Nos. 24-354 and 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 THE CATO INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no limit on the FCC's power to raise revenue for the USF.

2. Whether the FCC violated the nondelegation doctrine by transferring its revenue-raising powers to a private company run by industry groups.

3. Whether the combination of Congress's delegation to the FCC and the FCC's delegation to the private Universal Service Administrative Company violates the nondelegation doctrine.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, MI's constitutional studies program aims to preserve the Constitution's original public meaning, including with regard to the separation of powers.

This case interests *amici* because Congress has delegated legislative power to the Federal Communications Commission (FCC) and private parties in violation of Article I.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC's powers are the result of several strange, Constitution-distorting, legislative experiments. The FCC has a free hand, for instance, to punish media companies when they refuse to distribute the content the agency deems worthwhile.[2] And Congress has empowered the FCC to unilaterally render entire statutes inoperative.[3] But perhaps the most objectionable experiment is the one at issue here—the "universal service" subsidy program. *See* 47 U.S.C. § 254.

This uncapped congressional appropriation has many of the hallmarks of a tax. The Government collects a fixed percentage of telecommunications companies' long-distance service revenues, deposits the money in the U.S. Treasury, and spends the funds

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[2] *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). The radio station in *Red Lion* aired a segment by a conservative pastor criticizing a journalist and his anti–Barry Goldwater book. The FCC required the station to provide the journalist free airtime to respond to the criticisms. The Supreme Court rejected the station operator's free speech claims, holding that the power to mandate radio messages was not "beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves 'the public interest.'" *Id.* at 386.

[3] *See* 47 U.S.C. § 160. As Professor David Post wondered, "[I]s this provision constitutional? It *requires* ('the Commission shall . . .') the FCC to refrain from enforcing *statutory provisions* when it determines that it is not consistent with the public interest to do so. . . . Hard for me to believe that can pass constitutional muster; it's like a repeal process, but one not involving Congressional action." David Post, *Can a federal agency declare "regulatory bankruptcy"?*, WASH. POST: VOLOKH CONSPIRACY (Oct. 2, 2014), https://tinyurl.com/bdh7duvy.

on a public welfare program. Yet, because the FCC outsources revenue collection and disbursement to a nominally private company, the government designates the tax, euphemistically, as a regulatory "fee." The government collects around $8 billion of these "fees" annually,[4] which are often buried as a line item in Americans' monthly wireless and home phone bills. After 200 years, the government has purportedly discovered a novel scheme—available all this time—to raise and spend funds outside the strictures of Article I.

This circuitous subsidy system was designed by government and industry technocrats to run virtually on autopilot since it was initiated in 1996. It is the successor to an earlier system from a much different era, when AT&T was the nation's telephone monopolist. Beginning in the 1950s, federal and state regulators had compelled AT&T to use its long-distance service revenues to keep Americans' phone bills artificially low.[5] But in the 1980s and 90s, the U.S. Department of Justice imposed a network breakup, ending this monopoly and making the corporatist system of internal cross-subsidies impossible. *See United States v. AT&T*, 552 F. Supp. 131, 226–28 (D.D.C. 1982).

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[4] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106967, ADMINISTRATION OF UNIVERSAL SERVICE PROGRAMS IS CONSISTENT WITH SELECTED FCC REQUIREMENTS 2 (2024) (hereinafter "2024 GAO REPORT").

[5] *See* MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 159–62 (MIT Press 1997).

Congress responded to this new reality in the 1996 Telecommunications Act.[6] The Act required the FCC to create a system of "universal service" subsidies to compensate telecom and tech companies for serving favored constituencies, including rural households, schools, and libraries. *See* 47 U.S.C. § 254.

Both Congress's creation and the FCC's implementation of the universal service fund (Fund) have odd and novel characteristics. Congress's guidance to the FCC is skeletal and open-ended. For example, the FCC must subsidize an "evolving" level of technology services, and the FCC must consider six vague "principles" (and add others it deems worthy) when determining how much universal service "support" to collect. *See id.*

The FCC further attenuated Americans' control of the scheme when it delegated Fund collection and spending responsibilities solely to a private nonprofit it created: the Universal Service Administration Company (USAC). The USAC Board comprises 20 members who are, predominantly, current and retired employees of telecommunications firms and Fund recipients. *See* 2024 GAO REPORT, *supra*, at 6. Safely shielded from accountability to the electorate, USAC quietly exacts billions of dollars annually from Americans' phone bills to disburse among eligible telecom firms.

One of the core aims of the Constitution is to make government officials accountable. *See Gundy v. United States*, 588 U.S. 128, 155 (2019) (Gorsuch, J., dissenting) ("[T]he Constitution sought to ensure that

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[6] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."). As Thomas Paine remarked, "the constitution of England [was] so exceedingly complex, that the nation may suffer for years together without being able to discover in which part the fault lies." THOMAS PAINE, COMMON SENSE 12 (Richard Beerman ed.) (1776). The Framers therefore designed three branches of government, each with distinct powers, responsibilities, and ambitions. *See* THE FEDERALIST NO. 51, at 302 (James Madison) (Royal Classics ed. 2020). This separation of powers thus prevents both overreach *and* abdication. Congress cannot "unconstitutionally diminish [its own] authority" any more than it can intrude upon the province of the courts or the President. *Mistretta v. United States*, 488 U.S. 361, 395 (1989).

In the present case, Congress has attempted to outsource some of its most important Article I powers: the powers to tax and spend. U.S. CONST., art I, § 8, cl. 1. Instead of taxing the revenues of carriers directly and apportioning funds for universal-service subsidies, Congress instead created an accountability-shrouding system of taxes and subsidies operated by the FCC, which in turn subdelegated that responsibility to an unaccountable and self-perpetuating private entity, of which the statute "makes no mention." Pet. App. 59a.

Consumers' Research contested a recent USAC imposition (and the FCC's nominal consideration) of these monthly exactions. After the FCC persisted in taxing phone lines, Consumers' Research sued in the Fifth Circuit Court of Appeals. On rehearing *en banc*,

the court held that this scheme violates Article I's Legislative Vesting Clause. U.S. CONST., art I, § 1, cl. 1; Pet. App. 64a–81a. Because the scheme violates both the nondelegation and private nondelegation doctrines, this Court should affirm the decision below.

ARGUMENT

I. SECTION 254 VIOLATES THE NONDELEGATION DOCTRINE.

The required financial "support" in Section 254 has the hallmarks of a tax. The FCC demands a specific percentage of phone companies' revenue, which USAC and the FCC remit to the Treasury. Such "support" cannot be fairly characterized as a "fee" because a fee is when a "charge" corresponds to "a benefit voluntarily sought by the payer." Pet. App. 21a (quoting Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 270 (2005)). This "support," rather, is a tax because it "inure[s] to the benefit of the public." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989). Section 254, therefore, impermissibly delegates Congress's taxing power to the FCC.

A. CONGRESS CANNOT DELEGATE ITS TAXING POWER.

With the oppressions of a distant and unfamiliar legislature fresh in mind,[7] the Framers recognized taxation as a legislative object "of most importance, and which seems most to require local knowledge."

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[7] *See* PAINE, *supra*, at 43 ("[A] power, so distant from us, and so very ignorant of us . . . cannot govern us[.]").

THE FEDERALIST NO. 56, at 328 (James Madison) (Royal Classics ed. 2020). Article I thus grants the people's elected representatives in Congress the exclusive "power to lay and collect taxes." U.S. CONST., art I, § 8, cl. 1.

The Framers also knew that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). "Because of its breadth, the taxing power can be highly dangerous if abused." Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 98 (Peter J. Wallison & John Yoo eds., 2022). For this reason, the Framers enshrined special safeguards against unaccountable—and hence, excessive—taxation. First, they required revenue bills to originate in the House of Representatives. U.S. CONST., art I, § 7, cl. 1. The House was chosen for this role because it was the chamber of Congress "so constituted as to support in [its] members an habitual recollection of their dependence on the people." THE FEDERALIST NO. 57, at 334 (James Madison) (Royal Classics ed. 2020). Second, the Framers imposed a limit on direct taxes by requiring that they be apportioned among the States on the basis of population. *See* U.S. CONST., art I, § 9, cl. 4; *see also Moore v. United States*, 602 U.S. 572, 582 (2024).

These special limits on federal taxation "would be bypassed" if Congress could simply pass the taxing-and-spending baton to administrative agencies or private companies like USAC. Chenoweth & Samp, *supra*, at 98–99. "The dangers thereby created are

such that careful judicial review . . . is warranted." *Id.* at 99.

The court below correctly ruled that Section 254 violates Article I. Holding otherwise would have created a constitutional "cheat code"—Congress would no longer need to impose unpopular taxes and could instead simply command favored industries and their captured regulators to fund welfare programs. For example, Congress could pass the unenviable task of raising revenues for Medicare and Medicaid to hospital executives. Pet. App. 22a. It could empower a consortium of grocers to set the Supplemental Nutrition Assistance Program ("SNAP") budget only for shoppers to foot the bill at checkout. *Id.* It could even empower Lockheed Martin to set the defense budget at whatever it "wants it to be, unless Congress intervenes to revise it." *Id.* at 49a.

Each of these hypotheticals would be unconstitutional for the same reason as the scheme at issue here. Congress must make difficult policy decisions about taxation for itself and thereby incur the people's judgment. Accountability to voters for imposing taxation may be unwelcome, but Article I requires it.

B. SECTION 254 IMPERMISSIBLY DELEGATES CONGRESS'S TAXING POWER TO THE FCC.

With Section 254, Congress has attempted to evade the strictures of Article I by delegating its taxing and spending powers to the FCC. The law "delegate[d] the definition, execution, and financing of [a massive entitlement program] to the FCC." Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of*

Taxing Power, 2000 MICH. ST. L. REV. 107, 110 (2000). In the words of the Government Accountability Office, "Congress authorized the [Fund] as a permanent, indefinite appropriation." 2024 GAO REPORT, *supra*, at 7 (citing 47 U.S.C. § 254). This "appropriation" is for "an unspecified amount" and "remain[s] available without further congressional action." *Id.*

Ultimately, the FCC wields "unfettered power . . . in defining the scope of universal service" with "no limits" on how much of a financial "burden" it may impose to fund it. Cherry & Nystrom, *supra*, at 110. Congress thus replaced the accountable taxation contemplated by the Framers with a series of "complicated and indirect measures" that disguise its "encroachments" on the people. THE FEDERALIST NO. 48, at 289 (James Madison) (Royal Classics ed. 2020). Article I does not permit "[t]his congressional obfuscation of the duty to lay taxes." Cherry & Nystrom, *supra*, at 110.

Section 254 contains no "formula, ceiling, or other meaningful restrictions on how much money can be raised" from American consumers. Resp. Br. 3. This broad delegation from Congress, combined with the FCC's dubious delegation of operational control to USAC, likely explains why the Fund exploded in cost from $1.37 billion in 1995 to $9 billion in 2021. Pet. App. 8a.[8] While the people's elected representatives are reluctant to raise taxes, USAC—a private

[8] This nearly seven-fold increase in the USF overwhelmingly outpaced the growth of federal receipts as a share of gross domestic product over the same period, which decreased by 0.6%. *See Federal Receipts as Percent of Gross Domestic Product*, FED. RESERVE ECON. DATA (Jan. 30, 2025), https://tinyurl.com/2tm2twbe.

nonprofit shielded from electoral accountability—has fewer reservations.

The government responds that Congress has not delegated its powers of the purse to the FCC (or USAC) because the agency must "base policies for the preservation and advancement of universal service" on specific "principles." 47 U.S.C. § 254(b)(1)–(6); Gov. Pet. Br. at 30. That is wrong for two reasons.

First, those "principles" are aspirational and standardless. The FCC is expressly empowered to introduce "other principles" that are "necessary and appropriate for the protection of the public interest," 47 U.S.C. § 254(b)(7). As one government report put it, the statute "neither specified how the FCC was to administer universal service . . . nor prescribed the structure and legal parameters of the universal service mechanisms to be created." U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-151, GREATER INVOLVEMENT NEEDED BY FCC IN THE MANAGEMENT AND OVERSIGHT OF THE E-RATE PROGRAM 12 (2005). The law empowers the agency to "roam at will" in disregard of the statute's stated principles. *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935); Pet. App. 28a–29a.

Second, the FCC is not meaningfully constrained by the requirement that the "other principles" it introduces must be "consistent with the Act." 47 U.S.C. § 254(b)(7). As noted, the principles laid out in the Act are "contentless" and "aspirational." Pet. App. 29a. One court has even suggested that the FCC may *ignore* one principle to satisfy another. *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000). Given the lack of guidance in the statute, the FCC may divine similarly vague and aspirational principles that

expand the statute beyond the contemplation of its drafters,[9] only to *ignore* these new principles in the "exercise [of its] reasoned discretion." *Alenco*, 201 F.3d at 621.

The permissiveness of Congress's delegation is further indicated by the fact that the Fund's exactions have risen considerably, contrary to the expectations of the statute's drafters and the accountants at the Congressional Budget Office, who expected the Fund to *shrink* in cost over time.[10]

"[T]he only real constraint on the FCC's discretion to levy excise taxes on telecommunications carriers (and American consumers in turn) is that rates 'should' remain 'affordable.'" Pet. App. 30a (quoting 47

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[9] And so it has. As the government points out, "the FCC has added two principles" to the original six, one of which is "that universal service funding should be 'competitively neutral.'" Gov. Pet. Br. 32. When the agency proposed adding this "extra principle," a commenter argued, plausibly, that it was "wholly inconsistent with the language of Section 254(b)," to incorporate "competitive neutrality" because that term was omitted in subsection (b) yet included in subsection (h). Western Alliance, Comment at 10–11, *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) (Dec. 19, 1996), https://tinyurl.com/4yxpjm7y. While "the statute demonstrates a conscious decision by Congress *not* to include 'competitive neutrality' as a basic or rural universal service principle," *id.*, the agency nonetheless added it under its § 254(b)(7) powers.

[10] "Senator Ted Stevens, in fact, noted during debate on the Telecommunications Act that CBO estimated that the cost of providing universal service *would decline by billions of dollars after passage of the act*. These anticipated subsidy reductions never occurred." Brent Skorup & Michael Kotrous, *The FCC's High-Cost Programs, Rural Broadband Penetration & Rural Broadband Service Quality*, at 4 & nn.13–14 (Dec. 14, 2020) (emphasis added), https://tinyurl.com/4xw3sn55.

U.S.C. § 254(b)(1)). But even determining what is "affordable" is illusory. "There are no answers because Congress never gave them." *Id.* at 31a. Further, the taxed services here are "uncommonly inelastic"—consumer purchases change little in response to price changes—because phone and broadband services are "essential to participation in the modern world." *Id.* at 30a, 31a. The FCC and USAC "could impose eye-watering USF Taxes" and still see relatively few Americans give up their smartphones. Pet. App. 31a. The "affordability constraint" thus "amounts to *no guidance* whatsoever." *Id.* at 30a (internal quotation marks omitted).

Section 254 represents an entitlement funded by taxes, set to autopilot. Congressmen can "hide behind a thin veil of ignorance as they scratch their heads wondering how universal service became such a costly entitlement program." Cherry & Nystrom, *supra*, at 108–09. This is not the accountable Congress contemplated by the Framers and mandated by Article I.

II. THE COURT SHOULD CLARIFY OR REPLACE THE INTELLIGIBLE PRINCIPLE TEST TO PROTECT THE SEPARATION OF POWERS.

Justice Scalia once remarked that "[t]he real key to the distinctiveness of America is the structure of our government." *Considering the Role of Judges Under the Constitution of the United States*, U.S. SENATE COMM. ON THE JUDICIARY, at 00:40:21 (Oct. 5, 2011).[11] That distinct structure will be maintained only if this Court is willing to police and demarcate the

[11] Available at https://tinyurl.com/2k3u2m3v.

boundaries which separate the legislative and executive powers.

The Framers envisioned the federal courts as "the bulwarks of a limited Constitution against legislative encroachments" and "an intermediate body between the people and the legislature." THE FEDERALIST NO. 78, at 451, 452 (Alexander Hamilton) (Royal Classics ed. 2020). Consistent with that mission, this Court has a proud tradition of judicial engagement. Historically, when government conduct has implicated fundamental constitutional rights, this Court has vigorously scrutinized those impingements to ensure that the political branches comport with constitutional commands.[12]

When it comes to delegation, however, the Court over the last 90 years has taken a too-lax approach. So long as a statute contains a mere "intelligible principle" to guide executive action, the Court has refused to second-guess Congress "regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (internal quotation marks omitted).

Unfortunately, courts' deferential interpretations of the intelligible principle test have permitted the Executive Branch to aggrandize itself at Congress's expense, usurping Congress's role as the predominant policymaking branch. The result is a multi-million-man bureaucracy, an Executive Branch of record size.

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[12] *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (First Amendment); *Musser v. Utah*, 333 U.S. 95, 97 (1948) (Fifth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (Second Amendment).

See Paul C. Light, *The true size of government is nearing a record high*, BROOKINGS INST. (Oct. 7, 2020).[13] This case offers the Court a chance to begin correcting that imbalance in the separation of powers.

To the extent that the intelligible principle test applies here, the Court should apply a robust form of the test that protects the separation of powers. *See Gundy v. United States*, 588 U.S. 128, 164, 166 (2019) (Gorsuch, J., dissenting) (proposing a three-pronged inquiry based on "prior teachings"); *see generally* Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 45–70 (Peter J. Wallison & John Yoo eds., 2022); Chenoweth & Samp, *supra*. Certain decisions are "simply too great for [them] to be called anything other than legislative." *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (internal quotation marks omitted). This is one such case.

Under any meaningful nondelegation test, the statute at issue in this case should not pass muster. In enacting Section 254, Congress did not "determine what [was] to be funded and at what cost." Cherry & Nystrom, *supra*, at 123. Instead, Congress "require[d] the FCC to define universal service," "quantify the respective net costs to be recovered," and "determine how" to recover them "from carriers' customers." *Id.* at 123–24. Plainly, Congress left the difficult work of legislating to the FCC, which then subdelegated that

[13] Available at https://tinyurl.com/2ub68684.

work to USAC—a private entity of which "Section 254 . . . makes no mention." Pet. App. 59a.

While the statute provides a skeletal framework of policy goals to guide the agency's operations, these goals do not *meaningfully constrain* its discretion to extract revenue from American consumers in whatever amounts it might desire. *Id.* at 69a–70a. Indeed, the statute leaves so much undefined that government agencies have not even held a consistent view as to whether money in the Fund belongs to the government.[14] This is the case—and the statute—to give the nondelegation doctrine teeth again.

III. THE COURT SHOULD CLARIFY THAT THE MAJOR QUESTIONS DOCTRINE IS NOT A SUBSTITUTE FOR THE NONDELEGATION DOCTRINE.

If Congress wishes to vest in the Executive Branch domestic policy "decisions of vast economic and political significance," it must "speak clearly." *West Virginia v. EPA*, 597 U.S. 697, 716 (2022) (internal quotation marks omitted). Accordingly, "[s]ome have described [this major questions] doctrine as a

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[14] *Compare* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OPINION LETTER ON THE STATUS OF THE UNIVERSAL SERVICE FUND 3 (2000), bit.ly/49udXwN (concluding that "the Universal Service Fund does not constitute public money pursuant to the Miscellaneous Receipts Statute . . ., and is appropriately maintained outside the Treasury by a non-governmental manager"), *with* Brief for the United States as *Amicus Curiae* Supporting Respondent at 8, *Wisconsin Bell, Inc. v. United States ex rel. Todd Heath* (No. 23-1127) (Oct. 2024) ("[M]oney held in the Fund *does* belong to the government. Congress has appropriated money from the Fund; the President accounts for it in his annual budget; and the Commission accounts for it in its financial statements.") (emphasis added).

substitute for nondelegation policing." Gaziano & Blevins, *supra*, at 48 n.15.

While the rise of the major questions doctrine is a welcome development, it cannot serve as a sufficient substitute for the nondelegation doctrine. Nondelegation and major questions are "closely related" because each doctrine aims "to prevent government by bureaucracy supplanting government by the people." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 124, 125 (2022) (Gorsuch, J., concurring) (internal quotation marks omitted). However, the doctrines perform different jobs. *See* Gaziano & Blevins, *supra*, at 48 n.15. As an interpretative presumption, the major questions doctrine limits only *how* Congress must make particularly large delegations to the Executive; it leaves unrestrained Congress's power to offload vast amounts of legislative authority in the first place. *Cf. id.*

As the Fifth Circuit correctly concluded, Section 254 "delegated to FCC the power to decide how much revenue the Government will raise [from American taxpayers] via USF taxes." Pet. App. 69a. Congress cannot do so regardless of how "clearly" it "speak[s]." *West Virginia*, 597 U.S. at 716. This Court should likewise make clear that the development of the major questions doctrine has not obviated courts' need to apply the nondelegation doctrine.

IV. THE FCC VIOLATED THE PRIVATE NONDELEGATION DOCTRINE BY TRANSFERRING ITS REVENUE-RAISING POWERS TO USAC.

The private nondelegation doctrine prevents the government from vesting sovereign power in those

who are not part of the government. One important purpose served by the private nondelegation doctrine is that it prevents the government from using private parties to do what the government legally could not do. As a component of both due process of law and separation of powers, the doctrine confines private actors to advisory or subordinate functions, under the "pervasive oversight and authority" of government. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388–89 (1940); *see also Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).[15]

If there were no private nondelegation doctrine, Congress could empower private entities or

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[15] The *Carter Coal* decision "did not specify which provision—the Legislative Vesting Clause or the Fifth Amendment Due Process Clause—the statute offended. But because . . . *Carter Coal* cited *Schechter Poultry*, a Vesting Clause case, alongside Due Process cases, the Court presumably held the delegation was unlawful on both grounds." Pet. App. 45a. n.15; *accord* Paul J. Larkin, *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 44 (2021) ("It would . . . violate the Due Process Clause altogether to exempt someone exercising delegated government power from compliance with the law."). A series of cases sustaining *state* laws authorizing state officials to reopen banks with the consent of a certain percentage of their creditors suggest that under state constitutions, private nondelegation is a doctrine rooted in due process of law, as opposed to separated powers more generally. *See Doty v. Love*, 295 U.S. 64, 71–73 (1935); *Dorman v. Dell*, 245 Ky. 34, 38–40 (1934); *Milner v. Gibson*, 249 Ky. 594, 601 (1933); *Nagel v. Ghingher*, 166 Md. 231, 241–42 (1934); *McConville v. Ft. Pierce Bank & Trust Co.*, 101 Fla. 727, 733 (1931); *Smith v. Texley*, 55 S.D. 190, 194 (1929); *Hoff v. First State Bank*, 174 Minn. 36, 44–45 (1928). Still, separation of powers and due process of law are not mutually exclusive. They are closely related and mutually reinforcing. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

"individual[s to] exercise significant governmental authority free from [constitutional] constraints, so long as they served outside of an ongoing position." Jennifer Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. L. REV. 837, 848 (2022). That is, Congress could create headless fourth, fifth, or sixth branches of "government" comprising private officials—a modern and secular "millet system"[16]—that would undermine the Framers' design and dilute democratic accountability.

In this case, the government has empowered a private entity to tax American citizens without the "pervasive oversight and authority" required by this Court's precedents. *Adkins*, 310 U.S at 388–89. USAC sets the program's budget each quarter, "includ[ing] the cost of funding USAC itself." Resp. Br. 3. The FCC merely "converts that figure [from USAC] into a [tax rate] that will apply to certain telecommunications revenues." Resp. Br. 3.

As the *en banc* court below explained, "USAC is responsible for deciding the quarterly USF contribution amount" as a "percentage of [each carrier's] end-user telecommunications revenue." Pet. App. 6a. "As a practical matter," the court continued, "USAC sets the tax," and the FCC merely "rubber stamp[s]" it. *Id.* at 7a. Indeed, the FCC's rubberstamp

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[16] In the Ottoman millet system, the Sultan and his state officials delegated autonomy and legal jurisdiction to leaders of non-Muslim Ottoman subjects. Heads of millets had near-absolute secular and ecclesiastical power over their communities. *See, e.g.*, Karen Barkey & George Gavrilis, *The Ottoman* Millet *System: Non-Territorial Autonomy and its Contemporary Legacy*, 15 ETHNOPOLITICS 24 (2016). Whatever the merits of the millet system, it is foreign to our Constitution.

is not even a prerequisite, as USAC's proposals *automatically* become law within 14 days absent adverse agency action. 47 C.F.R. § 54.709(a)(3). To call this uncapped revenue-generating system "on autopilot" is being generous—it appears the passive approvals of USAC tax rates would continue even if the FCC lacked a quorum to commence normal agency operations. *See* 47 U.S.C. § 154(h).

As Respondents emphasize, "[t]here is no evidence the FCC itself *actually reviews* USAC's work." Resp. Br. 3 (emphasis added). Indeed, given that the "entire [approval] process happens only days before the new quarter begins, . . . FCC [has] no real option *but to accept whatever numbers USAC demands*." *Id.* at 4 (emphasis added). Thus, USAC's work "is far from a ministerial undertaking." *Id.*

A. CONGRESS HISTORICALLY DELEGATED ONLY MINISTERIAL TASKS TO PRIVATE ACTORS.

Congress's delegations of power to USAC are historically unprecedented.[17] To be sure, there *is* historical pedigree for *certain* types of private

[17] While early congressional practice is not dispositive as to a measure's constitutionality, *see, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and while "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation," *Mistretta*, 488 U.S. at 373 n.7, history and tradition are at least "probative" of the Constitution's original meaning. *Trump v. Anderson*, 601 U.S. 100, 122 (2024) (Barrett, J., concurring in part and concurring in the judgment); *see, e.g.*, *Mistretta*, 488 U.S. at 398–99 (considering how "early history" shed light on whether Article III judges could simultaneously serve in extrajudicial roles); *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (weighing actions by members of the First Congress).

delegations. *See generally* Mascott, *supra*. These arrangements offer "a glimpse" of how the founding generation understood "the scope of tasks that Congress may constitutionally delegate to private actors." *Id.* at 848.

Founding-era history suggests that Congress may assign only "ministerial tasks" to private parties, and even then, "the performance of those tasks [must] not constitute a portion of the delegated *sovereign authority* of the United States." *Id.* at 866 (emphasis added). Private parties exercise sovereign authority when their actions bind the legal rights of other citizens "absent subsequent sanction" by the government. *Id.* at 914 n.296 (internal quotation marks omitted).

Two examples from early American history illustrate what the founding generation and early American legislators considered permissible private delegations: (1) private boatman employed to enforce customs laws; and (2) private boards of experts established to review patent denials by the Commissioner of Patents. Neither example provides a historical analog to USAC nor suggest that Congress's delegations here are consistent with the original understanding of Article I.

Historically, Congress has hired "non-governmental actors . . . for expert services in which they complete[] measurements or other types of empirical assessments." *Id.* at 916. These delegations look nothing like a substantive tax power, which is inherently a sovereign power. *Id.* at 905.

Around the time of the founding, Congress employed private "boatmen" as "inspectors, weighers,

measurers, and gaugers . . . to measure the quantity of goods on which the customs duties were to be assessed." *Id.* at 861 (internal quotation marks omitted) (quoting § 6, 1 Stat. 145, 154; § 53, 1 Stat. at 172). The Framers considered these quintessential "ministerial tasks" because customs inspectors "had very little discretion" given "the detailed nature of the customs rates . . . that Congress had developed and imposed." *Id.* at 861–862, 866.

Critically, "the sovereign act . . . occurred at the point that Congress *authorized and assigned weight* to the expert assessment," *not* during the "actual expert assessment" itself. *Id.* at 897 (emphasis added). It was for Congress, not the boatmen, to "bind the legal rights" of citizens. *Id.* at 914 n.296

The other prominent example of Congress delegating expert services to private parties occurred in 1836, when Congress created "nongovernmental boards of experts" to review the denial of patents by the Commissioner of Patents. *Id.* at 879. If the Commissioner determined that an applicant was not entitled to a patent, the applicant could appeal to the board, which consisted of "three disinterested persons" selected by the Secretary of State "for that purpose." *Id.* at 891 (quoting § 7, 5 Stat. 117, 120). Board members were "private experts" who served on a case-by-case basis, "not governmental officers of any kind." *Id.* at 858.

These boards were not as strictly ministerial as the private boatmen used in customs. For example, they could "effectuat[e] *binding* reversal of prior Patent Commissioner assessments" and make "mixed fact-law determinations regarding threshold patentability findings on obviousness and interference." *Id.* at 856,

863, 882 (emphasis added). Although Congress did grant some discretion to these private parties, the Founding Generation viewed the Executive Branch's role in evaluating patents as "ministerial,"[18] so this delegation to private actors was constitutionally unremarkable. Furthermore, the boards "did not have binding sovereign authority to set the terms for future proceedings." Mascott, *supra*, at 899.

In any case, courts never evaluated the constitutionality of these boards, and this governance experiment was short-lived, lasting from 1836 to 1839, when Congress "transferred the power of the 1836 boards to the [chief] district judge [of the District of Columbia.]" *Id.* at 903.

B. USAC FALLS FAR OUTSIDE THE HISTORICAL TRADITION OF PRIVATE DELEGATIONS.

USAC falls far outside this historical tradition of Congress employing private actors to administer technical services under federal law. USAC—a private entity comprising private actors—binds the legal

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[18] For instance, an 1812 letter from the U.S. Attorney General to the Secretary of State "concluded that the Secretary . . . lacked discretion to decline to issue a patent once the prospective patentee had complied with the congressionally mandated application process." Mascott, *supra*, at 898 (citing *Patents for Inventions*, 1 Op. Att'y Gen. 170, 171 (1812)). Similarly, in 1831, the Attorney General confirmed that when granting patents, the Executive "acts ministerially," reasoning that satisfaction of statutory criteria removes "an[y] examination of the question of right." *Id.* (internal quotation marks omitted) (quoting *Patents, Patent Office, and Clerks,* 2 Op. Att'y Gen. 454, 454–55 (1831)). *See also Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 241 (1832) (noting that the Secretary issued patents through a routine process "as a ministerial officer").

obligations of most Americans "absent subsequent sanction" by the government. *Id.* at 914 n.296 (internal quotation marks omitted). "And surely [much] discretion inheres in decisions about how much money to allocate to a massive federal welfare program." Pet. App. 54a.

In short, USAC does not resemble the private boatmen Congress employed as measurers and gaugers in 1789, nor the private boards created to review patentability findings in 1836. Instead, USAC is "a private company [that] is taxing Americans in amounts that total billions of dollars every year, under penalty of law, without true governmental accountability." Resp. Br. 4. It is a "junior varsity Congress" working outside and in contravention of the separation of powers. *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting). The constitutional problems are immediate and far-reaching.

CONCLUSION

For the foregoing reasons, and those presented by Respondents, the Court should affirm the decision below.

Respectfully submitted,

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