Nos. 24-354 and 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

v.

CONSUMERS' RESEARCH, ET AL.,

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL.,

v.

CONSUMERS' RESEARCH, ET AL.,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 14 OTHER STATES AND THE ARIZONA LEGISLATURE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Too often, the American legislative process looks like this:

A bill is proposed to address an important problem. The bill is rather vague on the details, but its supporters can at least reassure everyone that they've tackled the issue—and maybe emphasize the funds the bill appropriates to prove it. The bill wends its way through Congress. Eventually, it passes. Congratulatory speeches are given, handshakes are exchanged, and the President signs the bill. Voters are sufficiently placated. Only then does the *real* work of legislating begin, when an agency staffer in a quiet office somewhere in Washington sits down to start writing the rules or making the decisions that might give Congress's work any real meaning.

This story should unsettle anyone who reveres our traditional constitutional structure. "[N]o provision in the Constitution … authorizes the President to enact, to amend, or to repeal statutes." *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998), yet executive agencies have been doing that in everything but name for a great long while. And today, it's the agency's rules that too often impose real obligations, create real duties, and otherwise produce real law. Meanwhile, legislators are happy to play along because they can then shift responsibility to the agencies for any missteps in the process. See David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 274-75 & n.315 (2020).

The program at issue here—the Universal Service Fund—repeats this same unfortunate story. Congress passed a law to collect money to address an important

issue: providing universal telecommunications services. But the law was deeply flawed—a "model of ambiguity or indeed even self-contradiction." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). So after providing only "vague, general language" articulating "aspirational" principles, *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 321-22 (5th Cir. 2001), Congress left the actual work of ensuring universal service to the Federal Communications Commission. Congress then walked away from the problem.

But the story here has an extra troubling twist. The FCC, as it turns out, was also not very interested in setting the rates that would be used to collect funds from interstate telecommunications providers (and ultimately, consumers). So it in turn created the Universal Service Administrative Company, "a private corporation owned by an industry trade group." *United States ex rel. Shupe* v. *Cisco Sys., Inc.*, 759 F.3d 379, 387 (5th Cir. 2014). The Commission then gave the Company the power to make key program-related decisions, including setting the rate for the de facto tax used to fund the program and identifying the places where the money can be spent. See 47 C.F.R. § 54.709. Although the FCC ostensibly retains nominal oversight power, the Company is the one calling the shots. So now, when Americans see an opaque but sizeable charge pop up on their cell phone bill each month, they don't call their congressman. And billions of dollars are collected with little real accountability.

Our Constitution demands more. Congress must exercise the legislative power, especially when it comes to bread-and-butter issues like imposing a multi-billion tax and then spending the spoils. An agency can't make laws; a private corporation can't, either. The Fifth Circuit recognized no more than these foundational principles,

which most people label the nondelegation doctrine. The court below applied a genuine understanding of the nondelegation doctrine, the precise constitutional limit that's supposed to stop the kind of buck-passing seen here. It called on Congress to do the actual legislative work of addressing universal service.

The Court should affirm. Our country—and the States themselves—need a meaningful nondelegation doctrine to ensure Congress fulfills its constitutional mission. Anything less will allow agencies to take more and more of the core legislative power that our Constitution has said belongs to Congress alone. And "federal action that violates the Constitution's separation of powers may also invade rights which are reserved by the Constitution to the several states." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX L. REV. 1321, 1324 (2001) (cleaned up). These stories simply can't be allowed to repeat anymore.

SUMMARY OF ARGUMENT

I. For many years now, the nondelegation doctrine has gone essentially dormant. The current test—the intelligible-principle standard—serves largely as a greenlight for sprawling delegations of traditional legislative power. In contrast, the originalist understanding of nondelegation examines the nature of the power to be exercised (rather than a few words that might be dug up from the statute) and turns Congress back when it tries to vest legislative power elsewhere. Beyond that, this more fulsome form of the nondelegation doctrine raises some special concern when an agency takes it a step further and sends legislative power to a private entity. The Court should return courts to this originalist understanding.

II. Those who would warn the Court away from giving real respect to nondelegation principles are wrong. The benefits of the present state of play are largely overstated. Meanwhile, the supposed harms that would flow from holding Congress accountable are no real harms at all. We don't even have to guess at these consequences because the States—having already reinvigorated the nondelegation doctrine in many places—bring experiences that confirm what we can expect.

III. The States need a real nondelegation doctrine to ensure that lawmaking happens before Congress. States can participate in lawmaking before that body much more effectively than they can before agencies, especially independent agencies. Federalism matters, and a weak nondelegation doctrine weakens federalism in turn. And the little nod toward federalism that the particular law here includes doesn't solve the fundamental problem, either.

IV. The statute at issue contains some of the feeblest constraints on the agency's discretion to be found in the code books. It directs core congressional functions—taxing and spending—to an independent agency. And it piles on by giving broad authority in this process to a private entity, rendering the whole process doubly wrong. The Fifth Circuit was right to declare it unconstitutional.

V. Lastly, those who complain that the Universal Service Fund is just too important to afford a meaningful remedy for the constitutional wrong are mistaken. Yes, the Universal Service Fund serves some important purposes. But those purposes cannot trump constitutional precepts. And the Court can ultimately shape an appropriate remedy to mitigate the harm if it is worried that a decision striking the program immediately down will cause too much upheaval.

ARGUMENT

I. The States—And Our Country—Need A *Meaningful* Nondelegation Doctrine.

A. The Founders thought the greatest threat to liberty is governmental power—and the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is a tyranny. THE FEDERALIST NO. 47 (James Madison). Responding to that threat, they defined the power the federal government could hold and then divvied it up among three co-equal branches. Divided power, the Founders said, would force one branch's ambition "to counteract" another's. THE FEDERALIST NO. 51 (James Madison). And as part of that division, keeping legislative power out of the hands of the executive has been "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892). "[T]he making of laws is entirely work of ... the legislative branch, of the sovereign power," Blackstone explained. 1 WILLIAM BLACKSTONE, COMMENTARIES *260-61 (1765). Only "tyrannical governments" tended to "vest[]" "the right both of making and of enforcing laws" in "the same body of men." *Id.* at 142. Thus, Blackstone—and the Founders in turn—expected that the legislative branch would "take care not to entrust the [executive] with so large a power, as may tend to the subversion of its own independence." *Id.*; see also, *e.g.*, CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 185 (1751) ("When the legislative and executive powers are united in the same person … there can be no liberty.").

The Court initially intended to put these separation-of-powers principles into action through the nondelegation

doctrine. That doctrine contemplates that Congress "can[not] delegate to the Courts, or to any other tribunals," or to anyone else, really, "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 23 U.S. 1, 42 (1825); accord *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). For nearly 200 years, the Court's nondelegation cases have at least recognized that truly legislative power resides with Congress. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935); *Panama Refin. Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928); *Marshall Field*, 143 U.S. at 693-94. And early cases endorsed a particularly fulsome understanding of the doctrine, recognizing a difference between "discretion as to what [law] shall be" (non-delegable legislative power) and "discretion as to its execution" (an executive function). *Marshall Field*, 143 U.S. at 693-94. True to the Constitution, these cases recognized that "the Constitution vests all legislative powers in Congress, [so] Congress cannot vest any such powers elsewhere … [and] cannot divest itself of the powers that the Constitution vests in it." Philip Hamburger, *Delegating or Divesting?*, 115 NW. U.L. REV. ONLINE 88, 110 (2020).

The originalist understanding contemplated a rigorous division between legislative and executive functions—one fully consistent with a full-throated nondelegation doctrine. See generally, *e.g.*, Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 663 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021). Particularly in the years just after the Founding,

"members of the Founding generation involved in public life and government repeatedly argued that Congress could not delegate its legislative power to the Executive." Wurman, *supra*, at 1503. In early debates over post roads, immigration authority, and more, lawmakers and others recognized that the Constitution did not empower them issue "general conveyance[s] of authority" to the executive branch. Aaron Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718, 737-79 (2019) (comprehensively surveying pre-ratification evidence, post-ratification legislative evidence, early case law, and state decisions in finding an originalist conception of nondelegation).

But the Court's tests appear to have slipped from an originalist understanding based on these constitutional first principles. Again, early cases of the 1900s, at least, were promising. When the Court confronted overly broad legislative delegations in the 1930s, for example, it rebuffed them. *Schechter Poultry*, 295 U.S. at 551; *Panama Refin.*, 293 U.S. at 432-33. The Court at that time stood against "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring). Yet things soon began to unravel. "To the confusion of lower courts and the frustration of legal scholars, sweeping grants of what appear[ed] to be embarrassingly legislative powers [were] consistently upheld against nondelegation challenges." Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1231-32 (2018). For about ninety years, "the Court has averted its eyes while Congress has enacted a host of expansive delegations with only minimal policy guidance." Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 143-44 (2011).

The Court's more hands-off approach led to the intelligible-principle standard. See, *e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 371 (2002). In its earlier version, the theory said that a congressional act does not violate the separation of powers if Congress articulates "an intelligible principle" to guide an agency's discretion. *J.W. Hampton*, 276 U.S. at 409. This standard has since "mutated" into one with no footing "in the original meaning of the Constitution, in history, or even in" *J.W. Hampton* itself. *Gundy*, 139 S. Ct. at 2139-41 (Gorsuch, J., dissenting). This test generally does not evaluate the nature and scope of the power that is delegated. Contrast with Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1258 (2021) (proposing that courts "should determine the original public meaning of each of Congress' powers, including what that meaning says about Congress' ability to delegate each power," to evaluate the constitutionality of delegations). Instead, it becomes a hunt for sufficient words that might arguably provide some direction—even in the most minimal form—to entity to whom the delegation is made. And now, it sometimes seems like effectively any standard will do. See Pet.App.37a ("[T]he Supreme Court has upheld seemingly broad congressional delegations of core legislative functions."). Even broad statements of congressional purpose might get a judicial sign-off. See, *e.g.*, *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946) (looking to "the purpose of the Act, its factual background and the statutory context" to find an intelligible principle).

Under this "notoriously lax" test, Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014), the administrative state has flourished, "with hundreds of federal agencies poking into every nook and cranny of daily life," *City of Arlington* v. *FCC*, 569 U.S.

290, 315 (2013) (Roberts, C.J., dissenting); see also *Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 575 U.S. 43, 76-86 (2015) (Thomas, J., concurring in the judgment) (tracing the doctrine's long decline). The standard has become so weak that it is unclear to some today whether the nondelegation doctrine retains power. Scholars have attacked the present test's "untruth," "laxity," and "fictional" nature, raising questions about why we even go through the farce of applying it. Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1091-92 (2023). Even those who oppose the doctrine have said its "continual appearance in the case law has confused administrative law as a whole." Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1007 (2015). Given Congress's "propensity to send messages to constituents rather than instructions to agencies," John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 236 (1990), statutes have often become just speed bumps on the way to vast administrative efforts undertaken independent from Congress and accountability.

B. The Court should return the nondelegation doctrine to the originalist understanding—one that looks to whether *legislative* functions have been delegated (or, more accurately, improperly vested outside the legislative branch). "[C]lassifying governmental power" is no doubt an "elusive venture," "[b]ut it is no less important for its difficulty." *Dep't of Transp.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). Madison even called it "the great problem to be solved." THE FEDERALIST NO. 48 (J. Madison). But the Court still should embrace the challenge, as the Constitution requires "call[ing] foul" when necessary. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). The "inconvenience" of creating a meaningful standard "does not mean that the … Court may shy away

from tackling the difficult questions and enforcing the Constitution's checks on delegation." Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395, 448 (2020).

And really, the Court can easily spot at least some of the acts that fall within the heartland of legislative power. "The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective," for instance, "constitute the performance, in the constitutional sense, of the legislation function." *Opp Cotton Mills* v. *Adm'r of Wage & Hour Div. of Dep't of Lab.*, 312 U.S. 126, 144 (1941); see also *Hirabayashi* v. *United States*, 320 U.S. 81, 104 (1943) ("The essentials of [the legislative] function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution."); contra Br. for Fed. Pets. at 21 (arguing that the executive branch may exercise "substantial policymaking discretion"); *id.* at 37-38 (attacking the Fifth Circuit's "rigid dichotomy between policy judgments and technical judgments"). Other times, the Court has looked to the target of the relevant act to define its character. "It is the peculiar province of the legislature to prescribe general rules for the government of society," the Court has said, while "the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 10 U.S. 87, 136 (1810). Thus, the Court has some guideposts already laid if it is to return to an original understanding of legislative power. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 588 (1952) (finding the President had improperly exercised legislative power where he determined "certain policies should be adopted, proclaim[ed] these policies as rules of conduct to be followed, and again, like a statute,

authorize[d] a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution").

Remember that the nondelegation doctrine protects liberty by keeping policy decisions where the voters can see them—in Congress. It is human nature to work more carefully when others are watching. The nondelegation doctrine does its part "to protect liberty," *Dep't of Transp.*, 575 U.S. at 61 (Alito, J., concurring), by keeping lawmaking power "with the people's *elected* representatives" and away from unaccountable officials hidden inside bureaucracies, *Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (emphasis added). At the same time, half-loaf approaches to nondelegation—such as enforcing it through a canon of constitutional avoidance—can undermine accountability by upsetting "the fruits of legislative compromise." John M. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000).

Keeping lawmaking power in Congress is also important because lawmakers—like everyone else—can sometimes shirk tough decisions. See Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017). There's already some evidence that Congress is doing that; a decline in legislative activity in Congress has led two scholars to decry "the fall of lawmaking by legislation." Jonathan H. Adler & Christopher J. Walker, *Delegation & Time*, 105 IOWA L. REV. 1931, 1937 (2020).

Worse, lawmakers might try "to take credit for addressing a pressing social problem by" offloading it to the executive and then "blaming the executive for the

problems that attend whatever measures he chooses to pursue." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Justice Rehnquist thought that happened when Congress "pass[ed] this difficult choice" of how to address benzene exposure on to OSHA. *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment). It was not his imagination; legislators have admitted it happens. Congressman Elliott Levitas confessed that "[w]hen hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes." 122 CONG. REC. 31,628 (1976). Another of his colleagues confirmed the consequences: "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation.'" *Id.* at 31,622 (statement of Rep. Flowers). A meaningful nondelegation doctrine ensures Congress can't shirk—decisionmakers reap the benefits and bear the blame.

The Court should therefore redeploy the nondelegation doctrine to return responsibility to where it belongs—Congress.

C. Beyond these "public" nondelegation principles, the Court should also reaffirm a meaningful "private" nondelegation doctrine.

When Congress (or an agency) delegates functions outside the government entirely, this public-to-private shift is "delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936). It is "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537; see also, *e.g.*, *Texas* v. *Comm'r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., respecting the denial of certiorari) ("To ensure the Government remains accountable to the public, it

cannot delegate regulatory authority to a private entity." (cleaned up)). "[I]f people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Consumers' Rsch.* v. *FCC*, 88 F.4th 917, 925 (11th Cir. 2023) (cleaned up). What's more, private actors are "not bound by any official duty, but are free to [act] for selfish reasons or arbitrarily and may subject [others] to their will or caprice." *State of Wash. ex rel. Seattle Title Tr. Co.* v. *Roberge*, 278 U.S. 116, 122 (1928). So unsurprisingly, courts have resisted broad delegations of governmental power to private enterprises.

Take this Court's decision in *Carter v. Carter Coal Co.* There, the Court confronted a law in which Congress delegated substantial power to private coal mine operators; certain majorities of the operators and miners within a district court could set minimum wages and maximum hours for *all* the operators within the district. 298 U.S. at 310-11. This "power conferred upon the majority … to regulate the affairs of an unwilling minority" was "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." *Id.* at 311. The Court was unimpressed: the "delegation [wa]s so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it [wa]s unnecessary to do more than" cite a few decisions and move on. *Id.* Congress later revised the law to empower a federal agency to approve or reject the proposed rates and rules; with that real oversight, the law finally passed constitutional muster. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388 (1940). But the line was drawn, and it's now plain enough that a delegation of authority to write the rules for an

industry to the industry itself is "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537.

Lower courts have taken issue with broad delegations of power to private entities, too. In *Association of American Railroads* v. *DOT*, 721 F.3d 666, 668 (D.C. Cir. 2013) ("*Amtrak I*"), for example, the D.C. Circuit addressed a scheme in which Amtrak (which the Court perceived to be a private entity) "wield[ed] joint regulatory authority with a government agency. It started from the premise that "difficulties … are even more prevalent in the context of agency delegations to private individuals." *Id.* at 670. "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Id.* at 671. Private parties can "help," but no more. *Id.* In short: "Federal lawmakers cannot delegate regulatory authority to a private entity." *Id.* at 670. Given all that, Amtrak's role in setting certain metrics and standards was an improper delegation because it did not "function subordinately" to any federal (public) authority. *Id.* at 674. Its role was akin to "giv[ing] to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers." *Id.* at 668. Although this Court later vacated and remanded *Amtrak I* on other grounds, the D.C. Circuit later "st[oo]d by [its] analysis" that "detailed extensively why private entities cannot wield the coercive power of government." *Ass'n of Am. R.Rs.* v. *DOT*, 821 F.3d 19, 37 (D.C. Cir. 2016) ("*Amtrak III*").

Like the D.C. Circuit, other courts have stressed that private entities must play only a peripheral part in governing. They've used different language—some courts say that private entities can act as "aides and advisors,"

Oklahoma v. *United States*, 62 F.4th 221, 229 (6th Cir. 2023), while others speak of "advisory," "ministerial," or "administrative" functions, *Pittston Co.* v. *United States*, 368 F.3d 385, 395 (4th Cir. 2004); *United States* v. *Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989). But at bottom, all these descriptions reduce to the same basic principle: at an absolute minimum, "the [private] entity [must] function[] subordinately to the agency, and … the [federal] agency [must] retain[] authority and surveillance over the activities of the private entity." *Consumers' Rsch.*, 88 F.4th at 926 (cleaned up); *accord Amtrak I*, 721 F.3d at 673 ("[P]rivate parties must be limited to an advisory or subordinate role in the regulatory process."). And above this minimum, it may well be that agencies cannot delegate certain "inherently governmental activities" in *any* circumstances, such as activities "[s]ignificantly affecting the life, liberty, or property of private persons." Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. Rev. 397, 438 (2006) (quoting OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-76, REVISED PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), at A-2). Applying these principles once again ensures that decisions are made in the right place—Congress.

II. Worries About The Consequences Of A Meaningful Nondelegation Doctrine Are Overstated.

In the face of these salutary benefits, some insist that the risks of reembracing the nondelegation doctrine are just too great. But the evidence doesn't bear that out.

A. For instance, some think agencies act faster than Congress—but Congress can legislate quickly when it

wants to. President Bush signed the PATRIOT Act just three days after it was introduced. See Pub. L. No. 107-56, 115 Stat. 272 (2001); see also *Tiger Lily, LLC* v. *U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (giving more examples). Legislating by notice-and-comment rulemaking is not faster than legislating by bill in non-emergency situations, either. On average, it takes about 18 months. See Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (Cary Coglianese ed., 2012). This deliberative lawmaking is a feature—not a bug. The Founders deliberately "went to great lengths to make lawmaking difficult." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

Some also regard agencies as better experts, and they worry the nation will lose the benefit of agencies' expertise if nondelegation becomes real again. There's strong reason to question "the myth of expertise as an inviolable shield for agency action." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1011 (1986). Even if one were to assume that agency personnel are the most qualified to decide, "this faith in [agency] deliberation and administrative expertise stands at odds with" originalist understandings of "democracy itself." D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 88 (2017). But in any event, Congress can ensure that laws are technically sound by using its own experts, eliciting testimony from others, or commissioning reports from executive-branch experts, agencies like the FCC included. The Congressional Budget Office has top-notch experts on

financial, economic, and budget matters, for example. *Tiger Lily, LLC*, 5 F.4th at 675 (Thapar, J., concurring). And fact-gathering and investigation is the reason committees and (especially) subcommittees exist. Congress can access the same information that executive branch agencies have.

A more robust nondelegation doctrine also need not disrupt efficient governing. Most obviously, Congress can adopt existing regulations as statutes—it already does. See *Whitman*, 531 U.S. at 472 (noting "a subsequent Congress had incorporated the regulations into a revised version of the statute"). And applying a more rigorous nondelegation doctrine wouldn't require Congress to draft every fine detail into the statute. It would only require Congress to do the *meaningful* work of legislating—the kind of work it has shown itself more than equipped to do. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) (predicting that "[t]here should not be many" "extreme cases" requiring the Court to strike down "open-ended grants of authority," even under a more rigorous conception of the doctrine).

B. Many States have also refused to abandon true versions of the nondelegation doctrine, and their experience provides reassurance, too. See MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 450 (4th ed. 2014) ("The nondelegation doctrine has much greater practical significance at the state level than at the federal level."). Michigan's legislature, for instance, stepped up when the Michigan Supreme Court reinvigorated its state-law-based nondelegation doctrine and invalidated certain executive orders. See *In re Certified Questions From U.S. Dist. Ct., W. Dist. of Mich.*, 958 N.W.2d 1, 16 (Mich.

2020); see also Samuel Dodge, *Whitmer bill signings include tightened sex offender registration protocols, boosts in medical staffing*, MLIVE (Dec. 30, 2020, 11:09 a.m.), https://bit.ly/3WXARXC. Life moved on in Michigan even though the state court "reached a result far out of step with federal law." Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U.L. REV. 359, 394 (2023).

Dozens of other state-court decisions have invalidated statutes on a strong conception of nondelegation grounds without catastrophic effect. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (cataloguing 151 successful nondelegation challenges in state courts). And a recent study found "some evidence … that enforcement of the nondelegation doctrine in the states changed state legislative behavior and curbed delegation." Daniel E. Walters & Elliot Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication"*, 108 CORNELL L. REV. 401, 415 (2023). "[E]ven the vast majority of [so-called] *weak* nondelegation state courts invalidate statutes from time to time on nondelegation grounds," and yet no one has sounded the alarm in those States, either. Zoldan, *supra*, at 393. So real-world experience confirms that a meaningful nondelegation doctrine "would not lead to apocalyptic results." Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 305 (2022).

And the States' experiences with the *private* nondelegation doctrine are equally encouraging. "The states are not virgins with respect to this issue." Calvin R. Massey, *The Non-Delegation Doctrine and Private*

Parties, 17 GREEN BAG 2D 157, 165 (2014) (collecting authorities). States like Texas and Rhode Island have "exercise[d] more scrutiny over delegations to private parties on the basis that … more oversight [is needed] for nongovernmental officials exercising government power." Benjamin Silver, *Nondelegation in the States*, 75 Vand. L. Rev. 1211, 1245 (2022); see also, *e.g.*, *City of Lancaster* v. *Pa. Pub. Util. Comm'n*, 284 A.3d 522, 533 (Pa. Commw. Ct. 2022) (applying Pennsylvania's more muscular iteration of the private nondelegation doctrine); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 965 (2014) (collecting many other examples of state private nondelegation doctrines). Yet those States have yet to see any discernible ill effects from showing fidelity to the separation of powers and due process.

C. Many still insist that the Court should wait before returning to first-principle notions of nondelegation—yet the time is right to act. In truth, these issues have been simmering for years. "[T]he expansion of federal commerce and taxing powers, as well as the contraction of constitutional protections for economic liberties and property rights[,] have led to the rise of a modern administrative state" that requires some purposeful brakes. See Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 663 (2021). Other potential tools of congressional control, like the legislative veto, have fallen away. See *INS v. Chadha*, 462 U.S. 919, 966 (1983). So it's even more important that Congress get it right on the front end: exercising the legislative power in a genuine way and leaving the executive branch only with the interstitial work of execution.

Recent developments have only confirmed the need for a reinvigoration of nondelegation. For instance, "major questions" cases make it even more important to understand the doctrine—for "without knowing what [the] underlying [nondelegation] theory is, it becomes much harder to accurately apply a rule that ostensibly exists 'in service of' that underlying doctrine'" (at least to some). See Mila Sohoni, *The Major Questions Quartet,* 136 HARV. L. REV. 262, 300 (2022) (quoting *Gundy,* 139 S. Ct. at 2142 (Gorsuch, J., dissenting)). At the same time, the major-questions doctrine does not obviate the need to address nondelegation. The former doctrine asks whether Congress *has* delegated a broad power, while the latter doctrine consider whether Congress *can* delegate a broad power—thus acting as a backstop of sorts. And now that *Chevron* deference has also come off the board, see generally *Loper Bright Enters.* v. *Raimondo,* 144 S. Ct. 2244 (2024), it has become even more important that Congress be the one to actually exercise legislative power through clear statutes—otherwise, courts could be inappropriately forced to go it alone in deciding issues of agency authority drawing from ambiguous laws. See Sidney J. Hardy & Patrick M. Garry, *Reinvigorating Congress's Role in the Administrative State: What the Major Questions Doctrine Suggests About Nondelegation,* 69 S.D. L. REV. 24, 47 (2024).

III. Preserving Congress's Legislative Power Protects The States' Interests.

States have a particular interest in seeing the nondelegation doctrine meaningfully applied, as it ensures that they retain their voice in our system of government. For too long, an illusory nondelegation has given rise to real federalism-related problems. See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal*

Administrative Encroachment, 82 S. CAL. L. REV. 45, 53 (2008) (arguing that the Court's treatment of nondelegation doctrine explains why "hard questions" about federalism are now arising in administrative-law cases).

Separating the powers of our federal government preserves the "integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Balancing powers among the branches helps "ensure that States function as political entities in their own right." *Id.* On the other hand, "[p]ermitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority." Clark, *supra*, at 1324. Indeed, the Framers chose the "structure of the Federal Government" as the "*principal* means" "to ensure the role of the States." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (emphasis added); see also *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (calling "federalism and separation of powers" two of the "most important" "structural protections" in our Constitution).

Ensuring Congress retains the legislative-drafting pen is better for the States because Congress can be better "relied upon to respect th[ose] States." Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887, 891 (1997). At least in part because they come to Washington from specific communities, "[m]embers of Congress are more responsive to the concerns of local regional con[stituencies] than centralized regulatory agencies." Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 221 (2001). In other words, the legislative

branch faces "localized accountability." MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 138 (1995).

But Congress does not afford more respect to the States just because its members travel from everywhere. Rather, "political checks and Congress' political accountability"—like State-centered involvement in congressional elections, State-focused lobbying efforts, state political party pressure, and more—are the political safeguards of federalism. D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 633 (1985). So over time, Congress has also come to show its "peculiar institutional competence … in adjusting federal power relationships," including relationships between the States and the federal government. Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 696 (1976).

In contrast, federal agencies are a particular threat to States' interests. "[U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). Rather, the "'political safeguards' that give [S]tates a voice in Congress's lawmaking" do not extend to a "voice in the executive branch's activities." Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 640 (2003). Even purportedly public rulemakings may lack the transparency that ordinary lawmaking offers, as "many substantive policy decisions happen before the agency publishes the notice of proposed rulemaking."

Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 743 (2016).

Indeed, the "success of American federalism" might be undermined "[i]f the federal government were free to evade federal lawmaking procedures by shifting substantial lawmaking authority to unelected officials (such as independent agencies or federal courts)." Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 337 (2001). That shift would undermine the state-focused party system that some say deserves credit for federalism's success. *Id.*; see also La Pierre, *supra*, at 633. After all, if all the real decisions are made by the "fourth branch of the Government" ensconced safely in Washington, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), why would anyone feel beholden to the people back home?

And more than ordinary agencies, independent agencies like the FCC present huge delegation headaches. They are "virtually insulated from political forces." David A. Herrman, *To Delegate or Not to Delegate—That Is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1181-82 (1997). These agencies even escape soft directives from the President—coming in the form of various executive orders—to respect federalism. See, *e.g.*, Exec. Order No. 13,132, 64 Fed. Reg. 43255, 43255 (Aug. 4, 1999); see also Daniel Backman, *The Antimonopoly Presidency*, 133 YALE L.J. 342, 402 (2023) (noting delegations to independent agencies might "lack sufficient accountability to the President and should therefore be more heavily scrutinized under a nondelegation test, not

less"). So the agencies have more room to ignore the States' concerns. And indeed they have, as when the FCC tried to "re-allocate decision-making power between the states and their municipalities" in a broadband rule. *Tennessee* v. *FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

So "from a state's perspective," the legislative process provides several concrete on-ramps for state involvement—"more opportunities and more access points to provide input to Congress than [there would be] to the President" and his or her agencies. Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 365 (2010). The nondelegation doctrine ensures that those on-ramps remain open for *all* legislative activities. In this way, "the nondelegation doctrine can be conceptualized as a protector of federalism." Aaron Nielson, *Erie as Nondelegation,* 72 OHIO ST. L.J. 239, 265 (2011). And that federalism in turn ups the accountability that the nondelegation doctrine is designed to encourage, as "a State's government will represent and remain accountable to its own citizens." *Printz* v. *United States*, 521 U.S. 898, 920 (1997). It's a positive feedback cycle. Cf. Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 505-08 (2023) (explaining how both nondelegation and federalism conceits underlie several of the Court's recent administrative-law decisions).

One group of States tries to reassure the Court that federalism is well protected because (1) the law at issue here allows States to participate on an advisory board, and (2) States wanted universal-service support. See Amicus Br. of Colorado, *et al.*, at 31-32. That's no real answer for a few reasons. For one, that *this* statute might provide some atypical avenue for state involvement doesn't say much about whether the watered-down version of the

nondelegation doctrine applied to *all* statutes does enough to protect the States. For another, that the States might be allowed to participate in a few meetings and make "recommendations" is a pale substitute for the ability to directly influence the development of the law through Congress. Congress has "a superior democratic pedigree," Scott A. Keller, *supra*, at 81, especially when compared to a typical milquetoast advisory committee or board. And lastly, although it may well be that States support the notion of universal service, that's not suggest that all States are willing to dispense with important constitutional limits to achieve it. See Section V.

* * * *

It might be tempting to dismiss the States' concerns about federalism as the predictable complaints of parties set to lose something—like the bleating of the sheep at the sound of the shears. But "an underenforced nondelegation doctrine" undermines a "complex system of checks"—federalism included—that the Framers expected would prevent "hegemony." Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177 (1994). So more is at stake in this Petition than just the States' personal interests. The Court should thus reinvigorate the nondelegation doctrine, restore the States' rightful role in the lawmaking process, and reinstate the checks the Framers wanted.

IV. This Statute Here Violates *Both* The Public And Private Nondelegation Doctrines.

If any statute violates the nondelegation doctrine, then this is it. Congress charged the Commission with determining a "contribution" that telecommunications services carriers will make to "preserve and advance

universal service." 47 U.S.C. § 254(d); see also *id.* § 254(b)(4). The Commission gets to decide what constitutes universal service, considering such unhelpful factors as what services are "consistent with the public interest, convenience, and necessity." *Id.* § 254(c)(1)(D). It can change that definition "periodically." *Id.* § 254(c)(1). After that, the Commission can require any carrier to "contribute … if the public interest so requires." *Id.* § 254(d). The contributions are supposed to be "equitable" and "nondiscriminatory," though neither of those terms is defined. *Id.* The statute also lists various aspirational principles for universal service—but here, too, the Commission gets to add any principles that it "determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with [the Federal Communications Act]." *Id.* § 254(b)(7). Congress didn't cap the size of the "contribution." And it didn't say how the Commission should exact the "contributions" from the service-providers (let alone how service providers will take the funds back from consumers).

Quite simply, "Congress painted in very broad strokes and took virtually no responsibility for any of the major details of implementing or funding the universal service program." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 308 (2005). Read together, these provisions give the Commission two core legislative functions—taxing *and* spending—with no real constraints on how to exercise them.

Start with taxes. The Court said it well a century-and-a-half ago: "the power of taxation belongs exclusively to the legislative department of the government." *State ex*

rel. S. Bank v. *Pilsbury*, 105 U.S. 278, 299 (1881). Given that longstanding clarity, the nondelegation doctrine should apply most rigorously when a tax is involved. See James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 270–71 (2015); see also Krotoszynski, *supra*, at 243 ("Whatever the merits of delegation in other contexts, however, one should view with skepticism delegations of authority over the ability to raise and expend revenue."). Although there's indication that the present, weakened conception of the nondelegation gives no special scrutiny to a delegated tax power, *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989), that should change.

And make no mistake, this "contribution" is a tax. When monies collected "inure[] to the benefit of the public," they constitute taxes, not fees. *Nat'l Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 343 (1974). Further, "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *Sebelius*, 567 U.S. at 564; see also *Magruder* v. *Supplee*, 316 U.S. 394, 399 (1942). Fees, on the other hand, discourage conduct or defray regulatory expenses. *Norfolk S. Ry. Co.* v. *City of Roanoke*, 916 F.3d 315, 319 (4th Cir. 2019). And fines serve as punishment for an offense. *United States* v. *Bajakajian*, 524 U.S. 321, 328, (1998). The "contribution" here checks all the tax boxes—it's distributed to the public at large, it produces billions in revenue, and it serves none of the usual purposes of a fee or a fine. So the Commission has seized the power to levy. See 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, 133-37 (2000); Nichole L. Millard, *Universal Service, Section 254 of the*

Telecommunications Act of 1996: A Hidden Tax?, 50 FED. COMM. L.J. 255, 267-72 (1997).

The Commission has also seized another legislative power in deciding how to spend its spoils. "Among Congress's most important authorities is its control of the purse." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2375 (2023). And the Appropriations Clause issues a "straightforward and explicit command" that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). Its restraint is "absolute." *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.). It covers "any sum of money collected for the government." *Ring* v. *Maxwell*, 58 U.S. 147, 148 (1854). So "[w]hile Congress can delegate some discretion to the President [and his or her agencies] to decide how to spend appropriated funds, any delegation and discretion is cabined by these constitutional boundaries." *Cnty. of Santa Clara* v. *Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017).

The statute here ignores those constraints. No appropriation appears anywhere in the text. Instead, the Commission can spend as it wishes, so long as it can say the spending falls under the umbrella of "universal service." This fund, existing independent of the ordinary congressional oversight process, dwarfs the budgets of several federal agencies. And this setup has become common "[t]o an unprecedented extent." Christopher C. DeMuth, Sr., Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 556-57 (2017).

Were these problems not enough, the statute even lacks an intelligible principle that would satisfy the current standard. "Instead of prescribing rules of

conduct, it authorizes the making of codes to prescribe them." *Schechter Poultry*, 295 U.S. at 541. It delegates to the Commission wide-open discretion to do whatever it feels is "necessary," "appropriate," "convenien[t]," or in the "public interest." See 47 U.S.C. § 254(b)(7). Under any ordinary understanding, words like these do not provide "intelligible" limits when piled on in separate disjunctives. In fact, all these words are problematic in their own way. "[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). "Appropriate," too, is "all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015). "'[N]ecessary" does not mean 'absolutely necessary,'" but just things that are convenient or useful. *United States* v. *Comstock*, 560 U.S. 126, 134 (2010). And convenient just means "suited to personal comfort or to easy performance." *Convenient*, MERRIAM-WEBSTER, https://bit.ly/42ujiSV (last visited Feb. 14, 2025). Words like these provide no real constraints.

A last concern lurks on top of all that's already been said: this whole process is really pushed forward by a private entity. "The FCC essentially has abdicated its oversight responsibilities." Jonathan S. Marashlian et al., *The Mis-Administration and Misadventures of the Universal Service Fund: A Study in the Importance of the Administrative Procedure Act to Government Agency Rulemaking*, 19 COMMLAW CONSPECTUS 343, 381 (2011). And because of that abdication, a private entity effectively decides the contribution rate—that is, the amount of the "tax"—that will be imposed. "[L]etting the *President* set

tax rates," let alone a private entity like this, "sounds like an easy kill for an originalist nondelegation doctrine." Lawson, *supra*, at 369 (emphasis added). And this isn't even the first time the Commission has had this problem. See, *e.g.*, *U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (holding that the FCC improperly subdelegated certain functions outside the agency). Thus, this rule-by-private-interest is a last sprinkle of salt in the wound when it comes to the delegation problems here. Compare with *Texas*, 142 S. Ct. at 1309 (Alito, J., respecting the denial of certiorari) (raising questions about delegation to a private authority of question implicating "hundreds of millions of dollars").

This "contribution" comes by way of an unlawful delegation. Should the Court affirm, this case will serve as an excellent signal to agencies and Congress about what it means to go too far.

V. This Program's Benefits Are No Reason To Reverse.

Many of those pushing the Court to overturn the decision below emphasize the Universal Service Fund's benefits. See Amicus Br. of NCTA at 6-27 (praising the program). To be clear, not everyone agrees that these benefits justify continuing the present program even as a policy matter. See, *e.g.*, Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 U.C. Davis L. Rev. 803, 805 (2018) ("Unfortunately, the Universal Service Fund has also been one of the most criticized programs administered by the Federal Communications Commission."); FCC, IN RE REP. ON THE FUTURE OF THE UNIVERSAL SERV. FUND, 37 F.C.C. RCD. 10041, 10101 (2022) (statement of Commissioner Brendan Carr) ("[T]he FCC's funding

mechanism for this vital program is stuck in a death spiral.").

But the States are not here to quibble with the Universal Service Fund's merits. They agree that universal service is an important objective. Indeed, many programs within the Amici States have benefited from monies that the Universal Service Fund distributes. And the States agree, too, that Congress has the power to support universal service in interstate telecommunications if it so chooses. Although "States [have] traditionally exercised broad power to regulate telecommunications markets within their borders in ways that were designed to promote universal service," there's still room for Congress to act under the Commerce Clause. *MetroPCS Cal., LLC* v. *Picker*, 970 F.3d 1106, 1119 (9th Cir. 2020) (cleaned up).

Ultimately, the States here don't need to take a position on whether this law is good as a matter of policy—because that's rather beside the point. The States here are presently interested in seeing that Congress use its conceded power within prescribed constitutional limits. Good policy or not, an unconstitutional law cannot stand. It's a "fundamental principle that, no matter how laudable its purposes, the actions of our government are always subject to the limitations of the Constitution." *Barr* v. *DOJ*, 819 F.2d 25, 25 (2d Cir. 1987). "The Constitution makes strict demands. Often times, important and justifiable public policy goals must bow before its restraints." *Republican Party of Minn.* v. *Kelly*, 247 F.3d 854, 891–92 (8th Cir. 2001) (Beam, J., dissenting); see also *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1138 n.18 (10th Cir. 1999) (noting how "constitutional rights … trump more mundane policy concerns"). So time and again, the Court has reminded parties that "the fact

that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944; see also, *e.g., Stern* v. *Marshall*, 564 U.S. 462, 501 (2011) (rejecting arguments premised on the purposed "practical consequences" recognizing limits on authority). So too here. The law's many supporters should direct their attention to Congress, not the courts.

If, however, the Court were still concerned about any practical disruption that might be caused by affirming, it would still have options far short of reversal. For instance, the Court could stay the judgment to allow Congress time to amend the statute to appropriately exercise its legislative power, as it has done in similar situations involving separation-of-powers concerns. See, *e.g.*, *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (entering a "limited stay [to] afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976). The Court could also provide specific direction as to what would be constitutionally sufficient here, which might expedite the congressional revision process. And the Court could limit the effect of its decision on the Commission's past funding decisions; retroactivity need not be assumed. See, *e.g.*, *John Doe Co.* v. CFPB, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (noting that "vacatur of past actions is not routine" when separation-of-powers violations are found).

But at the end of the day, the Constitution stands supreme. As the Fifth Circuit said, the salutary purposes of this program must be served in another way. A constitutional way.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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