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 *AMICUS CURIAE* THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY IN SUPPORT OF RESPONDENTS

DAVID J. CRAIG
Counsel of Record
SOFIA DEVITO
RYAN YOUNG
THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY
15275 Collier Blvd., Ste. 201
Naples, FL 34119
(239) 244-8808
dcraig@theFGA.org

Counsel for Amicus Curiae

February 18, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

The Foundation for Government Accountability (FGA) is a 501(c)(3) non-profit organization that helps millions achieve the American Dream by improving welfare, workforce, health care, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependency, restore dignity and self-sufficiency, and empower individuals to take control of their futures. FGA's policy reforms are grounded in the principles of government transparency, the free market, individual freedom, and limited constitutional government.

Since its founding, FGA has helped achieve more than 1,000 reforms impacting policies in 42 states as well as 38 federal reforms. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing as *amicus curiae* before state and federal courts, including this Court in *Azar v. Gresham*, 141 S. Ct. 1043 (2021), *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 143 S. Ct. 978 (2023), and *Loper Bright Enters. v. Raimondo.*, 144 S. Ct. 2244 (2024).

---

[*] Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

Justice Joseph Story once stated that "the three great powers of government … should forever be kept separate and distinct." 2 Joseph Story, *Commentaries on the Constitution of the United States* §519, at 2-3 (Boston, Hilliard, Gray, & Co. 1833). This Court has further observed that as far as the legislative power goes, Congress alone has authority to legislate, in part because "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). The vesting of legislative power in Congress alone is one of the constitutional structures designed to ensure that any powers delegated by the federal government remain "few and defined." *The Federalist*, No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

But despite the Constitution's exclusive vesting of legislative power in Congress, Congress has allowed and actively facilitated a runaway growth of Executive Branch lawmaking through the administrative state. Through this delegation, the Executive Branch as we know it today has expanded its powers well beyond what the Founders imagined. Rather than acting according to "few and defined" law enforcement powers, the Executive Branch now creates laws that regulate every aspect of the American economy. This mission creep now proliferates with the Code of Federal Regulations, which codifies all current federal regulations,

spanning more than 105 million words across nearly 190,000 pages, encompassing more than 1.3 million regulatory mandates and restrictions. Fick et al., *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U. In 2023, federal agencies issued more than 3,000 administrative rules even though Congress only enacted 68 laws, a ratio of 44 rules for every law enacted. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: Sizing Up the Federal Government's New Rules and Regulations*, Competitive Enterprise Institute (2024), https://shorturl.at/T0kU6. Governance of our nation is increasingly done by unelected bureaucrats rather than our elected leaders.

This case presents an opportunity for the Court to restore the appropriate balance of powers between the branches by "say[ing] what the law is." U.S. CONST. art. III, §1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "'*All* legislative powers … shall be vested in a Congress of the United States,'" and "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (quoting U.S. Const. Art. I §1) (emphasis added).

The Court's intelligible principle test has failed to enforce this constitutional mandate and thus failed the American people. Instead, the Court should apply the standard first articulated by Chief Justice Marshall: "important subjects … must be entirely regulated by the legislature itself, [while] those of less

interest" may be regulated by "a general provision" that gives "power … to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). This would enforce the separation of powers while giving Congress the right to exercise "flexibility and practicality" when crafting legislation. *Schechter Poultry*, 295 U.S. at 529.

For our constitutional structure to work as intended, the Court must finally act to enforce the separation of powers by checking Congress's penchant for handing its authority over to Executive Branch agencies. An affirmation of the 5th Circuit and reinvigoration of the nondelegation doctrine will not cause chaos in the judiciary. It will restore balance between the branches without disorder, just as a robust nondelegation doctrine has done in several states.

For these reasons and more, this Court should affirm and restore the nondelegation doctrine.

ARGUMENT

I. Reversal of the 5th Circuit Would Encourage the Continued Unsustainable Growth of the Unaccountable Administrative State

A. The Court Must Finally Check Congress's Fire Sale of Its Authority

Since the beginning of the 20th century the administrative state has exploded in size. In the year 1900, there were eight federal departments with

230,000 employees, most of whom worked for the Post Office Department. Kosar, *Staffing Congress to Strengthen Oversight of the Administrative State*, The C. Boyden Gray Ctr., Antonin Scalia Law School, George Mason Univ., Policy Brief 24-01, p. 4, (Mar. 2024), https://shorturl.at/OVea1. Today, there are more than 400 federal agencies with a civilian staff of approximately 2.25 million employees., Press Release, James Comer, Chairman, Committee on Oversight and Government Reform, *Chairman Comer and Senator Lee Introduce Bill to Fast-Track President Trump's Government Reorganization Plans*, (Feb. 13, 2025), https://bit.ly/4hPp8oI, Congressional Budget Office, *Federal Personnel*, https://shorturl.at/l2pjS, (last visited Feb. 14, 2025). But this explosion in the size of the administrative state did not happen solely because of administrative overreach. It also occurred because Congress has failed to zealously protect its vested power to legislate, and the Judicial Branch has failed to check the legislature from handing its authority over to the executive.

This Court has repeatedly held that "[t]hat Congress cannot delegate legislative power to the President," and that this is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). But this Court has done little to enforce this principle since 1935. *See Schechter Poultry*, 295 U.S. 495; *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The nondelegation doctrine is not always easy to apply, but the Court's duty to stop one branch of government from violating the Constitution does not

stop with difficult cases. "[T]he judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (citing *Cohens v. Virginia*, 19 U.S. 264, 257 (1821)). With Congress's continued unconstitutional delegations and this Court's inaction to remedy those delegations, the intelligible principle standard has created an inertia of perpetual governmental growth, with the national debt standing at over $36.2 trillion and a debt to gross domestic product (GDP) ratio of 123%. *What is the National Debt*, U.S. Treasury, Debt as of Feb. 14, 2025, https://shorturl.at/c7JiG.

While quantifying the cost of all unconstitutional delegations is impossible, measuring the explosive growth of the administrative state is not. Take for example the four years of the Biden administration. During that period, more than 1,000 administrative rules were finalized with aggregated new costs of $1.7 trillion and over 346 million paperwork hours. Dan Goldbeck, *HHS Serves the Main Dishes*, Am. Action Forum, (Dec. 2, 2024), https://shorturl.at/60lBp. Those new rules added more than 350,000 pages to the Federal Register. Michael Greibrok, *How Lawmakers Can Roll Back the Biden Administration's Blunders and Improve the Food Stamp Program*, FGA, (Jan. 29, 2025), https://shorturl.at/jeK9j. And this stunning growth is nothing new. In the decade preceding the Biden administration, the nation saw agencies issue 23 rules for every law enacted. Crews Jr., *supra*, at 6.

This deluge of administrative rulemaking not only comes with extraordinary compliance and paperwork costs, but it also drives inflation. It's been estimated

that for every 10 percent increase in federal regulations, there is a 0.687 percent increase in the cost of consumer goods and services. Chambers & Collins, *How do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, Mercatus Ctr., George Mason Univ. (Feb. 2016), https://shorturl.at/i3Vtb.

The federal administrative state is out of control and the Court must act to ensure the Congress is not allowed to exacerbate the problem by continuing its unchecked delegation of vested legislative authority.

This case presents the Court with an opportunity to rein in a statute devoid of limitations on taxing authority and at the same time to lay out a judicial standard that effectively guides Congress in crafting laws that give the Executive Branch decision-making power. The intelligible principle standard does not provide that guidance and therefore cannot rein in the administrative state. As one observer rightly noted "[i]t's no exaggeration to say that this more forgiving understanding of the non-delegation doctrine was central to the rise and growth of the administrative state throughout the twentieth century." Steve Vladeck, One First, 110. *The Universal Service Fund and the Non-Delegation Doctrine* (Nov. 25, 2024), https://www.stevevladeck.com/p/110-the-universal-service-fund-and.

B. Congress's Perpetual Choice to Increase Entitlement Spending Further Begs the Court's Immediate Action to Reinvigorate the Nondelegation Doctrine

Without action by the Court, Congress's addiction to giving away its authority will only become worse and the consequences further reaching. This is illustrated by the budget constraints the institution has put itself under by allowing more mandatory spending programs and total mandatory spending to swallow more and more of the federal budget. *The Nation's Fiscal Health*, U.S. GAO (Feb. 2025), https://www.gao.gov/assets/gao-25-107714.pdf. There is also a danger that Congress will enact more statutes like §254 that evade the appropriations process, which is an important check on executive mission creep. "While Congress does not regularly revisit past statutes authorizing agency action, Congress still approves the annual appropriations necessary to keep agencies operating. In the process, Congress often enacts measures limiting or directing how agencies may spend appropriated funds." Jonathan H. Adler & Christopher Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931, 1956 (2020). This increase in mandatory spending and movement away from the appropriations process diminishes Congress's authority over its "power of the purse," which is Congress's "ultimate weapon of enforcement." *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974).

With this case, the Court has an opportunity to send a clear signal to Congress that it cannot rely on

agency policymaking and that it must clearly define the parameters in which the agency must act, particularly in policy areas funded by mandatory funding and outside of Congress's annual control of appropriations.

II. Affirming the 5th Circuit Will Force Congress to Fix the USF

The tax implicated here, the Universal Service Fund (USF), is a "contribution" by telecommunications carriers that "may be recovered through interstate telecommunications-related charges to end users." 47 C.F.R. §54.712. The FCC reports that "[a]pproximately 82% of USF contributors pass through the costs to their end-users." FCC, FCC 22-67, *Report on the Future of the Universal Service Fund 10084-85*, p. 46, (Aug. 15, 2022). Meaning, the vast majority of the USF tax is paid directly by consumers.

Aside from being an unconstitutional tax, the USF is yet another unsustainable government program. The program is in such dire financial condition that the former FCC Commissioner and new FCC Chairman, Brendan Carr, noted that "the FCC's funding mechanism for this vital program is stuck in a death spiral." *Statement of Commissioner Brendan Carr Re: Report on the Future of the Universal Service Fund, Report*, WC Docket No. 21-476, FCC, https://shorturl.at/Fjzf6. The good news for the USF, however, is that several bipartisan pieces of legislation have recently been introduced in Congress to help stabilize the program. *See The Future of the Universal Service Fund and Related Broadband*

Programs, Cong. Rsch. Serv., (Updated Mar. 1, 2024), https://crsreports.congress.gov/product/pdf/R/R47621. In fact, a bipartisan USF "working group" has been created in the U.S. Senate to address issues surrounding USF deficiencies. Senator Ben Ray Lujan, *Universal Service Fund (USF) Working Group Request for Comment*, https://www.lujan.senate.gov/usf/.

But were the Court to reverse the 5th Circuit, it could short-circuit Congress's ability to clean up the mess it made when enacting Section 254. Until now, Congress has been able to duck this tough political question without accountability to the electorate on the issue. This includes not only the substance of the USF funding mechanism and nondelegation issues, but also the USF's violation of the Origination Clause, commanding that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, §7, cl. 1.

The legislation introduced in Congress shows that the political process is sufficient to preserve the USF. But reaching consensus is difficult and Congress, like any other political body, is averse to bad press. If the goal for an individual serving in Congress is to be seen as doing something—or anything—then it is far better to pass a statute that leaves out the details that cannot be agreed upon, than it is to try to resolve disagreement and come away with nothing. By passing statutes with gaps for agencies to fill, members of Congress can receive credit from their constituencies for taking action while allowing

agencies to shoulder the blame for divisive policy choices.

But affirming the 5th Circuit would put the onus back on Congress—where it belongs—to debate and decide this difficult political question, since "Article I's detailed processes for new law were also designed to promote deliberation." *Gundy v. United States*, 588 U.S. 128, 154 (2019) (Gorsuch, J., dissenting). Here Congress can fix the financial *and* constitutional deficiencies with the USF by any number of policy remedies. For instance, Congress could require the FCC to investigate what the USF tax should be and make a recommendation for Congress's approval. Alternatively, Congress could create a commission that makes such recommendations for Congress to consider. Potential remedies abound, but so long as the Court allows Congress to delegate its vested authority, Congress will have no urgency to act, and it will continue to deflect and delegate to the Executive Branch.

III. Reinvigorating the Nondelegation Doctrine Will Help Restore Governance by the Consent of the Governed

A. The Intelligible Principle Standard Has Not Checked Congress's Delegations

The first enumerated power that the people granted to Congress was the power to lay taxes. U.S. CONST. art. I, §8. This power is part of Congress's vested legislative power that includes "[a]ll legislative Powers." U.S. CONST. art. I, §1. This Court has further clarified that "[t]axation is a legislative function, and

Congress … is the sole organ for levying taxes." *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974). Indeed, "the breadth of Congress's power to tax is greater than its power to regulate commerce." *NFIB v. Sebelius*, 567 U.S. 519, 573 (2012). So powerful is Congress's taxing authority, that Chief Justice John Marshall observed that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

This Court has also made clear that "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). Further, federal executive agencies possess only those powers conferred upon them by Congress through statute. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

But here the FCC defends a statute that allows it to raise a tax with no limit, delegate that authority to a private entity, and to spend that money as it sees fit without any substantive limit. *See* 47 U.S.C. §254. The statute strays far beyond what the Constitution allows because "[i]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting, (quoting Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)). A statute that strays so far from the bounds of the Constitution requires this Court to act since "the Constitution does not permit judges to look

the other way; [they] must call foul when the constitutional lines are crossed." *Id.* at 157.

The Court should call foul based on a principle other than the "mutated version of the 'intelligible principle' remark [that] has no basis in the original meaning of the Constitution … or even in the decision from which it was plucked." *Id.* at 164. Under this "mutated" intelligible principle standard, "delegation is fine so long as Congress has stated an 'intelligible principle,'" but this "is not standard at all: it simply means that Congress gets to do as it wishes." Michael S. Greve, *Delegation in Context*, Center for the Study of the Administrative State, Antonin Scalia Law School, George Mason University, Working Paper 23-09, (June 20, 2023), https://shorturl.at/HyqMP. Thus, applying the intelligible principle standard is little different than refusing to review the statute at all.

The Court should instead articulate a new and more workable test, and at a minimum, it should affirm the 5th Circuit's decision, which carefully applies this Court's precedents to "'ascertain whether the will of Congress has been obeyed.'" *Consumers' Rsch. v. FCC*, 109 F.4th 743, 764 (5th Cir. 2024) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)). Doing so would "put the Congress on notice of what it is expected to do in future legislation, [and] the agencies on notice to refrain from making policy decisions in future regulations…" Douglas H. Ginsburg, *Reviving the Nondelegation Principle in the U.S. Constitution: Perspectives on the Nondelegation Doctrine in* The Administrative State Before The Supreme Court, 45, (Peter J. Wallison & John Yoo

eds., 2022). An enforceable nondelegation doctrine would also make agencies and Congress better at their jobs as "[a]gencies will predictably be more circumspect, more wary of judicial reversal" and "Congress will likewise be more hesitant to enact delegations of doubtful constitutionality." *Id.* at 43.

B. Reinvigorating the Nondelegation Doctrine Complements the Court's Recent Separation of Powers Decisions

Adopting a stricter standard than the intelligible principle standard will continue to move the law toward a more balanced separation of powers. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), this Court clarified that significant assertions of regulatory authority required a clear statement by Congress. *Id.* at 2608-09. Then, in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), the Court rightly restored the Judicial Branch's power to review and reject agency interpretations of ambiguous statutes. But it's important to note that these cases dealt only with whether Congress has delegated clearly and do not address the underlying issue of whether Congress can delegate legislative power in the first place. While *West Virginia* and *Loper Bright* have helped restore important aspects of rulemaking and statutory interpretation to constitutional compliance, the "consent of the governed" will not be restored without addressing the root cause of executive power imbalance—delegation. This case, *West Virginia*, and *Loper Bright* can work together to make Congress do its work by communicating its intentions and

requiring it to precisely "fill up the details" in a way that keeps policy-making in the legislative branch.

IV. State Nondelegation Doctrines Show that Revitalizing the Nondelegation Doctrine Will Not Create Disarray

The Court need not look further than the experience of the states in seeing that a reinvigorated nondelegation doctrine will not leave federal administrative law in a state of disarray. The application of the non-delegation doctrine in state courts demonstrates that a robust federal non-delegation doctrine is an administrable pursuit.

For instance, in Oklahoma, the state supreme court has held for four decades that "[w]hile the constitutional doctrine of nondelegation has been somewhat relaxed in several jurisdictions, its force in this state remains undiminished. The doctrine teaches that the legislature must establish its policies and set out definite standards for the exercise of an agency's rulemaking power." *Democratic Party of Okla. v. Estep*, 652 P.2d 271, 277-78 (Okla. 1982).

So also in Florida, the courts have held for half a century that for a statute to be upheld on nondelegation grounds, it "must clearly announce adequate standards to guide … in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." *Lewis v. Bank of Pasco Cnty.*, 346 So. 2d 53, 55-56 (Fla. 1976).

The Kentucky Supreme Court has likewise held for many years that "'the legislature must lay down policies and establish standards,'" and Kentucky's doctrine "has not been as toothless as the 'intelligible-principle rule.'" *Bd. of Trs. of the Judicial Form Ret. Sys. v. AG*, 132 S.W.3d 770, 782 (Ky. 2003).

Despite the more robust enforcement of the non-delegation doctrine in these states, their courts have not sown chaos in state administrative law jurisprudence. Each state's government and executive branch continues to function well, but with the added benefit of a judicial check on violations of the separation of powers.

By contrast, the federal government's constitutional structure continues to buckle under the weight of the expanding administrative state. In 2021 alone, agencies published in the Federal Register more than 75,000 pages of new proposed and final regulations, orders, and notices governing the conduct of American companies and citizens. Allie Fick *et al.*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U. That's roughly 24,000 more pages of rules and regulations than were published in 1984. *Federal Register Pages Published Annually*, LLSDC (2020), bit.ly/3peYBew.

Creating so much regulation comes at great economic cost. In 2021, Federal taxpayers spent nearly $80 billion to develop, administer, and enforce federal regulations, an amount that has more than tripled since 2000. Fick, *supra*, at 4. Americans spend more

than 10 billion hours every year on regulatory compliance paperwork at an annual cost of more than $140 billion. *Id.* When accounting for compliance costs, economic losses, and other costs, the price tag for federal regulations comes out to a staggering $2 trillion every year. *Id.* This experience shows that, far from promoting good government, the abandonment of the nondelegation doctrine at the federal level has imposed great and unnecessary costs.

CONCLUSION

For these reasons and more, this Court should affirm.

Respectfully submitted,

DAVID J. CRAIG
Counsel of Record
SOFIA DEVITO
RYAN YOUNG
THE FOUNDATION FOR
GOVERNMENT ACCOUNTABILITY
15275 Collier Blvd., Ste. 201
Naples, FL 34119
(239) 244-8808
dcraig@theFGA.org

February 18, 2025 *Counsel for Amicus Curiae*