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 REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

1. Respondents are correct on the bottom line, and so was the en banc Fifth Circuit: the administration of the Universal Service Fund (USF) Tax mechanism is unconstitutional. But the Fifth Circuit got it right for the wrong reason. The problem is not that the FCC's reliance on the Universal Service Administrative Company (USAC) as administrator of the USF violates the "private nondelegation doctrine." Rather, the problem is twofold: (1) The arrangement violates the Appointments Clause, because the USAC members can exercise significant governmental power

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

under federal law without having gone through the proper appointment process. (2) The arrangement violates the Due Process Clause, because various members of USAC have an interest in the contribution amounts they project.

2. The Fifth Circuit was wrong that the FCC's reliance on USAC violates the "private nondelegation doctrine." There is no such doctrine. The idea that delegations of power to private parties are judged by a stricter standard than delegations to public parties has no support in any holdings of this Court. Any decisions that seem to the contrary have either been misinterpreted or were in fact based on other doctrines, like the Due Process Clause. And the lack of such a doctrine makes sense, because the nondelegation doctrine, which is rooted in Article I, is aimed at controlling *Congress*; it sensibly asks whether Congress has given up too much power, not who the recipient of such power is.

   Assuming that the FCC is authorized to subdelegate to USAC, that subdelegation should be judged by the same standard as a subdelegation to a public body. (*Amicus* takes no position here on the statutory issue, or on whether the subdelegation to USAC would survive under the public-delegation standard.)

3. USAC exercises substantial federal power, because its projections go into effect automatically if the FCC does nothing within 14 days, and this determines the amount and distribution of the tax. This makes the members of USAC Officers of the United States. But because they weren't appointed as Officers in the way

that Article II requires, this arrangement violates the Appointments Clause.

That USAC members are nominally private is unimportant for Officer status. The labeling of USAC as private, and the fact that USAC is organized as a private organization under Delaware law, are constitutionally irrelevant, and in any event Appointments Clause doctrine doesn't demand that an Officer formally be a public employee.

4. The Fifth Circuit was right to point out that there is a conflict of interest inherent in having USAC—which contains members of telecommunications companies, "who stand to benefit financially when universal service subsidies grow"—determine contribution amounts. *Consumers' Research v. FCC*, 109 F.4th 743, 772 (5th Cir. 2024). But this problem should be located in the Due Process Clause, not in a private nondelegation doctrine. The Due Process Clause has for a century been interpreted to bar exercises of regulatory power by self-interested parties, whether public or private.

5. The distinction between the "private nondelegation doctrine," the Appointments Clause, and the Due Process Clause, isn't just of academic interest.

   First, the doctrines are motivated by different theories. The nondelegation doctrine is *giver-focused*, asking whether Congress has given up too much power; the public-private question fits poorly with this concern. By contrast, the Appointments Clause is *recipient-focused*, asking, from a democratic accountability perspective, whether the recipient

of major power has been validly authorized by the proper political process. And the Due Process Clause is *application-focused*, asking whether the use of the power implicates fairness concerns. The problem here fits more naturally with the Appointments Clause and Due Process issues.

Second, the doctrines apply in different contexts and have different remedies. For instance, a Due Process theory (unlike the nondelegation doctrine or the Appointments Clause) would apply even if this were a *state* regulatory scheme. It could also support damages under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). And an Appointments Clause theory asks whether someone is "exercising significant authority pursuant to the laws of the United States." Thus, an Appointments Clause approach will turn on *how much* power the agent exercises, ignoring trivial cases and requiring political accountability for significant ones. This is a sensible approach—otherwise, countless private delegations could be indiscriminately invalidated, from *qui tam* suits to private prison contracting to incorporation of private actuarial standards into healthcare regulation. Whether these are valid should depend on an inquiry into "significant authority."

Third, a private nondelegation doctrine requires tough judgment calls about whether an organization is public or private, so the results will depend on the vagaries of public-private doctrines like the State Action Doctrine. (Indeed, it is not at all obvious that USAC is actually private here.) By contrast, the Appointments Clause and Due Process Clause depend

on functional questions, such as whether significant power exists and whether there is a danger that it will be used self-interestedly. In today's world of hybrid public-private organizations and nominally private organizations wielding coercive power, it makes more sense to rely on doctrines that do not hinge on formal public-private categorization.

6. Therefore, if this Court invalidates this regulatory scheme, it should do so on Due Process and/or Appointments Clause grounds. Regardless, this Court should not endorse any "private nondelegation doctrine" theory. (*Amicus* takes no position here on the ordinary nondelegation doctrine theory that the Fifth Circuit relied on to invalidate the initial delegation from Congress to the FCC. *Amicus* merely disagrees with the "private nondelegation doctrine.")

ARGUMENT

I. The Fifth Circuit Was Right for the Wrong Reason.

The en banc Fifth Circuit was right was that the administration of the USF Tax is unconstitutional. However, it was wrong to rely on the private nondelegation doctrine, which, as discussed in Part II *infra*, has no basis in any decisions of this Court and is also ill-advised on its own merits. The involvement of USAC is indeed constitutionally problematic, but for different reasons, both of which were hinted at in the Fifth Circuit's opinion (though without naming the proper doctrines).

First, as discussed in Part III *infra*, USAC exercises significant federal power: its projections and contribution

factor are "deemed approved" if the FCC takes no action on them within fourteen days, and then that factor is used to calculate contributors' taxes. This is enough to make USAC's members Officers of the United States, who must be appointed according to the methods specified in the Appointments Clause. Because they were not so appointed, this arrangement violates the Appointments Clause.

Second, as discussed in Part IV *infra*, USAC is composed of members that have a financial interest in their projections of how much it will cost to achieve universal service. Some represent telecommunications carriers; some represent beneficiaries of projects that can be funded by the USF. This is enough to make USAC's control over the amount of taxes a violation of the Due Process Clause.

This is not some purely academic exercise in doctrinal categorization: as discussed in Part V *infra*, the different theories differ in their purpose, in what remedies are available, in whether they apply only against federal entities or also against state entities, and in whether they require a difficult threshold public-private inquiry.

Finally, as discussed in Part VI *infra*, it is true that the Fifth Circuit did not rule on the Due Process and Appointments Clause theories. But there are various ways this Court could respond to the concerns raised in this brief; *amicus* takes no position on which is preferable.

This Court could, for instance, (1) invalidate the system as having no "intelligible principle" solely on the basis of Congress's delegation to the FCC (making no reference to FCC's subdelegation to USAC); (2) invalidate the FCC's subdelegation to USAC solely based on the Fifth

Circuit's statutory argument, *see Consumers' Research*, 109 F.4th at 774-77; (3) hold that USAC is actually public because determining the amount and incidence of a tax is a "traditionally exclusive public function" and therefore state action, similarly to its holding in *DOT v. Ass'n of Am. R.R.s*, 575 U.S. 43, 55 (2015); (4) reject both the public and private nondelegation challenges and remand to the Fifth Circuit for analysis under the Due Process and Appointments Clauses; or (5) reject both the public and private nondelegation challenges, note that there are plausible Due Process and Appointments Clause arguments that remain open, and leave those arguments for another day.

In any event, this Court should not establish bad precedent by endorsing a private nondelegation doctrine that has no support in the prior decisions of this Court and that is ill-advised on its own merits.

II. There Is No "Private Nondelegation Doctrine" (Nor Should There Be).

The Fifth Circuit held that the Constitution bars delegations of governmental power to private bodies. *Consumers' Research*, 109 F.4th at 768-70; *see also Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880-90 (5th Cir. 2022) (*Horsemen I*); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 423-35 (5th Cir. 2024) (*Horsemen II*). Because the FCC subdelegated some of its power to USAC, a private organization, this private subdelegation—if not itself unconstitutional—at least contributed to the unconstitutionality of the USF Tax at issue here. *Consumers' Research*, 109 F.4th at 770-73.

The Fifth Circuit purported to find this private nondelegation principle in two of this Court's precedents: *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Consumers' Research*, 109 F.4th at 768-69.

But, as explained below, this Court's precedents don't support any private nondelegation doctrine that is stricter than the ordinary nondelegation doctrine that applies to federal agencies. *See also* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 229-33 (2023). USAC's powers are indeed unconstitutional, but—as explained in Parts III and IV *infra*—the problem lies in the Appointments Clause and the Due Process Clause, not in the nondelegation doctrine.

A. This Court Has Repeatedly Upheld Private Delegations.

Delegations of authority are ubiquitous in government; the Article I Vesting Clause merely bars delegations of *legislative power*. What makes a permissible delegation of authority into a forbidden delegation of legislative power is the lack of an "intelligible principle." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). However, Fifth Circuit caselaw holds that private entities are subject to a more stringent doctrine, under which private actors must never have final decisionmaking authority and must always be supervised by a governmental actor. *Consumers' Research*, 109 F.4th at 769-70.

But this Court has *never* invalidated a delegation to private parties under *any* version of the nondelegation

doctrine, and certainly has never stated any version that resembles the Fifth Circuit's strong private nondelegation doctrine. On the contrary, it has upheld delegations to private parties against nondelegation challenges at least four times. *See Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *St. Louis, Iron Mountain, & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908); *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 553 (1939). (The Fifth Circuit was thus quite wrong to state, "Only four times has the Supreme Court considered whether a delegation to private entities violates Article I's Vesting Clause." *Consumers' Research*, 109 F.4th at 769. Its listing of four cases manages to omit three of the four cases listed above.)

In two of those cases—*Butte City Water* and *Rock Royal*—this Court simply upheld the delegation without much discussion. In *Butte City Water*, this Court upheld the power of Congress, as part of its power to make regulations for public lands, to delegate rulemaking authority to miners in local mining districts. 196 U.S. at 125-26. And in *Rock Royal*, this Court upheld the power of agricultural producers or handlers to vote on whether certain agricultural marketing orders would go into effect. 307 U.S. at 577-78.

Two other times—in *St. Louis Railway* and *Currin*—this Court went even further, and upheld the delegation by explicitly analogizing it to a similar case where the delegation was to the President or an executive official:

- *St. Louis Railway* concerned a nondelegation challenge to a statute that authorized the American Railway Association, a private group, to "designate to the Interstate

Commerce Commission the standard height of draw bars for freight cars." 210 U.S. at 286. The ICC was then directed to promulgate that height as law. *Id.* This Court upheld the delegation to the American Railway Association simply by appealing to the precedent of *Buttfield v. Stranahan*, 192 U.S. 470 (1904), which had upheld a delegation of tea-inspecting authority to the Secretary of the Treasury; this Court wrote that the public-delegation *Buttfield* case, "in principle, is completely in point." *St. Louis Railway*, 210 U.S. at 287.

- *Currin* concerned a challenge to the Tobacco Inspection Act of 1935. The Act authorized the Secretary of Agriculture to establish uniform standards for tobacco, and designate tobacco markets where no tobacco could be sold unless it was inspected and certified according to those standards. But the Secretary couldn't designate a market unless two-thirds of the growers in that market voted in favor of the designation in a referendum. Industry members thus held an "on-off" power to decide whether certain predetermined regulations would go into effect. This Court upheld the delegation to industry members by analogizing it to a delegation *to the President* of the power to set equalizing tariffs, which had been upheld in *J.W. Hampton*; *see Currin*, 306 U.S. at 16. This Court concluded that the delegation of the on-off power was not a forbidden "delegation of legislative authority."

This Court upheld both of these delegations—concluding that they were not delegations of legislative power—without even mentioning the difference between public and private status, and indeed by relying on public-delegation precedents. Thus, in those cases, this Court cannot have endorsed any special nondelegation principle that would apply more strictly against private delegates—quite to the contrary.

Butte City Water and *St. Louis Railway* were even explicitly cited in *Schechter Poultry* as examples of cases where private delegation would be constitutional. 295 U.S. at 537 nn.14-15. No later case has taken a contrary approach.

B. This Court Has Been Right to Treat Public and Private Delegations Equivalently.

And this is the correct rule: because the nondelegation doctrine is rooted in the Article I Vesting Clause, it is about controlling *Congress*; the question is whether Congress has given away too much power. The focus is on *how much* power Congress has given away (i.e., whether the delegation is adequately constrained), not on *who* is the recipient of such power.

Thus, though this Court's nondelegation doctrine cases have usually concerned executive officials or agencies, they have also concerned the judiciary, *see Mistretta*, Indian tribes, *see United States v. Mazurie*, 419 U.S. 544 (1975), and (as discussed above) private parties. Indeed, Congress's dynamic incorporation of state law in many areas is a sort of delegation to state legislatures, which, by altering their tort law or definitions of marriage, affect

the scope of the federal government's sovereign immunity or the amount of federal taxpayers' liability.

There are indeed constitutional problems with USAC's rulemaking power, but those problems are properly located in the Appointments Clause or the Due Process Clause, not in the nondelegation doctrine.

C. *Schechter Poultry* and *Carter Coal* Do Not Support a Private Nondelegation Doctrine.

Though the Fifth Circuit purported to rely on *Schechter Poultry* and *Carter Coal*, neither of these cases is on point. *See* Volokh, *supra*, at 233-36.

Schechter Poultry did not involve any delegation to private parties: the only power involved in the case was the President's power to adopt codes of fair competition—which private industries were merely allowed to propose. So this Court cannot possibly have held anything relevant to private delegations. (Respondents characterize *Schechter Poultry* as involving "a dual-layer delegation—which involved private parties, too," Br. for Resps. at 89, but this is incorrect.) It is true that, in dictum, this Court denied that Congress could give unrestricted power to industry. 295 U.S. at 537. But then it went on to strike down the challenged statute on the ground that it gave unrestricted power to the President. *Id.* at 537-42. So, if anything, *Schechter Poultry* stands for the rule that Congress cannot give *anyone* unrestricted power; it does not support any rule that would treat private and public delegations differently.

As for *Carter Coal*, that case is most properly characterized as a Due Process case: the problem there was that power to regulate wages and prices was delegated to self-interested groups of competitors. *Carter Coal* thus fits naturally into a line of Due Process cases stretching back to *Eubank v. City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), disapproving of coercive power being wielded by financially self-interested parties. This Court has repeatedly declined to classify *Carter Coal* as a nondelegation doctrine case. *See Mistretta v. United States*, 488 U.S. 361, 373 (1989); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001); *cf. Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (Scalia, J.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

The Due Process concerns here are indeed substantial—*see* Part IV *infra*. But *Carter Coal* does not contribute much to an argument based on the nondelegation doctrine. And even if *Carter Coal* were considered a nondelegation doctrine case, its holding could be explained in very conventional terms: because the delegation to industry was unrestricted, it would have been unconstitutional under the ordinary rule that delegations require an "intelligible principle."

III. USAC's Exercise of Government Power Is Unconstitutional Because Its Members Weren't Appointed Consistently with the Appointments Clause.

USAC exercises significant federal power: USAC's projections and contribution factor are "deemed approved" if the FCC takes no action on them within fourteen days,

and then that factor is used to calculate contributors' taxes. Because of this, USAC's members are Officers of the United States. This is so whether USAC is public or private and whether its members are formally part of the federal government.

If USAC members are principal Officers, their appointment is necessarily unconstitutional because they did not go through presidential nomination and Senate confirmation. But even if USAC members are inferior officers, their appointment is still unconstitutional: they are appointed by the FCC Chair, who is not a "Head[] of Department[]" under the Appointments Clause. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511-12 (2010) (the FCC as a whole is a Head of Department). Even beyond these clear problems, the appointment of the USAC members was vested in the Chair not by Congress (as the Clause requires) but by the FCC itself under 47 C.F.R. § 54.703(c)(3). And in any event, the regulation strictly limits the appointment discretion of the FCC Chair, who is required to appoint members nominated by particular groups of constituents under § 54.703(c)(3) (unless "an industry or non-industry group does not reach consensus on a nominee or fails to submit a nomination").

Because USAC's members weren't appointed consistently with the Appointments Clause (and thus did not take the oath required under Article VI), USAC's exercise of power violates the Appointments Clause.

A. Whether the Appointments Clause Applies Is Governed by a Simple Test.

In *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), this Court held that Officers of the United States are those

who "exercis[e] significant authority pursuant to the laws of the United States." Other cases establish that, to be an Officer, one must exercise such authority as a "continuing and permanent" (rather than "occasional and intermittent") matter. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867); *United States v. Germaine*, 99 U.S. 508, 512 (1879). Officer status is significant, because only Officers are subject to the requirements of the Appointments Clause.

By this standard, the members of USAC are Officers. USAC's projections and contribution factor are "deemed approved" if the FCC takes no action on them within fourteen days. 47 C.F.R. § 54.709(a)(3). At that point, with a minor exception, USAC is required to apply that contribution factor to contributors' telecommunications revenues "to calculate the amount of individual contributions." *Id.* (This in fact happened in this case. *Consumers' Research*, 109 F.4th at 752.) In other words, USAC can be responsible for a tax going into effect—and for the amount of tax that individual contributors must pay—as long as the FCC does nothing, which could be because it has too much on its plate and hasn't gotten around to evaluating whether USAC's projections are correct. This power to set a tax is a core governmental power that isn't available to ordinary citizens. And USAC is a continually existing organization.

It is inconceivable that a standing organization with the power to set the amount of a tax isn't "exercising significant authority pursuant to the laws of the United States." If the members of USAC were federal employees, this result wouldn't be controversial. Any possible subordination of USAC to the FCC affects, at most,

whether USAC members are *inferior* officers, not whether they are officers at all.

B. Whether the Members of USAC Are Part of the Structure of the Federal Government Is Irrelevant.

The above factors—whether, as a "continuing and permanent" matter, one "exercis[es] significant authority pursuant to the laws of the United States"—don't depend on whether one is formally within the federal government.

If actors formally outside the federal government couldn't count as Officers—and could thus be granted governmental powers exempt from Appointments Clause requirements—some classic cases could have been radically simplified. Consider, for instance, *Auffmordt v. Hedden*, 137 U.S. 310 (1890), where an importer challenged the appointment of an expert merchant appraiser on the grounds that the appraiser should have been appointed as an Officer. This Court ruled that the appraiser wasn't an Officer and was thus exempt from Appointments Clause constraints, but it didn't simply rely on the fact that he wasn't a federal employee. Rather, the Court focused on factors like the tenure, duration, compensation, and duties of the office, and particularly whether the appraiser's duties were "occasional and temporary" or "continuing and permanent." None of that discussion would have been necessary if the Appointments Clause simply didn't apply to parties outside the federal governmental structure.

The Office of Legal Counsel (OLC), after canvassing caselaw and voluminous historical evidence, has also taken the same view. "[I]t is not within Congress's

power to exempt federal instrumentalities from . . . the Appointments Clause; . . . Congress may not, for example, resort to the corporate form as an artifice to evade the solemn obligations of the doctrine of separation of powers." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. OLC 73, at *2 (2007) (cleaned up). A key element in whether one is an Officer is whether one exercises "delegated sovereign authority," which "one could define . . . as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit. . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law," *id.* at *11, and generally includes "functions in which no mere private party would be authorized to engage," *id.* at *14.

"A person's status as an independent contractor," the OLC continued, "does not per se provide an exemption from the Appointments Clause," *id.* at *18, though most contractors turn out to be exempt because they usually merely provide goods and services rather than wielding power, and "in most cases . . . their actions . . . have no legal effect on third parties or the Government absent subsequent sanction," *id.* at *19. Appointments Clause constraints, OLC stressed, do apply "in those rare cases where a mere contractor *did* exercise delegated sovereign authority (and did so on a continuing basis)." *Id.* at *20 (citing *United States v. Maurice*, 26 F. Cas. 1211, 1216-20 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Cir. Justice)). Likewise, whether someone is paid by the government isn't relevant to whether they are an Officer. *Id.* at *36-*38.

It is true that this Court has occasionally characterized Officers as being "appointees," *Buckley*, 424 U.S. at

126, or implied that they are "functionaries," *id.* at 126 n.162; a recent opinion contrasted Officers with "'lesser functionaries' such as employees or contractors," *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021). Even if these words clearly excluded private parties, the public-private question wasn't at issue in those cases. The vast majority of cases concern the Officer status of traditional governmental employees, and so statements assuming that Officers formally work for the government should be interpreted with that context in mind; anything those cases might say about private Officers is dictum. *See* Volokh, *supra*, at 240-47.

Thus, the members of USAC are Officers of the United States because of their significant authority (i.e., setting the amount and the distribution of a tax if the FCC doesn't act), despite their position outside of the formal structure of the federal government. They should follow the proper appointment procedure (and take the oath required of officers under Article VI).

IV. USAC's Exercise of Power Violates the Due Process Clause Because There Is No Protection Against USAC Members' Self-Interested Bias.

USAC's exercise of power also violates the Due Process Clause, because several of the members of USAC are self-interested telecommunications industry participants who can benefit financially from how USAC sets its projections and contribution factor.

A. Basic Due Process Principles Prevent Self-Interested Parties, Whether Public or Private, from Having Coercive Power over the Rights of Others.

The basic Due Process principles that are relevant here were formulated in a line of cases that began over a century ago; and though the problem of bias shows up in a variety of factual settings, the caselaw is consistent. *See* Volokh, *supra*, at 256-59.

In the zoning context, this Court has established that a legislature may not delegate a power to some property owners to "virtually control and dispose of the property rights of others" when they can "do so solely for their own interest." *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928).

In the context of industrial regulation, a "majority" of industry participants may not "regulate the affairs of an unwilling minority": "This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311. Such a delegation to self-interested parties clearly violates Due Process because, "*in the very nature of things*, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Id.* (emphasis added). *Carter Coal* may not be a useful case for nondelegation analysis, but it is highly relevant for Due Process.

In the context of creditor remedies like wage garnishment or prejudgment replevin procedures, a creditor—obviously a self-interested party—may not simply freeze a debtor's wages or seize his goods without making some showing before a judge. *See Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 83, 92-93 (1972); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975). This Court has recently reaffirmed the rule in the context of landlord-tenant law: the ability of a tenant to unilaterally stave off eviction by self-certifying financial hardship, where the landlord has no access to a hearing to contest that certification, violates the command that "'no man can be a judge in his own case.'" *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

This isn't just a rule against private regulators: the rule is substantially the same when public actors are involved. A judge can't rule on a case if he has a pecuniary interest in the result. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *see also Connally v. Georgia*, 429 U.S. 245, 250 (1977) (finding a Due Process violation where a magistrate was paid $5 for each search warrant issued). This principle applies equally in quasi-judicial proceedings like administrative adjudications, as when a State Board of Optometry controlled by independent optometrists tried to revoke the licenses of corporate-employed optometrists in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *see also Marshall v. Jerrico*, 446 U.S. 238, 248 (1980). Thus, it does not matter whether USAC is characterized as private or (because it wields governmental power) as public.

B. USAC's Composition Introduces the Possibility of Self-Interested Bias.

The Fifth Circuit pointed out the conflicts of interest present in the structure of USAC:

> Moreover, the entity most responsible for snuffing out wasteful or fraudulent disbursements—USAC—is run almost entirely by stakeholders who stand to benefit financially when universal service subsidies grow. And that is no accident. USAC is run by self-interested stakeholders because FCC regulations require it. *See* 47 C.F.R. § 54.703(b). FCC mandates that nine of USAC's nineteen directors represent companies in the telecommunications industry who are compensated by the very same USF funds they raise. *See id.* § 54.703(b)(1)-(6). It mandates that another seven represent the schools, libraries, health care providers, and low-income consumers who are direct recipients of USF funds. *See id.* § 54.703(b)(7)-(10).
>
> Because the telecommunications industry polices its own compliance with FCC universal service policy, and responsibility for monitoring the industry falls most heavily on a board composed of industry representatives and consumer groups with a direct financial interest in the size of USF taxes, private entities have a far more important and discretionary role in determining the size of the contribution amount (which controls the level of universal service taxation) than FCC would have you believe.

Consumers' Research, 109 F.4th at 772 (some citations omitted).

The Fifth Circuit placed this discussion in the private nondelegation doctrine section, writing elsewhere that the Due Process cases "present a question different from the one before us." *Id.* at 768 n.14. But in fact, the Fifth Circuit's observations are relevant to Due Process. If beneficiaries play a role in determining the quarterly USF contribution amount under 47 C.F.R. § 54.709(a)(3), they have an incentive to overestimate what will be required to achieve universal service—a sort of self-dealing akin to tenants' ability to self-certify financial hardship, the situation at issue in *Chrysafis*. If telecommunications companies play a role, they likewise have an incentive to inflate the necessary amounts. And if some telecommunications companies have representatives and USAC and others don't, those companies that are represented on USAC can affect the incidence of the tax on their competitors by choosing whether and how to verify contributors' self-reported revenue projections under 47 C.F.R. § 54.711(a).

This is all the predictable result of giving the power to determine the tax to people who are financially self-interested. If the FCC signs off on USAC's projections and contribution ratio, there is no Due Process problem: the involvement of a neutral decisionmaker usually cures any previous problem of bias. For this reason, Due Process is not implicated when private parties (even self-interested ones) merely have the power to set (disinterested) legal machinery in motion, *see, e.g.*, *Miller v. Schoene*, 276 U.S. 272, 281 (1928); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616-17 (1974); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 243 n.6 (1984); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers*

Pension Trust for S. Cal., 508 U.S. 602, 618-20 (1993). *See generally* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 944-50 (2014) (discussing the "mandatory-discretionary distinction").

But if the FCC takes no action and USAC's projections and contribution ratio are "deemed approved" under 47 C.F.R. § 54.709(a)(3) (as happened here), the self-interested bias of the various USAC members leads to a Due Process violation.

V. Getting the Doctrinal Basis Right Is Important.

One might think the precise doctrinal basis doesn't much matter if the bottom line is the same. Indeed, one court in a private nondelegation case once remarked that a nondelegation/Due Process distinction merely "evokes scholarly interest" but wouldn't "effect a change in the inquiry." *Ass'n of Am. R.R.s v. U.S. DOT*, 721 F.3d 666, 671 n.3 (D.C. Cir. 2013). Another court wrote that one didn't need to worry about holding that private parties are exempt from the Appointments Clause; the private nondelegation doctrine would "corral any attempts to . . . giv[e] unaccountable governmental power to a pre-existing private entity." *Horsemen II*, 107 F.4th at 440. But this is too cavalier: in these sorts of cases, the doctrinal basis can actually make a difference.

A. The Various Doctrines Serve Different Purposes.

Most basically, the various doctrines should be kept analytically distinct because they serve different

purposes. The nondelegation doctrine is a *giver-based* doctrine. Its purpose is to control *Congress*—ensuring that Congress doesn't give up too much power. This concern is valid no matter who the delegate is—whether Congress delegates to executive agencies, Indian tribes, the judiciary, state governments, or private organizations. Provided Congress adequately narrows its delegation (to comply with the "intelligible principle" test or whatever other test might be adopted in the future), it should have the flexibility to select a delegate of its choice.

The Appointments Clause, on the other hand, is a *recipient-based* doctrine. Its purpose is to control the *recipients* of federal power—ensuring that nobody, whatever their status, can exercise "significant authority under the laws of the United States" without being personally approved by the necessary federal officials. Provided Congress delegates that sort of significant authority, the recipient of that authority should be held to the requisite degree of accountability; alternatively, Congress should be able to dispense with that degree of accountability if it chooses to delegate some more trivial power.

And the Due Process Clause is an *application-based* doctrine. Its purpose is to ensure fundamental fairness in the *application* of law; if the presence of financial bias leads to a Due Process violation, Congress can cure the problem by changing the composition of USAC to ensure that it is staffed only by disinterested people, or perhaps by ensuring that USAC cannot make any decisions that affect people's life, liberty, or property rights without disinterested review (or by changing how the actors are compensated, though that option is not relevant here).

B. The Various Doctrines Apply to Different Entities and Have Different Remedies.

The nondelegation doctrine and Appointments Clause apply to federal entities, because the sources of those doctrines are Articles I and II of the U.S. Constitution (respectively), which delineate the legislative and executive powers of the federal government. By contrast, the Due Process Clause applies equally whether a state or a federal entity is involved, because—at least when it comes to the self-interested bias branch of Procedural Due Process doctrine—the versions of the Clause in the Fifth and Fourteenth Amendments are interpreted identically. This may not make a difference in this case (where the entity is federal), but the doctrinal basis of any holding in this case will affect its precedential effect going forward.

Violations of the Due Process Clause can also lead to damages for victorious plaintiffs under 42 U.S.C. § 1983 (against a state entity) or *Bivens* (against a federal entity). There is no monetary remedy for violations of the nondelegation doctrine or Appointments Clause.

C. The Appointments and Due Process Theories Don't Require Any Public-Private Inquiry.

The Fifth Circuit's private nondelegation inquiry would apparently invalidate any exercise of power by non-subordinate private parties. That would require a threshold inquiry that depends on the application of public-private doctrines like the State Action Doctrine. "Unfortunately," as Justice O'Connor once wrote, "[this Court's] cases deciding when private action might be deemed that of the state have not been a model of

consistency." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 632 (1991).

Prior decisions already illustrate the hazards of public-private inquiries. In *Ass'n of American Railroads*, the D.C. Circuit determined that Amtrak was private for purposes of the private nondelegation doctrine. The D.C. Circuit recognized that *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), a State Action Doctrine case, had held that Amtrak was public for purposes of the First Amendment; but it concluded that the purposes of the private nondelegation doctrine called for a different public-private analysis. *Ass'n of Am. R.R.s*, 721 F.3d at 676-77. This Court reversed the D.C. Circuit, holding that Amtrak was public for purposes of the nondelegation doctrine. *DOT v. Ass'n of Am. R.R.s*, 575 U.S. at 55. This Court wrote that *Lebron* "provides necessary instruction" on Amtrak's characterization as public or private, *id.* at 54, but it stopped short of saying that the State Action Doctrine applies wholesale to such inquiries. Thus, it is even unclear what public-private inquiry is required for private nondelegation purposes.

In *Horsemen II*, the Fifth Circuit determined under the State Action Doctrine—relying on *Lebron*—that the Horseracing Integrity and Safety Authority (HISA) was private. *Horsemen II*, 107 F.4th at 437-39. It came to this conclusion even though HISA exercised significant federal rulemaking, investigation, and enforcement authority, which seem to easily qualify as state action under the "traditionally exclusive public function" test. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). A petition for a writ of certiorari is currently pending in that

case, *see* No. 24-433; the important point here is that, in this era of mixed public-private associations and private groups wielding coercive power, such inquiries will be ubiquitous and often difficult.

Thus, it is quite plausible that the assumption that USAC is private is incorrect. ("Assumption," because the Fifth Circuit apparently did not analyze the question—perhaps relying on USAC's formalistic labeling and organization under state nonprofit law—and the FCC and respondents seem to assume this as well, *see* Br. for Fed. Petrs. at 4, Br. for Resps. at 74-75.) Anyone who can determine the size and incidence of a tax seems to exercise a "traditionally exclusive public function," and that act should be considered state action on that ground. Surely, if USAC discriminated among contributors based on race, sex, religion, or viewpoint (for instance, what if it discriminatorily chose which contributors' self-reported revenue projections to verify under 47 C.F.R. § 54.711(a)?), it could be sued for constitutional violations. Thus, assuming the *Horsemen II* court was right that the State Action Doctrine governs public-private inquiries for private nondelegation purposes (which, as discussed above, is still an open question), then perhaps USAC's tax determination should be treated as state action after all, and so we are dealing with a public delegation.

But it is hard to predict how such inquiries will come out. Moreover, respondents argue that "even ministerial governmental powers cannot be delegated to private parties," Br. for Petrs. at 77; if they are right, a private nondelegation doctrine extends substantially further than a Due Process or Appointments Clause theory. Embracing a private nondelegation doctrine may thus have expansive

and unpredictable effects—in such disparate areas as private prison contracting, *qui tam* relators, or actuarial standard-setting associations. (On that last example, *see Texas v. Rettig*, 993 F.3d 408, 410, 412 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).)

On the other hand, an advantage of the Appointments Clause and Due Process Clause approaches is that they apply *functionally*. As discussed in Part III *supra*, the Appointments Clause analysis depends on whether someone (public or private) exercises significant federal power; the question is properly *how much* federal power the challenged party wields. And as discussed in Part IV *supra*, the Due Process Clause analysis depends on whether someone (public or private) exercises coercive power over another's life, liberty, or property interests when that exercise could be biased by their self-interest; the question is properly *the extent* of the challenged party's self-interest.

The Appointments Clause and Due Process Clause approaches thus avoid unnecessary engagement with the vagaries of State Action Doctrine.

VI. Conclusion.

For these reasons, this Court should affirm the judgment of the Fifth Circuit that the administration of the USF Tax is unconstitutional.

It is true that the Fifth Circuit did not rule on the Due Process and Appointments Clause theories. And respondents did not raise Due Process arguments as petitioners in the Fifth Circuit. Respondents mentioned

the Appointments Clause briefly in their Fifth Circuit brief, *see* Opening Br. for Petrs., *Consumers' Research v. FCC*, No. 22-60008 (5th Cir. Apr. 11, 2022), 2022 WL 1129534, at *66 ("Moreover, USAC's board members are nominated by those interest groups and appointed by the FCC Chair. This fails to comply with the Constitution's Appointments Clause, which does not authorize appointment of 'Officers' by a single member of a multi-member commission." (citation omitted)). But this was a fallback argument (apparently aimed at the possibility that USAC could be argued to be a public entity, and based on the assumption, disputed in Part III.B *supra*, that the Appointments Clause does not apply to private parties), and the Fifth Circuit did not reach it.

This Court might be unwilling to rule based on theories that were not pressed (or barely pressed) below. But there are various other ways this Court could respond to the concerns raised in this brief.

This Court could, for instance, (1) invalidate the system as having no "intelligible principle" solely on the basis of Congress's delegation to the FCC (again making no reference to FCC's subdelegation to USAC); (2) invalidate the FCC's subdelegation to USAC solely based on the Fifth Circuit's statutory argument, *see Consumers' Research*, 109 F.4th at 774-77; (3) hold that USAC is actually public because determining the amount and incidence of a tax is a "traditionally exclusive public function" and therefore state action, similarly to its holding in *DOT v. Ass'n of Am. R.R.s*, 575 U.S. at 55; (4) reject both the public and private nondelegation challenges and remand to the Fifth Circuit for analysis under the Due Process and Appointments Clauses; or (5) reject both

the public and private nondelegation challenges, note that there are plausible Due Process and Appointments Clause arguments that remain open, and leave those arguments for another day.

Amicus does not now take any position on which approach is preferable, if this Court is unwilling to rule on these theories directly. In any event, this Court should not establish bad precedent by endorsing a private nondelegation doctrine that has no support in the prior decisions of this Court and that is ill-advised on its own merits.

Respectfully submitted,

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