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*.

SHLB 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 FOR THE RESPONDENTS

ROBERT HENNEKE
CHANCE WELDON
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, TX 78701
(512) 472-2700
rhenneke@texaspolicy.com

R. TRENT MCCOTTER
Counsel of Record
JONATHAN BERRY
MICHAEL BUSCHBACHER
JARED M. KELSON
JAMES R. CONDE
JONATHAN FELD*
BOYDEN GRAY PLLC
800 Connecticut Ave. NW
Suite 900
Washington, DC 20006
(202) 706-5488
tmccotter@boydengray.com

*Admitted in Pennsylvania; practice supervised by D.C. Bar Members

QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no objective limit on the revenue to be raised for the Universal Service Fund.

2. Whether the FCC violates the private nondelegation doctrine by transferring its revenue-raising power to the Universal Service Administrative Company, a private company run by industry interest groups.

3. Whether the combination of those two delegations violates the nondelegation doctrine.

4. Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Consumers' Research and Cause Based Commerce, Inc., have no parent corporations, and no publicly held company owns 10% or more of their stock.

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INTRODUCTION

"[A]n indefinite power to tax is a power to destroy."
Nathan v. Louisiana, 49 U.S. 73, 76 (1850).

Imagine Congress enacted a statute giving the Internal Revenue Service the power to raise "sufficient" revenue to "equitably" fund the federal government. Unbounded by any caps or rates, the IRS would instead be guided by a list of vague "principles" that are precatory and "aspirational only," and the IRS could add new "principles" along the way. The IRS would even have the power to broadly redefine its scope based on an "evolving" standard the IRS itself determines. To top it off, suppose the IRS lets a privately-run tax association propose how much money should be raised each quarter, and that figure is passively "deemed approved" under penalty of law a few days later, unless the IRS intervenes.

The result would be a bureaucrat's dream. Industry "experts" would decide how to fund the federal government, with no more fights over appropriations or political heat for income taxes. But it would be a nightmare for the Constitution, the separation of powers, and the liberty they protect.

As it turns out, no imagination is required. This nightmare scenario already exists in the form of the Universal Service Fund (USF). In 1996, Congress created the USF with the "laudable objective" of expanding telephone access at reasonable prices. Pet.App.5a. Like any social welfare program, it collects lots of money and then distributes it to benefit others. But rather than fund this program with an accepted mechanism like an appropriation or fixed

tax, Congress created an open-ended scheme that even the USF's supporters have acknowledged is "unique" in the country's history, Pet.App.137a, which itself should raise alarm bells, *see Seila Law LLC v. CFPB*, 591 U.S. 197, 220 (2020) ("Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it.") (cleaned up).

In particular, Congress delegated power to the Federal Communications Commission (FCC) to raise revenue to fund the USF, but Congress omitted the most important policy determination of all: "how much" to raise. Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 103 (2020). As Hamilton explained, "the AMOUNT of taxes to be laid" is a matter for "the legislature," The Federalist No. 83 (Alexander Hamilton) (capitalization in original), not some trifling "detail[]" that can be left to bureaucrats to "fill up," let alone for a multi-billion-dollar social welfare program, *Gundy v. United States*, 588 U.S. 128, 157–59 (2019) (Gorsuch, J., dissenting).

Unbounded by any statutory caps or rates, the USF's revenue-raising mechanism is a historic anomaly at odds with 600 years of Anglo-American practice. To be sure, the FCC claims to be guided by a list of universal service "principles," but courts and the FCC itself have long said those principles are so precatory and amorphous as to be "aspirational only." The FCC can even add new principles and—taking the cake—redefine "universal service" itself, based on an "evolving" standard the FCC determines. In sum "the

FCC is almost *certainly* exercising legislative power when it decides … how big the universal-service program should be." *Consumers' Rsch. v. FCC*, 88 F.4th 917, 930 (11th Cir. 2023) (Newsom, J., concurring in judgment) (emphasis in original).

One would be hard pressed to find a worse example of delegation than an agency allowed to raise revenue under penalty of law, bound only by its own "aspirations," and with broad power to redefine the program on an "evolving" basis. That is delegation running riot, at least as bad as the statutes in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). And it is no answer that Congress itself desired this broad delegation. Separation of powers must be enforced even when "the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). Perhaps *especially* in that circumstance.

But wait, it gets worse. The FCC has largely handed off this revenue power to the Universal Service Administrative Company (USAC), a private company run by self-described industry interest groups. Each quarter, USAC issues "proposals" for how much money to raise for the USF, which are ministerially converted into a "Contribution Factor" that is passively "deemed approved" fourteen days later. The FCC does not even have mechanisms to substantively review USAC's figures. Letting private proposals become binding without formal, independent approval by government officials is the

very definition of an unconstitutional private delegation.

Predictably, the USF tax rate has skyrocketed. It was under 4% in 1998 but now approaches 37%, even though the relevant statutory text hasn't changed. The USF has also been subject to extraordinary peculation and ineffectiveness, and its regressive nature means it hits low-income users the hardest.

Scholars have long flagged the USF's serious constitutional flaws, arguing that "this delegation is unique because of the unfettered power given to the FCC in defining the scope of universal service, and because Congress delegated the power to levy a tax to pay for the service with no limits, knowing that the end user, the American public, would ultimately be saddled with the burden." Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. Rev. Mich. St. U. Det. C.L. 107, 110.

Consistent with that scholarly view, the *en banc* court below held this "misbegotten tax" is unconstitutional. Pet.App.2a. The court observed that no "other federal programs … have the same or similar constitutional defects" as the USF, Pet.App.80a, nor is there any "record of any government program like [the USF] in all the U.S. Reports," Pet.App.67a.

That decision should be affirmed, which would vindicate the separation of powers and even help revitalize universal service itself. There is bipartisan interest in fixing the USF, which is facing a death spiral that will soon implode the program. Congress

could make the program both sustainable and constitutional simply by appropriating money or adding half a sentence setting a specific tax rate or cap. That would ensure accountability for raising revenue remains with the People's representatives.

By contrast, the consequences of upholding this scheme would be severe. If Congress replicated this mechanism elsewhere, there would be no need to pass budgets or make appropriations ever again. The entire federal government could be funded with a single, vague delegation to the IRS, which could then hand over that power to a private group.

Courts should not "shy away from [their] judicial duty to invalidate unconstitutional delegations," and this case presents an easy application under both originalist and modern nondelegation frameworks. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in the judgment).

The Court should affirm.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. Universal Service Before 1996.

"Since the inception of the Federal Radio Commission in 1928, and continuing with the creation of the Federal Communications Commission in 1934, the federal government has pursued a policy of providing 'universal' telephone service to all residents and businesses in the United States." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation*

Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine, 80 Ind. L.J. 239, 279 (2005). The objective was for consumers to have access to roughly the same telephone services and pricing regardless of where they lived.

This narrow view of universal service was initially a condition of the monopoly status granted to incumbent telephone companies like AT&T, *id.* at 279–81, which agreed "not [to] discriminate among 'similarly situated' users, which in practice meant that [AT&T] had a limited capacity to price service as a function of demand and marketplace conditions," Robert M. Frieden, *Universal Service: When Technologies Converge and Regulatory Models Diverge*, 13 Harv. J.L. & Tech. 395, 401 (2000).

But AT&T was broken up in the 1980s, and the resulting Regional Bell Operating Companies were no longer able to subsidize certain local services through other artificially increased rates, such as long-distance calls. Krotoszynski, Jr., *supra*, at 281; *see Tex. Off. of Pub. Util. Couns. v. FCC* (*TOPUC I*), 183 F.3d 393, 406 (5th Cir. 1999).

2. The Telecommunications Act of 1996.

In response, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which created an explicit funding system—the USF—to facilitate universal service and broadened the concept dramatically from the historic, narrow cross-subsidization program. *See* 47 U.S.C. § 254. Beyond basic telephone service for consumers across the country, universal service now included "'advanced telecommunications and information

services,' particularly high-speed internet access, for schools (as well as for libraries and rural health care providers)." *City of Springfield v. Ostrander (In re LAN Tamers, Inc.)*, 329 F.3d 204, 206 (1st Cir. 2003).

Congress did not appropriate funds for the USF, however, nor did Congress impose any statutory rates or limits on how much money the FCC could raise for that purpose. Rather, the FCC would ostensibly be guided by several "[u]niversal service principles," 47 U.S.C. § 254(b), which are written in such vague and precatory terms that courts and the FCC itself have long labeled them "merely aspirational," *Tex. Off. of Pub. Util. Couns. v. FCC* (*TOPUC II*), 265 F.3d 313, 321 (5th Cir. 2001) (also labeling them as "aspirational only"). Among those principles, for example, are grandiose statements like: "Telecommunications services 'should' be 'available at just, reasonable, and affordable rates'; accessible 'in all regions of the Nation'; and available to 'low-income consumers and those in rural, insular, and high cost areas' at rates 'reasonably comparable to rates charged for similar services in urban areas.'" Pet.App.4a (quoting 47 U.S.C. § 254(b)(1)–(3)).

Even more troubling, Congress gave the FCC power to create new universal service "principles" in "the public interest," and then raise revenue for that expanded scope, too. 47 U.S.C. § 254(b)(7).

Although the money collected must then be spent on advancing "universal service," "Congress declined to define 'universal service' itself. Instead, it delegated to FCC the responsibility to periodically 'establish' the concept of 'universal service' by 'taking into account

advances in telecommunications and information technologies and services,'" Pet.App.3a, which was expressly labeled in the statute as an "evolving" inquiry, 47 U.S.C. § 254(c)(1). This lets the FCC redefine universal service and then raise revenue based on that new, expanded scope.

The money is drawn initially from thousands of "telecommunications carrier[s] that provide[] interstate telecommunications services," which must "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." *Id.* § 254(d). The FCC has discretion to expand who must pay. *See id.* The bill is then footed by millions of Americans, who pay a separate line item for the USF on their monthly phone bills. *See* Part A.4, *infra*.

3. The FCC Redelegates Its Powers to a Private Company.

The FCC subsequently re-delegated its revenue-raising authority and administration of the USF to USAC, a Delaware-registered non-profit company. 47 C.F.R. § 54.701(a); *id.* § 54.5.

USAC has a twenty-member Board of Directors comprising individuals from various "interest groups affected by and interested in universal service programs" and who were "nominated by their respective interest groups." Pet.App.6a; 47 C.F.R. § 54.703(b). Board members are neither chosen by the full FCC, nor nominated by the President and confirmed by the Senate. 47 C.F.R. § 54.703(c).

"USAC is responsible for deciding the quarterly USF contribution amount—a projection of the dollar value of demand for universal support programs and the costs of administering them." Pet.App.6a. This contribution amount directly "dictates the size of the universal service contributions levied on telecommunications carriers and, in turn, American telecommunications consumers." *Id.*

"To set the contribution amount, USAC relies on 'information from universal service program participants' to 'estimate[] how much money will be needed each quarter to provide universal service support.'" *Id.*; *see* 47 C.F.R. § 54.709(a)(3). "In other words, the contribution amount ultimately derives from the universal service demand projections of private, for-profit telecommunications carriers," which USAC funnels into a "projection of demand." Pet.App.6a. USAC also makes estimates for how much revenue telecommunications carriers are expected to generate from interstate and international services over the upcoming quarter. *See* 47 C.F.R. § 54.709(a)(1)–(2).

The FCC's Office of the Managing Director (OMD) then ministerially divides those two USAC-provided figures to create the "proposed" tax rate, or in FCC-speak, the "Contribution Factor." Pet.App.7a. OMD also applies two "routine adjustments," Gov.Br.43, to account for unrecoverable charges and to avoid taxing USF contributions themselves (a "circularity factor"). *See* 47 C.F.R. §§ 54.706(b), 54.709(a); Pet.App.144a.

This self-labeled Contribution Factor "proposal" is not binding itself, nor is it labeled an "approval."

Pet.App.141–49a. Rather, it simply takes USAC's numbers as gospel and plugs them into set formulas.

If the FCC "take[s] no action" within fourteen days, USAC's proposal is automatically "deemed approved." 47 C.F.R. § 54.709(a)(3). Although the FCC "reserves the right" to change the numbers during those fourteen days, *id.*, there is no pretense of substantive review of USAC's figures by government officials. The FCC "never made a substantive revision to USAC's proposed contribution amount prior to this litigation, and it does not even have a documented process for checking USAC's work." Pet.App.7a.

USAC then sends out invoices imposing that rate as a "percentage of end-user telecommunications revenues [that] each carrier must contribute to USF in a particular quarter." Pet.App.7a. "So FCC has delegated to USAC responsibility—*de facto* if not *de jure*—for imposing the USF Tax." *Id.*

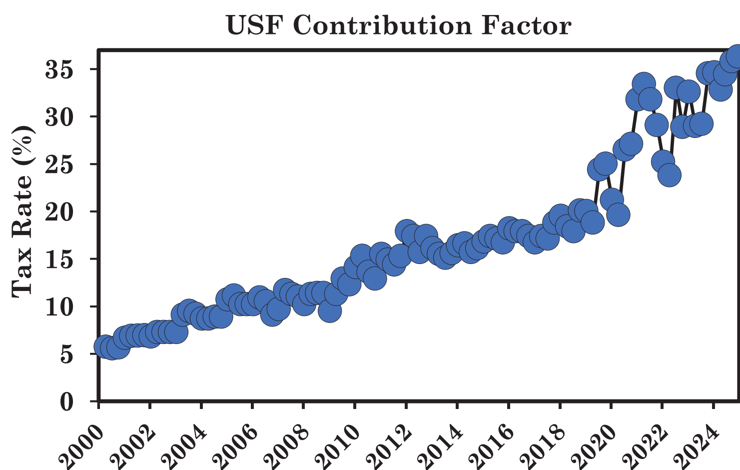
4. Carriers Pass Section 254 Taxes Through to Consumers.

Although initially paid into the USF by thousands of telecommunications carriers, they "pass this cost through to their subscribers," *In re Incomnet, Inc.*, 463 F.3d 1064, 1066 (9th Cir. 2006), which the FCC's regulations expressly permit, *see, e.g.*, 47 C.F.R. §§ 54.407(c), 54.712(a). The "charge generally appears on phone bills as the 'Universal Service Fund Fee.'" *Incomnet*, 463 F.3d at 1066. The FCC always understood that consumers would bear the costs of the USF through extra fees. *See In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 9199, ¶¶ 828–29 (1997); *id.* at 9211–12, ¶ 855.

The USF is—and was designed to be—financed by "virtually every American's money" because "at the end of the day, it is still the same taxpaying people who bear the cost." *The Lifeline Fund: Money Well Spent?*: *Hearing Before the H. Subcomm. on Commc'ns & Tech., H. Comm. on Energy & Com.*, 113th Cong. 1–2 (2013) (statement of Rep. Greg Walden, Chairman, Subcomm. on Commc'ns & Tech.), https://www.govinfo.gov/content/pkg/CHRG-113hhrg82189/pdf/CHRG-113hhrg82189.pdf.

5. USAC Imposes Skyrocketing Rates, Raising Tens of Billions of Dollars.

Without statutory limits on the amounts the FCC or USAC can raise for the USF, the figures have predictably skyrocketed. The quarterly tax rate has gone from under 4% in 1998 to routinely over 35% now. Pet.App.8a; *Third Quarter 1998 Universal Service Contribution Factors Revised and Approved*, 63 Fed. Reg. 35,930, 35,931 (July 1, 1998).



The total amount raised has also increased dramatically. "In 1995, the USF Tax was $1.37 billion. But by the end of 2021, USAC ballooned the USF to over $9 billion." Pet.App.8a. The scheme now yields an amount approaching 20 times the FCC's entire annual budget. FCC, *2022 Budget Estimates to Congress* 8 (May 2021), https://docs.fcc.gov/public/attachments/DOC-372853A1.pdf.

USAC takes these contributions from carriers and deposits them into the USF, then disburses the funds via a myriad of programs with the purported goal of expanding telecommunication services for the masses. *Incomnet*, 463 F.3d at 1066–67, 1072.

6. Rampant Fraud, Waste, and Abuse.

Given its lack of accountability and the fact that USAC is populated with self-acknowledged industry interest groups, the USF has unsurprisingly demonstrated a history of extensive fraud, waste, and abuse, with the FCC's then-Inspector General agreeing that "applicants view this program as a big candy jar, free money." Sam Dillon, *School Internet Program Lacks Oversight, Investigator Says*, N.Y. Times, June 18, 2004, at A22.

Most notably, the Government Accountability Office (GAO) has issued a series of reports about the wasteful nature of the USF. The titles of those reports illustrate the incorrigibility of USF management: the USF needs "improved management" (2010); the USF needs more "accountability and transparency" (2014); the USF lacks "efficiency and effectiveness" (2015); "additional action" is "needed" (2017); the FCC must "manage fraud risks" (2019); the FCC must "better

manage persistent fraud risks" (2020); the USF lacks "performance goals and measures" (2020); the FCC must "improve performance goals" and "fraud risk management" (2023).[1]

After sampling almost 3.5 million users, the GAO was "unable to confirm" the eligibility of "36 percent" of those who receive USF benefits. GAO-17-538, *supra* note 1, at 38. For the Lifeline program, designed to assist low-income users, nearly 80% of users in some states may be legally ineligible. *See id.* at 42.

Fraud nonetheless continues. In one recent example, the CEO of a provider for low-income

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[1] GAO-11-11, *Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program* (2010), http://www.gao.gov/assets/320/312708.pdf; GAO-14-587, *FCC Should Improve the Accountability and Transparency of High-Cost Program Funding* (2014), https://www.gao.gov/assets/gao-14-587.pdf; GAO-15-335, *FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program* (2015), http://www.gao.gov/assets/670/669209.pdf; GAO-17-538, *Additional Action Needed to Address Significant Risks in FCC's Lifeline Program* (2017), https://www.gao.gov/assets/gao-17-538.pdf; GAO-20-27, *FCC Should Take Additional Action to Manage Fraud Risks in its Program to Support Broadband Service in High-Cost Areas* (2019), https://www.gao.gov/assets/gao-20-27.pdf; GAO-20-606, *FCC Should Take Action to Better Manage Persistent Fraud Risks in the Schools and Libraries Program* (2020), https://www.gao.gov/assets/d20606.pdf; GAO-21-24, *FCC Should Enhance Performance Goals and Measures for Its Program to Support Broadband Service in High-Cost Areas* (2020), https://www.gao.gov/assets/gao-21-24.pdf; GAO-23-105399, *FCC Could Improve Performance Goals and Measures, Consumer Outreach, and Fraud Risk Management* (2023), https://www.gao.gov/assets/gao-23-105399.pdf.

broadband service fraudulently obtained over $10 million from the USF to pay for a new condo, a Ferrari, yacht memberships, and a private jet. *In Re American Broadband & Telecomms. Co.*, FCC 18-144 ¶¶ 135–40, at 45–46 (rel. Oct. 25, 2020), https://docs.fcc.gov/public/attachments/DA-20-493A1.pdf. He did so by having his company "receive[] funding for tens of thousands of ineligible Lifeline customer accounts" by "creat[ing] fake or duplicate accounts by using the names of deceased people," among other tricks. *Id.* at 71 (statement of Ajit Pai, Chairman, FCC).

7. The USF Fails to Accomplish Its Goals and Hurts the People It Should Be Helping.

Unfortunately, the USF has often failed to accomplish its goals and may even hurt the people it is supposed to help. A GAO report found that the USF's Lifeline Program may not have played *any* meaningful role in improving the "level of low-income households' subscribing to telephone service over the past 30 years," despite costing billions of dollars. GAO-15-335, *supra* note 1. The GAO has also reported that the USF is not focused on providing the basic telephone services that low-income Americans actually use, but instead is expanding advanced telecommunications services for wealthier Americans. GAO-21-24, *supra* note 1, at 17.

Moreover, the USF imposes a flat tax rate, making it among the "most regressive taxes in America." *Broadband Subsidies for Some, Broadband Taxes for Everyone*, TechFreedom (May 28, 2015),

https://techfreedom.org/broadband-subsidies-for-some-broadband-taxes-for/. Thus, even in the best light, the USF "arguably hurts as many poor consumers as it benefits." Krotoszynski, Jr., *supra*, at 314. "A single, low-income mother, living in the Bronx, with a cell phone for personal safety, pays 10% or more of her monthly wireless telephone bill to support universal service for wealthy Montana residents living on ranchettes." *Id.*

Further, by drawing more money from a dwindling contribution base, the USF is widely recognized to be in a "death spiral." *In re Report on the Future of the Universal Service Fund*, FCC 21-127, at 23 (rel. Dec. 15, 2021) (statement of Brendan Carr, Comm'r, FCC), https://docs.fcc.gov/public/attachments/FCC-21-127A1.pdf. There is bipartisan congressional interest in fixing the USF, but thus far no statutory fix has materialized. *See* Pub. L. No. 117-58, § 60104, 135 Stat. 429, 1205 (2021) (calling for a report on the "future" of the USF).

B. Proceedings Below and in Other Courts.

1. Proceedings at the FCC and Fifth Circuit.

Respondents comprise several organizations and individuals adversely affected by USF charges. They range from the consumer awareness group Consumers' Research (which itself pays a monthly USF charge), to a reseller of telecommunications services Cause Based Commerce (which pays directly into the USF), to individual customers whose tight budgets are stretched thinner from having to pay the USF line-item tax each month. For example,

Respondent Bayly is a pastor and editor who resides in the Midwest with his wife and six children. He provides his family's sole income but must pay into the USF every month via his phone bill.

In Fall 2021, Respondents filed a lengthy comment at the FCC challenging USAC's proposed first quarter 2022 USF contribution amount, and they filed a substantively identical comment after the FCC's Office of Managing Director ministerially converted that amount into a "proposed" tax rate. Pet.App.11a, 141–49a.

Despite Respondents' objections, USAC's projections were automatically "deemed approved by the Commission" after the FCC took no action for fourteen days, a process that plays out like clockwork every quarter. *See* 47 C.F.R. § 54.709(a)(3). This automatic approval occurred on the expiration of December 27, 2021, just five days before the rate became effective. Pet.App.11a.

Respondents promptly sued in the Fifth Circuit. A three-judge panel rejected their arguments, Pet.App.125a, but the court reheard the case *en banc* and held the USF's revenue raising is unconstitutional under Article I of the U.S. Constitution. "[T]he unprecedented nature of the delegation" of broad taxing power from Congress to the FCC, "combined with other factors" like the FCC's subsequent redelegation to USAC, was more than "enough to hold [the USF] unlawful." Pet.App.42a.

The government and its supporting intervenors below sought review by this Court, which granted

their petitions for writs of certiorari in November 2024.

2. Proceedings at Other Courts.

Respondents and other parties have challenged different USF quarterly tax rates in other circuits. Most notably, they sued in the Eleventh Circuit over the fourth quarter 2022 rate. Although the court rejected that challenge, Judge Newsom "reluctantly" concurred because he was "deeply skeptical that [the] result can be squared with constitutional first principles." *Consumers' Rsch.*, 88 F.4th at 928 (Newsom, J., concurring in judgment). He said that "the FCC is almost *certainly* exercising legislative power when it decides, among other things, how big the universal-service program should be." *Id.* at 930 (emphasis in original). He further concluded that the USF charges are likely taxes, and "[s]etting tax rates sure seems like a legislative power," as does "prescribing the universal-service program's sweep and scope." *Id.* But Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority." *Id.*

Judge Newsom concluded that "as a first-principles matter, I think that the agency is violating the Constitution." *Id.* at 932. But because, in his view, the "non-delegation doctrine has become a punchline" under current precedent, he voted to deny relief. *Id.* at 929. Judge Lagoa wrote separately, agreeing with Judge Newsom that "the current nondelegation doctrine … has strayed from constitutional first principles." *Id.* at 938 (Lagoa, J., concurring).

SUMMARY OF THE ARGUMENT

In Section 254, Congress handed its taxing power to the FCC without objective or meaningful limits on the size of the tax. The FCC is guided by its own "aspirations," and for good measure Congress let the agency expand its own scope of authority at will by adding new universal service principles and even redefining "universal service" altogether. This scheme violates both the original understanding of nondelegation, which prohibits Congress from delegating significant legislative policy judgments to an executive agency, and also the modern nondelegation framework test, which still requires Congress to "clearly delineate" delegated power. Parts II–III, *infra*. A constitutional fix would be simple but meaningful: Congress could add a specific tax rate or appropriate money directly. Petitioners are wrong that the size of a multi-billion-dollar social welfare program is a trifling detail that can be left to agency bureaucrats to fill up.

This scheme also violates the private nondelegation doctrine because the FCC has abdicated substantive review and independent approval of USAC's proposals, which are ministerially converted into a Contribution Factor that is "deemed approved" after just fourteen days. Part IV, *infra*.

Further, the combination of these defects likewise "violates the Legislative Vesting Clause." Pet.App.19a; Part V, *infra*.

Finally, this case is not moot. A contrary conclusion would require overruling dozens of this Court's prior cases. Part VI, *infra*.

ARGUMENT

I. REVENUE-RAISING IS A LEGISLATIVE POWER.

Article I of the Constitution provides that "*[a]ll* legislative Powers herein granted shall be vested in a Congress of the United States" and nowhere else. U.S. Const. art. I, § 1 (emphasis added). "Accompanying that assignment of power to Congress is a bar on its further delegation," *Gundy*, 588 U.S. at 135 (plurality op.), meaning Congress may not "delegate … powers which are strictly and exclusively legislative," *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (Article I's "text permits *no delegation* of those powers") (emphasis added).

Accordingly, the first task in an Article I nondelegation challenge is to determine whether the authority at issue implicates a legislative power at all. Petitioners have never disputed that it does here. Nor could they. Under our Constitution, Congress "controls how much revenue to raise and how," McConnell, *supra*, at 103, especially in the "domestic" context, *id.* at 334. That means the authority given by Congress to the FCC to raise money for the USF implicates Article I nondelegation scrutiny, which it fails as explained in Parts II–III, *infra*.

Although this Court should affirm the decision below regardless of whether the USF charges are deemed "taxes" specifically, the *en banc* court below correctly held that those charges are indeed taxes, which raise special concerns because "[t]axation is a legislative function, and Congress … is the sole organ

for levying taxes." *Nat'l Cable & Television Ass'n, Inc.* (*NCTA*) *v. United States*, 415 U.S. 336, 340 (1974).

A. Historical Roots of the Legislative Power to Raise Revenue.

The power of the purse has been the most important legislative power for checking the executive and advancing freedom for the People. In England, as in America, "the Taxing Power—more so than the power to enact laws—was the source of the 'powerful influence'" the legislature had over the executive, McConnell, *supra*, at 100, allowing the legislature to "reduc[e] … all the overgrown prerogatives of the other branches of the government," The Federalist No. 58 (James Madison).

"The English parliament … owed its origin and its existence … almost entirely to the Englishman's age-old determination not to be taxed without his consent." Paul Einzig, *The Control of the Purse* 17 (1959). Early Parliaments were convened primarily to "grant taxes, not to have any direct control of the actual government." Jonathan Healey, *The Blazing World: A New History of Revolutionary England, 1603–1689*, at 43, 81 (2023). It was only "through their control of taxation [that] the Commons became the supreme guardians of all rights and interests of the citizen against despotic actions by Kings." Einzig, *supra*, at 44. Protecting the money let Parliament protect everything else.

But continued legislative control over the purse was not easily won. It was a "prolonged struggle" that lasted for at least four centuries, and the pathway to the Glorious Revolution in 1688 was littered with

failed efforts by the King to control taxation without having to return to Parliament. *Id.* at 56.

Richard II convinced Parliament in 1398 to "delegate[] its power" of raising certain taxes "to a small committee" composed of individuals who were "the King's personal adherents," and this committee was "authorised" and "entrusted" to "raise tallage and other forms of revenue at his will." *Id.* at 51. Parliament was thus a willing participant in the delegation, but even in that age this was seen as an outrageous transfer of power away from Parliament to executive cronies. Richard II's "success in evading Parliamentary control subsequently avenged itself" when he was deposed a year later and left to starve to death in Pontefract Castle. *Id.*

Henry VIII similarly pushed Parliament in 1525 to pass a statute "under which Parliament would 'freely, liberally and absolutely give and grant unto the King's highness … all and every sum'" he had spent or promised to spend. *Id.* at 53. With that promise, of course, came a commensurate obligation to raise the funds.

Other Kings did not face such pliant Parliaments and asserted a "royal prerogative" to raise taxes without even pretending to involve Parliament, sometimes referring to their collections as "loving contribution[s]" and "benevolences."[2] Charles I imposed a "forced loan" from citizens, then turned to

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[2] *See Benevolence*, 3 Encyclopedia Britannica 728 (11th ed. 1911), https://en.wikisource.org/wiki/Page%3AEB1911_-_Volume_03.djvu/748.

demanding "Ship Money" from citizens even beyond the coasts, Einzig, *supra*, at 59–61, 80; Healey, *supra*, at 81, all while "claim[ing] that there was no legal basis to the idea that he couldn't take taxes without Parliamentary consent," Healey, *supra*, at 113.

The resulting Glorious Revolution was, in large part, "a revolution in public finance," as "[t]axation was now almost entirely controlled by Parliament," with the share of government revenues deriving from Parliament increasing from 25% before 1640, to 90% by 1660. *Id.* at 328. Afterwards, even the most amenable Parliaments imposed limits on how much revenue could be raised from Englishmen. *See* Einzig, *supra*, at 63.

The English Civil War conclusively established that the representative legislature *alone* had the authority to access the pocketbooks of the people. *See* An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1689, 1 W. & M., Sess. 2, c. 2, § 4; *see* 1 William Blackstone, *Commentaries on the Laws of England* *140 (1753) ("[N]o subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.").

This long history, combined with our Founders' own "widespread distrust of taxation" from their "colonial experience," *Moore v. United States*, 602 U.S. 572, 626 (2024) (Thomas, J., dissenting), had made clear that "the power to tax involves the power to destroy," *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.)

316, 431 (1819). "[T]hat great principle, which was asserted in our revolution" was "that representation is inseparable from taxation." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1007, at 468 (1833). And as Patrick Henry explained, "[t]he oppression arising from taxation is not from the amount, but from the mode: a thorough acquaintance with the condition of the people is necessary to a just distribution of taxes." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 320 (Jonathan Elliot ed., 2d ed. 1836) (statement of Patrick Henry).

Accordingly, the Framers took steps to ensure that "the legislative department alone has access to the pockets of the people." The Federalist No. 48 (James Madison). Article I of our Constitution closely followed the English practice but put it in writing to ensure no future Congress or executive could create the same problems that had once plagued England.

The Constitution thus provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. art. I, § 1, and the *very first* power granted is "to lay and collect Taxes, Duties, Imposts and Excises," *id.* § 8, cl. 1. The Founders went even further with the Origination Clause, which requires that "[a]ll bills for raising Revenue shall originate in the House of Representatives," *id.* § 7, cl. 1, which was the only chamber at the time to be popularly elected. According to James Madison, the "principal reason" for the Origination Clause was that House members are "chosen by the People," "best acquainted with their

interests," and subject to "more frequent[]" elections. 1 Annals of Cong. 361 (1789) (Joseph Gales ed., 1834). The House could not even delegate this power to the Senate, let alone outside Congress.

The Federalist Papers confirm that "the AMOUNT of taxes to be laid, … the OBJECTS upon which they are to be imposed, [and] the RULE by which they are to be apportioned" are matters for "the legislature." The Federalist No. 83 (capitalization in original). As Professor McConnell aptly summarized, the Constitution dictates that Congress "controls how much revenue to raise and how." McConnell, *supra*, at 103.

Accordingly, as then-Judge Kavanaugh explained, the "power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (Kavanaugh, J.) (quoting The Federalist No. 51 (James Madison)). Congress's powers over taxing and spending are "a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers." *Id.* at 1347. That is especially so because Congress can exercise its power of the purse simply by refusing to act. Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 45 (2017).

The delegation of such powers to the executive branch strikes at the very heart of our constitutional system. In response to Anti-Federalist fears of a

tyrannical president, Madison said, "The purse is in the hands of the representatives of the people." 3 *The Debates in the Several State Conventions*, *supra*, at 393; *see* Chafetz, *supra*, at 57. Except, it turns out, when it comes to the USF.

B. USF Revenue-Raising Triggers Nondelegation Scrutiny.

Petitioners have never disputed that imposing USF charges implicates a legislative power and thus requires Article I nondelegation scrutiny. As Judge Newsom explained, "prescribing the universal-service program's sweep and scope"—e.g., deciding how much money it raises—is a "legislative power" regardless of whether the charges are deemed fees or taxes. *Consumers' Rsch.*, 88 F.4th at 930 (Newsom, J., concurring in judgment) (cleaned up); *see* The Federalist No. 83.

That alone is sufficient to move to whether that transfer of power passes muster under nondelegation principles. *See* Parts II–III, *infra*. But merely skipping ahead would elide an important aspect of the issue: the USF charges are not just any form of revenue raising but are "domestic *tax[es]*," perhaps the most dangerous power the legislature can hand to the executive. McConnell, *supra*, at 334; Pet.App.41–42a n.13.

The USF charges thus directly invoke the sordid history of late-medieval executives self-funding from domestic coffers, even though sometimes Parliament had blessed the enterprise by broadly "delegat[ing]" its taxing power. Einzig, *supra*, at 51; *see* Part I.A, *supra*. The label of forced USF payments as

"contribution[s]" to the executive, 47 U.S.C. § 254(d), is even reminiscent of English kings demanding "loving contributions."[3]

But Congress's statutory euphemisms make no difference here. "Congress cannot change whether an exaction is a tax … for *constitutional* purposes simply by" relabeling it. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (emphasis in original); *contra* Gov.Br.34–35.[4]

The charges imposed for the USF are widely recognized as taxes because they "inure[] to the benefit of the public." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989). The very title of the program—"Universal Service"—is textual proof that the funds are designed to "benefit the public" at large. The FCC's ability to define and implement "universal service" based on its considerations of "public interest, convenience, and necessity," among other broad social goals, reaffirms that purpose. 47 U.S.C. § 254(b), (c).

Indeed, as Respondents demonstrated with uncontested expert analysis during the agency proceedings, the USF redistributes funds and benefits

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[3] *See supra* note 2.

[4] Petitioners contend that § 254 might have been enacted pursuant to the Commerce Clause, rather than the Taxing Clause. Gov.Pet.16–17. It does not appear Congress expressly invoked either Clause, and under *NFIB*, Congress's label would be irrelevant for nondelegation purposes anyway. Similarly, *Wisconsin Bell, Inc. v. United States ex rel. Heath*, No. 23-1127, addresses a statutory question (how to treat USF disbursements under the False Claims Act), not a constitutional one (how to treat USF collections under the Constitution).

away from payors and towards “a galaxy of policy concerns with no obvious connection to carrier liabilities.” JA99. Courts and the FCC itself have long recognized that the USF “benefit[s] the customer, not the carrier.” *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000); Br. for FCC at *48–49, *Alenco*, 1998 WL 34084157 (Nov. 2, 1998) (“[T]he role of universal service support … [is] to benefit high cost subscribers,” not “carrier[s].”) (emphases removed).

And those aspects are “precisely what makes [the USF charge] a tax.” *Trafigura Trading LLC v. United States*, 29 F.4th 286, 293–94 (5th Cir. 2022). In other words, it is “relevant to the contributions’ ‘tax’ status that the statute itself designates the American public—writ large, rather than the payor carriers—as the universal-service program’s principal beneficiary.” *Consumers’ Rsch.*, 88 F.4th at 930 n.1 (Newsom, J., concurring in judgment).

Petitioners claimed below that USF charges are mere “fees.” But a fee is a charge that is “incident to a voluntary act,” meaning an agency can “exact” a charge in exchange for “bestow[ing] a benefit on the applicant, not shared by other members of society.” *Id.* at 340–41; *see also United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998). Stated another way, a fee represents a “value-for-value transaction[]” where “an agency exacts” a “charge” “in return for a benefit voluntarily sought by the payer.” Pet.App.21a.

But USF “contributions do not have any of these characteristics.” *Id.* They “are not incident to a voluntary act” but rather are compelled under penalty of law simply by doing business in the

telecommunications industry. *Id.* The government just told this Court in another case that "[c]arriers … cannot choose whether to pay universal service contributions." Br. for U.S. as *Amicus Curiae* at 15, *Wisconsin Bell, Inc. v. United States ex rel. Heath*, No. 23-1127 (U.S. Oct. 1, 2024). Similarly, no one would argue that income tax is "incident to" the "voluntary act" of making money, and therefore only a fee.

Further, most contributors receive nothing in return—and certainly no "fair approximation of the benefits conferred by [the] government." Pet.App.21a. The undisputed administrative record states that those who "contribute large sums to the program receive few benefits" while those who "contribute little to the fund receive large benefits." JA98. Some, like Respondent Cause Based Commerce, are actually injured beyond the amounts they pay because the USF charges encourage customers to drop their subscriptions. JA99. That is never true of a fee.

As a result, "the cost of universal service contributions is widely shared by the population in a manner reminiscent of a classic tax," and the "benefits associated with universal service contributions" likewise "'inure to the benefit of the public' … rather than to the benefit of the persons who pay them." Pet.App.22a (quoting *NCTA*, 415 U.S. at 343). The sheer dollar values confirm these are no mere "incident[al]" charges. *NCTA*, 415 U.S. at 340–41. The USF collects nearly $10 billion a year, roughly twenty times the FCC's annual budget.

* * *

Again, to trigger Article I nondelegation scrutiny, the Court need only accept the undisputed proposition that USF charges implicate the legislative power to raise revenue. But this Court should remain mindful that these charges are "obviously taxes," meaning the regime implicates a "quintessentially legislative power" that took centuries to wrest from the executive. Pet.App.19a, 23a.

II. SECTION 254 VIOLATES THE ORIGINAL UNDERSTANDING OF NONDELEGATION.

The next step is to evaluate whether the relevant statute provides sufficient direction such that Congress itself can be said to have made the relevant policy choices and left only the execution of them to the executive branch.

The original understanding of nondelegation precludes Congress from "merely announc[ing] vague aspirations and then assign[ing] others the responsibility of adopting legislation to realize its goals." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting). But that is precisely what Congress did with the USF. As explained in detail below, rather than appropriate a specific amount of money or set an upper limit (e.g., cap or rate) for the FCC, Congress handed the FCC the power to decide in the first instance how big the USF would be, limited only by the FCC's own "aspirations." Congress even let the FCC redefine core statutory terms, including "universal service" itself, and add new universal-service principles, reminiscent of a similar power in *Schechter Poultry* that this Court found particularly egregious. *See* 295 U.S. at 538–39 (explaining the

President could "add[] to … what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act").

"[T]his case illuminates deeper problems in nondelegation precedent," 88 F.4th at 938 (Newsom, J., concurring in judgment), which "has strayed from constitutional first principles," *id.* (Lagoa, J., concurring). The Court should accordingly take this opportunity to realign its nondelegation framework with its traditional understanding of the Constitution, as described in Justice Gorsuch's *Gundy* opinion. Petitioners practically invite the Court to do so by arguing at length about "the Constitution's original meaning." Gov.Br.21; SHLB.Br.35–39; CCA.Br.31–34.

A. Congress Must Set Definite Limits on the Amount of Revenue to Raise.

Article I dictates that Congress—and Congress alone—must "make[] the policy decisions when regulating private conduct" and can only "authorize another branch to 'fill up the details'" or "make the application of that rule depend on executive fact-finding." *Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting); *see also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("[M]ajor national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.").

In terms of how specific Congress would need to be when authorizing the executive branch to act, Madison explained that "[i]f nothing more were

required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law." 4 *The Debates in the Several State Conventions*, *supra*, at 560.

The requirement for "precise rules" is especially true for certain "important subjects" that "must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. (10 Wheat.) at 43. "[T]here are cases in which … the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

1. As explained above, Part I.A, *supra*, chief among such legislative powers is Congress's "control[]" over "how much revenue to raise." McConnell, *supra*, at 103. This means not only must Congress authorize revenue-raising, but at least in the "domestic" context, *id.* at 334, it must also determine "how much," which is the paramount "policy decision[]" when it comes to money, *Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting).

This Court has long recognized that "an indefinite power to tax is a power to destroy." *Nathan v. Louisiana*, 49 U.S. 73, 76 (1850). "In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof." 3 Story,

Commentaries, *supra*, § 1342, at 214. Recall the example of Richard II, who convinced Parliament to "delegate[] its power" of imposing certain taxes "to a small committee … composed of the King's personal adherents," who were "authorised" and "entrusted" to raise certain taxes on their own. Einzig, *supra*, at 51.

But after 1688, taxes in England were "fixed on the same principle as that of Income Tax today," i.e., "at the rate of so many shillings [per] the pound." *Id.* at 136–37. Of course, "receipts necessarily fluctuated" over time, *id.* at 137, but the rates themselves were set by Parliament.

The requirement that the legislature itself must set some kind of definite limit on raising revenue likewise pervaded early American thinking. In the Federalist Papers, Hamilton made clear that "the AMOUNT of taxes to be laid, … the OBJECTS upon which they are to be imposed, [and] the RULE by which they are to be apportioned" are matters for "the legislature." The Federalist No. 83 (capitalization in original).

When discussing Congress's power to raise money, Hamilton said, "Upon the constitutional plan, the only inquiry will be, *How much is actually wanted?*" 2 *The Debates in the Several State Conventions*, *supra*, at 368 (emphasis added). The answer was that only "Congress … in laying the tax" could "calculate for" all the various factors like "losses and inconveniences" and "delays and delinquencies." *Id.* Members of Congress "are alone the judges whether five or one per cent. is necessary or convenient" for "the common defence." *Id.* at 79 (statement of Rufus Choate).

Just as telling is the absence of any contrary notion in the historical record, i.e., that Congress could let the executive set specific revenue rates or sums. That would have been an absurd notion to a Nation that had fought for independence largely to rid itself of abusive and unresponsive taxation.

As explained next, early congressional practice uniformly followed Hamilton's rule. The House was "especially" attentive to its duty to identify "sums of money, amount of penalties, and limitations of numbers," 2 Story, *Commentaries*, *supra*, § 893, at 359, which were not mere "details" that could be left to executive officials to "fill up," *Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting).

Taxes. In 1791, Congress enacted the whiskey tax that led to The Whiskey Rebellion. The statute imposed varying rates per gallon of liquor distilled in the United States, based on the alcoholic content and type of liquor. Congress itself set the rates. Rum, for example: "For every gallon of those spirits more than ten per cent. below proof," pay "eleven cents"; all the way up to "those spirits more than forty per cent. above proof," on which a tax of "thirty cents" per gallon was imposed. Ch. 15, § 14, 1 Stat. 199, 202–03 (1791). Spirits distilled using "any article of the growth or produce of the United States" paid slightly less, but again Congress set the rates. *Id.* at 203. Congress even awarded a discount of "two cents for every ten gallons" if the taxes were paid before the liquor was removed from the premises. *Id.* Congress enlisted the executive branch to collect the money, of course, but Congress itself had set the determinative rate. *Id.*

In 1794, Congress passed a carriage tax and again imposed the specific rates: "For and upon every coach, the yearly sum of ten dollars"; for every chariot, eight dollars; for every "phaeton" and "coachee," six dollars; and so on, down to one dollar for the simplest carriages. Ch. 45, 1 Stat. 373, 374 (1794).

This rule continued well after the Founding. In 1815, for example, Congress taxed household goods based on their value and set the specific rates by law: "If not exceeding four hundred dollars" in goods, pay "one dollar" in tax; if between four hundred and six hundred dollars in goods, pay "one dollar and fifty cents" in tax; and so on, all the way up to goods valued above $9,000. Ch. 23, 3 Stat. 186, 186–87. Congress even imposed a special tax of "two dollars on every gold watch kept for use, and of one dollar on every silver watch kept for use." *Id.* at 187.

Early congresses also imposed direct taxes that would raise a set sum. "In each instance, the total sum … was assessed at prescribed rates" by law. *Veazie Bank v. Fenno*, 75 U.S. 533, 543 (1869). When it imposed a direct tax on houses in 1798, Congress set the exact sum to be raised—"two millions of dollars," Ch. 75, § 1, 1 Stat. 597, 597—and also imposed ranges with maximum amounts for each category of property to be taxed, from the smallest houses up to the largest, to count towards the $2 million cap: "Upon every dwelling-house which, with the out-houses appurtenant thereto, and the lot whereon the same are erected, not exceeding two acres in any case, shall be valued in manner aforesaid, at more than one hundred, and not more than five hundred dollars,"

with increasing figures up to dwelling-houses valued at more than $30,000, which "shall be assessed a sum equal to one per centum on the amount of the valuation." *Id.* § 2, at 598.

To defray the costs of the War of 1812, Congress enacted numerous direct taxes, each time setting it at a specific amount, down to the cent. *See* Ch. 37, 3 Stat. 53, 53 (1813) ("three millions of dollars"); Ch. 21, 3 Stat. 164, 164 (1815) ("six millions of dollars"); Ch. 60, 3 Stat. 216, 216 (1815) ("nineteen thousand nine hundred and ninety-eight dollars and forty cents"); Ch. 24, 3 Stat. 255, 255 (1816) ("six millions of dollars").

Congress continued imposing caps or rates when it first enacted income taxes during the Civil War. Congress set a rate of 3% on persons residing in the United States with "annual gains, profits, or income" exceeding $600, and 5% on persons residing in the United States with "annual gains, profits, or income" exceeding $10,000. Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473. "Congress modified the Civil War income tax several times," and "the rates and the thresholds" were "adjust[ed]," but they were always set by Congress itself. Milan N. Ball, Cong. Rsch. Serv., R46551, *The Federal Taxing Power: A Primer* 9 n.72 (updated Dec. 9, 2024), https://crsreports.congress.gov/product/pdf/R/R46551/3 (listing numerous examples).

Even in modern times, with the exception of the USF statute, Congress itself still sets precise numerical limits on taxes of nearly every kind imaginable, including individual income, capital

gains, corporate income, Social Security, Medicare, estate, and unemployment taxes, and even more obscure ones like on removal of certain fuels from refineries, vaccines, wagering, liquor, small cigars, cigarette papers, "structured settlement factoring transactions," and dozens of others. *See, e.g.*, 26 U.S.C. §§ 1, 11, 1401, 2001, 3101, 3301, 4081, 4131, 4401, 5001, 5701, 5891.

Thus, "Congress has always relied on the executive to execute tax laws," Pet.App.69a, but those laws always set some kind of objective limit. Otherwise, it would be the executive, not Congress, making the most important policy decision of all: "how much" to raise. McConnell, *supra*, at 103.

Similarly, "prescribing the … sweep and scope" of welfare programs is exactly "the sort of policy judgment that Congress, and not the Executive Branch, should make." *Consumers' Rsch.*, 88 F.4th at 930 (Newsom, J., concurring in judgment) (cleaned up). Such a choice is "heavily laden (or ought to be) with value judgments and policy assessments" that only Congress can make. *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting).

Fees. At the Founding, Congress also set the specific rates for fees, i.e., "value-for-value transactions" where "an agency exacts" a "charge" "in return for a benefit voluntarily sought by the payer." Pet.App.21a.

Congress allowed "early executive agencies" to "fund themselves directly from revenue collected," but Congress itself "imposed a detailed schedule of duties" and "fees specified by law," usually down to the penny.

CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 433 (2024). For example, Congress allowed the Post Office to self-raise revenue to pay its salaries but statutorily imposed "an upper limit," *id.* at 434 (majority op.), and "specified in minute detail the fees that could be collected from those who used the Post Office's services," *id.* at 465 (Alito, J., dissenting). Eight members of this Court in *CFPB* highlighted nearly a dozen times the historical importance of objective upper limits in this context. *See id.* at 429, 431, 432, 433, 434, 435, 436 (majority op.); *id.* at 442 (Kagan, J., concurring); *id.* at 464–66 (Alito, J., dissenting).

Other early examples included:

- Imposing rules for collecting "fees" for "every entrance of any ship or vessel," with those "under the burthen of one hundred tons" paying "one dollar and a half," and so on, based on increasing tons. Ch. 5, § 29, 1 Stat. 29, 44 (1789); *see also* Ch. 35, § 53, 1 Stat. 145, 171–72 (1790).

- Allowing the Mint to raise money on exchanges of bullion and coins with a charge of "one half per cent." Ch. 16, § 14, 1 Stat. 246, 249 (1792).

- Setting a specific rate (10 cents per 100-word sheet) for the public to acquire copies of government records. Ch. 14, § 6, 1 Stat. 68, 69 (1789).

- Directing the patent office to charge "fifty cents" for "receiving and filing the petition" for

> a patent and "two dollars" for "making out [the] patent." Ch. 7, § 7, 1 Stat. 109, 112 (1790).

Many more examples could be cited, all following the same format.

Further, although not indicative of original understanding, in 1875, Congress followed suit with early agencies by allowing the Office of the Comptroller of the currency to pay its salaries via assessments, which were set by statute, e.g., "For examining national banks having a capital less than one hundred thousand dollars, [impose] twenty dollars" in assessments. Ch. 89, 18 Stat. 329, 329.

Congress later deviated on occasion from strict adherence to numerical limits. These say nothing about the original understanding of the Constitution, but the most notable example is nonetheless distinguishable. When Congress created the Federal Reserve Board in 1913, it let the Board impose assessments on reserve banks to fund salaries and expenses (member salaries were set by statute, but other expenses were not). Ch. 6, § 10, 38 Stat. 251, 260–61 (codified as amended at 12 U.S.C. § 243). The reserve banks, however, were themselves government-created entities, so this scheme amounted to the government collecting revenue from itself. Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 Yale J. on Regul. 257, 279 (2015).

Duties and Imposts. Early American statutes imposed detailed schedules for tariffs, customs, and duties, too. For example, the Tariff Act of July 4, 1789, which was the first substantive statute passed by the

federal government and provided the bulk of federal revenues for decades, laid out duties for dozens of products, literally down to the penny in every case. Ch. 2, 1 Stat. 24, 24–27 (1789) (e.g., "On tarred cordage, for every one hundred and twelve pounds, seventy five cents. … On dried fish, per quintal, fifty cents."); *see also* Ch. 39, 1 Stat. 180, 180–82 (1790). Congress also imposed tonnage down to the penny. Ch. 3, 1 Stat. 27, 27–28 (1789); Ch. 30, 1 Stat. 135, 135–36 (1790); *see CFPB*, 601 U.S. at 433 (citing same provisions).

The 1791 whiskey tax discussed above also imposed duties on liquor being imported into the United States, with varying rates per gallon based on the alcoholic content: "For every gallon of those spirits more than ten per cent. below proof," pay "twenty cents"; all the way up to the strongest stuff: "For every gallon of those spirits more than forty per cent. above proof, … forty cents." Ch. 15, § 1, 1 Stat. at 199.

Modern statutes often still follow the same pattern. *E.g.*, 19 U.S.C. § 58c (setting out a detailed table of charges for various customs services, ranging from $1.75 to $397 per transaction); 8 U.S.C. § 1356(d), (e) (setting certain immigration fees). Even where the President has been given broad power to adjust duties, it is often within specific ranges set by Congress. 19 U.S.C. § 2111; *see also id.* § 1981(a)–(b).

Although early congresses imposed tight restrictions, they arguably possessed more flexibility in this foreign-relations context than for "domestic" revenue-raising. McConnell, *supra*, at 334. Nondelegation "limitations are … less stringent in

cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975).[5] And "many foreign affairs powers are constitutionally vested in the president under Article II." *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting).

Thus, "statutes relating to trade and commerce with other nations," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 691 (1892), including "embargoes" and "suspending commercial intercourse with certain countries," may not require the same specificity as domestic revenue-raising statutes because authorizing foreign-facing powers "confide[s] to the President … an authority which was cognate to the conduct by him of the foreign relations of the government," *Panama Refining*, 293 U.S. at 422; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327 (1936); *see DOT v. Ass'n of Am. Railroads*, 575 U.S. 43, 80 (2015) (Thomas, J., concurring in the judgment) (noting delegation of powers regarding embargoes and tariffs "arguably did not involve an exercise of core legislative power").[6]

Professor McConnell has explained that this approach "provide[s] a superior grounding for *Field v.*

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[5] *See generally* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 Emory L.J. 1391 (2017).

[6] This would also track English practice, where the King's "role in protecting shipping engaged in overseas trade" meant that Parliament could grant customs powers on terms "much more liberal[]" than for domestic taxation. Einzig, *supra*, at 65–66.

Clark, where Congress gave the President a bargaining chip to use in foreign negotiations, and *Curtiss-Wright*, which recognized a broader range of legitimate delegation in the foreign affairs arena than in domestic law," and it "may also explain why stronger nondelegation norms survive in the context of power that is especially central to the legislative branch, such as domestic taxation." McConnell, *supra*, at 334.[7]

2. Petitioners respond by claiming early Congresses issued sweeping delegations of various types. Gov.Br.21–23. But their examples miss the target and ultimately prove Respondents' point.

The relies heavily on the 1798 direct property tax already discussed. Gov.Br.23, 36. But "the 1798 direct tax is nothing like the USF Tax." Pet.App.69a. As explained above, Congress set the exact amount to be raised and also maximum amounts for each type of property. Ch. 75, §§ 1–2, 1 Stat. at 597–98; *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1550–51 (2021). It thus fits neatly with the historic rule that Congress must set an objective upper limit on the size of taxes.

The government cites other statutes involving money—but never taxes—while neglecting to mention that these provisions likewise imposed definite limits. For example, the government cites a 1791 statute allowing the President to fix "reasonable and proper"

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[7] *Curtiss-Wright* itself acknowledged the delegation in that case would have been invalid "if it were confined to internal affairs." 299 U.S. at 315.

salaries for revenue officers, Ch. 15, § 68, 1 Stat. at 213; Gov.Br.22, but the government omits that Congress dictated that "such allowance shall not exceed the annual amount of forty-five thousand dollars," 1 Stat. at 213. The government's invocation of early postal statutes, Gov.Br.22 (citing 1 Stat. 234), is also misplaced, given this Court's recitation in *CFPB* that early post office rates were laid down in excruciating detail, *CFPB*, 601 U.S. at 433–34; *id.* at 465 (Alito, J., dissenting).

The government turns to provisions involving powers that are not strictly legislative and thus not subject to the same nondelegation rules. *See Mazurie*, 419 U.S. at 556–57. The government leads with a 1790 statute allowing the President to adopt "rules and regulations" to govern "trade and intercourse with the Indian tribes," Gov.Br.21–22 (citing Ch. 33, 1 Stat. 137 (1790)), but "negotiat[ing] trading terms with Native American tribes" was "then seen as foreign affairs-related," Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1391 (2019). As noted above, the same analysis applies to statutes involving embargoes, *see* Gov.Br.22 (citing Ch. 41, 1 Stat. 372 (1794)), which have long been recognized as "cognate to the conduct by [the President] of the foreign relations of the government," *Curtiss-Wright*, 299 U.S. at 327; *see DOT*, 575 U.S. at 80 (Thomas, J., concurring in the judgment) ("The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power.").

The same holds true for the government's invocation of the President's power to "restructure the country's foreign debt" under a 1790 statute, Gov.Br.22, because "administration of debt repayment" was an "executive function[]," Mascott, *supra*, at 1392. In any event, Congress expressly said the President's borrowing could "not exceed[] in the whole twelve million of dollars." Ch. 34, 1 Stat. 138, 139 (1790). The same is true for another 1790 statute regarding debt, *see* Gov.Br.22, which limited the President to borrowing "a sum or sums not exceeding in the whole two millions of dollars, at an interest not exceeding five per cent," Ch. 47, 1 Stat. 186, 187 (1790).[8]

Other examples involved "Congress prescrib[ing] the rule governing private conduct" and then "mak[ing] the application of that rule depend on executive fact-finding." *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting). A 1791 statute allowed the Secretary of Treasury to return the payment of certain penalties on a case-by-case basis, *see* Gov.Br.22, but only "if it shall appear to him that such penalty or forfeiture was incurred without wilful negligence, or any design or intention of fraud," Ch. 15, § 43, 1 Stat. at 209; *see* Wurman, *supra*, at 1542. The same applied

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[8] This statute elsewhere provides an example of early Congress setting an objective limit without specifying a numerical rate or cap *per se*. It authorized the government to pay down the Nation's debt by the exact amount in surplus collected from duties and tonnage as calculated on "the last day of December next, inclusively." 1 Stat. at 186. Because Congress itself set the duties and tonnage rates, *see* 1 Stat. at 24–28, this still laid down a definite limit on the size of debt to be purchased.

to the 1797 statute (Gov.Br.22) authorizing case-by-case refund of a "just and reasonable" portion of a license fee, but only when "by failure of water, or other casualty, occurring to the mill or mills, or to the implements or to the proprietor, or other person licensed, the use and benefit of such license has been lost, or considerably interrupted." Ch. 18, § 2, 1 Stat. 509, 509 (1797). These statutes are a far cry from delegating authority to set a tax that raises billions of dollars from the pockets of millions of Americans.

The government's examples thus unintentionally drive home Respondents' point that Congress must set definite limits on domestic revenue-raising because that represents the most important policy decision of all, i.e. "how much" to raise. Statutory delegations without such limits were ones that did not involve strictly legislative powers in the first place.

As explained next, the USF statute lacks such limits and thus is unconstitutional. And even if objective limits are not strictly required, the USF statute is still so vague and "aspirational" that it fails the original understanding of nondelegation.

B. Section 254 Violates the Original Understanding of Nondelegation.

Recall Madison's response to Anti-Federalist fears of a tyrannical President: "The purse is in the hands of the representatives of the people." 3 *The Debates in the Several State Conventions*, *supra*, at 393. When it comes to the USF, however, that is not true. The USF raises domestic revenue, *see* Part I.B, *supra*, but lacks any of the requisite forms of historic limits on size demanded by the Constitution.

For nondelegation purposes, the Court looks to the maximum scope of the statutory grant of power, regardless of whether the agency has fully exercised that scope or hemmed itself in by regulation. *See Whitman*, 531 U.S. at 473 ("[A]n agency's voluntary self-denial has no bearing upon" "[w]hether the statute delegates legislative power[.]"). As explained next, the FCC's full statutory authority for raising revenue for the USF is uniquely broad. To be sure, § 254 includes "a lot of words," Pet.App.27a, but it provides "only the faintest, most vacuous guidance about how [the FCC could] exercise its authority" to raise money, *Consumers' Rsch.*, 88 F.4th at 930 (Newsom, J., concurring in judgment).

As a "first-principles matter," therefore, the FCC "is violating the Constitution." *Id.* at 928, 932.

1. No Objective Limit on the Amount Raised for USF.

It is common ground that there is "no objective ceiling on the amount that the FCC can raise each quarter," Pet.App.132a, because "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund," *Consumers' Rsch. v. FCC*, 67 F.4th 773, 788 (6th Cir. 2023). As demonstrated above, such definite limits on domestic revenue-raising have been a near-universal aspect of Anglo-American constitutional law for centuries and are required to ensure the legislature sets the most important policy of all: how much to raise.

This Court has found such limits relevant to the nondelegation inquiry. For example, the Court rejected a nondelegation challenge to a statute that obligated the executive to collect import duties based on a precise but fact-bound determination, with no rate allowed to vary more than 50% from statutory figures. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 401 (1928); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397–99 (1940) (rejecting nondelegation challenge where statute set tax rates down to the penny). Later, the Court rejected a nondelegation challenge where an agency was statutorily barred from raising more than 105% of the amount Congress had separately appropriated. *Skinner*, 490 U.S. at 215, 220–22. Those statutes all appropriately passed originalist muster.

The absence of any such limits in the USF revenue-raising mechanism is itself a sufficient basis to hold it unconstitutional. That holding would be straightforward and narrow while enforcing an important separation-of-powers principle: Congress itself must decide how much to raise. It has some flexibility in how to do so, but there must be some definite limit to the size.

Even if objective limits are not strictly required, however, § 254 still fails because it does no more than announce "vague aspirations." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting). History bears this out: the relevant statutory language has not changed, but the USF tax rate has increased tenfold, from under 4% to nearly 37% (and still climbing). That is possible

because the statute imposes no meaningful limits on size.

2. Section 254(b): "Aspirational Only."

The government hangs its hat on § 254(b)'s list of several universal service "principles" as ostensibly limiting the FCC's broad power to decide how much money to raise for the USF. Gov.Br.24–26. Those principles fail to impose meaningful restrictions.

Merely Precatory. This Court has long held that "procedural safeguards cannot validate an unconstitutional delegation." *United States v. Rock Royal Co-Op.*, 307 U.S. 533, 576 (1939); *see Schecter Poultry*, 295 U.S. at 523 n.4 (statute unconstitutional even though affected parties had a "right to be heard prior to approval" of codes).

But procedural hurdles are, at most, what § 254(b) imposes—and extraordinarily weak ones, at that. The FCC must "consider" the § 254(b) principles, which are merely precatory. They are all things that universal service "*should*" be, not must be, and thus do not impose any substantive mandate. *See TOPUC I*, 183 F.3d at 418 (emphasis added). The FCC has long agreed that these principles are not "mandatory," and that the FCC "need not implement" them. Br. for FCC at *26–27, *TOPUC II*, 2000 WL 34430695 (Nov. 30, 2000); *see* Br. for FCC at 12, *U.S. W. Commc'ns, Inc. v. FCC*, Nos. 99-9546 et al. (10th Cir. May 30, 2000) ("[T]he seven principles identified in section 254(b) were not statutory requirements."). And courts have concurred, holding the principles are "aspirational only." *TOPUC II*, 265 F.3d at 321. That description is

almost verbatim the language in Justice Gorsuch's *Gundy* dissent that Congress cannot announce mere "vague aspirations." 588 U.S. at 153.

The government now backpedals, claiming for the first time that *each* of the principles are things the FCC "must ensure," "must achieve," and "must obtain." Gov.Br.26. That is the opposite of what the statute says, what courts have held, and what the FCC itself has long insisted. This volte-face is as good as an admission that the government cannot prevail under the statute as written and long interpreted by courts.

The "aspirational only" nature is important because the FCC is bound only if it *chooses* to bind itself, and this Court has held that "an agency's voluntary self-denial has no bearing upon" "[w]hether the statute delegates legislative power," *Whitman*, 531 U.S. at 473. That is, the Court must assume the agency will check the procedural boxes and then exercise the full and outer limit of its substantive power. *See Rock Royal*, 307 U.S. at 576 ("[P]rocedural safeguards cannot validate an unconstitutional delegation."). The legislative non-delegation doctrine, after all, is a limitation on *Congress*, not on the executive.

Contentless. The § 254(b) principles also "are contentless," Pet.App.29a, and so "hazy" that they "cannot possibly constrain the FCC's policymaking discretion in any meaningful way," *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment).

Examples include: "Quality services *should* be available at just, reasonable, and affordable rates";

"[t]here *should* be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service"; and of course the catch-all: "Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with [the Act]." 47 U.S.C. § 254(b) (emphases added).

As Judge Newsom observed: "As a matter of first principles—as in real life—such empty, mealymouthed shibboleths provide no meaningful constraint; to the contrary, they confer front-line law- and policymaking power on unelected, unaccountable agency bureaucrats." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment).

At the FCC's insistence, lower courts have long "avoided relying on the aspirational language in § 254(b) to bind the FCC to adopt certain cost methodologies for calculating universal service support," *TOPUC I*, 183 F.3d at 421, and thus the FCC is allowed to "roam at will" "in that wide field of legislative possibilities," *Schechter Poultry*, 295 U.S. at 538.

The government seizes on § 254(b)(1)'s statement that "quality services should be … affordable." *See* Gov.Br.30. Notably, the FCC itself has long *denied* that the "affordability goals set out in section 254 are mandatory." Br. for FCC, *TOPUC II*, supra, at *26. In any event, "saying telecommunications services 'should' remain 'affordable' amounts to '*no guidance* whatsoever.'" Pet.App.30a (emphasis in original). Given the importance of telecommunications, "the

FCC could impose eye-watering USF Taxes while also arguing with a straight face that cell phones remain 'affordable' in the sense that most Americans would choose to keep using them." Pet.App.31a. A similar proviso did not save the statute in *Schechter Poultry*. *See* 295 U.S. at 523 n.4 (statute required codes to be "truly representative of such trades").

On that score, the government's claim that "[t]he affordability principle" precludes the FCC from allowing "the universal service contribution … [to] become so large as to risk making basic telephone services unaffordable," Gov.Br.30, is not just contrary to its own prior statements that affordability is not a mandate, *see* Br. for FCC, *TOPUC II* , *supra*, at *26–27, but is also whistling past the graveyard, given the USF's current rate of nearly 37% and climbing. If that is "affordable," the term is toothless.[9]

The FCC Can Rewrite Its Own Authority. "[T]o make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause" allowing the FCC to add other principles as it determines are "necessary and appropriate." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment); *see* 47 U.S.C. § 254(b)(7). Under *Whitman*, for nondelegation purposes the Court must assume the FCC will exercise the full extent of that power. 531 U.S. at 473.

The government argues this power is limited because new principles must be "consistent with" the

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[9] Similarly, the "predictability" provision does "not [] require predictable funding amounts." *Alenco*, 201 F.3d at 623 (emphasis omitted).

Communications Act. Gov.Br.32. But it adds nothing to say the new agency-created universal-service principles must be "consistent with" existing provisions that are *themselves* "contentless." Pet.App.29a; *see Schechter Poultry*, 295 U.S. at 527 (statute likewise said any codes adopted must "tend to effectuate the policy declared in title 1 of the act").

Further, this Court has found similar multi-layer delegations to be especially pernicious from a nondelegation perspective. In *Schechter Poultry*, the statute granted broad power to the executive and then allowed him to "add[] to … what is proposed, as 'in [the executive's] discretion' he thinks necessary 'to effectuate the policy' declared by the act," an aspect this Court cited as being particularly problematic. 295 U.S. at 538–39. Letting the executive branch redefine the scope of its own power was "delegation running riot." *Id.* at 553 (Cardozo, J., concurring).[10]

The Few Cases Finding Violations of § 254(b) Are Inapposite. The government cites two cases it purports found violations of § 254(b). Gov.Br.34. The government's apparent premise is that there can be a nondelegation violation only if a statute is impossible to transgress. Under that view, there could be a nondelegation violation only if Congress granted truly infinite power to an agency.

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[10] The government suggests the Court could sever the open-ended grant in § 254(b)(7), Gov.Br.32–33, but that argument is forfeited because it was not raised below, and, in any event, the statute is unconstitutionally broad even without that provision.

That is flatly inconsistent with this Court's precedent. In *Panama Refining*, the statute was limited to the subject matter of "hot oil," which had been statutorily "defined" with particularity. 293 U.S. at 414, 418. It would have been easy to transgress that limitation, but what mattered was that *within that subject matter*, the executive was "free to select as he chooses from the many and various objects generally described." *Id.* at 432. The government's view would mean *Panama Refining* was wrongly decided. Even cases upholding broad delegations recognize that Congress must "clearly delineate[]" the delegated authority's "boundaries"—plural—meaning it won't suffice to point to any single "boundary" and be done. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

If the government were right, Congress could delegate the *entirety* of its legislative power to the President or an executive agency, so long as Congress withheld the tiniest sliver, say, to select which currency USF contributions must be paid in. The *en banc* decision below recognized this point when it held that a narrow set of statutory provisions "may supply sufficient guidance for FCC to execute *certain aspects* of the universal service program," but those provisions notably do not impose limitations on the FCC's revenue-raising writ-large. Pet.App.29–30a n.7 (emphasis added).

In any event, neither of the government's cases addressed nondelegation. Both involved the FCC's failure to comply with *procedural* requirements, not substantive ones. Gov.Br.34 (noting both times the

FCC had "not adequately explained" a decision). But "procedural safeguards cannot validate an unconstitutional delegation." *Rock Royal*, 307 U.S. at 576. Indeed, the Tenth Circuit was clear that "each of the principles in § 254(b) internally is phrased in terms of 'should,'" which "indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'" *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). The government's reliance on *TOPUC I* is especially curious because that opinion recognized § 254(b) is merely "aspirational" and that the FCC can raise more money for the USF than it spends on USF programs—points the *en banc* court below repeatedly cited in *support* of its nondelegation holdings. Pet.App.27a–28a.

All told, § 254(b) "leave[s] the agency all the room it needs to do essentially whatever it wants" when deciding how big the USF tax will be. *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment).

3. Section 254(c): An "Evolving" Definition of "Universal Service."

Nor is there a meaningful limit in the definition of "universal service" itself. "Congress declined to define 'universal service'" and instead "delegated to FCC the responsibility to periodically 'establish' the concept of 'universal service' by 'taking into account advances in telecommunications and information technologies and services.'" Pet.App.3a (quoting 47 U.S.C. § 254(c)(1)).

"[D]iminishing the likelihood of any real guidance, the term 'universal service'—the very object of the

entire program—is defined only in the most ambiguous way" and will "'evolv[e]'" over time as the FCC itself sees fit. *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment).

Petitioners invoke § 254(c)(1)'s provision saying that, when *spending* money on universal service, the FCC must "consider the extent to which" telecommunications services "are essential to education, public health, or public safety"; "have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers," etc. 47 U.S.C. § 254(c)(1); *see* Gov.Br.27.

That clause fails to impose meaningful limits for several independent reasons. *First*, "procedural safeguards"—like having to "consider" or explain something—"cannot validate an unconstitutional delegation." *Rock Royal*, 307 U.S. at 576. And here, the FCC does not even have to consider certain statutory definitions or imperatives, but rather consider only "*the extent to which*" the FCC itself thinks those factors might apply. The FCC must ponder whether something might be applicable. A weaker procedural requirement is hard to imagine.

Second, limitations on the USF's back-end spending are largely beside the point. The government acknowledged in its brief below that "spending decision[s]" under § 254 are "irrelevant to this case," Gov.CA5.Br.60 (filed June 10, 2022), because Respondents' challenge is to whether Congress provided requisite limits on how much the

FCC can *raise*, not on how it ultimately spends the funds.[11]

That distinction is important because the FCC can raise more money than it spends. Courts and Petitioners have long agreed that "nothing in the statute" requires that "universal service support must equal the actual costs incurred." *TOPUC I*, 183 F.3d at 412; Pet.App.27a; SHLB.Br.28 (§ 254 "may not mandate support that precisely equals the actual costs") (cleaned up).

Third, the reference to spending money on "telecommunications services" in § 254(c)(1) cannot save the government. Gov.Br.27. The FCC can ignore that rule for schools, libraries, and health care providers, *see* 47 U.S.C. § 254(c)(3), and, in any event, there are good reasons to doubt it serves as a real limit anywhere else. The government suggests, for example, that USF money cannot be spent on things like "veterans' benefits," Gov.Pet.15, yet the FCC has established "a $100 million, three-year program …

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[11] The nondelegation inquiry for government spending may be less restrictive, assuming the funds were constitutionally raised in the first place. *See* McConnell, *supra*, at 105; John Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, in *The Administrative State Before the Supreme Court* 232 (Peter J. Wallison & John Yoo eds., 2022). *But see* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1386 (1988).

with a particular emphasis on low-income and *veteran patients*."[12]

Section 254(c), like § 254(b), fails to make the requisite policy decision of "how much" money to raise.

4. Section 254(d): "I Have No Idea What That Means."

The government also contends that § 254(d) imposes caps on the size of the USF by stating that charges must be paid into "sufficient mechanisms established by the [FCC] to preserve and advance universal service" and must be "equitable and nondiscriminatory." Gov.Br.26, 29 (quoting 47 U.S.C. § 254(d)). But this provision likewise provides "essentially no" direction about *how much* "should actually be charged." *Consumers' Rsch.*, 88 F.4th at 931 (Newsom, J., concurring in judgment).

On the "sufficient mechanisms" aspect, Judge Newsom put it best: "Candidly, I have *no* idea what that means." *Id.* (emphasis in original). Whatever it means, it imposes at best a floor—not a ceiling—on the FCC's revenue-raising power. *See Sufficient*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/sufficient ("enough to meet the needs of a situation or a proposed end"). As noted above, courts and the FCC itself have long agreed that the FCC can raise more than it spends. *See TOPUC I*, 183 F.3d at 412; Pet.App.27a.

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[12] *In re Report on the Future of the Universal Service Fund*, FCC 22-67, at 43 (rel. Aug. 15, 2022) (emphasis added), https://docs.fcc.gov/public/attachments/FCC-22-67A1.pdf.

Further, the notion "[t]hat funding should be 'sufficient … to preserve and advance universal service' is meaningful only if the concept of universal service is sufficiently intelligible," but as described above, it isn't. Pet.App.27a. Rather, "universal service is 'an evolving level of telecommunications services that the Commission shall establish periodically.'" *Id.*

As for the requirement that USF funding be "equitable and nondiscriminatory," one need only look to the statute in *Schechter Poultry*, which likewise prohibited policies that imposed "inequitable restrictions" or "discriminate[d] against" small companies, 295 U.S. at 522–23. If aphorisms about equity and nondiscrimination couldn't save the statute in *Schechter Poultry*, they can't save § 254.

The government also cites § 254(d)'s requirement that USF contributions be made by "[e]very telecommunications carrier that provides interstate telecommunications services." Gov.Br.26. But that still fails to say *how much* should be collected. And the government elides mention of another clause that lets the FCC expand the list of contributors whenever it deems such an expansion in "the public interest." 47 U.S.C. § 254(d). The FCC thus determines not just how much to tax, but who should pay it.

With the world becoming increasingly connected, little could escape the FCC's grasp. It already taxes an exceptionally broad range of services, including mobile data, satellite service, and a dozen other

services most people have never even heard of,[13] and has suggested it could do the same for "broadband Internet access service," "streaming video" service, "digital advertising," "cloud service[]," and even "private networks" owned by those companies.[14] One FCC report cites research indicating that if broadband Internet were taxed at the USF's current 36.3% rate, it would yield nearly $100 billion a year, a ten-fold increase.[15]

"Congress's instruction to raise 'sufficient' funds amounts to a suggestion that FCC exact as much tax revenue for universal service projects as FCC thinks is good." Pet.App.27a. That is the epitome of "merely announc[ing] vague aspirations." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).

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[13] Services already taxed include: "Cellular telephone and paging services; Mobile radio services; Operator services; Personal communications services (PCS); Access to interexchange service; Special access service; WATS; Toll-free service; 900 service; Message telephone service (MTS); Private line service; Telex; … Video services; Satellite service; Resale of interstate services; Payphone services; … Interconnected VoIP services; Prepaid calling card providers." 47 C.F.R. § 54.706(a).

[14] FCC 22-67, *supra* note 12, at 48 & n.356, 50–51.

[15] *See id.* at 48 & n.356 (citing Mattey Consulting, LLC, *USForward Report* 16 (Sept. 2021), https://publicknowledge.org/wp-content/uploads/2021/11/USForward-Report-2021-for-Release_September-2021.pdf (noting 2024 broadband revenues expected to be over $260 billion, which at a 36.3% tax rate would equate to over $90 billion)).

5. Remaining Subsections: More of the Same.

Petitioners also point to § 254(e), *see* Gov.Br.27, 29, which says funding recipients "should" *receive* funds "sufficient to achieve the purposes" of § 254—i.e., the same purposes the FCC can perpetually re-define—and to § 254(h), which imposes several discrete details for discounts to be awarded to specific *recipients* of USF dollars, based on what "is appropriate and necessary to ensure affordable access to and use of such services," 47 U.S.C. § 254(h)(1)(B).

But (1) these sections are irrelevant because they do not limit the amounts of money to be *raised*, *see* Part II.B.3, *supra*; (2) in any event, "sufficiency" fails to impose a meaningful limit in § 254(e) just as it did in § 254(d), *see* Part II.B.4, *supra*; and (3) § 254(h) uses equally vacuous terms like "appropriate and necessary," which mimic the language used in § 254(b) to describe the FCC's open-ended power to add new universal service principles, *see* Part II.B.2, *supra*.

C. *Schechter Poultry* and *Panama Refining* Confirm the USF Statute Is Unconstitutional.

"Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it," *Seila Law*, 591 U.S. at 220 (cleaned up), and even the USF's supporters admit it uses a historically "unique revenue raising mechanism," Pet.App.137a (panel decision). The *en banc* Fifth Circuit's opinion likewise surveyed centuries' worth of this Court's precedent on

delegations and concluded that "amidst all the statutes that have survived nondelegation challenges, § 254 stands alone." Pet.App.40a.

But if the USF scheme does have any analogues in American jurisprudence, they would be the statutory regimes this Court held unconstitutional in *Schechter Poultry* and *Panama Refining*. Far from Petitioners' revisionist suggestion that the statutes in those cases "involved an *absence* of legislative guidance," CCA.Br.16, they actually featured pages of it, requiring executive action to "eliminate unfair competitive practices," "avoid undue restriction of production (except as may be temporarily required)," prohibit "discriminat[ory]" codes, allow a "right to be heard" before adoption of certain provisions, and require codes to be "representative" of the relevant industries. *Panama Refining*, 293 U.S. at 417; *Schechter Poultry*, 295 U.S. at 521 & n.4, 535.

For the Court's benefit, the Appendix to this brief includes the full text of the relevant (and lengthy) sections of the National Industrial Recovery Act of 1933.

The Fifth Circuit acknowledged that § 254 likewise contains "a lot of words," Pet.App.27a, but it imposes no meaningful "policy of limitation" on the size of the USF as the FCC "chooses from the many and various objects generally described," *Panama Refining*, 293 U.S. at 418, 431–32. Indeed, the FCC is left free to "roam at will" "in that wide field of

legislative possibilities." *Schechter Poultry*, 295 U.S. at 538.[16]

D. Affirming Would Help Revitalize Universal Service and Strengthen the Separation of Powers.

Petitioners point to alleged "reliance interests" in the current nondelegation doctrine and the purported benefits of the USF, CCA.Br.52–53, which they claim will be "upend[ed]" by affirming the decision below, Gov.Pet.10. These arguments are wrong on each point.

First, there is no "too big to comply" exception to the Constitution. Quite the opposite. If raising billions of dollars for the USF is truly so important, that is all the more reason it must be subject to political debates in the halls of Congress, rather than delegated to bureaucrats. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (noting that "normally" we expect Congress "'to make major policy decisions itself'"); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) ("[M]ajor national policy decisions must be made by Congress.").

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[16] Petitioners suggest that *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), might somehow cabin the FCC's broad authority to raise money. SHLB.Br.26. But the USF tax rates post-*Loper-Bright* are noticeably higher than those predating it. *Compare* Pet.App.146a (25.2% for First Quarter 2022), *with* FCC, *Proposed First Quarter 2025 Universal Service Contribution* Factor, DA 24-1245 (rel. Dec. 12, 2024) (36.3% for First Quarter 2025), https://docs.fcc.gov/public/attachments/DA-24-1245A1.pdf.

Some cynics may think that determining the size of a social welfare program is too important to be left to legislators, but Congress sets specific taxes and appropriations to address the most critical national issues, as well as every other major federal program. It beggars belief that the USF is so important that it alone is entitled to a free pass.

Second, Petitioners overstate the real-world effectiveness of the USF. As explained above, the USF is notoriously ineffective for its intended recipients—e.g., the GAO said the USF may not have played *any* meaningful role in improving the "level of low-income households' subscribing to telephone service over the past 30 years." GAO-15-335, *supra* note 1. It is telling that some Petitioners focus heavily on the companies that make money from the USF, i.e., "investment-backed reliance interests." CCA.Br.49.

Third, Petitioners are also wrong that affirming would upend the USF. The decision below did not vacate the Contribution Factor but rather remanded without vacatur. Pet.App.81a. Even if this Court ordered vacatur, it could be limited to the named Respondents, as they have long proposed.[17]

In fact, affirming the Fifth Circuit's decision is likely the best thing that could happen for universal service. The USF's sustainability and constitutional flaws are well known, and there is bipartisan interest in ensuring the continuity of USF.[18] There is certainly

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[17] *See, e.g.*, FCC.CA5.Reply.Br.7.n.2 (filed July 15, 2022).

[18] *See generally* Br.*Amici.Curiae*.Members.of.Congress.

no shortage of ways for Congress to do so in a way that would be sustainable and constitutional. *See generally* FCC 22-67, *supra* note 12. Affirming the decision below could very well provide the impetus for Congress to act, as it has recently done elsewhere in the face of a judicial ruling finding a nondelegation violation.[19]

A corrective fix would be as straightforward as adding half a sentence setting the specific USF tax rate, or simply appropriating money instead. This would ensure that Congress itself decides "how much" is raised. McConnell, *supra*, at 103; The Federalist No. 83 ("[T]he AMOUNT of taxes to be laid" is a matter for "the legislature.") (capitalization in original).[20]

But reversing the decision below would yield dramatic separation-of-powers harms. If the USF scheme were replicated elsewhere, there would be no need for budgets or appropriations ever again. If the FCC can raise $10 billion a year based on its own aspirations and evolving definitions, there is no reason the IRS could not be similarly tasked with funding the federal government as it sees fit.

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[19] *See, e.g.*, *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023) (recounting Congress's swift statutory amendments).

[20] Even if the Court were worried about practical effects (and it shouldn't be), it could consider staying issuance of its judgment as it has done in the past to give Congress time to pass a statutory fix or simply appropriate money directly. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

Finally, the government suggests that affirming the decision below will cause uncertainty across other areas of law. *See* Gov.Br.18–21; Gov.Pet.27–28. The government trots out this argument in every important administrative-law case, only to be proven wrong every time. *See, e.g.*, Br. for Resp. at 33, *Loper Bright Enters., Inc. v. Raimondo*, No. 22-451 (U.S. Sept. 15, 2023) ("Overruling *Chevron* would thus create 'an upheaval.'"); Br. for Resp. at 39, *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 22-1008 (U.S. Dec. 13, 2023) (following the APA's accrual language would "create serious problems for agency and judicial administration").

The doomsayers will be proven wrong here, too. Nondelegation challenges are batting a whopping .000 at the Fifth Circuit since it issued the binding decision below in July 2024, with the court since rejecting numerous challenges even to broad statutory transfers of authority. *See, e.g.*, *Airlines for Am., Inc. v. DOT*, ___ F.4th ___, 2025 WL 313998, at *11 (5th Cir. Jan. 28, 2025); *Mayfield v. DOL*, 117 F.4th 611, 621–22, (5th Cir. 2024). The *en banc* court was right when it said the USF funding scheme truly is "unprecedented." Pet.App.42a.

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Despite putting a "lot of words" in § 254, Congress "suppl[ied] no principle," Pet.App.27a, for the single most important policy determination of all: "how much" to raise, McConnell, *supra*, at 103. Instead, Congress told the FCC to "exact as much tax revenue for universal service projects as FCC thinks is good,"

Pet.App.27a, and the FCC has been more than happy to oblige.

Such an important aspect is no mere "detail" that can be left to bureaucrats to "fill up." *Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting). Congress cannot "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* at 153. Because that is precisely what Congress did here, this Court should affirm.

III. SECTION 254 VIOLATES THE MODERN NONDELEGATION TEST.

The USF revenue-raising scheme is so open-ended that it violates even the modern interpretation of the nondelegation doctrine.

A. Section 254 Does Not Clearly Delineate the FCC's Revenue-Raising Power.

The modern framework requires Congress to "clearly delineate[] … the boundaries of th[e] delegated authority," among other things. *Skinner*, 490 U.S. at 219. The government's briefs (Gov.Br.19, 24; Gov.Pet.11) tellingly omit the requirement that the boundaries be "*clearly* delineate[d]." *Skinner*, 490 U.S. at 219 (emphasis added); *Am. Power*, 329 U.S. at 105.

As explained above, § 254 contains no objective limits on the amounts raised, imposes aspirational-only principles, and lets the FCC redefine its subject matter and add new principles at will. *See* Part II.B.2–3, *supra*. Given all this, it begs reality to claim that Congress "*clearly delineate[d]* … the boundaries of th[e] delegated authority." *Skinner*, 490 U.S. at 219

(emphasis added). Even if one does not agree with the court below that the FCC has *no* real limits on USF revenue-raising, there is nothing in the statute "*clearly*" delineating the size of the USF. *Id.*

Even opinions blessing broad delegations have said Congress must "specify" statutory details "so far as is reasonably practicable." *Rock Royal*, 307 U.S. at 574. Adding half a sentence imposing a statutory tax rate or cap is as straightforward and "reasonabl[e]" a "specif[ication]" as one could imagine. *Id.* For 600 years, legislatures have imposed such specifications, yet Congress chose not to do so here.

The Court could therefore resolve this case simply by applying its existing tests as written, rather than trying to determine in the abstract whether there is an "intelligible principle," a term that has resulted in far more confusion than clarity. *See Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting).

B. Petitioners' Cases Are Distinguishable.

Petitioners' primary response is a breezy syllogism of sorts: because a few of this Court's decisions have upheld seemingly broad statutory delegations, pretty much any statute will pass muster. Gov.Br.20–21, 30.

As the *en banc* decision below explained, Pet.App.33a, Petitioners ignore this Court's rule that the level of statutory specificity required by the nondelegation doctrine varies based on "the extent and character" of the power delegated, *Mistretta*, 488 U.S. at 372, and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," *Whitman*, 531 U.S.

at 475; *see* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 Mo. L. Rev. 1239, 1294–95 (2021) (collecting examples of how "nondelegation principles are regularly applied differently to different powers" by courts).

This Court has explained, for example, that statutory phrases like "in the public interest" raise grave nondelegation concerns when appearing in statutes allowing domestic revenue-raising by agencies. *NCTA*, 415 U.S. at 341–42. In *NCTA*, the Court held that giving the FCC the power to raise money based on "'public policy or interest served, and other pertinent facts'" raises the specter of "forbidden delegation of legislative power" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* Applying that rule later in *Skinner*, this Court correctly upheld a delegation letting an agency raise no more than 105% of the amount already appropriated by Congress. 490 U.S. at 220–22; *see also CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 184 n.2 (2d Cir. 2023) (finding the statutory "twelve-percent limit on the amount of funding [the CFPB] may draw from the Federal Reserve System" "clearly delineates the … boundaries of this delegated budgetary authority") (cleaned up).

By contrast, the cases Petitioners cite involved powers that are not strictly legislative in the first place or featured more limitations than Petitioners will admit.

Petitioners invoke cases arising in a wartime posture, like *Yakus v. United States*, 321 U.S. 414 (1944), and *Lichter v. United States*, 334 U.S. 742 (1948); *see* Gov.Br.21. But nondelegation "limitations are … less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," *Mazurie*, 419 U.S. at 556–57, and thus war statutes are different for nondelegation purposes because war powers are "cognate to the conduct by [the President] of the foreign relations of the government" and his Commander-in-Chief powers, *Panama Refining*, 293 U.S. at 422.

The government also invokes *Mistretta*, which addressed the U.S. Sentencing Guidelines, Gov.Br.24, but that likewise is not a pure legislative-delegation case, given that the judicial branch possesses inherent power over sentencing, *Mistretta*, 488 U.S. at 390–91 & n.17; Pet.App.35a; Volokh, *supra* note 5, at 1401–02.

Similarly misplaced is Petitioners' reliance (Gov.Br.11; CCA.Br.23) on *NBC v. United States*, 319 U.S. 190 (1943), which upheld a statute allowing the FCC to regulate "chain broadcasting" in the "public interest, convenience, or necessity," *id.* at 194 n.1, 216. As Professor McConnell and the *en banc* court below have explained, *NBC* addressed disposition of government property because "the public owns the airwaves," Pet.App.35–36a (cleaned up), and the "power to manage public property" is a long-time *executive* power, McConnell, *supra*, at 334

(distinguishing *NBC* on this basis).[21] This explains why the statutory reference to "public interest" sufficed here, yet that exact same term was so problematic in *NCTA*, which involved revenue raising, as discussed above.

In *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), the statute allowed the setting of rates based on the "public interest," *id.* at 24–25, but as the *en banc* court below explained, that was "shorthand" for invoking the pre-existing "common law of common carriers." Pet.App.39a.[22]

But deeming pre-existing frameworks as incorporated into the statute won't work here because the universal service scheme in existence pre-1996 was "nothing like the modern universal service regime, which allows a greatly expanded class of carriers to bill USF for a broad range of subsidized services provided at no cost to themselves." Pet.App.61–62a. Petitioners acknowledge that "Congress adopted fundamental changes" (SHLB.Br.3) and "overhauled" (Gov.Br.3) the universal-service scheme in 1996. *See also* Br. for FCC, *U.S. W. Commc'ns*, *supra*, at 32 ("Nothing in the

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[21] This also provides a second reason to distinguish *Lichter*, which involved case-by-case determinations related to "recapture" of government contracts, 334 U.S. at 784, an executive function. Likewise distinguishable is *United States v. Grimaud*, 220 U.S. 506 (1911); *see* Gov.Br.21, which addressed rules for use of "public land," *DOT*, 575 U.S. at 83 n.7 (Thomas, J., concurring in the judgment).

[22] A similar analysis explains *American Power & Light Co.*, 329 U.S. at 104–05; *see* Pet.App.38a.

statute, however, requires the FCC to sustain existing levels of universal service support.").

Whitman likewise "does not implicate legislative power," as the relevant statute "govern[ed] the allocation of federal funds" that had already been properly raised by Congress. A.J. Jeffries, *Making the Nondelegation Doctrine Work: Toward A Functional Test for Delegations*, 60 U. Louisville L. Rev. 237, 259 (2021). The Clean Air Act instructed the EPA Administrator to set national ambient air quality standards, but those standards "did not put any business or individual at direct risk of any penalty, criminal or civil, because the provision imposed obligations on states which were backed up principally with the prospect of reductions in federal funding or federal preemptive action." *Id. Whitman* itself explained that "[i]t is to the States that the [Clean Air Act] assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources." 531 U.S. at 470.

Whitman therefore addressed a provision that involved the federal government's spending of its own money and thus was not a core legislative power for nondelegation purposes. *See Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting). Further, this Court interpreted the relevant statute in *Whitman* to impose both a ceiling, 531 U.S. at 473, which is absent from § 254.

Another category of acceptable delegations is present in *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *see* Gov.Br.20, where Congress authorized case-by-case "determin[ations of] some fact or the

state of things upon which the enforcement" of the statute would turn, 204 U.S. at 387 (identifying particular bridges that hindered movement on rivers). This is a textbook example of "mak[ing] the application of that rule depend on executive fact-finding." *Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting).

In other cases, the statutes simply contained more limitations than Petitioners disclose. In *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941); *see* Gov.Br.21, for example, Congress statutorily imposed both a floor and a ceiling on the minimum wage the executive could announce, 312 U.S. at 142 (between 30 and 40 cents per hour), ensuring an objective range. The USF lacks such clear delineations. And in *Yakus*, which is already distinguishable because of its wartime posture, Congress pegged executive price-setting to specific historic dates. *See* 321 U.S. at 419–21.[23]

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The Court should reject Petitioners' oversimplification of nondelegation precedent, which is far more nuanced. "Unlike delegations implicating the power to impose criminal sentences, taxation has always been an exclusively legislative function. Unlike the power to impose conditions on the use of public property, taxation involves the conversion of private property. And unlike other congressional

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[23] The government also cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *see* Gov.Br.21, but the majority opinion there did not address nondelegation.

delegations implicating core legislative functions, § 254 is a hollow shell that Congress created for FCC to fill." Pet.App.40–41a.

C. Petitioners' Remaining Arguments Are Unpersuasive.

The government objects to this approach altogether by arguing that *Skinner* barred distinguishing between different types of delegations. Gov.Br.35. The government overreads *Skinner*, which certainly did not purport to overrule the centuries-old principle that what suffices under the nondelegation doctrine will vary based on context—a principle this Court expressly reaffirmed later in *Whitman*, 531 U.S. at 475; *see also* McConnell, *supra*, at 334. And far from rejecting a requirement for clear boundaries, *Skinner* reiterated that Congress must "clearly delineate[]" its delegated power. *Skinner*, 490 U.S. at 214. But § 254 fails to do so, which is why Respondents prevailed below even with the court acknowledging *Skinner*. Pet.App.41–42a n.13.

Further, the portion of *Skinner* on which the government relies is "likely *dicta*." Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, in *The Administrative State*, *supra* note 11, at 81, 99. That is because the Court had held that the mathematical cap on agency revenue-raising was a key reason why the statute in that case survived nondelegation, and only then did the Court discuss the standards for delegating the taxing power in particular. *Id.* If *Skinner* did hold that taxing delegations are subject only to an extraordinarily weakened test (which it did not), that would be

inconsistent with centuries of practice, as well as "the Constitution's original meaning," which if anything "would seem to compel a more restrictive test for delegations of the taxing power." Pet.App.41–42a n.13.

The government alternatively claims in passing that deciding how much money to raise for USF is a technical determination that Congress could delegate to the executive. Gov.Br.37–38. That argument is forfeited.[24] In any event, the government's premise is wrong. When it comes to deciding how much money to raise for a social welfare program, Congress itself is—and, under the Constitution, *must be*—the expert. "[D]etermining the ideal size of a welfare program involves policy judgments, not technical ones." Pet.App.35a.

As Joseph Story put it: "in respect to the particular subject of taxation, there is quite as much reason to suppose, that there will be an adequate assemblage of experience, knowledge, skill, and wisdom, in congress, and as adequate means of ascertaining the proper bearing of all taxes." 2 Story, *Commentaries*, *supra*, § 941, at 415. "To suppose otherwise, is to suppose the Union impracticable, or mischievous." *Id.*

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[24] The government raised the point below only in footnotes, *see* Gov.CA5.EnBanc.Br.34 n.12 (filed Aug. 30, 2023); Gov.CA5.Br.38 n.20, which is insufficient under circuit precedent, *e.g.*, *Bridas SAPIC v. Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003).

IV. THE USF REVENUE-RAISING SCHEME ALSO VIOLATES THE PRIVATE NONDELEGATION DOCTRINE.

Delegation to "private persons" is "delegation in its most obnoxious form" because "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 v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). "Could trade or industrial associations or groups be constituted legislative bodies … because such associations or groups are familiar with the problems of their enterprises? … The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537.

"When it comes to private entities, … there is not even a fig leaf of constitutional justification." *DOT*, 575 U.S. at 62 (Alito, J., concurring). "Private entities are not vested with 'legislative Powers.' Nor are they vested with the 'executive Power,' which belongs to the President." *Id.* The Constitution thus reflects the long-established practice in England, which required that "taxes[] have to be approved by Parliament as such and not merely by the merchants' representatives in the Commons *or outside it*." Einzig, *supra*, at 109 (emphasis added).

Despite this, each quarter, USAC—a "private corporation owned by an industry trade group," *U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 387 (5th

Cir. 2014)—undertakes the "imprecise exercise" of deciding how much money will be needed to cover universal service programs over the next quarter, *TOPUC II*, 265 F.3d at 328. USAC also determines expected interstate and international telecommunications revenues over the next quarter, based on self-reporting from private carriers. 47 C.F.R. § 54.709(a)(2).

A component within the FCC ministerially divides those two numbers, creating a proposed tax rate, which will be "deemed approved" under penalty of law fourteen days later unless the FCC affirmatively steps in to stop it. 47 C.F.R. § 54.709(a)(3); Gov.Br.43 (admitting Office of Managing Director's calculations are "routine").

In the 100-plus quarters of USAC's involvement before this suit was filed, the FCC had never substantively changed USAC's proposals. In fact, the FCC does not engage even in the *pretense* of substantive review, presumably because "it does not even have a documented process for checking USAC's work." Pet.App.7a. The FCC simply deems approved whatever figures USAC sends. And "[w]ith such a short time window, it appears FCC has no real choice but to accept USAC's proposed figures." Pet.App.50a n.17.

The government tries to analogize the FCC/USAC relationship to "Members of Congress speak[ing] to lobbyists" or "Presidents consult[ing] with private groups before making nominations." Gov.Br.40. To make the analogy fit, Congress would need to say that lobbyists' proposed bills will be printed and "*deemed*

enacted" by Congress unless it intervenes within fourteen days; or that private groups could propose nominations that will be transcribed and "*deemed submitted*" unless the President stops it. The government even says USAC's role is like letting private individuals sit on federal juries, Gov.Br.41, which is expressly required by the Constitution, U.S. Const. amends. V–VII. The government declines to identify which constitutional provision requires USAC to set tax rates. The patent weakness of these analogies only undermines the government's position.

In addition to lacking any historical analogue, this scheme fails to comply with this Court's precedents on private nondelegation, and the Court should reject the government's badly flawed counterproposal.

A. USAC Exercises Governmental Power.

"[I]t is clear that delegations to private entities raise constitutional concerns entirely distinct from delegations to the executive." Pet.App.43a. Although Congress can give some discretion to executive agencies carrying out the law, *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013), private delegations are different because private actors have no constitutional duties or powers, nor do they take an Article VI oath to uphold the law, *see, e.g.*, *Carter Coal*, 298 U.S. at 311; *DOT*, 575 U.S. at 62 (Alito, J., concurring); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.").

1. Some Petitioners (but not the government, as explained below) insist that USAC's work is purely ministerial and therefore does not implicate private nondelegation principles at all. CCA.Br.35–37; SHLB.Br.40–42.

It is unclear whether the ministerial versus non-ministerial framework is dispositive, as presumably even ministerial governmental powers cannot be delegated to private parties. In any event, USAC's work is not ministerial. This Court has defined a ministerial task as "one in respect to which nothing is left to discretion." *Gaines v. Thompson*, 74 U.S. 347, 353 (1868). But "discretion inheres in decisions about how much money to allocate to a massive federal welfare program," Pet.App.54a, and the "budget for the four USF Programs is not set by the FCC, which Congress put in charge of the program, but rather by USAC," James E. Dunstan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations* 3 (Pac. Legal Found. Working Paper, Apr. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4599298.

USAC's task is to make "projections" (a word its quarterly filing uses over 80 times in various forms, *see* JA1–82) about how much money to raise for an expansive federal program aimed at achieving a vague and largely undefined social goal. USAC makes findings as to individual carriers' eligibility, which then are aggregated to form the demand projection, i.e., how many billions of dollars to raise for universal service. The amount to be raised is thus highly dependent on USAC's voluminous decisionmaking.

USAC makes dozens of determinations based on discretion-inhering terms like "reasonable" or "suitable," *see, e.g.*, 47 C.F.R. §§ 54.308(a), 54.309(a), 54.322(g), 54.805(a); and it faces ranges measured in the hundreds of millions of dollars for some programs, *see, e.g.*, *id.* §§ 54.423(a), 54.507(a), 54.619(a). And that is before it decides how much to pay itself, which routinely tops $50 million *every quarter*. JA13. No wonder one FCC Commissioner said program limits on USAC were "a joke, not a budget." Benjamin Herold, *FCC Adds Broadband to "Lifeline" Program in Party-Line Vote*, Educ. Week (Mar. 31, 2016), https://www.edweek.org/technology/fcc-adds-broadband-to-lifeline-program-in-party-line-vote/2016/03.

Two people working independently with the same FCC regulations would never arrive at the same number needed for universal service each quarter—proof that discretion inheres in the exercise. Given that USAC "dictate[s] the size of the universal service contribution amount, which controls the size of a tax levied on American consumers," Pet.App.48–49a, it is clear that USAC's role is more than ministerial.

That presumably explains why the government has suddenly abandoned the "ministerial" argument after pushing it for years, including in its certiorari petition. Gov.Pet.20, 24, 26. Not once does the word "ministerial" appear in the government's merits brief.

2. The government instead argues that USAC "simply gives the FCC advice," Gov.Br.13, and therefore does not exercise "governmental power," Gov.Br.38. In this telling, USAC is the same as any

member of the public who merely submits ideas and proposals to government officials. But that framing fares no better. The FCC lets USAC's proposals become binding on the public without proper vetting or formal approvals, meaning the "FCC has virtually no input into setting the quarterly contribution factor." Dunstan, *supra*, at 5.

The *en banc* court below correctly recognized three requirements that must be satisfied to ensure that private entities remain subordinate to government officials. "First, government officials must have final decision-making authority. Second, agencies must actually exercise their authority rather than 'reflexively rubber stamp work product prepared by others.' And third, the private actors must always remain subject to the 'pervasive surveillance and authority' of some person or entity lawfully vested with government power." Pet.App.46–47a (cleaned up) (collecting authorities).

USAC's involvement violates the second and third requirements.

No Affirmative Approval. Under private nondelegation principles, the FCC must formally adopt USAC's proposals before they bind the public. *Id.*; *see Sunshine Anthracite*, 310 U.S. at 388, 399; *cf. INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983) ("To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."); *Ass'n of Am. Railroads v. DOT*, 721 F.3d 666, 671 (D.C. Cir. 2013) ("Even an intelligible principle cannot

rescue a statute empowering private parties to wield regulatory authority.").

But "FCC regulations provide that USAC's projections take legal effect without formal FCC approval" because they are "deemed approved" after fourteen days. Pet.App.49a (citing 47 C.F.R. § 54.709(a)(3)). The "FCC has, in effect, given private entities the final say with respect to the size of the USF Tax." Pet.App.49a. "[D]ictating the contribution amount" without formal FCC approval amounts to "an exercise of government power." Pet.App.54a.

The government makes an unpersuasive pass at claiming it *does* formally approve USAC's figures. The government argues—for the first time—that courts must "take at face value" the "FCC's report that the Commission independently approves the [USAC] projections and determines the contribution factor." Gov.Br.46. But there is no such "report." The government apparently is referring to the Office of Managing Director (OMD)'s quarterly release that shows the proposed Contribution Factor, Pet.App.141–49a, but nowhere does that document say the FCC has "independently" reviewed USAC's figures, Gov.Br.46, and OMD's breathless parroting of USAC's projections proves no such review occurs, Pet.App.141–49a; Gov.Br.43 (acknowledging OMD makes, at most, "routine adjustments").

Nor does the OMD release say the FCC has affirmatively "approve[d] the projections and determine[d] the contribution factor." Gov.Br.46. In fact, it says the opposite. It is labeled as a "proposed"

figure that has *not* been "approved." Pet.App.141a, 146a.

If further proof were needed, consider the current memorandum of understanding (MOU) between USAC and the FCC: "the Managing Director issues a public notice announcing *USAC's projections* and proposing a contribution factor based on those projections. The Commission reserves the right to revise *USAC's projections* within fourteen (14) days." *Memo. of Understanding Between FCC and USAC* ¶ 13, at 7, https://www.fcc.gov/sites/default/files/usac-mou.pdf (last accessed Feb. 9, 2025) (emphases added).

The MOU doesn't say OMD announces its *own* projections or that the Commission can revise "*OMD's* projections," as would be the case if the government's rendition to this Court were accurate. Rather, the MOU repeatedly calls them "*USAC's* projections," even *after* the OMD release is issued. And "USAC's projections," not the FCC's, are passively "deemed approved" fourteen days later.[25]

Recognizing this problem, some Petitioners respond that the FCC's lack of formal approval is simply a form of "policymaking" where the agency "decid[es] *not* to act" in the face of USAC's proposals. CCA.Br.41–42 (emphasis in original). But "not acting" here means that a private proposal automatically

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[25] Petitioners' *amici* acknowledge the emperor has no clothes: "USAC['s] … universal service rate projections take effect without formal FCC approval." Br.*Amicus.Curiae*.Ad.Hoc.Healthcare.Group.11.

becomes binding under penalty of law. That is not "policymaking"—it is abdication, and it is a paradigmatic example of a private nondelegation violation.

No Pervasive Surveillance. The FCC also violates the requirement that it exercise pervasive surveillance over USAC. The FCC does not "'independently perform[] its reviewing, analytical and judgmental functions' with respect to the privately supplied universal service contribution amount." Pet.App.49a. The FCC does not even have a mechanism to "check[] USAC's work. Instead, it appears to 'reflexively rubber stamp' whatever contribution amount USAC proposes." *Id.* (cleaned up). "[T]he FCC needn't (and overwhelmingly doesn't) do anything at all." *Consumers' Rsch.*, 88 F.4th at 937 (Newsom, J., concurring in judgment).

The government claims the FCC has on "occasion[]" "conduct[ed] meaningful review" of USAC's Contribution Factor work, Gov.Pet.23, but another Petitioner admits reality: "the FCC has never publicly reversed USAC's projections of demand," CCA.Br.42. The *en banc* court made swift work of the government's assertion, noting that even though the "FCC claims it has made three alterations to USF projections," "one of those was a ministerial change of the rate from .09044 to .091 because some carriers' computers could not handle five decimal places" and "the other two were not even initiated by FCC." Pet.App.7a n.1. Petitioners cite two revisions that post-date the initiation of this suit, Gov.Br.47, but those involved ministerial adjustments for excess

USF funds carried over from prior quarters. Again, if anybody were conducting merely ministerial work here, it's the FCC, not USAC.

Petitioners note the FCC oversees dozens of appeals from USAC invoicing disputes. Gov.Pet.21 (citing 47 C.F.R. § 54.719); SHLB.Br.42–43. This process is unavailable to the millions of consumers who never "receiv[e] an invoice" from USAC but have to pay money because of USAC's handiwork. *Consumers' Rsch.*, 67 F.4th at 786 n.6. Further, this appellate process directly refutes the notion that USAC's work is ministerial or nongovernmental. How could there be so many vigorous disputes about simple bean counting?

The government also cites a self-serving regulation saying USAC "may not make policy." Gov.Br.43. But USAC *inherently* makes policy because it exercises judgment and discretion. And even if it didn't, it still makes policy because the FCC does not formally approve USAC's proposals before they become binding, nor does the FCC engage in pervasive surveillance of USAC's work. On that note, the court below held that the FCC's outsourcing to USAC is problematic for the additional reason that "the decision to delegate government power to a private entity is itself a legislative one." Pet.App.63a n.21; *see Whitman*, 531 U.S. at 473. Petitioners respond that no specific authority to involve USAC is needed because USAC merely offers "advice," Gov.Pet.13, 24, or because its role is purely "ministerial," SHLB.Br.47. As explained above, both contentions are inconsistent with reality.

B. The Government Instead Proposes a Badly Flawed Test.

Rather than seriously try to satisfy the three-requirement test dictated by precedent and applied by the *en banc* court below, the government asks this Court to adopt a brightline rule: there can never be a private nondelegation violation if the agency "has *authority* to reject" private proposals. Gov.Br.45. (emphasis in original). In the government's telling, it is irrelevant whether the agency *actually* reviews or affirmatively approves private proposals before they become binding on the public, or whether the agency even has the practical ability or time to do so. The mere unexercised authority is categorically sufficient.

The government wants this test because it knows the FCC does not engage in independent review and approval of USAC's figures, and the only way out is a rule that unabashedly lets USAC sit in the driver's seat. The government's test is wrong and would be disastrous.

First, the government's proposal is impossible to reconcile with the existence of the private nondelegation doctrine. "[A]ny agency can always claw back its delegated power," but if merely pointing to the existence of that unexercised authority would automatically defeat a private nondelegation claim, then the "nondelegation doctrine [is] a dead letter." *Texas v. Rettig*, 993 F.3d 408, 416–17 (2021) (Ho, J., dissenting from denial of reh'g *en banc*). As Judge Williams put it, "vague or inadequate assertions of final reviewing authority" on the backend will not

"save an unlawful subdelegation" to a private entity. *U.S. Telecom*, 359 F.3d at 568.

That rule makes good sense. In the context of delegations from Congress to an agency, it is no answer that Congress retains the right to enact a new statute overruling an agency's particular use of delegated power. It makes even less sense to claim that this trick defeats a *private* delegation, given that such delegations are viewed more skeptically. *See Carter Coal*, 298 U.S. at 311; *DOT*, 575 U.S. at 62 (Alito, J., concurring).

Second, the government misreads the caselaw it believes supports its view. It invokes *Sunshine Anthracite*, *see* Gov.Br.45, but that case involved a critical difference: a government commission, "*not the [private] code authorities*, determine[d] the prices" to be charged, and the private proposals were null and void until the Coal Commission *affirmatively* adopted them, 310 U.S. at 388, 399 (emphasis added); *see also Rock Royal*, 307 U.S. at 577–78.

"To make *Sunshine Anthracite* apposite [to USAC], the Coal Commission's discretion to set minimum prices would have had to have been unfettered (it was not); the Coal Commission's passive acquiescence would have had to make the code authorities' price recommendations legally binding (it did not); and there would have to have been evidence that the Coal Commission *always* agreed with the code authorities'

price recommendations (there was not).” Pet.App.68a (emphasis in original).[26]

More apt is *Carter Coal*, where this Court held unconstitutional a statute that allowed privately-set minimum-price and labor codes to bind producers “without approval by any federal official.” Pet.App.44–45a (citing 298 U.S. at 282, 284). It is difficult to believe, as Petitioners must, that *Carter Coal* would have come out the other way if only the National Bituminous Coal Labor Board had said in advance that all codes proposed by private industry would be passively “deemed approved” by the Board after fourteen days.

Third, the government’s test would yield disastrous consequences. Private entities could directly exercise government powers. As the government would have it, Congress could say, “The defense budget is whatever Lockheed Martin wants it to be, unless Congress [or an agency] intervenes to revise it.” Pet.App.49a. Or the IRS could let private tax associations set tax rates for the entire country. *See* Introduction, *supra*. This would be catastrophic to the separation of powers and the liberty it protects. “[W]ith each successive delegation—from Congress to agencies, and then from agencies to private parties—we drift further and further from the locus of

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[26] Similarly, in *Currin v. Wallace*, 306 U.S. 1 (1939), “the producers had no power to designate the markets in which classification would be required; only the Secretary could do that,” Pet.App.45a.

democratic accountability." *Consumers' Rsch.*, 88 F.4th at 938 (Newsom, J., concurring in judgment).

Fourth, the government suggests its lethally simple test is preferable because the *en banc* court below "identified no workable standard" as an alternative. Gov.Br.46. Wrong. To begin, "passive acquiescence" in letting a private party's "recommendations [become] legally binding" is a clear test—one the government just as clearly fails. Pet.App.68a; *see* Pet.App.49a. That alone was sufficient to resolve the matter, but the court below gave the government the benefit of the doubt by nonetheless searching for other forms of evidence that the FCC exercises pervasive supervision and approval. Every trail went cold.

The Court should emphatically decline Petitioners' invitation to greenlight the transfer—really, the abdication—of government power to private parties.

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One of Petitioners' *amici* argued that the FCC's delegation to USAC is fine because international custom dictates that a "separate, independent (autonomous) entity" should calculate and collect universal service funds because it supposedly improves "efficiency."[27] But constitutional separation of powers is not designed to maximize "efficiency" and "autonom[y]." Quite the opposite. "[B]icameralism and presentment make lawmaking difficult *by design*." Pet.App.25a (emphasis in original). "It would

[27] Br.Frieden.CA5.*Amicus.Curiae*.23 (5th Cir. June 17, 2022).

dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *DOT*, 575 U.S. at 61 (Alito, J., concurring).

V. THE COMBINATION OF DELEGATIONS IS UNCONSTITUTIONAL.

Rather than declare invalid both the statutory delegation to the FCC and the FCC's subsequent delegation to USAC, the court below instead held that "*the combination* … violates the Legislative Vesting Clause in Article I, § 1." Pet.App.64a (emphasis in original). The "USF's double-layered delegation is unprecedented." Pet.App.67a. It "combines a sweeping delegation of the taxing power, with a subdelegation of that power to private entities with a personal financial interest in the size of the tax. It is difficult to imagine early Congresses would have authorized a similarly dual-layered delegation of the taxing power." Pet.App.68–69a (cleaned up).

Petitioners argue this "combination" approach is inconsistent with *Sunshine Anthracite*, Gov.Br.48–49, but that case never addressed the legality of a combination of delegations. It appears no party raised the argument, so the Court had no reason to address it. Further, *Sunshine Anthracite* expressly rejected both statutory and private delegation claims, 310 U.S. at 397–99, whereas the Fifth Circuit recognized "grave concerns" about the legality of each separate delegation before ruling on the narrower ground that the combination was unlawful, Pet.App.64a. Petitioners should applaud the Fifth Circuit's

restraint, not attack it as "exceed[ing] its appropriate role" as a court. CCA.Br.45.

In any event, this Court has emphasized in analogous contexts that multi-layer schemes dilute accountability—which is the core concern with delegation—and thus "[t]he added layer … makes a difference" from a constitutional perspective. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010). "[J]ust as the added layer of tenure protection at issue in *Free Enterprise Fund* 'made a difference' to the President's ability [to] control the executive branch, so too do the myriad obfuscations of the USF Tax make a difference to the Legislative Vesting Clause" because "accountability is undermined twice over." Pet.App.76–77a (cleaned up).

Petitioners are thus wrong that the two types of delegation are "non-cumulative." SHLB.Br.54. In fact, this Court has recognized a similar concern specifically in the nondelegation context. In *Schechter Poultry*, this Court labeled a dual-layer delegation—which involved private parties, too—as especially egregious. *See* 295 U.S. at 537–39. The President not only was given broad authority by Congress to adopt private codes as if they were binding, but the President could even modify them as he saw fit.

Far from "novel," CCA.Br.43, the analysis below thus tracks precedent and common sense. The Constitution bars "'Matryoshka doll[s]' of delegations and subdelegations." Pet.App.77a.

VI. THIS CASE IS NOT MOOT.

When the Court granted review, it added a fourth question presented: "Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit." None of the twenty-two circuit judges who have ruled on the various nondelegation suits against the USF have suggested any of them are moot. And all parties agree this case presents a live dispute. Gov.Br.14–18; SHLB.Br.18–19; CCA.Br.53–54. The Court should adopt that unanimous view.

A. Respondents Can Seek Restitution.

This case remains live for the simple reason that the government has not "returned the [money] collected from" Respondents during the applicable quarter. *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 n.48 (1996). This Court, the Fifth Circuit, or the FCC upon remand could order the return of Respondents' payments or a portion thereof, *see In re Federal-State Joint Board on Universal Service Access Charge Reform*, 20 FCC Rcd. 13779 (Aug. 22, 2005), and that potential monetary recovery keeps the dispute alive, *see Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8–9 (1978).[28]

The government claims—without any authority—that "the applicable judicial-review statute does not waive the government's immunity from damages claims." Gov.Br.14 (citing 28 U.S.C. § 2342(1)). But

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[28] Respondents' requested relief below encompasses restitution under longstanding Fifth Circuit precedent. *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975).

Respondents seek restitution, not damages, which is an important distinction in the context of sovereign immunity. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). In any event, the government's argument contradicts its position elsewhere that regional circuit courts *can* require the FCC to pay money in cases brought under § 2342(1). *See Sandwich Isles Commc'ns, Inc. v. United States*, 992 F.3d 1355, 1363 (Fed. Cir. 2021).

B. This Is a Textbook Case of Capable-of-Repetition-Yet-Evading Review.

In any event, this case presents a textbook example of a dispute that is "capable of repetition, yet evading review," which requires that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. FEC*, 554 U.S. 724, 735 (2008); *see* Gov.Br.14–15.

On the first requirement, this Court has held the challengers must reasonably have been able to "obtain plenary review by this Court." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978). This "considered plenary review" by this Court contrasts with review that is "by nature short-lived." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976); *see FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (explaining the test is whether a party could obtain "complete judicial review of its claims").

This Court has held that "a period of two years" is typically "too short to complete judicial review" under this doctrine. *Kingdomware Techs., Inc. v. United*

States, 579 U.S. 162, 170 (2016). Here, an FCC order setting the quarterly Contribution Factor necessarily lasts just three months by its own terms. There is no reasonable prospect that one of these challenges could receive "plenary" review by "this Court" within three months of when it was filed.

A request for an emergency stay is irrelevant to this framework because it does not provide "plenary review" but rather a preliminary ruling that does not even necessarily bind that same court. *See Neb. Press*, 427 U.S. at 547. And, obviously, a ruling by a lower court is not "review by this Court." *Bellotti*, 435 U.S. at 774.

On the second requirement, there is also a reasonable expectation—in fact, a *guarantee*—that the same injury will occur again because there is a new Contribution Factor every quarter, using the same process. "There is no mere risk that [the government] will repeat its allegedly wrongful conduct; it has already done so." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *see* Gov.Br.15.

C. Precedent Precludes Requiring a Request for Emergency Relief.

Adding a new requirement to seek an emergency stay would run contrary to dozens of this Court's decisions.

First, the Court has held that equitable considerations like parties' "dilatory tactics" are irrelevant to the capable-of-repetition-yet-evading-review inquiry. *Spencer v. Kemna*, 523 U.S. 1, 18

(1998). In *Spencer*, the Court held that defendants' and the lower courts' slowness were irrelevant to whether the challenged action was too short in duration to be fully litigated prior to cessation, or whether there was a reasonable expectation that the same action would occur again. *Id.* That holding accords with this Court's view that jurisdictional limitations typically do not turn on "equitable considerations" like diligence. *United States v. Wong*, 575 U.S. 402, 409 (2015).

Second, for more than a century, the Court has applied the capable-of-repetition-yet-evading review doctrine in dozens of cases, but—as far as the parties can tell (Gov.Br.15–16)—the Court has never held that the party bringing suit must also seek preliminary relief.[29] In many cases, the Court's

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[29] *See, e.g.*, *Kingdomware*, 579 U.S. at 169–70; *Turner v. Rogers*, 564 U.S. 431, 439–41 (2011); *Davis*, 554 U.S. at 735; *Wis. Right to Life*, 551 U.S. at 462; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999); *Morse*, 517 U.S. at 235 n.48; *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Honig v. Doe*, 484 U.S. 305, 318–20 (1988); *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 436 n.4 (1987); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987); *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 6 (1986); *Wis. Dept. of Indus., Lab., & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 285 n.3 (1986); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 603 (1982); *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 115 n.13 (1981); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979); *Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979); *SEC v. Sloan*, 436 U.S. 103, 109–10 (1978); *Bellotti*, 435 U.S. at 774–75;

opinion never mentioned, even in passing, whether emergency relief was sought.

Take *Kingdomware*, where the plaintiff challenged a Veterans Affairs regulation after losing out on government contracts with two-year terms. The plaintiff never sought preliminary relief, took five weeks to appeal, and then obtained a *six-month* extension for its opening brief before the Federal Circuit. Even though the disputes about the underlying contracts had become moot by 2013, this Court unanimously held in 2016 that the case was still live because "full judicial review" could not have occurred within the two-year term for the underlying contracts, and the underlying dispute was likely to reoccur. 579 U.S. at 169–70. There was no discussion of the plaintiff's failure to seek emergency relief, even though the Court was apparently aware of that aspect. *See id.* at 169 (noting the plaintiff had sought only "a *permanent* injunction") (emphasis added). Rightly so, because this Court's test simply does not consider such factors.

United States v. N.Y. Tel. Co., 434 U.S. 159, 165 n.6 (1977); *Neb. Press*, 427 U.S. at 546–47; *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Roe v. Wade*, 410 U.S. 113, 125 (1973), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 178–79 (1968); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Many other examples could be cited. The Court should not effectively overrule dozens of its prior decisions by adding an "emergency stay" requirement.

D. Requiring Emergency Motions Would Yield a Host of Problems.

Imposing a new requirement to seek emergency relief would also cause serious repercussions.

First, it would result in an explosion of motions for emergency relief or expedited merits review, as parties must pursue such relief in any case that may become moot during the yearslong time it takes to obtain plenary resolution by this Court. And if no emergency relief is obtained from the first court, plaintiffs presumably must keep appealing, including up to this Court, to prove their diligence.

As the government agrees (Gov.Br.17), this would likely *ensure* that complex and consequential legal issues are resolved on expedited timeframes with potentially limited briefing, which the Court disfavors. *See Does 1–3 v. Mills*, 142 S. Ct. 17 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

Second, in the circumstances here, such a requirement could very well *increase* the odds the underlying dispute evades review. A stay could last only through the end of the particular challenged quarter because each Contribution Factor, by its own terms, expires at the end of the quarter. Then a new stay—in a different lawsuit—would be required.

This Court has previously encountered a similar situation and held the case was not moot. *See N.Y. Tel.*

Co., 434 U.S. at 165 n.6 ("[E]ven had the [relevant] order been stayed pending appeal, the mootness problem would have remained, because the showing … upon which the order authorizing the [challenged action] was based would almost certainly have become stale before review could have been completed.").

E. Even if the Court Creates a Diligence Requirement, Respondents Satisfy It.

If the Court does require an equitable diligence inquiry as part of a jurisdictional mootness determination, Respondents would easily satisfy it.

Courts cannot "permit a federal agency to so arrange its timetables that the scope of its authority would continue to elude judicial scrutiny." *Empower Texans, Inc. v. Geren*, 977 F.3d 367, 372 (5th Cir. 2020); *S. Pac.*, 219 U.S. at 515 (jurisdiction is not "defeated" by "short term orders, capable of repetition"). The FCC set up a system where the time to bring suit is extraordinarily short, with passive approval occurring just a few days before a Contribution Factor goes into effect. Each Factor then expires after three months by its own terms.

Nor is this a situation where the plaintiff "himself has delayed [the case's] disposition." *Empower Texans*, 977 F.3d at 371. Respondents sued the FCC only *eight days* after the quarterly contribution rate was passively deemed approved, then filed their response to the government's certiorari petition just *one day* after it was filed. The Court would also have to consider "delay by the defendant," *id.* at 372, and here the government sought to hold this case in abeyance indefinitely at the Fifth Circuit while the

FCC prepared a report to Congress, relief that Respondents promptly opposed.

The Court should not add a new requirement after 115 years, but if it does, Respondents would satisfy it.

CONCLUSION

The Court should affirm.

ROBERT HENNEKE
CHANCE WELDON
TEXAS PUBLIC POLICY
FOUNDATION
901 Congress Avenue
Austin, TX 78701
(512) 472-2700
rhenneke@texaspolicy.com

R. TRENT MCCOTTER
Counsel of Record
JONATHAN BERRY
MICHAEL BUSCHBACHER
JARED M. KELSON
JAMES R. CONDE
JONATHAN FELD*
BOYDEN GRAY PLLC
800 Connecticut Ave. NW
Suite 900
Washington, DC 20006
(202) 706-5488
tmccotter@boydengray.com

* Admitted in Pennsylvania; practice supervised by D.C. Bar Members

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TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

ADMINISTRATIVE AGENCIES

SEC. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

(c) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

CODES OF FAIR COMPETITION

SEC.3. (a) Upon the application to the President by one or more trade or industrial associations or groups the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in

his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair

competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce

any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

…

OIL REGULATION

SEC. 9. (a) The President is further authorized to initiate before the Interstate Commerce Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines, and the Interstate Commerce Commission shall grant preference to the hearings and determination of such cases.

(b) The President is authorized to institute proceedings to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant rates in the transportation of petroleum or its products tends to create a monopoly.

(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.