Nos. 24-354, 24-422

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

v.

CONSUMERS' RESEARCH, *et al.*,

Respondents.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, *et al.*,

Petitioners,

v.

CONSUMERS' RESEARCH, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

CHRISTOPHER J. HAJEC
Counsel of Record
MATT A. CRAPO
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Avenue, NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae Immigration Reform Law Institute

130919

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Reform Law Institute[1] ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also organizations and communities seeking to control illegal immigration. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 585 U.S. 667 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016). Because IRLI has litigated cases challenging the federal government's creation of large work-authorization programs for nonimmigrants without, in IRLI's view, implementing a statute (*see*, *e.g.*, the petition for *certiorari* filed today in *Save Jobs USA v. U.S. Dep't of Homeland Security*, No. _____), it has an interest in the issues in this case, including the correct application of the delegation doctrine, and the proper understanding of its key terms.

SUMMARY OF ARGUMENT

Congress has authorized the Federal Communications Commission ("FCC") to raise revenue to fund the

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1. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

Universal Service Fund ("USF"). The FCC, however, has chosen not to exercise this delegated authority; instead, by regulation, the agency has sub-delegated its revenue-raising power to the Universal Service Administrative Company ("USAC"), a private entity composed of industry interest groups.

Congress did not authorize this sub-delegation of government power to a private entity. Under the delegation doctrine, an agency regulation is unauthorized by Congress, and thus invalid, if it fails to conform to an intelligible principle in a statute. Here, no intelligible principle in the governing statute permits the FCC's sub-delegation. This lack of congressional authorization for the FCC's regulatory action is sufficient ground for this Court to uphold the judgment below.

ARGUMENT

Congress did not authorize the FCC to sub-delegate its authority to raise funds for the USF to interested private parties.

Regardless of whether Congress properly delegated authority to the FCC to establish a funding mechanism for the USF, Congress did not authorize the FCC to sub-delegate this funding or taxing authority to a non-governmental entity. By sub-delegating this government authority to a private entity composed of interested groups, the FCC has exceeded the authority granted to it by Congress.

As this Court has repeatedly held, a delegation of authority to an agency is invalid unless the delegating

statute contains an "intelligible principle" to which the agency "is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). It follows that, if an agency purports to regulate without implementing a statute—that is, without conforming to a principle discernible in a statute—it exceeds its power.

The delegation doctrine is often derided as too permissive. Cass, Ronald A., Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (March 2, 2016), George Mason Legal Studies Research Paper No. LS 16-07, at 3, available at https://ssrn.com/abstract=2741208. *Hampton* did, however, greatly clarify the concept of regulatory power, and the distinction between it and legislative power. Namely, *Hampton*'s elucidation of the delegation doctrine allowed an end to be made to a vague distinction between "important" matters—the subjects of legislative power, exercised by Congress—and "details"—the subjects of regulatory power, exercised by agencies—and its replacement with a rigid, formal definition of regulatory power. Both legislative and regulatory power concern the determination of rights and obligations. *See, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.) (defining a substantive rule or regulation as "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties"). Implicitly, then, under *Hampton* and the delegation doctrine, regulatory power is a species of executive power, being exercised when and only when an agency carries out or "executes" a statute by determining rights and obligations under the statute's instructions. This "carrying out" power is quintessentially executive, and is exercised under the delegation doctrine

only when a regulation conforms to an intelligible principle in a statute. *Hampton*, 276 U.S. at 409. On this view, when an agency issues a substantive rule without following statutory instructions (that is, without implementing a statute by conforming to a principle therein), it does not really "regulate" at all. Rather, it legislates—that is, determines rights and obligations without statutory instructions—as if it were a second Congress.

At this point, the question arises of what it means to implement a statute, or conform to a principle in it. It cannot be merely that a regulation conforms to a statute if it is logically consistent with it. For example, the D.C. Circuit has rightly rejected the argument that a statute allowed the Federal Trade Commission to regulate attorneys merely because the statute did not prohibit it from doing so. *ABA v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005). And, generally, if the standard were that agencies could make any regulation that was not forbidden by a statute, they could wildly exceed their lawful power. Clearly, a stronger logical relation than mere consistency is needed to capture the idea of a regulation's "conforming to" an intelligible principle and thereby implementing a statute.

Specifically, a regulation can be said to implement a statute and conform to a principle in it only if the statute entails that the regulation is permissible—provided that the statute entails this permissibility without recourse to any premise that, just because the regulation is not prohibited by the statute, it is permitted by it. In other words, if a regulation is to implement a statute, the statute must not merely fail to prohibit the regulation, but must affirmatively allow the regulation.

Here, in order to provide funding for the USF, Congress declared that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service," 47 U.S.C. § 254(b)(4), and tasked the FCC with establishing "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id.* § 254(b)(5). The principle discernible in § 254(b) is that the FCC may impose an equitable fee or tax on telecommunication service providers in order to raise funds for the USF. From this principle, it does not follow that the FCC may empower a private entity composed of industry insiders to set rates that will become binding absent any action by the FCC. Such a private entity is neither a "Federal" nor a "State" "mechanism[]." Nowhere did Congress suggest that this government power to extract funds from telecommunication service providers on an equitable basis (and thus ultimately extract them from the American consumer) could be sub-delegated to a private group of industry insiders. As the Fifth Circuit observed, drawing a contrast with two cases that allowed private entities to wield government-like powers that were expressly authorized by Congress, § 254 "makes no mention of the fact that private entities might be responsible for determining the size of the tax FCC levies on American consumers." Pet. App. 59a (citing *Currin v. Wallace*, 306 U.S. 1, 6, 15 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 387-88 (1940)).

Because § 254 conferred the authority to raise funds for the USF directly upon the FCC with no mention of the possibility that this government power may be sub-delegated by regulation, the FCC's regulations do not implement statutory instructions or conform to a statutory

principle. Thus, the FCC's regulations sub-delegating this authority to USAC are *ultra vire*s. Of course, even if the statute does not prohibit such a sub-delegation of authority, that mere lack of prohibition cannot save the FCC's regulations, nor can the fact that § 254 confers this fund-raising authority on the FCC. After all, Congress, without any contradiction, could pass another law barring the FCC from sub-delegating its fundraising authority to a private entity, while still, in § 254, authorizing the FCC to raise funds for the USF itself. The statutory delegation to the FCC of this fund-raising authority, therefore, does not imply that the FCC is permitted to sub-delegate that power.

The government suggests that the Fifth Circuit should not have concluded that the statute does not authorize the FCC's sub-delegation of governmental power to USAC, even if the Constitution does not otherwise forbid it, because respondents did not press that argument below. Gov. Br. at 47. But this Court may uphold the judgment below on any ground supported by the record. *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

Also, to be sure, as the government points out, Gov. Br. at 48, Congress authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the statute], as may be necessary in the execution of *its* functions." 47 U.S.C. § 154(i) (emphasis added). But sub-delegating the FCC's fundraising power to a private entity can hardly

be deemed necessary to the execution of the FCC's own functions under the statute. Indeed, that sub-delegation is the abdication of the agency's statutory functions, and is thus the very opposite of "necessary" to its performing them. If USAC's role in determining the funding levels for the USF were limited to an advisory or reporting capacity, there might be little problem with the FCC's regulations; such advice and fact-finding might at least be helpful to the agency in carrying out its functions. But, as Respondents amply demonstrate, USAC actually does the job of deciding the funding levels for the USF. Resp. Br. at 76-83. Because Congress did not affirmatively allow the FCC to sub-delegate that task to a private entity, the agency exceeded its authority by doing so.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

Christopher J. Hajec
Counsel of Record
Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Avenue, NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae
Immigration Reform Law Institute