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.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, et al.,
Petitioners,

v.

CONSUMERS' RESEARCH, et al.

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

BRIEF OF TECHFREEDOM AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

We address Respondents' Question 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.

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom frequently offers expert commentary both on the Universal Service Fund, see, e.g., Comments of TechFreedom, *In re Report on the Future of the Universal Service Fund*, FCC WT Dkt No. 21-476 (Jan. 18, 2022); and on nondelegation, see, e.g., Corbin K. Barthold, *A Path Forward on Nondelegation*, WLF Legal Pulse (Jan. 31, 2022), bit.ly/3LedfSe. In this case, those two issues intersect. Indeed, this case demonstrates why each issue is so important to TechFreedom, which filed amicus briefs on both sides of the circuit split below.

The Universal Service Fund plays an important role in ensuring that the benefits of technological innovation are enjoyed widely across the country. But the power to run the Universal Service Fund has been delegated to a federal agency, which has in turn subdelegated that power to a private organization. This double delegation—and, worse, private delegation—has led to lax oversight, runaway budgets, wasteful spending, and outright fraud.

A well-run Universal Service Fund could help close this country's digital divide. As the Founders

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* No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

understood, however, over-delegation, especially in the form of private delegation, is a recipe for bad governance.

SUMMARY OF ARGUMENT

When it approved the creation of the Universal Service Fund (USF), Congress started with an idea that was sound enough. It wanted to expand its policy of promoting universal access to communications services—a policy that began with telephone service in the early twentieth century—to modern telecommunications. Codified in the Telecommunications Act of 1996, the USF pays for "'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) (quoting 47 U.S.C. §§ 254(b)(6), (h)(1)).

Sadly, Congress did a poor job of structuring the USF to fit within the Constitution's parameters. Article I, section 1, "vest[s]" "all legislative Powers" in Congress, which may not delegate those powers to another branch of government. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). In creating the USF, Congress handed the Federal Communications Commission (FCC) open-ended power to define what services should be "universal," to set the amount of private-sector money (ultimately, consumer money) the government will collect to promote those services, and to determine how the money is spent. As written, the law governing the USF might well fail even the "notoriously lax" intelligible-

principle test for nondelegation. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014). See Resp. Brief 65-73. If this Court were to discard that test in favor of a more rigorous one, the constitutionality of Congress's delegation to the FCC would become more doubtful still. See Resp. Br. 44-61.

But we know this much for sure: After Congress passed the USF's enabling statute, the FCC botched the USF's implementation. It was bad enough that Congress handed such broad and ill-defined regulatory power to an independent agency—a government entity not subject to direct control by democratically elected leadership. To make matters worse, the agency then passed the power again, handing it to a private organization, the Universal Service Administrative Company (USAC). What's more, it did so without Congress's permission, which means that the USF is not subject to any congressionally established procedural guardrails.

In this brief, we explain why the FCC's subdelegation of legislative authority to a private entity is unconstitutional. In Section I, we discuss some of the cases—including this Court's most definitive word on nondelegation, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—that establish the invalidity of such "private" delegation. We then explain where the FCC goes wrong in contending otherwise. The FCC fails to grapple with (1) the fact that it delegated government authority to USAC without Congress's permission and (2) the fact that it lets USAC operate free of virtually any oversight.

In Sections II and III, we explore some of the reasons why private delegation is so problematic. For one thing, it flouts the Framers' understanding of democratic representation. For another, it is pernicious to accountable governance—a fact the history of the USF well illustrates.

In Section IV, we turn to a more subtle, but still vital, point: that agency-set procedural rules cannot cure an unconstitutional private delegation. For purposes of a nondelegation analysis, we establish, procedural requirements concocted by an agency count for nothing. The reality is that the FCC has placed few procedural checks on USAC. But no amount of procedural protection created by the FCC, and then imposed on USAC (and itself), could rescue the FCC's subdelegation of power to USAC from constitutional invalidity.

The USF, as structured, is probably unconstitutional. USAC, however, is clearly unconstitutional, and this Court should take the opportunity to say so.

ARGUMENT

I. THE FCC'S SUBDELEGATION OF AUTHORITY TO USAC IS UNCONSTITUTIONAL.

Private delegation violates the Constitution. The FCC's subdelegation of authority to USAC is unconstitutional under this principle.

A. Private Delegation Violates Article I Of The Constitution.

The most prominent case on nondelegation, *Schechter Poultry*, 295 U.S. 495, is also an important case on private delegation. Seeking to combat the Great Depression, President Franklin Roosevelt signed the National Industrial Recovery Act (NIRA) of 1933. NIRA Section 1 set forth Congress's industrial "policy"—a mishmash of goals that included reducing unemployment, improving labor standards, and "otherwise" rehabilitating industry. Section 3 empowered the President to approve "codes of fair competition" presented to him by trade or industry groups. Although the President could also create such codes himself, *Schechter Poultry* involved a code created by private entities. The chicken dealers of New York drafted a "Live Poultry Code," which President Roosevelt approved. A slaughterhouse in Brooklyn challenged the code and invoked nondelegation.

Defending NIRA, the government tried to paint the private production of codes as a virtue—as a way to generate codes "deemed fair for each industry … by the persons most vitally concerned and most familiar with its problems." 295 U.S. at 537. The Court, however, did not see it that way. On the contrary, the Justices treated the strong role played by private parties, in administering NIRA, as a grave constitutional defect. "[W]ould it be seriously contended," they asked:

> that Congress could delegate its legislative authority to trade or industrial associations or groups so as to

> empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in [NIRA] section 1?

Id. "The answer," the Court concluded, "is obvious." *Id*. "Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id*.

A year after issuing *Schechter Poultry*, the Court confirmed the unconstitutionality of private delegation in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The case was, in effect, the hypothetical in *Schechter Poultry* brought to life: The statute in question empowered coal industry groups to issue binding wage-and-hour codes. "This," *Carter* declares, "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 311. As *Carter* points out, private delegation is worse than intra-government delegation. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another."

Id. Letting one private party regulate another is "clearly arbitrary," *Carter* insists, and "an intolerable and unconstitutional interference with personal liberty and private property." *Id*. (citing, among other authorities, *Schechter Poultry*).

"*Even an intelligible principle* cannot rescue a statute empowering private parties to wield regulatory authority." *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), vacated and remanded on other grounds, 575 U.S. 43 (2015) (emphasis added); accord *Nat'l Horsemen's Ass'n v. Texas*, 53 F.4th 869, 882 n.24, 883 (5th Cir. 2022). Simply put, "[f]ederal lawmakers cannot delegate regulatory authority to a private entity." 721 F.3d at 670.

B. The FCC Fails To Justify Private Delegation To USAC.

The FCC contends that USAC is its subordinate. The agency emphasizes how it could, in theory, undo any of USAC's decisions. But this overlooks at least two key problems. First, an agency may not subdelegate government power to a private entity without Congress's permission—period. And second, even if an agency may at times oversee a private entity's use of government power, the FCC has violated the Constitution by failing to engage in such oversight.

1. Congress Did Not Permit The FCC To Subdelegate Power To USAC.

Congress gave the FCC immense and open-ended authority to run the USF. That's problematic; but at

least it's *what Congress did*. What Congress *did not* do was authorize the FCC to hand the task of wielding that authority—a task that would, if the FCC did it itself, constitute almost forty percent of the agency's operating budget—to a private organization. Compare FCC, *2025 Budget-In-Brief* at 6 (Mar. 2024) (proposed budget of $591 million), tinyurl.com/8aepm7a4, with USAC, *2023 Annual Report* at 4 (Mar. 2024) (budget of $368 million), tinyurl.com/ynxh6b3k.

The "manipulation of official appointments" was "one of the American revolutionary generation's greatest grievances" against the British monarchy. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991). The Framers were "concern[ed]," therefore, about the possibility "that the President might attempt unilaterally to create and fill federal offices." *Weiss v. United States*, 510 U.S. 163, 188 n.2 (1994) (Souter, J., concurring). They wanted those who structured the federal government to be "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. That is why "Congress has plenary control over the salary, duties, and even existence of executive offices." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 500 (2010); see also *Myers v. United States*, 272 U.S. 52, 129 (1926), overruled on other grounds, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). "The power to create federal offices," the "Framers … assumed," would "belong to Congress." *Weiss*, 510 U.S. at 184 (Souter, J., concurring).

An agency has no authority, therefore, "to re-delegate [its] power out to a private entity." *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., joined by Jones, Smith, Elrod, and Duncan, JJ.,

dissenting from denial of rehearing en banc); see also *Texas v. Comm'r of Internal Revenue*, No. 21-379 (U.S., Mar. 28, 2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting denial of certiorari). The FCC's delegation of power to USAC "was effectuated not by Congress, but at the whim of an agency—and without Congressional blessing of any kind." 993 F.3d at 410. This was improper.

In its defense, the FCC can only cite (FCC Br. 48) a general authorization, at 47 U.S.C. § 154(i), to "perform any and all acts," consistent with the Communications Act of 1934, "as may be necessary in the execution of its functions." But to repeat: "Congress has plenary control over … executive offices." *Free Enter. Fund*, 561 U.S. at 500. Given this important constitutional fact, we must assume that when Congress wants to *create a new federal office*, it does so in a statute that *creates a new federal office*. Section 154(i), it hardly needs saying, does not create a new federal office. (Who runs this body? How are they chosen? What are they supposed to do? How are they held accountable? The FCC decided all these things for itself. 47 C.F.R. §§ 54.701-717. Congress provided no help, for the obvious reason that it didn't grant permission to create a new organization in the first place.)

What's more, this is a frying pan-into-fire situation. As read by the FCC, Section 154(i) is the biggest nondelegation problem in this case. Congress may not bestow on an agency the power to undertake "any and all acts," if that means the agency may go about standing up entire sub-agencies. Read that literally, such a clause would lack an intelligible

principle. Section 154(i) must instead be read as a "housekeeping" clause that authorizes internal "rules of agency organization, procedure or practice." *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979).

2. Even If USAC Is Subordinate To The FCC *In Theory*, USAC Is Not Subordinate To The FCC *In Practice*.

Even if Congress *authorizes* an agency to subdelegate authority to a private entity—which has not happened here—that is not the end of the private delegation analysis. "*At a minimum*, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (Sutton, C.J.) (emphasis added). And "whether subordination always suffices to withstand a challenge raises complex separation of powers questions." *Id*. What is clear, though, is that proper subordination is lacking here.

True, the FCC has issued regulations that technically "subordinate" USAC to the FCC. FCC Br. 42. As we'll see, those regulations count for nothing in the constitutional analysis. See Sec. IV, infra. But in any event, the regulations here, as put into practice, do not "suffice[]" to "withstand a non-delegation challenge." *Oklahoma*, 62 F.4th at 229. For USAC is not *in fact* "subordinate" to the FCC. Subordination on paper is not the same as actual oversight.

Nothing the FCC says establishes that it engages in genuine oversight of USAC:

- The FCC stresses that USAC provides "non-binding advice." FCC Br. 41. But it is more accurate to say that USAC submits *proposals*—read: demands for large sums of money from regulated entities—for *approval* by the FCC. And the FCC has a long track record of serving simply as a conduit through which USAC's "proposals" flow. Indeed, the FCC effectively concedes that it has never meaningfully modified USAC's proposed budget. *Id.* at 47. (Although the FCC tries (*id.* at 42-43) to make it sound as though it engages in substantive review of the process by which USAC *produces* the proposals, such "review" in fact amounts to no more than making a few ministerial adjustments. See Resp. Br. 9, 75, 81.)
- The FCC protests that, even if we can't see it from the outside, it indeed reviews the USAC proposals it invariably approves. FCC Br. 42. Who says? The FCC need not review and approve USAC's work: A quarterly budget submitted by USAC is "deemed approved" by the FCC after fourteen days of inaction. 47 C.F.R. § 54.709(a)(3). Because the FCC need not show its own work—need not, for that matter, even issue a summary order—when it approves a USAC demand, there is no way to tell whether it reviews USAC's work. (The FCC says its rubberstamping of USAC proposals is itself evidence of "general [FCC] oversight." FCC Br. 47. But this habitual inaction could equally be evidence of neglect.)

- The FCC emphasizes that carriers may challenge USAC proposals before the FCC and obtain relief. FCC Br. 43. But that review is cursory at best. The FCC summarily resolves dozens of challenges to USAC policy determinations at a stroke, in orders that offer little or no justification for the FCC's decisions. See, e.g., FCC, Public Notice, *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, No. DA 22-448 (Apr. 29, 2022) (FCC order summarily resolving dozens of challenges to USAC policy determinations).

Even if the FCC's subdelegation of authority to USAC were otherwise valid—it's not—the agency's extraordinarily lax oversight of USAC would render the subdelegation unconstitutional.

In the way it actually operates, USAC is no different from a trade association that's given the power of a "legislative bod[y]" because of its "familiar[ity] with the problems of [its] enterprise." *Schechter Poultry*, 295 U.S at 537. (Indeed, USAC is run by people with strong ties to industry trade groups. Resp. Br. 8.) Such unsupervised (or barely supervised) private governance is "utterly inconsistent with the constitutional prerogatives and duties of Congress." 295 U.S. at 537.

The FCC complains that second-guessing its interactions with USAC would harm the separation of powers. FCC Br. 46. But this is just a scare tactic. The Court is not being asked to second-guess executive judgments *in general* (see *id.*); it is being asked to

scrutinize the FCC's dealings with a *private corporation*. And if the FCC loses this case, the next case won't be about whether Senators are "relying too much on staffers" (*id.*); for congressional staffers, unlike USAC officials, don't work for a *private corporation*. The private-delegation piece of this case has no wider ramifications for *intra*-government affairs. And to the extent the case raises difficult matters of degree (e.g., how much oversight of USAC is enough), it's a problem created by the presence in this case of a *private corporation*—and thus a problem of the FCC's own making.

II. PRIVATE DELEGATION OFFENDS THE CONSTITUTIONAL PRINCIPLE OF REPRESENTATIVE DEMOCRACY.

What makes private delegation so "utterly inconsistent" with Congress's role under the Constitution? *Schechter Poultry*, 295 U.S. at 537. Undoubtedly, the short answer is: the Constitution itself. "[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *W. Va. v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citing *Federalist* No. 11 (Hamilton)); see also *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). If Congress cannot pass lawmaking power to other government bodies, it stands to reason that government bodies cannot pass lawmaking power to private groups.

A slightly longer explanation is that the Framers made laws difficult to pass in order to promote liberty, encourage deliberation, protect minorities, guard

against faction, and ensure accountability (this last goal being one to which we will return). See *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). Letting Congress delegate its lawmaking power would frustrate these aims. *Id*. at 2134-35. And, once again, what is true of delegation to other government branches is true as well of subdelegation to private parties.

Yet private delegation is also worse than intra-government delegation in a key way. Both an executive agency and a private regulator might, at least in theory, be structured so as to promote caution, deliberation, care for minority interests, and accountability. But when lawmaking power is delegated to a private party, any semblance of representative governance is lost.

"If one maxim reflected" the American colonists' "ideas of representation," it was "the belief that a representative assembly 'should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.'" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203 (Vintage 1997) (quoting John Adams, *Thoughts on Government* (1776)). The colonists demanded far higher "standards of representation" than "the minuscule electorate of Georgian Britain and the oligarchic Parliament it supported could claim." *Id*. at 214. The revolutionary movement arose from the colonists' rejection of "the British idea … of being virtually represented"—an idea that "struck Americans then, and us today, as absurd." Gordon S. Wood, *Power and Liberty:*

Constitutionalism in the American Revolution 14 (Oxford Univ. Press 2021).

Some, to be sure, questioned the practicality, or the wisdom, of overly direct representation. "The idea of an actual representation of all classes of the people, by persons of each class," Hamilton complained, "is altogether visionary." *Federalist* No. 35. Madison, for his part, worried that the people could not control their passions. He remarked the Athenian mob's capacity to decree "to the same citizens the hemlock on one day and statues on the next." *Federalist* No. 63. In *Federalist* No. 10, Madison suggested that wise representatives should seek to "discern the true interest of their country," even when that "true interest" diverges from the views "pronounced by the people themselves."

It is arguably in the "populist Anti-Federalist calls for the most explicit form of representation possible, and not in Madison's *Federalist* No. 10," that "the real origins of American pluralism and American interest-group politics" are to be found. Gordon S. Wood, *The Radicalism of the American Revolution* 259 (Vintage 1993). Transforming itself into a "society that was more egalitarian, more middling, and more dominated by the interests of ordinary people than any that had ever existed before," America "experienced an unprecedented *democratic* revolution." *Id.* at 348 (emphasis added). Lincoln did not extol government of all of the people, by a few of the people, for the rest of the people.

But even those who favored a more "filtered" representation would never have tolerated private

delegation. Private persons are not "proper guardians of the public weal," *Federalist* No. 10; if anything, they are "advocates and parties to the causes which they determine," *id*. The notion that the public is "virtually represented," when lawmaking power is placed in private hands, is, indeed, "absurd." Wood, *Power and Liberty*, supra, at 14. "Such a delegation of legislative power is unknown to our law." *Schechter Poultry*, 295 U.S at 537.

"Our right to vote only matters if our elected officials matter. There's no point in voting if the *real* power rests in the hands of unelected bureaucrats—or their private delegates." FCC Pet.App. 87a (Ho, J., concurring).

III. PRIVATE DELEGATION LENDS ITSELF TO POLITICALLY UNACCOUNTABLE GOVERNANCE.

Does private delegation violate more than just Article I? It has been argued that "the doctrine of forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers." *Ass'n of Am. Railroads*, 721 F.3d at 671 n.3 (quoting A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 Duke L.J. 17, 153 (2000)); see also *Carter*, 298 U.S. at 311 (declaring a private delegation of lawmaking power "a denial of rights safeguarded by the due process clause of the Fifth Amendment").

The impulse to see private lawmaking as a due process problem is yet another sign that private

delegation is an unusually egregious constitutional offense. We have seen that it is qualitatively worse than intra-government delegation (flouting, as it does, core principles of representative government). But it is also worse in degree, in that it takes the problem of unaccountability created by intra-government delegation and increases it. While delegation to the Executive Branch harms "principles of political accountability," such "harm is doubled … in the context of a transfer of authority … to private individuals." *NARUC v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984).

Look no further than USAC, a fundamentally dysfunctional institution. USAC is complex: It requires applicants for funding to complete a "Byzantine set of forms." James Dunstan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations* at 6, Center for Growth and Opportunity (Apr. 23, 2023), tinyurl.com/msaz4eau. USAC is closed: When it rejects an application, "the same group … that made the initial decision hears [any] appeal." *Id*. USAC is hidebound: The Government Accountability Office regularly "issues a report on USF problems, makes recommendations for addressing these problems, and then, years later, issues another report finding that little has changed." Corbin K. Barthold, *The FCC's $200 Billion Disaster*, Pirate Wires (Dec. 20, 2024), tinyurl.com/5e7wcpxp. USAC is opaque: "As a private entity, [it] isn't subject to Freedom of Information Act (FOIA) disclosures, rendering it all but impossible to determine the salaries or bonuses of [its] managers and staff." Dunstan, supra, at 7.

The biggest sign of USAC's dysfunction is runaway USF spending. What was once a 4% tax on end-user interstate telecommunications revenue, as of 1998, is "routinely over 35% now." Resp. Br. 11. The so-called contributions collected have ballooned from $1.37 billion in 1995 to more than $9 billion in 2021. *Id*. at 12. (Making matters worse, this fee is a regressive flat tax paid, by all but the poorest Americans, as a line item on monthly phone bills.) No one is minding the till—a fact made all the clearer by the "history of extensive fraud, waste, and abuse" that has occurred on USAC's watch (or lack thereof). *Id.* at 12.

Even when it does take a stab at fiscal responsibility, USAC manages to flout due process. USAC appears to reward (or to have rewarded) bonuses to employees based on how much money they "recover" from audits of beneficiaries. Dunstan, supra, at 7. Meanwhile, USAC does not (or for years did not) think any statute of limitations governed these recoupment efforts. *Id*. at 9-12. As a result, USAC has frequently demanded that beneficiaries return money they received five or even ten years earlier—long after the money has been spent and key evidence they'd use to defend the initial grants is gone. *Id*. at 17.

This is not an instance where the answer to the "constitutional issue" rests simply on "musings" about "political theory." *Collins v. Yellen*, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part and concurring in the judgment). USAC embodies the Founders' fear of unaccountable government both in theory and in practice.

IV. USAC CANNOT BE SAVED BY PROCEDURAL REQUIREMENTS SET BY THE FCC.

"The degree of agency discretion that is acceptable varies according to *the scope of the power* congressionally *conferred*." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2000) (emphasis added). Likewise, it varies according to *how much process* is congressionally *required*. A statute that requires an agency to undertake more process before acting, in other words, may confer more overall power to act. Congress can avoid making "a pure delegation of legislative power" by "enjoin[ing] upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935) (quoting *Wichita R.R. Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 59 (1922)).

When an agency wields broad regulatory power, in short, it should do so subject to "formal administrative procedure," which tends "to foster the fairness and deliberation that should underlie" an "administrative action" with "the effect of law." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Crucially, though, the procedures must be set by Congress itself. "[A]n agency can[not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472.

The FCC makes much of the fact that it has imposed various procedural rules and limits on USAC. FCC Br. 42. Among other things, USAC must maintain subcommittees to oversee the USF's various

programs, 47 C.F.R. § 54.701; it must submit "the basis for [its] projections" to the FCC, *id.* § 54.709(a)(3), file "an annual report" with the FCC and Congress, *id.* § 54.702(g), and undergo audits, *id.* § 54.717; and it must avoid "mak[ing] policy, interpret[ting] unclear provisions of [the law], or interpret[ting] the intent of Congress," *id.* § 54.702(c). These are flimsy guardrails for an entity that wields such broad power. (Not that either USAC or the FCC are particularly disciplined about following them to begin with. See Sec. I.B.2, supra.) But in any event, procedural requirements set by the FCC, however rigorous, cannot render USAC valid under Article I. Only Congress can repair an improper delegation. *Whitman*, 531 U.S. at 472-73. Whatever process the FCC might require of USAC does not count, therefore, in an analysis of whether USAC is constitutional. For constitutional purposes, any such process is equivalent to no process at all. As far as Article I is concerned, the current setup is no different than one in which the FCC instructed USAC to draw its proposed contribution factors from a hat.

CONCLUSION

The judgment should be affirmed.

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Respectfully submitted,

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