

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION,)
ET AL.,)
Petitioners,)
v.) No. 24-354
CONSUMERS' RESEARCH, ET AL.,)
Respondents.)

SCHOOLS, HEALTH & LIBRARIES)
BROADBAND COALITION, ET AL.,)
Petitioners,)
v.) No. 24-422
CONSUMERS' RESEARCH, ET AL.,)
Respondents.)

Pages: 1 through 180

Place: Washington, D.C.

Date: March 26, 2025

HERITAGE REPORTING CORPORATION

Official Reporters

1150 Connecticut Avenue, N.W., Suite 305

Washington, D.C. 20036

(202) 628-4888

www.hrccourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 FEDERAL COMMUNICATIONS COMMISSION,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 24-354
7 CONSUMERS' RESEARCH, ET AL.,)
8 Respondents.)
9 - - - - -
10 SCHOOLS, HEALTH & LIBRARIES)
11 BROADBAND COALITION, ET AL.,)
12 Petitioners,)
13 v.) No. 24-422
14 CONSUMERS' RESEARCH, ET AL.,)
15 Respondents.)
16 - - - - -
17 Washington, D.C.
18 Wednesday, March 26, 2025

19
20 The above-entitled matter came on for
21 oral argument before the Supreme Court of the
22 United States at 10:16 a.m.

23
24
25

1 APPEARANCES:

2 SARAH M. HARRIS, Acting Solicitor General, Department
3 of Justice, Washington, D.C.; on behalf of the
4 Petitioners in Case 24-354.

5 PAUL D. CLEMENT, Alexandria, Virginia; on behalf of
6 the Petitioners in Case 24-422.

7 R. TRENT McCOTTER, Washington, D.C.; on behalf of the
8 Respondents.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SARAH M. HARRIS, Acting Solicitor General	
4	On behalf of the Petitioners	
5	in Case 24-354	4
6	ORAL ARGUMENT OF:	
7	PAUL D. CLEMENT, ESQ.	
8	On behalf of the Petitioners	
9	in Case 24-422	69
10	ORAL ARGUMENT OF:	
11	R. TRENT McCOTTER, ESQ.	
12	On behalf of the Respondents	111
13	REBUTTAL ARGUMENT OF:	
14	SARAH M. HARRIS, Acting Solicitor General	
15	On behalf of the Petitioners	
16	in Case 24-354	176
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-354, Federal
5 Communications Commission versus Consumers'
6 Research, and the consolidated case.

7 General Harris.

8 ORAL ARGUMENT OF SARAH M. HARRIS

9 ON BEHALF OF THE PETITIONERS IN CASE 24-354

10 GENERAL HARRIS: Mr. Chief Justice,
11 and may it please the Court:

12 Section 254 is no delegation running
13 riot. Congress first told the FCC what policy
14 to follow, to give all Americans access to basic
15 telecommunications services at reasonable
16 charges, i.e., universal service. So FCC can
17 promote phone service but not faxes.

18 Second, Congress said how to do it, by
19 charging carriers a fee, then reimbursing
20 carriers that serve universal service programs.

21 Third, Congress dictated how much to
22 charge, only what's sufficient to achieve
23 universal service, so no more than needed to
24 support specified programs.

25 Fourth, Congress prescribed how to

1 allocate fees. They must be equitable and
2 non-discriminatory. So FCC can't charge by
3 carrier size or revenue.

4 Fifth, Congress detailed what
5 underserved areas FCC must target, low-income,
6 rural, insular, and high-cost areas, plus
7 schools, libraries, and healthcare providers.

8 On top of that, Congress enacted 254
9 against the backdrop of a half-century history
10 where FCC advanced universal service for rate
11 subsidies. That delegation leaves key policy
12 choices to Congress and is definite and precise
13 enough for courts to tell if FCC followed
14 Congress's limits when filling in details.

15 Indeed, this scheme resembles the
16 pipeline safety fee in *Skinner*, which this Court
17 deemed an easy case. Like in *Skinner*,
18 Respondents do not ask this Court to revisit
19 precedents approving far broader delegations.
20 Respondents instead press a special
21 non-delegation rule for taxes, the very rule
22 *Skinner* rejected.

23 Respondents' private non-delegation
24 challenge likewise fails. They challenged FCC's
25 reliance on USAC to calculate carriers' proposed

1 contribution fee. But FCC itself reviews,
2 publishes, and adopts the fee for it to take
3 effect. That is a basic delegation of
4 accounting tasks, not grounds for the Magna
5 Carta.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Do any of the
8 principles that you just listed apply to the
9 revenue-raising activities of the -- of the FCC?

10 GENERAL HARRIS: All of the principles
11 I identified apply to them -- well, all of the
12 principles I identified apply to them in that
13 it's a -- a sort of unitary scheme in which the
14 FCC is constrained and not raising more than is
15 sufficient to support specified programs.

16 So under the Fifth Circuit's Alenco
17 decision, which we agree with, FCC can't just
18 say wouldn't it be nice to have a rainy day fund
19 where there's an additional \$10 billion lying
20 around. It has to be teed to the specific
21 universal program -- service programs that have
22 been in existence and that Congress prescribed
23 for the FCC to pursue.

24 JUSTICE THOMAS: How does that
25 constrain the revenue raising?

1 GENERAL HARRIS: It constrains the
2 revenue raising because it has to be sufficient.
3 Congress uses that word three times in different
4 parts of the statute, in 254(d), 254(e), and
5 also in -- and also in (b)(5).

6 And "sufficient" means it can't be,
7 again, excessive. It -- and that's what the
8 Fifth Circuit decision that we agree with is
9 saying.

10 So, again, if the programs are running
11 at a particular rate, which they have been for
12 the last 10 years, Congress -- the FCC can't
13 just turn around and say: Why don't we charge
14 more. Why don't we put more -- why don't we --
15 why don't we make the carriers pay more of a
16 fee?

17 And -- and so that is a real limit.
18 It's a qualitative limit, and it is the type of
19 limit that is common throughout statutory
20 schemes. We cite a number of other ones in our
21 reply brief at pages 8 to 9 where -- where
22 various agencies, and indeed this Court, are
23 allowed to -- are -- are allowed to charge
24 reasonable fees, which is construed in --
25 against the backdrop of a statutory --

1 JUSTICE THOMAS: Can you -- do you
2 have any examples of fees that did not have a
3 monetary limit or taxes that did not have
4 monetary limits that were imposed either by
5 agencies or by Congress?

6 GENERAL HARRIS: Well, yes. Again,
7 all of the ones on pages 8 to 9 are examples of
8 that. They're all -- either -- you could
9 classify them as either taxes or fees, but they
10 involve such things as supporting the Office of
11 the Comptroller of the -- of the currency's
12 functions with fees from regulated parties --

13 JUSTICE THOMAS: And those have no
14 limits and -- or no rates?

15 GENERAL HARRIS: So we are not arguing
16 for a no limits at all approach where you can
17 just raise whatever revenue we feel like -- you
18 feel like. And we don't think 254 follows that
19 approach either. It -- the idea is there are
20 qualitative limits that are baked into the
21 statutory scheme, not raise whatever amount of
22 money; you know, a trillion dollars.

23 And, again, I'll just point out it's a
24 little perverse in two senses to think that you
25 can cure a non-delegation problem and give no

1 other guidance than giving a cap of, say, like
2 \$1 trillion to raise and leave the rest for the
3 agency to figure out. Not only is that a very
4 arbitrary separation of powers rule but it would
5 require overturning such cases as Skinner and
6 J.W. Hampton, where this Court not only said
7 there's no special non-delegation rule for taxes
8 but did -- didn't seem to adopt that basic
9 proposition.

10 CHIEF JUSTICE ROBERTS: Should --
11 should we be looking to sort of a common law
12 approach, in other words, what the Commission
13 has done, or instead what the Commission could
14 do?

15 GENERAL HARRIS: I think you should
16 look first and foremost at the statutory text.
17 And the statutory text itself incorporates the
18 concept of universal service that applied from
19 -- from the inception of the FCC Act. And so
20 let me just sort of explain why that is.

21 Section 254 obviously itself is a
22 reticulated scheme that prescribes all the
23 details and constraints that I described, but on
24 top of that, it is preserving and advancing the
25 concept of universal service that was set forth

1 in Section 151 of the Act that harks back to
2 1934.

3 So, for instance, when the FCC is
4 directed to figure out what universal service
5 entails, the FCC is not just looking to Section
6 254(c), which is defining universal service as
7 an evolving level of telecommunications services
8 that have to meet sort of four specified
9 parameters, including the objective -- objective
10 criterion of -- that a substantial majority of
11 residential customers adopted it.

12 The FCC also has to consider the
13 backdrop of Section 151, which originally
14 defined "universal service" as mandating the FCC
15 to make available, so far as possible, to all
16 the people of the United States, a rapid,
17 efficient, nationwide wire and radio
18 communications service with adequate facilities
19 at reasonable charges.

20 Congress was enacting this statute in
21 1996 against that backdrop and against the way
22 the FCC had implemented this system.

23 CHIEF JUSTICE ROBERTS: Well, what if
24 the law said the level of service that the --
25 should be afforded is -- is service that is

1 fair? Would that present a constitutional
2 problem?

3 GENERAL HARRIS: It could but not
4 against this statutory scheme because I think
5 the level of service that could be fair would,
6 again, in this particular context, and something
7 this Court has recognized in other
8 non-delegation cases with rate setting or other
9 stuff, if you have a regulatory backdrop that
10 Congress is acting against, a term that's
11 otherwise amorphous like "fair" or "equitable"
12 or whatever it is gets meaning through the --
13 through the particular regulatory context in
14 which it exists.

15 And, again, I'll also just point out
16 Section 254 is a heck of a lot more specific
17 than just do what is fair. Section (b)(3), for
18 instance, is prescribing in like very specific
19 detail how exactly --

20 CHIEF JUSTICE ROBERTS: But your --
21 your answer, I guess, is that it could, that
22 could be sufficient?

23 GENERAL HARRIS: It could be a problem
24 or it could be --

25 CHIEF JUSTICE ROBERTS: And it -- you

1 would look -- in the -- in a particular context
2 or something, but --

3 GENERAL HARRIS: Absolutely. And
4 that's exactly what this Court has done in other
5 rate-setting contexts. So, for instance, in the
6 Court's past cases with respect to Rock Royal,
7 for instance, where the question is what is a
8 reasonable rate for milk prices, to achieve
9 price parity, you could say in the abstract sort
10 of just and reasonable, if you looked at it
11 divorced from anything else, might be a pretty
12 significant delegation of policy-making
13 authority. But in the particular context of the
14 history of rate-making, it gains meaning and
15 gains teeth.

16 And I think that's consistent with the
17 objective when the Court is looking at a
18 constitutional challenge. The aim is to look
19 for constraints and means of -- and -- and --
20 and -- and constitutional avoidance, as opposed
21 to saying Congress didn't give any meaningful
22 limits.

23 And again, that is very consistent
24 with the highly detailed nature of 254 in this
25 particular context, which is providing much more

1 than just abstract rates.

2 Again, looking back at the 19- --
3 pre-1996 scheme, the FCC did, for, you know, a
4 half century, use its power to impose just and
5 reasonable rates to provide universal service
6 through a system of implicit subsidies.
7 Respondents aren't challenging that, and I think
8 that history of what the FCC did just gives more
9 substance and more guidance to what's happening
10 here.

11 And --

12 JUSTICE JACKSON: Can you speak to the
13 combination theory or the combination argument?

14 GENERAL HARRIS: Yes. It's meritless.
15 And the reason is -- there's a couple of reasons
16 for this.

17 One is the idea that Congress can't
18 delegate legislative power is a basic
19 restriction on Congress -- on -- on what
20 Congress can do and the constitutional design.

21 Congress can't pass legislative power
22 to anyone. It doesn't matter if it's an agency
23 or a private party. And it doesn't matter if
24 someone then sort of passes it along. Like, you
25 just can't pass go. Congress can't do that.

1 So the idea that there's sort of an
2 aggravated constitutional offense just by having
3 a -- a -- a subdelegation, just really doesn't
4 track the nature of the Article I challenge.

5 The second issue is just the way in
6 which the combination theory has kind of morphed
7 in this Court.

8 I am, candidly, not sure at this point
9 whether we are dealing with an Article I
10 subdelegation challenge from the FCC to USAC,
11 where there's an additional pass-along of
12 legislative power that's the problem, or if
13 we're dealing with an Article II challenge,
14 where there is a supposedly excessive delegation
15 of executive power to USAC but the FCC would
16 presumably be okay in at -- at least possessing
17 that power.

18 And if it's the latter category, I'm
19 not sure what constraints Respondent is offering
20 here or, you know, the -- the presentation of
21 that particular argument. But what I can tell
22 you is it's -- it's definitely meritless,
23 because USAC is not exercising any kind of
24 problematic power. It is just making
25 recommendations --

1 JUSTICE JACKSON: Let me ask you.

2 Does the private non-delegation theory suffer
3 from the same lack of clarity in terms of its
4 origins? I mean, I -- I -- I'm trying to
5 understand its distinction with the traditional
6 non-delegation theory.

7 It seems as if, you know, if there's a
8 problem with Congress delegating this power,
9 this -- the status of the party that receives it
10 shouldn't matter. And if the party that
11 receives it, being private is the problem, that
12 seems more like an appropriations issue.

13 So I -- I guess I'm just trying to
14 understand what the source of that theory is as
15 well.

16 GENERAL HARRIS: Yes. So the --
17 the -- I think the source of the theory is in
18 question in this case. I will say, again, for
19 Article I, you can't delegate that power to
20 anyone. So it wouldn't matter if it's the
21 agency, if it's directly to a private party.
22 But, like, there's no additional offense from
23 subdelegating it.

24 JUSTICE GORSUCH: Ms. Harris --

25 GENERAL HARRIS: With respect to

1 Article II --

2 JUSTICE GORSUCH: -- well, why is --
3 why -- why is that true? You -- you want to
4 compartmentalize the delegation of authority
5 from Congress, the alleged delegation of
6 authority from Congress, to an executive branch
7 agency and -- and then separately look at the
8 delegation of authority from the agency to a
9 private party.

10 But when it is alleged that Congress
11 has delegated legislative authority to an
12 executive branch agency, we run into the problem
13 of drawing a line between the execution of
14 the -- the -- the formulation of the law and the
15 execution of the law.

16 But when the agency then goes ahead
17 and just passes that off to a private party,
18 then doesn't the argument in favor of the
19 position that all that the agency is doing is
20 exercising leg- -- executive authority in
21 enforcing the law disappear, or at least is --
22 is diminished?

23 GENERAL HARRIS: I don't think so.
24 And I think this scheme, I mean, just on the
25 merits would illustrate why. But just as a

1 conceptual matter, we're talking about two
2 different things.

3 One is Congress can't pass off its
4 power to anyone. And two is if Congress does
5 give the FCC something to execute in its
6 executive power, that's a separate category of
7 issues. The question in that case is, is there
8 too much executive power being delegated to
9 someone else?

10 Appointments clause might be a sort of
11 way of looking at it, but in this case I don't
12 even think you need to get there, because the
13 bottom line is I think the Fifth Circuit and
14 Respondents are misconceiving of exactly what
15 USAC does. It is doing math.

16 It is saying: We are looking to
17 exactly how the projections for universal
18 service, based on historical numbers, work and
19 making a recommendation to the FCC on that
20 score, 60 days before the quarterly contribution
21 fee is due.

22 And then on -- sort of for the
23 denominator for the fee, it is summing up
24 reports from telecommunications carriers as to
25 what their eligible revenues are for a quarter.

1 Both of those things get -- get passed
2 on to the FCC, the FCC reviews them, it has to
3 publish them in the Federal Register as its own,
4 and then it has 14 days in which to revise what
5 is essentially a proposed rate and make it its
6 zone.

7 JUSTICE ALITO: But when we're --
8 we're inquiring whether the agency is -- has
9 simply asked a private group to -- to perform
10 some ministerial functions, why shouldn't we
11 look at the record of what the FCC has actually
12 done?

13 And if you look at the record here,
14 isn't it really hard to say anything other than
15 the fact that they just have rubber-stamped
16 whatever the USAC has -- has told them? Except
17 -- there are a few exceptions, but basically
18 they just say: Okay, fine. Right?

19 GENERAL HARRIS: No. So two points of
20 pushback, one on the law and one on the facts.

21 With respect to the law, this Court
22 has in no context of sort of looking at
23 recommendations said: Who's really making the
24 recommendations? Is there a lot of sway?

25 So take Skinner, for instance. The

1 Secretary of Transportation in that case, which,
2 again, easy case, gave -- consulted the Private
3 Surface Pipeline Carriers Association about,
4 like, hey, what would be a good way of figuring
5 out the usage fee in that case? And a rep just
6 said great. You guys have a good idea. I'm
7 going to run with it.

8 This Court did not sort of peak behind
9 the hood and say: Was that, you know, too much
10 influence by a private group or not?

11 In Sunshine Anthracite, when there
12 were coal producers who were proposing prices
13 but -- that had to be -- that actually had to be
14 adopted by the federal agency, this Court didn't
15 sort of ask for record evidence, or assessments
16 of was that too much influence, how much
17 independent work was actually done by the
18 agency, should there be discovery.

19 There are tons of blue ribbon
20 commissions that do similar stuff like this, and
21 this Court never says: Who is actually the
22 driver -- in the driver's seat? Because it's a
23 very formal inquiry in the non-delegation
24 context.

25 The actor is an officer of the United

1 States who's adopting the actual form of policy.

2 And, again, this sort of happens every day.

3 But again --

4 JUSTICE ALITO: I know -- I know
5 that's true as a formal matter, but isn't it a
6 fact that the GAO reports about what the USAC
7 has been done'ing or has been doing are pretty
8 damming?

9 I mean, they say that the -- the GAO
10 couldn't verify the eligibility of 36 percent of
11 those who receive USF benefits? Nearly
12 80 percent of the Lifeline Program users may --
13 may be legally ineligible for the benefits
14 they're receiving?

15 GENERAL HARRIS: So here's what I'll
16 say on this. One, with respect to whether
17 there's meaningful review of the contribution
18 factor, which is the question in this particular
19 case, there are four instances in which the FCC
20 has, in fact, said USAC is not doing it right.

21 Two of them, as Respondents point out,
22 have happened since this lawsuit, but others
23 happened in the third quarter of 2003. And in
24 2016 there was an award of relief when there was
25 a disagreement with how the administrator

1 calculated the contributions.

2 So there are empirical examples of
3 this not just being a rubber stamp.

4 And more broadly, to the extent that
5 GAO -- GAO report raises concerns with you with
6 respect to how exactly these programs are
7 administered, that sounds like the stuff of an
8 APA challenge, not a non-delegation challenge.

9 Again, there are limits on what the
10 FCC is supposed to be doing, the kinds of
11 programs it's supposed to be supporting and --

12 JUSTICE GORSUCH: Ms. -- Ms. Harris,
13 I -- I find it -- sorry, just to shift gears a
14 little bit -- notable that in your reply brief,
15 in terms of the legal task that you think we're
16 supposed to be engaged in, made a couple of
17 comments. And I would just like to confirm this
18 is your thoughts.

19 One is that in distinguishing between
20 lawful conferrals of discretion from unlawful
21 delegations, that that requires more than asking
22 in the abstract whether there is an intelligible
23 principle.

24 GENERAL HARRIS: Yes, Justice Gorsuch,
25 we think there are two paths for this Court to

1 do. And one path could be just to sort of stay
2 the course and say is this delegation any worse
3 than ones the Court has approved?

4 We think to the extent the Court is
5 interested in looking to past precedents to
6 tighten their reins, the better approach is not
7 just say, you know, there is kind of mush for
8 the intelligible principle, look to past cases,
9 but to look at the parameters I talked about.

10 Including one of the most important is
11 is there sufficiently definite and precise
12 language in the statute to enable Congress, the
13 courts, and the public to ascertain whether
14 Congress's rules are followed?

15 And, again, taking from Chief Justice
16 Marshall's opinion of Wayman, if -- when you
17 have a broad delegation, making sure there are
18 sufficient rules.

19 JUSTICE GORSUCH: And -- and I'm sorry
20 to prolong this, Chief --

21 CHIEF JUSTICE ROBERTS: Go ahead,
22 please.

23 JUSTICE GORSUCH: -- but just to
24 finish up.

25 One -- one critical element you

1 indicated is there have to be
2 sufficiently-defined boundaries, that judicial
3 review is -- is possible?

4 GENERAL HARRIS: Absolutely. And we
5 think 254 passes that with flying colors in --
6 in numerous respects, just with respect to how
7 the fee has to be assessed.

8 JUSTICE GORSUCH: And then finally,
9 that it -- there not -- needs not just be a
10 general policy for the agency to pursue but
11 boundaries also clearly delineated; is that
12 right?

13 GENERAL HARRIS: Absolutely. And we
14 think --

15 JUSTICE GORSUCH: Okay.

16 GENERAL HARRIS: And we think that --

17 JUSTICE GORSUCH: All right.

18 GENERAL HARRIS: -- 254 satisfies --

19 JUSTICE GORSUCH: No, I understand
20 that.

21 GENERAL HARRIS: Okay.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas? Anything further?

24 JUSTICE THOMAS: Would you -- is there
25 any direct statutory constraint on the revenue

1 raising?

2 GENERAL HARRIS: The direct statutory
3 constraint is the sufficiency provision that
4 appears three times throughout the statute. It
5 is a qualitative limit. It is tied to -- you
6 cannot raise more funds than would be needed to
7 provide universal service to the standards that
8 are provided in the statute. So basic
9 telecommunications services have to be at that
10 level.

11 Again, it's also historically defined
12 by what the FCC has done. And I think this is
13 telling because the -- the -- while Respondents
14 are saying this is an out-of-control program,
15 where it's gone from 3 percent to 35 percent
16 contribution rate, the math is not -- is pretty
17 misleading on that. This program actually --
18 the actual amounts for the revenues have stayed
19 flat for 10 years.

20 The complaint that they seem to have
21 with respect to their percentage actually deals
22 with is explainable because the -- it's
23 technical -- but the contribution base for the
24 telecommunications revenues has fallen from \$288
25 billion in 2014 to \$116 billion today. That has

1 to do with the fact that the carriers' revenues
2 for intrastate telecommunications has fallen,
3 not with respect to some out-of-control program.

4 JUSTICE THOMAS: So if I understand
5 your argument, it is that indirect constraints
6 or at least constraints to the services being
7 offered are sufficient to constrain the
8 revenue-raising side as far as non-delegation is
9 -- is concerned?

10 GENERAL HARRIS: Absolutely. A couple
11 of reasons for that. One is because that is the
12 best reading of the statutory scheme. It would
13 prevent the FCC, again, from doing like the
14 rainy day fund or raising an indefinite amount
15 of money.

16 Two, it's consistent with upholding a
17 range of other statutory schemes that similarly
18 say that an agency or, again, this Court has the
19 discretion as to how much fees or analogous
20 devices to be charged. We think that that is
21 tethered to the statutory structure and that
22 there are real limits on what can be imposed.

23 JUSTICE THOMAS: And, finally, can you
24 give me an example where this indirect approach
25 has been accepted for non-delegation purposes?

1 GENERAL HARRIS: So the Court's
2 non-delegation cases don't really sort of map
3 onto this, other than, I guess, in the tariff
4 context. So if you want to accept the tariff
5 context as on all fours, the tariff context has
6 a number of examples in which the president was
7 not just empowered to set tariffs to a
8 particular rate but where the tariffs were
9 tethered to sort of qualitative judgments by the
10 president with respect to what would promote
11 trade or what would equalize production levels.

12 And I think that's not uncommon. It's
13 sort of if your teeing something to a level that
14 requires some sort of expertise or might change
15 over time, it kind of makes sense that that
16 would be true.

17 Again, you could also look to Skinner
18 where there is a lot of discretion with respect
19 to exactly what level the fee was going to be
20 set at for surface pipeline fee purposes. It
21 did have like an ultimate cap of 105 percent of,
22 like, what the programs were running at for
23 appropriations, but, like, within that, there's,
24 like, a wide range of discretion.

25 And I just think it just doesn't pan

1 out, the idea that you have to have some sort of
2 magic number inquiry. It's not consistent with
3 how this Court has treated the Tax Clause as
4 indistinguishable from other Article I powers.
5 And it just doesn't make a lot of sense. Like,
6 \$2 trillion is where a cap is constitutional
7 without any other guardrails? That can't be
8 right.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: Well, the amount to be
11 raised is tied to the provision of universal
12 services, so -- but universal services can
13 evolve. How far can it evolve?

14 GENERAL HARRIS: Not so far for two
15 reasons. One is that evolving technological
16 landscape is specifically tied to four different
17 things that define universal service under
18 254(c). So the most objective of those,
19 although there's a bunch of them, is one I
20 mentioned, that it's a substantial majority of
21 residential customers have chosen to subscribe.
22 So, again, that would throw out faxes. Most
23 people are not subscribing to faxes today as
24 their means of communicating with each other.
25 It's phones.

1 And the other constraint is 151. You
2 have to pick things that are similar to radio
3 and wires as they were in -- sort of envisioned
4 in 1934 and just this history of what universal
5 service has been.

6 JUSTICE ALITO: So if a new form of
7 very expensive telecommunications services
8 popped up, then this -- that could be covered?

9 GENERAL HARRIS: I don't think
10 so because --

11 JUSTICE ALITO: If enough people
12 subscribed to it?

13 GENERAL HARRIS: Well, it would have
14 to have a substantial majority of residential
15 customers have chosen to subscribe through
16 market forces. So, again, if the -- the entire
17 country is suddenly able to afford extremely
18 expensive telecommunications, that might be an
19 issue --

20 JUSTICE ALITO: Well, what's a
21 substantial --

22 GENERAL HARRIS: -- but then you'd
23 have a --

24 JUSTICE ALITO: What is a substantial
25 portion?

1 GENERAL HARRIS: A substantial
2 majority.

3 JUSTICE ALITO: Substantial.

4 GENERAL HARRIS: Substantial majority.
5 So more than a majority. Certainly, more than
6 50 percent. And I'll just also point out that
7 (b)(1) would be an additional constraint in your
8 hypothetical because the quality services have
9 to be available at just, reasonable, and
10 affordable rates.

11 And so, again, the scheme would work
12 out so that you're not -- it's hard to imagine
13 that you would have like Cadillac.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: To that point, the
17 Act has only subsidized two services, phone and
18 Internet, correct?

19 GENERAL HARRIS: So it's actually --
20 phone is the universal service --

21 JUSTICE SOTOMAYOR: Mm-hmm.

22 GENERAL HARRIS: -- and for the
23 Internet, it comes in under the express
24 directive under (h)(2) that the FCC shall
25 establish competitively neutral rules to

1 enhance, to the extent feasible -- dot, dot, dot
2 -- advanced -- access to advanced
3 telecommunications and information services.

4 JUSTICE SOTOMAYOR: So --

5 GENERAL HARRIS: Internet and advanced
6 information services.

7 JUSTICE SOTOMAYOR: So whatever, there
8 is a real constraint. There's only two services
9 have been identified?

10 GENERAL HARRIS: Yes. It is a very
11 real constraint. And it's --

12 JUSTICE SOTOMAYOR: All right.

13 GENERAL HARRIS: -- constrained
14 further.

15 JUSTICE SOTOMAYOR: Justice Thomas and
16 -- and the other side makes a great deal, and
17 you've been answering it, about the fact that
18 there has never been a tax-raising law that we
19 have addressed where Congress has not put an
20 upper limit on the tax.

21 I think your -- you say that may be
22 true, but we have a lot of tariff situations
23 where historically, from the beginning of the
24 country, Congress didn't set a limit, correct?

25 GENERAL HARRIS: There's that and also

1 just the -- the history on pages 8 to 9 of our
2 reply brief --

3 JUSTICE SOTOMAYOR: Right.

4 GENERAL HARRIS: -- where, like,
5 there's a lot of statutory examples. The Court
6 just hasn't addressed them.

7 JUSTICE SOTOMAYOR: Okay. So,
8 historically, we have a lot of examples of it?

9 GENERAL HARRIS: Yes, and the only
10 other thing on the history is the 1798 real
11 estate tax, if we want to get there. The extent
12 of the discretion there, while there was a cap,
13 is just -- was extremely broad.

14 JUSTICE SOTOMAYOR: Yeah. The federal
15 boards, the -- the boards there could set
16 different rates in different places and did a
17 lot of -- gave it extraordinarily broad power,
18 correct?

19 GENERAL HARRIS: Exactly right.
20 Allegheny County, Pennsylvania, for instance,
21 got a 50 percent downward departure on their
22 assessments because of the Whiskey Rebellion.
23 That's a policy judgment.

24 JUSTICE SOTOMAYOR: All right. I want
25 to -- so to -- now, I think why that's important

1 is twice we've said that the taxing power
2 shouldn't be looked at any differently than
3 tariffs or customs or duties.

4 And the reason for that is the
5 Constitution itself, right? The Tax Cause is
6 part of duties, it says, I think -- let me just
7 get the language -- it -- basically, it's the
8 same clause with -- talking about the same
9 power, correct?

10 GENERAL HARRIS: Exactly right.

11 JUSTICE SOTOMAYOR: All right. Now, I
12 want to go back to Justice Alito's questions
13 with respect to the contribution limit and the
14 -- the -- the complaints about whether some of
15 the people who have received the funds are
16 proper or not.

17 I think the point you were making is
18 that the delegation issue is the contribution
19 base?

20 GENERAL HARRIS: Yes.

21 JUSTICE SOTOMAYOR: Not whether or not
22 the agency itself or the person it's delegated
23 to is actually functioning properly and who it's
24 identifying to receive the funds, correct?

25 GENERAL HARRIS: Correct.

1 JUSTICE SOTOMAYOR: So the
2 contribution limit, he says the history is very
3 sparse that the agency has reviewed that
4 contribution base that was recommended.

5 The reason I see that's -- the reason
6 for that, I think, is because the FCC controls
7 every component of calculating that, correct?

8 GENERAL HARRIS: Yes. It sure does.

9 JUSTICE SOTOMAYOR: So it tells -- it
10 determines and tells USAC what information to
11 get from the people that it's surveying,
12 correct?

13 GENERAL HARRIS: Yes.

14 JUSTICE SOTOMAYOR: And then the FCC
15 says -- determines what the final contribution
16 base calculation should be, correct?

17 GENERAL HARRIS: Absolutely.

18 JUSTICE SOTOMAYOR: It determines what
19 expenses should be covered?

20 GENERAL HARRIS: Yes.

21 JUSTICE SOTOMAYOR: So what USAC is
22 doing is a mathematical calculation?

23 GENERAL HARRIS: That is correct.

24 JUSTICE SOTOMAYOR: So we would hope
25 that there's not much more than four examples of

1 them getting math wrong, correct?

2 GENERAL HARRIS: That is certainly the
3 hope.

4 JUSTICE SOTOMAYOR: If there were a
5 lot more, I'd be much more worried, but at the
6 end, the number they're given is a number where
7 each component has been set by the -- by the
8 agency?

9 GENERAL HARRIS: By the parameters the
10 FCC sets, correct. Under the regulations.

11 JUSTICE SOTOMAYOR: All right. Now,
12 Justice Gorsuch asked you a list of principles.
13 And -- and you said --I'm assuming he's asking
14 whether, I think -- and he can speak for himself
15 -- and he often does.

16 (Laughter.)

17 JUSTICE SOTOMAYOR: But those
18 principles are from our cases, correct?

19 GENERAL HARRIS: Absolutely.

20 JUSTICE SOTOMAYOR: And the best
21 example of what those principle mean --
22 principles mean is not us redefining them, but
23 us looking to how they've been applied in our
24 precedents, correct?

25 GENERAL HARRIS: I would just give one

1 caveat, which is I know members of the Court are
2 concerned that specific cases have not followed
3 the principles that the Court has actually laid
4 out in the cases. And there is arguably some
5 tension there.

6 And so that's why we've identified two
7 paths for the Court to go.

8 JUSTICE SOTOMAYOR: Okay.

9 GENERAL HARRIS: One is the metrics of
10 the cases. Just, you know, is the delegation
11 worse or better? And two is what do the
12 principles mean?

13 JUSTICE SOTOMAYOR: But none of our
14 precedents have been rejected by the court
15 below?

16 GENERAL HARRIS: None -- none of --
17 correct. The court below and Respondents are
18 not asking you to overturn any of them.

19 JUSTICE SOTOMAYOR: Any. And if we
20 were going to overturn any precedent, we should
21 have brief -- briefing on that, correct?

22 GENERAL HARRIS: You certainly could.

23 JUSTICE SOTOMAYOR: Could. But we
24 should?

25 GENERAL HARRIS: Sure, yes.

1 JUSTICE SOTOMAYOR: Okay. It's a
2 better practice, isn't it, if we're going to
3 overturn precedent, to find out what all the
4 stare decisis factors are?

5 GENERAL HARRIS: Stare decisis is
6 important. Again, I think we're not saying that
7 the Court cannot constrain or sort of revitalize
8 the principles in the cases by overturning
9 things, though.

10 JUSTICE SOTOMAYOR: Oh, sure. We're
11 always free to do that, but we should proceed
12 with caution when we're looking at overturning
13 precedent.

14 GENERAL HARRIS: Yes.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: The easiest parts of
18 an argument are where you just have to say yes
19 to everything.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: Remember, I was a
22 prosecutor.

23 (Laughter.)

24 JUSTICE KAGAN: This is going to be
25 just a little bit harder. But just a little

1 bit.

2 (Laughter.)

3 JUSTICE KAGAN: You mentioned to
4 Justice Thomas when you were first talking to
5 him that there are other schemes that function
6 exactly like this one, in the sense of
7 revenue-raising provisions that don't have
8 specific numerical limits.

9 And you pointed to your list on page
10 8, which is like the Federal Reserve and the
11 FDIC and a bunch of others.

12 And I just want you to talk a little
13 bit more about that and to tell me: How close
14 are those? Or, you know, otherwise put, like,
15 are there distinctions -- if I looked at all of
16 these more carefully than I have, would I be
17 able to say no, these are distinguishable in
18 various ways? Or are these, like, really right
19 there?

20 GENERAL HARRIS: I think they are
21 right there, in the sense that especially the
22 ones that are the agencies using their
23 fee-raising power to cover the cost of the
24 agency's function -- the programs that the
25 agencies are doing, it's going to the regulated

1 party. So here, telecommunications carriers for
2 their OCC banks, and saying: Please support the
3 programs that we're doing.

4 Even though, oftentimes the programs
5 that are being supported are not things worthy
6 of benefit of the bank's, per se. It's like
7 enforcement proceedings, or here, it's not --
8 the telecommunication carriers that participate
9 in universal service are getting the money back
10 at the back end.

11 So I think it is on all fours in that
12 sense. The idea is you have a special
13 fee-raising provision to a specific subcomponent
14 of the industry that's used to sort of fund new
15 programs that affect that industry. So in that
16 sense, it's on all fours.

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: They're going to get
21 harder still. But you can handle it.

22 (Laughter.)

23 JUSTICE GORSUCH: Ms. Harris, let's
24 suppose that Congress passed a statute saying
25 that every American should pay an equitable and

1 non-discriminatory contribution to paying down
2 the national debt, sufficient to reduce the
3 national debt by 1 percent a year. Okay?

4 A lot of language sort of like what we
5 have here, but then left it up to the IRS to
6 figure out marginal tax rates, deductions, do
7 you get your charitable deduction, unrealized
8 income. You figure it out, IRS.

9 Good to go or not?

10 GENERAL HARRIS: Not good to go. Two
11 differences from this particular scheme.

12 JUSTICE GORSUCH: Okay.

13 GENERAL HARRIS: One is the breadth of
14 the delegation obviously matters. We talked
15 about that before. The --

16 JUSTICE GORSUCH: So it's okay if it
17 does it to a subset of citizens, but it can't do
18 it to all citizens?

19 GENERAL HARRIS: It's not just a
20 subset of citizens that's different for 254.
21 It's the specified nature and the details of the
22 programs.

23 You are talking about a tax for the
24 entire country that has no other parameters and
25 wouldn't sort of be building on the history of

1 IRS regulation. And we are talking here --

2 JUSTICE GORSUCH: No, no, there would
3 be IRS regulate -- there have been IRS
4 regulations for some time.

5 GENERAL HARRIS: I take the premise of
6 the hypothetical --

7 JUSTICE GORSUCH: Quite a few of them.
8 So let's -- let's assume it's -- you know, you
9 can make the same kind of old soil arguments,
10 they know how to do this. They are very good at
11 it. The IRS has been at it for a long time.

12 GENERAL HARRIS: So I wouldn't say the
13 old soil argument here is they are great at
14 this. It is that Congress understood when
15 enacting the particular scheme that it was
16 incorporating those restraints and concepts that
17 go into those concepts.

18 JUSTICE GORSUCH: Don't you think you
19 would have the -- make -- be making the same
20 argument in the case that I just posited,
21 that -- that the IRS would?

22 Or -- or maybe if you want to make it
23 narrower. Same -- same delegation, but to
24 secure universal healthcare, for example,
25 sufficient to secure advanced universal

1 healthcare on a non-discriminatory basis.

2 That's a narrow one for you.

3 GENERAL HARRIS: Again, I think the
4 problem there is you are using the words of this
5 particular statutory scheme out of context in
6 ways that divorce it from the constraints in
7 this particular scheme.

8 JUSTICE GORSUCH: Okay.

9 GENERAL HARRIS: It's the idea that
10 universal healthcare is a goal that has not sort
11 of been a --

12 JUSTICE GORSUCH: In -- in this scheme
13 there is no cap on how much can be raised,
14 right?

15 GENERAL HARRIS: I disagree. I
16 think --

17 JUSTICE GORSUCH: No numerical cap.

18 GENERAL HARRIS: -- there is a --
19 there is a qualitative cap.

20 JUSTICE GORSUCH: There's no numerical
21 cap.

22 GENERAL HARRIS: There is absolutely
23 no numerical cap.

24 JUSTICE GORSUCH: There is no rate?

25 GENERAL HARRIS: There is no rate, but

1 the rate is something that is historically
2 defined in ways that your hypotheticals aren't.
3 And --

4 JUSTICE GORSUCH: Let's -- let's talk
5 about your -- the constraints you do mention.
6 What are advanced services?

7 GENERAL HARRIS: Advanced information
8 services or technical -- and -- or
9 telecommunications services are things that are,
10 again, above the baseline of what's been
11 considered universal service. So like existing
12 telecommunications and -- are, again, a more
13 novel technology.

14 JUSTICE GORSUCH: Those evolve over
15 time, right?

16 GENERAL HARRIS: It could evolve over
17 time --

18 JUSTICE GORSUCH: Sure.

19 GENERAL HARRIS: -- but the statutory
20 parameter for (h)(2) would be something that
21 someone could challenge. Again, an APA suit
22 could be a great way to go if you thought it was
23 misdefined.

24 JUSTICE GORSUCH: Okay. Let's talk
25 about (b)(6) in schools, for example, as well.

1 The FCC's interpreted that to mean that it can
2 provide mobile WiFi hotspots for off-premises
3 use and in school buses, right?

4 GENERAL HARRIS: It has. And I would
5 also point you to (h)(1)(B), which is providing
6 yet more specificity with respect to the -- how
7 the school and library programs are supposed to
8 go and how the rates are charged.

9 And, again, I'll just do the refrain.
10 If you think that there is a problem, or people
11 think that there is a problem, with the way in
12 which the FCC's rules are interpreting the
13 parameters of the program, you can bring a
14 challenge to exceeding the scope of the
15 statutory authority.

16 JUSTICE GORSUCH: Could the FCC use
17 the program to give everybody a mobile hotspot?

18 GENERAL HARRIS: To give everyone a
19 mobile hotspot?

20 JUSTICE GORSUCH: Yeah, everybody
21 who's a library patron at least.

22 GENERAL HARRIS: Everyone who is a
23 library patron? I think the question there
24 would be whether it fits within (h)(2) to the
25 extent feasible to give access to tele --

1 advanced telecom and information services for
2 schools and libraries.

3 JUSTICE GORSUCH: Yeah.

4 GENERAL HARRIS: So --

5 JUSTICE GORSUCH: It's -- it's
6 feasible. It just costs a lot.

7 GENERAL HARRIS: Right. And then the
8 other constraints with respect to the costs
9 would be making sure that the ensuing -- any
10 sort of ensuing program for that would not
11 interfere with just reasonable and affordable
12 rates for universal services.

13 Again, I think when you see how the
14 system works --

15 JUSTICE GORSUCH: And then -- and then
16 with respect to (b)(7), it -- it allows FCC to
17 come up with new principles that aren't found
18 anywhere in the statutory text, right?

19 GENERAL HARRIS: I don't think that's
20 quite right. And here's why.

21 JUSTICE GORSUCH: Why -- why not?

22 GENERAL HARRIS: Because the
23 principles have to be consistent with the rest
24 of the chapter. And the proof is how FCC has
25 interpreted -- I think FCC's way of interpreting

1 this shows that it's more of a
2 belts-and-suspenders provision than a
3 do-whatever-you-feel-like provision.

4 The two things that FCC has done under
5 (b)(7) are, one, to require competitive
6 neutrality --

7 JUSTICE GORSUCH: Well, now, hold on.
8 You say we shouldn't look at what's actually
9 been done; we should look at the statute. So
10 let's --

11 GENERAL HARRIS: So --

12 JUSTICE GORSUCH: -- let's look at the
13 statute, okay? I mean, that's your argument
14 everywhere else, so I think it's only fair to
15 hold you to it here, Ms. Harris.

16 GENERAL HARRIS: That's fine.

17 JUSTICE GORSUCH: It says the
18 commission -- anything they determine is
19 necessary and appropriate for the protection of
20 the public interest, convenience, and necessity,
21 and are consistent with this chapter.

22 GENERAL HARRIS: Yeah, "and are
23 consistent with." And so --

24 JUSTICE GORSUCH: Well -- well, how
25 about everybody gets a Starlink account?

1 GENERAL HARRIS: Why would -- I'm not
2 sure why that would be sort of -- the idea that
3 it's consistent with the rest of the chapter,
4 they wouldn't need (b)(7) to do that. It would
5 be are you pursuing the (h)(2) advanced services
6 --

7 JUSTICE GORSUCH: All right.

8 GENERAL HARRIS: -- or something else
9 and --

10 JUSTICE GORSUCH: They could do it
11 under (7), too, right?

12 GENERAL HARRIS: Well, then it
13 wouldn't be an additive power. It would just be
14 pursuing a different statutory command and --

15 JUSTICE GORSUCH: So they don't even
16 need (7) to -- to give everybody in America a
17 Starlink account?

18 GENERAL HARRIS: I'm not saying
19 everyone in America is getting a
20 Starlink account. What I am saying --

21 JUSTICE GORSUCH: It sounds like it.
22 It's a pretty good deal. I'd like one.

23 And then what about (c)(3), which says
24 that "in addition to the services included in
25 universal service, the Commission may designate

1 additional services for support mechanisms for
2 schools, libraries, and healthcare providers"?

3 At least -- at least one court has
4 pointed out that that's not even limited to
5 telecommunications services.

6 GENERAL HARRIS: Again, I would read
7 that alongside the many other provisions that
8 give content to exactly what the programs with
9 respect to schools and libraries and healthcare
10 providers are supposed to do, not only (b)(6)
11 but 254(h)(1)(A) with respect to rural
12 healthcare providers and exactly how their rates
13 are supposed to work and what the services are,
14 and (h)(1)(B), which is with respect to the
15 school and libraries, what the -- what the
16 services are supposed to be, what the rates are
17 supposed to look like.

18 Again, I think you read this -- this
19 scheme in context. And the goal in reading it
20 is not to look for ways of reading the language
21 in a -- one isolated provision in a way that
22 would create non-delegation problems. But
23 you're looking at --

24 JUSTICE GORSUCH: No, for sure, of
25 course. I take that point.

1 It -- it's interesting to me, though,
2 that the cases that you cite on page 8 and 9 of
3 your reply brief are all fees, basically. And
4 fees have been historically understood, as, in
5 fact, we've said, this Court has said, and Judge
6 Cooley has said, right, way back when, to cover
7 the costs of the program in question or the
8 services rendered, things like that. They're --
9 they're pretty particularly tied. And, in fact,
10 many of the examples you cite, even the snippets
11 you take, point that out. And we don't have
12 that here with respect to this tax.

13 GENERAL HARRIS: I disagree because I
14 think this is a similar -- and, again, I think
15 whether you think this is a fee or a tax, you
16 would have the same problem with a lot of the
17 examples on pages 8 to 9. It's not so much that
18 there is sort of like you're paying for the
19 privilege of going to the OCC; it is that there
20 is a regulated industry that is being asked to
21 support the global costs of whatever the
22 regulatory agency is doing --

23 JUSTICE GORSUCH: Well, here's what we
24 said in National Cable, that fees are typically
25 based on either the value to the recipient or

1 the cost to the government. That's -- that's
2 what this Court -- that's how we've described
3 fees. That's how Cooley 100 years ago described
4 fees. That's how all your examples line up.

5 Now, I take the just and reasonable
6 rate argument with respect to rate setting, but
7 that's rate setting for monopolies and public
8 utilities. And their just and reasonable is a
9 long-embodied common law tradition of trying to
10 say, okay, you get your costs back and a
11 reasonable profit to try and approximate a
12 competitive market, acknowledging that we don't
13 have a competitive market; we have a monopolist,
14 a regulated utility.

15 And that's what -- that's -- that's
16 that body of law. So we've a fee body of law.
17 We've got a rate-setting body of law. This
18 isn't either one of those. This is -- this is
19 just a straight-up tax without any -- any -- any
20 numerical limit, any cap, any rate. And we --
21 we've never approved something like that before.

22 GENERAL HARRIS: So here's what I
23 would point you to. I think Skinner makes that
24 a much harder argument in terms of this is so
25 clearly a tax --

1 JUSTICE GORSUCH: It's --

2 GENERAL HARRIS: -- versus a fee.

3 JUSTICE GORSUCH: I -- I'm -- I'm not
4 saying -- I'm not saying taxes are special. I'm
5 just saying what's unique about this case is we
6 have a tax that's unlike any other tax that this
7 Court's ever approved. And -- and -- and -- and
8 it's not a fee related to costs, and it's not
9 rate setting of a monopolist.

10 In fact, the '96 Act blew up the
11 monopolies and said we're done with that. We're
12 setting up a new regime with explicit, explicit
13 subsidiaries. So --

14 GENERAL HARRIS: So we warn against
15 overemphasizing the novelty. And the part of
16 Skinner that I think is even more relevant than
17 just saying there's no special rule for taxes is
18 the fact that the Court thought it was actually
19 unclear whether the surface pipeline fee, which
20 was paid by the pipeline -- like, users of
21 pipelines to support -- to support various
22 things, including enforcement actions, it was
23 unclear whether that was a tax or a fee.

24 I'm not sure how that would fit within
25 the framework of thinking that there is this

1 sort of very neat distinction among them. And I
2 think it is a very good analogy to the way the
3 telecommunication carriers are doing this here.
4 It's not just that being they are being --
5 having things exacted from them for the benefit
6 of a general welfare program. The carriers then
7 themselves get the subsidiary if they opt to
8 support the Universal Service Program. I just
9 don't think these -- these --

10 JUSTICE GORSUCH: And many of them are
11 recipients, too, and sit on the board, but
12 that's a whole 'nother set of issues.

13 GENERAL HARRIS: It is not a
14 constitutional issue, though.

15 JUSTICE GORSUCH: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: How exactly would
19 you define tax versus fee, to the extent the
20 other side's position could, or at least one
21 version of the other side's position could,
22 depend on this being a tax?

23 GENERAL HARRIS: So for tax v. fee, I
24 think we would point you to Skinner and the --
25 the lines that the Court was struggling to draw

1 in that case. A tax is something that is to
2 raise general revenue. It can be on a specified
3 sort of -- a subset of someone. And a fee is
4 often, but not always, conceived of as a payment
5 for a particular service or license.

6 That could be a line that you draw.
7 Again, I think the problem with trying to draw
8 that line, as Skinner points out, is it's
9 unbelievably murky in practice, and the Court
10 has not sort of -- at least in Skinner, was not
11 even comfortable drawing it.

12 And the other thing with that line is,
13 if it's a murky line, it's going to be a pretty
14 hard non-delegation test in any case that
15 plausibly involves fees or taxes to -- to have
16 the threshold question be is this a tax or a fee
17 or something else, and then go on to which
18 non-delegation lens are you supposed to go on.

19 JUSTICE KAVANAUGH: Based on the
20 definition you just gave or the principles you
21 just gave, is this a tax or a fee?

22 GENERAL HARRIS: So the government is
23 assuming it could be classified as a tax.
24 Again, there -- like -- but I don't think you
25 have -- I think under Skinner, there's genuine

1 ambi- -- ambiguity on that score.

2 JUSTICE KAVANAUGH: But your position,
3 it's a tax?

4 GENERAL HARRIS: We are willing to
5 have it treated as a tax. We just don't think
6 it matters for constitutional purposes because
7 the non-delegation framework doesn't distinguish
8 on this basis. And this is also a Commerce
9 Clause power.

10 JUSTICE KAVANAUGH: Should it matter
11 in how we think about this that the delegation
12 is to an independent agency rather than to the
13 president or to an executive agency? Does that
14 heighten the concern about unaccountable power
15 to, in some of Justice Gorsuch's questions,
16 unaccountable power to raise money to determine
17 the rate, to determine the amount, that it's not
18 someone accountable to the president?

19 GENERAL HARRIS: I don't think so for
20 two reasons. One is that the FCC does not have
21 statutory for-cause removal protections. It is
22 something that's been read into the statutes.
23 And so --

24 JUSTICE KAVANAUGH: So you don't --
25 okay. Your answer is the FCC is not an

1 independent agency?

2 GENERAL HARRIS: Not in the sense of
3 having for-cause removal protection. It's
4 something -- depends on what you mean. Is it
5 one that sort of --

6 JUSTICE KAVANAUGH: That's usually
7 what I mean about independent.

8 GENERAL HARRIS: Okay.

9 JUSTICE KAVANAUGH: So --

10 GENERAL HARRIS: So that is what I
11 would mean. There's no statutory for-cause
12 removal protections for the FCC. So in that
13 sense, that's less of a concern. But even if
14 you wanted to say, is there some sort of
15 additional heightened concern with respect to
16 accountability to the president, that's an
17 Article II problem that's sort of separate from
18 the broader non-delegation issues.

19 And even if you wanted to sort of say
20 it is a -- when executive power is being
21 delegated to an agency that's not controlled by
22 the president, that's the bigger problem, not is
23 there then a body that is not performing things
24 that are executive power that is then doing
25 something.

1 It's sort of like if you have the FTC
2 or other bodies accepting recommendations from
3 someone, that's not a problem, but the problem
4 may well be is the FTC accountable to the
5 president?

6 JUSTICE KAVANAUGH: If the other side
7 were correct that it's a tax, and you
8 acknowledge that it could be considered a tax,
9 and it was held that a tax has to have a -- a
10 tax that's delegated to an agency has to have a
11 cap or a rate, what other programs would be at
12 risk?

13 GENERAL HARRIS: A cap or a rate? I
14 mean, I think, you -- again --

15 JUSTICE KAVANAUGH: If it's a -- so
16 tax, if it's a tax, it has to have a cap or
17 rate. Are there other programs that you think
18 -- and this picks up on Justice Kagan's
19 questions but I'm not sure those are taxes,
20 that's why I'm asking the question.

21 GENERAL HARRIS: Well, I think you
22 would have a heck of a lot of litigation over
23 whether they are taxes, and we think they would
24 probably qualify based on the nature of -- like,
25 just depending on how you define a tax, how it

1 would, would. So, yes, I think you would have a
2 panoply of issues of are -- like various other
3 measures that don't have a cap.

4 And on top of that, you would sort of
5 incentivize a system where Congress would think
6 it could do its work just by saying a trillion
7 dollars was a good cap and no other constraints
8 are necessary. So, again, a very perverse
9 separation of power scheme that would feel -- I
10 think also require you to overturn a couple of
11 cases, Skinner and J.W. Hampton to start.

12 JUSTICE KAVANAUGH: And then on
13 Justice Gorsuch's hypothetical about the IRS, I
14 just want to make sure I have this nailed down
15 exactly what your answer is for why that's
16 different.

17 GENERAL HARRIS: Why it's different?

18 JUSTICE KAVANAUGH: Yeah, the
19 delegation --

20 GENERAL HARRIS: One is the breadth of
21 the --

22 JUSTICE KAVANAUGH: -- to the IRS to
23 set tax rates.

24 GENERAL HARRIS: Yep. One is the
25 breadth of the delegation. So I took the

1 hypothetical to be it's sort of a tax rate for
2 the entire country. It is for the general --
3 it's supposed to be quote/unquote, "equitable"
4 but a different meaning from, obviously, 254,
5 which is a constraint on what you actually have
6 to be imposing, and that it's to accomplish
7 1 percent of reducing the national debt.

8 And so it gives the IRS plenary
9 discretion to figure out exactly how else to
10 operate the tax in ways that would be pretty --
11 that -- that I take it not to be drawing upon
12 the ways in which the IRS had historically done
13 so. And so if it's divorced from that context
14 and you can't use the IRS's regulatory history
15 because this is a novel type of tax, that would
16 be a problem.

17 Now, again, I think the outer limit of
18 Justice Gorsuch's hypothetical is going to have
19 to be the 1798 real estate tax. And that is
20 because that was not too far apart from the idea
21 of giving federal tax assessors the power to
22 reach a cap of \$2 million, a ton of money back
23 then, and figure out how to calibrate the
24 assessments in a very discretionary manner.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: So, Ms. Harris, let
4 me just narrow the hypothetical then, a little
5 bit.

6 What about a law that gave the IRS the
7 authority to impose taxes on the sale of food in
8 interstate commerce to fund programs that would
9 provide food for the needy?

10 GENERAL HARRIS: Provide food for the
11 needy? So I think the deal there is you don't
12 have a sufficiency limit. So provide food for
13 the needy, two issues that would distinguish
14 that potentially.

15 One is what does provide food for the
16 needy mean? Is it something similar to you need
17 to provide a basic level of, you know, three --
18 like, two meals a day or something? Which is
19 sort of more similar to this system.

20 JUSTICE BARRETT: Sure. Make it two
21 meals a day.

22 GENERAL HARRIS: Okay. So it's
23 sufficient to provide two meals a day, and there
24 is sort of -- I think then you'd be looking at
25 are there other constraints on the statutory

1 scheme on top.

2 JUSTICE BARRETT: What would -- what
3 would -- so do you think if there were no other
4 constraints, it would be too far? If it's just
5 provide two meals a day for the needy.

6 GENERAL HARRIS: If it's --

7 JUSTICE BARRETT: So impose taxes on
8 the sales sufficient to fund programs that
9 provide two meal a day to the needy.

10 GENERAL HARRIS: I think the operative
11 question ends up being is there an ability to
12 figure out, as a qualitative matter, what that
13 -- what that would look like.

14 JUSTICE BARRETT: Is there.

15 GENERAL HARRIS: I think you can get
16 it closer --

17 JUSTICE BARRETT: That's the question.

18 GENERAL HARRIS: I know. I think you
19 can get it closer to being constitutional
20 because of the limit of if it is something that
21 you can measure that is sufficient to give two
22 meals a day, I -- I might give them that one,
23 but I think reasonable minds could disagree on
24 exactly what other constraints you would look
25 for, who -- who it's being assessed -- who is

1 being assessed for it, and what exactly the
2 mechanism for delivering this -- this sort of
3 food is.

4 JUSTICE BARRETT: Okay. Let me zoom
5 out for a minute.

6 In *Mistretta*, Justice Scalia said that
7 once you agree that you can confer discretion,
8 then we are just talking about matters of
9 degree. You know, and ever since the beginning,
10 founding error debates, or *Wayman* versus
11 *Southard*, Justice -- Chief Justice Marshall says
12 this is a delicate and difficult line-drawing
13 task. And so it's obviously been a long time
14 since we've held that something is
15 unconstitutional under the non-delegation
16 doctrine.

17 Do you think this is an area in just
18 which -- in which there are just not judicially
19 manageable standards?

20 GENERAL HARRIS: No. There are
21 judicially manageable standards. And the two
22 paths we've identified are both versions of
23 that.

24 One is your manageable standard is
25 like a common law system, where you look to

1 previous delegations and see how they stack up.

2 And two is the standards that we are
3 offering that are drawn from the Court's cases
4 where obviously there is a judgment line on how
5 much discretion is too much, but at a minimum
6 Congress is obviously having to provide
7 parameters that you can tell, yes or no, did the
8 agency transgress the boundaries? And this
9 scheme is full of them.

10 JUSTICE BARRETT: So this doesn't have
11 a cap, as, you know, many people have pointed
12 out to you. And so you agree that there's a
13 broad range. I mean, what is it, about
14 \$9 billion right now?

15 GENERAL HARRIS: It's \$9 billion, but
16 it's dedicated to very specific programs. So it
17 is a qualitative cap, in our view.

18 JUSTICE BARRETT: But it could be
19 3 billion?

20 GENERAL HARRIS: It could be 3 billion
21 if that were sufficient to support the way the
22 programs operate.

23 JUSTICE BARRETT: Could be 30 billion?

24 GENERAL HARRIS: Again, tied to the
25 nature of the scheme. And that's no different

1 from other delegations that are tied to some
2 sort of qualitative number. The Court could
3 have fees at all sorts of rates. The OCC could
4 have fees at all sorts of rates depending on
5 what kind of functions it's performing and
6 exacting them.

7 And that has not been seen as
8 something that is a problem because there are
9 qualitative limits built into the scheme that
10 constrain sort of -- that -- again, we think it
11 is what's necessary to support the defined
12 programs that Congress has provided.

13 JUSTICE BARRETT: Let me ask you about
14 universal service. So Justice Gorsuch asked you
15 about Starlink, but I'm going to ask you just
16 about cell phone plans.

17 Could universal service include having
18 the FCC provide every American with a cell phone
19 and a cell phone plan?

20 GENERAL HARRIS: So the cell phone and
21 cell phone plan, the question would be does that
22 fit within the concept of the (h)(2) support for
23 advanced services and the parameters of the
24 specific programs that are supposed to be
25 tethered to providing advanced services.

1 JUSTICE BARRETT: So it could or
2 couldn't?

3 GENERAL HARRIS: I think it could, but
4 there would be questions with respect to whether
5 that's within bounds.

6 JUSTICE BARRETT: Okay.

7 GENERAL HARRIS: And again, whether
8 that would have collateral consequences for the
9 other parameters in the scheme of would it be
10 something that then imposed so many costs that
11 there would no longer be universal services
12 provided at -- at affordable charges, for
13 instance, because of, like, the pass-on by the
14 telephone -- by the telecom carriers.

15 Again, I think this is a scheme.
16 It -- it is hard to see how this scheme would be
17 the thing that crosses the line for
18 non-delegation purposes and yet much broader
19 delegations are okay.

20 JUSTICE BARRETT: Last question. Can
21 you think of any other statutory scheme that
22 gives the agency the authority to identify the
23 additional principles that constrain its power?

24 GENERAL HARRIS: Yes. The Securities
25 and Exchange Act gives the SEC -- there's --

1 there's -- I think -- there are a bunch of them
2 that give agencies the power to say are there
3 other consistent principles to consider in a
4 multi-factor test?

5 And even in (2)(B), where this Court
6 said it was a perfectly fine delegation for the
7 AG to decide what is a controlled substance,
8 there's often a balancing of factors that are
9 kind of open-ended within the scheme.

10 So that one is sort of the nature and
11 pattern of the abuse -- of the controlled
12 substance abuse, how -- how prevalent it is, how
13 much of a danger to public safety. Sort of
14 factors that -- each one of them might not be
15 particularly strong, but the AG could decide
16 would be enough, just in their judgment.

17 So I don't think that's anything
18 novel. And if you had a problem with (b)(7),
19 there is a severability provision in the statute
20 under 608, and so, again, you could sever that.
21 It would be sort of pointless, because the only
22 thing the FCC has ever done with this is hark it
23 to other principles in the statute.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I guess I'm
3 struggling with trying to understand what
4 difference it makes that we do the hard work of
5 trying to characterize this as a tax or a fee.

6 My understanding was that the
7 non-delegation doctrine, as you've said a few
8 times this morning, is that Congress is not
9 allowed to give away or delegate legislative
10 powers. And I don't hear any serious argument
11 that Congress doesn't have both the power to tax
12 and to levy fees.

13 So I don't -- I -- it seems to me that
14 any restriction on Congress's ability to do this
15 would run to both. Is that right?

16 GENERAL HARRIS: Yes. That's not only
17 right, but also perverse. Because the other
18 issue here is even if you go through the tax-fee
19 fee analysis, you have a separate inquiry. When
20 Congress is doing overlapping powers, as it is
21 here, using the commerce power and the tax
22 power, you have to figure out which one you're
23 picking.

24 There's no sort of, like, pick the
25 more restrictive power and impose a special test

1 rule. That's -- that's the exact opposite of
2 what the Court has done in all sorts of cases
3 that implicated both the tax power and the
4 commerce power or the tax power and the war
5 powers.

6 And so you're exactly right that the
7 tax-fee fee inquiry doesn't have any
8 constitutional rooting for which non-delegation
9 test you pick, and it -- above -- above and
10 beyond that, there is another layer -- layer of
11 complexity that I don't think Respondents have
12 dealt with on that.

13 JUSTICE JACKSON: And -- and you've
14 said many times that there is a cap. I mean,
15 there's sort of characterizations being made
16 that there's no cap in this statute. And you
17 say there's a qualitative cap.

18 Can you just say more about how you
19 see this as actually imposing a limit on the
20 amount that can be collected through this
21 program?

22 GENERAL HARRIS: Yes. So in three
23 different places of the statute, in 254(d) and
24 254(e) and also in -- in 254(b)(5), it is a
25 sufficient -- the -- the -- it has been to be a

1 sufficient mechanism to achieve the objectives
2 of the programs that Congress has set out.

3 The Fifth Circuit in Alenco
4 interpreted that -- as we agree with -- to mean
5 you can't charge excessive things for the
6 program. It can't be more than the programs
7 need to accomplish the specified objective that
8 Congress set out.

9 JUSTICE JACKSON: So this is not an
10 opportunity to just raise money for the FCC to
11 use for whatever reason or et cetera?

12 GENERAL HARRIS: Exactly. It can't be
13 used for whatever reason. There's also
14 constraints on once you have raised this -- once
15 -- once you essentially have the
16 telecommunication carriers' contributions, how
17 they are supposed to be allocated and how the
18 carriers that participate in these specified
19 programs are supposed to then not, themselves,
20 be able to get too much money from the program.
21 They only are able to get what they are spending
22 to support universal service.

23 JUSTICE JACKSON: And so the call for
24 a particular number, it's sort of hard to even
25 figure out how Congress would do that in this

1 situation, right?

2 GENERAL HARRIS: That's exactly right,
3 and why qualitative -- why sort of these
4 qualitative judgments are common. Again, think
5 of the tariff system, where there were sort of
6 judgments with respect to changing
7 circumstances.

8 There are programs where you can have
9 qualitative limits that are trying to accomplish
10 defined objectives that might change over time,
11 and Congress can give that flexibility to an
12 agency without violating the non-delegation
13 factors.

14 JUSTICE JACKSON: And -- and you say
15 in your page 8 here that there are a number of
16 different agencies that have similar kinds of
17 revenue generating -- I know some people call
18 them fees and not taxes. I've already
19 established that in my view that doesn't make a
20 difference -- a number of agencies that have
21 these kinds of general statements about raising
22 revenue that they determine is necessary or
23 appropriate to carry out responsibilities.

24 So let me just say that if we find
25 that this one is unconstitutional, are all of

1 these programs in jeopardy, in your view?

2 GENERAL HARRIS: Yes.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Ms. Harris.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS IN CASE 24-422

9 MR. CLEMENT: Mr. Chief Justice and
10 may it please the Court:

11 There is no delegation problem here.
12 Congress did not decide out of the blue in 1996
13 that it wanted to impose a tax on certain
14 telecommunication carriers to subsidize other
15 carriers.

16 Instead, what Congress did in 1996 was
17 to make explicit the universal sub -- service
18 subsidiaries that had long been implicit in
19 rate -- monopoly rate regulation.

20 Now, that rate regulation was classic
21 commerce clause legislation that did no more to
22 guide the agency than tell them to regulate in
23 the public interest.

24 So when Congress in 1996 decides not
25 only to deregulate but to expressly embrace

1 these subsidiaries, and then specified who
2 should pay what, that is a victory both for
3 competition and for non-delegation principles.

4 The resulting statute is fully
5 consistent with all of this Court's precedents,
6 none of which my friends on the other side ask
7 this Court to overrule, nor do they confront the
8 massive reliance interests on this program or
9 many of the other programs that might be taken
10 out by overruling this Court's cases.

11 This is simply not the right vehicle
12 for this Court to revamp its non-delegation
13 doctrine.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Do you agree with the
16 government's argument as to the constraints on
17 the revenue raising?

18 MR. CLEMENT: I -- I do. We also
19 think that sufficiency can be construed to be
20 both a ceiling and a floor. But I guess the
21 only thing I would add to the government's
22 answer is I think where the real constraints
23 come from are in the parameters of the universal
24 service program itself.

25 It is not a charge to the agency to

1 just do anything it wants. With respect to
2 rural customers, for example, what it's supposed
3 to guarantee them is reasonably comparable
4 services at reasonably comparable rates.

5 So if the agency wants to say, you
6 know, actually, rural rates, it's hard to be a
7 farm, the rural rates should be lower, that
8 would violate the statute. It would also in the
9 process make the program more expensive.

10 And so one way to think about where
11 the -- where the real caps are coming from is
12 the fact that in the four major programs, rural,
13 low-income, rural health, and the schools, none
14 of those are things where the agency isn't
15 constrained and can't just add sort of things
16 willy-nilly to the program.

17 And that's why, if you look at the --
18 the graph on page 3 of the SHLB reply brief
19 where it shows you the total revenues of the
20 fund over time, it has been remarkably flat.
21 And I think that's a reflection of the basic
22 parameters of universal service in the four
23 major buckets that the agency has adopted have
24 all been relatively stable over time, and that's
25 why, though you might see that rate going up

1 because the contribution base is shrinking, the
2 total revenues raised are actually lower,
3 inflation-adjusted terms, over the last decade.

4 JUSTICE THOMAS: Now to take the flip
5 side of this, what would a -- a -- a program
6 look -- of this sort look like and -- in order
7 to violate the non-delegation clause?

8 MR. CLEMENT: So I think a program
9 like this -- I mean, you know, the first thing
10 you -- you would do is you would say, all right,
11 if you gave some agency that doesn't have --
12 hadn't had -- previously had rate regulation
13 authority, doesn't have jurisdiction over a
14 industry where there's network effects and a
15 reason to have some degree of regulation even
16 after you get rid of the -- the monopolies, if
17 in that kind of industry you just basically
18 said, you know, have at it, do fair competition
19 or do some kind of fund, I think that would be
20 problematic.

21 And, you know, I mean, I'd start with
22 this Court's cases. Obviously, there haven't
23 been a lot of cases striking things down on
24 delegation doctrine, but you do look to
25 Schechter Poultry, that says if you try to do

1 something that's economy-wide and you use a term
2 that, because it's economy-wide, doesn't have
3 any particular specialized meaning like fair
4 competition, okay, that's out of bounds.

5 If, Panama Refining, you try to
6 basically tell the executive branch, go -- go
7 deal with hot oil, that's a problem, but you
8 don't give them any direction --

9 JUSTICE GORSUCH: So --

10 MR. CLEMENT: -- and --

11 JUSTICE GORSUCH: So -- so -- I'm
12 sorry to interrupt there, but I think that's a
13 really interesting and a good point. So, for
14 example, when you say just and reasonable rates
15 and a regulated monopoly that's historically
16 been understood to mean cost plus some
17 reasonable profit approximating, what would
18 happen in a competitive environment, that's --
19 that's something.

20 But if you were to say go forth and
21 create a just and reasonable tax system, that
22 would be different, even -- even though you're
23 applying the same principle of -- intelligible
24 principles across the board because one has
25 historical content and the other doesn't. Is

1 that -- is that the gist of it?

2 MR. CLEMENT: That's the gist of it --

3 JUSTICE GORSUCH: Okay.

4 MR. CLEMENT: -- and I also would
5 think, just to take -- you know, because --
6 because this is I think all consistent --

7 JUSTICE GORSUCH: So -- so -- so if
8 that's true, just -- I'm sorry to interrupt --

9 MR. CLEMENT: Yeah.

10 JUSTICE GORSUCH: -- but so if that's
11 true, you'd agree that there are some judicially
12 manageable standards that we can apply when it
13 comes to delegations?

14 MR. CLEMENT: Absolutely. And, you
15 know, I -- I mean, I would add to my list, I
16 mean, just two other things. If you interpreted
17 the statute at issue in Gundy the way that the
18 dissenters interpreted the statute there, then
19 that's just Panama Refining II, right? That's
20 just the Attorney General can do whatever he
21 wants with the preexisting sex offenders. And I
22 think, as interpreted, that would plainly be a
23 non-delegation problem.

24 And then the other thing I would --
25 just to complete the cycle of this Court's

1 cases, and I know it's not a huge cycle, but
2 Carter Coal is also a situation where Congress
3 itself tried to delegate in part to private
4 entities. And that may be a distinct problem,
5 but that's not what happened here.

6 JUSTICE GORSUCH: No, I understand.
7 And with respect to, like, fees, again we have a
8 classic understanding. We said it in National
9 Cable, and, you know, the GAO has repeatedly
10 said it. Those are designed to cover -- cover
11 the costs or the expenses, right? Generally?

12 MR. CLEMENT: That -- that's right.
13 And I would part company with the government on
14 their answer that you should conceive of this as
15 a tax. I would agree with them on the
16 front-line answer, which is, I mean -- you know,
17 I don't see how Skinner could have been much
18 clearer that you don't have to determine
19 definitively whether it's a tax or a fee.

20 And I would caution that, you know,
21 saying this is a tax could have some
22 implications for the Origination Clause. I
23 think the test is slightly different, but I
24 think there's a lot to be said for not calling
25 this either a tax or a fee.

1 But what I would say is in the
2 universe of things that are -- can be understood
3 like a fee like this, which I think it can
4 because part of the reason Congress specified in
5 254(d) that it's the telecommunication carriers
6 are the ones that are going to be -- make
7 contributions to this, is they had, both
8 historically and going forward, been ones that
9 benefited quite considerably from the idea that
10 there would be universal service --

11 JUSTICE GORSUCH: Well --

12 MR. CLEMENT: -- and a network that
13 overcame networking --

14 JUSTICE GORSUCH: -- that's a little
15 hard to understand, though, because we all
16 benefit from tax collection too, right? I
17 mean -- I mean, that's kind of circular. I'm
18 not sure that really helps very much.

19 MR. CLEMENT: So I -- I -- I -- I
20 actually think it does in the following sense,
21 which is I think --

22 JUSTICE GORSUCH: Well -- and let me
23 throw one more thing in --

24 MR. CLEMENT: Okay.

25 JUSTICE GORSUCH: -- before I forget

1 it.

2 MR. CLEMENT: Yeah.

3 JUSTICE GORSUCH: And that is, of
4 course, the '96 Act was new and -- and rejected
5 the whole monopoly rate-making regime and -- and
6 ignited competition and made these subsidies no
7 longer part of the rate-making process, but very
8 explicit.

9 MR. CLEMENT: I -- I mean, I agree,
10 but I think --

11 JUSTICE GORSUCH: Okay.

12 MR. CLEMENT: -- that's a feature and
13 not a bug of my position because it would have
14 been easy for Congress to say, all right, while
15 we're introducing competition, universal service
16 doesn't really work with competition.

17 And Congress here made the critical
18 policy judgment itself -- and I don't think it's
19 at all ambiguous -- that we are going to
20 continue to have universal service and universal
21 service fees even once we get -- we go into a
22 more deregulated environment. But just one --

23 JUSTICE GORSUCH: If we -- if we
24 reject your view that they're fees and accept
25 the government's willingness to characterize it

1 as a tax, what difference does that make, in
2 your mind?

3 MR. CLEMENT: Well, under this Court's
4 --

5 JUSTICE GORSUCH: You're -- you're
6 fighting it so hard. There -- must make a
7 billing difference to you.

8 MR. CLEMENT: Well, two reasons. One
9 is under this Court's precedents which haven't
10 been asked to be overruled, like, it doesn't
11 make any difference at all. So that would be my
12 sort of front-line answer.

13 But to give you my other answer, which
14 is, look, I have the same instinct that I think
15 underlies many of your questions, that if you
16 just tried to delegate the tax power to the
17 Internal Revenue Service, that there's something
18 problematic about that.

19 Now, I think that's in part because
20 those are statutes where raising revenue is the
21 end in itself; whereas I think with fees and
22 whether you call this a fee or a tax --

23 JUSTICE GORSUCH: Really? Raising
24 revenues, an end in and of itself? I thought it
25 was to provide for the common good and

1 protection of this country and all that other
2 stuff.

3 MR. CLEMENT: Yeah, all that other
4 stuff is taken care of by other agencies. When
5 you're talking about the IRS --

6 (Laughter.)

7 MR. CLEMENT: No, seriously.

8 JUSTICE GORSUCH: So it depends on
9 which agency it is?

10 MR. CLEMENT: Well, if -- if you're
11 delegating --

12 JUSTICE GORSUCH: Really?

13 MR. CLEMENT: If you're delegating
14 something to the IRS --

15 JUSTICE GORSUCH: That's what it all
16 boils down to.

17 MR. CLEMENT: -- you must be
18 delegating to them revenue raising.

19 JUSTICE GORSUCH: So if the IRS is
20 spending the money, then it would be okay? So
21 if the IRS --

22 MR. CLEMENT: No, no. But --

23 JUSTICE GORSUCH: So if we put the
24 Department of Defense reported to the
25 Commissioner of the IRS, it would all be good?

1 MR. CLEMENT: No. I think there is a
2 material difference between a statute that says
3 IRS, as to all the citizenry, raise some
4 revenue, as opposed to a statute that says:
5 Look, we've been doing universal service for 50
6 years. We want to continue to do it. It's
7 always been implicitly that telecom carriers
8 that are paying for that, and we want to
9 continue to do that, and we're going to put a
10 fee -- I'd call it a fee -- on those carriers
11 for that purpose.

12 And I think it's also consistent with
13 the idea that I assume most of these
14 hypotheticals -- where it's the IRS that's
15 getting the delegation, Congress would be
16 explicit. This is our taxing power. We're
17 using Article I, Section 8, clause 1.

18 I don't think the '96 Act at all
19 conceptualized that what it was doing was using
20 the taxing power, just like the '34 Act was a
21 classic regulation of an instrumentality of
22 commerce. When Congress was trying to
23 deregulate that in 1996 --

24 JUSTICE KAVANAUGH: What do you think
25 the role of novelty is in assessing the

1 constitutional issue here? In other words,
2 we've said in other contexts that when Congress
3 does something that it's never done before, that
4 can be an indication of a problem. And that's
5 where the tax/fee issue comes into play, as I
6 see it, potentially, which is, yeah, there have
7 been lots of fees, but this seems somewhat
8 different from what has been done before in
9 terms of the nature of it and how it works and
10 operates. It falls, as the government says, on
11 the tax side of the line.

12 That seems different, novel, and
13 raises the IRS hypothetical, if we go down this
14 road. So how does -- should we think about
15 that?

16 MR. CLEMENT: Well, I mean, that is
17 part of the reason I take -- part -- part
18 company with the government because, I mean, I
19 do take it, you know, it's -- it's -- we've been
20 at this republic thing for quite a while, and
21 when something hasn't been done before, you
22 might think, well, that's at least something we
23 have to look at more carefully.

24 I don't really think this is something
25 that hasn't been done before. In fact --

1 JUSTICE KAVANAUGH: And what -- and
2 what do you think are the best precedents in
3 terms of what Congress has done for this?

4 MR. CLEMENT: Well, I think all of
5 this stuff in Section 8 and Section 9 are
6 precedents for the idea that when you have
7 something that's not a pure revenue-raising
8 scheme, not a delegation to the IRS, but you
9 give some other agency some kind of
10 revenue-raising authority with respect to
11 covering their services or the programs they
12 provide, this fits comfortably within that
13 pretty long tradition that includes delegations
14 to this Court to have fees to cover the cost of
15 certain services.

16 And those -- you know, it -- it --
17 like this Court in *Whitman*, just to take a
18 precedent that nobody is asking to be overruled,
19 it looked at the statute there, and one of the
20 arguments was -- that the lower court has
21 accepted is: Uh, this isn't good enough. There
22 has to be -- the words they used was "a
23 determinative criterion."

24 And I think, at least in a statute
25 like this where it's not pure revenue-raising, I

1 don't think that asking for a determinant cap
2 makes anymore sense here than asking for a
3 determinative criterion made in Whitman. And
4 the reason is it's not that this is
5 standardless; it's just that the criterion,
6 rather than being a determinative cap, is all
7 the different restrictions on this universal
8 service fund.

9 And there is so many ways -- and I
10 think this was the government's point as well.
11 There is so many ways that by changing a rule
12 here -- I mean, if they -- if the agency,
13 tomorrow, changed the eligibility requirements
14 for the Lifeline Program and substantially
15 loosened those eligibility requirements, that
16 would increase the -- the burdens on the
17 universal service fund. It would increase
18 the -- the rate; it would increase the base --
19 base.

20 But if they did that, that is an
21 agency action that could be challenged under the
22 APA. If they tried to loosen the eligibility so
23 that everybody who is making, you know, seven
24 figures, six figures, whatever it is, can get
25 the Lifeline Program, that would be invalidated

1 in the courts.

2 And so the restraints on this are not
3 a definitive cap, but they are from the
4 substantive limits of the scope of the program.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Well, just out of
10 curiosity, the Court has said, as the Appellees
11 note at the very beginning of their brief, an
12 indefinite power to tax is a power to destroy.

13 Do you think that can be said about
14 every power that is conferred on Congress in
15 Article I? The power to establish post -- post
16 offices and post roads is the power to destroy?
17 The power to establish uniform laws on the
18 subject of bankruptcies is the power to destroy?

19 MR. CLEMENT: I'll give you coining
20 money too.

21 JUSTICE ALITO: All right.

22 (Laughter.)

23 MR. CLEMENT: So -- so -- so -- so I
24 don't think -- I don't think death by coining
25 money is a possibility. Or destruction by

1 coining money.

2 But -- but -- but what I will say is
3 there may be other ways in which you think of
4 the tax power as being slightly different or
5 slightly more dangerous, but I don't think
6 non-delegation is -- and this Court unanimously
7 rejected that twice.

8 But what I would say is there's a way
9 to apply your existing jurisprudence. This is
10 what I was trying to get at with my colloquy
11 with Justice Gorsuch -- maybe not
12 successfully -- is if you apply your basic
13 approach to these issues, which does ask at some
14 level has Congress made the basic policy
15 judgment, I think when you're talking about a
16 pure revenue-raising statute, I would say if
17 Congress hasn't given you a cap or a rate, maybe
18 Congress hasn't made the basic policy judgment.

19 But when you're talking about
20 something, whether you call it a fee or a tax,
21 that's directed at a particular industry and is
22 a judgment by Congress that we are going to
23 continue to have universal service even in a
24 deregulated environment, Congress has made the
25 important policy judgment there.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: You started at the
4 beginning by talking about what -- invalidating
5 Section 254 would have disastrous effect for
6 your clients. In which ways?

7 And can you summarize why all of the
8 ideas that have been floated as to how to say
9 this is a tax that -- and that as such, it needs
10 some cap or something else, how -- what effects
11 would that have on our precedents?

12 MR. CLEMENT: So let me take them both
13 in turn.

14 I mean, the disastrous effects are not
15 just for my clients. They're for all the
16 various beneficiaries of this program. And so,
17 like, start in rural Alaska, which is very
18 dependent on this program.

19 Talk about Native American
20 reservations, where people are dependent on this
21 program, both because of the rule and because
22 they're low income. Talk about all the schools
23 and libraries that benefit from this program.

24 Talk about all the rural health
25 providers. And that's an area of the statute

1 where Congress has been very specific. The
2 rural healthcare providers get the same rates or
3 reasonably comparable rates to the urban health
4 providers in the same states.

5 So you have very definitive guardrails
6 on the system, and huge beneficiaries. And, of
7 course, we all benefit from having a
8 communication system that is truly universal. I
9 mean, I might not live in rural -- you know,
10 like, rural Alaska, but it's nice to be able to
11 place a call there.

12 And even beyond that, we all benefit
13 from the fact that we have a -- a service
14 network that everybody can use. And that
15 includes, you know, as -- as broadband gets
16 expanded, the fact that people all over the
17 country can access these services.

18 But I promise to get to the second
19 part of this, which is this Court's
20 jurisprudence. And, I mean, I'll tell you, I
21 think all of those statutes at pages 8 and 9 of
22 the government's reply brief are vulnerable.

23 But I go further and say I don't know
24 what else is at issue here. Because, as you
25 pointed out, that's just not the way this case

1 has been briefed.

2 And typically in a -- in a universe
3 where, you know, there's two unanimous Supreme
4 Court cases that say we don't treat taxes
5 different from other legislation for
6 non-delegation purposes, typically if you're
7 going to go into the wall of that, you know,
8 bravely go forth, but say why the stare decisis
9 factors are satisfied in this particular
10 context.

11 And then we can have briefing that
12 really gets to the idea: All right. You know,
13 they have a theory that half those statutes on
14 page 8 are still going to be okay, but we have a
15 theory that other things are going to go.

16 I'll just tack one on that's not on 8
17 and 9, but, you know, I took a look at the way
18 the National Park Service funds itself. It's
19 actually very similar to the way this works.

20 The -- the fees are supposed to cover
21 the services that are provided. If you cut down
22 on the number of national parks, the fees are
23 going to go down. If you add a couple national
24 parks, the fees might go up because you have
25 more to cover.

1 And there's six factors, it turns out,
2 that guide the Park Service on that. And the
3 sixth one is something of a catch-all, a lot
4 like (b)(7).

5 So -- but, again, we just haven't had
6 the briefing that would allow me to definitely
7 tell you I know exactly what the damage and the
8 consequences are of overturning your precedents
9 in this case.

10 JUSTICE SOTOMAYOR: On the first part
11 of the answer, Respondents said at the end,
12 recognizing the rather dramatic effects of
13 invalidating this law would have on
14 communications, that we had two alternatives.

15 One, as we did in the bankruptcy
16 context, tell Congress: Figure it out in six
17 months before we made our judgment effective.

18 I'm covering all options in my
19 question. So I hope it's not a hypothetical
20 that's necessary. But I'm covering options
21 or -- I don't know what the second -- but do you
22 have a preferred manner to do this --

23 MR. CLEMENT: So --

24 JUSTICE SOTOMAYOR: -- to minimize the
25 disruption?

1 Long term, you can't, because we're
2 overruling precedent and putting a lot of
3 programs at risk, but --

4 MR. CLEMENT: Yeah. If the -- if the
5 question is: Do we have a preferred way to
6 lose --

7 JUSTICE SOTOMAYOR: Right.

8 (Laughter.)

9 MR. CLEMENT: -- you know, it's not --
10 not, you know, high on my wish list.

11 But, you know, I mean, look, I don't
12 think the Northern Pipeline sort of six-month
13 interregnum was necessarily the height of this
14 Court's remedial jurisprudence. So I am
15 somewhat reluctant to recommend that to you as
16 an option.

17 I actually kind of think it works the
18 other way, which is if you really think you need
19 to do Northern Pipeline, then maybe you
20 shouldn't do what you were doing in the merits
21 part of your opinion.

22 JUSTICE SOTOMAYOR: There's a whole
23 lot of --

24 MR. CLEMENT: So I know that's --

25 JUSTICE SOTOMAYOR: There's a whole

1 lot of people in that area of law that agree
2 with you --

3 MR. CLEMENT: Yeah.

4 JUSTICE SOTOMAYOR: -- we shouldn't
5 have done it, but --

6 MR. CLEMENT: Yeah. No. And -- and,
7 you know, so -- so since I think that's
8 doctrinally -- I think the second thing they
9 suggested is you could make this relief only run
10 to the particular parties here at issue.

11 And since it's capable of repetition
12 yet evading review -- I'm not even sure what
13 that means -- and -- and -- and then you -- YOU
14 could try to fix it.

15 The other thing they suggest, of
16 course, is you could fix this whole thing with
17 half a sentence. Well, gee whiz, I mean --
18 like, I -- I -- I don't really think that that
19 sort of is right.

20 And I think -- you know, what would --
21 what would the sentence say? Would the sentence
22 say no more than \$10 billion? Well, if you look
23 at the way the program is operated, that's
24 essentially how it's operated.

25 And if this were delegation run riot,

1 I just don't think you'd see that flat line in
2 terms of the size of the fund.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Just on these eight to
5 nine programs again.

6 I mean, I -- I -- I take it that maybe
7 one argument is that, well, these are
8 fee-for-service programs; and this is not a
9 fee-for-service program, it's a -- it's a
10 revenue raiser. You want to call it a fee? You
11 want to call it a tax? Not sure, but it's a
12 revenue raising for a program, not for a
13 service.

14 Is that a distinction that's worth
15 making?

16 MR. CLEMENT: So I don't know that
17 that maps up to all of the different things on
18 pages 8 or 9. But what I guess I would say is
19 what -- what I think distinguishes this from
20 almost everything else, in a good way, is that
21 here you are continuing a tradition that
22 predated the statute.

23 In the way the statute worked
24 before -- I mean the way things worked before
25 1996, it was the same basic, you know, carriers

1 that are covered by 254(d), roughly speaking,
2 that were implicitly subsidizing, or their
3 customers were implicitly subsidizing, some
4 rural service and some low-income service.

5 And it's not -- you know -- and -- and
6 just -- this is a historical point that I think
7 is actually relevant, because there was about a
8 10-year gap between when Ma Bell was broken up
9 in the '96 act. And during those 12 years, or
10 whatever it was, there was something like a
11 Universal Service Fund already being developed
12 through interchange fees and things like that.

13 And Congress was clearly trying to
14 preserve that. One place it's most clear is
15 254(j), little provision nobody looks at. But
16 that says that Congress specifically looked at
17 the Lifeline Program the agency was operating
18 before 1996 and wanted to preserve it.

19 And so this is a situation where there
20 is a program that has always been understood to
21 benefit particular classes because of the most
22 obvious beneficiaries of having a truly
23 universal network. And we're going to put a fee
24 on those people.

25 And then when you move from

1 deregulation to the new system, you impose what
2 I think is a fee, call it whatever you want, on
3 those people for a very specific purpose,
4 subject to very specific constraints.

5 I think that probably does look like
6 some of the things on pages 8 and 9, but in some
7 ways it looks better because of all that
8 pre-history that you can borrow.

9 JUSTICE KAGAN: And -- and,
10 Mr. Clement, you were asked to name some of what
11 you thought were the manageable standards in
12 this area, and you came up with a few. And you
13 said, well, it hasn't often been done, but it's
14 totally possible.

15 And I just wanted to give you the
16 opportunity to sort of do the flip half of that.
17 I mean, you obviously don't think that in terms
18 of the manageable standards that you, yourself,
19 laid out, that this falls on the inappropriate
20 side of the line.

21 So why not?

22 MR. CLEMENT: So I think that if you
23 --

24 JUSTICE KAGAN: As to each of those
25 things you said. I just wanted to peg it to

1 your own sense of what the standards are here.

2 MR. CLEMENT: Yeah. So one of the
3 things I said was if it's economy-wide and it's
4 a made-up new term, that's probably a problem.
5 Well, this isn't economy-wide and it's an old --
6 old soil term. So we do really well on that.

7 And then the second thing is Panama
8 Refining: Go solve a problem for me, hot oil,
9 whatever that is. That's a problem. You go
10 solve it. I'm not going to give you any
11 standards.

12 Or if you accepted the dissenters'
13 view of the statute in Gundy, and I know you
14 don't, but if you accepted their view where it's
15 just --

16 JUSTICE KAGAN: Totally.

17 MR. CLEMENT: -- past -- past
18 offenders are a problem, go solve it, like --
19 you know, that -- that's a problem. But, of
20 course, this is the opposite of that because
21 there are all these different constraints,
22 reasonably comparable rates and services for
23 rural customers and urban customers, affordable
24 for schools, it's got to be cheaper than other
25 rates, and the discount has to be enough to make

1 people take advantage of the program; for rural
2 healthcare providers, it has to be the same
3 rates as the urban healthcare providers in the
4 same state.

5 Like, that is so much better than so
6 many of the statutes that this Court has
7 overruled. But lest you think, to paraphrase
8 Judge Newsom in the Eleventh Circuit, that all
9 of the jurisprudence is a punch line, like, you
10 know, where this Court has approved the broadest
11 language is typically in regulated industries,
12 regulated circumstances. I suppose Yakus is an
13 exception. That's wartime. You could do with
14 that what you will.

15 But for the most part when -- when --
16 when Congress used broad language and this Court
17 has approved it, it has been in the context of
18 regulated industries where there actually are a
19 lot of principles to draw from.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Just back to page 8
24 and 9. It does seem to me that they're --
25 they're all pretty easily distinguishable on the

1 basis that it's an agency collecting fees from a
2 regulated party in order to offset its own
3 operating expenses or providing a service to
4 offset the expenses of the service. Thoughts?

5 MR. CLEMENT: So, I mean, if -- if
6 that had to be the paradigm, I could put this in
7 that paradigm in --

8 JUSTICE GORSUCH: No, I -- fair
9 enough. But if that's a paradigm and this
10 doesn't fit, then what?

11 MR. CLEMENT: It's still okay.

12 JUSTICE GORSUCH: Yeah.

13 (Laughter.)

14 JUSTICE GORSUCH: Okay.

15 MR. CLEMENT: And it's still okay, I
16 think in part, because, like, even if you think
17 this is sui generis -- and this gets back to the
18 colloquy I was having with Justice Kavanaugh --

19 JUSTICE GORSUCH: Yeah.

20 MR. CLEMENT: -- I mean, the fact that
21 something is unprecedented is like a yellow
22 flag, but it's not a red flag.

23 JUSTICE GORSUCH: Okay.

24 MR. CLEMENT: There's no unprecedented
25 clause in the Constitution.

1 JUSTICE GORSUCH: Okay. Okay. And --

2 MR. CLEMENT: And --

3 JUSTICE GORSUCH: And -- and this is
4 something you think Congress could -- could
5 easily fix. Now, you think that's an argument
6 in your favor, but they could easily put in a
7 cap or a rate or something tomorrow?

8 MR. CLEMENT: Sure, but why make them?
9 I mean, is my point. Especially when they have
10 put what I would say are the equivalent -- just
11 to put it in Whitman terms --

12 JUSTICE GORSUCH: Well, maybe because
13 otherwise it's regulated parties who are
14 self-interested in a program making the
15 decisions for themselves.

16 MR. CLEMENT: But they're not.

17 JUSTICE GORSUCH: It's sort of like
18 Schechter Poultry, right? I mean, it's the
19 same -- it was a regulated industry there that
20 was making those decisions for its own benefit.
21 And one -- I'm not -- one can dispute that
22 characterization, but -- but maybe, huh?

23 MR. CLEMENT: No. Give me half a
24 chance to -- to dispute that characterization.

25 JUSTICE GORSUCH: By all means.

1 MR. CLEMENT: Because this is miles
2 away. And this really gets to the sort of
3 private delegation piece of this. That argument
4 which hasn't gotten a lot of play -- I mean, let
5 me first say I think --

6 JUSTICE GORSUCH: I'm not talking
7 about private delegation. I'm just saying maybe
8 this is an area that Congress might speak. How
9 about that? Congress could decide.

10 MR. CLEMENT: Congress can always do
11 more. I mean, that -- that's got to be the rule
12 in every delegation issue, that Congress could
13 always do more. And as an aspirational
14 normative matter, wouldn't it be --

15 JUSTICE GORSUCH: In an unprecedented
16 area where there's a yellow flag on the field,
17 how about that?

18 MR. CLEMENT: How about an
19 unprecedented area that's not that unprecedented
20 because universal service has been going on
21 pursuant to congressional sanction under the
22 1934 Act for 50, 60 years --

23 JUSTICE GORSUCH: Through --

24 MR. CLEMENT: -- and --

25 JUSTICE GORSUCH: Through rate making

1 and a -- and a regulated monopoly that it -- it
2 -- it proceeded in the '96 Act to disavow and
3 blow up.

4 MR. CLEMENT: With all due respect,
5 this is where the 12-year interregnum is
6 actually quite important, because they blew up
7 -- Ma Bell gets blown up by the courts in 1984
8 --

9 JUSTICE GORSUCH: Sort of.

10 MR. CLEMENT: So -- sort of. Sort of.

11 JUSTICE GORSUCH: Sort of.

12 MR. CLEMENT: I know you know this.
13 But sort of. And as soon as it's blown up --

14 JUSTICE GORSUCH: Created new
15 monopolies in the process, but that's a whole
16 'nother story.

17 MR. CLEMENT: And -- and -- and -- but
18 when they do it, they don't say the agency is
19 still operating under 151, the '34 Act. They
20 don't say, all right, well, we can no longer do
21 any universal service subsidies through
22 long-distance rates.

23 Instead, they say, boy, this is really
24 important. As a regulatory matter, we've been
25 doing it this way for, at that point, 50 years,

1 so let's use the exchange fees and let's create
2 a universal service fund.

3 Now, they did all that out of -- in
4 the public interest. So if you're talking about
5 what's -- what's good for delegation principles,
6 boy, is it good that in 1996 Congress comes in
7 and says we expressly bless that, 254(j), we
8 expressly bless the exact program you were doing
9 for lifeline, and now we're going to put
10 guardrails on it that address this kind of
11 unique phenomenon -- I don't know, totally
12 unique, but --

13 JUSTICE GORSUCH: Okay.

14 MR. CLEMENT: But --

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE BARRETT: So, Mr. Clement, one
19 of the -- one of the questions that we ask in
20 the non- -- non-delegation context is whether
21 the public or the courts could judge whether a
22 particular policy adopted by the agency is
23 unlawful.

24 So there's no objective limit on the
25 contribution, right, which is kind of what we've

1 been going round and round about. How, if you
2 had a client who wanted to challenge the
3 contribution rate, would you argue that it
4 exceeded the statutory authority?

5 MR. CLEMENT: So I think the
6 contribution rate is just a by-product of other
7 things in the statute that I would tell my
8 client to challenge. So, I mean, you know -- I
9 mean, look, one of the things that is really
10 driving the contribution rate is that the
11 contribution base has shrunk. So one of the
12 things I might well tell my client to do is to
13 go to the agency and try to get the agency to
14 expand the contribution base.

15 And they might have the authority to
16 do that. If they did it, it would probably be
17 challenged by somebody under the arbitrary and
18 capricious or consistent with the -- the
19 statute, and we could sort that out. Or maybe
20 the agency would tell me: No, we can't do that.
21 We don't have enough statutory authority --
22 there's a recognizable limit -- so go to
23 Congress.

24 So if I really was concerned about the
25 rate qua rate, then I would probably have to go

1 at it that way. But I think most rational
2 people aren't concerned with the rate qua rate.
3 They're really concerned with that bottom line
4 number --

5 JUSTICE BARRETT: Mm-hmm.

6 MR. CLEMENT: -- where you see a flat
7 line and you don't see much of a problem. But
8 if I thought that there was something --

9 JUSTICE BARRETT: If I thought
10 35 percent was too high or something like that?

11 MR. CLEMENT: Yeah, but, like, you
12 know, 35 percent of what?

13 JUSTICE BARRETT: Of what.

14 MR. CLEMENT: That's like -- you know,
15 like it's -- it's that bottom line number, is
16 the money that's actually being funded by
17 universal service. And that's been a flat line.

18 But if I wanted to try to get at that,
19 I would tell my clients: All right, let's look
20 at this. Over half of this is the rural
21 carriers program. So is there something the
22 agency did in implementing the rural carrier
23 program that created a lot of costs?

24 And maybe I can identify something
25 where they just funded a big project out in

1 Montana somewhere and it's adding a lot of cost
2 and it's not actually doing anything to lower
3 rural rates or improve rural services. Well,
4 then that gives me a statutorily enforceable
5 standard. And I go in and I make an arbitrary
6 and capricious standard, but I also make a "in
7 excess of statutory authority" question.

8 Or if the reason I perceive that the
9 fund had become too big is that they monkeyed
10 with the eligibility requirements for the
11 lifeline program, so now virtually everybody
12 gets \$9 off in this fee. Well, I could say
13 that's arbitrary and capricious. That's in
14 excess of the statutory authority. The
15 statutory authority is to make it affordable. I
16 can read from the context of this statute that
17 that's supposed to be for low-income people.
18 That's consistent with everything else in the
19 statute. That's ultra vires.

20 That's -- and -- and it's the way you
21 limit the size of this fund is to bring
22 challenges to the FCC action, and they're all
23 FCC action. None of it's USAC. It's FCC
24 actions that affect the scope and size of the
25 program.

1 JUSTICE BARRETT: Okay. One last
2 question. Now, this is a little bit of an
3 unfair question, but you're pretty good, so
4 we'll see.

5 (Laughter.)

6 JUSTICE BARRETT: Justice Kagan -- in
7 your colloquy with Justice Kagan, you were
8 identifying some of the judicially manageable
9 standards. And, you know, obviously your
10 position is that, applied here, the program
11 passes.

12 Do you think there are any programs,
13 any delegations of discretion in the U.S. Code
14 that would fail it?

15 MR. CLEMENT: I -- I think there
16 probably are. And I might, if I get the right
17 client, spend some time looking for them.

18 (Laughter.)

19 MR. CLEMENT: You know, I -- I'm not
20 here to tell you that there should be no
21 non-delegation test. I am here to concede, as
22 Justice Scalia, who didn't like flob -- flabby
23 statutes, but he still said, you know, this is
24 tough. And, you know, Chief Justice Marshall
25 was pretty smart and he said this was delicate.

1 Chief Justice Taft, in J.W. Hampton -- you know,
2 pretty good judge for separation of powers,
3 decided Myers like two years before -- he says,
4 boy, this is common sense. And, you know, when
5 judges try to just apply their common sense,
6 that is its own separation of powers problem.

7 So I'm not here to tell you it's easy,
8 but I'm not here to tell you it's impossible.
9 And I do think the Court's precedents provide a
10 -- a good guide. I mean, I -- I will say that I
11 think there's a lot in the Gundy dissent that
12 could say that certain things are out of bounds.
13 It's just not this one.

14 JUSTICE BARRETT: Okay.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: So I guess I'm --
18 I'm questioning your response to Justice Gorsuch
19 in the colloquy about whether or not Congress
20 could easily put a cap on this. I -- I -- I
21 mean, I take your point that Congress can always
22 do more, but if Congress actually wanted a
23 rational cap, if they wanted one that reflected
24 the amount of money that would be sufficient to
25 run this program, I would think they would need

1 to have a lot more than just picking a number
2 out of the air.

3 And that's really what the function of
4 giving it to an expert agency who's sort of
5 focused on this issue, that -- that's what is
6 happening in the delegation. Am I wrong about
7 that?

8 MR. CLEMENT: I don't think you're
9 wrong about that at all. Now, I mean, one way
10 you could fix it in a trivial way that would
11 really sort of allied your question, I suppose,
12 is what I think the Solicitor General was
13 getting at, which is this idea that you just
14 like make the cap a trillion dollars. And then
15 there, it's your definitive cap and now we're
16 done. Now --

17 JUSTICE JACKSON: And I guess we're
18 done with delegation, but, again, the whole
19 point is that we're in a policy system where
20 Congress is trying to do something in this
21 statute. And it would seem to me kind of at
22 least weird to say Congress solves this
23 constitutional problem by picking a number out
24 of the air.

25 MR. CLEMENT: I mean, I agree with

1 that. And I think in a sense that does
2 distinguish this again from some of the tax
3 hypos. Because when you're talking principally
4 about raising revenue, you're really focused on
5 the number. How much are we going to raise?
6 Like we have a deficit, and we're going to cover
7 some of it and we're -- some of it with
8 bothering. And like all we really care about is
9 how much we're going to raise. So for a statute
10 where that's all you care about to not address
11 that in Congress does seem like a problem.

12 But, on the other hand, with this
13 program, they clearly weren't that focused on is
14 this going to be a \$10 billion program or an \$11
15 billion program? What they wanted to do is
16 provide reasonably comparable rates and services
17 for rural customers and -- versus urban
18 customers.

19 They had a rough sense of what that
20 was going to cost, but if it cost, like, you
21 know, a hundred million dollars more to actually
22 get universal service that worked for everybody
23 in the country, I think Congress would have been
24 fine with that because their principal judgment
25 here was not a how much money judgment, but a

1 how much universal service is going to survive
2 in a competitive environment.

3 JUSTICE JACKSON: And am I right that
4 that judgment and the program that was generated
5 was enacted on a bipartisan basis, it's been
6 wildly successful in terms of actually providing
7 the services that Congress wanted; am I right
8 about that?

9 MR. CLEMENT: Yes. And, you know, I'm
10 not 100 percent sure, but my recollection is it
11 started in the Senate too, which is why I really
12 think saying it's a tax is a mistake because
13 it's not a tax. It's Commerce Clause
14 legislation.

15 And it's a program that was
16 overwhelmingly popular. And you see a
17 congressional amicus brief that, you know, I
18 have to say in this era is refreshingly
19 bipartisan.

20 JUSTICE JACKSON: And I guess I think
21 that that's kind of important because there is
22 an argument that some of the amici have raised
23 that the reason why we need to get into this as
24 a Court and have a more robust non-delegation
25 doctrine is to promote democratic

1 accountability.

2 And I guess I'm just wondering whether
3 it is really democracy-enhancing to create a
4 doctrine that, at least in this case, would
5 allow judges to strike down this very
6 popularly-enacted law.

7 MR. CLEMENT: Well, I -- two
8 observations on that. One, there's a certain
9 perversity that the other side is like so
10 confident that if you just said there needs to
11 be a cap, Congress would snap to it and put in a
12 cap. And the only reason they can be confident
13 is that this is a really popular law. And so,
14 of course, Congress would do it because they
15 don't want the sky to fall. So that's -- that's
16 -- that's weird enough as it is.

17 And then the second thing I would say
18 is, like, on the one hand, I don't think that
19 you can have a jurisprudence that says: Well,
20 this -- this law passed unanimously and this one
21 was on a party line vote, so we're going to
22 apply a different test, but I do think where --
23 and this is the point I was trying to make with
24 Justice Barrett -- there is a problem that if
25 you sort of come up with a test that is kind of

1 like I know it when I see it, that is incredibly
2 judicially empowering to the expense of the
3 political branches.

4 And I think that's why somebody like
5 Justice Scalia, who was, you know, distressed at
6 some of what he saw, but nonetheless said, you
7 know, sort of too -- too big, too big, too much,
8 that's just not the right test. You need to
9 come at it from a different angle.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. McCotter.

14 ORAL ARGUMENT OF R. TRENT McCOTTER

15 ON BEHALF OF THE RESPONDENTS

16 MR. McCOTTER: Mr. Chief Justice and
17 may it please the Court:

18 At its heart, this case is about
19 taxation without representation. Every year
20 Americans pay billions for the Universal Service
21 Fund. The rate has increased ten-fold. The
22 amount collected is now 20 times the size of the
23 FCC's entire annual budget.

24 The FCC -- the government and the FCC
25 now agree, or at least do not dispute, that USF

1 charges are, indeed, taxes; that the
2 non-delegation inquiry is stricter in this
3 domestic context; that the nature of the power
4 is at least relevant; that the USF statute sets
5 no objective rule to limit the amount raised;
6 and that Congress has set such rules for every
7 other domestic tax in American history.

8 Those concessions doom their case.
9 The amount of public revenue to raise is a
10 quintessential legislative determination, not
11 some minor detail to be filled in later.

12 But in deciding how much to raise, the
13 FCC is guided by aspirational-only principles in
14 254(b) and even gets to redefine universal
15 service itself in 254(c) based on an evolving
16 standard; the exact opposite of incorporating
17 some preexisting framework.

18 This broad delegation to the FCC was
19 entirely by design, and this is before we get to
20 USAC. Even now, the recent memorandum of
21 understanding between the FCC and USAC says that
22 it is USAC's projections, not the FCC's, that
23 will be deemed approved.

24 But passive acquiescence does not
25 comply with this Court's non-delegation case

1 law. To be clear, the Court can affirm without
2 overturning any prior decision because this is
3 the easy case. Neither the executive, nor
4 private parties gets to set tax rates.

5 But if Petitioners are right, then
6 Congress could use similarly-vague language to
7 let the executive decide any domestic
8 legislative issue, even, for example, setting
9 the size of lower federal courts. The
10 Constitution prohibits that, the transfer of
11 power.

12 The en banc ruling below should be
13 affirmed, and I welcome the Court's questions.

14 JUSTICE THOMAS: The Petitioners make
15 the argument that this isn't a particularly new
16 program, it comes from the -- the old Bell
17 system before we had deregulation.

18 The other thing that they argue is
19 that the constraints that are on the service
20 delivery side are indirectly or at least
21 sufficient, they are sufficient to regulate or
22 to supply constraints on the revenue-raising
23 side.

24 I think that puts some degree of
25 specificity on the argument, and I'd like to see

1 you address those.

2 MR. McCOTTER: Yes, Your Honor.

3 So on the pre-1996 regime, this
4 argument wasn't really developed below by the
5 Petitioners, but, remember, 254(c) says the FCC
6 gets to decide what universal service is, based
7 on an evolving standard.

8 The Petitioners themselves said in
9 1996 that there was a fundamental overhaul --
10 that's their opening brief -- fundamental
11 overhaul of the regime. And that's because they
12 are ditching whatever the prior understanding
13 was, even assuming there was one -- and we
14 dispute that -- but even if there were, in '96,
15 Congress said we're completely changing, not
16 just how the system operates, but what it
17 covers. It's dramatically larger.

18 And even if you see our brief at pages
19 69 to 70, we cite some of the government's own
20 briefs where they say we have no obligation.
21 The statute imposes no obligation to raise the
22 same amount of money that we did before the '96
23 regime.

24 So the idea that somehow the old
25 regime is incorporated, I think, is directly

1 dispelled by the text of the language -- by the
2 text of the statute itself.

3 On the second part of your question,
4 Your Honor, if I can make one point that you all
5 remember today, it's that the -- the principles
6 in 254(b) are ones that the FCC does not have to
7 substantively comply with. This is not some
8 extreme, unusual reading as they try to make it
9 sound. That's been their uniform interpretation
10 for 25 years.

11 They say each one of those, maybe we
12 have to consider them. We can't ignore them
13 altogether. But we only --

14 JUSTICE KAGAN: Mr. McCotter, I mean,
15 there are some real standards in this program.
16 So what this program covers is things that a
17 substantial majority of residential customers
18 already have, all right? So it's not like
19 newfangled, go all get ourselves some Starlink
20 accounts, it's substantial majority of
21 residential customers already have that are
22 essential to living in our world, that are
23 essential to education, public health, and
24 public safety.

25 And those things have to be available

1 at affordable rates. The FCC can't do anything
2 by way of this program that is not basically
3 geared towards getting those who live in very
4 rural areas or who are very low income, getting
5 those -- getting those people access to services
6 that all the rest of us have. That's the nature
7 of the program, and that's the limit of the
8 program.

9 MR. McCOTTER: So the substantial
10 majority point, Your Honor, again, that's not
11 listed as something that the FCC has to
12 accomplish. It's listed only as something they
13 must consider the extent to which communications
14 are.

15 So it's not even saying universal
16 service is this level --

17 JUSTICE KAGAN: I -- I think if they
18 -- if -- if the FCC walked into this Court and
19 said we don't -- we can do something that, like,
20 a tiny minority of residential customers have, I
21 think that they would lose that case. I mean,
22 there are constraints on this agency and on this
23 -- and on their operation of the program.

24 And if we're going to read the statute
25 just -- I mean, honestly, I think that that's a

1 -- a not credible reading of this statute. This
2 statute clearly puts constraints on these are
3 the services that all the rest of us take for
4 granted, that you can't take for granted in
5 rural North Dakota.

6 And what this program says is that
7 rural North Dakota citizens should also get what
8 all the rest of us have long had. That's the
9 nature of this program, that the services that
10 the rest of us have that are essential to life
11 in a modern world, that are essential to
12 education, public health, and public safety,
13 which are providable at affordable rates.

14 So if it really takes a lot of money,
15 even then you can't get the program. You can't
16 get the service.

17 MR. McCOTTER: Well, so I'll address
18 the affordable point again because that came up
19 a lot in the opening section.

20 Again, affordability under 254(b) is
21 something the FCC itself has said it does not
22 actually have to comply with. It can pick any
23 254(b) principle, including one that it comes up
24 with on its own, and say that's what we're going
25 for. That's the real limitation.

1 JUSTICE KAGAN: Mr. McCotter, I'm
2 going to tell you again that if the FCC -- and
3 -- and maybe the Solicitor General can -- can
4 respond to this -- but if the FCC came in and
5 said we don't have to worry about affordable
6 rates and, you know, they -- they can be
7 exorbitant rates and we're going to still go
8 ahead and fund things from this program, I -- I
9 mean, that's just not a reasonable reading of
10 the statute.

11 MR. McCOTTER: That's been their
12 position for 30 years, Your Honor.

13 JUSTICE KAGAN: Okay. I'm -- I'm --

14 MR. McCOTTER: And they haven't
15 changed it.

16 JUSTICE KAGAN: I'm inclined to ask
17 the Solicitor General to say whether that is
18 their position.

19 MR. McCOTTER: I understand. And the
20 way to read the statute, as I said, is not some
21 extreme version that we're offering. It's the
22 version that they've proffered for 30 years.

23 JUSTICE KAGAN: It's the --

24 MR. McCOTTER: They've always said --

25 JUSTICE KAGAN: But you just look at

1 the text. The text, it leaps out at you,
2 substantial majority of residential customers;
3 essential to education, public health, and
4 public safety; available at reasonable and
5 affordable rates.

6 MR. McCOTTER: Again, those are things
7 the FCC only must consider the extent to which.
8 They don't even have to consider whether those
9 are actually true. They have to say, do we
10 think that this is true and, if so, to what
11 extent. Okay, we've considered it. It's --
12 that's an important factor. It is not
13 substantive limitation.

14 JUSTICE JACKSON: Why isn't that an
15 arbitrary and capricious challenge, though? I
16 mean, it -- it seems to me that if you're
17 complaining about the FCC and the way in which
18 they have exercised its authority, you should be
19 bringing that kind of case. That's not a
20 non-delegation problem.

21 MR. McCOTTER: I don't think it has to
22 be one or the other, though, Your Honor. I
23 think if the agency --

24 JUSTICE JACKSON: Well, there has to
25 be a distinction between the two if you're

1 asking us to strike a -- a statute down on a
2 particular constitutional basis.

3 MR. McCOTTER: But if the agency has
4 such a broad scope in the first place --

5 JUSTICE JACKSON: I mean, don't we
6 have constitute avoidance as a principle? If we
7 could do it under arbitrary and capricious,
8 shouldn't we be doing that rather than striking
9 the statute down as unconstitutional?

10 Let me ask you another question. I
11 guess I'm confused about what you're asking us
12 to do. Your brief says that the Court should,
13 quote, "take this opportunity to realign its
14 non-delegation framework with its traditional
15 understanding of the Constitution," end quote.

16 But you also have said, both in your
17 brief, I guess, and here, that you're not asking
18 us to overrule any specific precedents. But I
19 would think that a realignment would mean
20 different outcomes from cases that we've decided
21 under the standard that you want us to displace.

22 So, I -- I mean, if the intelligible
23 principle test, in your view, has been yielding
24 proper outcomes for the past century, then why
25 do we need to revisit it?

1 MR. McCOTTER: So we win even under
2 the current framework. And that's why we say
3 that the Court need not necessarily overturn any
4 precedent.

5 JUSTICE JACKSON: So why do we need to
6 revisit the framework? If you -- if you're --
7 if you're right about all the past cases, if we
8 got them right, then what's the need for having
9 a new standard?

10 MR. McCOTTER: So the main reason is
11 that the intelligible principle test as some
12 judges have interpreted it -- now, again, we
13 don't quite agree with this view. In Judge
14 Newsom's words, it's a punch line. It
15 essentially allows transfers altogether of
16 exclusive and strict legislative powers to
17 agencies. And you could say --

18 JUSTICE JACKSON: But not apparently
19 in all the cases that you say got it right. So
20 --

21 JUSTICE KAVANAUGH: The -- oh, keep
22 going. Sorry.

23 JUSTICE JACKSON: No, I just -- I just
24 -- I guess I'm really hyper focused on the need
25 for us to make any changes in terms of the legal

1 standard that applies here. And the reason is,
2 in part, because of what the Chief Justice
3 Marshall said -- we've quoted it a couple of
4 times -- this is delicate and difficult, this
5 inquiry, but he goes on to say it's an inquiry
6 into which a court will not enter unnecessarily,
7 precisely because it's so hard.

8 So I'm really trying to understand the
9 need for us to come up with a different test or
10 try to figure out something else, especially if
11 you appear to concede that the outcomes of all
12 these prior cases are correct.

13 MR. McCOTTER: I think the outcomes of
14 the cases are arguably correct under the
15 original understanding, but, again, part of that
16 could just be coincidence. This Court has
17 addressed certain statutes. We think a lot of
18 them are distinguishable in certain ways that
19 make them different from the statute here.

20 But, again, I don't think we should be
21 slighted for saying that we win even under the
22 modern test, though, because there is no clear
23 boundary for the FCC's ability to set the amount
24 to be raised. This Court has said that since
25 American Power & Light, even under its most

1 watered-down modern case law.

2 JUSTICE KAVANAUGH: Your -- your
3 position would say, I think, that a solution to
4 the problem you identify could be a trillion
5 dollar cap or \$100 billion cap. And that makes
6 the position seem -- what is -- what exactly are
7 you trying to accomplish?

8 MR. McCOTTER: And that's exactly what
9 Justice Thomas said in his Whitman concurrence.
10 He says, just because there is an intelligible
11 principle, assuming there is one -- and,
12 obviously, we don't -- but even assuming there
13 is one, it doesn't stop Congress from just
14 handing wholesale its power. Just like Justice
15 Scalia said in his Mistretta dissent.

16 JUSTICE KAVANAUGH: Well, maybe that's
17 not -- maybe I didn't phrase my question
18 correctly. I think your position is that it
19 needs -- needs a cap, correct?

20 MR. McCOTTER: There needs to be some
21 kind of objective limit.

22 JUSTICE KAVANAUGH: Okay.

23 MR. McCOTTER: Yeah.

24 JUSTICE KAVANAUGH: So cap. Yes.

25 MR. McCOTTER: It doesn't have to be a

1 number. Just -- there's another -- if I had to
2 make a second point --

3 JUSTICE KAVANAUGH: But even if it has
4 to be -- even if it has to be a number, you're
5 not taking the further position, I don't think,
6 that the number -- the number could be a cap.
7 It could be very high, and then the question is
8 what exactly are we accomplishing?

9 MR. McCOTTER: Well, so if Congress
10 did set a trillion-dollar cap, obviously it's
11 unlikely, but at least then we would know that
12 Congress itself has made that determination. It
13 says we think universal service is this
14 important; we want the agency to be able to
15 raise --

16 JUSTICE KAVANAUGH: And how -- how is
17 that then different from saying we're not going
18 to do a trillion-dollar cap, but we're uncertain
19 about -- we're uncertain about the amount that
20 will cover the costs of the program and so we're
21 going to use the term "sufficient"?

22 And so I think you need to zero in on
23 this -- the word "sufficient" and why that's not
24 enough of a constraint vis-à-vis the trillion
25 dollar. Like, we would be saying, I think, if

1 we agree with you, sufficient is not good enough
2 but trillion dollar is. And I think a lot of
3 people would say that doesn't make a lot of
4 sense. So what's the answer to that?

5 MR. McCOTTER: Well, so the answer
6 with the trillion-dollar example is then we can
7 say Congress has set the policy. Yes, the test
8 this Court had for 150 years, Congress sets the
9 policy. It can't use just vague aspirations,
10 but it sets the policy, leaves only details to
11 be filled in.

12 I think the -- in that case, they've
13 set the policy, essentially, right? The policy
14 that matters for this purpose, which is the
15 amount to be raised. But if they just say raise
16 a sufficient amount --

17 JUSTICE JACKSON: But that's just
18 because --

19 MR. McCOTTER: -- first of all, that's
20 --

21 JUSTICE JACKSON: -- you say the
22 amount to be -- sorry. Go ahead.

23 JUSTICE BARRETT: That -- that seems
24 pretty empty, right? I mean, isn't that Justice
25 Kavanaugh's point, that if they say \$3 trillion

1 -- \$3 trillion or \$5 trillion, that's just kind
2 of throwing a number out there for the sake of
3 throwing a number. Why have they really set the
4 policy in a way that's meaningfully different
5 than they did in this statute?

6 MR. McCOTTER: But I still think if
7 they put a particular objective limit like that,
8 they have set the policy. They've said this is
9 how important universal service is to us. The
10 agency can --

11 JUSTICE BARRETT: You're talking about
12 if they -- you're still talking about just if
13 they raise money through the fund this way.
14 You're not talking about them appropriating the
15 money, right? You're just saying --

16 MR. McCOTTER: Correct, yes.

17 JUSTICE BARRETT: -- this is the cap.
18 That just -- that seems a little bit hollow.
19 Kind of seems like a meaningless exercise.

20 MR. McCOTTER: Well, still there is
21 accountability. At least then we know. If you
22 think that's too much, if you think --

23 JUSTICE BARRETT: Counsel, let me just
24 --

25 MR. McCOTTER: -- that it's too low,

1 you know it's Congress.

2 JUSTICE BARRETT: Let me switch gears
3 for one minute and just ask you to respond to
4 the page 8 and 9 reply brief statutes. You
5 know, both Ms. Harris and Mr. Clement have said
6 that your position is going to jeopardize a lot
7 of laws.

8 MR. McCOTTER: So the list of statutes
9 there, they're kind of like the dog that didn't
10 bark. All they have are a few relatively modern
11 provisions, almost all of which are standard fee
12 provisions, like how much do you pay for a
13 postal stamp, that sort of thing, which this
14 Court addressed in National Cable, the 1974
15 case, and said maybe that has its own built-in
16 limiting principle, because you're limited to
17 the value to the recipient.

18 JUSTICE BARRETT: Okay. So --

19 MR. McCOTTER: However --

20 JUSTICE BARRETT: -- you're saying
21 that page 8 and 9, they're all distinguishable?

22 MR. McCOTTER: Correct.

23 JUSTICE BARRETT: Okay. So do you
24 think that our deciding this case in your favor
25 would jeopardize other statutes that maybe

1 aren't on pages 8 and 9 of the briefs? I mean,
2 do you think it would be cataclysmic or do you
3 think it would be pretty modest, like a -- this
4 -- this statute only?

5 MR. McCOTTER: So the proof is in the
6 pudding here. The decision below has been
7 binding in the Fifth Circuit for eight months
8 now. They have repeatedly rejected
9 non-delegation challenges, including to some
10 relatively broad language. We cite these in our
11 brief. The Mayfield case, for example, involved
12 a statute that referred to DOL regulations being
13 detrimental to health, deficiency, general
14 well-being.

15 And the court there unanimously said:
16 No, that gives enough meat on the bones. This
17 is not like what we saw with the Universal
18 Service Fund.

19 JUSTICE BARRETT: Okay.

20 MR. McCOTTER: The government has
21 never cited another one like this.

22 JUSTICE BARRETT: All right. Then
23 last question. What about the consequences?
24 You know, Mr. Clement said the consequences of
25 holding this statute unconstitutional would be

1 devastating for universal service. What about
2 that?

3 MR. McCOTTER: Well, just as a
4 disclaimer, it's not relevant to the
5 constitutional question, of course, but I will
6 address it anyway.

7 JUSTICE BARRETT: I -- I understand.
8 I -- I understand that. But I think it's a fair
9 question to consider the consequences of your
10 position.

11 MR. McCOTTER: So the more important
12 that my friends on the other side make out this
13 program to be, all it does is make my case
14 stronger that it should have been Congress
15 itself to set meaningful limits in it.

16 In terms of how this would play out --
17 again, we offer options in our brief. They've
18 never -- my friends on the other side don't
19 respond to them; I think maybe they accept
20 them -- the Court could limit relief to the
21 named Respondents.

22 This does challenge just one court
23 order, remember. I realize there are others in
24 the --

25 JUSTICE KAVANAUGH: And the -- well,

1 on your answer to Justice Barrett on the Fifth
2 Circuit, and the proof is in the pudding, I
3 guess I question that, because they relied on
4 the combination theory.

5 MR. McCOTTER: True, but --

6 JUSTICE KAVANAUGH: So proof is not in
7 the pudding.

8 (Laughter.)

9 MR. McCOTTER: True, but the first
10 part of their opinion goes right up to the line
11 on the statutory delegation aspect.

12 JUSTICE KAVANAUGH: Well -- well, they
13 rely on the combination theory. You're barely
14 defending that theory, right?

15 MR. McCOTTER: We're not running away
16 from it at all. We think it's correct. We
17 think it flows directly from Free Enterprise
18 Fund.

19 Judge Newsom himself, in his
20 concurrence, made the same argument, right, that
21 with each delegation we run into -- or we move
22 away from the locus of democratic
23 accountability. And so that's --

24 CHIEF JUSTICE ROBERTS: Well --

25 JUSTICE KAVANAUGH: That's a --

1 CHIEF JUSTICE ROBERTS: Free
2 Enterprise Fund was quite a different -- I mean,
3 they had -- they both had two, but I don't think
4 that's -- that's where the similarity ends.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Because it was
7 a question of direct control by the -- by the
8 President. And if he can't control both of
9 them, then he's got no control at all.

10 So I -- I think it was --

11 MR. McCOTTER: Sure.

12 CHIEF JUSTICE ROBERTS: -- quite a
13 different case.

14 MR. McCOTTER: Sure. But even then,
15 the -- the concern, as you said, was the
16 President's control. Here, the concern is
17 democratic accountability. And the private
18 non-delegation and the -- what I'll call the
19 statutory --

20 JUSTICE SOTOMAYOR: Counsel --

21 CHIEF JUSTICE ROBERTS: Well, but it's
22 a much more -- I'll let it go in a second. But
23 it's a much more precise straight line, direct,
24 as opposed to a broad concept like democratic
25 accountability. Thank you.

1 MR. McCOTTER: I understand. And if
2 the Court doesn't want to go down the road of
3 the combination theory, then I think the
4 Petitioners agree that the Court could just
5 address QP 1 and 2 and resolve the statutory.

6 JUSTICE KAVANAUGH: And on the -- on
7 your main position, not the combination theory,
8 does it depend on drawing a distinction between
9 tax and fee? I think it may, particularly when
10 you answer the way you have on the examples on
11 pages 8 and 9.

12 And if so, can you tell us what the
13 definition of tax and fee is? And then the
14 follow-up question will be: The other side, the
15 government, says that'll be a complete morass
16 and just basically a jurisprudential disaster to
17 try to figure out the difference between tax and
18 fee. I'm characterizing what they say.

19 MR. McCOTTER: So I'll say this.
20 We're not saying taxing is in a category of one
21 for non-delegation purposes. As we said, the
22 test is the same for every strictly and
23 exclusively legislative power. So whether you
24 think it's a tax or a fee doesn't change the
25 initial framework. We're not asking for some

1 one-off special test for taxing.

2 But it's true that applying that test
3 is easier in the context of a tax, for two
4 reasons.

5 First, we all know that taxing is
6 strictly and exclusively legislative. That has
7 been established for centuries.

8 And second, we know what that required
9 policy is. What is the sine qua non of a tax?
10 Federalist 83 told us. It needs to be an
11 amount. And we also have 250 years of tradition
12 following that rule -- for those who look to
13 kind of post-founding evidence -- 250-year
14 unbroken history following that.

15 That's not to say that if the Court
16 for some reason thinks that it's not a tax, that
17 we must lose.

18 This Court said just last year in the
19 CFPB case raising public money is a legislative
20 task. Professor McConnell's referred to it as
21 raising domestic revenue. These are terms that
22 I think would include fees.

23 And so the reason why I think, if you
24 go down that road, we are still different than
25 the statutes that the government cites on pages

1 8 to 9 of its reply is that those, either on
2 their face or under the limiting construction
3 that this Court required in National Cable in
4 1974, those would be construed as fees. They
5 have a limiting principle of, you can only
6 charge the value of the benefit to the
7 recipient.

8 And maybe there's one statute, like
9 the OCC one, that is kind of on the line. And
10 that's tough. It's a more modern statute. You
11 know, maybe that one is questionable.

12 JUSTICE JACKSON: I'm sorry, why isn't
13 sufficiency a limit that is similar?

14 MR. McCOTTER: Well, so sufficient
15 -- well, as you said, sufficiency is not --

16 JUSTICE JACKSON: Sufficient to run
17 this program?

18 MR. McCOTTER: Sufficiency is not a
19 mandate, first of all. They don't have to do
20 that.

21 In 254(b) it is listed as a principle,
22 they have already said, for 30 years. They
23 don't have to follow any particular principle.
24 And 254(e), there's also a reference to
25 sufficiency. It says should. Again --

1 JUSTICE JACKSON: In a hypothetical --

2 JUSTICE KAGAN: Again, you -- you --
3 you're saying that we should interpret this
4 statute to say that that word, "sufficient," is
5 not imposing a requirement, meaning sufficient,
6 what is required to do these services, but not
7 more than that?

8 MR. McCOTTER: Yes, because that's
9 what the FCC itself has said for 30 years.

10 JUSTICE KAGAN: Okay. I'll add that
11 to my list to things that I think would be an
12 unreasonable statutory interpretation.

13 Sufficiency means -- like when I call
14 the pizza operator and say: I want you to send
15 me pizza sufficient for 10 people, and then an
16 18 wheeler shows up --

17 (Laughter.)

18 JUSTICE KAGAN: -- that is not an
19 accurate understanding of what I asked for.

20 (Laughter.)

21 MR. McCOTTER: Well, I think the key
22 distinction there is at least you have an
23 objective limitation on the end, right?
24 Sufficient pizza for 10 people. Okay. We'll
25 give -- give them the benefit of the doubt and

1 assume sufficient --

2 JUSTICE KAGAN: Yeah, so I take that
3 point. So it is sufficient for what. And then
4 we go back to my earlier thing.

5 MR. McCOTTER: So then --

6 JUSTICE KAGAN: It's sufficient to get
7 the people in these rural and low-income people,
8 these -- these -- these populations, it's to --
9 it's to get them the -- the services that the
10 rest of us have, that a majority of other --
11 that the majority of us have that are necessary
12 for education, public health, and safety, and --
13 and that can be accomplished at reasonable and
14 affordable rates.

15 That's -- that's -- that's the
16 nature -- that's the substantive mandate.
17 Sufficient is -- that's how much you have to
18 raise, is to do that and nothing else.

19 MR. McCOTTER: And again, I return to
20 254(c)(1), principles are not mandatory, except
21 that the FCC must consider them. And even that,
22 honestly, is too much.

23 JUSTICE SOTOMAYOR: I'm sorry, I --
24 the word -- statute says that the FCC -- uses
25 the word "shall base its policies on the six

1 universal service principles."

2 You keep saying that for 30 years the
3 FCC has said it doesn't.

4 I find two cases where briefs were
5 submitted where it said that, but I don't see
6 that anywhere in the SG's brief here. And I
7 certainly don't see it controlling the outcome
8 of at least two circuits, the Fifth and I think
9 it was the Tenth, who -- who invalidated certain
10 regulation -- certain things by the FCC because
11 they ignored the principles.

12 So you can't have it both ways.

13 MR. McCOTTER: Well, so on your
14 first --

15 JUSTICE SOTOMAYOR: So if we say
16 they're just plain wrong, these principles are
17 binding on their decision-making, which I don't
18 think they're going to dispute, it may well be
19 that they come in conflict at some point or
20 they're not pertinent to another issue. That
21 always happens.

22 But you're sort of saying the
23 principles set no limits.

24 MR. McCOTTER: Well, so on the first
25 part of your question, Your Honor, they do

1 say -- in their reply brief, they say I quoted
2 out of context one of their briefs saying that
3 the 254 principles don't have to be complied
4 with.

5 JUSTICE SOTOMAYOR: Exactly.

6 MR. McCOTTER: And they say: If you
7 read the rest of what we said, we said was in
8 light of other statutory obligations.

9 And so what they are saying, as they
10 have said for 30 years, is at most, we can --
11 have to consider the 254(b) principles. At
12 most, we have to follow one of them.

13 We can say one is more important than
14 the other -- it could be one we came up with --
15 but we don't actually have to follow
16 substantively any of them.

17 JUSTICE GORSUCH: And don't they have
18 to sometimes make choices between them? I mean,
19 (1), for example, talks about reasonable and
20 affordable. But then (2) says advanced
21 telecommunications services should be provided
22 in all regions of the nation.

23 And that doesn't have a reasonable or
24 financial limitation at all. And -- and I -- I
25 just -- I'm not sure I understand why you're

1 fighting the notion that if -- if they were
2 bound by them somehow, they would still provide
3 guidance.

4 MR. McCOTTER: Sure. So we obviously
5 make that argument, that even if 254(b)
6 principles are all mandatory in every way you
7 could think of, as Justice -- or, excuse me, as
8 Judge Newsom said in his concurrence, they are
9 all -- they are all mealy-mouthed chivalrous;
10 they are just generic terms.

11 And so even if the Court says: The
12 position the FCC has provided for 30 years is
13 wrong, no, you must try to meet every single one
14 of these, we think we still win.

15 And I think, to get back to Justice
16 Kagan's question, it's because we still have the
17 object. It's sufficient for what? Sufficient
18 for universal service. And the FCC gets to
19 redefine universal service based on an evolving
20 standard.

21 JUSTICE KAGAN: Well, you know, there
22 is something that says to the FCC, yes, you get
23 to keep thinking about this. And, you know,
24 Justice Jackson suggested that that's exactly
25 when you want delegations. It's you get to keep

1 thinking about this because we recognize that
2 the -- that the technology is going to change.
3 And these very clear principles are going to be
4 in -- in a -- in -- in 2025 different from what
5 they were in 2010, which is different from what
6 they were in 2000.

7 So -- but the -- the -- the -- the
8 guidelines are quite it clear. You know, a
9 substantial majority of people already have to
10 have them. They have to be at affordable and
11 reasonable rates. And what's the one I'm
12 missing? They -- and they have to be essential
13 to, essentially, you know, live in our modern
14 society for education and health and safety.

15 I mean, if you go through what this
16 program is providing, what -- what would you cut
17 out?

18 MR. McCOTTER: I'm sorry. What would
19 I cut from this?

20 JUSTICE KAGAN: Yeah, because, you
21 know --

22 MR. McCOTTER: I would add things to
23 the statute.

24 JUSTICE KAGAN: -- like, for -- to me,
25 it's like, okay, you know, what it's providing

1 is landline connections and now broadband in
2 very rural areas, about a \$9 per month subsidy
3 for people who live just -- who live below the
4 poverty line, rural health to make -- to ensure
5 that we facilitate telehealth services and allow
6 rural clinics to operate.

7 I mean, this is all basic stuff.
8 These are not exorbitant things. These are not
9 gratuitous things. This is just like -- the way
10 the FCC has operated that program is consistent
11 with the standards that have been set in this
12 program, which is these -- these are providing
13 basic services for people who live in North
14 Dakota and for people who live below the poverty
15 line.

16 And, by the way, as Mr. Clement said,
17 those basic services benefit all of us because
18 we should all be able to talk to people in North
19 Dakota.

20 MR. McCOTTER: So on that point, I'd
21 respectfully direct you to our opening brief,
22 search for where we use the phrase "wealthy
23 Montanans on ranchettes." It's a phrase used by
24 a scholar saying this money gets used for things
25 like that. They're taking money from people who

1 are just above the line to receive, say,
 2 lifeline assistance, and it goes to help people
 3 who are rural but who already wealthy and that
 4 sort of thing. So the idea that this is just
 5 unalloyed good, we would respectfully disagree
 6 with.

7 JUSTICE GORSUCH: On --

8 MR. McCOTTER: GAO reports say that
 9 for 20 years --

10 JUSTICE KAGAN: I -- I think you can't
 11 have a government program that doesn't have a
 12 couple of instances, a few instances, some
 13 instances of -- you know, where somebody could
 14 come in and say this goes too far. Probably so.

15 MR. McCOTTER: On the -- if I could --

16 JUSTICE KAGAN: Trying to make an
 17 arbitrary and capricious stand --

18 MR. McCOTTER: If -- if I could --

19 JUSTICE KAGAN: -- challenge.

20 MR. McCOTTER: Sorry. If I could
 21 address your prior point about the changing
 22 technology, so we're not challenging -- we made
 23 this very clear -- we're not spending the
 24 spending on the back end. And the FCC can
 25 address changing technology on the back end by

1 saying here's the new equipment that we think
2 people should have. We've already -- in that
3 case, if they've constitutionally raised the
4 money, have much broader leeway. You should see
5 footnote 11 in our opening brief that explains
6 the distinction.

7 But the point is there are other
8 programs like this, think like -- in the sense
9 that they have changing technology, I mean,
10 think of Medicare. They are obviously -- the --
11 the medical treatments are changing every day,
12 but yet Congress has set objective rules on the
13 Medicare tax.

14 JUSTICE GORSUCH: I -- I would have
15 understood your argument not to be that they're
16 spending too much and subsidizing wealthy
17 Montanans, which does happen, in rural areas,
18 and -- and Colorado too, but maybe that they're
19 also spending too little and maybe -- maybe we
20 should have cell phones for everyone under this
21 standard. I mean, it -- wouldn't that be
22 advanced telecommunications services for
23 everybody? And don't most people have them?
24 And, therefore, shouldn't everybody have them?

25 And I -- I -- I had understood your

1 argument to be not that they're spending too
2 little or too much, but that nobody can tell
3 what the right answer is.

4 MR. McCOTTER: That's certainly right.
5 There's nothing to stop the agency from doing
6 that. And to respond on this point about
7 advanced telecommunications services, the idea
8 that's somehow limited only to schools and
9 libraries, if we're going to make 254(b)
10 mandatory, I'll point you to 254(b)(2), which
11 says access to advanced telecommunications and
12 information services should be provided in all
13 regions of the nation.

14 So there we go. Starlink for the
15 whole nation. Maybe they're not spending
16 enough. Who knows?

17 And this kind of gets to one of the
18 questions -- I think it was from Justice
19 Barrett -- about whether there are kind of
20 judicially manageable standards and that sort of
21 thing. And, again, that's why I strongly push
22 back on the idea that this incorporated some
23 preexisting framework. Congress made clear it
24 was not. It fundamentally overhauled it by
25 letting the FCC, on an evolving basis, redefine

1 this. It's the exact opposite of a judicially
2 manageable standard.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: I am quite concerned
8 about the effects of a decision in your favor on
9 the grounds that you have been pressing this
10 morning. In the end, that may not matter, but I
11 would like to know where -- what such a decision
12 would mean.

13 So to start out, what would be the
14 effect on people in rural areas if this is held
15 to be unconstitutional and Congress does not
16 act? Where should I look to get an accurate
17 picture of the answer to that question?

18 MR. McCOTTER: So I would look to our
19 response brief first, where we say the Court
20 could limit relief to the named Respondents. I
21 think that's one at least potential answer
22 there. I think you could also --

23 JUSTICE ALITO: On -- no, go ahead.

24 MR. McCOTTER: Sorry. And so you
25 could also look to the Fifth Circuit -- excuse

1 me -- en banc opinion, which did not even vacate
2 the quarterly contribution factor at issue here.
3 It simply remand it to the agency.

4 And so I realize that that may turn in
5 part on how the Court actually rules on the
6 merits, but that's another possible remedy here,
7 which is that the FCC decision isn't even
8 vacated in the meantime.

9 JUSTICE ALITO: Well, the Fifth
10 Circuit based its decision on the combination
11 theory. And if we were to affirm on the basis
12 of the combination theory, the problem could be
13 fixed rather readily, I would think, by the FCC
14 itself. Isn't that right?

15 MR. McCOTTER: It could. And I -- I
16 find it telling that in the eight months since
17 the opinion came out, they haven't actually
18 tried to do so for subsequent orders.

19 JUSTICE ALITO: So, again, where
20 should I look to get a -- an accurate picture of
21 the empirical situation? Are there studies?

22 MR. McCOTTER: I'm not sure of the --
23 the best source I could give you, Your Honor, on
24 that. I think the answer is that Congress would
25 have an opportunity to take the reins and decide

1 what do we really want universal service to be.
2 It's so important. As I say, the friend -- my
3 friends on the other side insist this is the
4 most important program in the country, but yet
5 they think that perhaps it's not one where
6 Congress itself needed to impose any real
7 limits.

8 And I think if it's that important,
9 then Congress will step up. I think even
10 Mr. Clement admitted essentially, of course
11 Congress would step up here.

12 JUSTICE ALITO: Another concern is the
13 effect on other statutes. And I -- I -- I sort
14 of throw up my hands at dealing with this. This
15 has come up before. This sort of argument made
16 by the Solicitor General has come up before. It
17 was made in the -- the CFPB case last term. I
18 don't blame the government at all for making it,
19 but the argument is made that if you decide a
20 case in a particular way, it is going to result
21 in imperiling, dooming a whole list of statutes.

22 And maybe that's true; maybe that's
23 not true. But each one of those would require
24 individual determination, and we don't have
25 briefing on all of those, on all of those

1 statutes. So maybe that's some -- something
2 that the Solicitor General could -- could
3 address. Maybe that's directed more to her than
4 to you, but do you have thoughts on that?

5 MR. McCOTTER: Well, sure. So I think
6 it's telling, again, that the best examples they
7 could have, after almost four years of
8 litigation, are the ones at pages 8 to 9 of
9 their reply, which are distinguishable for all
10 the reasons Justice Gorsuch has given. I think
11 --

12 JUSTICE ALITO: They -- they're
13 distinguishable on the grounds that those are
14 fees and this is a tax; is that right?

15 MR. McCOTTER: That's an easy
16 distinction, yes. And even if you were to say
17 this isn't a tax, again, as we say, we still win
18 because there's no clear boundary. There's no
19 clear principle. There's no clear rule for the
20 statute.

21 I think also the Court in its opinion,
22 if it were to rule in our favor, would explain
23 so why is this statute different than, say, ones
24 like in NBC? And I think the Court would go
25 through the fact that this did not bring the

1 common law soil with it. It did the opposite.

2 There are no other provisions around
3 it that give it meaning like this Court has
4 sometimes done to fill in vague terms. If
5 anything, every time you look at a different
6 provision, it's just broader than the one before
7 it. And so I think that would naturally limit
8 the follow-on cases.

9 JUSTICE ALITO: Okay. And then,
10 finally, maybe, potential ways of limiting the
11 practical impact of the decision in this case,
12 if the decision is in your favor along the lines
13 that you're advancing this morning.

14 One is Northern pipeline. Some
15 skepticism about whether that's precedent that
16 should be followed has been expressed. Another
17 is limiting the relief to just parties here. If
18 we were to do that, how long would it be, do you
19 think, before enough parties would bring suit
20 and bring this whole thing down?

21 MR. McCOTTER: Well, it's taken 25
22 years for someone to kind of get the gumption to
23 challenge it in the first place. So I have some
24 doubts, actually, that others would mount such
25 challenges. But even if so, I think it would be

1 half the time --

2 JUSTICE ALITO: Well, it -- it takes
3 maybe -- it takes gumption to take the lead, but
4 maybe it doesn't take very much gumption to try
5 to -- to -- to get the benefit of something that
6 somebody else has done the work to enable you to
7 get.

8 MR. McCOTTER: True enough. I think
9 however much time that would take, especially
10 given that this is a quarterly process that
11 doesn't play out on a daily basis in that sense,
12 I think by that time, we would have had
13 congressional action either saying we are going
14 to say that this program is important as the
15 Petitioners say and we're going to put some
16 limits on it, or they'll say this thing is out
17 of control, it's in a death spiral, we need to
18 come up with something else altogether. There
19 would be more than enough time to do that.

20 JUSTICE ALITO: It's not easy to get
21 legislate -- it's never easy to get legislation
22 enacted by Congress.

23 MR. McCOTTER: True.

24 JUSTICE ALITO: Even more difficult
25 right now than it has been at times in the past.

1 Isn't that right?

2 MR. McCOTTER: That's true. And I
3 should also add, Congress could simply
4 appropriate money here. They could say: Here's
5 8 billion. You don't need to charge the fee in
6 the meantime. It's kind of -- it's a bit like
7 the with the Affordable Care Act tax where they
8 zeroed it out, that sort of thing, where they
9 went through some of their kind of Senate
10 trickery and they figured out how to do this
11 with a lesser number of votes or something and
12 just say here's an amount of money, 8 billion, 9
13 billion, 20 billion, 5 billion, whatever,
14 Congress is the one that gets to choose, right,
15 and they should choose, they have to choose.
16 And they could do that and you don't even have
17 to change the statute.

18 JUSTICE ALITO: Do you think that
19 would be a better solution to have the taxpayers
20 pay for this rather than the providers?

21 MR. McCOTTER: Well, remember, this
22 fee is already paid by the taxpayers.

23 JUSTICE ALITO: Let me not ask whether
24 it's a better -- a better approach but one that
25 Congress is more likely to be enthusiastic

1 about?

2 MR. McCOTTER: Well, as of now, it's
3 already paid by the taxpayers because Americans
4 are really the ones who pay for it, but also on
5 -- on the idea -- I'll be brief -- but just on
6 the idea that because it's a popular program or
7 something, that that should somehow matter, I
8 think --

9 JUSTICE ALITO: It's not overt. But,
10 anyway, go ahead.

11 MR. McCOTTER: Right. I -- I -- I
12 think it's right, it shouldn't matter. And the
13 main reason for that, for this purpose is, of
14 course, members of Congress love handing off
15 taxing to someone else and say: Don't blame me,
16 blame the FCC.

17 JUSTICE ALITO: Thank you.

18 MR. McCOTTER: Blame USAC.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Most taxpayers
23 complain that when they're taxed, they don't
24 know what the government is spending the money
25 on. And certainly most of the time they don't

1 like what the government's spending money on.

2 But in terms of accountability, your
3 monthly phone charge -- bill tells you that
4 you're paying for universal service charge
5 because it has a line that says, your bill, this
6 is the amount of the federal universal service
7 charge.

8 What you're saying to Justice Alito is
9 in a time in which the federal budget is being
10 slashed dramatically, that Congress will now
11 appropriate, we should ask Congress to
12 appropriate something that taxpayers know they
13 are already paying and have agreed to?

14 MR. McCOTTER: Right, but that's what
15 the Constitution requires. And the -- the thing
16 is if people don't like it, they can vote out --

17 JUSTICE SOTOMAYOR: Let me ask you
18 another question. You told Justice Alito that
19 every other law that might be affected could be
20 distinguished. What can't be distinguished is
21 that all of these are levying fees or
22 assessments or charges based on agency
23 determinations, the Office of the Comptroller,
24 quote, "determines what is necessary or
25 appropriate to carry out its responsibilities."

1 The FDIC, none of these are with
2 limits, any fee which the corporation may be by
3 regulation proscribed, after giving due
4 consideration to the need to establish and
5 maintain the reserve ratio of the Deposit
6 Insurance Fund. The Federal Housing Finance
7 Agency can levy upon regulated entities an
8 assessment sufficient to pay its reasonable
9 costs and expenses. I can go on and on, where
10 agencies are being told levy fees, duties,
11 tariffs.

12 Tariffs are not even tied to a
13 particular activity. Tariffs just say: Pay
14 this tariff on this good and agencies have been
15 permitted to assess -- the president has been
16 permitted to assess tariffs to raise revenues
17 for no reason or whatever reason he deems
18 appropriate. That, I think, is much less
19 guidance than this law.

20 So I am not sure how you could answer
21 that we can distinguish each one of them. Each
22 one of them does not have a numerical cap. And
23 yet we've said that they are sufficiently
24 precise as to what the activities are being
25 spent on, as to not be a non-delegation

1 violation.

2 MR. McCOTTER: So a few responses. On
3 the statute, on pages 8 to 9, none of those are
4 being used to fund the multi-billion dollar
5 social welfare program, which was the entire
6 purpose of this statutory regime. I don't think
7 my friends on the other side dispute that point.

8 On --

9 JUSTICE SOTOMAYOR: You don't think
10 that these programs are funding the banking
11 system, funding the bank -- the banking system?
12 The housing system? They're all being used to
13 fund programs that assist various groups in one
14 form or another.

15 So, yes, they are funding industries.

16 MR. McCOTTER: Well, so the way this
17 Court described them in Skinner when it talked
18 about National Cable was to say that those sorts
19 of statutes refer to the administrative costs to
20 -- internal to the agency. I think --

21 JUSTICE SOTOMAYOR: But the --

22 MR. McCOTTER: -- if they are using --

23 JUSTICE SOTOMAYOR: -- administrative
24 costs, they are all related to the programs.
25 And this is related directly to specified

1 programs.

2 MR. McCOTTER: Right, but that would

3 --

4 JUSTICE SOTOMAYOR: So it's doing
5 exactly the same thing.

6 MR. McCOTTER: But that wouldn't be
7 the administrative cost, Your Honor. That would
8 be the actual program itself, funding --

9 JUSTICE SOTOMAYOR: But that's --

10 MR. McCOTTER: -- the whole separate
11 welfare or social welfare program.

12 JUSTICE SOTOMAYOR: But that's exactly
13 what these other agencies are doing.

14 MR. McCOTTER: Well --

15 JUSTICE SOTOMAYOR: They are running
16 programs and services that are being funded in
17 their determination of what's going to meet
18 their obligations.

19 MR. McCOTTER: I think, respectfully,
20 Your Honor, that's just not how they actually
21 work. That's not really what the text says.

22 Some of them may seem a little
23 broader. I think under this Court's National
24 Cable decision, they would need to be limited.
25 This Court already said in that case, 50 years

1 ago, there's a major distinction from delegation
2 purposes from letting an agency set a true fee
3 and letting an agency raise money in the public
4 interest.

5 I think that's a very important point
6 here under current doctrine, as the phrases like
7 "in the public interest" just won't work here.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So one of the things
12 that strikes me, Mr. McCotter, about this case
13 is that when we typically interpret regulatory
14 statutes, sometimes we just interpret them
15 straight up, but to the extent we don't, what we
16 usually do is that we interpret the statutes to
17 limit agency authority.

18 In other words, you know, like we
19 narrowly construe the statute, as in Benzene, or
20 the major questions doctrine is all about doing
21 this. These look like very broad delegations.
22 We can't really believe that's what Congress
23 meant, so we're going to sort of impose some
24 limits.

25 And -- and what you're asking us to

1 do, I think, is kind of the opposite, is like
2 instead of doing that or reading the statute
3 straight up, what you're saying is that we
4 should read this statute as expansively as
5 possible to give the agency as much power as it
6 could possibly be viewed as giving, and all in
7 order to, in the end, blow the statute up.

8 And I think that that's just not a
9 right way to think about the interpretation of
10 regulatory statutes. So, again, this sort of
11 goes back to my -- this statute has plenty in it
12 that imposes limits on what the FCC is doing.
13 And why shouldn't we interpret the statute,
14 which, you know, I think both sides in Gundy
15 thought that -- the one thing that they agreed
16 on was the first thing you do in a -- in a
17 delegation case is interpret the statute.

18 We interpret the statute. There's a
19 lot of limits here. The agency can raise the
20 money that's good enough, but no more to satisfy
21 a pretty -- a pretty clear mandate, which is to
22 provide basic services, those services necessary
23 for health and safety and education, basic
24 services, for people of low-income and -- and
25 rural areas who don't have what a substantial

1 majority of us do have. That's a pretty clear
2 directive to the agency.

3 And that seems to me consistent with
4 the way we should interpret statutes in this
5 context.

6 MR. McCOTTER: So as the en banc
7 decision below said, there are a lot of words
8 here, but there are not a lot of limits,
9 especially when it comes to raising the amount.

10 JUSTICE KAGAN: So I think --

11 MR. McCOTTER: And so I realize we can
12 disagree --

13 JUSTICE KAGAN: I'm just going to
14 interrupt. I'm going to give you time to answer
15 but I'm just going to interrupt. I actually
16 think that the "lot of words" here makes it seem
17 as though it's a little bit more loose than it,
18 in fact, is; like the fact that there are six
19 factors and stuff like that.

20 The -- the lot of words are actually
21 masking an extremely clear mandate to the
22 agency. This -- this agency knows what it's
23 supposed to do under this statute, which is
24 exactly what this agency has been doing. This
25 goes back to Mr. Clement's historical point.

1 It's basically what this agency has been doing
2 since the 1930s.

3 MR. McCOTTER: Well, again --

4 JUSTICE KAGAN: Sorry.

5 MR. McCOTTER: Well, sorry. I was
6 going to say, again, remember, the key inquiry
7 here, what is the fundamental object, right,
8 universal service. The FCC gets to define it on
9 an evolving standard.

10 And it's not an extraordinary
11 interpretation to read it as it says, which is
12 that in 254(c) the FCC need only consider the
13 extent to which -- and then it lists some of
14 these factors.

15 And so we read it just straight up.
16 Again, this is not -- respectfully, it's just
17 not an unusual interpretation to say the FCC,
18 sure, they must are consider it. And if they
19 don't, that could be an APA challenge, but we're
20 going to assume they did consider it. And they
21 are not actually substantively limited by these
22 sorts of things.

23 On the list of policies, in Schechter
24 Poultry, there was a similar list of poultry --
25 list of principles -- excuse me, list of

1 policies, including, you know, non- --
2 non-discriminatory provisions. There -- the
3 codes adopted needed to be equitable, things
4 like that, words that may in other contexts have
5 provided enough, but because they're added on
6 with all these other provisions that make clear,
7 Agency, you can go ahead and kind of do what you
8 want here.

9 And just to be clear, we're completely
10 freeing you from the preexisting doctrine. So
11 Mr. Clement said this isn't one of those cases
12 where Congress said, hey, Agency, figure it out.
13 Respectfully, we just disagree. I think that's
14 exactly what happened here.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Counsel.

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: I did have a few.
20 On accountability, I assume because I haven't
21 heard from you, you don't have any separate
22 problem here with the fact that it's the FCC and
23 that's commonly thought of to be independent,
24 either it's not independent as the government
25 says, or you don't think that's an additional

1 problem; is that correct?

2 MR. McCOTTER: It's perhaps a minor
3 plus factor. We're not raising a separate
4 challenge on that basis, no.

5 JUSTICE KAVANAUGH: Okay. Second, are
6 you asking us to do anything with Skinner?

7 MR. McCOTTER: So the way we interpret
8 Skinner -- I think this is the fair reading of
9 it, given all the cases before and after -- is
10 that the nature of the power at issue does
11 matter. The Court's said that since Wayman.
12 And to the extent the Court went further, all it
13 said was something that we're willing to agree
14 with, although we win either way, which is that
15 taxing is not in a category of one, essentially.
16 It's not some unique specific thing, although
17 historically we think it is, we think that's
18 important, but we don't want to tie the whole
19 case to that point.

20 And so, in our view, at most that's
21 what Skinner said. And so whether you view it
22 as a tax or a fee, we win either way. Skinner
23 doesn't control beyond that.

24 JUSTICE KAVANAUGH: Is your argument
25 that the word "sufficient" is too loose or the

1 back-end objects are too loose or both?

2 MR. McCOTTER: It's not just
3 "sufficient" is too loose. There are many
4 principles in here that are too loose because
5 even if you think they might have some meat on
6 the bones, again, the FCC doesn't have to comply
7 with any particular 254(b) principle.

8 JUSTICE KAVANAUGH: You are arguing
9 "sufficient," the word "sufficient," even if the
10 back-end objects were more specific -- you
11 understand the question?

12 MR. McCOTTER: I think I do.

13 JUSTICE KAVANAUGH: Yeah.

14 MR. McCOTTER: And I -- what I would
15 say is it's not as if we have a statute where
16 Congress said, FCC, please raise money and you
17 can spend up to 8 billion. I think then the
18 reasonable interpretation, as Justice Kagan
19 would say, is, okay, let's kind of tie those two
20 together there and put them, and let's try to
21 avoid a constitutional problem.

22 But here on the back-end spending,
23 it's not like they suddenly have some real
24 objective limits there either.

25 JUSTICE KAVANAUGH: Yeah. And then,

1 on your point about limiting relief to the named
2 parties, I guess I'm not understanding that at
3 all because, you know, would not be -- it's not
4 a district court ruling. This ruling would be
5 binding through vertical stare decisis
6 throughout the country.

7 And I assume -- and you want to react
8 to that? I -- I -- I -- I think the named
9 relief thing is -- doesn't help you at all.

10 MR. McCOTTER: Well, so two responses.
11 First, the government's always asking this Court
12 to limit relief to the named parties. For once,
13 they found someone who was willing to agree to
14 it. So it must make some distinction.

15 Second, I think it's more applicable
16 to the quarters that are kind of already in the
17 hopper. So for all the ones that have already
18 gone, already been approved, as it were, for
19 those, limiting relief to the named parties,
20 especially given that the time limit to bring
21 FCC challenges --

22 JUSTICE KAVANAUGH: Well, let's play
23 this out. We've had this discussion before in
24 past years, the past few years, but if this
25 Court were to say that it's unconstitutional for

1 the FCC to continue in this way, even though the
2 named parties are here before us, my
3 understanding of what the government has said
4 before is we would comply with what the Supreme
5 Court said.

6 MR. McCOTTER: Sure. And I think it's
7 important that -- that they say that, but this
8 is really important --

9 JUSTICE KAVANAUGH: You don't think
10 they would do that?

11 (Laughter.)

12 MR. McCOTTER: I don't think they
13 necessarily have a legal obligation to do so.

14 JUSTICE KAVANAUGH: Really? What's --
15 what's your case for that?

16 MR. McCOTTER: Well, the -- the case
17 is that the judgment applies to the parties
18 only, specifically if the Court has already said
19 so, which again --

20 JUSTICE KAVANAUGH: What's your --
21 what's your response to vertical stare decisis
22 and how that's traditionally been understood in
23 the country?

24 MR. McCOTTER: So that's why I say I
25 think the limiting it to the named parties is

1 really most relevant for all the challenges that
2 are already in the hopper, to say we're not
3 going to unscramble all these statutes in the
4 past, except for maybe these few named parties.
5 Going forward, as people might bring new
6 challenges -- and as I said in response to
7 Justice Alito, I'm not convinced they will --
8 but even if they did, then, okay, well, that
9 plays out well into the future. By then we
10 think if the Court has actually reached this
11 point, Congress would have done something --

12 JUSTICE KAVANAUGH: The --

13 MR. McCOTTER: -- hence forwardly.

14 JUSTICE KAVANAUGH: Sorry to prolong
15 it. The premise of what you're saying right
16 there is the FCC is going to say we don't care
17 what the Supreme Court said about the program.
18 And I'm not sure that premise is -- is -- is
19 accurate.

20 MR. McCOTTER: I think what they --
21 sorry if I'm not being clear. I'm saying for
22 the -- for the quarters that have already been
23 challenged, the past ones --

24 JUSTICE KAVANAUGH: Right.

25 MR. McCOTTER: -- I think they would

1 say, look, the Supreme Court has ruled in your
2 favor, Respondents, and we will address that as
3 necessary, as to you. Going forward, though, I
4 do think that limiting it to the named parties
5 is less effective. That's why we list other
6 options, though.

7 I'm not saying that that's like a
8 cure-all, just to be clear. I think it is an
9 important limitation, especially for the suits
10 already filed.

11 JUSTICE KAVANAUGH: Thank you very
12 much.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Mr. McCotter, I just
16 want to clear something up about the 254(b)
17 universal service principles. We've been going
18 round and round and round about whether these
19 are mandatory factors or not. So I just want to
20 be sure that I understand your position.

21 So it begins under (b) by saying that
22 the joint board and the Commission shall base
23 policies for the preservation and advancement of
24 universal service on the following principles.
25 And then each one of those principles has a

1 "should."

2 Is that your problem, that they say
3 "should"? And would you feel differently if the
4 principles were worded that quality services be
5 available at just, reasonable, and affordable
6 rates?

7 MR. McCOTTER: That's one of the
8 problems, is that it says "should." But I
9 think, more fundamentally, the problem is, as
10 the FCC itself has said for 30 years now almost,
11 that any one of these --

12 JUSTICE BARRETT: Okay, but put aside
13 --

14 MR. McCOTTER: All right.

15 JUSTICE BARRETT: This is a legal
16 question. This is a statutory interpretation
17 question. So the FCC can say that all it wants,
18 but we still have to interpret the statute,
19 right? So we're not bound by what the FCC says
20 about its own authority.

21 So return to the question.

22 MR. McCOTTER: True, although I think
23 the fact that they've interpreted it the same
24 way for 30 years --

25 JUSTICE BARRETT: Okay. Okay.

1 MR. McCOTTER: -- is an indication.

2 JUSTICE BARRETT: Okay, I said, but
3 don't -- don't fight the premise.

4 MR. McCOTTER: All right. And so even
5 then, let's say that they all are mandatory. We
6 still run into the problem that I think Justice
7 Gorsuch was getting at, which is that these
8 terms, especially when you have them fighting
9 against each other with no rules for how to
10 balance them or pick and choose between them,
11 it's just like Schechter Poultry. It's a lot of
12 policies, some of which of which may actually
13 have some meaning in some sense, but they're all
14 fighting against each other, and the FCC gets to
15 kind of pick and choose which ones are more --
16 more important.

17 JUSTICE BARRETT: Okay. And then
18 second question. We've talked about the
19 difficulty of having judicially manageable
20 standards in this area. And when you and I
21 talked before, we were talking about a cap, and
22 you said a cap would solve the problem.

23 So is that a manageable principle,
24 that you would be happy -- you said, well, then
25 at least Congress would have decided the policy

1 for itself and put a limit on it, so we know if
2 it said 3 trillion, 3 billion, whatever, I
3 understood you to tell me before that would
4 solve the problem.

5 MR. McCOTTER: Absolutely.

6 JUSTICE BARRETT: And so that would be
7 the intelligible principle?

8 MR. McCOTTER: If we're under the
9 intelligible principle, yes --

10 JUSTICE BARRETT: Yeah.

11 MR. McCOTTER: -- that's -- that's
12 more than sufficient. And I think it's
13 noteworthy that --

14 JUSTICE BARRETT: And we wouldn't have
15 to worry about anything else in the statute, not
16 this 254(b) list or anything like that? Just
17 the money would do it?

18 MR. McCOTTER: Correct. Although we
19 win even if you don't think that's the
20 requirement.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So you've said
24 several times that you're not asking for a
25 special rule for taxes versus fees, but you

1 began today by saying that this case is about
2 taxation without representation. And you say
3 there has to be a cap because the amount of
4 public revenue that is to be raised via, you
5 know, a mechanism is a legislative prerogative
6 and can't be delegated.

7 So it seems to me that you are relying
8 to some extent on the characterization of this
9 as a tax.

10 MR. McCOTTER: So to be clear, we're
11 making alternative arguments. We think it is a
12 tax. We think that --

13 JUSTICE JACKSON: Does that matter?

14 MR. McCOTTER: -- it should matter.

15 But even --

16 JUSTICE JACKSON: Does it matter?

17 MR. McCOTTER: But if even if you
18 disagree --

19 JUSTICE JACKSON: No, I understand. I
20 just understand whether your delegation argument
21 in substantial part is hinging on your point
22 that the legislature has the power to tax and it
23 can't be handed off, and unless the legislature
24 has a cap that it says this is the amount that
25 you can raise, it is doing something

1 unconstitutional because of that structure?

2 MR. McCOTTER: It matters in the sense
3 that we know taxing is a strictly and
4 exclusively legislative power. So we know that
5 this is something Congress itself has to set the
6 objective rule on.

7 It's not necessarily that they have a
8 cap in the numerical sense. In footnote 7 of
9 our opening -- of our brief there's an example.

10 JUSTICE JACKSON: No, I understand,
11 but you -- but -- but the thought is that --
12 that to the extent that you believe this is a
13 tax, there has to be a cap set by Congress, is
14 your basic point.

15 Now, let me just ask you this:
16 Mr. Clement says, okay, this statute is really
17 not about raising public revenue. It is about
18 providing universal services. So if we
19 disagree, if this comes down to how we're
20 characterizing this statute, and we disagree
21 with your view that this is a public
22 revenue-raising vehicle and, therefore, Congress
23 has to put a cap on it, do you lose? I mean --

24 MR. McCOTTER: No.

25 JUSTICE JACKSON: -- why must there be

1 a cap if this is not a tax?

2 MR. McCOTTER: So, there -- again,
3 there doesn't need to be a cap in the numerical
4 sense.

5 JUSTICE JACKSON: No, I understand.

6 MR. McCOTTER: There needs to be a
7 rule.

8 JUSTICE JACKSON: Well, why if this is
9 not a tax? Why can't Congress develop a policy
10 that says we would like to have the following
11 thing happen? We would like to have everybody
12 in rural places throughout the country,
13 everywhere, have this kind of service?

14 And as Mr. Clement said, we don't
15 really care about how much it costs to do that.
16 We are trying to get to this objective. And you
17 would come back and say: Ah, but you have to
18 tell us, you know, there has to be a cap on the
19 amount of money that you have to raise for this.
20 And Congress says: But that's not our
21 objective. This is not about raising money.
22 It's about providing a service; however much
23 that costs.

24 What's unconstitutional about that?

25 MR. McCOTTER: It's still domestic

1 revenue raising, as Professor McConnell
2 describes it or as this Court last year in CFPB
3 described it. It's raising public moneys. And
4 when you have that sort of exclusive legislative
5 power, there needs to be a policy set by
6 Congress.

7 JUSTICE JACKSON: All right.

8 MR. McCOTTER: The policy can't be
9 vague.

10 JUSTICE JACKSON: Let me just ask one
11 more question. I know we're running out of time
12 here.

13 Is it your first-line position that we
14 should not be using the intelligible principle
15 standard? Are you saying -- are you encouraging
16 us -- I know you say you win under that
17 standard, but is your first point that we should
18 be doing something else?

19 MR. McCOTTER: Yes. The Court should
20 at the very least return to the intelligible
21 principle that I think J.W. Hampton itself laid
22 out, which says that Congress must set the rule
23 that shall prevail. And as our argument is,
24 there is no rule that shall prevail when it
25 comes to the amount of money.

1 JUSTICE JACKSON: So you're not doing
2 important subjects or something like that, is --
3 is that what you mean? Is that the test that
4 you're -- I'm just trying to understand what it
5 is that you would have us do if we don't do
6 intelligible principle?

7 MR. McCOTTER: So we would say that
8 the proper framework is what this Court applied
9 for 150 years, if it is a strictly and
10 exclusively legislative power, then Congress
11 itself must set the policy. It can leave only
12 fact-finding and details to the executive.

13 And as I started off today saying, the
14 amount of money to raise for an enormous social
15 welfare program is not a minor detail to be left
16 to someone else.

17 JUSTICE JACKSON: And -- and you don't
18 see the risk that we judges would be overriding
19 popular -- and I -- I know you don't care that
20 it's popular -- but popular in the sense that
21 Congress has enacted it, programs?

22 I mean, Mr. -- Mr. Clement says that
23 this could be the aggrandizement power by the
24 courts if we don't have a really clear standard
25 for determining when we come in and say this is

1 unconstitutional versus not?

2 MR. McCOTTER: Well, I think he
3 apparently prefers an aggrandizement by Article
4 II executive. And Congress was more than happy
5 to let that happen when it comes to taxes
6 because nobody wants to take responsibility for
7 that.

8 So I think if we care about kind of
9 democratic accountability I will return to what
10 Judge Newsom said in his concurrence, with each
11 delegation here, each new layer, we move further
12 and further away from that democratic
13 accountability.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 General Harris, rebuttal?

18 REBUTTAL ARGUMENT OF SARAH M. HARRIS
19 ON BEHALF OF THE PETITIONERS IN CASE 24-354

20 GENERAL HARRIS: Thank you. Just want
21 to go over three problems for Respondents.

22 One, I candidly don't know what the
23 rule is at this point. On the one hand, there
24 is an anomalous rule that is foreign to the
25 non-delegation precedents apparently for taxes,

1 fees, and other revenue-raising actions, and I
2 don't know how it can possibly be squared as
3 something that preserves a separation of powers.

4 When saying that an agency can raise
5 up to \$1 trillion with no further restrictions
6 is somehow not a non-delegation problem, but
7 tying what an agency can extract from a
8 particular set of people, tied to the specific
9 needs of a program is somehow constitutionally
10 unconscionable.

11 I think there is a grave risk that if
12 the Court went down that path, the Court would
13 not be revitalizing the non-delegation doctrine
14 or giving it meaningful teeth. It will just
15 crop up case by case new, exclusively
16 legislative powers, what is the new sort of
17 limit that is going to be reverse-engineered for
18 that one? That is chaos.

19 Second, Respondent is ignoring the
20 very real constraints in Section 254. This is a
21 little bit of an odd case in which the
22 government is fervently insisting that the terms
23 of the statute are mandatory, and yet
24 Respondents won't take yes for an answer, that
25 it is really, really a constraint.

1 And you know that 254 is mandatory for
2 a couple of reasons, not just the fact that 254
3 starts with "shall," as Justice Barrett and
4 others have pointed out, but the fact that this
5 is a highly repetitive statutory scheme. So all
6 of the things in Section 254(b) actually recur
7 elsewhere in the statute. 254(d) is a "shall"
8 with respect to the equitable and
9 non-discriminatory rates.

10 Other parts of the program in 254(h)
11 with respect to how the rural program is
12 supposed to work or how the libraries are
13 supposed to be funded. Those are shall's.

14 And so there is no doubt that this is
15 a mandatory system. The FCC has treated it as
16 such, but the question is what the statute
17 means. It is mandatory.

18 Third of all, just the consequences of
19 Respondents' position are really troubling. The
20 reply brief 8 to 9 examples are truly the tip of
21 the iceberg. It is a little bit strange that
22 Respondents think that it is perfectly fine if
23 there is some sort of fee system for the agency
24 to decide how much its own costs or expenses are
25 going to be, that that is not sort of the --

1 that is not sort of inviting the agency to raise
2 whatever it sort of feels like, but that there
3 is a problem when Congress is tethering the
4 costs or fees or rates not to what the agency
5 feels like doing to fund its own enforcement
6 priorities and other things that it's doing, but
7 instead to meet defined, external goals that
8 Congress has required the program to meet
9 against a historical backdrop. That is a very,
10 very strange position to be in.

11 Now, on top of that, that's just the
12 problem with a different rule for fees or taxes
13 or just looking at statutory analogs for revenue
14 raising. That really is the tip of the iceberg
15 because Respondents' position also seems to have
16 other built-in features that jeopardize, sort of
17 create a mindfield for the U.S. code, one of
18 which is if the idea is you can't ever have
19 balancing of factors in a statute without
20 running into a non-delegation problem, guess
21 what? Agencies are delegated with a lot of
22 balancing of factors. It doesn't mean they have
23 no constraints at all. It means they have to do
24 both.

25 So this Court should not stray from

1 the path. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:50 p.m., the case
5 was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Official - Subject to Final Review

<p>\$</p> <p>\$1 [2] 9:2 177:5 \$10 [3] 6:19 91:22 108:14 \$100 [1] 123:5 \$11 [1] 108:14 \$116 [1] 24:25 \$2 [2] 27:6 57:22 \$288 [1] 24:24 \$3 [2] 125:25 126:1 \$5 [1] 126:1 \$9 [4] 61:14,15 104:12 141:2</p> <hr/> <p>1</p> <p>1 [5] 39:3 57:7 80:17 132:5 138:19 10 [4] 7:12 24:19 135:15,24 10-year [1] 93:8 10:16 [2] 1:22 4:2 100 [2] 49:3 109:10 105 [1] 26:21 11 [1] 143:5 111 [1] 3:12 12 [1] 93:9 12-year [1] 100:5 12:50 [1] 180:4 14 [1] 18:4 150 [2] 125:8 175:9 151 [4] 10:1,13 28:1 100:19 176 [1] 3:16 1798 [2] 31:10 57:19 18 [1] 135:16 19 [1] 13:2 1930s [1] 160:2 1934 [3] 10:2 28:4 99:22 1974 [2] 127:14 134:4 1984 [1] 100:7 1996 [9] 10:21 69:12,16,24 80:23 92:25 93:18 101:6 114:9</p> <hr/> <p>2</p> <p>2 [2] 132:5 138:20 2)(B) [1] 64:5 20 [3] 111:22 142:9 151:13 2000 [1] 140:6 2003 [1] 20:23 2010 [1] 140:5 2014 [1] 24:25 2016 [1] 20:24 2025 [2] 1:18 140:4 24-354 [6] 2:4 3:5,16 4:4,9 176:19 24-422 [3] 2:6 3:9 69:8 25 [2] 115:10 149:21 250 [1] 133:11 250-year [1] 133:13 254 [15] 4:12 5:8 8:18 9:21 11:16 12:24 23:5,18 39:20 57:4 86:5 138:3 177:20 178:1,2 254(b) [12] 112:14 115:6 117:20,23 134:21 138:11 139:5 144:9 163:7 167:16 170:16 178:6 254(b)(2) [1] 144:10 254(b)(5) [1] 66:24 254(c) [5] 10:6 27:18 112:15 114:5 160:12 254(c)(1) [1] 136:20</p>	<p>254(d) [5] 7:4 66:23 76:5 93:1 178:7 254(e) [3] 7:4 66:24 134:24 254(h) [1] 178:10 254(h)(1)(A) [1] 47:11 254(j) [2] 93:15 101:7 26 [1] 1:18</p> <hr/> <p>3</p> <p>3 [6] 24:15 61:19,20 71:18 170:2,2 30 [10] 61:23 118:12,22 134:22 135:9 137:2 138:10 139:12 168:10,24 34 [2] 80:20 100:19 35 [3] 24:15 103:10,12 36 [1] 20:10</p> <hr/> <p>4</p> <p>4 [1] 3:5</p> <hr/> <p>5</p> <p>5 [1] 151:13 50 [6] 29:6 31:21 80:5 99:22 100:25 156:25</p> <hr/> <p>6</p> <p>60 [2] 17:20 99:22 608 [1] 64:20 69 [2] 3:9 114:19</p> <hr/> <p>7</p> <p>7 [3] 46:11,16 172:8 70 [1] 114:19</p> <hr/> <p>8</p> <p>8 [26] 7:21 8:7 31:1 37:10 48:2,17 68:15 80:17 82:5 87:21 88:14,16 92:18 94:6 96:23 127:4,21 128:1 132:11 134:1 148:8 151:5,12 155:3 163:17 178:20 80 [1] 20:12 83 [1] 133:10</p> <hr/> <p>9</p> <p>9 [20] 7:21 8:7 31:1 48:2,17 82:5 87:21 88:17 92:18 94:6 96:24 127:4,21 128:1 132:11 134:1 148:8 151:12 155:3 178:20 96 [7] 50:10 77:4 80:18 93:9 100:2 114:14,22</p> <hr/> <p>A</p> <p>a.m [2] 1:22 4:2 ability [3] 59:11 65:14 122:23 able [7] 28:17 37:17 67:20,21 87:10 124:14 141:18 above [4] 42:10 66:9,9 142:1 above-entitled [1] 1:20 Absolutely [9] 12:3 23:4,13 25:10 33:17 34:19 41:22 74:14 170:5 abstract [3] 12:9 13:1 21:22 abuse [2] 64:11,12 accept [3] 26:4 77:24 129:19 accepted [4] 25:25 82:21 95:12,14 accepting [1] 55:2 access [6] 4:14 30:2 43:25 87:17</p>	<p>116:5 144:11 accomplish [5] 57:6 67:7 68:9 116:12 123:7 accomplished [1] 136:13 accomplishing [1] 124:8 account [3] 45:25 46:17,20 accountability [10] 54:16 110:1 126:21 130:23 131:17,25 153:2 161:20 176:9,13 accountable [2] 53:18 55:4 accounting [1] 6:4 accounts [1] 115:20 accurate [4] 135:19 145:16 146:20 166:19 achieve [3] 4:22 12:8 67:1 acknowledge [1] 55:8 acknowledging [1] 49:12 acquiescence [1] 112:24 across [1] 73:24 Act [14] 9:19 10:1 29:17 50:10 63:25 77:4 80:18,20 93:9 99:22 100:2,19 145:16 151:7 Acting [4] 2:2 3:3,14 11:10 action [4] 83:21 104:22,23 150:13 actions [3] 50:22 104:24 177:1 activities [2] 6:9 154:24 activity [1] 154:13 actor [1] 19:25 actual [3] 20:1 24:18 156:8 actually [39] 18:11 19:13,17,21 24:17,21 29:19 32:23 35:3 45:8 50:18 57:5 66:19 71:6 72:2 76:20 88:19 90:17 93:7 96:18 100:6 103:16 104:2 106:22 108:21 109:6 117:22 119:9 138:15 146:5,17 149:24 156:20 159:15,20 160:21 166:10 169:12 178:6 add [7] 70:21 71:15 74:15 88:23 135:10 140:22 151:3 added [1] 161:5 adding [1] 104:1 addition [1] 46:24 additional [8] 6:19 14:11 15:22 29:7 47:1 54:15 63:23 161:25 additive [1] 46:13 address [10] 101:10 108:10 114:1 117:17 129:6 132:5 142:21,25 148:3 167:2 addressed [4] 30:19 31:6 122:17 127:14 adequate [1] 10:18 administered [1] 21:7 administrative [3] 155:19,23 156:7 administrator [1] 20:25 admitted [1] 147:10 adopt [1] 9:8 adopted [5] 10:11 19:14 71:23 101:22 161:3 adopting [1] 20:1 adopts [1] 6:2 advanced [15] 5:10 30:2,2,5 40:25 42:6,7 44:1 46:5 62:23,25 138:20 143:22 144:7,11</p>	<p>advancement [1] 167:23 advancing [2] 9:24 149:13 advantage [1] 96:1 affect [2] 38:15 104:24 affected [1] 153:19 affirm [2] 113:1 146:11 affirmed [1] 113:13 afford [1] 28:17 affordability [1] 117:20 affordable [15] 29:10 44:11 63:12 95:23 104:15 116:1 117:13,18 118:5 119:5 136:14 138:20 140:10 151:7 168:5 afforded [1] 10:25 AG [2] 64:7,15 agencies [13] 7:22 8:5 37:22,25 64:2 68:16,20 79:4 121:17 154:10, 14 156:13 179:21 agency [71] 9:3 13:22 15:21 16:7, 8,12,16,19 18:8 19:14,18 23:10 25:18 32:22 33:3 34:8 48:22 53:12, 13 54:1,21 55:10 61:8 63:22 68:12 69:22 70:25 71:5,14,23 72:11 79:9 82:9 83:12,21 93:17 97:1 100:18 101:22 102:13,13,20 103:22 107:4 116:22 119:23 120:3 124:14 126:10 144:5 146:3 153:22 154:7 155:20 157:2,3,17 158:5, 19 159:2,22,22,24 160:1 161:7,12 177:4,7 178:23 179:1,4 agency's [1] 37:24 aggrandizement [2] 175:23 176:3 aggravated [1] 14:2 ago [2] 49:3 157:1 agree [17] 6:17 7:8 60:7 61:12 67:4 70:15 74:11 75:15 77:9 91:1 107:25 111:25 121:13 125:1 132:4 162:13 164:13 agreed [2] 153:13 158:15 Ah [1] 173:17 ahead [7] 16:16 22:21 118:8 125:22 145:23 152:10 161:7 aim [1] 12:18 air [2] 107:2,24 AL [4] 1:4,7,11,14 Alaska [2] 86:17 87:10 Alenco [2] 6:16 67:3 Alexandria [1] 2:5 ALITO [31] 18:7 20:4 27:9,10 28:6, 11,20,24 29:3 84:8,9,21 145:6,7, 23 146:9,19 147:12 148:12 149:9 150:2,20,24 151:18,23 152:9,17, 19 153:8,18 166:7 Alito's [1] 32:12 alleged [2] 16:5,10 Allegheny [1] 31:20 allied [1] 107:11 allocate [1] 5:1 allocated [1] 67:17 allow [3] 89:6 110:5 141:5 allowed [3] 7:23,23 65:9 allows [2] 44:16 121:15 almost [4] 92:20 127:11 148:7 168:</p>
--	--	--	---

Official - Subject to Final Review

<p>10 alongside ^[1] 47:7 already ^[19] 68:18 93:11 115:18,21 134:22 140:9 142:3 143:2 151:22 152:3 153:13 156:25 164:16,17, 18 165:18 166:2,22 167:10 alternative ^[1] 171:11 alternatives ^[1] 89:14 although ^[5] 27:19 162:14,16 168: 22 170:18 altogether ^[3] 115:13 121:15 150: 18 ambi ^[1] 53:1 ambiguity ^[1] 53:1 ambiguous ^[1] 77:19 America ^[2] 46:16,19 American ^[5] 38:25 62:18 86:19 112:7 122:25 Americans ^[3] 4:14 111:20 152:3 amici ^[1] 109:22 amicus ^[1] 109:17 among ^[1] 51:1 amorphous ^[1] 11:11 amount ^[24] 8:21 25:14 27:10 53: 17 66:20 106:24 111:22 112:5,9 114:22 122:23 124:19 125:15,16, 22 133:11 151:12 153:6 159:9 171:3,24 173:19 174:25 175:14 amounts ^[1] 24:18 analogous ^[1] 25:19 analog ^[1] 179:13 analogy ^[1] 51:2 analysis ^[1] 65:19 angle ^[1] 111:9 annual ^[1] 111:23 anomalous ^[1] 176:24 another ^[10] 66:10 120:10 124:1 128:21 137:20 146:6 147:12 149: 16 153:18 155:14 answer ^[20] 11:21 53:25 56:15 70: 22 75:14,16 78:12,13 89:11 125:4, 5 130:1 132:10 144:3 145:17,21 146:24 154:20 159:14 177:24 answering ^[1] 30:17 Anthracite ^[1] 19:11 anyway ^[2] 129:6 152:10 APA ^[4] 21:8 42:21 83:22 160:19 apart ^[1] 57:20 apparently ^[3] 121:18 176:3,25 appear ^[1] 122:11 APPEARANCES ^[1] 2:1 appears ^[1] 24:4 Appellees ^[1] 84:10 applicable ^[1] 164:15 applied ^[4] 9:18 34:23 105:10 175: 8 applies ^[2] 122:1 165:17 apply ^[8] 6:8,11,12 74:12 85:9,12 106:5 110:22 applying ^[2] 73:23 133:2 Appointments ^[1] 17:10 approach ^[7] 8:16,19 9:12 22:6 25: 24 85:13 151:24 appropriate ^[7] 45:19 68:23 151:4</p>	<p>153:11,12,25 154:18 appropriating ^[1] 126:14 appropriations ^[2] 15:12 26:23 approved ^[7] 22:3 49:21 50:7 96: 10,17 112:23 164:18 approving ^[1] 5:19 approximate ^[1] 49:11 approximating ^[1] 73:17 arbitrary ^[7] 9:4 102:17 104:5,13 119:15 120:7 142:17 area ^[8] 60:17 86:25 91:1 94:12 99: 8,16,19 169:20 areas ^[7] 5:5,6 116:4 141:2 143:17 145:14 158:25 aren't ^[5] 13:7 42:2 44:17 103:2 128:1 arguably ^[2] 35:4 122:14 argue ^[2] 102:3 113:18 arguing ^[2] 8:15 163:8 argument ^[38] 1:21 3:2,6,10,13 4: 4,8 13:13 14:21 16:18 25:5 36:18 40:13,20 45:13 49:6,24 65:10 69: 7 70:16 92:7 98:5 99:3 109:22 111:14 113:15,25 114:4 130:20 139:5 143:15 144:1 147:15,19 162:24 171:20 174:23 176:18 arguments ^[3] 40:9 82:20 171:11 around ^[3] 6:20 7:13 149:2 Article ^[10] 14:4,9,13 15:19 16:1 27:4 54:17 80:17 84:15 176:3 ascertain ^[1] 22:13 aside ^[1] 168:12 aspect ^[1] 130:11 aspirational ^[1] 99:13 aspirational-only ^[1] 112:13 aspirations ^[1] 125:9 assess ^[2] 154:15,16 assessed ^[3] 23:7 59:25 60:1 assessing ^[1] 80:25 assessment ^[1] 154:8 assessments ^[4] 19:15 31:22 57: 24 153:22 assessors ^[1] 57:21 assist ^[1] 155:13 assistance ^[1] 142:2 Association ^[1] 19:3 assume ^[6] 40:8 80:13 136:1 160: 20 161:20 164:7 assuming ^[5] 34:13 52:23 114:13 123:11,12 Attorney ^[1] 74:20 authority ^[20] 12:13 16:4,6,8,11,20 43:15 58:7 63:22 72:13 82:10 102: 4,15,21 104:7,14,15 119:18 157: 17 168:20 available ^[5] 10:15 29:9 115:25 119:4 168:5 avoid ^[1] 163:21 avoidance ^[2] 12:20 120:6 award ^[1] 20:24 away ^[5] 65:9 99:2 130:15,22 176: 12</p> <p style="text-align: center;">B</p>	<p>b)(1) ^[1] 29:7 b)(3) ^[1] 11:17 b)(5) ^[1] 7:5 b)(6) ^[2] 42:25 47:10 b)(7) ^[5] 44:16 45:5 46:4 64:18 89:4 back ^[18] 10:1 13:2 32:12 38:9,10 48:6 49:10 57:22 96:23 97:17 136: 4 139:15 142:24,25 144:22 158: 11 159:25 173:17 back-end ^[3] 163:1,10,22 backdrop ^[6] 5:9 7:25 10:13,21 11: 9 179:9 baked ^[1] 8:20 balance ^[1] 169:10 balancing ^[3] 64:8 179:19,22 banc ^[3] 113:12 146:1 159:6 bank ^[1] 155:11 bank's ^[1] 38:6 banking ^[2] 155:10,11 bankruptcies ^[1] 84:18 bankruptcy ^[1] 89:15 banks ^[1] 38:2 barely ^[1] 130:13 bark ^[1] 127:10 Barrett ^[48] 58:2,3,20 59:2,7,14,17 60:4 61:10,18,23 62:13 63:1,6,20 64:24 101:18 103:5,9,13 105:1,6 106:14 110:24 125:23 126:11,17, 23 127:2,18,20,23 128:19,22 129: 7 130:1 144:19 167:14,15 168:12, 15,25 169:2,17 170:6,10,14 178:3 base ^[10] 24:23 32:19 33:4,16 72:1 83:19 102:11,14 136:25 167:22 based ^[9] 17:18 48:25 52:19 55:24 112:15 114:6 139:19 146:10 153: 22 baseline ^[1] 42:10 basic ^[17] 4:14 6:3 9:8 13:18 24:8 58:17 71:21 85:12,14,18 92:25 141:7,13,17 158:22,23 172:14 basically ^[8] 18:17 32:7 48:3 72: 17 73:6 116:2 132:16 160:1 basis ^[9] 41:1 53:8 97:1 109:5 120: 2 144:25 146:11 150:11 162:4 bate ^[1] 83:18 become ^[1] 104:9 began ^[1] 171:1 beginning ^[4] 30:23 60:9 84:11 86:4 begins ^[1] 167:21 behalf ^[11] 2:3,5,7 3:4,8,12,15 4:9 69:8 111:15 176:19 behind ^[1] 19:8 believe ^[2] 157:22 172:12 Bell ^[3] 93:8 100:7 113:16 below ^[8] 35:15,17 113:12 114:4 128:6 141:3,14 159:7 belts-and-suspenders ^[1] 45:2 beneficiaries ^[3] 86:16 87:6 93: 22 benefit ^[12] 38:6 51:5 76:16 86:23 87:7,12 93:21 98:20 134:6 135:25 141:17 150:5 benefited ^[1] 76:9</p>	<p>benefits ^[2] 20:11,13 Benzene ^[1] 157:19 best ^[5] 25:12 34:20 82:2 146:23 148:6 better ^[8] 22:6 35:11 36:2 94:7 96: 5 151:19,24,24 between ^[10] 16:13 21:19 80:2 93: 8 112:21 119:25 132:8,17 138:18 169:10 beyond ^[3] 66:10 87:12 162:23 big ^[4] 103:25 104:9 111:7,7 bigger ^[1] 54:22 bill ^[2] 153:3,5 billing ^[1] 78:7 billion ^[19] 6:19 24:25,25 61:14,15, 19,20,23 91:22 108:14,15 123:5 151:5,12,13,13,13 163:17 170:2 billions ^[1] 111:20 binding ^[3] 128:7 137:17 164:5 bipartisan ^[2] 109:5,19 bit ^[11] 21:14 36:25 37:1,13 58:5 105:2 126:18 151:6 159:17 177: 21 178:21 blame ^[4] 147:18 152:15,16,18 bless ^[2] 101:7,8 blew ^[2] 50:10 100:6 blow ^[2] 100:3 158:7 blown ^[2] 100:7,13 blue ^[2] 19:19 69:12 board ^[3] 51:11 73:24 167:22 boards ^[2] 31:15,15 bodies ^[1] 55:2 body ^[4] 49:16,16,17 54:23 boils ^[1] 79:16 bones ^[2] 128:16 163:6 borrow ^[1] 94:8 Both ^[18] 18:1 60:22 65:11,15 66:3 70:2,20 76:7 86:12,21 120:16 127: 5 131:3,8 137:12 158:14 163:1 179:24 bothering ^[1] 108:8 bottom ^[3] 17:13 103:3,15 bound ^[2] 139:2 168:19 boundaries ^[3] 23:2,11 61:8 boundary ^[2] 122:23 148:18 bounds ^[3] 63:5 73:4 106:12 boy ^[3] 100:23 101:6 106:4 branch ^[3] 16:6,12 73:6 branches ^[1] 111:3 bravely ^[1] 88:8 breadth ^[3] 39:13 56:20,25 brief ^[24] 7:21 21:14 31:2 35:21 48: 3 71:18 84:11 87:22 109:17 114: 10,18 120:12,17 127:4 128:11 129:17 137:6 138:1 141:21 143:5 145:19 152:5 172:9 178:20 briefed ^[1] 88:1 briefing ^[4] 35:21 88:11 89:6 147: 25 briefs ^[4] 114:20 128:1 137:4 138: 2 bring ^[7] 43:13 104:21 148:25 149: 19,20 164:20 166:5 bringing ^[1] 119:19</p>
---	--	---	---

Official - Subject to Final Review

broad ^[10] 22:17 31:13,17 61:13 96:16 112:18 120:4 128:10 131:24 157:21 BROADBAND ^[3] 1:11 87:15 141:1 broader ^[6] 5:19 54:18 63:18 143:4 149:6 156:23 broadest ^[1] 96:10 broadly ^[1] 21:4 broken ^[1] 93:8 buckets ^[1] 71:23 budget ^[2] 111:23 153:9 bug ^[1] 77:13 building ^[1] 39:25 built ^[1] 62:9 built-in ^[2] 127:15 179:16 bunch ^[3] 27:19 37:11 64:1 burdens ^[1] 83:16 buses ^[1] 43:3 by-product ^[1] 102:6 <hr/> C <hr/> c) ^[1] 46:23 Cable ^[6] 48:24 75:9 127:14 134:3 155:18 156:24 Cadillac ^[1] 29:13 calculate ^[1] 5:25 calculated ^[1] 21:1 calculating ^[1] 33:7 calculation ^[2] 33:16,22 calibrate ^[1] 57:23 call ^[11] 67:23 68:17 78:22 80:10 85:20 87:11 92:10,11 94:2 131:18 135:13 calling ^[1] 75:24 came ^[6] 1:20 94:12 117:18 118:4 138:14 146:17 candidly ^[2] 14:8 176:22 cannot ^[2] 24:6 36:7 cap ^[52] 9:1 26:21 27:6 31:12 41:13,17,19,21,23 49:20 55:11,13,16 56:3,7 57:22 61:11,17 66:14,16,17 83:1,6 84:3 85:17 86:10 98:7 106:20,23 107:14,15 110:11,12 123:5,5,19,24 124:6,10,18 126:17 154:22 169:21,22 171:3,24 172:8,13,23 173:1,3,18 capable ^[1] 91:11 capricious ^[6] 102:18 104:6,13 119:15 120:7 142:17 caps ^[1] 71:11 care ^[8] 79:4 108:8,10 151:7 166:16 173:15 175:19 176:8 carefully ^[2] 37:16 81:23 carrier ^[2] 5:3 103:22 carriers ^[18] 4:19,20 7:15 17:24 19:3 38:1,8 51:3,6 63:14 67:18 69:14,15 76:5 80:7,10 92:25 103:21 carriers' ^[3] 5:25 25:1 67:16 carry ^[2] 68:23 153:25 Carta ^[1] 6:5 Carter ^[1] 75:2 Case ^[55] 2:4,6 3:5,9,16 4:4,6,9 5:17 15:18 17:7,11 19:1,2,5 20:19	40:20 50:5 52:1,14 69:8 87:25 89:9 110:4 111:18 112:8,25 113:3 116:21 119:19 123:1 125:12 127:15,24 128:11 129:13 131:13 133:19 143:3 147:17,20 149:11 156:25 157:12 158:17 162:19 165:15,16 171:1 176:19 177:15,15,21 180:3,4 cases ^[28] 9:5 11:8 12:6 22:8 26:2 34:18 35:2,4,10 36:8 48:2 56:11 61:3 66:2 70:10 72:22,23 75:1 88:4 120:20 121:7,19 122:12,14 137:4 149:8 161:11 162:9 cataclysmic ^[1] 128:2 catch-all ^[1] 89:3 category ^[4] 14:18 17:6 132:20 162:15 Cause ^[1] 32:5 caution ^[2] 36:12 75:20 caveat ^[1] 35:1 ceiling ^[1] 70:20 cell ^[6] 62:16,18,19,20,21 143:20 centuries ^[1] 133:7 century ^[2] 13:4 120:24 certain ^[8] 69:13 82:15 106:12 110:8 122:17,18 137:9,10 Certainly ^[6] 29:5 34:2 35:22 137:7 144:4 152:25 cetera ^[1] 67:11 CFPB ^[3] 133:19 147:17 174:2 challenge ^[17] 5:24 12:18 14:4,10,13 21:8,8 42:21 43:14 102:2,8 119:15 129:22 142:19 149:23 160:19 162:4 challenged ^[4] 5:24 83:21 102:17 166:23 challenges ^[6] 104:22 128:9 149:25 164:21 166:1,6 challenging ^[2] 13:7 142:22 chance ^[1] 98:24 change ^[5] 26:14 68:10 132:24 140:2 151:17 changed ^[2] 83:13 118:15 changes ^[1] 121:25 changing ^[7] 68:6 83:11 114:15 142:21,25 143:9,11 chaos ^[1] 177:18 chapter ^[3] 44:24 45:21 46:3 characterization ^[3] 98:22,24 171:8 characterizations ^[1] 66:15 characterize ^[2] 65:5 77:25 characterizing ^[2] 132:18 172:20 charge ^[11] 4:22 5:2 7:13,23 67:5 70:25 134:6 151:5 153:3,4,7 charged ^[2] 25:20 43:8 charges ^[5] 4:16 10:19 63:12 112:1 153:22 charging ^[1] 4:19 charitable ^[1] 39:7 cheaper ^[1] 95:24 CHIEF ^[44] 4:3,10 9:10 10:23 11:20,25 22:15,20,21 23:22 27:9 29:14 36:16 38:18 51:16 58:1 60:11	64:25 69:4,9 84:5 86:1 92:3 96:21 101:16 105:24 106:1,15 111:11,16 122:2 130:24 131:1,6,12,21 145:3 152:20 157:10 161:16 167:13 170:21 176:15 180:2 chivalrous ^[1] 139:9 choices ^[2] 5:12 138:18 choose ^[5] 151:14,15,15 169:10,15 chosen ^[2] 27:21 28:15 Circuit ^[8] 7:8 17:13 67:3 96:8 128:7 130:2 145:25 146:10 Circuit's ^[1] 6:16 circuits ^[1] 137:8 circular ^[1] 76:17 circumstances ^[2] 68:7 96:12 cite ^[5] 7:20 48:2,10 114:19 128:10 cited ^[1] 128:21 cites ^[1] 133:25 citizenry ^[1] 80:3 citizens ^[4] 39:17,18,20 117:7 clarity ^[1] 15:3 classes ^[1] 93:21 classic ^[3] 69:20 75:8 80:21 classified ^[1] 52:23 classify ^[1] 8:9 clause ^[10] 17:10 27:3 32:8 53:9 69:21 72:7 75:22 80:17 97:25 109:13 clear ^[20] 93:14 113:1 122:22 140:3,8 142:23 144:23 148:18,19,19 158:21 159:1,21 161:6,9 166:21 167:8,16 171:10 175:24 clearer ^[1] 75:18 clearly ^[5] 23:11 49:25 93:13 108:13 117:2 CLEMENT ^[81] 2:5 3:7 69:6,7,9 70:18 72:8 73:10 74:2,4,9,14 75:12 76:12,19,24 77:2,9,12 78:3,8 79:3,7,10,13,17,22 80:1 81:16 82:4 84:19,23 86:12 89:23 90:4,9,24 91:3,6 92:16 94:10,22 95:2,17 97:5,11,15,20,24 98:2,8,16,23 99:1,10,18,24 100:4,10,12,17 101:14,18 102:5 103:6,11,14 105:15,19 107:8,25 109:9 110:7 127:5 128:24 141:16 147:10 161:11 172:16 173:14 175:22 Clement's ^[1] 159:25 client ^[4] 102:2,8,12 105:17 clients ^[3] 86:6,15 103:19 clinics ^[1] 141:6 close ^[1] 37:13 closer ^[2] 59:16,19 coal ^[2] 19:12 75:2 COALITION ^[1] 1:11 Code ^[2] 105:13 179:17 codes ^[1] 161:3 coincidence ^[1] 122:16 coining ^[3] 84:19,24 85:1 collateral ^[1] 63:8 collected ^[2] 66:20 111:22 collecting ^[1] 97:1 collection ^[1] 76:16	colloquy ^[4] 85:10 97:18 105:7 106:19 Colorado ^[1] 143:18 colors ^[1] 23:5 combination ^[9] 13:13,13 14:6 130:4,13 132:3,7 146:10,12 come ^[12] 44:17 70:23 110:25 111:9 122:9 137:19 142:14 147:15,16 150:18 173:17 175:25 comes ^[10] 29:23 74:13 81:5 101:6 113:16 117:23 159:9 172:19 174:25 176:5 comfortable ^[1] 52:11 comfortably ^[1] 82:12 coming ^[1] 71:11 command ^[1] 46:14 comments ^[1] 21:17 Commerce ^[7] 53:8 58:8 65:21 66:4 69:21 80:22 109:13 COMMISSION ^[7] 1:3 4:5 9:12,13 45:18 46:25 167:22 Commissioner ^[1] 79:25 commissions ^[1] 19:20 common ^[9] 7:19 9:11 49:9 60:25 68:4 78:25 106:4,5 149:1 commonly ^[1] 161:23 communicating ^[1] 27:24 communication ^[1] 87:8 COMMUNICATIONS ^[5] 1:3 4:5 10:18 89:14 116:13 company ^[2] 75:13 81:18 comparable ^[5] 71:3,4 87:3 95:22 108:16 compartmentalize ^[1] 16:4 competition ^[6] 70:3 72:18 73:4 77:6,15,16 competitive ^[5] 45:5 49:12,13 73:18 109:2 competitively ^[1] 29:25 complain ^[1] 152:23 complaining ^[1] 119:17 complaint ^[1] 24:20 complaints ^[1] 32:14 complete ^[2] 74:25 132:15 completely ^[2] 114:15 161:9 complexity ^[1] 66:11 complied ^[1] 138:3 comply ^[5] 112:25 115:7 117:22 163:6 165:4 component ^[2] 33:7 34:7 Comptroller ^[2] 8:11 153:23 concede ^[2] 105:21 122:11 conceive ^[1] 75:14 conceived ^[1] 52:4 concept ^[4] 9:18,25 62:22 131:24 concepts ^[2] 40:16,17 conceptual ^[1] 17:1 conceptualized ^[1] 80:19 concern ^[6] 53:14 54:13,15 131:15,16 147:12 concerned ^[6] 25:9 35:2 102:24 103:2,3 145:7 concerns ^[1] 21:5 concessions ^[1] 112:8
--	---	--	--

Official - Subject to Final Review

<p>concurrence ^[4] 123:9 130:20 139:8 176:10</p> <p>confer ^[1] 60:7</p> <p>conferrals ^[1] 21:20</p> <p>conferred ^[1] 84:14</p> <p>confident ^[2] 110:10,12</p> <p>confirm ^[1] 21:17</p> <p>conflict ^[1] 137:19</p> <p>confront ^[1] 70:7</p> <p>confused ^[1] 120:11</p> <p>Congress ^[120] 4:13,18,21,25 5:4, 8,12 6:22 7:3,12 8:5 10:20 11:10 12:21 13:17,19,20,21,25 15:8 16: 5,6,10 17:3,4 22:12 30:19,24 38: 24 40:14 56:5 61:6 62:12 65:8,11, 20 67:2,8,25 68:11 69:12,16,24 75:2 76:4 77:14,17 80:15,22 81:2 82:3 84:14 85:14,17,18,22,24 87: 1 89:16 93:13,16 96:16 98:4 99:8, 9,10,12 101:6 102:23 106:19,21, 22 107:20,22 108:11,23 109:7 110:11,14 112:6 113:6 114:15 123:13 124:9,12 125:7,8 127:1 129:14 143:12 144:23 145:15 146: 24 147:6,9,11 150:22 151:3,14,25 152:14 153:10,11 157:22 161:12 163:16 166:11 169:25 172:5,13, 22 173:9,20 174:6,22 175:10,21 176:4 179:3,8</p> <p>Congress's ^[3] 5:14 22:14 65:14</p> <p>congressional ^[3] 99:21 109:17 150:13</p> <p>connections ^[1] 141:1</p> <p>consequences ^[6] 63:8 89:8 128: 23,24 129:9 178:18</p> <p>consider ^[12] 10:12 64:3 115:12 116:13 119:7,8 129:9 136:21 138: 11 160:12,18,20</p> <p>considerably ^[1] 76:9</p> <p>consideration ^[1] 154:4</p> <p>considered ^[3] 42:11 55:8 119:11</p> <p>consistent ^[16] 12:16,23 25:16 27: 2 44:23 45:21,23 46:3 64:3 70:5 74:6 80:12 102:18 104:18 141:10 159:3</p> <p>consolidated ^[1] 4:6</p> <p>constitute ^[1] 120:6</p> <p>Constitution ^[5] 32:5 97:25 113: 10 120:15 153:15</p> <p>constitutional ^[15] 11:1 12:18,20 13:20 14:2 27:6 51:14 53:6 59:19 66:8 81:1 107:23 120:2 129:5 163: 21</p> <p>constitutionally ^[2] 143:3 177:9</p> <p>constrain ^[5] 6:25 25:7 36:7 62:10 63:23</p> <p>constrained ^[3] 6:14 30:13 71:15</p> <p>constrains ^[1] 7:1</p> <p>constraint ^[9] 23:25 24:3 28:1 29: 7 30:8,11 57:5 124:24 177:25</p> <p>constraints ^[23] 9:23 12:19 14:19 25:5,6 41:6 42:5 44:8 56:7 58:25 59:4,24 67:14 70:16,22 94:4 95: 21 113:19,22 116:22 117:2 177:</p>	<p>20 179:23</p> <p>construction ^[1] 134:2</p> <p>construe ^[1] 157:19</p> <p>construed ^[3] 7:24 70:19 134:4</p> <p>consulted ^[1] 19:2</p> <p>CONSUMERS' ^[3] 1:7,14 4:5</p> <p>content ^[2] 47:8 73:25</p> <p>context ^[22] 11:6,13 12:1,13,25 18: 22 19:24 26:4,5,5 41:5 47:19 57: 13 88:10 89:16 96:17 101:20 104: 16 112:3 133:3 138:2 159:5</p> <p>contexts ^[3] 12:5 81:2 161:4</p> <p>continue ^[5] 77:20 80:6,9 85:23 165:1</p> <p>continuing ^[1] 92:21</p> <p>contribution ^[19] 6:1 17:20 20:17 24:16,23 32:13,18 33:2,4,15 39:1 72:1 101:25 102:3,6,10,11,14 146: 2</p> <p>contributions ^[3] 21:1 67:16 76:7</p> <p>control ^[6] 131:7,8,9,16 150:17 162:23</p> <p>controlled ^[3] 54:21 64:7,11</p> <p>controlling ^[1] 137:7</p> <p>controls ^[1] 33:6</p> <p>convenience ^[1] 45:20</p> <p>convinced ^[1] 166:7</p> <p>Cooley ^[2] 48:6 49:3</p> <p>corporation ^[1] 154:2</p> <p>correct ^[25] 29:18 30:24 31:18 32: 9,24,25 33:7,12,16,23 34:1,10,18, 24 35:17,21 55:7 122:12,14 123: 19 126:16 127:22 130:16 162:1 170:18</p> <p>correctly ^[1] 123:18</p> <p>cost ^[8] 37:23 49:1 73:16 82:14 104:1 108:20,20 156:7</p> <p>costs ^[17] 44:6,8 48:7,21 49:10 50: 8 63:10 75:11 103:23 124:20 154: 9 155:19,24 173:15,23 178:24 179:4</p> <p>couldn't ^[2] 20:10 63:2</p> <p>counsel ^[9] 84:6 111:12 126:23 131:20 145:4 157:9 161:16 176: 16 180:3</p> <p>country ^[11] 28:17 30:24 39:24 57: 2 79:1 87:17 108:23 147:4 164:6 165:23 173:12</p> <p>County ^[1] 31:20</p> <p>couple ^[8] 13:15 21:16 25:10 56: 10 88:23 122:3 142:12 178:2</p> <p>course ^[10] 22:2 47:25 77:4 87:7 91:16 95:20 110:14 129:5 147:10 152:14</p> <p>COURT ^[90] 1:1,21 4:11 5:16,18 7: 22 9:6 11:7 12:4,17 14:7 18:21 19: 8,14,21 21:25 22:3,4 25:18 27:3 31:5 35:1,3,7,14,17 36:7 47:3 48: 5 49:2 50:18 51:25 52:9 62:2 64:5 66:2 69:10 70:7,12 82:14,17,20 84:10 85:6 88:4 96:6,10,16 109: 24 111:17 113:1 116:18 120:12 121:3 122:6,16,24 125:8 127:14 128:15 129:20,22 132:2,4 133:15,</p>	<p>18 134:3 139:11 145:19 146:5 148:21,24 149:3 155:17 156:25 162:12 164:4,11,25 165:5,18 166: 10,17 167:1 174:2,19 175:8 177: 12,12 179:25</p> <p>Court's ^[19] 6:6 12:6 26:1 50:7 61: 3 70:5,10,14 72:22 74:25 78:3,9 87:19 90:14 106:9 112:25 113:13 156:23 162:11</p> <p>courts ^[7] 5:13 22:13 84:1 100:7 101:21 113:9 175:24</p> <p>cover ^[9] 37:23 48:6 75:10,10 82: 14 88:20,25 108:6 124:20</p> <p>covered ^[3] 28:8 33:19 93:1</p> <p>covering ^[3] 82:11 89:18,20</p> <p>covers ^[2] 114:17 115:16</p> <p>create ^[5] 47:22 73:21 101:1 110:3 179:17</p> <p>Created ^[2] 100:14 103:23</p> <p>credible ^[1] 117:1</p> <p>criterion ^[4] 10:10 82:23 83:3,5</p> <p>critical ^[2] 22:25 77:17</p> <p>crop ^[1] 177:15</p> <p>crosses ^[1] 63:17</p> <p>cure ^[1] 8:25</p> <p>cure-all ^[1] 167:8</p> <p>curiosity ^[1] 84:10</p> <p>currency's ^[1] 8:11</p> <p>current ^[2] 121:2 157:6</p> <p>customers ^[13] 10:11 27:21 28:15 71:2 93:3 95:23,23 108:17,18 115: 17,21 116:20 119:2</p> <p>customs ^[1] 32:3</p> <p>cut ^[3] 88:21 140:16,19</p> <p>cycle ^[2] 74:25 75:1</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:17 2:3,7</p> <p>daily ^[1] 150:11</p> <p>Dakota ^[4] 117:5,7 141:14,19</p> <p>damage ^[1] 89:7</p> <p>damming ^[1] 20:8</p> <p>danger ^[1] 64:13</p> <p>dangerous ^[1] 85:5</p> <p>day ^[10] 6:18 20:2 25:14 58:18,21, 23 59:5,9,22 143:11</p> <p>days ^[2] 17:20 18:4</p> <p>deal ^[4] 30:16 46:22 58:11 73:7</p> <p>dealing ^[3] 14:9,13 147:14</p> <p>deals ^[1] 24:21</p> <p>dealt ^[1] 66:12</p> <p>death ^[2] 84:24 150:17</p> <p>debates ^[1] 60:10</p> <p>debt ^[3] 39:2,3 57:7</p> <p>decade ^[1] 72:3</p> <p>decide ^[9] 64:7,15 69:12 99:9 113: 7 114:6 146:25 147:19 178:24</p> <p>decided ^[3] 106:3 120:20 169:25</p> <p>decides ^[1] 69:24</p> <p>deciding ^[2] 112:12 127:24</p> <p>decision ^[12] 6:17 7:8 113:2 128:6 145:8,11 146:7,10 149:11,12 156: 24 159:7</p> <p>decision-making ^[1] 137:17</p>	<p>decisions ^[2] 98:15,20</p> <p>decisis ^[5] 36:4,5 88:8 164:5 165: 21</p> <p>dedicated ^[1] 61:16</p> <p>deduction ^[1] 39:7</p> <p>deductions ^[1] 39:6</p> <p>deemed ^[2] 5:17 112:23</p> <p>deems ^[1] 154:17</p> <p>defending ^[1] 130:14</p> <p>Defense ^[1] 79:24</p> <p>deficiency ^[1] 128:13</p> <p>deficit ^[1] 108:6</p> <p>define ^[4] 27:17 51:19 55:25 160:8</p> <p>defined ^[6] 10:14 24:11 42:2 62: 11 68:10 179:7</p> <p>defining ^[1] 10:6</p> <p>definite ^[2] 5:12 22:11</p> <p>definitely ^[2] 14:22 89:6</p> <p>definition ^[2] 52:20 132:13</p> <p>definitive ^[3] 84:3 87:5 107:15</p> <p>definitively ^[1] 75:19</p> <p>degree ^[3] 60:9 72:15 113:24</p> <p>delegate ^[5] 13:18 15:19 65:9 75: 3 78:16</p> <p>delegated ^[7] 16:11 17:8 32:22 54: 21 55:10 171:6 179:21</p> <p>delegating ^[4] 15:8 79:11,13,18</p> <p>delegation ^[36] 4:12 5:11 6:3 12: 12 14:14 16:4,5,8 22:2,17 32:18 35:10 39:14 40:23 53:11 56:19,25 64:6 69:11 72:24 80:15 82:8 91: 25 99:3,7,12 101:5 107:6,18 112: 18 130:11,21 157:1 158:17 171: 20 176:11</p> <p>delegations ^[10] 5:19 21:21 61:1 62:1 63:19 74:13 82:13 105:13 139:25 157:21</p> <p>delicate ^[3] 60:12 105:25 122:4</p> <p>delineated ^[1] 23:11</p> <p>delivering ^[1] 60:2</p> <p>delivery ^[1] 113:20</p> <p>democracy-enhancing ^[1] 110:3</p> <p>democratic ^[6] 109:25 130:22 131:17,24 176:9,12</p> <p>denominator ^[1] 17:23</p> <p>Department ^[2] 2:2 79:24</p> <p>departure ^[1] 31:21</p> <p>depend ^[2] 51:22 132:8</p> <p>dependent ^[2] 86:18,20</p> <p>depending ^[2] 55:25 62:4</p> <p>depends ^[2] 54:4 79:8</p> <p>Deposit ^[1] 154:5</p> <p>deregulate ^[2] 69:25 80:23</p> <p>deregulated ^[2] 77:22 85:24</p> <p>deregulation ^[2] 94:1 113:17</p> <p>described ^[5] 9:23 49:2,3 155:17 174:3</p> <p>describes ^[1] 174:2</p> <p>design ^[2] 13:20 112:19</p> <p>designate ^[1] 46:25</p> <p>designed ^[1] 75:10</p> <p>destroy ^[3] 84:12,16,18</p> <p>destruction ^[1] 84:25</p> <p>detail ^[3] 11:19 112:11 175:15</p>
--	---	--	--

Official - Subject to Final Review

<p>detailed [2] 5:4 12:24</p> <p>details [5] 5:14 9:23 39:21 125:10 175:12</p> <p>determinant [1] 83:1</p> <p>determination [4] 112:10 124:12 147:24 156:17</p> <p>determinations [1] 153:23</p> <p>determinative [3] 82:23 83:3,6</p> <p>determine [5] 45:18 53:16,17 68:22 75:18</p> <p>determines [4] 33:10,15,18 153:24</p> <p>determining [1] 175:25</p> <p>detrimental [1] 128:13</p> <p>devastating [1] 129:1</p> <p>develop [1] 173:9</p> <p>developed [2] 93:11 114:4</p> <p>devices [1] 25:20</p> <p>dictated [1] 4:21</p> <p>difference [7] 65:4 68:20 78:1,7,11 80:2 132:17</p> <p>differences [1] 39:11</p> <p>different [37] 7:3 17:2 27:16 31:16,16 39:20 46:14 56:16,17 57:4 61:25 66:23 68:16 73:22 75:23 81:8,12 83:7 85:4 88:5 92:17 95:21 110:22 111:9 120:20 122:9,19 124:17 126:4 131:2,13 133:24 140:4,5 148:23 149:5 179:12</p> <p>differently [2] 32:2 168:3</p> <p>difficult [3] 60:12 122:4 150:24</p> <p>difficulty [1] 169:19</p> <p>diminished [1] 16:22</p> <p>direct [5] 23:25 24:2 131:7,23 141:21</p> <p>directed [3] 10:4 85:21 148:3</p> <p>direction [1] 73:8</p> <p>directive [2] 29:24 159:2</p> <p>directly [4] 15:21 114:25 130:17 155:25</p> <p>disagree [9] 41:15 48:13 59:23 142:5 159:12 161:13 171:18 172:19,20</p> <p>disagreement [1] 20:25</p> <p>disappear [1] 16:21</p> <p>disaster [1] 132:16</p> <p>disastrous [2] 86:5,14</p> <p>disavow [1] 100:2</p> <p>disclaimer [1] 129:4</p> <p>discount [1] 95:25</p> <p>discovery [1] 19:18</p> <p>discretion [9] 21:20 25:19 26:18,24 31:12 57:9 60:7 61:5 105:13</p> <p>discretionary [1] 57:24</p> <p>discussion [1] 164:23</p> <p>dispelled [1] 115:1</p> <p>displace [1] 120:21</p> <p>dispute [6] 98:21,24 111:25 114:14 137:18 155:7</p> <p>disruption [1] 89:25</p> <p>dissent [2] 106:11 123:15</p> <p>dissenters [1] 74:18</p> <p>dissenters' [1] 95:12</p> <p>distinct [1] 75:4</p>	<p>distinction [10] 15:5 51:1 92:14 119:25 132:8 135:22 143:6 148:16 157:1 164:14</p> <p>distinctions [1] 37:15</p> <p>distinguish [4] 53:7 58:13 108:2 154:21</p> <p>distinguishable [6] 37:17 96:25</p> <p>distinguished [2] 127:21 148:9,13</p> <p>distinguishes [1] 153:20,20</p> <p>distinguishes [1] 92:19</p> <p>distinguishing [1] 21:19</p> <p>distressed [1] 111:5</p> <p>district [1] 164:4</p> <p>ditching [1] 114:12</p> <p>divorce [1] 41:6</p> <p>divorced [2] 12:11 57:13</p> <p>do-whatever-you-feel-like [1] 45:3</p> <p>doctrinally [1] 91:8</p> <p>doctrine [10] 60:16 65:7 70:13 72:24 109:25 110:4 157:6,20 161:10 177:13</p> <p>dog [1] 127:9</p> <p>doing [33] 16:19 17:15 20:7,20 21:10 25:13 33:22 37:25 38:3 48:22 51:3 54:24 65:20 80:5,19 90:20 100:25 101:8 104:2 120:8 144:5 156:4,13 157:20 158:2,12 159:24 160:1 171:25 174:18 175:1 179:5,6</p> <p>DOL [1] 128:12</p> <p>dollar [4] 123:5 124:25 125:2 155:4</p> <p>dollars [4] 8:22 56:7 107:14 108:21</p> <p>domestic [5] 112:3,7 113:7 133:21 173:25</p> <p>done [23] 9:13 12:4 18:12 19:17 24:12 45:4,9 50:11 57:12 64:22 66:2 81:3,8,21,25 82:3 91:5 94:13 107:16,18 149:4 150:6 166:11</p> <p>done'ing [1] 20:7</p> <p>doom [1] 112:8</p> <p>dooming [1] 147:21</p> <p>dot [3] 30:1,1,1</p> <p>doubt [2] 135:25 178:14</p> <p>doubts [1] 149:24</p> <p>down [15] 39:1 56:14 72:23 79:16 81:13 88:21,23 110:5 120:1,9 132:2 133:24 149:20 172:19 177:12</p> <p>downward [1] 31:21</p> <p>dramatic [1] 89:12</p> <p>dramatically [2] 114:17 153:10</p> <p>draw [4] 51:25 52:6,7 96:19</p> <p>drawing [4] 16:13 52:11 57:11 132:8</p> <p>drawn [1] 61:3</p> <p>driver [1] 19:22</p> <p>driver's [1] 19:22</p> <p>driving [1] 102:10</p> <p>due [3] 17:21 100:4 154:3</p> <p>during [1] 93:9</p> <p>duties [3] 32:3,6 154:10</p>	<p>E</p> <p>each [14] 27:24 34:7 64:14 94:24 115:11 130:21 147:23 154:21,21 167:25 169:9,14 176:10,11</p> <p>earlier [1] 136:4</p> <p>easier [1] 133:3</p> <p>easiest [1] 36:17</p> <p>easily [4] 96:25 98:5,6 106:20</p> <p>easy [8] 5:17 19:2 77:14 106:7 113:3 148:15 150:20,21</p> <p>economy-wide [4] 73:1,2 95:3,5</p> <p>education [6] 115:23 117:12 119:3 136:12 140:14 158:23</p> <p>effect [4] 6:3 86:5 145:14 147:13</p> <p>effective [2] 89:17 167:5</p> <p>effects [5] 72:14 86:10,14 89:12 145:8</p> <p>efficient [1] 10:17</p> <p>eight [3] 92:4 128:7 146:16</p> <p>either [13] 8:4,8,9,19 48:25 49:18 75:25 134:1 150:13 161:24 162:14,22 163:24</p> <p>element [1] 22:25</p> <p>Eleventh [1] 96:8</p> <p>eligibility [5] 20:10 83:13,15,22 104:10</p> <p>eligible [1] 17:25</p> <p>elsewhere [1] 178:7</p> <p>embrace [1] 69:25</p> <p>empirical [2] 21:2 146:21</p> <p>empowered [1] 26:7</p> <p>empowering [1] 111:2</p> <p>empty [1] 125:24</p> <p>en [3] 113:12 146:1 159:6</p> <p>enable [2] 22:12 150:6</p> <p>enacted [4] 5:8 109:5 150:22 175:21</p> <p>enacting [2] 10:20 40:15</p> <p>encouraging [1] 174:15</p> <p>end [11] 34:6 38:10 78:21,24 89:11 120:15 135:23 142:24,25 145:10 158:7</p> <p>ends [2] 59:11 131:4</p> <p>enforceable [1] 104:4</p> <p>enforcement [3] 38:7 50:22 179:5</p> <p>enforcing [1] 16:21</p> <p>engaged [1] 21:16</p> <p>enhance [1] 30:1</p> <p>enormous [1] 175:14</p> <p>enough [17] 5:13 28:11 64:16 82:21 95:25 97:9 102:21 110:16 124:24 125:1 128:16 144:16 149:19 150:8,19 158:20 161:5</p> <p>ensuing [2] 44:9,10</p> <p>ensure [1] 141:4</p> <p>entails [1] 10:5</p> <p>enter [1] 122:6</p> <p>Enterprise [2] 130:17 131:2</p> <p>enthusiastic [1] 151:25</p> <p>entire [5] 28:16 39:24 57:2 111:23 155:5</p> <p>entirely [1] 112:19</p> <p>entities [2] 75:4 154:7</p>	<p>environment [4] 73:18 77:22 85:24 109:2</p> <p>envisioned [1] 28:3</p> <p>equalize [1] 26:11</p> <p>equipment [1] 143:1</p> <p>equitable [6] 5:1 11:11 38:25 57:3 161:3 178:8</p> <p>equivalent [1] 98:10</p> <p>era [1] 109:18</p> <p>error [1] 60:10</p> <p>especially [8] 37:21 98:9 122:10 150:9 159:9 164:20 167:9 169:8</p> <p>ESQ [2] 3:7,11</p> <p>essential [6] 115:22,23 117:10,11 119:3 140:12</p> <p>essentially [8] 18:5 67:15 91:24 121:15 125:13 140:13 147:10 162:15</p> <p>establish [4] 29:25 84:15,17 154:4</p> <p>established [2] 68:19 133:7</p> <p>estate [2] 31:11 57:19</p> <p>ET [5] 1:4,7,11,14 67:11</p> <p>evading [1] 91:12</p> <p>even [55] 17:12 38:4 46:15 47:4 48:10 50:16 52:11 54:13,19 64:5 65:18 67:24 72:15 73:22,22 77:21 85:23 87:12 91:12 97:16 112:14,20 113:8 114:13,14,18 116:15 117:15 119:8 121:1 122:21,25 123:12 124:3,4 131:14 136:21 139:5,11 146:1,7 147:9 148:16 149:25 150:24 151:16 154:12 163:5,9 165:1 166:8 169:4 170:19 171:15,17</p> <p>everybody [11] 43:17,20 45:25 46:16 83:23 87:14 104:11 108:22 143:23,24 173:11</p> <p>everyone [4] 43:18,22 46:19 143:20</p> <p>everything [3] 36:19 92:20 104:18</p> <p>everywhere [2] 45:14 173:13</p> <p>evidence [2] 19:15 133:13</p> <p>evolve [4] 27:13,13 42:14,16</p> <p>evolving [7] 10:7 27:15 112:15 114:7 139:19 144:25 160:9</p> <p>exact [4] 66:1 101:8 112:16 145:1</p> <p>exacted [1] 51:5</p> <p>exacting [1] 62:6</p> <p>exactly [29] 11:19 12:4 17:14,17 21:6 26:19 31:19 32:10 37:6 47:8,12 51:18 56:15 57:9 59:24 60:1 66:6 67:12 68:2 89:7 123:6,8 124:8 138:5 139:24 156:5,12 159:24 161:14</p> <p>example [11] 25:24 34:21 40:24 42:25 71:2 73:14 113:8 125:6 128:11 138:19 172:9</p> <p>examples [13] 8:2,7 21:2 26:6 31:5,8 33:25 48:10,17 49:4 132:10 148:6 178:20</p> <p>exceeded [1] 102:4</p> <p>exceeding [1] 43:14</p> <p>Except [3] 18:16 136:20 166:4</p> <p>exception [1] 96:13</p>
---	--	--	---

Official - Subject to Final Review

exceptions ^[1] 18:17 excess ^[2] 104:7,14 excessive ^[3] 7:7 14:14 67:5 Exchange ^[2] 63:25 101:1 exclusive ^[2] 121:16 174:4 exclusively ^[5] 132:23 133:6 172:4 175:10 177:15 excuse ^[3] 139:7 145:25 160:25 execute ^[1] 17:5 execution ^[2] 16:13,15 executive ^[14] 14:15 16:6,12,20 17:6,8 53:13 54:20,24 73:6 113:3,7 175:12 176:4 exercise ^[1] 126:19 exercised ^[1] 119:18 exercising ^[2] 14:23 16:20 existence ^[1] 6:22 existing ^[2] 42:11 85:9 exists ^[1] 11:14 exorbitant ^[2] 118:7 141:8 expand ^[1] 102:14 expanded ^[1] 87:16 expansively ^[1] 158:4 expense ^[1] 111:2 expenses ^[6] 33:19 75:11 97:3,4 154:9 178:24 expensive ^[3] 28:7,18 71:9 expert ^[1] 107:4 expertise ^[1] 26:14 explain ^[2] 9:20 148:22 explainable ^[1] 24:22 explains ^[1] 143:5 explicit ^[5] 50:12,12 69:17 77:8 80:16 express ^[1] 29:23 expressed ^[1] 149:16 expressly ^[3] 69:25 101:7,8 extent ^[14] 21:4 22:4 30:1 31:11 43:25 51:19 116:13 119:7,11 157:15 160:13 162:12 171:8 172:12 external ^[1] 179:7 extract ^[1] 177:7 extraordinarily ^[1] 31:17 extraordinary ^[1] 160:10 extreme ^[2] 115:8 118:21 extremely ^[3] 28:17 31:13 159:21 <hr/> F face ^[1] 134:2 facilitate ^[1] 141:5 facilities ^[1] 10:18 fact ^[21] 18:15 20:6,20 25:1 30:17 48:5,9 50:10,18 71:12 81:25 87:13,16 97:20 148:25 159:18,18 161:22 168:23 178:2,4 fact-finding ^[1] 175:12 factor ^[4] 20:18 119:12 146:2 162:3 factors ^[11] 36:4 64:8,14 68:13 88:9 89:1 159:19 160:14 167:19 179:19,22 facts ^[1] 18:20 fail ^[1] 105:14 fails ^[1] 5:24	fair ^[10] 11:1,5,11,17 45:14 72:18 73:3 97:8 129:8 162:8 fall ^[1] 110:15 fallen ^[2] 24:24 25:2 falls ^[2] 81:10 94:19 far ^[8] 5:19 10:15 25:8 27:13,14 57:20 59:4 142:14 farm ^[1] 71:7 favor ^[7] 16:18 98:6 127:24 145:8 148:22 149:12 167:2 faxes ^[3] 4:17 27:22,23 FCC ^[92] 4:13,16 5:2,5,10,13 6:1,9,14,17,23 7:12 9:19 10:3,5,12,14,22 13:3,8 14:10,15 17:5,19 18:2,2,11 20:19 21:10 24:12 25:13 29:24 33:6,14 34:10 43:16 44:16,24 45:4 53:20,25 54:12 62:18 64:22 67:10 104:22,23,23 111:24,24 112:13,18,21 114:5 115:6 116:1,11,18 117:21 118:2,4 119:7,17 135:9 136:21,24 137:3,10 139:12,18,22 141:10 142:24 144:25 146:7,13 152:16 158:12 160:8,12,17 161:22 163:6,16 164:21 165:1 166:16 168:10,17,19 169:14 178:15 FCC's ^[7] 5:24 43:1,12 44:25 111:23 112:22 122:23 FDIC ^[2] 37:11 154:1 feasible ^[3] 30:1 43:25 44:6 feature ^[1] 77:12 features ^[1] 179:16 FEDERAL ^[11] 1:3 4:4 18:3 19:14 31:14 37:10 57:21 113:9 153:6,9 154:6 Federalist ^[1] 133:10 fee ^[47] 4:19 5:16 6:1,2 7:16 17:21,23 19:5 23:7 26:19,20 48:15 49:16 50:2,8,19,23 51:19,23 52:3,16,21 65:5,19 66:7 75:19,25 76:3 78:22 80:10,10 85:20 92:10 93:23 94:2 104:12 127:11 132:9,13,18,24 151:5,22 154:2 157:2 162:22 178:23 fee-for-service ^[2] 92:8,9 fee-raising ^[2] 37:23 38:13 feel ^[4] 8:17,18 56:9 168:3 feels ^[2] 179:2,5 fees ^[37] 5:1 7:24 8:2,9,12 25:19 48:3,4,24 49:3,4 52:15 62:3,4 65:12 68:18 75:7 77:21,24 78:21 81:7 82:14 88:20,22,24 93:12 97:1 101:1 133:22 134:4 148:14 153:21 154:10 170:25 177:1 179:4,12 fervently ^[1] 177:22 few ^[10] 18:17 40:7 65:7 94:12 127:10 142:12 155:2 161:19 164:24 166:4 field ^[1] 99:16 Fifth ^[10] 5:4 6:16 7:8 17:13 67:3 128:7 130:1 137:8 145:25 146:9 fight ^[1] 169:3 fighting ^[4] 78:6 139:1 169:8,14 figure ^[13] 9:3 10:4 39:6,8 57:9,23 59:12 65:22 67:25 89:16 122:10	132:17 161:12 figured ^[1] 151:10 figures ^[2] 83:24,24 figuring ^[1] 19:4 filed ^[1] 167:10 fill ^[1] 149:4 filled ^[2] 112:11 125:11 filling ^[1] 5:14 final ^[1] 33:15 finally ^[3] 23:8 25:23 149:10 Finance ^[1] 154:6 financial ^[1] 138:24 find ^[5] 21:13 36:3 68:24 137:4 146:16 fine ^[5] 18:18 45:16 64:6 108:24 178:22 finish ^[1] 22:24 first ^[18] 4:13 9:16 37:4 72:9 89:10 99:5 120:4 125:19 130:9 133:5 134:19 137:14,24 145:19 149:23 158:16 164:11 174:17 first-line ^[1] 174:13 fit ^[3] 50:24 62:22 97:10 fits ^[2] 43:24 82:12 fix ^[4] 91:14,16 98:5 107:10 fixed ^[1] 146:13 flabby ^[1] 105:22 flag ^[3] 97:22,22 99:16 flat ^[5] 24:19 71:20 92:1 103:6,17 flexibility ^[1] 68:11 flip ^[2] 72:4 94:16 floated ^[1] 86:8 flob ^[1] 105:22 floor ^[1] 70:20 flows ^[1] 130:17 flying ^[1] 23:5 focused ^[4] 107:5 108:4,13 121:24 follow ^[4] 4:14 134:23 138:12,15 follow-on ^[1] 149:8 follow-up ^[1] 132:14 followed ^[4] 5:13 22:14 35:2 149:16 following ^[5] 76:20 133:12,14 167:24 173:10 follows ^[1] 8:18 food ^[6] 58:7,9,10,12,15 60:3 footnote ^[2] 143:5 172:8 for-cause ^[3] 53:21 54:3,11 forces ^[1] 28:16 foreign ^[1] 176:24 foremost ^[1] 9:16 forget ^[1] 76:25 form ^[3] 20:1 28:6 155:14 formal ^[2] 19:23 20:5 formulation ^[1] 16:14 forth ^[3] 9:25 73:20 88:8 forward ^[3] 76:8 166:5 167:3 forwardly ^[1] 166:13 found ^[2] 44:17 164:13 founding ^[1] 60:10 four ^[7] 10:8 20:19 27:16 33:25 71:12,22 148:7 fours ^[3] 26:5 38:11,16	Fourth ^[1] 4:25 framework ^[9] 50:25 53:7 112:17 120:14 121:2,6 132:25 144:23 175:8 free ^[3] 36:11 130:17 131:1 freeing ^[1] 161:10 friend ^[1] 147:2 friends ^[5] 70:6 129:12,18 147:3 155:7 front-line ^[2] 75:16 78:12 FTC ^[2] 55:1,4 full ^[1] 61:9 fully ^[1] 70:4 function ^[3] 37:5,24 107:3 functioning ^[1] 32:23 functions ^[3] 8:12 18:10 62:5 fund ^[24] 6:18 25:14 38:14 58:8 59:8 71:20 72:19 83:8,17 92:2 93:11 101:2 104:9,21 111:21 118:8 126:13 128:18 130:18 131:2 154:6 155:4,13 179:5 fundamental ^[3] 114:9,10 160:7 fundamentally ^[2] 144:24 168:9 funded ^[4] 103:16,25 156:16 178:13 funding ^[4] 155:10,11,15 156:8 funds ^[4] 24:6 32:15,24 88:18 further ^[8] 23:23 30:14 87:23 124:5 162:12 176:11,12 177:5 future ^[1] 166:9 <hr/> G gains ^[2] 12:14,15 GAO ^[6] 20:6,9 21:5,5 75:9 142:8 gap ^[1] 93:8 gave ^[6] 19:2 31:17 52:20,21 58:6 72:11 geared ^[1] 116:3 gears ^[2] 21:13 127:2 gee ^[1] 91:17 General ^[142] 2:2 3:3,14 4:7,10 6:10 7:1 8:6,15 9:15 11:3,23 12:3 13:14 15:16,25 16:23 18:19 20:15 21:24 23:4,10,13,16,18,21 24:2 25:10 26:1 27:14 28:9,13,22 29:1,4,19,22 30:5,10,13,25 31:4,9,19 32:10,20,25 33:8,13,17,20,23 34:2,9,19,25 35:9,16,22,25 36:5,14 37:20 38:17 39:10,13,19 40:5,12 41:3,9,15,18,22,25 42:7,16,19 43:4,18,22 44:4,7,19,22 45:11,16,22 46:1,8,12,18 47:6 48:13 49:22 50:2,14 51:6,13,23 52:2,22 53:4,19 54:2,8,10 55:13,21 56:17,20,24 57:2 58:10,22 59:6,10,15,18 60:20 61:15,20,24 62:20 63:3,7,24 65:16 66:22 67:12 68:2,21 69:2 74:20 107:12 118:3,17 128:13 147:16 148:2 176:17,20 Generally ^[1] 75:11 generated ^[1] 109:4 generating ^[1] 68:17 generic ^[1] 139:10 generis ^[1] 97:17
--	--	--	--

Official - Subject to Final Review

<p>genuine ^[1] 52:25 gets ^[17] 11:12 45:25 87:15 88:12 97:17 99:2 100:7 104:12 112:14 113:4 114:6 139:18 141:24 144:17 151:14 160:8 169:14 getting ^[9] 34:1 38:9 46:19 80:15 107:13 116:3,4,5 169:7 gist ^[2] 74:1,2 give ^[29] 4:14 8:25 12:21 17:5 25:24 34:25 43:17,18,25 46:16 47:8 59:21,22 64:2 65:9 68:11 73:8 78:13 82:9 84:19 94:15 95:10 98:23 135:25,25 146:23 149:3 158:5 159:14 given ^[6] 34:6 85:17 148:10 150:10 162:9 164:20 gives ^[6] 13:8 57:8 63:22,25 104:4 128:16 giving ^[6] 9:1 57:21 107:4 154:3 158:6 177:14 global ^[1] 48:21 goal ^[2] 41:10 47:19 goals ^[1] 179:7 GORSUCH ^[98] 15:24 16:2 21:12, 24 22:19,23 23:8,15,17,19 34:12 38:19,20,23 39:12,16 40:2,7,18 41:8,12,17,20,24 42:4,14,18,24 43:16,20 44:3,5,15,21 45:7,12,17,24 46:7,10,15,21 47:24 48:23 50:1,3 51:10,15 62:14 73:9,11 74:3,7,10 75:6 76:11,14,22,25 77:3,11,23 78:5,23 79:8,12,15,19,23 85:11 96:22,23 97:8,12,14,19,23 98:1,3,12,17,25 99:6,15,23,25 100:9,11,14 101:13,15 106:18 138:17 142:7 143:14 148:10 161:17 169:7 Gorsuch's ^[3] 53:15 56:13 57:18 got ^[7] 31:21 49:17 95:24 99:11 121:8,19 131:9 gotten ^[1] 99:4 government ^[15] 49:1 52:22 75:13 81:10,18 111:24 128:20 132:15 133:25 142:11 147:18 152:24 161:24 165:3 177:22 government's ^[8] 70:16,21 77:25 83:10 87:22 114:19 153:1 164:11 granted ^[2] 117:4,4 graph ^[1] 71:18 gratuitous ^[1] 141:9 grave ^[1] 177:11 great ^[4] 19:6 30:16 40:13 42:22 grounds ^[3] 6:4 145:9 148:13 group ^[2] 18:9 19:10 groups ^[1] 155:13 guarantee ^[1] 71:3 guardrails ^[3] 27:7 87:5 101:10 guess ^[16] 11:21 15:13 26:3 65:2 70:20 92:18 106:17 107:17 109:20 110:2 120:11,17 121:24 130:3 164:2 179:20 guidance ^[4] 9:1 13:9 139:3 154:19 guide ^[3] 69:22 89:2 106:10 guided ^[1] 112:13</p>	<p>guidelines ^[1] 140:8 gumption ^[3] 149:22 150:3,4 Gundy ^[4] 74:17 95:13 106:11 158:14 guys ^[1] 19:6</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>h(1)(B ^[2] 43:5 47:14 h(2 ^[5] 29:24 42:20 43:24 46:5 62:22 half ^[7] 13:4 88:13 91:17 94:16 98:23 103:20 150:1 half-century ^[1] 5:9 Hampton ^[4] 9:6 56:11 106:1 174:21 hand ^[3] 108:12 110:18 176:23 handed ^[1] 171:23 handing ^[2] 123:14 152:14 handle ^[1] 38:21 hands ^[1] 147:14 happen ^[4] 73:18 143:17 173:11 176:5 happened ^[4] 20:22,23 75:5 161:14 happening ^[2] 13:9 107:6 happens ^[2] 20:2 137:21 happy ^[2] 169:24 176:4 hard ^[10] 18:14 29:12 52:14 63:16 65:4 67:24 71:6 76:15 78:6 122:7 harder ^[3] 36:25 38:21 49:24 hark ^[1] 64:22 harks ^[1] 10:1 HARRIS ^[138] 2:2 3:3,14 4:7,8,10 6:10 7:1 8:6,15 9:15 11:3,23 12:3 13:14 15:16,24,25 16:23 18:19 20:15 21:12,24 23:4,13,16,18,21 24:2 25:10 26:1 27:14 28:9,13,22 29:1,4,19,22 30:5,10,13,25 31:4,9,19 32:10,20,25 33:8,13,17,20,23 34:2,9,19,25 35:9,16,22,25 36:5,14 37:20 38:23 39:10,13,19 40:5,12 41:3,9,15,18,22,25 42:7,16,19 43:4,18,22 44:4,7,19,22 45:11,15,16,22 46:1,8,12,18 47:6 48:13 49:22 50:2,14 51:13,23 52:22 53:4,19 54:2,8,10 55:13,21 56:17,20,24 58:3,10,22 59:6,10,15,18 60:20 61:15,20,24 62:20 63:3,7,24 65:16 66:22 67:12 68:2 69:2,5 127:5 176:17,18,20 HEALTH ^[12] 1:10 71:13 86:24 87:3 115:23 117:12 119:3 128:13 136:12 140:14 141:4 158:23 healthcare ^[10] 5:7 40:24 41:1,10 47:2,9,12 87:2 96:2,3 hear ^[2] 4:3 65:10 heard ^[1] 161:21 heart ^[1] 111:18 heck ^[2] 11:16 55:22 height ^[1] 90:13 heighten ^[1] 53:14 heightened ^[1] 54:15 held ^[3] 55:9 60:14 145:14 help ^[2] 142:2 164:9</p>	<p>helps ^[1] 76:18 hence ^[1] 166:13 high ^[3] 90:10 103:10 124:7 high-cost ^[1] 5:6 highly ^[2] 12:24 178:5 himself ^[2] 34:14 130:19 hinging ^[1] 171:21 historical ^[5] 17:18 73:25 93:6 159:25 179:9 historically ^[9] 24:11 30:23 31:8 42:1 48:4 57:12 73:15 76:8 162:17 history ^[11] 5:9 12:14 13:8 28:4 31:1,10 33:2 39:25 57:14 112:7 133:14 hold ^[2] 45:7,15 holding ^[1] 128:25 hollow ^[1] 126:18 honestly ^[2] 116:25 136:22 Honor ^[9] 114:2 115:4 116:10 118:12 119:22 137:25 146:23 156:7,20 hood ^[1] 19:9 hope ^[3] 33:24 34:3 89:19 hopper ^[2] 164:17 166:2 hot ^[2] 73:7 95:8 hotspot ^[2] 43:17,19 hotspots ^[1] 43:2 Housing ^[2] 154:6 155:12 However ^[3] 127:19 150:9 173:22 huge ^[2] 75:1 87:6 hundred ^[1] 108:21 hyper ^[1] 121:24 hypos ^[1] 108:3 hypothetical ^[9] 29:8 40:6 56:13 57:1,18 58:4 81:13 89:19 135:1 hypotheticals ^[2] 42:2 80:14</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>i.e ^[1] 4:16 iceberg ^[2] 178:21 179:14 idea ^[21] 8:19 13:17 14:1 19:6 27:1 38:12 41:9 46:2 57:20 76:9 80:13 82:6 88:12 107:13 114:24 142:4 144:7,22 152:5,6 179:18 ideas ^[1] 86:8 identified ^[5] 6:11,12 30:9 35:6 60:22 identify ^[3] 63:22 103:24 123:4 identifying ^[2] 32:24 105:8 ignited ^[1] 77:6 ignore ^[1] 115:12 ignored ^[1] 137:11 ignoring ^[1] 177:19 II ^[5] 14:13 16:1 54:17 74:19 176:4 illustrate ^[1] 16:25 imagine ^[1] 29:12 impact ^[1] 149:11 imperiling ^[1] 147:21 implemented ^[1] 10:22 implementing ^[1] 103:22 implicated ^[1] 66:3 implications ^[1] 75:22 implicit ^[2] 13:6 69:18</p>	<p>implicitly ^[3] 80:7 93:2,3 important ^[23] 22:10 31:25 36:6 85:25 100:6,24 109:21 119:12 124:14 126:9 129:11 138:13 147:2,4,8 150:14 157:5 162:18 165:7,8 167:9 169:16 175:2 impose ^[8] 13:4 58:7 59:7 65:25 69:13 94:1 147:6 157:23 imposed ^[3] 8:4 25:22 63:10 imposes ^[2] 114:21 158:12 imposing ^[3] 57:6 66:19 135:5 impossible ^[1] 106:8 improve ^[1] 104:3 inappropriate ^[1] 94:19 incentivize ^[1] 56:5 inception ^[1] 9:19 inclined ^[1] 118:16 include ^[2] 62:17 133:22 included ^[1] 46:24 includes ^[2] 82:13 87:15 including ^[6] 10:9 22:10 50:22 117:23 128:9 161:1 income ^[3] 39:8 86:22 116:4 incorporated ^[2] 114:25 144:22 incorporates ^[1] 9:17 incorporating ^[2] 40:16 112:16 increase ^[3] 83:16,17,18 increased ^[1] 111:21 incredibly ^[1] 111:1 Indeed ^[3] 5:15 7:22 112:1 indefinite ^[2] 25:14 84:12 independent ^[6] 19:17 53:12 54:1,7 161:23,24 indicated ^[1] 23:1 indication ^[2] 81:4 169:1 indirect ^[2] 25:5,24 indirectly ^[1] 113:20 indistinguishable ^[1] 27:4 individual ^[1] 147:24 industries ^[3] 96:11,18 155:15 industry ^[7] 38:14,15 48:20 72:14,17 85:21 98:19 ineligible ^[1] 20:13 inflation-adjusted ^[1] 72:3 influence ^[2] 19:10,16 information ^[6] 30:3,6 33:10 42:7 44:1 144:12 initial ^[1] 132:25 inquiring ^[1] 18:8 inquiry ^[8] 19:23 27:2 65:19 66:7 112:2 122:5,5 160:6 insist ^[1] 147:3 insisting ^[1] 177:22 instance ^[7] 10:3 11:18 12:5,7 18:25 31:20 63:13 instances ^[4] 20:19 142:12,12,13 instead ^[6] 5:20 9:13 69:16 100:23 158:2 179:7 instinct ^[1] 78:14 instrumentality ^[1] 80:21 insular ^[1] 5:6 Insurance ^[1] 154:6 intelligible ^[11] 21:22 22:8 73:23 120:22 121:11 123:10 170:7,9</p>
---	---	---	---

Official - Subject to Final Review

<p>174:14,20 175:6 interchange ^[1] 93:12 interest ^[5] 45:20 69:23 101:4 157:4,7 interested ^[1] 22:5 interesting ^[2] 48:1 73:13 interests ^[1] 70:8 interfere ^[1] 44:11 Internal ^[2] 78:17 155:20 Internet ^[3] 29:18,23 30:5 interpret ^[10] 135:3 157:13,14,16 158:13,17,18 159:4 162:7 168:18 interpretation ^[7] 115:9 135:12 158:9 160:11,17 163:18 168:16 interpreted ^[8] 43:1 44:25 67:4 74:16,18,22 121:12 168:23 interpreting ^[2] 43:12 44:25 interregnum ^[2] 90:13 100:5 interrupt ^[4] 73:12 74:8 159:14,15 interstate ^[1] 58:8 intrastate ^[1] 25:2 introducing ^[1] 77:15 invalidated ^[2] 83:25 137:9 invalidating ^[2] 86:4 89:13 inviting ^[1] 179:1 involve ^[1] 8:10 involved ^[1] 128:11 involves ^[1] 52:15 IRS ^[21] 39:5,8 40:1,3,3,11,21 56:13,22 57:8,12 58:6 79:5,14,19,21,25 80:3,14 81:13 82:8 IRS's ^[1] 57:14 isn't ^[16] 18:14 20:5 36:2 49:18 71:14 82:21 95:5 113:15 119:14 125:24 134:12 146:7,14 148:17 151:1 161:11 isolated ^[1] 47:21 issue ^[17] 14:5 15:12 28:19 32:18 51:14 65:18 74:17 81:1,5 87:24 91:10 99:12 107:5 113:8 137:20 146:2 162:10 issues ^[6] 17:7 51:12 54:18 56:2 58:13 85:13 It' ^[1] 169:11 itself ^[25] 6:1 9:17,21 32:5,22 70:24 75:3 77:18 78:21,24 88:18 112:15 115:2 117:21 124:12 129:15 135:9 146:14 147:6 156:8 168:10 170:1 172:5 174:21 175:11</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J.W ^[4] 9:6 56:11 106:1 174:21 JACKSON ^[41] 13:12 15:1 65:1,2 66:13 67:9,23 68:14 69:3 106:16,17 107:17 109:3,20 111:10 119:14,24 120:5 121:5,18,23 125:17,21 134:12,16 135:1 139:24 170:22,23 171:13,16,19 172:10,25 173:5,8 174:7,10 175:1,17 176:14 jeopardize ^[3] 127:6,25 179:16 jeopardy ^[1] 69:1 joint ^[1] 167:22 Judge ^[8] 48:5 96:8 101:21 106:2 121:13 130:19 139:8 176:10</p>	<p>judges ^[4] 106:5 110:5 121:12 175:18 judgment ^[13] 31:23 61:4 64:16 77:18 85:15,18,22,25 89:17 108:24,25 109:4 165:17 judgments ^[3] 26:9 68:4,6 judicial ^[1] 23:2 judicially ^[8] 60:18,21 74:11 105:8 111:2 144:20 145:1 169:19 jurisdiction ^[1] 72:13 jurisprudence ^[5] 85:9 87:20 90:14 96:9 110:19 jurisprudential ^[1] 132:16 Justice ^[428] 2:3 4:3,10 6:7,24 8:1,13 9:10 10:23 11:20,25 13:12 15:1,24 16:2 18:7 20:4 21:12,24 22:15,19,21,23 23:8,15,17,19,22,22,24 25:4,23 27:9,9,10 28:6,11,20,24 29:3,14,14,16,21 30:4,7,12,15,15 31:3,7,14,24 32:11,12,21 33:1,9,14,18,21,24 34:4,11,12,17,20 35:8,13,19,23 36:1,10,15,16,16,17,21,24 37:3,4 38:17,18,18,20,23 39:12,16 40:2,7,18 41:8,12,17,20,24 42:4,14,18,24 43:16,20 44:3,5,15,21 45:7,12,17,24 46:7,10,15,21 47:24 48:23 50:1,3 51:10,15,16,16,18 52:19 53:2,10,15,24 54:6,9 55:6,15,18 56:12,13,18,22 57:18,25 58:1,1,3,20 59:2,7,14,17 60:4,6,11,11 61:10,18,23 62:13,14 63:1,6,20 64:24,25,25 65:2 66:13 67:9,23 68:14 69:3,4,9 70:15 72:4 73:9,11 74:3,7,10 75:6 76:11,14,22,25 77:3,11,23 78:5,23 79:8,12,15,19,23 80:24 82:1 84:5,7,8,9,21 85:11 86:1,1,3 89:10,24 90:7,22,25 91:4 92:3,3,4 94:9,24 95:16 96:20,21,21,23 97:8,12,14,18,19,23 98:1,3,12,17,25 99:6,15,23,25 100:9,11,14 101:13,15,16,16,18 103:5,9,13 105:1,6,6,7,22,24 106:1,14,15,15,17,18 107:17 109:3,20 110:24 111:5,10,11,16 113:14 115:14 116:17 118:1,13,16,23,25 119:14,24 120:5 121:5,18,21,23 122:2 123:2,9,14,16,22,24 124:3,16 125:17,21,23,24 126:11,17,23 127:2,18,20,23 128:19,22 129:7,25 130:1,6,12,24,25 131:1,6,12,20,21 132:6 134:12,16 135:1,2,10,18 136:2,6,23 137:15 138:5,17 139:7,15,21,24 140:20,24 142:7,10,16,19 143:14 144:18 145:3,5,6,7,23 146:9,19 147:12 148:10,12 149:9 150:2,20,24 151:18,23 152:9,17,19,20,20,22 153:8,17,18 155:9,21,23 156:4,9,12,15 157:8,10,10,11 159:10,13 160:4 161:15,16,17,18,19 162:5,24 163:8,13,18,25 164:22 165:9,14,20 166:7,12,14,24 167:11,13,13,15 168:12,15,25 169:2,6,17 170:6,10,14,21,21,23 171:13,16,19 172:10,25 173:5,8 174:7,10</p>	<p>175:1,17 176:14,15 178:3 180:2</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan ^[38] 36:16,17,24 37:3 38:17 92:3,4 94:9,24 95:16 96:20 105:6,7 115:14 116:17 118:1,13,16,23,25 135:2,10,18 136:2,6 139:21 140:20,24 142:10,16,19 157:10,11 159:10,13 160:4 161:15 163:18 Kagan's ^[2] 55:18 139:16 Kavanaugh ^[45] 51:17,18 52:19 53:2,10,24 54:6,9 55:6,15 56:12,18,22 57:25 80:24 82:1 97:18 101:17 121:21 123:2,16,22,24 124:3,16 129:25 130:6,12,25 132:6 161:18,19 162:5,24 163:8,13,25 164:22 165:9,14,20 166:12,14,24 167:11 Kavanaugh's ^[1] 125:25 keep ^[4] 121:21 137:2 139:23,25 key ^[3] 5:11 135:21 160:6 kind ^[36] 14:6,23 22:7 26:15 40:9 62:5 64:9 72:17,19 76:17 82:9 90:17 101:10,25 107:21 109:21 110:25 119:19 123:21 126:1,19 127:9 133:13 134:9 144:17,19 149:22 151:6,9 158:1 161:7 163:19 164:16 169:15 173:13 176:8 kinds ^[3] 21:10 68:16,21 knows ^[2] 144:16 159:22</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack ^[1] 15:3 laid ^[3] 35:3 94:19 174:21 landline ^[1] 141:1 landscape ^[1] 27:16 language ^[9] 22:12 32:7 39:4 47:20 96:11,16 113:6 115:1 128:10 larger ^[1] 114:17 last ^[8] 7:12 63:20 72:3 105:1 128:23 133:18 147:17 174:2 later ^[1] 112:11 latter ^[1] 14:18 Laughter ^[16] 34:16 36:20,23 37:2 38:22 79:6 84:22 90:8 97:13 105:5,18 130:8 131:5 135:17,20 165:11 law ^[24] 9:11 10:24 16:14,15,21 18:20,21 30:18 49:9,16,16,17 58:6 60:25 89:13 91:1 110:6,13,20 113:1 123:1 149:1 153:19 154:19 lawful ^[1] 21:20 laws ^[2] 84:17 127:7 lawsuit ^[1] 20:22 layer ^[3] 66:10,10 176:11 lead ^[1] 150:3 leaps ^[1] 119:1 least ^[22] 14:16 16:21 25:6 43:21 47:3,3 51:20 52:10 81:22 82:24 107:22 110:4 111:25 112:4 113:20 124:11 126:21 135:22 137:8 145:21 169:25 174:20 leave ^[2] 9:2 175:11 leaves ^[2] 5:11 125:10</p>	<p>leeway ^[1] 143:4 left ^[2] 39:5 175:15 leg ^[1] 16:20 legal ^[4] 21:15 121:25 165:13 168:15 legally ^[1] 20:13 legislate ^[1] 150:21 legislation ^[4] 69:21 88:5 109:14 150:21 legislative ^[16] 13:18,21 14:12 16:11 65:9 112:10 113:8 121:16 132:23 133:6,19 171:5 172:4 174:4 175:10 177:16 legislature ^[2] 171:22,23 lens ^[1] 52:18 less ^[3] 54:13 154:18 167:5 lesser ^[1] 151:11 lest ^[1] 96:7 letting ^[3] 144:25 157:2,3 level ^[9] 10:7,24 11:5 24:10 26:13,19 58:17 85:14 116:16 levels ^[1] 26:11 levy ^[3] 65:12 154:7,10 levying ^[1] 153:21 LIBRARIES ^[9] 1:10 5:7 44:2 47:2,9,15 86:23 144:9 178:12 library ^[3] 43:7,21,23 license ^[1] 52:5 life ^[1] 117:10 Lifeline ^[7] 20:12 83:14,25 93:17 101:9 104:11 142:2 Light ^[2] 122:25 138:8 likely ^[1] 151:25 likewise ^[1] 5:24 limit ^[30] 7:17,18,19 8:3 24:5 30:20,24 32:13 33:2 49:20 57:17 58:12 59:20 66:19 101:24 102:22 104:21 112:5 116:7 123:21 126:7 129:20 134:13 145:20 149:7 157:17 164:12,20 170:1 177:17 limitation ^[5] 117:25 119:13 135:23 138:24 167:9 limited ^[5] 47:4 127:16 144:8 156:24 160:21 limiting ^[9] 127:16 134:2,5 149:10,17 164:1,19 165:25 167:4 limits ^[22] 5:14 8:4,14,16,20 12:22 21:9 25:22 37:8 62:9 68:9 84:4 129:15 137:23 147:7 150:16 154:2 157:24 158:12,19 159:8 163:24 line ^[26] 16:13 17:13 49:4 52:6,8,12,13 61:4 63:17 81:11 92:1 94:20 96:9 103:3,7,15,17 110:21 121:14 130:10 131:23 134:9 141:4,15 142:1 153:5 line-drawing ^[1] 60:12 lines ^[2] 51:25 149:12 list ^[13] 34:12 37:9 74:15 90:10 127:8 135:11 147:21 160:23,24,25,25 167:5 170:16 listed ^[4] 6:8 116:11,12 134:21 lists ^[1] 160:13 litigation ^[2] 55:22 148:8 little ^[16] 8:24 21:14 36:25,25 37:</p>
---	--	---	---

Official - Subject to Final Review

<p>12 58:4 76:14 93:15 105:2 126:18 143:19 144:2 156:22 159:17 177: 21 178:21 live [7] 87:9 116:3 140:13 141:3,3, 13,14 living [1] 115:22 locus [1] 130:22 long [7] 40:11 60:13 69:18 82:13 90:1 117:8 149:18 long-distance [1] 100:22 long-embodied [1] 49:9 longer [3] 63:11 77:7 100:20 look [39] 9:16 12:1,18 16:7 18:11, 13 22:8,9 26:17 45:8,9,12 47:17, 20 59:13,24 60:25 71:17 72:6,6, 24 78:14 80:5 81:23 88:17 90:11 91:22 94:5 102:9 103:19 118:25 133:12 145:16,18,25 146:20 149: 5 157:21 167:1 looked [5] 12:10 32:2 37:15 82:19 93:16 looking [14] 9:11 10:5 12:17 13:2 17:11,16 18:22 22:5 34:23 36:12 47:23 58:24 105:17 179:13 looks [2] 93:15 94:7 loose [5] 159:17 162:25 163:1,3,4 loosen [1] 83:22 loosened [1] 83:15 lose [4] 90:6 116:21 133:17 172:23 lot [38] 11:16 18:24 26:18 27:5 30: 22 31:5,8,17 34:5 39:4 44:6 48:16 55:22 72:23 75:24 89:3 90:2,23 91:1 96:19 99:4 103:23 104:1 106: 11 107:1 117:14,19 122:17 125:2, 3 127:6 158:19 159:7,8,16,20 169: 11 179:21 lots [1] 81:7 love [1] 152:14 low [3] 86:22 116:4 126:25 low-income [6] 5:5 71:13 93:4 104:17 136:7 158:24 lower [7] 71:7 72:2 82:20 104:2 113:9 lying [1] 6:19</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Ma [2] 93:8 100:7 made [16] 21:16 66:15 77:6,17 83: 3 85:14,18,24 89:17 124:12 130: 20 142:22 144:23 147:15,17,19 made-up [1] 95:4 magic [1] 27:2 Magna [1] 6:4 main [3] 121:10 132:7 152:13 maintain [1] 154:5 major [4] 71:12,23 157:1,20 majority [14] 10:10 27:20 28:14 29: 2,4,5 115:17,20 116:10 119:2 136: 10,11 140:9 159:1 males [1] 58:21 manageable [11] 60:19,21,24 74: 12 94:11,18 105:8 144:20 145:2 169:19,23 mandate [4] 134:19 136:16 158:</p>	<p>21 159:21 mandating [1] 10:14 mandatory [9] 136:20 139:6 144: 10 167:19 169:5 177:23 178:1,15, 17 manner [2] 57:24 89:22 many [12] 47:7 48:10 51:10 61:11 63:10 66:14 70:9 78:15 83:9,11 96:6 163:3 map [1] 26:2 maps [1] 92:17 March [1] 1:18 marginal [1] 39:6 market [3] 28:16 49:12,13 Marshall [3] 60:11 105:24 122:3 Marshall's [1] 22:16 masking [1] 159:21 massive [1] 70:8 material [1] 80:2 math [3] 17:15 24:16 34:1 mathematical [1] 33:22 matter [18] 1:20 13:22,23 15:10,20 17:1 20:5 53:10 59:12 99:14 100: 24 145:10 152:7,12 162:11 171: 13,14,16 matters [5] 39:14 53:6 60:8 125: 14 172:2 Mayfield [1] 128:11 McConnell [1] 174:1 McConnell's [1] 133:20 McCOTTER [126] 2:7 3:11 111:13, 14,16 114:2 115:14 116:9 117:17 118:1,11,14,19,24 119:6,21 120:3 121:1,10 122:13 123:8,20,23,25 124:9 125:5,19 126:6,16,20,25 127:8,19,22 128:5,20 129:3,11 130:5,9,15 131:11,14 132:1,19 134:14,18 135:8,21 136:5,19 137: 13,24 138:6 139:4 140:18,22 141: 20 142:8,15,18,20 144:4 145:18, 24 146:15,22 148:5,15 149:21 150:8,23 151:2,21 152:2,11,18 153:14 155:2,16,22 156:2,6,10,14, 19 157:12 159:6,11 160:3,5 162:2, 7 163:2,12,14 164:10 165:6,12,16, 24 166:13,20,25 167:15 168:7,14, 22 169:1,4 170:5,8,11,18 171:10, 14,17 172:2,24 173:2,6,25 174:8, 19 175:7 176:2 meal [1] 59:9 meals [4] 58:18,23 59:5,22 mealy-mouthed [1] 139:9 mean [69] 15:4 16:24 20:9 34:21, 22 35:12 43:1 45:13 54:4,7,11 55: 14 58:16 61:13 66:14 67:4 72:9, 21 73:16 74:15,16 75:16 76:17,17 77:9 81:16,18 83:12 86:14 87:9, 20 90:11 91:17 92:6,24 94:17 97: 5,20 98:9,18 99:4,11 102:8,9 106: 10,21 107:9,25 115:14 116:21,25 118:9 119:16 120:5,19,22 125:24 128:1 131:2 138:18 140:15 141:7 143:9,21 145:12 172:23 175:3,22 179:22</p>	<p>meaning [7] 11:12 12:14 57:4 73: 3 135:5 149:3 169:13 meaningful [4] 12:21 20:17 129: 15 177:14 meaningfully [1] 126:4 meaningless [1] 126:19 means [8] 7:6 12:19 27:24 91:13 98:25 135:13 178:17 179:23 meant [1] 157:23 meantime [2] 146:8 151:6 measure [1] 59:21 measures [1] 56:3 meat [2] 128:16 163:5 mechanism [3] 60:2 67:1 171:5 mechanisms [1] 47:1 medical [1] 143:11 Medicare [2] 143:10,13 meet [5] 10:8 139:13 156:17 179:7, 8 members [2] 35:1 152:14 memorandum [1] 112:20 mention [1] 42:5 mentioned [2] 27:20 37:3 meritless [2] 13:14 14:22 merits [3] 16:25 90:20 146:6 metrics [1] 35:9 might [19] 12:11 17:10 26:14 28: 18 59:22 64:14 68:10 70:9 71:25 81:22 87:9 88:24 99:8 102:12,15 105:16 153:19 163:5 166:5 miles [1] 99:1 milk [1] 12:8 million [2] 57:22 108:21 mind [1] 78:2 mindfield [1] 179:17 minds [1] 59:23 minimize [1] 89:24 minimum [1] 61:5 ministerial [1] 18:10 minor [3] 112:11 162:2 175:15 minority [1] 116:20 minute [2] 60:5 127:3 misconceiving [1] 17:14 misdefined [1] 42:23 misleading [1] 24:17 missing [1] 140:12 mistake [1] 109:12 Mistretta [2] 60:6 123:15 Mm-hmm [2] 29:21 103:5 mobile [3] 43:2,17,19 modern [6] 117:11 122:22 123:1 127:10 134:10 140:13 modest [1] 128:3 monetary [2] 8:3,4 money [34] 8:22 25:15 38:9 53:16 57:22 67:10,20 79:20 84:20,25 85: 1 103:16 106:24 108:25 114:22 117:14 126:13,15 133:19 141:24, 25 143:4 151:4,12 152:24 153:1 157:3 158:20 163:16 170:17 173: 19,21 174:25 175:14 moneys [1] 174:3 monkeyed [1] 104:9 monopolies [4] 49:7 50:11 72:16</p>	<p>100:15 monopolist [2] 49:13 50:9 monopoly [4] 69:19 73:15 77:5 100:1 Montana [1] 104:1 Montanans [2] 141:23 143:17 month [1] 141:2 monthly [1] 153:3 months [3] 89:17 128:7 146:16 morass [1] 132:15 morning [4] 4:4 65:8 145:10 149: 13 morphed [1] 14:6 most [17] 22:10 27:18,22 80:13 93: 14,21 96:15 103:1 122:25 138:10, 12 143:23 147:4 152:22,25 162: 20 166:1 mount [1] 149:24 move [3] 93:25 130:21 176:11 Ms [8] 15:24 21:12,12 38:23 45:15 58:3 69:5 127:5 much [44] 4:21 12:25 17:8 19:9,16, 16 25:19 33:25 34:5 41:13 48:17 49:24 61:5,5 63:18 64:13 67:20 75:17 76:18 96:5 103:7 108:5,9, 25 109:1 111:7 112:12 126:22 127:12 131:22,23 136:17,22 143: 4,16 144:2 150:4,9 154:18 158:5 167:12 173:15,22 178:24 multi-billion [1] 155:4 multi-factor [1] 64:4 murky [2] 52:9,13 mush [1] 22:7 must [14] 5:1,5 78:6 79:17 116:13 119:7 133:17 136:21 139:13 160: 18 164:14 172:25 174:22 175:11 Myers [1] 106:3</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nailed [1] 56:14 name [1] 94:10 named [10] 129:21 145:20 164:1,8, 12,19 165:2,25 166:4 167:4 narrow [2] 41:2 58:4 narrower [1] 40:23 narrowly [1] 157:19 nation [3] 138:22 144:13,15 national [12] 39:2,3 48:24 57:7 75: 8 88:18,22,23 127:14 134:3 155: 18 156:23 nationwide [1] 10:17 Native [1] 86:19 naturally [1] 149:7 nature [12] 12:24 14:4 39:21 55:24 61:25 64:10 81:9 112:3 116:6 117: 9 136:16 162:10 NBC [1] 148:24 Nearly [1] 20:11 neat [1] 51:1 necessarily [4] 90:13 121:3 165: 13 172:7 necessary [9] 45:19 56:8 62:11 68:22 89:20 136:11 153:24 158: 22 167:3</p>
---	---	--	--

Official - Subject to Final Review

<p>necessity ^[1] 45:20</p> <p>need ^[22] 17:12 46:4,16 58:16 67:7 90:18 106:25 109:23 111:8 120:25 121:3,5,8,24 122:9 124:22 150:17 151:5 154:4 156:24 160:12 173:3</p> <p>needed ^[4] 4:23 24:6 147:6 161:3</p> <p>needs ^[10] 23:9 86:9 110:10 123:19,19,20 133:10 173:6 174:5 177:9</p> <p>needy ^[6] 58:9,11,13,16 59:5,9</p> <p>Neither ^[1] 113:3</p> <p>network ^[4] 72:14 76:12 87:14 93:23</p> <p>networking ^[1] 76:13</p> <p>neutral ^[1] 29:25</p> <p>neutrality ^[1] 45:6</p> <p>never ^[7] 19:21 30:18 49:21 81:3 128:21 129:18 150:21</p> <p>new ^[15] 28:6 38:14 44:17 50:12 77:4 94:1 95:4 100:14 113:15 121:9 143:1 166:5 176:11 177:15,16</p> <p>newfangled ^[1] 115:19</p> <p>Newsom ^[4] 96:8 130:19 139:8 176:10</p> <p>Newsom's ^[1] 121:14</p> <p>nice ^[2] 6:18 87:10</p> <p>nine ^[1] 92:5</p> <p>nobody ^[4] 82:18 93:15 144:2 176:6</p> <p>non ^[3] 101:20 133:9 161:1</p> <p>non-delegation ^[43] 5:21,23 8:25 9:7 11:8 15:2,6 19:23 21:8 25:8,25 26:2 47:22 52:14,18 53:7 54:18 60:15 63:18 65:7 66:8 68:12 70:3,12 72:7 74:23 85:6 88:6 101:20 105:21 109:24 112:2,25 119:20 120:14 128:9 131:18 132:21 154:25 176:25 177:6,13 179:20</p> <p>non-discriminatory ^[5] 5:2 39:1 41:1 161:2 178:9</p> <p>none ^[8] 35:13,16,16 70:6 71:13 104:23 154:1 155:3</p> <p>nonetheless ^[1] 111:6</p> <p>nor ^[2] 70:7 113:3</p> <p>normative ^[1] 99:14</p> <p>North ^[4] 117:5,7 141:13,18</p> <p>Northern ^[3] 90:12,19 149:14</p> <p>notable ^[1] 21:14</p> <p>note ^[1] 84:11</p> <p>noteworthy ^[1] 170:13</p> <p>nother ^[2] 51:12 100:16</p> <p>nothing ^[2] 136:18 144:5</p> <p>notion ^[1] 139:1</p> <p>novel ^[4] 42:13 57:15 64:18 81:12</p> <p>novelty ^[2] 50:15 80:25</p> <p>number ^[22] 7:20 26:6 27:2 34:6,6 62:2 67:24 68:15,20 88:22 103:4,15 107:1,23 108:5 124:1,4,6,6 126:2,3 151:11</p> <p>numbers ^[1] 17:18</p> <p>numerical ^[8] 37:8 41:17,20,23 49:20 154:22 172:8 173:3</p> <p>numerous ^[1] 23:6</p>	<p style="text-align: center;">O</p> <p>object ^[2] 139:17 160:7</p> <p>objective ^[15] 10:9,9 12:17 27:18 67:7 101:24 112:5 123:21 126:7 135:23 143:12 163:24 172:6 173:16,21</p> <p>objectives ^[2] 67:1 68:10</p> <p>objects ^[2] 163:1,10</p> <p>obligation ^[3] 114:20,21 165:13</p> <p>obligations ^[2] 138:8 156:18</p> <p>observations ^[1] 110:8</p> <p>obvious ^[1] 93:22</p> <p>obviously ^[13] 9:21 39:14 57:4 60:13 61:4,6 72:22 94:17 105:9 123:12 124:10 139:4 143:10</p> <p>OCC ^[4] 38:2 48:19 62:3 134:9</p> <p>odd ^[1] 177:21</p> <p>off-premises ^[1] 43:2</p> <p>offenders ^[2] 74:21 95:18</p> <p>offense ^[2] 14:2 15:22</p> <p>offer ^[1] 129:17</p> <p>offered ^[1] 25:7</p> <p>offering ^[3] 14:19 61:3 118:21</p> <p>Office ^[2] 8:10 153:23</p> <p>officer ^[1] 19:25</p> <p>offices ^[1] 84:16</p> <p>offset ^[2] 97:2,4</p> <p>often ^[4] 34:15 52:4 64:8 94:13</p> <p>oftentimes ^[1] 38:4</p> <p>oil ^[2] 73:7 95:8</p> <p>okay ^[55] 14:16 18:18 23:15,21 31:7 35:8 36:1 39:3,12,16 41:8 42:24 45:13 49:10 51:15 53:25 54:8 58:22 60:4 63:6,19 73:4 74:3 76:24 77:11 79:20 88:14 97:11,14,15,23 98:1,1 101:13 105:1 106:14 118:13 119:11 123:22 127:18,23 128:19 135:10,24 140:25 149:9 162:5 163:19 166:8 168:12,25,25 169:2,17 172:16</p> <p>old ^[6] 40:9,13 95:5,6 113:16 114:24</p> <p>once ^[6] 60:7 67:14,14,15 77:21 164:12</p> <p>One ^[103] 13:17 17:3 18:20,20 20:16 21:19 22:1,10,25,25 25:11 27:15,19 34:25 35:9 37:6 39:13 41:2 45:5 46:22 47:3,21 49:18 51:20 53:20 54:5 56:20,24 58:15 59:22 60:24 64:10,14 65:22 68:25 71:10 73:24 76:23 77:22 78:8 82:19 88:16 89:3,15 92:7 93:14 95:2 98:21,21 101:18,19 102:9,11 105:1 106:13,23 107:9 110:8,18,20 114:13 115:4,11 117:23 119:22 123:11,13 127:3 128:21 129:22 132:20 134:8,9,11 138:2,12,13,14 139:13 140:11 144:17 145:21 147:5,23 149:6,14 151:14,24 154:21,22 155:13 157:11 158:15 161:11 162:15 167:25 168:7,11 174:10 176:22,23 177:18 179:17</p> <p>one-off ^[1] 133:1</p>	<p>ones ^[13] 7:20 8:7 22:3 37:22 76:6,8 115:6 148:8,23 152:4 164:17 166:23 169:15</p> <p>only ^[25] 4:22 9:3,6 29:17 30:8 31:9 45:14 47:10 64:21 65:16 67:21 69:25 70:21 91:9 110:12 115:13 116:12 119:7 125:10 128:4 134:5 144:8 160:12 165:18 175:11</p> <p>open-ended ^[1] 64:9</p> <p>opening ^[5] 114:10 117:19 141:21 143:5 172:9</p> <p>operate ^[3] 57:10 61:22 141:6</p> <p>operated ^[3] 91:23,24 141:10</p> <p>operates ^[2] 81:10 114:16</p> <p>operating ^[3] 93:17 97:3 100:19</p> <p>operation ^[1] 116:23</p> <p>operative ^[1] 59:10</p> <p>operator ^[1] 135:14</p> <p>opinion ^[6] 22:16 90:21 130:10 146:1,17 148:21</p> <p>opportunity ^[4] 67:10 94:16 120:13 146:25</p> <p>opposed ^[3] 12:20 80:4 131:24</p> <p>opposite ^[6] 66:1 95:20 112:16 145:1 149:1 158:1</p> <p>opt ^[1] 51:7</p> <p>option ^[1] 90:16</p> <p>options ^[4] 89:18,20 129:17 167:6</p> <p>oral ^[7] 1:21 3:2,6,10 4:8 69:7 111:14</p> <p>order ^[4] 72:6 97:2 129:23 158:7</p> <p>orders ^[1] 146:18</p> <p>original ^[1] 122:15</p> <p>originally ^[1] 10:13</p> <p>Origination ^[1] 75:22</p> <p>origins ^[1] 15:4</p> <p>other ^[87] 7:20 9:1,12 11:7,8 12:4 18:14 25:17 26:3 27:4,7,24 28:1 30:16 31:10 37:5 39:24 44:8 47:7 50:6 51:20,21 52:12 55:2,6,11,17 56:2,7 58:25 59:3,24 62:1 63:9,21 64:3,23 65:17 69:14 70:6,9 73:25 74:16,24 78:13 79:1,3,4 81:1,2 82:9 85:3 88:5,15 90:18 91:15 95:24 102:6 108:12 110:9 112:7 113:18 119:22 127:25 129:12,18 132:14 136:10 138:8,14 143:7 147:3,13 149:2 153:19 155:7 156:13 157:18 161:4,6 167:5 169:9,14 177:1 178:10 179:6,16</p> <p>others ^[5] 20:22 37:11 129:23 149:24 178:4</p> <p>otherwise ^[3] 11:11 37:14 98:13</p> <p>ourselves ^[1] 115:19</p> <p>out ^[64] 8:23 9:3 10:4 11:15 19:5 20:21 27:1,22 29:6,12 35:4 36:3 39:6,8 41:5 47:4 48:11 52:8 57:9,23 59:12 60:5 61:12 65:22 67:2,8,25 68:23 69:12 70:10 73:4 84:9 87:25 89:1,16 94:19 101:3 102:19 103:25 106:12 107:2,23 119:1 122:10 126:2 129:12,16 132:17 138:2 140:17 145:13 146:17 150:11,16 151:8,10 153:16,25 161:12</p>	<p>164:23 166:9 174:11,22 178:4</p> <p>out-of-control ^[2] 24:14 25:3</p> <p>outcome ^[1] 137:7</p> <p>outcomes ^[4] 120:20,24 122:11,13</p> <p>outer ^[1] 57:17</p> <p>over ^[12] 26:15 42:14,16 55:22 68:10 71:20,24 72:3,13 87:16 103:20 176:21</p> <p>overcame ^[1] 76:13</p> <p>overemphasizing ^[1] 50:15</p> <p>overhaul ^[2] 114:9,11</p> <p>overhauled ^[1] 144:24</p> <p>overlapping ^[1] 65:20</p> <p>overriding ^[1] 175:18</p> <p>override ^[2] 70:7 120:18</p> <p>overruled ^[3] 78:10 82:18 96:7</p> <p>overruling ^[2] 70:10 90:2</p> <p>overt ^[1] 152:9</p> <p>overturn ^[5] 35:18,20 36:3 56:10 121:3</p> <p>overturning ^[5] 9:5 36:8,12 89:8 113:2</p> <p>overwhelmingly ^[1] 109:16</p> <p>own ^[11] 18:3 95:1 97:2 98:20 106:6 114:19 117:24 127:15 168:20 178:24 179:5</p> <p style="text-align: center;">P</p> <p>p.m ^[1] 180:4</p> <p>PAGE ^[9] 3:2 37:9 48:2 68:15 71:18 88:14 96:23 127:4,21</p> <p>pages ^[13] 7:21 8:7 31:1 48:17 87:21 92:18 94:6 114:18 128:1 132:11 133:25 148:8 155:3</p> <p>paid ^[3] 50:20 151:22 152:3</p> <p>pan ^[1] 26:25</p> <p>Panama ^[3] 73:5 74:19 95:7</p> <p>panoply ^[1] 56:2</p> <p>paradigm ^[3] 97:6,7,9</p> <p>parameter ^[1] 42:20</p> <p>parameters ^[10] 10:9 22:9 34:9 39:24 43:13 61:7 62:23 63:9 70:23 71:22</p> <p>paraphrase ^[1] 96:7</p> <p>parity ^[1] 12:9</p> <p>Park ^[2] 88:18 89:2</p> <p>parks ^[2] 88:22,24</p> <p>part ^[22] 32:6 50:15 75:3,13 76:4 77:7 78:19 81:17,17,17 87:19 89:10 90:21 96:15 97:16 115:3 122:2,15 130:10 137:25 146:5 171:21</p> <p>participate ^[2] 38:8 67:18</p> <p>particular ^[28] 7:11 11:6,13 12:1,13,25 14:21 20:18 26:8 39:11 40:15 41:5,7 52:5 67:24 73:3 85:21 88:9 91:10 93:21 101:22 120:2 126:7 134:23 147:20 154:13 163:7 177:8</p> <p>particularly ^[4] 48:9 64:15 113:15 132:9</p> <p>parties ^[14] 8:12 91:10 98:13 113:4 149:17,19 164:2,12,19 165:2,17,25 166:4 167:4</p>
--	---	---	--

Official - Subject to Final Review

<p>parts ^[3] 7:4 36:17 178:10</p> <p>party ^[9] 13:23 15:9,10,21 16:9,17 38:1 97:2 110:21</p> <p>pass ^[3] 13:21,25 17:3</p> <p>pass-along ^[1] 14:11</p> <p>pass-on ^[1] 63:13</p> <p>passed ^[3] 18:1 38:24 110:20</p> <p>passes ^[4] 13:24 16:17 23:5 105:11</p> <p>passive ^[1] 112:24</p> <p>past ^[12] 12:6 22:5,8 95:17,17 120:24 121:7 150:25 164:24,24 166:4,23</p> <p>path ^[3] 22:1 177:12 180:1</p> <p>paths ^[3] 21:25 35:7 60:22</p> <p>patron ^[2] 43:21,23</p> <p>pattern ^[1] 64:11</p> <p>PAUL ^[3] 2:5 3:7 69:7</p> <p>pay ^[9] 7:15 38:25 70:2 111:20 127:12 151:20 152:4 154:8,13</p> <p>paying ^[5] 39:1 48:18 80:8 153:4,13</p> <p>payment ^[1] 52:4</p> <p>peak ^[1] 19:8</p> <p>peg ^[1] 94:25</p> <p>Pennsylvania ^[1] 31:20</p> <p>people ^[36] 10:16 27:23 28:11 32:15 33:11 43:10 61:11 68:17 86:20 87:16 91:1 93:24 94:3 96:1 103:2 104:17 116:5 125:3 135:15,24 136:7,7 140:9 141:3,13,14,18,25 142:2 143:2,23 145:14 153:16 158:24 166:5 177:8</p> <p>per ^[2] 38:6 141:2</p> <p>perceive ^[1] 104:8</p> <p>percent ^[12] 20:10,12 24:15,15 26:21 29:6 31:21 39:3 57:7 103:10,12 109:10</p> <p>percentage ^[1] 24:21</p> <p>perfectly ^[2] 64:6 178:22</p> <p>perform ^[1] 18:9</p> <p>performing ^[2] 54:23 62:5</p> <p>perhaps ^[2] 147:5 162:2</p> <p>permitted ^[2] 154:15,16</p> <p>person ^[1] 32:22</p> <p>pertinent ^[1] 137:20</p> <p>perverse ^[3] 8:24 56:8 65:17</p> <p>perversity ^[1] 110:9</p> <p>Petitioners ^[16] 1:5,12 2:4,6 3:4,8,15 4:9 69:8 113:5,14 114:5,8 132:4 150:15 176:19</p> <p>phenomenon ^[1] 101:11</p> <p>phone ^[9] 4:17 29:17,20 62:16,18,19,20,21 153:3</p> <p>phones ^[2] 27:25 143:20</p> <p>phrase ^[3] 123:17 141:22,23</p> <p>phrases ^[1] 157:6</p> <p>pick ^[8] 28:2 65:24 66:9 117:22 169:10,15</p> <p>picking ^[3] 65:23 107:1,23</p> <p>picks ^[1] 55:18</p> <p>picture ^[2] 145:17 146:20</p> <p>piece ^[1] 99:3</p> <p>pipeline ^[8] 5:16 19:3 26:20 50:19,</p>	<p>20 90:12,19 149:14</p> <p>pipelines ^[1] 50:21</p> <p>pizza ^[3] 135:14,15,24</p> <p>place ^[4] 87:11 93:14 120:4 149:23</p> <p>places ^[3] 31:16 66:23 173:12</p> <p>plain ^[1] 137:16</p> <p>plainly ^[1] 74:22</p> <p>plan ^[2] 62:19,21</p> <p>plans ^[1] 62:16</p> <p>plausibly ^[1] 52:15</p> <p>play ^[5] 81:5 99:4 129:16 150:11 164:22</p> <p>plays ^[1] 166:9</p> <p>please ^[6] 4:11 22:22 38:2 69:10 111:17 163:16</p> <p>plenary ^[1] 57:8</p> <p>plenty ^[1] 158:11</p> <p>plus ^[3] 5:6 73:16 162:3</p> <p>point ^[42] 8:23 11:15 14:8 20:21 29:6,16 32:17 43:5 47:25 48:11 49:23 51:24 73:13 83:10 93:6 98:9 100:25 106:21 107:19 110:23 115:4 116:10 117:18 124:2 125:25 136:3 137:19 141:20 142:21 143:7 144:6,10 155:7 157:5 159:25 162:19 164:1 166:11 171:21 172:14 174:17 176:23</p> <p>pointed ^[5] 37:9 47:4 61:11 87:25 178:4</p> <p>pointless ^[1] 64:21</p> <p>points ^[2] 18:19 52:8</p> <p>policies ^[5] 136:25 160:23 161:1 167:23 169:12</p> <p>policy ^[24] 4:13 5:11 20:1 23:10 31:23 77:18 85:14,18,25 101:22 107:19 125:7,9,10,13,13 126:4,8 133:9 169:25 173:9 174:5,8 175:11</p> <p>policy-making ^[1] 12:12</p> <p>political ^[1] 111:3</p> <p>popped ^[1] 28:8</p> <p>popular ^[6] 109:16 110:13 152:6 175:19,20,20</p> <p>popularly-enacted ^[1] 110:6</p> <p>populations ^[1] 136:8</p> <p>portion ^[1] 28:25</p> <p>posited ^[1] 40:20</p> <p>position ^[21] 16:19 51:20,21 53:2 77:13 105:10 118:12,18 123:3,6,18 124:5 127:6 129:10 132:7 139:12 167:20 174:13 178:19 179:10,15</p> <p>possessing ^[1] 14:16</p> <p>possibility ^[1] 84:25</p> <p>possible ^[5] 10:15 23:3 94:14 146:6 158:5</p> <p>possibly ^[2] 158:6 177:2</p> <p>post ^[3] 84:15,15,16</p> <p>post-founding ^[1] 133:13</p> <p>postal ^[1] 127:13</p> <p>potential ^[2] 145:21 149:10</p> <p>potentially ^[2] 58:14 81:6</p> <p>Poultry ^[5] 72:25 98:18 160:24,24 169:11</p>	<p>poverty ^[2] 141:4,14</p> <p>power ^[56] 13:4,18,21 14:12,15,17,24 15:8,19 17:4,6,8 31:17 32:1,9 37:23 46:13 53:9,14,16 54:20,24 56:9 57:21 63:23 64:2 65:11,21,22,25 66:3,4,4 78:16 80:16,20 84:12,12,14,15,16,17,18 85:4 112:3 113:11 122:25 123:14 132:23 158:5 162:10 171:22 172:4 174:5 175:10,23</p> <p>powers ^[10] 9:4 27:4 65:10,20 66:5 106:2,6 121:16 177:3,16</p> <p>practical ^[1] 149:11</p> <p>practice ^[2] 36:2 52:9</p> <p>pre-1996 ^[2] 13:3 114:3</p> <p>pre-history ^[1] 94:8</p> <p>precedent ^[7] 35:20 36:3,13 82:18 90:2 121:4 149:15</p> <p>precedents ^[13] 5:19 22:5 34:24 35:14 70:5 78:9 82:2,6 86:11 89:8 106:9 120:18 176:25</p> <p>precise ^[4] 5:12 22:11 131:23 154:24</p> <p>precisely ^[1] 122:7</p> <p>predated ^[1] 92:22</p> <p>preexisting ^[4] 74:21 112:17 144:23 161:10</p> <p>preferred ^[2] 89:22 90:5</p> <p>prefers ^[1] 176:3</p> <p>premise ^[4] 40:5 166:15,18 169:3</p> <p>prerogative ^[1] 171:5</p> <p>prescribed ^[2] 4:25 6:22</p> <p>prescribes ^[1] 9:22</p> <p>prescribing ^[1] 11:18</p> <p>present ^[1] 11:1</p> <p>presentation ^[1] 14:20</p> <p>preservation ^[1] 167:23</p> <p>preserve ^[2] 93:14,18</p> <p>preserves ^[1] 177:3</p> <p>preserving ^[1] 9:24</p> <p>president ^[9] 26:6,10 53:13,18 54:16,22 55:5 131:8 154:15</p> <p>President's ^[1] 131:16</p> <p>press ^[1] 5:20</p> <p>pressing ^[1] 145:9</p> <p>presumably ^[1] 14:16</p> <p>pretty ^[17] 12:11 20:7 24:16 46:22 48:9 52:13 57:10 82:13 96:25 105:3,25 106:2 125:24 128:3 158:21,21 159:1</p> <p>prevail ^[2] 174:23,24</p> <p>prevalent ^[1] 64:12</p> <p>prevent ^[1] 25:13</p> <p>previous ^[1] 61:1</p> <p>previously ^[1] 72:12</p> <p>price ^[1] 12:9</p> <p>prices ^[2] 12:8 19:12</p> <p>principal ^[1] 108:24</p> <p>principally ^[1] 108:3</p> <p>principle ^[21] 21:23 22:8 34:21 73:23 117:23 120:6,23 121:11 123:11 127:16 134:5,21,23 148:19 163:7 169:23 170:7,9 174:14,21 175:6</p>	<p>principles ^[36] 6:8,10,12 34:12,18,22 35:3,12 36:8 44:17,23 52:20 63:23 64:3,23 70:3 73:24 96:19 101:5 112:13 115:5 136:20 137:1,11,16,23 138:3,11 139:6 140:3 160:25 163:4 167:17,24,25 168:4</p> <p>prior ^[4] 113:2 114:12 122:12 142:21</p> <p>priorities ^[1] 179:6</p> <p>private ^[15] 5:23 13:23 15:2,11,21 16:9,17 18:9 19:2,10 75:3 99:3,7 113:4 131:17</p> <p>privilege ^[1] 48:19</p> <p>probably ^[7] 55:24 94:5 95:4 102:16,25 105:16 142:14</p> <p>problem ^[49] 8:25 11:2,23 14:12 15:8,11 16:12 41:4 43:10,11 48:16 52:7 54:17,22 55:3,3 57:16 62:8 64:18 69:11 73:7 74:23 75:4 81:4 95:4,8,9,18,19 103:7 106:6 107:23 108:11 110:24 119:20 123:4 146:12 161:22 162:1 163:21 168:2,9 169:6,22 170:4 177:6 179:3,12,20</p> <p>problematic ^[3] 14:24 72:20 78:18</p> <p>problems ^[3] 47:22 168:8 176:21</p> <p>proceed ^[1] 36:11</p> <p>proceeded ^[1] 100:2</p> <p>proceedings ^[1] 38:7</p> <p>process ^[4] 71:9 77:7 100:15 150:10</p> <p>producers ^[1] 19:12</p> <p>production ^[1] 26:11</p> <p>Professor ^[2] 133:20 174:1</p> <p>proffered ^[1] 118:22</p> <p>profit ^[2] 49:11 73:17</p> <p>program ^[76] 6:21 20:12 24:14,17 25:3 43:13,17 44:10 48:7 51:6,8 66:21 67:6,20 70:8,24 71:9,16 72:5,8 83:14,25 84:4 86:16,18,21,23 91:23 92:9,12 93:17,20 96:1 98:14 101:8 103:21,23 104:11,25 105:10 106:25 108:13,14,15 109:4,15 113:16 115:15,16 116:2,7,8,23 117:6,9,15 118:8 124:20 129:13 134:17 140:16 141:10,12 142:11 147:4 150:14 152:6 155:5 156:8,11 166:17 175:15 177:9 178:10,11 179:8</p> <p>programs ^[42] 4:20,24 6:15,21 7:10 21:6,11 26:22 37:24 38:3,4,15 39:22 43:7 47:8 55:11,17 58:8 59:8 61:16,22 62:12,24 67:2,6,19 68:8 69:1 70:9 71:12 82:11 90:3 92:5,8 105:12 143:8 155:10,13,24 156:1,16 175:21</p> <p>prohibits ^[1] 113:10</p> <p>project ^[1] 103:25</p> <p>projections ^[2] 17:17 112:22</p> <p>prolong ^[2] 22:20 166:14</p> <p>promise ^[1] 87:18</p> <p>promote ^[3] 4:17 26:10 109:25</p> <p>proof ^[4] 44:24 128:5 130:2,6</p>
---	--	---	--

Official - Subject to Final Review

<p>proper ^[3] 32:16 120:24 175:8</p> <p>properly ^[1] 32:23</p> <p>proposed ^[2] 5:25 18:5</p> <p>proposing ^[1] 19:12</p> <p>proposition ^[1] 9:9</p> <p>proscribed ^[1] 154:3</p> <p>prosecutor ^[1] 36:22</p> <p>protection ^[3] 45:19 54:3 79:1</p> <p>protections ^[2] 53:21 54:12</p> <p>providable ^[1] 117:13</p> <p>provide ^[19] 13:5 24:7 43:2 58:9, 10,12,15,17,23 59:5,9 61:6 62:18 78:25 82:12 106:9 108:16 139:2 158:22</p> <p>provided ^[8] 24:8 62:12 63:12 88:21 138:21 139:12 144:12 161:5</p> <p>providers ^[10] 5:7 47:2,10,12 86:25 87:2,4 96:2,3 151:20</p> <p>providing ^[10] 12:25 43:5 62:25 97:3 109:6 140:16,25 141:12 172:18 173:22</p> <p>provision ^[9] 24:3 27:11 38:13 45:2,3 47:21 64:19 93:15 149:6</p> <p>provisions ^[7] 37:7 47:7 127:11,12 149:2 161:2,6</p> <p>public ^[22] 22:13 45:20 49:7 64:13 69:23 101:4,21 112:9 115:23,24 117:12,12 119:3,4 133:19 136:12 157:3,7 171:4 172:17,21 174:3</p> <p>publish ^[1] 18:3</p> <p>publishes ^[1] 6:2</p> <p>pudding ^[3] 128:6 130:2,7</p> <p>punch ^[2] 96:9 121:14</p> <p>pure ^[3] 82:7,25 85:16</p> <p>purpose ^[5] 80:11 94:3 125:14 152:13 155:6</p> <p>purposes ^[7] 25:25 26:20 53:6 63:18 88:6 132:21 157:2</p> <p>pursuant ^[1] 99:21</p> <p>pursue ^[2] 6:23 23:10</p> <p>pursuing ^[2] 46:5,14</p> <p>push ^[1] 144:21</p> <p>pushback ^[1] 18:20</p> <p>put ^[19] 7:14 30:19 37:14 79:23 80:9 93:23 97:6 98:6,10,11 101:9 106:20 110:11 126:7 150:15 163:20 168:12 170:1 172:23</p> <p>puts ^[2] 113:24 117:2</p> <p>putting ^[1] 90:2</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>QP ^[1] 132:5</p> <p>qua ^[3] 102:25 103:2 133:9</p> <p>qualify ^[1] 55:24</p> <p>qualitative ^[13] 7:18 8:20 24:5 26:9 41:19 59:12 61:17 62:2,9 66:17 68:3,4,9</p> <p>quality ^[2] 29:8 168:4</p> <p>quarter ^[2] 17:25 20:23</p> <p>quarterly ^[3] 17:20 146:2 150:10</p> <p>quarters ^[2] 164:16 166:22</p> <p>question ^[39] 12:7 15:18 17:7 20:18 43:23 48:7 52:16 55:20 59:11,17 62:21 63:20 89:19 90:5 104:7</p>	<p>105:2,3 107:11 115:3 120:10 123:17 124:7 128:23 129:5,9 130:3 131:7 132:14 137:25 139:16 145:17 153:18 163:11 168:16,17,21 169:18 174:11 178:16</p> <p>questionable ^[1] 134:11</p> <p>questioning ^[1] 106:18</p> <p>questions ^[11] 6:6 32:12 53:15 55:19 63:4 70:14 78:15 101:19 113:13 144:18 157:20</p> <p>quintessential ^[1] 112:10</p> <p>Quite ^[10] 40:7 44:20 76:9 81:20 100:6 121:13 131:2,12 140:8 145:7</p> <p>quote ^[3] 120:13,15 153:24</p> <p>quote/unquote ^[1] 57:3</p> <p>quoted ^[2] 122:3 138:1</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>radio ^[2] 10:17 28:2</p> <p>rainy ^[2] 6:18 25:14</p> <p>raise ^[26] 8:17,21 9:2 24:6 52:2 53:16 67:10 80:3 108:5,9 112:9,12 114:21 124:15 125:15 126:13 136:18 154:16 157:3 158:19 163:16 171:25 173:19 175:14 177:4 179:1</p> <p>raised ^[10] 27:11 41:13 67:14 72:2 109:22 112:5 122:24 125:15 143:3 171:4</p> <p>raiser ^[1] 92:10</p> <p>raises ^[2] 21:5 81:13</p> <p>raising ^[21] 6:14,25 7:2 24:1 25:14 68:21 70:17 78:20,23 79:18 92:12 108:4 133:19,21 159:9 162:3 172:17 173:21 174:1,3 179:14</p> <p>ranchettes ^[1] 141:23</p> <p>range ^[3] 25:17 26:24 61:13</p> <p>rapid ^[1] 10:16</p> <p>rate ^[37] 5:10 7:11 11:8 12:8 18:5 24:16 26:8 41:24,25 42:1 49:6,6,7,20 50:9 53:17 55:11,13,17 57:1 69:19,19,20 71:25 72:12 83:18 85:17 98:7 99:25 102:3,6,10,25,25 103:2,2 111:21</p> <p>rate-making ^[3] 12:14 77:5,7</p> <p>rate-setting ^[2] 12:5 49:17</p> <p>rates ^[36] 8:14 13:1,5 29:10 31:16 39:6 43:8 44:12 47:12,16 56:23 62:3,4 71:4,6,7 73:14 87:2,3 95:22,25 96:3 100:22 104:3 108:16 113:4 116:1 117:13 118:6,7 119:5 136:14 140:11 168:6 178:9 179:4</p> <p>rather ^[6] 53:12 83:6 89:12 120:8 146:13 151:20</p> <p>ratio ^[1] 154:5</p> <p>rational ^[2] 103:1 106:23</p> <p>reach ^[1] 57:22</p> <p>reached ^[1] 166:10</p> <p>react ^[1] 164:7</p> <p>read ^[10] 47:6,18 53:22 104:16 116:24 118:20 138:7 158:4 160:11,15</p> <p>readily ^[1] 146:13</p> <p>reading ^[8] 25:12 47:19,20 115:8</p>	<p>117:1 118:9 158:2 162:8</p> <p>real ^[13] 7:17 25:22 30:8,11 31:10 57:19 70:22 71:11 115:15 117:25 147:6 163:23 177:20</p> <p>realign ^[1] 120:13</p> <p>realignment ^[1] 120:19</p> <p>realize ^[3] 129:23 146:4 159:11</p> <p>really ^[46] 14:3 18:14,23 26:2 37:18 73:13 76:18 77:16 78:23 79:12 81:24 88:12 90:18 91:18 95:6 99:2 100:23 102:9,24 103:3 107:3,11 108:4,8 109:11 110:3,13 114:4 117:14 121:24 122:8 126:3 147:1 152:4 156:21 157:22 165:8,14 166:1 172:16 173:15 175:24 177:25,25 178:19 179:14</p> <p>reason ^[20] 13:15 32:4 33:5,5 67:11,13 72:15 76:4 81:17 83:4 104:8 109:23 110:12 121:10 122:1 133:16,23 152:13 154:17,17</p> <p>reasonable ^[24] 4:15 7:24 10:19 12:8,10 13:5 29:9 44:11 49:5,8,11 59:23 73:14,17,21 118:9 119:4 136:13 138:19,23 140:11 154:8 163:18 168:5</p> <p>reasonably ^[5] 71:3,4 87:3 95:22 108:16</p> <p>reasons ^[8] 13:15 25:11 27:15 53:20 78:8 133:4 148:10 178:2</p> <p>Rebellion ^[1] 31:22</p> <p>REBUTTAL ^[3] 3:13 176:17,18</p> <p>receive ^[3] 20:11 32:24 142:1</p> <p>received ^[1] 32:15</p> <p>receives ^[2] 15:9,11</p> <p>receiving ^[1] 20:14</p> <p>recent ^[1] 112:20</p> <p>recipient ^[3] 48:25 127:17 134:7</p> <p>recipients ^[1] 51:11</p> <p>recognizable ^[1] 102:22</p> <p>recognize ^[1] 140:1</p> <p>recognized ^[1] 11:7</p> <p>recognizing ^[1] 89:12</p> <p>recollection ^[1] 109:10</p> <p>recommend ^[1] 90:15</p> <p>recommendation ^[1] 17:19</p> <p>recommendations ^[4] 14:25 18:23,24 55:2</p> <p>recommended ^[1] 33:4</p> <p>record ^[3] 18:11,13 19:15</p> <p>recur ^[1] 178:6</p> <p>red ^[1] 97:22</p> <p>redefine ^[3] 112:14 139:19 144:25</p> <p>redefining ^[1] 34:22</p> <p>reduce ^[1] 39:2</p> <p>reducing ^[1] 57:7</p> <p>refer ^[1] 155:19</p> <p>reference ^[1] 134:24</p> <p>referred ^[2] 128:12 133:20</p> <p>Refining ^[3] 73:5 74:19 95:8</p> <p>reflected ^[1] 106:23</p> <p>reflection ^[1] 71:21</p> <p>refrain ^[1] 43:9</p> <p>refreshingly ^[1] 109:18</p> <p>regime ^[7] 50:12 77:5 114:3,11,23,</p>	<p>25 155:6</p> <p>regions ^[2] 138:22 144:13</p> <p>Register ^[1] 18:3</p> <p>regulate ^[3] 40:3 69:22 113:21</p> <p>regulated ^[13] 8:12 37:25 48:20 49:14 73:15 96:11,12,18 97:2 98:13,19 100:1 154:7</p> <p>regulation ^[8] 40:1 69:19,20 72:12,15 80:21 137:10 154:3</p> <p>regulations ^[3] 34:10 40:4 128:12</p> <p>regulatory ^[7] 11:9,13 48:22 57:14 100:24 157:13 158:10</p> <p>reimbursing ^[1] 4:19</p> <p>reins ^[2] 22:6 146:25</p> <p>reject ^[1] 77:24</p> <p>rejected ^[5] 5:22 35:14 77:4 85:7 128:8</p> <p>related ^[3] 50:8 155:24,25</p> <p>relatively ^[3] 71:24 127:10 128:10</p> <p>relevant ^[5] 50:16 93:7 112:4 129:4 166:1</p> <p>reliance ^[2] 5:25 70:8</p> <p>relied ^[1] 130:3</p> <p>relief ^[9] 20:24 91:9 129:20 145:20 149:17 164:1,9,12,19</p> <p>reluctant ^[1] 90:15</p> <p>rely ^[1] 130:13</p> <p>relying ^[1] 171:7</p> <p>remand ^[1] 146:3</p> <p>remarkably ^[1] 71:20</p> <p>remedial ^[1] 90:14</p> <p>remedy ^[1] 146:6</p> <p>Remember ^[6] 36:21 114:5 115:5 129:23 151:21 160:6</p> <p>removal ^[3] 53:21 54:3,12</p> <p>rendered ^[1] 48:8</p> <p>rep ^[1] 19:5</p> <p>repeatedly ^[2] 75:9 128:8</p> <p>repetition ^[1] 91:11</p> <p>repetitive ^[1] 178:5</p> <p>reply ^[11] 7:21 21:14 31:2 48:3 71:18 87:22 127:4 134:1 138:1 148:9 178:20</p> <p>report ^[1] 21:5</p> <p>reported ^[1] 79:24</p> <p>reports ^[3] 17:24 20:6 142:8</p> <p>representation ^[2] 111:19 171:2</p> <p>republic ^[1] 81:20</p> <p>require ^[4] 9:5 45:5 56:10 147:23</p> <p>required ^[4] 133:8 134:3 135:6 179:8</p> <p>requirement ^[2] 135:5 170:20</p> <p>requirements ^[3] 83:13,15 104:10</p> <p>requires ^[3] 21:21 26:14 153:15</p> <p>RESEARCH ^[3] 1:7,14 4:6</p> <p>resembles ^[1] 5:15</p> <p>reservations ^[1] 86:20</p> <p>Reserve ^[2] 37:10 154:5</p> <p>residential ^[7] 10:11 27:21 28:14 115:17,21 116:20 119:2</p> <p>resolve ^[1] 132:5</p> <p>respect ^[28] 12:6 15:25 18:21 20:16 21:6 23:6 24:21 25:3 26:10,18 32:13 43:6 44:8,16 47:9,11,14 48:</p>
--	---	---	---

Official - Subject to Final Review

<p>12 49:6 54:15 63:4 68:6 71:1 75:7 82:10 100:4 178:8,11 respectfully [5] 141:21 142:5 156: 19 160:16 161:13 respects [1] 23:6 respond [4] 118:4 127:3 129:19 144:6 Respondent [2] 14:19 177:19 Respondents [20] 1:8,15 2:8 3:12 5:18,20 13:7 17:14 20:21 24:13 35:17 66:11 89:11 111:15 129:21 145:20 167:2 176:21 177:24 178: 22 Respondents' [3] 5:23 178:19 179:15 response [4] 106:18 145:19 165: 21 166:6 responses [2] 155:2 164:10 responsibilities [2] 68:23 153:25 responsibility [1] 176:6 rest [9] 9:2 44:23 46:3 116:6 117:3, 8,10 136:10 138:7 restraints [2] 40:16 84:2 restriction [2] 13:19 65:14 restrictions [2] 83:7 177:5 restrictive [1] 65:25 result [1] 147:20 resulting [1] 70:4 reticulated [1] 9:22 return [4] 136:19 168:21 174:20 176:9 revamp [1] 70:12 revenue [22] 5:3 6:25 7:2 8:17 23: 25 52:2 68:17,22 70:17 78:17,20 79:18 80:4 92:10,12 108:4 112:9 133:21 171:4 172:17 174:1 179: 13 revenue-raising [10] 6:9 25:8 37: 7 82:7,10,25 85:16 113:22 172:22 177:1 revenues [8] 17:25 24:18,24 25:1 71:19 72:2 78:24 154:16 reverse-engineered [1] 177:17 review [3] 20:17 23:3 91:12 reviewed [1] 33:3 reviews [2] 6:1 18:2 revise [1] 18:4 revisit [3] 5:18 120:25 121:6 revitalize [1] 36:7 revitalizing [1] 177:13 ribbon [1] 19:19 rid [1] 72:16 riot [2] 4:13 91:25 risk [4] 55:12 90:3 175:18 177:11 road [3] 81:14 132:2 133:24 roads [1] 84:16 ROBERTS [35] 4:3 9:10 10:23 11: 20,25 22:21 23:22 27:9 29:14 36: 16 38:18 51:16 58:1 64:25 69:4 84:5 86:1 92:3 96:21 101:16 106: 15 111:11 130:24 131:1,6,12,21 145:3 152:20 157:10 161:16 167: 13 170:21 176:15 180:2 robust [1] 109:24</p>	<p>Rock [1] 12:6 role [1] 80:25 rooting [1] 66:8 rough [1] 108:19 roughly [1] 93:1 round [5] 102:1,1 167:18,18,18 Royal [1] 12:6 rubber [1] 21:3 rubber-stamped [1] 18:15 rule [21] 5:21,21 9:4,7 50:17 66:1 83:11 86:21 99:11 112:5 133:12 148:19,22 170:25 172:6 173:7 174:22,24 176:23,24 179:12 ruled [1] 167:1 rules [8] 22:14,18 29:25 43:12 112: 6 143:12 146:5 169:9 ruling [3] 113:12 164:4,4 run [9] 16:12 19:7 65:15 91:9,25 106:25 130:21 134:16 169:6 running [7] 4:12 7:10 26:22 130: 15 156:15 174:11 179:20 rural [33] 5:6 47:11 71:2,6,7,12,13 86:17,24 87:2,9,10 93:4 95:23 96: 1 103:20,22 104:3,3 108:17 116:4 117:5,7 136:7 141:2,4,6 142:3 143:17 145:14 158:25 173:12 178: 11 <hr/>S<hr/> safety [8] 5:16 64:13 115:24 117: 12 119:4 136:12 140:14 158:23 sake [1] 126:2 sale [1] 58:7 sales [1] 59:8 same [21] 15:3 32:8,8 40:9,19,23, 23 48:16 73:23 78:14 87:2,4 92: 25 96:2,4 98:19 114:22 130:20 132:22 156:5 168:23 sanction [1] 99:21 SARAH [5] 2:2 3:3,14 4:8 176:18 satisfied [1] 88:9 satisfies [1] 23:18 satisfy [1] 158:20 saw [2] 111:6 128:17 saying [42] 7:9 12:21 17:16 24:14 36:6 38:2,24 46:18,20 50:4,4,5,17 56:6 75:21 99:7 109:12 116:15 122:21 124:17,25 126:15 127:20 132:20 135:3 137:2,22 138:2,9 141:24 143:1 150:13 153:8 158:3 166:15,21 167:7,21 171:1 174:15 175:13 177:4 says [40] 19:21 32:6 33:2,15 45:17 46:23 60:11 72:25 80:2,4 81:10 93:16 101:7 106:3 110:19 112:21 114:5 117:6 120:12 123:10 124: 13 132:15 134:25 136:24 138:20 139:11,22 144:11 153:5 156:21 160:11 161:25 168:8,19 171:24 172:16 173:10,20 174:22 175:22 Scalia [4] 60:6 105:22 111:5 123: 15 Schechter [4] 72:25 98:18 160:23 169:11</p>	<p>scheme [27] 5:15 6:13 8:21 9:22 11:4 13:3 16:24 25:12 29:11 39: 11 40:15 41:5,7,12 47:19 56:9 59: 1 61:9,25 62:9 63:9,15,16,21 64:9 82:8 178:5 schemes [3] 7:20 25:17 37:5 scholar [1] 141:24 school [3] 43:3,7 47:15 SCHOOLS [10] 1:10 5:7 42:25 44: 2 47:2,9 71:13 86:22 95:24 144:8 scope [4] 43:14 84:4 104:24 120:4 score [2] 17:20 53:1 se [1] 38:6 search [1] 141:22 seat [1] 19:22 SEC [1] 63:25 Second [15] 4:18 14:5 87:18 89:21 91:8 95:7 110:17 115:3 124:2 131: 22 133:8 162:5 164:15 169:18 177:19 Secretary [1] 19:1 Section [14] 4:12 9:21 10:1,5,13 11:16,17 80:17 82:5,5 86:5 117: 19 177:20 178:6 secure [2] 40:24,25 Securities [1] 63:24 see [20] 33:5 44:13 61:1 63:16 66: 19 71:25 75:17 81:6 92:1 103:6,7 105:4 109:16 111:1 113:25 114: 18 137:5,7 143:4 175:18 seem [8] 9:8 24:20 96:24 107:21 108:11 123:6 156:22 159:16 seems [12] 15:7,12 65:13 81:7,12 119:16 125:23 126:18,19 159:3 171:7 179:15 seen [1] 62:7 self-interested [1] 98:14 Senate [2] 109:11 151:9 send [1] 135:14 sense [23] 26:15 27:5 37:6,21 38: 12,16 54:2,13 76:20 83:2 95:1 106:4,5 108:1,19 125:4 143:8 150: 11 169:13 172:2,8 173:4 175:20 senses [1] 8:24 sentence [3] 91:17,21,21 separate [6] 17:6 54:17 65:19 156: 10 161:21 162:3 separately [1] 16:7 separation [5] 9:4 56:9 106:2,6 177:3 serious [1] 65:10 seriously [1] 79:7 serve [1] 4:20 service [77] 4:16,17,20,23 5:10 6: 21 9:18,25 10:4,6,14,18,24,25 11: 5 13:5 17:18 24:7 27:17 28:5 29: 20 38:9 42:11 46:25 51:8 52:5 62: 14,17 67:22 69:17 70:24 71:22 76: 10 77:15,20,21 78:17 80:5 83:8, 17 85:23 87:13 88:18 89:2 92:13 93:4,4,11 97:3,4 99:20 100:21 101:2 103:17 108:22 109:1 111: 20 112:15 113:19 114:6 116:16 117:16 124:13 126:9 128:18 129:</p>	<p>1 137:1 139:18,19 147:1 153:4,6 160:8 167:17,24 173:13,22 services [54] 4:15 10:7 24:9 25:6 27:12,12 28:7 29:8,17 30:3,6,8 42: 6,8,9 44:1,12 46:5,24 47:1,5,13,16 48:8 62:23,25 63:11 71:4 82:11, 15 87:17 88:21 95:22 104:3 108: 16 109:7 116:5 117:3,9 135:6 136: 9 138:21 141:5,13,17 143:22 144: 7,12 156:16 158:22,22,24 168:4 172:18 set [29] 9:25 26:7,20 30:24 31:15 34:7 51:12 56:23 67:2,8 112:6 113:4 122:23 124:10 125:7,13 126:3,8 129:15 137:23 141:11 143:12 157:2 172:5,13 174:5,22 175:11 177:8 sets [4] 34:10 112:4 125:8,10 setting [6] 11:8 49:6,7 50:9,12 113:8 seven [1] 83:23 sever [1] 64:20 severability [1] 64:19 several [1] 170:24 sex [1] 74:21 SG's [1] 137:6 shall [7] 29:24 136:25 167:22 174: 23,24 178:3,7 shall's [1] 178:13 shift [1] 21:13 SHLB [1] 71:18 shouldn't [10] 15:10 18:10 32:2 45:8 90:20 91:4 120:8 143:24 152: 12 158:13 shows [3] 45:1 71:19 135:16 shrinking [1] 72:1 shrunk [1] 102:11 side [15] 25:8 30:16 55:6 70:6 72:5 81:11 94:20 110:9 113:20,23 129: 12,18 132:14 147:3 155:7 sides [2] 51:20,21 sides [1] 158:14 significant [1] 12:12 similar [9] 19:20 28:2 48:14 58:16, 19 68:16 88:19 134:13 160:24 similarity [1] 131:4 similarly [1] 25:17 similarly-vague [1] 113:6 simply [4] 18:9 70:11 146:3 151:3 since [9] 20:22 60:9,14 91:7,11 122:24 146:16 160:2 162:11 sine [1] 133:9 single [1] 139:13 sit [1] 51:11 situation [4] 68:1 75:2 93:19 146: 21 situations [1] 30:22 six [5] 83:24 89:1,16 136:25 159: 18 six-month [1] 90:12 sixth [1] 89:3 size [6] 5:3 92:2 104:21,24 111:22 113:9 skepticism [1] 149:15</p>
--	---	--	--

Official - Subject to Final Review

<p>Skinner ^[19] 5:16,17,22 9:5 18:25 26:17 49:23 50:16 51:24 52:8,10, 25 56:11 75:17 155:17 162:6,8,21, 22 sky ^[1] 110:15 slashed ^[1] 153:10 slighted ^[1] 122:21 slightly ^[3] 75:23 85:4,5 smart ^[1] 105:25 snap ^[1] 110:11 snippets ^[1] 48:10 social ^[3] 155:5 156:11 175:14 society ^[1] 140:14 soil ^[4] 40:9,13 95:6 149:1 Solicitor ^[8] 2:2 3:3,14 107:12 118: 3,17 147:16 148:2 solution ^[2] 123:3 151:19 solve ^[5] 95:8,10,18 169:22 170:4 solves ^[1] 107:22 somebody ^[4] 102:17 111:4 142: 13 150:6 somehow ^[6] 114:24 139:2 144:8 152:7 177:6,9 someone ^[10] 13:24 17:9 42:21 52:3 53:18 55:3 149:22 152:15 164:13 175:16 sometimes ^[3] 138:18 149:4 157: 14 somewhat ^[2] 81:7 90:15 somewhere ^[1] 104:1 soon ^[1] 100:13 sorry ^[15] 21:13 22:19 73:12 74:8 121:22 125:22 134:12 136:23 140: 18 142:20 145:24 160:4,5 166:14, 21 sort ^[85] 6:13 9:11,20 10:8 12:9 13: 24 14:1 17:10,22 18:22 19:8,15 20:2 22:1 26:2,9,13,14 27:1 28:3 36:7 38:14 39:4,25 41:10 44:10 46:2 48:18 51:1 52:3,10 54:5,14, 17,19 55:1 56:4 57:1 58:19,24 60: 2 62:2,10 64:10,13,21 65:24 66: 15 67:24 68:3,5 71:15 72:6 78:12 90:12 91:19 94:16 98:17 99:2 100: 9,10,10,11,13 102:19 107:4,11 110:25 111:7 127:13 137:22 142: 4 144:20 147:13,15 151:8 157:23 158:10 174:4 177:16 178:23,25 179:1,2,16 sorts ^[5] 62:3,4 66:2 155:18 160: 22 Sotomayor ^[54] 29:15,16,21 30:4, 7,12,15 31:3,7,14,24 32:11,21 33: 1,9,14,18,21,24 34:4,11,17,20 35: 8,13,19,23 36:1,10,15,21 86:2,3 89:10,24 90:7,22,25 91:4 131:20 136:23 137:15 138:5 152:21,22 153:17 155:9,21,23 156:4,9,12,15 157:8 sound ^[1] 115:9 sounds ^[2] 21:7 46:21 source ^[3] 15:14,17 146:23 Southard ^[1] 60:11 sparse ^[1] 33:3</p>	<p>speaking ^[1] 93:1 special ^[8] 5:20 9:7 38:12 50:4,17 65:25 133:1 170:25 specialized ^[1] 73:3 specific ^[15] 6:20 11:16,18 35:2 37:8 38:13 61:16 62:24 87:1 94:3, 4 120:18 162:16 163:10 177:8 specifically ^[3] 27:16 93:16 165: 18 specificity ^[2] 43:6 113:25 specified ^[10] 4:24 6:15 10:8 39: 21 52:2 67:7,18 70:1 76:4 155:25 spend ^[2] 105:17 163:17 spending ^[11] 67:21 79:20 142:23, 24 143:16,19 144:1,15 152:24 153:1 163:22 spent ^[1] 154:25 spiral ^[1] 150:17 squared ^[1] 177:2 stable ^[1] 71:24 stack ^[1] 61:1 stamp ^[2] 21:3 127:13 stand ^[1] 142:17 standard ^[16] 60:24 104:5,6 112: 16 114:7 120:21 121:9 122:1 127: 11 139:20 143:21 145:2 160:9 174:15,17 175:24 standardless ^[1] 83:5 standards ^[14] 24:7 60:19,21 61:2 74:12 94:11,18 95:1,11 105:9 115: 15 141:11 144:20 169:20 stare ^[5] 36:4,5 88:8 164:5 165:21 Starlink ^[6] 45:25 46:17,20 62:15 115:19 144:14 start ^[4] 56:11 72:21 86:17 145:13 started ^[3] 86:3 109:11 175:13 starts ^[1] 178:3 state ^[1] 96:4 statements ^[1] 68:21 STATES ^[5] 1:1,22 10:16 20:1 87: 4 status ^[1] 15:9 statute ^[73] 7:4 10:20 22:12 24:4,8 38:24 45:9,13 64:19,23 66:16,23 70:4 71:8 74:17,18 80:2,4 82:19, 24 85:16 86:25 92:22,23 95:13 102:7,19 104:16,19 107:21 108:9 112:4 114:21 115:2 116:24 117:1, 2 118:10,20 120:1,9 122:19 126:5 128:4,12,25 134:8,10 135:4 136: 24 140:23 148:20,23 151:17 155: 3 157:19 158:2,4,7,11,13,17,18 159:23 163:15 168:18 170:15 172: 16,20 177:23 178:7,16 179:19 statutes ^[20] 53:22 78:20 87:21 88: 13 96:6 105:23 122:17 127:4,8,25 133:25 147:13,21 148:1 155:19 157:14,16 158:10 159:4 166:3 statutorily ^[1] 104:4 statutory ^[35] 7:19,25 8:21 9:16, 17 11:4 23:25 24:2 25:12,17,21 31:5 41:5 42:19 43:15 44:18 46: 14 53:21 54:11 58:25 63:21 102:4, 21 104:7,14,15 130:11 131:19</p>	<p>132:5 135:12 138:8 155:6 168:16 178:5 179:13 stay ^[1] 22:1 stayed ^[1] 24:18 step ^[2] 147:9,11 still ^[18] 38:21 88:14 97:11,15 100: 19 105:23 118:7 126:6,12,20 133: 24 139:2,14,16 148:17 168:18 169:6 173:25 stop ^[2] 123:13 144:5 story ^[1] 100:16 straight ^[4] 131:23 157:15 158:3 160:15 straight-up ^[1] 49:19 strange ^[2] 178:21 179:10 stray ^[1] 179:25 strict ^[1] 121:16 stricter ^[1] 112:2 strictly ^[4] 132:22 133:6 172:3 175: 9 strike ^[2] 110:5 120:1 strikes ^[1] 157:12 striking ^[2] 72:23 120:8 strong ^[1] 64:15 stronger ^[1] 129:14 strongly ^[1] 144:21 structure ^[2] 25:21 172:1 struggling ^[2] 51:25 65:3 studies ^[1] 146:21 stuff ^[8] 11:9 19:20 21:7 79:2,4 82: 5 141:7 159:19 sub ^[1] 69:17 subcomponent ^[1] 38:13 subdelegating ^[1] 15:23 subdelegation ^[2] 14:3,10 subject ^[2] 84:18 94:4 subjects ^[1] 175:2 submitted ^[3] 137:5 180:3,5 subscribe ^[2] 27:21 28:15 subscribed ^[1] 28:12 subscribing ^[1] 27:23 subsequent ^[1] 146:18 subset ^[3] 39:17,20 52:3 subsidiaries ^[3] 50:13 69:18 70:1 subsidiary ^[1] 51:7 subsides ^[4] 5:11 13:6 77:6 100: 21 subsidize ^[1] 69:14 subsidized ^[1] 29:17 subsidizing ^[3] 93:2,3 143:16 subsidy ^[1] 141:2 substance ^[3] 13:9 64:7,12 substantial ^[15] 10:10 27:20 28: 14,21,24 29:1,3,4 115:17,20 116:9 119:2 140:9 158:25 171:21 substantially ^[1] 83:14 substantive ^[3] 84:4 119:13 136: 16 substantively ^[3] 115:7 138:16 160:21 successful ^[1] 109:6 successfully ^[1] 85:12 suddenly ^[2] 28:17 163:23 suffer ^[1] 15:2</p>	<p>sufficiency ^[8] 24:3 58:12 70:19 134:13,15,18,25 135:13 sufficient ^[40] 4:22 6:15 7:2,6 11: 22 22:18 25:7 39:2 40:25 58:23 59:8,21 61:21 66:25 67:1 106:24 113:21,21 124:21,23 125:1,16 134:14,16 135:4,5,15,24 136:1,3,6, 17 139:17,17 154:8 162:25 163:3, 9,9 170:12 sufficiently ^[2] 22:11 154:23 sufficiently-defined ^[1] 23:2 suggest ^[1] 91:15 suggested ^[2] 91:9 139:24 sui ^[1] 97:17 suit ^[2] 42:21 149:19 suits ^[1] 167:9 summarize ^[1] 86:7 summing ^[1] 17:23 Sunshine ^[1] 19:11 supply ^[1] 113:22 support ^[12] 4:24 6:15 38:2 47:1 48:21 50:21,21 51:8 61:21 62:11, 22 67:22 supported ^[1] 38:5 supporting ^[2] 8:10 21:11 suppose ^[3] 38:24 96:12 107:11 supposed ^[19] 21:10,11,16 43:7 47:10,13,16,17 52:18 57:3 62:24 67:17,19 71:2 88:20 104:17 159: 23 178:12,13 supposedly ^[1] 14:14 SUPREME ^[6] 1:1,21 88:3 165:4 166:17 167:1 Surface ^[3] 19:3 26:20 50:19 surveying ^[1] 33:11 survive ^[1] 109:1 sway ^[1] 18:24 switch ^[1] 127:2 system ^[19] 10:22 13:6 44:14 56:5 58:19 60:25 68:5 73:21 87:6,8 94: 1 107:19 113:17 114:16 155:11, 11,12 178:15,23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tack ^[1] 88:16 Taft ^[1] 106:1 talked ^[5] 22:9 39:14 155:17 169: 18,21 talks ^[1] 138:19 target ^[1] 5:5 tariff ^[6] 26:3,4,5 30:22 68:5 154: 14 tariffs ^[7] 26:7,8 32:3 154:11,12,13, 16 task ^[3] 21:15 60:13 133:20 tasks ^[1] 6:4 Tax ^[79] 27:3 30:20 31:11 32:5 39: 6,23 48:12,15 49:19,25 50:6,6,23 51:19,22,23 52:1,16,21,23 53:3,5 55:7,8,9,10,16,16,25 56:23 57:1, 10,15,19,21 65:5,11,21 66:3,4 69: 13 73:21 75:15,19,21,25 76:16 78: 1,16,22 81:11 84:12 85:4,20 86:9 92:11 108:2 109:12,13 112:7 113:</p>
---	---	---	---

Official - Subject to Final Review

<p>4 132:9,13,17,24 133:3,9,16 143:13 148:14,17 151:7 162:22 171:9,12,22 172:13 173:1,9</p> <p>tax-fee [2] 65:18 66:7</p> <p>tax-raising [1] 30:18</p> <p>tax/fee [1] 81:5</p> <p>taxation [2] 111:19 171:2</p> <p>taxed [1] 152:23</p> <p>taxes [18] 5:21 8:3,9 9:7 50:4,17 52:15 55:19,23 58:7 59:7 68:18 88:4 112:1 170:25 176:5,25 179:12</p> <p>taxing [9] 32:1 80:16,20 132:20 133:1,5 152:15 162:15 172:3</p> <p>taxpayers [5] 151:19,22 152:3,22 153:12</p> <p>technical [2] 24:23 42:8</p> <p>technological [1] 27:15</p> <p>technology [5] 42:13 140:2 142:22,25 143:9</p> <p>teed [1] 6:20</p> <p>teeing [1] 26:13</p> <p>teeth [2] 12:15 177:14</p> <p>tele [1] 43:25</p> <p>telecom [3] 44:1 63:14 80:7</p> <p>telecommunication [5] 38:8 51:3 67:16 69:14 76:5</p> <p>telecommunications [17] 4:15 10:7 17:24 24:9,24 25:2 28:7,18 30:3 38:1 42:9,12 47:5 138:21 143:22 144:7,11</p> <p>telehealth [1] 141:5</p> <p>telephone [1] 63:14</p> <p>tells [3] 33:9,10 153:3</p> <p>ten-fold [1] 111:21</p> <p>tension [1] 35:5</p> <p>Tenth [1] 137:9</p> <p>term [7] 11:10 73:1 90:1 95:4,6 124:21 147:17</p> <p>terms [18] 15:3 21:15 49:24 72:3 81:9 82:3 92:2 94:17 98:11 109:6 121:25 129:16 133:21 139:10 149:4 153:2 169:8 177:22</p> <p>test [18] 52:14 64:4 65:25 66:9 75:23 105:21 110:22,25 111:8 120:23 121:11 122:9,22 125:7 132:22 133:1,2 175:3</p> <p>tethered [3] 25:21 26:9 62:25</p> <p>tethering [1] 179:3</p> <p>text [8] 9:16,17 44:18 115:1,2 119:1,1 156:21</p> <p>that'll [1] 132:15</p> <p>themselves [4] 51:7 67:19 98:15 114:8</p> <p>theory [15] 13:13 14:6 15:2,6,14,17 88:13,15 130:4,13,14 132:3,7 146:11,12</p> <p>there's [5] 6:19 9:7 13:15 14:1,11 15:7,22 20:17 26:23 27:19 30:8,25 31:5 33:25 41:20 50:17 52:25 54:11 61:12 63:25 64:1,8 65:24 66:15,16,17 67:13 72:14 75:24 78:17 85:8 88:3 89:1 90:22,25 97:24 99:16 101:24 102:22 106:11 110:</p>	<p>8 124:1 134:8,24 144:5 148:18,18,19 157:1 158:18 172:9</p> <p>therefore [2] 143:24 172:22</p> <p>they'll [1] 150:16</p> <p>they've [8] 34:23 118:22,24 125:12 126:8 129:17 143:3 168:23</p> <p>thinking [3] 50:25 139:23 140:1</p> <p>thinks [1] 133:16</p> <p>Third [3] 4:21 20:23 178:18</p> <p>THOMAS [16] 6:7,24 8:1,13 23:23,24 25:4,23 30:15 37:4 70:15 72:4 84:7 113:14 123:9 145:5</p> <p>though [14] 36:9 38:4 48:1 51:14 71:25 73:22 76:15 119:15,22 122:22 159:17 165:1 167:3,6</p> <p>thoughts [3] 21:18 97:4 148:4</p> <p>three [5] 7:3 24:4 58:17 66:22 176:21</p> <p>threshold [1] 52:16</p> <p>throughout [4] 7:19 24:4 164:6 173:12</p> <p>throw [3] 27:22 76:23 147:14</p> <p>throwing [2] 126:2,3</p> <p>tie [2] 162:18 163:19</p> <p>tied [8] 24:5 27:11,16 48:9 61:24 62:1 154:12 177:8</p> <p>tighten [1] 22:6</p> <p>tiny [1] 116:20</p> <p>tip [2] 178:20 179:14</p> <p>today [5] 24:25 27:23 115:5 171:1 175:13</p> <p>together [1] 163:20</p> <p>tomorrow [2] 83:13 98:7</p> <p>ton [1] 57:22</p> <p>tons [1] 19:19</p> <p>took [2] 56:25 88:17</p> <p>top [5] 5:8 9:24 56:4 59:1 179:11</p> <p>total [2] 71:19 72:2</p> <p>totally [3] 94:14 95:16 101:11</p> <p>tough [2] 105:24 134:10</p> <p>towards [1] 116:3</p> <p>track [1] 14:4</p> <p>trade [1] 26:11</p> <p>tradition [4] 49:9 82:13 92:21 133:11</p> <p>traditional [2] 15:5 120:14</p> <p>traditionally [1] 165:22</p> <p>transfer [1] 113:10</p> <p>transfers [1] 121:15</p> <p>transgress [1] 61:8</p> <p>Transportation [1] 19:1</p> <p>treat [1] 88:4</p> <p>treated [3] 27:3 53:5 178:15</p> <p>treatments [1] 143:11</p> <p>TRENT [3] 2:7 3:11 111:14</p> <p>trickery [1] 151:10</p> <p>tried [4] 75:3 78:16 83:22 146:18</p> <p>trillion [13] 8:22 9:2 27:6 56:6 107:14 123:4 124:24 125:2,25 126:1,1 170:2 177:5</p> <p>trillion-dollar [3] 124:10,18 125:6</p> <p>trivial [1] 107:10</p> <p>troubling [1] 178:19</p> <p>true [18] 16:3 20:5 26:16 30:22 74:</p>	<p>8,11 119:9,10 130:5,9 133:2 147:22,23 150:8,23 151:2 157:2 168:22</p> <p>truly [3] 87:8 93:22 178:20</p> <p>try [13] 49:11 72:25 73:5 91:14 102:13 103:18 106:5 115:8 122:10 132:17 139:13 150:4 163:20</p> <p>trying [17] 15:4,13 49:9 52:7 65:3,5 68:9 80:22 85:10 93:13 107:20 110:23 122:8 123:7 142:16 173:16 175:4</p> <p>turn [3] 7:13 86:13 146:4</p> <p>turns [1] 89:1</p> <p>twice [2] 32:1 85:7</p> <p>two [37] 8:24 17:1,4 18:19 20:21 21:25 25:16 27:14 29:17 30:8 35:6,11 39:10 45:4 53:20 58:13,18,20,23 59:5,9,21 60:21 61:2 74:16 78:8 88:3 89:14 106:3 110:7 119:25 131:3 133:3 137:4,8 163:19 164:10</p> <p>tying [1] 177:7</p> <p>type [2] 7:18 57:15</p> <p>typically [5] 48:24 88:2,6 96:11 157:13</p>	<p>unique [4] 50:5 101:11,12 162:16</p> <p>unitary [1] 6:13</p> <p>UNITED [4] 1:1,22 10:16 19:25</p> <p>universal [68] 4:16,20,23 5:10 6:21 9:18,25 10:4,6,14 13:5 17:17 24:7 27:11,12,17 28:4 29:20 38:9 40:24,25 41:10 42:11 44:12 46:25 51:8 62:14,17 63:11 67:22 69:17 70:23 71:22 76:10 77:15,20,20 80:5 83:7,17 85:23 87:8 93:11,23 99:20 100:21 101:2 103:17 108:22 109:1 111:20 112:14 114:6 116:15 124:13 126:9 128:17 129:1 137:1 139:18,19 147:1 153:4,6 160:8 167:17,24 172:18</p> <p>universe [2] 76:2 88:2</p> <p>unlawful [2] 21:20 101:23</p> <p>unless [1] 171:23</p> <p>unlikely [1] 50:6</p> <p>unlikely [1] 124:11</p> <p>unnecessarily [1] 122:6</p> <p>unprecedented [5] 97:21,24 99:15,19,19</p> <p>unrealized [1] 39:7</p> <p>unreasonable [1] 135:12</p> <p>unscramble [1] 166:3</p> <p>unusual [2] 115:8 160:17</p> <p>up [41] 17:23 22:24 28:8 39:5 44:17 49:4 50:10,12 55:18 59:11 61:1 71:25 88:24 92:17 93:8 94:12 100:3,6,7,13 110:25 117:18,23 122:9 130:10 135:16 138:14 147:9,11,14,15,16 150:18 157:15 158:3,7 160:15 163:17 167:16 177:5,15</p> <p>upholding [1] 25:16</p> <p>upper [1] 30:20</p> <p>urban [4] 87:3 95:23 96:3 108:17</p> <p>USAC [14] 5:25 14:10,15,23 17:15 18:16 20:6,20 33:10,21 104:23 112:20,21 152:18</p> <p>USAC's [1] 112:22</p> <p>usage [1] 19:5</p> <p>users [2] 20:12 50:20</p> <p>uses [2] 7:3 136:24</p> <p>USF [3] 20:11 111:25 112:4</p> <p>using [7] 37:22 41:4 65:21 80:17,19 155:22 174:14</p> <p>utilities [1] 49:8</p> <p>utility [1] 49:14</p>
U			
<p>U.S [2] 105:13 179:17</p> <p>ultimate [1] 26:21</p> <p>ultra [1] 104:19</p> <p>unaccountable [2] 53:14,16</p> <p>unalloyed [1] 142:5</p> <p>unanimous [1] 88:3</p> <p>unanimously [3] 85:6 110:20 128:15</p> <p>unbelievably [1] 52:9</p> <p>unbroken [1] 133:14</p> <p>uncertain [2] 124:18,19</p> <p>unclear [2] 50:19,23</p> <p>uncommon [1] 26:12</p> <p>unconscionable [1] 177:10</p> <p>unconstitutional [9] 60:15 68:25 120:9 128:25 145:15 164:25 172:1 173:24 176:1</p> <p>under [31] 6:16 27:17 29:23,24 34:10 45:4 46:11 52:25 60:15 64:20 78:3,9 83:21 99:21 100:19 102:17 117:20 120:7,21 121:1 122:14,21,25 134:2 143:20 156:23 157:6 159:23 167:21 170:8 174:16</p> <p>underlies [1] 78:15</p> <p>underserved [1] 5:5</p> <p>understand [20] 15:5,14 23:19 25:4 65:3 75:6 76:15 118:19 122:8 129:7,8 132:1 138:25 163:11 167:20 171:19,20 172:10 173:5 175:4</p> <p>understanding [9] 65:6 75:8 112:21 114:12 120:15 122:15 135:19 164:2 165:3</p> <p>understood [9] 40:14 48:4 73:16 76:2 93:20 143:15,25 165:22 170:3</p> <p>unfair [1] 105:3</p> <p>uniform [2] 84:17 115:9</p>			
V			
<p>vacate [1] 146:1</p> <p>vacated [1] 146:8</p> <p>vague [3] 125:9 149:4 174:9</p> <p>value [3] 48:25 127:17 134:6</p> <p>various [6] 7:22 37:18 50:21 56:2 86:16 155:13</p> <p>vehicle [2] 70:11 172:22</p> <p>verify [1] 20:10</p> <p>version [3] 51:21 118:21,22</p> <p>versions [1] 60:22</p> <p>versus [7] 4:5 50:2 51:19 60:10 108:17 170:25 176:1</p>			

Official - Subject to Final Review

vertical ^[2] 164:5 165:21 via ^[1] 171:4 victory ^[1] 70:2 view ^[11] 61:17 68:19 69:1 77:24 95:13,14 120:23 121:13 162:20, 21 172:21 viewed ^[1] 158:6 violate ^[2] 71:8 72:7 violating ^[1] 68:12 violation ^[1] 155:1 vires ^[1] 104:19 Virginia ^[1] 2:5 virtually ^[1] 104:11 vis-à-vis ^[1] 124:24 vote ^[2] 110:21 153:16 votes ^[1] 151:11 vulnerable ^[1] 87:22 <hr/> W <hr/> walked ^[1] 116:18 wall ^[1] 88:7 wanted ^[12] 54:14,19 69:13 93:18 94:15,25 102:2 103:18 106:22,23 108:15 109:7 wants ^[5] 71:1,5 74:21 168:17 176: 6 war ^[1] 66:4 warn ^[1] 50:14 wartime ^[1] 96:13 Washington ^[3] 1:17 2:3,7 watered-down ^[1] 123:1 way ^[46] 10:21 14:5 17:11 19:4 42: 22 43:11 44:25 47:21 48:6 51:2 61:21 71:10 74:17 85:8 87:25 88: 17,19 90:5,18 91:23 92:20,23,24 100:25 103:1 104:20 107:9,10 116:2 118:20 119:17 126:4,13 132:10 139:6 141:9,16 147:20 155:16 158:9 159:4 162:7,14,22 165:1 168:24 Wayman ^[3] 22:16 60:10 162:11 ways ^[14] 37:18 41:6 42:2 47:20 57:10,12 83:9,11 85:3 86:6 94:7 122:18 137:12 149:10 wealthy ^[3] 141:22 142:3 143:16 Wednesday ^[1] 1:18 weird ^[2] 107:22 110:16 welcome ^[3] 6:6 70:14 113:13 welfare ^[5] 51:6 155:5 156:11,11 175:15 well-being ^[1] 128:14 whatever ^[18] 8:17,21 11:12 18:16 30:7 48:21 67:11,13 74:20 83:24 93:10 94:2 95:9 114:12 151:13 154:17 170:2 179:2 wheeler ^[1] 135:16 whereas ^[1] 78:21 Whereupon ^[1] 180:4 whether ^[31] 14:9 18:8 20:16 21: 22 22:13 32:14,21 34:14 43:24 48: 15 50:19,23 55:23 63:4,7 75:19 78:22 85:20 101:20,21 106:19 110:2 118:17 119:8 132:23 144: 19 149:15 151:23 162:21 167:18	171:20 Whiskey ^[1] 31:22 Whitman ^[4] 82:17 83:3 98:11 123: 9 whiz ^[1] 91:17 Who's ^[4] 18:23 20:1 43:21 107:4 whole ^[12] 51:12 77:5 90:22,25 91: 16 100:15 107:18 144:15 147:21 149:20 156:10 162:18 wholesale ^[1] 123:14 wide ^[1] 26:24 WiFi ^[1] 43:2 wildly ^[1] 109:6 will ^[16] 4:3 15:18 85:2 96:14 106: 10 112:23 122:6 124:20 129:5 132:14 147:9 153:10 166:7 167:2 176:9 177:14 willing ^[3] 53:4 162:13 164:13 willingness ^[1] 77:25 willy-nilly ^[1] 71:16 win ^[8] 121:1 122:21 139:14 148: 17 162:14,22 170:19 174:16 wire ^[1] 10:17 wires ^[1] 28:3 wish ^[1] 90:10 within ^[7] 26:23 43:24 50:24 62:22 63:5 64:9 82:12 without ^[7] 27:7 49:19 68:12 111: 19 113:1 171:2 179:19 wondering ^[1] 110:2 word ^[7] 7:3 124:23 135:4 136:24, 25 162:25 163:9 worded ^[1] 168:4 words ^[10] 9:12 41:4 81:1 82:22 121:14 157:18 159:7,16,20 161:4 work ^[11] 17:18 19:17 29:11 47:13 56:6 65:4 77:16 150:6 156:21 157: 7 178:12 worked ^[3] 92:23,24 108:22 works ^[4] 44:14 81:9 88:19 90:17 world ^[2] 115:22 117:11 worried ^[1] 34:5 worry ^[2] 118:5 170:15 worse ^[2] 22:2 35:11 worth ^[1] 92:14 worthy ^[1] 38:5 <hr/> Y <hr/> Yakus ^[1] 96:12 year ^[4] 39:3 111:19 133:18 174:2 years ^[27] 7:12 24:19 49:3 80:6 93: 9 99:22 100:25 106:3 115:10 118: 12,22 125:8 133:11 134:22 135:9 137:2 138:10 139:12 142:9 148:7 149:22 156:25 164:24,24 168:10, 24 175:9 yellow ^[2] 97:21 99:16 Yep ^[1] 56:24 yielding ^[1] 120:23 yourself ^[1] 94:18 <hr/> Z <hr/> zero ^[1] 124:22 zeroed ^[1] 151:8	zone ^[1] 18:6 zoom ^[1] 60:4
---	--	--

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 24, 2024

Lyle W. Cayce
Clerk

No. 22-60008

CONSUMERS' RESEARCH; CAUSE BASED COMMERCE,
INCORPORATED; KERSTEN CONWAY; SUZANNE BETTAC;
ROBERT KULL; KWANG JA KERBY; TOM KIRBY; JOSEPH BAYLY;
JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS;
RHONDA THOMAS,

Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF
AMERICA,

Respondents.

Petition for Review from the
Federal Communications Commission
Agency No. 96-45

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, and DOUGLAS, *Circuit Judges*.^{*}

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, ELROD, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*:

In the Telecommunications Act of 1996, Congress delegated its taxing power to the Federal Communications Commission. FCC then subdelegated the taxing power to a private corporation. That private corporation, in turn, relied on for-profit telecommunications companies to determine how much American citizens would be forced to pay for the “universal service” tax that appears on cell phone bills across the Nation. We hold this misbegotten tax violates Article I, § 1 of the Constitution.

I.

A.

Congress has long “pursued a policy of providing ‘universal’ [telecommunications] service to all residents and businesses in the United States.” Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 279 (2005). For half a century Congress pursued this policy through a complicated cross-subsidy regime. Back when the old AT&T was a regulated monopoly, Congress allowed it to charge supra-competitive rates to urban customers in exchange for requiring it to provide services it might not otherwise provide to high-cost rural customers. But “[f]or obvious reasons, this system of implicit subsidies can work well only under regulated

^{*} JUDGE RAMIREZ joined the court after this case was submitted and did not participate in the decision.

conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers.” *Tex. Off. of Pub. Util. Couns. v. FCC* (“*TOPUC I*”), 183 F.3d 393, 406 (5th Cir. 1999). So when Congress deregulated AT&T and other telecommunications companies, it had to abandon the old way of pursuing universal service.

Congress’s new way is 47 U.S.C. § 254. Section 254 authorizes FCC to establish “specific, predictable, and sufficient . . . mechanisms to preserve and advance universal service.” *Id.* § 254(b)(5). Pursuant to this grant of authority, FCC levies “contributions” to a Universal Service Fund (“USF”) from telecommunications carriers, *id.* § 254(b)(4), and it distributes the monies raised to people, entities, and projects to expand and advance telecommunications services. FCC regulations expressly permit carriers to pass these “contributions” through to their customers, *see* 47 C.F.R. § 54.712(a), and the overwhelming majority of carriers do so, *see* FCC, FCC 22-67, Report on the Future of the Universal Service Fund 10084–85 , (Aug. 15, 2022) (“Report to Congress”).

Notably, Congress declined to define “universal service” itself. Instead, it delegated to FCC the responsibility to periodically “establish” the concept of “universal service” by “taking into account advances in telecommunications and information technologies and services.” 47 U.S.C. § 254(c)(1). In making this determination, Congress directed FCC to:

consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (C) are being deployed in public telecommunications networks by telecommunications carriers; and
- (D) are consistent with the public interest, convenience, and necessity.

Id. § 254(c)(1).

Section 254(b) also suggests principles for FCC to “base policies for the preservation and advancement of universal service.” Telecommunications services “should” be “available at just, reasonable, and affordable rates”; accessible “in all regions of the Nation”; and available to “low-income consumers and those in rural, insular, and high cost areas” at rates “reasonably comparable to rates charged for similar services in urban areas.” *Id.* § 254(b)(1)–(3). FCC also may develop “such other [universal service principles it] determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.” *Id.* § 254(b)(7).

Section 254 further provides that “[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services.” *Id.* § 254(b)(6). Accordingly, “telecommunications carrier[s] shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State . . . to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State.” *Id.* § 254(h)(1)(A). And “telecommunications carriers . . . shall, upon a bona fide request for any of its services that are within the [FCC’s] definition of universal service . . . , provide such services to elementary schools, secondary schools, and libraries for educational

purposes at rates less than the amounts charged for similar services to other parties.” *Id.* § 254(h)(1)(B). FCC then reimburses telecommunications providers for the costs of providing this subsidized service. *Id.* § 254(h)(1)(A), (B)(i)–(ii).

B.

Presently, USF supports telecommunications projects through four major programs: the High-Cost Program (*see* 47 C.F.R. §§ 54.302–54.322), the Lifeline Program (*see id.* §§ 54.400–54.423), the E-rate Program (*see id.* §§ 54.500–54.523), and the Rural Health Care Program (*see id.* §§ 54.600–54.633).

Each program has a laudable objective. The High-Cost Program subsidizes the provision of voice and internet services in rural communities. The Lifeline Program subsidizes the provision of phone service to low-income consumers. The E-Rate Program subsidizes the provision of broadband connectivity and Wi-Fi to schools and libraries. And the Rural Health Care Program subsidizes the provision of telecommunications services to rural healthcare providers.

FCC regulations establish the services supported by each of these programs and the eligibility criteria applicants must satisfy to obtain assistance. But FCC does not administer all these universal service programs itself. Instead, it relies on a private company called the Universal Service Administrative Company (“USAC”). USAC is managed by representatives from “interest groups affected by and interested in universal service programs” who are “nominated by their respective interest groups.” *See Leadership, UNIVERSAL SERV. ADMIN. CO.*, <https://perma.cc/9W92G4Z9> (last accessed Sept. 11, 2023); *see also* 47 C.F.R. § 54.703(b) (providing for the composition of USAC’s board of directors). FCC has charged USAC with myriad tasks: “billing contributors,

collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.” 47 C.F.R. § 54.702(b).

Most prominently, though, USAC is responsible for deciding the quarterly USF contribution amount—a projection of the dollar value of demand for universal support programs and the costs of administering them. *See id.* § 54.709(a)(3). The contribution amount dictates the size of the universal service contributions levied on telecommunications carriers and, in turn, American telecommunications consumers. To set the contribution amount, USAC relies on “information from universal service program participants” to “estimate[] how much money will be needed each quarter to provide universal service support.” *See Universal Service*, UNIVERSAL SERV. ADMIN. CO., <https://perma.cc/B5NN-AVF8> (last accessed Oct. 10, 2023). In other words, the contribution amount ultimately derives from the universal service demand projections of private, for-profit telecommunications carriers, all of whom have “have financial incentives” to increase the size of universal service programs. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-538, ADDITIONAL ACTION NEEDED TO ADDRESS SIGNIFICANT RISKS IN FCC’S LIFELINE PROGRAM 1 (2017), <https://perma.cc/K5J9-L89K> (“FCC’s Lifeline Program”).

FCC then uses USAC’s contribution amount to impose a tax on America’s telecommunications carriers. (FCC calls this tax the USF “contribution factor”; but we call it what it is—the “USF Tax.”) The USF Tax is the percentage of end-user telecommunications revenues each carrier must contribute to USF in a particular quarter. As a practical matter, USAC sets the USF Tax—subject only to FCC’s rubber stamp. True, FCC “reserves the right to set projections of demand and administrative expenses at amounts that [it] determines will serve the public interest.” *See* 47 C.F.R. § 54.709(a)(3). But FCC never made a substantive revision to USAC’s

proposed contribution amount prior to this litigation,¹ and it does not even have a documented process for checking USAC's work. Instead, FCC has provided that if it "take[s] no action within fourteen (14) days of the date of release of the public notice announcing [USAC's] projections of demand and administrative expenses, the projections of demand and administrative expenses . . . shall be *deemed approved* by the Commission." *See ibid.* (emphasis added). So FCC has delegated to USAC responsibility—*de facto* if not *de jure*—for imposing the USF Tax.

C.

In 1995, the USF Tax was \$1.37 billion. JA62. But by the end of 2021, USAC ballooned the USF to over \$9 billion. *See* UNIVERSAL SERV. ADMIN. CO., 2021 ANNUAL REPORT 20 (2023) <https://perma.cc/9CPT-H5LM>. The proposed USF Tax at issue in this case is 25.2%, up from just over 5% in 2000. *See* FCC, DA 00-517, PROPOSED SECOND QUARTER 2000 UNIVERSAL SERVICE CONTRIBUTION FACTOR (Mar. 7, 2000), <https://perma.cc/4BSK-6QZR>. Recent USF Taxes have been set as high as 34.5%. *See* FCC, DA 23-843, PROPOSED FOURTH QUARTER 2023 UNIVERSAL SERVICE CONTRIBUTION FACTOR (Sep. 13, 2023), <https://perma.cc/Y2QW-6HBD>.

Many of the billions injected into the USF have undoubtedly been deployed to support the important goal of universal service. But waste and fraud have also contributed to the USF's astronomical growth. For example, in 2004, FCC's Inspector General affirmed that schools view the E-Rate Program as "a big candy jar" of "free money." Sam Dillon, *School Internet*

¹ FCC claims it has made three alterations to USF projections. But one of those was a ministerial change of the rate from .09044 to .091 because some carriers' computers could not handle five decimal places. And the other two were not even initiated by FCC. *See* Petrs' EB Br. 63.

Program Lacks Oversight, Investigator Says, N.Y. TIMES (June 18, 2004), <https://perma.cc/9PZY-ED3K>. The Inspector General’s primary concern was FCC’s heavy and longstanding reliance on self-certified eligibility determinations in the E-rate Program. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-606, FCC SHOULD TAKE ACTION TO BETTER MANAGE PERSISTENT FRAUD RISKS IN THE SCHOOLS AND LIBRARIES PROGRAM¹⁸ (Sep. 2020), <https://perma.cc/5EK4-Q8V8> (“FCC’s E-rate Program”). A 2008 GAO report demonstrated that, in a single year, USAC made almost a billion dollars of High-Cost Program payments that “should not have been made, or were not made, in the correct amount, when viewed from the perspective of applicable Federal Communications Commission rules, orders and interpretative opinions.” OFF. OF THE INSPECTOR GEN., FCC, THE HIGH COST PROGRAM 2 (Nov. 26, 2008), <https://perma.cc/WJG3-6PJ6> (“The High-Cost Program”). In 2013, one Congressman noted:

The [Lifeline] fund [] increased 266 percent [between 2008 and 2013], . . . all while the cost of phone service [went] down. Despite the limit of one subsidized subscriber per household, published reports suggest some subscribers have eight or more phones with subsidized service, with one woman saying that to get one “she just goes across the street and gets it.” One man has claimed to have a bag full of 20 phones on the program that he sells “for about 10, 15, 20 bucks” each.

The Lifeline Fund: Money Well Spent?: Hearing Before the H. Subcomm. on Commc’n & Tech., H. Comm. On Energy & Comm., 113th Cong. 2 (2013) (opening statement of Chairman Greg Walden), <https://perma.cc/4DAWUERW>. And in 2018, FCC’s managing director reported a GAO audit that uncovered gross improper payments of \$336.39 million in the Lifeline Program alone. See Letter from Mark Stephens, Managing Director, FCC, to Ron Johnson, Chairman, S. Comm. On

Homeland Sec. & Gov't Affs. (Aug. 27, 2019), <https://perma.cc/VNQ6-N3WB>. While earth's only two certainties are death and taxes, the USF Tax manages to cheat the grave: It is well-documented that FCC disburses USF money to dead people. *See* FCC's LIFELINE PROGRAM, *supra*, at 43.

USAC's role in perpetuating USF waste is equally well known. In 2010, GAO concluded that USAC "lacks key features of effective internal controls." U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-11, IMPROVED MANAGEMENT CAN ENHANCE FCC DECISION MAKING FOR THE UNIVERSAL SERVICE FUND LOW-INCOME PROGRAM i (Oct. 2010), <https://perma.cc/9YHE-8YE9> ("FCC's Low-Income Program"); *see also* FCC's E-RATE PROGRAM, *supra*, at 20-21. The Low-Income Program report noted that while USAC primarily uses audit findings to monitor compliance with USF rules, "the number and scope of USAC's audits have been limited and there is no systematic process in place to review the findings of those audits that are conducted." FCC's LOW-INCOME PROGRAM, *supra*, at cover page. Moreover, the GAO noted USAC had not even considered "the possibility that multiple carriers may claim support for the same telephone line and that households may receive more than one discount, contrary to program rules." *Ibid.* In 2017, GAO explained that USAC "relies on over 2,000 Eligible Telecommunication Carriers that are Lifeline providers to implement key program functions, such as verifying subscriber eligibility," which is problematic because "companies may have financial incentives to enroll as many customers as possible." FCC's LIFELINE PROGRAM, *supra*, at cover page. And in 2019, FCC acknowledged that USAC was out of compliance with improper payment reporting requirements. *See* Letter from Mark Stephens, *supra*, at 1.

* * *

Section 254 reflects a policy goal of making telecommunications services available to all Americans. It is emphatically the province of Congress to make such policy choices. But it is our judicial duty to ensure that Congress pursued its goal through lawful means. And in that regard, our brief survey of the USF's history makes three things clear. First, Congress's instructions are so ambiguous that it is unclear whether Americans should contribute \$1.37 billion, \$9 billion, or any other sum to pay for universal service. Second, private entities bear important responsibility for universal service policy choices. And third, it is impossible for an aggrieved citizen to know who bears responsibility for the USF's serious waste and fraud problems. All three of those things implicate bedrock constitutional principles.

II.

A.

On November 2, 2021, USAC proposed its Q1 2022 USF contribution amount. A subset of the Petitioners in this action filed a comment with FCC challenging the constitutionality of the universal service contribution mechanism on November 19. On December 13, 2021, FCC issued a public notice of its Proposed Q1 2022 USF Tax, which was derived directly from USAC's proposed contribution amount. Petitioners re-filed their comment on December 22. FCC took no action with respect to USAC's proposed contribution amount, so on December 27 the contribution factor was deemed approved. *See* 47 C.F.R. § 54.709(a)(3). Petitioners then filed a timely petition for review in our court.

B.

We have statutory jurisdiction under 47 U.S.C. § 402 and 28 U.S.C. § 2342.² FCC does not contest our constitutional jurisdiction, but we have an obligation to consider jurisdictional questions *sua sponte* even when they are not raised by the parties. *See E.T. v. Paxton*, 41 F.4th 709, 718 n.2 (5th Cir. 2022).

Consistent with that obligation, we note that at least one petitioner—Cause Based Commerce—had Article III standing when the petition was filed. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (“If at least one plaintiff has standing, the suit may proceed.”); *Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000) (“Standing is assessed at the time the action commences.” (citation and quotation omitted)). Cause Based Commerce incurred a classic pocketbook injury as a result of its legal obligation to pay the USF Tax. Its injury is fairly traceable to the challenged conduct because the size of its Q1 2022 USF liability was controlled by the contribution factor set by USAC. And, at the time the petition was filed, its injury could have been redressed by a favorable judicial decision because vacatur of FCC’s approval of the proposed contribution factor would have prevented collection of the USF Tax. *See* 47 C.F.R. § 54.709(a)(3) (“[T]he Administrator shall apply the quarterly contribution factor, *once approved by the Commission*, to contributor’s interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.” (emphasis added)).

² Before the panel, FCC argued that we lack statutory jurisdiction because the petition was not timely filed. The panel rejected that argument, *see Consumers’ Rsch. v. FCC*, 63 F.4th 441, 446 (5th Cir. 2023), *reh’g en banc granted, opinion vacated*, 72 F.4th 107 (5th Cir. 2023), and FCC has abandoned it.

It is not clear that Cause Based Commerce’s pocketbook injury is still redressable because sovereign immunity may bar recovery of the monies it paid into USF pursuant to the Q1 2022 USF Tax. *See* 5 U.S.C. § 702 (waiving sovereign immunity for actions against agencies seeking relief “other than money damages”). If that is right, Cause Based Commerce’s challenge might be moot because no court-ordered relief could redress the injuries it incurred as a result of the Q1 2022 USF Tax. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (“A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” (quotation and citation omitted)).

We need not reach that question, however, because even assuming Cause Based Commerce’s injury is no longer redressable, it is nonetheless justiciable because it is capable of repetition yet evading review. *See, e.g., S. Pac. Terminal Co. v. Interstate Com. Comm’n*, 219 U.S. 498, 515 (1911) (establishing the exception and noting that jurisdiction “ought not to be . . . defeated, by short term orders, capable of repetition, yet evading review” because otherwise the government and regulated parties would “have their rights determined by the Commission without a chance of [judicial] redress”). The Q1 2022 USF Tax evades review because it was in force for just one quarter—“too short [a] duration to be fully litigated in the United States Supreme Court before it expire[d].” *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014); *see ibid.* (“As a rule of thumb, agency actions of less than two years’ duration cannot be fully litigated prior to cessation or expiration, so long as the short duration is typical of the challenged action.” (quotation and citation omitted)). And it is capable of repetition because there is “a reasonable expectation”—indeed, a near certainty—that [Cause Based Commerce] will be subjected to the same action again.” *Id.* at 323; *see id.* at 324 (“The same action generally refers to

. . . recurrent identical agency actions.” (quotation and citations omitted)); *see also* 47 C.F.R. § 54.709(a)(3) (providing that a new contribution factor is calculated each quarter).

Accordingly, we have jurisdiction to decide the merits of petitioners’ constitutional claims.

C.

We must decide one more threshold issue. On June 17, 2024, FCC filed a motion to dismiss on the that ground issue preclusion bars the petition for review. In FCC’s view, that is because petitioners raised identical challenges to different USF quarterly contribution factors in the Sixth and Eleventh Circuits, and those courts rejected petitioners’ arguments. But even if there were something to FCC’s issue preclusion argument, it fails because FCC forfeited it.

“[I]ssue preclusion[] is an affirmative defense.” *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). That means the party asserting preclusion ordinarily must timely raise it. *Ibid.*; *see* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4405 (3d ed. 2017). Where, as here, an allegedly preclusive judgment is rendered after suit is filed, the party “wishing to raise [preclusion] is obliged to assert it at the earliest moment practicable.” *Home Depot, Inc. v. Guste*, 773 F.2d 616, 620 n. 4 (5th Cir. 1985); *see Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983) (“[T]he party wishing to raise [preclusion as a] defense is obliged to plead it at the earliest possible moment.” (quotation omitted)); *Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992) (issue preclusion must be raised “at the first reasonable opportunity after the rendering of the decision having the preclusive effect”); *Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003) (holding that district court abused its discretion by allowing defendant to

assert preclusion defense “at the eleventh hour”); *Georgia Pac. Consumer Prod., LP v. Von Drehle Corp.*, 710 F.3d 527, 533 (4th Cir. 2013) (“Even when a preclusion defense is not available at the outset of a case, a party may waive such a defense arising during the course of litigation by waiting too long to assert the defense after it becomes available.”); *Arizona v. California*, 530 U.S. 392, 413 (2000) (holding that party could not raise preclusion as a defense when party could have raised the defense earlier in the proceedings but did not, “despite ample opportunity and cause to do so”).

That makes sense. The policy underlying issue preclusion is based primarily on a “defendant’s interest in avoiding the burdens of twice defending a suit” and “the avoidance of unnecessary judicial waste.” *Arizona*, 530 U.S. at 412 (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Issue preclusion cannot serve either of those purposes if it is raised in the eleventh hour of proceedings, after the defendant and the court have already carried all the burdens necessary to decide the case. So even assuming FCC could defeat petitioners’ claims on the ground the Sixth and the Eleventh Circuits have rendered preclusive judgments, FCC was obliged to raise that issue “at the earliest moment practicable.” *Guste*, 773 F.2d at 620 n.4.

It did not. The first allegedly preclusive judgment FCC cites is the Sixth Circuit’s judgment in *Consumers’ Research v. FCC*. See 67 F.4th 773 (6th Cir. 2023), *cert. denied Consumers’ Rsch. v. FCC*, No. 23-456, 2024 WL 2883753 (U.S. June 10, 2024). That judgment bound six of the named petitioners in this case.³ And it was final on June 7, 2023. See *Mandate Issued, Consumers’ Rsch.*, 67 F.4th 773 (No. 21-3886) (Jun. 7, 2023). True, the

³ *Consumers’ Research, Cause Based Commerce*, Deanna Roth, Jeremy Roth, Joseph Bayly, Lynn Gibbs, and Paul Gibbs.

petitioners sought certiorari in that case. But “the general rule in American jurisprudence [is] that a final judgment of a court . . . can be given [preclusive] effect even while an appeal is pending.” *Prymer v. Ogden*, 29 F.3d 1208, 1213 n.2 (7th Cir. 1994); see WRIGHT & MILLER, *supra*, § 4433 (“[I]t is . . . held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided.”); RESTATEMENT (SECOND) OF JUDGMENTS § 13, cmt. f (explaining a “judgment otherwise final” for purposes of the law of res judicata should “remain[] so despite the taking of an appeal”).

That means FCC could have asserted preclusion against six petitioners on June 7, 2023. At the very least, FCC could have raised preclusion in its supplemental brief, which it filed on August 30, 2023. But FCC did not do so. Instead, it waited more than a year and then filed a tardy motion to dismiss at the eleventh hour. FCC therefore forfeited its preclusion defense with respect to at least six petitioners.⁴ So there is no doubt we may proceed to the merits of those petitioners’ claims.

FCC also cites the Eleventh Circuit’s judgment in *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 923 (11th Cir. 2023), *cert. denied Consumers’ Rsch. v. FCC*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024). That judgment bound all the petitioners in this case, including the six who were parties to the Sixth Circuit proceeding. But that another allegedly preclusive judgment was rendered during the course of this proceeding does not change the fact that FCC had a purported preclusion defense against six petitioners as of June 7, 2023. And even if the Eleventh Circuit’s judgment somehow gave FCC a new window to raise a preclusion defense against those petitioners, the window closed before FCC raised it. The Eleventh Circuit’s judgment was final (and

⁴ Including Cause Based Commerce, who certainly has standing. See *supra*, at 11.

therefore had preclusive effect) on February 5, 2024. *See* Mandate Issued, *Consumers' Research v. FCC*, 88 F.4th 917 (No. 22-13315) (Feb. 5, 2024). FCC nonetheless waited to file a motion to dismiss on the basis of that judgment until June 17, 2024—more than four months later.

There may sometimes be ambiguity about whether a defendant carried its obligation to raise a preclusion defense “at the earliest moment practicable.” *Guste*, 773 F.2d at 620 n.4. But this is not a close case. Litigants ordinarily have 21 days to plead an affirmative defense. *See* FED. R. CIV. P. 12(a)(1)(A)(ii); *see also* WRIGHT & MILLER, *supra*, § 1394 (noting affirmative defenses are forfeited if they are not raised in responsive pleadings). There is no reason a party should have six times that many days to raise an affirmative defense to a petition for review. So even if we thought FCC could have asserted preclusion against all the petitioners within a reasonable time after the Eleventh Circuit rendered judgment, we would hold FCC failed to do so.

In sum, FCC forfeited any preclusion defense. True, we have discretion to forgive a forfeiture in “extraordinary circumstances”—as where “a miscarriage of justice would result from our failure to consider” the forfeited argument. *See, e.g., AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009). But FCC does not supply any reason to think a miscarriage of justice would result from our reaching the merits of petitioners’ claims. *See ibid.* (explaining the burden of establishing extraordinary circumstances is on the party seeking review). And we cannot think of one. In fact, if we do not decide the constitutional questions presented in this case, we will have to decide them in a pending challenge that includes petitioners who were not parties to the Sixth or Eleventh Circuit proceedings. *See* Petition for Review,

Consumers' Research v. FCC, No. 24-60330 (5th Cir. Jun. 27, 2024). It effects no injustice to hold FCC to its forfeiture.⁵

* * *

We therefore proceed to the merits. Our review is de novo. *See Humaei Tech. USA, Inc. v. FCC*, 2 F.4th 421, 434 (5th Cir. 2021).

III.

Petitioners contend the universal service contribution mechanism violates the Legislative Vesting Clause. *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). We agree. We (A) explain that the power to levy USF “contributions” is the power to tax—a quintessentially legislative power. Then we (B) explain that Congress through 47 U.S.C. § 254 may have delegated legislative power to FCC because it purported to confer upon FCC the power to tax without supplying an intelligible principle to guide FCC’s discretion. Next, we (C) explain that FCC may have impermissibly delegated the taxing power to private entities. Finally, we (D) explain that we need not definitively answer either delegation question because even if § 254 contains an intelligible principle, and even if FCC was permitted to enlist private entities to

⁵ FCC convinced the Supreme Court to deny certiorari in the Sixth and Eleventh Circuit cases in part by explaining the Court would have another chance to consider the constitutionality of the USF after this court’s en banc ruling. *See* Br. in Opp’n 17–18, *Consumers’ Rsch. v. FCC*, Nos. 23-456, 23-743 (U.S. May 3, 2024) (“[T]he en banc Fifth Circuit has not yet issued its decision in that case. Once it does so, the parties can determine whether to seek, and this Court can determine whether to grant, certiorari to review that decision.”). Had FCC told the Supreme Court it thought petitioners’ claims in this court were issue precluded, the Court might have granted certiorari in those other cases. It would be unjust to allow FCC to raise an issue to evade en banc review so soon after it hid that issue to evade Supreme Court review.

determine how much universal service tax revenue it should raise, the combination of Congress's broad delegation to FCC and FCC's subdelegation to private entities certainly amounts to a constitutional violation.

A.

Section 254(d) provides that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” 47 U.S.C. § 254(d). Pursuant to this authority, FCC mandates that “telecommunications carriers . . . must contribute to the universal service support mechanisms.” 47 C.F.R. § 54.706(a). USAC determines carriers’ USF contribution obligations on a quarterly basis by “apply[ing] the quarterly contribution factor . . . to [each carriers’] interstate and international end-user telecommunications revenues.” *Id.* § 54.709(a)(3). The result is a USAC-fashioned USF Tax.

FCC’s principal defense of the USF scheme is that the USF Tax is not really a *tax* at all. Rather, FCC contends, it is a *fee*. That is because, FCC reasons, a fee is a charge that “bestows a benefit on the [payor], not shared by other members of society.” *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341 (1974). And FCC thinks universal service contributions comport with that definition because telecommunications carriers pay them, and because they are used to fund the universal service program, which “confers special benefits on contributing carriers by (among other things) expanding the network such carriers can serve.” FCC EB Br. 51.

But FCC misunderstands the nature of the inquiry. A fee has three characteristics: First, fees are incurred “incident to a voluntary act.” *Nat’l Cable*, 415 U.S. at 341; *see also* Krotoszynski, Jr., *Reconsidering the*

Nondelegation Doctrine, *supra*, at 270 (“A ‘fee’ constitutes a charge that an agency exacts in return for a benefit voluntarily sought by the payer.”). For example, “[a] public agency might charge a user fee to visit a public park, tour a museum, or enter a toll road.” *Trafigura Trading LLC v. United States*, 29 F.4th 286, 293 (5th Cir. 2022) (Opinion of Ho, J.); *see also ibid.* (noting that fees “arise in the context of value-for-value transactions” between individuals and government). The government may also charge fees designed to defray the cost of providing benefits to a regulated party, but only if the fees charged represent a “fair approximation of services, facilities, or benefits furnished.” *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998). Second, a fee generally is “imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes.” *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). And third, the revenue the government raises through its collection of fees is used to supply benefits inuring to the persons or entities paying them rather than to the public generally. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989) (quoting *Nat’l Cable*, 415 U.S. at 343).

Universal service contributions do not have any of these characteristics. First, they are not incident to a voluntary act but rather are a condition of doing business in the telecommunications industry. *See* 47 U.S.C. § 254(d). Nor do they represent a fair approximation of the benefits conferred by government regulation on telecommunications carriers. In fact, they are not related to regulatory costs at all. They are designed to fund telecommunications subsidies to schools, libraries, healthcare facilities, and low-income individuals. Second, the cost of universal service contributions is not borne by parties FCC regulates. While FCC formally imposes the charges on telecommunications carriers, carriers overwhelmingly pass the cost of contributions on to consumers, as is expressly permitted by FCC regulation. *See* FCC, REPORT TO CONGRESS, *supra*, at 45–46; 47 C.F.R.

§ 54.712(a). So the cost of universal service contributions is widely shared by the population in a manner reminiscent of a “classic tax.” *See Valero*, 205 F.3d at 134 (“The ‘classic tax’ is imposed by the legislature upon a large segment of society.”). And third, the benefits associated with universal service contributions “inure to the benefit of the public”—or more accurately to the benefit of those fortunate enough to receive subsidies from USAC—rather than to the benefit of the persons who pay them. *Skinner*, 490 U.S. at 223 (quoting *Nat’l Cable*, 415 U.S. at 343). There is no overlap at all between the class of USF beneficiaries (recipients of subsidized telecommunications services) and the class of USF contributors (American telecommunications consumers who see USF charges on their phone bills each month).

Think about the consequences of FCC’s position:

- Congress could fund Medicare and Medicaid without “taxing” anyone. It could simply allow hospital executives to set the Medicare-Medicaid budget, then have HHS rubber-stamp the hospitals’ healthcare taxes, which could then be passed through to consumers’ hospital bills.
- Congress could fund the Supplemental Nutrition Assistance Program (“SNAP”) without “taxing” anyone. It could simply allow grocery store executives to set the SNAP budget, then have USDA rubber-stamp the grocers’ SNAP taxes, which could then be passed through to consumers at the checkout register.
- Congress could fund affordable housing without “taxing” anyone. It could simply allow real estate companies to set the affordable housing budget, then have HUD rubber-stamp the companies affordable-housing taxes, which could then be passed through to consumers as new line items at closing or in monthly surcharges for rent.

We could go on. But you get the point: All of these are obviously taxes. So while “[d]istinguishing a tax from a fee often is a difficult task,” *Tex. Ent.*

Ass’n, Inc. v. Hegar, 10 F.4th 495, 505 (5th Cir. 2021) (citation omitted), the analysis here is straightforward. Congress has bestowed upon FCC the power to levy taxes, and we accordingly conclude that it has delegated its taxing power.⁶

B.

In § 254 of the Telecommunications Act, Congress delegated its taxing power to FCC. The power to tax is a quintessentially legislative one. *See* U.S. CONST. art. 1, § 8, cl. 1; *see also Nat’l Cable*, 415 U.S. at 340 (“Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes.”); MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 334 (2020) (noting that domestic taxation is “especially central to the legislative branch”). So § 254 is constitutional only if it passes nondelegation muster. We (1) explain the nondelegation doctrine as articulated by the Supreme Court. Then we (2) explain the breadth of Congress’s delegation to FCC. Lastly, we (3) explain that the Supreme Court has never upheld a delegation of core legislative power as sweeping as the one contained in § 254.

1.

The Constitution vests “[a]ll legislative Powers herein granted” “in a Congress of the United States.” U.S. CONST. art. I, § 1. “Accompanying that assignment of power to Congress is a bar on its further delegation.” *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality op.). Moreover, “the principle of separation of powers that underlies our tripartite system of

⁶ The fact that Congress euphemistically labeled these universal service charges “contribution[s],” 47 U.S.C. § 254(d), is irrelevant. “Congress cannot change whether an exaction is a tax . . . for constitutional purposes simply by” relabeling it. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (emphasis in original).

Government” independently compels the conclusion that Congress, not agencies, must make legislative decisions. *Mistretta v. United States*, 488 U.S. 361, 371 (1989); see *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting) (“[I]t would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.” (quotation omitted)). So there is no doubt that “the lawmaking function belongs to Congress,” *Loving v. United States*, 517 U.S. 748, 758 (1996), and that Congress “may not constitutionally delegate that power to another” constitutional actor, *Touby v. United States*, 500 U.S. 160, 165 (1991).

But “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function.” *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935). So the Supreme Court has held that delegations are constitutional so long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Still, “there are limits of delegation which there is no constitutional authority to transcend.” *Panama Refin.*, 293 U.S. at 430. And for good reason. Vague congressional delegations undermine representative government because they give unelected bureaucrats—rather than elected representatives—the final say over matters that affect the lives, liberty, and property of Americans. See *Tiger Lily, LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (“By shifting responsibility to a less accountable branch, Congress . . . deprives the people of the say the framers intended them to have.”). Overly broad delegations also obscure accountability: When elected representatives shirk hard choices, constituents do not know whom to hold accountable for government action.

See Gundy, 588 U.S. at 156 (Gorsuch, J., dissenting). And they offend the deliberation-forcing features of the constitutionally prescribed legislative process. *See* U.S. CONST. art. I, § 7; John Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007) (“[B]icameralism and presentment make lawmaking difficult *by design*.” (emphasis in original)); *see also* THE FEDERALIST No. 73 (A. Hamilton) (noting that the Constitution prescribed elaborate procedures for lawmaking because “[t]he oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.”).

So while “the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle,” *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *aff’d on other grounds*, 144 S. Ct. 2117 (2024), “[t]hat does not mean . . . we must rubber-stamp all delegations of legislative power,” *Big Time Vapes, Inc. v. FDA.*, 963 F.3d 436, 443 (5th Cir. 2020). Rather, “[w]e ought not to shy away from our judicial duty to invalidate unconstitutional delegations.” *Ibid.* (quotation omitted).

2.

Nondelegation inquiries “always begin[] . . . with statutory interpretation” because the constitutional question is whether Congress has supplied a sufficiently intelligible principle to guide an agency’s discretion. *Gundy*, 588 U.S. at 135 (plurality op.). So we must construe “the challenged statute to figure out what task it delegates and what instructions it provides.” *Id.* at 136. Petitioners challenge the USF’s funding mechanism, so we must consider whether 47 U.S.C. § 254 sufficiently instructs FCC regarding how much it should tax Americans to pay for the universal service program.

Two of § 254's subsections are relevant: § 254(d) provides that USF funding should be "sufficient . . . to preserve and advance universal service," and § 254(b)(1) suggests that telecommunications services "should be available at . . . affordable rates."

These statutory phrases supply no principle at all. Start with sufficiency. That funding should be "sufficient . . . to preserve and advance universal service" is meaningful only if the concept of universal service is sufficiently intelligible. It is not. Rather, universal service is "an evolving level of telecommunications services that the Commission shall establish periodically" by determining what telecommunications services are "essential to education, public health, or public safety"; are "subscribed to by a substantial majority of residential customers"; are "deployed . . . by telecommunications carriers"; or are otherwise "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c). That is a lot of words, but they amount to a concept of universal service so amorphous that Congress's instruction to raise "sufficient" funds amounts to a suggestion that FCC exact as much tax revenue for universal service projects as FCC thinks is good. *Cf.* Gary Lawson, *Delegation and Original Meaning*, 88 V.A. L. REV. 327, 339–40 (2002) (describing consequences of congressional enactment that requires "'goodness and niceness'").

That § 254(b) supplies minimal guidance on the contours of Congress's idea of an ideal universal service policy is no answer. That is for three reasons. First, we have previously accepted FCC's contention that "nothing in [§ 254] defines 'sufficient' to mean that universal service support must equal the actual costs incurred by" telecommunications carriers contributing to the USF. *TOPUC I*, 183 F.3d at 412. So FCC's universal service taxation is not formally limited by the amount it disburses on universal service projects. Nothing in the statute precludes FCC from, for example, imposing the USF Tax to create an endowment that it could use to

fund whatever projects it might like. FCC has never done so, but the fact “that the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress’s* decision to delegate that is unconstitutional.” *Dep’t of Transp. v. Ass’n of Am. Railroads* (“*Amtrak II*”), 575 U.S. 43, 62 (2015) (Alito, J., concurring) (emphasis in original) (quotation omitted) (quoting *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.* (“*Amtrak I*”), 721 F.3d 666, 674 (D.C. Cir. 2013), *vacated and remanded sub nom. Amtrak II*, 575 U.S. 43); see *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

Second, even if FCC’s power to levy taxes were limited by the amount it disburses on universal service projects, subsection (b) still would not curb FCC’s discretion because we have explained it sets out “aspirational” principles rather than “inexorable statutory command[s].” *TOPUC I*, 183 F.3d at 421; see also *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001). And even if the principles in subsection (b) were more than aspirational, they still would not meaningfully limit FCC because § 254(b)(7) vests FCC with discretion to formulate “other principles” so long as it considers the additional principles to be “necessary and appropriate for the protection of the public interest, convenience, and necessity and . . . consistent with” the rest of Chapter 5 of Title 47 of the United States Code. In other words, FCC “may roam at will,” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935), disregarding § 254(b)’s enumerated principles altogether when it thinks the “public interest” warrants the journey. 47 U.S.C. § 254(c)(1)(D); *id.* § 254(b)(7).

Third, even if the principles in § 254(b) in some way bind FCC, they are contentless in important respects. For example, § 254(b)(6) suggests that “[e]lementary and secondary schools and classrooms . . . and libraries should

have access to advanced telecommunications services as described in subsection (h).” But subsection (h) says only that “elementary schools, secondary schools, and libraries” should have access to telecommunications services “for educational purposes at rates less than the amounts charged for similar services to other parties.” *Id.* § 254(h)(1)(B). Which services? Presumably those FCC thinks are “essential to education” or otherwise within the ambit of its self-defined universal service utopia. *Id.* § 254(c). But how is FCC to make that determination? And which schools and libraries should receive subsidized services? And how much less should they pay?

Congress never said. FCC has answered some of these questions, *see* 47 C.F.R. §§ 54.501, .502, .505, but it remains a mystery how we are supposed to “ascertain whether the will of Congress has been obeyed.” *Mistretta*, 488 U.S. at 379 (citation omitted). Each of the “aspirational” universal service principles in § 254(b) & (c) is inapposite.⁷ So apparently your guess is as good as ours is as good as FCC’s is as good as any random American taxpayer’s. And funding for schools and libraries is not merely an

⁷ Section 254(c)(1)(B) suggests low-income consumers should have access to telecommunications services comparable to those subscribed to by unsubsidized residential customers. And § 254(b)(3) tells FCC to make telecommunications services available in rural areas at rates comparable to those charged in urban areas. Those provisions may supply sufficient guidance for FCC to execute certain aspects of the universal service program. But nothing in the statute remotely suggests FCC should provide universal service funding only to low-income or rural schools. So §§ (b)(3) and (c)(1)(B) cannot supply the limiting principle that § (h)(1)(B) lacks. And the fact that FCC has limited universal service funding to low-income schools is, once again, irrelevant. *See Am. Trucking*, 531 U.S. at 472. The question is whether the statute itself in any way limits FCC’s discretion to supply universal service funding for educational programs, and it plainly does not.

interstitial gap in the statutory scheme. It constituted more than a third of the contribution amount that gave rise to these proceedings. *See* JA.101.⁸

So if § 254(b) binds at all, it is apparent that the only real constraint on FCC’s discretion to levy excise taxes on telecommunications carriers (and American consumers in turn) is that rates “should” remain “affordable.” 47 U.S.C. § 254(b)(1); *see Consumers’ Rsch.*, 67 F.4th at 794 (“[E]xcess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.” (citation omitted)). But saying telecommunications services “should” remain “affordable” amounts to “*no guidance whatsoever.*” *Jarkesy*, 34 F.4th at 462 (emphasis in original). How is FCC to determine whether the USF Tax it mandates has made telecommunications services unaffordable? The demand for cell phones is uncommonly inelastic because cell phones are essential to participation in the modern world. *See Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (“[C]ell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society.” (citation and quotation omitted)). That means the FCC could impose eye-watering USF Taxes while also arguing with a straight face that cell phones remain “affordable” in the sense that most Americans would choose to keep using them. And that means § 254 leaves FCC—and as importantly reviewing courts⁹—utterly at sea. Is a 25% excise tax excessively burdensome under §

⁸ Both dissenting opinions contend 47 U.S.C. § 254 is loaded with intelligible principles. *See post*, at 77–82 (Stewart, J., dissenting); *id.* at 101–02 (Higginson, J., dissenting). But neither identifies any principle that might guide FCC in determining how much less schools and libraries should pay for telecommunications services.

⁹ *See Mistretta*, 488 U.S. at 379 (noting courts are “justified” in invalidating delegations where it would be “impossible in a proper proceeding to ascertain whether the

254(b)(1)? 250%? 2500%? There are no answers because Congress never gave them.

Finally, the breadth of § 254’s delegation is especially troubling because the statute insulates FCC from the principal tool Congress has to control FCC’s universal service decisions—the appropriations power. *See* U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”). Ordinarily, when Congress delegates broadly, it retains a residuum of control over agency action because the agency is powerless to act without a congressional appropriation of funds. *See CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 232 (5th Cir. 2022) (Jones, J., concurring) (“Congress’s supremacy in fiscal matters makes the executive branch dependent on the legislative branch for subsistence, thereby forging a vital line of accountability between the executive branch and the legislative branch and, therefore, the people. Recent history confirms that Congress’s appropriations powers have proven a forcible lever of accountability: Congress has tightened the purse strings to express displeasure with an agency’s nefarious activities and even to end armed combat.”). So even when statutes vest agencies with significant discretion, the appropriations process generally ensures agencies remain subservient to the will of the people as expressed through their elected representatives. *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1957 (2020) (cataloguing examples and noting that “[l]imiting appropriations is an effective way to limit an agency’s exercise of delegated power”).

will of Congress has been obeyed”) (quoting *Yakus v. United States*, 321 U.S. 414, 425–26 (1944)).

Here, though, Congress cannot exercise control by limiting appropriations because the whole point of USF is to fund universal service *outside* the regular appropriations process.¹⁰ And since FCC commissioners are removable by the President only for-cause, *see* 47 U.S.C. § 154(c)(1)(A), the connection between FCC policy decisions made pursuant to § 254 and *any* democratically accountable federal official is extremely attenuated.

3.

The Supreme Court has “over and over upheld even very broad delegations.” *Gundy*, 588 U.S. at 146 (plurality op.). But it has also suggested the scope of permissible delegation varies with context. *See Am. Trucking*, 531 U.S. at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”); *J.W. Hampton*, 276 U.S. at 406 (“In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance [*sic*] must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”); *Loving*, 517 U.S. at 768 (noting the general rule that “*a constitutional power implies a power of*

¹⁰ FCC has concluded that 47 U.S.C. § 254 constitutes “a permanent indefinite appropriation.” GAO-05-151, GREATER INVOLVEMENT NEEDED BY FCC IN THE MANAGEMENT AND OVERSIGHT OF THE E-RATE PROGRAM 11 (2005), <https://perma.cc/QNU6-YEFS>. If we had to decide whether § 254 comports with the Appropriations Clause, U.S. CONST. art. I, § 1, cl. 9, we would apply the Supreme Court’s decision in *CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416 (2024). But we need not decide that question because Petitioners did not formally raise an Appropriations Clause challenge. Our point is only that, to the extent Congress’s ability to control agencies through regular appropriations supplies some justification for broad delegations, *see, e.g.*, Christopher J. Walker, *Restoring Congress’s Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1116 (2018) (explaining the tools Congress has, including the appropriations power, “to rein in the administrative state and prevent federal agencies from abusing their consolidated lawmaking and law-execution powers”), that justification is absent here.

delegation of authority under *it* sufficient to effect *its* purposes” (emphasis added)) (quoting *Lichter v. United States*, 334 U.S. 742, 778 (1948)); *Lichter*, 334 U.S. at 778–79 (suggesting Congress may delegate its war powers more broadly); *Panama Refin.*, 293 U.S. at 422 (same). So the fact that the Court has upheld certain broad delegations does not necessarily dictate that we uphold § 254’s delegation of power to FCC to levy taxes on American consumers. And § 254 appears unlike any delegation the Court has ever blessed.

For starters, the Supreme Court’s nondelegation “jurisprudence has been driven by a practical understanding that 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.” *Mistretta*, 488 U.S. at 372 (emphasis added). So the Court has deemed it constitutionally sufficient for Congress to make a policy judgment and then direct an agency to give that judgment effect through the application of technical knowledge.

For example, in *American Trucking*, 531 U.S. 457, the Court considered a congressional directive to EPA to set ambient air quality standards for certain pollutants. *Id.* at 472. It held that the statute supplied an intelligible principle because it required EPA to set air quality standards “requisite to protect the public health” “for a discrete set of pollutants” based on “the latest scientific knowledge.” *Id.* at 472–73. In other words, the statute was constitutional because Congress made the crucial policy judgment—that the public should be protected from harmful pollutants—and then relied on EPA to give effect to that judgment through the

application of its scientific expertise.¹¹ *See Gundy*, 588 U.S. at 166 (Gorsuch, J., dissenting) (explaining that the “most important[]” question in the intelligible principle inquiry is whether “Congress, and not the Executive Branch, ma[d]e the policy judgments”).

Here, in contrast, Congress did not delegate because FCC has some superior technical knowledge about the optimal amount of universal service funding. No such knowledge exists because determining the ideal size of a welfare program involves policy judgments, not technical ones. And under our Constitution, those judgments usually are Congress’s to make.

In fact, in every case where the Court has upheld a congressional delegation of its prerogative to make significant policy judgments, there has been some special justification. In *Mistretta*, for example, the Court considered a congressional delegation of authority to Article III judges to promulgate sentencing guidelines. Few things are more policy-laden than criminal sentencing decisions, but the Court found the delegation permissible because “the Judiciary always has played, and continues to play, [a role] in sentencing.” *Mistretta*, 488 U.S. at 391; *see also ibid.* (“Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission’s functions, like this Court’s function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch.”).

¹¹ The Court upheld the delegation only after deciding that the statute in question “unambiguously bar[red] cost considerations from the NAAQS-setting process.” *Id.* at 471; *see also id.* at 473–74 (noting the statute “did not permit economic costs to be considered”).

Similarly, in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Court upheld a delegation to FCC to regulate broadcasting “as public convenience, interest, or necessity requires” *Id.* at 214. But licensing of broadcasting rests on the principle “that the public . . . own[s] the airwaves,” and that private people may use that resource only on terms the government sets. John Harrison, *Executive Administration of the Government’s Resources and the Delegation Problem*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT* 232, 250 (Peter J. Wallison & John Yoo eds., 2022); *see also* McCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING*, *supra*, at 334 (noting that the Communications Act of 1934 “can be seen as merely a transfer back to the executive branch of a power to manage public property”). “[S]ecur[ing] the maximum benefits of” a public resource “to all the people of the United States,” *Nat’l Broad. Co.*, 319 U.S. at 217, is “within the core of the executive power,” Harrison, *Executive Administration*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT*, *supra*, at 238. And “when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if the discretion is to be exercised over matters already within the scope of executive power.” *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting) (citation and quotation omitted); *see Wayman v. Southard*, 23 U.S. 1, 42–43 (1825) (“It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (explaining that Congress may delegate more broadly in the foreign affairs context because “the President [is] the sole organ of the federal government in the field of international relations.”); *see also* McCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING*, *supra*, at 334 (“[S]ome of Congress’s enumerated powers are strictly and

exclusively legislative but some are not, and Congress may either exercise the latter powers itself or delegate them.”); Phillip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1148 (2023) (noting that “the shared reach of the” legislative, executive, and judicial “powers occasionally allows different branches to do the same thing even under their different and separated powers.”).

Section 254, in contrast, did not delegate to the executive any power even remotely executive in character. It delegated the power to tax, which “is a legislative function.” *Nat’l Cable*, 415 U.S. at 340.

True, the Supreme Court has upheld seemingly broad congressional delegations of core legislative functions. *See, e.g., Yakus*, 321 U.S. at 420 (upholding a delegation to the agency to fix the prices of commodities at a level that “will be generally fair and equitable and will effectuate the purposes of the Act.” (citation omitted)); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 97 (1946) (upholding a delegation to SEC to modify the structure of holding company systems so as to ensure that they are not “unduly or unnecessarily complicated” and do not “unfairly or inequitably distribute voting power among security holders.” (citation omitted)). But careful consideration reveals that the statutes considered in all these cases limited agency discretion enough that, at the very least, reviewing courts could “ascertain whether the will of Congress ha[d] been obeyed.” *Mistretta*, 488 U.S. at 379 (quoting *Yakus*, 321 U.S. at 425–26).

In *Yakus*, for example, Congress directed the administrator responsible for ensuring “fair and equitable” prices to “ascertain and give due consideration to the prices prevailing” in a particular two-week period, and to make adjustments for relevant factors including “[s]peculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits

earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.” 321 U.S. at 421 (citation omitted). It can hardly be contended that the executive wanted for legislative direction under this statute, or that reviewing courts lacked workable standards. *See id.* at 426 (noting that “the standards prescribed by the . . . Act” were “sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards”). Similarly in *American Power & Light Co.*, the Court found that “a veritable code of rules” set out in other sections of the statute clarified the ambiguities inherent in the phrases “unduly or unnecessarily complicate[d]” and “unfairly or inequitably distribute[d]” such that courts would have no trouble testing SEC’s policies against the law. 329 U.S. at 104–05.

The Court’s other nondelegation precedents are in accord. The statute considered in *J.W. Hampton*, 276 U.S. 394, simply directed the President to impose tariffs that would “equalize” the relative costs of production for American companies and their foreign counterparts—a fact-finding role. *Id.* at 401; *see also Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting) (noting that the statute may have required the President to make “intricate calculations, but it could be argued that Congress had made all the relevant policy decisions, and the Court’s reference to an ‘intelligible principle’ was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details.”). And the term “public interest” in § 407 of the Transportation Act of 1920 was shorthand for a congressional instruction to the Interstate Commerce Commission to ensure that proposed railroad consolidation would not result in deteriorating service quality or unreasonable or discriminatory rates—an instruction with discernible content in light of the common law of common carriers. *See N.Y. Cent. Sec. Corp. v. U.S.*, 287 U.S. 12, 25 (1932); *see also id.*

at 24 (“It is a mistaken assumption that [the term ‘public interest’] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.”); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1045 (1988) (“As early as the 17th century, the common law had derived the duty to charge reasonable rates from the common carrier’s obligation to serve everyone”). And the statute considered in *Touby* “meaningfully constrain[ed] the Attorney General’s discretion” because it directed the Attorney General to ban drugs only after making a factual determination that there was a history of significant abuse that threatened the public health. *See* 500 U.S. at 166; *see also Gundy*, 588 U.S. at 166 (Gorsuch, J., dissenting) (noting that in *Touby* the Court “stressed all [the statutory] constraints on the Attorney General’s discretion . . . to indicate that the statute supplied an ‘intelligible principle’ *because* it assigned an essentially fact-finding responsibility to the executive.” (emphasis in original)). And the statute considered in *Lichter*, 334 U.S. 742—which authorized the executive to recoup “excessive profits” on wartime government contracts—was likewise judicially workable. As the Court noted, ‘excessive’ simply means “[g]reater than the usual amount or degree.” *Id.* at 785 n.37 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1938)). A reviewing court would thus have no trouble discerning whether a contractor reaped in excess because it could easily compare his profits to those of his peers.¹² And so on and so forth.

¹² Moreover, as we have noted, context matters to the intelligible-principle inquiry. So assuming *arguendo* *Lichter* blessed a delegation more sweeping than any other (we think it did not), it is surely relevant that the Court emphasized that the statute in question came about because of the necessities of war, “sprang from [Congress’s] war powers,” and

* * *

So amidst all the statutes that have survived nondelegation challenges, § 254 stands alone. Unlike delegations implicating special agency expertise, § 254 delegates to FCC the power to make important policy judgments, and to make them while wholly immunized from the oversight Congress exercises through the regular appropriations process. Unlike delegations implicating the power to impose criminal sentences, taxation has always been an exclusively legislative function. Unlike the power to impose conditions on the use of public property, taxation involves the conversion of private property. And unlike other congressional delegations implicating core legislative functions, § 254 is a hollow shell that Congress created for FCC to fill—so amorphous that no reviewing court could ever possibly invalidate any FCC action taken in its name.¹³

operated only for “the duration of the war or . . . a short time thereafter.” *Id.* at 755; 787. As the Court explained, because “[t]he power to wage war is the power to wage war successfully,” “[r]easonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war.” *Id.* at 780–81. The *Panama Refining* Court similarly deemed the wartime posture of certain broad delegations meaningful to the delegation inquiry because the President himself has war powers “cognate to the conduct by him of the foreign relations of the government.” 293 U.S. at 422.

¹³ Section 254 also implicates the taxing power, which makes the nondelegation concerns it raises especially salient. See *Nat’l Cable*, 415 U.S. at 341 (“It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read [the relevant statute] narrowly as authorizing not a ‘tax’ but a ‘fee.’”). That is because limitations on the taxing power have long been the mechanism through which the people curb the excesses of unelected power. See *THE FEDERALIST* No. 58 (J. Madison) (“[The House], in a word, hold[s] the purse that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.”).

We therefore have grave concerns about § 254’s constitutionality under the Supreme Court’s nondelegation precedents. *See Gundy*, 588 U.S. at 136 (plurality op.) (noting that the Court “*would* face a nondelegation question” if the statutory provision at issue had “grant[ed] the Attorney General plenary power to determine [the statute’s] applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time” (emphasis added) (citation omitted)). Nevertheless, we need not hold the agency action before us unconstitutional on that ground alone because the unprecedented nature of the delegation combined with other factors is enough to hold it unlawful. *See infra*, Part III.D.

For that reason, the framers through the Origination Clause took special care to ensure that the taxing power remained intimately connected with the people. *See* U.S. CONST. art. I, § 7, cl.1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 544 (Max Farrand ed., 2d ed. 1937) (George Mason) (“[T]he consideration which weighed with the Committee [when drafting the Origination Clause] was that the [House] would be the immediate representatives of the people, the [Senate] would not.”). In fact, “vesting the origination power with the House was an integral part of the deal that resolved the conflict over congressional apportionment: seats in the Senate would not be apportioned based on population, but only the House of Representatives would have the power to initiate legislation that raises or spends money.” Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine*, *supra*, at 252. Benjamin Franklin, among others, noted that “the two clauses, the originating of money bills, and the equality of votes in the Senate, [are] essentially connected by the compromise which had been agreed to.” 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra*, at 233.

So the Constitution’s original meaning would seem to compel a more restrictive test for delegations of the taxing power. Nevertheless, the Supreme Court has declined to apply heightened scrutiny to tax-related delegations, *see Skinner*, 490 U.S. at 223, and we are not authorized to depart from that holding.

C.

The Q1 2022 USF Tax is not only difficult to square with the Supreme Court’s public nondelegation precedents. It was also formulated by private entities. That raises independent but equally serious questions about its compatibility with Article I, § 1, which requires “[a]ll legislative Powers herein granted shall be vested in a Congress.” We (1) explain that the scope of FCC’s delegation to private entities may violate the Legislative Vesting Clause by allowing private entities to exercise government power. Then we (2) explain that even if FCC’s delegation could be constitutionally justified, FCC may have violated the Legislative Vesting Clause by delegating government power to private entities without express congressional authorization.

1.

a.

The Supreme Court has held Congress has broad discretion to empower executive agencies to “execute” the law. *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). “When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with legislative Powers. Nor are they vested with the executive Power, which belongs to the President.” *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (quotation and citations omitted). So it is clear that delegations to private entities raise constitutional concerns entirely distinct from delegations to the executive.

Only four times has the Supreme Court considered whether a delegation to private entities violates Article I's Vesting Clause.¹⁴

First, in *Schechter Poultry*, the Court considered a constitutional challenge to the National Industrial Recovery Act ("NIRA") of 1933, 48 Stat. 195. *See* 295 U.S. at 519–21. That statute delegated to trade or industrial groups the authority to develop codes defining "unfair method[s] of competition." *Id.* at 521 n.4 (quotation omitted). If the codes were approved by the President, they were to become law under "such exceptions to and exemptions from the provisions of such code, as the President in his discretion deem[ed] necessary to effectuate the policy" of the NIRA. *Ibid.* The Court held that the statute was unconstitutional. In part, it reasoned the idea that "Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries," or that "trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises" was "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537.

The next year, in *Carter v. Carter Coal Company*, 298 U.S. 238, 278 (1936), the Court considered a delegation challenge to the Bituminous Coal Conservation Act of 1935, 49 Stat. 991 (repealed 1937). That statute authorized the district board in local coal districts (the "code authority") to

¹⁴ The parties in *Amtrak II* raised a private delegation challenge, but the Court did not reach it because it determined that, for relevant purposes, Amtrak was a governmental entity. *See* 575 U.S. at 55. The Court has also several times considered whether state delegations of legislative power to private entities violated due process, *see* Paul J. Larkin, *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 45–47 (2021), but those cases present a question different from the one before us.

adopt a code that included agreed-upon minimum prices for coal. *Carter Coal*, 298 U.S. at 282–83. It also allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide minimum wage and maximum working-hour agreements. *Id.* at 283–84. Both the minimum price codes and the labor codes bound producers—*i.e.*, obtained legal force—without approval by any federal official. *Id.* at 282, 284. The Court explained the statute amounted to “delegation in its most obnoxious form” because it purported to delegate regulatory power not “to an official or an official body, presumptively disinterested,” but rather “to private persons whose interests . . . often are adverse” to those whom the statute authorized them to regulate. *Id.* at 311. That, the Court held, was “an intolerable and unconstitutional interference with personal liberty and private property.” *Ibid.*¹⁵

In *Currin v. Wallace*, 306 U.S. 1, 5–6 (1939), the Court considered a delegation challenge to the Tobacco Inspection Act of 1935, 49 Stat. 731 which authorized the Secretary of Agriculture to designate markets in which no tobacco could be sold unless it had “been inspected and certified by an authorized representative of the Secretary according to the established standards.” One of the bases for the challenge was that the Secretary could not designate a market unless two-thirds of the growers voting at a prescribed referendum favored the designation. *See Currin*, 306 U.S. at 6, 15. But the producers had no power to designate the markets in which classification would be required; only the Secretary could do that. Nor did the statute even

¹⁵ The Court did not clearly specify which constitutional provision—the Legislative Vesting Clause or the Fifth Amendment Due Process Clause—the statute offended. *See id.* at 310–12; *see also Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 881 n.23 (5th Cir. 2022). But because the relevant portion of the *Carter Coal* cited *Schechter Poultry*, a Vesting Clause case, alongside Due Process cases, the Court presumably held the delegation was unlawful on both grounds.

provide that the producers would help craft regulations. So unlike the private bodies in *Carter Coal*, the tobacco producers had no power to “make the law and force it upon a minority.” *Id.* at 15–16 (citation omitted). Congress merely gave them the ability to prevent certain regulations from taking effect. *See ibid.* The Court accordingly rejected the challenge on the ground that the statute did not delegate *any* legislative power to private entities. *Ibid.*

Finally, in *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381, 387 (1940), the Court considered a private delegation challenge to The Bituminous Coal Act of 1937, 50 Stat. 72 (repealed 1966), a revised version of the statute the Court held unlawful in *Carter Coal*. Congress’s most important revision was to relegate the code authorities from lawmakers to “aid[s]” subject to the “pervasive surveillance and authority” of the National Bituminous Coal Commission. *Sunshine Anthracite*, 310 U.S. at 388. Under the revised statute, code authorities could “propose” minimum prices, but their proposals were legal nullities until they were expressly “approved, disapproved, or modified” by the Coal Commission. *Ibid.* Thus, the Court concluded that the Commission, “not the code authorities, determine[d] [coal] prices,” *id.* at 399, and it therefore held that the statute did not unconstitutionally delegate government power to private entities.

Lower courts have discerned from these cases the “cardinal constitutional principle [] that federal power can be wielded only by the federal government.” *Black*, 53 F.4th at 872. Private delegations are thus constitutional only on three conditions. First, government officials must have final decision-making authority. *See Larkin, The Private Delegation Doctrine, supra*, at 50–51 (noting that in every case in which the Supreme Court has upheld a private delegation, “the law[] at issue . . . left final decision-making authority in the hands of a government official”). Second, agencies must *actually exercise* their authority rather than “reflexively rubber stamp [work product] prepared by others.” *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir.

1974); *see State v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021), *cert. denied*, *Tex. v. Comm’r of Internal Revenue*, 142 S. Ct. 1308 (2022) (“A federal agency may not abdicate its statutory duties by delegating them to a private entity.” (quotation and citation omitted)).¹⁶ And third, the private actors must always remain subject to the “pervasive surveillance and authority” of some person or entity lawfully vested with government power. *Sunshine Anthracite*, 310 U.S. at 388.

In light of these strictures on private delegations, we held unconstitutional a statute that vested a private entity with the power to make rules regulating an industry where those rules were subject only to limited agency review. *See Black*, 53 F.4th at 884–89. And the D.C. Circuit similarly held unconstitutional a statute that empowered Amtrak to work jointly with the Federal Railroad Administration to develop binding railroad performance standards because the statute did not vest FRA with complete regulatory control. *See Amtrak I*, 721 F.3d at 670–74, *vacated and remanded sub nom. Amtrak II*, 575 U.S. 43; *see also Black*, 53 F.4th at 889–90 (relying on *Amtrak I*).

In contrast, where courts have deemed delegations to private entities constitutional, they have uniformly emphasized the agency’s actual decision-making authority and control. For example, when the Third Circuit approved the National Association of Securities Dealers’ role in securities regulation, it explained industry self-regulation raises “serious constitutional

¹⁶ *Lynn* arose under the National Environmental Policy Act (“NEPA”), not the Constitution. But *Rettig* repeatedly cited *Lynn* to expound the level of control agencies must retain over private actors wielding governmental power for constitutional purposes. *Rettig*, 987 F.3d at 532. The central question in *Lynn* was whether an agency bore ultimate responsibility for work product prepared by a private entity, *see* 502 F.2d at 59, which is required not only by NEPA but also by the Legislative Vesting Clause, *see, e.g., Black*, 53 F.4th at 881.

challenges.” *Todd & Co. v. SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977). Accordingly, the Court held securities self-regulation was constitutional only after emphasizing that SEC was obliged to “insure fair treatment of those disciplined by” NASD. *Ibid.* It also stressed that SEC was statutorily required to review NASD orders, make de novo findings, and come to an “independent decision on” securities’ violations and penalties. *See id.* at 1012; *see also id.* at 1012–13 (“[NASD’s] rules and its disciplinary actions were subject to full review by the S.E.C., a wholly public body, which *must* base its decision on its own findings.” (emphasis added)). Similarly, when we approved a private entity’s role in drafting an environmental impact statement, we emphasized that “the applicable federal agency [bore] the responsibility for the ultimate work product” and “independently perform[ed] its reviewing, analytical and judgmental functions.” *Lynn*, 502 F.2d at 59 (quotation and citation omitted); *see also Rettig*, 987 F.3d at 531–32 (citing *Lynn* in an Art. I, § 1 challenge).

b.

FCC has delegated government power—the power to dictate the size of the universal service contribution amount, which controls the size of a tax levied on American consumers—to USAC and private telecommunications carriers. That delegation is lawful only if FCC (1) has final decision-making authority, (2) actually exercises that authority, and (3) exercises “pervasive surveillance and authority” over the private entities exercising power in its name. *Black*, 53 F.4th at 884 (quoting *Sunshine Anthracite*, 310 U.S. at 388).

FCC’s subdelegation of its taxing power violates this test in two ways. The first problem is that FCC regulations provide that USAC’s projections take legal effect without formal FCC approval. *See* 47 C.F.R. § 54.709(a)(3). FCC has, in effect, given private entities the final say with respect to the size of the USF Tax. That FCC retains discretion to revise the proposed

contribution amount, *see ibid.*, is insufficient. Congress could not say: “The defense budget is whatever Lockheed Martin wants it to be, unless Congress intervenes to revise it.” To make law, Congress must affirmatively adopt the statutory text, pass it bicamerally, and present it to the President for signature. *INS v. Chadha*, 462 U.S. 919, 959 (1983). Legislation requires action not acquiescence. Similarly, while FCC may solicit advice from USAC and private carriers, it must affirmatively act to give legal effect to that advice because it alone has constitutional authority to execute 47 U.S.C. § 254.

The second problem is that FCC does not appear to “independently perform[] its reviewing, analytical and judgmental functions” with respect to the privately supplied universal service contribution amount. *Rettig*, 987 F.3d at 532 (quoting *Lynn*, 502 F.2d at 59). FCC has not pointed us to anything that suggests it *even checks* USAC’s work. Instead, it appears to “reflexive[ly] rubber stamp” whatever contribution amount USAC proposes. *Lynn*, 502 F.2d at 59. The record before us shows that, before this litigation started, FCC *never made a single substantive change* to the contribution amounts proposed by USAC. *See supra*, at 6 & n.1.¹⁷

That is a *de facto* abdication. And when an agency *de facto* abdicates to a private entity its responsibility to make governmental decisions, that entity becomes more than a mere “aid” to the agency. *See Black*, 53 F.4th at 881 (quoting *Sunshine Anthracite*, 310 U.S. at 388). The private company becomes a lawmaker in its own right. So *de jure* approval alone is not enough. If FCC is going to rely on a non-governmental actor to supply a revenue requirement that dictates the size of a tax levied on American consumers, it

¹⁷ Even if FCC wanted to change USAC’s proposals, it is not at all clear it could. Petitioners contend, and FCC does not dispute, that the “approval” process for USAC’s proposals plays out just days before the new quarter begins. With such a short time window, it appears FCC has no real choice but to accept USAC’s proposed figures.

must at the very least do something to demonstrate that it applied its independent judgment.

c.

The Government's principal counterargument is that FCC—not USAC—is exercising governmental power. Its argument goes like this: FCC sets out detailed regulations specifying who is eligible for what kinds of universal service subsidies. Private companies merely project the costs they will incur supplying the FCC-specified subsidized services and report that information to USAC. And then USAC merely aggregates that information into a contribution amount, which FCC turns into the contribution factor that is levied on telecommunications revenues as a USF Tax. FCC regulations even preclude USAC from making policy. So in determining the contribution amount, which directly controls the size of the tax levied on American telecommunications consumers, USAC and private carriers perform a simple, ministerial task—a mere “fact gathering function for the FCC.” FCC EB Br. 56 (quotation omitted).

But FCC obfuscates how the universal service sausage is really made. FCC would have us believe its universal service policy necessarily dictates the size of the contribution amount, and so FCC really controls the size of the USF Tax. But that cannot be right because USF disbursements often do not comply with FCC policy. *See supra*, Part I.C. Instead, large swaths of USF funds—perhaps at one point close to one-quarter—are disbursed to ineligible recipients. *See, e.g.*, THE HIGH-COST PROGRAM, *supra*, at 2. That FCC sets universal service policy obviously does nothing to limit the revenue FCC allows private entities to exact from consumers to fund payments made *in violation of* FCC's universal service policy.

Put differently, FCC policy would dictate the contribution amount only if it in fact dictated how private companies raised and spent USF

monies. The problem is that FCC has abdicated responsibility for ensuring compliance to the very entities whose universal service demand projections dictate the size of the contribution amount. *See, e.g.*, FCC’S LIFELINE PROGRAM, *supra*, at executive summary page (noting that FCC “relies on over 2,000 Eligible Telecommunication Carriers that are Lifeline providers to implement key program functions, such as verifying subscriber eligibility,” which is problematic because “companies may have financial incentives to enroll as many customers as possible”); FCC’S E-RATE PROGRAM, *supra*, at 21–22 (noting that telecommunications service providers have opportunities to “make misrepresentations . . . during the funding phase” that “may not be discovered due to the self-certifying nature of the program”).

Moreover, the entity most responsible for snuffing out wasteful or fraudulent disbursements—USAC—is run almost entirely by stakeholders who stand to benefit financially when universal service subsidies grow. *See Leadership*, UNIVERSAL SERV. ADMIN. CO., *supra*; *see also* FCC’S E-RATE PROGRAM, *supra*, at 15 (noting that FCC relies on USAC to ensure compliance carrier compliance with FCC rules). And that is no accident. USAC is run by self-interested stakeholders because FCC regulations *require* it. *See* 47 C.F.R. § 54.703(b). FCC mandates that nine of USAC’s nineteen directors represent companies in the telecommunications industry who are compensated by the very same USF funds they raise. *See id.* § 54.703(b)(1)–(6). It mandates that another seven represent the schools, libraries, health care providers, and low-income consumers who are direct recipients of USF funds. *See id.* § 54.703(b)(7)–(10).

Because the telecommunications industry polices its own compliance with FCC universal service policy, and responsibility for monitoring the industry falls most heavily on a board composed of industry representatives and consumer groups with a direct financial interest in the size of USF taxes,

private entities have a far more important and discretionary role in determining the size of the contribution amount (which controls the level of universal service taxation) than FCC would have you believe. For example, a carrier could (intentionally or unintentionally) project and then supply USF-subsidized service costing twenty-five percent more than its USF-subsidized service would cost if it strictly complied with FCC rules. And FCC offers us *zero* reason to think it would even discover the discrepancy—let alone that FCC would do *anything* about it. FCC has in effect said to carriers: “Here is our universal service policy and a blank check. We’re not going to pay any attention to what you put in the dollar box. We know you have financial incentives to juice the number, but we trust you’ll follow our policy to the letter anyways. Just fill it out however you see fit, take it to the bank, and the money will be drawn from the accounts of American telecommunications consumers.” We do not doubt that most of the industry is staffed by individuals of the utmost integrity, but we cannot agree that private entities are no more than ministerial bean counters when it comes to setting the USF Tax.

Moreover, even if we put the compliance issue to one side, we would still disagree that private companies have merely “ministerial” control over the contribution amount. As we have noted, FCC’s counterargument turns on the Commission’s nominal control over universal service policy. But setting a policy is not the same as allocating funds to execute that policy. That much is evident from the constitutional requirement that Congress appropriate money to execute the government programs it establishes. *See* U.S. CONST. art. I, § 9, cl. 7. Thus, FCC’s argument fails because it impermissibly collapses universal service funding decisions into universal service policy decisions. The decision of how much money should be set aside to execute FCC’s universal service policies—the very decision FCC has delegated to USAC and private carriers—is an independent decision that

requires independent judgment. And surely discretion inheres in decisions about how much money to allocate to a massive federal welfare program. *See Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 353 (1868) (“A ministerial duty . . . is one in respect to which nothing is left to discretion.” (quotation omitted)). So even if we thought FCC correctly described the role of private entities, we would still conclude that dictating the contribution amount is an exercise of government power.

* * *

FCC has not delegated to private entities a trivial, fact-gathering role. It has delegated the power to dictate the amount of money that will be exacted from telecommunications carriers (and American consumers in turn) to promote “universal service.” In other words, it has delegated the taxing power. And the delegation is not even “to an official or an official body, presumptively disinterested,” but rather to private persons vested with no government power and with interests that “often are adverse” to those whom they are taxing. *Carter Coal*, 298 U.S. at 311; *see also Ass’n of Am. Railroads v. U.S. Dep’t of Transp.* (“*Amtrak III*”), 821 F.3d 19, 29 (D.C. Cir. 2016) (“Delegating legislative authority to official bodies is inoffensive because we presume those bodies are disinterested, that their loyalties lie with the public good, not their private gain. But here, the majority producers may be and often are adverse to the interests of others in the same business.” (citation and quotation omitted)). We accordingly have serious trouble squaring FCC’s subdelegation with Article I, § 1 of the Constitution.¹⁸

¹⁸ JUDGE NEWSOM recently expressed skepticism that the private entities involved in USF may constitutionally exercise the power FCC delegated to them. *See Consumers’ Rsch.*, 88 F.4th at 932 (Newsom, J., concurring). But JUDGE NEWSOM voted to deny a petition for review that is almost identical to the one before us because in his view, these private entities exercise executive rather than legislative power, and petitioners did

2.

Even if the Constitution does not categorically forbid FCC’s delegation to USAC and private telecommunications carriers, 47 U.S.C. § 254 does not authorize it. And there is no precedent establishing that federal agencies may subdelegate powers in the absence of statutory authorization. To the contrary, the *only* Supreme Court cases blessing private delegations involved explicit statutory authorizations.

a.

At the Founding, the maxim that *delegata potestas non potest delegari*—no delegated powers can be further delegated—was widely accepted. The maxim has its roots in the civil law. *See* Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 171 (1929). Lord Coke enshrined the maxim as a common law doctrine. *See id.* at 170–71 (citations omitted). And the doctrine endured through the founding generation, as evidenced by treatises of the great 19th-century scholars. Samuel Livermore, for example, noted that “[a]n authority given to one person cannot in general be delegated by him to another; for being a personal trust and confidence it is not in its nature transmissible, and if there be such a power to one person, to exercise his judgment and discretion, he cannot say, that the trust and confidence reposed in him shall be exercised at the discretion of another person.” A TREATISE ON THE LAW OF PRINCIPAL AND AGENT AND OF SALES BY AUCTION 54 (1818). Likewise, James Kent wrote that “[a]n agent, ordinarily and without express authority, has not power to employ a

not raise an Article II challenge. *Ibid.* With utmost respect to our distinguished colleague, private entities do play a legislative role in the USF because their projections directly control the size of USF tax rates, and setting tax rates is unquestionably a legislative function. *See supra*, Part III.B.

sub-agent to do the business, without the knowledge or consent of his principle. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated.” 2 COMMENTARIES ON AMERICAN LAW 496 (1827). And Joseph Story agreed, explaining that “[o]ne, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal or who, if known, might not be selected by him for such a purpose.” COMMENTARIES ON THE LAW OF AGENCY, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE 66–67 (1844).

As with most rules, this one had exceptions. Common lawyers assumed that ministerial tasks could be subdelegated. See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION 115 (2017). And a fiduciary document could specifically authorize subdelegations of delegated authority. *Ibid.*

But as a general matter, “[t]he founding-era rule against subdelegation of delegated agency authority is as clearly established as any proposition of law can be established.” *Id.* at 114. And it was not merely a proposition of agency law. In fact, the Supreme Court once noted that the maxim “has had wider application in the construction of our federal and state Constitutions than it has in private law.” *J.W. Hampton*, 276 U.S. at 405–06; see also Duff & Whiteside, *Delegata Potestas Non Potest Delegari*, *supra*, at 175 (“[I]n cases which involve a supposed delegation to an independent board or commission, as well as those where the delegation is to the executive or judiciary, the maxim *delegata potestas non potest delegari*, or its English

equivalent, has been the chief reliance of the courts, and has attained in their eyes the dignity of a principle of constitutional law.”).

So the Founders’ law prohibited unauthorized subdelegations of non-ministerial delegated authority, and the Supreme Court has recognized that as a constitutional principle. *See J.W. Hampton*, 276 U.S. at 405–06; *cf. Gundy*, 588 U.S. at 135 (plurality op.) (“Article I of the Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.’ § 1. Accompanying that assignment of power to Congress is a bar on its further delegation.”). We think the clear implication is that the Constitution imposes upon federal agencies—acting as agents of the people’s representatives in Congress—a duty to wield delegated power unless Congress authorizes subdelegation or the subdelegation involves no more than ministerial tasks. In other words, “*Congress* may formalize [a limited] role [for] private parties” in executing its laws, *Amtrak I*, 721 F.3d at 671 (emphasis added) (citing *Sunshine Anthracite*, 310 U.S. at 388), but agencies may not.

b.

This rule does not just accord with law at the Founding; it also accords with Supreme Court precedent.

The Court has emphasized the “vital constitutional principle” that “[l]iberty requires accountability.” *Amtrak II*, 575 U.S. at 57 (Alito, J., concurring). Every executive branch official is in some way accountable to the people because every executive branch official may be removed—for good cause at least—by the President, who is himself “the most democratic and politically accountable official in Government.” *Seila L. LLC v. CFPB*, 591 U.S. 197, 224 (2020). Private persons, in contrast, may not be removed by the President because private persons do not wield any portion of “the executive Power” our Constitution vests “in a President of the United States

of America.” U.S. CONST. art. II, § 1, cl. 1. There is no reason to lightly infer that Congress intends to insulate law execution from democratic accountability in this way.¹⁹

In accordance with these principles, both Supreme Court cases authorizing private entities to wield anything like government power involved express authorizations from Congress. The Tobacco Inspection Act considered in *Curran* expressly provided that regulations would take effect only with the support of two-thirds of the tobacco growers in the relevant market. *See* 306 U.S. at 6, 15. And the Bituminous Coal Act considered in *Sunshine Anthracite* created the very private boards that proposed minimum prices and labor codes to the Coal Commission. *See* 310 U.S. at 387–88 (noting that the statute provided for “[s]ome twenty district boards of code members . . . which are to operate as an aid to the Commission” and “specifie[d] in detail the methods of their organization and operation, the scope of their functions, and the jurisdiction of the Commission over them.”).²⁰

c.

Section 254, by contrast, makes no mention of the fact that private entities might be responsible for determining the size of the tax FCC levies

¹⁹ Deciding who should exercise governmental power can be as important as deciding whether governmental power should be delegated in the first place. If it were not, we would not care so deeply about Presidential elections. So democratic accountability is frustrated when decisions about who should exercise governmental power are made by bureaucrats—whose connection to the people is real but highly attenuated—rather than Congress, whose members are directly “accountable to [their] constituents through regular popular elections.” *Jarkesy*, 34 F.4th at 459 (citation omitted).

²⁰ Likewise the Maloney Act, which the Third Circuit considered in *Todd & Co.*, specifically authorized registered organizations to self-regulate over-the-counter securities markets. *See* 557 F.2d at 1012.

on American consumers. It does not *even mention* USAC, a Delaware corporation FCC established without congressional authorization.

When asked at oral argument to identify the portion of § 254 that authorizes FCC to subdelegate administration of the universal service contribution mechanism to private entities, the Government’s counsel could point only to subsection § 254(b)(5). *See* Oral Arg. at 46:40–48:55. That subsection directs FCC to establish “mechanisms to preserve and advance universal service.” § 254(b)(5). But a directive to establish “mechanisms” plainly does not imply that those “mechanisms” may be controlled by a private, non-governmental entity incorporated by FCC without any involvement from Congress.

In fact, § 254(b)(5) seems to suggest precisely the opposite. Rather than directing FCC to establish private mechanisms, it specifically instructs FCC to establish “Federal and State mechanisms,” *ibid.*, which indicates Congress intended to make government entities responsible for administering universal service programs. So subsection (b)(5) is unavailing.

The closest § 254 comes to contemplating that a non-governmental entity might play any role in executing the statute is to incorporate by reference some of the preexisting regulations governing the Lifeline Program. *See* § 254(j) (“Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.”). Those regulations made the National Exchange Carrier Association (“NECA”) responsible for calculating the Lifeline Assistance charges levied on local exchange carriers. *See* 47 C.F.R. § 69.117 (10-1-95 ed.). And they gave local exchange carriers a small role in determining the size of Lifeline Assistance charges because carriers could obtain subsidies for their self-reported costs

incurred in waiving one kind of regulatory fee. *See id.* § 69.104(j) (10-1-95 ed.).

But the fact that § 254 incorporated certain pre-1996 Lifeline Assistance program regulations does not suggest Congress authorized FCC's abdication of responsibility for the USF Tax to private entities. That is for three reasons.

First, NECA's role under 47 C.F.R. § 69.117 in 1995 was not remotely analogous to USAC's current role of administering the entire USF. Section 69.117 charged NECA only with two simple, ministerial tasks: (1) Calculating Lifeline Assistance charges by "dividing the sum of one-twelfth of the projected annual Lifeline Assistance revenue requirement and one-twelfth of the projected annual revenue requirement calculated by all telephone companies pursuant to § 69.104(l) by the number of common lines presubscribed to interexchange carriers" *Id.* § 69.117(b) (10-1-95 ed.). And (2) "bill[ing] and collect[ing] the charge, and disburs[ing] associated revenue." *Ibid.* USAC's role as USF administrator, by contrast, involves far more than ministerial tasks. *See supra*, Part III.C.1.c.

Second, the carriers' role under 47 C.F.R. § 69.117 (and associated regulations) in 1995 was not analogous to their role in 2023. Before the 1996 Act, FCC regulations authorized certain carriers to bill the Lifeline Program for costs associated with waiving certain minor, regulatorily imposed end user common line charges for certain means-tested subscribers pursuant to a carrier-developed plan certified by FCC. *Id.* § 69.104(j) (10-1-95 ed.). But carriers could waive end user charges only if they reduced their own service rate charges by an equivalent amount. *Ibid.* That is nothing like the modern universal service regime, which allows a greatly expanded class of carriers to bill USF for a broad range of subsidized services provided at no cost to themselves.

Third, even if the role NECA and telecommunications carriers played in administering Lifeline Assistance charges before § 254 was analogous to the role they play in administering the modern Lifeline Program, there is no evidence Congress contemplated private entities would play the same role in administering the three other major universal service programs FCC has established pursuant to its § 254 authority. That Congress provided a narrow role for certain private entities in administering a small government program subsidizing one kind of telecommunications service says nothing about whether Congress authorized a broadly expanded class of private entities to play a central role in administering a nine-billion-dollar welfare fund offering subsidies for technologies no one could have imagined when § 254 was enacted. If anything, the text of § 254 suggests Congress actually meant to *preclude* private entities from administering USF programs other than Lifeline. That is because NECA did administer the pre-1996 USF. *See* 47 C.F.R. § 69.116 (10-1-95 ed.). But NECA's USF responsibilities were distinct from its Lifeline Assistance responsibilities; the former were spelled out in § 69.116, and the latter in § 69.117. Congress referenced § 69.117 in § 254, but it conspicuously did not reference § 69.116. Congress's explicit recognition of one relatively minor aspect of private companies' participation in the pre-1996 Lifeline Assistance regime thus evinces that Congress knew how to empower private companies and chose not to empower them to administer other aspects of the USF.

So if Congress authorized FCC to delegate sweeping universal service responsibilities to private entities, it did not say so very clearly. Indeed, it speaks volumes that the only plausible statutory justification for FCC's subdelegation—§ 254(j)—is so ambiguous that FCC, which should be more familiar with § 254 than anyone, did not even think to point to it as justification for its reliance on private companies to set the USF Tax.

* * *

FCC subdelegated the power to determine the universal service contribution amount to USAC, who further subdelegated it to private, for-profit telecommunications carriers. That subdelegation was not authorized. *See supra*, Part III.C.2.c. And the tasks FCC subdelegated are not ministerial. *See supra*, Part III.C.1.b–c. So even if Article I, § 1 does not categorically forbid USAC and private telecommunications carriers from exercising the kind of power FCC has vested in them, it may forbid them from doing so absent express congressional authorization.²¹

D.

We are highly skeptical that the contribution factor before us comports with the bar on congressional delegations of legislative power. And we are similarly skeptical that it comports with the general rule that private entities may not wield governmental power, especially not without express and unambiguous congressional authorization. But we need not resolve either question in this case. That is because *the combination* of Congress’s sweeping delegation to FCC and FCC’s unauthorized subdelegation to USAC violates the Legislative Vesting Clause in Article I, § 1.

²¹ Petitioners certainly could have framed their private nondelegation challenge in statutory terms. *See Consumers’ Rsch*, 88 F.4th at 933 (Newsom, J., concurring) (“[I]t may be that USAC is operating in contravention of the governing statute, 47 U.S.C. § 254, which conspicuously never even *mentions* USAC, let alone authorizes its involvement in the universal-service program.” (emphasis in original)). But assuming private entities are permitted to exercise government power at all, the decision to delegate government power to a private entity is itself a legislative one. And since agencies may not wield legislative power, we are persuaded FCC’s unauthorized decision to delegate government power to a private actor likely violates not only § 254 but also Article I, § 1 of the Constitution. *But see id.* at 933 n.5 (Newsom, J., concurring) (expressing skepticism that the lack of statutory authorization for a delegation to a private entity “has any real bearing on the *constitutional* [private nondelegation] question” (emphasis in original)).

We (1) explain the Supreme Court’s cases instructing that separation-of-powers jurisprudence is done holistically, with an eye to constitutional history and structure, not by dissecting government programs into their component parts. Then we (2) explain why an agency action involving a broad congressional delegation *and* an unauthorized agency subdelegation to private entities violates the Constitution even if neither of those features does so independently.

1.

The Supreme Court has instructed us to review separation-of-powers challenges holistically. And it has held that two or more things that are not independently unconstitutional *can combine* to violate the Constitution’s separation of powers.

Take for example *Seila Law*, 591 U.S. 197. The question presented in that case was whether a for-cause removal restriction unconstitutionally infringed the President’s power to remove the Director of the Consumer Financial Protection Bureau. *See id.* at 204. Two lines of precedent seemed to converge to suggest the removal restriction at issue posed no constitutional problem. First, *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), established that Congress may constitutionally grant for-cause removal protections to a group of agency directors that wield executive power. *See also Seila L.*, 591 U.S. at 216 n.2 (noting that FTC has always exercised executive power). Second, *Morrison v. Olson*, 487 U.S. 654 (1988), established that Congress may constitutionally give for-cause removal protection to a single official vested with executive authority. *See also Seila L.*, 591 U.S. at 217 (noting that the independent counsel wielded executive power). The Court of Appeals accordingly reasoned that *Humphrey’s Executor* and *Morrison* controlled and that the statutory provision limiting the President’s power to

remove the CFPB director was constitutional. *CFPB v. Seila L. LLC*, 923 F.3d 680, 684 (9th Cir. 2019).

The Supreme Court reversed. It granted that some for-cause removal restrictions are not problematic. *See Seila L.*, 591 U.S. at 215. And it granted that for-cause removal restrictions applied to single-member directorships are sometimes constitutionally permissible. *See id.* at 217. But it held the combination of (1) for-cause removal, (2) a one-member CFPB Director, and (3) the capacious powers of the CFPB created a constitutional problem. *Id.* at 224–25; *see also id.* at 258 (Thomas, J., concurring in part) (“The constitutional violation results from, at a minimum, the *combination* of the removal provision and the provision allowing the CFPB to seek enforcement of a civil investigative demand.” (emphasis added) (citations omitted)). In other words, three features of the CFPB—each independently constitutional—combined to create a “new situation” that could not be decided by reference to precedents that concerned only one aspect of the problem. *Id.* at 220 (citation omitted).

The same kind of reasoning guided the Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In that case, the question presented was whether “the President [may be] restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States[.]” *Id.* at 483–84. The Court noted its previous holding that Congress may provide for restrictions on the President’s ability to remove the directors of independent agencies like SEC. *See id.* at 483; *see also Humphrey’s Executor*, 295 U.S. 602. It also noted its previous holding that Congress may provide for restrictions on the power of principal executive officers to remove their own inferiors. *See ibid.*; *see also United States v. Perkins*, 116 U.S. 483 (1886). But the Court held that the *combination* of two separate layers of removal protections created “a

new situation not yet encountered by the Court.” *Free Enter. Fund*, 561 U.S. at 483. And that combination, the Court held, violated the Constitution. *Id.* at 484.

Seila Law and *Free Enterprise Fund* thus evince a general principle that, with respect to the separation of powers at least, two constitutional parts do not necessarily add up to a constitutional whole. *Cf.* Aristotle, *Metaphysics*, in 1 WORKS OF ARISTOTLE 569 (Mortimer J. Adler ed., W. D. Ross trans., 1990) (observing “the whole is” often “something besides the parts”). Rather, reviewing courts must consider a government program holistically, with an eye toward its compatibility with our constitutional history and structure. *See Seila L.*, 591 U.S. at 222.

2.

Here, history and structure both point in the same direction: the universal service contribution mechanism is unconstitutional.

a.

“Perhaps the most telling indication of a severe constitutional problem” with the structure of a government program “is a lack of historical precedent to support it.” *Id.* at 220 (quotation omitted) (quoting *Free Enter. Fund*, 561 U.S. at 505). And USF’s double-layered delegation is unprecedented.

First, there is no record of any government program like USF in all the U.S. Reports. The only case that even remotely resembles USF’s combination of a broad congressional delegation with significant industry involvement is *Sunshine Anthracite*, 310 U.S. 381. *See supra*, Part III.C.1.a.

While *Sunshine Anthracite* is the closest analogue, it is not really that close. Unlike USAC and private telecommunications carriers, which *de facto* decide the USF contribution amount, the code authorities under the

Bituminous Coal Act of 1937 only had the power to *recommend* minimum coal prices. *See* 310 U.S. at 399 (“[The Coal Commission], not the code authorities, determines the prices.”). And the only recommendations the code authorities could make were cabined by a clear rule: Congress provided that minimum coal prices were to be fixed at a level which “reflect[ed] as nearly as possible the relative market values at points of delivery taking into account specifically enumerated factors,” *id.* at 397—namely labor, supplies, power, taxes, insurance, workmen’s compensation, royalties, depreciation and depletion and all other direct expenses of production, coal operators’ association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration. *See* The Bituminous Coal Act of 1937, 50 Stat. at 78. Those enumerated factors, “consistently with the process of coordination, yield a return to each area approximating its weighted average cost per ton.” *Sunshine Anthracite*, 310 U.S. at 397.²²

That case is nothing like ours. To make *Sunshine Anthracite* apposite, the Coal Commission’s discretion to set minimum prices would have had to have been unfettered (it was not); the Coal Commission’s passive acquiescence would have had to make the code authorities’ price recommendations legally binding (it did not); and there would have to have been evidence that the Coal Commission *always* agreed with the code authorities’ price recommendations (there was not).

Second, FCC has not pointed to any historical analogue outside the U.S. Reports. That is hardly surprising. USF combines a sweeping delegation of the taxing power, *see supra*, Part III.B, with a subdelegation of that power

²² The statute also authorized the Commission to fix maximum coal prices under certain circumstances, but the code authorities had no role in formulating those maximums. *See ibid.*

to private entities with a personal financial interest in the size of the tax, *see supra*, Part III.C. It is difficult to imagine early Congresses would have authorized a similarly dual-layered delegation of the taxing power.

True, Congress has always relied on the executive to execute tax laws. For example, in 1798 Congress vested tax assessors with authority to value real estate for the purpose of administering a nationwide direct tax. *See* Act of July 14, 1798, ch. 75, 1 Stat. 597 (1798); *see also* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021). But the 1798 direct tax is no precedent for the USF Tax because the 1798 direct tax is nothing like the USF Tax. That is for three reasons.

First, the 1798 Congress itself decided the amount of revenue the Government would levy from American citizens. *See* Parrillo, *New Evidence*, *supra*, at 1303 (“Congress decided to raise \$2 million nationwide and, per the Constitution’s requirement for direct taxes, apportioned that sum among the states according to each state’s free population plus three-fifths of its slave population.”). In contrast, Congress through § 254 delegated to FCC the power to decide how much revenue the Government will raise via USF taxes. And FCC’s revenue-raising discretion is limited only by the most amorphous of standards. *See supra*, Part III.B.2. So while the 1798 Executive Branch only had authority to raise \$2 million, the present-day FCC can levy taxes practically *ad infinitum* based on little more than its own conception of the public interest. *See ibid.* It thus strains credulity to analogize the 1798 direct tax to the USF Tax.

Second (and relatedly), unlike the Congress that enacted § 254, the 1798 Congress made all the relevant tax policy decisions. It decided to raise \$2 million, it decided to levy the \$2 million through direct taxes on property

(mostly real estate), and it decided how the tax burden would be allocated: mainly in proportion to the value of citizens' property in money. Parrillo, *New Evidence*, *supra*, at 1303; *see supra*, Part III.B.2 (explaining the policy decisions § 254 leaves for FCC). That makes sense because tax decisions—including decisions about rates—traditionally implicated the legislative power and so could not be made by officials in the executive branch. *See* PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL* 57–64 (2014).

Obviously a direct tax on land could not be administered without a fair accounting of the value of citizens' property, so Congress provided for assessors and gave them authority to assess the value of citizens' property. Congress did not provide detailed instructions about how assessors were to go about their business, but that is of no significance. At common law, “[d]eterminations of facts, *including assessments*, were understood . . . to be judicial in nature, not legislative. Although not actually exercises of judicial power, they were expected to mimic judicial decisions at least in being exercises of judgment” as opposed to legislative will. Hamburger, *Nondelegation Blues*, *supra*, at 1211 (emphasis added). In other words, the making of assessments has never involved legislative power because it has always been assumed that assessors must accurately characterize the facts on the ground and fairly apply the law to the facts.

For example, in 1598 the English Court of Common Pleas heard a case concerning the power of the sewers commissioners, who were tasked with repairing riverbanks and assessing the costs to nearby landowners. *See Rooke's Case*, 77 Eng. Rep. 209 (C.P. 1598) (Coke, J.). The commissioners repaired a riverbank and then assessed the entire cost to one nearby landowner. The landowner sued, and Lord Coke held the commissioners acted unlawfully because they were supposed to assess repair costs to “all who had land in danger.” *Id.* at 210. Coke explained that while “[t]he words

of the commission [gave] authority to the commissioners to do according to their discretions,” the commissioners could “not [act] according to their wills and private affections” but rather were “limited and bound with the rule of reason and law.” *Id.* at 210. Thus, the discretion possessed by the commissioners was merely the discretion “to discern between falsity and truth.” *Ibid.* In other words, the commissioners had the power to determine whose land was truly endangered by damaged riverbanks, but they could not use that discretion to make policy judgments about which landowners should bear the cost of repairing those banks. *See* HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL*, *supra*, at 97–100 (describing the nature of assessments at common law).

Like the common law assessors, the tax assessors at the founding had discretion merely “to discern between falsity and truth” in property values. *Rooke’s Case*, 77 Eng. Rep. at 210. Federal officials assumed all property had a “correct valuation.” Parrillo, *New Evidence*, *supra*, at 1366 (quoting OLIVER WOLCOTT, JR., *DIRECT TAXES* 441 (1796)). The task of officials executing the direct tax was merely to make the factual determinations necessary to unearth that correct valuation. Congress told the assessors to do this “just[ly] and equitab[ly]” — “a familiar measure of the conduct of government officials making judicial or judicial-like determinations, including assessments.” Hamburger, *Nondelegation Blues*, *supra*, at 1212. The assessors accordingly had no power to make tax policy, at least not legitimately. And the kinds of factual findings Congress charged the assessors with making have never been thought to involve legislative power. *See, e.g., Panama Refin.*, 293 U.S. at 426 (“[A]uthorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained.”).

It is possible that assessors sometimes mischaracterized the value of property so as to shift the tax burden from one group of citizens to another. *See* Hamburger, *Nondelegation Blues*, *supra*, at 1212 (noting “assessments and other determinations of fact have often been misused to exercise a disguised legislative power”). If that is right, some assessors may have exercised will rather than judgment and so acted in a legislative rather than an executive capacity. But in doing so, the assessors abused the power the 1798 Congress gave them, and abuses of a power do not change the nature of the power itself. For example, it is commonly said that the Supreme Court in *Lochner* abused the judicial power. *See, e.g.*, Kermit Roosevelt III, *What if Slaughter-House had been Decided Differently?*, 45 IND. L. REV. 61, 84 (2011) (noting in *Lochner* the court committed “the sin . . . of substituting judicial for legislative policymaking”). But no one contends that in light of *Lochner*’s abuses the Court in fact exercises legislative power when it rules in constitutional cases. So too with the assessors.

Thus, we can find no historical precedent for broad delegations of Congress’s power to tax. But even if there were—even if the 1798 direct tax suggests Congress may delegate the Taxing Power to the Executive Branch—there is still no historical precedent for the USF Tax. That is because it is utterly inconceivable that the first Treasury, upon receiving from Congress broad powers to levy taxes on American citizens, would have abdicated responsibility for determining tax rates to privately employed bounty hunters who had a personal financial interest in the amount of tax revenue collected. And that is exactly what FCC has done here. *See supra*, Part III.C.

Accordingly, USF’s double-layered delegation “is an innovation with no foothold in history or tradition.” *Seila L.*, 591 U.S. at 222.

b.

In addition to being a historical anomaly, USF's double-layered delegation "is incompatible with our constitutional structure." *Ibid.*

Both the public and the private nondelegation doctrines exist to ensure that Congress exercises its legislative powers—the greatest of the powers vested by the Constitution in the federal government—“in a way that comports with the People’s will.”²³ *Jarkesy*, 34 F.4th at 459; *see* THE FEDERALIST NO. 51 (J. Madison) (“A dependence on the people is, no doubt, the primary control on the government[.]”). As we previously noted:

Every member of Congress is accountable to his or her constituents through regular popular elections. And a duly elected Congress may exercise the legislative power only through the assent of two separately constituted chambers (bicameralism) and the approval of the President (presentment). This process, cumbersome though it may often seem to eager onlookers, ensures that the People can be heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life.

²³ The private nondelegation doctrine also likely applies to delegations of the executive power to private entities, *see Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (“[I]t raises ‘difficult and fundamental questions’ about the ‘delegation of Executive power’ when Congress authorizes citizen suits.”) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring), but petitioners did not raise an Article II challenge. If they had, we might also conclude that FCC has unconstitutionally delegated the executive power to private entities. *See Consumers’ Rsch*, 88 F.4th at 934 (Newsom, J., concurring) (“[I]t seems obvious to me that in collecting de facto taxes and distributing benefits USAC is exercising ‘executive’ power.”)).

Jarkesy, 34 F.4th at 459–60 (citations and footnote omitted). “But that accountability evaporates if a person or entity other than Congress,” whether public or private, “exercises legislative power.” *Id.* at 460 (citation omitted).

Broad congressional delegations to the executive undermine democratic accountability for at least three reasons. First, they allow Congress to circumvent the “many accountability checkpoints” inherent in the Constitutional lawmaking process. *Amtrak II*, 575 U.S. at 61 (Alito, J., concurring). Second, they obscure lines of accountability the Framers intended to be clear. *See Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting) (“[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.”); *id.* at 156 (Gorsuch, J., dissenting) (“Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to disguise responsibility for the decisions.” (citations and quotation omitted)). And third, they render the promise of recourse to the judiciary illusory because they give reviewing courts no standard against which to measure the compatibility of executive action with the prescriptions of the people’s elected representatives. *See id.* at 167–68 (Gorsuch, J., dissenting) (noting the similarity of the questions raised in vagueness challenges and delegation challenges).

Delegations to private entities undermine accountability for different reasons. Most obviously, private entities are “neither legally nor politically accountable to . . . government officials or to the electorate.” Larkin, *The*

Private Delegation Doctrine, *supra*, at 20; *see Black*, 53 F.4th at 880 (“[I]f people outside government could wield the government’s power[]then the government’s promised accountability to the people would be an illusion.”). Unlike officers of the United States, who “must take an oath or affirmation to support the Constitution,” *Amtrak II*, 575 U.S. at 57 (Alito, J., concurring) (citing U.S. CONST. art. VI, cl. 3), directors of private entities owe no fealty to the Constitution and instead owe legal obligations to their shareholders. *See* 2 BUS. & COM. LITIG. FED. CTS. § 13:77 (5th ed.) (“Under Delaware law, directors, officers, and controlling shareholders owe a duty of loyalty to the company and to its shareholders or owners.”). Moreover, “passing off a Government operation as an independent private concern” allows “Government officials [to] wield power without owning up to the consequences” because the people might not associate bad results with the Government at all. *Amtrak II*, 575 U.S. at 57 (Alito, J., concurring).

USF combines these features, meaning accountability is undermined twice over. First, the public cannot tell whether it is being taxed by the FCC or USAC. *See Universal Service*, UNIVERSAL SERV. ADMIN. CO., *supra* (“Using information from universal service program participants, *USAC* estimates how much money will be needed each quarter to provide universal service support.” (emphasis added)). And if some sleuthing member of the public suspected the federal government was behind the mysterious USF charge on his phone bill, how could he determine which governmental official to blame? Not only could Congress and FCC point fingers at each other, *see Gundy*, 588 U.S. at 156 (Gorsuch, J., dissenting), but both could offload responsibility onto the private entities (USAC and its private, for-profit, constituents) to which FCC delegated the USF Tax without congressional authorization. *See Free Enter. Fund*, 561 U.S. at 497–98 (“The diffusion of power carries with it a diffusion of accountability . . . Without a clear and effective chain of command, the public cannot determine on whom the blame

or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” (citation omitted)). And even as government officials are immunized from public oversight by this “Matryoshka doll” of delegations and subdelegations, *id.* at 497, important governmental responsibilities are carried out by private entities with a legal obligation not to serve the public but rather to reap profits from it. And last but not least, reviewing courts are handicapped from redressing the injuries of aggrieved citizens by the complete absence of a judicially workable standard in 47 U.S.C. § 254.

Thus, just as the added layer of tenure protection at issue in *Free Enterprise Fund* “ma[de] a difference” to the President’s ability control the executive branch, *id.* at 495, so too do the myriad obfuscations of the USF Tax make a difference to the Legislative Vesting Clause. Accordingly, we hold that the universal service contribution mechanism’s double-layered delegation “is incompatible with our constitutional structure.” *Seila L.*, 591 U.S. at 222.

IV.

Finally, a brief word about the dissenting opinions. The principal dissent spills much ink on the distinction between fees and taxes only to conclude the distinction does not matter because all “revenue-raising delegation[s]” are the same. *Post*, at 96 (Stewart, J., dissenting). And how does the Constitution permit *double* insulation of a revenue-raising delegation like the USF? The principal dissent does not say.

The second dissenting opinion calls the majority opinion an “unannounced” and “unprecedented” “sleight of hand.” *Post*, at 98, 105 (Higginson, J., dissenting). Worse, it is a usurpation that leaves “the political branches powerless to govern.” *Post*, at 101, 105. With deepest respect for

our esteemed colleagues who see this case differently, the dissenting opinion’s legal authorities do not support its conclusions.

For example, it repeatedly accuses us of contravening Supreme Court precedent. *Post*, at 98, 99, 100, 101, 103, 105 (Higginson, J., dissenting). But which precedent, precisely, are we flouting? The dissenting opinion does not say. The closest it comes is to contend that the Supreme Court has considered cases involving both a “delegation of legislative power and a[] delegation of government power to a private entity, yet the Court has never instructed . . . that a different standard applies.” *Id.* at 98–99 (Higginson, J., dissenting). But in which case did the Supreme Court consider a double delegation problem like the one presented here? The statutory provision at issue in *Carter Coal* did not feature a combined public/private delegation; it delegated power directly to private enterprise. *See* 298 U.S. at 283–84. And the Court found that violated the Constitution. *Id.* at 311. Having found that statute unconstitutional, it would have been quite peculiar for the Court to proceed to render an advisory opinion on whether a nonexistent double delegation would also violate the Constitution.

Meanwhile, in *Currin* and *Sunshine Anthracite*, the Court found the Government had not delegated any legislative power to any private entity. *See Currin*, 306 U.S. at 15 (“So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority.”); *Sunshine Anthracite*, 310 U.S. at 399 (“Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.”). There cannot be a combined public/private delegation without a private delegation. We obviously agree with our esteemed colleagues in dissent that Supreme Court precedent binds us and binds us absolutely. But we do not understand how the dissenting opinions can say this case is controlled by Supreme Court precedent without disputing that the double delegation at issue here is unprecedented.

The second dissenting opinion also contends we have mischaracterized the Supreme Court’s separation-of-powers precedents. On its telling, *Seila Law* does not evince a general principle that two constitutional parts can converge to create an unconstitutional whole. Rather, it says the *Seila Law* Court simply declined to recognize an exception to the President’s removal power for single principal officers who wield significant executive authority. *Post*, at 100 (Higginson, J., dissenting). Even if that were right, it would not explain *Free Enterprise Fund*. In that case the Court unquestionably held that two independently constitutional removal restrictions—one that fit squarely within the *Humphrey’s Executor* exception, and one that fit squarely within the *Morrison* exception—combined to create a constitutional violation. The dissenting opinion offers no explanation for that holding.

Finally, the second dissenting opinion contends our decision leaves the political branches “powerless to govern.” *Post*, at 105 (Higginson, J., dissenting). That is quite an assertion, but with greatest respect, it is untrue. Today’s decision applies to a narrow question, implicating just one federal program that is doubly insulated from political accountability. The parties before us have not pointed to other federal programs that have the same or similar constitutional defects. And as to the USF particularly, Congress could obviate the constitutional problem by simply ratifying USAC’s decisions about how much American citizens should contribute to the goal of universal service. *Cf.* Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT*, *supra*, at 290 (“Legislative ratification of agency law would wholly preclude a nondelegation challenge[.]”).

The second dissenting opinion contends otherwise because, in its view, the Federal Government will grind to a halt if Congress, or even FCC,

were required to do more than wield a Russian veto over the USF tax. As evidence, it points to private contractors who perform ministerial functions on behalf of the Centers for Medicare and Medicaid Services. *Post*, at 103 (Higginson, J., dissenting). But if anything, Medicare and Medicaid prove the opposite. *Congress*—not a federal agency, and certainly not executives of private companies—decides how much Americans should be taxed to fund federal healthcare programs. *See, e.g.,* Louise Sheiner, Lora Stojanovic, & David Wessel, *How does Medicare work? And how is it financed?*, BROOKINGS (Mar. 20, 2024), <https://perma.cc/D7LN-DHYW> (explaining the Government’s contributions to Medicare come from a combination of general revenues and payroll taxes); 26 U.S.C. § 3101 (setting the Medicare payroll tax rate). The unconstitutionality of the USF says nothing about other tax programs, like Medicare and Medicaid, that Congress administers.

* * *

American telecommunications consumers are subject to a multi-billion-dollar tax nobody voted for. The size of that tax is *de facto* determined by a trade group staffed by industry insiders with no semblance of accountability to the public. And the trade group in turn relies on projections made by its private, for-profit constituent companies, all of which stand to profit from every single tax increase. This combination of delegations, subdelegations, and obfuscations of the USF Tax mechanism offends Article I, § 1 of the Constitution.

For the foregoing reasons, we hold unconstitutional the Q1 2022 USF Tax. Accordingly, we GRANT the petition and REMAND to FCC for further proceedings.

JENNIFER WALKER ELROD, *Circuit Judge*, joined by HO and ENGELHARDT, *Circuit Judges*, concurring:

I concur in the majority opinion in full. The majority correctly and thoroughly identifies the concerns that make this double delegation unconstitutional. I write separately to say that I would go one step further and address the lawfulness of each individual delegation. For the reasons explained in the majority’s thorough opinion, Congress’s delegation of legislative power to the FCC and the FCC’s delegation of the taxing power to a private entity each individually contravene the separation of powers principle that undergirds our Constitutional Republic.

As James Madison put it, “[t]he accumulation of all powers legislative, executive, and judiciary in the same hands, . . . may justly be pronounced the very definition of tyranny.” *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring) (quoting The Federalist No. 47, p. 301 (C. Rossiter ed. 1961)); *see also* Baron de Montesquieu, *The Spirit of the Laws*, bk. XI, ch. VI (1748) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; . . .”).

To ensure that the legislative power remains separate from the executive power, the Constitution “provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People’s will.” *Jarkesy v. Sec. and Exch. Comm’n*, 34 F.4th 446, 459 (5th Cir. 2022) *aff’d*, No. 22-859, 2024 WL 3187811 (U.S. June 27, 2024). Each member of Congress is accountable to his or her constituents through regular popular elections. U.S. Const. art I, §§ 2, 3; *id.* amend. XVII, cl. 1. And Congress may exercise legislative power (including the power to tax) only by going through the arduous process of bicameralism and presentment. U.S. Const. art. I, § 7. This “ensures that the People can be heard and that their

representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life.” *Jarkesy*, 34 F.4th at 459–60. Each of the delegations here, viewed independently, violates this principle.

Justifying the Congressional delegation on the grounds that Congress has enlisted the “expertise” of the FCC in the undefined area of Universal Service rings hollow given that the FCC relies on the determinations of private industry leaders to determine the USF tax.

The second dissent states that the federal government is rendered “powerless to govern” by the majority’s holding. *Post*, at 101 (Higginson, J., dissenting). That is a *non sequitur*. Congress can always act by passing duly enacted legislation through bicameralism and presentment. The assertion that delegations of legislative power are necessary for effective and efficient governance in the modern world does not authorize Congress to violate Article I, Section I’s vesting clause. Congress’s inability to implement and oversee the program itself might even suggest that the program should not exist. Regardless, Congress must implement, or at least approve, the USF tax. That way, the power of the people to oversee those they have chosen to govern is rightfully restored.¹

With this in mind, I join the thorough and well-reasoned opinion of the court in full.

¹ They are, after all, the ones ultimately footing the bill for Universal Service.

JAMES C. HO, *Circuit Judge*, concurring:

Our Constitution establishes three branches of government, not four.¹ It vests “[a]ll legislative Powers herein granted” —including the “Power To lay and collect Taxes” —not in some unnamed fourth branch of government, but in “a Congress of the United States,” whose members are chosen by and directly accountable to the people of the United States. U.S. CONST. art. I, §§ 1, 8. So if we’re serious about protecting our constitutional democracy, we must enforce the principle that all legislative powers like the power to tax are indeed exercised by the people we elect.

That’s what our court does today. We hold that the delegation of Congress’s taxing power, first to a federal agency, and then to a private entity, violates the Vesting Clause of Article I. I certainly concur.

In reaching this decision, the court distinguishes *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021). I would also disavow *Rettig* altogether, for the reasons noted in *Texas v. Rettig*, 993 F.3d 408, 408 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

The delegations of taxing authority at issue in *Rettig* present the same challenges to our constitutional democracy—and to the founding principle of taxation without representation—that are presented here. It’s just as true in *Rettig* as it is here that “[t]he right to vote means nothing if we abandon our constitutional commitments and allow the real work of lawmaking to be

¹ See, e.g., *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 892 (3rd Cir. 1986) (Becker, J., concurring) (“The Constitution establishes three branches of government, not four.”); *Ass’n of American Railroads v. U.S. Dep’t of Transp.*, 821 F.3d 19, 30–31 (D.C. Cir. 2016) (various provisions of “our Constitution . . . were designed for a government of three branches, not four”).

exercised by private interests colluding with agency bureaucrats, rather than by elected officials accountable to the American voter.” *Id.* at 410-11.

And both in *Rettig* and here, the threats to democracy presented by the administrative state are not inadvertent, but intentional—a deliberate design to turn consent of the governed into an illusion. “[T]he expansion of the electorate has been accompanied by the growth of administrative law. . . . [W]hether in 1870, 1920, or 1965 . . . each time, after representative government became more open to the people, legislative power increasingly has been sequestered to a part of government that is largely closed to them.” PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 369 (2014). “[A]lthough [members of the knowledge class] mostly supported expanded suffrage, they also supported the removal of legislative power to administrative agencies staffed by persons who shared their outlook.” *Id.* at 374. “The development of administrative power thus . . . must be recognized as . . . a profoundly disturbing shift of power. As soon as the people secured the power to vote, a new class cordoned off for themselves a sort of legislative power that they could exercise without representation.” *Id.* Another scholar put it this way: “However much [administrative] agencies may emphasize their formal openness, in practice well-organized, directly interested parties dominate comment processes. Normal people do not perceive these proceedings as ‘democratic.’” PHILIP A. WALLACH, *WHY CONGRESS?* 231 (2023). With Congress, “the electorate still has the chance, crude as it may be, to pass judgment on the elected official and convince other members of their community of the importance of doing so. Against . . . the bureaucracy, citizens have no such recourse.” *Id.*

We devote significant energy and resources to securing the right to vote for every citizen. But that right matters only if our elected officials matter. There’s no point in voting if the real power rests in the hands of unelected bureaucrats—or their private delegates. If you believe in

democracy, then you should oppose an administrative state that shields government action from accountability to the people. I concur.

CARL E. STEWART, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and DOUGLAS, *Circuit Judges*, dissenting:

I dissent because the Universal Service Fund (“USF”) is not unconstitutional. Section 254 of the Telecommunications Act of 1996 provides an intelligible principle and the Federal Communications Commission (“FCC”) maintains control over the Universal Service Administrative Company (“USAC”), the private entity entrusted to aid its administration of the USF. The majority’s exhaustive exegesis about policy, history, and assorted doctrines does not eclipse the consistent holding of three sister circuits that have addressed constitutional challenges to Section 254. All have held it constitutional under the intelligible principle test. The majority has created a split in a sweeping opinion that (1) crafts an amorphous new standard to analyze delegations, (2) overturns—without much fanfare—circuit precedent holding that this program collects administrative fees and not taxes, (3) blurs the distinction between taxes and fees, and (4) rejects established administrative law principles and all evidence to the contrary to create a private nondelegation doctrine violation.

I. THE NONDELEGATION DOCTRINE

Petitioners and the majority contend that § 254 violates the nondelegation doctrine. Notably, the Supreme Court has denied petitions for review of the Sixth Circuit’s and the Eleventh Circuit’s decisions rejecting these contentions. *Consumers’ Rsch. v. FCC*, No. 23-456, 2024 WL 2883753 (U.S. June 10, 2024) (Mem.); *Consumers’ Rsch. v. FCC*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024) (Mem.). In line with our colleagues in the Sixth, Eleventh, and D.C. Circuits, I would reject this challenge and hold that § 254 satisfies the intelligible principle test as articulated by the Supreme Court.

a. Section 254 Sufficiently Delimits the FCC’s Discretion

The nondelegation doctrine is based on the central principle that the separation of powers underlies our system of Government. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989). Article I, Section 1 of the U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. CONST., art. I, § 1. The Court has long acknowledged that Congress “may confer *substantial discretion* on executive agencies to implement and enforce the laws” where it “has supplied an intelligible principle to guide the delegate’s use of discretion.” *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality opinion) (emphasis added). It has consistently held that a delegation is constitutional if “Congress has supplied an intelligible principle to guide the delegate’s use of discretion.” *Id.* at 2123. Under this framework, the Court has approved narrow and broad delegations, acknowledging that “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.” *Mistretta*, 488 U.S. at 372; *see Am. Power Light & Co. v. SEC*, 329 U.S. 90, 105 (1946) (“The judicial approval accorded [to] these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems.”); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940). It has further explained that the nondelegation inquiry “always begins (and often almost ends) with statutory interpretation.” *Gundy*, 588 U.S. at 135.

As such, we begin our nondelegation inquiry not with a long discourse about the history of the USF’s shortcomings, but with statutory interpretation. *See id.* In 47 U.S.C. § 254, Congress clearly set out both the general policy—ensuring “[a]ccess to advanced telecommunications and information services [are] provided in all regions of the Nation,” *id.* at

§ 254(b)(2)—and the agency entrusted to execute that policy, the FCC, *see Am. Power*, 329 U.S. at 105. All that leaves is the question of whether Congress delineated “the boundaries of this delegated authority.” *Id.* Petitioners argue that because § 254 sets no definite limits on how much the FCC can raise for the USF that it lacks any concrete, objective guidance limiting this authority. The Court has rejected this argument in several formulations in challenges to delegations implicating the authority to raise revenue. *See, e.g., Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222–23 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). For similar reasons, Petitioners’ argument should fail here. Examining the plain language of § 254, it becomes clear that Congress has sufficiently limited the FCC’s ability to raise revenue in a way other than imposing a statutory cap on how much can be raised.

Section 254(b) lays out the principles that the FCC *must* adhere to. It sets out the specific directive that the FCC “*shall* [create] policies for the preservation and advancement of universal service.” 47 U.S.C. § 254(b) (emphasis added). It further establishes that the FCC is required to do so pursuant to certain enumerated principles that: “quality services should be made available at just and reasonable rates; advanced services should be provided to the entire United States; and ‘low-income consumers and those in rural, insular, and high cost areas’ should have access to advanced services at reasonably comparable rates to those in urban areas.” 47 U.S.C. § 254(b)(1)–(3). Section 254(b)(5) limits the FCC to only enact universal service policies that are “specific, predictable and sufficient” to “preserve and advance universal service.” *Id.* 254(b)(5). The statute further charges telecommunications carriers with the duty to provide access that meets minimum standards of universal service to “[e]lementary and secondary schools and classrooms, healthcare providers, and libraries.” *Id.* 254(b)(6).

As the panel noted, § 254(b)(7) “enables, and likely *obligates*, [the FCC] to add principles ‘consistent with’ § 254’s overall purpose.” *Consumers’ Rsch. v. FCC*, 63 F.4th 441, 448 (5th Cir. 2023) (quoting 47 U.S.C. § 254(b)(7)), *reh’g en banc granted, opinion vacated*, 72 F.4th 107 (5th Cir.). In line with our colleagues at the Sixth Circuit, I view § 254(b) as Congress laying out “a high-level goal for universal service” and then going further to “enumerate[] specific principles of universal service.” *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 790–91 (6th Cir. 2023), *cert. denied*, 2024 WL 2883753 (June 10, 2024) (Mem.). Section 254(b) contains limiting principles that impose “a mandatory duty on the FCC” to consider the listed universal service principles when it updates its universal service policies. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001); *see, e.g., Consumers’ Rsch.*, 67 F.4th at 791; *Consumers’ Rsch.*, 88 F.4th 917, 924 (11th Cir. 2023), *cert. denied*, 2024 WL 2883755 (June 10, 2024) (Mem.). By its plain language, Congress ordered in § 254 that the FCC “*shall* base policies for the preservation and advancement of universal service on the principles” enumerated in § 254(b). 47 U.S.C. § 254(b). This imposition of a duty to weigh the enumerated universal service principles is reminiscent of constitutional statutory delegations that provided an intelligible principle in the form of “guidance that the [agency] cannot disregard.” *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 775 (6th Cir. 2023) (Nalbandian, J., dissenting) (citing *Mistretta*, 488 U.S. at 375–76).

Reading § 254(b)’s provisions together, as our sister circuits have, “indicates that Congress *required* that the FCC base its efforts to preserve and advance universal service on the enumerated principles while allowing the FCC to then ‘*balance* [each] principle[] against one another when they conflict.’” *Consumers’ Rsch.*, 67 F.4th at 791 (quoting *Qwest Corp.*, 258 F.3d at 1200); *see also Tex. Off. of Pub. Util. Couns. v. FCC* (“*TOPUCF*”), 183 F.3d 393, 412 (5th Cir. 1999) (“[W]e agree that the use of the word ‘shall’

indicates a congressional command . . .”). Thus, contrary to Petitioners’ and the majority’s contentions, § 254(b)(7)’s grant of authority to the FCC to devise new universal service policies based on principles that it “determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity” *does not* render the other principles meaningless. Nor does it “strip away the intelligible principle and the limits on the FCC’s discretion that Congress imposed in the first six principles and throughout” the remainder of § 254’s other provisions. *See Consumers’ Rsch. v. FCC*, 67 F.4th at 792. Rather, § 254(b)(7) allows the FCC to comply with [Congress’s] mandate to account for the advances to the world of ‘evolving’ telecommunications,” as stated in § 254(c)(1). *See id.* (quoting 47 U.S.C. § 254(c)(1)).¹

The majority’s holding to the contrary here contravenes the rationale that “underpins the nondelegation doctrine.” *Id.* at 793 (citing *Gundy*, 588 U.S. at 135–36). Section 254’s strictures set out from whom funds are exacted, 47 U.S.C. § 254(d), who receives the benefit of the funds, 47 U.S.C. § 254(e), and what minimum standards of service must be provided in order to satisfy the longstanding goal of providing universal service. *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000) (“Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934.”). With this context, it becomes clear that this is not a situation in which Congress has “left the matter to the [FCC] without standard or rule, to be dealt with as [it] please[s].” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935).

¹ This intent is consistent with Congress’s longstanding aim to ensure reliable and affordable universal service for all and is clearly discernible from “the context, purpose, and history” of the Communications Act of 1934 and the Telecommunications Act of 1996. *See Gundy*, 588 U.S. at 136.

Petitioners’ and the majority’s assertions that § 254(b) and its limits are insufficient or vague place far too much weight on prior litigating positions in the context of *Chevron* doctrine questions arising out of different actions taken by the FCC. Thus, any assertion that the USF’s goals are “aspirational” has no bearing on its constitutionality. Maj. Op. at 20–21. Thus, any reference to this dicta from *Texas Office of Public Utility Counsel v. FCC* (“*TOPUC II*”), 265 F.3d 313 (5th Cir. 2001) is misplaced. A closer look at *TOPUC II* reveals how a strained interpretation of our prior utterances does not support a determination that § 254 contains “no guidance whatsoever.” *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

In *TOPUC II*, we examined whether the FCC’s CALLS Order, which raised a price cap on the amount that “end-users of basic local service,” 265 F.3d at 318, paid on their telephone bills, violated § 254’s “requirement of affordable universal access.” *Id.* at 320. Undertaking a *Chevron* analysis, we asked “whether Congress has spoken directly on the precise question at issue,” and then turned to whether the FCC’s interpretation of § 254 was based upon a permissible construction. *Id.* at 320–21. Notably, we did *not* evaluate the constitutionality of Congress’s delegation there, but considered whether the Order’s price cap violated the Act’s principles of ensuring “just, reasonable, and affordable rates” of universal service. *Id.* at 321 (quoting 47 U.S.C. § 254(b)(1), (i)). Given the full scope of our prior interpretation of § 254(b), Petitioners’ overreliance on these unrelated considerations to carry the day in a nondelegation doctrine inquiry is unfounded.

Section 254’s other provisions provide further checks on the FCC’s discretion. Section 254(c) limits the FCC in determining which telecommunications services will receive support from the USF. In § 254(c)(1), Congress specifically ordered the FCC to revise its definition of supported services only to account for “advances in telecommunications and

information technologies and services.” Some have said that § 254(c) does not limit the FCC’s discretion to raise revenue because it only addresses the spending of USF money. However, that contention neglects the direct link between the collection of universal service contributions and the disbursement of USF money. Section 254(d) requires “telecommunications carrier[s] that provide[] interstate telecommunications services” to “contribute, on an equitable and nondiscriminatory basis” to the “mechanisms established by the [FCC] to preserve and advance universal service.” *Id.* § 254(d).² As the FCC points out, the less money the telecommunications carriers require to effectively provide universal service results in “less revenue the FCC must raise to finance those mechanisms.”

With respect to dispersing any money from the USF, the FCC is restricted to dispersing credits to statutorily designated eligible telecommunications carriers that provide support for universal services. *Id.* § 254(e); *see TOPUC I*, 183 F.3d at 412 (“The term ‘sufficient’ appears in § 254(e), and the plain language of § 254(e) makes sufficiency of universal service support *a direct statutory command* rather than a statement of one of several principles.” (emphasis added)). On more than one occasion, we have held that § 254(e) “*requires* that universal service support be ‘explicit and sufficient.’” *Alenco*, 201 F.3d at 614 (emphasis added). As a practical matter, it is worth noting that USF program disbursements have “remained relatively stable over the past decade” and even decreased from 2012 to 2020. FCC, FCC 22-67, REPORT ON THE FUTURE OF THE

² As I explain in Part III, *infra*, that telecommunications carriers typically pass through the cost of their quarterly contributions in the form of line-item charges on consumers’ bills on their own volition is irrelevant to our constitutional analysis. *Cf. J.W. Hampton*, 276 U.S. at 406 (describing that Congress’s delegations must be analyzed for the specificity and extent of vestment of discretion yielded to the appropriate co-ordinate branch of government).

UNIVERSAL SERVICE FUND 10084–85, ¶ 92 (Aug. 15, 2022) (“Report to Congress”). This fact flatly contradicts Petitioners’ assertions that the FCC has acted from a position “that it has a free hand to overcharge” for universal service. Thus, I would deny the petition for review because § 254 satisfies the intelligible principle test as articulated by the Supreme Court.

b. Section 254’s Context, Purpose, and History

In *Gundy*, the Court stated that the intelligible principle analysis requires examination of “[t]he [statute’s] text, considered alongside its context, purpose, and history.” 588 U.S. at 136. Congress’s consistent intention to preserve and advance universal service for nearly a century,³ combined with § 254’s articulated purpose provide further evidence of the existence of an intelligible principle. *Consumers’ Rsch.*, 67 F.4th at 790–95; *see Am. Power*, 329 U.S. at 104; *TOPUC I*, 183 F.3d at 405–06. The majority’s disagreement with Congress’s policy choices, Maj. Op. at 26, does not transform the USF into a constitutional or statutory violation. *See Consumers’ Rsch.*, 63 F.4th at 449 n.4. As the panel held, § 254 does not leave the FCC with “no guidance whatsoever,” *id.* at 448–49, and more befittingly, it accords with the statute’s purpose, and “Congress’s history of pursuing universal service” to clearly enunciate an intelligible principle that sufficiently cabins the FCC’s discretion. *See Consumers’ Rsch.*, 67 F.4th at 795; *Gundy*, 588 U.S. at 135–36. In sum, I would hold that the context,

³ Congress passed the FCC’s organic statute in 1934 and modernized the agency’s regulatory role in passing the Telecommunications Act of 1994 “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151.

purpose, and history surrounding § 254 evinces a clear intelligible principle delimiting agency discretion.

II. THE PRIVATE NONDELEGATION DOCTRINE

An agency may obtain the assistance of private parties in implementing its mandate under federal law so long as those private parties are subordinate to the agency and subject to the agency’s “surveillance” and guidance. *Adkins*, 310 U.S. at 388, 399; *see also Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 708 (5th Cir. 2017) (noting same). Petitioners and the majority assert however, that the FCC “reflexively rubberstamps” USAC’s proposals to determine the contribution rates charged to telecommunications carriers. They further posit that USAC maintains final decision-making power because “the FCC has never reversed USAC’s projections of demand.” Neither of these arguments is supported by the statute or applicable regulations nor do they consider well-established principles of administrative law. As described below, these arguments follow from misstatements of record facts.

The FCC determines a quarterly contribution factor “based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total end-user interstate and international telecommunications revenues.” 47 C.F.R. § 54.709(a)(2). Sixty days in advance of this determination, USAC submits its “projections of demand”—the projected expenses to ensure the operation of the USF programs—to the FCC. *Id.* § 54.709(a)(3). These projections of demand for USF support are subject to the FCC’s imposed caps. *See, e.g., Interim Cap Order*, 23 FCC Rcd. 8834 (2008) (adopting caps on disbursements of USF contributions that eligible telecommunications carriers may receive to “rein in the explosive growth in high-cost universal service support disbursements”). Considering the FCC’s limitations on USAC’s proposed

“projections of demand,” USAC compiles the total revenues and expenses of the contributing carriers based on their Reporting Worksheets. 47 C.F.R. § 54.709(a)(2). These worksheets, created by the FCC, *id.* § 54.711, must be submitted for review at least thirty days before the start of the quarter. *Id.* § 54.709(a)(2). USAC then calculates the contribution factor from the Reporting Worksheets and then the ratio is publicly noticed and made available on the FCC’s website. *See id.* § 54.709(a)(3). The FCC then may approve the projections or administrative expense estimates or exercise its “right to set projections of demand and administrative expenses.” *Id.* Where the FCC does not act within fourteen days of the release of the projections of demand, then the projections and contributions are deemed approved by the FCC. *Id.*

The USF and its programs receive funding only after the execution of a detailed, multistep process devised by the FCC. Petitioners and the majority assert that this framework is evidence that the FCC merely sits on its hands while USAC drives the boat in determining how much is raised. This ignores the established principle that “an agency exercises its policymaking discretion with equal force when it makes policy by either ‘decid[ing] to act’ or ‘decid[ing] not to act.’” *Consumers’ Rsch.*, 67 F.4th at 796 (quoting *Oklahoma v. United States*, 62 F.4th 221, 230 (6th Cir. 2023)). Significantly, the structural relationship between the agency and the private party is the focus of the private nondelegation doctrine inquiry. *See Texas v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021). A closer look at the relationship here leads to the conclusion that the FCC has not ceded control of the USF to USAC.

USAC is fully subordinate to the FCC as its functions are strictly ministerial. *See Consumers’ Rsch.*, 63 F.4th at 451–52. Here is a short list of what USAC *can* do. USAC is tasked with “billing contributors, collecting contributions to the universal service support mechanisms, and disbursing

universal service support funds.” 47 C.F.R. § 54.702(b). It collects information and facts from the contributing telecommunications companies and tabulates the companies’ contribution factors based on that information and the formulas that the FCC furnishes for USAC to apply. *See, e.g.*, 47 C.F.R. §§ 54.1304(b) (establishing formula to calculate safety net additive support), 54.901(a) (explaining Connect America Fund Broadband Loop Support), 54.303(a)(1) (setting formula to determine total eligible operating expenses), 54.702(n). USAC contribution determinations are mere *proposals* subject to government approval. *See Consumers’ Rsch.*, 88 F.4th at 927. As the Court held in *Adkins*, a private entity’s participation in ministerial functions under the agency “pervasive surveillance and authority” does not violate the Constitution. 310 U.S. at 388. Here, all of this is done under the FCC’s watch *and* is conducted only with the FCC’s approval. *See Universal Service Contribution Methodology*, 34 FCC Rcd. 4143, 4144–45 (2019) (citing *Connect America Fund*, 26 FCC Rcd. 17663, 17847 (2011)) (directing USAC to make specific contribution collections “regardless of the projected quarterly demand” calculated from the FCC-supplied formulas).

With respect to the FCC’s control over USAC, the list of what USAC *cannot* do is instructive. USAC cannot make policy. 47 C.F.R. § 54.702(c). It cannot interpret unclear provisions or rules. *Id.* It cannot unilaterally give its proposals the force of law. 47 C.F.R. § 54.709(a)(2). The very agency action addressed in the instant petition for review is the FCC’s “*Proposed First Quarter 2022 Universal Service Contribution Factor*.” Consequently, it is inaccurate to state that USAC definitively determines how much money the USF will collect each quarter. *See* 47 C.F.R. § 54.709(a)(3). The FCC is not bound by USAC’s projections. *Id.* USAC acts no differently than an advisor or policy aide that proposes regulations subject to government approval. *See Adkins*, 310 U.S. at 388. Upon receiving USAC’s proposals, the FCC issues

a Public Notice, publishing the proposed contribution factor and soliciting public comment. 47 C.F.R. § 54.709(a)(3).

What occurs after the FCC approves the quarterly contribution factor further supports the notion that USAC is fully subservient to the FCC. The FCC maintains supervision and review over USAC proposals well after it issues the approved quarterly contribution factor.⁴ Any party that is aggrieved by a ministerial act of USAC—typically the issuance of an invoice to collect contributions—may seek review from the FCC. 47 C.F.R. § 54.719(b); *Universal Serv. Contribution Methodology*, 31 FCC Rcd. 13220 (2016) (holding that USAC overcharged Cisco WebEx through an improper revenue calculation). The FCC quite routinely adjusts USAC proposals that deny discount rate status to public libraries and schools. *See, e.g., Streamlined Resol. of Requests Related to Actions by the Universal Serv. Admin. Co.*, 37 FCC Rcd. 5442 (2022); *Alpaugh Unified Sch. Dist.*, 22 FCC Rcd. 6035, 6036–37 (2007) (remanding USAC proposals that reduced or denied discounted rates to public libraries and schools for further fact finding). USAC is not charged with reviewing applications to receive subsidized universal service from qualified hospitals, libraries, low-income consumers, rural consumers, and

⁴ Hospitals in rural areas and libraries and schools can apply for discounted telecommunications services under the E-Rate program. 47 U.S.C. § 254(h)(1)(A)–(B). The hospitals, schools, and libraries must post their applications on USAC’s website, undergo a technology assessment, and comply with strenuous bidding requirements as outlined by the FCC. *See Bishop Perry Middle Sch. New Orleans*, 21 FCC Rcd. 5316, 5317–18 (2006) (listing the requirements for the E-Rate program as set out by Congress in § 254(h) and the FCC in 47 C.F.R. §§ 54.504, 54.511(a)). Where a party fails to comply with the statutory and regulatory requirements necessary to obtain the discount, it may seek review with the FCC. *See generally id.* Notably, the FCC issues the final orders that analyze the requests and either grants them outright, remands them to USAC for further fact-finding, or denies them. *See id.* at 5327–28 (ordering clauses).

schools. The FCC fulfills that role. *See* 47 U.S.C. § 254(h)(1)(A)–(B). We could continue to illustrate the other places in § 254 and the Code of Federal Regulations that demonstrate that the FCC is in the driver’s seat. But, all of this shows that the FCC maintains complete control over USAC and holds final decision-making authority regarding the USF and its programs.

A comparison to a recent case where we held that a violation of the private nondelegation doctrine occurred further underscores this point. Take our recent decision in *National Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869 (5th Cir. 2022). There, this court was confronted with Congress’s delegation of rulemaking authority to a private entity, the Horseracing Integrity and Safety Authority (the “Authority”). *Id.* at 872. The statute at issue “nationalize[d] the governance of the thoroughbred horseracing industry,” placing substantial unchecked rulemaking power in the Authority’s hands. *Id.* at 872. The statute ordered the Authority—and not the Federal Trade Commission (“FTC”)—to establish anti-doping, medication, and racetrack safety programs and a scheme of sanctions, among many other rules carrying the force of law. *Id.* at 882–83. The FTC was then *required by statute* to affirm the Authority’s proposed regulations if deemed consistent with the statute. *Id.* at 884–85. This essentially placed the FTC and the Authority on the same ground with respect to enacting rules regulating the horseracing industry that carried the force of law. *See id.* at 883. Specifically, we stated that “[a]n agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance.” *Id.* at 872.

That is not the case here. Unlike the FTC in *National Horsemen’s*, the FCC sets the rules and policy determinations under which USAC operates and retains final approval and review of USAC’s proposals. *See Consumers’ Rsch.*, 63 F.4th at 451; *Consumers’ Rsch.*, 67 F.4th at 796–97; *Consumers’ Rsch.*, 88 F.4th at 927–28. “Contributions to [universal service] mechanisms

. . . *shall* be based on contributors’ projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly *by the [FCC]*.” 47 C.F.R. § 54.709(a) (emphasis added). This case differs from instances where courts have analyzed whether an agency was statutorily authorized to rely on a private entity for matters that exceeded ministerial tasks. *See Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974). As an initial matter, those cases are inapt comparisons because USAC serves solely ministerial functions. And the majority can point to no binding jurisprudence requiring Congress to specifically designate a private entity to aid an agency to avoid a constitutional violation.

Put another way, this court is confronted with a classic case where an agency enlists a private entity to assist with ministerial support in the form of fee calculation and collection. *See, e.g., Adkins*, 310 U.S. at 399 (holding a private subdelegation of ministerial or fact collecting functions is valid); *Oklahoma*, 62 F.4th at 229 (“Private entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection.” (internal citations omitted)). Furthermore, the private entity holds not even a modicum of final decision-making power. Regrettably, the majority has adopted Petitioners’ exaggerated conception of USAC’s role and discretion to create a private nondelegation doctrine violation where none exists. To the contrary, I would hold, as the panel did, that there is no private-nondelegation doctrine violation.

III. EXAMINING REVENUE-RAISING DELEGATIONS

I conclude with a point of clarification regarding USF contributions in the instant regulatory scheme. Section 254 establishes a system of fees, not taxes. It refers to these sums as contributions—a fee for telecommunications providers to pay as a cost of doing business. However, whether the contributions are a fee has no bearing on the nondelegation doctrine analysis

because delegations of the taxing power are not subject to stricter scrutiny. *See Skinner*, 490 U.S. at 222. The majority’s holding presents an unnecessary narrowing—or perhaps even elimination—of the distinction of pass-through fees and taxes and drastically breaks with our prior precedent to proclaim that the instant case involves a delegation of the power to tax.

a. The Difference Between Pass-Through Fees and Taxes

The Supreme Court has long differentiated taxes from fees or other efforts to generate revenue. *See, e.g., Twin City Nat’l Bank of New Brighton v. Nebecker*, 167 U.S. 196, 202 (1897); *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990). In *National Cable Television Ass’n v. United States*, 415 U.S. 336, 340–41 (1974), the Court distinguished fees as costs incurred “incident to a voluntary act,” that “bestow[] a benefit on the applicant, not shared by other members of society.” *Id.* Even in cases requiring “heightened scrutiny,” we have similarly analyzed costs assessed to entities engaged in the course of business by legislative bodies and divined our own analysis for whether costs are fees or taxes. *See Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000). An examination of both the law of this circuit and the Court’s cases addressing this important distinction reveals that the majority’s analysis distinguishing taxes and fees invites future line-drawing that will prove to be unworkable.

i. Analyzing this Distinction under Circuit Precedent

The majority errs by misapplying its standard to determine what constitutes a tax to the USF contributions at issue. The majority erases the established distinctions between fees, which do not implicate the Taxing Clause, and taxes. *See Nat’l Cable*, 415 U.S. at 340–41. I cannot condone the patent overriding of established precedent from this court and our sister circuits that have long held that USF contributions are fees without substantial consideration of those determinations.

In *TOPUC I*, we considered a constitutional challenge from several wireless telecommunications companies asserting that the USF contribution scheme violated the Origination Clause. 183 F.3d at 426. There, the petitioning companies specifically argued that the constitutional violation flowed from the FCC’s requirement that paging carriers make contributions to the USF. *Id.* at 426–27. The panel rejected this challenge, noting that the Court has made clear that “a statute [] creat[ing] a particular governmental program and [] rais[ing] revenue to support that program . . . is not a ‘Bil[l] for raising Revenue’ within the meaning of the Origination Clause.” 183 F.3d at 426–27 (quoting *Munoz-Flores*, 495 U.S. at 398). As to the waived Tax Clause argument, the panel explained in dicta that “[e]ven if [the petitioner]’s Taxing Clause argument were properly before us, we find no basis for reversal” because “the universal service contribution qualifies as a fee because it is a payment in support of a service (managing and regulating the public telecommunications network) that confers special benefits on the [telecommunications carrier] payees.” *TOPUC I*, 183 F.3d at 427 n.52 (first citing *Nat’l Cable*, 415 U.S. at 340; and then citing *Rural Tele. Coalition v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988) (holding universal service contributions as a fee supporting allocations between interstate and intrastate jurisdictions)).

Even though the Taxing Clause and Origination Clause analyses differ, they require consideration of essentially the same factors—namely, “whether the revenues are used to primarily defray the expenses of regulating the act” or whether “the revenues generated from the assessment are for general revenues or for a particular program.” *Id.* at 427 n.51. Nearly fifteen years after *TOPUC I*, the D.C. Circuit rejected the same arguments presented under the Tax Clause in *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1089–90 (D.C. Cir. 2012). It held that § 254 could not reasonably be “interpreted” as “an unconstitutional delegation of Congress’s authority

under the Taxing Clause . . . because the assessment of contributions from carriers is not a tax.” 685 F.3d at 1091. The en banc court should have reached this same determination here, as this dicta from *TOPUC I* applies in equal force.

The conclusion that USF contributions are valid fees and not impermissible taxes follows even under heightened scrutiny borrowed from different constitutional and statutory frameworks. See discussion *infra* Part II.a–b, pp. 20–23. For instance, in *Texas Entertainment Ass’n, Inc. v. Hegar*, 10 F.4th 495 (5th Cir. 2021), we set out the governing factors to determine whether an assessed contribution is a fee or a tax for the purposes of the Tax Injunction Act (“TJA”). Under the TJA, we have favored a “broad construction of ‘tax’” out of respect of preventing delays in reviewing challenges to revenue raising efforts of state and local governments. See *Home Builders Ass’n of Miss. v. City of Madison*, 143 F.3d 1006, 1011 (5th Cir. 1998). Despite the differences in the analysis presented in the TJA and taxing power inquiries, any distinction does not impact the fact that USF contributions are not taxes under either test.

The *Hegar* panel stated that a fee: “is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purposes of defraying regulatory costs, not simply for general revenue-raising purposes.” *Id.* at 505–06 (quoting *Neinast*, 217 F.3d at 278). We considered whether the Texas legislature’s enactment of a “sexually oriented business” fee was a fee or a tax. *Id.* at 502, 505–06. We noted that while the cost assessed to each “sexually oriented business” was imposed by the legislature, the text made clear that the cost was imposed only on “sexually oriented businesses” to finance a program for the prevention of sexual assault in that industry. *Id.* at 506. Ultimately, we concluded that a charge by a legislative body is a fee, and not a tax, where the charge is levied

against a specific industry sector, serves a regulatory purpose, and raises funds for a specific regulatory program. *Id.* at 506–07.

All of the same factors are present here. In § 254, Congress set out that a charge must be collected from “[e]very *telecommunications carrier* that provides interstate telecommunications services.” 47 U.S.C. § 254(d) (emphasis added). The contributions collected from telecommunications carriers are directed to a specific fund and “not general revenue.” *See Hegar*, 10 F.4th at 506–07. In fact, § 254(e) provides that these funds are not universally distributed but paid only to eligible telecommunications carriers that provide universal service. USF contributions are imposed upon a specific industry—telecommunications carriers—and not the general public. *See id.*; *see also TOPUC I*, 183 F.3d at 427–28 (holding that all telecommunications carriers—including those that are exempt from contributing—are the beneficiaries of the program receiving the primary benefit in the form of the expansion of universal service). The best support for this lies in the plain language of § 254(b)(4), (d).

But one need not rely solely on Congress’s word as expressed in § 254. A look at the USF contribution system in practice confirms who the true payors are. The class of entities that Congress orders to contribute—those that are compelled by congressional act to actually pay this fee—are the telecommunications providers themselves. A close review of the list of entities that must contribute, reproduced on USAC’s website, includes landline providers, prepaid calling card providers, coaxial cable providers, telex companies, and other types of telecommunications service providers.⁵ Conspicuously absent from § 254, this list, or from any material or orders of

⁵ *See* 47 U.S.C. § 254(d); Univ. Serv. Admin. Co., *Who Must Contribute*, <https://www.usac.org/service-providers/contributing-to-the-usf/who-must-contribute/> (last visited May 24, 2024).

Congress or the FCC is any listing of the American populace as contributors. Thus, the majority errs in categorizing the class of contributors as “American telecommunications consumers who see USF charges on their phone bills each month.” Maj. Op. at 15. Whether or not the telecommunications carriers pass through that cost to consumers in the form of a line-item on their bills is irrelevant to our analysis because we are concerned with the constitutionality of Congress’s action, not the action of independent third parties that choose to pass costs along to their customers. This degree of separation between the governmental act and the consumers’ payments should end the inquiry.

But if we continue, it becomes even clearer that there *is* complete overlap between the class of USF contributors are the payors and the beneficiaries. The general public then receives an ancillary benefit in the form of more affordable, standardized service. However, the telecommunications carriers receive the primary benefit in the forms of both direct dispersals of USF money and positive network economic effects that result from the proliferation of universal service. *See* 47 U.S.C. § 254(e); *TOPUC I*, 183 F.3d at 427–28 & n.52; *Rural Cellular Ass’n*, 685 F.3d at 1091–92; *see also* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 551 (1998). As we said in *TOPUC I*, “universal service contributions are part of a particular program supporting the expansion of, and increased access to, the public institutional telecommunications network. . . . Each [] carrier *directly benefits* from a *larger and larger network* and, with that in mind, Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service.” 183 F.3d at 427–28 (emphasis added).

In *Rural Cellular*, the D.C. Circuit reached the exact same conclusion regarding enhanced access to broadband services. 685 F.3d at 1091–92. It held that as telecommunications providers advance universal service “they

will benefit from the increased utility of the [basic] Internet [and cell services] that come[] with a greater number of users having enhanced access to” those services. *Id.* at 1090–91. It concluded that the FCC “collected these [universal service] contributions to support the expansion of universal service and no other use was ever contemplated.” *Id.* at 1091.

The majority makes much ado of the benefit that the general public and the rural area consumers, schools, hospitals, and public libraries receive from USF programs. Maj. Op. at 15 (“There is no overlap at all between the class of USF beneficiaries (recipients of subsidized telecommunications services) and the class of USF contributors.”). But, the majority mistakes the recipients of an ancillary benefit derived from the exaction of a fee with the payor that primarily benefits from the fees exacted for the purposes of funding regulatory efforts. Curiously, the majority cites *Trafigura Trading LLC v. United States*, for the proposition that a common fee arises “in the context of ‘value-for-value transaction[s].’” 29 F.4th 286, 289 (5th Cir. 2022) (quoting Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 8 (2003)).

Its reliance on *Trafigura* is misplaced. The majority omits that we reviewed that case under the Export Clause of the Constitution, which requires “apply[ing] ‘heightened scrutiny’ . . . [to] strictly enforce the Export’s Clause ban on taxes by ‘guard[ing] against . . . the imposition of a [tax] under the pretext of fixing a fee.’” *Id.* at 282 (citation omitted). Looking at the precedent set forth by this court and our sister circuits, it should be apparent that USF contributions are fees. *TOPUC I*, 183 F.3d at 427–28 & n.52; *Rural Cellular*, 685 F.3d at 1091–92. Nonetheless, some remain unmoved to apply our established precedent and venture into crafting new formulations to analyze whether a certain charge is a fee or not. Once again, noting our role not to directly contravene Supreme Court jurisprudence, I would hold that § 254 does not implicate the taxing power.

b. At Every Level of Scrutiny, USF Contributions are Fees

The majority's framing of the fee inquiry misconstrues language from the Court's decision in *National Cable* and numerous persuasive authorities to reach its result. It describes fees as costs: (1) "incurred 'incident to a voluntary act'"; (2) "imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes"; and (3) revenues the government raises to supply a benefit that inures to the persons or entities paying them rather than to the public generally. *See* Maj. Op. at 14.

USF contributions have nearly all of these characteristics. First, they are incurred by telecommunications carriers incident to the voluntary act of doing business. In *National Cable*, the Court categorized charges incurred as a result of a request to obtain a state license to practice law or medicine, or to run a broadcast station, as fees because they were incident to "a voluntary act." *See* 415 U.S. at 340–41. Thus, telecommunications providers' willing choice to engage in the industry, like the cost paid for professional licensure, fits within the Court's formulation of costs incurred incident to a voluntary act. Second, USF contributions are imposed by the legislature on telecommunications providers, and not society at large for the purposes of maintaining a system of universal service that they benefit from. *See* 47 U.S.C. § 254(d), (e) (imposing the contribution on telecommunications carriers for the benefit of qualified telecommunications carriers). In this case, the majority can point to nowhere in § 254 or the Code of Federal Regulations where Congress, the FCC, or even USAC order or direct telecommunications providers to pass along the cost to their customers. At most, the majority points to a regulation enacted by the FCC that merely notes that is not unlawful for carriers to pass on the costs to consumers. Maj. Op. at 15 (citing 47 C.F.R. § 54.712(a)). That simply is not sufficient for our constitutional analysis that examines Congress's action and scrutinizes what

it has set out in delegating authority. *Cf. J.W. Hampton*, 276 U.S. at 406 (analyzing what *Congress* “may do in seeking assistance from another branch” through the delegation of authority).

The majority cites *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000), for the proposition that the fact that carriers pass along the cost of contributions to consumers makes it “reminiscent of a ‘classic tax’” with obligations shared by the population at large. Maj. Op. at 15. As mentioned above, this determination relies on the baked-in assumption that Congress or the FCC has imposed the cost on consumers. Again, this simply is not supported by the plain language of the statute. Section 254(d) specifically provides that “[e]very *telecommunications carrier* that provides interstate telecommunications services” must make contributions. 47 U.S.C. § 254(d). Costs incurred by entities and passed down to consumers through the entities’ independent business judgment are not taxes.⁶

In my view, a strained interpretation of our applicable law and liberties taken to broadly expand the definition of a tax using distinguishable authorities should not stand. But regardless of the outcome of this analysis, the Court has made clear that whether a revenue-raising delegation implicates the taxing power is irrelevant to a nondelegation doctrine challenge. *See Skinner*, 490 U.S. at 223. I remain unpersuaded that we should create a sharp split with our precedent concluding that USF contributions are fees, along with our sisters circuits’ same conclusions. Nor do I support our departure from the sound reasoning of the Court that any distinction of a

⁶ *See, e.g., Edye v. Robertson*, 112 U.S. 580, 595 (1884) (holding that a per-head charge imposed on ship owners that brought immigrants to American was a processing fee or mitigation charge, and not a tax); Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 337–50, 364–65 (2002) (detailing differences between taxes and different types of user charges, commodities charges, and the like).

charge as a fee or tax is of little relevance as it pertains to the nondelegation doctrine analysis.

IV. CONCLUSION

In sum, § 254 represents Congress’s effort to “obtain[] the assistance of its coordinate Branches”⁷ in an extensive and vastly changing subject matter area. In so doing, Congress has provided the FCC with an intelligible principle that sufficiently delimits the FCC’s discretion based on the established universal service principles. Petitioners’ argument that this revenue-raising delegation is subject to a higher standard of scrutiny has been consistently rejected by the Supreme Court. Because I am not persuaded that we should deviate from Supreme Court precedent, deviate from our precedent, and create a split with the Sixth, Eleventh, and D.C. Circuits by departing from the solid reasoning offered in their denials of those nondelegation doctrine challenges, I would affirm our original holding that § 254 satisfies the intelligible principle test and that no constitutional violation arises from the FCC’s subdelegation of ministerial tasks to USAC.

⁷ *Mistretta*, 488 U.S. at 372.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by STEWART, SOUTHWICK, GRAVES, and DOUGLAS, *Circuit Judges*, dissenting:

The majority finds neither an unconstitutional delegation of legislative power nor an unconstitutional exercise of government power by a private entity. Supreme Court precedent dictates these answers, which is why every other circuit to consider these questions stopped there and the Supreme Court denied petitions for review of those decisions. *Consumers' Rsch. v. FCC*, No. 23-456, 2024 WL 2883753 (U.S. June 10, 2024) (Mem.); *Consumers' Rsch. v. FCC*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024) (Mem.).

But our court does not stop there, going beyond even petitioners' arguments to adopt a novel theory that it is “the combination” of these two *non*-violations that “violates the Legislative Vesting Clause in Article I, § 1.” Maj. Op. at 55. That is, according to the majority, when Congress provides an intelligible principle to channel agency discretion (constitutional) and a private entity performs calculations under the agency's supervision (also constitutional), it becomes—pursuant to an undefined, unannounced, and unprecedented test—unconstitutional. Make no mistake, there is nothing narrow about this ruling. This decision invites lower courts to leapfrog the Supreme Court; creates a split with all other circuits to have considered the issue; ignores statutory criteria and regulations; and upends the political branches' decades-long engagement with each other, industry, and consumers to address the technology divide.

I.

The majority argues that the “combination” theory on which its holding rests is nothing new. But the Supreme Court has considered cases that, like this one, involved challenges on the grounds that there was both an unconstitutional delegation of legislative power and an unconstitutional

delegation of government power to a private entity, yet the Court never instructed, as the majority does now, that a different standard applies. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Curran v. Wallace*, 306 U.S. 1, 15-16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

In *Sunshine Anthracite*, for example, challengers argued that there was both an impermissible delegation of legislative power to an executive commission and an impermissible delegation of government power to a private entity because that commission relied on private actors. 310 U.S. at 397-99. The Supreme Court rejected the legislative delegation challenge after concluding that “in the hands of experts the criteria which Congress ha[d] supplied [we]re wholly adequate for carrying out the general policy and purpose of the Act.” *Id.* at 398. It then rejected the private delegation challenge after concluding that the private actors “function subordinately to the Commission,” which had “authority and surveillance” over them. *Id.* at 399. It ended its analysis of both delegation challenges there. If the majority were correct that a different standard applies, the Supreme Court would have instead asked whether, despite constituting neither a delegation of legislative power nor a delegation of government power to a private entity, there was still a constitutional problem. It did not. The majority attempts to distinguish on the ground that the Supreme Court “found the Government had not delegated any legislative power to any private entity” and “[t]here cannot be a combined public/private delegation without a private delegation.” Maj. Op. at 68. But that is no answer. Indeed, it directly undermines the majority’s conclusion because the majority *also* does not find a private delegation. *Id.* at 17 (explaining the court “need not definitively answer either delegation question”).

The majority points to presidential removal authority precedent but ignores how the Supreme Court itself has characterized that precedent. In

Seila Law LLC v. CFPB, a decade after *Free Enterprise Fund*, it explained that there were only two exceptions to the president’s otherwise “unrestricted removal power.” 591 U.S. 197, 204 (2020). The CFPB’s structure fit into neither exception. *Id.* The Court declined to create a new one and, unlike the majority here, applied precedent. *Id.* It was not, as the majority recasts it, a situation in which “[t]wo lines of precedent seemed to converge to suggest the removal restriction at issue posed no constitutional problem” but “the combination” of features was unconstitutional. Maj. Op. at 56.¹ And, as discussed above, the Supreme Court has considered this combination of features and, applying the legislative delegation and private delegation tests the majority disregards, has found no constitutional defect.

Even if the majority were correct that the presidential removal authority cases now suggest that a different standard could apply in this case, the Supreme Court has been clear that, where its precedent “has direct application in a case,” “the Court of Appeals should follow the case which directly controls, leaving to [it] the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)); *see also Consumers’ Rsch. v. Consumer Prod. Safety Comm’n*, 91 F.4th 342, 352 (5th Cir. 2024) (“[O]ur role in the judicial architecture requires us only to map—not adjust—the borders” of Supreme Court precedent). The majority ignores this repeated instruction.

II.

¹ In doing so, the majority quotes Justice Thomas’s separate writing in which he disagreed with seven Justices that severing the removal provision cured the CFPB’s constitutional defect. But that analysis, joined by only one other Justice, about when severance is a proper remedy has little purchase here in determining whether there has been a constitutional violation in the first place.

The majority cannot prevail under legislative delegation or private delegation precedent, and so it concocts a theory to rewrite both. In doing so, it offers no test for determining when something that is neither an unconstitutional delegation of legislative power from Congress to an agency nor an unconstitutional delegation of government power to a private entity becomes unconstitutional, leaving the political branches powerless to govern.

On the issue of legislative delegation, the majority acknowledges that “the Supreme Court’s nondelegation ‘jurisprudence has been driven by a practical understanding that 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.’” Maj. Op. at 29 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (added emphasis omitted)). It then asserts, without explanation, that “Congress did not delegate because FCC has some superior technical knowledge about the optimal amount of universal service funding” as “[n]o such knowledge exists because determining the ideal size of a welfare program involves policy judgments, not technical ones.” *Id.* at 30.

But Congress designed a vital, nationwide program in an area—telecommunications—where the only constant has been rapid change in both technology and markets. This is exactly the type of “ever changing” and “technical problem[]” that the Supreme Court has held Congress can address with “broad general directives” to expert agencies. *Mistretta*, 488 U.S. at 372. Congress chose not to freeze in place precise rates for different types of customers in different regions nor to impose service technology standards that would almost immediately become obsolete. Instead, Congress made policy decisions about how those precise answers should be reached, and regularly revisited, by the expert agency it had created. To determine which services to fund, FCC is required to account for which services “are essential to education, public health, or public safety”;

“subscribed to by a substantial majority of residential customers”; “being deployed in public telecommunications networks by telecommunications carriers”; and “consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 254(c)(1). Congress provided additional principles to guide FCC. For example, Congress made the policy decision that rural Americans should not be abandoned on the wrong side of the technology divide. Without the ability to predict what types of services urban Americans would have access to and what rates they would pay, Congress decided to require FCC to ensure that rural Americans have “access to telecommunications and information services” “reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” *Id.* § 254(b)(3). The majority offers Congress no guidance on how it should address this rapidly evolving area, or any number of others, differently.

The majority is mistaken to suggest that these are issues that have been withdrawn from congressional scrutiny—and attendant public debate—because Congress has enlisted FCC’s expertise to address them. There have been congressional hearings, reports, proposed bills, and engagement with FCC over every aspect of the Universal Service Fund (USF), ranging from revising the High Cost Program’s performance goals to expanding the list of eligible entities for the Rural Health Care Program to broadening the contribution base for the USF. PATRICIA FIGLIOLA, CONG. RSCH. SERV., R47621, *THE FUTURE OF THE UNIVERSAL SERVICE FUND AND RELATED BROADBAND PROGRAMS* 12-16 (2024) (“*FUTURE OF THE UNIVERSAL SERVICE FUND*”). The USF remains subject to extensive congressional efforts to weigh competing policy priorities and interests, balancing concerns of different consumers and industries.

On private delegation, too, the majority ignores both precedent and facts. The Universal Service Administrative Company (USAC), constrained by comprehensive regulations, “bill[s] contributors, collect[s] contributions to the universal service support mechanisms, and disburs[es] universal service support funds.” 47 C.F.R. § 54.702(b). In performing these administrative functions, USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.” *Id.* § 54.702(c).

Yet, the majority asserts that FCC has “*de facto* if not *de jure*” abdicated government power to USAC because FCC has rarely rejected the contribution factor that USAC calculates based on collected inputs. Maj. Op. at 7. But the relevant question is what the majority discounts as only the “*de jure*” one: Whether FCC has the “authority” to do so. *Sunshine Anthracite*, 310 U.S. at 399. And even the majority acknowledges that FCC does have that authority. *See* Maj. Op. at 6 (“True, FCC ‘reserves the right to set projections of demand and administrative expenses at amounts that [it] determines will serve the public interest.’ *See* 47 C.F.R. § 54.709(a)(3).”). Certainly, any number of private entities that perform administrative roles at government direction and under government control would fail this rewritten test. *See, e.g., What’s a MAC, CTR. FOR MEDICARE & MEDICAID SERVS.*, <https://www.cms.gov/medicare/coding-billing/medicare-administrative-contractors-macs/whats-mac> (last modified Mar. 13, 2024) (describing how Medicare Administrative Contractors—private insurers—process claims, make and account for Medicare payouts, and establish local coverage determinations).

Furthermore, as Judge Stewart explains, it is hardly surprising that FCC should approve USAC’s calculation of the contribution factor when it is entirely the product of inputs that FCC regulates at every turn, from the detailed worksheets that FCC requires telecommunications companies

submit to calculate projected revenue to the caps that FCC imposes on projected expenses. If anything, it is evidence of the efficacy of FCC’s “pervasive surveillance and authority” exercised over USAC. *Sunshine Anthracite*, 310 U.S. at 388. That authority is maintained through processes that allow parties disagreeing with USAC’s math to seek further FCC review, 47 C.F.R. § 54.719(b), and audits to ensure “proper[] administrat[ion] [of] the universal service support mechanisms to prevent fraud, waste, and abuse,” *id.* § 54.717. That those audits reveal errors and waste is concerning but this has never been enough to declare a coequal political branch’s act unconstitutional. Nor does it convert USAC’s accounting role into a constitutional violation.²

Additionally, the majority overlooks the fact that the increasing contribution factor is not caused by the scope of USAC’s authority but is instead driven “in large part [by] a decline in the contributions revenue base, i.e., providers are reporting a declining share of telecommunications revenues and an increasing share of non-telecommunications revenues.” *FUTURE OF THE UNIVERSAL SERVICE FUND* at 9. Crucially, Congress has responded with a number of legislative proposals, from members of both parties, to potentially expand the revenue base by including broadband providers and online content and services providers. *Id.* at 9-10 (citing Senator Markwayne Mullin’s Lowering Broadband Costs for Consumers Act, Senator Roger Wicker’s FAIR Contributions Act, and the Reforming

² The majority separately argues that Congress was required to expressly authorize USAC’s role under founding-era agency law principles. But, even granting that this were historically accurate and the relevant question, the majority acknowledges that there was an “assum[ption] that ministerial tasks could be subdelegated,” and so this argument fails because, as discussed above, USAC performs only ministerial tasks. *Maj. Op.* at 49 (citing GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION 115 (2017)).

Broadband Connectivity Act proposed by Senator Amy Klobuchar and Representative Joe Neguse). Put differently, the body constitutionally tasked with addressing the policy problem the majority identifies is doing just that.

As our unanimous panel and every other court to have considered these issues held, each challenge fails under binding Supreme Court legislative delegation and private delegation precedent. Yet the majority, in undermining both lines of precedent, offers no test for determining at what point something that is neither an unconstitutional delegation of legislative power nor an unconstitutional delegation of government power to a private entity still becomes, convergingly, unconstitutional. Congress, the Executive, and courts in our circuit are left only with the implication that the bar for what is an intelligible principle is raised—by how much is unclear—when an agency enlists a private entity to perform accounting tasks. Conversely, tasks performed by private entities that have long been considered ministerial will be elevated—at what point, again, is unclear—to exercises of government power when Congress legislates with otherwise permissibly intelligible principles that limit agency discretion.

This convergence sleight of hand not only undoes Supreme Court precedent but also leaves the political branches powerless to address this perceived constitutional deficiency, ignorant as to how to legislate and regulate in ways that will survive judicial review. Here, Article III nullifies a program that has served millions of Americans for over a quarter of a century, which Congress, FCC experts, industry, and consumers revisit yearly in the face of changing technology and markets. Our court should not constitutionalize policy disagreements nor, worse still, do so with an amorphous standard, not urged by petitioners and contrary to precedent, that leaves the coequal, political branches without stability or clarity. In announcing its new constitutional theory, our court creates a greater threat to the separation of powers than the one it purports to address.

No. 22-60008

* * *

For these reasons, and those stated by Judge Stewart, I respectfully dissent.