No. 23-____

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 Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners challenge the unprecedented revenue-raising mechanism for the Universal Service Fund, a nationwide social program aimed at expanding telecommunications services. Rather than appropriating funds, Congress has authorized the Federal Communications Commission to levy taxes for the USF without any statutory cap or formula, guided only by a list of "aspirational" principles. Congress even authorized the FCC to redefine "universal service" altogether and raise funds for that expanded scope. The FCC then redelegated operation of the USF to a private company run by self-described industry "interest groups."

With no meaningful limits or accountability, the USF has ballooned, with Americans now paying nearly $10 billion every year—approaching 25 times the FCC's annual budget. The Eleventh Circuit upheld this unique scheme below, over two concurrences arguing the outcome is inconsistent with the original understanding of nondelegation. The questions presented are:

(1) Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no limit on the FCC's power to raise revenue for the USF.

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

PARTIES TO THE PROCEEDING

Petitioners are Consumers' Research; Cause Based Commerce, Inc.; Edward J. Blum; Kersten Conway; Suzanne Bettac; Robert Kull; Kwang Ja Kirby; Tom Kirby; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; Paul Gibbs; and Rhonda Thomas.

Respondents are the Federal Communications Commission and the United States of America.

Intervenors below are Benton Institute for Broadband & Society; Center for Media Justice d/b/a MediaJustice; USTelecom – The Broadband Association; Schools, Health & Libraries Broadband Coalition; National Telecommunications Cooperative Association; National Digital Inclusion Alliance; and Competitive Carriers Association.

CORPORATE DISCLOSURE STATEMENT

Consumers' Research and Cause Based Commerce, Inc., have no parent corporations, and no publicly held company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceeding:

- *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.) (opinion issued Dec. 14, 2023).

The same legal issues for different quarterly contribution rates arise in the following related proceedings:

- *Consumers' Rsch v. FCC*, No. 23-456 (U.S.).
- *Consumers' Rsch. v. FCC*, Nos. 22-60008, 22-60195, 22-60363, 23-60359, 23-60525, 24-60006 (5th Cir.).
- *Consumers' Rsch. v. FCC*, Nos. 21-3886, 22-4069 (6th Cir.).
- *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir.).

There are no additional proceedings in any court that are directly related to these cases within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's December 14, 2023, opinion (Pet.App.1a) is reported at 88 F.4th 917.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on December 14, 2023.

STATUTORY PROVISION INVOLVED

The relevant portions of 47 U.S.C. § 254 are reproduced at Pet.App.53a.

INTRODUCTION

Petitioners raise core separation-of-powers challenges to the revenue-raising mechanism for the Federal Communications Commission's Universal Service Fund ("USF" or "Fund"), which now collects nearly $10 billion every year—approaching 25 times the FCC's annual budget—by imposing a tax on consumers' monthly phone bills and then redistributing the money with the purported goal of expanding telecommunications services.

The Eleventh Circuit upheld this scheme against Petitioners' nondelegation challenges, but Judge Newsom "reluctantly" concurred in the judgment because he was "deeply skeptical" that the USF funding program "can be squared with constitutional first principles." Pet.App.20a (Newsom, J., concurring in judgment). "Setting tax rates sure seems like a legislative power to me," Pet.App.23a, yet Congress has given the FCC "only the faintest, most vacuous guidance about how to exercise [this] authority," which "cannot possibly constrain the FCC's policymaking discretion in any meaningful way," Pet.App.24a–25a. He argued that "this case illuminates deeper problems in nondelegation precedent," concluding that Petitioners' challenge "fails, as I see it, only because non-delegation doctrine has become a punchline." Pet.App.22a, 42a. Judge Lagoa also separately concurred, saying she "share[s] much of the same concerns expressed by Judge Newsom." Pet.App.43a (Lagoa, J., concurring).

As explained below, Judges Newsom and Lagoa are correct that the USF funding scheme violates the original understanding of nondelegation, but it also fails the current "intelligible-principle" framework.

"Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (cleaned up), and the USF statute undoubtedly hands the FCC a historically "unique revenue raising mechanism," *Consumers' Rsch. v. FCC*, 63 F.4th 441, 450 (5th Cir. 2023), *reh'g en banc granted, opinion vacated,* 72 F.4th 107 (5th Cir. 2023).

It is "unique" because the statute delegates Congress's revenue-raising and taxing powers to an unelected agency bureaucracy without clear and meaningful limitations. Pet.App.23a–27a (Newsom, J., concurring in judgment). This delegation was accomplished through a combination of factors that track the regimes in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which likewise featured statutes with lengthy lists of vague, precatory, and competing policies, but no directions on how to balance or limit them. If anything, the USF scheme is worse because it gives an executive agency the power to lay taxes.

First, there is an "absence of a[n objective] limit on how much the FCC can raise for the USF." *Consumers' Rsch.*, 63 F.4th at 448. Unlike other programs, "Congress neither capped the amount that the FCC

may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 788 (6th Cir. 2023), *cert. pending*, No. 23-456; *see* 47 U.S.C. § 254.

Nor are there meaningful *implied* limitations. The statute lists universal service "principles," but courts and the FCC have long insisted they are merely "aspirational." *Tex. Off. of Pub. Util. Couns. v. FCC* ("*TOPUC I*"), 183 F.3d 393, 421 (5th Cir. 1999). As Judge Newsom explained below, Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority," using vague terminology that "cannot possibly constrain the FCC's policymaking discretion in any meaningful way." Pet.App.24a–25a (Newsom, J., concurring in judgment). "As a matter of first principles—as in real life—such empty, mealymouthed shibboleths provide no meaningful constraint; to the contrary, they confer front-line law- and policymaking power on unelected, unaccountable agency bureaucrats." Pet.App.26a–27a (Newsom, J., concurring in judgment). And this Court has recognized in the nondelegation context that an agency constrained only by its own "voluntary self-denial" has no limit at all. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Second, "to make matters even worse" and "even more open-ended," Pet.App.25a (Newsom, J., concurring in judgment), the USF statute features a rare "dual-layer" delegation, where Congress not only allowed the FCC to raise money for universal service, but also allowed the FCC itself to redefine "universal

service" virtually at will and even add new universal service "principles." 47 U.S.C. § 254(c)(1), (b)(7). Letting an agency daisy-chain the scope of its own power is "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

Third, the USF charges are taxes, and "[s]etting tax rates sure seems like a legislative power." Pet.App.23a (Newsom, J., concurring in judgment). Thus, "the FCC is almost *certainly* exercising legislative power when it decides, among other things, how big the universal-service program should be." *Id.* The taxing power is—or should be—the most jealously guarded legislative prerogative. Even the label of these forced payments as "contribution[s]" to the executive, 47 U.S.C. § 254(d), is reminiscent of English kings avoiding Parliament's purse strings by demanding payment from subjects under the euphemistic title of "loving contributions."[1]

No wonder scholars have explained that "[u]nlike the thousands of responsibilities carried out by governmental agencies on behalf of Congress, this delegation is unique because of the unfettered power given to the FCC in defining the scope of universal service, and because Congress delegated the power to levy a tax to pay for the service with no limits, knowing that the end user, the American public, would ultimately be saddled with the burden." Barbara A. Cherry & Donald D. Nystrom, *Universal*

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[1] *See Benevolence*, 3 ENCYCLOPEDIA BRITANNICA 728 (11th ed. 1911), https://en.wikisource.org/wiki/Page%3AEB1911_-_Volume_03.djvu/748.

Service Contributions: An Unconstitutional Delegation of Taxing Power, 2000 L. Rev. Mich. St. U. Det. C.L. 107, 110.

As Judges Newsom and Lagoa explained below, the USF scheme violates the original understanding of nondelegation, which precludes Congress from "merely announc[ing] vague aspirations and then assign[ing] others the responsibility of adopting legislation to realize its goals." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see* Pet.App.23a (Newsom, J., concurring in judgment); Pet.App.43a (Lagoa, J., concurring).

The USF also violates the intelligible-principle test. This Court has expressly warned—in a case involving the FCC, no less—that allowing an agency to raise money based only on vague statutory phrases like "'public policy or interest served, and other pertinent facts'" would raise the specter of "'forbidden delegation of legislative power'" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA v. United States*, 415 U.S. 336, 341–42 (1974). And this Court has found an intelligible principle in delegations of revenue-raising *only* where there was some objective statutory limit—like a cap or formula—on the executive's ability to self-fund. The USF funding mechanism in 47 U.S.C. § 254 lacks such a limit.

Accordingly, the USF scheme violates every formulation of the nondelegation doctrine.

But it gets worse. The FCC has subsequently delegated determination of the quarterly USF tax to a *private* corporation, the Universal Service Administrative Company ("USAC"), led by a group of self-described industry "interest groups." Each quarter, USAC proposes the new USF budget—typically several billion dollars—which is ministerially converted to a tax and *automatically* "deemed approved" if the FCC Commissioners do nothing during the next fourteen days. There is not even a pretense of review by the Commissioners themselves, and the process is designed to occur so close to the start of a new quarter that the FCC has no choice but to accept USAC's underlying figures. Unsurprisingly, the FCC has never meaningfully changed USAC's proposals over the last 25 years.

The Eleventh Circuit majority opinion, however, endorsed this scheme because the FCC "has the right" to review USAC determinations, and it makes little difference whether the FCC actually reviews them, because "'an agency exercises its policymaking discretion with equal force when it … decid[es] *not* to act.'" Pet.App.16a. But letting private proposals automatically become binding—i.e., "not acting"—is the definition of a private nondelegation violation. Further, if the mere *possibility* of oversight could defeat a nondelegation challenge, it "would render the nondelegation doctrine a dead letter" because "any agency can always claw back its delegated power." *Texas v. Rettig*, 993 F.3d 408, 416–17 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*).

* * *

The legality of this scheme is eminently worthy of this Court's review. *See* Parts I & II, *infra*. Although there is no circuit split yet on these issues, the Fifth Circuit is poised to create one. After a panel of that court rejected Petitioners' nondelegation arguments in a parallel suit about a different quarterly Contribution Factor, the Fifth Circuit granted Petitioners' request for rehearing *en banc*, *see Consumers' Rsch.*, 72 F.4th at 108, and the full court heard oral argument in that case in September 2023. A decision is pending.

Even without a circuit split, this case warrants review. The current approach to nondelegation is "notoriously lax," Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014), thereby diminishing the likelihood of a split, even when numerous jurists have recognized that the USF scheme is unprecedented and violates core constitutional principles.

The stakes couldn't be higher. Americans already foot the USF's bill to the tune of nearly $10 billion every year. If Congress were to replicate this scheme, it would never again have to appropriate funds or pass a budget. Congress could replace the Internal Revenue Code with a single sentence authorizing the Internal Revenue Service to collect mandatory "contributions" that are "sufficient and equitable" to fund the entire federal government or pay off the national debt, even giving the IRS discretion to decide for itself which agencies or programs to fund. And then the IRS could outsource this process to a private group. "[W]ith each successive delegation—from

Congress to agencies, and then from agencies to private parties—we drift further and further from the locus of democratic accountability." Pet.App.42a (Newsom, J., concurring in judgment).

Courts "ought not to shy away from [their] judicial duty to invalidate unconstitutional delegations." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in the judgment).

The Court should grant the Petition.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. Telecommunications Act of 1996.

The Telecommunications Act of 1996, Pub. L. No. 104-104, created an explicit funding system to facilitate universal service, i.e., the expansion of telecommunications services across the country at more affordable rates, and required the FCC to create and implement the USF. *See* 47 U.S.C. § 254.

But unlike other social programs, Congress did not appropriate funds, nor did it impose any statutory formula, rate, or cap on how much money the FCC could raise to support the USF. And although the money must be spent on "universal service," that term was defined generically as "an evolving level of telecommunications services that the [FCC] shall establish periodically under this section, taking into

account advances in telecommunications and information technologies and services." *Id.* § 254(c)(1). In other words, the FCC could redefine universal service and then raise revenue based on that new, expanded scope.

Congress also announced several "universal service principles" to guide the FCC, *id.* § 254(b), but they are written in such grandiose and ephemeral language—and aren't binding anyway—that courts and the FCC itself have long labeled them as merely "aspirational." *Tex. Off. of Pub. Util. Couns. v. FCC* ("*TOPUC II*"), 265 F.3d 313, 321 (5th Cir. 2001). For good measure, Congress also handed to the FCC the power to create new universal service "principles" and then raise revenue for that expanded scope. 47 U.S.C. § 254(b)(7).

2. The FCC Redelegates Its Powers to a Private Company.

The FCC almost immediately redelegated operation of the USF to USAC, a private company registered in Delaware. 47 C.F.R. § 54.701(a); *In re Incomnet, Inc.*, 463 F.3d 1064, 1067 (9th Cir. 2006). USAC has a 19-member Board of Directors comprising individuals from various "interest groups affected by and interested in universal service programs" and who are nominated "by their respective interest groups." *Leadership*, USAC, https://www.usac.org/about/leadership/ (last accessed Jan. 4, 2024); *see* 47 C.F.R. § 54.703(b).

USAC is charged with establishing the budget for the USF. *Id.* § 54.709(a). Each quarter, USAC announces a proposed budget, which is essentially how much money USAC wants for "universal service" for the next quarter for the entire country, an "'imprecise exercise'" inherently fraught with policy judgments. *TOPUC II*, 265 F.3d at 328. The FCC's Office of Managing Director then ministerially calculates what percentage of all telecommunication carriers' expected interstate and international end-user revenues would be necessary to reach that target. 47 C.F.R. §§ 54.706(a), 54.709(a). This number is published as the proposed quarterly "Contribution Factor."

A quarterly Contribution Factor is then automatically "deemed approved" by the FCC and becomes binding unless the Commissioners act within 14 days of publication. *Id.* § 54.709(a)(3). The FCC has never meaningfully modified USAC's proposed budget. The entire process is automated, as the rate is deemed approved only a few days before the start of the new quarter.

As a result, USAC sets the quarterly taxing rate paid by millions of Americans, without the FCC Commissioners ever affirmatively adopting or even substantively reviewing that rate.

3. Carriers Pass Section 254 Taxes Through to Consumers.

Although technically paid into the USF by telecommunications carriers, the USF charge is

"pass[ed] through to [the carriers'] subscribers," *Incomnet,* 463 F.3d at 1066, which the FCC's regulations expressly permit, *see, e.g.*, 47 C.F.R. §§ 54.407(c), 54.712(a). The "charge generally appears on phone bills as the 'Universal Service Fund Fee.'" *Incomnet*, 463 F.3d at 1066.

It was always understood that consumers would bear the costs of the USF through extra fees and increased telephone rates. *See In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 9199, ¶ 828–29 (1997); *id.* at 9211–12, ¶ 855.

In the end, the USF is—and was designed to be—financed by "virtually every American's money" because "at the end of the day, it is still the same taxpaying people who bear the cost." *The Lifeline Fund: Money Well Spent?*: *Hearing Before the H. Subcomm. on Commc'n and Tech., H. Comm. on Energy and Com.*, 113th Cong. 1–2 (2013) (statement of Rep. Greg Walden, Chairman, Subcomm. on Commc'n and Tech.), https://www.govinfo.gov/content/pkg/CHRG-113hhrg82189/pdf/CHRG-113hhrg82189.pdf.

4. USAC Imposes Skyrocketing Rates, Raising Tens of Billions of Dollars.

The USF rate has skyrocketed since its inception. In 2000, the tax was around 5%,[2] but by the early

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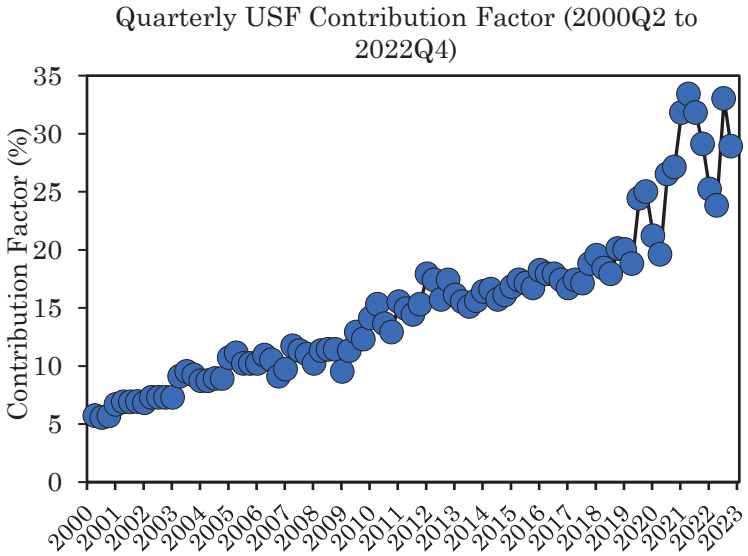
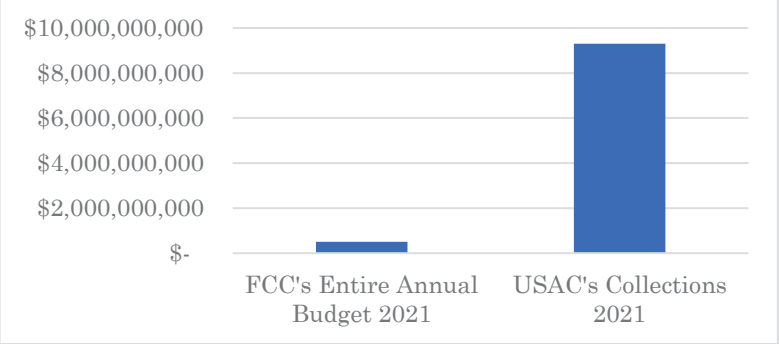
[2] Fed. Commc'ns Comm'n, *Proposed Second Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45,

2020s the rate had reached unprecedented levels. For the fourth quarter of 2022—at issue in this suit—USAC set the rate at 28.9%, representing a nearly 600% relative increase. Pet.App.44a.



The scheme now yields nearly $10 billion annually, approaching 25 times the FCC's entire annual budget. Fed. Commc'ns Comm'n, *2022 Budget Estimates to Congress* (May 2021), https://docs.fcc.gov/public/attachments/DOC-372853A1.pdf.

Public Notice, DA Docket No. 00-517 (rel. Mar. 7, 2000), https://docs.fcc.gov/public/attachments/DA-00-517A1.pdf.



USAC takes these contributions from carriers and deposits them into the USF, then disburses the funds with the purported goal of expanding telecommunication services for the masses. *Incomnet*, 463 F.3d at 1067, 1072.

5. Rampant Fraud, Waste, and Abuse in the USF.

Given the lack of accountability, the USF has predictably demonstrated—in the words of then-Senator Claire McCaskill—a "history of extensive waste and abuse." *The Lifeline Fund: Money Well Spent?*, *supra*, at 2 (quoting Sen. McCaskill).

The GAO and the FCC's internal watchdogs have issued numerous reports on USF's waste and abuse over the past 15 years, cataloguing not just billions of dollars wasted but also a lack of responsiveness by the FCC and USAC to prior reports of waste and fraud. The FCC's Inspector General summed it up when he agreed that "applicants view this program as a big candy jar, free money." Sam Dillon, *School Internet*

Program Lacks Oversight, Investigator Says, N.Y. Times, June 18, 2004, at A22.

For example, the GAO has reported that the USF is not focused on providing the basic telephone services that low-income Americans actually use, but instead is expanding advanced telecommunications services for wealthier Americans. U.S. Gov't Accountability Off., GAO-21-24, *FCC Should Enhance Performance Goals and Measures for Its Program to Support Broadband Service in High-Cost Areas* 17 (2020), https://www.gao.gov/assets/gao-21-24.pdf.

A separate GAO report found that the FCC had not bothered to evaluate the USF's effectiveness. The low-income Lifeline Program, for example, may not have played *any* meaningful role in improving the "level of low-income households' subscribing to telephone service over the past 30 years," despite costing billions of dollars, footed by American consumers at the discretion of USAC and the FCC. U.S. Gov't Accountability Off., GAO-15-335, *FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program* (2015), http://www.gao.gov/assets/670/669209.pdf.

Moreover, because the USF imposes a flat tax, customers pay the same rate regardless of their income or bill amount, making it among the "most regressive taxes in America." *Broadband Subsidies for Some, Broadband Taxes for Everyone,* TechFreedom (May 28, 2015), https://techfreedom.org/broadband-subsidies-for-some-broadband-taxes-for/. "A single, low-income mother, living in the Bronx,

with a cell phone for personal safety, pays 10% or more of her monthly wireless telephone bill to support universal service for wealthy Montana residents living on ranchettes." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 314 (2005).

B. Proceedings Below and in Other Courts.

1. Proceedings at the FCC and Eleventh Circuit.

Petitioners comprise several organizations and individuals adversely affected by USF charges. They range from the consumer awareness group Consumers' Research (which pays a monthly USF charge), to a reseller of telecommunications services Cause Based Commerce (which pays directly into the USF), to individual customers whose tight budgets are stretched thinner from having to pay the USF charge each month. For example, Petitioner Joseph Bayly is a pastor and editor who resides in Ohio with his wife and six children. He provides his family's sole income but has to pay into the USF every month via his phone bill.

In Fall 2022, Petitioners filed two substantively identical comments at the FCC challenging the proposed fourth quarter 2022 Contribution Factor, which was automatically "deemed approved by the Commission" after the Commissioners took no action. *See* 47 C.F.R. § 54.709(a)(3). This automatic approval

occurred just a few days before the rate became effective on October 1, 2022. Pet.App.44a, 50a.

Petitioners sued in the Eleventh Circuit, and the panel issued its opinion on December 14, 2023. It correctly concluded the suit was timely, Pet.App.3a–7a, but then upheld the USF's revenue-raising mechanism against Petitioners' nondelegation challenges.

The majority opinion spent only two pages on the lead nondelegation argument, relying exclusively on 47 U.S.C. § 254(b) as providing "limiting principles," including that universal service charges "should" be "specific, predictable and sufficient … to preserve and advance universal service." Pet.App.9a–10a. The majority opinion also rejected Petitioners' private nondelegation challenge because the FCC allegedly "maintains deep and meaningful control over the USAC." Pet.App.17a. When confronted with the lack of evidence that the FCC exercises supervision over USAC with respect to the quarterly Contribution Factor in particular, the majority opinion concluded that the FCC "has the right" to review USAC determinations, and it made little difference whether the FCC *actually* reviews them, because "'an agency exercises its policymaking discretion with equal force when it … decid[es] *not* to act.'" Pet.App.16a.

Judge Newsom "reluctantly" concurred in the judgment, stating he was "deeply skeptical that [the] result can be squared with constitutional first principles." Pet.App.20a (Newsom, J., concurring in judgment). He first concluded that "the FCC is almost

certainly exercising legislative power when it decides, among other things, how big the universal-service program should be." Pet.App.23a. He further concluded that the USF charges are likely taxes, and "[s]etting tax rates sure seems like a legislative power," as does "prescribing the universal-service program's sweep and scope." Pet.App.23a–24a. That is "the sort of policy judgment that Congress, and not the Executive Branch, should make." Pet.App.24a (cleaned up).

But Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority." *Id.* The § 254(b) principles are so "hazy" that they "cannot possibly constrain the FCC's policymaking discretion in any meaningful way" and instead "leave the agency all the room it needs to do essentially whatever it wants." Pet.App.25a. Then, "to make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause" allowing the FCC to add other principles as it determines are "'necessary and appropriate.'" *Id.*

"Further diminishing the likelihood of any real guidance, the term 'universal service'—the very object of the entire program—is defined only in the most ambiguous way" and will "'evolv[e]'" over time. Pet.App.26a. Section 254 also provides "essentially no" direction about how much telecom companies "should actually be charged." *Id.*

He concluded that "as a first-principles matter, I think that the agency is violating the Constitution." Pet.App.29a. But because the "non-delegation

doctrine has become a punchline" under current precedent, he felt constrained to reject Petitioners' nondelegation arguments. Pet.App.22a.

Addressing the private nondelegation claim, Judge Newsom concluded that "if under existing precedent I'm stuck with the fiction that the FCC isn't acting legislatively when it sets the rates, then I think it follows *a fortiori* that USAC isn't doing so either." Pet.App.29a.

Judge Lagoa separately concurred, stating she "share[d] much of the same concerns expressed by Judge Newsom in his concurring opinion about how the current nondelegation doctrine … has strayed from constitutional first principles." Pet.App.43a (Lagoa, J., concurring).

2. Proceedings at Other Courts.

Petitioners have challenged other USF quarterly tax rates in other circuits. They currently have a petition for a writ of certiorari pending before this Court, arising from the Sixth Circuit's review of the fourth quarter 2021 Contribution Factor. *See Consumers' Rsch. v. FCC*, No. 23-456.

Further, a panel of the Fifth Circuit rejected Petitioners' nondelegation challenges to the first quarter 2022 Contribution Factor, *Consumers' Rsch.*, 63 F.4th 441, but the *en banc* Fifth Circuit granted rehearing *en banc* in that case, 72 F.4th at 108, and held oral argument in September 2023. A decision is pending.

Petitioners also brought a challenge in the D.C. Circuit, where briefing recently concluded. *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir.).

REASONS FOR GRANTING THE PETITION

As Judges Newsom and Lagoa explained below, Congress has delegated to an executive agency the power to raise billions of dollars in taxes without meaningful limits, constrained only by the agency's own "aspirations," and with the authority to redefine the scope of its own taxing power at will. The agency has handed off this awesome power to a private company full of industry interest groups, which make the policy judgment of how much money to raise, a process that plays out on the eve of each quarter without meaningful governmental oversight.

This Court should grant review and reverse. The USF is the poster child for the problems that result from the unconstitutional delegation of constitutionally vested authority. Nobody takes responsibility for a program vacuuming nearly $10 billion a year out of Americans' pockets, with rates that climb ever higher.

This scheme violates both the original understanding of nondelegation, which prohibits Congress from delegating difficult policy judgments to an executive agency, and also the intelligible-principle test, which requires Congress to impose clear limits on agency power, most of all in the context of revenue-raising. Indeed, the USF resembles the statutory schemes this Court held unconstitutional in *Schechter Poultry* and *Panama Refining*. And by handing off this power to a private entity, the FCC has violated the private nondelegation doctrine. The Court should grant the Petition and reverse.

I. THE COURT SHOULD REVIEW PETITIONERS' NONDELEGATION CHALLENGE TO 47 U.S.C. § 254.

The Court should review the constitutionality of the USF statute's "unique revenue raising mechanism," *Consumers' Rsch.*, 63 F.4th at 450, which now approaches 25 times the FCC's annual budget. Several aspects demonstrate why this scheme is so problematic from a nondelegation perspective:

- Congress allows the FCC to raise money directly, with the general public footing the bill, but "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund." *Consumers' Rsch.*, 67 F.4th at 788.

- The statutory "universal service principles" that might limit the FCC are in fact "aspirational only." *TOPUC II*, 265 F.3d at 321. Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority." Pet.App.24a (Newsom, J., concurring in judgment). The § 254(b) principles are so "hazy" that they "cannot possibly constrain the FCC's policymaking discretion in any meaningful way" and instead "leave the agency all the room it needs to do essentially whatever it wants." Pet.App.25a (Newsom, J., concurring in judgment). Accordingly, Congress imposed no "policy of

limitation" on the FCC. *Panama Refining*, 293 U.S. at 418.

- "[T]o make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause" allowing the FCC to add other principles as it determines are "'necessary and appropriate,'" Pet.App.25a (Newsom, J., concurring in judgment), and the FCC can *redefine* "universal service" and raise money to cover that expanded scope, 47 U.S.C. § 254(c)(1). This makes § 254's dual-layer delegation even broader than the one this Court found problematic in *Schechter Poultry*, 295 U.S. at 538–39.

- USF charges are not just any revenue but are *taxes*, and "[s]etting tax rates sure seems like a legislative power," as does "prescribing the universal-service program's sweep and scope." Pet.App.23a–24a (Newsom, J., concurring in judgment).

The Court should grant review of this historical anomaly, which violates both the original understanding of nondelegation and also the intelligible-principle test.

A. Section 254 Violates the Original Understanding of Nondelegation.

The amorphous grant of extensive revenue-raising powers to an executive agency violates the original understanding of nondelegation. Pet.App.23a–27a

(Newsom, J. concurring in judgment); *see also Consumers' Rsch.*, 63 F.4th at 449 n.4.

Article I of the Constitution begins: "*All* legislative Powers herein granted *shall* be vested in a Congress." U.S. Const. art. I, § 1 (emphases added). The Constitution vests legislative power nowhere else. That means Congress must "make[] the policy decisions when regulating private conduct" and can only "authorize another branch to 'fill up the details'" or "make the application of that rule depend on executive fact-finding." *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting); *see also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

James Madison explained during the ratification debates that "[i]f nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1836). Accordingly, under the Constitution, certain "important subjects … must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). "[T]here are cases in which … the significance of the delegated decision is simply too great for the decision to be called anything

other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

Chief among those important subjects is raising revenue. The "power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (Kavanaugh, J.). Congress's powers over taxing and spending are "a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers." *Id.* at 1347.

As Judge Newsom explained below, "[s]etting tax rates sure seems like a legislative power to me," as does "prescribing the universal-service program's sweep and scope." Pet.App.23a–24a (Newsom, J., concurring in judgment). That is "the sort of policy judgment that Congress, and not the Executive Branch, should make." Pet.App.24a (cleaned up). Such a choice is "heavily laden (or ought to be) with value judgments and policy assessments" that only Congress can make. *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting).

Section 254 violates the requirement that Congress itself "*make[] the policy decisions* when regulating private conduct." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (emphasis added). Indeed, § 254 purposefully "'delegate[d] difficult policy choices to the Commission's discretion,'" including how much revenue to raise for universal service. *TOPUC II*, 265

F.3d at 321. That alone violates the original nondelegation doctrine.

Stated another way, "it 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," *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (emphasis added), but that is exactly what § 254 does: it imposes merely "aspirational" limits on the FCC's revenue-raising powers, *TOPUC II*, 265 F.3d at 321 (emphasis added).

As Judge Newsom explained, Congress gave the FCC "only the faintest, most vacuous guidance about how to exercise its authority." Pet.App.24a (Newsom, J., concurring in judgment). The § 254(b) principles are so "hazy" that they "cannot possibly constrain the FCC's policymaking discretion in any meaningful way" and instead "leave the agency all the room it needs to do essentially whatever it wants." Pet.App.25a. Then, "to make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause" allowing the FCC to add other principles as it determines are "'necessary and appropriate.'" *Id.*

"Further diminishing the likelihood of any real guidance, the term 'universal service'—the very object of the entire program—is defined only in the most ambiguous way" and will "'evolv[e]'" over time. Pet.App.26a. Section 254 also provides "essentially no" direction about how much telecom companies "should actually be charged." *Id.* The statute says charges should be "equitable and nondiscriminatory"

and paid into "sufficient mechanisms established by the [FCC] to preserve and advance universal service," 47 U.S.C. § 254(d), but, in the words of Judge Newsom, "[c]andidly, I have *no* idea what that means," Pet.App.26a (Newsom, J., concurring in judgment).

For all these reasons, as Judge Newsom explained below, "as a first-principles matter," the FCC "is violating the Constitution" by raising taxes without sufficient congressional direction and limitation. Pet.App.29a; *see also* Pet.App.43a (Lagoa, J., concurring) ("[S]har[ing] much of the same concerns expressed by Judge Newsom in his concurring opinion about how the current nondelegation doctrine … has strayed from constitutional first principles.").

B. Section 254 Violates the Intelligible-Principle Test.

The FCC's power to raise revenue under § 254 runs afoul even of the intelligible-principle test, *see J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), which requires Congress to "clearly delineate[] … the boundaries of th[e] delegated authority." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989).

The Eleventh Circuit majority opinion relied exclusively on § 254(b) to conclude that Congress satisfied the intelligible-principle test. That court stated that § 254(b) imposed "limiting principles," most notably that universal service charges "should" be "specific, predictable and sufficient … to preserve

and advance universal service." Pet.App.9a. The opinion acknowledged the FCC has the power to add "'other principles,'" but that grant "comes with specific limits: the FCC may only add principles that 'are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.'" Pet.App.9a–10a.

This Court has held that what suffices as an "intelligible principle" varies based on "'the extent and character'" of the power delegated, *Mistretta*, 488 U.S. at 372, and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," *Whitman*, 531 U.S. at 475. In other words, there must be an intelligible principle, but what suffices will vary depending on context.

Pursuant to that precedent, Petitioners argued to the Eleventh Circuit that it should not rely on distinguishable cases upholding vague delegations involving complex scientific matters, and instead should follow cases that involved objective limits on core government revenue-raising, as here.

This Court has held there is a difference between revenue-raising and other types of statutes when it comes to nondelegation. In *NCTA*, for example, this Court held that giving an agency the power to raise money based only on vague statutory phrases like "'public policy or interest served, and other pertinent facts'" would raise the specter of "'forbidden delegation of legislative power'" and "carr[y] [the] agency far from its customary orbit and put[] it in search of revenue in the manner of an Appropriations

Committee of the House." *NCTA*, 415 U.S. at 341–42. Those vague statutory phrases may be sufficiently intelligible in complex scientific contexts, but not when it comes to deciding how much money to raise from the general public, where Congress itself is—and, under the Constitution, *must be*—the expert.

Similarly, this Court rejected a nondelegation challenge to the statute in *J.W. Hampton*, which allowed the executive to raise import duties but prohibited any charge that deviated more than 50% from the statutory figures Congress provided. 276 U.S. at 401. And similarly in *Skinner*, the Court found no nondelegation problem because the agency was statutorily barred from raising more than 105% of the amount already appropriated by Congress. 490 U.S. at 215.

There is no dispute that § 254 lacks any kind of objective limit. That alone renders it unconstitutional because there is no "clearly delineate[d]" limit. *Skinner*, 490 U.S. at 219. But the Eleventh Circuit's decision below never even addressed this distinction or the on-point cases like *NCTA*. That led the court erroneously to conclude that the nondelegation challenge here must fail simply because this Court previously blessed broad delegations in other contexts. Pet.App.8a.

Moreover, as noted above in Part I.A, Judge Newsom's concurrence explained that there are no meaningful *implied* limits in § 254, either. Pet.App.24a–26a (Newsom, J., concurring in the judgment). The language is entirely vacuous and

almost never mandatory in any event. The FCC itself has long insisted that § 254(b)'s principles, for example, are "merely aspirational," *TOPUC II*, 265 F.3d at 321, and "need not [be] implement[ed]," Br. for Resp't FCC 26–27, *TOPUC II*, 2000 WL 34430695, at *26–27 (Nov. 30, 2000).

That means the FCC is bound (or not) based only on its own discretion and self-restraint. This Court has previously held that "an agency's voluntary self-denial has no bearing upon" "[w]hether the statute delegates legislative power." *Whitman*, 531 U.S. at 473. We must therefore assume an agency will exercise the full and outer limit of its statutory power, and the non-binding principles here impose no limits in the first place.

Further, § 254(b)'s vague list is eerily similar to the statute in *Panama Refining*, which likewise featured a list of "policies," such as "eliminat[ing] unfair competitive practices," "promot[ing] the fullest possible utilization of the present productive capacity of industries," and "avoid[ing] undue restriction of production (except as may be temporarily required)." 293 U.S. at 417. That list, like the one in § 254(b), certainly announced "policies" in the general sense, but this Court held that there was no meaningful "policy *of limitation*" on the President's discretion. *Id.* at 418 (emphasis added). The President was still "free to select as he chooses from the many and various objects generally described," *id.* at 431–32, just like the FCC.

The Eleventh Circuit also invoked § 254's requirement that USF funding be "equitable and nondiscriminatory," Pet.App.9a, but the statute in *Schechter Poultry* likewise prohibited policies that imposed "inequitable restrictions on admission" or "discriminate[d] against" small companies, 295 U.S. at 522–23. If aphorisms about equity and nondiscrimination couldn't save the statute in *Schechter Poultry*—even under the intelligible-principle test—they can't save § 254, either. *See* 295 U.S. at 541 (considering *J.W. Hampton*); *see also Panama Refining*, 293 U.S. at 429 (same).

Congress, not an executive agency, is the expert at making the policy judgment of how much money can be raised for the USF. It was Congress's constitutional obligation to clearly delineate a limit on the FCC's power. Congress failed to "constrain the FCC's policymaking discretion in any meaningful way" and instead left the FCC "all the room it needs to do essentially whatever it wants." Pet.App.25a (Newsom, J., concurring in judgment).

C. Multi-Layer Delegation.

Independently warranting review under even current doctrine is § 254's unique multi-layer delegation, which allows the FCC not just to raise money for universal service but also to *redefine* the already-vague definition of "universal service" and add *new* "universal service principles"—and then raise money for those expanded concepts. 47 U.S.C. § 254(b)(7), (c)(1)(D). As Judge Newsom explained below, this "make[s] matters even worse—even more

open-ended." Pet.App.25a (Newsom, J., concurring in judgment).

Even if the statute were otherwise constitutional, this unprecedented second layer would warrant finding it unconstitutional. This Court has emphasized in analogous contexts that "[t]he added layer … makes a difference" from a constitutional perspective. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010) (multiple layers of removal protection). And this Court labeled an even narrower multi-layer delegation in *Schechter Poultry* as especially egregious, again *en route* to finding a violation of the intelligible-principle test. *See* 295 U.S. at 538–39 (statute allowed President to "impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act").

D. The USF Collects Taxes.

Review is also warranted because Congress offboarded the power to raise *taxes*. "Setting tax rates sure seems like a legislative power," and that is "the sort of policy judgment that Congress, and not the Executive Branch, should make." Pet.App.23a–24a & nn.1–2 (Newsom, J., concurring in judgment) (cleaned up). Hard-fought tradition dating back to England established that "[t]axation is a legislative function," and thus the legislature "is the sole organ for levying taxes." *NCTA*, 415 U.S. at 340; *see* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 63 (2014).

Allowing an executive agency to raise taxes is therefore the most egregious form of delegation.

A tax for constitutional purposes is typically a charge where "some of the administrative costs at issue 'inure[] to the benefit of the public.'" *Skinner*, 490 U.S. at 223; Pet.App.23a–24a & nn.1–2 (Newsom, J., concurring in judgment). But nearly all, if not *all* of the universal service charges "inure to the benefit of the public." Indeed, the stated purpose of the program is to provide *Universal* Service at the expense of the general public. Pet.App.23a n.1 (Newsom, J., concurring in judgment) ("It also seems to me relevant to the contributions' 'tax' status that the statute itself designates the American public—writ large, rather than the payor carriers—as the universal-service program's principal beneficiary.").

These are not mere "fees," which represent "a 'value-for-value' transaction, in which a feepayer pays the fee to receive a service or benefit in return, and is thus better off as a result of the transaction." *Trafigura Trading LLC v. United States*, 29 F.4th 286, 294 (5th Cir. 2022) (collecting authorities). For the USF, most contributors receive nothing in return—and certainly no proportional "value-for-value." Pet.App.23a–24a & nn.1–2 (Newsom, J., concurring in judgment).

Whatever the precise line between a fee and a tax, the USF crosses it. That makes the delegation of that power to an executive agency all the more dangerous.

* * *

Congress handed over its taxing power to an agency without objective limits, hemmed in only by the agency's own "aspirations," and then for good measure let the agency expand its own scope of authority at will. The Court should review the constitutionality of this unprecedented revenue-raising mechanism.

II. THE COURT SHOULD REVIEW PETITIONERS' PRIVATE NON-DELEGATION CHALLENGE.

The Eleventh Circuit's rejection of Petitioners' private nondelegation challenge also warrants review.

Delegation to "private persons" is "delegation in its most obnoxious form" because "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." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). "Private entities are not vested with 'legislative Powers.' Nor are they vested with the 'executive Power,' which belongs to the President." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring).

Each quarter, USAC—a purely private corporation run by self-described industry "interest groups"—undertakes the "'imprecise exercise'" of deciding how much money will cover universal service over the next quarter. *TOPUC II*, 265 F.3d at 328. That proposed amount is converted to a Contribution Factor and

automatically "deemed approved" by the FCC after a mere fourteen days, without the FCC substantively reviewing the figures or the Commissioners themselves even lifting a finger, on the eve of each new quarter.

The Eleventh Circuit majority opinion defended the FCC's decision to let USAC act with near-absolute deference when setting the quarterly taxing figure. The FCC "has the right" to review USAC determinations, and it made little difference whether the FCC *actually* reviews them, because "'an agency exercises its policymaking discretion with equal force when it … decid[es] *not* to act.'" Pet.App.16a.

But letting private proposals automatically become binding under penalty of law—i.e., "not acting"—is the very definition of a private nondelegation violation. Under the Eleventh Circuit's view, there can never be a nondelegation violation, as any transfer of authority could be reframed as merely deciding "not to act" going forward. Congress could simply "vote all power to the President and adjourn *sine die*," *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting), and any resulting actions by the President would be construed as Congress deciding "not to act" to stop it. That view is just as wrong in the context of private delegations, which is why the private nondelegation doctrine requires an agency to "independently perform its reviewing, analytical and judgmental functions," rather than rubber stamp a private proposal. *State v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021) (cleaned up).

The Eleventh Circuit also claimed the FCC "maintains deep and meaningful control over the USAC." Pet.App.17a. But as Judge Newsom explained, "[W]ith respect to the proposed universal-service 'contribution factor,' in particular—the primary and most direct way that USAC executes congressional directives—the FCC needn't (and overwhelmingly doesn't) do anything at all." Pet.App.40a (Newsom, J., concurring in judgment).

The FCC does not even engage in the *pretense* of review of USAC's figures, which are ministerially converted into the quarterly taxing rate. The FCC never issues a separate approval document, nor responds to comments filed by the public. In fact, the FCC criticizes public comments like Petitioners' as being "uninvited" and "unrelated to the matter at hand"[3]—as if the constitutionality of agency action could ever be "unrelated" to that action. And because the FCC designed this "approval" process to play out on the eve of each new quarter, the FCC conveniently has no choice but to accept whatever figures USAC proposes.

Given all this, it's no surprise that the FCC has never meaningfully changed USAC's proposals over 25 years, amounting to over 100 quarters "deemed approved." *See* Pet.App.40a (Newsom, J., concurring in judgment).

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[3] Br. for Resp't 28, *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir. Dec. 22, 2022).

USAC's role here puts to shame those cases where courts allowed agencies to "employ private entities for *ministerial* or *advisory* roles." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (citing *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989)). There is not some simplistic and objectively ideal amount needed for "universal service" each quarter, especially because the term is so vague. *See* Pet.App.26a (Newsom, J., concurring) (noting that universal service is "defined only in the most ambiguous way"). The determination of that figure thus inherently requires considerable policy and judgment calls. *See TOPUC II*, 265 F.3d at 328. It is the FCC, not USAC, that performs the ministerial role here.

To be sure, the FCC could revoke the power it has handed over to USAC, but "[i]f all it reserves for itself is 'the extreme remedy of totally terminating the [delegation agreement],' an agency abdicates its 'final reviewing authority.'" *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (citation omitted); *see Rettig*, 993 F.3d at 416–17 (Ho, J., dissenting from denial of rehearing *en banc*). There is an ongoing constitutional violation unless and until the agency actually does rescind that power.

Under the Eleventh Circuit's framing, there is nothing stopping agencies from handing over vast powers to private companies run by industry interest groups. "[T]here is not even a fig leaf of constitutional justification" for such a scheme, yet the decision below wholeheartedly endorsed it. *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring).

The Court should review this private delegation.

III. THE QUESTIONS PRESENTED ARE IMPORTANT, AND THIS IS AN EXCELLENT VEHICLE TO ADDRESS THEM.

The questions presented are eminently worthy of review. The Fifth Circuit's decision to grant rehearing *en banc* to consider Petitioners' arguments in a parallel case confirms their importance and merit. *Consumers' Rsch.*, 72 F.4th at 108. Although there is no circuit split yet, the *en banc* Fifth Circuit is poised to create one, at which point the FCC itself would likely agree certiorari is warranted.

But even without a split, this Court should grant review. The USF scheme is historically unique both in terms of the authority delegated to the executive branch to raise taxes itself, and also the subsequent transfer of that power to a private company. This level of delegation surpasses even those in *Schechter Poultry* and *Panama Refining*.

Further, as Judge Newsom argued below, "this case illuminates deeper problems in nondelegation precedent," Pet.App.42a (Newsom, J., concurring in judgment), and Judge Lagoa's concurrence agreed with how far "the current nondelegation doctrine … has strayed from constitutional first principles," Pet.App.43a (Lagoa, J., concurring); *see also* Barrett, *supra*, at 318 (describing the current doctrine as "notoriously lax"). This case presents an ideal vehicle to address those problems.

The consequences of upholding this scheme are profound. The FCC has never disputed that if Congress replicated this mechanism elsewhere, there would be no need to pass budgets or make appropriations ever again. The entire federal government could be funded with a single sentence telling the IRS to raise sufficient revenue for the entirety of federal operations, and the IRS could even be given wide-ranging discretion to redefine what agencies and programs are included or excluded. If such a scheme can legally raise $10 billion a year, why not $10 trillion? And if the FCC can let a private company run the show, the IRS could, too. "[W]ith each successive delegation—from Congress to agencies, and then from agencies to private parties—we drift further and further from the locus of democratic accountability." Pet.App.42a (Newsom, J., concurring in judgment).

This case presents an ideal vehicle. The USF funding mechanism violates both the original understanding of nondelegation and the modern nondelegation test, and has a clear historical analog considered by this Court in *Schechter Poultry* and *Panama Refining*. This Court's decision in *NCTA* further emphasizes that revenue-raising—and especially *taxation*—requires Congress itself to impose real limitations on executive agencies' fundraising. The Court could also separately address the private nondelegation violation arising from the FCC's near-absolute deference to a private company's quarterly taxing demands.

There are no procedural hurdles to review. Petitioners have raised their nondelegation challenges at every step. And although the FCC argued below that this challenge was untimely, the FCC has since expressly abandoned that view,[4] which had been unanimously rejected even by those judges who sided with the FCC on other issues. Pet.App.3a–7a; *Consumers' Rsch.*, 67 F.4th at 783–87; *Consumers' Rsch.*, 63 F.4th at 446–47.

This case also lacks the vehicle flaws present in the petition arising out of *Rettig*, where the statute had been changed in the interim and the government still pressed untimeliness arguments. *See Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., respecting the denial of certiorari). Three Justices noted that, absent those flaws, they would have voted to review the private-nondelegation challenge in that case, which "present[ed] an important separation-of-powers question." *Id.* Petitioners' case presents an even greater issue because the "hundreds of millions of dollars" at issue in *Rettig* pale in comparison to the nearly $10 billion raised for the USF every year. *Id.*; Pet.App.22a (Newsom, J., concurring in judgment) ("USAC's collections activity brings in real money. The record indicates that USAC was projected to collect nearly $2 billion from carriers *in the final quarter of 2022 alone*, a figure that dwarfs the FCC's entire annual

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[4] En Banc Br. for Resp't 1 n.1, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Aug. 30, 2023) ("[R]espondents no longer press the argument.").

budget."). That amount is almost fourteen times bigger than the CFPB's annual budget, the constitutionality of which this Court granted review to consider. *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638 n.12 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023) (mem.).

The government has previously suggested that a ruling in Petitioners' favor would somehow cause practical difficulties. But that is wrong for numerous reasons. *First*, the magnitude of a constitutional violation should not be a reason to let it persist. It's a reason to grant review.

Second, in any event, Petitioners have made clear that any relief granted here could be limited to the named Petitioners, i.e., a handful of private citizens, a consumer protection organization, and a small telecommunications reseller.[5]

Third, Congress is well aware of the constitutional flaws with the USF statute. The Congressional Research Service warned Congress in January 2023 of the potential nondelegation issue and advised that it consider "limit[ing] the FCC's discretion over the program by placing a cap on the total revenue the FCC may collect from interstate carriers" or by "articulat[ing] a formula for how the contribution factor should be calculated." Cong. Rsch. Srv., LSB10904, *Fifth Circuit Considers Constitutionality of the Universal Service Fund* 4 (2023), https://

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[5] *See* Reply Br. of Pet'rs 7 n.2, *Consumers' Rsch.*, No. 22-13315 (11th Cir. Feb. 3, 2023).

crsreports.congress.gov/product/pdf/LSB/LSB10904. A bipartisan group of Members of Congress even submitted an amicus brief in support of the FCC in Petitioners' lead Fifth Circuit case, demonstrating they are well aware of the issues here.[6]

The high level of congressional interest in § 254, combined with Congress's recent prompt statutory response to the Fifth Circuit's invalidation of another statute on nondelegation grounds, provides strong reason to believe Congress would take similar action here if it considered doing so necessary. *See Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023) (recognizing Congress's statutory response to *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022)).

That would ensure that Congress remains accountable to the public for raising revenue for the USF, in accordance with the Constitution's separation of powers.

* * *

This case presents an excellent vehicle for addressing the contours of nondelegation in the context of a program whose abuses highlight the dangers of delegated and politically unaccountable power. The Court should grant review.

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[6] Br. of Amici Curiae Members of Congress in Support of Resp't, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. June 17, 2022).

CONCLUSION

The petition for a writ of certiorari should be granted.

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January 5, 2024

APPENDIX

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APPENDIX A

United States Court of Appeals for the Eleventh Circuit

CONSUMERS' RESEARCH, CAUSE BASED COMMERCE, INC., EDWARD J. BLUM, KERSTEN CONWAY, SUZANNE BETTAC, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents,

BENTON INSTITUTE FOR BROADBAND AND SOCIETY, et al.
Intervenors.

No. 22-13315

Petition for Review of a Decision of the Federal Communications Commission No. 96-45

FILED: December 14, 2023

Before WILSON, NEWSOM and LAGOA, Circuit Judges.

WILSON, Circuit Judge:

In this petition for review of final agency action, the Petitioners ask us to declare 47 U.S.C. § 254—the Telecommunications Act of 1996's universal service requirements—unconstitutional as a violation of the nondelegation doctrine. Additionally, they argue that

the Federal Communications Commission (FCC), the agency Congress put in charge of § 254, has impermissibly delegated authority over the universal service fund to a private entity in violation of the private nondelegation doctrine.

Because § 254 provides an intelligible principle and the FCC maintains control and oversight of all actions by the private entity, we hold that there are no unconstitutional delegations and therefore **DENY** the petition.

I. Background

The FCC was created in 1934 "[f]or the purpose of regulating interstate . . . commerce in communication . . . so as to make available, so far as possible, to all the people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In 1996, Congress instructed the FCC to establish and maintain a universal service fund in furtherance of this purpose. *Id*. § 254. Congress enacted § 254 to provide equitable universal services. *Id*. The Act instructs the FCC to determine the requisite level of universal service based on an "evolving" evaluation of four statutory factors. *Id*. § 254(c). The FCC requires contributors to submit a specified amount of money to the Fund per quarter. *Id*. § 254(d).

The FCC depends on the Universal Service Administrative Company (USAC), a private entity, to carry out Congress' instruction. The USAC assists the

FCC in determining the amount each contributor must provide to the fund. *See* 47 C.F.R. §§ 54.701, 54.709. The USAC uses the FCC's detailed formulas to determine projections and demand for the universal service fund per quarter. *See id*. §§ 54.303, 54.901, 54.1301, 54.711(a). The USAC must submit its "projections of demand for the federal universal service support mechanisms" to the FCC 60 days before the start of the quarter, and then submit the total contribution base (i.e., the percentage of revenues that each carrier will have to pay) to the agency at least 30 days before the start of the quarter. *Id*. § 54.709(a)(3). Only after the FCC approves the USAC's proposal is the USAC's valuation used to calculate that quarter's contribution factor. *Id*. Then, the contribution factor is used to determine the amount of individual contributions. *Id*.

On appeal, the Petitioners—a nonprofit organization that aims to increase consumer knowledge of issues, a corporation that resells telecommunications services, and various individuals who pay into the universal service fund through monthly phone bills—challenge the FCC's and USAC's roles in creating the 4th Quarter 2022 Contribution Factor. They argue that the actions taken by both entities are unconstitutional under nondelegation doctrine jurisprudence.

II. Jurisdiction

Because we have "an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute," we begin with a jurisdictional analysis before addressing the Petitioners'

claims. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020).

The FCC challenges our jurisdiction to hear this appeal under the Hobbs Act. A "proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in [the Hobbs Act]." 47 U.S.C. § 402(a).[1] The Hobbs Act gives Courts of Appeal exclusive jurisdiction to "determine the validity of . . . all final orders of the Federal Communications Commission." 28 U.S.C. § 2342(1); *see also FCC v. ITT World Commc'ns, Inc*., 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals."). However, the aggrieved party has only 60 days after the order's entry to file a petition for review. 28 U.S.C. § 2344.

The FCC argues that the Hobbs Act bars us from exercising jurisdiction for two reasons. First, because the Petitioners' true challenge is to the constitutionality of the entire statutory delegation scheme, and not the 4th Quarter Contribution Factor specifically. The FCC asserts that analyzing jurisdiction under the Hobbs Act requires looking at the impact of a proceeding rather than the reason a plaintiff brought a suit. Thus, because the statute was last amended in 2011, the Petitioners are far beyond their 60-day jurisdictional limit to file this petition. Second, the FCC argues that a challenge to a Contribution Factor is an

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[1] This direction is subject to exclusions not applicable in the case before us. *See* 47 U.S.C. § 402(b).

invalid pre-enforcement challenge because the Petitioners will not be harmed by the announcement of the Contribution Factor since it has not yet been applied to them. We disagree on both points.

First, even if Petitioners challenge the entire statutory scheme, we agree with the Sixth and D.C. Circuits that administrative regulations "are capable of continuing application." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *Rettig v. State*, 987 F.3d 518, 529 (5th Cir. 2021). When considering a challenge to FCC rules under the Hobbs Act, the D.C. Circuit reasoned that the 60-day limit does not affect review of the validity of agency action that reapplies a rule. *See Functional Music*, 274 F.2d at 546. This is true because "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id*. Such is the case here. The Fourth Quarter Contribution Factor re-applies the statutory delegation in § 254. Thus, "Petitioners' challenge to the FCC's constitutional authority to implement § 254, reapply its prior regulations, and issue the [4th Quarter 2022 Contribution Factor] restarts the sixty-day clock." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 786 (6th Cir. 2023).

Here, the challenge is timely. The Petitioners filed their challenge to the 4th Quarter Contribution Factor twenty-one days after public notice, and seven days after the Contribution Factor was deemed approved by the FCC and therefore became effective. The

Petitioners were well within their 60-day jurisdictional limit.

Second, we find that the Contribution Factor is ripe for review. The Contribution Factor itself is a final and judicially reviewable agency action—Petitioners need not wait for "harm." According to FCC regulations, "Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or *judicial review*, on the date of public notice." 47 C.F.R. § 1.103(b) (emphasis added); *see also Bennett*, 520 U.S. at 177–78; *Consumers' Rsch*., 67 F.4th at 785 (finding the text of 47 C.F.R. § 1.103(b) to be sufficient indication that an FCC contribution factor is final and review- able). Further, as we have explained, "[o]rders 'adopted by the Commission in the avowed exercise of its rule-making power' that 'affect or determine rights generally . . . have the force of law and are orders reviewable under the' Hobbs Act." *Mais v. Gulf Coast Collection Bureau, Inc*., 768 F.3d 1110, 1121 (11th Cir. 2014) (quoting *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417 (1942)). Here, the challenge is properly brought because the Petitioners filed their challenge after the Contribution Factor's public notice date, and the Contribution Factor affects or determines their rights.

Even it was not ripe for review, however, Petitioners have demonstrated that their appeal presents a proper pre-enforcement review. A threatened enforcement of a law creates an Article III injury "[w]hen an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action." *Susan B. Anthony List v. Driehaus*, 573 U.S.

149, 158 (2014). "[I]t is not necessary that petitioner first expose himself to actual [harm] to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The Supreme Court has "permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Driehaus*, 573 U.S. at 159. Here, Petitioners have met this bar. Accordingly, we possess jurisdiction and proceed to the merits.

III. Standard of Review

"We review questions of constitutional law *de novo*." *United States v. Brown*, 364 F.3d 1266, 1268 (11th Cir. 2004).

IV. Traditional Nondelegation Doctrine

Although all legislative powers granted by the Constitution "shall be vested in a Congress of the United States," U.S. Const. art. I, "the Constitution does not deny to the Congress the necessary resources of flexibility and practicality that enable it to perform its functions." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (alterations adopted) (internal quotation marks omitted). Consequently, Congress may "obtain the assistance of its coordinate Branches—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* (cleaned up). Thus, "a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated

authority is directed to conform." *Id*. (alterations adopted) (internal quotation marks omitted).

The standards necessary to satisfy the nondelegation doctrine "are not demanding." *Id*. at 2129; *see also Brown*, 364 F.3d at 1271 ("The government does not bear an onerous burden in demonstrating the existence of an intelligible principle."). "[A] delegation of legislative power will be 'constitutionally sufficient if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority.'" *Brown*, 364 F.3d at 1271 (alterations in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989)).

The Petitioners argue that because there is no limit on how much the FCC can raise for the Fund, the statutory grant lacks any concrete, objective guidance. The FCC responds that § 254 has multiple standards.[2] "[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy*, 139 S. Ct. at 2123. An analysis of § 254 confirms that Congress' delegation provides an intelligible principle and therefore passes constitutional muster.

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[2] The general policy of § 254 is clear: it exists to make sure "[a]ccess to advanced telecommunications and information services [are] provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). The agency to implement it is likewise clear: the FCC must act to carry out this general policy. *See id*. § 254(a)(2). The parties disagree only on whether Congress has properly delineated "the boundaries of th[e] delegated authority." *Brown*, 364 F.3d at 1271.

Section 254(b) expressly states many of the principles the FCC must adhere to. We begin with the general principles that guide the FCC. The FCC shall create "policies for the preservation and advancement of universal service." 47 U.S.C. § 254(b). Those policies must be based on specifically identified principles: 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. *Id*. § 254(b)(1)–(3).

Next, § 254(b)'s limiting principles. All policies the FCC creates relating to the fund must be "specific, predictable and sufficient . . . to preserve and advance universal service." *Id*. § 254(b)(5). Congress assigns the responsibility for contributions to the fund to "telecommunications carrier[s] that provide[] interstate telecommunications services." *Id*. § 254(d). It instructs the FCC to charge contributors in an equitable and nondiscriminatory manner. *Id*. § 254(b)(4), (d). The FCC must provide access to "[e]lementary and secondary schools and classrooms, health care providers, and libraries," *id*. § 254(b)(6), and the funds can only be disbursed to statutorily designated eligible telecommunications carriers to provide support for universal services, *id*. § 254(e).

The last of the § 254(b) principles is more open ended, and Petitioners take specific issue with it. Under § 254(b)(7), the FCC "shall base policies . . . on . . . "[s]uch other principles as the . . . [FCC] 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). The Petitioners contend that paragraph (b)(7) is proof of the FCC's boundless authority. But the grant itself comes with specific limits: the FCC may only add principles that "are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter." *Id*. Because Congress is afforded wide latitude to delegate authority to executive agencies, these limits suffice. *Gundy*, 139 S. Ct. at 2129; *Brown*, 364 F.3d at 1271. We agree with the Sixth Circuit that the principles in § 254 collectively

> direct the FCC on (1) what it must pursue: accessible, quality, and affordable service. (2) How the FCC must fund these efforts: by imposing carrier contributions. (3) The method by which the FCC must effectuate the goals of accessible, sound-quality, and affordable service: by creating specific mechanisms for the Fund. And (4) to whom to direct the programs: by identifying the USF's mechanisms' beneficiaries.

Consumers' Rsch., 67 F.4th at 791 (emphases omitted). Thus, we hold that 47 U.S.C. § 254 is permissible under the nondelegation doctrine.

V. Private Nondelegation Doctrine

"[I]f people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion. . . . This commonsense principle has come to be known as

the 'private non-delegation doctrine.'" *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black,* 53 F.4th 869, 880 (5th Cir. 2022). As the Fifth Circuit aptly explained, the application of the doctrine is derived from an 80-year-old Supreme Court analysis in *Carter v. Carter Coal Co*., 298 U.S. 238, 311–12 (1936) and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940):

> In *Carter Coal*, the Court invalidated a federal law that authorized a majority of coal producers to fix wages and hours for all producers. Giving regulatory power to "private persons whose interests may be and often are adverse to the interests of others in the same business" was, the Court held, an unconstitutional "legislative delegation" of a "governmental function." Congress then rewrote the law and, four years later, the Court upheld it in *Adkins*. Under the new law, private boards only proposed prices—and those prices now had to be "approved, disapproved, or modified by the [agency]." The private entities "operate[d] as an aid" to the agency "but [were] subject to its pervasive surveillance and authority." The Court found the new scheme "unquestionably valid." The Court emphasized that the private entities "function[ed] subordinately to the [agency]," that the agency and not the private entities "determine[d] the prices," and that the agency had "authority and surveillance over the [private entities]."

Nat'l Horsemen's Benevolent & Protective Ass'n, 53 F.4th at 880–81 (alterations in original) (internal citations omitted).

From the Supreme Court's guidance, our sister circuits have held that there is no violation of the private nondelegation doctrine where the private entity functions subordinate to an agency, and the agency has authority and surveillance over the entity. *See, e.g.*, *United States v. Frame*, 885 F.2d 1119, 1128–29 (3rd Cir. 1989) ("[N]o law-making authority has been entrusted to" the private entity and therefore "the [statute] does not constitute an unlawful delegation of legislative authority. In essence, the [private entities] serve an advisory function, and in the case of collection of assessments, a ministerial one."), *abrogated on other grounds*, *Cochran v. Veneman*, 359 F.3d 263 (3rd Cir. 2004); *Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004) (holding that the private entity merely carried out the ministerial tasks of doing calculations and collecting funds, thus the "powers given to the [private entity] are of an administrative or advisory nature, and delegation of them to the [private entity] does not, we conclude, violate the nondelegation doctrine"); *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (stating that private "entities may . . . help a government agency make its regulatory decisions" and "Congress may formalize the role of private parties in proposing regulations so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve[], disapprove[], or modif[y]' them" (alterations in original)), *vacated and remanded on other grounds*, *Dep't of Transp. v.*

Ass'n of Am. R.R., 575 U.S. 43 (2015); *Nat'l Horsemen's Benevolent & Protective Ass'n*, 53 F.4th at 881 ("If the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional."); *Oklahoma v. United States*, 62 F.4th 221, 228–29 (6th Cir. 2023) ("*Adkins* shows that a private entity may aid a public federal entity that retains authority over the implementation of federal law. But if a private entity creates the law or retains full discretion over any regulations . . . it is an unconstitutional exercise of federal power." (internal citation omitted)).

Today we join our sister circuits in holding that a government agency may delegate statutory authority to private entities without violating the private nondelegation doctrine so long as (1) the entity "function[s] subordinately" to the agency, and (2) the agency retains "authority and surveillance over the activities" of the private entity. *Adkins*, 310 U.S. at 399 (alteration in original).

Private entities "may aid [a federal agency] that retains authority over the implementation of federal law" by serving "as advisors that propose regulations[,] . . . undertak[ing] ministerial functions, . . . gather[ing] facts for the agency, or advis[ing] on or mak[ing] policy recommendations to the agency." *Consumer's Rsch.*, 67 F.4th at 795 (internal citations omitted). Likewise, "a statute does not violate the private nondelegation doctrine if it 'imposes a standard to guide' the private party." *Consumers' Rsch. v. FCC*, 63 F.4th 441, 451 (5th Cir. 2023) (quoting *Texas v. Rettig*, 987 F. 3d 518,

532 (5th Cir. 2021),[3] *vacated & reh'g en banc granted*, 72 F.4th 107 (5th Cir. 2023) (mem.)).

The Petitioners argue that the FCC has impermissibly delegated its statutory authority under § 254 to the USAC in violation of the private nondelegation doctrine. Because the USAC functions subordinately to the FCC, and the FCC maintains authority, we disagree and hold that the USAC's role in carrying out the universal service fund does not violate the private nondelegation doctrine.

a. The USAC's Functions

In considering an identical private nondelegation challenge to a previous FCC Contribution Factor, the Sixth Circuit found that the USAC is "subordinate to the FCC and performs ministerial and fact-gathering functions." *Consumers' Rsch.*, 67 F.4th at 795–96. We agree. The USAC cannot make policy or interpret unclear provisions or rules. 47 C.F.R. § 54.702(c). Where there is confusion about how it should act, it must seek direction from the FCC. *Id*. The USAC must act in accordance with FCC regulations, and those regulations expressly limit the USAC's functions to ministerial functions like "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." *Id*. § 54.702(b). The USAC must file annual reports with the FCC and Congress that conform to

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[3] The Fifth Circuit mistakenly attributed the quoted portion to *Rettig*. It properly appears in *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 708 (5th Cir. 2017).

specifications outlined by the FCC. *Id*. § 54.702(g). The reports must detail the USAC's "operations, activities, and accomplishments" from the prior year and all "administrative action intended to prevent waste, fraud, and abuse." *Id*. The report must also "include all expenses, receipts, and payments associated with the administration of the universal service support programs." *Id*. Each year, the USAC must consult with the FCC "to determine the scope and content of the annual report." *Id*.

The USAC's actions are ministerial. It gathers facts to determine the Fund's needs each quarter, then proposes a dollar amount that would ensure those needs are met. *Consumer's Rsch*., 67 F.4th at 796. As discussed below, it collects and disburses the funds pursuant to statutory and FCC instruction. Finally, every decision concerning the fund is submitted for review to both the FCC and Congress. Therefore, the USAC is properly subordinate to the FCC.

b. The FCC's Authority

The Petitioners argue that the FCC's use of the USAC violates the private nondelegation doctrine because: the USAC decides how much money to raise and how to spend it, and the FCC exercises no meaningful oversight of these decisions. We disagree. A review of the regulations governing each point in the Petitioners argument reveals that the FCC maintains substantial authority over the USAC.

First, the USAC's projection for the 2022 Fourth Quarter Contribution Factor is only a proposal. *See id*. ("[T]he FCC is not bound by USAC's projections."). The

regulations make clear that "the quarterly universal service contribution factor *shall be determined by the Commission*." 47 C.F.R. § 54.709(a)(2) (emphasis added). Consequently, the USAC cannot "decide" how much money the fund will make per quarter. Instead, it submits quarterly projected costs that "must be approved" by the FCC. *Id*. § 54.709(a)(3). The FCC has the right to adjust the projection, set its own, or take no action (in which case the USAC's projection will be deemed approved by the FCC). *Id*. If approved, the projected expenses "are used to calculate the quarterly contribution factor." *Id*. Importantly, the USAC cannot apply the contribution factor to the fund contributors until the factor has been approved by the FCC. *Id*.

The Petitioners take issue with the FCC's option to deem a proposal approved through inaction. *See id*. ("If the Commission take no action within fourteen (14) days of the date of release of the public notice announcing the projections . . . the contribution factor shall be deemed approved by the Commission."). But "an agency exercises its policymaking discretion with equal force when it makes policy by either deciding to act or deciding *not* to act." *Consumer's Rsch*., 67 F.4th at 796 (alterations adopted) (internal quotation marks omitted). Thus, the USAC simply acts as an advisor that proposes regulations subject to government approval. *Adkins* 310 U.S. at 388 (explaining that private entities that aid government agencies "but [that are] subject to [the agency's] pervasive surveillance and authority" are permissible); *see also Consumer's Rsch*., 67 F.4th at 795–96.

Second, the USAC must disburse the funds collected in the manner prescribed by statute and FCC regulation.[4] The FCC mandates that the USAC "shall account for the financial transactions of the Universal Service Fund in accordance with generally accepted accounting principles . . . and maintain the accounts of the Universal Service Fund in accordance with the United States Government Standard General Ledger." 47 C.F.R. § 54.702(n). Under the implementing statute, the funds can *only* be disbursed to an eligible telecommunications carrier. 47 U.S.C. § 254(e). The USAC must report on the disbursement of the Fund to the FCC on a quarterly basis. 47 C.F.R. § 54.702(g)–(h). If a party is aggrieved by the USAC's decision making, that party may seek review by the FCC, *id*. § 54.719(b), and any decision rendered by the FCC becomes binding on the USAC for future decisions. Thus, any discretion the USAC purports to exercise in fund distribution is ultimately reviewable by the FCC to ensure it has been used in the manner prescribed by the FCC and Congress.

Last, the FCC maintains deep and meaningful control over the USAC. In addition to the ways the FCC

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[4] The USAC also collects the Universal Service Fund contributions, but this action is clearly ministerial and therefore permissible. *Oklahoma*, 62 F.4th at 229 (stating that decisions from courts of appeals hold that "[p]rivate entities. . . may undertake ministerial functions, such as fee collection"); *Pittston*, 368 F.3d at 397 ("[T]he mere ability to receive governmental monies is clearly ministerial, so that the power to receive taxes (premiums) and other federal revenues . . . does not violate the nondelegation doctrine.").

maintains final decision-making authority regarding the universal service fund, the FCC always maintains control of the USAC as an entity. It sets requirements for selection and selects each of the USAC's nineteen directors, *id*. § 54.703(b)–(c), and the Chairman of the FCC must approve or appoint the USAC's Chief Executive Officer, *id*. § 54.704(b). A review of the USAC's involvement with calculating the contribution factor process reveals no unconstitutional delegation of legislative authority. The USAC submits proposed projections of the fund's needs, and the FCC reviews the USAC's proposal. If the FCC approves the projection, it is then used in the FCC's calculation of the contribution factor. The USAC collects and disburses the funds but must do so according to statutory and administrative directions. Parties can appeal any USAC action to the FCC, and the FCC's decisions in these cases bind USAC. In sum, under § 254, the USAC is subordinate to and remains subject to the authority of the FCC. Consequently, "[s]ince law-making is not entrusted to the [USAC], this statutory scheme is unquestionably valid." *Adkins*, 310 U.S. at 399.

VI. Conclusion

Today we hold that there are no unconstitutional delegations under 47 U.S.C. § 254 because Congress has laid out the principles the FCC must follow in bringing universal service to our Nation. Additionally, because all USAC action is subordinate to the FCC, and the FCC retains ultimate decision-making power, we further hold that there is no violation of the private

nondelegation doctrine. For these reasons, we **DENY** the petition.

NEWSOM, Circuit Judge, concurring in judgment:

Although I concur in the judgment denying the petition for review, I do so reluctantly. I'm deeply skeptical that today's result can be squared with constitutional first principles. And even under existing precedent, I'm not sure how the case would come out had it been framed differently. Let me explain.

I

First, a brief tour of the statutory and regulatory landscape. Congress has tasked the FCC with administering a program designed to make telecommunications services widely available throughout the United States. *See generally* 47 U.S.C. § 254. This "universal service" program is funded through mandatory exactions on telecom companies—euphemistically called "contributions"—that are then redistributed to cash-strapped carriers that serve hard-to-reach areas, like rural and insular communities. *Id*. § 254(b), (d). The FCC determines the program's size and scope by prescribing what "universal service" should entail, guided by an "evolving" consideration of several statutory criteria. *Id*. § 254(c)(1). Having done so, the agency proceeds to decide how much carriers should have to pay into the pot in order to make "universal service" a reality. *Id*. § 254(d).

The FCC relies on a private entity called the Universal Service Administrative Company to assist it in administering the universal-service program. USAC projects universal-service funding demands, proposes contribution rates, bills and collects money from carriers, and then disburses those funds to eligible

providers. *See* 47 U.S.C. § 254(e) (describing the basic requirements for disbursement); *id*. §§ 54.701–02, 54.706, 54.708, 54.709, 54.712 (designating USAC as the administrator of the universal-service program and outlining the rules for contributions and distribution). To calculate demand, USAC uses detailed FCC-promulgated formulas, inputting companies' self-reported operating expenses and other values. *See* 47 C.F.R. §§ 54.303, 54.901, 54.1301. After crunching the numbers, USAC submits "projections of demand" to the agency 60 days before the start of each quarter. *Id*. § 54.709(a)(3). Thirty days later, the FCC publishes USAC's proposed contribution rate for all telecommunications carriers. *Id*.

If the FCC fails to countermand USAC's contribution rate within two weeks, the rate goes into effect for the quarter, and carriers are charged accordingly. *Id*. The agency apparently exercises its oversight authority sparingly; so far as I can tell, it has disapproved or modified USAC's rate only three times in the last 25 years. *See First Quarter 1998 Universal Service Contribution Factors Revised and Approved*, CC Docket No. 96-45, Public Notice, 12 FCC Rcd. 21881, 21886 (1997); *Revised Second Quarter 2003 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice,18 FCC Rcd. 5097 (2003); *Proposed Third Quarter 2023 Universal Service Contribution Factor*, DA 23-507, 2023 WL 4012359 (June 14, 2023). In one instance, the FCC rounded the rate up fifty-six one-thousandths of a percentage point, from 9.044% to 9.1%. *See Revised Second Quarter 2003*, 18 FCC Rcd. 5097. Another occurred (serendipitously or otherwise)

during the pendency of this litigation and, in fact, involved nothing more than a minor front-end adjustment carrying unspent funds forward to a new quarter. *See Proposed Third Quarter 2023*, 2023 WL 4012359; *see also Proposed Fourth Quarter 2023* CC Docket No. 96-45, Public Notice, DA 23-843 (Sept. 13, 2023) (also noting the carryover funds for the fourth quarter).

USAC's collections activity brings in real money. The record indicates that USAC was projected to collect nearly $2 billion from carriers *in the final quarter of 2022 alone*, a figure that dwarfs the FCC's entire annual budget. *Compare FCC, Proposed Fourth Quarter 2022 Universal Service Contribution Factor*, Public Notice, 2022 WL 424497 (Sept. 13, 2022) (projecting $1.914 billion in universal-service program collection for the quarter), *with* FCC, *2022 Budget Estimates to Congress*, DA 22-946, 2021 WL 2190014 (May 1, 2021) (requesting approximately $500 million for the year).

II

Petitioners principally contend that in 47 U.S.C. § 254 Congress has unconstitutionally delegated its "legislative Powers" to the FCC. *See* U.S. Const. art. I, § 1, cl. 1. As an original matter, I suspect they may well be right. Their challenge fails, as I see it, only because non-delegation doctrine has become a punchline.

First off, what exactly is "legislative Power[]"? In short, it's the authority "to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy v. United States*, 139 S. Ct. 2116, 2133

(2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *accord Department of Transp. v. Association of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring) (similar). By that measure, the FCC is almost *certainly* exercising legislative power when it decides, among other things, how big the universal-service program should be, what it should entail, and how much carriers should have to chip in to bring it to fruition.

The contribution scheme, in particular, seems suspect. In practical effect, the universal-service "contributions" are probably taxes, in that they are exacted from all telecom carriers but are redistributed only to the subclass of those that are "eligible" on the ground that they serve high-cost and underserved areas. *See* 47 U.S.C. § 254(d)–(e); 47 C.F.R. § 54.701(c)(1); *see also National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341–42 (1974) (distinguishing a tax from a fee on the ground that the latter "bestows a benefit on the applicant, not shared by other members of society").[1] Setting tax rates sure seems like a legislative power to me. *See* The Federalist No. 56 at 1 (James Madison or Alexander Hamilton) (Clinton Rossiter ed., 1961) ("What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.");

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[1] It also seems to me relevant to the contributions' "tax" status that the statute itself designates the American public—writ large, rather than the payor carriers—as the universal-service program's principal beneficiary. *See* 47 U.S.C. § 254(b)(2).

National Cable, 415 U.S. at 341–42 ("Taxation is a legislative function and Congress . . . is the sole organ for levying taxes.").[2] Likewise, prescribing the universal-service program's sweep and scope—determining what it should accomplish, to what extent, and where—strikes me as the sort of "policy judgment[]" that "Congress, and not the Executive Branch, [should] make." *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting).

Section 254 gives the FCC only the faintest, most vacuous guidance about how to exercise its authority. For instance, in crafting "policies for the preservation and advancement of universal service," the statute

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[2] I recognize that two other circuits have concluded that the universal-service contributions constitute fees rather than taxes. *See Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1091 (D.C. Cir. 2012); *Texas Off. Pub. Util. Couns. v. FCC (TOPUC I)*, 183 F.3d 393, 440 (5th Cir. 1999). Respectfully, I'm not so sure. Notably, one of those courts deemed the contributions fees in order to avoid the con- stitutional difficulties that would arise were they instead deemed taxes. *See TOPUC I*, 183 F.3d at 440 (stating that the "FCC's decision to extend universal service support to internet access and internal connections raises grave doubts as to whether § 254(h) creates an unconstitutional tax" and accordingly "construe[ing] the statute narrowly to avoid raising these constitutional problems"). In any event, the Supreme Court's decision in *Skinner v. Mid-America Pipeline Co*. indicates that the tax-fee distinction shouldn't affect the nondelegation analysis. 490 U.S. 212, 222–23 (1989) (rejecting "the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").

directs the agency to consider a handful of "principles." 47 U.S.C. § 254(b). Among them, the agency shall—

- aim to make "[q]uality services" available at "just, reasonable, and affordable rates," *id*. § 254(b)(1);
- endeavor to make telecom services available to "[c]onsumers in all regions of the Nation" at rates that are "reasonably comparable to rates charged for similar services in urban areas," *id*. § 254(b)(3);
- require all telecom carriers to make "an equitable and nondiscriminatory contribution to the preservation and advancement of universal service," *id*. § 254(b)(4); and
- ensure that there are "specific, predictable and sufficient Federal and State mechanisms" to preserve and advance universal service, *id*. § 254(b)(5).

Those hazy "principles"—grounded in terms like "just," "reasonable," "affordable," "reasonably comparable," "equitable," "predictable," and "sufficient"—cannot possibly constrain the FCC's policymaking discretion in any meaningful way. They leave the agency all the room it needs to do essentially whatever it wants. And to make matters even worse—even more open-ended—§ 254(b) adds a catch-all clause, which authorizes the FCC to consider "[s]uch other principles" as 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).

Further diminishing the likelihood of any real guidance, the term "universal service"—the very object of the entire program—is defined only in the most ambiguous way. "Universal service," the statute says, is an "evolving" concept that should "tak[e] into account advances in telecommunications and information technologies and services." *Id*. § 254(c)(1). In specifying the content of that concept, the statute vaguely directs the 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—the kicker—(d) are "consistent with the public interest, convenience, and necessity." *Id*.

Finally, § 254 provides similarly squishy (which is to say essentially no) direction about how much telecom companies should actually be charged: "Every 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." *Id*. § 254(d). Candidly, I have *no* idea what that means.

As a matter of first principles—as in real life—such empty, mealymouthed shibboleths provide no

meaningful constraint; to the contrary, they confer front-line law- and policymaking power on unelected, unaccountable agency bureaucrats. *See* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 369 (2002) (suggesting that a statute that allows a "ratemaking agency" to "choose its own standard for the rate base" would be "invalid[]").[3]

But—and herein lies the problem—I don't think I can say that the so-called "principles" that § 254 articulates are any less "intelligible" than those that the Supreme Court has explicitly sanctioned as sufficiently clear to forestall a non-delegation challenge. *See Gundy*, 139 S. Ct. at 2123 (2019) ("[W]e have held, time and again, that a statutory delegation is constitutional as 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.'" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). To take just one example, the Court has upheld

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[3] I'm aware of Founding-era evidence indicating that agency boards some- times set real-estate valuations that served as the baselines for the imposition of taxes. But I see that as a fact-finding exercise appropriate to Executive Branch determination, not as the articulation of any generally applicable policy. *Cf.* Nicholas 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, 1313 & n.102 (2021) (presenting "skeptics'" argument that setting valuations is a fact-finding exercise). In the cited example, Congress set the tax rates via statute; the assessors merely determined the taxed property's value. *See id*. at 2020–21.

a statute directing the FCC to act in the "public interest, convenience, or necessity" on the ground that it wasn't "so indefinite as to confer an unlimited power" and didn't leave the agency wholly "at large in performing this duty." *National Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *see also, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001) ("requisite" "to protect the public health"); *Yakus v. United States*, 321 U.S. 414, 421, 427 (1944) ("so far as practicable," "fair and equitable"). In light of the decidedly "not demanding" standards that the Court has tolerated to date, *Gundy*, 139 S. Ct. at 2129, I think the majority here is correct to conclude that, under existing precedent, § 254 probably passes constitutional muster.

To be clear, I'm not at all "convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power." *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). But taking the intelligible-principle standard as I find it, I feel constrained to conclude that § 254 satisfies it.

III

Petitioners separately raise a "private nondelegation" challenge. *See* Br. of Petrs. at 64–70; Reply Br. of Petrs. at 43–49. I'll have to say, though, that it's hard to discern precisely what they mean by that. Clearly, they object to USAC's participation in the universal-service program. What's less clear to me is on exactly what ground. As I understand their position, petitioners contend that USAC—the private entity that the FCC has tapped to help it run the program—is

impermissibly exercising *legislative* power. Thus, for instance, petitioners conclude their brief by arguing that USAC's involvement "violates the private nondelegation doctrine, *contrary to Article I of the U.S. Constitution*." Br. of Petrs. at 70 (emphasis added); *see also id*. at 64 ("But that is exactly what has happened here—'[w]hat [i]s essentially a *legislative* determination' is now 'made not by Congress or even by the Executive Branch but by a private group.'" (emphasis added) (alterations in original).

To the extent that's the gist of petitioners' private-delegation challenge, I disagree with it. I don't think that USAC is exercising legislative power. So far as I can tell, the majority is right that the FCC establishes the formulas from which USAC derives the contribution rate. *See* Maj. Op. at 3; 47 C.F.R. §§ 54.303, 54.901, 54.1301. Accordingly, to the extent that rate-setting is a legislative function—and I think it is, *see supra* at 3–5—it's the FCC that's exercising legislative power. As I've said, as a first-principles matter, I think that the agency is violating the Constitution in doing so. *See supra* at 3–7. But if under existing precedent I'm stuck with the fiction that the FCC isn't acting legislatively when it sets the rates, then I think it follows *a fortiori* that USAC isn't doing so either. *Cf*. 47 C.F.R. § 54.702(c) ("[USAC] may not make policy . . . .").

Even so, it might yet be the case that USAC is operating ultra vires—for either of at least two reasons. Because petitioners haven't teed up either objection, I offer only a few preliminary observations.

A

First, it 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. As already explained, the statute charges the FCC with establishing "mechanisms" to "preserve and advance universal service" such that "[e]very telecommunications carrier" will "contribute" to the program. 47 U.S.C. § 254(d). But it says nary a word about USAC. That alone seems a pretty good reason to think that USAC shouldn't be exercising governmental power. *Cf. Carter v. Carter Coal Co*., 298 U.S. 238, 311 (1936) (deeming delegation of governmental power to a private entity "obnoxious" even where Congress *had* explicitly authorized it).[4] For whatever reasaon, though, petitioners haven't framed

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[4] At oral argument, the FCC asserted that § 254(j) contains what is, in effect, a veiled acknowledgement of USAC's role. *See* Oral Arg. at 23:08–24:25. I'm not convinced. All subsection (j) says is that "[n]othing in this section shall affect the contribution, distribution, or administration of the Lifeline Assis- tance Program . . . ." 47 U.S.C. § 254(j). That program was originally run by the National Exchange Carrier Association, another private organization that preceded USAC. *See Allnet Comm. Serv., Inc. v. National Exch. Carrier Ass'n, Inc*., 965 F.2d 1118, 1119 (D.C. Cir. 1992) (observing that NECA collected access charges for the Lifeline Assistance Program). Conspicuously, though, § 254(j) never mentions NECA, much less sanctions a private entity's involvement in the program's administration. I think it strains credulity to read subsection (j) as authorizing USAC's participation in the universal-service scheme.

their challenge in statutory terms, so I won't pursue the matter further.[5]

B

Second, and separately, even if USAC isn't impermissibly exercising legislative power, its involvement in the universal-service program may yet violate the Constitution. "[B]ound to apply [the] 'intelligible principle' test," and thus to conclude that there's been no unlawful delegation of *legislative* power, *Association of Am. R.Rs.*, 575 U.S. at 90 (Thomas, J., concurring), I'm left to ask two follow-on questions,

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[5] I realize that some of my colleagues have found the lack of statutory authorization relevant to the question whether a private-delegation arrangement violates the Constitution. *See Texas v. Rettig*, 993 F.3d 408, 413–15 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). To be sure, when the operative statute requires an agency to act, as ours does, *see* 47 U.S.C. § 254(d), and yet doesn't authorize further subdelegation to a private entity, that subdelegation violates the statute. *See, e.g., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004). I'm less convinced, though, that congressional authorization (or the lack thereof) has any real bearing on the *constitutional* question, if only because we generally don't take Congress's word for whether a scheme is constitutional. For the same essential reason, I think that *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), is largely inapposite—to the constitutional question, I mean. That case merely holds, as a statutory matter, that when a provision says that the "applicable federal agency must bear the responsibility for the ultimate work product," the agency "must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process." *Id*. (internal quotation omitted). I don't think it bears on the constitutionality of the agency's subdelegation to a private party.

neither of which the parties here have squarely teed up: Is USAC exercising *executive* power, and if so, is it "constitutionally eligible" to do so? *Id*.

The answer to the first of those two follow-ons is clear. The majority opinion accurately describes USAC's role in the universal-service program: "The FCC depends on [USAC], a private entity, to carry out Congress's instruction[s]." Maj. Op. at 3; *see also id*. at 14 (referring to "USAC's role in carrying out the universal service fund"). And that description perfectly describes the "executive" function. The term "execute" has long meant—and means today—"to carry out or into complete effect." *Webster's New International Dictionary* (2d ed. 1944); *accord* Noah Webster, *An American Dictionary of the English Language* (1828) ("to carry into complete effect"); 1 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) ("[t]o put in act; to do what is planned or determined"). So yes, it seems obvious to me that in collecting de facto taxes and distributing benefits USAC is exercising "executive" power.

The critical question, then, is whether the Constitution permits it to do so.[6] Let's start with what

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[6] So far as I can tell, none of the pertinent Supreme Court decisions have tackled the question whether a private party was impermissibly exercising executive power; rather, all have addressed the allegedly unlawful exercise of *legislative* authority. In 1936, the Court in *Carter Coal* invalidated a statute that authorized a group of private business owners to set maximum work hours. 298 U.S. at 311. In so doing, the Court called the scheme "*legislative* delegation in its most obnoxious form." *Id*.

we know for sure. First, "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take care that the Laws be faithfully executed.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cls. 1; *id.* § 3); *see also id.* at 2197 ("The entire 'executive Power' belongs to the President alone."). Second, "[b]ecause no single person could

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(emphasis added). Several years later, after the infamous "switch in time" the Court twice upheld statutes that conferred authority on private entities against challenges that they "involve[d] any delegation of *legislative* authority." *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (emphasis added); *accord Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("Nor has Congress delegated its legislative authority to the industry. . . . Since *law-making* is not entrusted to the industry, this statutory scheme is unquestionably valid." (emphasis added)).

Our sister circuits' decisions have likewise focused on the question whether private entities were unconstitutionally exercising legislative (rather than executive) authority. *See, e.g., Frame v. United States*, 885 F.2d 1119, 1128–29 (3d Cir. 1989) (observing that because "no law-making authority ha[d] been entrusted to" the private entity, the statute in question did "not constitute an unlawful delegation of legislative authority"); *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880–83 (5th Cir. 2022) (criticizing a scheme that gave "rulemaking power" to a private entity); *cf. Pittston Co. v. United States*, 368 F.3d 385, 397 (4th Cir. 2004) (stating, without citation, that "the mere ability to receive governmental monies is clearly ministerial"). Only the Sixth Circuit in *Oklahoma v. United States* acknowledged the "[d]iffcult and fundamental questions" that may "arise when private entities enforce federal law." 62 F.4th 221, 233 (6th Cir. 2023) (internal quotation omitted). Notably, though, because the parties there (like those here) hadn't "engaged with this feature of the Act," the court declined to do so. *Id.*

fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance"—provided, at least, that he maintains sufficient supervisory authority over them. *Id*. at 2191; *see also, e.g.*, Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 795 (2003); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 J. Const. L. 781, 790 (2009).

Beyond that, things get hazier. In particular, the question whether (and to what extent) a private party or entity may share in the Executive Branch's implementation of federal policy is, to use a buzzphrase du jour, undertheorized. There is, I think it's fair to say, evidence pointing in both directions.

On the one hand, the Constitution's text and structure indicate—admittedly without saying so explicitly—that private parties may not be tasked with exercising governmental power of any sort. Justice Thomas has explained the point well: "Although no provision of the Constitution expressly forbids private entities f rom exercising government authority," the "so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses":

> 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. In short, the "private nondelegation doctrine" is merely one

> application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

Association of Am. R.Rs., 575 U.S. at 87–88 (Thomas, J., concurring); *see also Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (emphasizing that the three parallel Vesting Clauses lodge "the authority to exercise different aspects of the people's sovereign power in distinct entities"). Put simply, "when it comes to private entities" exercising governmental power, "there is not even a fig leaf of constitutional justification." *Association of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring).

And to be clear, it's not all form and structure. Delegation of government power to private entities also raises practical and fairness concerns. As the Supreme Court said almost a century ago, delegation of official power to a private party is "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." *Carter Coal*, 298 U.S. at 311. Emphasizing the Court's rationale there, at least one commentator has described *Carter Coal* as turning, fundamentally, on the due process concerns that attend allowing one private, self-interested party to harness the coercive power of the state to regulate others. *See* Alexander Volokh, *New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37

Harv. J. L. & Pub. Pol'y 931, 980–81 (2014); *see also* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 257 (2023).

All of this squares with what I've said before about the prospect of private parties exercising *executive* power, in particular— namely, that they can't. That is so, I've said, for both "formal, structural reasons—in particular, Article II's explicit vesting of federal 'executive Power' in the President"—and "instrumental ones"— specifically, the risks inherent in giving enforcement power to those not "subject to political and legal constraints." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1294–95 (11th Cir. 2022) (Newsom, J., concurring), *vacated*, 77 F.4th 1366, 2023 (11th Cir. 2023); *accord Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1133 (11th Cir. 2021) (Newsom, J., concurring) ("From [Article II's] explicit vesting, it follows that the 'executive Power' can't be exercised by private parties.").

Now, in the interest of completeness, I should acknowledge some historical counterevidence—areas and instances in which private parties and entities seemingly *have* been allowed to exercise what would certainly seem to be executive authority. One obvious example: The Constitution itself contemplates that private individuals—in essence, mercenaries—might play a role in international law enforcement. *See* U.S. Const. art. 1 § 8, cl. 11 (allowing Congress to "grant Letters of Marque and Reprisal"). There's also a fairly long history in this country of private entities managing prisons. *See, e.g.*, Gillian Metzger, *Privatization as*

Delegation, 103 Colum. L. Rev. 1367, 1392–93 (2003) (noting that "[e]xtensive privatization characterized incarceration in the nineteenth century," waned during the early twentieth century, and has since come back into vogue). The nation's early years saw private parties bringing criminal prosecutions—a practice that, needless to say, has died out—and qui tam actions—a practice that has persisted. *See, e.g.*, Zachary Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 720–22 (2014); *but see United States ex rel. Polansky v. Executive Health Res., Inc.*, 599 U.S. 419, 449 (Thomas, J., dissenting) ("There are substantial arguments that the qui tam device is inconsistent with Article II . . . ."). And most recently, the Supreme Court recognized that "[f]or as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2255 (2021).

As best I can tell, the history of private-party involvement in tax collection—a role roughly analogous to one that USAC seems to play in § 254's universal-service scheme—is mixed. In the Founding era, private parties seem not to have been involved. The First Congress created the Treasury Department in 1789 to, among other things, collect federal taxes, and it has been doing so ever since. *See* U.S. Dep't of the Treasury, *History Overview*, https://home.treasury.gov/about/history/history-overview (last visited Sept. 22, 2023) (listing "collecting income and excise taxes" as one of the Treasury's "activities," "formally established as an ex- ecutive department by the First Session of

Congress in 1789"); Prakash, *Essential Meaning*, at 747 (citing Montesquieu for the proposition that tax collection is a quintessential government task); *see also, e.g.*, Act of July 11, 1798, ch. 71, §§ 1–16, 1 Stat. 591, 591–94 (repealed) (setting compensation for tax collectors during the Fifth Congress); id., ch. 70, §§ 2–9, 28–30, 1 Stat. 580, 583, 590–91 (1798) (setting compensation and requiring oaths for federal real-estate assessors); Act of July 14, 1798, ch. 75, § 2, 1 Stat. 597, 598 (1798) ("That the said tax shall be collected by the supervisors, inspectors, and collectors of the internal revenues of the United States . . . ."); Act of Mar. 3, 1804, ch. 20, §§ 1–7, 2 Stat. 262, 262–64 (1804) (using tax collectors for the direct tax); Oliver Wolcott, Compensation of Officers of the Revenue (Apr. 17, 1798), *in* 1 American State Papers, Finance 576, 576–79 (1832) (encouraging Congress to accept a proposed "augmentation of compensation" for tax collectors to "prevent the greatest embarrassments").

For a brief period in the 1870s, and again more recently, the federal government experimented with privatized tax collection. The 19th-century effort failed spectacularly—and very publicly— and was scrapped after just two years. *See, e.g.*, H.R. Rep. No. 559 at 9 (1874) ("The committee are of [the] opinion that any system of farming the collection of any portion of the revenues of the Government is fundamentally wrong; that no necessity for such laws exist[s], for the reason that the Secretary of the Treasury and the head of the Internal-Revenue Bureau are fully empowered by law to make all collections of taxes . . . ."); 2 Cong. Rec. 2121 (1874) (statement of Sen. Hale) ("[I]n [this law's]

inception it was, in my view, wholly, radically, violently, wickedly wrong."); *The President and the Sanborn Business*, N.Y. Times, May 5, 1874 (describing one of the private tax collectors as a "superlative rogue who has swindled the Government from one month's end to another with amazing impunity"). The more modern experiment began about 20 years ago and remains ongoing. IRS, *Private Debt Collection* (July 5, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/private- debt-collection; Emily Rockwood, *Privatizing Tax Collection: A Case Study in the Outsourcing Debate*, 36 Pub. Cont. L.J. 423, 427 (2007).

Candidly, I'm not quite sure what to make of all this—the textual, structural, and historical indicators seem to point in different (or multiple) directions. But of this much I'm confident: To the extent that delegation of executive power to a private entity outside the government is permissible at all, it is permissible *only* if that entity "is adequately subject to Presidential control." *Assoc. of Am. R.Rs.*, 575 U.S. at 91 (Thomas, J., concurring). So if I'm right that USAC is exercising executive power, *see supra* at 12, then the question becomes, at the very least, whether USAC is subject to the sort of control that Article II demands. *See generally* Alexander Volokh, *supra*, at 248, 254.

That, to my mind, is far from clear. To be sure, USAC operates under *some* supervision. For example, it has to file annual reports detailing its activities. *See* 47 C.F.R. 54.702(g). The FCC retains the formal authority to reject USAC determinations, and a party wishing to challenge one of those determinations is entitled to a hearing before the agency. *See id.* §§

54.709(a)(3); 54.719; 54.722. Critically, though, with respect to the proposed universal-service "contribution factor," in particular—the primary and most direct way that USAC executes congressional directives—the FCC needn't (and overwhelmingly doesn't) do anything at all. *See supra* 2–3. Unless and until the agency steps in to affirmatively countermand USAC's proposed exaction within 14 days, it goes into effect by sheer force of inertia. *Id*. Accordingly, while the FCC maintains a patina of control over USAC's most important function, the fact that agency approval can be entirely passive—and in fact, is effectively presumed—calls into question how meaningful its control really is.

In any event, the key isn't the degree of the FCC's control, but the *President's*. And in that connection, the Supreme Court's decisions "treat appointment and removal powers as the primary devices of executive control." *Assoc. of Am. R.Rs*., 575 U.S. at 91 (Thomas, J., concurring) (citing *Free Enter. Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 492 (2010)). The removal issues vis-à-vis USAC, it seems to me, are doubly fraught. First, the only word regarding USAC's removal comes from its own bylaws, which authorize the entity's board to remove one of its members by a majority vote and with the approval of the FCC's chairman. *See* By-Laws of Univ. Serv. Admin. Co., art. 2 https://www.usac.org/wp-content/uploads/about/documents/leadership/usacbylaws.pdf. So far as the bylaws are concerned, then, USAC is essentially in charge of its own continuance in office. Second, and to compound matters, because the FCC is an independent

agency, whose commissioners may be removed only for cause, *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537F.3d 667, 695–96 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010), USAC's board members enjoy something akin to the double-for-cause-removal protection that the Supreme Court has recently held to be unconstitutional. *See Seila Law*, 140 S. Ct. at 2197; *Free Enter. Fund*, 561 U.S. 477 at 484 (2010). And, it seems to me, the removal-and control-related considerations that attend delegation of executive power to a private entity are at least as acute as—if not demonstrably more acute than—those that attend delegation to an administrative agency. Delegation to a private entity breaks the ordinary chain of accountability that our "carefully calibrated" system of government is designed to uphold. *Seila Law*, 140 S. Ct. at 2203.[7]

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[7] I suppose the FCC (although not the President) retains some modicum of authority over the appointment of USAC's directors. *See* 47 C.F.R. § 54.703. Even there, though, the agency's oversight is minimal and is filtered through private groups' preferences: The FCC Chairman's initial selection comes from the "nominations submitted by industry and non-industry groups"; he can make his own selection in the event they can't "reach consensus on a nominee or fail[] to submit a nomination." *Id*. § 54.703(c)(3). USAC's Chief Executive Officer is selected in much the same way: first, the board forwards names for the FCC Chairman's review; then, if no consensus is reached, the Chairman makes the selection. *Id*. § 54.704(b).

Because petitioners didn't squarely present either a statutory or an executive-delegation challenge, I won't go any further. Suffice it to say, though, that nondelegation issues do not necessarily end with Article I. Article II provides important limits, as well, however uncertain under current doctrine.

III

Bound by precedent and the parties' framing of the issues, I concur in the majority's judgment. But this case illuminates deeper problems in nondelegation precedent. After all, "[l]iberty requires accountability." *Ass'n of Am. R.Rs.*, 575 U.S. at 57 (Alito, J., concurring). But with each successive delegation—from Congress to agencies, and then from agencies to private parties—we drift further and further from the locus of democratic accountability. The Constitution imposes important limits on how the government goes about doing its job. If it can't do everything it wants to do—such that it has to outsource responsibilities to private parties—that may indicate it's trying to do too much.

LAGOA, Circuit Judge, concurring:

I concur in the majority opinion. But I share much of the same concerns expressed by Judge Newsom in his concurring opinion about how the current nondelegation doctrine, which requires courts to look to "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion," *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion), has strayed from constitutional first principles, *see* Newsom Conc. at 3–9; *see also Gundy*, 139 S. Ct. at 2133–42 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). However, we are bound to apply the intelligible principle test as set forth by Supreme Court precedent. And given how both the Supreme Court and this Court have applied the intelligible principle test in rejecting nondelegation challenges to other statutes, *see, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Yakus v. United States*, 321 U.S. 414 (1944); *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Lichter v. United States*, 334 U.S. 742 (1948); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *United States v. Brown*, 364 F.3d 1266 (11th Cir. 2004), I believe that those cases require us to find that 47 U.S.C. § 254's statutory language likewise satisfies the intelligible principle test, as the majority opinion concludes.

With this understanding, I concur.

APPENDIX B

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Universal Service Contribution Factor
CC Docket No. 96-45

In this Public Notice, the Office of Managing Director (OMD) announces that the proposed universal service contribution factor for the fourth quarter of 2022 will be 0.289 or 28.9 percent.[1]

Rules for Calculating the Contribution Factor

Contributions to the federal universal service support mechanisms are determined using a quarterly contribution factor calculated by the Federal Communications Commission (Commission).[2] The Commission calculates the quarterly contribution factor based on the ratio of total projected quarterly costs of

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[1] *See* 47 C.F.R. § 54.709(a).

[2] *See id*.

the universal service support mechanisms to contributors' total projected collected end-user interstate and international telecommunications revenues, net of projected contributions.[3]

USAC Projections of Demand and Administrative Expenses

Pursuant to section 54.709(a)(3) of the Commission's rules,[4] the Universal Service Administrative Company (USAC) submitted projections of demand and administrative expenses for the fourth quarter of 2022.[5] Accordingly, the projected demand and expenses are as follows:

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[3] *See* 47 C.F.R. § 54.709(a)(2).

[4] *See* 47 C.F.R. § 54.709(a)(3).

[5] *See* Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2022, available at <https://www.usac.org/fcc-filings> (filed August 2, 2022) *(USAC Filing for Fourth Quarter 2022 Projections*; *See also* Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2022, available at <https://www.usac.org/fcc-filings> (filed September 1, 2022) (*USAC Filing for Fourth Quarter 2022 Contribution Base*).

($ millions)

Program Demand	Projected Program Support	Admin. Expenses	Application of True-Ups & Adjustments	Total Program Collection (Revenue Requirement)
Schools and Libraries	593.30	21.69	(5.92)	609.07
Rural Health Care[6]	0	0	0.11	0.11
High-Cost	1,100.74	17.94	(33.62)	1,085.06
Lifeline	290.07	29.09	(107.73)	211.43
Connected Care	8.33	0.12	(0.09)	8.36
Total	1,992.44	68.84	(147.25)	1,914.03

[6] $152.64 million projected program demand for Rural Health Care was funded with available funds rolled forward from prior years' collections. Rural Health Care administrative costs of $6.79 million are funded within the program cap. *See* Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2022, available at <http://www.usac.org/fcc-filings> (filed August 2, 2022) (*USAC Filing for Fourth Quarter 2022 Projections*).

USAC Projections of Industry Revenues

USAC submitted projected collected end-user telecommunications revenues for October 2022 through December 2022 based on information contained in the Fourth Quarter 2022 Telecommunications Reporting Worksheet (FCC Form 499-Q).[7] The amount is as follows:

> Total Projected Collected Interstate and International End-User Telecommunications Revenues for Fourth Quarter 2022: $8.624083 billion.

Adjusted Contribution Base

To determine the quarterly contribution base, we decrease the fourth quarter 2022 estimate of projected collected interstate and international end-user telecommunications revenues by the projected revenue requirement to account for circularity and decrease the result by one percent to account for uncollectible contributions. Accordingly, the quarterly contribution base for the fourth quarter of 2022 is as follows:

> Adjusted Quarterly Contribution Base for Universal Service Support Mechanism
>
> (Fourth Quarter 2022 Revenues - Projected Revenue Requirement) * (100% - 1%)
>
> = ($8.624083 billion – $1.914030 billion) * 0.99
>
> =$6.642952 billion.

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[7] *USAC Filing for Fourth Quarter 2022 Contribution Base* at 4.

Unadjusted Contribution Factor

Using the above-described adjusted contribution base and the total program collection (revenue requirement) from the table above, the proposed unadjusted contribution factor for the fourth quarter of 2022 is as follows:

> Contribution Factor for Universal Service Support Mechanisms
>
> > Total Program Collection / Adjusted Quarterly Contribution Base
> >
> > =$1.914030 billion / $6.642952 billion
> >
> > =0.288129

Unadjusted Circularity Factor

USAC will reduce each provider's contribution obligation by a circularity discount approximating the provider's contributions in the upcoming quarter. Accordingly, the proposed unadjusted circularity factor for the fourth quarter of 2022 is as follows:

> Unadjusted Circularity Factor for Universal Service Support Mechanisms
>
> > = Total Program Collection / Projected Fourth Quarter 2022 Revenues
> >
> > = $1.914030 billion / $8.624083 billion
> >
> > = 0.221940

Proposed Contribution Factor

The Commission has directed OMD to announce the contribution factor as a percentage rounded up to the nearest tenth of one percent.[8] Accordingly, the proposed contribution factor for the fourth quarter of 2022 is as follows:

28.9%

Proposed Circularity Discount Factor

The Commission also has directed OMD to account for contribution factor rounding when calculating the circularity discount factor.[9] Accordingly, the proposed circularity factor for the fourth quarter of 2022 is as follows:

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[8] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in- Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Order and Second Order on Reconsideration, 18 FCC Rcd 4818, 4826, para. 22 (2003) *(Second Order on Reconsideration*).

[9] *Id*.

0.22428410[10]

Conclusion

If the Commission takes no action regarding the projections of demand and administrative expenses and the proposed contribution factor within the 14-day period following release of this Public Notice, they shall be deemed approved by the Commission.[11] USAC shall use the contribution factor to calculate universal service contributions for the fourth quarter of 2022. USAC will reduce each provider's contribution obligation by a circularity discount approximating the provider's contributions in the upcoming quarter.[12] USAC includes contribution obligations less the circularity discount in invoices sent to contributors. Contribution payments are due on the dates shown on the invoice. Contributors will pay interest for each day for which the payments are late. Contributors failing to pay contributions in a timely fashion may be subject to the enforcement provisions of the Communications Act of 1934, as amended, and any other applicable law. In addition,

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[10] The proposed circularity discount factor = 1 + [(unadjusted circularity discount factor – 1) * (unadjusted contribution factor / proposed contribution factor)]. The proposed circularity discount factor is calculated in a spreadsheet program, which means that internal calculations are made with more than 15 decimal places.

[11] *See* 47 C.F.R. § 54.709(a)(3).

[12] USAC will calculate each individual contributor's contribution in the following manner: (1-Circulatory Factor) * (Contribution Factor*Revenue)

contributors may be billed by USAC for reasonable costs of collecting overdue contributions.[13]

We also emphasize that carriers may not mark up federal universal service line-item amounts above the contribution factor.[14] Thus, carriers may not, during the fourth quarter of 2022, recover through a federal universal service line item an amount that exceeds 28.9 percent of the interstate telecommunications charges on a customer's bill.

In addition, under the limited international revenues exception (LIRE) in section 54.706(c) of the Commission's rules, a contributor to the universal service fund whose projected collected interstate end-user telecommunications revenues comprise less than 12 percent of its combined projected collected interstate and international end-user telecommunications revenues shall contribute based only on projected collected interstate end-user telecommunications revenues, net of projected contributions.[15] The rule is intended to exclude from the contribution base the international end-user telecommunications revenues of any entity whose annual contribution, based on the provider's interstate and international end-user telecommunications revenues, would exceed the

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[13] *See* 47 C.F.R. § 54.713.

[14] *See* 47 C.F.R. § 54.712.

[15] *See* 47 C.F.R. § 54.706.

amount of its interstate end-user revenues.[16] The proposed contribution factor exceeds 12 percent, which we recognize could result in a contributor being required to contribute to the universal service fund an amount that exceeds its interstate end-user telecommunications revenue. Should a contributor face this situation, the contributor may petition the Commission for waiver of the LIRE threshold.[17]

For further information, contact Thomas Buckley at (202) 418-0725 or Kim Yee at (202) 418- 0805, TTY (888) 835-5322, in the Office of Managing Director.

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[16] *See Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration, CC Docket No. 96-45, Eighth Report and Order, CC Docket No. 96-45, Sixth Report and Order, Docket No. 96-262, 15 FCC Rcd 1679, 1687-1692, paras. 17-29 (1999) (*Fifth Circuit Remand Order*).

[17] Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may consider considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166; 47 C.F.R. § 54.802(a).

APPENDIX C

47 U.S. Code § 254 - Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15

months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that

are 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.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall 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.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the

definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution

Every 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. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section

214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

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