No. 23-456

IN THE

Supreme Court of the United States

CONSUMERS' RESEARCH, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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

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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" 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. NCLA trains its primary focus on this unconstitutional administrative state.

NCLA represents clients harmed by unconstitutional divesting of legislative power to administrative agencies who would benefit from

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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* and its counsel, paid for the brief's preparation or submission. Counsel for *amicus curiae* notified Petitioner and Respondent of its intention to file this brief on November 16, 2023.

enforcement of the constitutional mandate that legislative power be exercised by Congress or not at all. *See, e.g.*, Complaint, *RMS of Georgia, LLC v. EPA*, No. 1:23-cv-4516 (N.D. Ga. Oct. 26, 2023).

SUMMARY OF ARGUMENT

NCLA agrees with Petitioners that 47 U.S.C. § 254, which allows the Federal Communications Commission ("FCC") to dynamically contour its own scope of power and to self-fund a multi-billion dollar social program, violates core constitutional principles and warrants this Court's attention. NCLA writes separately to highlight that the nondelegation doctrine has become impotent to protect fundamental separation of powers built into the very structure of the Constitution and meant to serve as a bulwark for liberty.[2] NCLA also writes to explain that the current "nondelegation" doctrine is a misnomer based on falsity that betrays the Constitution. *Id*. at 1091–94.

The Constitution vested legislative power in Congress and demanded that it remain there. Legitimate exercise of legislative power rests on the consent of the governed. Only Congress has the People's consent to make the prospective laws that can infringe on their pre-existing natural liberty and lay claim to their property.

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[2] *See* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1090 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247 (the nondelegation doctrine "is the fulcrum of a sobering crises of governance and legitimacy").

The nondelegation doctrine ostensibly developed to determine whether transfers of authority from Congress were unconstitutional grants of legislative power or were permissible delegations of other authority. Modern application of the doctrine, however, serves the opposite function; it purports to legitimize statutes that grant the executive branch the power to enact general prospective laws with all the hallmarks of legislation.

The nondelegation doctrine fails to acknowledge what is at stake in congressional grants of power. Further, it rests on unsustainable fictions concerning the breadth and nature of power granted to the executive and the scope and force of guidance that allegedly constrains the executive. Today's nondelegation doctrine reliably permits political expediency to overcome constitutional duty, not only duties of Congress, but also duties of the judiciary.

Because the grant of authority in 47 U.S.C. § 254 allows FCC to establish its own guiding policies and touches on the core legislative power of the purse, it is particularly troubling.

The Petition should be granted; until this Court returns to restricting legislative power to Congress, no other court will be able to do so.

REASONS FOR GRANTING THE PETITION

I. THE "NONDELEGATION" DOCTRINE ENABLES CONSTITUTIONAL VIOLATIONS

The Constitution, by design, vested separate and largely exclusive powers in each branch of the United States government. When establishing the Constitution, the People gave Congress alone the power to legislate—the power through an exercise of will to make general, prospective, binding rules that limit liberty.

While the "nondelegation" doctrine claims to prevent divesting of legislative power, its application actually enables such transfers. This misnomered, fictional doctrine must be recast if the Constitution is to serve its purpose.

A. Legislative Power Must Be Exclusive to Congress

Limiting legislative power to Congress was (and is) essential to the Constitution's fundamental principles of consent of the governed. The Constitution thus makes clear that legislative power cannot be shared or divested.

1. The Principle of Consent

No principle mattered more for the founding of the Nation than consent. Without consent, a government lacks legitimacy and its laws lack obligation. *See* Hamburger, *supra* note 2, at 1105–07.

In a republic such as the United States, consent for laws that impinge on liberty comes through the election of representatives to the legislature. American colonists declared it "the first principle in civil society, founded in nature and reason, that no law of the society can be binding on any individual[], without his consent, given by himself in person, or by his representative of his own free election."[3]

2. "Shall Be Vested" Mandates That All Legislative Powers Be in Congress

Consistent with its motivating principles, the Constitution states that each of the government's tripartite powers "shall be vested" in a separate branch. U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1. The Constitution thereby emphasizes that its powers cannot be rearranged.

Imagine that the Constitution had used the word "vested" as one might in a grant of property, saying merely that the legislative powers are hereby vested in Congress. Then there would be an initial transfer of legislative power from the People, but no express textual indication that the legislative powers must remain with Congress.

But the Constitution says that its powers "shall be vested." It thereby not only transfers the People's powers, but it says where they "shall" and thus *must* be located. Of particular interest here, "*all* legislative

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[3] *Resolutions of the Boston Town Meeting* (Sept. 13, 1768), *in A Report of the Record Commissioners of the City of Boston, Containing the Boston Town Records, 1758 to 1769*, 261, 261 (Boston: Rockwell & Churchill, 1886).

powers … *shall be* vested in a Congress." U.S. CONST. art. I, § 1 (emphases added). The phrase "shall be vested" reinforces what already should be clear, that "the Constitution's vesting of powers is not just an initial distribution." *See* Hamburger, *supra* note 2, at 1174. Rather, the Constitution mandates where they shall remain, and that Congress may not divest them.

For these reasons and more, limiting legislative power to Congress is fundamental to protecting liberty.

B. The Nondelegation Doctrine Wrongly Enables Divesting Legislative Power to the Executive

Adhering to these Constitutional dictates, the Court once demanded that Congress complete the act of legislating before empowering an agent to administer statutes. Now, the Court allows Congress to merely articulate broad policies, leaving agencies to develop codes of law that constrain liberty.

1. How It Started: The Nondelegation Doctrine Developed to Enforce Constitutional Boundaries

For over 150 years after the founding of our republic, this Court faithfully acted as a boundary warden, keeping legislative power where the Constitution vested it. *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."); *see also*

Wayman v. Southard, 23 U.S. 1, 20 (1825) ("It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative."); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch").

In the 1930s and early 1940s, as the administrative state took root, the Court took care to define what Congress must do before it could delegate authority. Specifically, it was not sufficient that Congress identify broad policy goals, rather, Congress also had to set the standards that would be applied in accomplishing such goals, to establish rules of decision and conduct, and to do so in a manner that would allow courts and the public to determine whether the acts of the executive were consistent with the legislative will expressed in a statute. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *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).

In *Panama Refining*, the Court held Section 9(c) of the National Industrial Recovery Act unconstitutional. 293 U.S. at 430–32. Section 9(c) authorized the President to prohibit the transportation of "hot" oil, but provided no standards for when he should do so. After finding no standards for or constraints on this specific power in Section 9, the Court turned to the broader statute. *Id.* at 414–16. The Act's "declaration of policy," identified at least

twelve policy objectives such as "to promote the fullest possible utilization of the present productive capacity" and "to conserve natural resources." *Id*. at 416–17. The Court found that this "general outline of policy" did nothing to establish a standard for when the granted authority should be used. *Id*. at 417. Rather, it left the President to perform the legislative function of establishing the standard for when to apply governmental power. *Id*.

The Court distinguished other cases where delegations of authority had been permissible. *Id*. at 421–30. In such cases, Congress had established not only policies, but *specific standards* or rules of conduct; leaving the executive to develop "subordinate" rules or to find facts needed to apply the legislative rule. *Id*. at 421; *see also id*. at 422–26. In such instances, 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.

Further, the Court rejected the idea that it previously approved something so vague as "public convenience, interest, or necessity" as a sufficiently limiting standard. *Id*. at 428 (noting that the executive was also required to provide "equality of radio broadcasting service, both of transmission and of reception" between the states) (citing *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co*., 289 U.S. 266 (1933)).

Ultimately, the Court struck Section 9(c) because "Congress has declared no policy, has established no standard, has laid down no rule," *specifically as to the*

transportation of hot oil. *Panama Refining*, 293 U.S. at 430; *see also id*. at 432 (to prevent "a pure delegation of legislative power" Congress must establish the "rules of decision"). Notably, the Court was looking for a standard related to the narrow authority granted in one subsection of the statute, not a global aspiration.

Later the Court struck another part of the Act, holding that Congress must "itself establish[] the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S. at 530. "[F]ailure to enact such standards" amounted to an "attempt[] to transfer [the legislative] function to others." *Id*. When the purpose of a statute is not to establish law, but to authorize the executive to make "new and controlling prohibitions through codes of law[,]" and when any restrictions "leave virtually untouched the field of policy envisaged," Congress has exceeded its bounds. *Id*. at 535, 538. A statute that "does not undertake to prescribe rules of conduct," but instead "authorizes the making of codes to prescribe [rules of conduct]" is "an unconstitutional delegation of legislative power." *Id*. at 541–42; *see also Currin v. Wallace*, 306 U.S. 1, 18 (1939) (statute upheld where Congress both "defines the policy" and "establishes standards."); *Opp Cotton Mills*, 312 U.S. at 145 ("The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct."); *id*. at 144 (where a statute sets up standards for the guidance of the administrative agency "such that Congress, the courts[,] and the public can ascertain whether the agency has conformed to the standards which

Congress has prescribed, there is no failure of performance of the legislative function").

Thus, the Court once properly applied standards for legislation that required Congress to do more than make grand statements of policy. Those days passed.

2. How It's Going: The Nondelegation Doctrine Now Endorses Divesting Legislative Power

Today, the standard that purports to restrict legislative power to Congress is impotent. The nondelegation doctrine is viewed as moribund and in practice wholly ineffective.

As the administrative state gained power, the Court became an enabler. The Court had previously stated that, "[e]xtraordinary conditions do not create or enlarge constitutional power[,]" and government actors "are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." *Schechter Poultry*, 295 U.S. at 528–29. By 1946, however, the Court had a different view, stating that "[n]ecessity fixes a point beyond which it is unreasonable and impracticable [for] Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

While the Court feigned a nod to the demand for congressionally established standards as well as policy, it made the "standards" requirement meaningless. The Court curtly stated that since it had

previously approved "public interest" and like expressions as sufficiently definitive, it was now compelled to sanction similar standards. *Id*. A review of the cases it cited, however, demonstrates that the Court had not, in fact, approved such vague and broad standards, standing alone, to complete the task of legislating. *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Yakus*, 321 U.S. at 414.

By 1989, the Court admitted its retreat from enforcing the constitutional demand that "*all*" legislative power be vested in Congress. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court remarked that "Congress *generally* cannot delegate its legislative power." 488 U.S. at 372 (emphasis added). The Court acknowledged that its "jurisprudence has been driven by a practical understanding that … Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id*. This reasoning confirmed that since 1946, so long as Congress provided "general directives" through an "intelligible principle," Congress was free of further demands.

Thus, any true nondelegation doctrine had collapsed, perhaps died, and congressional delegation of legislative power became the rule. For example, a panel on the Tenth Circuit noted 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); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002).

The panel continued, "if there is anything clear or obvious about the nondelegation doctrine, it is that, viewed through its lens, virtually any statute will be deemed valid." *Rickett*, 535 F. App'x at 675 (citing *Am. Trucking*, 531 U.S. at 474–75; *Mistretta*, 488 U.S. at 373 n.7).

While other courts may not yet state that the nondelegation doctrine is defunct, they view it as "lax," "lenient," or a low threshold, unworthy of meaningful analysis. The First Circuit, for example, held that discretion constrained to "the public interest" and "substantial justice" "indisputably satisfies the lax 'intelligible principle' standard under our precedents and those of the Supreme Court." *United States v. Diggins*, 36 F.4th 302, 319 n.19 (1st Cir. 2022) (citing *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012)); *see, e.g.*, *CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 184 (2d Cir. 2023) (referring to "the nondelegation doctrine's lenient standard") (cert. pet. filed June 21, 2023); *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir. 2014) ("under controlling nondelegation doctrine jurisprudence, the hurdle for the government … is not high"); *Granados v. Garland*, 17 F.4th 475, 480 (4th Cir. 2021) ("intelligible principle is not an exacting standard"); *All. for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2023 WL 6862856, at *10 n. 13 (5th Cir. Oct. 18, 2023) ("the intelligible principle standard means 'that a total absence of guidance is impermissible'"); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (since the Supreme Court found that "in the 'public interest, convenience, or necessity'" was a sufficient intelligible principle,

there is a "low threshold for validation under the nondelegation doctrine").

In the case below, the Sixth Circuit arguably took the nondelegation doctrine even further. *See Consumers' Res. v. FCC*, 67 F.4th 773 (6th Cir. 2023). The court was untroubled by Congress's divesting to FCC not only the ability to define the objective of the statute, "universal service," but also the power to set at least some of the intelligible principles to guide implementation. *Id.* at 792–93. The court found that giving FCC "evolving" objectives and flexibility "*reflects the exact rationale that underpins the nondelegation doctrine*." *Id.* (emphasis added) (citing *Mistretta*, 488 U.S. at 372).

That the court below saw Congress's alleged inability to do its job without giving away power as the "rationale" for the nondelegation doctrine demonstrates how far the doctrine has deviated from its purpose. Further, so long as an "intelligible principle" could be identified, the court below believed it was relieved of any duty to inquire whether the executive was in fact exercising legislative power.

Effectively, the "nondelegation doctrine" has become a "pro-delegation doctrine." *See* Hamburger, *supra* note 2, at 1086.

C. Falsity, Fiction, and Other Faults Riddle the Nondelegation Doctrine

The nondelegation doctrine has become either a misnomer or double-speak, and it rests on fictions that can neither be maintained nor justified any longer. Hamburger, *supra* note 2, at 1091–95.

1. "Delegation" Falsely Implies an Easily Revocable Transfer

When statutes improperly divest legislative power, they do not merely delegate. When a political officer "delegates" power, she retains the authority to unilaterally revoke the delegation. An FCC Commissioner, for example, who "delegates" statutorily authorized powers, has the right to terminate that arrangement at any time, for any reason.

That is not the case when a statute has conferred lawmaking powers. A statutory divesting of power ties the hands of Congress until another statute can be passed. Congress may revoke the "delegation" only via the cumbersome bicameralism and presentment process of Article I, § 7. The President is empowered to veto any effort to withdraw powers that a statute vests, so Congress cannot unilaterally revoke a divesting of authority that a predecessor Congress made via statute. Congress must obtain the President's assent, or else it must secure veto-proof supermajorities in both houses of Congress—an exceedingly difficult task.

It is therefore misleading to discuss divesting of legislative power in terms of "delegation."

2. The Nondelegation Doctrine Rests on Fictions

The nondelegation doctrine rests on multiple fictitious assumptions.

One such fiction is the idea that agency lawmaking is merely "specifying" or "filling in the details" of a statutory standard. *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").

But even where authorizing statutes offer governing standards, the authorized agencies often are not merely filling in details. As is widely understood, such statutes frequently leave the most difficult legislative questions to the agencies—indeed, members of Congress notoriously use such statutes to avoid making difficult legislative decisions. *See Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) ("Because Congress could not achieve the consensus necessary to solve the hard problems …, it passed the potato" to an agency "freed from the need to assemble a broad supermajority[.]"); 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).

A second fiction is that an "intelligible principle" provided by Congress ensures that it is delegating something less than legislative power. As summarized above and as Justice Gorsuch has accurately recounted, courts have gradually relaxed the "intelligible principle" standard so that it no longer prevents Congress's divestment of legislative powers. *See Gundy*, 139 S. Ct. at 2140 (the Court's

"intelligible principle" remark "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. … Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle 'test' began to take hold") (Gorsuch, J., dissenting) (citations omitted).

Every act of Congress is ostensibly constrained by the Constitution's enumerated powers, and there is almost always some semblance of an "intelligible principle" that may be found in an agency's enabling statutes. But that does not demote an agency's liberty-impinging laws to something less than an exercise of legislative power.

Hence, an "intelligible principle" does not save agency rulemaking from being legislative. And current doctrine is fictional in suggesting otherwise.

3. Today's Nondelegation Doctrine Interferes with Article III

Another fault with the nondelegation doctrine is that courts cannot perform their constitutional duty if Congress can delegate lawmaking after providing no more than an open-ended policy suggestion. *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, 93–95 (Peter J. Wallison & John Yoo eds., 2022). Legislation must be "sufficiently definite and precise" so as to permit courts (and the public) "to ascertain whether the will of Congress has been obeyed." *Yakus*, 321

U.S. at 425–26; *Opp Cotton Mills*, 312 U.S. at 144 (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"). 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.

Importantly, to "mark the field within which the [Commission] is to act," is not accomplished by merely establishing the outer limits of an agency's jurisdiction and setting aspirational goals. For example, *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 the standards to be used in fixing maximum prices. *Id.* at 420–21. In the standards, Congress required reference to prices prevailing on specific dates with further standards for when deviations may be appropriate. The executive was required to "conform to standards." *Id.* at 423. It was the standards, not the policy, that "define[d] the boundaries within which prices having [the purpose of furthering the policy] must be fixed." *Id.* The Act was a sufficient exercise of legislative power because it "stated the legislative objective, … prescribed the method of achieving that objective … and laid down standards to guide the administrative determination" of when to exercise price-fixing power *and* the prices that could be set. *Id.* The Court reiterated that the essential of the legislative function was not only the determination of

policy, but its "formulation and promulgation as a defined and binding rule of conduct." *Id.* at 424.

Virtue-signaling aspirational policy goals are not standards. *See Panama Refining*, 293 U.S. at 418–20; Chenoweth & Samp, *supra* p. 16, at 91. In the absence of discernible, enforceable standards that create rules of conduct for delegated authority, Congress has not completed the task of legislating. Likewise, in the absence of identifiable standards, courts have done no more than improperly defer to administrative agencies' opinion that their action advances statutory policy goals. *Schecter Poultry*, 295 U.S. at 538; Chenoweth & Samp, *supra* p. 16, at 106. In doing so, the court is not completing its task of independently determining and applying the law. *See* THE FEDERALIST NO. 78, at 525 (A. Hamilton) (Jacob E. Cooke ed., 1961) (where the legislature's will "stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former").

* * *

The current nondelegation doctrine has become a misnomer that no longer protects the principles enshrined in our Constitution. This constitutional safeguard can begin to be resuscitated by granting certiorari.

II. THE DIVESTING OF LEGISLATIVE POWERS IN 47 U.S.C. § 254 IS PARTICULY OFFENSIVE TO THE CONSTITUTION

The statute at issue here evinces a particularly troubling divesting of legislative power, making this case a good vessel for this Court's review. Section 254 gives FCC the power to define the purpose *and* policy of the statute. Section 254 is also self-funding, evading the congressional power of the purse.

A. Section 254 Permits FCC to Set Its Own Objectives and Policies

Even under today's nondelegation doctrine, Congress must provide a guiding "intelligible principle," but § 254's guidance is neither binding nor fixed.

Congress granted FCC the ability to define "universal service" *and* to establish the policy principles for preserving and advancing universal service. *See* 47 U.S.C. §§ 254(c)(1), 254(b). Section 254 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).

The "evolving" definition of "universal service," to be set and revised by FCC, according to policies FCC selects, fails to accomplish the goal of "mark[ing] 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. The statutory scheme of § 254 allows FCC to continually move the goalposts and enlarge the field.

B. FCC's Universal Service Fund Evades Legislative Taxing and Spending Powers

Congress handed FCC the purse strings in § 254, thus warranting this Court's review. Divesting of Congress's greatest power—the power of the purse—must be viewed with particular concern. *See* THE FEDERALIST NO. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]his power over the purse … [is] the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people[.]"); *NFIB 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 … in the Congress, as the people's representative. … Because of [] 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 taxing was also the byproduct of other grievances against the Crown. Consider the battle cry and anger of "no taxation without representation" that led to the Boston Tea Party and culminated in the American Revolution.

If viewed as a tax, as Petitioners contend, § 254 represents a core legislative 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[.]"). 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." Chenoweth & Samp, *supra* p. 16, at 98.

But regardless of its title—a tax, a fee, a king's ransom—Section 254 allows FCC to unilaterally raise revenue that adds up to roughly 25 times its congressionally-appropriated budget. *See* Pet'rs' Pet. for Writ of Cert. at 2, *Consumers' Res. v. FCC*, No. 23-456 (Oct. 27, 2023). The Constitution dictates that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. CONST. art. I, § 9, cl. 7. Here, Congress does not fund the FCC's Universal Service Fund, but rather gives FCC a blank check written on consumer accounts.

Under the Appropriations Clause, "[f]or the executive branch to act to achieve the ends of government identified by Congress, *Congress must affirmatively authorize the funds to do the job*." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350 (1988) (emphasis added). *See also Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) ("Just as the pardon power cannot override the command of the Appropriations Clause, so too judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.").

Self-funding mechanisms raise constitutional issues because "[t]he 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.'" *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 221 (5th Cir. 2022) (Jones, J., concurring) (quoting Stith, *supra* p. 22, at 1349). "Given that the executive is forbidden from unilaterally spending funds, the actual exercise by Congress of its power of the purse is imperative to a functional government." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022). "Congress may no more lawfully chip away at its own obligation to regularly appropriate money than it may abdicate that obligation entirely." *All Am. Check Cashing*, 33 F.4th at 226, 241 (Jones, J., concurring).

The Appropriations Clause, like Congress's power to tax, was the result of the Framers' stance against the tyrannical control over monies in England. *Id.* at 226 (Jones, J., concurring). 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).

Congress's spending power is also an important check on the other branches. Congress is the gatekeeper of the United States Treasury. *See Richmond*, 496 U.S. at 424 ("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)).

FCC's self-funding mechanism, particularly as it is unconstrained by any binding standards, warrants this Court's review. *See All Am. Check Cashing*, 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."). FCC unilaterally determines what it wishes to accomplish and then how much funding it will take from American consumers to serve its self-selected ends. Such core legislative functions cannot rest with an unrestrained agency.

CONCLUSION

This Court should grant the Petition and take the opportunity to establish guidance that enables the lower courts to enforce constitutional limitations found in the Vesting Clauses.

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Respectfully submitted,

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