

No. 21-3886

In the United States Court of Appeals
for the Sixth Circuit

CONSUMERS' RESEARCH, CAUSE BASED COMMERCE, INC., JOSEPH BAYLY,
JEREMY ROTH, DEANNA ROTH, LYNN GIBBS, PAUL GIBBS,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

BRIEF OF AMICUS CURIAE TECHFREEDOM
IN SUPPORT OF PETITIONERS'
PETITION FOR REHEARING EN BANC

On Petition for Review from the Federal Communications Commission,
CC Docket No. 96-45, DA21-1134

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DISCLOSURE OF CORPORATION AFFILIATIONS
AND FINANICAL INTEREST

TechFreedom makes the following disclosure under Sixth Circuit
Rule 26.1:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

None.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom frequently offers expert commentary both on the Universal Service Fund, see, e.g., Comments of TechFreedom, *In re Report on the Future of the Universal Service Fund*, FCC WT Dkt No. 21-476 (Jan. 18, 2022); James Dunstan, *The Arrival of the Federal Computer Commission?*, Regulatory Transparency Project, <https://bit.ly/3Jm9PCh> (Aug. 27, 2021), and on nondelegation, see, e.g., Corbin K. Barthold, *A Path Forward on Nondelegation*, WLF Legal Pulse, <https://bit.ly/3LEdfSe> (Jan. 31, 2022).

INTRODUCTION & SUMMARY OF ARGUMENT

“This case presents a fundamental question about the limits on the Federal Government’s authority to delegate its powers to private actors.” *Texas v. Comm’r of Internal Revenue*, No. 21-379 (U.S., March 28, 2022)

* No party’s counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief’s preparation or submission.

(statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting denial of certiorari).

Congress established the Universal Service Fund in order to “facilitat[e] ... broad access to telecommunications services across the country.” Slip op. 5. “The USF accomplishes this goal by raising funds which are later distributed to people, entities, and projects to expand and advance telecommunications services in the nation.” *Id.* Congress entrusted the USF’s administration to the Federal Communications Commission. *Id.* at 1. Without Congress’s permission, however, the FCC in turn passed the management of the USF to a private entity, the Universal Service Administrative Company. It is USAC, not the FCC, that first “calculate[s]” the quarterly contribution that “each [telecommunications] carrier must pay to the USF.” *Id.* at 8. USAC’s budget proposals are deemed approved by the FCC after fourteen days of agency inaction. *Id.* at 9.

The FCC’s subdelegation of authority to USAC is unconstitutional. In our brief at the panel stage, we set out why this is so. By transferring legislative authority to a private entity, we explained, subdelegation violates Article I of the Constitution. TechFreedom Panel Stage Br. 6-10. By letting private actors wield that authority, we continued, subdelegation offends the constitutional principle of representative

democracy. *Id.* at 10-13. And by its very nature, we added, subdelegation encourages wasteful spending and unaccountable governance. *Id.* at 13-15. The improper subdelegation to USAC cannot be rescued, we noted, by procedural requirements placed on USAC by the FCC. *Id.* at 15-17. Anyone interested in exploring these issues further should consult that brief.

The panel erred in finding that “USAC is subordinate to the FCC,” and that “there is” therefore “no private-nondelegation doctrine violation.” Slip op. 27, 29. In reaching this conclusion, the panel overlooked two fundamental questions. First: may an agency subdelegate power to a private entity without Congress’s permission? And second: even if an agency *could* oversee a private entity’s use of government power, is the Constitution violated when the agency does not *in fact* engage in such oversight?

The full Court should grant en banc review and consider both questions.

ARGUMENT

I. Congress Did Not Permit The FCC To Subdelegate Power To USAC

Congress gave the FCC immense and open-ended authority to run the USF. That's problematic. But at least it's *what Congress did*. What Congress *did not* do was authorize the FCC to hand the task of managing that immense and open-ended authority to a private organization.

The “manipulation of official appointments” was “one of the American revolutionary generation’s greatest grievances” against the British monarchy. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883 (1991). The Framers were “concern[ed],” therefore, about the possibility “that the President might attempt unilaterally to create and fill federal offices.” *Weiss v. United States*, 510 U.S. 163, 188 n.2 (1994) (Souter, J., concurring). They wanted those who structured the federal government to be “accountable to political force and the will of the people.” *Freytag*, 501 U.S. at 884. That is why “Congress has plenary control over the salary, duties, and even existence of executive offices.” *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 500 (2010); see also *Myers v. United States*, 272 U.S. 52, 129 (1926), overruled on other grounds, *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). “The power

to create federal offices,” the “Framers ... assumed,” would “belong to Congress.” *Weiss*, 510 U.S. at 184 (Souter, J., concurring).

“The delegation” of power to USAC “was effectuated not by Congress, but at the whim of an agency—and without Congressional blessing of any kind.” *Texas v. Rettig*, 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J., joined by Jones, Smith, Elrod, and Duncan, JJ., dissenting from denial of rehearing en banc). This was improper. An agency has no authority “to re-delegate [its] power out to a private entity.” *Id.* at 415.

The panel neglected this important point. The full Court should grant en banc review and consider it. Private delegation is bad enough. Private delegation absent congressional approval is intolerable.

II. Even If USAC Is “*Subordinated*” To The FCC, USAC Is Not *Overseen* By The FCC

Chief Judge Sutton recently affirmed that, “*at a minimum*, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge.” *Oklahoma v. United States*, No. 22-5487, slip op. at 9 (6th Cir. March 6, 2023) (emphasis added). “Whether subordination always suffices to withstand a challenge,” Chief Judge Sutton went on, “raises complex separation of powers questions.”

Id. Those questions were not raised in the case before Chief Judge Sutton; but they are squarely raised here.

True, the FCC has *issued regulations* that claim to “subordinate” USAC to the FCC. Slip. op. 27. But that is the kind of “subordination” that may not “always suffice[]” to “withstand a non-delegation challenge.” *Oklahoma*, No. 22-5487, slip op. at 9. In taking the next step, and declaring that USAC is *in fact* “appropriately subordinated to the FCC,” slip op. 29, the panel conflated legal subordination with actual oversight. Yet nothing in the panel’s analysis of private delegation establishes that the FCC engages in genuine oversight of USAC. To wit:

- The panel stressed that USAC submits its “proposals”—read: demands for large sums of money from regulated entities—“for *approval*” by the FCC. Slip op. 28 (emphasis in original). But “the FCC has a long track record of serving simply as a conduit through which USAC’s decisions flow.” TechFreedom Panel Stage Br. 9. “The FCC appears never to have rejected a USAC budget.” *Id.*
- The panel said that “the FCC permits telecommunications carriers to challenge USAC proposals ... and often grants relief to those challenges.” Slip op. 29. But that review is cursory at best. The FCC “summarily resolv[es] dozens of challenges to

USAC policy determinations” at a stroke, in orders that offer little or no justification for the FCC’s decisions. TechFreedom Panel Stage Br. 16.

- The panel said that the FCC “uses USAC’s proposals” only after giving them “independent consideration.” Slip op. 29. Who says? “The FCC need not ... review and approve USAC’s work: A quarterly budget submitted by USAC ... is ‘*deemed* approved’ by the FCC after fourteen days of inaction. 47 C.F.R. § 54.709(a)(3) (emphasis added).” TechFreedom Panel Stage Br. 9. Because the FCC need not show its work—need not, for that matter, even issue a summary order—when it approves a USAC demand, there is no way to tell whether it “independent[ly] consider[s]” the work of USAC.

The full Court should grant en banc review and decide whether the FCC’s extraordinarily lax oversight of USAC renders its subdelegation of authority to USAC unconstitutional.

CONCLUSION

The petition should be granted.

May 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(b)(4) because it contains 1,283 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

On May 15, 2023, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold