

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 PROFESSOR CHAD SQUITIERI AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Chad Squitieri is Assistant Professor of Law at the Catholic University of America's Columbus School of Law.² Professor Squitieri's scholarship focuses on separation-of-powers topics, including the nondelegation doctrine. His law review article in the *Missouri Law Review*, *Towards Nondelegation Doctrines*, forms the foundation of this brief. Professor Squitieri has a strong interest in the nondelegation doctrine's development.

SUMMARY OF ARGUMENT

This brief offers a simple argument in support of Respondents' position: The Constitution contains a nondelegation principle that should be enforced differently for different congressional powers, depending upon the limitations imposed by the Necessary and Proper Clause and the relevant congressional power that Congress has sought to delegate. It follows that the Constitution's nondelegation principle should not be enforced by the "intelligible principle" test—a test that is unmoored from the Constitution's text and structure and has proven unworkable.

The Constitution's nondelegation principle is grounded in the conception of enumerated power. Congress is not a sovereign legislature vested with "the legislative power" in its entirety. Instead, "We the People"

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

² Professor Squitieri serves as an amicus in his personal capacity. His institutional affiliation is offered for identification purposes.

are sovereign, and the People’s Constitution vested Congress with an enumerated subset of “all legislative Powers herein granted.” U.S. Const. art. I, § 1. As a coequal agent of the People, federal courts must ensure that any law enacted by Congress (including a law that purports to delegate a congressional power) does not run afoul of the limitations imposed by the specific meanings of Congress’s enumerated powers.

Yet the intelligible principle test provides federal courts with an inept and ineffective tool for ensuring the constitutionality of delegations. That is because the intelligible principle test itself fundamentally conflicts with the Constitution’s text and structure. The test turns on “legislative power” generally, but Article I does not vest Congress with all legislative power. Instead, the Constitution carefully circumscribed Congress’s authority by only vesting Congress with specifically enumerated powers. The Constitution’s nondelegation principle should therefore be enforced by a test that reflects this foundational constitutional design.

The intelligible principle test has also shown itself to be unworkable—so much so that Justice Scalia suggested that the Constitution’s nondelegation principle may be judicially unenforceable. *Mistretta v. United States*, 488 U.S. 361, 415, 417 (1989). But the test’s unworkability flows from its focus on “legislative power” in the abstract. Grounding the nondelegation doctrine in the concrete, textual limits offered by specifically enumerated powers will produce a more manageable judicial standard, enable a more measured development of the law, and offer courts a principled framework for considering statutory context (such as the unique “combination” context, removal provision, and appropriations structure presented in this case).

Applying a power-specific approach to nondelegation counsels in favor of affirming the Fifth Circuit’s decision. While the Fifth Circuit was constrained by current doctrine concerning the intelligible principle test, the court’s scholarly opinion demonstrated a focus on Congress’s Article I Taxing Clause power specifically (rather than just the legislative power generally). This Court can affirm the Fifth Circuit by similarly focusing on the Article I Taxing Clause, in addition to the Necessary and Proper Clause, and concluding that 47 U.S.C. § 254 is not a “necessary and proper” means of carrying Congress’s Article I Taxing Clause power “into execution.”

ARGUMENT

I. The Court Should Abandon The Intelligible Principle Test

A. The Intelligible Principle Test is Constitutionally Irrelevant

The intelligible principle test turns on “legislative power.” *See, e.g., Gundy v. United States*, 588 U.S. 128, 132, 135 (2019). It requires courts to identify the precise moment at which Congress has vested so much policy-setting discretion in an executive or judicial official that the official begins to exercise power that is legislative in nature. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (“[W]e look to the statute to see whether Congress has . . . itself established the standards of legal obligation, thus performing its essential legislative function, or . . . has attempted to transfer that function to others”).

The intelligible principle test’s focus on “legislative power” in the abstract fundamentally conflicts with the Constitution. Unlike Article II, § 1, cl. 1 and Article III,

§ 1, which vest “[t]he executive Power” and “[t]he judicial Power” in their entirety, Article I § 1 does *not* vest Congress with “the legislative power” in its entirety. Article I § 1 instead vests Congress with an enumerated subset of legislative powers—namely, “[a]ll legislative Powers herein granted.” (emphasis added). See, e.g., *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“[T]he powers of the legislature are defined, and limited.”); Robert G. Natelson, *How to Correct the Context of the “Non-delegation” Debate*, The Originalism Blog, <https://originalismblog.typepad.com/the-originalism-blog/2020/01/how-to-correct-the-context-of-the-non-delegation-debaterob-natelson.html> (“[T]he Constitution does not delegate to Congress a single ‘legislative power,’ but discrete, enumerated legislative powers. The scope of each, including the extent of delegation approved by the people who conveyed it, must be sought in its particular wording and background.”).

Vesting Congress with only specifically enumerated powers is a notable component of the Constitution’s design, as it indicates that Congress is not a sovereign legislature vested with plenary legislative authority. In “Britain [the supreme power] is lodged in the British Parliament.” *Trump v. Mazars USA, LLP*, 591 U.S. 848, 874 (2020) (Thomas, J., dissenting) (citation omitted). But in the United States, “the supreme, absolute, and uncontrollable authority, remains with the people.” *Id.*; see also *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”). This constitutional design was influenced by British parliamentary abuses, which “had been a significant complaint of the American Revolution,” as well as “experiments in legislative supremacy in the States.” *Mazars*, 591 U.S. at 874.

In the British parliamentary system, the sovereign “Parliament . . . has, under the English constitution, the right to make or unmake any law whatever.” A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 3 (10th ed. 1964). As a consequence, “[a]ny Act of Parliament . . . will be obeyed by the Courts.” *Id.* at 4. But in the United States, the sovereign People’s Constitution created three coequal branches of federal government: The President, the Congress, and the federal Judiciary. See Chad Squitieri, *Treating the Administrative as Law: Responding to the “Judicial Aggrandizement” Critique*, 110 *Cornell L. Rev. Online* 1, 25 (2024) (“[A] federal system of three coequal powers, each being used to ‘check and balance’ the others, is a core component of the Constitution’s design.”).

As a coequal branch, federal courts are not required to “obey” the delegatory decisions of a sovereign Congress vested with plenary legislative power. Instead, as a coequal agent of the sovereign People, federal courts must ensure that federal statutes are consistent with the Constitution’s requirements before giving statutes legal effect. Put differently, federal courts must ensure that *any* law enacted by Congress (including a law that purports to delegate a congressional power) does not run afoul of the limitations inherent in the sovereign People’s decision to only vest *specific* legislative powers in Congress.

For these reasons, the Constitution’s text and structure repudiate the intelligible principle test’s focus on general “legislative power.” The test also lacks relevant historical support. To wit, the phrase “intelligible principle” arrived in this Court’s jurisprudence only in 1928. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). And although “[n]o one at the time thought the

phrase meant to effect some revolution in this Court’s understanding of the Constitution,” it “eventually began to take on a life of its own.” *Gundy*, 588 U.S. at 163 (2019) (Gorsuch, J., dissenting).

Intentional or not, the intelligible principle test’s focus on “legislative power” has created untenable distance between the Constitution’s nondelegation principle and the test that courts use to enforce that principle. The “nondelegation principle is grounded in the more basic principle of enumerated powers,” Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002), and thus should be enforced by power-specific nondelegation inquiries that account for differences between enumerated powers. The current intelligible principle test, by comparison, offers only a constitutionally irrelevant, one-size-fits-all approach that is grounded in judicial dicta.

B. The Intelligible Principle Test is Notoriously Difficult to Administer

Not only does the intelligible principle test rest on dubious constitutional principles, but it requires courts to engage in the notoriously “difficult” task of “mark[ing] . . . the line which divides legislative power, from the other departments of power.” James Madison, Virginia Report of 1800. As Chief Justice Marshall recognized, the legislature “may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.” *Wayman v. Southard*, 23 U.S. 1, 46 (1825). Yet the intelligible principle test calls for exactly this sort of unnecessary, delicate, and difficult inquiry.

The difficulty in applying the intelligible principle test has pushed the judicial enforcement of the nondelegation doctrine towards extinction. See *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting) (“This mutated version of the ‘intelligible principle’ remark . . . has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.”) (quoting Lawson, *Delegation and Original Meaning*, at 351). This presents a serious problem for federal jurists, who as faithful agents of the People must ensure that they do not give legal effect to federal statutes that go beyond the sovereign People’s constitutional instructions.

For instance, although Justice Scalia recognized that “the doctrine of unconstitutional delegation” was “unquestionably a fundamental element of our constitutional system,” he did not think it “an element readily enforceable by the courts.” *Mistretta*, 488 U.S. at 415, 417 (Scalia, J., dissenting). Dissatisfaction with the then-prevailing test for enforcing the nondelegation doctrine is understandable. But a turn toward the originalist methodology Justice Scalia championed—a methodology that seeks to understand the Constitution’s text as an objective reader would have at the time of ratification—offers the solution for replacing the unworkable intelligible principle test.

As “faithful agents of” the sovereign People’s Constitution, *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (quoting Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010)), federal courts are not “permit[ted] . . . to look the other way . . . when the constitutional lines are crossed.” *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting). Instead, federal courts must “call

foul” when Congress violates the Constitution’s non-delegation principle. *Id.* This case presents an ideal vehicle for reinvigorating the means through which federal courts should call nondelegation fouls going forward.

II. The Court Should Adopt A Power-Specific Approach Consistent with the Constitution’s Text and Structure

The text and structure of the Constitution require power-specific analyses for nondelegation questions. Specifically, the Necessary and Proper Clause “provides the text-based standard for determining how Congress can delegate its Article I, Section 8 powers.” Chad Squitieri, *Towards Nondelegation Doctrines*, 86 *Mo. L. Rev.* 1239, 1267 (2022); *see also* Lawson, *Delegation and Original Meaning*, at 351 (arguing that the Necessary and Proper Clause “is in fact a crucial textual vehicle through which the specific contours of the nondelegation doctrine are constitutionalized”).

The Necessary and Proper Clause states: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18. Power-specific nondelegation analyses should run through the text of the Necessary and Proper Clause and ask whether a particular statute is a “necessary and proper” means of carrying another of Congress’s enumerated powers “into execution.”

Because Congress is not sovereign, it should not be left to Congress alone to determine whether a particular statute, delegating a particular congressional power, is

a “necessary and proper” means of carrying that particular congressional power “into execution.” To be sure, federal courts might offer respect to congressional determinations of necessity and properness. But federal courts must not offer Congress the sort of obedience that English courts might offer acts of a sovereign Parliament. After all, the Necessary and Proper Clause’s use of the word “shall” indicates that federal statutes “must *in fact* be necessary and proper” as a matter of Constitutional interpretation, “and not merely *thought by Congress* to be necessary and proper.” See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 276 (1993).

To see how a power-specific nondelegation analysis would apply in practice, consider a hypothetical involving the United States Postal Service (“USPS”). To empower the USPS to make various postal decisions on Congress’s behalf, Congress might rely on its Post Office Clause authority “[t]o establish Post Offices and post Roads,” U.S. Const. art. I, § 8, cl. 7, as well as its Necessary and Proper Clause authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution,” U.S. Const. art. I, § 8, cl. 18. Nondelegation challenges brought against those grants of decision-making authority to the USPS should be analyzed with a focus on the text of the specific powers Congress relied on.

Thus, a nondelegation challenge brought against a statute that, for example, gave the USPS discretion to determine the location of post offices should be analyzed by asking whether an objective reader in 1788 would have considered the statute a “necessary and proper” means of “carrying” Congress’s Postal Power “into exe-

cution.” See Squitieri, *Towards Nondelegation Doctrines*, at 1253–54 (discussing the post roads debates in the Second Congress). Other nondelegation challenges concerning other powers should be conducted pursuant to similar, but nonetheless distinct, analyses. For example, in a case such as this one, which concerns Congress’s Article I Taxing Clause power, the relevant nondelegation inquiry asks whether an objective reader in 1788 would have considered Section 254 a “necessary and proper” means of “carrying” Congress’s Article I Taxing Clause power “into execution.”³

III. A Power-Specific Approach Has Practical Benefits

In addition to more closely adhering to the Constitution’s text and structure, a power-specific approach to nondelegation also has practical benefits over the intelligible principle test.

A. Judicial Manageability

The intelligible principle test has proven to be judicially unmanageable. Squitieri, *Towards Nondelegation Doctrines*, at 1242 (collecting citations and referring “to the modern nondelegation doctrine’s inability to produce a judicially manageable standard”). The unmanageability of the intelligible principle test is a result of

³ The year 1788 is used because that is when the relevant constitutional text was ratified into law. Gary Lawson & Guy Seidman, *When Did The Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 24 (2001) (“[T]he Constitution was properly ratified when the necessary ninth state convention completed its work, which in this case was 1:00 p.m. on June 21, 1788.”). Were Congress to rely on authority vested by amendments ratified at later moments in time, the relevant nondelegation inquiry can be distinct. See Squitieri, *Towards Nondelegation Doctrines*, at 1275–90.

the test’s focus on “the abstract conception of ‘legislative power,’” rather than “the particular powers vested in Congress.” *Id.* In short, a “one-size-fits-all nondelegation doctrine focusing on ‘legislative power’ (singular) necessitates that courts speak in vague and unhelpful terms.” *Id.*

By adopting a power-specific approach—one that focuses on actual words in the Constitution, rather than abstract concepts—this Court can help ensure that nondelegation challenges are more judicially manageable in the future. That is because a power-specific approach frees courts to focus on the text and the original meaning of the specific congressional power that Congress has sought to delegate in any particular case.

By interpreting the “actual words in the Constitution,” courts can enforce the nondelegation doctrine by resorting to familiar interpretive guideposts—such as the text and structure of “the rest of the Constitution,” as well as the “relevant history” of the specific congressional power at issue. *Id.* at 1292. Those guideposts are unavailable under the intelligible principle’s freewheeling analysis of legislative power generally.

B. Measured Development of the Law

A power-specific approach would also allow for the measured development of the law in the lower courts. For example, under a power-specific approach, one nondelegation holding (*e.g.*, a holding about the scope of permissible delegation under the Article I Taxing Clause) need not impact the constitutionality of a delegation found somewhere else in the administrative state (*e.g.*, a delegation under the Commerce Clause). That is because, if a court were “to hold a particular delegation in-

volving a particular power to be unconstitutional pursuant to” the limitations imposed by one constitutional provision, “it need not follow that the same result would apply to another delegation involving other powers.” *Id.* at 1290–91. Courts can thus address nondelegation issues more precisely, by considering the different limitations imposed by different constitutional provisions, and developing a body of power-specific nondelegation precedents over time. *Id.* at 1264.

Indeed, because “Congress’s legislative authority sometimes overlaps with authority the Constitution separately vests in another branch,” *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting), courts might naturally recognize that Congress is able to constitutionally delegate some powers more than others. For example, “foreign-affairs-related statute[s]” that overlap with the President’s constitutional authority, or statutes “applied to the judiciary” that overlap with courts’ Article III powers “to regulate their practice,” offer two contexts in which Congress might have more ability to delegate. *Id.* (quoting *Wayman v. Southard*, 23 U.S. 1, 20 (1825)). By using this case to clarify that the Constitution’s nondelegation principle should be enforced on a power-by-power basis, this Court can allow lower courts to systematically develop informative nondelegation precedents for each of Congress’s powers over time.

C. A More Principled Framework for Considering Context

Finally, a power-specific nondelegation inquiry also provides a more principled framework for accounting for statutory context. Indeed, this case serves as a prime example of this benefit.

The Fifth Circuit held that the “the *combination* of Congress’s broad delegation to FCC and FCC’s subdelegation to private entities certainly amounts to a constitutional violation.” *Consumers’ Rsch. v. FCC*, 109 F.4th 743, 756 (5th Cir. 2024) (emphasis added). In reaching that conclusion, the Fifth Circuit supported its rationale with precedent from this Court, which has held in administrative law contexts that a combination of features can result in a constitutional violation. *Id.* at 778–80 (citing *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 204 (2020) and *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010)). The Fifth Circuit also stated that “FCC commissioners are removable by the President only for-cause,” *id.* at 762–63 (citing 47 U.S.C. § 154(c)(1)(A)), and that the universal service is funded “*outside* the regular appropriations process.” *Id.* at 762.

When considered through the lens of the intelligible-principle test, the Fifth Circuit’s “combination” holding, and its references to FCC removal protections and the congressional appropriations process, seem less relevant than they should. But the constitutional relevance of these features becomes quite clear when viewed through the lens offered by a power-specific approach to nondelegation. Under a power-specific approach, each aspect of the overall statutory scheme—*e.g.*, the appropriations context, FCC removal protections, and the “combination” of delegations to and from the FCC—all speak to whether Section 254 is a “necessary and proper” means of carrying Congress’s Article I Taxing Clause power “into execution.”

Like how toothpaste and orange juice might be perfectly fine alone, but not in combination, statutory features can be “necessary and proper” standing alone, but

not when combined. A power-specific approach that accounts for the text of the Necessary and Proper Clause can thus offer a principled framework for considering unique combinations of features in particular statutory frameworks.

IV. A Power-Specific Analysis Can Resolve This Case

This Court can resolve this case by ruling that Section 254 is not a “necessary and proper” means of carrying Congress’s Taxing Clause power “into execution.”

Despite the Government’s halfhearted suggestions to the contrary,⁴ Section 254 is most naturally understood as an exercise of Congress’s Article I Taxing Clause power. That Article I power vests Congress with the “Power To lay and collect Taxes.” U.S. Const. art. I, § 8, cl. 1. While the Fifth Circuit was constrained by this Court’s precedent concerning the intelligible principle test, the Fifth Circuit was correct to focus on Congress’s Article I Taxing Clause power. The Fifth Circuit was also correct to repeatedly stress that the constitutionality of a particular delegation should account for particular “context.” *See, e.g., Consumers’ Rsch.*, 109 F.4th at 763, 766 n.12. This Court can both clarify and affirm the Fifth Circuit’s contextual, power-specific analysis of

⁴ The Government suggests in a single paragraph that Section 254 could be defended as an exercise of Congress’s power under the Commerce Clause. Pet. Br. 34–35. Given that lack of argument, this Court may wish to inquire at oral argument whether or not the Government has effectively waived its Commerce Clause defense. If the Government maintains its Commerce Clause defense, this Court could order supplemental briefing as to whether an objective reader in 1788 would have understood a statute like Section 254 to be a “necessary and proper” means of ‘carrying’ Congress’s power to “regulate commerce . . . among the several States” “into execution.”

Congress's Article I Taxing Clause power by concluding that Section 254 is not a "necessary and proper" means of carrying Congress's power to "lay and collect Taxes" "into execution." U.S. Const. art. I, § 8, cl. 1, cl. 18.

To the extent Section 254 empowers the FCC to not only set tax policy itself, but to further empower private entities to set tax policy, Section 254 doubly-insulates tax policy from the sovereign People who vested the Article I Taxation Power in *Congress* alone. And when that double-insulation is combined with whatever removal protections the FCC might enjoy, and funding obtained "*outside* the regular appropriations process," *Consumers' Rsch.*, 109 F.4th at 762, the result is a taxation system that is quite afield from the sovereign People's decision to entrust the power to tax to a politically accountable Congress. The people did not vest the Article I Taxing Clause power in unelected FCC Commissioners or private entities—let alone a confusing combination of the two which operates outside the clear lines of accountability created by Presidential removal and the congressional appropriations process.

As nine judges on the Fifth Circuit concluded, "there is no record of any government program like" the one contended to be consistent with Section 254 "in all the U.S. Reports," nor could the FCC identify "any historical analogue" for Section 254. *Id.* at 779–80. Although the lack of a historical analogue may not be dispositive as to Section 254's constitutionality, this Court may properly account for Section 254's status as an "innovation with no foothold in history or tradition," *id.* at 782 (quoting *Seila Law*, 591 U.S. at 222), when exercising the judicial discretion inherent in enforcing the limitations imposed by the Article I Taxing Clause and Necessary and Proper Clause.

As this Court has recognized, “under our constitutional regime,” taxes “are traditionally levied by Congress.” *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 341 (1974); *see also id.* (noting that it “would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power”). Yet as the specter of the facts in this case highlight, “American telecommunications consumers are subject to a multibillion-dollar tax nobody voted for,” and which is “*de facto* determined by a trade group staffed by industry insiders with no semblance of accountability to the public.” *Consumers’ Rsch.*, 109 F.4th at 786.

The Fifth Circuit thought it “utterly inconceivable that the first Treasury, upon receiving from Congress broad powers to levy taxes on American citizens, would have abdicated responsibility for determining tax rates to privately employed bounty hunters who had a personal financial interest in the amount of tax revenue collected.” *Id.* at 782. This Court can affirm the Fifth Circuit’s rationale, but clarify the point by concluding more straightforwardly that the objective reader in 1788 would not have considered a statute like Section 254 to be a “necessary and proper” means of carrying Congress’s power to “lay and collect Taxes” “into execution.”

CONCLUSION

It is past time for the Court to abandon the “intelligible principle” experiment. The Constitution’s nondelegation principle should be enforced through the textual limits imposed by the Necessary and Proper Clause and Congress’s other enumerated powers. This Court can affirm the Fifth Circuit by concluding that Section 254

is not a “necessary and proper” means of carrying Congress’s Article I Taxing Clause power “into execution.”

Respectfully submitted.

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