NO. 25-1779

IN THE
SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
Fourteenth Circuit Court

BRIEF FOR PETITIONER

TEAM NUMBER 39
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether Congress violated the private nondelegation doctrine by passing the Keeping the Internet Safe for Kids Act which grants the Kids Internet Safety Association unbridled enforcement powers.
2. Whether a law requiring pornographic websites to impose age verification restrictions on their platforms infringes upon the First Amendment right to Free Speech.

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is available at *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024), and pages 1 – 15 of the record. (R. at 1-15). The opinion of the United States District Court for the District of Wythe is unreported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment I to the United States Constitution provides:

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

15 U.S.C.A. § 78u(a)(1), in relevant part, provides:

> The Commission may . . . make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act . . . the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board . . . or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated.

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

> For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

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

> In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records.

15 U.S.C.A. § 78u(d)(1), in relevant part, provides:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter . . . it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C.A. § 78s(g)(1) in relevant part, provides:

> The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

15 U.S.C. § 3053(e) provides

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

15 U.S.C.A. § 3054(h) provides

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

15 U.S.C.A. § 3054(i) provides

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

15 U.S.C.A. § 3054(j)(1) provides

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

15 U.S.C.A. § 3057(d)(1) provides

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

15 U.S.C. § 3058(a) provides

> If the Authority imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Authority, the Authority shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

55 C.F.R. § 1(6), in relevant part, provides

> "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.

55 C.F.R. § 2(a) provides

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

55 C.F.R. § 2(b) provides

> 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(a) provides

> 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(a) provides

> If the Kids Internet Safety Association, 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.

55 C.F.R. § 5(a) provides

> 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.

STATEMENT OF THE CASE

I. Statement of Facts

In 2023, the United States Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), with the goal of keeping children safe from online pornography. This goal was justified by statistics indicating childhood pornography exposure is correlated with adverse mental health, a desire to engage with deviant pornography as an adult, and poor academic performance. As part of the legislation, Congress created a private corporation known as the Kids Internet Safety Association, Inc. ("KISA"), whose stated purpose is "to monitor and assure children's safety online." 55 U.S.C. § 3054(a). KISKA grants KISA both rulemaking and enforcement authority, but subjects KISA to the "oversight" of the Federal Trade Commission ("FTC").

Shortly after the passage of KISKA, KISA promulgated Rule ONE, which requires some websites and commercial entities to instate age verification technology on their platforms. Rule ONE applies to "any commercial entity that knowingly and intentionally publishes material on an internet website . . . more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 1.

II. Procedural History

Petitioner Pact Against Censorship is the largest trade association for the adult entertainment industry. The remaining three plaintiffs are John and Jane Doe, adult entertainment performers, and a production studio, Sweet Studios, LLC. Petitioners filed the instant action against Respondents in the United States District Court for the District of Wythe on August 15, 2023, requesting a permanent injunction against both Rule ONE and KISA's operation. Plaintiffs moved for preliminary injunction, which was granted by the District Court, having found that

Congressional delegation of power to KISA was proper, but granted the injunction based on the likely First Amendment violations. Respondent KISA appealed the District Court's ruling as to the free speech claim, and petitioners filed a cross-appeal as to the issue of nondelegation.

On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the injunction, finding first, Congress appropriately delegated power to KISA and second, strict scrutiny was not applicable and thus Rule ONE presented no violations of the First Amendment right to Free Speech.

SUMMARY OF THE ARGUMENT

The Court should uphold the injunction granted by the United States District Court for the District of Wythe because the broad delegation of enforcement power was unconstitutional, and Rule ONE, promulgated under that improper delegation, is a content-based restriction of speech that fails strict scrutiny.

The rulemaking authority granted to KISA is constitutional, as similar laws have been upheld in the past. The enforcement powers retained by KISA, however, which are not supervised by the Federal Trade Commission (FTC), are unconstitutional. The lower court mistakenly allowed the FTC's retroactive rulemaking to serve as adequate oversight. By granting KISA subpoena power, the ability to enforce civil penalties, and the right to sue companies independently, Congress created a framework in which KISA holds similar power to the FTC, violating constitutional principles that require subordination.

The private non-delegation doctrine prohibits unaccountable delegations of legislative and executive power, especially when private entities perform executive functions, such as investigations or enforcement, without sufficient government oversight. In *Black II*, the court found that HISA's broad enforcement powers, exercised without FTC supervision, were unconstitutional. KISA's enforcement powers raise similar concerns, as it operates without adequate oversight from the FTC, violating the constitutional requirement of subordination under the non-delegation doctrine.

The comparison between KISA and HISA highlights the broader issue of excessive delegation of federal power to private entities. In both cases, the statutes create a gap in supervision, granting private entities significant power without adequate government oversight. This unconstitutional arrangement undermines the accountability that is fundamental to

representative government. Unlike the Securities Exchange Act, which ensures robust oversight by agencies like the SEC, KISA lacks these safeguards. The SEC retains investigative and enforcement powers over entities like FINRA, a critical distinction from KISA's unchecked powers.

Rule ONE is a content-based restriction of speech, and therefore strict scrutiny must be applied. The Fourteenth Circuit erred in relying on *Ginsberg v. New York*, a case with little relevance to modern internet speech regulation. The Supreme Court's decision in *Reno v. ACLU* is far more pertinent, as it struck down parts of the 1996 Communications Decency Act ("CDA") for burdening adult speech. Rule ONE shares structural similarities with the CDA, making strict scrutiny the appropriate standard for review.

Under strict scrutiny, the government must demonstrate a compelling interest and prove that the law is narrowly tailored to achieve that interest without unduly restricting speech. While the government's interest in protecting minors from harmful content is compelling, Rule ONE ultimately fails this test because it is overbroad, regulating more content than necessary, and underinclusive, failing to sufficiently protect minors. Alternatives like content filtering provide both less restrictive and more effective means of achieving the same goal, rendering Rule ONE unconstitutional. Therefore, the injunction should be upheld.

ARGUMENT

I. The Keeping the Internet Safe for Kids Act is unconstitutional on its face because Congress improperly delegated enforcement authority to the Kids Internet Safety Association, Inc.

"Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'" *State v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). In an effort to create a safe online environment for kids accessing the internet, Congress passed the Keeping the Internet Safe for Kids Act ("KISKA" or "the Act"), which creates the Kids Internet Safety Association, Inc. ("KISA"), a "private, independent, self-regulatory, non-profit corporation" whose main objective is to "develop[] and implement[] standards of safety for children online and rules of the road for adults interacting with children online." 55 U.S.C. § 3052. The Act vests KISA with both rulemaking and enforcement authority, both of which must function subordinately to the Federal Trade Commission ("FTC") to comply with the private nondelegation doctrine.

The rulemaking power delegated to KISA is constitutional. Congress wrote the Act almost identically to the Horseracing Integrity and Safety Act ("HISA"), an act that was held to be unconstitutional until an amendment gave the supervising government agency, the FTC, the authority to "abrogate, add to, or modify the rules . . . as the Commission finds necessary or appropriate to ensure the fair administration of the Association . . ." 15 U.S.C § 3053; *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 420 (5th Cir. 2024) ("*Black II*"). Congress gave the FTC the same supervisory authority over KISA's rulemaking power that it did in the amended HISA. The Act is thus a constitutional delegation of rulemaking power because the supervising government authority, the FTC, has the power to not only alter and

reject rules proposed by KISA, but to independently add rules as it deems necessary. KISA retains, however, full autonomy over enforcement actions including the ability to unilaterally wield its subpoena and investigatory authority, create and enforce civil penalties, and file civil lawsuits against offending technological companies, all without the FTC's approval or supervision.

The Sixth Circuit held that HISA was made fully constitutional with the amendment of the "abrogate, add to, or modify" language increasing the FTC's supervision. The Fifth Circuit, however, held that, while the HISA amendment remedied the unconstitutional delegation of rulemaking power, it did nothing to cure the unconstitutional delegation of enforcement power granted to the Horseracing Authority in HISA, the same controversial delegation of authority at issue here.

Petitioner asks the Court to resolve this Circuit split in favor of the Fifth Circuit, holding that KISKA is unconstitutional on its face because the Constitution requires that private entities to which Congress grants its executive authority must function subordinately to a government agency, neither pre-enforcement involvement in rulemaking nor post-enforcement review is sufficient to constitute the requisite supervision for enforcement action piloted by the private entity, and there is no analogous enforcement scheme that has been approved by the courts.

A. The Constitution mandates that only the federal government may exercise federal power and limited delegation is justified only when the private party functions subordinately to a government entity.

"A cardinal constitutional principle is that federal power can be wielded only by the federal government. Private entities may do so only if they are subordinate to an agency." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) ("*Black I*"). To maintain "the government's promised accountability to the people," the private

nondelegation doctrine allows "only the federal government to exercise federal power." *Id.* at 880.The Constitution mandates that the federal executive, judicial, and legislative powers "shall be vested in" each of the three branches of federal government. U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

Federal power cannot be delegated wholesale to private parties. "[A]t a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679, 219 L. Ed. 2d 1298 (2024). "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). Legislative delegations "to private persons whose interests may be and often are adverse to the interests of others in the same business" is "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

There is "a principle upon which both sides [of the circuit split] agree: Federal lawmakers cannot delegate regulatory authority to a private entity." *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (Vacated and remanded on other grounds by Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 135 S. Ct. 1225, 191 L. Ed. 2d 153 (2015)). "As much as legislative power, the private nondelegation doctrine forbids unaccountable delegations of executive power." *Black II*, 107 F.4th at 428.

> The power to launch an investigation, to search for evidence, to sanction, to sue—these are all quintessentially executive functions. And they have been considered so from our Nation's founding. As much as legislative power, the private nondelegation doctrine forbids unaccountable delegations of executive power.

Id. When it amended HISA to give the FTC the power to "abrogate, add to, or modify" rules proposed by the Horseracing Authority, Congress cured the unconstitutional defect in the rulemaking delegation of authority, which "la[id] in the agency's being at the mercy of the Authority's policy choices." *Id.* at 424. Before the amendment, "when the Authority issued rules on the kinds of horseshoes permitted during races, the FTC . . . lacked the power to question the Authority's views*." Id*. at 424. Further, the Fifth Circuit has held that a private party may aid a federal agency by "providing the federal agency, which must of necessity work with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement." *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974).

"The provision that the Secretary shall make the necessary investigations to that end and fix the standards according to kind and quality is plainly appropriate and conforms to familiar legislative practice as shown by the various statutes already mentioned." *Currin v. Wallace*, 306 U.S. 1, 16–17 59 S. Ct. 379, 83 L. Ed. 441 (1939). "Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id.* at 16.

By giving KISA alone subpoena and investigatory authority, the ability to create and enforce civil penalties, and the power to file civil lawsuits against offending technological companies, Congress created a statutory scheme where KISA functions on the same level as the FTC, rather than subordinately, because KISA can perform each of those functions without permission or supervision from the FTC. This is evidenced in the Act itself, whereby Congress wrote

> the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall – implement

> and enforce the Anti-Crime Safety Agenda; and exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.

55 U.S.C § 3054. It does not matter that the FTC can attempt to stymy the breadth of KISA's authority by creating rules around how KISA may use its enforcement power; an over-delegation of power is plainly unconstitutional. The Sixth Circuit held that because "the FTC *could* subordinate every aspect of . . . enforcement," the private party is sufficiently supervised. *Oklahoma*, 62 F.4th at 231. The court, in that same opinion, stated unequivocally that "[p]rivate entities may serve as advisors that propose regulations." *Id.* at 229. The *Oklahoma* court further delineates between a private party's constitutional ability "to aid a public federal entity that retains authority over the implementation" and the unconstitutional delegation of power where the private entity can "create[] the law or retain[] full discretion over any regulations." *Id.*

In her dissent below, Justice Marshall correctly notes that "a private nondelegation doctrine violation does not simply go away because the private actor acts *nicely* with his government power." *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1, 12 (14th Cir. 2024). An over-delegation of federal authority is a violation of the private nondelegation doctrine; it does not matter if the private entity to whom the over-delegation was made does not exercise the power that constitutes the violation. This Court should thus reverse the decision of the 14th Circuit and hold that KISKA is unconstitutional on its face as an over-delegation of Congress' power because the private nondelegation doctrine plainly requires that the federal government alone may exercise federal power.

B. Limiting the FTC's involvement to pre-enforcement rulemaking and post-enforcement review is insufficient supervision under the private non-delegation doctrine.

Congress left a statutory gap in KISKA when it provided for the FTC's supervisory power over only the pre-enforcement rulemaking process and the post-enforcement review of KISA's actions, thereby allowing a private entity to exercise federal power virtually unchecked by a government entity. Private parties may, however, *aid* government agencies in their exercise of federal power. *Oklahoma*, 62 F.4th at 229. "Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'") *Rettig*, 987 F.3d at 532 (quoting *Sunshine*, 310 U.S. at 399.) "Congress may formalize the role of private parties in proposing regulations so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve[], disapprove[], or modif[y]' them." *Black I*, 53 F.4th at 881(quoting *Ass'n of Am. Railroads*, 721 F.3d 666). The "discretionary power to seek judicial relief[] is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law . . ." *Buckley v. Valeo*, 424 U.S. 1, 138, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (abrogated on other grounds). The Supreme Court has further held that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Biden v. Nebraska*, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023) (quoting *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994)). Private parties must function only to "fill up the details" in their aid to the government entity in the exercise of federal power. *Currin*, 306 U.S. at 15 (quoting *Wayman v. Southard*, 23 U.S. 1, 43; 6 L. Ed. 253 (1825)). This Court's jurisprudence focuses on what "powers and responsibilities" the private party has to determine whether the delegated authority is overbroad. *Black II*, 107 F.4th at 429.

The act at issue in *Black II*, the Horseracing Integrity and Safety Act , gives the Horseracing Authority the same broad enforcement powers as KISA: subpoena and investigatory authority, the power to draft and impose civil sanctions, and the power to bring civil lawsuits against a person or racetrack that violates HISA. 15 U.S.C. § 3054, §§ 3057 – 3058. Further, the Horseracing Authority partners with a different private party, the U.S. Anti-Doping Agency ("USADA"), which has the ability to "implement" the Authority's rules "on behalf of the Authority." *Black II*, 107 F.4th at 429. The FTC supervises HISA's rulemaking process in much the same way as KISA. HISA allows the FTC to "abrogate, add to, or modify" rules promulgated by HISA, but the Fifth Circuit aptly notes "what HISA does not say." *Id.;* 15 U.S.C. § 3053 ; HISA

> does not empower the FTC to decide whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it. Nor does the Act empower the FTC to countermand any of the Authority's investigatory or charging decisions (or, more precisely, USADA's decisions). Nor does it require the Authority or USADA to seek the FTC's approval before investigating, searching, charging, sanctioning, or suing. All these actions are enforcement actions, and, by the plain terms of the Act, they can be done by the private entities without the FTC's involvement. The inescapable conclusion is that the Authority does not "function subordinately" to the FTC when enforcing HISA.

Black II, 107 F.4th at 429.

The statutory scheme in HISA further provides that the Authority must submit all "final civil sanction[s]" to the FTC so that the Commission has the opportunity to submit the civil sanction to an Administrative Law Judge for review. 15 U.S.C. § 3058. Given the notable gap in the statutory scheme of HISA, the Fifth Circuit comes to the only possible conclusion "that the Authority does not 'function subordinately' to the FTC when enforcing HISA." *Black II*, 107 F.4th at 429 (quoting *Black I*, 53 F.4th at 881).

The Sixth Circuit relies on the amended language of HISA to hold that the FTC is just as capable of supervising the Horseracing Authority in its enforcement actions as it is in its rulemaking actions. *Oklahoma*, 62 F.4th at 225. However, the Sixth Circuit's explanation of how the FTC may supervise the Horseracing Authority's enforcement actions falls short because it relies only on the FTC's ability to "abrogate, add to, or modify" the rules promulgated by the Authority. *Id.* at 231. This reliance is misplaced because it pertains only to the FTC's ability to influence and oversee the rulemaking authority held by the Authority.

The *Oklahoma* court claims that the FTC can promulgate rules "to ensure a fair enforcement process," such as issuing "rules protecting covered persons from overbroad subpoenas or onerous searches" and requiring "that the Authority provide a suspect with a full adversary proceeding and with free counsel." *Id.* This "solution" plainly shows that the FTC does not have control over HISA's actual enforcement actions because it relies on the FTC's ability to step in during the rulemaking process. Further, the argument that the FTC can promulgate its own rules to control HISA's enforcement power would not be necessary if the Sixth Circuit truly believed in the FTC's power to review HISA's enforcement actions.

The statutory scheme of KISKA is identical in all relevant purposes to HISA; KISKA thus suffers the same gap in supervision by the FTC. The Fourteenth Circuit rubber stamps KISKA as a constitutional delegation of power relying on the logic of the *Oklahoma* court: KISKA gives the FTC full authority to review all of KISA's enforcement actions. This is similarly insufficient because it still does not allow the FTC to oversee or be involved in KISA's actual enforcement procedure. The Fifth Circuit and Judge Marshall both analogize the unchecked delegation of enforcement with a hypothetical: consider a world where a private group of citizens is empowered to monitor vehicle speed on public roadways and issue citations

to drivers who violate posted speed limits. Identical to how the KISA-FTC relationship functions under KISKA, the city has the opportunity to review all citations given and withdraw them as the city finds necessary. If the city chooses to do nothing, who has enforced the speed limits? Certainly not the city. Even if the city chooses to withdraw a citation, that action could hardly be called enforcement simply because the city chose to undo an enforcement action which already took place. The fact that a significant portion of KISA's power is unchecked by the federal government is enough to invalidate KISKA, and as a result, this Court should hold that KISKA is unconstitutional.

C. No statutory scheme like KISKA has been validated by the Court.

The characteristics of other relationships between government entities and private entities that have long been held constitutional are not present in the relationship between the FTC and KISA. "Completely transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn." *Id.* at 228. The Securities Exchange Act of 1934 allows the government entity, the Securities Exchange Commission ("SEC"), to,

> in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated . . .

15 U.S.C. § 78u. Additionally, in conducting any investigation as mentioned above, the SEC "is empowered to administer oaths and affirmations, [subpoena] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. *Id.* Should any person refuse to obey a subpoena issued by the SEC, the Commission "may invoke the aid of any

court of the United States within the jurisdiction of which such investigation or proceeding is carried on . . . in requiring the attendance and testimony of witnesses . . .” *Id.* Further, the SEC may, “by rule . . . relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter. 15 U.S.C. § 78s. Finally, the Maloney Act, which amended the Securities Exchange Act of 1934, empowers the federal government entity, the SEC, not the private entity, the Financial Industry Regulatory Authority (“FINRA”), to

> in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u.

Noting that “HISA was modeled on the Maloney Act,” the Fifth Circuit distinguished HISA stating: “[u]nlike the SEC-FINRA relationship, HISA does not give the FTC potent oversight power over the Authority's enforcement such as the power to enforce HISA itself, deregister the Authority as the enforcing entity, or remove its directors.” *Black II*, 107 F.4th at 434. The Second Circuit has held that the SEC’s oversight of FINRA is “formidable” due to the SEC’s “power to supervise, investigate, and discipline” FINRA for “any possible wrongdoing or regulatory missteps. *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007).

Along with HISA, the Act at issue was modeled after the Maloney Act. Importantly, Judge Marshall notes that “‘modeled after’ does not mean ‘identical to.’” *KISA v. PAC*, 345 F.4th 1, 12 (14th Cir. 2024). Analogizing the FTC’s authority over KISA, it is evident that the FTC does not have nearly the same oversight as the SEC has over FINRA. Of the powers already stated that the SEC exercises over FINRA, namely investigatory and subpoena powers, the

SEC's ability to revoke FINRA's ability to enforce its own rules, and the authority to bring civil lawsuits, the FTC can exercise exactly none of those powers over KISA. In terms of the FTC's ability to oversee KISA's enforcement authority, the FTC can review actions already taken by KISA and reverse them retroactively. The corollary of the FTC's lack of authority is that KISA, a "private entity that is not elected, nominated, removable, or impeachable," has all of the named enforcement powers. *Oklahoma*, 62 F.4th at 228. This statutory scheme is not one of subordination, it is one of "unchecked federal power." *Id.*

Holding that the delegation of enforcement power to KISA is constitutional, the Fourteenth Circuit addresses only pre-enforcement and post-enforcement supervision by the FTC; the initiation of and performance of the actual enforcement actions are plainly not supervised by the FTC. Quoting *Oklahoma*, the Fourteenth Circuit noted "the FTC *could* subordinate every aspect of . . . enforcement," but then immediately justifies the quote by re-stating the language allowing the FTC to "'abrogate, add to, or modify' KISA's rules." *KISA v. PAC*, 345 F.4th at 6–7. This muddles the rulemaking and enforcement authority granted to KISA by Congress, a confusion the court must createto justify its position. Neither the Sixth nor Fourteenth Circuit have presented a constitutional statutory scheme that analogizes with the KISA-FTC relationship because the KISA-FTC relationship is unconstitutional. As such, this Court should invalidate KISKA as an unconstitutional delegation of federal authority.

II. Strict scrutiny is the proper standard of review under which Rule ONE ultimately fails because it is an overbroad, content-based restriction of the First Amendment free speech rights of adults.

The District of Wythe properly held that Rule ONE violated free speech, in part, because it affects more speech than necessary, regardless of how compelling the government interest in protecting minors may be. R. at 5. The First Amendment functions as a safeguard to expression

by prohibiting the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. Accordingly, the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This freedom empowers all Americans in their expression, as well as speech they choose to receive, and cannot be altered in ways that reduce speech for all to what is deemed fit only for some. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957). Recognizing the validity of this core principle, the Supreme Court noted that "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all." *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023) (emphasis included).

To uphold Rule ONE would be to uphold an overbroad invasion of First Amendment free speech protections for adults in favor of idealized protections for minors. Worse, this invasion comes as part of a content-based regulation that is not effective in satisfying the government interest it claims as its spearhead. For these reasons, Rule ONE should be subject to strict scrutiny under which it will ultimately fail, thus reaffirming the injunction originally granted by the District Court.

A. Strict scrutiny is the proper standard of review.

If a statute is not content-neutral with respect to speech, then upon review, it must satisfy strict scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The Constitution demands that content-based restrictions on speech be presumed invalid, (*R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)), and that the Government must bear the burden of showing their constitutionality. *U.S. v. Playboy*, 529 U.S. 803, 818 (2000). This is not to say all speech is unequivocally shielded, as there are certain categories of speech, such as obscenity, that fall outside the purview of First Amendment protection and are consequently subject to lower standards of review. *See*

Roth v. U.S., 354 U.S. 476, 484 (1957); See also *Ginsberg v. New York*, 390 U.S. 629, 634 (1968). Still, prohibitions on these fringe categories of speech cannot be so burdensome that they "have the potential to chill, or deter, speech outside their boundaries. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023).

i. Rule One is a prima facie content-based restriction of speech.

Under the First Amendment, "our tradition of free speech commands that a speaker . . . should be free from interference by the State based on the content of what he says." *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995). Regulations are "content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The "common sense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the messages a speaker conveys." *Id.* In other words, if a law cannot be justified without reference to the content of the regulated speech, then it is facially content-based. *See Id.*; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Rule ONE's text states that the regulation is triggered specifically when "a commercial entity . . . knowingly and intentionally publishes or distributes material on an Internet website . . . more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a) (2024). The rule's one-tenth requirement alone implies that a website's content must be assessed as a whole and "material harmful to minors" must be measured in proportion to the entirety of the content expressed to determine whether Rule ONE is applicable to the site all-together. Functionally, the one-tenth requirement renders the regulation inherently facially content-based by necessitating this content assessment from the outset. It therefore follows that Rule ONE presumptively

violates the First Amendment as an unconstitutional limitation on free speech subject to review under the highest degree of scrutiny.

ii. Supreme Court precedent supports an application of strict scrutiny.

While Circuit Courts are split on which standard is proper to apply in cases such as this—strict scrutiny or the rational basis standard—the Fourteenth Circuit was incorrect in its assertion that the District Court's application of strict scrutiny was flawed. In adopting the Fifth Circuit's approach, the appellate court defers to precedent set in *Ginsberg v. New York* (See *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 267 (Fifth Cir. 2024)) which, as later Supreme Court rulings make clear, is different from the issues we face today and cannot be applied without further inquiry. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997); *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). Other circuits, including the Third, rely on precedent fresher than *Ginsberg* that is more analogous to the regulation at issue here and more aptly addresses the nuances communication via the internet presents in the realm of First Amendment expression. *See Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 187 (Third Cir. 2008).

Cited by the Third Circuit, *Reno v. ACLU* was a unanimous ruling in which the Supreme Court found the 1996 Communications Decency Act ("CDA")—which had provisions meant to protect children in the same way Rule ONE aims to—violated the First Amendment freedom of speech in part because of the burden the Act's provisions imposed on adults. *See Reno*, 521 U.S. 844, 876 (1997). Where *Ginsberg* deals with person-to-person sales of magazines, *Reno* and our present case deal with communication via the Internet—an area in which *Ginsberg* "provide[d] no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *See Id*. at 870. Thus, while it may stand that *Ginsberg* remains good law for different

sets of circumstances, a proper resolution of this circuit split requires adherence to the more relevant Supreme Court precedents at play, both in terms of statutory construction and the method of communication of speech.

Notably, the statute struck down in *Reno* differed from the narrower New York criminal obscenity statute upheld in *Ginsberg* in four important ways. (*See Id*. at 865-66). First, the CDA made it so "neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute" whereas under 484–h of the New York Penal Law in *Ginsberg*, a parent can purchase a "girlie magazine" for their child if they deem it okay for them to read, even though the law permits their child from making that purchase themselves. *Compare Reno*, 521 U.S. 844, 865 (1997) to *Ginsberg*, 390 U.S. 629, 639 (1968). Second, the New York statute applied only to commercial transactions whereas the CDA was not limited to such a way. *See Reno*, 521 U.S. 844, 865 (1997); See also *Ginsberg*, 390 U.S. 629, 633 (1968). Third, the New York statute narrowly defines what kind of material it believes is harmful to minors whereas the CDA fails to define the term "indecent" in its prohibitions on speech. *See Reno*, 521 U.S. 844, 865 (1997); *See also Ginsberg*, 390 U.S. 629, 634 (1968). And finally, the New York law defines a minor as anyone under the age of 17, while the CDA's definition of a minor includes all those under 18 years old, thereby extending to a larger class and including individuals closer to the age of majority. *See Reno*, 521 U.S. 844, 866 (1997); *See also Ginsberg*, 390 U.S. 629, 633 (1968). The Fourteenth Circuit frames each of these distinctions as justification to distance these precedents from each other, but this supposition appears incomplete in that it doesn't disprove why *Reno* should be controlling considering Rule ONE is far more analogous to the CDA—a law which aimed to censor communications via the internet

which would be "indecent to children"—than the New York law—a statute which prohibited in-person sales of certain material to minors and did not address the nuances of the internet at all.

For comparison, the statutory construction of Rule ONE aligns with the CDA in three out of the four aforementioned categories. First, even if a parent did consent to their child seeing material that the state deemed potentially harmful to them, Rule ONE does not make any distinction between an adult accessing a website and a minor accessing a website to be applicable, so even with consent, Rule ONE presents a barrier just as the CDA did. *See* 55 C.F.R. § 2. Second, where the New York law applied to commercial transactions, Rule ONE is applicable against "commercial entities," but does not necessarily need to be tied to a commercial exchange to be triggered. *See Id.* Third, and the point on which Rule ONE differs from the CDA, Rule ONE defines "material harmful to minors" much more specifically than the CDA, including reference to speech that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 55 C.F.R. § 1(6). Fourth, like the CDA, Rule ONE's definition of minors is expansive by including all individuals under 18, rather than just those under 17. 55 C.F.R. § 1(3). On their own, these observations about the mere construction of the laws in question should be enough to illustrate that *Reno* must present a more relevant set of precedent than *Ginsberg* could. Yes, the law in *Ginsberg* may have the same goal of protecting minors from sexually harmful material, but that does not automatically guarantee *Ginsberg* is the monolithic precedent on laws designed to protect minors in this way. To overlook the authority of *Reno* here would be to erroneously ignore these construction disparities as well as major differences and changes to the communication landscape which must be considered in any First Amendment speech question.

Courts in alignment with the Third Circuit also cite *Ashcroft v. ACLU,* in which the Court applied strict scrutiny to a law almost identical to Texas H.B. 1181 at issue in *Paxton* and Rule ONE at issue here because it limited adults' access to constitutionally protected speech. *See Ashcroft*, 542 U.S. 656, 669 (2004). The Fourteenth Circuit dismisses *Ashcroft's* authority stating the Supreme Court did not rule on the proper standard of scrutiny to be applied, but "merely ruled on the issues the parties presented: whether [the Child Online Protection Act ("COPA")] would survive strict scrutiny." *Kisa v. PAC*, 345 F.4th at 9. In deciding on the question of whether the law passed the strict scrutiny test; however, it should follow that, if the Court disagreed with the application of a such standard, it would have said so—but we know this is not the case. In fact, the Court stated just the opposite.

From the outset, the Supreme Court contextualized *Ashcroft* as a direct successor to *Reno* given that "COPA [was] the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech," with the CDA having been the predecessor struck down because "it was not narrowly tailored to serve a compelling government interest and because less restrictive alternatives were available." *Ashcroft*, 542 U.S. 656, 661 (2004). In aligning these cases, the Court not only clarifies its precedents but also reaffirms the language of the strict scrutiny test applied in *Reno*—a signal that the same standard ought to be applied to COPA as well. In assessing the proper level of scrutiny, or test, to be applied while considering content-based restrictions of speech, the Court made the following distinctions:

> The purpose of the test is not to consider whether the challenged restriction has *some* effect in achieving Congress' goal, regardless of the restriction it imposes. 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. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on

> speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the *least restrictive means among available, effective alternatives*.

Id. at 666 (emphasis added). Here the Court is signaling that the rational basis standard relied upon in *Ginsberg*, which only required that the New York law be directed at affecting the government's interest in protecting children, is not a strong enough test to assess the legislation at issue in *Ashcroft*. Instead, the Court favors a test that demands the "least restrictive means among available alternatives," otherwise known as the Strict Scrutiny test. *Id*. This does not necessarily mean that the Court in *Ashcroft* overturns *Ginsberg* or makes any comment on the strength of *Ginsberg's* authority, but rather accurately recognizes the construction of and circumstances surrounding the law in question in *Ashcroft* are patently different from those in *Ginsberg*, and thus a different standard of review is necessary.

To be more specific, COPA requires all those who wish to view certain content provide age verification and can make no distinction based on one's physical appearance in the same way a merchant at a physical store could. *See Id.* at 663. Put another way, COPA acts as a turnstile at which all must approach, but only few can pass through whereas the New York law forms two separate lines for minors and adults. One method broadly burdens all, even those who are not the target of such protections, while the latter more narrowly applies to the protected class and presents no burden to other groups. Such a difference in burdens necessitates varying degrees of applied scrutiny—a determination the Court can make without contradicting itself.

Tracing the history of legislation, we recognize that where COPA succeeded the CDA, Texas H.B. 1181 is one state's version of a successor to COPA. Likewise, KISKA is yet another federal attempt at a successor to COPA. Each of these acts has proposed age verification measures to access material potentially harmful to minors on the internet—an issue which

Ginsberg never addressed nor considered. Recognizing the analogous constructions of each of these laws, we ought to rely on similarly analogous of Supreme Court precedent ruling on these regulations. Once these lines of precedent are untangled, it becomes clear that there is no other acceptable path than to apply strict scrutiny to a review of Rule ONE.

iii. Strict scrutiny is still applicable under the Ginsberg *precedent.*

With this more focused review, it is evident the Fifth Circuit and the Fourteenth circuit are mistaken in their deference to *Ginsberg* and rational basis review. Recall the New York law prohibits in-person sales of magazines to minors. *See Ginsberg*, 390 U.S. 629, 631 (1968). Functionally, this would present no barrier to adults accessing the same magazines, as they are clearly identifiable as non-minors or can present their I.D. for a cursory check to confirm their majority at the time of purchase. In this regard, the law is already narrowly tailored enough to not chill speech for any other classes than those the law is designed to protect.

Moreover, *Ginsberg* does not address this question of whether the New York law chilled adult speech because, as the Court noted, the appellant's argument was that the material at issue was not obscene to minors and to prohibit their purchases would "constitute an unconstitutional deprivation of protected liberty" specifically for minors. *Id*. at 636. At no point does *Ginsberg* contemplate the law's effect on adult speech because that was not problem the Court was asked to settle—they only examined to what degree an extension of the definition of obscenity burdened the speech of minors. Yet, as the Court has long held, it is not unconstitutional to modify the bounds of obscenity in the valid interest of protecting minors because what is appropriate for a minor is patently different from what is appropriate to an adult. *See Miller v. California*, 413 U.S. 15, 24 (1973). However, an extension of *Ginsberg* into the area of

limitations on adult speech stretches the decision into territory it was never meant to venture into to begin with.

In its later rulings, the Court does not disagree with the holding of *Ginsberg*, nor does it make any changes to the long-standing precedents regarding obscenity and minors set in *Miller*, but rather merely recognizes that where *Ginsberg* is a question of burdens on minors' speech, *Reno* and *Ashcroft* are questions on burdens of adults' speech. Accordingly, we differentiate between two separate lines of jurisdiction dealing with laws that happen to have the same goal. As the Fourteenth Circuit affirms, *Ginsberg* does in fact remain good law, but this does not change the fact that the precedent applicable to our present case insists upon an application of strict scrutiny and nothing less.

B. Rule ONE fails to pass strict scrutiny.

Under strict scrutiny, the Government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restricted means to further the articulated interest." *Sable Commc'ns of California, Inc. v. F.C.C*, 492 U.S. 115, 126 (1989). To satisfy this heightened scrutiny, "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id*. In other words, for a content-based regulation to stand, strict scrutiny demands the law have (1) a compelling government interest, (2) narrow tailoring, (3) and that it is the least restrictive means among available alternatives.

The strict scrutiny test requires all three of its prongs to be satisfied, not just one. Under this degree of review, Rule ONE may pass the first gate, but it fails to progress through the following two. In several ways, Rule ONE is both underinclusive in that it fails to do enough to achieve its own purported goals and is simultaneously overbroad in seeking to regulate far more

content than necessary to achieve that same purpose. Considering these failures, modern technology also presents less restrictive alternatives with precision capabilities previously unconceived by the courts which further signal Rule ONE's constitutional short comings

i. The government has a compelling interest in protecting minors from harm, but strict scrutiny analysis does not end here.

There is no disputing the Supreme Court has already "recognized there is a compelling interest in protecting the physical and psychological well-being of minors." *Id*. This interest also extends to "shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns*, 492 U.S. 115, 126 (1989); see also *Ginsberg*, 390 U.S. 629, 636 (1968). However, "innocent motives do not eliminate the danger of censorship . . . as future government officials may wield such statutes to suppress disfavored speech." *Reed*, 576 U.S. 155, 168 (2015). In 2015, the Court emphasized this is why the First Amendment "targets the operation of laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them." *Id*. Strict scrutiny must necessarily assess further as "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Reno*, 521 U.S. 844, 875 (1997). To stop the assessment there would be to restrict what reaches the mailbox to "that which would be suitable for a sandbox." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983).

While the Fifth Circuit and Fourteenth Circuit seem to defer to *Ginsberg* for its alignment on the interest of protecting children, both circuits fall into the trap of restricting the mailbox. We need not dispute the point that protecting children is valid governmental aim to argue against the

passage of Rule ONE, but we must implore that heightened scrutiny demands a deeper assessment than merely this.

ii. Rule ONE does not satisfy the narrow tailoring requirements of strict scrutiny.

Narrow tailoring in the context of First Amendment strict scrutiny requires the means chosen to advance a particular interest "not [be] substantially broader than necessary to achieve that interest." *Ward*, 491 U.S. 781, 783 (1989). When dealing with content-based regulations, a lack of narrow tailoring, or vagueness, of such regulations may raise "special First Amendment concerns" due to the resulting inevitable chilling of free speech. *See Reno*, 521 U.S. 844, 872 (1997). Further and as noted previously, even where there is a recognized governmental interest in protecting children from harmful materials, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id*. at 875.

On its face, Rule ONE applies more broadly than other similarly situated regulations. Compared to the Texas House Bill which applies when more than one-third of a website's material is sexually harmful to minors, Rule ONE is triggered when only one-tenth of a website's material is considered to be harmful. *See Paxton*, 95 F.4th 263, 267 (Fifth Cir. 2024); *see also* 55 C.F.R. § 2(a). This lower bar means far more websites will be subject to Rule ONE's age verification requirement than ever would have been implicated under the Texas House Bill. Further, it will be incredibly impractical to measure what one-tenth of a given website's material looks like in comparison to its whole. Most websites that host content today—whether indecent or not—are ever-growing with new material added to them almost daily at varying rates. One-tenth one day may not be the same the next day meaning Rule ONE's necessity will slide dependent on the website's content proportionality. Not only does this make Rule ONE content-

based as mentioned previously, but this vagueness means Rule ONE will be onerous to implement, with several more outlets than necessary left wondering whether they fall within the category of needing age verification.

Aside from the one-tenth requirement, Rule ONE's broad definition of what is "harmful to minors" also leaves ample room for confusion. 55 C.F.R. § 1(6). For comparison, the *Miller* Test for obscenity, which KISA appears to have based Rule ONE on with some modifications for minors, states that the parameters for what is obscene are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. 15, 24 (1973) (citations omitted). One key phrase here is that sexual conduct is defined by "applicable state law." *Id*. Rule ONE, on the other hand, does not make such a distinction, but rather attempts to define what it believes is "patently offensive" to minors on its own including descriptions or depictions of an exposed female breast, the touching, fondling, or caressing thereof among other body parts, sexual intercourse, excretory functions, or "any other sexual act" to name just a few prohibited items. *See* 55 C.F.R. § 1(6)(B).

A plain reading of the enumerated categories also necessarily raises questions of practicability in their application. For instance, the acts of merely touching or caressing a romantic partner are commonly depicted in movies and television programs available on every major streaming service today. If it is the case that depictions such as these are deemed harmful to minors, does this mean Rule ONE requires age verification on all streaming websites including Netflix, Max, Amazon Prime Video, Hulu, and even YouTube as well? Accessing material via these platforms is patently different than a minor attempting to see an R-rated movie

in a theater where their minority is easily detected—much like the aforementioned distinctions drawn in *Ginsberg*. While Rule ONE is careful to note its inapplicability to news gathering organizations, Internet service providers, and even search engines, these narrow exceptions still leave numerous other commercial content hosts to question whether they too must enforce age verification or suffer the debilitating costs of Rule ONE's civil penalties. *See* 55 C.F.R. § 4(b).

Rather than applying strictly to entities engaged in publishing and distributing pornographic content, Rule ONE's construction creates a gray area of absurd results. Beyond streaming platforms, one might conclude retail websites selling clothes may be subject to regulation for featuring photos of models in varying stages of undress to advertise their products. Perhaps a minor inconvenience at best to require age verification when shopping on Target.com, but it is doubtful that was one of the "commercial entities" KISA had in mind when they set out to protect our minors. Likewise, it is common today for museums to upload photos of their galleries online, many of which may feature art of historical and cultural significance that depicts nude figures. *See Reno*, 521 U.S. 844, 854 (1997). Because, unlike the *Miller* obscenity test, Rule ONE does not anchor its determination of what "lacks serious literary, artistic, political, or scientific value *for minors*" to applicable State law, we must question by whose standards these museum galleries will be judged? Again, it is doubtful KISA had art museums in mind when drafting Rule ONE, and yet they will cower in its shadow alongside adult content publishers.

The minimality of what Rule ONE defines as "harmful to minors" combined with the one-tenth triggering requirement for regulations makes Rule ONE undeniably overbroad in a way that would, as one justice put it, "burn the house to roast the pig." *Butler*, 352 U.S. 380, 383 (1957). In these ways, Rule ONE's parameters are too dangerously vague to be considered

narrowly tailored given they will broadly and absurdly affect far more speakers than necessary to protect minors.

iii. Less restrictive alternatives are available to satisfy the government's interest in protecting minors.

When a content-based regulation is challenged, "the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft*, 542 U.S. 656, 665 (2004). In cases where adult speech is burdened such as here, the regulation will fail strict scrutiny "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S. 844, 874 (1997). In essence, this means the mere existence of a single alternative that is less restrictive to speech and still satisfies the goal the statute aims to fulfill will mean to entire law fails strict scrutiny. *See Reno*, 521 U.S. 844 (1997); *Ashcroft*, 542 U.S. 656 (2004).

One less restrictive alternative to Rule ONE which the Supreme Court has already endorsed is the use of content filters because "they impose selective restrictions on speech at the receiving end, not universal restrictions at the source [of speech]." *Ashcroft*, 542 U.S. 656, 667 (2004). Content filtering is a process by which organizations or individuals on their personal computers can block content that contains harmful information by the receiver's standards. Fortinet, *What is Content Filtering?*, https://www.fortinet.com/resources/cyberglossary/content-filtering#:~:text=Content%20filtering%20is%20a%20process,used%20by%20home%20computer%20users. (last visited Jan. 19, 2025). Filters may be implemented as hardware or via software downloads and are often built into internet firewalls to block access to information. *Id.* If filtering were the required norm rather than age verification, adults without children would face no barrier to material they are legally empowered to consume without having to provide their

identifying information or credit card information—another proposed restrictive alternative to age verification. *See Ashcroft*, 542 U.S. 656, 667 (2004). Adults in households with children could similarly access this same material if they so choose to by simply turning off the filters on their computers. *See Id*. The fact that this alternative necessitates the cooperation of parents does not undercut its strength because "a court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. 803, 805 (2000).

Championing the use of content filters uprights no turnstile before adults seeking to access certain materials. Rather, filtering enables the formation of two lines—one for minors and one for adults—as they seek to engage with material on the Internet and eliminates any burdens on adult expression, regardless of how broadly or narrowly Rule ONE's definition of "material harmful to minors" is defined. Filtering in this way has the potential to satisfy Rule ONE's goal of protecting minors from harmful material much more effectively than age verification processes ever could. A notable weakness of age verification is that it only serves as a barrier to material on Internet websites, but cannot protect against material that may be received via email, chat rooms, or other online methods of communication. Comparatively, because content filtering works on the receiving end, filters can protect minors in these areas of online activity where age verifications simply cannot reach, still without placing an additional burden on adult speech.

Additionally, Rule ONE leaves open the issue of minors being able to access harmful sexual material from websites originating outside of the United States. In *ACLU v. Mukasey*, the Third Circuit posited that about one percent of all Web pages available on the surface web were sexually explicit, and that approximately fifty percent of sexually explicit websites are foreign in origin *See Mukasey*, 534 F.3d 181, 184, 193 (3d Cir. 2008). Rule ONE's inability to regulate

foreign entities who may make sexually explicit material available to minors online leaves open a major gap in the protection KISA seeks to provide. We may conclude that Rule ONE's failure to account for fifty percent of all commercial pornography distributors renders the legislation wholly underinclusive and perhaps even ineffective in achieving its goal. On the other hand, content filters would remain effective regardless of the origin point of any explicit material. Again, because they are effective on the receiving end of online communication, they have the capability to be effective beyond borders thus making them far more powerful in protecting minors than Rule ONE is capable of.

Given the construction of Rule ONE and the unique challenges that communication via the Internet presents for First Amendment expression, strict scrutiny is the only standard acceptable for which to review Rule ONE's content-based burdens on adult speech. While Congress undoubtedly has a compelling government interest in protecting minors, it seeks to do so through legislation that is simultaneously overbroad in its application and underinclusive in its protection, therefore failing both the narrow tailoring and less restrictive alternative prongs of the strict scrutiny test. For these reasons, the injunction against Rule ONE must be upheld.

CONCLUSION

This Court should uphold the injunction issued by the District Court for the District of Wythe. The delegation of Congressional power to KISA is unconstitutional, as it grants unchecked enforcement authority to a private entity without sufficient oversight from the Federal Trade Commission. This failure to ensure proper governmental supervision violates the principles of accountability and subordination embedded in the non-delegation doctrine. By allowing KISA to wield investigative, enforcement, and civil litigation powers independently,

Congress has created an unconstitutional statutory framework that mirrors the problematic delegation found in HISA.

Moreover, Rule ONE constitutes a content-based restriction on speech, subject to strict scrutiny under First Amendment principles. The Fourteenth Circuit's reliance on outdated precedents, such as *Ginsberg v. New York*, is misplaced. The proper standard is found in both *Reno v. ACLU* and *Ashcroft v. ACLU*, which struck down broad, unconstitutional internet speech restrictions, similar to those imposed by Rule ONE. Due to the rule's simultaneous overbreadth and under inclusivity, it fails to satisfy the narrow tailoring required by strict scrutiny and more effective yet less restrictive alternatives are available.

Given these significant constitutional violations, Rule ONE cannot survive the rigorous scrutiny it requires. The government's interest in protecting minors is compelling, but Rule ONE's overbroad scope and vague definitions unjustifiably burden lawful speech for adults. As such, the injunction against Rule ONE should be upheld to preserve the constitutional balance of power and protect free speech.