**No. 22-60008**

IN THE

# United States Court of Appeals for the Fifth Circuit

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CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INC.; KERSTEN CONWAY; SUZANNE BETTAC; ROBERT KULL; KWANG JA KERBY; TOM KIRBY; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS; RHONDA THOMAS,

*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

*Respondents*.

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Petition for Review of an Order of the
Federal Communications Commission
Agency No. 96-45

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## EN BANC BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF GRANTING THE PETITION FOR REVIEW OF AGENCY ACTION

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## CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1, in addition to those listed in Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** The New Civil Liberties Alliance is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership in it.

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August 7, 2023

/s/ *Kaitlyn D. Schiraldi*
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## INTEREST OF AMICUS CURIAE

*Amicus curiae* the New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government) and due process of law. These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—because Congress, Presidents, federal administrative agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA defends civil liberties primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a different sort of government—a type, in fact, the Constitution was designed to prevent. This unconstitutional administrative state is where NCLA trains its primary focus.

Section 254 of the Telecommunications Act of 1996 ("The Act") authorizes the Federal Communications Commission ("FCC" or "Commission") to define "universal" telecommunications and information services on an "evolving" basis and to extract funding from the American people to pay for the mandated service. 47 U.S.C. § 254. The substantive criteria allegedly guiding the FCC are enabling,

not limiting, and are vague and aspirational such as "consistent with public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1)(D). Further, the FCC is empowered not only to define the object of the statute, "universal service," but also to identify policies guiding the advancement of this service. 47 U.S.C. § 254(b)(7). The FCC is thus free to establish "intelligible principles" for purposes it creates, resulting in a transfer of legislative policymaking (as opposed to implementing) authority, and backed by the FCC's own ability to raise revenue. NCLA is concerned that if this standardless, self-funding delegation survives scrutiny, then Article I's grant of "[a]ll legislative Powers" to Congress and Congress alone becomes a nullity.

## SUMMARY OF ARGUMENT

In enacting § 254, Congress improperly endowed FCC with legislative power. The Constitution strictly dictates the power each branch of government may wield. Legislative power is "vested" in Congress, art. I, § 1, and cannot be divested by that branch. Yet, § 254 permits FCC to define statutory objectives, to set policies to meet those objectives, and to raise and disburse needed funds. Delegating this power of the purse to an agency alongside policymaking authority is unconstitutional.

The delegation at issue here touches on core legislative power and is particularly troubling. One of Congress's most powerful forms of checking the other branches is that Congress, and Congress alone, may tax and may appropriate money from the Treasury. The Framers, motivated by a long list of grievances against the

Crown, wanted the American people, through the bicameralism of Congress, to control the purse strings. The famous phrase, "no taxation without representation" indicates the critical role this issue has played since America's founding.

Yet pursuant to § 254, FCC raises and disburses billions of dollars per year, more than 25 times its congressionally-appropriated budget, without any ongoing involvement by Congress. If this revenue-raising scheme is a tax, it is beyond FCC's authority. If it is not a tax, the Universal Service Fund's self-funding mechanism circumvents Congress's appropriations power. Courts should closely scrutinize this wolf-in-sheep's-clothing approach to delegating core taxing or spending power.

Setting aside tax and spending concerns, § 254, particularly its layered delegation of purpose and policy, unlawfully transfers legislative power Congress is not permitted to give away. Granted, the current "nondelegation" doctrine is a misnomer that rests on false assumptions and should be overhauled based on the Constitution's first principles. But even under a modern, appropriate application of the intelligible principle test, § 254 fails. By giving FCC the ability to *define* "universal service," the purpose of the Act, and set the *policies* that guide advancement of that service, § 254 enables but does not constrain FCC's exercise of legislative power. Moreover, the layered delegation prevents courts from evaluating whether the agency has adhered to the will of Congress.

For these reasons, the Petition should be granted and § 254 held unlawful.

## ARGUMENT

### I. CONGRESS MAY NOT DIVEST ITS LEGISLATIVE POWER

The Constitution, by design, vested separate and largely exclusive powers in each branch of the United States government. Congress cannot decide legislating is not en vogue this session and hand that power over to the Executive. Judges cannot cast off their robes and head to Capitol Hill to re-write the U.S. Code. While this may seem like elementary school civics, Congress periodically needs a *Schoolhouse Rock!*[1] refresher to be reminded that it has unique duties it cannot abdicate. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340–41 (2002) ("The Constitution does not merely create the various institutions of the federal government; it vests, or clothes, those institutions with specific, distinct powers. The Constitution reflects a separation of powers … .").

Congress's power is to legislate. *See* U.S. CONST. art. I, § 1. And the Framers *specifically* gave Congress the authority to tax and spend through legislation. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments . . . ."); U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide

[1] *Three Branches of Government Schoolhouse Rock!*, THE SCHOLARS' ACADEMY, https://vimeo.com/156097813 (last visited Aug. 7, 2023).

for the common Defence and general Welfare of the United States"); U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"). No other branch holds such control.

The location of this power in Congress is essential to a fundamental principle of self-government: citizens must consent, through their elected representatives, to all legal limits on their liberty. This consent is necessary—and by intentional design—when touching upon the power of the purse. Taxing and revenue raising power must therefore be guarded with heightened scrutiny as those powers are core responsibilities of Congress and may never be delegated.

### A. Legislative Power Is Exclusive to Congress

The Constitution says each of its tripartite powers "shall be vested" in one branch of government, indicating that is where the powers are to remain. U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1. If the Constitution merely "vested" power, as one might grant property, saying the powers *are hereby vested*, then there arguably could be a transfer of powers between branches. But in declaring that its powers "*shall* be vested," the Constitution not only vests legislative, executive, and judicial power in respective branches, but dictates where such powers "shall," and thus must, be located—and remain. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (confirming that the Constitution's "text permits no delegation of [legislative] powers"); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406

(1928) ("[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President[.]").

The Constitution does not say that legislative powers "shall be vested in a Congress of the United States *and anyone with whom Congress shares them*." Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. __, § IX.C (forthcoming 2023) (manuscript at 68).[2] "If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" *Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002)).

### B. Consent of the Governed Is Essential to Valid Lawmaking

The Constitution's prohibition against delegating legislative power not only protects one branch of government from another, but "[t]he structural principles secured by the separation of powers protect the individual as well." *DOT v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 55 (2015) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). That is because legislative delegation aligns with the Constitution's most important principle: consent of the people. Without consent, a government would be illegitimate, and its laws would be without obligation. Legislative power is vested

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247

solely in the Congress because Congress is directly politically accountable, and thus laws it enacts are premised on the consent of the governed. *See I.N.S. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in the judgment) ("The only effective constraint on Congress's power is political[.]").

The Framers understood consent to be the underpinning of Congress's authority. The Declaration of Independence reminds us "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers *from the consent of the governed*[.]" THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); *see also Rucho v. Common Cause*, 138 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting) ("The Gettysburg Address (almost) ends: '[G]overnment of the people, by the people, for the people.' If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign."). Constituents are aware of their representatives' voting patterns to ensure transparency:

> Article I requires how they vote—'the Yeas and Nays'—be published when requested by one-fifth of the legislators present. So, these directly or indirectly elected officials would be accountable for the hard legislative choices. Such accountability would enable the governed to withhold their consent in response to the decisions of elected officials. *That was the deal that the Framers offered the people*.

David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. L. & PUB. POL'Y 213, 219 (2020) (emphasis added); Hamburger *supra* p.6, at § III ("If law is not to rest merely on

brute force, but is to have obligation, it must be adopted with a broad range of consent, and in an extended republic, this means through the election of representatives.").

Here, the FCC does not operate with the people's consent; it is not directly accountable to American citizens. FCC commissioners are appointed, not elected.

### C. The Core Power of the Purse Belongs Uniquely to Congress and Must Be Treated with Special Care

Whether FCC's Universal Service Fund is a tax or merely a means to evade congressional control of spending, heightened scrutiny must be employed to assess Congress's ability to transfer its greatest power—the power of the purse. *See* THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("[T]his power over the purse … is the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people[.]"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 573 (2012) ("[T]he breadth of Congress's power to tax is greater than its power to regulate commerce.").

Congress's financial powers were drafted intentionally, not haphazardly, due to the unpredictable and dictator-like control of the purse strings in England:

> The [F]ramers were particularly intent on vesting the power of the purse and the power of initiating war in the Congress, as the people's representative. They were well aware of the efforts of English kings to rely on extra-parliamentary sources of revenue for their military expeditions and other activities. Some of the payments came from foreign governments; others came from private citizens. Because of these transgressions and encroachments of legislative prerogatives,

> England lurched into a bloody civil war…. The rise of democratic government is directly related to legislative control over all expenditures. The U.S. Constitution attempted to avoid the British history of civil war and bloodshed by vesting the power of the purse squarely in Congress.

Symposium, Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 937 (1999). Congressional control of tax was the byproduct of other grievances against the Crown as well. Consider the battle cry and anger of "no taxation without representation" that led to the Boston Tea Party and culminated in the American Revolution.

### 1. If Agencies Have the Power to Tax, the Constitution Is an Empty Promise

Taxing is a core power that cannot be delegated to agencies. *See Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress … is the sole organ for levying taxes[.]"); *Brackeen v. Haaland*, 994 F.3d 249, 349 (5th Cir. 2021), *rev'd*, 143 S. Ct. 1609 ("Congress may not delegate to other actors the core legislative power that would be subject to the bicameralism and presentment requirements[.]").

Because "the power to tax involves the power to destroy[,]" *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819), "the Founders placed special controls on the enactment of federal taxes." Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, THE ADMINISTRATIVE STATE BEFORE

THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 81, 98 (Peter J. Wallison & John Yoo eds., 2022).

Further, taxing power should be treated with special care because:

> In addition to the usual hurdles that proposed legislation must overcome before becoming law—approval by both Houses of Congress plus either the president's approval or an override of a presidential veto by both Houses—tax bills *must also comply* with the Origination Clause, which provides that "all bills for raising Revenue [must] originate in the House of Representatives." The Direct Tax Clause imposes an *additional limit* on federal taxing authority: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration." If Congress were permitted to delegate its taxing power to a federal administrative agency, the Constitution's controls on tax legislation would be bypassed.

Chenoweth & Samp, at 98–99 (quoting U.S. CONST. art. I, § 7; U.S. CONST. art. I, § 9, cl. 4) (emphases added).

A common rebuttal to the core power argument is that *Skinner v. Mid-America Pipeline Company*, 490 U.S. 212 (1989), rejects such exacting scrutiny on Congress's taxing power. However, the line in *Skinner*—"[w]e find no support … for [the] contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power[,]" *id.* at 222–23, is dicta. *Skinner* is also factually distinct from the case at bar.

In *Skinner*, Congress delegated to the Secretary of Transportation a way "to establish a system of user fees to cover the costs of administering certain federal pipeline safety programs[.]" *Id.* at 214. The fees were to be calculated based on "volume-miles, miles, revenues, or an appropriate combination thereof," *id.* at 214, and the fees *could not* "exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees[,]" *id.* at 215. The statute set a ceiling for revenue raising and a means for calculating it. Congress did not abdicate any of its legislative power to the Department of Transportation—the agency was properly apprised of Congress's mandates. The Court did not need to reach the higher scrutiny standard proposed for Congress's taxing power; therefore, the single sentence dispensing with a more exacting standard is dicta. Chenoweth & Samp, *supra* p.10, at 99.

By contrast, here, "there is an 'absence of a limit on how much the FCC can raise for the USF' because the USF statute contains no objective limits—no cap, rate, or formula … ." En Banc Br. for Pet'rs, Doc. 242 at 1. In fact, the Universal Service Fund's annual collections are nearly "*25 times* the FCC's enire annual budget." *Id.* at 6 (emphasis added). The FCC has become a runaway agency, unilaterally determining what it wishes to accomplish and then how much funding it will take from American consumers to serve its self-selected ends. Such a core legislative function cannot rest with an unrestrained agency.

### 2. Even If the Universal Service Fund Is Not a Tax, FCC's Self-funding Circumvents the Constitution's Appropriations Clause

Congress's spending power is also an important check on the other branches. Congress is the gatekeeper of the United States Treasury. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'") (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)).

The Appropriations Clause, like Congress's power to tax, was the result of the Framers' stance against the tyrannical control over monies in England. *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 226 (5th Cir. 2022) (Jones, J., concurring) ("The ensuing struggle between the crown and parliament over extraordinary revenues (and the king's attempts to extract revenues through prerogative taxation) contributed to one king's beheading, another's deposition, and, eventually, the English Revolution.") (internal citation omitted). At the Founding, "[a]mong delegates to the Constitutional Convention, that Congress would exercise power over both taxation and appropriations was *wholly uncontroversial*. The idea, of course, was 'that the money of the people should not be voted out of their pockets

without giving them the utmost satisfaction, for passing the laws to this effect.'" *Id.* at 228 (quoting 5 ANNALS OF CONG. 448 (1796) (statement of Rep. Heath)) (emphasis added).

Here, regardless of its title—a tax, a fee, a ransom—the FCC unilaterally raises revenue that adds up to roughly 25 times its congressionally-appropriated budget. *See* En Banc Br. for Pet'rs, Doc. 242 at 6. In deciding how much to assess, the FCC determines its own objectives and the policies guiding those objectives; this defies the Constitution. *See All Am. Check Cashing, Inc.*, 33 F.4th at 232 (Jones, J., concurring) ("Because the CFPB is a perpetually self-funded agency armed with vast executive authority, its structure defies congressional oversight and is incompatible with the Constitution."). The dictates of the Appropriations Clause are crucial:

> The Constitution vests Congress not only with the power to tax and spend, but also removes 'the option *not* to require legislative appropriations prior to expenditure.' The Appropriations Clause embodies a fundamental separation of powers principle—subjugating the executive branch to the legislature's power of the purse. And separation of powers is at the heart of our constitutional government in order to preserve the people's liberty and the federal government's accountability to the people.

*Id.* at 221 (Jones, J., concurring) (quoting Kate Stith, *Congress' Power of the Purse*, YALE L.J. 1343, 1349 (1988)).

Usurpation of the Appropriations Clause is at risk within other agencies as well. This term, the Supreme Court is set to decide whether *Chevron* should be overruled, but the case also presents an appropriations issue. *See Loper Bright*

*Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.). In *Loper Bright*, the agency "promulgated a rule that required [the fishing] industry to fund at-sea monitoring programs." *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 363 (D.C. Cir. 2022). The agency did this "because it could not implement its preferred monitoring programs with only the money appropriated by Congress." Brief for the U.S. House of Representatives as *Amicus Curiae* in Support of Petitioners at 27, *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (July 24, 2023) (No. 22-451). Just like the FCC, "the [National Marine Fisheries] Service expanded its observer program without Congress appropriating the necessary funds. Instead, it *offloaded costs on the regulated industry*. In doing so, the Service effectively augmented its appropriation and performed an end-run of Congress's power of the purse." *Id.* at 28 (emphasis added). Agencies must be thoroughly disabused of the notion that they may design *and* fund their own pet projects.

* * * * *

Congressional transfer of legislative power is forbidden, and special care should be taken when the power at issue arguably permits taxation or agency self-funding. To determine whether delegated power is legislative or executive, courts employ the "nondelegation" doctrine. That doctrine is inaptly named, rests on assumptions not borne out over time, and should be reexamined to return to first principles. Even under today's test, however, the functionally unbounded power

§ 254 grants to the FCC to define, advance, and fund, "universal service" improperly conveys legislative power.

## II. THE CURRENT 'NONDELEGATION' DOCTRINE RESTS ON LEGAL FICTIONS THAT ARE NO LONGER JUSTIFIABLE

Petitioners here invoke the "original understanding" that legislative power is vested exclusively in Congress and cannot be delegated to the FCC. *See* En Banc Br. for Pet'rs, Doc 242 at 19. The original understanding of Article I, § 1 is appropriate not just because it is mandated by the Constitution, but because the current "nondelegation" doctrine, which allows the transfer of power when accompanied by a sufficient "intelligible principle," understates the gravity of transferring legislative power and rests on fictions inconsistent with today's administrative state.

### A. The Term 'Delegation' Falsely Implies an Easily Revocable Transfer

Contrary to the term's implication, Congress alone cannot take back authority it "delegates." This consequential reality should not be masked by an inaptly named doctrine. When an agency official "delegates" powers, she retains the ability to unilaterally revoke that delegation. The FCC chairperson who "delegates" statutorily authorized powers to subordinates, for example, has the right to terminate that arrangement at any time, for any reason, without consent of the delegatees. But the same is not true when Congress transfers legislative power.

Congress may *only* reclaim statutorily granted power by *repealing or amending an authorizing statute*. The President, however, may veto any effort to

withdraw such powers and will nearly always use a veto to protect power he controls. After all, this natural inclination to accumulate and preserve power is why government powers are separated in the Constitution in the first place; men are not angels and ambition counteracts ambition. *See Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022). Congress must obtain the President's assent, or it must secure veto-proof supermajorities in both houses of Congress before it can unwind a transfer of power. So, a statutory authorization does not merely delegate; it limits Congress's freedom to reassert its prerogative.

By transferring legislative power to an agency like FCC, one Congress can enable the enactment of telecommunications standards and associated funding mandates without undergoing bicameralism and presentment—binding legal requirements that a future Congress cannot reverse without difficulty. It is therefore misleading to discuss divested legislative power in terms of "delegation." Rather, at issue is which political branch will be indefinitely empowered to legislate.

In passing the Act, the 1996 Congress purported to authorize the Commission to extract essentially public funding for whatever "evolving level" of universal telecommunications service it deems "consistent with the public interest, convenience, and necessity." 47 U.S.C. §§ 254(c)(1)(D), (b)(7). Put simply, the power to select telecommunication standards that must be provided to all consumers

and to decide how much should be spent toward that end by consumer-funded subsidies no longer resides in Congress but in appointed Commissioners.

### B. The Doctrine Rests on Other Indefensible Legal Fictions

In addition to its status as a misnomer, the "nondelegation" doctrine arose from now-fictitious assumptions that deny the modern reality of agency lawmaking.

First, as currently enabled, and particularly after *Chevron*, agency lawmaking is not merely "filling in the details" of a statutory requirement as was anticipated in early judicial analysis. *See, e.g., United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations[.]"); *see also Gundy*, 139 U.S. at 2136 (Gorsuch, J., dissenting) ("[A]s long as Congress makes the policy decisions … it may authorize another branch to 'fill up the details.'").

The "filling in the details" fiction is vividly demonstrated here. Shortly after it was passed, the Supreme Court noted that the 1996 Act granted "most promiscuous rights" to the FCC, even at the expense of state authority. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). The Court further lamented:

> It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. … But Congress is well aware that the

> ambiguities it chooses to produce in a statute will be resolved by the implementing agency.

*Id*. (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). More specifically, this Circuit has noted that § 254 "reflects a Congressional intent to delegate … difficult policy choices to agency discretion." *Tex. Office of Pub. Util. Council v. FCC*, 183 F.3d 393, 411 (5th Cir. 1999); *see Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* says that we should infer from any statutory ambiguity Congress's 'intent' to 'delegate' its 'legislative authority' to the executive to make 'reasonable' policy choices."). Indeed, FCC believes it is vested with the power to achieve any policy objectives in the Act. *See Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (noting FCC argument that it "may use the universal-service mechanism to achieve policy objectives elsewhere in the Act").

Second, the mere existence of a broad "intelligible principle" does not prevent an enactment from being the exercise of legislative power. Every Act of Congress, for example, is ostensibly guided by "intelligible principles" memorialized in the Constitution when We the People delegated enumerated powers. Congress must always act within the scope of one or more of those "intelligible principles" that define and limit what it may do. But Congress is most assuredly "legislating" when it enacts statutes, it is not merely engaged in an administrative or executive act. *See Whitman*, 531 U.S. at 487 (Thomas, J. concurring) ("[T]here are cases in which the

principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"). As guiding principles become more abstract and ambiguous (*i.e.*, "go forth and do good"), they are less likely to prevent legislative acts.

The result is no different when an agency issues an edict under a statute that confers powers defined by a vague, non-exclusive "intelligible principle"—such as an instruction to regulate on an evolving basis consistent with "public interest, convenience, and necessity" according to principles perpetually open for revision. *See* 47 U.S.C. §§ 254(b)–(c). The existence of just an "intelligible principle" does not save agency rulemaking from being legislative.

These fictions warrant a return to the original understanding of exclusive Congressional powers. Nonetheless, by giving FCC the power both to define the object *and* the policy of the statute—a layered delegation—Section 254 fails to satisfy the common intelligible-principle test.

## III. SECTION 254'S LAYERED DELEGATION OF PURPOSE AND POLICY RENDERS IT UNCONSTITUTIONAL UNDER CURRENT PRECEDENT

Section 254 lacks an adequate limiting "intelligible principle." To evaluate whether a statutory authorization improperly grants legislative power or merely grants administrative or executive authority, courts determine whether Congress has "la[id] down by legislative act an intelligible principle to which the [delegatee] … is directed to conform." *Hampton,* 276 U.S. at 409; *see Gundy*, 139 S. Ct. at 2123. Key

to this analysis is determining what task has been delegated. *Gundy*, 139 S. Ct. at 2123. Once identified, proper application of the "intelligible principle" test would sort whether the task is one of creating policy or filling up details, of lawmaking or of fact-finding, of creating binding rules governing the future conduct of private persons or something else. *Id*. at 2135, 2133 (Gorsuch, J., dissenting).

Additionally, the "intelligible principle," needs to be more than an open-ended suggestion, it must be "sufficiently definite and precise" so as to permit courts "to ascertain whether the will of Congress," the only branch empowered to legislate, "has been obeyed*." Yakus v. United States*, 321 U.S. 414, 425–26 (1944). Through its statute, Congress must thus set "the boundaries" of the delegatee's authority. *See Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Gundy*, 139 S. Ct. at 2129.

In this case, where the FCC is permitted to develop an "evolving" standard governed by policy principles it may select, § 254 fails to provide the requisite intelligible principle—or sufficiently definite and precise boundaries of authority.

### A. The Panel's Reasoning Inappropriately Misconstrues *Jarkesy* and Enfeebles the Intelligible Principle Standard

The panel's determination that § 254 passes constitutional muster relies on a rendition of precedent which would leave the intelligible principle standard meaningless. Citing *Jarkesy*, the panel states that "the nondelegation doctrine applies where Congress has provided '*no guidance* whatsoever.'" 63 F.4th at 448 (quoting *Jarkesy*, 34 F.4th at 460–62). *Jarkesy*, however, was not so absolute.

In *Jarkesy*, this Court found that Congress granted legislative power when it gave the SEC discretion to prosecute in either a federal court or an agency tribunal while providing no guidance as to how that discretion should be used. 34 F.4th at 460–62. But "no guidance" *wasn't the test* for an unlawful transfer of power, it simply made it indisputable that the test was satisfied in that instance.

Rather, *Jarkesy* identifies two questions that "must" be addressed to determine whether Congress granted "powers which are strictly and exclusively legislative." *Id*. at 460–61. First, a court must determine if the power granted would be legislative but for a guiding intelligible principle. *Id*. at 461. Second, the intelligible principle must ensure "that the agency exercises only executive power." *Id*. If the agency is exercising legislative power, even in the presence of an "intelligible principle," immutable boundaries between the branches of government have been breached.

Here, it is not a complete lack of guidance that permits FCC to wield legislative power, it is the grant of an open-ended, agency-defined "evolving" statutory objective accompanied by vague aspirational policy guidance that FCC can itself supplement. 47 U.S.C. § 254(b)(7). These layered delegations do not bind FCC to "conform" to a "definite and precise" will of Congress.

### B. The Layered Delegation in § 254 Makes It More of an Affront to the Constitution Than *Schechter Poultry* or *Panama Refining*

By leaving the FCC to define the objective of the statute—universal service—and to supply its own policy considerations while doing so, § 254 leaves more to

FCC than was left to the executive in the prior cases striking improper delegations of legislative power. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (FCC's action will be upheld if it advances at least one statutory policy).

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court unanimously rejected a statutory scheme that empowered the President to impose "codes of fair competition" whenever he found that the codes would not "promote monopolies" and that the organizations proposing such codes were representative. *Id.* at 521–23. The Court pronounced the statute unconstitutional because it "supplies no standards" for limiting the President's discretion. *Id.* at 541.

The massive loopholes and qualifications in § 254 present an even graver offense to the Vesting Clause. U.S. CONST. art. 1, § 1. First, § 254(c)(1) gives FCC the very power to define the object, the purpose, of the statute. Congress did not, through bicameralism and presentment, define "universal service," rather, it explicitly left that task to the FCC. *See* 47 U.S.C. §254(c)(1) ("Universal service is an *evolving* level … that the Commission shall establish *periodically* … .") (emphases added). FCC can continually extend its field of play, amassing greater and greater authority "taking into account advances in … technologies." *Id.*

Adding insult to injury, where Congress theoretically supplied governing principles, it again passed the pen to the Commission to continue to alter the aims of the statute. Section 254(b) provides that universal service shall be based on

"principles" that include whatever the Commission determines is necessary and appropriate for "public interest, convenience, and necessity." 47 U.S.C. § 254(b)(7). Through this layered delegation, Congress neither set a binding policy to limit FCC, nor boundaries for FCC's authority to establish universal service.

*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), reaffirmed that statutes empowering the executive must provide criteria to limit the executive's discretion—otherwise the statute becomes a forbidden transfer of lawmaking power. *Panama Refining* disapproved a statute that authorized the President to prohibit the transportation of petroleum goods produced in excess of state quotas, but that failed to provide a standard for whether or to what extent the power should be invoked. *Id.* at 415. In the Court's words, the statute "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id*.

Here, the panel found a limitation because FCC can "only raise enough revenue to satisfy its primary function" and "Congress has placed identifiable limits on what USF distributions can fund." 63 F.4th at 450. But Congress did not place an "identifiable limit" on what can be funded. Rather, Congress granted FCC the ability to define the funded "universal service" *and* to establish the policy principles for preserving and advancing universal service. *See* 47 U.S.C. §§ 254(c)(1), 254(b). This sort of circular enabling statute cannot pass constitutional muster.

### C. The Intelligible Principle Test Requires a Statute to Be Judicially Administrable; § 254 Is Not

As discussed above, a statute does not avoid transfer of legislative power merely by setting out a minimally intelligible guiding principle; there must be more. Indeed, without more, vague statutory delegations also impinge on Article III of the Constitution. U.S. CONST. art. III, § 1. The Supreme Court explained that, at the very least, Congress must supply principles that allow "the courts to test" whether the agency has faithfully executed the legislative command. *See Am. Power & Light*, 329 U.S. at 105; *Yakus*, 321 U.S. at 425 (the "concern of courts is to ascertain whether the will of Congress has been obeyed"). In order to accomplish this task, a statute must "mark the field within which the [Commission] is to act so that it may be known whether [it] has kept within it in compliance with the legislative will." *Yakus*, 321 U.S. at 425.

Here, the intentionally "evolving" definition of "universal service," to be set and revised by FCC, according to policies FCC selects, fails to accomplish that goal. The statutory scheme of § 254 allows FCC to move the goalposts and mark its own field. Suppose, for instance, that FCC determined that it is in the "public interest" for government to proactively "dispel false rumors, and to explain what actions citizens … should take to advance the public good."[3] It would be an easy step for

[3] *See* Brief for [Government] Appellants at 1, *Missouri v. Biden*, No. 23-30445 (5th Cir. filed July 25, 2023), ECF No. 60 ("[O]ne of the government's key roles is simply

FCC to find that any "quality service" would permit government-managed content moderation in a manner similar to parental controls. It is not obvious that FCC would be constrained, at least by § 254, from forcing telecommunication providers, and ultimately the American people, to provide funds to ensure the "availability' of such "advanced" service on a "universal" basis. *See* 47 U.S.C. § 254(b)–(c).

The loopholes built into § 254 prevent courts from determining whether a particular evolution of universal service is consistent with the will of Congress. A proper "intelligible principle" not only stops the executive from exercising legislative power, it facilitates rather than interferes with courts' ability to police the constitutional framework. Section 254 falls woefully short of performing that task.

## CONCLUSION

This Court should grant the Petition in this case and put an end to FCC's exercise of legislative power.

August 7, 2023 Respectfully submitted,

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to … dispel false rumors, and to explain what actions citizens and businesses can and should take to advance the public good.").

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## CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2023, I electronically filed this *amicus curiae* brief with the Clerk of this Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

August 7, 2023

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## CERTIFICATE OF COMPLIANCE

I certify that this *amicus curiae* brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29 (a)(5) because this brief contains 6,070 words, excluding those portions of the brief exempted by Rule 32(f). The limit for *amicus curiae* is 6,500 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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