No. 23-456

IN THE

Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

November 30, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Regulations

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the critical importance of answering the questions presented by Petitioners and the stakes for representative self-government, separation of powers, federalism, and individual liberty.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound telecommunications policy or the wisdom of universal services. "The question here is not whether something should be done; it is who has the authority to do it." *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023). "That

---

[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

is what this suit is about. Power." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution exclusively tasks the People's elected representatives with making policy choices and accessing the People's pocketbooks. And under the Constitution, the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus.

Toward this end, the Constitution flatly prohibits Congress from transferring any of its legislative power to other entities, U.S. Const. art. I, § 1, including the power "to lay and collect Taxes, Duties, Imposts, and Excises," U.S. Const. art. I, § 8. This means that such matters "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.). Congress "is the sole organ for levying taxes[.]" *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974). And *a fortiori* Congress cannot transfer "power to regulate the affairs of an unwilling minority" to private parties; this is "legislative delegation in its most obnoxious form[.]" *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

Here, Congress has done that which the Constitution prohibits by transferring the power to make legislative policy choices and levy taxes to unelected administrators who, in turn, transferred these powers to a private company staffed by industry

insiders. As Petitioners explain, *see* Pet. 2–6, 19–20, the Universal Service Fund ("USF") is both unprecedented and uniquely constitutionally offensive. It is also emblematic of a broader problem: "the vast subdelegation of legislative authority that permeates modern government." Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 853 (2019).

"The administrative degradation of consensual lawmaking is eating away at our government's legitimacy." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1108 (2023). There is no way to sweep this constitutional disorder under the rug. It is long past time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, C.J., concurring in judgment), by "hewing" the nondelegation doctrine "from the ice," Antonin Scalia, A Note on the Benzene Case, Reg., July/Aug. 1980, at 28. This case provides an ideal opportunity to do so.

For the foregoing reasons, this Court should grant the Petition.

ARGUMENT

I. The Separation of Powers Protects Liberty.

It bears reminding that "[t]he key principle underlying the formation of the United States was consent—in particular, consent by an elected representative body." Hamburger, 91 Geo. Wash. L.

Rev. at 1108 (citing The Declaration of Independence (U.S. 1776)). Toward that end, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Underscoring this, it "begins by declaring that 'We the People . . . ordain and establish this Constitution.' At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). In that document, the People agreed on a system of checks and balances.

"[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Canning*, 573 U.S. 513, 571 (2014). Indeed, "[o]f all 'principle[s] in our Constitution,' none is 'more sacred than . . . that which separates the legislative, executive and judicial powers.'" *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting) (quoting *Myers v. United States*, 272 U.S. 52, 116 (1926)), *petition for rehearing en banc filed*, No. 22-3772 (6th Cir. Oct. 6, 2023).

"The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring) (citations omitted). "The purpose of the separation and equilibration of powers" required by the Constitution is "not merely to assure effective government but to

preserve individual freedom."[2] *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting); *see Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people."). It also protects "democratic values." *Allstates*, 79 F.4th at 769 (Nalbandian, J., dissenting).

This separation "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., joined by Jones, Smith, Elrod, and Duncan, JJ., dissenting from denial of rehearing en banc). But "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). "The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *INS v. Chadha*, 462 U.S. 919, 959 (1983). History has confirmed that the Framers were right.

---

[2] Indeed, "[t]he primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution[.]" Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014).

II. The Constitution Bars Congress From Transferring Its Legislative Power.

Congress may not duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring). "Article I vests the 'Senate and House of Representatives' (and them alone) with '[a]ll legislative powers.'" *Allstates*, 79 F.4th at 769 (Nalbandian, J., dissenting) (quoting U.S. Const. art. I, § 1). The Constitution bars Congress from transferring "powers which are strictly and exclusively legislative" to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42. That includes Congress's power "to lay and collect Taxes, Duties, Imposts, and Excises." U.S. Const. art. I, § 8; *see Nat'l Cable Television Ass'n*, 415 U.S. at 340 ("Taxation is a legislative function, and Congress, [] is the sole organ for levying taxes[.]").

Instead, such matters "must be entirely regulated by the legislature itself[.]" *Wayman* 23 U.S. (10 Wheat.) at 43. This means "the hard choices" "must be made by the elected representatives of the people." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring in judgment). And "Congress, not some official in the Executive Branch, creates laws." *Allstates*, 79 F.4th at 769.

The Constitution's text makes this pellucidly clear. To begin, Article I unequivocally provides: "All legislative Powers herein granted shall be vested in a Congress[.]" U.S. Const. art. I, § 1; *see* Philip Hamburger, Is Administrative Law Unlawful? 388 (2014) ("Americans clearly understood how to write

constitutions that expressly permitted the subdelegation of legislative power to the executive, and they did not do this in the federal constitution."). This provision "speaks of what *shall be vested* and thereby bars delegation of the legislative powers."[3] Hamburger, 91 Geo. Wash. L. Rev. at 1168. "The phrase *shall be vested* is decisive. It emphatically reinforces what already should be clear, that the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards." *Id.* at 1174 (emphasis in original).

The Constitution's structure reenforces this conclusion. For example, by contrast to Article I's Vesting Clause, the Constitution "expressly acknowledged" circumstances "when Congress can designate the location of one of the tripartite powers, this is expressly acknowledged," such as in Article III's judicial vesting clause. Hamburger, 91 Geo. Wash. L. Rev. at 1175; *see* U.S. Const. art. III, § 1. As Professor Hamburger put it: "Given that Article III spells out that Congress may determine the location of some judicial power, it is nearly comic to observe so much scholarship strive to show that Article I did this for legislative power." Hamburger, 91 Geo. Wash. L. Rev. at 1175. Article II's executive vesting clause "provides a third textual basis for rejecting transfers of legislative power," making clear that the President

---

[3] "This conclusion is reinforced by other portions of the text: Article III's vesting of judicial power and Article II's vesting of executive power." Hamburger, 91 Geo. Wash. L. Rev. at 1168 (citing U.S. Const. art. II, § 1, cl. 1; *id.* art. III, § 1). The Constitution's "shall be vested" language "textually emphasizes that its powers cannot be rearranged." *Id.* at 1071.

"is not and cannot be vested with either of the other tripartite powers." *Id.* at 1176; *see City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) ("[U]nder our constitutional structure" federal agencies' activities "*must be* exercises of—the 'executive Power.'" (quoting Art. II, § 1, cl. 1)).

In sum, "the Vesting Clauses are exclusive," which means "that the branch in which a power is vested may not give it up or otherwise reallocate it." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring). "If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)); *see Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) ("[T]he exercise of power free of" the Constitution's structural "restraints subverts the design of the Constitution's ratifiers.").

III. The Universal Service Fund Makes a Mockery of the Constitution.

Section 254 of the Telecommunications Act of 1996 runs roughshod over the Constitution's structural guardrails. It not only transfers to the FCC power to make legislative policy choices but authorizes the agency to fund those choices by levying taxes.

Since 1934,"Congress has made universal service a basic goal of telecommunications regulation."[4] *Tex. Office of Pub. Util. Counsel (TOPUC I) v. FCC*, 183 F.3d 393, 405 (5th Cir. 1999). Today, it remains "a significant part of U.S. telecom policy." Cong. Research Serv., LSB10904, Fifth Circuit Considers Constitutionality of the Universal Service Fund 4 (2023).[5] To further this broad goal, "Congress enacted § 254 of the Telecommunications Act of 1996, which established the USF and entrusted its administration to the FCC." *Consumers' Research v. FCC*, 63 F.4th 441, 445 (5th Cir. 2023), *vacated and rehearing en banc granted*, 72 F.4th 107 (5th Cir. 2023). Problematically, the 1996 Act—which "profoundly affects a crucial segment of the economy worth tens of billions of dollars"—"is in many important respects a model of ambiguity," granting "'most promiscuous rights' to the FCC[.]" *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). That well describes § 274.

There, Congress tasked the FCC (and a Federal-State Joint Board) with setting "policies for the preservation and advancement of universal service[.]" 47 U.S.C. § 254(b). Congress, however, said precious little about how to do this, instead punting the policy choices necessary to achieve these broad, abstract aims to unelected Executive officials, who, in turn, promptly punted this duty to a private corporation. In

---

[4] "Universal service . . . is a social welfare subsidy program that benefits certain consumers . . . by imposing taxes on other consumers." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 278 (2005).

[5] https://crsreports.congress.gov/product/pdf/LSB/LSB10904.

47 U.S.C. § 254(b) Congress used "lofty and expansive language" to announce seven "aspirational" principles, "reflect[ing] congressional intent to delegate difficult policy choices to the Commission's discretion." *Tex. Office of Pub. Util. Counsel (TOPUC II) v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001) (cleaned up). That was by design: "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Iowa Utils. Bd.*, 525 U.S. at 397 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984)).

Section 254 mandates 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 [FCC] to preserve and advance universal service." 47 U.S.C. § 254(d). But Congress did not define "universal service." 47 U.S.C. § 254(c)(1) ("Universal service is an evolving level . . . that the Commission shall establish periodically[.]"). For that matter, Congress empowered the FCC with boundless discretion to add universal service principles it deems "necessary and appropriate for the protection of the public interest, convenience, and necessity[.]" 47 U.S.C. § 254(b)(7); *see also* Krotoszynski, 80 Ind. L.J. at 312 ("Congress has not established the precise services to be subsidized and . . . has urged the Commission to add new services over time.").

Making matters worse, Congress also established a "unique revenue raising mechanism," *Consumers' Research*, 63 F.4th at 450, empowering the FCC to effectively tax carriers to fund its social welfare program. The FCC does this by regulation at a rate

set quarterly known as the Contribution Factor. *See* 47 C.F.R. § 54.709(a); *In re Incomnet*, 463 F.3d 1064, 1066 (9th Cir. 2006). "The money in the USF is provided by private telecommunication providers[.]" *United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379, 387–88 (5th Cir. 2014). "The telecommunications companies pass this cost through to their subscribers; the charge generally appears on phone bills as the 'Universal Service Fund Fee.'" *In re Incomnet, Inc.*, 463 F.3d at 1066.

Section "254 limits neither the objects of the universal service program nor the funds to be expended to achieve them[.]" Krotoszynski, 80 Ind. L.J. at 318. "[B]ecause Congress has failed to limit either the amount of revenue to be raised or the particular purposes to which the revenue may be used, it has essentially given the Commission a blank check."[6] *Id.* at 246. Indeed, the FCC has argued "that so long as the Commission does not violate an express statutory command, it may use the universal-service mechanism to achieve policy objectives contained elsewhere in the Act." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (cleaned up).

In short, "Congress pointed to a problem that needed fixing and more or less told the Executive to

---

[6] This arrangement "permits Congress to take credit for the benefits it provides without being accountable for the taxes used to pay for them." *Krotoszynski,* 80 Ind. L.J. at 246.

go forth and figure it out."[7] *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). "This is delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (Cardozo, J., concurring).

On top of this, the FCC has re-delegated its authority over the USF to the Universal Service Administrative Company ("USAC"). *See* 47 C.F.R. § 54.701(a). "USAC is a not-for-profit private organization that is structured pursuant to the FCC's regulations," Pet. App. 13a (citing 47 C.F.R. §§ 54.701, 54.703), and "owned by an industry trade group," *Cisco Sys.*, 759 F.3d at 387. *Cf. Schechter*, 295 U.S. at 537 ("[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups[?]").

This private entity is tasked by regulation with calculating the Contribution Factor and thus for all practical purposes decides the rate at which the carriers—and, by extension, the general public—are taxed.[8] *See generally* 47 C.F.R. § 54.709(a). "USAC

---

[7] Any effort by the FCC to save the statute by proposing a limiting construction should be rejected. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). "It is [also] a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (cleaned up).

[8] For all practical purposes, the FCC has transferred final decision-making authority to USAC, subject to an illusory veto power with a 14-day time limit. *See* 47 C.F.R. § 54.709(a)(3).

sets its own budget" and subject to limited FCC oversight "decides if, when, and how it disburses funds on behalf of the USF's beneficiaries." *In re Incomnet,* 463 F.3d at 1076 (citing 47 C.F.R. §§ 54.701(a), 54.704(a), 54.705, 54.715). In short, a private company determines the tax rate that yields ten billion dollars a year—about 25 times the FCC's own budget. *See* Pet. App. 12. *That*, too, is legislative power.[9] Through this novel arrangement, "[t]he federal government forces" carriers—and, by extension, the general public—to pony up this exorbitant sum "not by an act of their elected representatives in Congress, but by private entities acting in collusion with unelected public bureaucrats." *Rettig*, 993 F.3d at 418 (Ho, J., dissenting from denial of rehearing en banc).

This makes a mockery of the Constitution's separation of powers. And it breaks the Constitution's promise that only the People's elected representatives in Congress may make legislative choices restricting their liberty and imposing obligations upon them.

---

[9] *Cf. Texas v. Commissioner*, 142 S. Ct. 1308, 1309 (2022) (statement of Alito, J., joined by Thomas, Gorsuch, JJ., respecting denial of certiorari) ("What was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group. And this was no inconsequential matter. It has cost the States hundreds of millions of dollars.").

IV. This Case Is an Ideal Vehicle to Restore Equilibrium Among the Branches.

This Court should not turn a blind eye to these serious constitutional problems. "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Id.* at 409 (Ho, J., dissenting from denial of rehearing en banc) (cleaned up). That well describes the sweeping and unprecedented dual-layer subdelegation of legislative power at issue here. "[T]his wolf comes as a wolf." *Morrison*, 487 U.S. at 699. And it should not be allowed to stand. It is past time for this Court to protect our Republic by enforcing the Constitution's structural protections.

A. Delegation Run Riot Has Had Awful Effects on Our Constitutional Republic.

The stakes here could not be higher and involve "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring). Among other things, "[t]ransfers of the Constitution's tripartite powers violate the principle of representative consent" and "come with profound social and governmental dangers." Hamburger, 91 Geo. Wash. L. Rev. at 1090; *see West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (surveying dangers). Unconstitutional "[d]elegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as

shadow administrators." Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015). This "drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process established to promote the public good." *Id.* at 1477.

In addition, "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). Put another way, "the transfer of legislative power to agencies dilutes voting rights." Hamburger, 91 Geo. Wash. L. Rev. at 1181. Such power-transfers are also slanted against disfavored groups. *See id.* at 1183–87. In short, "[d]elegation is never just about delegation. It also is about rendering legislation unrepresentative, diluting the value of equal suffrage, and disenfranchising mere *hoi polloi*[.]" *Id.* at 1187 (2023). On top of this, unconstitutional delegations of legislative power to putative agency experts undermines rational decisionmaking—the supposed justification for these delegations—as these administrators often labor under confirmation, specialization, and size biases. *See id.* at 1187–92.

Even worse, unconstitutional delegations undermine political stability, leading to "administratively induced irresponsibility, alienation, and political conflict." *Id.* at 1192. This state of affairs "tends to infantilize the Constitution's elements of government," "leaving Americans with ever less confidence in government." *Id.* at 1193. It "deprives

Americans of their sense of connection to government," leaving "growing numbers of Americans, left and right, feel politically alienated." *Id.* at 1194.

Finally, delegation of legislative power to administrative bodies contributes to political polarization. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 7 (2022) ("Delegation by Congress probably has the most pervasive polarizing effects."). "The breadth of centralized legislative power" housed within the Executive branch today "displaces much state politics. It also reaches deep into private institutions and life." Hamburger, 91 Geo. Wash. L. Rev. at 1195. This "not only nationalizes American politics but also politicizes American life," turning Presidential elections into "do-or-die battles" in which "[a]n almost irresistible incentive exists to suppress opponents and their views—abandoning all traditions of cooperation, tolerance, and freedom of speech." *Id.*

B. The Time Has Come to Jettison the "Intelligible Principle" Remark.

This Court should confront the root cause of these serious constitutional problems: the modern, judicially created intelligible-principle regime. Today's "nondelegation doctrine serves as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite." *Id.* at 1091. It is long past time to close and padlock it. This case provides an ideal vehicle to make clear "th[e] mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the

basis of the modern "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting); *see* Hamburger, 91 Geo. Wash. L. Rev. at 1095 ("[T]he current nondelegation doctrine has no originalist foundation.").

This Court should clearly announce the end of this failed experiment. After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. I, § 1). While the "doctrine long seemed acceptable while the shift of legislative and judicial powers to the executive was moderated by political restraint," "such restraint has been thrown to the winds[.]" Hamburger, 91 Geo. Wash. L. Rev. at 1093. And "a constitutional reckoning cannot be put off indefinitely." *Id.* at 1094. Why wait?

C. Line-Drawing Questions Cannot Justify Ignoring the Constitution's Demands.

Nor should line-drawing challenges stand in the way of enforcing the Constitution's bar against subdelegation of legislative power. "Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting). This raises the question what is "legislative power" that Congress may not

delegate.[10] To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters of "less interest" that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43. And "the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others." Ronald A. Cass, *Separating Powers in the Administrative State: Understanding Delegation, Discretion, and Deference*, C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 23-22, at 36 (Sept. 20, 2023).[11] Indeed, "[i]t may never be possible perfectly to distinguish between legislative and executive power[.]" *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring).

---

[10] "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); *see* Federalist No. 75 (Hamilton). "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment); *see also* Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 Baylor L. Rev. 152, 158 (2023) ("The original meaning of 'legislative power' was the authority to issue 'rule[s] of civil conduct . . . commanding what' a polity's citizens 'are to do, and prohibiting what they are to forbear[.]'" (quoting Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828) (defining "law")).

[11] https://administrativestate.gmu.edu/wp-content/uploads/2023/08/23-22_Cass-1.pdf.

"But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Id.* at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). *Cf.* Federalist 78 (Hamilton) (Courts "duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."). And "the difficulty of the inquiry doesn't mean it isn't worth the effort." *Nichols*, 784 F.3d at 671 (Gorsuch, J., dissenting from denial of rehearing en banc).

No matter the difficulty of the task, the Judiciary is dutybound to search for the line and could do so on a case-by-case basis. *Cf. Allstates*, 79 F.4th at 789 (Nalbandian, J., dissenting) (finding nondelegation violation); *United States v. Pheasant*, No. 21-cr-00024, 2023 U.S. Dist. LEXIS 72572, at *19-22 (D. Nev. Apr. 26, 2023) (unpublished) (same). More than sufficient ink has been spilled to allow this Court to articulate judicially manageable standards.[12] *See, e.g.*, Hamburger, 91 Geo. Wash. L. Rev. 1083; The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (Peter J. Wallison & John Yoo eds. 2022); Cass, *supra*; *see West Virginia v. EPA,* 142 S. Ct. at 2625 n.11 (Gorsuch, J., concurring) (collecting scholarship). This case provides an ideal vehicle to do so.

---

[12] As Paul Larkin has suggested, there may well be "multiple nonexclusive" nondelegation principles that, if enforced, would "force Congress to do its job, to prevent the President from doing Congress's work, and to avoid taking on that responsibility themselves." Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 263 (2022).

The sky will not fall if this Court enforces the Constitution's demands. Common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be run by legislators"—are constitutionally irrelevant and, in any event, lack merit on their own terms. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring).

V. The FCC's Subdelegation of Congress's Legislative and Taxing Powers to a Private Company Run By Industry Insiders Independently Warrants Review.

This Court should grant the Petition for a second reason: "This case presents a fundamental question about the limits on the Federal Government's authority to delegate its powers to private actors." *Texas v. Commissioner*, 142 S. Ct. at 1308 (statement of Alito, J., respecting denial of certiorari).

"A cardinal constitutional principle is that federal power can be wielded only by the federal government." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022). "To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity."[13] *Texas v. Commissioner*, 142 S. Ct. at 1309

---

[13] "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. . . . [S]ubdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004) (cleaned up).

(statement of Alito, J., respecting denial of certiorari) (cleaned up); *see Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity."), *vacated and remanded on other grounds*, 575 U.S. 43 (2015); *see also Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, concurring) ("Even the United States accepts that Congress cannot delegate regulatory authority to a private entity." (cleaned up)). "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body[.]"*Carter Coal*, 298 U.S. at 311. And "there is not even a fig leaf of constitutional justification" for it. *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring).

To the contrary, the Vesting Clauses categorically bar private parties from exercising government power. *See id.* at 87–88 (Thomas, J., concurring in the judgment). This "nondelegation principle serves both to separate powers as specified in the Constitution and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004).

Put simply, as Justice Thomas has explained:

> Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the

> legislative, executive, or judicial powers of the Federal Government.[14]

Ass'n of Am. R.Rs., 575 U.S. at 87–88 (concurring in judgment).

"Congress defies this basic safeguard by vesting government power in a private entity not accountable to the people." *Nat'l Horsemen's*, 53 F.4th at 872–73. And *a fortiori* an administrative body cannot transfer government power to a private party. After all, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). But that is what the FCC has done here. *See* Pet. App. 13a. The FCC's broad redelegation of its authority to administer the USF to a private company populated with industry representatives "is uniquely offensive to the Constitution—and unsupported by precedent—for three reasons: (1) It subdelegates substantive lawmaking power, rather than some minor factual determination or ministerial task; (2) the subdelegation is authorized by an administrative agency, rather than by Congress; and (3) the agency is subdelegating power to a private entity." *Rettig*, 993 F.3d at 410 (Ho, J., dissenting from denial of rehearing en banc). This should not stand.

---

[14] Founding-era practice appears to be in accord. *See* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 Geo. Wash. L. Rev. 1299, 1386 (2019); Jennifer Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J.L. & Pub. Pol'y 837, 925 (2022).

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae November 30, 2023