Nos. 24-354 and 24-422

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
*v.*
CONSUMERS' RESEARCH, ET AL.,

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL.,
*v.*
CONSUMERS' RESEARCH, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF RESPONDENTS

Zhonette M. Brown
*Counsel of Record*
Kaitlyn D. Schiraldi
Markham S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Phone: (202) 869-5210
zhonette.brown@ncla.legal

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## INTEREST OF *AMICUS CURIAE*[1]

*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" at issue include rights at least as old as the U.S. Constitution, 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). These civil rights are also very contemporary—and in dire need of renewed vindication—because Congress, Presidents, federal administrative agencies, and even the judiciary, have neglected them for so long.

NCLA defends civil liberties mainly 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 the Constitution was designed to prevent. NCLA trains its focus on this unconstitutional administrative state.

NCLA represents clients harmed by unconstitutional divesting of legislative power to administrative agencies who would benefit from enforcement of the constitutional mandate that legislative power be exercised by Congress or not at all. *See* Pet'r's Opening Br., *RMS of Georgia, LLC v. EPA*, No. 23-1263 (D.C. Cir. Jan. 5, 2024).

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity other than *amicus curiae* paid for the brief's preparation or submission.

## SUMMARY OF ARGUMENT

The "nondelegation" doctrine is failing.[2] It was intended to prevent legislative power, which the Constitution vests exclusively in the Legislative Branch, from being divested or transferred[3] to any other branch of government. Today, however, lower courts frequently cite language from this Court to support the conclusion that Congress *can* divest or transfer legislative power to executive agencies so long as certain conditions are met.

Here, Petitioners premise their arguments on the notion that the statutory authority[4] empowering the Federal Communications Commission ("FCC") to determine the charges for the Universal Service Fund ("USF"), the "evolving" level of funding the Commission obtains from American pocketbooks for a social benefit program, passes constitutional muster when compared to prior cases approving Congress's "broad" grants of authority. FCC Br. at 11, 21–22, 36; Competitive Carriers Ass'n, NTCA, and USTelecom

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[2] *See* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1089 (2023) (the nondelegation doctrine "is the fulcrum of a sobering crisis of governance and legitimacy").

[3] This brief refers to transfers of legislative power rather than "delegations." Once conveyed, Congress cannot end statutory transfers without a supermajority or the assistance of the Executive Branch. *See* Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 81, 98 (Peter J. Wallison & John Yoo eds., 2022).

[4] 47 U.S.C. § 254.

("CCA") Br. at 27–28. Close examination of the bases for Petitioners' claims demonstrates how their arguments improperly hobble already atrophied caselaw and how the Vested Powers precedent has gone awry. By enforcing constitutional limits on who may wield legislative power, the Court can return to fulfilling its duty to protect the right to have laws made by elected lawmakers.

First, Petitioners mischaracterize this Court's early cases which appropriately demanded that Congress set discernible standards, later known as intelligible principles, to provide an agency with decision-making criteria and allow courts and the public to determine when an agency fulfilled or exceeded the will of Congress. *See Opp Cotton Mills v. Adm'r of Wage and Hour Div.*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944); *see also Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Petitioners oversimplify these cases and argue that general policy statements, such as an instruction to act in "the public interest" provide sufficient legislative constraints on agency discretion. FCC Br. at 11, 20, 30, 32–33; CCA Br. at 23–24; Schools, Health & Libraries Broadband Coalition ("SHLB") Br. at 32–33. This common misconception arises from widely propagated but erroneous dicta. This Court has never held that "public interest" or similarly vague directional statements, standing alone, suffice to prevent the executive from wielding legislative power to impinge rights—and it should not do so here.

Second, Petitioners improperly rely on cases evaluating congressional guidance concerning privileges or authority constitutionally vested in both the Legislative and Executive Branches. In our constitutional scheme it is appropriate that Congress could give an agency policy-oriented, directional suggestions for doling out discretionary use of public land, rivers, or airwaves or for managing tasks affecting shared governmental authority. But Congress must provide a more constraining dictate to authorize interfering with liberty or private property.

Today, what remains of the nondelegation doctrine is cited to legitimize divesting legislative power to the Executive Branch. While the Fifth Circuit reached the correct result, other courts applied this Court's cases to approve a scheme that gives the FCC ongoing power to evolve its authority and associated conversion of private funds. A proper Vested Powers test that requires judicially discernible standards for laws intended to limit rights would reveal that the FCC's power here is unconstitutional.

## ARGUMENT

### I. THE NONDELEGATION DOCTRINE IS FAILING

This Court developed the nondelegation doctrine to ensure that the legislative power[5] the Constitution vested in Congress would remain there.

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[5] The power to legislate has been described as the power through an exercise of will to make general, prospective, binding rules meant to limit liberty. *See INS v. Chadha*, 462 U.S. 919, 952

Through the Constitution the People consented to Congress, and Congress alone, exercising all legislative power. U.S. CONST. art. I, § 1 ("*All* legislative powers … *shall be* vested in a Congress[.]") (emphasis added). This consent of the governed is fundamental to the legitimacy of the government. *See* Hamburger, *supra* n. 2, at 1105–08.

To protect liberty, the Constitution then placed various procedural burdens on the legislative process, *see* THE FEDERALIST NO. 70, at 475 (A. Hamilton) (J. Cooke ed. 1961), and isolated the legislative and other governmental powers, vesting executive and judicial power in separate branches. U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

Although limiting legislative power to Congress is essential to respect the consent of the governed and to uphold individual liberty, the recent precedent meant to serve those purposes falls short. Even this Court erroneously qualified what the Constitution makes absolute, stating "Congress *generally* cannot delegate its legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (emphasis added).

As a result, judges on at least four federal courts of appeal have cited this Court for the proposition that Congress may transfer legislative power. *See Int'l Union, United Auto. v. Gen. Dynamics Land Sys. Div.*,

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(1983) (legislative action has "the purpose and effect of altering the legal rights, duties and relations of persons"); *see also Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 76 (2001) (Thomas, J., concurring) ("[T]he core of the legislative power … is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct.")

815 F.2d 1570, 1574 (D.C. Cir. 1987) ("Because Congress may delegate its legislative power … .") (citing *Chevron v. NRDC*, 467 U.S. 837, 843–44 (1984)); *United States v. Erskine*, 717 F.3d 131, 138 (2nd Cir. 2013) ("Congress may delegate its legislative power so long as it provides … 'an intelligible principle … .'") (citing *Mistretta*, 488 U.S. at 371–72 and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)); *United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020) (same) (citing *Gundy v. United States*, 588 U.S. 128, 135 (2019), *Mistretta*, 488 U.S. at 372, and *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 795 (8th Cir. 2005) (same) (citing *J.W. Hampton*, 276 U.S. at 409); *see also Johnson v. City of Detroit*, 446 F.3d 614, 631 (6th Cir. 2006) (Martin, J., concurring in part, dissenting in part, and concurring in the judgment) ("[T]he Supreme Court has permitted Congress tremendously broad authority to delegate legislative power to administrative agencies …") (citing *Mistretta*, 488 U.S. at 372 and *Loving v. United States*, 517 U.S. 748, 758 (1996)). One panel on the Tenth Circuit even stated that the nondelegation doctrine has been long dormant, to the point of being deemed a "dead letter" never properly interred. *United States v. Rickett*, 535 F. App'x 668, 674–75 (10th Cir. 2013) (citing *Mistretta*, 488 U.S. at 373).

The modern nondelegation doctrine no longer adequately protects the separation of powers built into the Constitution as a bulwark for individual liberty. To honor the Constitution's design, this Court must return to its earlier, less deferential holdings.

## II. VESTED POWERS PRECEDENT ONCE DEMANDED THAT CONGRESS SET LEGISLATIVE STANDARDS

To protect the separately Vested Powers, this Court once demanded that Congress provide a rule of decision, a standard, for applying a policy, before empowering an agency to administer a statute with substantive authority to limit rights. An appropriate legislative standard would allow courts to determine when the legislated policy was accomplished or when it must give way.

In this case, for instance, precedent predating 1946 would have required that a court and the public be able to point to the language of the statute and identify a standard that would allow *them*, not the FCC, to determine when the agency has not done enough, has complied with the will of Congress, or has exercised authority beyond what Congress intended when laying claim to private funds for a public purpose.

Even the now-maligned intelligible-principle test, as originally applied by this Court, required Congress to set standards to limit the authority it conveyed to the Executive.

### A. Early Vested Powers Precedent Demanded That Congress Set Legislative Standards

For over 150 years after the founding of our republic, this Court dutifully observed the constitutional mandate to limit legislative power to Congress. *See Marshall Field & Co. v. Clark*, 143 U.S.

649, 692 (1892) ("That [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *Wayman v. Southard*, 23 U.S. 1, 42 (1825) ("It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative."); *J.W. Hampton*, 276 U.S. 394, 406 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power …").

In the 1930s and early 1940s, as the administrative state started expanding its reach, this Court took care to define what Congress must do before it could delegate authority to an executive agency. Specifically, it would not suffice for Congress to identify a broad policy, then grant power to advance the policy. To keep legislative power in the Legislative Branch, Congress also had to set standards, to establish rules of decision and conduct, in a manner that would allow courts and the public to determine whether the administrative acts of the executive were consistent with the legislative will expressed in the statute. *See Panama Refining*, 293 U.S. at 422–26; *Schechter Poultry Corp.*, 295 U.S. at 530; *Opp Cotton Mills*, 312 U.S. at 144–45; *Yakus*, 321 U.S. at 424–26.

In *Panama Refining*, the Court held § 9(c) of the National Industrial Recovery Act unconstitutional because while there were numerous policy goals, the statute did not provide a standard that determined when the specific power at issue should be applied. 293 U.S. at 430–32. Section 9(c) authorized the President to prohibit the transportation of certain oil but provided no principle for when to do so. *Id.* at 414–

16. The broader Act identified several policy objectives including "to promote the fullest possible utilization of the present productive capacity" and "to conserve natural resources," but the Court found that this "general outline of policy" did nothing to establish a standard for when the granted power should be used. *Id*. at 416–17.

The Court identified the key distinction between § 9(c) and other cases where delegations were held permissible. *Id*. at 421–30. In the other cases, Congress had established not only policies, but *standards* or rules of conduct; leaving the executive to develop "subordinate" rules or to find facts needed to apply the legislative standard. *Id*. at 421; *see id*. at 422–26. For example, Congress could have mandated that transportation of oil be prohibited when production exceeded a specified volume range or when prices deviated from a certain price range.

Where Congress set the standard, the President "was the mere agent of the law-making department to ascertain and declare the event upon which [the legislature's] expressed will was to take effect." *Id*. at 426 (quoting *Marshall Field*, 143 U.S. at 692–93). In *Panama Refining*, "Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule," *specifically as to the transportation of hot oil*, even though there were various other standards for other authority scattered throughout the statute. *Panama Refining*, 293 U.S. at 430; *see id*. at 432.

Later the Court struck another part of the Act, holding again that Congress must "itself establish[] the standards of legal obligation, thus performing its

essential legislative function." *Schechter Poultry*, 295 U.S. at 530 (addressing codes approved by the President to regulate wages, hours, and competitive practices). "[F]ailure to enact such standards" amounted to an "attempt[] to transfer [the legislative] function to others." *Id.* The Court rejected the suggestion that the context of a "national crisis" should lessen its inquiry, stating instead that, "[e]xtraordinary conditions do not create or enlarge constitutional power." *Id.* at 528. As to legislative power, when the purpose of a statute is not to establish law, but to authorize the executive to make "new and controlling prohibitions [*i.e.*, restrictions on liberty] through codes of laws," and when any congressional restrictions "leave virtually untouched the field of policy envisaged," Congress has exceeded the bounds of its lawful authority. *Id.* at 535, 538.

Standards are necessary in part because, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). But when a statute's guidance provides no more than aspirational policy statements, there is not a legislated determination of when rights need no longer yield in favor of the policy. The Constitution demands that Congress make these determinations because "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526.

As the Court put it in *Opp Cotton Mills*, the "essentials of the legislative function are the determination of the legislative policy *and* its formulation as a rule of conduct." 312 U.S. at 145 (emphasis added). In that case, the policy was to raise the minimum wage to 40 cents per hour. *Id*. at 142–43. Congress recognized, however, that an immediate and in some cases drastic mandated wage increase could have negative consequences. The statute thus provided that a wage increase should occur "as rapidly as is economically feasible without substantially curtailing employment" in an industry and required consideration of "economic and competitive conditions" and related subfactors. *Id*. at 135. *But see* FCC Br. at 21 (ignoring statute's provision of standards explaining "as rapidly as [is] economically feasible"). The Court found that the standards provided a "definition of the circumstances in which [the statute's] command is to be effective," which together with the declared policy, "constitute the performance, in the constitutional sense, of the legislation function." *Opp Cotton Mills*, 312 U.S. at 144. The Court later reiterated that where a statute sets up standards "such that Congress, the courts[,] and the public can ascertain whether the agency has conformed to the standards …, there is no failure of performance of the legislative function." *Id.*

Judicially discernable standards serve an additional constitutional purpose. The FCC suggests that the Court continue with the current lax Vested Powers precedent because of a claimed "practical reality that constitutional limits on delegation are not 'readily enforceable by the courts.'" FCC Br. at 24 (quoting *Mistretta*, 488 U.S. at 415). This alleged

difficulty is avoided if the Court returns to its prior demand that standards be sufficient to ascertain whether the agency has conformed to, contravened, or exceeded the will of Congress. The FCC's argument demonstrates how current interpretation of the nondelegation doctrine not only enables transfers of legislative power, but also interferes with the exercise of judicial power.

To accomplish their purpose, standards must thus be "sufficiently definite and precise." *Yakus*, 321 U.S. at 425–26. While this prescription permits flexibility, it negates the use of unqualified directional policy statements. 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." *Id*. at 425. *Yakus* examined an emergency wartime price control act. *Id.* at 420. The Court noted that Section 1 declared its purposes or policy objectives, while Section 2 and an amending statute provided standards, prices prevailing on a specific date, to be used in fixing maximum prices. *Id*. at 420–21; *but see* FCC Br. at 21 (identifying only "fair and equitable" as applicable statutory standard). It was the standards that "define[d] the boundaries" for agency action. *Id*. The Court repeated that the essential of the legislative function was not only determination of policy, but its "formulation and promulgation as a defined and binding rule of conduct." *Id.* at 424.

The demand for a standard and rule of decision as part of the legislative function was also made by James Madison. In criticizing the Alien Act for

improperly uniting legislative, judicial, and executive power, Madison observed:

> However difficult it may be to mark … the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional. … If 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 laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

*See* James Madison, *The Report of 1800*, NATIONAL ARCHIVES (Jan. 7, 1800); *id.* ("it must be enquired whether [a statute] contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded….").[6]

To exercise and not divest its legislative power, Congress must set standards sufficiently discernible

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[6] https://founders.archives.gov/documents/Madison/01-17-02-0202.

to serve the purpose of establishing a rule of law for when a statute is intended and should be applied to impinge or reorder rights.

### B. The "Principle" of the Intelligible Principle Test Once Required Standards for Agency Conduct

While this Court came to refer to the need for congressionally determined standards as the requirement for an intelligible principle,[7] that formulation itself did not signal a dilution of Vested Powers protection.

In *J.W. Hampton*, the Court dealt with a tariff that could be used to advance the policy of raising revenue, the policy of protecting domestic industry, or both. *Id.* at 411. Either way, the Court found Congress had set a "perfectly clear and perfectly intelligible" standard for administration of the statute: it should result in custom duties that would equal the difference in cost between producing and selling a foreign item in the United States and the cost of producing and selling the item domestically to "enable domestic producers to compete on terms of equality with foreign producers … ." 275 U.S. at 404.

While the standard was clear and fixed, the circumstances to which the policy and standard applied were complex and variable. Domestic and foreign production costs may be unknown by Congress and unknowable on an ongoing basis. *Id.* at

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[7] *See* WEBSTER'S NEW MODERN ENGLISH DICTIONARY (1922) (defining "principle" to include, among other meanings, a "settled rule or law of action or conduct[.]").

404–05. In such situations, Congress "having laid down the general rules of action" for an agency to follow, may require the agency to apply "such rules to particular situations and the investigation of facts, with a view to making orders … within the rules laid down by the Congress." *Id.* at 408 (quoting *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912)).

After citing repeated instances of courts approving statutory designs where Congress provided standards for when and how the Executive Branch should apply legislated authority, the Court observed that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [administer the law] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. *Contra* FCC Br. at 11, 25 (conflating principles and policy).

So, the Court once properly required that Congress establish judicially discernible standards for agency action intended to affect rights, but its dicta later led the doctrine astray.

## III. THE PUBLIC-INTEREST FALLACY PETITIONERS EMBRACE AND ITS ORIGIN IN THIS COURT

Rather than reckon with the need for judicially discernible, congressionally established standards, Petitioners argue that a statute does not fail the nondelegation test so long as it identifies a general policy, the agency to pursue the policy, and boundaries for the agency's power. FCC Br. at 11; CCA Br. at 19. Moreover, according to Petitioners' recounting, even a policy and boundary combination

so amorphous as telling an agency to act in the "public interest" as to a particular subject matter will suffice. *See* FCC Br. at 11, 20, 30, 32–33; CCA Br. at 23–24.

This public-interest fallacy and other weaknesses in Vested Powers precedent arose in large part from unfortunate and erroneous dicta uttered by this Court. In *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), the Court stated that "public interest" and similar precatory aspirations had been accepted as sufficient security to prevent an agency from exercising legislative power. But this Court had not so held. The statutes previously approved relied on additional statutory language, statutory interpretations predating the statute at issue, or settled common law to discern the rule of action or standard that Congress intended an agency to apply.

### A. *American Power & Light*'s Public-Interest Fallacy

In *American Power & Light*, the Court rejected a Vested Powers challenge to the Public Utility Holding Company Act of 1935. The Act prohibited nested holding company structures that "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders," methods that had been used to deprive some investors of governance or distributions proportionate to their investment. 329 U.S. at 97 (quotations omitted). The Court found that for "those familiar with corporate realities[,]" the challenged phrases held meaning "standing alone." *Id.* at 104. Even so, the phrases did not stand alone. After surveying the statute, the Court found that the legislation provided

"a veritable code of rules" "for the Commission to follow in giving effect to the standards." *Id*. at 105.

What followed, however, was dicta that has been widely and uncritically adopted, leading to ongoing misunderstandings of when Vested Powers are transferred. After the analysis above, the *American Power* Court stated that the standards at issue were "certainly no less definite in nature than … 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue." *Id*. The Court justified these alleged prior decisions stating that "[t]he judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems," *id.*, apparently abandoning its statement in *Schechter Poultry*, that even "[e]xtraordinary conditions do not create or enlarge constitutional power." 295 U.S. at 258.

The *American Power* "public interest" statement was not only unnecessary, it was also flatly wrong. *American Power* cited *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), but ignored that Court's explicit observation that it was a "mistaken assumption that [the 'public interest' mentioned in the statute] is a mere general reference to public welfare without any standard to guide determinations." *N.Y. Cent. Sec. Corp.*, 287 U.S. at 24. *New York Central* dealt with the issue of railroad consolidation under the Transportation Act of 1920. To identify standards in that Act, the Court stated

that it must consider, "[t]he purpose of the Act, the requirements it imposes, and the context of the provision in question." *Id.* Given the purpose of the Act and its language, the Court found that "the term 'public interest'" had a "direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities[.]" *Id.* at 25.

Just as importantly, *New York Central* and the statute at issue touched upon "questions to which the Interstate Commerce Commission ha[d] constantly addressed itself." *Id*. By the time the Act was adopted, the ICC had been operating for over 30 years, and there were dozens of cases, on top of a wealth of other laws, that provided meaning to the terms of the statute when it was passed. Courts regularly rely upon settled precedent and common law to provide meaning to statutory terms, including standards. *See, e.g.*, *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (regulations dealt with problems "as old as banking enterprise" and "precedents have crystallized into well-known and generally acceptable standards"); *Fed. Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591, 621 (1944) (Reed, J., dissenting) (noting "reasonable return" is discernible from daily transactions and "fair value" "had been worked out in fairness to investor and consumer" by cases predating the statute); c*ontra* FCC Br. at 21 (citing "just and reasonable" standing alone).[8] *New York Central* relied

[8] For similar reasons, the *American Power* statement that the Court had approved "unfair methods of competition," standing alone, as an adequate legislative standard is also incorrect. Likewise, the FCC's reliance on *Lichter v. United States*, 334

on a rich tapestry woven from the Act's purpose, requirements, context, and language as well as decades of precedent, not a threadbare invocation of aspirational "public interest."

*National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), is also frequently, but wrongly, cited as approving "public interest" as an intelligible principle. *National Broadcasting* addressed FCC regulations concerning "chain" or network broadcasting. The FCC determined that contracts associated with network obligations unduly restricted the operations of a radio licensee, interfering with the ability to select programming for its local audience. *Id.* at 194–209. While the Court identified "public interest, convenience, or necessity" as a "touchstone" criterion, *id.* at 216, the statute provided much more.

As particularly relevant to that case, Congress mandated that the Commission should "generally encourage the larger and more effective use of radio." *Id.* at 215–19. The Court returned over and over to this statutory mandate and FCC's finding that contractual restrictions on content prevented licensees from the fullest and best use of their federally licensed facilities to the detriment of the

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U.S. 742, 774–87 (1948), FCC Br. at 21, as approving a bare "excessive profits" standard is misplaced. *See Lichter*, 334 U.S. at 783–86 (relying on wartime powers, prior statutes, and administrative principles and procedures previously presented to Congress as controlling implementation of the statute).

local listeners.[9] *Id.* at 216–17, 224. Less relevant to the specific holding in that case but important when evaluating the need for standards to constrain discretion, the Communications Act at issue also expressly forbade interference between stations and it required a fair, efficient, and equitable distribution of radio services among states and communities. *Id.* at 215; *see* Communications Act of 1934, Pub. L. No. 73-416, 48. Stat. 1064, 1070, 1081–86.[10]

*American Power*'s implication that vague policy directions, unadorned by purpose, context, and legal history, can provide an intelligible principle was error.

### B. Other Unfortunate Consequences of *American Power & Light*

*American Power* bears blame for other language and decisions that have weakened protections for

[9] As explained further below, *National Broadcasting* is also distinguishable because it dealt with the privilege associated with using limited radio frequencies. There was not a private right to monopolize the limited availability of radio programming.

[10] FCC cites *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1943) as another case that allegedly approved a "public interest" standard. FCC Br. at 20. Not so. In that case the statute provided that USDA was to "establish prices … that will give agricultural commodities a purchasing power … equivalent to the purchasing power … in" a specified base period, with further standards for when and how to allow variances. 307 U.S. at 574–76. Discretion was limited between that price needed to provide adequate purchasing power (maximum price) and that low enough to provide an adequate supply (minimum price). It was not determined by public interest. *See id.* at 575–76.

Vested Powers. That Court stated that rather than "detailed rules," it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." 329 U.S. at 105. This purported reframing of the intelligible principle test has been diluted and then embraced by advocates of administrative power. *See* FCC Br. at 11, 19; CCA Br. at 19. "General policy" erroneously came to be understood as the "principle" in the intelligible principle test, loosing that test from its standards mooring. Additionally, "boundaries of authority" came to refer to not only extent, but scope of authority, and is now argued to be found in any limitation a statute may place on agency authority.

Petitioners, for example, argue that the limits on whom the USF is initially collected from, the purpose of the USF, and the beneficiaries of the USF provide boundaries that will allow a court to determine if the FCC has exceeded its authority. *See* FCC Br. at 12, 26; CCA Br. at 20. None of these limitations, however, provides a boundary for deciding how deeply the FCC may reach into consumer pockets, the specific power that is challenged. So long as the technology continues to evolve or advance, and especially so long as the statute allows the FCC to set its own "principles," then the FCC can expand its mandate indefinitely to justify taking more and more private funds.

Petitioners' arguments are not surprising, however, as courts have reasoned that "boundaries of authority," may refer to regulatory jurisdiction, the breadth of the agency authority. Following this logic,

courts have surmised that if the delegation is narrow enough, Congress "need not cabin the [agency's] discretion." *United States v. Martinez-Flores*, 428 F.3d 22, 27 (1st Cir. 2005). *See also Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34–35 (D.C. Cir. 2008) (Brown, J., dissenting in part) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001)) (stating boundaries of authority are adequately established if Congress provides either "standards to guide an agency's judgment or, in their absence, stringent limits on the scope of the delegated authority" such that "'Congress need not provide any direction' if the 'scope of the power congressionally conferred' is sufficiently small.").

The problem, of course, is that even a "narrow" delegation of *legislative* power is forbidden by the Constitution. *See Loving v. United States*, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring in part) ("While it has become the practice in our opinions to refer to 'unconstitutional delegations of legislative authority' versus 'lawful delegations of legislative authority,' in fact the latter category does not exist. Legislative power is nondelegable."). The exercise of legislative power is not converted into an exercise of administrative power by reducing its scope.[11] Similarly, even an "unimportant" right, if such a thing exists, or the rights of people deemed by an

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[11] To avoid this issue, the FCC carefully avoids classifying the power it exercises, referring only to "discretionary" power. FCC Br. at 19, 24. Discretion, however, refers to decision-making power, not a specific type of governmental power. *See Discretion*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "discretion" as "Freedom in the exercise of judgment; the power of free decision-making.").

agency to be "unimportant" cannot be stripped away during lawmaking other than by legislative power.

*American Power* mischaracterized the then-existing Vested Powers law and instituted an alternative test that led to erroneous judicial statements that Congress *can* delegate legislative power to advance specific policies or in small increments. Allowing the FCC to determine how to prioritize funding for Universal Service among the other demands on American taxpayers conveys legislative power and, regardless of how one views the breadth of that power, the Constitution bars it from being exercised by the Executive Branch.

## IV. Petitioners' Other Arguments for Broad Discretion Depend on Cases Addressing Benefits or Authority Constitutionally Vested in the Executive; Circumstances Inapplicable Here

Petitioners err not only by failing to recognize the need for judicially discernible statutory standards, but by failing to recognize the key distinction between the type of power granted to the FCC and challenged in this case and the types of authority exercised when broad delegations have been judicially approved.

Most nondelegation precedent accepting vague congressional guidance addresses administration of public franchises or benefits (not the conversion of private property to a public fund). Or it deals with an exercise of authority already constitutionally vested in both the Legislative and Executive Branches (such as foreign affairs and military justice). The USF

statute creates a public benefit, but the FCC's authority to administer the benefit is not at issue. Rather, what makes the USF scheme unlawful is giving a nonlegislative body power to determine when and how severely it may impinge upon rights.

Uncritically applying the reasoning from public benefit cases to the FCC's functionally unbridled power to lay legal claim to private funding commits dangerous error. The nature of the conversion power and rights at issue in this case further counsel in favor of the Court's requiring, as it has before, that Congress set a standard that delimits the bounds of the legislative body's will without requiring deference to the FCC's own agenda-setting.

### A. Administering Public Benefits and Franchises Is Constitutionally Distinct from Altering Rights

The FCC cites a litany of cases that purportedly stand for the proposition that the Supreme Court "has repeatedly upheld broad statutory grants of discretion to executive agencies." FCC Br. at 20–21. FCC's menagerie of cases bears closer examination. When properly classified, one finds that most of its cases addressed administration of benefits, not rights.

The distinction between government-issued benefits and individual rights is constitutionally significant. Core rights include an individual's "life, liberty, and property." *Axon Enter., Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 197 (2023) ("*Axon/Cochran*") (Thomas, J., concurring) (citation omitted). The demand that government respect rights

motivated the Declaration of Independence as well as various constitutional provisions. *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governments are created to secure unalienable rights); U.S. CONST. Preamble; U.S. CONST. amend. V.

Benefits, as used here, refers to government-created benefits and entitlements. Such "privileges are created purely for reasons of public policy and have no counterpart in the Lockean state of nature." *Axon/Cochran*, 598 U.S. at 199 (Thomas, J., concurring) (internal quotations and citations omitted). *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 11 n. 2 (2023) (Thomas, J., concurring). These benefits do not carry with them the power to interfere with others' rights. *See Richards v. Wash. Terminal Co.*, 233 U.S. 546, 556 (1914). Executive rulemaking regarding benefits has long been recognized as appropriate. *See* Hamburger, *supra* n. 2, at 1102.

The FCC relies extensively on cases that deal with public franchises, a particular kind of benefit. FCC Br. at 20–22. Public franchises are created by statute, can be subject to revocation or amendment, and provide only the protections conveyed by statute. *See Oil States Energy Srvs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 337 (2018). This Court has explained that "a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen …." *Frost v. Corp. Comm'n*, 278 U.S. 515, 534 (1929). Rather, a public franchise is conferred by the government and "may be granted or withheld at the pleasure of the state" while "the Federal Constitution imposes no limits upon the State's discretion in this respect." *Id.*

The public franchise or utility cases the FCC relies on include *National Broadcasting Co.*,[12] *New York Central*,[13] *Union Bridge Co. v. United States*,[14] *Federal Power Comm'n v. Hope Natural Gas Co.*,[15] and *American Power & Light*. FCC Br. at 20–21; *see also* FCC Br. at 22 (relying on statute dealing with patents, which are also a type of public franchise).

U*nited States v. Grimaud*, 220 U.S. 506 (1911), upon which FCC relies, Br. at 21, likewise deals with a limited privilege, there using public land for grazing. *Grimaud* is further distinguishable because it addressed the government's propriety management of land it owned. The Court said that the regulations at issue were not "of a legislative character," but more akin to the authority "an owner may delegate to his principal agent …." *Id.* at 516 (quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905)). Additionally, whatever "policymaking discretion" the statute conveyed was limited by congressionally set standards. The Act allowed the Secretary "to make provisions for the protection against destruction by

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[12] 319 U.S. at 216 ("the facilities of radio are limited and therefore precious"); *id.* at 218 ("the number of radio channels [is] limited by natural factors") (citation omitted).

[13] 287 U.S. 12 (addressing railroad merger); *see also N. Sec. Co. v. United States*, 193 U.S. 197, 353 (1904) (railroads "operate public highways, established primarily for the convenience of the people" and "in the exercise of public franchises, engage in the transportation of passengers and freight among the states." (quotations and citations omitted).

[14] 204 U.S. 364, 380, 401 (1907) (addressing the operation of a bridge constructed pursuant to a state-issued charter, a public franchise).

[15] 320 U.S. 591 (1944).

fire and depredations upon the public forests and forest reservations[,]" and Congress set the punishments. *Id.* at 509. Pasturing "sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which [the acts] were established." *Id.* at 516.

While the USF arguably provides a social benefit, the power to distribute and condition funds is not at issue. Instead, Respondents challenge the FCC's power to set its own standard for how much money it will take from American pockets to fund that benefit. Petitioners fail to consider important distinctions between management of benefits and impingement of rights. This Court, however, must not evaluate the conversion of private funds using metrics approved for guiding the administration of limited benefits.

### B. Petitioners Misplace Reliance on Cases Considering Authority Constitutionally Granted to the Executive; There Is No Inherent Executive Power to Convert Private Funds

In addition to missteps stemming from *American Power* and failing to appreciate the difference between the Constitution's treatment of rights versus benefits, Petitioners also misplace their reliance on shared-authority cases. Cases that address authority constitutionally vested in both the Legislative and Executive Branches are inapplicable here because the Executive Branch has no inherent authority to raise revenue through a domestic tax or its equivalent.

There are some government activities that rest on authority the Constitution placed in both the Legislative and Executive Branches. *See Gundy v. United States*, 588 U.S. 128, 159 (2019) (Gorsuch, J., dissenting) ("[W]hen a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if the discretion is to be exercised over matters already within the scope of executive power.") (quotations and citations omitted); *Ass'n of Am. R.Rs.*, 575 U.S. at 69 (Thomas, J., concurring) ("Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution."); *see also* Hamburger, *supra* n. 2, at 1145–48 (distinguishing exclusive government power and shared government authority).

As explained in Respondents' Brief, foreign affairs is a common example. Consumers' Rsch. Br. at 38–41. Further, not only does the Executive Branch have constitutional authority concerning foreign relations, but constitutional protections for American subjects cannot be compared to the breadth of government power when interacting with foreign nations and agents. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936) (the differences between internal and external affairs are "fundamental" to the point that a delegation "confined to internal affairs" may be invalid when the same delegation affecting foreign affairs is permissible). Petitioners' cited cases and statutes addressing tariffs, embargoes, and other import privileges are thus not comparable to the FCC's power here to determine domestic funding for its program. *See* FCC Br. at 36 (addressing tariffs and citing *Federal Energy*

*Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976), *Marshall Field*, 143 U.S. at 683–89, and *J.W. Hampton*, 276 U.S. at 409).

There are other contexts, including *Loving v. United States*, 517 U.S. 748, 771 (1996), cited by the SHLB Petitioners, SHLB Br. at 31, where the Court has recognized that broad delegations that are acceptable where the Executive has explicit constitutional authority may not have been acceptable otherwise. In *Loving* the issue was whether the President, not Congress, could "make the fundamental policy determination respecting the factors that warrant the death penalty" for cases tried in military tribunals. *Id.* at 755. After finding that the Constitution did not give Congress exclusive power over military judgments and that such power had historically been shared between the Crown and Parliament in England, *Loving*, 517 U.S. at 760–61, the Court considered whether the statute provided an intelligible principle. The Court stated that because "[t]he delegated duty, then, is interlinked with [the Commander in Chief] duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter," the direction provided was adequate. *See id.* at 772 (quotations and citations omitted). The Court noted, however, that had the delegation "called for the exercise of judgment or discretion that lies beyond the traditional authority of the President," the nondelegation argument may have had more weight. *Id.* at 772.

These shared authority cases and the shared authority statutes that Petitioners rely upon[16] are not comparable to Congress's granting FCC the power to decide what amount of private funds to take to further its program. Unlike the centuries-long practice of multi-branch authority over foreign relations and armed forces, the power to involuntarily convert private funds into public money to support a social benefit is not a shared authority. *Consumers' Rsch. v. FCC*, 109 F.4th 743, 767 (5th Cir. 2024) ("Unlike delegations implicating the power to impose criminal sentences, taxation has always been an exclusively legislative function.").

Regardless of its title—a tax, a fee, a king's ransom—§ 254 allows the FCC to unilaterally raise revenue that adds up to roughly 20 times its congressionally-appropriated budget. *See* Consumers' Rsch. Br. at 12. Congress effectively gives the FCC a blank check written on consumer accounts. Section 254 also allows the FCC to partially evade a core legislative power that cannot be delegated nor shared with agencies without special consideration. *See* Chenoweth & Samp, *supra* n. 3, at 98. *CFPB v. All Am. Check Cashing*, 33 F.4th 218, 241 (5th Cir. 2022) (Jones, J., concurring) ("Congress may no more lawfully chip away at its own obligation to regularly appropriate money than it may abdicate that obligation entirely.").

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[16] The statutes cited address, among other things, the salary of government employees, but not the associated raising of funds, embargoes, postal operations, and the temporary relocation of the government during an epidemic. FCC Br. at 21–23.

The power that the FCC is exercising in determining the funding level for the USF is the power to convert private money into public funds. This is not a power already within the Executive's constitutional authority, and there is no justification in this case for watering down the constitutional protections arising from the separation of powers and the burden of the legislative process.

The exclusive vesting of legislative power in Congress is fundamental to the legitimacy of government and the purpose for which it was created—securing rights and liberty. While the Court once demanded that Congress set the legislative standards by which rights could be infringed, case law has departed from these first principles. Through a series of imprecise statements and stray dicta now sometimes adopted as precedent, courts have come to contradict the Constitution.

Petitioners and others further compound these errors by failing to distinguish the extent of government authority over benefits versus the limits on government authority to interfere with rights. They also fail to acknowledge that the Executive has no traditional or constitutional authority to determine appropriate funding for social welfare programs. After almost 80 years of crumbling protection for Vested Powers, it is long past time for the Court to return to enforcing constitutional prohibitions on the transfer of legislative power.

## CONCLUSION

This Court should take the opportunity to re-establish the requirement for congressionally established and judicially discernible legislative standards as a barrier to keep legislative power in the Legislative Branch. By that measure, 47 U.S.C. § 254, to the extent that it gives the FCC discretion to determine how severely to infringe rights, must fall.

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Respectfully submitted,

/s/ *Zhonette M. Brown*
Zhonette M. Brown
*Counsel of Record*
Kaitlyn D. Schiraldi
Markham S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Phone: (202) 869-5210
zhonette.brown@ncla.legal

*Counsel for Amicus Curiae*
*New Civil Liberties Alliance*