No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC.

Petitioner

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM NUMBER 7
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association its enforcement powers.
2. Whether a law requiring websites which provide pornographic content to verify user's ages infringes on the First Amendment.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe is unreported but discussed on pages 2-15 of the record. Record 2-15. The District Court granted Petitioner's motion for a preliminary injunction. Record 5. The court held that the Keeping the Internet Safe for Kids Act ("KIKSA") does not violate the private nondelegation doctrine because the Kids' Internet Safety Association, Inc. ("KISA") is subordinate to the Federal Trade Commission ("FTC"). Id. But regarding Petitioner's First Amendment challenge of Rule One, the court held that strict scrutiny, not rational basis, applies. Record 7. The court granted Petitioner's injunction because it found that Petitioner's First Amendment claim met this standard and would succeed on the merits. Record 5.

The opinions of the United States Court of Appeals for the Fourteenth Circuit are unreported but reproduced on pages 1-15 of the record. Record 1-15. The court affirmed the District Court's nondelegation ruling because it concluded that the FTC possesses sufficient authority over KISA through its ability to review KISA's enforcement actions and create rules regulating enforcement. Record 7. But the court reversed the injunction because it reasoned that under Ginsberg v. New York, rational basis should apply, and that Respondent met this standard. Record 8-10. In a dissenting opinion, Judge Marshall wrote that the KIKSA violates the private nondelegation doctrine because the FTC lacks sufficient supervision over KISA, Record 10-13, and that because Rule One restricts access to constitutionally-protected speech, strict scrutiny should apply. Record 14.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I provides:

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

U.S. Const. art II § 3 provides:

> He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

15 U.S.C.A. § 78s, in relevant part provides

> (b)(2)(C)(i) The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.
>
> (b)(4)(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing whereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

15 U.S.C.A. § 833 (repealed 1966), in relevant part provided

> (a) Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

15 U.S.C.A. § 3054, in relevant part provides

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

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

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

TX H.B. No. 1181 § 129B.004, in relevant part, provides:

(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 chapter 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 the 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 THE FACTS

A. The Keeping the Internet Safe for Kids Act

In 2023 Congress enacted the Keeping the Internet Safe for Kids Act ("KISKA") with the purpose of "provid[ing] a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050; Record 1. But instead of creating a truly "comprehensive" statutory scheme, Congress tasked a private entity, respondent Kids Internet Safety Association, Inc. ("KISA") to create and enforce rules regulating online companies to "monitor and assure children's safety online." § 3054(a).

KISA is a "private, independent, self-regulatory nonprofit corporation." § 3052(a). Congress granted "oversight" of KISA to the Federal Trade Commission ("FTC"). The FTC's authority is limited to "abrogate[ing], add[ing] to, and modify[ing] the rules" created by KISA, § 3053, and reviewing KISA civil sanctions. § 3058.

B. Rule ONE

In response to findings about the potential deleterious effects that access to pornography can have on minors, KISA passed Rule ONE in June 2023. Record 3. Rule ONE requires certain websites and commercial entities to use age verification measures to prevent minors from accessing pornographic content. Record 3. The rule applies to commercial entities that "knowingly and intentionally publish and distribute material on an internet website, including social media platforms, more than one-tenth of which is sexual material harmful to minors." Record 3-4. The rule however exempts certain commercial entities including "bona fide news or public interest broadcasts," as well as "[i]nternet service provider[s]" and "search engine[s]" to the extent they are not responsible for the creation of the content. Record 18. Additionally, the rule functions such that any websites with material more than one-tenth of which is covered by the regulation, 100%

of the material will be blocked pending age-verification. Record 3-4. The rule provides that permissible age verification measures consist of government-issued ID, or other reasonable methods that use transactional data. Record 4. The rule stipulates that entities performing the age verification measures are not permitted to "retain any identifying information of the individual."

Additionally, as the authoritative body, KISA maintains the authority to punish violators of Rule ONE by filing for injunctive relief; issuing fines of up to $10,000 per day of noncompliance; and fining violators up to $250,000 for every time a minor accessed a site due to the site's noncompliance. Record 4.

Following Rule ONE's release, the adult entertainment industry immediately knew what its impact would be. Record 4; see, e.g., Marc Novioff, A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat, POLITICO (Aug. 8, 2023, 4:30 PM), https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148 ("[T]raffic in Louisiana has dropped 80%"). Jane and John Doe both testified that they stopped visiting sites that fell within the purview of Rule ONE. Record 4. Jane and John Doe expressed concern about other instances where seemingly safe and secure web platforms, such as hospitals or educational institutions, were hacked and supposedly private information was stolen. Record 4. Jane Doe stated that while she believes there is nothing wrong with adults who enjoy explicit adult content, she is fearful of public backlash from her community were she to be identified. Record 4. Further, the internet is her preferred platform for accessing this type of content and likewise does not feel comfortable seeking these materials in brick-and-mortar shops. Record 4. The industry is fearful of the harmful effects of Rule ONE and believes that their livelihood as well as their liberty is truly at stake. Record 4.

In the District Court, PAC submitted evidence proving that the law would burden significant amounts of non-objectionable material. Record 4. It showed that many of the websites which fall under the Rule ONE regime contain business centered discussion boards, job opportunities, and other educational material. Record 4. PAC also submitted expert affidavits explaining how easy it is to be anonymous on the internet and circumvent age verification requirements. Record 4-5. Additionally, other experts testified that internet filtering and blocking software may be more effective methods of preventing minors from accessing adult materials. Record 5.

II. PROCEDURAL HISTORY

On August 15, 2023, one month following the enactment of Rule ONE, Petitioner filed this suit to permanently enjoin KISA and Rule ONE, alleging that Congress violated the private nondelegation doctrine when creating KISA by granting it unfettered power and that Rule ONE violated the First Amendment's free speech clause by restricting adult's access to protected speech. Record 1, 5. Following full briefing and argument, the District Court for the District of Wythe granted the motion for preliminary injunction, holding (1) that KISA does not violate the private nondelegation doctrine because the FTC sufficiently supervises it but (2) that Rule ONE violated the First Amendment, in part, because it affected more speech than it needed. Record 5.

Respondent appealed the District Court's decision on the free speech claim and Petitioner cross-appealed on the non-delegation issue. Record 5. The United State Court of Appeals for the Fourteenth Circuit affirmed the lower court's holding regarding the private nondelegation issue and reversed the holding on the First Amendment issue, in favor of Respondent. Record 10. Petitioner appealed, and the United States Supreme Court granted certiorari. Record 16.

SUMMARY OF THE ARGUMENT

The Court should resolve the two questions in this case by reversing both decisions by the Fourteenth Circuit. First, to preserve the balance of powers created by the Framers and hold public officers accountable, the Court should find that KIKSA violates the private nondelegation doctrine. Congress may only delegate executive authority to a private entity if that entity remains subordinate to an executive agency. KISA's enforcement powers enable it to function without oversight by the FTC because only KISA has the authority to commence enforcement of potential violations, only KISA has the authority to create rules governing enforcement proceedings, and only KISA may file civil suits against violators, which the FTC is powerless to prevent. The determination that Congress did not improperly delegate authority to KISA would undermine the executive's authority under Article II of the Constitution and would place power in a private entity, which is less accountable to the public.

Second, this Court should adhere to First Amendment jurisprudence and find that 55 C.F.R. §§ 1-5 ("Rule ONE") is a content-based regulation, it results in a chilling effect on substantial amounts of protected speech and is subject to strict scrutiny. A court hearing a free speech challenge must analyze whether the regulation is content-based, whether it regulates protected speech, and whether there is potential for the regulation to have a chilling effect on the protected speech as directed in Ashcroft II. Following a determination that the regulation is content-based, that it attempts to regulate protected speech, and that there is potential for a chilling effect, this Court instructs that it must satisfy strict scrutiny. The Fourteenth Circuit's decision completely omits this analysis and misapplies this Court's precedents. Instead, the lower court wrongly applied Ginsberg. Ginsberg is not the appropriate precedent for analyzing Rule ONE because in that case, this Court did not address a statute that chilled substantial adult speech. Further, Rule ONE fails

strict scrutiny for being underinclusive, overinclusive, and for failing to use other less restrictive, equally effective, means of furthering the government's compelling interest. The determination that Rule ONE fails strict scrutiny would uphold First Amendment values and ensure that the Government does not unconstitutionally abridge freedom of speech.

ARGUMENT

Appellate courts review constitutional questions de novo. E.g., Anderson v. Milwaukee Cnty., 433 F.3d 975, 978 (7th Cir. 2006); Free Speech Coal., Inc. v. Att'y Gen. United States, 974 F.3d 408, 419 (3d Cir. 2020); see McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 867 (2005) (reviewing a question of law de novo). And the District Court's "ultimate conclusion [to issue a preliminary injunction] for abuse of discretion." McCreary Cnty., 545 U.S. at 867. The parties have stipulated to three of the four preliminary injunction factors, so this Court need only decide whether PAC has demonstrated a "substantial likelihood of success on the merits." See id. at 867, n.15.

When Congress's actions "restrict[] speech, the Government bears the burden of proving the constitutionality of its actions." United States v. Playboy Ent. Grp., 529 U.S. 803, 816 (2000). Though the Fourteenth Circuit reversed the District Court for the District of Whythe in favor of Respondent on both questions, this Court should reverse in favor of PAC after finding that (1) Congress violated the private nondelegation doctrine in improperly delegating executive authority to KISA and (2) Rule One's age verification violates the First Amendment.

I. THE KIKSA VIOLATES THE NONDELEGATION DOCTRINE BECAUSE KISA DOES NOT FUNCTION SUBORDINATELY TO THE FTC.

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government." Mistretta v. United States, 488 U.S. 361, 371 (1989). "When the Government is called upon to perform a function that requires an exercise of legislative,

executive, or judicial power, only the vested recipient of that power can perform it. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) (Railroads I), vacated and remanded on other grounds, U.S. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015) (Railroads II). On the other hand, the Constitution "commits no executive power" to private entities. Id.

This Court has explained that congressional delegation to a private entity is "delegation in its most obnoxious form." Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (emphasis added). And "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system," Mistretta, 488 U.S. at 415 (Scalia, J., dissenting), because it "is rooted in the principle of separation of powers that underlies our tripartite system of government." Id. at 372 (majority opinion).

Congress may delegate executive authority to a private entity only if the entity "functions subordinately," or in other words "as an aid" to, a government agency which maintains "authority and surveillance" over the entity. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 423-24 (5th Cir. 2024) (Black II); see Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (approving of Congress's delegation of legislative authority because it was clear the private entity "function[ed] subordinately" to a federal entity). In passing the KIKSA, Congress unconstitutionally delegated authority to KISA because (1) the private entity is not subordinate to the FTC, (2) a comparison of the Maloney Act and KIKSA further reveal a lack of subordination in the relationship between the FTC and KISA, and (3) affirming the court below would allow for a dangerous shift in the balance of powers as set forth in the Constitution.

A. KISA Does Not Act as "An Aid" to the FTC and Is Thus Not "Subordinate" to The Agency.

i. Only KISA has the Power to Commence Enforcement Proceedings.

This Court should adopt the Fifth Circuit's reasoning in Black II to find that the KIKSA's "enforcement provisions are facially unconstitutional." Black II, 107 F.4th at 421. In 2020, Congress passed the Horseracing Integrity and Safety Act of 2020 ("Horseracing Act") which authorized a private corporation, the Horseracing Integrity and Safety Authority ("HISA") to regulate and enforce national rules for horse racing. Id. at 420. The HISA's enforcement powers include (1) issuing subpoenas and investigations, 15 U.S.C.A. § 3054(h); (2) levying civil sanctions, §§ 3054(i), 3057; and (3) bringing civil suits against violators. § 3054(j)(1); Black II, 107 F.4th at 421. The FTC's sole involvement in enforcement proceedings is that it may, only on the backend, submit sanctions to an Administrative Law Judge for review and then the FTC may review the ALJ's decision. § 3058(b), (c). The Fifth Circuit concluded this enforcement regime was "plainly an unsupervised delegation of executive power." Black II, 107 F.4th at 431.

Like the Horseracing Act, under the KIKSA, only "a private entity, not the FTC, is in charge of enforcing [the law]." Black II, 107 F.4th at 429. The FTC's sole involvement in enforcement occurs after KISA imposes a final decision or civil sanction. 55 U.S.C. § 3058. Only KISA may authorize investigations and issue civil sanctions and final decisions. § 3054. KISA may, without FTC approval, partner with non-profit organizations, to assist in enforcement proceedings on its behalf, giving another private entity a greater role in enforcement than the federal government. § 3054(e). And while the FTC lacks any statutory authority to even recommend enforcement, KISA may "recommend that the [FTC] commence enforcement action[s] for violations of § 3059. § 3054(e)(1)(B). The FTC lacks any authority to start or stall

proceedings, and as such it is KISA who acts as "the principal decisionmaker in the use of [this] federal power." Oklahoma v. United States, 62 F.4th 221, 229 (6th Cir. 2023).

The Sixth and Eighth Circuit's interpretation that the FTC could simply create rules that give it more oversight in this scheme unconstitutionally rewrites the balance created by Congress. Walmsley v. Fed. Trade Comm'n, 117 F.4th 1032, 1039 (8th Cir. 2024); Oklahoma, 62 F.4th at 231. Agencies cannot "cure an unlawful delegation of legislative power" by altering the framework of a statute. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). The statute clearly gives KISA sole authority to commence enforcement without the need for prior approval. The argument that the FTC could create a rule requiring FTC approval before KISA could commence civil actions would "authorize basic and fundamental changes in the scheme designed by Congress." Black II, 107 F.4th at 432 (quoting Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023)). And any suggestion that the FTC could create rules prohibiting "overbroad subpoenas or onerous searches," Oklahoma, 62 F.4th at 231, contradicts the text of the statute which only gives KISA the authority to create rules regulating enforcement. 55 U.S.C. §§ 3054(c)(1)(A), (i). "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 328 (2014), but allowing the FTC to have such broad rulemaking authority would do just that.

ii. Only KISA Has Power to Make Rules Governing Enforcement.

Because KISA also has the exclusive authority to develop rules and procedures authorizing enforcement of the law, it is not subordinate to the mere persuasive authority of the FTC. §§ 3054(c), 3055(f). The executive's power to oversee subordinates must be greater than simply "persuading" them. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 501-02 (2010). And "[i]f a private entity creates the law" . . . Carter Coal and Schechter tell us . . . that it is an unconstitutional exercise of federal power." Oklahoma, 32 F.4th at 229. The FTC is no more

than a mere persuasive authority under the KIKSA because it cannot direct KISA to create enforcement rules or policies, and it lacks the authority to modify proposed rules.

In Sunshine Anthracite Coal Co. v. Adkins, this Court found that private actors were subordinate to a federal entity when the private actors merely offered proposals to the federal entity which had the ultimate discretion to adopt. 310 U.S. at 399. Under the Bituminous Coal Act of 1937, the National Bituminous Coal Commission ("the Commission") established maximum prices for coal while coal producers " 'on [their] own motion or when directed by the Commission' propose[d] minimum prices" to the Commission. Id. at 388 (quoting Bituminous Coal Act of 1937, 15 U.S.C.A § 833(a) (repealed 1966)). Then the Commission, in its discretion, could "approve[], disapprove[], or modify[]" the proposed prices. See id. The Court found the statute clearly gave the Commission "authority and surveillance" over the private actors because it alone had law-making authority. Id. at 399.

The FTC's role in the rule-making process is limited compared to the Commission. First, unlike the Commission, the FTC lacks the authority to "direct[]" KISA to create a rule. At most, the FTC may recommend that KISA create a rule, but the ultimate decision to do so rests solely with KISA. 55 U.S.C. § 3053(c)(3). In limiting the FTC to a mere persuasive authority, Congress has unconstitutionally reduced the executive "to a cajoler-in-chief." Free Enter. Fund, 561 U.S. at 502.

Second, unlike the Commission which could modify proposed prices and establish maximum prices, the KIKSA limits the FTC's ability to create and modify rules during the proposal process. Again, the law limits the FTC to playing a role "on the backend" of the rulemaking process. While the FTC may "abrogate, add to, and modify the rules of the [KISA]," it lacks discretion to do so until a rule is final. Compare § 3053(a-d) (laying out the FTC's

responsibilities while a rule is proposed) with § 3053(e) (allowing the FTC to "abrogate, add to, and modify . . . rules of the [KISA]"). To interpret the law otherwise would "have [this Court] read an absent word into the statute," creating "an enlargement of it . . . so that what was omitted, presumably by inadvertence, may be included within its scope." Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004).

This Court should not follow the Sixth and Eighth Circuit's interpretation that an identical provision in the HISA "enables the [FTC] to adopt new rules" because doing so would grant authority to the FTC that contradicts the text of the law. Walmsley, 117 F.4th at 1038; Oklahoma, 62 F.4th 221 at 230. The KIKSA specifically grants rule making authority to (1) KISA and (2) nonprofits with which KISA chooses to partner. §§ 3053(a), 3054(c)(1)(A), (i), 3055(f)(A). The FTC, in contrast, is only given the power "to abrogate, add to, or modify the [already existing] rules." §3053(e). The KIKSA as written simply does not grant the FTC the power to create new, independent rules as it sees fit, and as such, it lacks any "broad power to write . . . the rules." Oklahoma, 62 F.4th at 230. Any efforts to create such a power would "decrease the legislature's incentive to draft a narrowly tailored law in the first place," Osborne v. Ohio, 495 U.S. 103, 121 (1990), and thus "constitute a 'serious invasion of the legislative domain.' " United States v. Stevens, 559 U.S. 460, 481 (2010) (quoting United States v. Treasury Emps., 513 U.S. 454, 479, n. 26 (1995)).

B. The FTC's Lack of Authority is Clear When Compared to the SEC's Authority Under the Maloney Act.

i. The SEC Has Enforcement Powers Where the FTC is Essentially Powerless.

KISA's relationship to the FTC is clearly and significantly distinguishable from Financial Industry Regulatory Authority's ("FINRA") relationship to the Securities and Exchange Commission ("SEC") in that the SEC may independently enforce the Maloney Act's rules, while

the FTC must defer to KISA on enforcement decisions. The SEC has the power, "in its discretion," to investigate potential violations, seek subpoenas, issue injunction proceedings and criminal sanctions, and seek disgorgement. 15 U.S.C.A. §§ 78u(a)(1), (c), (d), (d)(3). The SEC may even prevent FINRA from enforcing its own rules or those set forth under the Maloney Act. § 78s(g)(2). Significantly, the Maloney Act solely empowers the SEC to file civil suits, but not FINRA. Black II, 107 F.4th, at 435; see §§ 78u-1(a)(1).

"[T]he SEC also 'retains formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps.' " Black II, 107 F.4th, at 435 (quoting In re NYSE Specialists Sec. Litig., 503 F.3d 89, 101 (2d Cir. 2007)). The Maloney Act authorizes the SEC to censure or limit FINRA's "activities, functions, and operations" if it determines doing so would be in "the public interest". § 78s(h)(1). The SEC also may remove members of FINRA's board for cause and prevent any person from associating with FINRA, § 78s(h)(3-4).

In Black II, the Fifth Circuit found that the FTC-HISA relationship under Horseman's Act was "meaningfully different" from that of the SEC-FINRA relationship set forth under the Maloney Act. Black II, 107 F.4th, at 434. The court took note of each of the SEC's enforcement powers mentioned above and pointed out that the Horseman's Act granted none of these same powers to the FTC. Id. The Fifth Circuit concluded that Congress's failure to afford the FTC the same authorities as the SEC meant that "the FTC lacks adequate oversight and control over the [HISA]'s enforcement power" because it "lacks any tools to ensure the law is properly enforced." Id.

Like the Horseman's Act, Congress did not provide any of these powers to the FTC in the KIKSA. Under the KIKSA, KISA alone maintains the authority to issue investigations. 55 U.S.C.

§ 3054(h). Unlike the SEC, the FTC is powerless to do so. KISA also maintains the sole authority to seek subpoenas, injunction proceedings, disgorgement, and criminal sanctions. Id. As previously explained, the FTC's ability to review these enforcement provisions on the backend does not erase the KIKSA's actions up until that point. If KISA chooses not to pursue enforcement measures, the FTC is powerless to do so itself. And finally, the KIKSA does not give the FTC the power to limit or censure KISA's activities, which is a power that demonstrates "a clear hierarchy" between the SEC and FINRA. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 888-89 (5th Cir. 2022) (Black I).

ii. KISA Has More Flexibility in Making Rules Than FINRA.

KISA-FTC relationship is also unlike the SEC-FINRA relationship because KISA has broader rulemaking authority than FINRA. The SEC's role in checking whether a proposed rule is "consistent with the requirements of [the Maloney Act]," 15 U.S.C.A. § 78s(b)(2)(C)(i), clearly supervisory in that the law "lays out" requirements that a rule change must meet for SEC approval. Bloomberg L.P. v. Sec. & Exch. Comm'n, 45 F.4th 462, 470 (D.C. Cir. 2022); see § 78o-3(b). "It is ultimately FINRA's burden to demonstrate that its proposed rule change is consistent with the Act and applicable rules and regulations." Bloomberg L.P., 45 F.4th at 470 (citing 17 C.F.R. § 201.700(b)(3)). FINRA is required to provide "information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent . . . ." 17 C.F.R. § 201.700(b)(3)(i).

Again, the KIKSA gives KISA greater power than FINRA throughout this process. The KIKSA only requires that proposed rules be "consistent" with the KIKSA and any applicable rules. 55 U.S.C. § 3053(c)(2). But Congress failed to provide requirements KISA must meet before the FTC may approve of the rule. And instead of having KISA bear the burden of "demonstrat[ing]

that its proposed rule change is consistent," it shifts that burden to the FTC. 15 U.S.C.A. § 78s(b)(4)(A); see 55 U.S.C. § 3053.

In contrast to the Maloney Act's requirement that FINRA provide information to show that the rule is consistent, KISA merely has to submit the proposed rule. 55 U.S.C. § 3053(a). No further action is required on behalf of KISA. See generally, § 3053. It is the FTC's burden to conduct the entire review process on its own, giving it about as much authority as the general public in the review process. See id. This entire process results in KISA less of "an aid" to the FTC as compared to FINRA throughout the rulemaking process. The FTC's ability to "abrogate, add to, and modify" does not balance the scale. § 3053(e). The KIKSA does not allow the FTC to require KISA to make these changes, unless they are inconsistent with the act. See § 3053(c)(2). It is thus still the FTC's burden should it decide that changes need to be made to KISA's rules. Id.

These differences between the Maloney Act and the KIKSA are significant because they are clear examples of manners by which the SEC may exercise control over FINRA and its members that Congress did not delegate to the FTC. For these reasons, the FTC clearly "has less supervisory power than the SEC." Black I, 53 F. 4th at 887.

C. KISA's Power to File Civil Actions Without FTC Review is Alone an Improper Delegation of Power.

Even if the FTC's backend review of sanctions and final rules should constitute sufficient supervision, Congress improperly delegated the power to KISA to conduct civil suits. "To ensure the Government remains accountable to the public, 'cannot delegate regulatory authority to a private entity.'" Texas v. Comm'r of Internal Revenue, 142 S. Ct. 1308, 1309 (2022) (quoting Railroads I, 721 F.3d at 670). Delegation of government authority raises cause for concern because "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." Railroads

II, 575 U.S. at 57 (Alito, J., concurring). The Government can escape accountability when it delegates its authority to independent agencies, id., because doing so allows the "Government to act unhindered by the restraints of bureaucracy and politics." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 391 (1995).

In enacting the KIKSA, Congress authorized KISA to "commence a civil action against a technological company" without the FTC's approval or review. § 3054(j). In doing so, Congress delegated "a power it does not possess." Railroads II, 575 U.S. at 68 (Alito, J. concurring) (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 132 (2015) (Thomas, J. concurring)). "A lawsuit is the ultimate remedy for a breach of the law," Buckley v. Valeo, 424 U.S. 1, 138 (1976), and it is the President who must "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3. In delegating this power to KISA without giving the FTC even the courtesy to review, Congress has stripped the agency of a constitutionally vested power. See Buckley, 424 at 111, 138. And as such, Congress clearly improperly delegated this power to KISA outside of the FTC's control. See Railroads II, 424 U.S. at 68 (Alito, J. concurring) ("Congress improperly 'delegates'—or, more precisely, authorizes the exercise of . . . executive power when it authorizes individuals or groups outside of the President's control to perform a function that requires the exercise of that power."). For these reasons, this Court should recognize that KISA is subordinate to the FTC and in doing so put an end to an unconstitutional degradation of executive authority.

II. RULE ONE IS SUBJECT TO AND FAILS STRICT SCRUTINY BECAUSE IT IS NEITHER NARROWLY TAILORED NOR THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENTS COMPELLING INTEREST.

The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. At its heart, the Free Speech Clause ensures that the government "has no power to restrict expression because of its message, its ideas, its subject

matter, or its content." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972); see also Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints"). However, the Free Speech Clause does not protect all forms of speech. This Court has recognized certain categories of speech such as obscenity, true threats, and incitement as "historically unprotected." United States v. Stevens, 559 U.S. 460, 468-69 (2010). Consequently, Congress is permitted to regulate such categories of speech without encroaching upon the First Amendment. Id. In contrast, regulation of protected speech is only permitted where statute satisfies constitutional muster. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (explaining how sexual expression which is indecent, but not obscene, is protected by the First Amendment and subject to strict scrutiny). To guard against governmental viewpoint discrimination, this Court subjects laws that target protected speech based on its content to strict scrutiny. Playboy Ent. Group, 529 U.S. at 813. A court analyzing a free speech challenge must therefore determine (1) whether the regulation targets speech based on its content, (2) whether the targeted content is protected speech, and (3) whether there is potential for the regulation to chill the protected speech.

If the regulation targets protected speech based on its content, it will be subject to strict scrutiny. Id. To satisfy strict scrutiny, the regulation must be narrowly tailored to serve a compelling governmental interest and must be the least restrictive means of advancing that interest. Sable Commc'ns, 492 U.S. at 126 (1989). Because it is a difficult standard to meet, lawmakers must carefully craft regulations targeting protected speech to ensure that no more speech than necessary is burdened to advance the compelling governmental interest.

Rule ONE, as a content-based regulation of protected speech, falls under the purview of the First Amendment. Rule ONE targets speech which, although unprotected for minors, is

protected adult speech. See Id. at 126; Record 17. Further, Rule ONE targets speech based on its subject-matter and is therefore a content-based regulation. See Playboy Ent. Group, 529 U.S. at 811-812; Record 17. Lastly, as evidenced by testimony in the District Court, Rule ONE chills adult speech. Record 4. Given that this Court has repeatedly held that regulations which satisfy the above criteria are subject to strict scrutiny, Rule ONE must also satisfy strict scrutiny. See Id.; Ashcroft v. ACLU, 542 U.S. 656, 670 (2004) (Ashcroft II). Because Rule ONE fails strict scrutiny for being underinclusive, overinclusive, and failing to use other less restrictive means, the Court should reverse the Fourteenth Circuit's decision and hold that Rule ONE is unconstitutional. Doing so will uphold the values that this country was founded upon and ensure that state power remains confined within the strictures of the First Amendment.

A. Rule One Is Subject to Strict Scrutiny Review Because It Is a Content-Based Regulation of Speech That Burdens Protected Speech.

Rule ONE targets protected content: adult speech. Record 17. First Amendment jurisprudence dictates that such content-based regulations are subject to strict scrutiny. Reed v. Gilbert, 576 U.S. 155 (2015). Additionally, when presented with regulations that pursued identical interests as Rule ONE and, in some cases, by the same means as Rule ONE, this Court has consistently applied strict scrutiny to the regulations, citing their content-based nature. Playboy Ent. Group, 529 U.S. at 811-12; Ashcroft II, 542 U.S. at 670. This Court should therefore reject the reasoning of the Fourteenth Circuit and find that Rule ONE is subject to strict scrutiny.

i. First Amendment Jurisprudence States That Content-Based Regulations on Protected Speech Are Subject to Strict Scrutiny.

The United States Supreme Court's decision in Reed v. Town of Gilbert states that content-based regulations of speech are subject to strict scrutiny and are presumptively unconstitutional. 576 U.S. 155, 155-56 (2015). In Reed, the Court held that where a law targets speech based on its "communicative content," it "may be justified only if the government proves that they are narrowly

tailored to serve compelling state interests." Id. at 155. Therefore, courts are required to consider whether a regulation of speech is facially content based. Id. at 156. Laws are facially content-based when they "defin[e] regulated speech by particular subject matter," or more subtly, "defin[e] regulated speech by its function or purpose." Id. at 163. This Court also recognized that laws which are facially content neutral will be considered content-based regulations if they "cannot be 'justified without reference to the content of the regulated speech,' or [were] adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. at 163-64 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Those facially content-neutral laws, "like those that are content-based on their face, must also satisfy strict scrutiny." Id. at 164. Likewise, the Court clarified in Austin v. Reagan Nat'l Adver. of Austin, LLC, 596 U.S. 61 (2022) that a law is facially content-based if it turns on the substantive message of the speaker. Id. at 93. Therefore, a law which, "on its face," attempts to regulate access to content based on its subject-matter is a content-based restriction and must withstand strict scrutiny. Id.; Reed, 576 U.S. at 163.

Second, the Court has recognized that First Amendment strict scrutiny is not necessary for content-based regulations in a few defined areas. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011). These limited exceptions include areas such as obscenity, incitement, and true threats which represent "well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem[.]" Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). This Court has also limited the application of strict scrutiny to content-based regulations in the context of some forms of commercial speech. Commercial speech is that which does "no more than propose a commercial transaction," Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973), or relates "solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp.

v. Pub Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). A common example would be a commercial advertisement or disclosure requirement. E.g., Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985).

While it may be up for debate whether all the speech Rule ONE attempts to regulate is protected, it is indisputable that a substantial portion of it is protected adult speech as Rule ONE regulates speech which is obscene only to minors. Record 17. The lower court in both its majority and dissenting opinions acknowledges that the speech regulated by Rule ONE is protected adult speech. Record 7-8, 14. Therefore, Rule ONE falls within the purview of the First Amendment's Free Speech Clause. By targeting speech defined as "[s]exual material harmful to minors[,]" Rule ONE facially targets speech based on its "communicative content." See Reed, 576 U.S. at 163; Record 17. Further, Rule ONE only applies to commercial entities whose websites contain material "more than one-tenth of which is sexual material harmful to minors." Record 17. Because Rule ONE turns on the substantive message a speaker conveys, it is content-based speech regulation. See id. This type of content-based regulation has always been subject to strict scrutiny. See id. at 164. The Fourteenth Circuit failed to conduct this analysis and, as a result, applied the improper standard of review to Rule ONE. See Record 7-8. This Court should reverse that decision and clarify, as First Amendment jurisprudence requires, that strict scrutiny is the proper standard for laws which regulate speech based on its content.

ii. Supreme Court Precedents Indicate That Content-Based Restrictions on Sexually Explicit Material Are Subject to Strict Scrutiny.

This Court has consistently recognized that regulations which seek to restrict speech based on its content are necessarily content-based and subject to strict scrutiny. See Reed, 576 U.S. at 163-64. Between 1989 and 2004, this Court adjudicated a series of different cases dealing with regulation of pornographic and pornographic-adjacent materials in pursuit of the laudable

governmental interest in protecting its youths. See Free Speech Coal., Inc. v. Rokita, No. 1:24-cv-00980-RLY-MG, 2024 WL 3228197, at * 36-38 (S.D. Ind. June 28, 2024) (published) (reciting the court's history addressing regulation of pornographic and pornographic adjacent materials). Across this series of cases, this Court has come to one conclusion: Content-based regulations of speech are presumptively unconstitutional and must survive strict scrutiny. Id.

The Court in Sable Communications of California, Inc. v. F.C.C. states that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 492 U.S. at 126. The Court held that strict scrutiny applied to a statute that criminalized "dial-a-porn" services, which it ultimately found unconstitutional. Id. This Court reaffirmed its position that "there is a compelling interest in protecting the physical and psychological well-being of minors[,]" but to do so it must be by "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment Rights." Id. Likewise, the Court in Reno v. ACLU, 521 U.S. 844 (1997) dealt with a content-based statute which attempted to criminalize the knowing transmission of obscene or indecent material to minors over the internet. Id. at 849. The Court held that where an act suppresses "speech that adults have a constitutional right to see and address to one another[,]" that "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective" in achieving the compelling state interest. Id. at 875. Thus, where a regulation attempting to protect minors from indecent protected adult content has a suppressing or chilling effect on adult content, it must be held to strict scrutiny. Id. Notably, this Court rejected the application of Ginsberg v. New York, 390 U.S. 629 (1968), the case which the majority in the lower court principally relies upon its application of rational basis review. Id. at 865; see Record 8-9.

The Court's ruling in United States v. Playboy Entertainment Group is instructive on how courts should analyze the standard of review for statutes which seek to regulate speech based on its content. 529 U.S. 803, 811-12 (2000). Playboy Enternainment Group dealt with a statute that aimed to prevent channel bleeding and applied exclusively to cable channels primarily dedicated to "sexually explicit adult programming[.]" Id. at 811. This Court reasoned that because the regulation concentrates only on content which the statute deemed "sexually explicit adult programming or other programming that is indecent," it "focuses only on the content of the speech and the direct impact that speech" might have on younger viewers. Id. "This is the essence of content-based regulation." Id. at 812. Thus, where the content is protected speech, "and the question is what standard the Government must meet in order to restrict it[,] [a]s we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny." Id. at 814.

Lastly, Ashcroft II is a valuable case involving a statute which targeted content materially identical to the content targeted by Rule ONE. 542 U.S. at 661-62. The Court relied on what it deemed the "closest precedent on the general point" in its decision in Playboy Entertainment Group, which, like Ashcroft II, "involved a content-based restriction designed to protect minors." Id. at 670. This Court insisted that "[t]he reasoning of Playboy Entertainment Group, and the holdings and force of this Court's precedents," compel the application of strict scrutiny and an ultimate finding that the government did not carry its burden. Id. at 670; see also Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 289 (5th Cir. 2024) (Higginbotham, J., dissenting in part and concurring in part) (explaining a materially identical law to Rule ONE "limits access to materials that may be denied to minors but remain constitutionally protected speech for adults[, and thus] the law must face strict scrutiny review because it limits adults' access to protected speech").

These cases suggest that regulations burdening protected speech which seek to restrict access to "sexual material harmful to minors," justified by an interest in protecting minors, are always subject to strict scrutiny. See Ashcroft II, 542 U.S. at 670. Rule ONE is such a regulation. It seeks to restrict access to material defined as "sexual material harmful to minors," in the name of protecting youths, and results in a burden on protected adult speech. Record 17. Rule ONE "focuses only on the content of the speech and the direct impact that speech" has on young viewers. See Playboy Entm't Group, 529 U.S. at 811. This is the essence of a content-based regulation. See id. While the government is constitutionally permitted to advance its compelling interest in shielding children from content which is harmful to them, where it suppresses a substantial amount of protected adult speech it must be held to strict scrutiny. See Reno, 521 U.S. at 875. Further, Ashcroft II is the controlling precedent on this issue. 542 U.S. 656. In the court below, the Fourteenth Circuit argued that the Ashcroft II Court was not asked whether strict scrutiny was the proper standard and thus its application of strict scrutiny is not binding. See Record 9. This is incorrect. The Ashcroft II Court reasoned by analogy to Playboy Entertainment Group, where it found that a content-based regulation was subject to strict scrutiny. See 542 U.S. at 670; 529 U.S. at 814. Rule ONE targets the very same content as the statute in Ashcroft II. See 542 U.S. at 661-62; Record 17; 55 C.F.R § 1(6). Though Rule ONE's application may be, in some respects, distinguishable from the above regulations, the Court's rationale behind the appropriate standard of review holds true: Regulations which aim to restrict minors' access to content purely based on its subject-matter must do so in a manner that places the smallest burden on First Amendment speech. See Sable Commc'ns, 492 U.S. at 126; Reno, 521 U.S. at 875; Playboy Ent. Group, 529 U.S. at 814; Ashcroft II, 542 U.S. at 670. It follows that this court should adhere to its reasoning

and precedents in Ashcroft II and Playboy Entertainment Group by applying strict scrutiny to this content-based regulation of protected adult speech. 542 U.S. at 670; 529 U.S. at 814.

iii. The Ginsberg Theory of Rational Basis Review Is Incorrect Because It Misconstrues Supreme Court Precedents.

The theory of rational basis review initially brought forward by the Fifth Circuit in Paxton and adopted by the Fourteenth Circuit in this case fails for three reasons: (1) It arbitrarily ignores controlling on point Supreme Court precedents. (2) It relies on an unsubstantiated legal theory that the court in Ashcroft II did not hold that strict scrutiny was applicable. And (3) It misunderstands Ginsberg's effect.

First, the decisions by the Fourteenth and Fifth Circuits ignore controlling Supreme Court precedent. When a precedent of the Supreme Court has direct application in a case, as it does here, "a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" Mallory v. Norfolk S. Ry., 600 U.S. 122, 136 (2023) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)). "This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" Id. Circuit courts are neither empowered nor justified in ignoring controlling Supreme Court precedents. Instead, the Circuits are instructed to leave to this Court the prerogative of overruling its own decisions. See id. The decision in Ashcroft II, as well as general First Amendment jurisprudence, compel circuit courts around the country to apply strict scrutiny to content-based regulations in the context of age-verification for sexually explicit material as well as any other content-based regulations of speech. 542 U.S. at 670. Instead, the Fourteenth Circuit, along with the Fifth Circuit, have arbitrarily decided to upend Supreme Court precedent, justifying unconstitutional abridgment of adults' free speech in the name of protecting children from explicit content.

Second, the Fourteenth and Fifth Circuits rely on a suspect legal theory that the Court in Ashcroft II did not reach the question of what standard of review applies. See Paxton, 95 F. 4th at 274; Record 9. While it is true that the Court did not explicitly state that rational basis review or even intermediate scrutiny were not applicable, the court reasoned by analogy to what it considered to be the closest available precedent, Playboy Entertainment Group. See Ashcroft II, 542 U.S. at 670 (relating the content-based nature of the statute in Playboy Entertainment Group to the one presently before the court). Justice Scalia was the sole justice to dissent as to the standard of scrutiny applied to the statute in Ashcroft II. Id. at 676 (J. Scalia, dissenting) ("Both the court and Justice Breyer err, however, in subjecting COPA to strict scrutiny."). This illustrates that it was well within the Court's power to address what standard of scrutiny applied, but, as the majority concluded, it was not necessary in light of recently decided precedent in Playboy Entertainment Group. See 529 U.S. at 813 ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.").

Third, the Fifth and Fourteenth Circuits misinterpret the effect that Ginsberg should have on content-based regulations that burden adults' access to protected speech. These courts argue that Ginsberg stands for the proposition that if a statute is attempting to regulate the speech of minors by a standard fit for minors, then that regulation is subject to rational basis review regardless of any impact the regulation might have protected adult speech. See Paxton, 95 F. 4th at 269; Record 8-9. This cannot be the case. Aside from the overwhelming precedent mentioned above detailing how content-based regulations targeting protected adult speech are subject to strict scrutiny, simple logic tells us that the capacity of the New York statute to chill protected adult speech is nowhere near that of Rule ONE. In 1968, the privacy exposure an adult risked when purchasing a "girlie magazine" from a corner store was limited to the owner of that shop and other

customers presently in the store. In contrast, today, according to a 2021 U.S. census report, ninety-five percent of households have at least one computer and ninety percent have a broadband internet subscription. Daniela Mejia, Computer and Internet Use in the United States: 2021, U.S. Census Bureau, 2 (June 2024), https://www2.census.gov/library/publications/2024/demo/acs-56.pdf. In a country with over 330 million people, the potential for privacy exposure on the internet has never been greater. As recognized in the record, regulations like Rule ONE have a tremendous chilling effect on adult speech. Record 4 (citing an article reporting that adult entertainment website traffic dropped eighty perfect after a law similar to Rule ONE was passed in Louisiana). As court's have acknowledged, the decision in Ginsberg "did not challenge an adults ability to access protected speech; rather, the petitioner there argued that the law burdened children." Record 14 (Marshall, J., dissenting); see also Paxton, 95 F.4th at 293 (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."). Therefore, when considering whether Rule ONE has the potential to chill adult speech, Ginsberg is not the appropriate precedent. Instead, this Court, as well as lower courts, should adhere to First Amendment jurisprudence, follow Ashcroft II, and apply strict scrutiny to Rule ONE. 542 U.S. at 670.

B. Rule ONE Cannot Satisfy Strict Scrutiny Because It Is Neither Narrowly Tailored Nor the Least Restrictive Means of Achieving the Government's Compelling Interest.

With the prerequisites for strict scrutiny satisfied, we next turn to its application. In the context of a regulation which abridges the First Amendment Free Speech Clause, the government is required to establish three prongs to survive strict scrutiny: (1) the regulation must serve a compelling governmental interest; (2) it must be narrowly tailored to achieve that interest; and (3) it must be the least restrictive means of advancing that interest. Sable Commc'ns, 492 U.S. at 126. Strict scrutiny requires courts to recognize essential values and subsequently demands that the

government advance them in a way that is narrow, just, and minimally invasive. Aaron Pinsoneault, Free Speech, Strict Scrutiny and a Better Way to Handle Speech Restrictions, 29 Wm. & Mary B. Rts J. 245, 263 (2020). While the analysis typically starts with determining whether the regulation targets a compelling governmental interest, here it is uncontested that the government has a compelling interest in protecting minors from material that may be harmful to them and Petitioner is not antithetical to that interest. See Ginsberg, 390 U.S. at 639. Therefore, we will start the analysis by determining whether Rule ONE is narrowly tailored and then conclude with the least restrictive means tests.

i. Rule ONE Fails Strict Scrutiny for Not Being Narrowly Tailored.

Rule ONE is not narrowly tailored to achieve its goal of protecting minors from sexual material that is harmful to them. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Sable Commc'ns, 492 U.S. at 126. A narrowly tailored law must pursue its compelling interest through "means that are neither seriously underinclusive nor seriously overinclusive." Brown, 564 U.S. at 805. Rule ONE is not narrowly tailored because it suffers from the same deficiencies the Child Online Protection Act ("COPA") suffered from in addition to being both underinclusive and overinclusive.

In ACLU v. Ashcroft, 332 F. 3d 240 (3d Cir. Pa., Mar. 6, 2003) (Aschroft I) the Third Circuit Court of Appeals applied strict scrutiny to COPA, a materially analogous statute to Rule ONE, and held that it failed for not being narrowly tailored. Id. at 251. The court found that COPA's "use of the term 'minors' in all three prongs of the statute's definition of 'material harmful to minors' [was] not narrowly drawn[.]" Id. Because COPA leaves the judgment of whether material which appeals to the "prurient interest" of minors to "the average person, applying contemporary community standards" and taking the material "as a whole," "the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only

by the most puritanical communities." Id. at 252. This is because the internet does not permit "speakers or exhibitors to limit their speech or exhibits geographically." Id. Such a limitation "by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings." Id. Further, the Third Circuit took issue with COPAs failure to tailor the regulations to their targeted audience. Id. at 253. COPA limited its application to minors which it defined as "any person under 17 years of age." Id. The term "minor" "thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen . . . Web publishers who seek to" abide by this regulation "must guess at which minor should be considered in determining whether the content of their Web site has 'serious . . . value for [those] minors.'" Id. at 254. This analysis of COPA is directly applicable to Rule ONE as the definition of "sexual material harmful to minors" is materially the same and Rule ONE's definition of a minor differs only in that it defines minors as "an individual younger than 18 years of age." Record 17. 55 C.F.R § 1(6)(A), § 1(3).

Rule ONE fails to be narrowly tailored for these same reasons. Because the internet does not allow speakers to limit their speech geographically, the speech which all minors will have access to will be curtailed to the standards of the most intolerant communities in the country. See Ashcroft I, 332 F.3d at 252. This is in contrast to a rule that would limit access to speech by the most tolerant communities' standards. While both applications of this regulation result in a chilling effect on content that adults have constitutionally protected right to access, the most common-sense application of Rule ONE § 1(6)(A) results in a greater restriction on minors' access to content in more tolerant communities. See id.; Record 17; 55 C.F.R. § 1 (6)(A). Similarly, Rule ONE is not narrowly tailored because it fails to address what aged "minor" should be applied in analyzing whether the content "taken as a whole, lacks serious literary, artistic, political, or scientific value."

See id. at 254; Record 17. Web publishers who seek to limit their liability under Rule ONE will have to make assumptions as to the minor's age they should consider in determining whether the content of their website falls under the regulation. See id. Faced with this predicament, some web publishers may choose to require age verification for things that would only lack serious value for pre-adolescent minors (i.e., ages two, three, four, etc.). This leads to the absurd result that a seventeen-year-old can only access content that "as a whole" has serious literary or other value for an infant.

Further, laws which abridge protected speech cannot be narrowly tailored where they are either underinclusive or overinclusive. Brown, 564 U.S. at 805. First, a law is underinclusive where "the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 451 (2015); see also Fla. Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment) ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). In Free Speech Coal., Inc. v. Rokita, the Southern District Court for the State of Indiana listed a multitude of different ways in which minors would be able to circumvent age verification legislation. Rokita, 2024 WL 3228197, at * 40-41 ("free proxy servers like ProxyScrape allows users to pretend to be in 129 different countries for no charge[,]" and "[f]ree VPNs like Proton VPN would allow a user to connect to an adult website from a multitude of other countries with just a download."). Likewise, in Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373 (W.D. Tex., Aug. 31, 2023), the case which preceded Paxton, the District Court found that the Texas age-verification legislation, H.B. 1181, was "severely underinclusive" because it did not regulate sites that are "most likely to serve as a gateway to pornography use." Id. at 394; TX H.B.

No. 1181 § 129B.004(b). The Texas regulation, like Rule ONE, exempts social media platforms and search engines from coverage because "they likely do not distribute at least one-third sexual material." Id. at 393; Record 17; 55 C.F.R. § 5(b). The District Court found that social media platforms "can show material which is sexually explicit for minors without compelled age verification." Id. This is problematic because social media platforms are dominated by minors, but, since the regulation is only targeting sites whose business model is driven by distribution of sexual material harmful to minors, minors will have unfettered access to this type of content as long as it stays below H.B. 1181's one-third threshold. Id.

Second, a law is overinclusive where it "encompasses more protected conduct than necessary to achieve its goal." Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 578 (1993). In Reno, this Court found that the regulation "place[d] an unacceptably heavy burden on protected speech," and it did "not constitute the sort of 'narrow tailoring'" necessary to make it constitutional. 521 U.S. at 882. While this court has acknowledged that the Government possesses legitimate power to protect children from harm, "speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. Jacksonville, 422 U.S. 20, 213-14 (1975). In the context of a regulation that suppresses all a website's material simply because some arbitrary portion of that website contains material regulators think is unsuitable for minors, it follows that the regulation is overinclusive and thus not narrowly tailored.

Due to this, Rule ONE is not narrowly tailored because it is both underinclusive and overinclusive. Rule ONE is underinclusive because it does nothing to regulate or prevent minors from circumventing the regulation. See Florida Star v. B.J.F., 491 U.S. at 541-42 (Scalia, J., concurring in part and concurring in judgment) ("[A] law cannot be regarded as protecting an

interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). Proxy servers and VPNs allow minors to circumvent the regulation with no cost whatsoever. See Rokita, 2024 WL 3228197, at * 40-41. As the Fourteenth Circuit addressed in its decision below, it is incredibly easy to be anonymous with a computer even when age verification is required. See Record 4-5 ("[C]hildren can bypass security measures" according "to a news report from 2022, where a 6-year old spent over $16,000 on in app purchases."); see also Record 15 (Marshall, J., dissenting) ("the prevalence of VPNs – and Rule ONE's lack of attempt to deal with them – also allows children to circumvent the rules.").

Further, Rule ONE is underinclusive because it explicitly exempts search engines from enforcement where the search engine is not responsible for the creation of the content. See Colmenero, 689 F. Supp. 3d at 394; Record 18; 55 C.F.R. § 5(b). Because search engines typically do not create any content and instead serve as a gateway to content, minors will still be able to view content proscribed by Rule ONE as long as they are viewing it within the search engine's platform. See id.; Record 18. Rule ONE's emphasis on only enforcing its provisions on the creators of adult content, rather than also including distributor search engines, highlights KISA's effort to target the adult entertainment industry, as opposed to targeting the content itself. See id.; Record 18; 55 C.F.R. § 5(b). Likewise, minors will have access to pornographic-adjacent content on social media platforms whose content does not fall within the one tenth threshold provided by Rule ONE. See id. at 393. Given that the central justification for this regulation is protecting minors, it is concerning that the regulators would exempt web companies such as search engines and social media platforms considering minors internet traffic is likely greatest in those areas. See id. Thus, Rule ONE is underinclusive.

Rule ONE also suffers from being overinclusive. Rule ONE is overinclusive because it burdens far more speech than necessary to accomplish its compelling interest. See Church of Lukumi Babalu Aye, 508 U.S. at 578. Under Rule ONE § 2(a), "commercial entities" that "distribute material . . . more than one-tenth of which" is material the regulation deems harmful to minors will be subject to it. See Record 17; 55 C.F.R. § 2(a). In the context of a commercial entity's website that consists of 10.1% "sexual material harmful to minors," 100% of that website's content will be suppressed, pending age-verification. See Record 17; 55 C.F.R. §2(a). Not only does this generally abridge the First Amendment rights of adults who have a constitutionally protected right to access 100% of that material, but it abridges the constitutionally protected rights of children to access the other 89.9% of material that the website publishes. See Erznoznik, 422 U.S. at 213-14. Thus, Rule ONE is underinclusive, overinclusive, and necessarily fails strict scrutiny for not being narrowly tailored.

ii. Rule ONE Fails Strict Scrutiny Because It Is Not the Least Restrictive Means.

A "statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose'" of that statute. Ashcroft II, 542 U.S. at 665 (quoting Reno, 521 U.S. at 874). In considering whether the proposed regulation is the least restrictive means of accomplishing the compelling governmental interest, a court "assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative." Id. at 666. Additionally, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." Id. at 665. The purpose is to ensure that "speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." Id. Rule ONE is not the least

restrictive means of accomplishing the government's compelling interest as Respondent has failed to show how the two less restrictive alternatives to Rule ONE are not, at least, as effective as Rule ONE.

First, as was accepted by the District Court below and as this Court states in Ashcroft II, filtering software is both less restrictive and more effective than age-verification requirements. Id. at 667; Record 5. Filtering software is less restrictive because "[it] impose[s] selective restrictions on speech at the receiving end, not universal restrictions at the source." Id. ("Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves."). This Court's analysis of COPA also found that "promoting the use of filters does not condemn . . . any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." Id. Further, "filtering software may well be more effective than" age-verification requirements. Id. In creating COPA, congress also created the Commission on Child Online Protection, which was tasked with evaluating the "relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet." Id. at 668. The Commission found that filtering software was a more effective means than age-verification requirements. Id. at 668 (highlighting data found by the commission that concluded that filtering software was more effective than adult-ID or credit card verification); see also Record 5 (noting expert testimony that internet filtering software is an effective method of preventing juvenile access to adult materials). Due to the flexibility of filtering software, parents, unlike the government, are not limited to filtering out just sexual content. Instead, they can filter out any content they deem harmful to their child until that child is of an appropriate age to view it. See Ginsberg, 390 U.S. at 639 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) ("It is cardinal with us 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.").

Second, as was also accepted by the District Court below, requiring Internet providers to block the targeted content until adults "opt out" is a less restrictive alternative to Rule ONE. Record 15. This is akin to the conclusion this Court reached in Playboy Ent. Group. 529 U.S. 803 (2000). There, this Court dealt with a regulation which effectively and categorically banned explicit adult content from cable networks during certain hours of the day. Id. When posed with the alternative of individual subscribers being able to opt in and out of "blocking" devices, this Court concluded that it would be a less restrictive alternative as it does not involve the government substituting itself for the place of informed and empowered parents. Id. at 826. A similar scheme could replace Rule ONE. By allowing individual internet subscribers to "opt in" or "opt out" of content blockers, the privacy risk of uploading your government ID on the internet and, consequently, the burden on protected first amendment speech, would be diminished, if not eliminated. The Government has failed to show that these less restrictive alternatives accepted by the District Court are not as effective as Rule ONE. Thus, Rule ONE fails strict scrutiny and is unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decisions and (a) the District Court's decision that the KIKSA does not violate the private nondelegation doctrine; and (b) affirm the District Court's grant of Petitioner's motion for preliminary injunction. The Court should find the KIKSA improperly delegates executive authority to KISA. The Court should also find that Rule ONE is subject to strict scrutiny, not rational basis review. Further, this Court should find that Rule ONE fails strict scrutiny and is an unconstitutional abridgement of the First Amendment. The First Amendment is preeminent amongst this country's founding principles and this Court should guard against such governmental intrusion into the lives of private citizens.

APPENDIX A

The Maloney Act
Relevant Provisions

15 U.S.C.A. § 78u, in relevant part provides

(a)(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, 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, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, 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. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(c) 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. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

APPENDIX B

Horseracing Integrity and Safety Act of 2020
Relevant Provisions

15 U.S.C.A. § 3057. Rule violations and civil sanctions

a. Description of rule violations

1. In general. The Authority shall issue, by rule in accordance with section 3053 of this title, a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons.

2. Elements. The description of rule violations established under paragraph (1) may include the following:

A. With respect to a covered horse, strict liability for covered trainers for--

i. the presence of a prohibited substance or method in a sample or the use of a prohibited substance or method;

ii. the presence of a permitted substance in a sample in excess of the amount allowed by the horseracing anti-doping and medication control program; and

iii. the use of a permitted method in violation of the applicable limitations established under the horseracing anti-doping and medication control program.

B. Attempted use of a prohibited substance or method on a covered horse.

C. Possession of any prohibited substance or method.

D. Attempted possession of any prohibited substance or method.

E. Administration or attempted administration of any prohibited substance or method on a covered horse.

F. Refusal or failure, without compelling justification, to submit a covered horse for sample collection.

G. Failure to cooperate with the Authority or an agent of the Authority during any investigation.

H. Failure to respond truthfully, to the best of a covered person's knowledge, to a question of the Authority or an agent of the Authority with respect to any matter under the jurisdiction of the Authority.

I. Tampering or attempted tampering with the application of the safety, performance, or anti-doping and medication control rules or process adopted by the Authority, including--

i. the intentional interference, or an attempt to interfere, with an official or agent of the Authority;

ii. the procurement or the provision of fraudulent information to the Authority or agent; and

iii. the intimidation of, or an attempt to intimidate, a potential witness.

J. Trafficking or attempted trafficking in any prohibited substance or method.

K. Assisting, encouraging, aiding, abetting, conspiring, covering up, or any other type of intentional complicity involving a safety, performance, or anti-doping and medication control rule violation or the violation of a period of suspension or eligibility.

L. Threatening or seeking to intimidate a person with the intent of discouraging the person from the good faith reporting to the Authority, an agent of the Authority or the Commission, or the anti-doping and medication control enforcement agency under section 3054(e) of this title, of information that relates to--

i. an alleged safety, performance, or anti-doping and medication control rule violation; or

ii. alleged noncompliance with a safety, performance, or anti-doping and medication control rule.

b. Testing laboratories

1. Accreditation and standards. Not later than 120 days before the program effective date, the Authority shall, in consultation with the anti-doping and medication control enforcement agency, establish, by rule in accordance with section 3053 of this title--

A. standards of accreditation for laboratories involved in testing samples from covered horses;

B. the process for achieving and maintaining accreditation; and

C. the standards and protocols for testing such samples.

2. Administration. The accreditation of laboratories and the conduct of audits of accredited laboratories to ensure compliance with Authority rules shall be administered by the anti-doping and medication control enforcement agency. The anti-doping and medication control enforcement agency shall have the authority to require specific test samples to be directed to and tested by laboratories having special expertise in the required tests.

3. Extension of provisional or interim accreditation. The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a laboratory accredited by the Racing Medication and Testing Consortium, Inc., on a date before the program effective date.

4. Selection of laboratories

A. In general. Except as provided in paragraph (2), a State racing commission may select a laboratory accredited in accordance with the standards established under paragraph (1) to test samples taken in the applicable State.

B. (B) Selection by the Authority. If a State racing commission does not select an accredited laboratory under subparagraph (A), the

Authority shall select such a laboratory to test samples taken in the State concerned.

c. Results management and disciplinary process

1. In general. Not later than 120 days before the program effective date, the Authority shall establish in accordance with section 3053 of this title--

A. rules for safety, performance, and anti-doping and medication control results management; and

B. the disciplinary process for safety, performance, and anti-doping and medication control rule violations.

2. Elements. The rules and process established under paragraph (1) shall include the following:

A. Provisions for notification of safety, performance, and anti-doping and medication control rule violations.

B. Hearing procedures.

C. Standards for burden of proof.

D. Presumptions.

E. Evidentiary rules.

F. Appeals.

G. Guidelines for confidentiality and public reporting of decisions.

H. Due process. The rules established under paragraph (1) shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.

d. Civil sanctions

1. In general. 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.

2. Requirements. The rules established under paragraph (1) shall--

A. take into account the unique aspects of horseracing;

B. be designed to ensure fair and transparent horseraces; and

C. deter safety, performance, and anti-doping and medication control rule violations.

3. Severity. The civil sanctions under paragraph (1) may include--

A. lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races; and

B. with respect to anti-doping and medication control rule violators, an opportunity to reduce the applicable civil sanctions that is comparable to the opportunity provided by the Protocol for Olympic Movement Testing of the United States Anti-Doping Agency.

e. Modifications. The Authority may propose a modification to any rule established under this section as the Authority considers appropriate, and the

proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

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

b. Review by administrative law judge

1. In general. With respect to a final civil sanction imposed by the Authority, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

2. Nature of review

A. In general. In matters reviewed under this subsection, the administrative law judge shall determine whether--

i. a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

ii. such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or

iii. the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Conduct of hearing. An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of Title 5.

3. Decision by administrative law judge

A. In general. With respect to a matter reviewed under this subsection, an administrative law judge--

i. shall render a decision not later than 60 days after the conclusion of the hearing;

ii. may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority; and

iii. may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

B. Final decision. A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

c. Review by Commission

1. Notice of review by Commission. The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Authority and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

2. Application for review

A. In general. The Authority or a person aggrieved by a decision issued under subsection (b)(3) 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.

B. Effect of denial of application for review. If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

C. Discretion of Commission

i. In general. A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

ii. Matters to be considered. In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that--

I. a prejudicial error was committed in the conduct of the proceeding; or

II. the decision involved--

aa. an erroneous application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or

bb. an exercise of discretion or a decision of law or policy that warrants review by the Commission.

3. Nature of review

A. In general. In matters reviewed under this subsection, the 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 judgement of the Commission, is proper and based on the record.

B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

C. Consideration of additional evidence

i. Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.

ii. Motion by a party

I. In general. A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that--

aa. such additional evidence is material; and

bb. there were reasonable grounds for failure to submit the evidence previously.

II. Procedure. The Commission may--

aa. accept or hear additional evidence; or
bb. remand the proceeding to the administrative law judge for the consideration of additional evidence.