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 Amici Curiae Advancing American Freedom; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN VALUES; AMERICANS FOR LIMITED GOVERNMENT;
(*Amici continued on inside cover*)

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in Support of Respondents

QUESTIONS PRESENTED

1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund.
2. Whether the Commission violated the nondelegation doctrine by using the Administrator's financial projections in computing universal service contribution rates.
3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to the Administrator violates the nondelegation doctrine.
4. Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that government officials must be constrained by the Constitution for the sake of the liberty of the people. AAF files this brief on behalf of its 10,483 members in the Fifth Circuit.

Amici American Association of Senior Citizens; American Values; Americans for Limited Government; Center for Independent Thought; Charlie Gerow; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Men and Women for a Representative Democracy in America, Inc.; Mountain States Legal Foundation; Mountain States Policy Center; North Carolina Values Coalition; NSIC Institute; Orthodox Jewish Chamber Of Commerce; Project 21 Black Leadership Network; Rio Grande Foundation; Setting Things Right; John Shadegg, Member of Congress, 1995-

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

2010; 60 Plus Association; Paul Stam, Former Speaker Pro Tempore. North Carolina House; Tradition, Family, Property, Inc. ; Women for Democracy in America, Inc.; Yankee Institute; Young America's Foundation; and Young Conservatives of Texas believe that holding the branches of the Federal Government to account for their powers, and the revitalization of the separation of powers, are essential to the preservation of American liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A recurring grievance of the American colonies in the Declaration of Independence is the multifaceted effort of the King to isolate the legislative power from the people and their representatives. Among these accusations is that the King had "impos[ed] taxes without our Consent," Declaration of Independence para. 19 (U.S. 1776), echoing the revolutionary generation's insistence on "no taxation without representation." That the same Founders who had, just years earlier, been willing to risk their lives rather than capitulate to taxation absent representation would in Philadelphia construct, and in all thirteen States ratify, a Constitution that granted Congress the authority to delegate taxation to unelected bureaucrats is dubious. That they would similarly grant Congress the power to pass its legislative authority on to "a multitude of New Offices, and sent hither swarms of Officers to harass [the] people, and eat out their substance," *id*, at para. 12, is absurd.

Yet this case concerns whether Congress is empowered to "[alter] fundamentally the Forms of our

government," *id.* para. 23, by authorizing the same tyrannical insulation of government power from the People that the revolutionary generation sacrificed so much to overcome and the drafters of the Constitution worked so hard to thwart.

Those Founders had repeatedly "warned" the British people "of attempts by their legislature to extend an unwarrantable jurisdiction over us," and "reminded them of the circumstances of our emigration and settlement here." *Id.* at para. 31. Yet over the last century, that very same old-world abuse of government power so many Americans' ancestors immigrated here to escape[3] has worked its way around the branches of constitutional liberty like a parasitic vine. The Federal Communications Commission (FCC) asks this Court to recognize as legitimate one of the vine's many snaky tendrils.

Congress has tasked the FCC with establishing "specific, predictable, and sufficient . . . mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). The Universal Service Fund ("USF") is the pool of revenue generated by taxes levied against telecommunications carriers. *Consumers' Research v. Fed. Commc'n Comm'n*, No. 22-60008 at 3 (5th Cir. July 24, 2024). Those funds are then used to provide for universal telecommunications services. The FCC relies on the Universal Service Administrative Company ("USAC") to administer its four universal service programs. *Id.* at 5. Most importantly, here, the USAC determines the amount of the quarterly

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[3] *See, generally*, Thomas Sowell, *Migrations and Cultures* (BasicBooks 1996).

contribution of telecommunications companies to the USF, meaning that the USAC is responsible for determining the amount that is owed of what is effectively a tax. *Id.* at 6. The FCC "rubber stamp[s]" the USAC's determination of contribution amount. *Id.*

This arrangement represents an unconstitutional abuse of congressional power. It begins with Congress, which has no power to establish a program like the USF because that program is neither within any of the enumerated powers of Congress nor is it necessary or proper to the exercise of any of those powers. Second, even if it did have such a power, it would not have the power to delegate it to the Executive Branch administrative state. The Executive cannot exercise the legislative power, yet the FCC is empowered to levy what amounts to a tax, a core legislative power. Because the USF is unconstitutional, this Court should rule for Respondents and strike it down.

ARGUMENT

I. The Universal Service Fund is Beyond the Power of Congress to Create.

Congress only has those powers specifically enumerated in Article I. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *Gibbons v. Ogden*, 9 Wheat 1, 195 (1824)) (alteration in original) ("The enumeration of powers is also a limitation of powers because '[t]he enumeration presupposes something not enumerated.'"). Because Congress's creation of the USF is neither an exercise of an enumerated power nor necessary or proper for the

exercise of one of those powers, the USF is an unconstitutional expansion of congressional power.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States," as well as with foreign nations and Indian tribes. U.S. Const. art. I, § 8 cl. 3. "[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines." *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting) (citing *United States v. Lopez*, 514 U.S. 549, 586-89 (1995) (Thomas, J., concurring)). This understanding of "commerce" as trade was common not only to the drafters of the Constitution but to the general public including those who ratified it. *Id*. (citing Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-862 (2003)). Commerce did not include, on the other hand, agriculture and manufacturing, which were wholly intrastate activities. Rather, "the term 'commerce' was used in contradistinction to" such "productive activities." *Lopez*, 514 U.S. at 586. *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) ("Commerce, or trade, stood in contrast to the productive activities like manufacturing and agriculture.").

"Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, the Federalist Papers, and the ratification debates, the term 'commerce' is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange." *Gonzales*, 545 U.S. at 58 (Thomas, J.,

dissenting) (citing *Lopez*, 514 U.S. at 586-87 (Thomas, J., concurring); (quoting Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-125 (2001)). For example, "In none of the sixty-three appearances of the term 'commerce' in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange."[4] "[C]ommerce" also had the meaning of "trade" in common usage.[5] Thus, whether used in relation to the drafting and ratification of the Constitution or for public consumption, the word "commerce" was understood at the time of the Founding to refer to "trade," not all things that today would constitute commercial activity. Thus, there is overwhelming evidence that the power originally granted by the Commerce Clause was the power to regulate interjurisdictional trade.

Not only is the evidence supporting the narrow meaning of the term "commerce" overwhelming, but the historical and constitutional context also demand a narrow interpretation of the power granted by the Clause. The purpose of the federal government was national unity, not national uniformity. "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and

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[4] Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 116 (2001).

[5] *See, e.g.*, Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-60 (2003).

indefinite."[6] The Founding generation understood that the powers delegated to the federal government "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."[7] Hamilton assured the public that "the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can *never* be desirable cares of a general jurisdiction."[8]

Congress may have some authority to regulate, the interstate elements of telecommunications services, depending on whether those elements fall within the definition of interjurisdictional trade. However, providing telecommunications services to individuals within states or to local entities is not regulation of interstate trade. The Fifth Circuit notes that the goals of the USF and its programs are "laudable," *Consumers' Research*, No. 22-60008 at 5, but the Constitution does not grant Congress the power to do whatever may be deemed beneficial to some individual or group.

The USF is also not justified by an independent congressional spending power. Congress has no independent spending power. *But see*, *Sebelius*, 567 U.S. at 577. Article I grants Congress the power "[t]o

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[6] The Federalist No. 45, at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

[7] *Id.*

[8] The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (emphasis added).

lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States." U.S. Const. art. I § 8 cl. 1. As Professor Phillip Hamburger has explained, during the constitutional convention, Gouverneur Morris "wanted a general spending power," but "knew he could not accomplish this openly."[9] He thus replaced the comma after "Excises" with a semicolon while on the Committee of Style. The convention noticed the change and reverted the punction to a comma, making it "abundantly clear that the phrase about 'providing for . . . general welfare' was merely a limitation on the taxing power, not a spending power."[10] Therefore, when Congress appropriates funds it is exercising its implied powers under the Necessary and Proper Clause.

The USF is not a necessary or proper exercise of Congress's Commerce Clause power. Article I grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested by the Constitution in the Federal Government. U.S. Const. art. 1, § 8, cl. 18. That Clause is not a grant of any independent power. In Federalist 33, Alexander Hamilton responded to allegations that that Necessary and Proper and Supremacy Clauses would be sources of the destruction of State authority, dismissing those claims as "virulent invective and petulant

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[9] Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 77 (Harvard University Press 2021).

[10] *Id.*

declamation."[11] Hamilton wrote that these two powers "are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government."[12]

As Justice Thomas has explained, *McCulloch v. Maryland* created a two-part test to assess compliance with the Necessary and Proper Clause:

> First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution . . . Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

United States v. Comstock, 560 U.S. 126, 160-61 (2010) (Thomas, J., dissenting) (alteration in original)

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[11] The Federalist No. 33 at 158 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001)

[12] *Id.*

(quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

The USF is not a legitimate exercise of an enumerated power and thus is not "directed toward a 'legitimate' end" because it is not "within the scope of the [C]onstitution." *Id.* at 160 (alteration in original) (internal quotation marks omitted) (quoting *McCulloch*, 17 U.S at 421). Further, the fit between the USF and the Commerce Clause are not necessary or proper.

The USF is not necessary to the exercise of the Commerce power because it is not appropriate or plainly adapted to the regulation of interstate commerce. Congress's means of implementing its enumerated power are "'necessary if they are 'appropriate' and 'plainly adapted' to the exercise of" that power. *Id.* at 160-61 (quoting *McCulloch*, 17 U.S at 421). The power to regulate commerce among the states is "to make regular," that is, to set the rules of the road, for commerce that crosses state borders.[13] The USF is not directed at ensuring that telecommunications companies are following rules Congress has established for interstate trade. Its purpose is to provide telecommunications services to certain classes of mostly private parties.

The means Congress selects are proper if they are not prohibited by the Constitution and are consistent with its "letter and spirit." *Comstock*, 560 U.S. at 161 (internal quotation marks omitted) (quoting *McCulloch*, 17 U.S at 421). First, the Constitution

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[13]Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001).

arguably prohibits the creation of a program like USF. Congress's taxing power is limited. Article I of the Constitution grants Congress the power "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. As noted above, the language after the first comma quoted is a limitation on the taxing power, not a separate spending power. The USF is not for the "general Welfare of the United States." Rather, it is for the benefit of mostly private parties, and at the expense of other private parties.[14] It is an instance of the Federal Government choosing winners and losers among the American people.

Relatedly, the USF violates the spirit of the Constitution in at least two ways. First, as Hamilton explained, local concerns are not the responsibility of the Federal Government.[15] The States are responsible for such things as providing for the needs of their residents and local institutions like rural hospitals. The Constitution does not justify the nationalization of such a policy.

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[14] "The General Welfare Clause was designed as a trust-style rule denying Congress authority to levy taxes for any but general, national purposes. Because the Clause prevented Congress from using tax revenue for local or special interest purposes, the Clause indirectly qualified the appropriation power. Even if some enumerated power could be enlisted to support the appropriation,317 federal tax money was not to be used for the private benefit of a museum-however worthy-in Savannah, nor an artist-however struggling-in New York." Robert Natelson, *The General Welfare Clause and the Public Trust*, 52 U. Kan. L. Rev. 1, 55 (2003-2004).

[15] *See* Hamilton, *supra* note 8.

Second, the Constitution's drafting and design were in part motivated by concerns among the Founders about just such governmental favoritism. The inclusion of the Contract Clause was a response to State debtor relief laws which put the needs of certain citizens over others.[16] While the USF does not violate the prohibition against "Law[s] impairing the Obligation of Contracts," U.S. Const. Art. I, § 10, cl. 1, since that prohibition applies specifically to State governments, it nonetheless engages in the same sort of inappropriate favoritism that Clause targets.

Finally, and relatedly, the USF is inconsistent with the fundamental principle of equality before the law represented in the Equal Protection principle this Court has found in the Fifth Amendment's Due Process Clause. *Davis v. Passman*, 442 U.S. 228 (quoting *Vance v. Bradley*, 440 U.S. 93, 95 n. 1 (1979)) (noting that "In numerous decisions, this Court 'has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.'"). Therefore, because Congress has no authority to create the USF, the program is unconstitutional.

II. Congress Cannot Delegate its Legislative Power to the Executive and Levying Taxes is Not Within the Legitimate Discretion of the Executive.

Even if Congress had the authority to create the USF, Congress' grant of power over that program to the FCC represents an unconstitutional delegation of

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[16] Michael B. Rappaport, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918, 931 (1984).

the legislative power. In the past, this Court has allowed Congress to cede much of its legislative power to the unelected bureaucrats of the administrative state on the theory "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[17] *Mistretta v. United States*, 488 U.S. 361, 372 (1989). That theory conflicts with the fundamental principle of the rule of law. Congress cannot change its powers on the basis of expedience. It is the Constitution that tells Congress what its job is, and more importantly, by implication, what it is not. This Court should rule for Respondents and make clear that those entrusted for a time with authority in America's Federal Government are stewards constrained by the Constitution, not beneficent tyrants empowered by convenience.

Because Congress has only those powers enumerated in Article I and because there is no power to delegate those powers to another branch, Congress has no power to do so. It alone can exercise the Federal Government's legislative power. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."). Thus, the foundational question in nondelegation cases is

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[17] "People who pride themselves on their 'complexity' and deride others for being 'simplistic' should realize that the truth is often not very complicated. What gets complex is evading the truth." Thomas Sowell, *Barbarians Inside the Gates*, 253 (Hoover Institution Press 1999).

whether the Executive is exercising legislative power or merely executive discretion.

The Court has recognized delegations for "the carrying out of the policy of Congress by filling in details or making subordinate rules and regulations in accordance with the standard laid down by Congress." *Schechter Corp. v. United States*, 295 U.S. 495, 500 (1935). To ensure that Congress is merely empowering the President to exercise his executive power rather than granting him legislative power, the Court has required that Congress constraint the President's actions with an "intelligible principle." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

However, the Court has been very permissive in its application of that requirement. As it explained in *Mistretta*, that Court saw itself as being "justified in overriding [Congress's] choice of means for effectuating its declared purpose" only if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." 488 U.S. at 379 (quoting *Yakus v. United States*, 321 U.S. at 414, 425 (1944)) (internal quotation marks omitted). But the courts' role in our system of divided powers is not merely to intervene only in extreme circumstances of overreach by the other branches, but to protect the liberty of the people from abuses of power by the other branches.

The Legislative power is "the power to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). "Taxation 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 (1974) (footnote omitted). Thus, because Congress can only authorize the Executive's exercise of executive power, not grant it legislative power, the USF is an unconstitutional delegation of legislative power to the FCC. It should be struck down.

CONCLUSION

The Court should rule for Respondents.

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