No. 24-354

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

FRANK D. GARRISON
JOSHUA M. ROBBINS
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
(202) 888-6881
FGarrison@pacificlegal.org
JRobbins@pacificlegal.org

LUKE A. WAKE
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
(916) 419-7111
LWake@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. Whether Congress violated the nondelegation doctrine by authorizing the Federal Communications Commission to determine, within the limits set forth in 47 U.S.C. § 254, the amount that providers must contribute to the Universal Service Fund?

2. Whether the FCC violated the nondelegation doctrine by using the financial projections of a private company in computing universal service contribution rates?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF attorneys have participated as lead counsel or amici in several cases involving the role of the Judiciary as an independent check on the executive and legislative branches under the Constitution's separation of powers. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Sackett v. EPA*, 598 U.S. 651 (2023) (application of Clean Water Act's "waters of the United States" provision to wetlands); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020) (restriction on President's ability to remove CFPB Director); *Kisor v. Wilkie*, 588 U.S. 558 (2019) (Auer deference); *Gundy v. United States*, 588 U.S. 128 (2019) (nondelegation doctrine); *Lucia v. SEC*, 585 U.S. 237 (2018) (SEC administrative law judge is an "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same).

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[1] 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.

Additionally, PLF attorneys, including counsel in this case, have developed extensive scholarship on separation of powers issues. *E.g.*, Luke A. Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J. L. & Liberty 751 (2022); Luke A. Wake & Damien Schiff, *Practical Applications of the Major Questions Doctrine*, 2024 Harv. J. L. & Pub. Pol'y Per Curiam 20 (2024); Frank Garrison, John Kerkhoff & Elizabeth Slattery, *The Fiduciary Constitution, the Separation of Powers, and the Legal Landscape after* SEC v. Jarkesy, Geo. J.L. & Pub. Pol'y, Vol. 23, Issue 2 (forthcoming, 2025).

PLF's adherence to constitutional principles and broad litigation experience offers the Court an important perspective that will help it decide whether the Telecommunications Act violates the nondelegation doctrine.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Chief Justice Marshall aptly said, in *McCullough v. Maryland*, that "[t]he power to tax is the power to destroy." 17 U.S. (4 Wheat) 316, 327 (1819). The men who ratified the Constitution certainly thought so. In a nation founded under the rallying cry "no taxation without representation," it is unsurprising that our Framers sought to ensure that this awesome power could only be exercised by our elected representatives in Congress. And they went further. They required that bills imposing taxes must be introduced in the house of the legislature closest to the people. Yet the Telecommunications Act hands the power to tax to the Federal Communications Commission—an "independent" agency that was intentionally designed to be as *unaccountable* to the people as possible.

To be sure, many nondelegation cases involve difficult line-drawing questions. But this is not such a case. The Constitution assigns to Congress alone the power to "lay and collect [t]axes[.]" U.S. Const. art. I, § 8. And the power to decide the *amount* of a tax is, plainly, an application of that power. So, this Court can resolve this case simply by holding that Congress has impermissibly delegated a core legislative power in authorizing the Commission to decide—without any statutory limit—the amount telecommunication carriers must pay to fund an evolving universal service program under the Telecommunications Act.

The conclusion flows from this Court's precedent in *Wayman v. Southard*, 23 U.S. (10 Wheat 1) 1 (1825). In *Wayman*, Chief Justice Marshall explained that the Constitution requires that Congress must decide the "important subjects," and can delegate authority only on matters of "less interest." *Id.* at 43. And under any accounting, the question of how great a tax should be is an "important subject." Marshall underscored that point himself in stressing that "there is a limit beyond which no institution and no property can bear taxation." *McCullough*, 17 U.S. at 327. Moreover, history confirms that public debate over taxation largely focuses on the *degree* to which taxes should be imposed to cover the cost of contemplated public programs—a debate that necessarily requires the exercise of raw political judgment.

Because the question of *how much* the universal service tax should be is undoubtedly an "important subject" (not a less important detail), this Court can resolve this case simply under the *Wayman* framework. There is no need to delve into the fineries of the intelligible principle test because a delegation of Congress' core power to decide the amount of a tax violates

separation of powers under any coherent approach to the nondelegation doctrine. Indeed, the simplest way to resolve this case is just to say that the Constitution requires Congress (not the Commission, or anyone else) to decide the amount of any tax. And this Court should take this straight-forward path, not least because it is sometimes easy to lose sight of the critical point that the Constitution does not allow any sub-delegation of the enumerated powers when trudging through the "intelligible principle" framework.

Yet the conclusion that Congress must decide the amount of any tax also follows from the intelligible principle test *as originally understood* in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Properly applied, the intelligible principle test requires that Congress must provide an *objective governing standard* to cabin the executive branch's discretion. And there simply is no objective governing standard if an agency is left free to decide, on its own, how much the People must pay to fund public programs.

In *J.W. Hampton* Congress determined the amount the government would exact by prescribing that the President should equalize tariff rates, subject to express limitations. And even this Court's decision in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), conforms to the rule, recognized in all prior nondelegation cases, that Congress must decide the amount of any tax—by deciding on the aggregate revenue to be collected, specifying a dollar amount for the amount of tax, or by setting a formula for the executive branch to follow.

And this Court's opinions in *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935), make clear that the Commission cannot defend the Telecommunications Act simply by pointing to indeterminate text and appealing to the general purposes of the Act. The nondelegation doctrine rejects the notion that Congress can delegate authority on important subjects simply by reciting hortatory goals, or enacting "empty vessel" words that can be filled with whatever meaning the executive branch prefers. *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 732 (2022). Thus, in the absence of any textual limitation on how high the Commission can go in raising universal service taxes, this Court must find the Telecommunications Act unconstitutional.

True, this Court has sometimes upheld broad delegations under the intelligible principle test. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Lichter v. United States*, 334 U.S. 742 (1948). But those were not tax cases. *Accord Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974) (narrowly construing a statute to avoid implicating a delegation of Congress' taxing power). And those cases cannot be extended beyond their facts to the point of upholding a statute delegating Congress' core power to decide the amount of a tax. To do so would illustrate how freakishly unmoored the post-1935 version of the intelligible principle test has become.

But if the Court feels compelled to apply the intelligible principle test in a way that would allow broad delegations with little to no scrutiny, then it is time to abandon that test. This Court should, instead, hold that—as a matter of first principles—Congress has no power to delegate significant discretionary power to

the executive branch at all. This accords with the Constitution's text, structure, and its very nature as an instrument by which the People have delegated specific enumerated authority to specific governmental departments. The point is bolstered by 18th Century agency-law principles—that this Court has looked to in past cases when addressing congressional delegations—and which the Framers looked to when drafting the Constitution. Under these principles, Congress must point to clear authorization from the People to subdelegate any discretionary authority it has been delegated. And there is no clear authorization for Congress to delegate away its taxing power or its lawmaking powers more generally.

At bottom, Congress alone must decide the amount to be exacted from private purses. When Congress tries to subdelegate that power away to the executive branch through nebulous standards, it has violated the Constitution's separation of powers. The Fifth Circuit's judgment should be upheld.

ARGUMENT

The Telecommunications Act Violates the Nondelegation Doctrine

A. The Constitution's Text, History, and This Court's Precedent in *Wayman*, Forbid Congress from Delegating the Core Legislative Power to Decide the Amount of a Tax

1. Through the Constitution, the People enumerated specific powers to the federal government and vested those powers in specific actors. In Article I, the People vested Congress with the legislative power to

"lay and collect [t]axes[.]"[2] U.S. Const. art. I, § 8. By the same token, the Constitution denied this power to the executive and judicial branches. After all, when a legal instrument—whether a contract, a statute, or the Constitution—expressly grants authority to one party, but not to another, the authority was intentionally denied to the latter.[3] *See Bittner v. United States*, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from another, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).").

Because the power to "lay" taxes is vested exclusively in Congress, it cannot be sub-delegated.[4] As this Court has emphasized, Congress is the "sole organ for levying taxes[.]" *Nat'l Cable Television*, 415

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[2] The Constitution was founded on the notion of "popular sovereignty[,]" which holds that the People are the "fountain of all power." V Elliot's Debates 500 (1787) (James Madison). *See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471-72 (1793) ("[T]he sovereignty of the nation is in the people of the nation. . . .").

[3] Suppose Major League Baseball entered into a multi-party licensing agreement with the National Broadcasting Corporation and YouTube for online streaming broadcasts. If the agreement expressly granted YouTube the rights to archive those games for viewers to access at any time, but made no provision for NBC to archive games, the obvious implication would be that MLB authorized YouTube (and only YouTube) to archive games.

[4] The Commission cannot side-step the issue by invoking the Commerce Clause. The primary purpose of any regulation that raises money must be regulatory, and the revenue-raising incidental. *See Gibbons v. Ogden*, 9 Wheat. 1, 202 (1824) (acknowledging that "[D]uties may [] be . . . imposed on tonnage, *with a view to the regulation of commerce*[.]") (emphasis added). By contrast, Section 254 is transparently designed as a revenue-generating measure.

U.S. at 340 . This means that Congress—not the FCC, or anyone else—must decide *how much* money will be exacted to cover the cost of the universal service program. *E.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-93 (1892) (emphasizing that "Congress itself prescribed, in advance, the duties to be levied[,]" and that "[n]othing involving the expediency or the just operation of such legislation was left to the determination of the President.").

2. History confirms what the Constitution's text and this Court's precedent commands. *See* Resp. Br. at 20-23. The power of the purse has "traditionally belonged to" the legislature in Anglo-American law. Philip Hamburger, *Is Administrative Law Lawful*, 57 (2014). Parliament jealously guarded its taxing power in the face of King Charles I's infamous demand for unpopular taxes—which culminated in the English Civil War. *Id.* at 57-61. With the assent of Parliament over the Crown, it was then "clear as never before that the legislative power rested in Parliament and [that] the king" could not impose taxes without the assent of Parliament. *Id.* at 61.

Thus, the American colonies inherited a legal tradition that placed tremendous weight on the idea that the taxing power belonged to the political community at large—as represented by elected lawmakers in a legislative body. *Id.* at 57 ("Taxes were duties or burdens on the community, and it therefore might be thought that, like any other legal constraints on freedom, taxes required the consent of the community."). The colonists invoked this tradition when protesting unpopular taxes in the 1770s. *See* Decl. of Colonial Rights (adopted by First Continental Congress) (Oct. 14, 1774) (resolving "[t]hat the inhabitants of the English colonies" have a right to property, which cannot

be "dispose[d] of [] without their consent.").[5] They insisted on their rights under the "English constitution" to have representation as a condition of assenting to taxes.[6] *Ibid.* Ultimately then, the American Revolution was born out of this bitter controversy. *See* Decl. of Indep., (Jul. 4, 1776) (citing the "imposing [of] [t]axes . . . without our consent" among the list of grievances justifying America's break from Great Britain).

The generation that ratified the Constitution was deeply concerned about the threat of over-taxation. Indeed, the proposal for "a federal taxing power was highly controversial at the Constitutional Convention[.]" *Moore v. United States*, 602 U.S. 572, 628 (2024). And one need only look to the 'Whiskey Rebellion' for confirmation of the hotly contested nature of Congress's taxing power in the early republic.[7] Even in the 21st Century, whether and *to what extent* the federal government should impose taxes remains among the most contentious political matters. *See NFIB v. Sebelius*, 567 U.S. 519, 668 (2012) ("Taxes have never been popular[.]").

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[5] https://tinyurl.com/fhpzcemz.

[6] "Resolved, N.C.D. 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as English colonists are not represented . . . they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity. . . ." *Ibid.*

[7] *See* Jennifer Elisa Chapman, United States v. Hodges*: Developments of Treason and the Role of the Jury*, 97 Denv. L. Rev. 117, 122-23 (2020) (explaining that citizens in western Pennsylvania "resisted the [federal] tax [on spirits] and threatened tax collectors.").

After their experience paying taxes without representation, it is little surprise that the American people specifically delegated the taxing power to the branch that would be the most accountable to them. *See Missouri v. Jenkins*, 495 U.S. 33, 68 (1990) (Kennedy, J., concurring) ("The confinement of taxation to the legislative branch[]. . . reflected our ideal that the power of taxation must be under the control of those who are taxed."). The Constitution vested Congress with the taxing power both because Congress was accountable to the People, and because Congress—representing the collective will of the entire political community—was presumed best-suited to make the required legislative judgments. *See* Federalist No. 10 (James Madison) (addressing the problem of "factions," and explaining that the Constitution was designed to ensure broad-based social consensus for changes in the law). As such, it strains credulity to believe that the generation that fought the Revolution, and that ratified the Constitution, would have tolerated Congress sub-delegating the power to "lay" taxes to unaccountable ministers.

The Framers also understood that the "power to tax involves, necessarily, the power to destroy[.]" *See McCulloch*, 17 U.S. at 327. As such, the decision to vest Congress with the taxing power was subject to significant debate. *Moore*, 602 U.S. at 628. The Federalists assuaged concerns for people who worried about the potential for over-taxation by assuring them that "the legislative department alone has access to the pockets of the people[.]" *See* Federalist No. 48 (James Madison). For good reason then, the constitutional delegates believed the Constitution provided assurance that Congress would have to decide for itself whether and to what extent to exact taxes. *See*

Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev., 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (emphasizing that the Constitution was designed to ensure accountability, and that in "shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have."). *See also* Gary S. Lawson, *A Private-Law Framework for Subdelegation*, in The Administrative State Before the Supreme Court: Prospectives on the Nondelegation Doctrine, 128-130 (Peter J. Wallison & John Yoo, eds. 2022) (explaining that the Framers understood the Constitution as prohibiting Congress from sub-delegating its powers consistent with 18th Century agency law principles).

3. No less than the power to impose a tax, the authority to decide *how much* to tax is non-delegable because it is *the* critical part of the power to "lay" taxes. *See Wayman*, 23 U.S. at 43 (emphasizing that Congress must decide the "important subjects," and can only delegate discretionary authority on matters of "less interest."). *Cf. California v. Texas*, 593 U.S. 659, 665 (2021) (observing that Congress effectively "nullified" the individual mandate exaction "by setting its amount at $0.") The setting of tax rates is by no mean ancillary or incidental to the taxing power. *Nat'l Cable*, 415 U.S. at 342 (narrowly construing a delegation to avoid an unconstitutional delegation of Congress' taxing power). Deciding the amount to be exacted from the pockets of private citizens is a quintessentially "important subject" because it requires an inherently political judgment; it is not a trifling "detail." *Wayman*, 23 U.S. at 43. *See also Nat'l Cable*, 415 U.S. at 341 (discussing policy trade-offs in deciding how heavily to tax). *See also NFIB*, 567 U.S. at 668 (Scalia,

J., dissenting) (emphasizing that "legislators must weigh the need for the tax against the terrible price they might pay at their next election. . . ."). Indeed, the setting of tax amounts requires weighing "competing values[,]" which "is the very essence of legislative choice. . . ." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987); *see also Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356, 382 (2023) (it is the role of the People's "elected representatives" to weigh "incommensurable" values like economic impacts versus moralistic judgments.).

4. For these reasons, Congress must set the amount government will exact from citizens by at least deciding on a specific dollar amount when laying a tax, the aggregate revenue to be raised, or by setting a concrete formula for taxation. *E.g.*, *NFIB*, 567 U.S. at 539 (explaining that the Affordable Care Act's individual mandate "tax" was "calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance."). For example, in 1798, Congress "decided the amount of revenue the Government would levy from American citizens" when authorizing a nationwide tax on real estate. *See* Pet. App. 69a ("Congress decided to raise $2 million nationwide and . . . apportioned the sum among the states according to each state's [] population.") (citing Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1303 (2021)).

Likewise, Congress decided "how much" to tax when enacting the Tariff Act, at issue in *J.W. Hampton*. There, Congress decided on default tariff rates and only then directed the President to adjust as needed to "equalize" differences in the cost of production for various commodities—but by no more than "50 per centum" from the default. 276 U.S. at 401. This Court held that this was permissible because the President was left only with the ministerial-like duty of determining the facts and applying Congress' directive to equalize trade differentials.

In the same way, *Marshall Field & Co.* upheld a statute that allowed for variable tariff rates established by Congress. Congress established a default policy allowing "free introduction" of specified commodities, but required the President to begin imposing tariffs—which Congress "prescribed" in the statute—upon a finding that another country was imposing tariffs on imports from the United States. 143 U.S. at 692-93. Put differently, the President was charged merely with a contingent duty to determine the relevant facts and *execute* the law. *Id.* at 693 (emphasizing that the President was merely directed to "ascertain and declare the event upon which its expressed will was to take effect.").

And the rule that Congress must decide the amount of a tax also accords with *Skinner*.[8] In *Skinner*, this Court found that the Constitution does not

[8] The Court in *Skinner* noted that "when enacting tax legislation, [Congress] has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive. . . ." 490 U.S. 212, 221 (1989). But *Skinner* pointed only to *Marshall Field & Co.*, which merely affirmed that the executive branch may engage in conditional fact finding. *Id.* at 221-22.

"require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." 490 U.S. at 222-23. But that is true only in the sense that the Constitution requires Congress to decide for itself the important matters and does not allow sub-delegation requiring the exercise of significant discretion regardless of what enumerated power is at issue. The point is the same in all cases: Congress must abide by the Constitution no matter what power it seeks to delegate.

In any event, Congress had also made *the important decision* in imposing a cap on usage fees for pipeline safety that the Department of Transportation set by regulation. *Id.* at 220-21. The aggregate fees in a fiscal year could not exceed "105 percent of the aggregate appropriations made" by Congress for that fiscal year for specified activities. *Id.* at 215. The statute also established that this was a "'usage'" fee that had to be established in a "'reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof.'" *Id.* at 214, 219. The revenue from the usage fees was also to be used in performing certain *objectively defined* "activities." *Id.* at 215. Thus, *Skinner* is not inconsistent with the rule—recognized elsewhere—that Congress must decide the amount of any tax through specific directions.

4. By contrast, in Section 254 of the Telecommunications Act, Congress declined to set an amount of

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Otherwise, *Skinner* cited only a single statute that allowed a degree of *enforcement discretion* to settle cases of unpaid taxes—which is to be distinguished from policy-making discretion in deciding, at the outset, the amount to be exacted from the American people.

the tax charged to carriers to fund its universal service goals or otherwise establish a firm limit on the amount of revenue the Commission could raise. It simply authorized the Commission to require carriers to "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). The statute is further explicit that there is no limit on this exaction because Congress defined "[u]niversal service" as an "evolving" standard and left the Commission to determine what that would be. *Id.* § 254(c)(1). This language neither sets a firm amount of the tax on carriers nor is it like the statutes authorizing minimal discretion that this Court has upheld in similar contexts. It is, in essence, a delegation saying, "let there be taxes."

B. There Is No Governing "Intelligible Principle" When Congress Fails To Decide The Amount Of Taxes To Be Exacted

The Fifth Circuit was correct to find that the Telecommunications Act provides no intelligible principle. Although this Court has sometimes interpreted nebulous statutory language as authorizing broad delegations, those cases did not involve the taxing power. *E.g.*, *NBC v. United States*, 319 U.S. 190, 255–26 (1943) (regulation of public airwaves), *Lichter*, 334 U.S. at 779–79 (regulation of price controls imposed under War Powers). This Court should decline to "extend those precedents to [a] 'new situation[,]'" where doing so would flout "history" and conflict with "our constitutional structure." *Seila Law*, 591 U.S. at 220. And this Court should not hesitate to repudiate cases that have upheld such, seemingly, broad delegations

as an authority to make rules 'in the public interest,' as needed to restore "the equilibrium the Constitution demands." *Tiger Lily*, 5 F.4th at 673 (Thapar, J., concurring).

1. Properly understood, the Intelligible Principle Test requires Congress to provide a concrete and objective governing standard

In accord with *Wayman*, the intelligible principle test—properly applied—requires that Congress must decide the amount of any tax. After all, *J.W. Hampton* concluded that there was an "intelligible principle" in the Tariff Act's directive to "equalize" trade differentials—subject to express limitations—because that directive provided a *governing standard* controlling and limiting the President's exercise of discretion. 276 U.S. at 410-11. The opinion stressed that the President was required to "conform" to that standard. *Id.* at 409.

After adopting the intelligible principle test in *J.W. Hampton*, this Court then twice declared statutes as unconstitutionally delegating legislative power in *Panama Refining* and *Schechter Poultry*. *Panama Refining* dealt with a provision of the National Industrial Recovery Act (NIRA) that provided no textual standard controlling whether or when the President should prohibit the shipment of hot oil. 293 U.S. at 430 ("As to the transport[] of [hot oil] . . . Congress has declared no policy, [] established no standard, [] laid down no rule."). This Court held that there was a nondelegation violation because the statutory text left the President free to weigh competing policy considerations as he deemed "fit." *Id.* at 415. The opinion stressed the absence of any requirement for the President to make

any ministerial finding of fact as a predicate for his decision.[9] The Court also emphasized that the text provided "no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. And the NIRA's hortatory goal of improving American economic conditions was not an intelligible principle because it provided no directive governing the President's exercise of discretion. *Id.* at 417-18.

In *Schechter Poultry*, Congress violated the nondelegation doctrine because the President was left free to exercise his own judgment in deciding the "important subjects" of whether and to what extent federal law should restrict private conduct—with no objective controlling or limiting statutory language to guide his exercise of discretion in approving (or disapproving) industry codes. The NIRA gave "unfettered discretion" for the President to issue "'codes of fair competition'" with whatever restrictions he thought "needed or advisable." *Schechter Poultry*, 295 U.S. at 535, 537-38. The NIRA did not define "fair competition." *Id.* at 531. The statute provided only that industry codes should "tend to effectuate" the statute's Declaration of Policy, which effectively called for the President to figure out the best way to improve American economic conditions.[10] *Id.* at 534-35.

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[9] *Accord J.W. Hampton*, 276 U.S. at 405-06 (invoking the agency-law maxim "*[d]elegata potestas non potest delegari*," as a predicate in its nondelegation analysis). *See* Lawson, *supra,* at 132-33 (explaining the maxim means "one to whom power is delegated is not able further to delegate that power[.]") (citing James Kent, Commentaries on American Law (1827), 2:496)).

[10] The NIRA declared the policies of Congress to be

But this was no intelligible principle because Congress left everything to the President's "unfettered" discretion. *Id*. at 542. Nor was the NIRA's minimalist restriction prohibiting the President from approving industry codes that would encourage monopolies or that would unduly suppress small business an intelligible principle because "these restrictions [left] virtually untouched the field of policy envisaged" by the NIRA's Declaration of Policy. *Id.* at 538. These formless standards, left the President full policy discretion, just as Section 254 leaves the Commission unfettered discretion here.

> "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Schecter Poultry, 295 U.S. at 534-35.

2. The Telecommunications Act violates the Intelligible Principle Test because there is no textually grounded standard governing universal service taxes

The Fifth Circuit correctly found that the Telecommunications Act provides no intelligible principle governing how high the Commission can go in raising taxes under the universal service program. Pet. App. at 31a (concluding the text provided "no answers" for how high is too high). The only flaw in its analysis was in the Circuit Court's hesitancy to stop at that point and to rule, definitively, that the Act violates the nondelegation doctrine. There was no reason to "tiptoe[] around the idea that an act of Congress [can] be invalidated as an unconstitutional delegation of power." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting), *cert. denied*, 144 S. Ct. 2490 (2024).

Indeed, the Telecommunications Act provides only vague policy declarations. But those nebulous goals do not differ from the NIRA's hortatory goals, which this Court found insufficient in *Panama Refining* and *Schecter Poultry*. Section 254's authorization of carrier contributions for the universal service fund bears striking resemblance to the unconstitutional NIRA.

First, the Act requires telecommunications service providers to contribute to the funding of the Commission's "mechanisms" "to preserve and advance universal service." 47 U.S.C. § 254(d). The statute provides a completely indeterminate definition of "universal service." It is whatever the Commission establishes to be "universal service" on an "evolving basis." Pet. App. at 27a. This leaves the Commission free to pur-

sue any policy it pleases—just as the NIRA left President Roosevelt free to pursue whatever policies he deemed "fit." *Panama Refin.*, 293 U.S. at 415.

Second, and critically, the Telecommunications Act requires no definite "findings which Congress has made essential in order" for the Commission to establish "universal service." *Schecter Poultry*, 295 U.S. at 538. The Commission is only asked to "consider" what telecommunications services are being widely used and "deployed," what is "essential to education, public health, or public safety," and "the public interest, convenience, and necessity." 47 U.S.C. § 254(c). But like the NIRA, these factors do not set standards, or a rule of law to which the Commission must "conform." *J.W. Hampton*, 276 U.S. at 409. The Act simply "authorizes" the Commission to determine what "universal service" is and how much carriers must pay to achieve it. *Schecter Poultry*, 295 U.S. at 541-42. These subjective considerations provide no more direction than the NIRA's meaningless command that industry codes of competition should "tend to effectuate" Congress's policy of improving American economic conditions. *Id.* at 535.

Third, Section 254's delegation to the Commission allowing it to set an ever-evolving standard of universal service, and thereby establish the basis for carrier contributions, exceeds even the bounds of the broad delegations this Court has sometimes permitted in other contexts. Just as a close analysis of the statutory authority and context is necessary here, so too is it necessary when applying this Court's other delegation cases. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context"). Prior cases cannot

be reduced to approvals of generic phrases such as "public interest" under the nondelegation doctrine. For example, in *NBC*, 319 U.S. at 216, this Court upheld regulations on chain broadcasting by radio networks under the statutory standard of "'public interest, convenience, or necessity.'" But that phrase was limited "'by its context, by the nature of radio transmission and reception, [and] by the scope, character, and quality of services'" such that the public interest "to be served" was "the interest of the listening public in 'the larger and more effective use of radio.'" *Ibid.* And in any event, the Communications Act enumerated a list of actions the FCC could do, which provided narrow context for an otherwise nebulous delegation. *Id.* at 214-15.

At least in *NBC*, the public interest was tied to a specific technology and its features. But Section 254 authorizes the Commission to establish universal telecommunications service based on ever "evolving" technology and usage by customers and carriers. 47 U.S.C. § 245(c). A constantly changing standard for universal telecommunication service *as determined by the Commission* is plainly not a standard "'as concrete as the complicated factors for judgment in such a field of delegated authority permit.'" *NBC*, 319 U.S. at 216. After all, Congress is capable of providing an objective definition of universal service and setting the amount of the required contribution either in the aggregate or by formula. *See Tiger Lily*, 5 F.4th 666, 675 (Thapar, J., concurring) (rebuffing arguments that Congress is not capable of deciding the important issues and observing that "Congress [generally] manages to pass tax legislation and annual budgets without outsourcing the job to the administrative agencies.").

C. Agency Law Principles Offer an Alternative Judicially Manageable Nondelegation Standard Grounded in the Constitution's Original Meaning

If the intelligible principle test is to be understood as so freakishly toothless as to permit a delegation of Congress' core power to decide the amount of taxes to be levied on the American people, then the time has come to abandon that test—and the cases upholding seemingly open-ended statutory delegations.[11] Luckily there are ready answers for the question of "what's the test?" *Gundy*, 588 U.S. at 157. One easy answer is to just go back to the historic approach this Court employed in confronting seemingly broad delegations in the 19th Century,[12] and in finding nondelegation violations in *Panama Refining* and *Schechter*. But there is another path this Court can take to reach the same result—one firmly rooted in a historical understanding of the Constitution's text and structure.

This Court's decision in *J.W. Hampton* points to a well-developed body of agency law that this Court can

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[11] "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530-31 (2005). That is largely the story of the "intelligible principle" test. As typically employed today, the concept of an "intelligible principle" is so nebulous, and unmoored from any objective governing standard, that it might justify any delegation—even those this Court found unconstitutional in *Panama Refining* and *Schechter*. This Court should eschew at least that version of the intelligible principle test.

[12] Historically, the judiciary narrowly construed delegations of rulemaking authority to avoid unlawful delegations of Congress's lawmaking powers. *See*, *e.g.*, *United States v. United Verde Co.*, 196 U.S. 207, 215 (1905) (rejecting an interpretation that would enable an officer to "define" critical text).

easily refer to in seeking to ground the nondelegation doctrine in the original public meaning of the Constitution. Writing for the Court, Justice Taft explained that the "law of agency in the general and common law . . . has wider application in the construction of our federal and state Constitutions than it has in private law." 276 U.S. at 405-06. And this Court has invoked agency-law precepts in delineating between legitimate delegations of authority and impermissible delegations of Congress' power to make law since this Court's seminal nondelegation opinion in *Wayman*, 23 U.S. (10 Wheat 1) 1.

Indeed, Chief Justice Marshall's division of "important subjects" from subjects of "less interest," *id.* at 43, was merely a "ters[e]" restatement of settled agency law doctrine. Lawson, s*upra,* at 128. As a lawyer trained in agency law principles, it was obvious to Marshall that when the People, as principals, delegated specific authority in the Constitution to Congress–as their agent—it had no authority to re-delegate or sub-delegate that authority. *See Wayman*, 23 U.S. at 47-48 (1825) (emphasizing that state legislatures "possess no portion of that legislative power which the Constitution vests in Congress, and cannot receive it by delegation."). *See also McCulloch*, 17 U.S. at 316, 405 (referring to the powers vested in Congress as a "delegat[ion]" from the People).

Likewise, the people who ratified the Constitution would have understood that in delegating the taxing power to Congress, they were by no means authorizing their representatives to vest anyone else with that formidable power. After all, "debate at the Constitutional Convention proceeded on the premise that Congress had to make the laws that govern the people itself rather than delegate that job to others." David

Schoenbrod, *A Judicially Manageable Test to Restore Accountability,* in The Administrative State Before the Supreme Court: Prospectives on the Nondelegation Doctrine, 349 (Peter J. Wallison & John Yoo, eds. 2022). *See also* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 245, 260 (2007) (noting the Founders explicit knowledge of fiduciary principles gleaned from "philosophers such as John Locke" under which "duties were non-delegable.").

Viewed in this way, it is important to begin textual interpretation with recognition that "[t]here are background norms of interpretation at work in any act of communication[.]" Lawson, *supra,* at 130. And when construing a legal document (like the Constitution), the learned person in 1789 would have understood—under well-established 18th Century agency law principles—that a delegation of specific authority to Congress (as an agent of the People) cannot be handed off to anyone else. *See, e.g.,* Matthew Bacon, *A New Abridgment of the Law* (1730), 1:203 ("One who has authority to do an Act for another, must execute it himself, and cannot transfer it to another. . . ."); Joseph Story, *Commentaries on the Law of Agency*, *as a Branch of Commercial and Maritime Jurisprudence* § 13, at 14 (1844) ("One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another. . . ."); Natelson, *supra*, at 247-48 (explaining

the high level of legal knowledge among the ratifying public).[13]

What is more, reference to agency law precepts is helpful in teasing out the line between a permissible and impermissible delegation to Executive Branch officers because "courts had faced subdelegation questions for centuries before the Constitution was ratified." *See* Lawson, s*upra*, at 127. Consistent with Chief Justice Marshall's formulation, common-law cases held, in 1789, that it was generally permissible for an agent to sub-delegate ministerial tasks, or limited duties that were obviously necessary to exercise delegated authority—but which did not require exercise of any significant discretion.[14] *See* Pet. App. at 56a. ("Common lawyers assumed that ministerial tasks could be subdelegated."). *E.g.*, *Goswill v. Dunkley*, 93 Eng. Rep. 779 (1747) (holding that an agent charged with selling a sword could subdelegate the ministerial task of storing the sword pending its sale).

By contrast, tasks that required the exercise of significant discretion were presumed non-delegable unless the legal instrument expressly allowed for sub-

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[13] This view also makes sense of the Constitution's structure, which enumerates and vests specific powers in specific agents. *See* Akhil Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) ("Like corporate officers, government officials were merely agents of principles who had prescribed limits on agent's powers in the founding charter.").

[14] Subdelegation was also permissible when "in specific contexts . . . there [was] a clear custom or tradition of allowing subdelegation[s]." Lawson, *supra*, at 134. But that exception could not possibly justify subdelegations of Congress's lawmaking powers for the simple reason that the American experiment with separation of powers was new in 1789.

delegation. For example, unless the instrument creating the principal-agent relationship said otherwise, an agent who was commissioned with the task of selling a painting at the best price would be expected to personally negotiate the sale of that painting—exercising his own judgment in deciding how to market it, and deciding the terms of a final sale. *See* Lawson, *supra*, at 137. After all, the agent was chosen for this task precisely because the principal had faith in *his* business judgment. Story, *supra*, at 14. In the same way, the American people vested Congress with the power to make law because they believed that their elected leaders (more than anyone else) could be trusted to exercise prudence—not least because they were accountable to the People in regular elections. *See* Federalist No. 51 (James Madison) ("A dependence on the people is, no doubt, the primary control on the government.").

Analogizing to private agency relationships is especially helpful in illuminating the problem here. Suppose that a couple gave their nanny a credit card to use as needed when watching their children. *See Nebraska v. Biden*, 143 S. Ct. 2355, 2379-80 (2023) (Barrett, J., concurring) (employing this agency law scenario in addressing a question of statutory delegation). The couple would have to have tremendous confidence in the nanny's character and prudence to trust she would use the card responsibly. And the nanny would surely violate that trust if she should give the card to someone else—just as it would violate the trust of the American people for Congress to sub-delegate the power to decide whether and to what extent to reach into private purses. That sub-delegation plainly violates the principal's expectations. *See Ingram v. Ingram*, 26 Eng. Rep. 455 (1740) (holding unlawful a

trustee's subdelegation of authority to dispose of a reversionary interest in an estate). *See also* Restatement (First) of Agency § 18 (1933) ("Unless otherwise agreed, a person cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of a third person.").

This agency law framework thus requires Congress (and only Congress as agents of the People) to exercise the powers delegated to them under the Constitution. Congress may permissibly delegate incidental powers as may be strictly "necessary and proper for carrying into execution" Congress's policy choices—like a charge to determine the facts and implement the law accordingly—because such tasks do not require the exercise of any significant discretion. *See* U.S. Const. art. I, § 8. *See also McCulloch*, 17 U.S. at 408-09 (explaining that the Constitution does not "prohibit" an act if it is "essential, to the beneficial exercise of [Congress' enumerated] powers."). *E.g., Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (President authorized to make factual determination that would trigger the lifting of an import ban). For this, the Court can look to how agency law principles applied in certain contexts at the founding. But that comes with a broad presumption that only Congress can be trusted to appropriately weigh the competing public values implicated with any exercise of its enumerated powers—including the amount of tax to be exacted from the People. *See* James Madison, *The Report of 1800* (Jan. 7, 1800) (laws must contain "such details, definitions, and rules, as appertain to the true character of the law."). The power to set the amount of taxes through vague standards is simply not a ministerial duty or a delegation of limited discretion that Congress may subdelegate to the executive branch.

CONCLUSION

For the above reasons, the Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

FRANK D. GARRISON
JOSHUA M. ROBBINS
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
(202) 888-6881
FGarrison@pacificlegal.org
JRobbins@pacificlegal.org

LUKE A. WAKE
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
(916) 419-7111
LWake@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

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