No. 23-743

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA, 20 OTHER STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

(1) Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no limit on the Federal Communications Commission's power to raise revenue for the Universal Service Fund.

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

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Agencies are finding all kinds of creative new ways to grab money and power for themselves lately. Perhaps they use statutory silence to justify creating a new funding mechanism from whole cloth. See *Loper Bright Enters.* v. *Raimondo*, 143 S. Ct. 2429 (2023). Maybe they accumulate an unsupervised slush fund by drawing hundreds of millions of dollars from the Federal Reserve. See *CFPB* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 143 S. Ct. 978 (2023). Or they might dragoon States into levying fees on their behalf by threatening the States that they'll lose their regulatory authority in the field if they don't acquiesce. See *Oklahoma* v. *United States*, No. 23-402 (petition filed Oct. 13, 2023). Options abound. But all in all, agencies are flexing their muscle in more areas, sucking up more money from the public, and dodging supervision from the elected lawmakers that are supposed to keep watch. No wonder, then, that more and more administrative actions are finding their way to this Court's docket.

This case involves an agency scheme that uniquely combines many of the problematic elements seen before. Every year, the Federal Communications Commission extracts billions from American consumers based on a vague statute that says telecommunications providers "should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4). There's no statutory cap on how much the Commission can collect, and the fee need only be justified by fuzzy notions like

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[*] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

"quality" and "access" to services. *Id.* § 254(b)(1)-(3). And the Commission doesn't even do the work of setting these rates itself. Instead, a private company recommends a number that the Commission rubberstamps on the backend. Huge sums of money—greater than the total government spending for the entire State of Montana—are raked in and doled out with next to no congressional oversight.

Yet this creativity proves to be unconstitutional. Congress must *at least* provide real guidance and limits if it purports to delegate legislative authority to agencies, and the relevant statutes here fail to do even that. Congress's choice is even more problematic because it delegates away some of its taxing and spending powers—powers that fall within the heartland of legislative authority. The Commission then exacerbated the problem by rolling its wide-open discretion over to a private organization. And although the FCC nominally retains oversight over the corporation's numbers, that authority is next to meaningless given that the corporation's decisions automatically take effect after a brief layover period. All this means that States and other interested parties are effectively shut out from real engagement with the funding decisions.

Amici States recognize the goal of securing universal telecommunications service is laudable. Citizens in the deepest hollers or furthest wilds should be able to connect. But even those most sympathetic to the program's objectives are beginning to experience "compassion fatigue." Rob Frieden, *Remedies for Universal Service Funding Compassion Fatigue*, 39 SANTA CLARA HIGH TECH. L.J. 395, 402 (2023). And more importantly here, it's a "fundamental principle that, no matter how laudable its purposes, the actions of our government are always

subject to the limitations of the Constitution." *Barr* v. *DOJ*, 819 F.2d 25, 25 (2d Cir. 1987). The Universal Service Fund ignores those limits.

The Court has long shown itself committed to applying the Constitution's constraints on federal agencies of all stripes. Here, the Court needs to step in to enforce those constraints again. The Court should grant the Petition and reverse the decision below.

SUMMARY OF ARGUMENT

I. The nondelegation doctrine is vital to our constitutional system. But over time, the doctrine has morphed into an anemic version of its original self. This twisting of the doctrine has left many confused. And agencies are unleashed. The Court should grant the Petition to reinfuse the doctrine with clarity, energy, and meaning.

II. Those that would warn the Court away from reaching these issues are wrong. The benefits of the present state of play are overstated. Meanwhile, the supposed harms that would flow from holding Congress accountable are no real harms at all. We don't even have to guess at these consequences because we can look to the States' experiences to gain confidence.

III. The States need a real nondelegation doctrine to ensure that lawmaking happens before Congress. States can participate in lawmaking before that body much more effectively than they can before agencies, especially independent agencies. Federalism matters, and a weak nondelegation doctrine weakens federalism in turn.

IV. This case is a good vehicle to address these issues. The statute here contains some of the feeblest constraints on the agency's discretion to be found in the code books.

It directs core congressional functions—taxing and spending—to an independent agency. And it piles on by giving broad authority in this process to a private entity, rendering the whole process doubly wrong.

REASONS FOR GRANTING THE PETITION

I. The States—And Our Country—Need Guidance On the Nondelegation Doctrine.

A. Given the muddled state of the law on delegation, it helps to start with first principles. The Founders thought the greatest threat to liberty is governmental power—and the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is a tyranny. THE FEDERALIST NO. 47 (J. Madison). Responding to that threat, they defined the power the federal government could hold and then divvied it up among three co-equal branches. Divided power, the Founders said, would force one branch's ambition "to counteract" another's. THE FEDERALIST NO. 51 (J. Madison). And as part of that division, keeping legislative power out of the hands of the executive has been "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892).

The Court intended to put these separation-of-powers principles into action through the nondelegation doctrine. That doctrine contemplates that Congress "can[not] delegate to the Courts, or to any other tribunals," or to anyone else, really, "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 23 U.S. 1, 42 (1825); accord *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). For nearly 200 years, the Court's nondelegation cases have at least recognized that

truly legislative power resides with Congress. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935); *Panama Refin. Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *J. W. Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928); *Marshall Field*, 143 U.S. at 693-94. And the originalist understanding, too, contemplated a rigorous division between legislative and executive functions—one fully consistent with a full-throated nondelegation doctrine. See generally, e.g., Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 663 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

But as Petitioners note, see Pet.23-27, the Court's tests slipped from an originalist understanding based on these constitutional first principles. Early cases, at least, were promising. When the Court confronted overly broad legislative delegations in the 1930s, for example, it rebuffed them. *Schechter Poultry*, 295 U.S. at 551; *Panama Refin.*, 293 U.S. at 432-33. The Court at that time stood against "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring). Yet things soon began to unravel. "To the confusion of lower courts and the frustration of legal scholars, sweeping grants of what appear[ed] to be embarrassingly legislative powers [were] consistently upheld against nondelegation challenges." Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1231-32 (2018). For about ninety years, "the Court has averted its eyes while Congress has enacted a host of expansive delegations with only minimal policy guidance." Evan J. Criddle, *When Delegation*

Begets Domination: Due Process of Administrative Lawmaking, 46 GA. L. REV. 117, 143-44 (2011).

The Court's more hands-off approach led to the intelligible-principle standard. See, *e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 371 (2002). In its earlier version, the theory said that a congressional act does not violate the separation of powers if Congress articulates "an intelligible principle" to guide an agency's discretion. *J.W. Hampton*, 276 U.S. at 409. This standard has since "mutated" into one with no footing "in the original meaning of the Constitution, in history, or even in" *J.W. Hampton* itself. *Gundy*, 139 S. Ct. at 2139-41 (Gorsuch, J., dissenting). Now, effectively any standard will do; one concurring judge below, for example, remarked on "the decidedly not demanding standards that the Court has tolerated to date." Pet.App.28a (Newsom, J., concurring) (cleaned up). And under this "notoriously lax" test, Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014), the administrative state has flourished, "with hundreds of federal agencies poking into every nook and cranny of daily life," *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

This decades-long watering down of the nondelegation doctrine has left many confused. See *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 76-86 (2015) (Thomas, J., concurring in the judgment) (tracing the doctrine's long decline). It is unclear to some today whether the nondelegation doctrine retains any power. Leading scholars have attacked the present test's "untruth," "laxity," and "fictional" nature, raising questions about why we even go through the farce of applying the test at all. Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1091-92 (2023). And even those who

oppose the doctrine have said its "continual appearance in the case law has confused administrative law as a whole." Kathryn A. Watts, *Rulemaking As Legislating*, 103 GEO. L.J. 1003, 1007 (2015).

Several members of the Court have also openly questioned at least some aspects of the present doctrine, intensifying the uncertainty. See *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., with Roberts, C.J., and Thomas, J., dissenting); *Paul* v. *United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari). Aside from express statements like these, the Court has been creeping back toward using the nondelegation doctrine for years without using the word "nondelegation." At least one scholar, for instance, described the Court's decision in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), as a "non-delegation doctrine case masquerading as a bicameralism and presentment case." Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton *v.* City of New York, 99 NW. U. L. REV. 77, 85 (2004); see also, *e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316-17 (2000) (arguing that "a set of seemingly disparate cases … actually constitute a coherent and flourishing doctrine, amounting to the contemporary nondelegation doctrine").

Lower courts, too, have begun diving into the "deeper problems in nondelegation precedent." Pet.App.42a (Newsom, J., concurring). To be sure, showing appropriate respect for that precedent, most still try to apply the modern, mutated version of the intelligible-principle formula. See, *e.g.*, Pet.App.7a-10a. But others have been finding room to adopt, or at least use bits of, the history-based ideas in Justice Gorsuch's *Gundy* dissent. See, *e.g.*, *Jarkesy* v. *SEC*, 34 F.4th 446, 460 (5th Cir. 2022),

cert. granted 143 S. Ct. 2688 (2023); *United States* v. *Melgar-Diaz*, 2 F.4th 1263, 1266-68 (9th Cir. 2021); *Granados* v. *Garland*, 17 F.4th 475, 480 (4th Cir. 2021). And still others have questioned the vitality of the nondelegation doctrine entirely. See *Bradford* v. *U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 846 n.8 (D. Colo. 2022).

Taken together, these "[r]ecent events have upended any assumption that the nondelegation doctrine will continue to go unenforced in the federal courts." Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 408 (2023). In short, "[t]he only certainty about the federal nondelegation doctrine is that it is sure to change." Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1271 (2022).

B. The Court should grant this Petition to dispel the confusion and give courts some real clarity. "[C]lassifying governmental power" is no doubt an "elusive venture," "[b]ut it is no less important for its difficulty." *Dep't of Transp.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). Madison even called it "the great problem to be solved." THE FEDERALIST NO. 48 (J. Madison). After all, the Constitution requires "call[ing] foul" when necessary. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). So the "inconvenience" of creating a meaningful standard "does not mean that the … Court may shy away from tackling the difficult questions and enforcing the Constitution's checks on delegation." Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with A Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395, 448 (2020).

Remember that the nondelegation doctrine protects liberty by keeping policy decisions where the voters can see them—in Congress. It is human nature to work more carefully when others are watching. The nondelegation doctrine does its part "to protect liberty," *Dep't of Transp.*, 575 U.S. at 61 (Alito, J., concurring in the judgment), by keeping lawmaking power "with the people's *elected* representatives" and away from unaccountable officials hidden inside bureaucracies, *Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (emphasis added). At the same time, half-loaf approaches to nondelegation—such as enforcing it through a canon of constitutional avoidance—can undermine accountability by upsetting "the fruits of legislative compromise." John M. Manning, *The Nondelegation Doctrine As A Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000).

Keeping lawmaking power in Congress is also important because lawmakers—like everyone else—can sometimes shirk tough decisions. See Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017). There's already some evidence that Congress is doing that; a drop in legislative activity in Congress has led two scholars to decry "the fall of lawmaking by legislation." Jonathan H. Adler & Christopher J. Walker, *Delegation & Time*, 105 IOWA L. REV. 1931, 1937 (2020).

Worse, lawmakers might try "to take credit for addressing a pressing social problem by" offloading it to the executive and then "blaming the executive for the problems that attend whatever measures he chooses to pursue." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). That's what Justice Rehnquist thought was

happening when Congress "pass[ed] th[e] difficult choice" of how to address benzene exposure on to OSHA. *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment). He wasn't imagining things; legislators have admitted it happens. Congressman Elliott Levitas confessed that "[w]hen hard decisions have to be made, [Congress] pass[es] the buck to the agencies with vaguely worded statutes." 122 CONG. REC. 31,628 (1976). Another of his colleagues confirmed the consequences: "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation.'" *Id.* at 31,622 (statement of Rep. Flowers). A meaningful nondelegation doctrine ensures Congress can't shirk—decisionmakers reap the benefits and bear the blame.

II. Those Who Mean To Scare The Court Away From These Issues Are Wrong.

In the face of these salutary benefits, some insist that the risks of reembracing the nondelegation doctrine are just too great. But the evidence doesn't bear that worrying out.

For instance, some think agencies act faster than Congress—but Congress can legislate quickly when it wants to. President Bush signed the PATRIOT Act just three days after it was introduced. See Pub. L. No. 107-56, 115 Stat. 272 (2001); see also *Tiger Lily, LLC* v. *U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (giving more examples). Legislating by notice-and-comment rulemaking is not faster than legislating by bill in non-emergency situations, either. On average, it takes about 18 months. See Jason

Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (2012). Anyway, deliberative lawmaking is a feature of our republic—not a bug. The Founders deliberately "went to great lengths to make lawmaking difficult." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

Some also regard agencies as better experts, and they worry we'll lose the benefit of agencies' expertise if nondelegation becomes real again. There's strong reason to question "the myth of expertise as an inviolable shield for agency action." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1011 (1986). Even if one were to assume that agency personnel are the most qualified to decide, "this faith in [agency] deliberation and administrative expertise stands at odds with" originalist understandings of "democracy itself." D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 88 (2017). But in any event, Congress can ensure that laws are technically sound by using its own experts, eliciting testimony from others, or commissioning reports from executive-branch experts, agencies like the FCC included. The Congressional Budget Office has top-notch experts on financial, economic, and budget matters, for example. *Tiger Lily, LLC*, 5 F.4th at 675 (Thapar, J., concurring). And fact-gathering and investigation is the reason committees and (especially) subcommittees exist. Congress can access the same information that executive branch agencies have.

A more robust nondelegation doctrine also need not disrupt efficient governing. Most obviously, Congress can adopt existing regulations as statutes—it already does. See *Whitman*, 531 U.S. at 472 (noting "a subsequent Congress had incorporated the regulations into a revised version of the statute"). And applying a more rigorous nondelegation doctrine wouldn't require Congress to draft every fine detail into the statute. It would only require Congress to do the *meaningful* work of legislating—the kind of work it has shown itself more than equipped to do. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) (predicting that "[t]here should not be many" "extreme cases" requiring the Court to strike down "open-ended grants of authority," even under a more rigorous conception of the doctrine).

Many States have also refused to abandon true versions of the nondelegation doctrine, and their experience provides reassurance, too. See MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 450 (4th ed. 2014) ("The nondelegation doctrine has much greater practical significance at the state level than at the federal level."). Michigan's legislature, for instance, stepped up when the Michigan Supreme Court reinvigorated its state-law-based nondelegation doctrine and invalidated certain executive orders. See Samuel Dodge, *Whitmer bill signings include tightened sex offender registration protocols, boosts in medical staffing*, MLIVE (Dec. 30, 2020, 11:09 a.m.), https://bit.ly/3WXARXC. Life moved on in Michigan even though the state court "reached a result far out of step with federal law." Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U.L. REV. 359, 394 (2023).

Dozens of other state-court decisions have invalidated statutes on a strong conception of nondelegation grounds without catastrophic effect. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (cataloguing 151 successful nondelegation challenges in state courts). And a recent study found "some evidence … that enforcement of the nondelegation doctrine in the states changed state legislative behavior and curbed delegation." Walters & Ash, *supra*, at 415. "[E]ven the vast majority of [so-called] *weak* nondelegation state courts invalidate statutes from time to time on nondelegation grounds," and yet no one has sounded the alarm in those States, either. Zoldan, *supra*, at 393. So real-world experience confirms that a meaningful nondelegation doctrine "would not lead to apocalyptic results." Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 305 (2022).

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Continuing uncertainty over nondelegation is doing no one any good. And it's only becoming more important that these issues get some clarity given this Court's recent "major questions" cases—for "without knowing what [the] underlying [nondelegation] theory is, it becomes much harder to accurately apply a rule that ostensibly exists 'in service of' that underlying doctrine'" (at least to some). Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 300 (2022) (quoting *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting)). If *Chevron* deference also comes off the board, then it will become still more important that Congress provide real direction—otherwise, courts could be inappropriately forced to go it alone in deciding issues of agency authority drawing from

ambiguous statutes. So the Court should grant the Petition and take this issue head on.

III. Preserving Congress's Legislative Power Protects The States' Interests.

States have a particular interest in seeing the nondelegation doctrine meaningfully applied, as it ensures that they retain their voice in our system of government. For too long, an illusory nondelegation has given rise to real federalism-related problems. See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 53 (2008) (arguing that the Court's treatment of nondelegation doctrine explains why "hard questions" about federalism are now arising in administrative-law cases).

Separating the powers of our federal government preserves the "integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Balancing powers among the branches helps "ensure that States function as political entities in their own right." *Id.* On the other hand, "[p]ermitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001). Indeed, the Framers chose the "structure of the Federal Government" as the "*principal* means" "to ensure the role of the States." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (emphasis added); see also *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (calling "federalism and separation of powers"

two of the "most important" "structural protections" in our Constitution).

Ensuring Congress retains the legislative-drafting pen is better for the States because Congress can be better "relied upon to respect th[ose] States." Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887, 891 (1997). Partly because they come to Washington from specific communities, "[m]embers of Congress are more responsive to the concerns of local regional con[stituencies] than centralized regulatory agencies." Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 221 (2001). In other words, the legislative branch faces "localized accountability." MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 138 (1995).

But Congress doesn't respect States just because its members travel from everywhere. Rather, "political checks and Congress' political accountability"—like State-centered involvement in congressional elections, State-focused lobbying efforts, state political party pressure, and more—are the political safeguards of federalism. D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 633 (1985). So over time, Congress has also come to show its "peculiar institutional competence … in adjusting federal power relationships," including relationships between the States and the federal government. Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 696 (1976).

In contrast, federal agencies are a particular threat to States' interests. "[U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). Rather, the "'political safeguards' that give [S]tates a voice in Congress's lawmaking" do not extend to a "voice in the executive branch's activities." Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 640 (2003). Even purportedly public rulemakings may lack the transparency that ordinary lawmaking offers, as "many substantive policy decisions happen before the agency publishes the notice of proposed rulemaking." Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 743 (2016).

Indeed, the "success of American federalism" might be undermined "[i]f the federal government were free to evade federal lawmaking procedures by shifting substantial lawmaking authority to unelected officials (such as independent agencies or federal courts)." Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 337 (2001). That shift would undermine the state-focused party system that some say deserves credit for federalism's success. *Id.*; see also La Pierre, *supra*, at 633. After all, if all the real decisions are made by the "fourth branch of the Government" ensconced safely in Washington, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), why would anyone feel beholden to the people back home?

And more than ordinary agencies, independent agencies like the FCC present big delegation headaches.

They are "virtually insulated from political forces." David A. Herrman, *To Delegate or Not to Delegate—That Is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1181-82 (1997). These agencies even escape soft directives from the President—coming in the form of various executive orders—to respect federalism. See, *e.g.*, Exec. Order 13,132, 64 Fed. Reg. 43255, 43255 (Aug. 4, 1999); see also Daniel Backman, *The Antimonopoly Presidency*, 133 YALE L.J. 342, 402 (2023) (noting delegations to independent agencies might "lack sufficient accountability to the President and should therefore be more heavily scrutinized under a nondelegation test, not less"). So these agencies have more room to ignore the States' concerns. And indeed they have, as when the FCC tried to "re-allocate decision-making power between the states and their municipalities" in a broadband rule. *Tennessee* v. *FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

So "from a state's perspective," the legislative process provides several concrete on-ramps for state involvement—"more opportunities and more access points to provide input to Congress than [there would be] to the President" and his or her agencies. Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 365 (2010). The nondelegation doctrine ensures that those on-ramps remain open for *all* legislative activities. In this way, "the nondelegation doctrine can be conceptualized as a protector of federalism." Aaron Nielson, *Erie As Nondelegation*, 72 OHIO ST. L.J. 239, 265 (2011). And that federalism in turn ups the accountability that the nondelegation doctrine is designed to encourage, as "a State's government will represent and remain accountable to its own citizens." *Printz* v. *United States*, 521 U.S. 898, 920 (1997). It's a

positive feedback cycle. Cf. Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 505-08 (2023) (explaining how both nondelegation and federalism conceits underlie several of the Court's recent administrative-law decisions).

* * * *

It might be tempting to dismiss the States' concerns about federalism as the predictable complaints of parties set to lose something—like the bleating of the sheep at the sound of the shears. But "an underenforced nondelegation doctrine" undermines a "complex system of checks"—federalism included—that the Framers expected would prevent "hegemony." Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177 (1994). More is at stake in this Petition than just the States' personal interests. The Court should thus grant the Petition to reinvigorate the nondelegation doctrine, restore the States' rightful role in the lawmaking process, and reinstate the checks the Framers wanted.

IV. This Case Is A Good Vehicle.

This case presents an excellent vehicle to address the scrambled state of nondelegation law.

If any statute violates the nondelegation doctrine, then this is it. Congress charged the Commission with determining a "contribution" that telecommunications services carriers will make to "preserve and advance universal service." 47 U.S.C. § 254(d); see also *id.* § 254(b)(4). The Commission gets to decide what constitutes universal service, considering such unhelpful factors as what services are "consistent with the public interest, convenience, and necessity." *Id.* § 254(c)(1)(D).

It can change up that definition "periodically." *Id.* After that, the Commission can require any carrier to "contribute … if the public interest so requires." *Id.* § 254(d). The contributions are supposed to be "equitable" and "nondiscriminatory," though neither of those terms is defined. *Id.* The statute also lists various aspirational principles for universal service—but here, too, the Commission gets to add any principles that it "determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with [the Federal Communications Act." *Id.* § 254(b)(7). Congress didn't cap the size of the "contribution." And it didn't say how the Commission should exact the "contributions" from the service-providers (let alone how service providers will take the funds back from consumers).

Quite simply, "Congress painted in very broad strokes and took virtually no responsibility for any of the major details of implementing or funding the universal service program." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 308 (2005). Read together, these provisions give the Commission two core legislative functions—taxing *and* spending—with no real constraints on how to exercise them.

Start with taxes. The Court said it well a century-and-a-half ago: "the power of taxation belongs exclusively to the legislative department of the government." *State ex rel. S. Bank* v. *Pilsbury*, 105 U.S. 278, 299 (1881). Given that longstanding clarity, the nondelegation doctrine should apply most rigorously when a tax is involved. See James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 270–71 (2015).

And make no mistake, this "contribution" is a tax. When monies collected "inure[] to the benefit of the public," they constitute taxes, not fees. *Nat'l Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 343 (1974). Further, "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564. Fees, on the other hand, discourage conduct or defray regulatory expenses. *Norfolk S. Ry. Co.* v. *City of Roanoke*, 916 F.3d 315, 319 (4th Cir. 2019). The "contribution" here checks all the tax boxes—it's distributed to the public at large, it produces billions in revenue, and it serves none of the usual purposes of a fee. So the Commission has seized the power to levy. See Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. REV. MICH. ST. U. DET. C.L. 107, 133-37 (2000); Nichole L. Millard, *Universal Service, Section 254 of the Telecommunications Act of 1996: A Hidden Tax?*, 50 FED. COMM. L.J. 255, 267-72 (1997).

The Commission has also seized another legislative power in deciding how to spend its spoils. "Among Congress's most important authorities is its control of the purse." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2375 (2023). And the Appropriations Clause issues a "straightforward and explicit command" that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). Its restraint is "absolute." *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.). It covers "any sum of money collected for the government." *Ring* v. *Maxwell*, 58 U.S. 147, 148 (1854). So "[w]hile Congress can delegate some discretion to the President [and his or her agencies] to decide how to spend appropriated funds, any delegation and discretion is

cabined by these constitutional boundaries." *Cnty. of Santa Clara* v. *Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017).

The statute here ignores those constraints. No appropriation appears anywhere in the text. Instead, the Commission can spend as it wishes, so long as it can say the spending falls under the umbrella of "universal service." This fund, existing independent of the ordinary congressional oversight process, dwarfs the budgets of several federal agencies. And this setup has become common "[t]o an unprecedented extent." Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 556–57 (2017).

Even under the current test, the statute has no intelligible principle. "Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them." *Schechter Poultry*, 295 U.S. at 541. It delegates to the Commission wide-open discretion to do whatever it feels is "necessary," "appropriate," "convenient," or in the "public interest." Under any ordinary understanding, words like these do not provide "intelligible" limits when piled on in separate disjunctives. In fact, all these words are problematic in their own way. "[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). "Appropriate," too, is "all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015). "'[N]ecessary" does not mean 'absolutely necessary,'" but just things that are

convenient or useful. *United States* v. *Comstock*, 560 U.S. 126, 134 (2010). And convenient just means "suited to personal comfort or to easy performance." *Convenient*, MERRIAM-WEBSTER, https://bit.ly/42ujiSV (last visited Feb. 6, 2024). None of these illusory limits provide real teeth.

A last concern lurks on top of all that's already been said: this whole process is really pushed forward by a private entity. Even experts who are somewhat critical of a muscular nondelegation doctrine have noted the special dangers of subdelegation of this sort. Cf. David J. Barron & Elena Kagan, Chveron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (2001). Private delegation is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936).

This case proves the point. Here, "[t]he FCC essentially has abdicated its oversight responsibilities." Jonathan S. Marashlian et al., *The Mis-Administration and Misadventures of the Universal Service Fund: A Study in the Importance of the Administrative Procedure Act to Government Agency Rulemaking*, 19 COMMLAW CONSPECTUS 343, 381 (2011). And this isn't the first time the Commission has had this problem. See, *e.g.*, *U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (holding that the FCC improperly subdelegated certain functions outside the agency). Thus, this rule-by-private-interest is a last sprinkle of salt in the wound. Compare with *Texas* v. *Comm'r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., respecting the denial of certiorari) (raising questions

about delegation to a private authority of question implicating "hundreds of millions of dollars").

This "contribution" comes by way of an unlawful delegation. This case will serve as an excellent signal to other agencies (and Congress) about what it means to go too far.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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