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 TECHFREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

We address Question 2:

Whether the FCC violated the private nondelegation doctrine by transferring its revenue-raising power to a private company run by industry interest groups.

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom frequently offers expert commentary both on the Universal Service Fund, see, e.g., James Dunstan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Center for Growth and Opportunity, https://tinyurl.com/2nbrtvj3 (Apr. 23, 2023); Comments of TechFreedom, *In re Report on the Future of the Universal Service Fund*, FCC WT Dkt No. 21-476 (Jan. 18, 2022); and on nondelegation, see, e.g., Corbin K. Barthold, *A Path Forward on Nondelegation*, WLF Legal Pulse, https://bit.ly/3L EdfSe (Jan. 31, 2022). In this case, those two issues intersect. Indeed, this case demonstrates why each issue is so important to TechFreedom.

The Universal Service Fund plays an important role in ensuring that the benefits of technological innovation are enjoyed widely across the country. But the power to run the Universal Service Fund has been delegated to a federal agency, which has in turn subdelegated that power to a private organization. This double delegation—and, worse, private

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* No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, TechFreedom notified each party's counsel of record of TechFreedom's intent to file the brief.

delegation—has led to lax oversight, runaway budgets, wasteful spending, and outright fraud.

A well-run Universal Service Fund could help close this country's digital divide. As the Founders understood, however, over-delegation, especially in the form of private delegation, is a recipe for bad governance.

SUMMARY OF ARGUMENT

When it approved the creation of the Universal Service Fund (USF), Congress started with an idea that was sound enough. It wanted to expand its policy of promoting universal access to communications services—a policy that began with telephone service in the early twentieth century—to modern telecommunications. Codified in the Telecommunications Act of 1996, the USF pays for "'advanced telecommunications and information services,' particularly high-speed internet access, for schools (as well as for libraries and rural health care providers)." *City of Springfield v. Ostrander (In re LAN Tamers, Inc.)*, 329 F.3d 204, 206 (1st Cir. 2003) (quoting 47 U.S.C. §§ 254(b)(6), (h)(1)).

Sadly, Congress did a poor job of structuring the USF to fit within the Constitution's parameters. Article I, section 1, "vest[s]" "all legislative Powers" in Congress, which may not delegate those powers to another branch of government. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). In creating the USF, Congress handed the Federal Communications Commission (FCC) open-ended power to define what services should be "universal," to

set the amount of private-sector money (ultimately, consumer money) the government will collect to promote those services, and to determine how the money is spent. As written, the law governing the USF might well fail even the "notoriously lax" intelligible principle test for nondelegation. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014). If this Court were to discard that test in favor of a more rigorous one—as a majority of the Court have signaled they intend to do—the constitutionality of Congress's delegation to the FCC would become even more doubtful. The Petitioners raise a strong nondelegation argument (Pet. 19-29) that merits review. The issue, even under the current test, is a close one.

In any event, we know this much for sure: After Congress passed the USF's enabling statute, the FCC botched the USF's implementation. It was bad enough that Congress handed such broad and ill-defined regulatory power to an independent agency—a government entity not subject to direct control by democratically elected leadership. To make matters worse, the agency then passed the power again, handing it to a private organization, the Universal Service Administrative Company (USAC). What's more, it did so without Congress's permission, which means that the USF is not subject to any congressionally established procedural guardrails.

In this brief, we explain why the FCC's subdelegation of legislative authority to a private entity is unconstitutional. In Section I, we discuss some of the cases—including this Court's most definitive word on nondelegation, *A.L.A. Schechter*

Poultry Corp. v. United States, 295 U.S. 495 (1935)—that establish the invalidity of such "private" delegation. We then explain how the court below erred in failing to find a constitutional violation here. The Sixth Circuit failed to grapple with (1) the fact that the FCC delegated government authority to USAC without Congress's permission and (2) the fact that the FCC lets USAC operate free of virtually any oversight.

In Sections II and III, we explore some of the reasons why private delegation is so problematic. For one thing, it flouts the Framers' understanding of democratic representation. For another, it is pernicious to accountable governance—a fact that the history of the USF well illustrates.

In Section IV, we turn to a more subtle, but still vital, point: that agency-set procedural rules cannot cure an unconstitutional private delegation. For purposes of a nondelegation analysis, we establish, procedural requirements concocted by an agency count for nothing. The reality is that the FCC has placed few procedural checks on USAC. But no amount of procedural protection created by the FCC, and then imposed on USAC (and itself), could rescue the FCC's subdelegation of power to USAC from constitutional invalidity.

The USF, as structured, is probably unconstitutional. USAC, however, is clearly unconstitutional. This Court should grant review and say so.

REASONS FOR GRANTING THE PETITION

I. THE FCC'S SUBDELEGATION OF AUTHORITY TO USAC IS UNCONSTITUTIONAL.

Private delegation violates the Constitution. The FCC's subdelegation of authority to USAC is unconstitutional under this principle. The court below erred in finding otherwise.

A. Private Delegation Violates Article I Of The Constitution.

The most prominent Supreme Court case on nondelegation, *Schechter Poultry*, 295 U.S. 495, is also an important case on private delegation. Seeking to combat the Great Depression, President Franklin Roosevelt signed the National Industrial Recovery Act (NIRA) of 1933. NIRA Section 1 set forth Congress's industrial "policy"—a mishmash of goals that included reducing unemployment, improving labor standards, and "otherwise" rehabilitating industry. Section 3 empowered the President to approve "codes of fair competition" presented to him by trade or industry groups. Although the President could also create such codes himself, *Schechter Poultry* involved a code created by private entities. The chicken dealers of New York drafted a "Live Poultry Code," which President Roosevelt approved. A slaughterhouse in Brooklyn challenged the code and invoked nondelegation.

Defending NIRA, the government tried to paint the private production of codes as a virtue—as a way to generate codes "deemed fair for each industry … by the persons most vitally concerned and most familiar

with its problems." 295 U.S. at 537. The Court, however, did not see it that way. On the contrary, the justices treated the strong role played by private parties, in administering NIRA, as a grave constitutional defect. "[W]ould it be seriously contended," they asked:

> 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? Could 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? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in [NIRA] section 1?

Id. "The answer," the Court concluded, "is obvious." *Id*. "Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id*.

A year after issuing *Schechter Poultry*, the Court confirmed the unconstitutionality of private delegation in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The case was, in effect, the hypothetical in *Schechter Poultry* brought to life: The statute in question empowered coal industry groups to issue

binding wage-and-hour codes. "This," *Carter* declares, "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 311. As *Carter* points out, private delegation is worse than intra-government delegation. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another." *Id*. Letting one private party regulate another is "clearly arbitrary," *Carter* insists, and "an intolerable and unconstitutional interference with personal liberty and private property." *Id*. (citing, among other authorities, *Schechter Poultry*).

"*Even an intelligible principle* cannot rescue a statute empowering private parties to wield regulatory authority." *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), vacated and remanded on other grounds, 575 U.S. 43 (2015) (emphasis added); accord *Nat'l Horsemen's Ass'n v. Texas*, 53 F.4th 869, 882 n.24, 883 (5th Cir. 2022). Simply put, "[f]ederal lawmakers cannot delegate regulatory authority to a private entity." 721 F.3d at 670.

B. In Upholding USAC's Structure, The Sixth Circuit Erred.

The Sixth Circuit erred in finding that "USAC is subordinate to the FCC," and that there is therefore "no private-nondelegation doctrine violation." Pet.App.43a. The court below found it dispositive that, in theory, the FCC could undo any decision made by

USAC. But this overlooks at least two key problems. First, an agency may not subdelegate government power to a private entity without Congress's permission—period. And second, even if an agency could oversee a private entity's use of government power, the FCC has violated the Constitution by failing to engage in such oversight.

1. Congress Did Not Permit The FCC To Subdelegate Power To USAC.

Congress gave the FCC immense and open-ended authority to run the USF. That's problematic; but at least it's *what Congress did*. What Congress *did not* do was authorize the FCC to hand the task of managing that immense and open-ended authority to a private organization.

The "manipulation of official appointments" was "one of the American revolutionary generation's greatest grievances" against the British monarchy. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991). The Framers were "concern[ed]," therefore, about the possibility "that the President might attempt unilaterally to create and fill federal offices." *Weiss v. United States*, 510 U.S. 163, 188 n.2 (1994) (Souter, J., concurring). They wanted those who structured the federal government to be "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. That is why "Congress has plenary control over the salary, duties, and even existence of executive offices." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 500 (2010); see also *Myers v. United States*, 272 U.S. 52, 129 (1926), overruled on other grounds, *Humphrey's Executor v. United States*, 295

U.S. 602 (1935). "The power to create federal offices," the "Framers … assumed," would "belong to Congress." *Weiss*, 510 U.S. at 184 (Souter, J., concurring).

An agency has no authority, therefore, "to re-delegate [its] power out to a private entity." *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., joined by Jones, Smith, Elrod, and Duncan, JJ., dissenting from denial of rehearing en banc); see also *Texas v. Comm'r of Internal Revenue*, No. 21-379 (U.S., Mar. 28, 2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting denial of certiorari). The FCC's delegation of power to USAC "was effectuated not by Congress, but at the whim of an agency—and without Congressional blessing of any kind." 993 F.3d at 410. This was improper.

2. Even If USAC Is "*Subordinate*" To The FCC, USAC Is Not *Overseen* By The FCC.

Even if Congress *authorizes* an agency to subdelegate authority to a private entity—which has not happened here—that is not the end of the private delegation analysis. "*At a minimum*, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (Sutton, C.J.) (emphasis added). "Whether subordination always suffices to withstand a challenge raises complex separation of powers questions." *Id*. What is clear, though, is that the Sixth Circuit erred in finding proper "subordination" here.

True, the FCC has issued regulations that "subordinate" USAC "to the FCC." Pet.App.43a. As we'll see, those regulations count for nothing in the constitutional analysis. See Sec. IV, infra. But in any event, the regulations here are precisely the kind of "subordination" that does not "suffice[]" to "withstand a non-delegation challenge." *Oklahoma*, 62 F.4th at 229. For USAC is not *in fact* "subordinate" to the FCC. Subordination on paper is not the same as actual oversight.

Nothing in the Sixth Circuit's analysis of private delegation establishes that the FCC engages in genuine oversight of USAC:

- The panel stressed that USAC submits its "proposals"—read: demands for large sums of money from regulated entities—"for *approval*" by the FCC. Pet.App.44a (emphasis in original). But the FCC has a long track record of serving simply as a conduit through which USAC's decisions flow. The FCC "has never meaningfully modified USAC's proposed budget." Pet. 10.
- The panel said that "the FCC permits telecommunications carriers to challenge USAC proposals … and often grants relief to those challenges." Pet.App.45a. But that review is cursory at best. The FCC summarily resolves dozens of challenges to USAC policy determinations at a stroke, in orders that offer little or no justification for the FCC's decisions. See, e.g., FCC, Public Notice, *Streamlined Resolution of Requests Related to Actions by the*

Universal Service Administrative Company, No. DA 22-448 (Apr. 29, 2022) (FCC order summarily resolving dozens of challenges to USAC policy determinations).

- The panel found that the FCC "reviews" USAC proposals, giving them "independent consideration" before "us[ing]" them. Pet.App.45a. Who says? The FCC need not review and approve USAC's work: A quarterly budget submitted by USAC is "deemed approved" by the FCC after fourteen days of inaction. 47 C.F.R. § 54.709(a)(3). Because the FCC need not show its work—need not, for that matter, even issue a summary order—when it approves a USAC demand, there is no way to tell whether it "reviews" and "independent[ly] consider[s]" the work of USAC.

Even if the FCC's subdelegation of authority to USAC were otherwise valid—it's not—the agency's extra-ordinarily lax oversight of USAC would render the subdelegation unconstitutional.

In the way it actually operates, USAC is no different from a trade association "constituted [a] legislative bod[y]" because of its "familiar[ity] with the problems of [its] enterprise." *Schechter Poultry*, 295 U.S at 537. (Indeed, USAC is run by people with strong ties to industry trade groups. Pet. 9.) In the absence of proper oversight, USAC's ratemaking and spending power is a *de facto* private delegation (even if it weren't a *de jure* one—which it is). Such unsupervised (or barely supervised) private governance is "utterly inconsistent with the

constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537.

II. PRIVATE DELEGATION OFFENDS THE CONSTITUTIONAL PRINCIPLE OF REPRESENTATIVE DEMOCRACY.

What makes private delegation so "utterly inconsistent" with Congress's role under the Constitution? *Schechter Poultry*, 295 U.S. at 537. Undoubtedly, the short answer is: the Constitution itself. "[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *W. Va. v. EPA*, No. 20-1530 (U.S., June 30, 2022) (Gorsuch, J., concurring) (slip. op. at 3) (citing *Federalist* No. 11 (Hamilton)); see also *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). If Congress cannot pass lawmaking power to other government bodies, it stands to reason that government bodies cannot pass lawmaking power to private groups.

A slightly longer explanation is that the Framers made laws difficult to pass in order to promote liberty, encourage deliberation, protect minorities, guard against faction, and ensure accountability (this last goal being one to which we will return). See *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). Letting Congress delegate its lawmaking power would frustrate these aims. *Id*. at 2134-35. And, once again, what is true of delegation to other government branches is true as well of subdelegation to private parties.

Yet private delegation is also worse than intra-government delegation in a key way. Both an executive agency and a private regulator might, at least in theory, be structured so as to promote caution, deliberation, care for minority interests, and accountability. But when lawmaking power is delegated to a private party, any semblance of representative governance is lost.

"If one maxim reflected" the American colonists' "ideas of representation," it was "the belief that a representative assembly 'should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.'" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203 (Vintage 1997) (quoting John Adams, *Thoughts on Government* (1776)). The colonists demanded far higher "standards of representation" than "the minuscule electorate of Georgian Britain and the oligarchic Parliament it supported could claim." *Id.* at 214. Indeed, the revolutionary movement arose from the colonists' rejection of "the British idea … of being virtually represented"—an idea that "struck Americans then, and us today, as absurd." Gordon S. Wood, *Power and Liberty: Constitutionalism in the American Revolution* 14 (Oxford Univ. Press 2021).

Some, to be sure, questioned the practicality, or the wisdom, of overly direct representation. "The idea of an actual representation of all classes of the people, by persons of each class," Hamilton complained, "is altogether visionary." *Federalist* No. 35. Madison, for his part, worried that the people could not control their passions. He remarked the Athenian mob's

capacity to decree "to the same citizens the hemlock on one day and statues on the next." *Federalist* No. 63. In *Federalist* No. 10, Madison suggested that wise representatives should seek to "discern the true interest of their country," even when that "true interest" diverges from the views "pronounced by the people themselves."

It is arguably in the "populist Anti-Federalist calls for the most explicit form of representation possible, and not in Madison's *Federalist* No. 10," that "the real origins of American pluralism and American interest-group politics" are to be found. Gordon S. Wood, *The Radicalism of the American Revolution* 259 (Vintage 1993). Transforming itself into a "society that was more egalitarian, more middling, and more dominated by the interests of ordinary people than any that had ever existed before," America "experienced an unprecedented *democratic* revolution." *Id.* at 348 (emphasis added). Lincoln did not extol government of all of the people, by a few of the people, for the rest of the people.

But even those who favored a more "filtered" representation would never have tolerated private delegation. Private persons are not "proper guardians of the public weal," *Federalist* No. 10; if anything, they are "advocates and parties to the causes which they determine," *id*. The notion that the public is "virtually represented," when lawmaking power is placed in private hands, is "absurd." Wood, *Power and Liberty*, supra, at 14. "Such a delegation of legislative power is unknown to our law." *Schechter Poultry*, 295 U.S at 537.

III. PRIVATE DELEGATION LENDS ITSELF TO POLITICALLY UNACCOUNTABLE GOVERNANCE.

Does private delegation violate more than just Article I? It has been argued that "the doctrine of forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers." *Ass'n of Am. Railroads*, 721 F.3d at 671 n.3 (quoting A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 Duke L.J. 17, 153 (2000)); see also *Carter*, 298 U.S. at 311 (declaring a private delegation of lawmaking power "a denial of rights safeguarded by the due process clause of the Fifth Amendment").

The impulse to see private lawmaking as a due process problem is yet another sign that private delegation is an unusually egregious constitutional offense. We have seen that it is qualitatively worse than intra-government delegation (flouting, as it does, core principles of representative government). But it is also worse in degree, in that it takes the problem of unaccountability created by intra-government delegation and increases it. While delegation to the Executive Branch harms "principles of political accountability," such "harm is doubled … in the context of a transfer of authority … to private individuals." *NARUC v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984).

Look no further than the USF, as run by USAC. As the Petitioners illustrate (Pet. 11-15), the USF is a case study in unaccountable governance. What started

as a 5.7% tax on end-user interstate telecommunications revenue, netting around $1.1 billion in quarterly "contributions," in 2000, ballooned to a 33.4% tax rate, and around $2.5 billion in quarterly "contributions," by mid-2021. (Making matters worse, this fee is a highly regressive flat tax paid, by all but the poorest Americans, as a line item on monthly phone bills.) No one is minding the till—a fact made all the clearer by the "history of extensive waste and abuse" that has occurred on USAC's watch (or lack thereof). Pet. 13.

This is not an instance where the answer to the "constitutional issue" rests simply on "musings" about "political theory." *Collins v. Yellen*, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part and concurring in the judgment). USAC embodies the Founders' fear of unaccountable government both in theory and in practice.

IV. USAC CANNOT BE SAVED BY PROCEDURAL REQUIREMENTS SET BY THE FCC.

"The degree of agency discretion that is acceptable varies according to *the scope of the power* congressionally *conferred*." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2000) (emphasis added). Likewise, it varies according to *how much process* is congressionally *required*. A statute that requires an agency to undertake more process before acting, in other words, may confer more overall power to act. Congress can avoid making "a pure delegation of legislative power" by "enjoin[ing] upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function." *Panama*

Refining Co. v. Ryan, 293 U.S. 388, 432 (1935) (quoting *Wichita R.R. Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 59 (1922)).

When an agency wields broad regulatory power, in short, it should do so subject to "formal administrative procedure," which tends "to foster the fairness and deliberation that should underlie" an "administrative action" with "the effect of law." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Crucially, though, the procedures must be set by Congress itself. "[A]n agency can[not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472.

The FCC has imposed various procedural rules and limits on USAC. Among other things, USAC must maintain subcommittees to oversee the USF's various programs, 47 C.F.R. § 54.701; it must submit "the basis for [its] projections" to the FCC, *id.* § 54.709(a)(3), file "an annual report" with the FCC and Congress, *id.* § 54.702(g), and undergo audits, *id.* § 54.717; and it must avoid "mak[ing] policy, interpret[ting] unclear provisions of [the law], or interpret[ting] the intent of Congress," *id.* § 54.702(c). These are flimsy guardrails for an entity that wields such broad power. (Not that either USAC or the FCC are particularly disciplined about following them to begin with. See Sec. I.B.2, supra.) But in any event, procedural requirements set by the FCC, however rigorous, cannot render USAC valid under Article I. Only Congress can repair an improper delegation. *Whitman*, 531 U.S. at 472-73. Whatever process the FCC might require of USAC does not count, therefore,

in an analysis of whether USAC is constitutional. For constitutional purposes, any such process is equivalent to no process at all. As far as Article I is concerned, the current setup is no different than one in which the FCC instructed USAC to draw its proposed contribution factors from a hat.

CONCLUSION

The petition should be granted.

November 17, 2023

Respectfully submitted,

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