Nos. 24-354 and 24-422

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL., *Respondent*s.

SHLB COALITION, ET AL., *Petitioners*,
v.
CONSUMERS' RESEARCH, ET AL., *Respondent*s.

On Writs of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of America's Future, DownsizeDC.org, Downsize DC Fdn., Citizens United, Gun Owners of America, Gun Owners Fdn., Free Speech Coalition, Free Speech Def. and Ed. Fund, U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Ed. Fund, in Support of Respondents

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, DownsizeDC.org, Downsize DC Foundation, Citizens United, Gun Owners of America, Inc., Gun Owners Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

To promote expansion of "universal service" of telephone and internet to certain categories of customers, the Telecommunications Act of 1996 empowers the Federal Communications Commission ("FCC") to adopt such universal service principles that it "determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity." *Consumers' Research Cause Based Commerce, Inc. v. FCC,* 109 F.4th 743, 749 (5th Cir. 2024) ("*Consumers' Research*"). The Act delegates to

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the FCC the power to exact "contributions" — *i.e.*, taxes — from telecommunications providers to pay into a Universal Service Fund ("USF") from which subsidies are disbursed. *Id.* at 748.

The FCC re-delegated its responsibility to determine what "contribution" amounts carriers must pay into this USF to a private company, the Universal Service Administrative Company ("USAC"), managed by persons from affected "interest groups." *Id.* at 750. Each year, the USAC sets the "USF Tax," which is "*deemed approved*" unless rejected by the FCC within 14 days. *Id.* The Fifth Circuit describes the FCC's role as a "rubber stamp." *Id.* In 2000, the USF Tax accounted for 5 percent of the telecommunications company's revenues, but has swelled to 25 percent. *Id.* at 751.

A rate hike was challenged by Respondent telecommunications companies and individual rate-paying telecommunications customers. This case was consolidated with one brought by an intervenor. *Health & Librs. Broadband Coal. v. Consumers' Research.*, 2024 U.S. LEXIS 4772 (2024).

SUMMARY OF ARGUMENT

These *amici* urge the Court to address and rule separately on Issue 1 ("Whether Congress violated the nondelegation doctrine...") following the approach of the concurring opinion below, rather than merge Issue 1 with Issue 2 ("Whether the Commission violated the nondelegation doctrine...) as done in the circuit court's main opinion. The violation of the nondelegation

doctrine by re-delegation raised by Issue 2, is highly problematic, but far less prevalent than the problem addressed in Issue 1. Only by addressing Issue 1 separately can this Court remedy the continuing problem of Congressional delegation and give true effect to Article I, section 1.

The Framers never envisioned the delegation of legislative power to the executive branch, and that was also the rule in state constitutions. As recently as 1892, this Court asserted that the nondelegation principle was "vital to the integrity and maintenance of the system of government ordained by the Constitution." However, the vast expansion of government during the Progressive Era and World War I directly led in 1928 to the rise of the administrative state with little to constrain it but the "intelligible principle" test, which after a century, has proven to be unintelligible. Not a single statute has been invalidated under this doctrine since 1935. As Professor Philip Hamburger writes, this Court "simultaneously worries about delegation and permits it," as it provides a "fiction" on which "the Court can pretend Congress is not delegating legislative power."

The dissent below relies on a 1989 decision of this Court which provides the standard rationalization used to turn a blind eye to the delegation of legislative powers — "the necessities of modern legislation dealing with complex economic and social problems." Necessities are always a dangerous justification for abandonment of constitutional principles. Moreover, this "necessity" is downstream of this Court's having facilitated the enormous growth of government

regulation, spending, and taxing by removing the constitutional limitations on those federal powers. Last fiscal year, this nation ran a truly unsustainable deficit of $1.83 trillion, and thus the many ways in which this Court has paved the way for the "necessity" of delegating legislative power to implement federal programs also needs re-examination.

Lastly, there is a close tie between the principles undergirding this case and this Court's decision in *Humphrey's Executor*. There, the Court based its decision to limit the ability of the President to remove certain executive branch officials because they were not only exercising executive power, but also "quasi-legislative" and "quasi-judicial" power. The loss of the President's power to remove certain officials has contributed to the unrestrained and unaccountable administrative state. In truth, there is nothing "quasi" about the type of legislative and judicial power delegated to many agencies. If the nondelegation doctrine is revived, it soon may require a revisitation of *Humphrey's Executor* as well.

ARGUMENT

I. CONGRESS'S DELEGATION OF ITS LEGISLATIVE POWER TO TAX TO THE FCC VIOLATES ARTICLE I, SECTION 1 APART FROM FCC'S RE-DELEGATION.

In addition to possible mootness, this court granted review on the three questions sought by petitioners:

> 1. Whether Congress violated the nondelegation doctrine...

> 2. Whether the Commission violated the nondelegation doctrine...
> 3. Whether the combination of [both 1 and 2] violates the nondelegation doctrine.

As to the second issue, the Fifth Circuit's decision explained that the funds exacted through this tax were used to subsidize four groups: rural residents, low-income consumers, schools and libraries, and rural healthcare providers. The USAC which sets the amount of the tax (subject only to the "rubber stamp" review of the FCC) is composed of "representatives from 'interest groups affected by and interested in universal service programs'" who were improperly entrusted with this power. Additionally, the FCC delegated to the USAC various responsibilities, including "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." *Consumers' Research* at 750.

The result of this scheme was predictable: "the contribution amount ultimately derives from the universal service demand projections of private, for-profit telecommunications carriers, all of whom have ... 'financial incentives' to increase the size of the universal service program." *Id.* It is easy to accept the conclusion of the court below that "waste and fraud have ... contributed to the USF's astronomical growth." *Id*. at 751. The method chosen by Congress to enable this tax increase allows Congress to avoid accountability, as it can blame the FCC. *See* Section III, *infra.* Making the matter even worse, the FCC's

re-delegation to this private company is utterly devoid of constitutional warrant.

However the crux of the case is the threshold issue, posed as issue 1 — Congress's delegation of its legislative authority to tax to the FCC. On that point the circuit court concluded that: "Congress's instructions are so ambiguous that it is unclear whether Americans should contribute $1.47 billion, $9.0 billion, or any other sum...." *Id.* at 752. The circuit court had no problem determining the power to tax was "a quintessentially legislative one." *Id.* at 758. The circuit court concluded: "[v]ague congressional delegations undermine representative government because they give unelected bureaucrats — rather than elected representatives — the final say over matters that affect the lives, liberty, and property of Americans." *Id.* at 759. At best, the Congressional delegation sets out "aspirational principles rather than 'inexorable statutory command[s].'" *Id.* at 760. And, at the end of its analysis set out in its sections III.A and B (at 756-67), the circuit court **suggested** that the Congressional delegation to the FCC alone was unconstitutional: "We therefore have grave concerns about § 254's constitutionality under the Supreme Court's nondelegation precedents. *See Gundy*, 588 U.S. at 136 (plurality op.)." *Id.* at 767. However, before actually ruling the scheme to violate the delegation doctrine, the circuit court merged both issues 1 and 2 together stating: "we need not hold the agency action before us unconstitutional on that ground alone because the unprecedented nature of the delegation **combined** with other factors is enough to hold it unlawful." *Id.* at 767 (emphasis added).

These *amici* urge this Court to take the approach of Judge Elrod's concurring opinion (joined by Judges Ho and Engelhardt) by ruling on question 1 separately to make clear that **Congress's delegation to the FCC standing alone is unconstitutional**, without any need to merge with the issue FCC's re-delegation of this power to a private company.

II. THE CONSTITUTION GUARDS AGAINST EXECUTIVE INTRUSIONS INTO LEGISLATIVE POWER.

A. "Fill Up the Details."

The scope of executive branch authority to implement legislation was addressed by Chief Justice John Marshall in 1825, declaring "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," but other branches are allowed to "act under such general provisions to **fill up the details**." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (emphasis added). Justice Marshall's test appears to have been designed to ensure the executive had just enough discretionary power to implement (or execute) a law, but no more, thereby protecting the Constitution's vesting of "**[a]ll** legislative Powers herein granted" to Congress. Art. I, sec. 1 (emphasis added).

None of the Framers had any tolerance for any delegation of legislative power. If legislative power were to be transferred to the executive, it could lead to the tyranny that Montesquieu sought to avoid by

separating powers. "'When the legislative and executive powers are united in the same person or body ... there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Federalist No. 47. This view was reinforced by James Madison in Federalist No. 51: "separate and distinct exercise of the different powers of government ... is admitted on all hands to be essential to the preservation of liberty."

During the Constitutional Convention's debate, Madison and General Charles Pinckney proposed specific language granting the executive the "'power to **carry into effect** national lagws ... and to **execute** such other powers "not Legislative nor Judiciary in their nature," as may from time to time be delegated by the national Legislature.'[2] The words 'not legislative nor judiciary in their nature' were added to the proposed amendment in consequence of a suggestion by General Pinckney that improper powers might otherwise be delegated." *Id*. In the end, the Convention deleted the language as unnecessary. "Yet, we are left with the unanimous record that ... all believed the exercise of non-executive power improperly delegated by the legislature to be prohibited." *Id*. at 142.

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[2] J. Hood, "Before There Were Mouseholes: Resurrecting the Non-Delegation Doctrine," 30 BYU J. PUB. L. 141-42 (2015-2016) (emphasis added).

In 1789, Madison proposed adding an amendment to ensure each branch of government stayed within its own lane:

> The powers delegated by this constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.[3]

Madison's amendment convincingly passed the House of Representatives, but was defeated in the Senate. But the reason for its defeat was not a lack of recognition by the Founders that the Constitution reserved legislative power to Congress. Indeed, both the amendment's critics and Madison himself viewed the amendment as unnecessary and duplicative, because the Constitution's text so clearly already reserved legislative power to Congress.

In a 1790 debate, Representative Gerry argued, "If the legislature ... have [a power], it is a legislative power, and they have no right to transfer the exercise of it to any other body."[4]

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[3] 1 Annals of Cong. 789 (1789) (Joseph Gales ed., 1834).

[4] Jonathan Elliot, ed., 4 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution at 404 (Taylor & Maury 1854) (statement of Rep. Gerry) (Aug. 1, 1790).

Early state constitutions contain express nondelegation provisions, including those of Massachusetts,[5] Virginia,[6] Georgia,[7] Vermont,[8] and Kentucky.[9] The constitutions of Maryland and North

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[5] MASS. CONST. OF 1780, pt. 1, art. XXX: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men." American Bar Foundation, Sources of our Liberties (1978) at 378.

[6] VA. CONST. OF 1776: "[T]he legislative and executive powers of the State should be separate and distinct from the judiciary."

[7] GA. CONST. OF 1777, art. I: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." F. Thorpe, II The Federal and State Constitutions at 2777 (Government Printing Office: 1909).

[8] VT. CONST. OF 1786, Ch. II, Sec. VI: "The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." F. Thorpe, VI The Federal and State Constitutions at 3755. *See also* G. Lawson and P. Granger, "The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause," 43 DUKE L.J. 267, 291-92 (1993).

[9] KY. CONST. OF 1792, Art. I, Sections 1 and 2: "1. The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: those which are legislative to one, those which are executive to another, and those which are judiciary to another. 2. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted." F.

Carolina similarly provided, "That the legislative, executive, and ... judicial powers of government, ought to be forever separate and distinct from each other."[10]

The need to prevent any delegation of legislative power to the executive was addressed and reaffirmed repeatedly through the nation's first century. Some illustrations demonstrate this point.

- In 1810, an amendment was proposed to an embargo bill to allow the President to employ "public armed vessels" to protect overseas commerce, and to "'issue instructions ... for the government of the ships which may be employed in that service.'" Representative John Jackson (a future federal judge) objected on nondelegation grounds, and the amendment was defeated by a 2-1 margin.[11]

- In an 1818 floor debate, Virginia Representative Alexander Smyth argued, "[l]egislative power, when granted, is not transferable; nor can it be exercised by

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Thorpe, III The Federal and State Constitutions at 1264-65.

[10] J. Hood at 135-37.

[11] *See* 21 ANNALS OF CONG. 2022 (1810) ("It seems to me with equal constitutionality we might refer to the President the authority of declaring war, levying taxes, or of doing everything which the Constitution points out as the duty of Congress. All legislative power is by the Constitution vested in Congress. They cannot transfer it.").

substitute; nor in any other manner than according to the constitution granting it."[12]

- In 1842, a proposal was introduced in Congress to allow executive branch officials to issue rules and regulations with criminal sanctions that, unless Congress repealed them, would be the law of the land. Representative John Quincy Adams objected that the proposal was an unconstitutional delegation, and the proposal was quickly withdrawn.[13]

B. The Non-Delegation Doctrine and the Intelligible Principle Exception.

In 1892, this Court flatly declared "That Congress cannot delegate legislative power to the President 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).

Yet, as government became bigger and the federal budget became larger, there developed pressure on courts to ignore the original plan and allow the growth of the executive power. As a result, even before the pressures on this Court from President Roosevelt and his New Deal, this Court — while still paying rhetorical homage to the nondelegation doctrine —

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[12] 31 ANNALS OF CONG. 1144 (1818).

[13] *See* I. Wurman, *Nondelegation at the Founding*, 130 YALE LAW JOURNAL 1490, 1516 (Mar. 23, 2020).

crafted a new test that over time has effectively eviscerated the doctrine. "If Congress shall lay down by legislative act **an intelligible principle** to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). While the "intelligible principle" standard has the sound of a legal principle, it must be noted that it is neither grounded in the constitutional text, nor is it a term with a meaning developed at common law. Thus, it was no surprise that over time various courts would give their own meaning to these vague, indeed empty words. The "intelligible principle" test has proven to be unintelligible.

In 2001, in a case finding that the "intelligible principle" test was met, Justice Thomas stressed it was an atextual test that could fail to guard against executive usurpation of legislative power:

> **[T]he Constitution does not speak of "intelligible principles."** Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress...." I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative." [*Whitman v. American Trucking*

> *Association*, 531 U.S. 457, 487 (Thomas, J., concurring) (emphasis added).]

Addressing the issue again in 2015, Justice Thomas explained that: "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.... These grants are exclusive." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring). To this, Justice Alito succinctly set out the reasons for the nondelegation rule:

> The principle that Congress cannot delegate away its vested powers exists to **protect liberty**. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many **accountability** checkpoints.... It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's **deliberative process** was viewed by the Framers as a valuable feature ... not something to be lamented and evaded. [*Id.* at 61 (Alito, J., concurring) (emphasis added).]

Then in 2019, an intelligible principle was found to be sufficient, but the doctrine came under further attack. In dissent, Justice Gorsuch provided a sweeping review of the text, history, and tradition of the nondelegation doctrine. *See Gundy v. United States*, 588 U.S. 128, 154-56 (Gorsuch, J., dissenting).

Justice Gorsuch proposed a three-part test designed to move at least a step closer to the Constitutional plan: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?" *Id.* at 166 (Gorsuch, J., dissenting). These *amici* hope that the Court uses this case to take not just a step, but to go the entire way back to the original plan.

C. The Unconstitutionality of Subdelegation.

The Fifth Circuit's opinion (*Consumers' Research* at 781) and Judge Ho's concurring opinion (*id.* at 788) briefly quotes from an insightful legal text by Professor Philip Hamburger's Is Administrative Law Unlawful? (U. Chicago Press: 2014), who explains:

> [T]he Court has not, since 1935, invalidated a statute on grounds of nondelegation, nor has it fully rejected the doctrine. Instead, **it simultaneously worries about delegation and permits it**.... [T]he Court requires Congress to offer agencies at least an "**intelligible principle**" — apparently on the assumption that where Congress provides such guidance, the agencies ... are not making, but merely executing the law. On this **fiction**, the Court can **pretend** that Congress is not delegating legislative power. [*Id.* at 378 (emphasis added).]

Moreover, Hamburger notes that even when Congress delegates legislative power according to what he describes as the "ludicrously low standard" of "intelligible principles," it is actually not a delegation, but rather a "subdelegation" of power that originally came from the People (*id.*), citing John Locke:

> As Locke explained, "The legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others." This follows not simply from their constitution, but from the nature of constitutions. [*Id.* at 381-82.]

When one seeks to move from an erroneous line of cases to return to constitutional order, the change seems dramatic. There is no middle ground:

> [W]here Congress authorizes the executive to exercise a rule-making power that is not legislative, there is no unlawful subdelegation. The subdelegation problem thus arises primarily where Congress authorizes **to make legally binding rules**, for this binding rulemaking by its nature and by constitutional grant, **is legislative**. [*Id.* 377-78 (emphasis added).]

It is one thing for the Congress to delegate to agencies the power to write rules which govern the agencies themselves, for that is not a subdelegation. It is quite another for Congress to delegate to agencies the power to write rules which are legally binding on

the American People, for that truly is a subdelegation. From its beginning almost a century ago, the Court repeatedly has allowed executive branch officials to "write the laws"[14] that apply to the People so long as they can source them to some statutory authorization, however broad. The case now before the Court provides yet another opportunity for this Court to re-examine the atextual intelligible principle test and discard it in favor of a textually faithful approach which bars the delegation of all legislative power which makes rules legally binding on the American People.

III. ADHERENCE TO THE NON-DELEGATION DOCTRINE IS DIFFICULT WHEN CONSTITUTIONAL LIMITATIONS ON FEDERAL POWERS ARE ABANDONED.

A. The Delegation of Legislative Power, as well as Limits on Regulatory, Spending, and Taxing Power, Jeopardizes the Nation.

In FY 2024, the U.S. Government receipts from taxes and other sources totaled almost $5.0 trillion, against outlays of $6.75 trillion, resulting in a deficit of $1.83 trillion ($138 billion higher than incurred in FY

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[14] *See, e.g.*, S. 3360, "Read the Bills Act" (112th Congress) (Sen. Rand Paul, R-KY). Senator Rand Paul has introduced this bill in each succeeding Congress. This bill, originally conceived by *amicus* DownsizeDC.org, would require that members of Congress certify they have actually read a bill before voting for it. This approach would curtail the length, breadth, and sheer complexity of most bills.

2023). Gross interest payments on the U.S. debt, for the first time, have exceeded $1 trillion.[15] Last week, the White House described the size of the federal civilian workforce and number of agencies:

> • Excluding active-duty military and Postal Service employees, the federal workforce exceeds 2.4 million.
> • No one knows exactly how many federal agencies exist, but the Federal Register lists over 400. ["Fact Sheet: President Donald J. Trump Works to Remake America's Federal Workforce," *The White House* (Feb. 11, 2025).]

The word frequently used to describe government spending is "unsustainable." In the words of economist Herbert Stein, former Chairman of the Council of Economic Advisers: "If something cannot go on forever, it will stop."[16] The question is whether the end of this regime of Big Government will be navigated by government officials protecting core government functions in a deliberate and orderly manner, or whether the nation's economic problems will be allowed to fester until the consequence of financial irresponsibility is brought down upon the American People in a destructive and chaotic fashion. Thus far, few of those in government responsible for the problem have implemented any meaningful reforms, while even

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[15] K. Zhu, "Breaking Down the U.S. Government's 2024 Fiscal Year," *Visual Capitalist* (Nov. 1, 2024).

[16] *See* https://quoteinvestigator.com/2018/04/28/go-on/.

fewer have welcomed the recent actions of those seeking to remedy the problem.

While there is no one cause of the crushing burden imposed on the nation by excessive federal regulation, profligate spending, and confiscatory taxes, this Court's prior rulings tolerating an expansive view of the Commerce Clause,[17] the spending power,[18] the taxing power,[19] and the non-delegation doctrine have

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[17] *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), which has never been overruled, but which on one occasion was described by this Court as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity" which operated to "greatly expand[] the previously defined authority of Congress under that Clause....." *United States v. Lopez*, 514 U.S. 549, 560, 556 (1995). Justice Thomas asserted that *Wickard's* "substantial effect on interstate commerce" test was "far removed from both the Constitution and from [this Court's] early case law." *Id.* at 601 (Thomas, J., concurring).

[18] *See, e.g., Helvering v. Davis*, 301 U.S. 619, 640-42 (1937),where the Court defaulted on its obligation to rule whether a particular spending measure was for the "general welfare" by deferring to Congress's discretion — a rule still followed. *See also* Federalist 41 ("It has been urged and echoed, that 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,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare.... For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?").

[19] *See NFIB v. Sebelius*, 567 U.S. 519 (2012), where even five justices (Roberts, Scalia, Kennedy, Thomas, and Alito) found the individual mandate in the Patient Protection and Affordable Care

contributed mightily. Indeed, it has been persuasively argued that regulations issued by bureaucrats are now more burdensome than laws passed by Congress. In 2016, a Heritage Foundation study reported that "just the 229 major regulations issued since 2009 added over $100 billion in annual costs.... With estimates of the total regulatory costs [in 2016] exceeding income tax burdens at over $2 trillion annually, regulations were far more burdensome for many Americans than legislation."[20]

While it may seem incongruous to address these constitutional powers in a case involving only the non-delegation doctrine, this Court's prior decisions on those issues have enabled the creation of today's Big Government which, in turn, has made it difficult to follow the Constitution's mandate that "all legislative power herein granted shall be vested in a Congress of the United States."

B. The Delegation of Legislative Power Corrupts Representative Government.

The dissent below seeks to explain the need to allow liberal delegation of legislative powers to administrative agencies with a quotation from

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Act (known as "Obamacare") not authorized by the Commerce Clause or Necessary and Proper Clause, five justices (Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) found it to be a lawful exercise of the taxing power.

[20] G. Galles, "The Bureaucracy Is Now More Powerful Than Congress," *Mises.org* (Nov. 25, 2016).

Mistretta v. United States, 488 U.S. 361, 372 (1989): "'The judicial approval accorded [to] these "broad" standards for administrative action is a reflection of the **necessities** of modern legislation dealing with **complex economic and social problems**.'" *Consumers' Research* at 789 (Stewart, J., dissenting) (emphasis added). The danger of "necessities" overriding constitutional principles is obvious. If the need for rulemaking is now so compelling that it requires setting aside the Constitution, perhaps too much rulemaking is going on. *See* Section III.A, *supra*. And, there are unintended consequences of allowing the delegation of legislative powers.

The plan had been that the People's elected leaders (originally in the People's House, and now also in the Senate) would exercise "all" legislative power for which they would be accountable to the electorate. However, today, Congress has no problem delegating its nearly unlimited tax, spending, and regulatory powers to unelected bureaucrats. There is a political reason for this counterintuitive result.

For those in Congress seeking re-election, the optimal system is one where they retain control over government decisionmaking but have deniability for any unpopular decisions. Such a system allows those in Congress to avoid responsibility for decisions which are unpopular with their various constituencies (*e.g.,* voters, the media, and donors), while taking credit for popular decisions. That optimal system has been enabled by this Court allowed Congress to delegate legislative power to bureaucrats.

Meanwhile, it is naive to believe that the bureaucrats operate independently in service to "the public interest." Those bureaucrats are still subject to behind-the-scenes control by those in Congress with power over the agency (*e.g.*, those serving in leadership roles, on the agency's authorizing committees and appropriating subcommittees). Bureaucrats who decline to follow private directives can find their authorizing statute amended, appropriations cut, or riders put on appropriations. Even when those in Congress do not *sub silentio* direct a particular action, bureaucrats can be motivated to serve personal agendas, including giving special attention to the voices of those who could provide them a soft landing at the end of their government careers.

As New York Law School Professor David Schoenbrod noted 30 years ago, "[p]oliticians understand that delegation helps them to avoid blame."

> For example, in 1988 legislators used delegation to try to give themselves a 50-percent pay raise without losing votes in the next election. They enacted a statute that delegated to a commission the power to set pay for themselves…. When the commission recommended the 50-percent increase, some legislators introduced bills to cancel it. But that action was part of a plan in which the congressional leadership would prevent a vote on the bills until it was too late to stop the increase. Legislators could then tell their

> constituents that they would have voted against the increase if given a chance.[21]

The pay raise scheme was so transparent, and the public outcry so great, that Congress eventually ended the Commission. However, when Congress simply votes for giant "omnibus" spending packages, especially in the "must-pass" annual National Defense Appropriations Act, massive delegations of power to agencies unavoidably occur.

C. The Delegation of Legislative Power Corrupts Federal Spending.

How well the United States Government has been functioning under this Court's non-enforcement of the non-delegation doctrine can be seen by examining recently exposed hidden government spending. President Trump selected Elon Musk to head a revamped United States Digital Service, known as the Department of Government Efficiency ("DOGE"), charged with identifying and eliminating wasteful federal spending. The revelations that have resulted demonstrate, better than any prior illustration, what happens when agencies headed by bureaucrats are entrusted with massive amounts of money to be expended — regardless of whether the appropriations are accompanied by directions, even those including intelligible principles.

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[21] D. Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation at 10 (Yale Univ. Press: 1993).

One of the first agencies targeted by DOGE was the U.S. Agency for International Development ("USAID"), which has an annual budget between $40 and $50 billion, which was used for purposes which have shocked the American People.

> $32,000 for a "transgender comic book" in Peru, $2 million for sex changes and "LGBT activism" in Guatemala, [h]undreds of thousands of dollars for a non-profit linked to designated terrorist organizations — even AFTER an inspector general launched an investigation ... [h]undreds of thousands of meals that went to al Qaeda-affiliated fighters in Syria, [f]unding to print "personalized" contraceptives birth control devices in developing countries, [and] [h]undreds of millions of dollars to fund "irrigation canals, farming equipment, and even fertilizer used to support the unprecedented poppy cultivation and heroin production in Afghanistan," benefiting the Taliban.[22]

Possessing vast authority to make arbitrary spending decisions, USAID resisted sharing that information with those in Congress who might be critical. Senator Joni Ernst (R-IA) attempted to investigate USAID spending last year, but reports that she and her staff were stonewalled, threatened with being sued, and surveilled by USAID while reviewing

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[22] Press Release, "At USAID, Waste and Abuse Runs Deep," *The White House* (Feb. 3, 2025).

only selected files.[23] Now that President Trump has pried spending data from USAID, Senator Ernst added her own list of rudderless USAID expenditures, including: "$20 million to create a Sesame Street in Iraq, $2 million for Moroccan pottery classes and promotion [and] $2 million promoting tourism to Lebanon." She noted that "[m]ore than $9 million of USAID's 'humanitarian aid' intended to feed civilians in Syria ended up in the hands of violent terrorists, including an affiliate of Al Qaeda in Iraq."[24]

One after another, those in Congress have expressed shock at the revelations, but is it likely, or even possible, that no members of Congress knew what was afoot? Is it predictable that those in Congress now criticizing the Trump/Musk investigation into USAID knew of and approved its spending practices? What is certain is that members of Congress would never have authorized these expenditures if they knew they would be held accountable for them. Instead, the U.S. taxpayer dollars were appropriated to USAID to expend without public knowledge, or congressional accountability.[25]

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[23] *See* J. Raasch, "Senator reveals 'crazy' USAID threatened her when she tried to curb its spending last year," *Daily Mail* (Feb. 4, 2025)

[24] T. Wise, "White House Releases List of USAID 'Waste and Abuse' on Everything from Al Qaeda to Trans Operas," *CBN News* (Feb. 7, 2025).

[25] At the risk of adding another deviation from the original plan, the funding of such programs could not have been concealed from the American People if the public accounting clause was followed.

The problem is not limited to USAID. Incoming Environmental Protection Agency head Lee Zeldin has also highlighted massive waste within his agency. Zeldin recently noted that during former President Joe Biden's term, the EPA "gave $160 million up front to a Canadian electric vehicle company to make school buses."[26] "'They still have not delivered $95 million of school buses,'" Zeldin said. "'What has happened in the meantime? They declared bankruptcy. $95 million still not delivered that that company has already received and they've filed for bankruptcy and they're not even an American company.'" *Id.* Zeldin added, "'in the name of environmental justice, in the name of climate equity, they will distribute tens of billions, hundreds of billions of dollars of your tax dollars … and they will spend it recklessly where they are willing to just toss billions of dollars off the Titanic. And who cares what happens next?'" *Id.*

Just beginning to review spending by the Department of Homeland Security, DOGE discovered that DHS had rushed out the door $59 million to house illegal immigrants in New York City.[27] Within hours,

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See Art. I, sec. 9, cl. 7 ("a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

[26] N. Weatherholtz, "Lee Zeldin to Newsmax: Climate Hoax Blows Billions in Name of 'Environmental Justice,'" *Newsmax* (Feb. 13, 2025).

[27] A. Spady, "DOGE focuses on millions in migrant hotels billed to US taxpayers as DHS Sec. Noem targets FEMA," *FoxNews* (Feb. 10, 2025).

the DHS announced, "'four employees are being fired today for circumventing leadership and unilaterally making the egregious payment for hotels for migrants in New York City.'"[28] DOGE also investigated the Treasury Department, and discovered that "'payment approval officers at Treasury were instructed always to approve payments, even to known fraudulent or terrorist groups. They literally never denied a payment in their entire career. Not even once.'"[29] DOGE is also reviewing a list of agency expenditures highlighted by Senator Rand Paul (R-KY), including a 2023 "USDA study on whether Labrador fur color affects their body temperature."[30]

House Speaker Mike Johnson (R-LA) responded that "'what they've uncovered is, frankly, shocking. There are a lot of expenditures of the federal government that Congress has not been aware of, in spite of our best efforts to do oversight, some of this has been hidden.'"[31] Regardless of whether those in Congress instructed these expenditures, or knew of these expenditures and did nothing, or whether they

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[28] G. Norman, "4 FEMA employees fired for paying for hotels for migrants in New York City," *FoxNews* (Feb. 11, 2025).

[29] E. Colton, "Musk rips 'fraudulent' Treasury handouts as reports mount DOGE has access to federal payment system," *Fox News* (Feb. 2, 2025).

[30] M. Friel, "Elon Musk is looking for DOGE cuts. A GOP senator's list caught his eye," *Business Insider* (Nov. 15, 2024).

[31] A. Powell, "Johnson Says What DOGE Has 'Uncovered' Is 'Shocking'," *Independent Journal Review* (Feb. 11, 2025).

were ignorant of what the money they appropriated was being spent on, the problem is the same. Once the limitations on the constitutional powers to spend, tax, and regulate have been lifted by this Court, the government has grown so large that it simply cannot be monitored and run efficiently. As a result, the non-delegation doctrine goes by the boards.

Although it may be more logical for this Court to reinstate the constitutional limitations on the powers to regulate, tax, and spend, followed by revitalizing the non-delegation doctrine, only that latter matter is now before this Court. There is no reason why the non-delegation doctrine should not be revived first, as this will return transparency, responsibility, and accountability to Congress, and the other reforms can follow. Given that the alternative is to wait for the financial collapse of the American Republic, these *amici* urge the Court to find the FCC Act makes an unconstitutional delegation, as well as any delegation of legislative power to issue what Professor Hamburger describes as legally binding rules imposed on the American people.

IV. REVISITING THE NON-DELEGATION DOCTRINE REQUIRES A REVIEW OF THE INTERRELATED PRINCIPLES SET OUT IN *HUMPHREY'S EXECUTOR*.

An evaluation of the constitutionality of Congress's delegation of all three powers of government to a single agency requires revisiting this Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). While principally viewed as a case limiting the

President's power to remove executive branch officials, that case demonstrated the interrelationship of the non-delegation power with the removal power. Particularly since cases involving the removal power may come before this Court in the near future, this Court's review of the reasons for its decision in *Humphrey's Executor* is warranted here.

In that early New Deal case, this Court upheld the provision of the Federal Trade Commission Act ("FTC Act") which authorized a President to remove a member of the Federal Trade Commission only for "inefficiency, neglect of duty, or malfeasance in office." Without expressly analyzing the non-delegation doctrine, the Court's rationale was premised on its view that Congress's delegation of both legislative and judicial powers to an executive branch agency was constitutionally permitted. Perhaps since an admission that all three types of government power had been in one body would be indefensible under our Separation of Powers, the Court termed the legislative powers delegated as only "quasi-legislative" and the judicial powers delegated as only "quasi-judicial." *Id.* at 624. The President's authority to remove executive branch officials exercising only executive power was preserved, but the President's power to remove executive branch officials vested with these additional non-executive powers could only be exercised for cause, as provided in the FTC Act. Thus, the Court's decision chipping away at the President's authority over who served in the executive branch simultaneously chipped away at the Separation of Powers principles undergirding the non-delegation doctrine.

Only nine years prior to *Humphrey's Executor*, in *Myers v. United States*, 272 U.S. 52 (1926), this Court had taken a quite different position in ruling that Congress could not place for-cause limits on the President's power to remove a principal officer even though that officer's appointment required the advice and consent of the Senate. In *Humphrey's Executor*, the Court distinguished *Myers*, reasoning that while postmaster *Myers* possessed only executive power, the FTC directors had been delegated all three powers of government by Congress.

This Court went even further in *Morrison v. Olson*, 487 U.S. 654 (1988), and approved for-cause removal limits on officers exercising only executive power so long as such limits do not interfere with the President's ability to execute his office, in the Court's view, too much. For-cause limitations on the President's removal power have the clear and obvious effect of interfering with his oath-bound duty to "faithfully execute the Office of President of the United States." Art. II, sec. 1, cl. 8. This limitation prevents the President, as the only official elected nationally by the People, from effecting real change across the whole of government. It presupposes the constitutionality of a fourth branch of government — the permanent, unelected Administrative State populated by "experts" and lawyers who can be entrusted with vast powers. It freezes in place the appointments of a prior President, even if that appointee's agenda is to undermine the current President's policies. Whether or not viewed as a component of the "unitary executive" theory, placing the executive power in officers that the President cannot directly control upsets the separation of powers

the Framers so carefully provided for. And, under *Humphrey's Executor*, if the President takes action to remove an officer, he is likely to face litigation that will distract or cause delay. Even the potential for litigation may cause the President to stay his hand. The President's constitutional duty to oversee the faithful execution of the law is thus denigrated. The same rule which President Franklin Roosevelt believed hampered his authority has been allowed to hamper the administrations of many Presidents of both political parties over nine decades.

In Federalist No. 70, Hamilton stressed the importance of energy and unity in the executive branch and explained that the dissolution of unity contributes to the lack of energy in executing the law. Under *Humphrey's Executor*, when a President takes steps to remove officers for cause, litigation brought by "Big Law" firms populated by former or would-be regulators, who are completely comfortable with making enormous fees by working with the regulatory agencies, file suit, delaying and diverting attention from the execution of his duties.[32] In *Humphrey's Executor*, good causes for removal included "inefficiency, neglect of duty, and malfeasance in office." Even if neglect of duty and malfeasance in office are not void for vagueness, "inefficiency" is

[32] *See generally*, A. Adcox, "The Big Law Firms Litigating Against the Trump Administration," *National Law Journal* (Feb. 14, 2025) ("A group of more than a half-dozen Big Law law firms have emerged in recent weeks in leading litigation against the Trump administration, including in lawsuits over the firing of top government officials and cuts to federal funding.")

certainly a prudential or political standard, and certainly not a judicially manageable standard.

Theoretically, Congress should oversee the performance of agencies and control them through the power of the purse, congressional investigation, and power of impeachment. Congress is not designed for speed and energy but rather for deliberation, and it certainly does not possess the marks of unity. The recently uncovered fiascos in USAID, discussed in Section III, *supra,* provide ample testimony to that fact.

CONCLUSION

Issue 1 should be answered with a clear statement that the Act, as well as any other statute which delegates to an agency the power to impose binding rules on the American People, is unconstitutional.

Respectfully submitted,

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