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 *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Regulations

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the critical importance of enforcing the Constitution's bar against delegation of legislative power and the stakes for representative self-government, separation of powers, federalism, and individual liberty.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound telecommunications policy or the wisdom of universal services. "The question here is not whether something should be done; it is who has the authority to do it." *Biden v. Nebraska*, 600 U.S. 477, 501 (2023). And by

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

what process. "That is what this suit is about. Power." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

At its core this case is about two competing governance paradigms. The first is a top-down command-and-control model based on the idea that because modern society is purportedly too complex (and Congress too dysfunctional) for the political branches to make policy choices through duly enacted legislation, those decisions must instead be made by a caste of unelected, unaccountable "experts" whose choices aim to promote the collective good. The second is a bottom-up model based on the idea that vertical and horizontal separation of powers protect individual liberty and promote government accountability by empowering the American People to govern themselves through their elected representatives, generally at the state and local level. The former model is a modern innovation that maximizes the coercive power of the federal government to restrict individual liberty. The latter model, by contrast, is deeply rooted in our history and tradition and enshrined in the Constitution to guard against tyranny and government oppression. This Court should take this opportunity to reaffirm it.

After all, in this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution exclusively tasks the People's elected representatives with making policy choices and accessing the People's pocketbooks, subject to constitutional limits on federal power. And under the Constitution, the political branches may only do so

through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus.

Toward this end, the Constitution flatly prohibits Congress from transferring any of its legislative power to other entities, U.S. Const. art. I, § 1, including the power "to lay and collect Taxes," U.S. Const. art. I, § 8. This means that such matters "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Congress "is the sole organ for levying taxes[.]" *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974). And *a fortiori* Congress cannot transfer "power to regulate the affairs of an unwilling minority" to private parties; this is "legislative delegation in its most obnoxious form[.]" *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

Here, Congress has done just that, transferring the power to make legislative policy choices and levy taxes to fund those choices to unelected administrators who, in turn, transferred these powers to a private company staffed by industry insiders. The Universal Service Fund ("USF") is unprecedented and uniquely constitutionally offensive. And as the en banc Fifth Circuit found, "this misbegotten tax violates Article I, § 1 of the Constitution." Pet. App. 2a.

The USF is emblematic of a broader problem: "the vast subdelegation of legislative authority that permeates modern government." Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 853 (2019). "The administrative degradation of

consensual lawmaking is eating away at our government's legitimacy." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1108 (2023). And as elsewhere, "here, the threats to democracy presented by the administrative state are not inadvertent, but intentional—a deliberate design to turn consent of the governed into an illusion." Pet. App. 86a (Ho, J., concurring).

There is no way to sweep this constitutional disorder under the rug. It is long past time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, C.J., concurring in judgment), by "hewing" the nondelegation doctrine "from the ice," Antonin Scalia, *A Note on the Benzene Case*, Reg., July/Aug. 1980, at 28. "There are times when it is [this Court's] duty to say simply that a law that blatantly attempts to circumvent the Constitution goes too far." *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 471 (2024) (Alito, J., dissenting). This is one of them.

The search for an administrable principle to delineate the nondelegation doctrine's metes and bounds has been a difficult one. To be sure, "the precise boundary" delimiting the power Congress may permissibly delegate to other entities "is a subject of delicate and difficult inquiry[.]" *Wayman*, 23 U.S. (10 Wheat.) at 46. But *amicus* respectfully submits that the Constitution's protection of liberty through the concept of nondelegation is best understood through multiple overlapping principles and tests.

These include prohibitions on delegations of government power to private entities, delegations of core congressional functions like taxing and spending, delegations of power to decide major questions, delegations that lack meaningful standards to give fair notice of required or prohibited conduct and permit arbitrary-and-capricious review of agency actions, and delegations of legislative policymaking power to make general rules that bind the public and impact private rights. Each of these guardrails has surfaced at important moments in the past in one form or another, and each will require thoughtful development moving forward. Instead of searching for an all-encompassing nondelegation theory, *amicus* suggests the Court spin each of these threads to weave a tapestry to protect the separation of powers.

This case presents an ideal opportunity to begin to articulate judicially manageable standards for meaningfully enforcing Article I's Vesting Clause and put Congress on notice that it must do its job. And enough ink has been spilled to allow this Court to address line-drawing questions, as necessary, on a context-specific case-by-case basis. The sky will not fall if this Court enforces Article I's demands over time. To the contrary, our constitutional Republic will be all the healthier for it.

For the foregoing reasons, this Court should affirm the decision below.

ARGUMENT

I. The Separation of Powers Protects Liberty.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Underscoring this, it "begins by declaring that 'We the People . . . ordain and establish this Constitution.'" *Gundy v. United States*, 588 U.S. 128, 152 (2019) (Gorsuch, J., dissenting). In that document, the People agreed on a system of checks and balances.

"The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 239 (2020) (Thomas, J., concurring) (citations omitted). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman*, 23 U.S. (10 Wheat.) at 46. "The purpose of the separation and equilibration of powers" required by the Constitution is "not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting); *see Collins v. Yellen*, 594 U.S. 220, 245 (2021). It also protects "democratic values." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting).

"[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Canning*, 573

U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment). Indeed, "[t]o safeguard individual liberty, '[s]tructure is everything.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416 (2024) (Thomas, J., concurring) (quoting Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008)). This separation "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). But "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution."[2] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment).

As James Madison explained, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Federalist No. 47; *see* 1 Montesquieu, The Spirit of Laws bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person . . . there can be no liberty[.]"). And "the great security against a gradual concentration of the several powers in the same department, consists in giving to those

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[2] "At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free." *Dep't. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Federalist No. 51 (Madison). That remains true today.

II. The Constitution Bars Congress From Transferring Its Legislative Power.

"The Constitution imposes important limits on how the government goes about doing its job." *Consumers' Rsch. v. FCC*, 88 F.4th 917, 938 (11th Cir. 2023) (Newsom, J., concurring), and "provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People's will," *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024). To protect liberty, "the framers went to great lengths to make lawmaking difficult," requiring "that any proposed law must win the approval of two Houses of Congress . . . and either secure the President's approval or obtain enough support to override his veto." *Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting).

Congress may not duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 595 U.S. 109, 124–25 (2022) (per curiam) (Gorsuch, J., concurring). "Article I vests the 'Senate and House of Representatives' (and them alone) with '[a]ll legislative powers.'" *Allstates*, 79 F.4th at 769 (Nalbandian, J., dissenting) (quoting U.S. Const. art. I, § 1). The Constitution bars Congress from transferring "powers which are strictly and exclusively legislative" to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42; *see Shankland v. Washington*, 30 U.S. 390, 395 (1831) ("[T]he general rule of law is,

that a delegated authority cannot be delegated."). That includes Congress's power "to lay and collect Taxes." U.S. Const. art. I, § 8; *see Nat'l Cable Television Ass'n*, 415 U.S. at 340 ("Taxation is a legislative function, and Congress, [] is the sole organ for levying taxes[.]").

Instead, such matters "must be entirely regulated by the legislature itself[.]" *Wayman* 23 U.S. (10 Wheat.) at 43; *see Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society[.]"). This means "the hard choices" "must be made by the elected representatives of the people." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring in judgment). And "Congress, not some official in the Executive Branch, creates laws." *Allstates*, 79 F.4th at 769 (Nalbandian, J., dissenting).

The Constitution's text makes this pellucidly clear. Article I provides: "All legislative Powers herein granted shall be vested in a Congress[.]" U.S. Const. art. I, § 1; *see* Philip Hamburger, Is Administrative Law Unlawful? 388 (2014) ("Americans clearly understood how to write constitutions that expressly permitted the subdelegation of legislative power to the executive, and they did not do this in the federal constitution."). This provision "speaks of what *shall be vested* and thereby bars delegation of the legislative

powers."[3] Hamburger, 91 Geo. Wash. L. Rev. at 1168. "The phrase *shall be vested* is decisive. It emphatically reinforces what already should be clear, that the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards." *Id.* at 1174 (emphasis in original).

The Constitution's structure reenforces this understanding. For example, by contrast to Article I's Vesting Clause, the Constitution "expressly acknowledged" circumstances "when Congress can designate the location of one of the tripartite powers," such as in Article III's judicial vesting clause. *Id.* at 1175; *see* U.S. Const. art. III, § 1. "Given that Article III spells out that Congress may determine the location of some judicial power, it is nearly comic to observe so much scholarship strive to show that Article I did this for legislative power." Hamburger, 91 Geo. Wash. L. Rev. at 1175. Article II's executive vesting clause "provides a third textual basis for rejecting transfers of legislative power," making clear that the President "is not and cannot be vested with either of the other tripartite powers."[4] *Id.* at 1176; *see*

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[3] "This conclusion is reinforced by other portions of the text: Article III's vesting of judicial power and Article II's vesting of executive power." Hamburger, 91 Geo. Wash. L. Rev. at 1168 (citing U.S. Const. art. II, § 1, cl. 1; *id.* art. III, § 1). The Constitution's "shall be vested" language "textually emphasizes that its powers cannot be rearranged." *Id.* at 1071.

[4] "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see id.* at 632 (Douglas, J., concurring).

City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) ("[U]nder our constitutional structure" federal agencies' activities "*must be* exercises of—the 'executive Power.'" (quoting Art. II, § 1, cl. 1)).

Founding-era practice further underscores that Congress cannot delegate its legislative power. Around the Framing, "statutes authorized the executive to create rules that were only 'binding' on executive officials, not members of the public." *Allstates*, 79 F.4th at 788 n.17 (Nalbandian, J., dissenting) (citation omitted). And "members of [the First] Congress viewed themselves as the actors responsible for reaching finely grained policy determinations that would impact and bind the public." Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1449 (2019).

Broader historical context lends additional support. Prominent among the Founders' grievances against King George III was that he had "erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people[.]" Decl. of Independence ¶ 12 (1776); *see id.* ¶ 17 ("imposing Taxes on us without our Consent"). Going back further still, "Magna Carta [likewise] bolsters the argument that the Constitution limits the type of lawmaking that nonelected federal officials may undertake. Would the English barons have understood the term 'law of the land' to include diktats from King John, the very person that Chapter 39 was designed to restrain?" Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 262 (2022).

In sum, "the Vesting Clauses are exclusive," which means "that the branch in which a power is vested may not give it up or otherwise reallocate it." *Ass'n of Am. R.R.*, 575 U.S. at 74 (Thomas, J., concurring). "The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002).

III. The Universal Service Fund Makes a Mockery of the Constitution.

Section 254 of the Telecommunications Act of 1996 runs roughshod over the Constitution's structural guardrails. Among delegations, "§ 254 stands alone." Pet. App. 40a. It not only transfers "to FCC the power to make important policy judgments," Pet. App. 40a, but "bestowed upon FCC the power to levy taxes" to fund those choices, Pet. App. 23a. On top of this, "the statute insulates FCC from the principal tool Congress has to control FCC's universal service decisions—the appropriations power." Pet. App. 31a (citing U.S. Const. art. I, § 9, cl. 7).

Since 1934,"Congress has made universal service a basic goal of telecommunications regulation."[5] *Tex. Office of Pub. Util. Counsel (TOPUC I) v. FCC*, 183 F.3d 393, 405 (5th Cir. 1999). Today, it remains "a significant part of U.S. telecom policy." Cong.

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[5] The USF "is a social welfare subsidy program that benefits certain consumers" "by imposing taxes on other consumers." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 278 (2005).

Research Serv., LSB10904, Fifth Circuit Considers Constitutionality of the Universal Service Fund 4 (2023).[6] To further this broad goal, Congress enacted § 254 of the Telecommunications Act of 1996, which created the USF and delegated to FCC effectively untrammeled power to administer it. *See generally* 47 U.S.C. § 254. Problematically, the 1996 Act—which "profoundly affects a crucial segment of the economy worth tens of billions of dollars"—"is in many important respects a model of ambiguity," granting "'most promiscuous rights' to the FCC[.]" *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). That well describes § 254.

There, Congress tasked the FCC (and a Federal-State Joint Board) with setting "policies for the preservation and advancement of universal service[.]" 47 U.S.C. § 254(b). Congress, however, said precious little about how to do this, instead punting the policy choices necessary to achieve these broad, abstract aims to unelected Executive officials, who, in turn, promptly punted this duty to a private corporation. In § 254(b) Congress used "lofty and expansive language" to announce seven "aspirational" principles, "reflect[ing] congressional intent to delegate difficult policy choices to the Commission's discretion." *Tex. Office of Pub. Util. Counsel (TOPUC II) v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001) (cleaned up).

Section 254 mandates that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an

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[6] https://crsreports.congress.gov/product/pdf/LSB/LSB10904.

equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the [FCC] to preserve and advance universal service." 47 U.S.C. § 254(d). "Notably, Congress declined to define 'universal service' itself." Pet. App. 3a; *see* 47 U.S.C. § 254(c)(1) ("Universal service is an evolving level . . . that the Commission shall establish periodically[.]"). For that matter, Congress empowered the FCC with boundless discretion to add universal service principles it deems "necessary and appropriate for the protection of the public interest, convenience, and necessity[.]" 47 U.S.C. § 254(b)(7); *see* Krotoszynski, 80 Ind. L.J. at 312. In other words, § 254(b)'s "hazy 'principles'" "leave the agency all the room it needs to do essentially whatever it wants." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring).

Making matters worse, "Congress delegated its taxing power to FCC," Pet. App. 23a, through a "unique revenue raising mechanism," *Consumers' Rsch. v. FCC*, 63 F.4th 441, 450 (5th Cir. 2023), reh'g en banc granted, opinion vacated, 72 F.4th 107 (5th Cir. 2023), that grants the agency untrammeled power to force carriers to fund its social welfare program. The FCC does this by regulation at a rate set quarterly known as the Contribution Factor. *See* 47 C.F.R. § 54.709(a); *In re Incomnet, Inc.*, 463 F.3d 1064, 1066 (9th Cir. 2006). "The money in the USF is provided by private telecommunication providers[.]" *United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379, 387–88 (5th Cir. 2014). "The telecommunications companies pass this cost through to their subscribers; the charge generally appears on phone bills as the 'Universal Service Fund Fee.'" *In re Incomnet*, 463

F.3d at 1066. This means that "American telecommunications consumers are subject to a multi-billion-dollar tax nobody voted for." Pet. App. 81a.

Section 254 gives "essentially no[] direction about how much telecom companies should actually be charged[.]" *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring); *see* 47 U.S.C. § 254(d). "[B]ecause Congress has failed to limit either the amount of revenue to be raised or the particular purposes to which the revenue may be used, it has essentially given the Commission a blank check."[7] Krotoszynski, 80 Ind. L.J. at 246. "Nothing in the statute precludes FCC from, for example, imposing the USF Tax to create an endowment that it could use to fund whatever projects it might like." Pet. App. 28a–29a. *Cf.* Harold W. Furchtgott-Roth, A Tough Act to Follow? 62 (2006) ("FCC, by its own logic, had as much authority to spend $2.25 trillion as it had to spend $2.25 billion.").

In sum, the statute "limits neither the objects of the universal service program nor the funds to be expended to achieve them[.]" Krotoszynski, 80 Ind. L.J. at 318. Indeed, the FCC has argued "that so long as the Commission does not violate an express statutory command, it may use the universal-service mechanism to achieve policy objectives contained elsewhere in the Act." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (cleaned up). Here, "Congress pointed to a problem that needed

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[7] This arrangement "permits Congress to take credit for the benefits it provides without being accountable for the taxes used to pay for them." Krotoszynski, 80 Ind. L.J. at 246.

fixing and more or less told the Executive to go forth and figure it out."[8] *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

"This is delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (Cardozo, J., concurring). The statute grants the FCC "an unlimited authority to determine the policy" as the agency "may see fit." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935). FCC "is free to select as [it] chooses . . . and then to act without making any finding[s]," *id.* at 388, as it "roam[s] at will" "in that wide field of legislative possibilities," *Schechter*, 295 U.S. at 538. This "absence of standards" makes it "impossible" "to ascertain whether the will of Congress has been obeyed[.]" *Yakus v. United States*, 321 U.S. 414, 426 (1944).

The statute is "so amorphous that no reviewing court could ever possibly invalidate any FCC action taken in its name." Pet. App. 41a. Indeed, one federal judge described the interpretive challenges posed by vacuous language in § 254(d)(4) thus: "Candidly, I have *no* idea what that means. . . . [S]uch empty, mealymouthed shibboleths provide no meaningful constraint; to the contrary, they confer front-line law-

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[8] Any effort by the FCC to save the statute by proposing a limiting construction should be rejected. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). "It is [also] a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677 (2020) (cleaned up).

and policymaking power on unelected, unaccountable agency bureaucrats." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring). Exactly so.

On top of this, the FCC has re-delegated its authority over the USF to the Universal Service Administrative Company ("USAC").[9] *See* 47 C.F.R. § 54.701(a). "USAC is a not-for-profit private organization that is structured pursuant to the FCC's regulations," Pet. App. 13a (citing 47 C.F.R. §§ 54.701, 54.703), and "owned by an industry trade group," *Cisco Sys.*, 759 F.3d at 387. *Cf. Schechter*, 295 U.S. at 537 ("[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups[?]").

This private entity is tasked by regulation with calculating the Contribution Factor and thus for all practical purposes decides the rate at which the carriers—and, by extension, the general public—are taxed.[10] *See* 47 C.F.R. § 54.709(a)(3); Pet. App. 6a–7a, 22a. *Cf. Texas v. Commissioner*, 142 S. Ct. 1308, 1309 (2022) (statement of Alito, J., respecting denial of certiorari) (describing setting Medicaid "actuarial standards" as "essentially a legislative determination"). "USAC sets its own budget" and subject to limited FCC oversight "decides if, when, and how it disburses funds on behalf of the USF's beneficiaries." *In re Incomnet,* 463 F.3d at 1076 (citing 47 C.F.R. §§ 54.701(a), 54.704(a), 54.705, 54.715).

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[9] The statute "does not *even mention* USAC[.]" Pet. App. 59a.

[10] "As a practical matter, USAC sets the USF Tax—subject only to FCC's rubber stamp." Pet. App. 7a.

This makes a mockery of the Constitution's separation of powers. And it breaks the Constitution's promise that only the People's elected representatives in Congress may make legislative choices restricting their liberty and imposing obligations upon them.

IV. This Court Should Restore Equilibrium Among the Branches.

This Court should not turn a blind eye to these serious constitutional problems. "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing en banc) (cleaned up). That well describes the sweeping and unprecedented dual-layer subdelegation of legislative power at issue here. "[T]his wolf comes as a wolf." *Morrison*, 487 U.S. at 699. And it should not be allowed to stand. It is past time for this Court to protect our Republic by enforcing the Constitution's structural protections.

A. Delegation Run Riot Has Had Awful Effects on Our Constitutional Republic.

The stakes here could not be higher and involve "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." *West Virginia v. EPA*, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring).

The baseline Article I sets is that agencies have no authority to act unless and until Congress confers

power on them via duly enacted legislation. *See FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022). The Constitution deliberately makes it difficult to alter this liberty-tilted baseline. "[T]he legitimate status quo ante is that a government wish is not law until Congress goes through Article I's rigorous process for enacting laws." Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 191, 235 (2023). And "the Constitution's procedure for enacting statutes, with its several veto points, is biased toward inaction—or, rather, toward action only where a fairly broad consensus supports it." Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & Liberty 718, 801 (2019).

By contrast, legislative delegations have "the effect of inverting the decision-making process: a legislative rule will go into effect unless a sufficiently broad consensus *disapproves*, whereas in the absence of legislative delegation, such a rule would go into effect only if an equally broad consensus *approves*." *Id.* at 802. This "reverses the burden that the Constitution places on those who want to expand the powers of government by imposing a new law." David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 739 (1999).

In addition, "[v]ague congressional delegations undermine representative government because they give unelected bureaucrats—rather than elected representatives—the final say over matters that affect the lives, liberty, and property of Americans." Pet. App. 25a. "By shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily, LLC*

v. HUD, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). Further still, "the transfer of legislative power to agencies dilutes voting rights." Hamburger, 91 Geo. Wash. L. Rev. at 1181. Such power-transfers are also slanted against disfavored groups. *See id.* at 1183–87. In short, "[d]elegation is never just about delegation. It also is about rendering legislation unrepresentative" and "diluting the value of equal suffrage[.]" *Id.* at 1187; *see* Pet. App. 87a (Ho, J., concurring) ("There's no point in voting if the real power rests in the hands of unelected bureaucrats—or their private delegates.").

Even worse, unconstitutional delegations undermine political stability, leading to "administratively induced irresponsibility, alienation, and political conflict." Hamburger, 91 Geo. Wash. L. Rev. at 1192. This state of affairs "tends to infantilize the Constitution's elements of government," "leaving Americans with ever less confidence in government." *Id.* at 1193. It "deprives Americans of their sense of connection to government," leaving "growing numbers of Americans, left and right, feel[ing] politically alienated." *Id.* at 1194.

Finally, delegation of legislative power to administrative bodies contributes to political polarization. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 7 (2022) ("Delegation by Congress probably has the most pervasive polarizing effects."). "The breadth of centralized legislative power" housed within the Executive branch today "displaces much state politics. It also reaches deep into private institutions and life." Hamburger, 91 Geo. Wash. L. Rev. at 1195. This "not only nationalizes American politics but also politicizes

American life," turning Presidential elections into "do-or-die battles[.]" *Id.*

B. This Court Should Jettison the "Intelligible Principle" Remark.

This Court should confront the root cause of these serious constitutional problems: the modern, judicially created intelligible-principle regime. "[T]he standard this Court currently applies to determine whether Congress has impermissibly delegated legislative power largely abdicates [this Court's] duty to enforce that prohibition[.]" *Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2490 (2024) (Thomas, J., dissenting from denial of certiorari) (cleaned up). The test is "notoriously lax," Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014), and "has become a punchline," *Consumers' Rsch.*, 88 F.4th at 929 (Newsom, J., concurring). "[T]he nondelegation doctrine has been more honored in the breach than in the observance." *Rettig*, 993 at 410 (Ho, J., dissenting from denial of rehearing en banc), and "over the years, the guardrails have crumbled," *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). Today's "nondelegation doctrine serves as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite." Hamburger, 91 Geo. Wash. L. Rev. at 1091. It is past time to close and padlock it.

The "mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the modern "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or

even in the decision from which it was plucked." *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting); *see Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment); *Consumers' Rsch.*, 88 F.4th at 928 (Newsom, J., concurring in judgment); *id.* at 938 (Lagoa, J., concurring); Hamburger, 91 Geo. Wash. L. Rev. at 1095 ("[T]he current nondelegation doctrine has no originalist foundation.").

This Court should clearly announce the end of this failed experiment. *Cf. Loper Bright*, 603 U.S. at 412. After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. I, § 1). While the "doctrine long seemed acceptable while the shift of legislative and judicial powers to the executive was moderated by political restraint," "such restraint has been thrown to the winds[.]" Hamburger, 91 Geo. Wash. L. Rev. at 1093.

C. Line-Drawing Questions Cannot Justify Ignoring the Constitution's Demands.

Nor should line-drawing challenges stand in the way of enforcing the Constitution's bar against subdelegation of legislative power. "Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting). This raises the question

what is "legislative power" that Congress may not delegate.[11]

To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters of "less interest" that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43; *see West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring) ("Doubtless, what qualifies as an important subject and what constitutes a detail may be debated."). And "the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others." Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference under Separated Powers*, 17 NYU J.L. & Liberty 1, 36 (2023). Indeed, "[i]t may never be possible perfectly to distinguish between legislative

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[11] "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting). As Hamilton put it, "[t]he essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society[.]" Federalist No. 75. As an original matter, "formulation of generally applicable rules of private conduct" "requires the exercise of legislative power." *Ass'n of Am. R.R.*, 575 U.S. at 70 (Thomas, J., concurring in the judgment). "By that measure, the FCC is almost *certainly* exercising legislative power when it decides, among other things, how big the universal-service program should be, what it should entail, and how much carriers should have to chip in to bring it to fruition." *Consumers' Rsch.*, 88 F.4th at 930 (Newsom, J., concurring).

and executive power[.]" *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring).

"But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Id.* at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). *Cf.* Federalist 78 (Hamilton) (Courts "duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."). And "the difficulty of the inquiry doesn't mean it isn't worth the effort." *Nichols*, 784 F.3d at 671 (Gorsuch, J., dissenting from denial of rehearing en banc). No matter the difficulty of the task, the Judiciary is dutybound to search for the line and could do so on a case-by-case basis. And just as the Constitution bars Congress from punting its legislative responsibilities to other entities, this Court should not punt on its "duty" "to say what the law is."[12] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

D. There Are Judicially Manageable Standards For Enforcing Nondelegation.

More than sufficient ink has been spilled to allow this Court to begin to articulate judicially manageable standards over time. *See generally West Virginia*, 597 U.S. at 750 n.11 (Gorsuch, J., concurring) (collecting scholarship). For example, surveying the jurisprudence and scholarship, Professor Cass has identified three "essential elements" shaping the nondelegation doctrine:

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[12] Under our Constitution the People have the last word. U.S. Const. amend. V.

> [F]irst, that Congress cannot pass to others the power to make important judgments on legally binding rules, second, especially on matters respecting the regulation of private rights rather than of public property, and, third, that grants of authority must fall within the constitutionally assigned purview of the delegate (must pertain to the exercise of that delegate's own power).

Cass, 17 NYU J.L. & Liberty at 43.[13] And "[d]evelopments in the modern administrative state suggest the time has come to articulate judicially manageable standards for identifying delegations of legislative power." Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015).

To be sure, there may well be "multiple nonexclusive" nondelegation principles. Larkin, 23 Federalist Soc'y Rev. at 263. And as in other areas of constitutional law, judgment and nuance may be required over a series of cases. But "[n]ot all rules require judgments comparable to distinguishing a dog

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[13] This rubric draws from both the principle expressed in *Wayman*, 23 U.S. 1, that Congress cannot delegate power to decide important subjects and the principle that there are certain types of power Congress cannot delegate, such as the power to make general binding rules impacting private rights. *See* Cass, 17 NYU J.L. & Liberty at 38–44. "Viewed simply, the focus on *importance* of a decision sets limits on *what* Congress can allow others to do, while the focus on *types* of decision sets limits on *which* others can do it as well as contributing to determination of how broad or narrow their authority can be." *Id.* at 40.

from a cat; some require, instead, the ability to differentiate a boulder from a rock from a pebble—matters of degree rather than of absolute differences in nature." Cass, 17 NYU J.L. & Liberty at 42.

The line for policing unconstitutional delegations may be context specific. *See* Lawson, 88 Va. L. Rev. at 376; Pet. App. 33a. For example, as here, "the Constitution's original meaning would seem to compel a more restrictive test for delegations of the taxing power." Pet. App. 42a n.13. *But see Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222–23 (1989). This makes sense. After all, "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), and "[a]mong Congress's most important authorities is its control of the purse," *Nebraska*, 600 U.S. at 505. And "if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of N.Y.*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). That may also hold true for other core legislative functions, such as government spending.

"It's [also] easy enough to see why a stricter [nondelegation] rule would apply in the criminal arena." *Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting from denial of rehearing en banc) (collecting cases). "Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law." *Id.* at 670. For that matter, *Panama Refining, see* 293 U.S. at 415, and *Schechter*, *see* 295 U.S. at 527–28, both involved criminal delegations. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921) (striking

down vague criminal law in part because it transferred legislative power to judges and juries).

In some contexts, the Commerce Clause's original public meaning may be another relevant background principle providing additional guideposts.[14] *See, e.g.*, *Schechter*, 295 U.S. at 554 (Cardozo, J., concurring) (noting Commerce Clause "objection, far-reaching and incurable, aside from any defect of unlawful delegation"). *Cf. BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021) (Duncan, J., concurring). Federalism principles may also properly inform the analysis. For example, where a statute grants "authority to regulate an area—public health and safety—traditionally regulated by the States," "lack of guidance" bounding an agency's discretion should be greeted skeptically.[15] *Allstates*, 79 F.4th at 788 n.16 (Nalbandian, J., dissenting) (cleaned up). As here, *see* Pet. App. 66a–67a, novelty may also indicate a serious subdelegation problem. *Cf. Seila Law*, 591 U.S. at 220. These examples of additional markers that might inform the constitutional inquiry are illustrative, not exhaustive.

In sum, this Court is well equipped to begin to articulate judicially manageable standards for

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[14] "Holding goals statutes that would regulate commerce or tax to be improper delegations would serve the purpose of the delegation doctrine." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance*, 83 Mich. L. Rev. 1223, 1254 (1985).

[15] This Court has also struck down unconstitutional transfers of exclusively federal legislative power to the States. *See, e.g., Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

enforcing Article I's Vesting Clause on a case-by-case basis. The time has come to start to do so. And whatever the line, the USF is well over it. *Cf. NFIB v. Sebelius,* 567 U.S. 519, 585 (2012) ("It is enough for today that wherever that line may be, this statute is surely beyond it."). Section 254 is an unprecedented delegation to unelected bureaucrats of sweeping power to make important policy decisions impacting private rights and fund those legislative choices by imposing taxes at any rate they want.[16] That is an unconstitutional delegation under any test.

E. Enforcing Article I's Vesting Clause Will Have Salutary Effects.

The sky will not fall if this Court enforces the Constitution's demands. Common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be run by legislators"—are constitutionally irrelevant and, in any event, lack merit on their own terms. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring); *see also* Gordon, 12 NYU J.L. & Liberty at 811–15.

Appeals to putative agency expertise to justify the USF fall particularly flat because "determining the ideal size of a welfare program involves policy

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[16] The combination theory the decision below relied on to find an Article I violation, *see* Pet. App. 19a, 64a, also tracks this Court's delegation precedent. In *Schechter* the statute "delegated to trade or industrial groups the authority to develop codes defining 'unfair method[s] of competition,'" Pet. App. 44a (citing 295 U.S. at 521), subject to presidential approval.

judgments, not technical ones."[17] Pet. App. 35a. Nor would enforcing Article I have disruptive consequences. After all, Congress is always free to codify existing regulations through legislation. *See, e.g., Whitman*, 531 U.S. at 472. "And as to the USF particularly, Congress could obviate the constitutional problem by simply ratifying USAC's decisions about how much American citizens should contribute to the goal of universal service." Pet. App. 80a. In any event, "[t]he assertion that delegations of legislative power are necessary for effective and efficient governance in the modern world does not authorize Congress to violate Article I, Section I's vesting clause."[18] Pet. App. 83a (Elrod, J., concurring). And "[i]f [the federal government] can't do everything it wants to do—such that it has to outsource responsibilities to private parties—that may indicate it's trying to do too much." *Consumers' Rsch.*, 88 F.4th at 938 (Newsom, J., concurring).

Sketching out the contours of the Constitution's bar against subdelegation of legislative power would

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[17] For that matter, "the FCC relies on the determinations of private industry leaders to determine the USF tax." Pet. App. 83a (Elrod, J., concurring).

[18] To the extent there are concerns with the practical implications of returning to the Constitution's original public meaning, "[c]onsideration of *stare decisis* and reliance interests may" counsel against abruptly "wip[ing] the slate clean." *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring). *Cf. Loper Bright*, 603 U.S. at 412 (granting statutory stare decisis to specific agency actions upheld under *Chevron*). But this is not that case. And this Court should begin to return to the original understanding, even if only incrementally over a series of cases.

also provide much-needed clarity as to the major questions doctrine's metes and bounds and conceptual underpinnings. *Cf. Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari); *Gundy*, 588 U.S. at 157–58 (Gorsuch, J., dissenting). *See generally* Randolph J. May and Andrew K. Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show*, 74 S.C. L. Rev. 265 (2022). This would answer a concern expressed by some that "the Court's failure to say anything about nondelegation creates genuine conceptual uncertainty about what exactly it was doing in these cases, a conceptual uncertainty that will matter for future cases." Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 297 (2022). It would also provide Congress with much-needed guidance on the universe of today's important subjects that cannot constitutionally be assigned (clearly or otherwise) to administrative bodies. *See Wayman*, 23 U.S. (10 Wheat.) at 43.

"The educational effect on Congress" of invalidating the USF as an unconstitutional subdelegation of legislative power "might well be substantial." Scalia, *A Note on the Benzene Case*, *supra*, 28. This, too, would be a welcome development for our constitutional Republic. For "[w]hen the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy." *Plyler v. Doe*, 457 U.S. 202, 253 (1982) (Burger, J., dissenting).

CONCLUSION

This Court should enforce Article I's Vesting Clause and affirm the decision below.

Respectfully submitted,

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