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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS COMPETITIVE CARRIERS ASSOCIATION, NTCA, AND USTELECOM–THE BROADBAND ASSOCIATION

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REPLY BRIEF

The "nightmare for the Constitution" that respondents imagine, Resp.Br.1, is nothing but a fever dream. Section 254 does not delegate legislative power to the Executive; instead, Congress took the universal-service subsidy long implicit in monopoly rate regulation and made the subsidy—and Congress' responsibility for it—explicit while deregulating many aspects of the communications industry. Congress left the implementation details to the Executive, but to a lesser degree than under the prior regime. That legislative change was a win for both consumers and nondelegation principles and has made the promise of broadband a reality for tens of millions of Americans. Under both historical tradition and settled precedent, §254 is entirely constitutional.

The Executive's implementation of that statutory scheme is equally constitutional. The FCC has not delegated its executive authority to a private actor; it has simply assigned ministerial tasks to a private entity that remains fully subordinate and subject to FCC oversight and control in the contribution-factor process, and whose actions have no legal effect unless and until the FCC determines and publishes the quarterly contribution factor. Respondents' strained efforts to depict the Universal Service Administrative Company ("USAC") as a rogue private lawmaker or executive with no meaningful federal oversight are belied by the record.

The combination of Congress' constitutional action in enacting §254 and the FCC's constitutional action in enlisting USAC to help administer it does not add up to a constitutional violation—which is

presumably why respondents devote less than two pages of their 98-page brief to defending the Fifth Circuit's "combination" theory, even though it was the sole basis for the judgment below. This is not a case where one branch has imposed multi-layered restrictions on another, and the Executive's decision to enlist private help cannot convert Congress' enactment of §254 into a delegation problem. This Court should reverse.

ARGUMENT

I. Section 254 Is Constitutional.

A. Section 254 Accords With Historical Tradition and Current Doctrine.

More than two centuries of historical practice and settled doctrine confirm that Congress did not impermissibly delegate away its legislative powers by enacting §254. Indeed, monopoly rate regulation is a context where this Court has routinely approved broad congressional authorization for agency-determined rates that include implicit subsidies for universal service. In the course of substantially deregulating communications in 1996, Congress expressly authorized the maintenance and expansion of universal service and provided far more explicit direction than anything that preceded the 1996 Act. That move from implied to express subsidies reduced delegation concerns, increased congressional accountability for universal-service contributions, and fully comports with the constitutional design.

1. From the First Congress to today, Congress has regularly granted broad discretionary powers to the Executive to carry out federal objectives. *See* U.S.Br.21-23 (describing numerous Founding-era

statutes); *accord* Mortenson.Br.11-23 (describing even more). The First Congress, for instance, left it to the Patent Board to decide which inventions were "sufficiently useful and important" to warrant patents, without further guidance. Act of Apr. 10, 1790, ch.7, §1, 1 Stat. 109-10. The Second Congress likewise left it to the Postmaster General to "provide for carrying the mail of the United States … as he may judge most expedient," and "to prescribe such regulations" for the postal service "as may be found necessary." Act of Feb. 20, 1792, ch.7, §3, 1 Stat. 234. *See also CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd*, 601 U.S. 416, 434 (2024) (noting "open-ended funding scheme" in same Act).

As those provisions and numerous other examples illustrate, it was clearly understood at the Founding that Congress could afford the Executive broad discretion to pursue goals that Congress set, and was not required to micromanage the means that the Executive might use to achieve those objectives. *See* U.S.Br.21-24; Mortenson.Br.1-23; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U.Chi.L.Rev. 1721, 1732-36 (2002); *see also Cmty. Fin. Servs. Ass'n*, 601 U.S. at 432 ("The practice of the First Congress … 'provides contemporaneous and weighty evidence of the Constitution's meaning.'"). Respondents' invocation of counterexamples where early Congresses provided greater direction do not advance the ball. No one doubts that Congress can provide direction to the Executive—the more, the better—but the practice of granting substantial discretion from the earliest days of the Republic speaks volumes about the permissibility of that practice.

Rate setting is an area where Congress has long deemed a degree of executive discretion particularly useful, and this Court has repeatedly endorsed Congress' approach. As private monopolies and oligopolies began to rise in prominence, trust-busting—or alternatively trust-regulating—became a national priority. Congress repeatedly tasked the Executive with regulating national markets in the public interest. And time and again, this Court confirmed that Congress could do so without violating Article I, even when Congress' instructions were expressed in necessarily expansive terms. *See, e.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407-08 (1928) (Taft, C.J.) ("If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide [the agency] to fix those rates … in accord with a general rule that Congress first lays down that rates shall be just and reasonable[.]"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 20-21 & n.1, 24 (1932) (statute authorizing agency to approve railroad acquisitions "in the public interest" on "just and reasonable" terms afforded a sufficient "standard to guide determinations"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397-98 (1940) (same for statute authorizing agency to fix maximum coal prices "in the public interest" to protect consumers against "unreasonably high prices"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214-19, 225-26 (1943) (same for statute authorizing FCC to regulate broadcast licensing "as public convenience, interest, or necessity requires").

The regulation of communications services and rates fit this familiar pattern. When Congress established the FCC in 1934, it tasked the agency with (among other things) making communications services "available, so far as possible, to all the people of the United States." 47 U.S.C. §151. Before the 1990s, the FCC's primary mechanism for achieving that goal was by "authorizing rates to monopoly providers sufficient to enable revenue from easy-to-reach customers, such as city dwellers, to implicitly subsidize service to those in areas that were hard to reach." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018); *see In re Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776, 8786-87 (May 8, 1997) ("Implicit subsidies were sustainable in the monopoly environment because some consumers (such as urban business customers) could be charged rates … significantly exceed[ing] the cost of providing service[.]"). In other words, urban consumers were subsidizing rural consumers all along, but both the precise amounts of the subsidies and Congress' responsibility for them were relatively obscure.

The Telecommunications Act of 1996 changed that by making both the universal-service subsidy and Congress' responsibility for it explicit. The Act was designed "to promote competition and reduce regulation" in the telecommunications industry. Pub. L. No.104-104, 110 Stat. 56. But competition would make maintaining above-cost rates untenable and so a Congress that favored both deregulation and universal service made the subsidy for universal service explicit and directed the FCC to implement that subsidy in accordance with explicit statutory directions. *See* 47 U.S.C. §254; *see* CCA.Br.3-5.

Section 254 thus represents a significant advance in terms of delegation principles, as both the universal-service subsidies and Congress' responsibility for them became more explicit. Moreover, in charging the FCC with maintaining and expanding universal service, Congress provided far more direction than in typical rate-regulation legislation routinely upheld as constitutional by this Court. *See* 47 U.S.C. §254(b) (setting specific principles for universal service); *id.* §254(c) (setting characteristics to consider in determining services to be supported); *id.* §254(d) (setting who must pay contributions); *id.* §254(e) (setting who may receive support and terms of its use). And since 1996, Congress has revisited the subject and provided additional guidance in multiple amendments and revisions to §254, as a remarkably bipartisan amicus brief details. Members.of.Congress.Br.15-18.

In short, there is no mistaking the judgment Congress made in §254: in moving away from monopoly-style rate regulation and implicit subsidies, the federal government would maintain its national commitment to universal service, which would now be funded by an explicit subsidy determined in light of principles set by Congress. That legislative direction passes muster under any test for impermissible delegations of legislative authority.

2. Section 254 comfortably satisfies this Court's settled nondelegation test. *See* CCA.Br.19-31. Indeed, respondents all but concede as much, spending most of their brief discussing first principles while giving short shrift to "modern" cases without ever asking that they be overruled or even mentioning *stare decisis* let alone explaining why overturning a

century of precedent is justified. *Compare* Resp.Br.29-65 (36 pages advocating the Court "realign its nondelegation framework"), *with* Resp.Br.65-73 (just 9 pages arguing §254 violates "modern" nondelegation doctrine). That is understandable: Respondents cannot dispute that §254 provides substantially more direction to the Executive than economic and rate-regulation legislation that this Court has upheld. *See* CCA.Br.19-24; U.S.Br.19-21, 24-30; *supra* p.4; *accord* *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (rejecting nondelegation challenge to statute directing executive discretion "with much greater specificity than in delegations that [this Court has] upheld in the past").

Nor is it surprising that this Court's precedent affords Congress wide latitude in deciding to what extent to empower or constrain the Executive in its implementation of federal statutes. As Chief Justice Marshall explained, the "precise boundary" of Congress' power to "commit something to the discretion of the other departments … is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Or as Justice Scalia—hardly a laggard in defending the Constitution's structural guarantees—put it, this Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," as that is "not an element readily enforceable by the courts." *Mistretta v. United States*, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting); *see id.* at 416 ("In short, I fully agree with the Court's rejection of petitioner's" intelligible-principles challenge).

Congress' long tradition of legislating in ways that give the Executive a key role in effectuating Congress' own policy judgments, and the basic reality that the boundaries on legislative authority "must be fixed according to common sense and the inherent necessities of the governmental coordination," *J.W. Hampton*, 276 U.S. at 406, all underscore that this Court has a limited role to play in deciding whether Congress has granted the Executive too much discretion to implement federal policy. Once the Court has confirmed that Congress is accountable for the basic policy judgment, there is no constitutional infirmity in giving the Executive discretion to execute the details—let alone a judicially administrable test for determining how much discretion is too much. Here, Congress is plainly accountable for making universal-service subsidies explicit and expanding the scope of universal service, and has given the FCC substantial guidance in implementing those directives.

Respondents' brief effort to analogize this case to *Schechter Poultry* and *Panama Refining* accordingly falls flat, as both statutory text and context provide far more guidance to the Executive here. *Contra* Resp.Br.59-61 (citing *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)). As this Court has explained, the statutory provision at issue in *Schechter Poultry* "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition,'" while the provision at issue in *Panama Refining* "provided literally no guidance for the exercise of discretion." *Whitman v. Am. Trucking*

Ass'ns, 531 U.S. 457, 474 (2001) (Scalia, J.). Section 254, by contrast, is focused on a specific aspect of telecommunications policy—long subsumed within general (and constitutional) statutory charges to go forth and regulate in the public interest. By preserving that specific policy preference while broadly deregulating the sector, Congress made its embrace of universal service explicit and provided specific directions for how to implement that legislative choice. Section 254 thus looks nothing like the standardless economy-wide directions in the National Industrial Recovery Act and falls "well within the outer limits of [this Court's] nondelegation precedents." *Id.* at 474.

3. Apparently recognizing that more than a century of settled doctrine makes their nondelegation challenge a very steep climb, respondents start their argument not with that doctrine, but with a red herring: an extended discussion (exceeding their discussion of "modern" nondelegation caselaw) of the uncontested proposition that taxation is a legislative power. *See* Resp.Br.19-29. That is both entirely true and entirely irrelevant (for multiple reasons, not least that §254 is not an exercise of the taxing power at all, *see infra* p.11). No one disputes that Congress' power to "lay and collect Taxes" is a legislative power. U.S. Const. art. I, §8, cl.1. Indeed, respondents *acknowledge* that petitioners "have never disputed" that point, Resp.Br.19, but nonetheless spend ten pages establishing a proposition the Framers put beyond reasonable debate with just nine words.

The fact that taxation is a legislative power says nothing about whether Congress impermissibly

delegated legislative power here. After all, *every* nondelegation case starts with the premise that some legislative power is involved; the question is simply whether Congress has properly exercised that legislative power or impermissibly delegated it elsewhere. Moreover, in analyzing that question, this Court has already wisely rejected the notion that some "different and stricter nondelegation doctrine" applies "where Congress delegates discretionary authority to the Executive under its taxing power." *Skinner*, 490 U.S. at 222-23; *see J.W. Hampton*, 276 U.S. at 409-10 (nondelegation doctrine "make[s] no such distinction"). That sound judgment was no doubt fortified by the notorious difficulties in trying to differentiate taxation from ordinary regulatory legislation. *See Skinner,* 490 U.S. at 220, 223 (rejecting respondents' "two-tiered theory of non-delegation" allowed Court to bypass the "threshold issue which so exercised the District Court").

Article I vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. art. I, §1, and makes no distinction among those enumerated powers "in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive," *Skinner*, 490 U.S. at 220-21. On the contrary, "[f]rom its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive in such enactments." *Id.* at 221-22. Indeed, the apportionment requirement for direct taxes all but demanded substantial executive-branch assistance. *See* U.S.Br.23. Moreover, respondents recognize that there is a historically rich and contemporaneously

relevant tradition of granting discretion to the Executive when it comes to tariffs and other duties and imposts. *See* Resp.Br.39-41. There is no basis for treating foreign and domestic taxation differently when the Framers authorized them both in the same clause, U.S. Const. art. I, §8, cl.1, and *Skinner* unanimously rejected a nondelegation challenge to a domestic assessment.

Even if there were some kind of heightened nondelegation scrutiny for taxation, it would not apply here, because §254 is a valid exercise of Congress' power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, §8, cl.3. The subsidy for universal service implicit in Congress' charge to the FCC to regulate telecommunications in the public interest was plainly an exercise of the commerce power. And the explicit authorization to maintain and expand that subsidy in §254, while deregulating much of the industry, was equally a classic example of Congress' undoubted authority to regulate interstate commerce and its channels and instrumentalities. *See United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *see also Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9-10 (1877) (explaining that "it cannot for a moment be doubted that this powerful agency of commerce and intercommunication"—the telegraph—"comes within the controlling power of Congress").

B. Section 254 Satisfies the Test Articulated in the *Gundy* Dissent.

Section 254 equally passes muster under the *Gundy* dissent's test, which provides that "as long as Congress makes the policy decisions when regulating

private conduct, it may authorize another branch to 'fill up the details.'" *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43); *see id.* at 166 ("[M]ost importantly, did Congress, and not the Executive Branch, make the policy judgments?"). The key question is thus whether Congress has "set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Id.* at 158 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

That standard is readily met here. Section 254 looks nothing like the bare authorization in 34 U.S.C. §20913(d) for the Attorney General to deal with pre-Act offenders (or not) as he saw fit. Here, there is no mistaking that in adopting §254, it was Congress and not the Executive that made the policy decision to preserve universal service, and to do so by requiring industry members to make contributions specifically designated to support universal-service programs. *See* 47 U.S.C. §254(b)-(e). In contrast to §20913(d), the Executive was not free to do nothing or discontinue universal-service subsidies. Expressly continuing those subsidies was the *raison d'être* for §254 and Congress took ownership of that policy choice. Congress likewise set forth guidance "sufficiently definite and precise" about how to accomplish its goals, including the principles on which "policies for the preservation and advancement of universal service" must be based, *id.* §254(b); the factors to consider in defining universal service, *id.* §254(c); who must contribute, *id.* §254(d); and who may receive support, *id.* §254(e). That guidance was informed by

decades of pre-existing universal-service efforts. *Cf. Gundy*, 588 U.S. at 160 (Gorsuch, J., dissenting) (favorably contrasting Sherman Act's reference to pre-existing common-law concepts with the novel unguided authorization in *Schechter Poultry*). Section 254 unquestionably leaves the FCC substantial discretion to implement Congress' statutory mandate—but it also unquestionably resolves the central policy questions of whether and how support for universal service should continue. In short, there is no doubt that Congress has owned the judgment to continue and expand universal service and to require contributions from specified industry participants.

Contrary to what respondents suggest, the principles set out in §254 are not merely "aspirational" or "precatory," Resp.Br.47-48; instead, they impose real limits on FCC authority. The statute mandates that the FCC "shall" base its universal-service policies on those principles, 47 U.S.C. §254(b), and in fact courts have struck down FCC actions for failing to comply with the statute, *see* U.S.Br.33-34. Respondents' assertions that those decisions show only that §254 is not "impossible to transgress," and involved only "*procedural* safeguards," Resp.Br.51-53 (emphasis added), miss the point: By setting out both the broad objectives that the FCC must pursue and specific requirements that the FCC must follow in supporting universal service, Congress properly made the key "policy decisions" in this area, with sufficient direction to the Executive to allow courts and the public to identify "whether Congress's guidance has been followed." *Gundy*, 588 U.S. at 157, 158 (Gorsuch, J., dissenting).

II. The Executive's Decision To Enlist USAC To Perform Ministerial Functions Is Constitutional.

Just as Congress did not violate the Constitution in enacting §254, the FCC has not violated the Constitution in implementing it. The agency's decision to enlist a not-for-profit corporation to help gather the information the agency needs to carry out its statutory mandate does not implicate Article I nondelegation constraints at all, let alone violate some heretofore unknown restriction in Article II. Agencies are free to recruit private entities to further their regulatory objectives, as long as the final authority to exercise executive discretion remains in agency hands. Because the FCC retained that final authority here, its implementation of §254 fully comports with the Constitution.

A. The FCC's Decision to Seek Assistance From USAC Does Not Implicate Article I Nondelegation Constraints, Let Alone Violate Them.

There is no precedent for treating *executive* action as violating the limits on *Congress'* ability to delegate legislative power. Whatever issues it might raise under Article II or the Administrative Procedure Act (APA), the FCC's decision to seek assistance from USAC in implementing universal-service programs does not even implicate Article I constraints on the delegation of legislative authority. The Legislative Vesting Clause of Article I prevents *Congress* from delegating its legislative power; it does not speak to whether the *Executive* can partner with private actors in implementing statutes that Congress has enacted.

See Whitman, 531 U.S. at 472 ("[i]n a delegation challenge," focus is on the statute, not executive implementation). Any limit on Executive cooperation with private actors in exercising its executive functions would instead come from the Executive Vesting Clause of Article II. U.S. Const. art. II, §1, cl.1; *accord Consumers' Rsch. v. FCC*, 88 F.4th 917, 933-38 (11th Cir. 2023) (Newsom, J., concurring) (agreeing that USAC is not exercising legislative power and that the relevant question is whether it is exercising executive power, but that Consumer Research had not teed up that issue).

As in the Eleventh Circuit, respondents have not teed up an Article II argument, *see* Resp.Br.xii, but there is no Article II violation here. There is nothing unusual or constitutionally suspect about the Executive enlisting private support to take care that the laws be faithfully executed. Congress and this Court have endorsed the practice both generally, *see* 28 U.S.C. §1442(a) (extending federal-officer removal to private parties "acting under" federal officers), and specifically with regard to tax collection, *see* Customs Act of 1815, ch.31, §8, 3 Stat. 198 (extending early removal statute to "any other person aiding or assisting" federal customs officials); *Watson v. Philip Morris Co.*, 551 U.S. 142, 147-48 (2007) (discussing same), and other distinctly sovereign functions, *see PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 495-96 (2021) (endorsing the longstanding practice of delegating eminent domain authority to private parties).

As decades of settled precedents confirm, federal agencies may properly enlist private entities to aid

them in carrying out their executive functions, as long as the private entities "function subordinately to" the agency" and the agency retains "authority and surveillance over" those private actors. *Sunshine Anthracite*, 310 U.S. at 399; *see also Consumers' Rsch.*, 88 F.4th at 925-26 (collecting cases). The FCC has not transgressed those limits here: It directed the creation of USAC as a subordinate entity to assist in implementing the statutory objectives of §254, and it retains ongoing authority and oversight over USAC. *See* U.S.Br.4-5. Nothing in Article II—let alone Article I—prohibits that sensible regulatory approach.

The FCC's control over USAC's ministerial role here is extensive. USAC must mechanically apply FCC rules and orders; it cannot make policy, and its work is subject to independent auditing and FCC oversight. *See* CCA.Br.6-7, 37-39; U.S.Br.41-44; SHLB.Br.40-47. USAC's role is confined to ministerially collecting data and calculating projections in strict accordance with FCC rules and policies. USAC calculates "projections of demand" for USF programs (and associated administrative expenses) and the contribution base by aggregating the information it collects in accordance with FCC rules and orders. It is the FCC that sets forth and adopts the contribution factor. 47 C.F.R. §54.709(a)(2)-(3); *see* U.S.Br.5-7.

Indeed, respondents implicitly concede that USAC is subject to the FCC's authority and control in this context by focusing on *how* the FCC carries out that control. *See* Resp.Br.79-83 (not disputing that the FCC has "final decision-making authority" over USAC). As both the parties and *amici* have explained,

the FCC exercises detailed oversight of USAC's ministerial contribution-factor role. *See* SHLB.Br.42-43; FCC.Comm'rs.Br.10-14 (explaining three "levers of control"); USAC.Leadership.Br.17-24. Regardless, if respondents believe that the FCC exercises insufficient supervision over USAC or there is something arbitrary and capricious about the manner in which the FCC uses USAC, their remedy lies in the APA or agency procedures, not a constitutional challenge to the entire §254 scheme. *See* 5 U.S.C. §706(2)(A) (review of "arbitrary [or] capricious" agency action); 47 C.F.R. §§1.41, 1.106, 1.115, 1.401 (various methods of seeking relief from the FCC).

B. Respondents' Contrary Arguments Are Unavailing.

None of respondents' contrary arguments is persuasive. As their primary argument, respondents assert that USAC improperly exercises government power by setting contribution rates that are legally binding unless the FCC affirmatively intervenes to alter them. Resp.Br.79-80. That assertion is flat wrong. Instead, as the governing regulations make clear, only the FCC has the authority to set the contribution factor; if the FCC never issues a public notice announcing the contribution factor, no legally binding contribution rate is ever set. *See* 47 C.F.R. §54.709(a)(2) (contribution factor "shall be determined *by the Commission*" (emphasis added)); *see also id.* §54.709(a)(3) (projected expenses "must be approved *by the Commission*," and "projections of demand and administrative expenses and the contribution factor shall be announced *by the Commission* in a public notice" (emphases added)). That eliminates any

argument that the FCC has abdicated its regulatory authority and allowed USAC to set binding contribution rates.

Respondents invoke an FCC-USAC memorandum of understanding ("MOU") as "proof" that USAC acts beyond FCC authority. Resp.Br.81. According to respondents, that MOU gives the game away by referring to the projections in the FCC's public notice as "*USAC's* projections" rather than "FCC's projections." *Id.* In reality, shorthand aside, the MOU confirms that the FCC exercises a firm hand over USAC throughout this process, requiring USAC to "adhere to the FCC's requirements for projecting demand and calculating the contribution base" and "take account of and comply with the Commission's universal service rules," and explaining that the FCC "shall review USAC's demand filing and provide any necessary feedback to USAC before USAC publicly files the demand with the FCC" and "provide USAC with guidance on the use of carryover funds each quarter if such funds exist." *Memorandum of Understanding Between FCC and USAC* at 7 (Oct. 17, 2024), https://www.fcc.gov/sites/default/files/usac-mou.pdf. More important, the MOU confirms that it is the FCC, not USAC, that "propos[es] a contribution factor" based on the projections—which is the critical step that leads to a legally binding contribution rate. *Id.* Calling the projections "USAC's projections" does not change the fact that they are not legally binding on anyone unless and until the FCC acts.

Respondents complain that the FCC does not exercise adequate oversight of USAC in practice, pointing to the fact that the FCC typically uses

USAC's calculations without substantial modification to set the contribution factor. Resp.Br.82-83. But that at most seems like fodder for an APA challenge, and in reality simply underscores the ministerial nature of USAC's task here and that it is good at following the clear directions provided by the FCC. There is no need for the FCC to intervene when USAC has properly followed the FCC's directions. *See* CCA.Br.42.

Respondents repeatedly exaggerate USAC's role in gathering the relevant information for the FCC. For instance, respondents assert that USAC "makes dozens of determinations based on discretion-inhering terms like 'reasonable' or 'suitable.'" Resp.Br.78. That is highly misleading. The FCC rules that respondents cite themselves establish criteria to receive funding, such as by requiring rural rates that are "reasonably comparable" to those offered in urban areas. *See id.* (citing 47 C.F.R. §§54.308(a), 54.309(a), 54.322(g), 54.805(a)). But they do not stand alone. The FCC has further elaborated on the meaning of the relevant terms in other rules, orders, and publications, such as by providing that recipients of various forms of high-cost support are presumed to comply with the "reasonably comparable" rates requirement if they offer rates at or below specific values announced by the FCC's Wireline Competition Bureau based on collected data. 47 C.F.R. §§54.308(a), 54.309(a), 54.805(a). Nothing in those rules gives USAC any substantial discretion; instead, USAC is limited to following specific FCC directives, such as collecting FCC-mandated reports to confirm compliance with FCC-set metrics or withholding from support recipients an FCC-specified percentage of support due

to noncompliance. *See, e.g.*, 47 C.F.R. §§54.308(g), (h); 54.309; 54.322(h)(3), (j); 54.805.

Respondents incorrectly assert that USAC "makes findings as to individual carriers' eligibility." Resp.Br.77. Not so. Carrier eligibility is a function of (i) eligible telecommunications carrier status, which is determined by state public utility commissions or the FCC, as directed by Congress in 47 U.S.C. §214(e); and (ii) FCC decisions about program rules and awards of support to specific carriers. *See, e.g.*, 47 C.F.R. §54.803 *et seq.*

In sum, despite respondents' efforts to suggest otherwise, the record is clear that the FCC has neither violated some Article II limit on enlisting private support nor simply handed over the keys to USAC. The FCC retains supervisory authority and exercises substantial oversight over USAC, and no binding contribution factor goes into effect unless and until the FCC publishes it. Nothing in the Constitution—or even the APA—requires anything more.

III. The Combination Of Congressional Action That Complies With Article I And Executive Action That Complies With Article II Does Not Somehow Become Unconstitutional.

To its credit, even the Fifth Circuit majority was unwilling to hold that either §254 alone or FCC's reliance on USAC alone violated the nondelegation doctrine. *See* Pet.App.64a (declining to "resolve either question in this case"). Instead, it adopted an entirely new theory—one that respondents themselves never advanced below, *but cf. United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (explaining that "[i]n our adversarial system of adjudication," courts

should "rely on the parties to frame the issues for decision")—and held that "*the combination*" of Congress' decision to afford FCC discretion and the FCC's reliance on USAC to perform ministerial functions "violates the Constitution even if neither of th[e]se features does so independently." Pet.App.64a.

That novel "combination" theory is the sole basis on which the Fifth Circuit majority ruled for respondents. *See* Pet.App.64a. It is thus exceptionally telling that—after declining to raise that "combination" theory below—respondents barely defend it in this Court, dedicating less than two pages of their near-hundred-page brief to the *ratio decidendi* of the opinion that brought them here. *See* Resp.Br.88-89. That extreme reticence is understandable, as the Fifth Circuit's "combination" theory is not just wrong, but mixes and matches distinct congressional and executive actions that even together do not amount to either congressional laxity or executive overreach. This is not a situation like *Carter Coal*, where Congress itself tried to cut out the Executive by delegating authority to private entities. Instead, the FCC itself opted to enlist USAC in a subordinate role, a decision respondents do not independently challenge under the APA. But having not challenged that executive decision, respondents cannot coherently deem it the straw that makes Congress' actions unconstitutional, which perhaps explains why respondents did not advance this "combination" theory themselves below and remain decidedly lukewarm about it here.

The Fifth Circuit majority's "combination" theory jumps the separation-of-powers tracks. The

restrictions that the Constitution imposes to prevent Congress from delegating legislative power to the Executive are entirely distinct from the restrictions that limit the Executive's ability to authorize private parties to exercise independent executive discretion. *Compare, e.g.*, *Sunshine Anthracite*, 310 U.S. at 397-98 (no nondelegation problem where Congress supplied statutory criteria "wholly adequate for carrying out [its] general policy and purpose"), *with id.* at 399 (no private nondelegation problem where the Executive "has authority and surveillance over" industry members who "function subordinately to [it]" in implementing the statute). Those distinct limitations (on separate branches and emanating from different constitutional articles) cannot combine to turn two constitutional actions into an unconstitutional one. CCA.Br.44. *Contra* Resp.Br.88-89. And if the FCC's action really had introduced a constitutional problem, it would logically be the regulations, and not the statute (which the Fifth Circuit viewed as not even authorizing USAC's role), that would be unlawful.

Like the Fifth Circuit majority, respondents invoke *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), as their model, claiming that it stands for the proposition that "multi-layer schemes dilute accountability." Resp.Br.89. But in *Free Enterprise Fund*, Congress was the source of both layers of the multi-layer removal restriction. Under those circumstances, this Court concluded that each additional layer of removal protection exacerbated Congress' intrusion on the prerogatives of the Executive. 561 U.S. at 483-84, 495-98. Here, by contrast, Congress' grant of discretion to

the Executive and the Executive's use of private assistance involve different branches taking different actions. It makes little sense to conclude that the Executive's decision to enlist private support is what put Congress' actions over the constitutional line. If anything, the closer model for this case is not *Free Enterprise Fund* but *Community Financial Services Association*, where this Court rejected the argument that a novel combination of multiple constitutional features could create a constitutional problem, although at least there Congress was the source of all the features. *See* 601 U.S. at 435-38. The Fifth Circuit majority erred by taking the opposite approach here.

IV. Affirming The Decision Below Would Be A Practical Disaster.

The Fifth Circuit majority's decision is not only wrong as a matter of law, but also threatens serious practical consequences. Not only has the universal-service arrangement not spread to the IRS or spawned copycat arrangements in its nearly 30 years of existence, but it has benefited tens of millions of rural and/or low-income customers. Eliminating the universal-service fund would cause severe disruptions for consumers, rural communities, anchor institutions, and enterprises. *See* CCA.Br.49-53. Rural consumers could lose planned broadband deployments; low-income customers could lose phone service; students could lose much needed connectivity; rural patients could lose access to essential telehealth services; and everyone could lose the benefits of having communication services that extend to the most rural or economically challenged individuals, as

even wealthy city dwellers benefit from a truly comprehensive network. CCA.Br.50.

The widespread benefits of a widespread network explain the diverse chorus of *amici* singing the praises of universal service:

- Universal-service programs have "assisted millions of Americans, schools, libraries, and health care providers," but affirming would "arrest this forward momentum." Members.of.Congress.Br.21-22; *accord* Software.Industry.Br.11-17 (detailing adverse consequences for E-rate beneficiaries).
- The fund's "sudden loss" "would mean cuts in … services, diminished access to the technology Congress wanted to be made universally available, and in some instances, bankruptcies and job losses." Colorado.Br.4.
- Affirming "will impact the safety of rural Alaskan communities" because "rural residents will lack a reliable way to call 911" and rural troopers will be unable "to use cell service during investigations." Alaska.Br.8; *accord* Tribal.Organizations.Br.14-30 (noting disastrous impacts on tribal communities).
- "Congress deliberately chose to vest the Commission with authority to respond nimbly to new developments in technology"; affirming "would eliminate that flexibility and throw federal efforts to support access to vital communications services into disarray." FCC.Comm'rs.Br.5.

Respondents' contrary depiction of the universal-service fund as ineffective, by contrast, is based primarily on a single, near-decade-old report. Resp.Br.12-13, 62. That depiction is outmoded and short-sighted, and focuses upon concerns with a single component of the larger fund. In reality, the universal-service fund enabled broadband deployment to 1.65 million rural locations in 2023 alone, Public.Knowledge.Br.16-17; supported services for approximately 106,000 schools and over 12,500 libraries in just the past two years, AASA.Br.22; and aided schools, libraries, hospitals, and low-income households on tribal reservations across the country, *see* Oglala.Sioux.Br.9-12.

In short, affirming the decision below would be unjustified as a doctrinal matter and disastrous as a practical matter. Section 254 does not raise any Article I problem; it is well within the range of permissible delegations routinely upheld by this Court. Indeed, compared to the monopoly rate regulation regime it replaced, §254 makes both universal-service subsidies and Congress' responsibility for them far clearer. The FCC's use of USAC does not raise any Article II problem. And the "combination" of a statutory regime that complies with Article I and a regulatory arrangement that complies with Article II does not add up to a constitutional problem.

CONCLUSION

This Court should reverse.

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