Nos. 24-354 and 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

CONSUMERS' RESEARCH, ET AL.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL., PETITIONERS

v.

CONSUMERS' RESEARCH, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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Respondents' brief attacks a strawman. On their telling (Br. 1), Congress has granted the Federal Communications Commission (FCC) powers that King George III would have envied: "[u]nbounded" power to levy taxes, subject at most to "precatory" standards and "'aspirational'" principles. Respondents further portray (Br. 2-3) the FCC as "hand[ing] off this revenue power" to a private Administrator in defiance of "600 years of

Anglo-American practice." If the Universal Service Fund really worked that way, the government would not defend its constitutionality. Congress may not vest federal agencies with an unbounded taxing power. Nor can Congress or agencies delegate that power to private entities.

Neither Congress nor the FCC, however, has done anything of the sort. Congress in 47 U.S.C. 254 clearly delineated the policy that the FCC must pursue and the limits of the FCC's authority, so that courts can police the agency's compliance with Congress's commands. And the FCC ultimately decides—within the limits and under the standards set by Congress—the amount of the contributions; the Administrator offers non-binding recommendations. Neither Congress's conferral of authority on the FCC, the FCC's reliance on advice from the Administrator, nor the combination of the two violates the Constitution.

A. Congress Has Not Delegated Legislative Power To The FCC

1. Respondents criticize (Br. 30) the leniency of the Court's longstanding nondelegation approach while tellingly declining to ask this Court to overturn its precedent. For good reason: that line of precedent need not be toothless. Indeed, respondents and the government agree on many of the nondelegation ground rules.

For instance, Article I undisputedly distinguishes between foreign-affairs delegations and domestic ones. Article II gives the President the "lead role in foreign policy." *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) (citations and ellipsis omitted). This Court has consistently rejected nondelegation challenges to statutes empowering the President to exercise sweeping discretion in managing foreign affairs. See, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 314-329 (1936); see Resp. Br. 39-41.

By contrast, all agree that the nondelegation rules are stricter in the domestic context. Even then, Congress "may commit something to the discretion" of the Executive. *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825); see Resp. Br. 76. A "degree of discretion" "inheres in most executive" action. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (citation omitted). And legislation often involves "details with which the national legislature cannot deal directly." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); see *Gundy* v. *United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (Congress "may authorize another branch to 'fill up the details.'").

Critically, however, all also agree that Congress may not grant an agency "[u]nbounded" discretion to regulate private parties. Resp. Br. 1. Further, distinguishing lawful conferrals of discretion from unlawful delegations requires more than just asking "in the abstract whether there is an 'intelligible principle.'" *Id.* at 66. Congress must delineate both the "general policy" that the agency must pursue and the "boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946); see Gov't Br. 19; see also, *e.g.*, *Panama Refining*, 293 U.S. at 430 (holding invalid a provision that "declared no policy"). And "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *American Trucking*, 531 U.S. at 475; see Chamber of Commerce Amicus Br. 2-3; see also, *e.g.*, *American Trucking*, 531 U.S. at 474 (Congress may not empower an agency "to regulate the entire economy on the basis of no more precise a standard than" "assuring 'fair competition'").

Further, the guidance must be "sufficiently definite" to permit meaningful judicial review of agency action. *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (quoting *Yakus* v. *United States*, 321 U.S. 414, 426 (1944)); see, *e.g.*, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 539 (1935) (holding invalid a statute empowering the President to promulgate fair-competition codes that, "in his discretion," would "tend to effectuate the [statute's] policy"). And while this case does not present the issue, Article I may impose further limits on delegations of authority to decide "major policy questions." *Paul* v. *United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.).

But respondents go too far in arguing that "the level of statutory specificity required by the nondelegation doctrine varies" from power to power, so that courts must apply a "'more restrictive'" test to the taxing power, a "less restrictive" test to the spending power, and (presumably) still other tests to other enumerated domestic-affairs powers. Br. 55 n.11, 66, 73 (citation omitted). That Goldilocks approach contravenes the century-old general nondelegation framework that this Court has applied across Article I powers, including the taxing power, see *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559-560 (1976); the commerce power, see *American Trucking*, 531 U.S. at 472-476; the power to regulate the armed forces, see *Loving* v. *United States*, 517 U.S. 748, 767-768 (1996); and the power to regulate federal courts, see *Mistretta* v. *United States*, 488 U.S. 361, 371-379 (1989). The Court has declined to adopt different tests for different powers, discerning "no reasons why Congress should have less capacity" to confer discretion under some clauses than under others. *Loving*, 517 U.S. at 767.

Particularly salient here, this Court has rejected special nondelegation tests for taxation. In *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928), the Court upheld a statute that empowered the President to set tariffs, explaining that "Congress may use executive officers in the application and enforcement of a policy declared in law." *Id.* at 409. The challenger claimed that "this never has been permitted to be done [under] the power to levy taxes," but the Court observed that "[t]he authorities make no such distinction." *Ibid.* And in *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989), the Court applied the "normal" nondelegation requirements in upholding an agency's statutory authority to collect assessments from pipeline operators. *Id.* at 219. The Court rejected "the application of a different and stricter nondelegation doctrine" in cases involving the "taxing power," explaining that Article I does not "distinguish Congress' power to tax from its other enumerated powers" "in terms of the scope and degree of discretionary authority that Congress may delegate." *Id.* at 220-223. When the Framers meant to subject the taxing power to special safeguards, they did so. See, *e.g.*, U.S. Const. Art. I, § 7, Cl. 1 (origination); § 8, Cl. 1 (uniformity of indirect taxes); § 9, Cl. 4 (apportionment of direct taxes). Courts may not superimpose additional restrictions that the Framers left out.

Respondents sidestep another problem: because the commerce power provides a sufficient basis for upholding Section 254, a special test for tax legislation would make no difference here. See Gov't Br. 34-35. Respondents suggest (Br. 26 n.4) that when Congress's powers overlap, courts should apply the most restrictive nondelegation test associated with those powers—here, their special tax-nondelegation test. But constitutional-avoidance principles counsel the opposite. "As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the act." *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 441 (1992) (brackets and citation omitted). More fundamentally, "[t]he idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers." *Gibbons* v. *Ogden*, 9 Wheat. 1, 202 (1824). That overlap among the enumerated powers proves that the enterprise of developing different nondelegation tests for different powers is misguided.

Finally, respondents noticeably remain "silent about the potential consequences of their position." *Haaland* v. *Brackeen*, 599 U.S. 255, 279 (2023). For decades, Congress has relied on this Court's longstanding nondelegation framework to enact a range of important statutes —including statutes authorizing agencies to prevent unfair competition, see 15 U.S.C. 41 *et seq.*; to oversee the securities industry, see 15 U.S.C. 78a *et seq.*; to ensure the safety of food and drugs, see 21 U.S.C. 301 *et seq.*; to regulate labor relations, see 29 U.S.C. 151 *et seq.*; and to set air-quality standards, see 42 U.S.C. 7401 *et seq.* Respondents do not explain whether their novel clause-by-clause test would "undermine established * * * statutes"—and, "[i]f so, which ones." *Brackeen*, 599 U.S. at 279. That incomplete presentation justifies rejecting respondents' invitation (Br. 30) "to realign [the Court's] nondelegation framework."

2. Respondents principally contend (Br. 35) that Section 254 violates Article I because their tax-specific

nondelegation rule requires Congress to impose "precise numerical limits" on agencies' collection of taxes, duties, fees, or the like. But tax statutes have long incorporated general standards rather than specific numbers. For example, Congress has long enacted, and this Court has frequently upheld, statutes that empower the President to set, lift, or change tariffs—the main source of federal revenue until the 20th century. See *Algonquin*, 426 U.S. at 558-560; *J.W. Hampton*, 276 U.S. at 409-411; *Field* v. *Clark*, 143 U.S. 649, 681-694 (1892). In the domestic sphere, many early statutes granted the Secretary of the Treasury broad authority to mitigate fees or penalties. See, *e.g.*, Act of June 6, 1798, ch. 49, § 1, 1 Stat. 561 (empowering the Secretary to grant relief to imprisoned debtors on "reasonable and proper" terms); Act of Mar. 3, 1797, ch. 18, § 2, 1 Stat. 509 (empowering the Secretary to refund a "just and reasonable" portion of a license fee); Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209 (empowering the Secretary to remit penalties for non-payment of liquor taxes "upon such terms and conditions as shall appear to him reasonable"). And another early statute empowered tax boards to make "just and equitable" adjustments to property valuations for a direct real-estate tax. Act of July 9, 1798, ch. 70, § 22, 1 Stat. 589; see Gov't Br. 23. Respondents note (Br. 34-35) that this 1798 statute imposed an overall cap on the amount of revenue to be collected. But respondents do not explain why Congress must impose an overall cap, yet may leave it to executive officers to decide which taxpayers owe how much.

Revenue-raising statutes without precise numerical limits remain common today. For example:

- This Court may "fix [its] fees," 28 U.S.C. 1911, and the Judicial Conference may fix "reasonable" fees for the courts of appeals, 28 U.S.C. 1913.
- The Office of the Comptroller of the Currency (OCC) may levy upon banks an "assessment, fee, or other charge," as the OCC "determines is necessary or appropriate to carry out [its] responsibilities." 12 U.S.C. 16.
- The Federal Reserve Board may levy upon Federal Reserve Banks "an assessment sufficient to pay its estimated expenses." 12 U.S.C. 243.
- The National Credit Union Administration Board may levy upon credit unions an annual fee after giving "due consideration to the expenses of the [agency] * * * and to the ability of Federal credit unions to pay the fee." 12 U.S.C. 1755(b).
- Banks must pay the Federal Deposit Insurance Corporation "any fee which the Corporation may by regulation prescribe, after giving due consideration to the need to establish and maintain the reserve ratio of the Deposit Insurance Fund." 12 U.S.C. 1815(d)(1).
- The Farm Credit Administration may levy upon financial institutions an "equitable" assessment to cover its expenses. 12 U.S.C. 2250(a)(2)(A).
- The Federal Housing Finance Agency may levy upon regulated entities an assessment "sufficient" to pay its "reasonable costs * * * and expenses." 12 U.S.C. 4516(a).
- The Animal and Plant Health Inspection Service may prescribe fees "sufficient" "to cover the cost

of providing agricultural quarantine and inspection services." 21 U.S.C. 136a(a)(1)(A).

- The Postal Service may set "reasonable and equitable rates of postage." 39 U.S.C. 404(b).

Outside the revenue-raising context, this Court has repeatedly upheld statutes that constrain agency discretion with standards rather than numbers. Under those precedents, Congress may empower an agency to regulate milk prices in "the public interest," even if it does not provide a "mathematical formula" for setting prices. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 577 (1939). Congress may empower an agency to set "just and reasonable" natural gas rates, even if it provides "no formula by which the 'just and reasonable' rate is to be determined." *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).[1] Congress may empower an agency to determine and recover "excessive profits" from military contractors, even without prescribing "a specific formula" or setting "flat percentage limitations of profits." *Lichter* v. *United States*, 334 U.S. 742, 783-785 (1948). And Congress may empower an agency to set air-quality standards that are " 'requisite to protect the public health,' " even if the statute lacks "a 'determinate criterion' for saying 'how much of the regulated harm is too much.' " *American Trucking*, 531 U.S. at 472, 475 (brackets and citations omitted). Respondents do not ask this Court to overrule any of those cases, instead urging a different rule for the taxing power. But "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scru-

[1] Respondents argue (Br. 71 n.23) that *Hope Natural Gas* "did not address nondelegation," but this Court has concluded otherwise. See *Mistretta*, 488 U.S. at 372-373; *Skinner*, 490 U.S. at 219.

tiny greater than [the Court has] applied to other nondelegation challenges." *Skinner*, 490 U.S. at 223.

This Court's recent decision in *CFPB* v. *CFSA*, 601 U.S. 416 (2024), reinforces that analysis. There, the Court rejected the theory that an appropriation violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, if it is "too open-ended in duration and amount." *CFSA*, 601 U.S. at 426. Appropriations, the Court explained, "need only identify a source of funds and authorize the expenditure of those funds for designated purposes." *Ibid.* As the dissenters observed, the Court did not "require Congress to set an upper limit on the amount of money that the Executive may take." *Id.* at 448 (Alito, J., dissenting). Just as Congress need not set numerical caps when spending money, it need not set such caps when raising money.

Respondents' rigid test would produce illogical results. Under that approach, a revenue-raising statute that lacked a numerical limit would violate Article I, no matter how much guidance it otherwise provided. Even if Congress left little to the agency's discretion—for instance, even if it directed the agency to provide a well-defined benefit with an easily ascertainable cost and ordered that the program's expenses be divided equally among specified payers—the absence of an explicit numerical cap would doom the legislation.

By contrast, a statute that used a precise number would pass muster under respondents' numerical-limit approach even if the statute otherwise offered no guidance. Indeed, respondents prescribe (Br. 5) "adding half a sentence setting a specific tax rate or cap" to fix otherwise "contentless" delegations. On that approach, Congress seemingly could avoid nondelegation problems by authorizing an agency to collect and spend up to one trillion dollars a year, while leaving to the agency all further details about whom to tax or how to spend the money. That result would hardly "vindicate the separation of powers." Resp. Br. 4.

3. Beyond their numerical-limit approach, respondents alternatively (Br. 47-59) argue that Section 254 inadequately constrains the FCC's discretion. The contours of respondents' alternative test are unclear, but respondents appear to object that Section 254 is too "hazy" or "contentless." Br. 48 (citations omitted). Were these provisions contentless, the government would not defend their constitutionality. In reality, Section 254 contains constitutionally adequate limits. It sets forth the "general policy" that the FCC must pursue and the "boundaries of th[e] delegated authority," *American Power & Light*, 329 U.S. at 105, and uses "sufficiently definite" terms to enable courts to judge whether the agency has followed Congress's instructions, *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (citation omitted).

Section 254's list of universal service principles, see 47 U.S.C. 254(b), delineates the general policy that the FCC must pursue. Respondents dismiss (Br. 47-50) these principles as nonbinding aspirations or mere procedural requirements because each uses the word "should." The whole list, however, begins with the command that "the Commission *shall* base policies * * * on the following principles." 47 U.S.C. 254(b) (emphasis added). The mandatory "shall" *requires* the FCC to follow the principles. The word "should" merely allows the FCC to "balance the principles against one another when they conflict," *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)—*e.g.*, when pursuing one of the principles would require so high a contribution factor that services would no longer be "affordable," 47 U.S.C. 254(b)(1). The FCC's ability to balance competing factors does not violate Article I; regulation routinely involves making such tradeoffs. See, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 752-753 (2015) (requiring agency to balance environmental benefits and economic costs).

Respondents contend that the FCC has described the statutory principles as aspirations that the agency "need not implement." Br. 47 (citation omitted). That takes the FCC's statements out of context. The FCC merely argued that it "need not implement [a particular principle] *in light of other valid statutory objectives*." Gov't Br. at 26-27, *Texas Office of Public Utility Counsel* v. *FCC*, 265 F.3d 313 (5th Cir. 2001) (No. 00-60434) (emphasis added). That comports with the government's position here: The FCC may balance conflicting principles against each other, but "may not depart from them altogether to achieve some other goal." *Qwest*, 258 F.3d at 1200. Anyway, the nondelegation issue turns on Congress's statutory language, not on the FCC's litigating positions. Just as agencies cannot "cure an unlawful delegation" by disclaiming power that Congress granted, *American Trucking*, 531 U.S. at 472, agencies cannot invalidate a lawful conferral of discretion by erroneously claiming power that Congress did not grant.

Respondents further assert that the principles "cannot possibly constrain the FCC's policymaking discretion in any meaningful way." Br. 48 (citation omitted). That is incorrect. Because Congress directed that contributions be "equitable and nondiscriminatory," 47 U.S.C. 254(b)(4), the FCC may not adopt a progressive fee structure in which more profitable carriers pay higher rates. Because Congress directed that rural and urban services be available at "reasonably comparable" rates, 47 U.S.C. 254(b)(3), the FCC may not seek to make rural services cheaper than urban ones. Because Congress directed that schools and libraries have access to "affordable" services, 47 U.S.C. 254(h)(1)(B), the FCC may not seek to make those services entirely free. And courts of appeals have invalidated FCC actions when the agency has failed to adhere to the principles. In one case, a court held that the FCC had not adequately explained why a subsidy would ensure that rural rates were "reasonably comparable" to urban rates. See *Qwest*, 258 F.3d at 1202-1203. In another, a court faulted the FCC for "focusing solely" on one principle while "ignor[ing]" other principles. *Qwest Communications International, Inc.* v. *FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005).

Section 254 also clearly delineates "the boundaries of th[e] delegated authority." *American Power & Light*, 329 U.S. at 105. Section 254 identifies who must pay (telecommunications carriers), the terms on which they must pay (on an equitable and nondiscriminatory basis), and the conditions for an exemption (the contribution would be de minimis). See 47 U.S.C. 254(d). And Section 254 identifies the program's beneficiaries (rural areas, rural health care providers, low-income consumers, and schools and libraries), the types of services that the FCC may fund (telecommunications services), and the purposes for which funds may be used (the provision, maintenance, and upgrading of facilities and services). See 47 U.S.C. 254(b), (c), (e), and (h). Courts have invalidated FCC action that violates those requirements. See Gov't Br. 34.

Section 254, in addition, contains specific rules about the scope of the individual programs. See Gov't Br. 27-28. Take the metric for calculating subsidies to rural health care providers: carriers must provide services "at rates that are reasonably comparable to rates charged for similar services in urban areas," and then may recoup from the Universal Service Fund "the difference" between the rural rate that they would normally charge and the urban rates that the statute required them to charge. 47 U.S.C. 254(h)(1)(A). Those provisions set forth "objective limits," Resp. Br. 44, on the FCC's management of the Universal Service Fund.

Section 254 further directs carriers to contribute to the "sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. 254(d). Respondents counter (Br. 56) that the sufficiency requirement "imposes at best a floor," "not a ceiling." But "an agency literally has no power to act" "unless and until Congress confers power upon it." *New York* v. *FERC*, 535 U.S. 1, 18 (2002) (citation omitted). Section 254 authorizes the FCC to collect contributions to support "sufficient" universal service subsidies—but no more. 47 U.S.C. 254(d); see Gov't Br. 29-30. The word "sufficient" leaves some flexibility, see *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 395 (2024), while placing an upper limit on the programs' size and budget.

Respondents also argue (Br. 3, 53) that "the definition of 'universal service' itself" lacks a "meaningful limit" and "evolv[es]" over time. But universal service is a concept that the FCC has long pursued as "a basic goal of telecommunications regulation." *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 405 (5th Cir. 1999). By 1996, when Congress enacted Section 254, the FCC had spent decades seeking to achieve that goal by capping the rates that providers could charge to categories of customers who might otherwise find service unaffordable. See Gov't Br. 2-3. To be sure, Section 254 reformed the mechanism through which the FCC must achieve universal service, effectively replacing the prior implicit subsidies with explicit ones. But the 1996 Congress left the *concept* of universal service itself intact. See *ibid.*

The FCC's regulatory practice before 1996 therefore constitutes a "pre-existing" body of law that can supply "meaningful guidance" about Section 254's contours. *Gundy*, 588 U.S. at 160 (Gorsuch, J., dissenting); see *Loper Bright*, 603 U.S. at 388 (agency practice "constitute[s] a body of experience and informed judgment" to which courts, litigants, and the agency itself may "properly resort for guidance") (citation omitted). That history gives content to Section 254's language and further constrains the FCC's discretion. Cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 250, 254 (1947) (rejecting a nondelegation challenge to a banking statute because the "accumulated experience" of bank regulation would help limit the agency's discretion).

Finally, Section 254 confines the FCC's authority to one industry: telecommunications services. That matters because Congress may permissibly confer more discretion when empowering an agency to regulate "a single type of enterprise" than when it empowers the agency to deal with the "economic problems of varied industries." *Mallonee*, 332 U.S. at 250. Congress must provide more guidance on "standards that affect the entire national economy" than on "regulations governing grain elevators." *American Trucking*, 531 U.S. at 475; see Chamber of Commerce Amicus Br. 2-3.

4. Respondents separately argue that Section 254 violates Article I because it allows the FCC to "rewrite its own authority" by adopting new universal service principles. Br. 50 (capitalization omitted). But those

new principles can only further limit the FCC's discretion. Because new principles must be "consistent with" the remainder of the statute, 47 U.S.C. 254(b)(7), they cannot supersede the limits that Congress elsewhere imposed.

Respondents are similarly incorrect in arguing (Br. 53-56) that Section 254 allows the FCC to redefine universal service itself. The statute retains the core meaning of universal service: ensuring, "so far as possible," that "all the people of the United States" have access to basic telecommunications services "with adequate facilities at reasonable charges." 47 U.S.C. 151. Section 254 instead authorizes the FCC to identify the *types* of telecommunications services that the Universal Service Fund should subsidize—*e.g.*, voice telephony—"taking into account advances in telecommunications and information technologies." 47 U.S.C. 254(c). Even then, the FCC must apply detailed statutory criteria, such as considering the extent to which a service has, "through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers." 47 U.S.C. 254(c)(1)(B). Those criteria would preclude subsidizing, say, telegrams or fax machines.

5. Finally, respondents call the Universal Service Fund "'unique' in the country's history." Br. 2 (citation omitted). That overlooks the pre-1996 statutory regime for universal service, which respondents have never challenged as unconstitutional. Yet that regime supplied significantly less guidance than Section 254. For decades until 1996, the FCC promoted universal service primarily through its power to set "just and reasonable" rates. Communications Act of 1934, ch. 652, § 201(b), 48 Stat. 1070 (47 U.S.C. 151 *et seq.*); see Gov't Br. 2-3. When exercising that power, the FCC did not have to

follow rate caps, limit assistance to particular types of services or classes of beneficiaries, or adhere to listed principles. Nonetheless, this Court repeatedly upheld similar statutes empowering agencies to set "just and reasonable" rates, see *Hope Natural Gas*, 320 U.S. at 600, or "fair and equitable" prices, see *Yakus*, 321 U.S. at 420-427, because those statutes gave "ample indications of the various factors to be considered" by the agency, *Rock Royal*, 307 U.S. at 577.

It would thus be perverse to conclude that Congress crossed the constitutional line by tightening the limits on the FCC in Section 254. Unlike the pre-1996 regime, Section 254 specifies who may receive subsidies, see 47 U.S.C. 254(e) and (h), and the types of services that the Fund may subsidize, see 47 U.S.C. 254(c). Because a provider's universal service contribution may be passed on to customers, the FCC in determining the amount of the contribution factor effectively determines one component of the rate that the provider's customers will pay. The authority to establish that component is clearly narrower than the FCC's prior authority to set "just and reasonable" rates.

More broadly, "[w]hether or not the [Fund] has an exact replica, its essentials are nothing new." *CFSA*, 601 U.S. at 445 (Kagan, J., concurring). Since the Founding, Congress has obtained the "assistance" of the Executive by granting agencies the "discretion" to issue regulations "directing the details of [a statute's] execution." *J.W. Hampton*, 276 U.S. at 406; see Gov't Br. 21-23. Congress has often limited agency discretion through qualitative standards rather than through "specific formula[s]." *Lichter*, 334 U.S. at 785; see Gov't Br. 20-21. And "[f]rom its earliest days to the present," Congress "has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive" "when enacting tax legislation." *Skinner*, 490 U.S. at 221; see Gov't Br. 23.

B. The FCC Has Not Subdelegated Legislative Power To The Administrator

Respondents separately argue (Br. 74-88) that the FCC has unlawfully delegated governmental power to a private Administrator. In doing so, they conflate analytically distinct constitutional principles. The court of appeals held only that the Administrator unlawfully exercises *legislative* power, see Pet. App. 55a n.18, yet respondents now suggest (Br. 74) that the Administrator unlawfully exercises *executive* power. And this case involves an agency's reliance on a private body's assistance, yet respondents invoke (*ibid.*) a case concerning a direct delegation of power from Congress to a private body without the involvement of an agency.

Those distinctions matter. Article I flatly forbids delegations of legislative power. If Congress impermissibly delegated legislative power to the FCC, that problem is fatal regardless of any ensuing subdelegation. If Congress permissibly constrained the FCC, however, there is no legislative delegation, and the FCC's delegation to the Administrator implicates executive power. But Article II generally permits delegations of the power to execute the laws, so long as all executive power remains subject to the President's control. See *Myers* v. *United States*, 272 U.S. 52, 117 (1926); *Mistretta*, 488 U.S. at 425-426 (Scalia, J., dissenting). And while Congress may not delegate legislative power to a private body, a private body may "operate as an aid" to an agency. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388 (1940).

Conceptual problems aside, respondents' theory is wrong under any conception of nondelegation to private entities. The FCC, not the Administrator, sets the quarterly contribution factor within the limits Congress prescribed; the Administrator just recommends how to exercise that authority. Respondents' constitutional objections (Br. 79-83) to the Administrator's advisory role are unsound.

1. Respondents first contend (Br. 79-82) that the Administrator's projections can take effect without the FCC's approval. The government agrees there would be a nondelegation problem if an agency empowered a private actor to adopt rules without the agency's approval. Indeed, empowering that private actor to adopt binding rules governing private conduct on a continuing basis would make that actor an officer of the United States subject to the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. But the FCC has not granted such authority to the Administrator, whose projections "*must be approved by the Commission* before they are used to calculate the quarterly contribution factor." 47 C.F.R. 54.709(a)(3) (emphasis added).

Further, the FCC's rules require the Administrator to submit projections of program expenses to the FCC's Office of the Managing Director at least 60 days before the start of the quarter. See 47 C.F.R. 54.709(a)(3). The Administrator must also report the "total contribution base" (*i.e.*, the carriers' total projected assessable revenues) to the FCC at least 30 days before the start of the quarter. *Ibid.* The FCC's staff reviews—and if necessary revises—the projections. See *Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company* 7 (Oct. 17, 2024) (providing that the Managing Director "shall review" the Administrator's filings); Pet. App. 144a (adjusting the reported contribution base). After that staff review, *the FCC* calculates the contribution factor and announces it in a public notice. See 47 C.F.R. 54.709(a)(3). The factor takes effect after 14 days unless *the FCC* revises it in the meantime. *Ibid.*

The FCC, not the Administrator, thus promulgates the contribution factor in a public notice. The Administrator simply provides data that the FCC reviews, revises, and then uses in calculating that factor. The Administrator's performance of that accountant-like advisory role poses no constitutional concerns.

Respondents focus (Br. 80) on an FCC rule stating that the contribution factor is "deemed approved" after 14 days. See 47 C.F.R. 54.709(a)(3). But that provision simply gives the FCC an additional 14-day period to revise the contribution factor that the FCC (via the Managing Director) previously announced, if the FCC determines that a revision is warranted. Even before that 14-day period, the FCC reviews and (if necessary) revises the Administrator's projections, uses the projections to calculate the contribution factor, and issues a public notice promulgating that factor. The public notice itself provides the "formal approval" that respondents insist (Br. 81) the Constitution requires. Nothing in the regulatory scheme allows any determination *of the Administrator* to have operative legal effect without the FCC's express approval.

Respondents liken this process to a hypothetical statute that provides, "The defense budget is whatever Lockheed Martin wants it to be, unless Congress or an agency intervenes to revise it." Br. 86 (brackets and citation omitted). That analogy ignores all the intervening steps between the Administrator's submission of the projections and the FCC's final approval of the contribution factor. Rather, this process is more like the following: a law clerk prepares a draft opinion; a judge reviews and revises the draft before issuing the opinion; the opinion then becomes final 14 days later, once the rehearing deadline expires. Just as the law clerk does not exercise delegated judicial power by advising the judge at the first stage of the opinion-writing process, the Administrator does not exercise subdelegated legislative power by advising the FCC at the first stage of the contribution-setting process. Contrary to respondents' suggestion, the government is not relying on the FCC's ability to "claw back" the authority granted to the Administrator, Br. 84 (citation omitted). Rather, the key is that the Administrator's proposals take legal effect only if the FCC approves them.

2. Respondents object that the FCC "rubber stamp[s]" the Administrator's work rather than "independently" reviewing it. Br. 82 (citation omitted). That argument is factually incorrect and legally irrelevant. Factually, as the government has noted (Gov't Br. 47) and as respondents concede (Br. 82-83), the FCC *has* revised projections when it has considered revisions to be warranted under the statute and rules. That the FCC has done so infrequently reflects the Administrator's limited role and the detailed regulations constraining its actions. Gov't Br. 47. Legally, what matters is that the Administrator's work cannot become final without the FCC's approval—not how often the FCC disapproves.

Consistent with the Constitution, myriad private actors make recommendations to the government. The lawfulness of such consultation does not turn on a judicial inquiry into how much weight the government gives those recommendations. A party could not challenge a statute on the ground that members of Congress made too few changes to a blue-ribbon commission's draft bill. A party likewise could not challenge a Federal Rule on the ground that this Court made no changes to the rules committee's proposal. Respondents identify no good reason to treat challenges to agency action any differently.

Respondents seek to minimize (Br. 61-64) the practical consequences of their position. But Congress has enacted many statutes—ranging from the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, to the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*—that empower governmental bodies to promulgate rules after considering private advice. This Court should not call untold numbers of federal statutes into question without offering clear guideposts for Congress and the Executive Branch going forward.

3. This Court need not consider whether the private nondelegation doctrine allows private actors to perform ministerial tasks. See Resp. Br. 77. The Fifth Circuit agreed that "ministerial tasks could be subdelegated," Pet. App. 56a, but the "line between a discretionary and a ministerial act is not always easy to mark," *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). This Court can resolve the case on the simpler ground that the Administrator plays only an advisory role in the contribution-setting process.[2]

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[2] Justice Thomas recently questioned whether the creation of the Universal Service Administrative Company complied with the Government Corporation Control Act, 31 U.S.C. 9101 *et seq.* See *Wisconsin Bell, Inc.* v. *United States ex rel. Heath*, 145 S. Ct. 498, 513-515 (2025) (Thomas, J., concurring). That law provides that the government "may establish or acquire a corporation as an agency" only with specific statutory authorization. 31 U.S.C. 9102. Because the

C. Respondents' Remaining Arguments Are Incorrect

Respondents briefly defend (Br. 88-89) the court of appeals' theory that the *combination* of Congress's grant of authority to the FCC and the FCC's reliance on the Administrator violates the Constitution even if neither delegation on its own is unconstitutional. That theory makes no sense. Congress cannot delegate legislative power to anyone, full stop. If a statute delegates legislative power to an agency, that violates Article I; any additional subdelegation to a private entity does not compound the offense. Likewise, if Congress delegates legislative power to a private group, that too violates Article I; it makes no difference whether that legislative power passed through an agency's hands along the way. At the same time, a litigant may not fuse a meritless public nondelegation challenge with a meritless private nondelegation challenge to produce a meritorious "combination" challenge. "Two wrong claims do not make one that is right." *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438, 457 (2009).

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This Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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Acting Solicitor General

MARCH 2025

Company is a private entity rather than an agency, its creation complied with the Act. See *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 390 (1995). In any event, respondents have not raised, and the court of appeals did not discuss, any challenge under the Act.