Nos. 24-354 & 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.

Respondents.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL.,

Petitioners,

v.

CONSUMERS' RESEARCH ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE FIREARMS POLICY COALITION, INC. AND FPC ACTION FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization that works to create a world of maximal human liberty and freedom and to promote and protect individual liberty, private property, and economic freedoms. It seeks to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs.

Amicus FPC Action Foundation ("FPCAF") is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on litigation, research, education, and other related efforts to inform the public about the importance of constitutionally protected rights—why they were enshrined in the Constitution and their continuing significance. FPCAF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations. FPCAF's research and *amicus curiae* briefs have been relied on by judges and advocates across the nation.

Amici have a particular interest in this case for two reasons. *Amici* litigate cases in federal court around the country, and the question added by the Court concerning the availability of mootness exceptions is of great importance to *Amici*. Whether

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or counsel made a monetary contribution to its preparation or submission.

by happenstance or strategic maneuvering, *compare Hirschfield v. ATF*, 14 F.4th 322 (4th Cir. 2021) (happenstance), *with New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336 (2020) (strategic), firearms cases frequently risk becoming moot, and the contours of the mootness doctrine are thus extremely important to *Amici*. Of even greater import to *Amici* is reigning in unconstitutional delegations of legislative power. Individual liberty, including the right to keep and bear arms, is routinely violated under the guise of broad delegations to administrative agencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress has granted the Federal Communications Commission ("FCC") authority to exact a regressive multi-billion-dollar tax on Americans each year. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), allows the FCC to take however much money it pleases to provide "universal [telecommunications] service" in the United States, which is an "evolving level of telecommunications services" that the FCC itself defines. 47 U.S.C. § 254(c)(1). Congress has laid out six non-exhaustive "principles" for the FCC to consider when "advanc[ing]" universal-service policy, *id.* § 254(b), but none of them actually constrain the FCC. As Judge Newsom has explained, "Section 254 gives the FCC only the faintest, most vacuous guidance" on how to tax Americans. *Consumers' Rsch. v. FCC*, 88 F.4th 917, 930 (11th Cir. 2023) (Newsom, J., concurring). This broad grant of authority violates the nondelegation doctrine. *See Wayman v. Southard*,

23 U.S. 1, 42–43 (1825); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935).

The constitutionally infirm delegation in 47 U.S.C. § 254 is compounded by the fact that the FCC has subdelegated, without authorization, its unconstitutional taxing authority to a private corporation that serves the interests of the very parties that benefit from the tax. The Universal Service Administrative Company ("USAC"), which is staffed by various interest-group leaders, has not even a "fig-leaf" of constitutional authority, *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 62 (2015) (Alito, J., concurring), yet is the true entity now in charge of taxing Americans billions of dollars each year.

The delegation of governmental power to private organizations violates the very nature of representative government, as this Court has recognized. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311–12 (1936). It also very likely violates the Due Process Clause, which prohibits self-interested regulators from exercising governmental power. *See Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013). *Amici*, however, concentrate on a third reason these delegations are unlawful: the Vesting Clauses of the Constitution.

The original public meaning of the Legislative Vesting Clause prohibits Congress from granting legislative authority to the FCC and to the private corporation USAC. This Court has properly applied the Clause in the context of private delegations but has slowly strayed away from the meaning of the text when it comes to intra-governmental or "public" delegations. *See Gundy v. United States*, 588 U.S. 128,

167 (2019) (Gorsuch, J., dissenting) (tracking the unfortunate development). This Court should revisit its public-delegation caselaw to hold Congress to the same high standards in that context as it is held to in the private-delegation context. Even, in the alternative, if USAC has been delegated *executive* power by the FCC, *see Consumers' Rsch.*, 88 F.4th at 934 (Newsom, J., concurring), the original public meaning of Article II's vesting of the "executive Power" in the President prohibits private parties from exercising such power, U.S. CONST. art. II, § 1. Only officers who are properly appointed *and* responsible to the head of the executive branch may execute the laws. This Court should affirm.

ARGUMENT

I. A Plaintiff Need Not Move for Preliminary Relief to Avail Itself of Mootness Exceptions.

A. The Injury to the Respondents is Capable of Repetition, Yet Evading Review.

A "case" or "controversy" must exist throughout the course of litigation for a federal court to exercise jurisdiction. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); U.S. CONST. art. III, § 2. The default rule is that when a plaintiff's injury can no longer be redressed by a favorable judgment, there is no longer a valid case or controversy between the parties, and the court must dismiss. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). But that default rule has exceptions. If the injury suffered by the plaintiff is "capable of repetition," yet the lawfulness of the action that inflicted the injury may "evade[] review," a justiciable case or controversy

remains between the parties. *United States v. Sanchez-Gomez*, 584 U.S. 381, 391 (2018) (internal quotation marks omitted). In such instances, federal courts continue to possess jurisdiction and cannot decline to exercise it. *See Cohens v. Virginia*, 19 US 264, 404 (1821).

As the Fifth Circuit concluded (which the United States does not contest), this case falls into the capable-of-repetition-yet-evading-review exception. The contribution factor set by USAC and (nominally) the FCC only applies for a single quarter, which is far too short to fully litigate. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (stating that even "two years" is usually not enough time). And because a new contribution factor is set every quarter, there is no doubt that this exact controversy will arise again between these same parties. *See Turner v. Rogers,* 564 U.S. 431, 439–440 (2011). No additional inquiry is necessary to conclude that an Article III "Case" or "Controversy" remains.

B. A Plaintiff's Decision Not to Seek Preliminary Relief has No Relevance to Justiciability.

Although Respondents satisfy the traditional formulation of the capable-of-repetition-yet-evading-review exception, some courts have refused to exercise jurisdiction when interim equitable relief could have prevented mootness. *See, e.g.*, *Newdow v. Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010). These cases fail to grapple with basic Article III principles and are plainly incorrect.

Article III justiciability turns on the "character" of the plaintiff's claim, not his litigation tactics. *See Hall*

v. Beals, 396 U.S. 45, 48 (1969) (per curiam); *cf. United States v. Texas*, 599 U.S. 670, 676 (2023) (asking whether a claim is of a judicially cognizable nature). This basic principle holds true when determining if a dispute is live or moot. As the dueling opinions of Justice Ginsburg (majority) and Justice Scalia (dissent) in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* agree, the proper question to ask when a case may be moot is whether a *continuing* controversy exists between the parties. 528 U.S. 167, 190–92 (2000); *id.* at 213–14 (Scalia, J., dissenting). Given the forward-looking nature of the mootness inquiry, there is no reason why a past decision not to make an optional motion for interim equitable relief would be relevant.

A plaintiff's decision not to seek interim equitable relief does not mean that the lawfulness of his injury is incapable of evading review. Despite having an airtight case on the merits, for instance, a plaintiff may reasonably decide not to move for preliminary equitable relief because it believed it would lose such motion on other grounds, such as a lack of irreparable harm or unfavorable balance of the hardships. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008). Or a plaintiff may believe seeking a final judgment rather than interim relief would be the fastest and most likely means of obtaining this Court's review. *See, e.g.*, *Wilson v. Hawaii*, No. 23-7517, 2024 WL 5036306, at *1 (U.S. 2024) (Statement of Thomas, J., respecting the denial of certiorari) (noting that "the interlocutory posture of the petition weigh[ed] against" review in that case). Interpreting Article III of the Constitution to require a plaintiff to seek preliminary relief to utilize mootness exceptions would thus unjustly

punish litigants who have meritorious claims but have legitimate reasons for foregoing interim relief.

If a plaintiff's decision to move for interim equitable relief determines whether the court has jurisdiction, then courts will be forced to examine the *merits* of a *hypothetical* motion to determine subject-matter jurisdiction. Analyzing this hypothetical motion would not only require looking at the merits of the claim, which is generally impermissible when determining jurisdiction, *see Davis v. United States*, 564 U.S. 229, 249 n.10 (2011), but also entail conducting a hypothetical balancing of the equities to determine if the plaintiff could have obtained the relief hypothetically sought. There is no principled or administrable way to conduct such an inquiry, indicating that the Constitution does not require it.

II. The Original Understanding of the Public and Private Nondelegation Doctrines.

The Legislative Vesting Clause prohibits delegations of legislative authority to administrative agencies (public nondelegation) and to private entities (private nondelegation). Until the 1940s, both doctrines identically prohibited Congress from delegating discretionary power to create binding rules respecting life, liberty, or property. *See Schechter Poultry*, 295 U.S. at 537–38. As even critics of the nondelegation doctrine have observed, there exists no reason to apply a less stringent test to determine whether Congress has delegated its legislative authority to the executive branch than to private parties. *See* Adrian Vermeule & Eric A. Posner,

Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721, 1757–58 (2002).

Although Congress may generally delegate to the executive branch powers not "strictly and exclusively legislative," *Wayman*, 23 U.S. at 42–43, Article II's Vesting Clause prohibits such delegations of "executive" power to private entities, U.S. CONST. art. II, § 1. The very nature of our Constitution, creating three separate branches and granting them unique powers, prohibits private parties from exercising governmental power. At most they can serve the government in an advisory or ministerial capacity.

A. Legislative Powers Granted via the Constitution Must Remain in Congress.

Article I of the Constitution establishes that "[*a*]*ll* legislative Powers herein granted" by the Constitution "shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1 (emphasis added). The text of the Clause affirmatively speaks to where "legislative Powers" must remain. *Id.* It uses the future-tense verb "shall," instead of a present-tense verb like "are," to make clear that the vesting of the legislative powers was not a mere initial allocation but a permanent, "mandatory" assignment of where they must remain. Philip A. Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1148 (2023); *see Shall*, SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755) ("a sign of the future tense"). The Framers of the Constitution could have easily chosen language that did not create a continuing obligation, such as "the legislative powers herein granted are given" or even "the legislative powers herein granted are hereby vested."

But the Framers instead chose a future-tense verb that created a permanent obligation for the "legislative Powers herein granted" to be vested in Congress. U.S. CONST. art. I, § 1.

The Framers' choice to keep all "legislative" powers in the legislature was neither groundbreaking nor accidental. It reflected a long-settled principle in English and Colonial law that the executive could not exercise inherently "legislative" powers.

In medieval times, when parliament was merely a council of the king's advisors, the king himself could make laws for his subjects. *See*, *e.g.*, ROBERT L. SCHUYLER, PARLIAMENT AND THE BRITISH EMPIRE: SOME CONSTITUTIONAL CONTROVERSIES CONCERNING IMPERIAL LEGISLATIVE JURISDICTION 1–39 (1929). Yet as parliament grew more powerful, it secured the power to enact law itself, and by 1470 the monarch only exercised a veto over legislation proposed by parliament. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 109 (2020). But the fight did not end there. Starting in 1538, Henry VIII began a campaign to revive the authority of the king to unilaterally make his will into law. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 36 (2014). To further his claim of lawmaking authority, Henry VIII obtained from parliament the power to issue "proclamations" with the force of law. *See* PROCLAMATION BY THE CROWN, 31 HENRY 8 C.8 *in* THE STATUTES AT LARGE FROM THE FIRST YEAR OF KING RICHARD III (Danby Pickering, ed. 1539). This infamous delegation of authority to legislate at a whim authorized a short reign of "despotic tyranny," 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS

OF ENGLAND 271 (1765), that only ended with Henry VIII's death and the repeal of the proclamation's statute in 1547, *see* 1 Edw. 6, c12 § VI (1547). King James I later reignited the issue of legally binding royal proclamations, but his attempt to regulate the seemingly innocuous subject of "the making of [s]tarch of [w]heat," *Case of Proclamations* (1610), 77 Eng. Rep. 1352, was stymied by Chief Justice Coke, who ruled that King James I had no such power. *See* McConnell, *supra*, at 109–11 (recounting the affair).

The Framers drafted our Constitution against this background of victories over an imperial crown. *See* Hamburger, *Is Administrative Law Unlawful*, *supra*, at 39 & n.17 (describing the prevailing view that binding proclamations were in "total subversion of the English constitution" (quoting D. Hume, 5 THE HISTORY OF ENGLAND FROM INVASION OF JULIUS CEASER TO THE WAR OF 1688 266–67 (Liberty Classics ed. 1983)). Preventing executive lawmaking, both the delegated kind that Henry VIII briefly exercised, and the undelegated kind that James I attempted to exercise, was a core mission in the summer of 1787. *See* McConnell, *supra*, 110–11. Although the king had given up using proclamations as a way of legislating in England, he continued to claim the power to legislate through binding proclamations in the colonies. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 31–32 (2010). Yet in the years leading up to the Revolutionary War, the colonies rejected this attempt to legislate through proclamations "unless the people who it concerned adopted it." *Id.* (cleaned up).

The fact that the Constitution mandates Congress keep its "legislative Powers" to itself only resolves half

of the nondelegation inquiry. The question that remains is "what are the 'legislative Powers' granted to Congress via the Constitution in the first place?" At a minimum, the "legislative Powers" conferred via the Constitution are those powers which were traditionally the exclusive domain of the legislature—i.e., those that are "strictly and exclusively legislative," *Wayman*, 23 U.S. at 42–43. These powers are broadly described as those "to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting); *Fletcher v. Peck*, 10 U.S. 87, 136 (1810).

Not every power granted to Congress met this definition. Some powers, such as regulating interstate commerce, were "strictly" legislative.[2] *See Wayman*, 23 U.S. at 42–43. But others, such as the powers to coin money, regulate trade with *foreign* nations, and govern the territories, were not necessarily "legislative" or "executive." *See* McConnell, *supra*, at 97–99. These powers, often described as "prerogative powers," had traditionally been exercised by the king and, although legislation could be passed upon them, that was not necessary to authorize the king's actions. *See id.* at 95.

The fact that the Framers flipped the default placement of these powers from the executive to the legislature did not necessarily alter the nature of the powers themselves. Thus, to decide this case, which involves a power (taxation) that is the epitome of a legislative power, the Court need not decide whether

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[2] Relatedly, powers such as "executing the laws," were strictly executive and by their nature could only be exercised by the executive branch. *See* McConnell, *supra*, at 97.

a power being properly considered "prerogative" and not "legislative" would mean that the power is not covered by Article I's "vest[ing]" of "*legislative*" powers in Congress. U.S. CONST. art. I, § 1 (emphasis added).

Early Congresses did not authorize private entities or the executive branch to wield strictly legislative powers. Every identified delegation of discretionary rulemaking authority involved a prerogative power given back to the executive, not an exclusively legislative one. For instance, Congress gave the executive broad discretion to determine how to structure the pensions for soldiers "wounded or disabled while in the line of … duty," Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121 (1790), which falls under the prerogative power of dispensing public monies, U.S. CONST. art. I, § 8, cl. 2. Congress gave the executive branch the authority to grant patents, Patent Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (1790), which falls under the prerogative power of granting patents and monopolies, U.S. CONST. art. I, § 8, cl. 8. Congress gave the executive branch the authority to regulate trade with Indians, Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137 (1790), which falls under the prerogative power of regulating trade with foreign entities, U.S. CONST. art. I, § 8, cl. 3. Congress gave the executive branch the authority to borrow up to $12 million and restructure the national debt, Act of Aug. 4, 1790, ch. 34, 1 Stat. 138, 139 (1790), which falls under the prerogative powers of borrowing money, U.S. CONST. art. I, § 8, cl. 2. The records from the First Congress thus show a distinct pattern: while Congress delegated some discretionary authority, none of the delegations concerned a strictly legislative power.

None of this is to say that Congress was or should be hamstrung in exercising the powers assigned to it by the Constitution. As discussed above, it is possible that non-legislative powers may be more freely delegable. Additionally, Congress can "condition a statutory duty on an executive determination of fact." *See* Hamburger, *Is Administrative Law Unlawful*, *supra*, at 107. The legislative aspect of such conditional statutes is enacted by Congress, and the President is only left with the objective question of whether the predicate has been satisfied. As such, the President is not properly defined as exercising discretion or will, which are the hallmarks of "legislative" power. *Id.*; *see also Gundy*, 588, U.S. at 163 (Gorsuch, J., dissenting) ("The President's fact-finding responsibility may . . . require[] intricate calculations, but it could be argued that Congress had made all the relevant policy decisions.").[3]

1. The intelligible-principle test cannot be squared with the text and history of the Legislative Vesting Clause.

The modern "intelligible principle" test to determine whether a delegation has occurred has no basis in the Constitution. Against text and history, that test deems grants of discretionary authority to set binding rules regarding liberty and property as "executive" power so long as Congress gives some general hint to the executive branch. *See id.* at 135 (plurality). But as explained above, the nature of the

[3] Given that some delegations of factfinding authority were vague or potentially aspirational, this category often overlaps or is coterminous with the sometimes-recognized category of delegations allowing the executive to "fill up details" in a statute. *See Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting).

power, not the amount of discretion afforded the delegee, is what determines whether it is "legislative."

Even when Congress gives an administrative agency an "intelligible principle" to guide its discretion, that agency is still exercising discretion in making rules on a "legislative" subject. Because the Framers considered some governmental powers "strictly and exclusively legislative," *Wayman*, 23 U.S. at 42–43, the intelligible-principle doctrine cannot be a valid way to distinguish between legislative and executive powers.

It should come as no surprise that the intelligible-principle doctrine does not reflect the original meaning of the Constitution because it entered into Supreme Court lore with minimal scrutiny. The phrase was originally used in passing in a tariff case, *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), and then sat on a shelf for two decades before being thrust back into the limelight in the late 1940s, *see Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting). Ironically, the intelligible-principle doctrine came into existence in a case involving a nonexclusive power.

B. Private Parties Cannot Exercise the "Executive Power."

When Congress grants the executive branch discretion to exercise government power that is neither legislative nor judicial, the delegee is properly considered exercising "executive power." *Cf. Loving v. United States*, 517 U.S. 748, 768 (1996); *id.* at 776–77 (Scalia, J., concurring in part and concurring in the judgment). This arrangement generally presents no constitutional issue because the head of the executive

branch is vested with "[t]he executive Power." U.S. CONST. art II, § 1.

But none of the "executive Power" is vested in private entities, so they cannot exercise it, *id.*, just as they cannot exercise the "legislative Powers" granted to Congress, *id.* art. I, § 1. The original meaning of the Constitution, this Court's precedents on private delegation, and this Court's precedents on the assignment of executive power are all in agreement. As Justice Story explained in 1816, it would be "utterly inadmissible" for Congress to vest the executive power "in any other person" but the President. *Martin v. Hunter's Lessee*, 14 U.S. 304, 329–30 (1816).

"The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. "Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance." *Seila Law LLC v. CFPB*, 591 U.S. 197, 203–04 (2020). The primary officers upon which the President relies are appointed by him, U.S. CONST. art. II, § 2, and officers inferior to those ones can either be appointed by him, heads of the departments of the executive branch, or by the courts, *id*. These officers, subject to a handful of exceptional circumstances, are removable at the will of the President. *Seila Law*, 591 U.S. at 204. After all, "[t]hese lesser [executive] officers must remain accountable to the President, whose authority they wield." *Id.* at 213.

The vesting of the executive power in the President and procedures for appointing his

subordinates do not merely concern "etiquette or protocol." *Buckley v. Valeo*, 424 U.S. 1, 125 (1976). They preserve the liberty of the American people by creating clear lines of authority and channeling accountability to the President of the United States, who is the only person in the American government (along with his Vice President) who is elected by the Nation as a whole. *See Seila Law*, 591 U.S. at 224. Courts thus strictly enforce the requirements pertaining to executive supervision, removal, and appointment.

Private parties do not fit into that picture. To begin with, they are not "the President or one of his [officers]." *Ass'n of Am. R.Rs.*, 575 U.S. at 68, 87–88 (Thomas, J., concurring); *id.* ("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."). Thus, if they exercise executive power, the "executive Power" is no longer "vested" in the President but another entity that is seeking its own private interest and not the public interest of the executive. *See Martin*, 14 U.S. at 329–30. Likewise, if the executive power is placed in a person not under the President's control or even aligned with his mission, there is no way for him to fulfill his duty to ensure the laws are faithfully executed. U.S. CONST. art. II, § 3; *see Seila Law*, 591 U.S. at 213. This Court (correctly) held as much in *Myers v. United States*, 272 U.S. 52, 164 (1926). Thus, as Justice Alito put it, "private entities" lack "even a fig leaf of constitutional justification" to execute the law because they are not "vested with the 'executive Power,' which "belongs to the President." *Ass'n of Am. R.Rs.*, 575 U.S. at 62

(Alito, J., concurring) (quoting U.S. CONST. art. II, § 1, cl. 1); *see also See Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1342–43 (D.C. Cir. 2024) (Walker, J., concurring in part and dissenting in part) ("[J]ust as Congress cannot delegate its legislative power to the President, the President's executive power cannot be delegated away from the Executive Branch.").

Private parties are likewise prohibited from exercising executive power, at least on a continuing basis, by the Appointments Clause. *See* U.S. CONST. art. II, § 2, cl. 2. Only officers of the United States can exercise "significant authority"[4] under our laws, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 486 (2010) (internal quotation marks omitted), and by definition, a private party has not been properly appointed as an "officer of the United States." If a purportedly private party were given such an appointment, it would no longer be acting in a private capacity but as a government official. *See* Alexander Volokh, *The Myth of the Private Nondelegation Doctrine*, 99 N.D. L. REV. 203, 230 (2023).

Thus, if a private party is attempting to exercise "significant authority," such authority is definitionally invalid under the Appointments Clause unless it is on an interim or *ad hoc* basis. *See United States v. Germaine*, 99 U.S. 508, 509 (1878); Jennifer L. Mascott, Who Are "Officers of the United States,"

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[4] Although this Court has often asked whether a person exercises "significant authority" to determine whether such person is an "officer" or "employee," there is strong Founding-era evidence that *any* authority exercised on a continuing basis is enough to make someone an "officer." *See* Mascott, *supra*, at 450–53; *NLRB v. S.W. Gen., Inc.,* 580 U.S. 288, 314 (2017) (Thomas, J., concurring).

70 STAN. L. REV. 443, 450 (2018). This *ad hoc* exception generally allows for contractors and other private parties to assist the executive branch so long as they themselves are not the ones exercising the executive power by binding the government or private parties. *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. OLC 73, 77 (Apr. 16, 2007), http://bit.ly/4i0iRXg.

The Constitutional provisions, principles, and cases discussed above are often expounded upon in the context of separation-of-powers controversies within the federal government, such as delegation to a headless fourth branch. Yet they do not apply to those instances alone. A prime example of these principles applying outside of intra-federal disputes is in *Printz v. United States*, which involved a statute delegating executive authority to *state* officers. 521 U.S. 898, 922–23 (1997). This Court explained that this delegation outside the executive branch left the President without any "meaningful Presidential control" over the execution of the laws. *Id.* Allowing non-executive officers, like state officers or private parties, to wield the executive power would sap the power of the President at the expense of Congress, who could simply dispose of him when it found the structure of our Constitution inconvenient. *Id.*

1. Permissible Roles for Private Entities.

Although private entities cannot exercise executive power, that fact does not mean they can play no role whatsoever in governance. For instance, there has been no delegation of "executive power" if a private entity is acting in a purely advisory role. *See Oklahoma v. United States*, 62 F.4th 221, 228–29 (6th

Cir. 2023). *If* private parties can play any non-advisory role in government, it must be a purely "ministerial" one. *Id.* at 229. There is some support in Founding-era caselaw that distinguishes between exercises of "discretionary" or "executive" power, which is placed purely in the hands of the executive branch, and "ministerial" duties, which are those that require no discretion to carry out. *See e.g.*, *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803); *Kendall v. United States ex rel Stokes*, 37 U.S. 524, 595 (1838). Decisions relating to the former are thought of as the exclusive domain of the executive branch, and the duty to carry out the latter are thought of as delegable. Inside and outside of government, ministerial duties were considered delegable in Founding-era, unlike discretionary ones. GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 115 (2017).

Caselaw in the lower courts generally accords with the history. As Judge Sutton observed in *Oklahoma v. United States*, private parties "may undertake ministerial functions" without running afoul of the Executive Vesting Clause. 62 F.4th at 229; *see also Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989), *abrogated on other grounds*, 521 U.S. 457 (1997). But if the private party steps past the mere ministerial role, then Article II applies. *See Alpine Sec. Corp.*, 121 F.4th at 1343 (Walker, J., concurring in part and dissenting in part).

C. This Court Should Assess "Public" Delegations Under the Same Strict Standards as and "Private" Ones.

Although the federal courts have largely abdicated enforcement of Article I's Vesting Clause in the context of delegations to administrative agencies, they have consistently enforced it against private parties. *See Oklahoma*, 62 F.4th at 229 ("Decisions from the courts of appeals hold this line."); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022); *Pittston Co.*, 368 F.3d at 397; *Frame*, 885 F.2d at1128–29. There is no textual or historical reason that public delegations should be treated more deferentially under the Legislative Vesting Clause.

Starting in the early 1930s, the New Deal Congresses attempted to delegate legislative authority not only to the growing executive branch but also to private parties. Consistent with the text of the Legislative Vesting Clause, this Court treated the two delegations as equally impermissible.

In the famed case of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), Congress delegated the power in the National Industrial Recovery Act, Act of June 16, 1933, c. 90, 48 Stat. 195, 196 (1933), to create binding private codes of conduct to both industry groups and the President. This Court rejected both delegations in one fell swoop. Allowing "trade or industrial associations or groups" to exercise such power was "utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 537. As was allowing the President to do the same. *Id.* at 537–

38. *Schechter Poultry* thus analyzed both a public-delegation and private-delegation issue in the same manner, without distinguishing based on recipient.

Carter v. Carter Coal Co., 298 U.S. 238 (1936), which was decided only a year after *Schechter Poultry*, accords. In that case, the Court reviewed a congressional statute that allowed private entities to set minimum prices on coal. *Id.* at 282–83. It took only a paragraph to conclude that this delegation was "legislative" in the most "obnoxious form." *Id.* at 311. The Court did not analyze whether the statute gave an intelligible principle to the private organizations.

The final two cases involving purported delegations to private entities upheld the statutes, but only because they would have passed muster under the public-delegation test. For instance, in *Currin v. Wallace*, 306 U.S. 1, 7, 15–16 (1939), Congress enacted a law allowing the Secretary of Agriculture to regulate tobacco markets. Part of the regulatory scheme required the approval of two-thirds of growers in specific areas to grant their approval before such regulations would take effect. *Id.*at 15. This scheme was not odious to the Constitution because it was an exercise of conditional legislation, not a delegation of "essential legislative functions," just like the one that the Court approved of in *J.W. Hampton*. *Id.* Finally, in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), this Court upheld a reworked version of the statute it disapproved of in *Carter Coal*. After the *Carter Coal* decision, Congress made the private entities serve in a purely advisory capacity, which the Court held cured the nondelegation violation, so long as they were sufficiently supervised by the agency. *Id.* at 399.

After the New Deal era, Congress largely acquiesced to the fact that private legislation is unconstitutional. This Court thus has not resolved another case involving a Legislative Vesting Clause challenge to a private delegation. Lower courts facing challenges to delegations of purportedly legislative power accordingly and properly have continued to ask whether the power exercised by the private organization is "legislative" without referencing any sort of intelligible-principle doctrine. *See, e.g.*, *State v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021); *Black*, 53 F.4th at 883 (5th Cir. 2022); *Frame*, 885 F.2d at 1128–29; *see also Ass'n of Am. R.R.s*, 575 U.S. at 62 (Alito, J., concurring).

As this Court is aware, however, the test to determine whether Congress has impermissibly delegated legislative authority to the executive branch has undergone a slow-but-massive change. It started in *J. W. Hampton,* where this Court noted in passing that Congress provided an intelligible principle to the President in a statute allowing him to establish an additional tariff on certain goods to equalize rates with foreign countries. 276 U.S. at 409. But this observation did not purport to establish a new test, which would have been odd because the statute was regulating *foreign* commerce and merely established a factual condition the President had to find before the law took effect. *See Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting). For the following decade-and-a-half, the Court went on analyzing delegations of legislative authority under the presumption that a mere "intelligible principle" was insufficient to save an otherwise-unlawful delegation. *Id.* It was not until the late 1940s did the "intelligible-

principle" test take root as an official doctrine instead of a one-off observation. *Id.*

The Court's retreat into the intelligible-principle doctrine for delegations to administrative agencies has created a sort of paradox. If Congress purports to grant legislative power to a private corporation, even if it provides an intelligible principle, the delegation is of "legislative" power. *Cf. Consumers' Rsch.*, 88 F.4th at 934 n.6 (Newsom, J., concurring). But if Congress enacts the exact same statute giving the same authority to an administrative agency, the intelligible-principle doctrine declares that the power granted is actually executive. As explained above, there is no textual basis to treat delegations to the executive less strictly. The Legislative Vesting Clause cares not where the power is being exercised, and it was well-accepted at the Founding that some powers were strictly legislative.

The Court can fix the anomaly in the doctrine by adopting Justice Gorsuch's proposed test in his *Gundy* dissent, which appears largely consistent with the law governing private delegations of legislative power. Doing so would not only bring this Court back in line with the original understanding of the Constitution but also fix a source of confusion in administrative-law doctrine. *See* Volokh, *supra*, at 230 ("[I]t doesn't make sense to have a different formulation of the Article I Nondelegation Doctrine that applies differently in private cases.").

Adopting Justice Gorsuch's approach would also bring the enforcement of the nondelegation doctrine in line with the rest of the Court's vesting-clause jurisprudence. The "Judicial Power" is "vested" in the

federal courts and this Court routinely, and forcefully, states that it cannot be relocated to other bodies. *See Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855); *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *Jarkesy v. SEC*, 603 U.S. 109, 127 (2024). The fact that non-Article III bodies may be more "efficient" is of no consequence to the Article III Vesting Clause—"efficiency" was not the basis for the Framers' adoption of a strong separation of powers. *Jarkesy*, 603 U.S. at 140; *INS v. Chadha*, 462 U.S. 919, 944 (1983).

This Court has also strongly enforced the Executive Vesting Clause, which, like the Legislative Vesting Clause, is designed to funnel democratic accountability. *See Collins v. Yellen*, 594 U.S. 220, 250–51 (2021); *Seila Law*, 591 U.S. at 224; *Free Enter. Fund*, 561 U.S. at 496. Much like how Congress has attempted to offload its legislative powers onto agencies in the past decades, Congress has also attempted to shift control of these agencies away from the President. Yet this Court (with controversial exceptions, *see Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988)), has held the line and enforced the Article II Vesting Clause.

III. The Delegation to the FCC in 47 U.S.C. § 254 is Unconstitutional.

The delegation in this case exemplifies the Framers' well-justified fears of Congress abdicating its legislative powers. To begin with, the power to tax is perhaps the quintessential "strictly and exclusively" legislative power. *Wayman*, 23 U.S. at 42–43; *see* McConnell, *supra*, at 100–20.

It is also obvious that 47 U.S.C. § 254 is not a piece of "conditional" legislation. It requires no factual finding that triggers a preordained course of action. Indeed, the discretion in the statute to tax American consumers for "universal service" is practically limitless. As Judge Newsom pointed out, section 254 "cannot possibly constrain the FCC's policymaking discretion in any meaningful way." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring). Because there is also no statutory cap on how much money the FCC can raise, *see CFPB v. Cmty. Fin. Servs. Of Am.*, 601 U.S. 416, 422–23 (2024), the FCC's spending has increased from $1.37 billion to $9 billion in the past three decades, *see Universal Serv. Admin. Co.*, *2021 Annual Report* at 20 (2021), https://perma.cc/9CPT-H5LM.

The statutory provisions that allegedly cabin the FCC's discretion in determining how much money to extract for "universal service" are of the most-vacuous kind. Section 254(d) requires that the funding be "sufficient" to "advance universal service." 47 U.S.C. § 254(d). And section 254(b)(1) states that enough money must be collected to make service "affordable." *Id.* § 254(b)(1). So-called "universal service," the goal of the program, is an "evolving" concept "establish[ed]" by the FCC. *Id.* § 254(c)(1).

The United States points to the six "principles" that the FCC "shall" consider while setting Universal Service policy, *id.* § 254(b), which it says constrains FCC's discretion. Br. of Petitioners FCC at 31–32. But these "principles," even presuming that they are mandatory and not precatory, do not provide nearly the guidance that the United States suggests. It admits that they must be "balanced . . . against one

another when they conflict." *Id.* at 31 (cleaned up). Given that the principles contain extremely open-ended suggestions like that the FCC should make "quality" services available at "just, reasonable, and affordable rates," 47 U.S.C. § 254(b)(1), and offer service in rural areas that is "reasonably comparable to rates charged for similar services in urban areas," *id.* § 254(b)(3), these broad principles will always be in *some* tension. Therefore, they will always need to be "balance[d]" against each other. U.S. Br. at 31. The United States does not pretend that 47 U.S.C. § 254 gives the FCC guidance on how to balance these competing goals.

Because these "principles" are always in tension, the debate between the Respondents and the United States over the issue of whether they are merely "aspirational" is largely irrelevant. *Tex. Off. of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001) (accepting the United States's previous argument that these principles were "merely aspirational"). If the principles are "merely aspirational," as the Fifth Circuit has held for decades, *id.*, then they provide no restriction on the FCC's authority. If the principles are not "aspirational," they still necessarily must be balanced according to the FCC's discretion, meaning that they provide no real restriction on the FCC's authority.

Standing alone, these "principles" do not give enough guidance to meaningfully constrain the FCC's discretion and they are certainly not contingent on any executive factfinding. The fact that they are non-exhaustive only makes things worse. The Telecommunications Act permits the FCC, in its discretion, to formulate additional principles, if it

finds them to be "necessary and appropriate for the protection of the public interest, convenience, and necessity." 47 U.S.C. § 254(b)(7).

IV. The Subdelegation to USAC is Unconstitutional.

If the Court does not wish to reconsider the intelligible-principle doctrine in this case, it should affirm the Fifth Circuit's judgment under the private nondelegation principles discussed above.

A. The FCC's Delegation to USAC is Inconsistent with the Private Nondelegation Doctrine.

Delegations to private parties of the taxing power are unconstitutional, *see* U.S. CONST. art. I, § 1; *Carter Coal*, 298 U.S. at 311–12, and the United States does not contend otherwise, *see* U.S. Br. at 38–39 (collecting cases). USAC's role in determining the size of the universal-service tax can only be constitutional if it not actually exercising legislative power. To determine whether it is exercising legislative power in this taxing scheme, this Court has asked whether the private entity is "subordinat[e]" to the agency and whether the agency exercises both "authority and surveillance" over it. *Sunshine Anthracite Coal Co.*, 310 U.S. at 399; *Oklahoma*, 62 F.4th at 231. In other words, the FCC must control the content of USAC's final product and the process by which the product comes about. The FCC's authority over USAC is too limited to satisfy these requirements.

Start with the FCC (lack of) "surveillance" or supervision over USAC's work. *Sunshine Anthracite Coal Co.*, 310 U.S. at 399. As the Ninth Circuit has

explained, USAC largely operates independently of the FCC. *See In re Incomnet, Inc.*, 463 F.3d 1064, 1074 (9th Cir. 2006). USAC board members are selected by "the industry or non-industry group that is represented by such director." 47 C.F.R. § 54.703(c)(1), (3). Only if "an industry or non-industry group does not reach consensus on a nominee or fails to submit a nomination" will the Chairman of the FCC, not the Commission as a whole, pick a person to represent that group. *Id.* § 54.703(c)(3). The directors are similarly insulated from FCC control through the removal process. "Removal may only occur upon the affirmative vote of the stockholder or the majority of Board members that are not facing removal, and upon the prior written approval of the FCC Chairperson." USAC BYLAWS art. II, § 7 (last revised July 18, 2000), https://bit.ly/4bb489K. The "[S]tockholder" here is not the FCC, but the National Exchange Carrier Association. *Id.* And the "majority of [USAC] Board members" is obviously not the FCC either. *See* 47 C.F.R. § 54.703(c)(3).

The appointment and removal processes are complicated, but this much is clear. The FCC as a whole has little control over who is staffed on the USAC board. Interest groups make appointments, *see id.* § 54.703(c)(1). which are then finalized by the Chairman, *id.* § 540703(c)(3), not the agency acting qua agency, *see Free Enter. Fund*, 561 U.S. at 513 (explaining that a commission as a whole is "head of the department," not chairman of the commission (internal quotation marks omitted)). The Commission itself also appears to play no role in removal, as USAC's bylaws allow removal based on the vote of other board members of the NECA. USAC Bylaws

Article II, § 7. This Court has made crystal clear that appointment and removal are key to a principal's authority over his agent. *See Buckley*, 424 U.S. at 125; *Seila Law*, 591 U.S at 214.

Even worse, the regulatory scheme concocted by the FCC does not even purport to have directors represent the interests of the agency that USAC is supposed to be aiding. It instead consciously states that directors will "represent" the industry that puts them on the Board. 47 CFR § 54.703(b)(1)–(13). And, of course, because the Board members are not "officers of the United States," they are not "bound by Oath or Affirmation, to support th[e] Constitution." U.S. CONST. art. VI; *Ass'n of Am. R.Rs.*, 575 U.S. at 57–58 (Alito, J., concurring) ("[A] commission from the President" has never been treated "as a mere wall ornament."). With the FCC playing a limited role, if any, in appointment and removal of the USAC board members and the members not even purporting to represent the FCC's interests, the FCC cannot be exercising sufficient "surveillance" over USAC's independent activities. *Sunshine Anthracite*, 310 U.S. at 399; *see also In re Incomnet, Inc.*, 463 F.3d at 1074 (describing USAC's independence from the FCC).

The FCC also fails to exercise "authority" over USAC's policy judgments, making USAC the "legislator" in this scheme. As explained in the Fifth Circuit *en banc* opinion, USAC's proposed tax is "deemed approved" by the Commission 14 days after it is publicly posted without any FCC action. 47 C.F.R. § 54.709(a)(3). This tail-wags-the-dog arrangement functions exactly as one would imagine, with the FCC never making a substantive change to USAC's calculations prior to this litigation.

The United States defends the decision to allow USAC to tax Americans for billions of dollars every year because the FCC retains nominal control over Universal Service contributions. It argues that the only "relevant question is whether the FCC has *authority* to reject the Administrator's advice," even if such authority is only on paper. U.S. Br. at 45. But the "Constitution deals with substance, not shadows," and nominal control is thus insufficient control. *See Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). This Court has repeatedly made the same point in the context of determining whether an officer exercises "significant authority." Whether a supervisor could elect to overrule him is not dispositive. *Freytag v. Commissioner,* 501 U.S. 868, 873 (1991); *Lucia v. SEC*, 585 U.S. 237, 248–49 (2018).

Even if this Court were inclined to conclude that an agency's veto authority *may* be enough to deem the private corporation as acting in a nonlegislative manner, the veto here is insufficient. Once the "Total Contribution Base" submitted by USAC is ministerially calculated into a "contribution factor," the FCC only has 14 days before it "shall be deemed approved by the Commission," 47 C.F.R. § 53.709(a)(3), which is plainly insufficient to conduct a true de novo review and come to an independent decision.

Imagine if the FCC had authority to reject or modify USAC's proposal, but it had only 12 hours to decide, or else the proposal would be "deemed approved." *Id.* It could not be plausibly argued that the FCC in such an example is the entity that is

actually legislating. Formal "authority" over the final decision is certainly a *necessary* requirement when an agency allows a private entity to formulate policy, *see Sunshine Anthracite*, 310 U.S. at 398–99, but it cannot be sufficient. Some level of practical, or *de facto*, authority must exist as well for a decision to truly be one of the agency. And as explained above, the *de facto* authority is missing here.

CONCLUSION

This Court should affirm the judgment of the Fifth Circuit.

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