Nos. 24-354, 24-422

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL., *Respondents.*

SHLB COALITION, ET AL., *Petitioners*

v.

CONSUMERS' RESEARCH, ET AL., *Respondents.*

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

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND TECHNOLOGY CHANNEL SALES PROFESSIONALS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc., is a nonprofit, public interest law firm established to provide legal resources to small businesses and to be their voice in the nation's courts. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C., and all 50 state capitals. To advocate for its members, NFIB regularly files amicus briefs in cases that will impact small and independent businesses.

More than most, the business community depends on landline telephone service. That means that scores of NFIB's members are subject to USAC's authority. NFIB thus has a strong interest in the calculation of Universal Service Fund (USF) contributions and the distribution of USF subsidies. NFIB urges this Court to adopt a balanced, principled nondelegation doctrine that strengthens the separation of powers and maintains political accountability. The FCC's unilateral delegation of regulatory power to USAC leaves billions of dollars in USF funds in the control of a private entity led by interested parties—rather than elected or appointed government officials oathbound to serve the public. This abdication of authority should not be allowed to withstand constitutional muster.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission.

Technology Channel Sales Professionals (TCSP) is a trade association for independent sales and sales fulfillment firms in the telecommunications sector (TCSP Agents). TCSP Agents help small to enterprise-size businesses manage complex telecommunications services. With regard to the Universal Service Program, TCSP Agents work with customers eligible under the Rural Health Care Program to (1) identify providers who meet customer requirements at the most attractive cost; (2) facilitate contracting between their clients and the service providers; (3) oversee the implementation of clients' services; (4) ensure invoices match contracted rates; (5) resolve billing disputes on clients' behalf; and (6) provide technical and customer service for clients navigating interactions with telecommunications providers. TCSP Agent services are paid directly by telecommunication providers through a sales commission arrangement based upon a percentage of the monthly book of business.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our government rests on the consent of the governed, deriving its legitimacy and authority from the democratic process. To strengthen the essential bonds of accountability, stability, and transparency vital for our republic to prosper, the Constitution vests power in three coordinate branches. U.S. Const. art. I, § 1 (legislative); U.S. Const. art. II, § 1 (executive); U.S. Const. art. III, § 1 (judicial). The text of those clauses "permits no delegation of those powers." *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). So while Congress may confer enforcement discretion on the executive branch, it may not divest itself of "the power to make the law." *Loving v. United States*, 517 U.S. 748, 771 (1996) (quoting *Wayman v. Southard*, 23 U.S. 1, 42 (1825)). And it certainly may not confer that power on a private company led by self-interested parties—a company untethered from the democratic process and accountable to nobody at all.

Yet that is exactly what is happening here. In the Telecommunications Act of 1996, Congress gave the Federal Communications Commission (FCC) power to manage universal service programs. Rather than exercise that power, the FCC improperly handed it to the Universal Service Administrative Company (USAC)—a private entity whose leadership is drawn from the industry it regulates. USAC lays and collects taxes, spends the funds it collects, and adjudicates all disputes that arise over its conduct. Those are the acts of an unaccountable private regulator, not a company acting in an advisory capacity.

To restore and preserve the constitutional separation of powers, amici urge this Court to articulate

meaningful limits on delegations of legislative power. The "intelligible principle" test has evolved to allow broad transfers of legislative authority—contributing to an accumulation of executive power that is difficult to forestall and even harder to reverse. A more precise and rigorous framework would help restore the traditional understanding of the separation of powers and political accountability that are vital to our republic. And it could achieve this without compromising the flexibility Congress needs to rely on agency expertise in addressing technical, scientific, and specialized problems in our evolving world.

These separation-of-powers concerns crescendo when the government attempts to transfer its core powers to a private actor. Such wholesale abdications are "delegation in its most obnoxious form," *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), amplifying the issues raised by delegations to executive agencies, and creating a host of deeper constitutional concerns. That is the case here: USAC wields the congressional power to lay and collect taxes; exercises executive discretion doubly insulated from Presidential removal; and adjudicates disputes over its services internally. And it is led by interest groups with skin in the game. This subdelegation is "utterly inconsistent with the constitutional prerogatives and duties of Congress," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), and should fail constitutional muster under any standard.

The decisions made by USAC have serious ramifications. Far from serving "as an aid" to the FCC, "subject to its pervasive surveillance and authority," *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940), USAC wields virtually unfettered authority to set, collect, distribute, and enforce USF contributions.

The rate determined by USAC automatically takes effect unless the FCC overrides it within 14 days—a power the FCC virtually never utilizes in practice. And even a cursory overview of USAC adjudications illustrates that USAC frequently exercises policy discretion, rendering novel decisions with billions of dollars at stake. This Court should hold that such consequential choices belong with the people's representatives, not with a private company.

ARGUMENT

Today, the line between a valid conferral of discretion and an unconstitutional delegation of legislative power is, to say the least, forgiving. A putative delegation "is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy v. United States*, 588 U.S. 128, 145 (2019). All Congress must do to satisfy that standard is delineate "the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). As a result, even the broadest, most inchoate delegations of power have survived constitutional muster—enabling unelected agencies to make laws without bicameralism, presentment, or political accountability.

This case illustrates why that line should be more precisely drawn and carefully guarded. Congress gave the FCC substantial power to manage universal service support mechanisms. Rather than exercise this power, the FCC unilaterally handed it off to USAC—an entity owned by an industry trade association,[2] and run by delegates of "various interest groups affected by and interested in universal service programs."[3] This means that USAC sets contribution rates, raises

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[2] As specified in FCC regulations, USAC "is an independent subsidiary of the National Exchange Carrier Association, Inc.," 47 C.F.R. § 54.5, a private membership organization of telecommunications carriers that collects and audits accounting reports from carriers, *see* NECA, *About Us*, https://tinyurl.com/397f3e8e (last accessed Feb. 14, 2025).

[3] USAC, *Leadership*, https://tinyurl.com/23d9ynup (last accessed Feb. 14, 2025); *see* USAC, *Board of Directors*, https://tinyurl.com/4mxetrz2 (last accessed Feb. 14, 2025).

billions in revenue, distributes subsidies, adjudicates claims, and hears appeals of its decisions. The result? A private, self-interested entity that exercises the taxing power given to Congress under Article I. This subdelegation was never authorized by Congress, and it creates serious constitutional concerns.

I. Nondelegation doctrine should protect the separation of powers and support political accountability, while permitting Congress to rely on agency expertise.

Amici encourage this Court to develop meaningful limitations on delegations of federal legislative power. Because the boundless "intelligible principle" test has seldom been used to strike down laws, it offers no serious protection for critical constitutional safeguards. Only two statutes have ever failed that test. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And plenty of broad and open-ended laws have passed it. *E.g.*, *Lichter v. United States*, 334 U.S. 742, 785 (1948) (power to determine excessive profits); *Yakus v. United States*, 321 U.S. 414, 427 (1944) (power to fix "fair and equitable" market prices); *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (power to regulate radio broadcasting as "public interest, convenience, or necessity" demands). Nondelegation doctrine has thus become a dead letter—giving executive agencies broad latitude to exercise legislative powers that the Constitution vests in Congress.[4]

[4] The nondelegation doctrine has guided constitutional avoidance and statutory interpretation. *See, e.g.*, *Gundy*, 588 U.S. at 135–36 (cleaned up). But following the doctrine's "one good year," Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315,

A majority of this Court has already recognized that this loose standard endangers the structure of our institutions. *E.g.*, *Gundy*, 588 U.S. at 164 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari); *DOT v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61–62 (2015) (Alito, J., concurring). It blurs the line between the legislative and executive, risking the "gradual concentration of the several powers in the same department." The Federalist No. 51 (J. Madison). And it permits Congress to grant executive branch agencies sweeping authority to make consequential policy decisions that affect millions of Americans. That cannot be what the Framers intended.

This Court should adopt a more precise framework to ensure that delegations of authority from Congress respect separation of powers. Any number of proposed standards could better balance our core constitutional safeguards with practical, prudential considerations. A more rigorous doctrine will preserve congressional legislative powers, strengthen checks and balances, and improve the political accountability fundamental to our government. And such a standard could achieve this aim without depriving Congress of the flexibility it needs to rely on agency subject-matter expertise in our rapidly changing world.

A. A revived nondelegation doctrine would protect the separation of powers.

The "separation of powers is at the heart of our constitutional government." *CFPB v. All Am. Check*

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322 (2000), this Court has never again applied it to strike down even the broadest delegations of congressional power.

Cashing, Inc., 33 F.4th 218, 221 (5th Cir. 2022) (en banc) (Jones, J., concurring). The Framers understood that the accumulation of power in a singular authority is "the very definition of tyranny," The Federalist No. 47 (J. Madison), and carefully crafted a government of checks and balances to guard against that danger, The Federalist No. 51 (J. Madison). Yet the intelligible principle test, as it now stands, lets Congress surrender its popular mandate to unelected agencies—accelerating the accretion of power in the executive branch. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *Kisor v. Wilkie*, 588 U.S. 558, 618 (2019) (Gorsuch, J., concurring) ("Abdication of responsibility is not part of the constitutional design." (cleaned up)).

Those agencies make rules without bicameralism and presentment, the chief guardrails on legislative power. The Framers crafted these requirements to promote deliberation, bargaining, and compromise. *See* The Federalist No. 62 (J. Madison); The Federalist No. 63 (J. Madison/A. Hamilton). They function as "accountability checkpoints" to ensure that the law is the result of a "deliberative process" among elected representatives. *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). But administrative agencies bypass those checkpoints. Agency regulations do not require congressional approval, much less full bicameralism. In fact, if Congress wants to undo agency rulemaking, or to claw back the power it has delegated, its act must pass bicameralism and presentment, *INS v. Chadha*, 462 U.S. 919, 959 (1983), meaning Congress typically can only restrain or reclaim its delegated power with the executive's permission.

Because legislative power is easier to forsake than to reclaim, congressional delegation is often a one-way

street. And once that power has been surrendered, few constraints exist on its exercise. The result has been a "dramatic shift in power over the last 50 years from Congress to the Executive . . . through the administrative agencies." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). A meaningful nondelegation doctrine would reverse that trend, and realign our government with the separation of powers the Framers carefully designed.

B. A revived nondelegation doctrine would align with the major questions doctrine.

A strengthened nondelegation doctrine would also comport with the major questions doctrine by further checking the executive's authority to regulate issues of "vast economic and political significance." *West Virginia v. EPA*, 597 U.S. 697, 716, 721 (2022); *NFIB v. OSHA*, 595 U.S. 109, 117 (2022); *Alabama Ass'n of Realtors v. DHS*, 594 U.S. 758, 764 (2021). Together, these doctrines would more effectively police and safeguard the boundary between legislative and executive power. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (citing Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 483–84 (2021)).

The doctrines strengthen this boundary in distinct, complementary ways. Nondelegation doctrine limits *what* Congress may delegate by restricting the power Congress can confer upon an agency. The major questions doctrine examines *whether* Congress ultimately "meant to confer the power the agency has asserted." *EPA*, 597 U.S. at 721. Thus, nondelegation doctrine stops the legislature from abdicating too much power; and major questions doctrine stops the executive from abusing it. Both support the bedrock notion that "hard

choices . . . must be made by the elected representatives of the people," and no one else. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

C. A revived nondelegation doctrine would improve political accountability.

Political accountability is "crucial to the intelligible functioning of a democratic republic." John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 132 (1980). It is "democracy's essential minimum condition." Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 44 (2004). After all, "the fundamental principle of our representative democracy" is "that the people should choose whom they please to govern them." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (cleaned up). That's precisely why Article I vests all legislative power in Congress, "the branch of our Government most responsive to the popular will." *Indus. Union*, 448 U.S. at 685 (Rehnquist, J., concurring). Congress acts in the shadow of its elections. The possibility of reelection and the threat of ouster bind its members to their constituents—lending legitimacy to law and restraint to power.

In its current state, the intelligible principle test lets Congress transfer that power to decisionmakers who generally lack those democratic incentives. Congress, accountable as it is, has every "incentive to insulate itself from the consequences of hard choices." *Tiger Lily, LLC v. U.S. Dep't of HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). At the same time, executive agencies have *little* incentive "to ascertain and implement majority preferences." Ronald A. Cass, *Looking With One Eye Closed: The Twilight of*

Administrative Law, 1986 Duke L.J. 238, 246 (1986). Agency officials do not stand for election, or test their beliefs and policy agendas in the crucible of the campaign. They are executive employees, not politicians—answering not to the people, but to the President. *Cf. Collins v. Yellen*, 594 U.S. 220, 252 (2021); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability."); *Chadha*, 462 U.S. at 968 (White, J., dissenting) (contending that delegation to executive agencies "risks unaccountable policymaking by those not elected to fill that role").

Here, too, the nondelegation doctrine may offer a potent antidote. Requiring Congress to confer discretion on more precise terms, and to carefully delineate agency power, will reduce the risk of arbitrary or subjective decisions on core issues of national importance. It will also clear "the channels of political change," Ely, Democracy and Distrust at 105, reducing barriers between the democratic process and the government's policymaking apparatus. That would yield a more active Congress, ensuring that the people's representatives make the hard decisions that shape the direction of our republic. What's more, "[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they . . . have to follow." *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting).

D. A revived nondelegation doctrine would not eliminate needed flexibility or ignore practical realities.

The nondelegation doctrine's long dormancy stems from prudential considerations. The fast-paced nature of today's world requires Congress to grant agencies

discretion and rely on their expertise. As this Court explained in *Gundy v. United States*:

> [T]he Constitution does not deny to the Congress the necessary resources of flexibility and practicality that enable it to perform its functions. . . . In our increasingly complex society, replete with ever changing and more technical problems, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.

588 U.S. 128, 135 (2019) (cleaned up). These realities often demand that Congress be allowed to legislate "in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165 (1991); *accord Opp Cotton Mills, Inc. v. DOL*, 312 U.S. 126, 145 (1941) (arguing "Congress obviously could not perform its functions" if it could not delegate factfinding discretion to agencies).

But a narrower, more precise framework could still advance those pragmatic interests while preserving the separation of powers our Framers designed. Practical considerations may require legislative "flexibility and practicality," *Mistretta*, 488 U.S. at 372, but the intelligible principle test fails to "adequately reinforce the Constitution's allocation of legislative power"—tilting the scales too far toward the executive. *Ass'n of Am. R.Rs.*, 575 U.S. at 77, 85 (Thomas, J., concurring) ("For whatever reason, the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive[.]"). A rule that more precisely defines and delimits the situations when congressional delegation

is acceptable would better balance constitutional safeguards with prudential concerns.

Many of the frameworks proposed by Justices and commentators could achieve that balance. For example, Justice Gorsuch has suggested that Congress may grant agencies rulemaking power in three situations without running afoul of the Article I Vesting Clause:

- First, it may permit a coordinate branch to "fill up the details" in a broad congressional mandate;
- Second, it may create rules that "depend on executive factfinding," such as conditional legislation; and
- Third, it may assign coordinate branches duties already found within their constitutional powers.

Gundy, 588 U.S. at 157–59 (Gorsuch, J., dissenting). This standard would reserve most policy decisions to Congress. But once those decisions have been made, Congress could permit agencies to "fill up the details," *id.* at 157, by answering minor technical, scientific, or specialized questions that do not involve substantive policy choices. The major questions doctrine would then police the boundaries of that delegation—ensuring that agencies do not abuse their discretion or overstep their statutory mandates.

* * *

These principles counsel in favor of articulating a rigorous, carefully drawn nondelegation doctrine. Today's intelligible principle test finds no home in the Constitution. And it has often "been abused to permit

delegations of legislative power that on any other conceivable account should be held unconstitutional." *Gundy*, 588 U.S. at 164 (Gorsuch, J. dissenting). It is time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions" that shape our way of life. *Indus. Union*, 448 U.S. at 687 (Rehnquist, J., concurring).

This Court should adopt a principled framework that adequately safeguards the separation of powers, and take a hard look at the constitutionality of FCC's subdelegation to USAC under that standard. In both theory and practice, USAC—not the FCC—wields policymaking authority over universal service programs. Whatever standard this Court prefers to adopt, USAC cannot withstand constitutional muster.

II. FCC's unauthorized delegation of power to USAC is unconstitutional, subjecting small businesses nationwide to regulation by an unaccountable private entity.

Even if this Court does not articulate a more rigorous framework for the nondelegation doctrine, it should strike down FCC's transfer of power to USAC as an unconstitutional delegation to a private entity. While delegations of legislative power to the executive unbalance our system of government, subdelegation by the executive to a private entity threatens to "dash the whole scheme." *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). Private entities face none of the checks and balances our Framers imposed on government power. They operate wholly outside our constitutional design. They pursue no elections, seek no appointments, take no oaths. And they act in their own interests, not those of the people.

These dangers reach their zenith when the government grants private entities the power of the purse. The "power to lay and collect taxes," U.S. Const. art. I, § 8, cl. 1, is the most potent congressional power. *See M'Culloch v. Maryland*, 17 U.S. 316, 431 (1819) ("[T]he power to tax involves the power to destroy."); *Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) ("The power over the purse was one of the most important authorities allocated to Congress[.]"); The Federalist No. 58 (J. Madison) (describing this power as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people"). No rational nondelegation standard would let a private entity pull the purse-strings—particularly when such an entity is controlled by self-interested parties. Yet that is precisely what USAC does.

The Fifth Circuit correctly held that USAC wields significant regulatory and adjudicatory powers—it affixes taxes, disburses funds, and adjudicates claims. It subjects scores of businesses to laws made and taxes raised by an unaccountable entity controlled by self-interested parties. The FCC's unauthorized appointment of USAC as the "permanent Administrator" of the USF, 47 C.F.R. § 54.701(a), stands in stark violation of the Constitution. This Court should hold that the federal government cannot delegate such tremendous power to a private party.

A. Delegation of legislative power to private, unaccountable entities endangers our system of government.

This Court has previously denounced laws passing government power to private entities. *See Carter Coal*, 298 U.S. at 311 ("This is legislative delegation in its

most obnoxious form."); *Schechter Poultry*, 295 U.S. at 537 ("Such a delegation of legislative power is unknown to our law, and utterly inconsistent with the constitutional prerogatives and duties of Congress."). Sure, private entities can support government agencies in a purely advisory or ministerial capacity. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). But they cannot be delegated the power to set national policy or make binding law, and they certainly should not be permitted to lay and collect taxes.

1. Delegations to private entities subvert the separation of powers and bypass all checks and balances.[5] The Constitution protects our republic by structuring and restricting the powers of the federal government. Its Framers scrupulously "divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Seila Law LLC v. CFPB*, 591 U.S. 197, 223 (2020) (cleaned up). The Vesting Clauses define, delimit, and stabilize that structure—ensuring that each coordinate branch operates within a fixed locus of power. U.S. Const. art. I, § 1 (legislative); U.S. Const. art. II, § 1 (executive); U.S. Const. art. III, § 1 (judicial). Those commitments are exclusive, requiring that "only the vested recipient

[5] As the D.C. Circuit noted, the potent concerns with delegations of power to executive agencies "are even more prevalent in the context of agency delegations to private individuals." *Ass'n of Am. R.Rs. v. DOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) (cleaned up). "To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity." *Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308, 1309 (Mar. 28, 2022) (Alito, J. respecting denial of certiorari) (cleaned up); *accord Schechter Poultry*, 295 U.S. at 537; *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928).

of [each] power can perform it." *Ass'n of Am. R.Rs.*, 575 U.S. at 68 (Thomas, J., concurring).

This constitutional structure would be meaningless if the federal government—or a single branch acting alone—could hand its powers to private entities. "A cardinal constitutional principle is that federal power can be wielded only by the federal government." *Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022). There "is not even a fig leaf of constitutional justification" for delegating that power to anyone else. *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring). Private actors have no mandate or check on their conduct, and answer not "to political force and the will of the people." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991). To grant them the legislative powers our Framers vested in the peoples' representatives would subvert first principles of republican government. *See Gamble v. United States*, 587 U.S. 678, 688 (2019) ("[O]ur Constitution rests on the principle that the people are sovereign[.]"); *accord* The Federalist No. 22 (A. Hamilton) (declaring that "all legitimate authority" flows from "the consent of the people").

2. Putting aside the structural concerns with private delegation, private entities take no oath and owe their loyalty only to private interests. This is no small thing. Government officials are "bound by Oath or Affirmation" to uphold the Constitution. U.S. Const. art. VI, cl. 3. While such solemn oaths may look quaint to modern eyes, the Framers viewed them as "'indispensable' to civil society." *Fulton v. City of Philadelphia*, 593 U.S. 522, 582 (2021) (Alito, J., concurring). Even today, the oaths that bind government officials justify the rebuttable presumption of constitutionality that typically accompanies legislative acts. *See, e.g.*, *Nat'l*

Endowment for the Arts v. Finley, 524 U.S. 569, 604 n.3 (1998) (Souter, J., dissenting); *Illinois v. Krull*, 480 U.S. 340, 352 n.8 (1987).

It should go without saying that parties unbound by that venerable oath have no business making laws. Private actors do not swear fealty to the Constitution or our republic. They are "advocates and parties to the causes which they determine," The Federalist No. 10 (J. Madison), bound by law to serve shareholders or interest groups. That difference in loyalties and incentives distorts the vital relationship between those who make laws and those who live by them. It creates an intolerable risk of self-interested legislation by self-serving actors.

3. To the extent agencies may lawfully promulgate legally binding regulations, their ability to do so is a function of *executive* power.[6] The use of such power by private parties thus creates removal power concerns. Article II commands the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1. To fulfill this mandate, the President must be able to control subordinate executive officers, and hold them accountable for policy and enforcement decisions. *Collins*, 594 U.S. at 252; *Free Enter. Fund*, 561 U.S. at 514; *Myers v. United States*, 272 U.S. 52, 147 (1926). "[A]ppointment and removal powers [are] the primary devices of executive control." *Ass'n of Am. R.Rs.*, 575 U.S. at 91 (Thomas, J., concurring). But private actors are not subject to these key constraints.

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[6] *See, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) ("These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" (quoting U.S. Const. art. II, §1)).

Corporate directors and executive officers are ordinarily appointed and removed by shareholder vote. When such entities wield the power to enact or enforce binding regulations, the President can do precious little to restrain their conduct.

4. Private lawmaking and adjudication also raise grave due process concerns. When the government enacts a statute, "the legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). When the government adjudicates individual claims, the rigors of due process depend on the rights at issue and the facts at hand. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). But these safeguards fall away when private actors call the shots. Private rulemaking creates law without the process inherent in legislative decisionmaking. Private adjudication denies individuals a meaningful opportunity to be heard before a neutral and detached arbiter. *Concrete Pipe & Prods. v. Constr. Lab. Pens. Tr.*, 508 U.S. 602, 617 (1993). And when industry players wield power over their direct competitors, the pronounced risk of self-dealing offends due process. *Cf. Carter Coal*, 298 U.S. at 311 (denouncing delegation "to private persons whose interests . . . often are adverse to the interests of others").

* * *

Our government derives power from the governed. When the government surrenders that power to an entity outside our constitutional system, "[t]he chain of dependence between those who govern and those who endow them with power is broken." *Collins*, 594 U.S. at 278 (Gorsuch, J., concurring). Because our form of government is incompatible with such "abdications of

constitutional responsibility," *Weiss v. United States*, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring), this Court should confirm its longstanding prohibition against delegations of power to private entities. That rule commands that the government cannot grant private actors the power of the purse. Applied here, the FCC's broad delegation of power to USAC cannot survive constitutional muster.

B. The FCC has unlawfully delegated its powers to USAC, an unaccountable private taxing authority and regulator.

Nobody disputes that Congress conferred upon the FCC power and directive to regulate in the interests of universal service. Section 254 instructs the FCC to implement "Federal universal support mechanisms," 47 U.S.C. § 254, aimed at expanding telecommunications services across the nation. *Consumers Research v. FCC*, 88 F.4th 917, 928 (6th Cir. 2023) (Newsom, J., concurring in the judgment). The Act lets the FCC decide what constitutes "universal service," and requires telecommunications carriers to fund the universal service support mechanisms. *See* 47 U.S.C. § 254(c), (d). But the statute nowhere mentions USAC—much less authorizes the FCC to subdelegate its statutory duties to any private entity.

In the face of this statutory silence, and derogation of its statutory duties, the FCC appointed USAC "the permanent Administrator of the federal universal service support mechanisms." 47 C.F.R. § 54.701(a). Through extensive revenue collection and disbursement systems, USAC collects billions in tax revenue, and spends those billions on the programs it controls. In performing these duties, USAC functions not as a

vendor or administrator, but a private, unaccountable government agency.

1. By raising and disbursing billions of dollars in revenue, USAC wields the most precious power vested in Congress. Each quarter, USAC asks the beneficiaries of its universal service subsidies to project "how much money will be needed . . . to provide universal service support." USAC, *Universal Service*, https://tinyurl.com/yc74e9r7 (last accessed Feb. 14, 2025). Using these projections, USAC proposes a contribution base to the FCC. 47 C.F.R. § 54.709(a)(2).[7] That base becomes the rate every telecommunications provider must pay into the USF during the upcoming quarter. While FCC can override this rate, *id.* § 54.709(a)(3), USAC's contribution base "goes into effect by sheer force of inertia" unless the FCC acts within 14 days. *See Consumers Research*, 88 F.4th at 937 (Newsom, J., concurring in the judgment). As of 2023, the FCC "has disapproved or modified USAC's rate only three times in the last 25 years." *Id.* at 929. And USAC now collects over $2 billion each quarter, "a figure that dwarfs the FCC's entire annual budget." *Id.* USAC thus has the de facto power to raise and collect taxes—a power our Constitution vests only in Congress.[8]

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[7] Contrary to Petitioner's position, USAC plays far more than a computational role in this process. USAC has the authority "to investigate contributions and require providers to amend their filings and adjust their payments." James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 5–6 (Apr. 2023), https://tinyurl.com/2s3hwta5; *see, e.g.*, *In re Request for Review by Inter-Call, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd. 10731, 10733 (2008) (appealing USAC decision following an investigation of 499-A contribution form).

[8] The Fifth Circuit was correct to hold that the contribution factor constitutes a tax, not a fee. "A fee constitutes a charge that

2. USAC also determines where, when, and how to spend the money it collects. USAC runs programs expanding telecommunications service in schools and libraries, 47 C.F.R. § 54.705(a); rural health systems, *id.* § 54.705(b); and high-cost and low-income areas, *id.* § 54.705(c). Each quarter, USAC "sets its own budget," deciding not just "when[] and how" it spends its funds, but "*if*" it will disburse funds in the first place. *In re Incomnet, Inc.*, 463 F.3d 1064, 1076 (9th Cir. 2006). USAC can also conduct audits to recover money if it believes that its complex contribution rules have been violated. 47 C.F.R. § 54.707(a). This is an exercise of *executive* power—akin to a discretionary disbursement of funds allocated to Medicare or Social Security. But USAC's Board of Directors can only be removed pursuant to the process outlined in USAC's bylaws. And the FCC Chairman, who appoints USAC board members, can only be removed for cause. *See* 47 U.S.C. § 154(c)(1)(A). Thus, to the extent USAC wields executive power, its board is unconstitutionally insulated from accountability.

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an agency exacts in return for a benefit voluntarily sought by the payer," while a tax is raised for the benefit of the general public. *Consumers Research v. FCC*, 109 F.4th 743, 757 (5th Cir. 2024) (cleaned up). Regulated parties do not voluntarily pay the USF contribution factor to access certain benefits. Rather, service providers are legally obligated to pay, and their funds "inure to the benefit of the public," *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989) (cleaned up), furthering the expansion of universal service for the benefit of consumers. And just like a tax, the contribution factor is ultimately borne by the public, as providers almost always pass it off to consumers. James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 2 (Apr. 2023), https://tinyurl.com/2s3hwta5.

3. On top of its legislative and executive powers, USAC can hear and adjudicate disputes. Any party aggrieved by a USAC action must "first seek review from the Administrator," referring to USAC itself. 47 C.F.R. § 54.719(a).[9] Maddeningly, "the same group within USAC that made the initial decision hears the appeal." *See* James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 6 (Apr. 2023), https://tinyurl.com/2s3hwta5. And because the Administrative Procedure Act does not apply to private entities, these internal proceedings lack the procedural guarantees provided in ordinary agency adjudication. Given the amount of money handled by USAC, adjudication by interested parties without key procedural safeguards cannot be all the process due. *Cf. Mathews*, 424 U.S. at 335 (examining "the private interest that will be affected by the official action").

4. Compounding these concerns, USAC's Board of Directors consists almost entirely of interested actors. As this Court explained nearly a century ago, delegation "to private persons whose interests may be and often are adverse" to their competitors' interests "is legislative delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311. In short, "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.*; *see also Schechter Poultry*, 295 U.S. at 535, 537

[9] Should USAC affirm its initial decision—as one would often expect given this unity of decisionmakers—the complainant may at last appeal to the FCC. *See* 47 C.F.R. §§ 54.719(a), (b). But the FCC almost always rejects these appeals in batches without explanation. James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 6 (Apr. 2023), https://tinyurl.com/2s3hwta5.

(invalidating delegation of power to set "codes of fair competition" to industry trade association populated by interested parties).

Because USAC is run by entities that benefit from its policy decisions, its exercise of governmental power is as odious as the trade association in *Schechter Poultry*. Following FCC regulations, USAC's "Board Members represent . . . interest groups affected by and interested in universal service programs." USAC, *Leadership*, https://tinyurl.com/23d9ynup (last accessed Feb. 15, 2025); *see also* 47 C.F.R. § 54.703(b). These stakeholders reap financial windfalls from the billions of dollars USAC collects, and benefit directly from the programs it runs. That is raw self-dealing. By nature, these directors cannot be entrusted to regulate purely in the public interest. Nor can they be expected to adjudicate claims with the evenhanded neutrality due process demands.[10]

* * *

Given these concerns, FCC's delegation to USAC is patently unconstitutional. It is "delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311,

[10] There is reason to believe USAC's self-interest has, in fact, contaminated its management of the universal service programs. Commentators have documented "waste, fraud, abuse, and mismanagement" in USAC, calling for reform and increased oversight. *E.g.*, Citizens Against Government Waste, *The FCC's Future of the Universal Service Fund Report* (Feb. 16, 2022), https://tinyurl.com/5rxr6njs; James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 23 (Apr. 2023), https://tinyurl.com/2s3hwta5. These trends illustrate the central problem with allowing private entities to wield government power: A "diffusion of power carries with it a diffusion of accountability," *Free Enter. Fund*, 561 U.S. at 497, and interested parties serve their own ambitions, rather than those of the people.

granting a private entity run by interested parties powers our Constitution commits to the federal government. USAC wields power to raise taxes; to disburse funds; and to adjudicate disputes. It wields these powers free from all the constitutional safeguards that accompany their exercise. There is not "a fig leaf of constitutional justification" for upholding this scheme. *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring).

It bears repeating that Congress did not authorize this delegation. Many circuits recognize that any subdelegation to an outside entity should be presumed invalid "absent an affirmative showing of congressional authorization." *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).[11] That is because any such delegation "blurs lines of accountability; undermines an important democratic check on government decision-making; and increases the risk that these parties will not share the agency's national vision and perspective." *Louisiana Forestry Ass'n Inc. v. Secretary, U.S. DOL*, 745 F.3d 653, 671 n.16 (3d Cir. 2014) (cleaned up).[12]

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[11] *See also Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008); *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*, 15 F.4th 407, 428 (6th Cir. 2021); *G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 212 (10th Cir. 2015); *Ethicon Endo-Surgery v. Covidien LP*, 812 F.3d 1023, 1032 n.5 (Fed. Cir. 2016).

[12] To be sure, courts sensibly presume that agencies and cabinet officials may subdelegate responsibilities to subordinate officers. *United States v. Giordano*, 416 U.S. 505, 512–13 (1974). After all, "[w]hen an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency." *Telecomm. Ass'n*, 359 F.3d at 565. But that rule has no place here, where the FCC has delegated power to a party outside the federal government.

This Court should hold the same. The separation and allocation of power is a constitutional prerogative. To whatever extent legislation may alter that balance, the question of who may lawfully exercise government power carries "vast . . . political significance," *cf. West Virginia*, 597 U.S. at 716 (cleaned up), and belongs to the people's representatives in Congress. Because the Telecommunications Act neither mentions USAC, nor grants the FCC power to delegate authority to outside entities, this Court can strike down the FCC's subdelegation on that basis alone.

C. USAC exercises discretion to set policy, and does not act merely as a ministerial or advisory aid to the FCC.

USAC makes de facto policy decisions, and thus exceeds the limited exceptions recognized by this Court. Agencies can rely on private parties "as an aid" to advise in the development of policy or perform ministerial functions. *See generally Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939). Such an entity must (1) "function subordinately" to the agency; and (2) operate "subject to its pervasive surveillance and authority." *Sunshine Anthracite*, 310 U.S. at 388, 399. Thus, agencies can deputize private parties to perform factfinding or recommend regulations. But agencies cannot grant private actors regulatory power or equal discretion in executing the law.

USAC flouts these constraints. First, because FCC never overturns USAC's proposed contribution factor, USAC is in the driver's seat. "An agency may not . . . merely 'rubber-stamp' decisions made by others under the guise of seeking their advice." *Telecomm. Ass'n*, 359 F.3d at 568 (quoting *Assiniboine and Sioux Tribes*

v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 795 (9th Cir. 1986)). As noted, USAC's proposed rate becomes law unless the FCC overrides it within 14 days. FCC's role in managing USAC is therefore hands-off. And, in practice, the FCC virtually never exercises its authority to modify USAC's proposal.

Second, far from performing "ministerial" duties, USAC frequently makes policy decisions of its own. "A ministerial duty . . . is one in respect to which nothing is left to discretion." *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 353 (1868); *accord Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998) (holding where "officials lacked discretion," their duties "were thus ministerial"). But USAC exercises significant discretion. More, it makes policy choices in collecting revenue, disbursing funds, and managing its universal service programs. A few examples will suffice.

1. Much like an agency promulgating regulations, USAC regularly invents new substantive rules for its universal service programs. Often, these rules expand the realm of providers who are subject to contribution. In 2015, USAC reclassified foreign wholesale revenue from Telecom Italia Sparkle of North America, Inc. (TINSA) as domestic retail telecommunications revenue—allowing USAC to assess these funds for the first time. *See Request for Review by Telecom Italia Sparkle of N. Am., Inc.*, F.C.C. 2–3 (July 1, 2016), https://tinyurl.com/ev9kp4be. This was a sea change. Because such traffic originates and terminates wholly outside the United States, with no domestic end users, USAC and industry players had considered it non-assessable. *Id.* at 6, 8, 10. But USAC changed all that, reclassifying and assessing this traffic by finding that "there was a United States nexus sufficient to assess USF contributions" because TINSA had switching

facilities in the United States. *Id.* at 6–7, 9. This policy shift had financial and jurisdictional implications for carriers around the globe.

2. Similarly, USAC has denied requests for funds after changing the rules for its universal service programs. After winning a competitive bidding process, Windstream, Inc., provided telecommunications services to the University of Texas from 2012 to 2016. *See Request for Review by Windstream Communications, LLC*, F.C.C. 3–5 (Aug. 23, 2018), https://tinyurl.com/ys5e839t. USAC initially funded these services through its Rural Health Care program. *Id.* at 4. In 2017, USAC found that one of Windstream's agents had a conflict of interest during the bidding process. *Id.* at 6. USAC denied further funding and attempted to recover the funds it had already disbursed—finding Windstream had violated a putative requirement that all competitive bidding processes be "fair and open." *Id.* at 6. But FCC rules imposed no such requirement at the relevant time. *Id.* at 7–9. Instead, USAC crafted it from cloth—citing an FCC decision issued *after* the funding years, and analogizing FCC opinions addressing *other* programs. *Id.* at 8–9 & n.31–32.

3. Like a court interpreting the common law, USAC has also construed the scope of its governing statute and regulations. In 2013, USAC denied the Lawrence Unified School District $340,000 in funds for 2014 and 2015, and sought recovery of $500,000 in funds previously granted for 2011 through 2013. *See Request for Review by Lawrence Unified School District #497*, F.C.C. 1, 6–7 (Dec. 14, 2016), https://tinyurl.com/jsf266pt. USAC predicated this decision on a conclusion that Lawrence had improperly accepted 15 free accounts from an internet service provider, concluding "any free service provided to an applicant

by a service provider is a prohibited 'gift.'" *Id.* at 2.[13] But FCC rules did not prohibit Lawrence from accepting any free services whatsoever. Rather, agency commentary provided that "charitable donations" would be permissible unless they had been "provided for the specific purpose of influencing the competitive bidding process." *Id.* at 11. Thus, USAC's conclusion that free services unrelated to a program constitute prohibited "gifts" broke new ground.

* * *

These are not ministerial or advisory actions. Each of the above-referenced decisions, and countless more, involved interpretive discretion and the force of law. Collectively, at stake were billions of dollars relied on by service providers seeking to expand telecommunications service nationwide. Policy choices of this magnitude must be made primarily by Congress—rarely by an executive agency, and never by an unaccountable private company.

It bears mention that two of the above-cited cases are still pending. TINSA, Windstream, and Lawrence appealed USAC's rulings to the FCC as early as 2016. Yet the FCC did not decide Windstream's appeal until 2020, and has taken no action in the other two cases. And they are not isolated incidents. The FCC has permitted scores of appeals from USAC decisions to languish unresolved for over a decade. James E. Dustan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Ctr. for Growth and Oppor. 15–17 (Apr. 2023), https://tinyurl.com/2s3hwta5. When the

[13] Unlike the Rural Health program at issue in *Windstream*, the E-Rate program to which Lawrence Schools applied was subject to regulations requiring that any competitive bidding process be "fair and open." 47 C.F.R. § 54.503.

FCC gets around to addressing them, it often issues "omnibus orders, lumping together dozens of appeals and ruling on them in large batches," with no substantive analysis. *Id.* at 6, 22 ("[N]one of the appeals with 'shelf lives' of more than ten years has been decided. They're just sitting there.").

This comes nowhere close to the "pervasive surveillance and authority" our constitution requires of agencies that deputize private entities for their statutory responsibilities. *Sunshine Anthracite*, 310 U.S. at 388. Because the FCC has virtually never restrained or invalidated USAC's decisions, this Court should reject Petitioner's efforts to cast FCC's rubber stamp as any meaningful exercise of supervision.

CONCLUSION

Amici urge this Court to affirm the decision below.

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