis. R. 13-14. She asserted that strict scrutiny is the correct standard of review under the First Amendment, and that Rule ONE fails to meet that standard. R. at 14-15. In the words of Judge Marshall, KISA and Rule ONE struck a "double blow to the liberty of the American people." R. at 10.

After the Fourteenth Circuit's opinion, Petitioners appealed to this Court for a writ of certiorari. R. at 16. This Court granted Petitioners' writ and scheduled this case for oral arguments on the questions presented. R. at 16.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erred by lifting the injunction set by the district court in favor of Respondent, and after *de novo* review this Court should reinstate the injunction because Respondent's enforcement powers violate the private nondelegation doctrine, and Rule ONE infringes protected First Amendment freedoms.

First, the circuit court erred in finding Respondent operated subordinately to FTC oversight because the court incorrectly applied *Oklahoma*'s subordination standard. The mere potential to review enforcement acts is not enough to constitute supervision. Respondent's enforcement powers operate beyond the scope of FTC oversight because the agency only retains the potential to review Respondent's conduct. This potential occurs at the tail end of the enforcement process and hinges on private citizens challenging Respondent's sanction. The FTC fails to supervise any of Respondent's enforcement acts prior to the end-of-process review. In this way, Respondent's regulatory scheme is distinguishable from those this Court has upheld in the past. Further, exceptions to the private nondelegation doctrine should be sparingly allowed because there is no Constitutional basis for the delegation of federal power to private entities.

Second, the circuit court erred in applying the rational basis test to review Rule ONE, as this Court's precedent consistently demonstrates a pattern of applying strict scrutiny to laws that impose a blanket burden on adults' freedom of speech. Although the circuit court correctly acknowledges the government's compelling interest in protecting its minors, it misinterprets *Ginsberg*, creating a circuit split. Furthermore, strict scrutiny review is crucial to safeguarding the identities of adults seeking access to sexual material that they have a lawful right to view. The long-standing tradition of narrowly applying laws that burden speech underscores the fundamental importance of free speech in America. If the Court resolves the circuit split in favor

of Respondent, the nation's freedom of speech could become vulnerable to overly burdensome legislation.

Lastly, under strict scrutiny, this Court should determine that Rule ONE fails the test because it is not narrowly tailored, and less restrictive alternatives exist. Because the government has not considered the numerous ways minors can access sexually explicit material, the injunction should be reinstated to allow KISA to revise its regulation. Moreover, even if this Court concludes Rule ONE is narrowly tailored, modern content filtering and internet blocks achieve substantially the same results as age verification while more closely aligning with the principle that parents have the primary right to govern their children.

ARGUMENT

The Court should reverse the lower court's ruling in favor of the government and uphold the district court's injunction. KISA's enforcement powers lack proper supervision by the FTC, and Rule ONE violates the First Amendment by censoring adults' freedom of expression. Preliminary injunctions are extraordinary remedies granted when the factors demonstrate an inequitable balance requiring judicial intervention. *Firearms Regul. Acct. Coal., Inc. v. Garland*, 112 F.4th 507, 517 (8th Cir. 2024) (citing *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013)). While generally reviewed for abuse of discretion, courts review all "underlying legal conclusions" of a preliminary injunction *de novo*. *Id.*

To obtain a preliminary injunction, the moving party must satisfy four factors: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm without preliminary relief; (3) a favorable balance of equities; and (4) service to public interest. *Id.* Here, PAC's likelihood of success on the merits is the sole contested factor, as the parties stipulated to the other three. *Id.*; R. at 5-6. Upon *de novo* review, the Court may examine the entire record

independent of the lower court's decision. *See O'Brien v. Caterpillar Inc.*, 900 F.3d 923, 928 (7th Cir. 2018).

While this brief does not address damages or attorney's fees, it will discuss why PAC has a strong likelihood of success on the merits. R. at 5-6. First, this brief explains why KISA represents an unconstitutional delegation of congressional power to a private entity. Next, it discusses why strict scrutiny is the proper standard of review for Rule ONE. Finally, it shows why Rule ONE fails strict scrutiny. For these reasons, the Court should reverse the circuit court's decision and reinstate the injunction.

I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S DECISION AND HOLD THAT KISA'S ENFORCEMENT POWER VIOLATES THE PRIVATE NONDELEGATION DOCTRINE.

The lower court erroneously found KISA's enforcement power in compliance with the private nondelegation doctrine because KISA operates concurrently, not subordinate, to the FTC. The Constitution vests federal power in three separate branches of government: Congress, the President, and federal courts. *See* U.S. Const. art. I § 1; art. II § 1; art. III § 1. Pursuant to the "private nondelegation" doctrine, federal power cannot be delegated to private entities. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). However, some power *may* be permissibly delegated to private entities that operate subordinately to a government agency. *Id.* at 229. This Court has held that delegation is proper when a private entity acts "as an aid" to a government agency that retains "ultimate authority" on delegated matters. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940). Subordination exists when a government agency exercises "authority and surveillance" over the private entity's conduct. *Id.* at 399.

However, the circuit courts have split on the meaning of "subordination" within the private nondelegation doctrine. *Compare Oklahoma*, 62 F.4th at 221 (recognizing the potential

for review of the private entity's enforcement as sufficient), *with Nat'l Horseman's Benevolent and Prot. Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*Black II*) (requiring review of the private entity's enforcement acts). The Sixth Circuit notes that a private entity operates subordinately when it (1) has "materially different power[s]" from an agency, (2) yields to agency supervision, and (3) "lacks the final say over . . . enforcement of the law." *Oklahoma*, 62 F.4th at 229. The circuit further claims that a private entity is constitutionally supervised when an agency has the mere potential to "subordinate every aspect of . . . enforcement." *Id.* at 231. Particularly, the potential authority for *de novo* review of an entity's sanctions constitutes proper supervision. *Id.* at 243 (Cole., J., concurring in judgment).

Conversely, the Fifth Circuit recognizes that private entities are not subordinate when "agency oversight [is permitted] only after the enforcement process is over." *Black II*, 107 F.4th at 433. Subordination requires the agency to "retain[] formidable oversight power to supervise, investigate, and discipline [the private party] for any possible wrongdoing or regulatory missteps" *Id.* at 435 (citing *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007) (distinguishing the SEC's supervisory role from the FTC)).

In *Adkins*, a coal company challenged the authority of the Bituminous Coal Code ("Code") after being taxed 19.5 percent on its coal. *Adkins*, 310 U.S. at 390-392. In the Bituminous Coal Act of 1937, Congress created the Code, a private entity, to aid the National Bituminous Coal Commission, a government agency, with regulating the sale and distribution of bituminous coal. *Id.* at 388-389. This Court held that Congress's delegation of power to the Code was constitutional because the Code operated "as an aid to the Commission [while remaining] subject to its pervasive surveillance and authority." *Id.* at 388. Although the Code proposed minimum and maximum prices for the sale of bituminous coal, the Commission had the ultimate

power to approve, modify, or reject the proposals. *Id.* Similarly, the Code could propose rules regarding the "sale and distribution of coal" to the Commission, who would then determine whether to implement them. *Id.* The Code was not given enforcement powers. *Id.* at 400. Instead, the Commission enlisted an administrative agency, the Commissioner of Internal Revenue, to enforce rules and collect taxes. *Id.* Ultimately, the members of the Code "function[ed] subordinately to the Commission" which made the Code's authority constitutionally sound. *Id.* at 399.

In *Black II*, a trade association of racehorse owners challenged the regulatory scheme of the Horseracing Integrity and Safety Act (HISA) because HISA delegated enforcement powers to a private entity. *Black II*, 107 F.4th at 426. Through HISA, Congress created the Horseracing Integrity and Safety Authority (Authority), a private entity, and charged it with the regulation of thoroughbred horseracing. *Id.* at 421; *See* 15 U.S.C.A. § 3052(a). According to HISA, the Authority operates subordinately to the Federal Trade Commission (FTC); in other words, the private entity is meant to operate under the relevant government agency's oversight. *Id.* While the Authority's rulemaking power has withstood constitutional challenges, its enforcement power has been called into question. *See Black I*, 53 F.4th 869 (5th Cir. 2022) (striking down the Authority's rulemaking powers); Amendment by Commission of rules of Authority 15 U.S.C.A. § 3053(e) (clarifying the FTC's role in rulemaking); *Black II*, 107 F.4th at 426 (upholding Amendment clarifying Authority's rulemaking authority).

The court held the Authority's enforcement power violated the nonprivate delegation doctrine because the Authority was operating concurrent to the FTC – without the FTC's supervision. *Black II*, 107 F.4th at 421. Under HISA, the Authority has the power to "investigate [potential violations], issue subpoenas, conduct searches, levy fines, and seek injunctions" – all

without the FTC's approval. *Id.* The court noted that the physical enforcement of doping and medication rules falls on the USADA, but even that enforcement is done "on behalf of the Authority." *Id.* at 421-422.

Additionally, "penalties imposed by the Authority are not automatically stayed pending appeal." *Id.* at 430 (citing 16 C.F.R. § 1.148(a)). The FTC can exercise its discretion and order a stay pending appeal, but the penalty is nonetheless automatically implemented after the Authority designates a sanction. *Id.* The FTC technically retains the power to review the Authority's sanctions, yet this review occurs only at the tail end of the process – if at all. *Id.* The court emphasizes that if a sanctioned individual chooses to pay the fine rather than appeal the sanction, the FTC *never* has the opportunity to review the Authority's efforts. *Id.* (comparing the Authority's enforcement power to that of police officers). Therefore, in settlement scenarios the Authority's enforcement power is not reviewed at all. *Id.* Further, the Authority exclusively has the power to seek injunctions and conduct warrantless searches against HISA violators – independent from the FTC. *Id.* at 431. The FTC plays no role in the civil litigation process beyond potential review at the end. *Id.* Ultimately, the court emphasizes "[t]he bottom line . . . that a private entity, not the agency, is in charge of enforcing HISA." *Id.*

Legislative history reveals internal concern over HISA's delegation of enforcement powers to the Authority. *Opposing the Unconstitutional Horseracing Integrity and Safety Authority*, Extensions of Remarks, 169 Cong. Rec. E43 (01/24/2023) (statement of Rep. Lance Gooden, Texas). Congress noted that, under HISA, the Authority's rulemaking power was "written so badly that no rule [would] ever be rejected" by the FTC. *Id.* The FTC itself expressed that its supervisory role over the Authority has "been a bit of a challenge [to] fully implement." *Oversight of the Federal Trade Commission: Hearing before the Committee on the Judiciary*,

U.S. House of Representatives Committee on the Judiciary, 118th Cong. (1st Sess. 2023) (FTC Chair Lina Khan responding to Rep. Gooden). Despite congressional intent to decrease horseracing-related deaths, the opposite has occurred under the Authority's enforcement of HISA. *Id.*

In the Securities Exchange Act of 1934, Congress created the Securities and Exchange Commission (SEC) to regulate the national market. *Kim v. Fin. Indus. Regul. Auth., Inc.*, 698 F.Supp.3d 147, 156 (D.D.C. 2023); *See* 15 U.S.C.A. § 78a *et seq*. Four years later, Congress amended the legislation to allow private entities to register with the SEC as self-regulating organizations over the securities industry. *Id.* The Financial Industry Regulatory Authority (FINRA) is a private national securities association that works under the SEC to help regulate the securities industry. *Id.* at 157. FINRA supervises the industry while also being "subject to oversight from the SEC." *Id.* at 158. "Though opportunities have abounded, no court has ever held that FINRA or its relationship with the SEC is unconstitutional." *Id.* at 153; *See e.g., Todd & Co., Inc. v. S.E.C.*, 557 F.2d 1008, 1014 (3rd Cir. 1977).

In *Kim*, a securities broker challenged the enforcement powers of FINRA after being sanctioned for unethical conduct. *Kim*, 698 F.Supp.3d at 159. The court held that FINRA's sanctions against the broker – a $30,000 fine and $16,000 disgorgement of profits – were appropriate because FINRA operated subordinately to the SEC. *Id.* at 161. The court reasoned that the SEC's extensive "authority and surveillance over [FINRA's] activities" constituted proper subordination. *Id.* at 166 (citing *Adkins*, 310 U.S. at 399 (1940)). Though FINRA initiated enforcement efforts, the SEC retained "ultimate control" over enforcement. *Id.* (citing *Oklahoma*, 62 F.4th at 229 (2023)). The SEC had the power to "cancel, reduce, or require the remission of" a FINRA imposed sanctions that poses an unnecessary or excessive burden on the

industry. *Id.* at 166; *See* 15 U.S.C.A. § 78s *et seq*. Additionally, the SEC alone has the power to issue subpoenas. *Id.* at 166.

The court emphasized the SEC's discretionary authority to relieve FINRA of all its enforcement powers. *Id.* at 166. The SEC may also suspend FINRA's authority for 12 months if FINRA exceeds the bounds of its SEC-approved conduct. *Id.* In response to the court's FINRA-friendly analysis, the securities broker argued that the SEC's power to review FINRA sanctions was nothing more than a mere theoretical that the SEC rarely employed. *Id.* at n. 16. Rather, the SEC had effectively "abandoned its responsibility to actually supervise and control FINRA." *Id.*

Despite continuous approval from the courts, the SEC-FINRA regulatory scheme has not escaped legal criticism. Tamar Hed-Hofmann, Introduction, *The Maloney Act Experiment*, 6 Bos. Coll. Indus. and Com. L. Rev. 187 (1965). Following its inception, the SEC's delegation of authority to private entities was considered "a unique experiment in supervised self-regulation." *Id.* While initially minimal, the SEC's supervisory role later intensified in light of disgruntled industry members who favored complete self-regulation. *Id.* at 212. Supervision of private self-regulatory organizations is imperative because the interests of private broker dealers are "in direct conflict with public interest." *Id.* at 213. Today, FINRA's website clearly states that it operates "under the close supervision of the SEC." *What It Means to Be Regulated by FINRA*, FINRA: 85 Years of Protecting Investors (April 22, 2024), http://www.finra.org/insights/regulated-by-FINRA (last visited Jan. 20, 2025). Evidencing their shared enforcement authority, both the SEC and FINRA consolidated their respective enforcement teams in 2017. *Consolidation of Enforcement Functions*, FINRA: 85 Years of Protecting Investors (April 2018), http://www.finra.org/about/finra-360 (last visited Jan. 20, 2025); Michael S. Piwowar, *Remarks at FINRA and Columbia University Market Structure Conference*, U.S. Securities and Exchange

Commission (October 26, 2017), http://www.sec.gov/newsroom/speeches-statements/speech-piwowar-2017-10-26 (last visited Jan. 20, 2025).

Like the Authority in *Black II*, KISA enforces rules without FTC supervision. Under statutory authority, the FTC can modify KISA's rules and even make rules itself. In contrast, KISA's liberal enforcement powers are decidedly distinct from FTC supervision. The statute vaguely mentions FTC oversight of KISA's enforcement powers only once – in an amendment expanding the FTC's own rulemaking authority. As the *Black II* court explained, an amendment making a private entity's rulemaking authority constitutional does not offer blanket protection of that entity's enforcement authority. KISA's extensive enforcement powers include: the ability to (1) launch investigations, (2) issue subpoenas, (3) levy sanctions, and (4) seek injunctive relief against violators through civil litigation – all without FTC supervision. None of KISA's enforcement actions require prior approval from or routine documentation with the FTC. KISA's enforcement authority lies securely in the private entity's own discretion. FTC oversight of KISKA enforcement is nonexistent without a legal challenge to KISA's sanctions.

The FTC's sole power to review KISA's conduct follows an administrative law judge's (ALJ) determination regarding a penalty. KISA sanctions are implemented immediately; stays are only granted at the discretion of the FTC or ALJ. The court's example in *Black II*, equating the Authority's enforcement role to that of a police officer, applies to KISA's unsupervised conduct. When the FTC opts to review an adjudicatory decision, both KISA's procedural conduct and the sanction itself are under review. While comprehensive, the FTC's power of review hinges on challenged sanctions. Without penalized individuals seeking equitable relief, the FTC would *never* have the chance to review KISA's enforcement acts. Because of this, KISA routinely polices without FTC oversight.

Further, the FTC fails to properly review KISA's enforcement conduct when given the opportunity. The faulty determination in *Oklahoma*'s concurring opinion, that the FTC properly supervises a private entity when it retains the potential for *de novo* review, is rejected here. Specifying a standard of review is irrelevant when an agency refuses to meaningfully invoke its reviewal power. Further, the *Oklahoma* court's recognition that the FTC power of review is optional is itself an admission that numerous enforcement steps occur beyond the scope of FTC supervision. The agency has only opted to review a KISA sanction *once*. R. at n. 3. Following review, the FTC ultimately "declin[ed] to take any action." R. at n. 3. Thus far, KISA's enforcement determinations are final because the FTC has never taken action to contradict or modify them. The FTC power to review KISA's enforcement is a mere possibility at best and a façade at worst.

In *Kim*, the court upholds the SEC-FINRA regulatory scheme, despite criticism that the SEC had forsaken its supervisory role, because the SEC maintained ultimate control over FINRA's enforcement power. The KISKA regulatory scheme is highly distinguishable from the SEC's relationship with FINRA. FINRA operates as a subordinate that aids the SEC, rather than an independent actor. Additionally, SEC-imposed limits over FINRA's enforcement power are statutorily expressed. Unlike the SEC, the FTC cannot revoke KISA's enforcement powers at its discretion. Nor can the FTC suspend KISA for any length of time. While the FTC and KISA share rulemaking authority, rule enforcement falls solely to KISA.

The capabilities of the FTC and SEC to properly supervise private entities are further distinguished by their respective leadership. The SEC Commissioner publicly heralds the agency's close relationship with FINRA and their shared goal of consolidating enforcement measures. Whereas the FTC Chair, during a Senate hearing, expressed apologetic remarks about

the agency's uncertainty regarding its enforcement role under HISA's regulatory scheme. This uncertainty has affected HISA's success, as more horseracing related deaths have occurred under HISA's regulation than without. The majority opinion from the Fourteenth Circuit acknowledges KISA's nearly identical structure to HISA, yet fails to make similar connections between their deficiencies. Based on the Chair's own remarks, the FTC's confusion regarding HISA enforcement, and its subsequent failure, will translate to KISA. Protecting children's safety online is too imperative to be carelessly neglected by an ineffective regulatory scheme.

In *Adkins*, this Court acknowledged the risk of private entities wielding enforcement power. The regulatory scheme was upheld because it solely allowed the Bituminous Coal Code to act as an aid in the rulemaking process. Rule enforcement was left to an administrative agency, not the private entity. Here, the enforcement process is distinctly carried out by KISA – independent from the FTC. An ALJ only enters the picture once a sanctioned individual challenges KISA's enforcement. Further, the entire enforcement process can occur without FTC oversight of any step.

Delegated power must remain minimal because the Framers intended federal power to reside solely within the three branches of the federal government. *See Dept. of Transp. v. Assoc. of American Railroads*, 575 U.S. 43, 56-91 (2015) (Scalia, J. concurring in judgment). Despite the nation's technological evolution, the "allocation of powers in the Constitution is absolute." *Id.* at 69 (Thomas, J. concurring in judgment). Congress's enumerated powers include the ability to pass Rule ONE as legislation. The risk of unconstitutionally delegating power to private entities is evidenced by HISA: a private entity with unchecked enforcement power that ultimately fails to achieve its purpose. Here, the delegated federal power resides multiple degrees of separation away from the federal government. KISA wields federal enforcement power

without any oversight from a government agency. Further, KISA itself can delegate enforcement power to other private bodies (e.g. non-profit child protection organizations). KISKA evidences the slippery slope of private entities wielding unchecked federal power when that power is improperly supervised. Therefore, the government must err on the side of caution when allowing exceptions to the private nondelegation doctrine.

KISA's extensive enforcement powers violate the private nondelegation doctrine. KISA effectively operates concurrent to the FTC because its enforcement powers are not subject to FTC oversight. Therefore, this Court should reverse the lower court's ruling that KISKA's regulatory scheme is constitutional.

II. THE COURT SHOULD REVERSE THE CIRCUIT COURT'S RULING BECAUSE, UNDER THE FIRST AMENDMENT, RULE ONE IS SUBJECT TO STRICT SCRUTINY REVIEW, THE GOVERNMENT FAILED TO NARROWLY TAILOR RULE ONE TO PROTECT CHILDREN ON THE INTERNET, AND THERE ARE LESS RESTRICTIVE ALTERNATIVES TO RULE ONE.

Rule ONE violates the First Amendment as a content-based restriction falling within the amendment's protected scope. The Respondent cannot rely on precedent to justify subjecting Rule ONE to rational basis review. Further, the government fails to demonstrate that Rule ONE is narrowly tailored to achieve a compelling interest using the least restrictive means possible. Thus, the circuit court erred in lifting the injunction for respondent, and under *de novo* review, this Court should reverse that decision and reinstate the injunction against enforcing Rule ONE.

A. Rule ONE is Subject to Strict Scrutiny Because it is Content-Based and Abridges the Expressive Conduct of Adults Rather than Narrowly Protecting Minors.

The First Amendment protects "the freedom of speech" from government abridgment. U.S. Const. amend I. To protect this essential freedom, this Court has consistently defended expressive speech in various forms from invasive laws. *Hurley v. Irish-Am. Gay, Lesbian and*

Bisexual Group of Boston, 515 U.S. 557, 570 (1995) (noting free speech can be expressed and received); *Sable Commc'n of Cal., Inc.*, 492 U.S. 115, 126 (1989). At its core, the protection of freedom of speech highlights that the government cannot restrict citizens' expressions based on their message or content. *Nat'l Inst. of Fam. and Life Advoc.'s v. Becerra*, 585 U.S. 755, 766 (2018) (cleaned up). This Court's precedent distinguishes between content-neutral and content-based regulations. *Id.* Content-based regulations, which restrict speech based on its subject matter, are presumptively unconstitutional. *Id.* Therefore, content-based regulations can only survive if "the government proves that they are narrowly tailored to serve compelling [government] interests." *Id*.; *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (noting stricter standards apply to statutes with a "potentially inhibiting effect on speech"). While the government may regulate sexual material deemed obscene for minors, *Ginsberg v. New York*, 390 U.S. 629, 641 (1968), it cannot infringe on adults' constitutionally protected liberties. *See Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (discussing the chilling effect of free speech infringement laws); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that when the law appears on its face to be "within a specific prohibition of the Constitution, such as those of the first ten Amendments[,]" a narrower scope should apply). Consequently, the government cannot reduce permissible adult conduct on the internet to "only what is fit for children." *Reno v. Am. C.L. Union*, 521 U.S. 844, 892 (1997) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Congress must protect minors from sexual material harmful to minors without chilling adult free speech. *Reno*, 521 U.S. at 892. In *Reno*, the government's enacted the "Communications Decency Act of 1996" (CDA) to shield minors from the effects of patently offensive speech on the internet. *Id.* at 849, 868. The CDA prohibited knowingly sending or

displaying patently offensive messages to minors through an interactive computer to achieve its goal. *Id.* at 859-60. The statute defined messages as any comment, suggestion, proposal, image, or other communication depicting sexual or excretory activities in a patently offensive way, judged by contemporary community standards. *Id.* Although the court acknowledged that publishers often do not know the identity of their audiences, the CDA still imposed punitive fines. *Id.* at 857, 860. The CDA applied to the entire internet including message boards, listservs, and chat rooms, but it provided producers with affirmative defenses: (1) making a good faith effort to restrict minors' access; and (2) verifying users' ages to block minors. *Id.* at 860-61. The Court held the CDA is a "content-based blanket restriction" subject to strict scrutiny because (1) it encompassed the "entire universe of cyberspace," and (2) significantly suppressed speech that adults have a constitutional right to send and receive. *Id.* at 868, 874; *see Sable*, 492 U.S. at 126 (applying strict scrutiny to strike down a statute that prohibited indecent material on telephone messages).

In *Ashcroft II*, Congress enacted the Child Online Protection Act (COPA) to safeguard minors under seventeen by penalizing commercial entities that exposed them to harmful sexual materials online. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 659-61 (2004). COPA defined harmful materials as any communication, including images and videos, that (1) "the average person, applying contemporary community standards," would find appeals to "the prurient interest," (2) depicts "patently offensive" acts such as actual or simulated sexual activity, and (3) lacks "serious literary, artistic, political, or scientific value for minors" when viewed as a whole. *Id.* at 661-62. COPA aimed to reduce the burden of this restriction by allowing commercial producers to verify users' ages through credit cards, access codes, personal identification numbers, digital age certificates, or any other feasible measures supported by existing

technology. *Id.* at 662. This Court upheld an injunction, ruling that strict scrutiny is the appropriate test to ensure the government meets its burden of proof for a content-based prohibition that burdens some protected speech. *Id.* at 660, 663; *Am. C.L. Union v. Mukasey*, 534 F.3d 181, 184-85, 190 (3rd Cir. 2008) (using strict scrutiny against COPA on remand), *cert. denied*, 555 U.S. 1137 (2009).

Rational basis review applies when the government is only restricting material that is deemed obscene for minors. *Ginsberg*, 390 U.S. at 635 (referencing *Roth v. United States*, 354 U.S. 476, 485 (1957)). In *Ginsberg*, a New York statute prohibited knowingly selling "girly magazines" deemed obscene for children directly to minors. *Id.* at 631-35. However, the statute permitted the sale of the "girly magazines" to adults. *Id.* at 634-35. After his conviction, the defendant challenged the statute, arguing that the state could not define freedom of expression based on "whether the citizen is a minor or adult." *Id.* at 636 (claiming the statute burdened children's speech). The Court rejected this argument, holding the statute was constitutional and that the rational basis test applied because the magazines are obscene for children, placing them outside First Amendment protections and within the state's power to regulate children's well-being. *Id.* at 639. Thus, *Ginsberg* clarified that the government can regulate children's conduct "beyond the scope of its authority over adults" when material is obscene for minors. *Id.* at 638. However, the Court left unresolved whether a restriction aimed at protecting children, but adversely affecting adults, is still subject to rational basis review. *See Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); *see also Free Speech Coa., Inc. v. Paxton*, 95 F.4th 263, 293 (5th Cir. 2024) (Higginbotham, J., dissenting in part and concurring in part) ("*Ginsberg*'s force here is its recognition of a state's power to regulate minors in ways it could not regulate adults").

Here, Rule ONE operates as a content-based blanket restriction by requiring all commercial entities with over ten percent of content deemed harmful sexual material to minors to verify users' ages. 55 C.F.R § 2(a). First, like *Reno*, where the CDA aimed to protect minors from patently offensive speech online, KISA aims to protect minors while online. R. at 2. Second, like the CDA in *Reno* restricted knowingly spreading sexual or excretory material to minors online, Rule ONE restricts knowingly spreading sexual material that is harmful to minors on the internet by requiring age verification systems. Third, like *Reno*, where the CDA applied to the entire internet, Rule ONE applies to any commercial entity or website where ten percent of the content consists of sexual material harmful to minors. Fourth, like the CDA in *Reno*, where the CDA imposed punitive fines despite content producers being unable to reasonably identify their audience, Rule ONE imposes punitive fines even when publishers struggle to implement effective age verification system to screen minors. Lastly, unlike the CDA in *Reno*, which provided affirmative defenses, Rule ONE does not have any defenses for content publishers who do not have effective age verification. *See* 55 C.F.R. § 1, *et seq.* Hence, Rule ONE functions as a content-based blanket restriction that suppresses the constitutionally protected speech of adults by reaching most of the internet. In *Reno*, this Court held the CDA was unconstitutional, and given the similarities, this Court should also hold Rule ONE is unconstitutional.

Further, Rule ONE is extremely similar and more burdensome than COPA because it requires commercial entities to implement age verification by government ID or other private transactional data. 55 C.F.R. § 3. Like *Ashcroft II*, where COPA restricted commercial entities from distributing sexually harmful materials to children under seventeen, Rule ONE extends this restriction to children under eighteen. Additionally, both COPA in *Ashcroft II* and Rule ONE define sexually harmful material for minors in three parts: (1) material appealing to a prurient

interest, based on contemporary community standards; (2) depictions of actual or simulated patently offensive sexual material; and (3) material without any social value for minors. Finally, while COPA in *Ashcroft II* provided an affirmative defense for commercial producers who used reasonable age verification methods, Rule ONE mandates that commercial producers implement such methods to restrict access to sexual material harmful to minors. Therefore, because this Court upheld an injunction in *Ashcroft II* and applied strict scrutiny to evaluate the government's content-based prohibitions, it should similarly reinstate the injunction and apply strict scrutiny to Rule ONE.

Ginsberg does not apply here because this Court has since upheld the use of strict scrutiny when age verification is required for adults to access sexually explicit material online. R. at 14. Drawing a parallel with *Ginsberg* would impede this Courts precedent. Here, Rule ONE requires all people accessing websites with ten percent sexually explicit material to provide age verification in some reasonable form, including adults. R. at 3. These identification measures create a chilling effect by discouraging adults from accessing content they have the liberty to view. R. at 4. Therefore, Rule ONE falls within a specific constitutional prohibition and is subject to strict constitutional review, unlike *Ginsberg*. In *Ginsberg*, a case from the 1960's, the court held that New York had a rational basis to punish shop owners for selling "girly" magazines to minors, when it still allowed adults to buy the magazines. However, in *Reno* and *Ashcroft*, this Court clarified that strict scrutiny applies when age verification measures are required to access sexually explicit material online. Unlike *Ginsberg*, where commercial sales allowed in-person identification of an adult, Rule ONE requires individuals to submit valid identification online, creating a known risk of security breaches. Moreover, *Ginsberg* involved a challenge to the burden placed on minors, while PAC challenges Rule ONE's burden on adults

seeking access to sexually explicit content. While *Ginsberg* only implicates a chilling effect on the adults purchasing "girly" magazines due to age confirmation at checkout, Rule ONE imposes a direct chilling effect by requiring adults to confirm their age before accessing explicit content. Therefore, unlike this Court's application of the rational basis test in *Ginsberg*, the Court should distinguish Rule ONE as it did in *Reno* and *Ashcroft* and apply strict scrutiny.

From a policy perspective, this Court should strike down Rule ONE due to its significant privacy concerns. Global data breaches online rose by seventy-two percent in 2023. *Data Breaches and Online Identity Verification Solutions*, Electronic Verification Systems (July, 31, 2024, 1:43 PM), https://evssolutions.com/insights/data-breaches-and-online-identity-verification-solutions/. Although internet security measures have improved and continue to evolve, criminal hackers still find ways to get access to identity data, putting individuals at risk. *Id.* Hackers exploit any available method to extract information from private entities, including phishing and malware. *Id.* Hackers also use spyware installation, a common method that allows them to steal identities without the victim's knowledge or consent. *Internet Safety: How to Protect Yourself Against Hackers*, The Office of Minnesota Attorney General, https://www.ag.state.mn.us/consumer/publications/HowtoProtectYourselfAgainstHackers.asp#:~:text=One%20way%20is%20to%20try,attachments%2C%20images%2C%20and%20links%20in (last visited Jan. 19, 2025). Although some third parties assist companies with age verification, no company is out of reach for these hackers. *Data Breaches*, *supra.* In recent years, major entities including Twitter, Yahoo, Equifax, and 23andME have suffered data breaches, proving that privacy remains a serious even for the companies that can afford high-cost security *Id.* These privacy concerns force adults to choose between exposing their identity online or refraining from

engaging in constitutionally protected speech – a dilemma absent in *Ginsberg*. *See Id.*; *Ginsberg*, 390 U.S. at 131.

The Respondent may argue that modern age verification technology is advanced enough to curb privacy concerns, but this argument fails because data exposure is not hypothetical – it is only a matter of time. Jason Kelley, *Hack of Age Verification Company Shows Privacy Danger of Social Media Laws*, Electronic Frontier Foundation (Jun. 24, 2024), https://www.eff.org/deeplinks/2024/06/hack-age-verification-company-shows-privacy-danger-social-media-laws. Even if a company or third party is required to delete collected data, internet users have no control over what actually happens to their information. *Id.* The recent data breach of third-party identification specialist AU10TIX, where data from TikTok and Twitter was leaked, illustrates this risk. *Id.* The age verification platforms promoted by lawmakers function as surveillance systems that are attacked daily. *Id.*

Furthermore, upholding blanket age verification statutes risks initiating a reverse *Lochner* era for the First Amendment, triggering a snowball effect that permits government intrusion on protected free speech. During the *Lochner* era, this Court was famous for striking down legislation based on its own views. Samuel Bagenstos, *Lochner Lives On*, Econ. Pol'y Inst. (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/. Justifying age verification legislation on commercial websites through personal views risks overturning decades of free speech precedent holding that Congress cannot "burn the house to roast the pig." *See* Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More Than a Half-Century Later*, 64. Fed. Commc'ns. L.J. 247, 251 (2012). Since *Butler*, the Court has continuously struck legislation that limits adults' access to material deemed only fit for children. *Id.* (referencing *Reno*, *Ashcroft*,

and *Sable*). This precedent contrasts with *Ginsberg*, where New York created a two-tiered, age-dependent approach to regulating obscene material. *Id.* at 261. That approach allowed adults to access sexual material while prohibiting minors from doing so. *Id.* With the Court's consistent application of *Butler* to free speech cases implementing childlike restrictions on adults, a decision allowing those types of restrictions would interrupt the precedent of *Butler* and *Ginsberg*. *See Id.* at 270-71. (reinforcing how the Court viewed the two cases differently). If the Court relies on personal views about pornography to justify rational basis review for age verification laws targeting material not obscene for adults, it could create a reverse *Lochner* era for the First Amendment, enabling widespread legislation that restricts free speech due to the deference given to the legislator under rational basis review. Bagenstos, *supra*; Jeff Baldassari, *Rational Basis Test: Unveiling Its Role in Law*, From Associate to Ambassador, https://www.fromassociatetoambassador.com/post/rational-basis-test (Jul. 9, 2024).

Rule ONE imposes an unconstitutional burden on adults by requiring them to identify themselves before accessing sexual material they have a constitutional right to consume. Considering this Court's precedent, *stare decisis* demands reversing the circuit court's application of the rational basis test to indecent speech that is protected for adults. The privacy risks of online age verification and the potential for congressional overreach under rational basis review are too great to ignore. Therefore, this Court should apply strict scrutiny to Rule ONE and reinstate the injunction placed by the District Court.

B. The Government Fails to Satisfy Strict Scrutiny Because Rule ONE is Not Narrowly Tailored to its Goal of Keeping the Internet Safe for Children, and There are Other Effective Alternatives to Achieve that Goal.

To validly restrict a fundamental right like freedom of speech to serve a compelling government interest, it must pass strict scrutiny. *Sable*, 492 U.S. at 126. To pass constitutional

scrutiny, Rule ONE must be narrowly tailored to protect children online and it must be the least restrictive means possible. *See Id.* ("the means must be carefully tailored to achieve those ends"); *Butler,* 352 U.S at 383 (striking down "legislation not reasonably restricted to the evil with which it is said to deal"). A narrowly tailored statute avoids being either underinclusive or overinclusive. *Brown v. Ent. Merch. Ass'n.*, 564 U.S. 786, 805 (2011). An age verification statute is underinclusive if it allows children to access sexually explicit material through other means. *See Id.* Conversely, age verification statutes for the commercial web are overinclusive if they prevent minors from accessing sexually explicit material that they would otherwise be able to view with parental consent, or if they restrict adults from accessing protected speech. *See Id.*; *Prince*, 321 U.S. at 166 ("[i]t is cardinal … that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"). To be the least restrictive means, the government must prove no less restrictive alternative would achieve results substantially similar to those produced by age verification. *Reno*, 521 U.S. at 846 (explaining the governments heavy burden to justify why a less restrictive method would be less effective).

In *Sable*, a communications firm offered prerecorded sexually explicit telephone messages, known as "dial-a-porn." *Sable*, 492 U.S. at 117-18. Meanwhile, to restrict minors' access, the government imposed a blanket ban on indecent and obscene commercial telephone messages but provided a defense for companies that restricted access to adults only. *Id.* at 118, 120. The government argued that only a total ban could effectively curb minors' access to explicit messages and sought judicial deference. *Id.* at 129. The Court held that because First Amendment rights were at stake, judicial inquiry could not defer to the legislature. *Id.* at 130-31. The Court also found that the statute was not narrowly tailored, as it allowed "disobedient young

people" to circumvent its requirements while being overly effective in suppressing adults' use of the messages. *Id.* Additionally, the Court held the government failed to present evidence or legislative findings to meet its burden of proving a total ban was the least restrictive constitutional means, since no other version of the statute had been tested. *Id.* at 129-30; *Brown*, 564 U.S. at 805 (striking down an underinclusive statute on violent video games because it did not stop minors from accessing other violent material); *Reed v. Town of Gilbert*, 576 U.S. 155, 171-72 (2015) (striking underinclusive legislation that restricted certain temporary signage while allowing unlimited other signage, causing the same "eye sore" issue); *Ashcroft*, 542 U.S. at 706 (remanding for strict scrutiny review because the government failed to prove a content filtering system was not a constitutionally acceptable, less restrictive option than COPA); *Reno*, 521 U.S. at 879 (finding there were less restrictive alternatives to the CDA that banned obscene messages on the web).

Here, Rule ONE fails strict scrutiny. While the government has an interest in protecting minors online, Rule ONE forces *all* users, including adults, to verify their age before accessing web pages or apps containing over ten percent sexual material harmful to minors. R. at 3-4. The identification measure is not narrowly tailored to minors because it effects all adults who wish to access said websites or apps, it does not block other sites or apps where minors can observe the same sexually harmful material, and minors can bypass the security measures. R. at 5, 14. Additionally, less restrictive means, such as content filtering and internet blocking, can effectively protect minors online. R. at 5. This situation closely mirrors the unconstitutional provision in *Sable*, where the government attempted to protect minors from "dial-a-porn" recordings by imposing a blanket restriction. In *Sable*, this Court held the statute failed strict scrutiny, and this Court should also find Rule ONE to fail strict scrutiny.

Subsequently, Rule ONE is not narrowly tailored, and other methods exist to protect minors from sexually harmful material. First, like *Sable*, where the statute imposed a blanket prohibition on all "dial-a-porn" services, Rule ONE similarly imposes a blanket prohibition on all commercial websites with ten percent or more content that is sexually harmful to minors. Second, as *Sable* was underinclusive because disobedient minors could bypass the "dial-a-porn" restriction, Rule ONE is also underinclusive, as disobedient minors can easily bypass Rule ONE by accessing the same sexually harmful material on websites with less than ten percent of content, like Instagram. Third, as *Sable* was effective in censoring adult access to legally protected indecent material, Rule ONE is similarly effective in censoring adult access to legally protected indecent material because adults would likely be skeptical about entering personal information online. Further, like *Sable*, where no legislative findings supported a blanket age verification requirement as the least restrictive means, here the record lacks legislative findings that such a requirement is the least restrictive means to protect minors from sexually harmful materials. Like *Sable*, where the Court found strict scrutiny was not met, this Court should again find the government's attempt to protect children on the internet unconstitutional.

Rule ONE is clearly not narrowly tailored to promote child welfare on the internet. First, the emergence of Artificial Intelligence (AI) has allowed users to generate nude photos and videos of women just by submitting a picture. Pranshu Verma, *AI Fake Nudes are Booming. It's Ruining Real Teens' Lives.*, The Wash. Post (Nov. 5, 2023), https://www.washingtonpost.com/technology/2023/11/05/ai-deepfake-porn-teens-women-impact/. AI is cheap and easy to use, allowing youth to take pictures of their friends, put it into an AI tool, and in seconds, see them appearing naked. *Id.* Additionally, AI software has evolved to create realistic images that are essentially the same as logging onto a well-known porn website

by accessing millions of images on the web. *See Id.* Once the image is created, it can circulate the web, reaching thousands of people. *Id.* Unsurprisingly, AI technology can also create completely fake nude images, showing just how underinclusive Rule ONE is. *See* Rhiannon Williams, *Text-to-Image AI Models Can Be Tricked into Generating Disturbing Images*, MIT Technology Review (Nov. 17, 2023), https://www.technologyreview.com/2023/11/17/1083593/text-to-image-ai-models-can-be-tricked-into-generating-disturbing-images/.

Second, apps such as Instagram allow children to find porn in seconds. Johnathan Berr, *Despite 'No Nudity Rule,' Instagram is Chock Full of Pornography*, Forbes (Sept. 28, 2018, 2:38 PM), https://www.forbes.com/sites/jonathanberr/2018/09/28/despite-no-nudity-rule-instagram-is-chock-full-of-pornography/. Minors are not protected by Rule ONE because one simple "nude" or "sexy" search on Instagram will generate pornographic photos that are obscene for children. *Id.* Likewise, porn stars use the social media platform to gain popularity. *Id.* Additionally, minors aged thirteen and older can create Instagram accounts. *Id.* Worse, searches by minors can go undetected if they use a burner account, making Rule ONE extremely underinclusive and allowing minors to easily access sexually harmful material on social media. *Id.*; *see* Elizabeth Thorn, *Finsta: How to Set Up an Anonymous Instagram Account*, Burner, https://www.burnerapp.com/blog/anonymous-instagram-account (last visited Jan. 19, 2025).

Third, a simple Google search of "naked people" will yield pictures of naked people when you click the images tab. *See* Daniel Boan, *Facebook is Reportedly Reconsidering its Ban on Nudity After Dozens of Naked People Protested Outside its Offices*, Business Insider (Jun. 6, 2019, 12:26 PM), https://www.businessinsider.com/facebook-reportedly-reconsidering-artistic-nudity-guidelines-2019-6. Google is undoubtably a platform that minors have access to, and

considering the breadth of material on Google, sexually explicit content is less than ten percent. *See Id.* Therefore, a simple Google search makes Rule ONE underinclusive.

Fourth, the presence of Virtual Private Networks (VPN's) will not stop youth from accessing sexually explicit websites they desire, even if the website does require age verification. Sam Singleton, *Age Verification Laws Threaten Pornhub, But a VPN Can Help*, PCWorld (Jun. 20, 2024, 3:36 PM), https://www.pcworld.com/article/2302285/how-to-access-adult-content-websites-with-a-vpn.html. Minors wanting to access harmful sexual material can start their VPN and connect to a remote server in a different country. *Id.* The VPN will make the web traffic appear like it is being accessed from a different country. *Id.* With an easy way around the age verification process, minors in the United States are under protected by Rule ONE because it does not deal with VPNs at all. *Id.*; R. at 15.

Notwithstanding the government's failure to create a narrowly tailored statute, the government heavily failed to show age verification is the least restrictive means possible. Whenever the government does not prove they have enacted the least restrictive statute possible, the Court should be suspicious of Congress's *post hoc* intent. Richard H. Fallon, Jr., *Article: Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1334 n. 357 (2007). The Court has continuously recognized that when Congress does not present evidence showing their statute is the least restrictive means to meet their compelling interest, the statute is invalid. *Id.* at 1325, 1329 (referencing *Ashcroft* and *Sable* as a few cases). But the Court has also used a proportionality test to strike down some legislation. *Id.* at 1330 (highlighting how the Court assesses the effectiveness of each "least restrictive measure"). A judge might ask whether the proposed least restrictive measure would "equally advance" the government's interest, and if the answer is yes, then strict scrutiny fails. *See Id.* at 1331. While the argument can be made that less restrictive

alternatives are less effective by their nature, the Court should also consider the proportionality – does the less restrictive alternative achieve almost as much reduction of minors accessing sexually harmful material? *Id.* The Court will weigh both alternatives to make their decision. *Id.* This type of inquiry is done in instances where the harm congress wants to remedy cannot be extirpated completely. *Id.* at 1331-32 (referencing *Ashcroft*). In *Ashcroft*, the COPA statute as proposed would not have completely remedied child viewership of obscene material, and the court thought that content filtering would do just as well in that fight for child safety on the internet. *Id.* at 1332.

Here, applying the proportionality test we would likely find content filtering or internet blocks would produce substantially the same effect as age verification. As stated above, minors have numerous ways around the age verification process. Even if content filtering or internet blocks would be less effective in keeping children safe on the internet, the difference would be marginal. Like *Ashcroft*, the Court should recognize how the government has provided no legislative reasoning that age verification would be drastically more effective and should recognize that age verification could, at most, only be marginally better than content filtering.

To counter, the respondent will argue that content filtering has major issues with parent supervision and implementation. *Id.* (discussing Justice Breyer's dissent in *Ashcroft*). This argument is negated by the notion that parents have the right to govern the lives of their children. *Paxton*, 95 F.4th at 304 (Higginbotham, J., dissenting in part and concurring in part). Furthermore, modern content filtering gives parents the capability to oversee their child's internet use with ease. *See* Sofia Kaufman, *How to Block Inappropriate Content: 2024 Guide for Parents*, Aura (Mar. 15, 2024), https://www.aura.com/learn/how-to-block-inappropriate-content#:~:text=Aura%20allows%20parents%20to%20limit,it's%20right%20for%20your%20fa

mily (laying out ten methods to restrict child internet engagement). Modern technology even allows parents to entirely disable internet browsers. *Id.* While the content filtering might not be 100 percent fool proof, neither is age verification, and this Court should reinstate the injunction as the difference between age verification and content filtering is minimal.

Lastly, internet blocks directly from the Wi-Fi router can produce similar results to age verification. *Benefits of Using Parental Controls on Your Wi-Fi Router*, Gryphon, https://gryphonconnect.com/blogs/gryphon/parental-control?srsltid=AfmBOopLagK4igDgjNukN2zYte65cq1jKm5PyPGOCnTUKQK7-JmRuGnp (last visited Jan. 20, 2025). From one centralized location of the home parents can restrict what their children see on their devices. *Id.* Once the Wi-Fi is set up in the home, parents can customize the settings and create a pin number for them to maintain access to indecent material for themselves. *Id.* Additonally, this technology allows parental monitoring of the sites visited on their Wi-Fi network. *Id.* Congress could have considered requiring internet providers to sell Wi-Fi routers that block sexually explicit material, but they did not, so this Court should reinstate the injunction on Rule ONE.

Rule ONE does not pass strict scrutiny as it over includes adults in the age verification burden, and it under includes protection of children by requiring age verification on only a fraction of the sexually harmful material available on the internet. Furthermore, options such as content filtering and internet blocks are less restrictive alternatives to Rule ONE that would produce substantially the same result in protecting children on the internet.

CONCLUSION

Congress impermissibly violated the private nondelegation doctrine by creating a private entity that operates concurrently with the FTC, undermining the special grant of enforcement

power given to KISA. Under this lack of proper delegation, KISA unconstitutionally implemented Rule ONE because it suppressed adults' free speech by creating an age verification requirement, and the circuit court incorrectly applied rational basis. Rule ONE fails strict scrutiny and is impermissible because it is not narrowly tailored and there are less restrictive alternatives that can accomplish substantially the same result. Therefore, for the reasons stated herein and after a *de novo* review, this Court should reverse the Circuit Court's decision and reinstate the injunction on the KISA and Rule ONE.

SIGNED & DATED this 20th day of January, 2025.

/s/ **Team 33**
Team 33
Counsel for Petitioners