SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

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Pages: 1 through 180

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Washington, D.C.

Wednesday, March 26, 2025

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

APPEARANCES:

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

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

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

C O N T E N T S

P R O C E E D I N G S

(10:16 a.m.)

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

General Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONERS IN CASE 24-354

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

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

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

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

Fourth, Congress prescribed how to

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

JUSTICE THOMAS: How does that constrain the revenue raising?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

fair? Would that present a constitutional problem?

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

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

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

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

CHIEF JUSTICE ROBERTS: And it -- you

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

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

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

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

than just abstract rates.

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

And --

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

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

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

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

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

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

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

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

JUSTICE JACKSON: Let me ask you. Does the private non-delegation theory suffer from the same lack of clarity in terms of its origins? I mean, I -- I -- I'm trying to understand its distinction with the traditional non-delegation theory.

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

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

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

JUSTICE GORSUCH: Ms. Harris --

GENERAL HARRIS: With respect to

Article II --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So take Skinner, for instance. The

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

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

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

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

The actor is an officer of the United

States who's adopting the actual form of policy. And, again, this sort of happens every day. But again --

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

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

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

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

calculated the contributions.

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Go ahead, please.

JUSTICE GORSUCH: -- but just to finish up.

One -- one critical element you

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

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

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

GENERAL HARRIS: Absolutely. And we think --

JUSTICE GORSUCH: Okay.

GENERAL HARRIS: And we think that --

JUSTICE GORSUCH: All right.

GENERAL HARRIS: -- 254 satisfies --

JUSTICE GORSUCH: No, I understand that.

GENERAL HARRIS: Okay.

CHIEF JUSTICE ROBERTS: Justice Thomas? Anything further?

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

raising?

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

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

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

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

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

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

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

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

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

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

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

And I just think it just doesn't pan

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

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

JUSTICE ALITO: If enough people subscribed to it?

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

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

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

JUSTICE ALITO: What is a substantial portion?

GENERAL HARRIS: A substantial majority.

JUSTICE ALITO: Substantial.

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

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

JUSTICE SOTOMAYOR: Mm-hmm.

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

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

JUSTICE SOTOMAYOR: So --

GENERAL HARRIS: Internet and advanced information services.

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

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

JUSTICE SOTOMAYOR: All right.

GENERAL HARRIS: -- constrained further.

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

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

GENERAL HARRIS: There's that and also

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

JUSTICE SOTOMAYOR: Right.

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

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

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

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

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

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

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

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

GENERAL HARRIS: Exactly right.

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

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

GENERAL HARRIS: Yes.

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

GENERAL HARRIS: Correct.

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

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

GENERAL HARRIS: Yes. It sure does.

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

GENERAL HARRIS: Yes.

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

GENERAL HARRIS: Absolutely.

JUSTICE SOTOMAYOR: It determines what expenses should be covered?

GENERAL HARRIS: Yes.

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

GENERAL HARRIS: That is correct.

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

them getting math wrong, correct?

GENERAL HARRIS: That is certainly the hope.

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

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

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

(Laughter.)

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

GENERAL HARRIS: Absolutely.

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

GENERAL HARRIS: I would just give one

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

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

JUSTICE SOTOMAYOR: Okay.

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

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

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

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

GENERAL HARRIS: You certainly could.

JUSTICE SOTOMAYOR: Could. But we should?

GENERAL HARRIS: Sure, yes.

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

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

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

GENERAL HARRIS: Yes.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

(Laughter.)

JUSTICE SOTOMAYOR: Remember, I was a prosecutor.

(Laughter.)

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

bit.

(Laughter.)

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

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

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

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

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

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

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

JUSTICE KAGAN: Thank you, General.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

(Laughter.)

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

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

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

Good to go or not?

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

JUSTICE GORSUCH: Okay.

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

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

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

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

IRS regulation. And we are talking here --

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

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

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

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

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

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

healthcare on a non-discriminatory basis. That's a narrow one for you.

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

JUSTICE GORSUCH: Okay.

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

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

GENERAL HARRIS: I disagree. I think --

JUSTICE GORSUCH: No numerical cap.

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

JUSTICE GORSUCH: There's no numerical cap.

GENERAL HARRIS: There is absolutely no numerical cap.

JUSTICE GORSUCH: There is no rate?

GENERAL HARRIS: There is no rate, but

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

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

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

JUSTICE GORSUCH: Those evolve over time, right?

GENERAL HARRIS: It could evolve over time --

JUSTICE GORSUCH: Sure.

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

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

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

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

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

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

GENERAL HARRIS: To give everyone a mobile hotspot?

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

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

advanced telecom and information services for schools and libraries.

JUSTICE GORSUCH: Yeah.

GENERAL HARRIS: So --

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

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

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

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

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

JUSTICE GORSUCH: Why -- why not?

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

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

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

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

GENERAL HARRIS: So --

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

GENERAL HARRIS: That's fine.

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

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

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

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

JUSTICE GORSUCH: All right.

GENERAL HARRIS: -- or something else and --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: It's --

GENERAL HARRIS: -- versus a fee.

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

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

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

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

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

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

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

JUSTICE GORSUCH: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

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

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

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

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

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

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

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

ambi- -- ambiguity on that score.

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

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

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

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

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

independent agency?

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

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

GENERAL HARRIS: Okay.

JUSTICE KAVANAUGH: So --

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

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

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

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

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

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

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

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

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

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

GENERAL HARRIS: Why it's different?

JUSTICE KAVANAUGH: Yeah, the delegation --

GENERAL HARRIS: One is the breadth of the --

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

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

JUSTICE BARRETT: Sure. Make it two males a day.

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

scheme on top.

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

GENERAL HARRIS: If it's --

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

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

JUSTICE BARRETT: Is there.

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

JUSTICE BARRETT: That's the question.

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

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

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

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

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

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

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

previous delegations and see how they stack up.

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

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

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

JUSTICE BARRETT: But it could be 3 billion?

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

JUSTICE BARRETT: Could be 30 billion?

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

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

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

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

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

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

JUSTICE BARRETT: So it could or couldn't?

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

JUSTICE BARRETT: Okay.

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

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

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

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

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

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Jackson?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

situation, right?

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

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

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

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

these programs in jeopardy, in your view?

GENERAL HARRIS: Yes.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Harris.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS IN CASE 24-422

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

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

It is not a charge to the agency to

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: So --

MR. CLEMENT: -- and --

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

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

that -- is that the gist of it?

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

JUSTICE GORSUCH: Okay.

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

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

MR. CLEMENT: Yeah.

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: Well --

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

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

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

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

MR. CLEMENT: Okay.

JUSTICE GORSUCH: -- before I forget

it.

MR. CLEMENT: Yeah.

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

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

JUSTICE GORSUCH: Okay.

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

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

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

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

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

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

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

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

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

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

protection of this country and all that other stuff.

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

(Laughter.)

MR. CLEMENT: No, seriously.

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

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

JUSTICE GORSUCH: Really?

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

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

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

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

MR. CLEMENT: No, no. But --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in the courts.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

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

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

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

JUSTICE ALITO: All right.

(Laughter.)

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

coining money.

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

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

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

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

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

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

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

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

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

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

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

has been briefed.

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

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

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

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

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

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

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

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

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

MR. CLEMENT: So --

JUSTICE SOTOMAYOR: -- to minimize the disruption?

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

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

JUSTICE SOTOMAYOR: Right.

(Laughter.)

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

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

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

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

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

JUSTICE SOTOMAYOR: There's a whole

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

MR. CLEMENT: Yeah.

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

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

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

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

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

And if this were delegation run riot,

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

Is that a distinction that's worth making?

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

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

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

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

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

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

And then when you move from

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

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

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

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

So why not?

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

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

your own sense of what the standards are here.

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

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

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

JUSTICE KAGAN: Totally.

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

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

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

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

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

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

MR. CLEMENT: It's still okay.

JUSTICE GORSUCH: Yeah.

(Laughter.)

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: Yeah.

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

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: Okay. Okay. And --
MR. CLEMENT: And --
JUSTICE GORSUCH: And -- and this is something you think Congress could -- could easily fix. Now, you think that's an argument in your favor, but they could easily put in a cap or a rate or something tomorrow?
MR. CLEMENT: Sure, but why make them? I mean, is my point. Especially when they have put what I would say are the equivalent -- just to put it in Whitman terms --
JUSTICE GORSUCH: Well, maybe because otherwise it's regulated parties who are self-interested in a program making the decisions for themselves.
MR. CLEMENT: But they're not.
JUSTICE GORSUCH: It's sort of like Schechter Poultry, right? I mean, it's the same -- it was a regulated industry there that was making those decisions for its own benefit. And one -- I'm not -- one can dispute that characterization, but -- but maybe, huh?
MR. CLEMENT: No. Give me half a chance to -- to dispute that characterization.
JUSTICE GORSUCH: By all means.

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

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

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

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

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

JUSTICE GORSUCH: Through --

MR. CLEMENT: -- and --

JUSTICE GORSUCH: Through rate making

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

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

JUSTICE GORSUCH: Sort of.

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

JUSTICE GORSUCH: Sort of.

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

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

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

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

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

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

JUSTICE GORSUCH: Okay.

MR. CLEMENT: But --

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

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

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

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

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

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

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

JUSTICE BARRETT: Mm-hmm.

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

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

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

JUSTICE BARRETT: Of what.

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

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

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

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

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

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

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

(Laughter.)

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

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

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

(Laughter.)

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

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

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

JUSTICE BARRETT: Okay.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

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

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

MR. CLEMENT: I mean, I agree with

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

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

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

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

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

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

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

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

accountability.

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

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

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. McCotter.

ORAL ARGUMENT OF R. TRENT McCOTTER

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

you address those.

MR. McCOTTER: Yes, Your Honor.

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

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

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

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

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

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

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

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

And those things have to be available

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: It's the --

MR. McCOTTER: They've always said --

JUSTICE KAGAN: But you just look at

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

watered-down modern case law.

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

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

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

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

JUSTICE KAVANAUGH: Okay.

MR. McCOTTER: Yeah.

JUSTICE KAVANAUGH: So cap. Yes.

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: But that's just because --

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

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

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

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

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

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

MR. McCOTTER: Correct, yes.

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

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

JUSTICE BARRETT: Counsel, let me just --

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

you know it's Congress.

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

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

JUSTICE BARRETT: Okay. So --

MR. McCOTTER: However --

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

MR. McCOTTER: Correct.

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

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

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

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

JUSTICE BARRETT: Okay.

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

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

devastating for universal service. What about that?

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

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

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

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

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

JUSTICE KAVANAUGH: And the -- well,

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

MR. McCOTTER: True, but --

JUSTICE KAVANAUGH: So proof is not in the pudding.

(Laughter.)

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

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

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

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

CHIEF JUSTICE ROBERTS: Well --

JUSTICE KAVANAUGH: That's a --

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

(Laughter.)

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

So I -- I think it was --

MR. McCOTTER: Sure.

CHIEF JUSTICE ROBERTS: -- quite a different case.

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

JUSTICE SOTOMAYOR: Counsel --

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

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

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

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

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

one-off special test for taxing.

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: Sufficient to run this program?

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

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

JUSTICE JACKSON: In a hypothetical --
JUSTICE KAGAN: Again, you -- you -- you're saying that we should interpret this statute to say that that word, "sufficient," is not imposing a requirement, meaning sufficient, what is required to do these services, but not more than that?
MR. McCOTTER: Yes, because that's what the FCC itself has said for 30 years.
JUSTICE KAGAN: Okay. I'll add that to my list to things that I think would be an unreasonable statutory interpretation.
Sufficiency means -- like when I call the pizza operator and say: I want you to send me pizza sufficient for 10 people, and then an 18 wheeler shows up --
(Laughter.)
JUSTICE KAGAN: -- that is not an accurate understanding of what I asked for.
(Laughter.)
MR. McCOTTER: Well, I think the key distinction there is at least you have an objective limitation on the end, right? Sufficient pizza for 10 people. Okay. We'll give -- give them the benefit of the doubt and

assume sufficient --

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

MR. McCOTTER: So then --

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

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

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

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

universal service principles."

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

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

So you can't have it both ways.

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

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

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

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

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

JUSTICE SOTOMAYOR: Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Yeah, because, you know --

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

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

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

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

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

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

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

JUSTICE GORSUCH: On --

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

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

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

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

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

JUSTICE KAGAN: -- challenge.

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

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

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

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

And I -- I -- I had understood your

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

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

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

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

JUSTICE ALITO: On -- no, go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

common law soil with it. It did the opposite.

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

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

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

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

half the time --

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

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

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

MR. McCOTTER: True.

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

Isn't that right?

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

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

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

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

about?

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

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

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

JUSTICE ALITO: Thank you.

MR. McCOTTER: Blame USAC.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

like what the government's spending money on.

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

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

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

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

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

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

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

violation.

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

On --

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

So, yes, they are funding industries.

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

JUSTICE SOTOMAYOR: But the --

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

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

programs.

MR. McCOTTER: Right, but that would --

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

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

JUSTICE SOTOMAYOR: But that's --

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

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

MR. McCOTTER: Well --

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

And -- and what you're asking us to

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

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

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

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

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

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

JUSTICE KAGAN: So I think --

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

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

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

It's basically what this agency has been doing since the 1930s.

MR. McCOTTER: Well, again --

JUSTICE KAGAN: Sorry.

MR. McCOTTER: Well, sorry. I was going to say, again, remember, the key inquiry here, what is the fundamental object, right, universal service. The FCC gets to define it on an evolving standard.

And it's not an extraordinary interpretation to read it as it says, which is that in 254(c) the FCC need only consider the extent to which -- and then it lists some of these factors.

And so we read it just straight up. Again, this is not -- respectfully, it's just not an unusual interpretation to say the FCC, sure, they must are consider it. And if they don't, that could be an APA challenge, but we're going to assume they did consider it. And they are not actually substantively limited by these sorts of things.

On the list of policies, in Schechter Poultry, there was a similar list of poultry -- list of principles -- excuse me, list of

policies, including, you know, non- -- non-discriminatory provisions. There -- the codes adopted needed to be equitable, things like that, words that may in other contexts have provided enough, but because they're added on with all these other provisions that make clear, Agency, you can go ahead and kind of do what you want here.

And just to be clear, we're completely freeing you from the preexisting doctrine. So Mr. Clement said this isn't one of those cases where Congress said, hey, Agency, figure it out. Respectfully, we just disagree. I think that's exactly what happened here.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Counsel.

Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: I did have a few. On accountability, I assume because I haven't heard from you, you don't have any separate problem here with the fact that it's the FCC and that's commonly thought of to be independent, either it's not independent as the government says, or you don't think that's an additional

problem; is that correct?

MR. McCOTTER: It's perhaps a minor plus factor. We're not raising a separate challenge on that basis, no.

JUSTICE KAVANAUGH: Okay. Second, are you asking us to do anything with Skinner?

MR. McCOTTER: So the way we interpret Skinner -- I think this is the fair reading of it, given all the cases before and after -- is that the nature of the power at issue does matter. The Court's said that since Wayman. And to the extent the Court went further, all it said was something that we're willing to agree with, although we win either way, which is that taxing is not in a category of one, essentially. It's not some unique specific thing, although historically we think it is, we think that's important, but we don't want to tie the whole case to that point.

And so, in our view, at most that's what Skinner said. And so whether you view it as a tax or a fee, we win either way. Skinner doesn't control beyond that.

JUSTICE KAVANAUGH: Is your argument that the word "sufficient" is too loose or the

back-end objects are too loose or both?

MR. McCOTTER: It's not just "sufficient" is too loose. There are many principles in here that are too loose because even if you think they might have some meat on the bones, again, the FCC doesn't have to comply with any particular 254(b) principle.

JUSTICE KAVANAUGH: You are arguing "sufficient," the word "sufficient," even if the back-end objects were more specific -- you understand the question?

MR. McCOTTER: I think I do.

JUSTICE KAVANAUGH: Yeah.

MR. McCOTTER: And I -- what I would say is it's not as if we have a statute where Congress said, FCC, please raise money and you can spend up to 8 billion. I think then the reasonable interpretation, as Justice Kagan would say, is, okay, let's kind of tie those two together there and put them, and let's try to avoid a constitutional problem.

But here on the back-end spending, it's not like they suddenly have some real objective limits there either.

JUSTICE KAVANAUGH: Yeah. And then,

on your point about limiting relief to the named parties, I guess I'm not understanding that at all because, you know, would not be -- it's not a district court ruling. This ruling would be binding through vertical stare decisis throughout the country.

And I assume -- and you want to react to that? I -- I -- I -- I think the named relief thing is -- doesn't help you at all.

MR. McCOTTER: Well, so two responses. First, the government's always asking this Court to limit relief to the named parties. For once, they found someone who was willing to agree to it. So it must make some distinction.

Second, I think it's more applicable to the quarters that are kind of already in the hopper. So for all the ones that have already gone, already been approved, as it were, for those, limiting relief to the named parties, especially given that the time limit to bring FCC challenges --

JUSTICE KAVANAUGH: Well, let's play this out. We've had this discussion before in past years, the past few years, but if this Court were to say that it's unconstitutional for

the FCC to continue in this way, even though the named parties are here before us, my understanding of what the government has said before is we would comply with what the Supreme Court said.

MR. McCOTTER: Sure. And I think it's important that -- that they say that, but this is really important --

JUSTICE KAVANAUGH: You don't think they would do that?

(Laughter.)

MR. McCOTTER: I don't think they necessarily have a legal obligation to do so.

JUSTICE KAVANAUGH: Really? What's -- what's your case for that?

MR. McCOTTER: Well, the -- the case is that the judgment applies to the parties only, specifically if the Court has already said so, which again --

JUSTICE KAVANAUGH: What's your -- what's your response to vertical stare decisis and how that's traditionally been understood in the country?

MR. McCOTTER: So that's why I say I think the limiting it to the named parties is

really most relevant for all the challenges that are already in the hopper, to say we're not going to unscramble all these statutes in the past, except for maybe these few named parties. Going forward, as people might bring new challenges -- and as I said in response to Justice Alito, I'm not convinced they will -- but even if they did, then, okay, well, that plays out well into the future. By then we think if the Court has actually reached this point, Congress would have done something --

JUSTICE KAVANAUGH: The --

MR. McCOTTER: -- hence forwardly.

JUSTICE KAVANAUGH: Sorry to prolong it. The premise of what you're saying right there is the FCC is going to say we don't care what the Supreme Court said about the program. And I'm not sure that premise is -- is -- is accurate.

MR. McCOTTER: I think what they -- sorry if I'm not being clear. I'm saying for the -- for the quarters that have already been challenged, the past ones --

JUSTICE KAVANAUGH: Right.

MR. McCOTTER: -- I think they would

say, look, the Supreme Court has ruled in your favor, Respondents, and we will address that as necessary, as to you. Going forward, though, I do think that limiting it to the named parties is less effective. That's why we list other options, though.

I'm not saying that that's like a cure-all, just to be clear. I think it is an important limitation, especially for the suits already filed.

JUSTICE KAVANAUGH: Thank you very much.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Mr. McCotter, I just want to clear something up about the 254(b) universal service principles. We've been going round and round and round about whether these are mandatory factors or not. So I just want to be sure that I understand your position.

So it begins under (b) by saying that the joint board and the Commission shall base policies for the preservation and advancement of universal service on the following principles. And then each one of those principles has a

"should."

Is that your problem, that they say "should"? And would you feel differently if the principles were worded that quality services be available at just, reasonable, and affordable rates?

MR. McCOTTER: That's one of the problems, is that it says "should." But I think, more fundamentally, the problem is, as the FCC itself has said for 30 years now almost, that any one of these --

JUSTICE BARRETT: Okay, but put aside --

MR. McCOTTER: All right.

JUSTICE BARRETT: This is a legal question. This is a statutory interpretation question. So the FCC can say that all it wants, but we still have to interpret the statute, right? So we're not bound by what the FCC says about its own authority.

So return to the question.

MR. McCOTTER: True, although I think the fact that they've interpreted it the same way for 30 years --

JUSTICE BARRETT: Okay. Okay.

MR. McCOTTER: -- is an indication.
JUSTICE BARRETT: Okay, I said, but don't -- don't fight the premise.
MR. McCOTTER: All right. And so even then, let's say that they all are mandatory. We still run into the problem that I think Justice Gorsuch was getting at, which is that these terms, especially when you have them fighting against each other with no rules for how to balance them or pick and choose between them, it's just like Schechter Poultry. It' a lot of policies, some of which of which may actually have some meaning in some sense, but they're all fighting against each other, and the FCC gets to kind of pick and choose which ones are more -- more important.
JUSTICE BARRETT: Okay. And then second question. We've talked about the difficulty of having judicially manageable standards in this area. And when you and I talked before, we were talking about a cap, and you said a cap would solve the problem.
So is that a manageable principle, that you would be happy -- you said, well, then at least Congress would have decided the policy

for itself and put a limit on it, so we know if it said 3 trillion, 3 billion, whatever, I understood you to tell me before that would solve the problem.

MR. McCOTTER: Absolutely.

JUSTICE BARRETT: And so that would be the intelligible principle?

MR. McCOTTER: If we're under the intelligible principle, yes --

JUSTICE BARRETT: Yeah.

MR. McCOTTER: -- that's -- that's more than sufficient. And I think it's noteworthy that --

JUSTICE BARRETT: And we wouldn't have to worry about anything else in the statute, not this 254(b) list or anything like that? Just the money would do it?

MR. McCOTTER: Correct. Although we win even if you don't think that's the requirement.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So you've said several times that you're not asking for a special rule for taxes versus fees, but you

began today by saying that this case is about taxation without representation. And you say there has to be a cap because the amount of public revenue that is to be raised via, you know, a mechanism is a legislative prerogative and can't be delegated.

So it seems to me that you are relying to some extent on the characterization of this as a tax.

MR. McCOTTER: So to be clear, we're making alternative arguments. We think it is a tax. We think that --

JUSTICE JACKSON: Does that matter?

MR. McCOTTER: -- it should matter. But even --

JUSTICE JACKSON: Does it matter?

MR. McCOTTER: But if even if you disagree --

JUSTICE JACKSON: No, I understand. I just understand whether your delegation argument in substantial part is hinging on your point that the legislature has the power to tax and it can't be handed off, and unless the legislature has a cap that it says this is the amount that you can raise, it is doing something

unconstitutional because of that structure?

MR. McCOTTER: It matters in the sense that we know taxing is a strictly and exclusively legislative power. So we know that this is something Congress itself has to set the objective rule on.

It's not necessarily that they have a cap in the numerical sense. In footnote 7 of our opening -- of our brief there's an example.

JUSTICE JACKSON: No, I understand, but you -- but -- but the thought is that -- that to the extent that you believe this is a tax, there has to be a cap set by Congress, is your basic point.

Now, let me just ask you this: Mr. Clement says, okay, this statute is really not about raising public revenue. It is about providing universal services. So if we disagree, if this comes down to how we're characterizing this statute, and we disagree with your view that this is a public revenue-raising vehicle and, therefore, Congress has to put a cap on it, do you lose? I mean --

MR. McCOTTER: No.

JUSTICE JACKSON: -- why must there be

a cap if this is not a tax?

MR. McCOTTER: So, there -- again, there doesn't need to be a cap in the numerical sense.

JUSTICE JACKSON: No, I understand.

MR. McCOTTER: There needs to be a rule.

JUSTICE JACKSON: Well, why if this is not a tax? Why can't Congress develop a policy that says we would like to have the following thing happen? We would like to have everybody in rural places throughout the country, everywhere, have this kind of service?

And as Mr. Clement said, we don't really care about how much it costs to do that. We are trying to get to this objective. And you would come back and say: Ah, but you have to tell us, you know, there has to be a cap on the amount of money that you have to raise for this. And Congress says: But that's not our objective. This is not about raising money. It's about providing a service; however much that costs.

What's unconstitutional about that?

MR. McCOTTER: It's still domestic

revenue raising, as Professor McConnell describes it or as this Court last year in CFPB described it. It's raising public moneys. And when you have that sort of exclusive legislative power, there needs to be a policy set by Congress.

JUSTICE JACKSON: All right.

MR. McCOTTER: The policy can't be vague.

JUSTICE JACKSON: Let me just ask one more question. I know we're running out of time here.

Is it your first-line position that we should not be using the intelligible principle standard? Are you saying -- are you encouraging us -- I know you say you win under that standard, but is your first point that we should be doing something else?

MR. McCOTTER: Yes. The Court should at the very least return to the intelligible principle that I think J.W. Hampton itself laid out, which says that Congress must set the rule that shall prevail. And as our argument is, there is no rule that shall prevail when it comes to the amount of money.

JUSTICE JACKSON: So you're not doing important subjects or something like that, is -- is that what you mean? Is that the test that you're -- I'm just trying to understand what it is that you would have us do if we don't do intelligible principle?

MR. McCOTTER: So we would say that the proper framework is what this Court applied for 150 years, if it is a strictly and exclusively legislative power, then Congress itself must set the policy. It can leave only fact-finding and details to the executive.

And as I started off today saying, the amount of money to raise for an enormous social welfare program is not a minor detail to be left to someone else.

JUSTICE JACKSON: And -- and you don't see the risk that we judges would be overriding popular -- and I -- I know you don't care that it's popular -- but popular in the sense that Congress has enacted it, programs?

I mean, Mr. -- Mr. Clement says that this could be the aggrandizement power by the courts if we don't have a really clear standard for determining when we come in and say this is

unconstitutional versus not?

MR. McCOTTER: Well, I think he apparently prefers an aggrandizement by Article II executive. And Congress was more than happy to let that happen when it comes to taxes because nobody wants to take responsibility for that.

So I think if we care about kind of democratic accountability I will return to what Judge Newsom said in his concurrence, with each delegation here, each new layer, we move further and further away from that democratic accountability.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Harris, rebuttal?

REBUTTAL ARGUMENT OF SARAH M. HARRIS
ON BEHALF OF THE PETITIONERS IN CASE 24-354

GENERAL HARRIS: Thank you. Just want to go over three problems for Respondents.

One, I candidly don't know what the rule is at this point. On the one hand, there is an anomalous rule that is foreign to the non-delegation precedents apparently for taxes,

fees, and other revenue-raising actions, and I don't know how it can possibly be squared as something that preserves a separation of powers.

When saying that an agency can raise up to $1 trillion with no further restrictions is somehow not a non-delegation problem, but tying what an agency can extract from a particular set of people, tied to the specific needs of a program is somehow constitutionally unconscionable.

I think there is a grave risk that if the Court went down that path, the Court would not be revitalizing the non-delegation doctrine or giving it meaningful teeth. It will just crop up case by case new, exclusively legislative powers, what is the new sort of limit that is going to be reverse-engineered for that one? That is chaos.

Second, Respondent is ignoring the very real constraints in Section 254. This is a little bit of an odd case in which the government is fervently insisting that the terms of the statute are mandatory, and yet Respondents won't take yes for an answer, that it is really, really a constraint.

And you know that 254 is mandatory for a couple of reasons, not just the fact that 254 starts with "shall," as Justice Barrett and others have pointed out, but the fact that this is a highly repetitive statutory scheme. So all of the things in Section 254(b) actually recur elsewhere in the statute. 254(d) is a "shall" with respect to the equitable and non-discriminatory rates.

Other parts of the program in 254(h) with respect to how the rural program is supposed to work or how the libraries are supposed to be funded. Those are shall's.

And so there is no doubt that this is a mandatory system. The FCC has treated it as such, but the question is what the statute means. It is mandatory.

Third of all, just the consequences of Respondents' position are really troubling. The reply brief 8 to 9 examples are truly the tip of the iceberg. It is a little bit strange that Respondents think that it is perfectly fine if there is some sort of fee system for the agency to decide how much its own costs or expenses are going to be, that that is not sort of the --

that is not sort of inviting the agency to raise whatever it sort of feels like, but that there is a problem when Congress is tethering the costs or fees or rates not to what the agency feels like doing to fund its own enforcement priorities and other things that it's doing, but instead to meet defined, external goals that Congress has required the program to meet against a historical backdrop. That is a very, very strange position to be in.

Now, on top of that, that's just the problem with a different rule for fees or taxes or just looking at statutory analogs for revenue raising. That really is the tip of the iceberg because Respondents' position also seems to have other built-in features that jeopardize, sort of create a mindfield for the U.S. code, one of which is if the idea is you can't ever have balancing of factors in a statute without running into a non-delegation problem, guess what? Agencies are delegated with a lot of balancing of factors. It doesn't mean they have no constraints at all. It means they have to do both.

So this Court should not stray from

the path. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:50 p.m., the case was submitted.)

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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)).

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[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 Huwaei 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

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[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 VA. 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 courts[9]—utterly at sea. Is a 25% excise tax excessively burdensome under §

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[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").

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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 assistence [*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.").

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[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

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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]

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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." Krotoszynksi, 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

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[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]

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[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

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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 *Currin* 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

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[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.

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[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.

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[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, Lorae 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.

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[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

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[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 delegee'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 delegee'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* ("*TOPUC I*"), 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).

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[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

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[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.

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[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); *Currin 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.

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For these reasons, and those stated by Judge Stewart, I respectfully dissent.