

No. 24-354

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IN THE  
**Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

v. *Petitioners,*

CONSUMERS' RESEARCH, ET AL.,

*Respondents.*

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

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**AMICI CURIAE BRIEF OF  
GERARD N. MAGLIOCCA AND  
JOHN Q. BARRETT  
IN SUPPORT OF PETITIONERS**

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purposes only.

Dated: January 3, 2025

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

Gerard N. Magliocca is a Distinguished Professor and the Samuel R. Rosen Professor at the Indiana University Robert H. McKinney Law School. He is the author of “Robert Jackson’s Non-Delegation Doctrine,” 25 Green Bag 2d 95 (2022).

John Q. Barrett is the Benjamin N. Cardozo Professor of Law at St. John’s University, editor of Robert H. Jackson’s memoir That Man: An Insider’s Portrait of Franklin D. Roosevelt, and writer of “The Jackson List.”

## SUMMARY OF ARGUMENT

The Court should read Solicitor General Robert H. Jackson’s brief on the non-delegation doctrine from *Currin v. Wallace* and adopt his position that the doctrine applies only when Congress delegates power to the President.

## ARGUMENT

**The Court should adopt Solicitor General Robert H. Jackson’s view that the non-delegation doctrine applies only when Congress delegates power to the President.**

In 1938, Solicitor General Robert H. Jackson proposed an elegant solution to the issue now before the Court. He argued, in the Brief for the United States in *Currin v. Wallace*, that the non-delegation doctrine applies only when Congress delegates power

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<sup>1</sup> This brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus curiae or its counsel has made a monetary contribution toward the brief’s preparation or submission.

to the President. *See* Brief for the United States, *Currin v. Wallace*, 306 U.S. 1 (1939) (No. 275), 1938 WL 63974, at \*46-47 (submitted by Solicitor General Jackson, Assistant Attorney General Thurman Arnold, and attorney Robert K. McConnaughey). Jackson argued that congressional delegations to federal agencies, independent boards, and private actors are not subject to the non-delegation doctrine. *See id.* at \*44-65.

The Court decided *Currin* without addressing the Solicitor General's non-delegation theory. *See Currin*, 306 U.S. at 15-18. In a 1941 book, Jackson cited his *Currin* brief and lamented that "the Court that required Congress to define standards to govern delegated power has, though urged by the Solicitor General, failed to set forth standards by which to define unconstitutional delegation." Robert H. Jackson, The Struggle for Judicial Supremacy, 95 (1941); *id.* at 95 n.9 (citing Brief for the Government, *Currin v. Wallace*, No. 275, October Term, 1938).

The Court should read and heed Solicitor General Jackson's thoughtful brief.

## CONCLUSION

Under Solicitor General Jackson's analysis, the non-delegation doctrine does not apply in this case because the congressional delegation at issue was not made to the President. The Fifth's Circuit's judgment should therefore be reversed.

Respectfully submitted,

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