Nos. 23-456 and 23-743

IN THE
Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CONSUMERS' RESEARCH, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Eleventh Circuits

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

If nondelegation means anything, it prohibits Congress from handing an "independent" agency the power to raise billions of dollars in taxes from the general public, based only on vague statutory "principles" that are "aspirational only." *Tex. Off. of Pub. Util. Couns. v. FCC* ("*TOPUC II*"), 265 F.3d 313, 321 (5th Cir. 2001). As Judge Newsom observed, an agency cannot be given the power "to do essentially whatever it wants." Pet.App.25a.[1]

That is precisely what Congress did when it created the USF. Petitioners have shown how the USF's unique taxing mechanism violates even modern nondelegation precedents. The only historical analogs for a delegation this broad and amorphous were the statutory provisions at issue in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). But even if Petitioners are wrong, it only confirms Judge Newsom's point below that the modern nondelegation doctrine has "become a punchline," Pet.App.22a, which this Court should revisit.

If ever a regime demonstrated the dangers of the "notoriously lax" modern nondelegation framework, this is it. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

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[1] Cites to the "Pet.App." and "Pet." are to those filed in No. 23-743. All cites to the Pet.App. are to Judge Newsom's concurrence in No. 23-743, unless otherwise indicated.

Congress "confer[red] front-line law- and policymaking power on unelected, unaccountable agency bureaucrats," Pet.App.27a, and those bureaucrats, hemmed in only by their own "aspirations," now collect 25 times the FCC's annual budget, thanks to quarterly tax rates that climb to new record highs every year.

The USF scheme is then worsened by the fact that the FCC approves "by default" the tax figures proposed by the self-interested Universal Service Administrative Company—a serious private nondelegation violation that independently warrants certiorari.

"[T]his case" therefore presents the ideal vehicle for resolving "deeper problems in nondelegation precedent." Pet.App.42a. The FCC never disputes that this case is free from any vehicle issues.

In its response, the FCC focuses primarily on the merits, again confirming there are no obstacles to review. The FCC also points to the lack of a circuit split, but that is hardly meaningful. The *en banc* Fifth Circuit could create a split at any time, and even if a split does not materialize it would only confirm that modern nondelegation precedent has become a meaningless "punchline" in need of this Court's review, because it would allow a statutory regime that gives an agency a blank check to raise taxes, curbed only by its own "aspirations." Indeed, a majority of the Eleventh Circuit panel concluded the USF violates the original understanding of nondelegation but felt

constrained by precedent from this Court. Pet.App.20a; Pet.App.43a (Lagoa, J., concurring).

Congress passed the buck to the FCC, which then passed it to the private USAC. "[W]ith each successive delegation—from Congress to agencies, and then from agencies to private parties—we drift further and further from the locus of democratic accountability." Pet.App.42a.

The buck should stop here. This Court should grant review and reverse.

I. THE QUESTIONS PRESENTED ARE IMPORTANT, AND THE PARTIES AGREE THERE ARE NO VEHICLE ISSUES.

The FCC's brief in opposition emphasizes there is currently no circuit split on the questions presented. BIO17–18. That is no reason to deny certiorari, especially when the FCC agrees there are no vehicle issues complicating this Court's review of these important issues.

First, the *en banc* Fifth Circuit could issue a decision at any time creating a split on one or both questions. Pet.8, 38. In fact, the FCC repeatedly asked this Court for extensions of time to file its response brief, on the express basis that the FCC wanted to wait for the Fifth Circuit—indicating the FCC itself might soon be the one asking for review from this Court. If review is not granted now, this Court should at least hold these Petitions until the Fifth Circuit issues its decision.

Second, even if no split materializes, review is still warranted. The prospect of generating a circuit split is inherently lower in this context, given current precedent's "notoriously lax" approach to nondelegation. Barrett, *supra*, at 318. To be sure, Petitioners contend that the USF fails even that modern precedent, *see* Pet.27–32, and if that is wrong, it only proves Judge Newsom's point below that modern nondelegation doctrine has become a "punchline," Pet.App.22a. Numerous jurists—including a majority of the Eleventh Circuit panel—have flagged this case as an excellent vehicle for reexamining nondelegation precedent and have argued that the USF regime would fail the original understanding of nondelegation. *See* Pet.App.20a; Pet.App.43a (Lagoa, J., concurring).

Third, the FCC never disputes that there are "no procedural hurdles to review" of the questions presented, nor that this case "lacks the vehicle flaws present in the petition arising out of *Rettig*." Pet.40 (citing *Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., respecting the denial of certiorari)).

The parties and numerous judges below all agree that this case presents a clean and ideal vehicle for addressing both questions presented.

II. THE FCC'S FOCUS ON THE MERITS CONFIRMS REVIEW IS WARRANTED.

The FCC spends most of its brief addressing the merits. BIO9–17. That confirms these issues warrant

plenary review, where the parties can address the merits at length. Petitioners briefly address the FCC's admissions and arguments.

Nondelegation. The FCC never disputes that the USF charges are taxes, as Petitioners have argued, Pet.32–33, and as Judge Newsom indicated below, Pet.App.23a–24a & nn.1–2. Nor does the FCC dispute that "[s]etting tax rates" and "prescribing the universal-service program's sweep and scope" are "legislative power[s]." Pet.App.23a–24a.

Rather, the FCC rests on its view that Congress imposed sufficient limitations on the FCC's exercise of that legislative taxing power. The FCC argues primarily that the universal-service "principles" in 47 U.S.C. § 254(b) impose meaningful "limit[s]" on the FCC. BIO10. Judge Newsom's concurrence is a far sight more persuasive on that point. As he explained, Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority" to impose these taxes. Pet.App.24a. The § 254(b) principles are so "hazy" that they "cannot possibly constrain the FCC's policymaking discretion in any meaningful way," and instead "leave the agency all the room it needs to do essentially whatever it wants." Pet.App.25a. The FCC itself has long taken the position that these illusory principles "need not [be] implement[ed]." Br. for Resp't FCC at 26–27, *TOPUC II*, 2000 WL 34430695, at *26–27 (Nov. 30, 2000).

And "to make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause" allowing the FCC to add other principles as it

determines are "'necessary and appropriate.'" Pet.App.25a. The FCC can thus daisy-chain its already-broad universal service "principles."

The FCC next claims its taxing power is limited because it can collect money only for the "universal" provision of "telecommunications services." BIO11. Invoking the "universal" nature of something is hardly a good argument that it is meaningfully constrained. In any event, Judge Newsom explained why this scheme only worsens the problem: "Further diminishing the likelihood of any real guidance, the term 'universal service'—the very object of the entire program—is defined only in the most ambiguous way" and will "'evolv[e]'" over time at the FCC's discretion. Pet.App.26a.

The FCC next claims § 254(e) imposes a "require[ment]" that universal-service funding must be "sufficient." BIO12. That provision actually uses the word "should" (as does almost every provision in § 254), not "must" or "shall"—so it isn't a requirement at all.[2] The same is true for Congress's hortatory statement that phone service "should" be "affordable." BIO12 (quoting § 254(b)(1)). Even if they were binding, however, Judge Newsom observed that words like "sufficient" and "affordable" "cannot possibly constrain the FCC's policymaking discretion in any meaningful way. They leave the agency all the room it

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[2] *See, e.g.*, *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999) ("Generally speaking, courts have read 'shall' as a more direct statutory command than words such as 'should' or 'may.'").

needs to do essentially whatever it wants." Pet.App.25a.

The FCC also claims it is limited by provisions in § 254(d) saying collections from telecommunications carriers must be "equitable and nondiscriminatory." BIO11. But as Judge Newsom noted, this imposes "essentially no" direction about how much telecom companies "should actually be charged." Pet.App.26a. And as for the related statutory clause stating such funds be paid into "sufficient mechanisms established by the [FCC] to preserve and advance universal service," 47 U.S.C. § 254(d), the FCC does not even attempt to dispute Judge Newsom's characterization of that statutory inkblot: "I have *no* idea what that means," Pet.App.26a (emphasis in original).

Nor does the FCC attempt to rebut Petitioners' argument that § 254 "track[s] the regimes in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which likewise featured statutes with lengthy lists of vague, precatory, and competing policies, but no directions on how to balance or limit them." Pet.3. The FCC's brief never even cites those cases. Its inability to distinguish *Schechter* and *Panama Refining* is fatal.

The FCC says the Tenth Circuit has twice found violations of § 254(b) and suggests this must mean the statute contains an intelligible principle *somewhere*. BIO13. But those cases did not address nondelegation challenges and involved the FCC's failure to comply with *procedural* requirements like explaining its

conclusions. *See Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201 (10th Cir. 2001).

The FCC's theory seems to be that the only way to violate the nondelegation doctrine is for Congress to give literally limitless power to an agency—unbounded even by subject matter—because otherwise there would always be at least *some* limit the agency could transgress. That's wrong. Even modern precedent does not require a showing of total abdication, but rather that Congress gave power that was not "clearly delineate[d]." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989). Thus, in *Panama Refining*, this Court easily found a nondelegation violation even though the relevant statute was narrowly limited to the precisely defined topic of "hot oil" transported in excess of state limits. *See Panama Refin.*, 293 U.S. at 414.

This Court's recent decision in *CFPB v. Community Financial Services Ass'n of America*, No. 22-448 (U.S. May 12, 2024), provides further confirmation of the unprecedented nature of USF's funding mechanism, which is "[p]erhaps the most telling indication of a severe constitutional problem with an executive entity." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (cleaned up). For example, *CFPB* explains there is a long history of Congress providing appropriations of "'sums not exceeding' a specified amount," Maj.Op.13, and the Court references the statutory "cap" on CFPB funding no less than a dozen times as an important historical limitation, Maj.Op.1,3,4,6,12. But as explained above,

there is an "absence of a limit on how much the FCC can raise for the USF," and there is "no objective ceiling on the amount that the FCC can raise each quarter." *Consumers' Rsch. v. FCC*, 63 F.4th 441, 448 (5th Cir. 2023).

CFPB also addresses the practices of agencies allowed to raise money directly from the public, as occurs with the USF. Congress historically "imposed a detailed schedule" with "fees specified by law," or at least imposed "an upper limit" on collections. Maj.Op.13–15; *see also* Alito.Dissent.19-20 (statutes "specified in minute detail" the "various fees, fines, and forfeitures that officers were to collect"). But the USF statute contains no such "upper limit" or "detailed schedules," but instead "gives the FCC only the faintest, most vacuous guidance about how to exercise its authority." Pet.App.24a.

If ever a regime demonstrated the dangers of a lax framework for evaluating nondelegation, the USF is it. At almost every step, the FCC's taxing power is constrained only by its own "voluntary self-denial," which this Court has held is no limit at all for nondelegation purposes. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Private Nondelegation. The private nondelegation doctrine bars an agency from automatically adopting the proposals of "private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Here, that happens every quarter, to the tune of billions of

dollars a year in compelled contributions flowing to USAC, whose website brags that the organization is run by members of industry "interest groups." Pet.10.

The FCC claims USAC merely "provide[s] billing, accounting, and related administrative services," BIO9, as if USAC were devoted exclusively to stuffing envelopes. But reality is far different. All three Eleventh Circuit judges below agreed that the "FCC depends on [USAC], a private entity, to carry out Congress' instruction[s]" for the USF, from soup to nuts. Pet.App.2a (majority op.); Pet.App.32a.

USAC's most critical role is in determining the budget for the USF each quarter. Deciding how many billions of dollars should be collected (and spent) for universal service is an "imprecise exercise." *TOPUC II*, 265 F.3d at 328. That means it requires judgment and policy determinations by the non-governmental actors at USAC.

Most importantly, the FCC never substantively reviews those numbers on the back end. As Judge Newsom put it, "the FCC needn't (and overwhelmingly doesn't) do anything at all." Pet.App.40a. In fact, the FCC does not even engage in the *pretense* of review, instead passively "approving" of USAC's proposals by default without any action whatsoever. The FCC has never pointed to any

analogous arrangement in the lawbooks, past or present.[3]

Whether framed as a delegation to a private entity of the Article I legislative power to set tax rates, *see* Pet.App.23a, as a private delegation of the Article II executive power to carry out the law, *see* Pet.App.40a, or as potentially both, *see* BIO at I (FCC framing the second question presented as whether USAC's role "violate[s] the Constitution"), what matters is that "while the FCC maintains a patina of control over USAC's most important function, the fact that agency approval can be entirely passive—and in fact, is effectively presumed—calls into question how meaningful its control really is." Pet.App.40a.

The FCC adopts the lower courts' view that this scheme is constitutional because the FCC has the "authority" to review USAC determinations. BIO16. But "deciding *not* to act" by letting private proposals automatically become binding, Pet.App.16a (majority op.) (emphasis in original), is a textbook private nondelegation violation.

Under the FCC's approach, an agency could never violate the private nondelegation violation, as there would always be "authority" to claw back the delegated power. That mere hypothetical oversight of

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[3] The FCC claims it does "conduct meaningful review" of USAC's proposals, BIO17, but as Judge Newsom explained below, the examples the FCC can muster involved ministerial edits like "round[ing] the rate up fifty-six one-thousandths of a percentage point, from 9.044% to 9.1%," Pet.App.21a–22a.

private actors making significant policy and executive determinations is insufficient to satisfy nondelegation principles.

CONCLUSION

The Court should grant the Petitions.

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