Nos. 24-354 and 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

v.

CONSUMERS' RESEARCH, ET AL.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL.,

v.

CONSUMERS' RESEARCH, ET AL.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
ELIZABETH M. FRITZ
PETER L. BYRNE
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

MARIA C. MONAGHAN
CHRISTOPHER J. WALKER
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

TABLE OF CONTENTS

Interest of amicus curiae 1
Introduction and summary of argument 2
Argument 3
I. The Court should revitalize the nondelegation doctrine 4
  A. Constitutional structure supports a proportionality principle 5
  B. This Court's early cases apply a proportionality principle 8
  C. Early Congresses legislated consistently with a proportionality principle 11
II. A proportional approach to nondelegation is both workable and desirable 17
  A. A revitalized nondelegation doctrine would be administrable 18
    1. A proportional approach is principled 18
    2. Courts frequently apply proportional approaches in other constitutional contexts 23
  B. A revitalized nondelegation doctrine would promote constitutional values 25
    1. The intelligible-principle test is insufficient 25
    2. A proportional approach would better protect important constitutional values 26
Conclusion 31

TABLE OF AUTHORITIES

Page(s)

Cases:

Alabama Association of Realtors v. *Department of Health & Human Services*, 594 U.S. 758 (2021) 28

Biden v. *Nebraska*, 143 S. Ct. 2355 (2023) 20, 22

Bond v. *United States*, 564 U.S. 211 (2011) 28

Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 19

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985) 24

Collins v. *Yellen*, 594 U.S. 220 (2021) 27

Department of Transportation v. *Association of American Railroads*, 575 U.S. 43 (2015) 6, 27

Field v. *Clark*, 143 U.S. 649 (1892) 10-11, 30

Financial Oversight & Management Board for Puerto Rico v. *Aurelius Investment, LLC*, 590 U.S. 448 (2020) 11

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 23

Gundy v. *United States*, 588 U.S. 128 (2019) 2, 25

Cases—Continued:

Industrial Union Department, AFL-CIO v. *American Petroeum Institute*, 448 U.S. 607 (1980) 27

Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983) 6

Lange v. *California*, 594 U.S. 295 (2021) 24

Loper Bright Enterprises v. *Raimondo*, 603 U.S. 369 (2024) 5, 18, 20

Lucia v. *Securities & Exchange Commission*, 585 U.S. 237 (2018) 23

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 24

Mistretta v. *United States*, 488 U.S. 361 (1989) 8

Morrison v. *Olson*, 487 U.S. 654 (1988) 27

Myers v. *United States,* 272 U.S. 52 (1926) 6

National Federation of Independent Business v. *Department of Labor, Occupational Safety & Health Administration*, 595 U.S. 109 (2022) 21-23

Nixon v. *Fitzgerald,* 457 U.S. 731 (1982) 7

Paul v. *United States*, 140 S. Ct. 342 (2019) 21

Sackett v. *Environmental Protection Agency*, 598 U.S. 651 (2023) 28

Cases—Continued:

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 28

The Brig Aurora, 11 U.S. 382 (1813) 10

Trump v. *United States*, 603 U.S. 593 (2024) 7

Turner Broadcasting System, Inc. v. *Federal Communications Commission*, 512 U.S. 622 (1994) 24

United States v. *Arthrex, Inc.*, 594 U.S. 1 (2021) 23

United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 24

Wayman v. *Southard*, 23 U.S. 1 (1825) 2, 5, 8-9, 11-12, 18-19, 21

West Virginia v. *Environmental Protection Agency*, 597 U.S. 697 (2022) 22-23

Constitution and Statutes:

U.S. Const.:

Art. I, § 1 5

Art. I, § 8, cl. 4 12

Art. II, § 1, cl. 1 ....5, 7

Art. II, § 3 7

Art. III, § 1, cl. 1 5

Statutes—Continued:

Act of July 4, 1789, ch. 2, § 1, 1 Stat. 25-26 16
Act of July 31, 1789, ch. 5, § 1, 1 Stat. 30-34 16
Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83..............11
Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103-104..........12
Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109-110...........17
Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 121 13
Act of July 16, 1790, ch. 28:
§ 1, 1 Stat. 130 13-14
§ 2, 1 Stat. 130 13
§ 3, 1 Stat. 130 13-14
Act of Aug. 12, 1790, ch. 47:
§ 1, 1 Stat. 186 16
§ 2, 1 Stat. 186 16
Act of Mar. 3, 1791, ch. 15:
§ 43, 1 Stat. 209 17
§ 58, 1 Stat. 213 17
Act of Feb. 20, 1792, ch. 7:
§ 1, 1 Stat. 232-233..14
§ 2, 1 Stat. 233 14
§ 3, 1 Stat. 234 14
§ 7, 1 Stat. 234-235..14
Act of July 9, 1798, ch. 70:
§ 8, 1 Stat. 585 15
§ 22, 1 Stat. 589 15
Act of July 14, 1798, ch. 75:
§ 1, 1 Stat. 597-598..15
§ 2, 1 Stat. 598 15

Statutes—Continued:

8 U.S.C. § 1154(b)....................19
12 U.S.C. § 1842(c)....................21
12 U.S.C. § 1842(d)(2)....................21
29 U.S.C. § 213(a)(1)....................19
33 U.S.C. § 1312(a)....................20
41 U.S.C. § 1708(e)....................19
47 U.S.C. § 254(b)....................29
47 U.S.C. § 254(c)....................29
47 U.S.C. § 254(d)....................29
47 U.S.C. § 254(e)....................29
49 U.S.C. § 5105(b)....................20
49 U.S.C. § 5105(c)....................20

Other Authorities:

Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931 (2020)....................26
3 Annals of Congress 229 (1791)....................14
Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243 (2021)....................16
Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986)....................22
Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol'y 147 (2017)....................22

Other Authorities:

Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* (Sept. 3, 2019)....................7

Bradley Custer, *Being a Good College Student: The History of Good Moral Character Rules In State Financial Aid Programs, 1850 To Now*, 2020 B.Y.U. Educ. & L. J. 44 12

Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) 7

Richard H. Fallon, Jr., *Judicially Manageable Standards & Constitutional Meaning*, 119 Harv. L. Rev. 1274 (2006).................................18

The Federalist (George W. Carey & James McClellan eds., 2001):

No. 47 (James Madison) 6, 27

No. 51 (James Madison) 30

No. 75 (Alexander Hamilton)................................5, 8

Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & Liberty 718 (2019).....................28

Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001)...................................7

Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 6, 8, 26

Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388 (2019) 16

Other Authorities:

Michael B. Rappaport, *A Two Tiered Categorical Approach to the Nondelegation Doctrine*, in *The Administrative State Before the Supreme Court* (Peter J. Wallison & John Yoo eds., 2022) 29

David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731 (1999) 26

David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 Mich. L. Rev. 1223 (1985) 26

Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999) 26

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000)...................................18

Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490 (2010) 13, 15

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

This case presents important questions about the public nondelegation doctrine. The Chamber's members, which include businesses regulated and supervised by federal administrative agencies, have an interest in the proper application of that doctrine. The Chamber therefore submits this amicus brief to offer an administrable approach to the public nondelegation doctrine that ensures each branch of government operates within its constitutional role. The Chamber does not take a position on the other issues in this case or on how the public nondelegation doctrine applies to the specific statutory scheme under review.[1]

---

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Founders had a simple yet inspiring vision for the structure of our government: "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard*, 23 U.S. 1, 46 (1825). But for the last 80 years, the basic boundaries of that system have been left unguarded. Instead, this Court has adopted a nondelegation doctrine that has become virtually impossible for Congress to violate. *See Gundy* v. *United States*, 588 U.S. 128, 163-164 (2019) (Gorsuch, J., dissenting). And in its wake, the Executive has become the branch primarily responsible for setting the rules that American businesses and individuals must follow.

This case presents an opportunity for this Court to return to first principles and ground the public nondelegation doctrine more firmly in the structure and history of the Constitution and its separation of powers. Under a proper conception of the doctrine, Congress may assign modest administrative tasks to an agency with little or no guidance. Once the authority granted to an agency becomes more significant, however, Congress must provide more specificity by supplying both an object and a route to guide the agency's discretion. And when it comes to the most important policy questions, Congress cannot delegate the hard choices to the agency at all, and instead must answer those questions itself—a constraint that complements the existing major-questions doctrine.

This approach has several critical attributes that are missing from the current intelligible-principle test. Demanding guidance in proportion to the significance

of the authority granted has roots in our constitutional structure and in this Court's earliest cases. It fits with how Congress originally framed its grants of authority. And it would be administrable for courts to apply. Hard cases will no doubt arise on the margins, but courts frequently apply tests that ratchet up the level of scrutiny as the importance of the interest increases. The same should be true here. The Court should make clear that the more power Congress wants to hand over to the Executive, the more instruction it must supply for the exercise of that power.

ARGUMENT

The Constitution vests the Legislature with discretion in making policy and vests the Executive with discretion in executing the law. It is an easy enough line to recite, but a more difficult one to police. For almost a century, the intelligible-principle test has not proven up to the task. Further elaboration of the nondelegation doctrine is needed.

The Judiciary should reaffirm its constitutionally prescribed role in holding the other branches to their own spheres. This Court need not demand that Congress decide every minute policymaking detail. But when the Legislature abdicates its lawmaking authority in favor of mere *goal*making, the Judiciary can and should intervene. It should require Congress to provide more instruction as it vests the Executive with the authority to make more and more important judgment calls. And it should follow the guidance from early sources on how Congress can properly grant authority to other branches: by supplying both an *object* to achieve and a *route* to get there.

This proportional approach to nondelegation will change little about how the Court treats cases at both extremes. Statutes directing the Executive to fill up details have always survived scrutiny and will continue to do so, while ostensible delegations on extremely important and politically sensitive issues will often fail anyway under the related major-questions doctrine. Where a revitalized nondelegation doctrine will have the most impact is in the middle, for questions that are significant but not so significant that it is implausible that Congress granted the agency the authority to answer them. For those cases, a faithful application of nondelegation principles protects political accountability and individual liberty while still preserving regulatory flexibility. And although the test would be more rigorous—and thus might pose more edge cases—than the current intelligible-principle test, it is still an administrable standard akin to other constitutional tests that courts regularly apply.

We urge this Court to adopt this proportional approach to the public nondelegation doctrine and remand the case. The detailed instructions that Congress provided in establishing the Universal Service Fund's funding mechanism may very well be sufficient to provide the Executive with both an object to achieve and a route to get there. The court of appeals is well positioned to decide that question in the first instance, after the parties have an opportunity to address the statute under the appropriate framework.

I. THE COURT SHOULD REVITALIZE THE NONDELEGATION DOCTRINE

Constitutional structure, this Court's early cases, and the practice of early Congresses do not support the

current application of the intelligible-principle test. They instead support the basic notion that Congress must supply guidance to the Executive commensurate with the significance of Congress's delegation. For administrative or implementation matters, Congress can authorize the Executive to "fill up the details" of its statutes. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 395 (2024) (citing *Wayman*, 23 U.S. at 43). But when Congress confers greater power, it must give the agency an object to work toward *and* some route to follow. And the more significant the authority, the more instruction Congress must provide.

A. Constitutional Structure Supports A Proportionality Principle

Several constitutional provisions and principles underlie the nondelegation doctrine. All of them suggest that the doctrine should be understood in flexible terms reflecting the scope of authority granted.

1. The nondelegation doctrine ultimately rests on the Legislative Vesting Clause. That Clause vests "*[a]ll* legislative Powers herein granted" in Congress. U.S. Const. art. I, § 1 (emphasis added). "The essence" of legislative power is "to enact laws, or, in other words, to prescribe rules for the regulation of the society." *The Federalist No. 75*, at 388 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Articles II and III contain their own Vesting Clauses, which vest "executive Power" in the President and "judicial Power" in the federal courts. U.S. Const. art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1. These three provisions form the bedrock of the separation of powers, "assur[ing], as nearly as possible, that each Branch of government

would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

By vesting each branch with a "separate and distinct power," the Constitution forbids the "accumulation" or "mixture of powers" in one branch, except as expressly set forth in the document. *The Federalist No. 47*, *supra*, at 249 (James Madison). As relevant here, "[w]hen the Government is called upon to perform a function that requires an exercise of legislative . . . power, only [Congress as] the vested recipient of that power can perform it." *Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring). "The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002).

2. The Constitution's grant of legislative power to Congress came with the "accountability checkpoints" of bicameralism and presentment. *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). Bicameralism ensures that legislation is "carefully and fully considered by the Nation's elected officials," with "study and debate" occurring in "separate settings." *Chadha*, 462 U.S. at 949, 951. Presentment, in turn, submits legislation to "the President[,] elected by all the people," to "protect the whole people from improvident laws." *Id.* at 948, 951 (citing *Myers* v. *United States*, 272 U.S. 52, 123 (1926)).

"[I]f Congress could give its power away" to the Executive Branch, "[i]t would dash the whole scheme." *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). After all, there is no approximation of bicameralism and presentment in the agency rulemaking pro-

cess. Executive "choices consistent with broad delegations are not the equivalent of legislative decisions" because they lack the "reflectiveness" of a "deliberative body reflecting the views of representatives from various states of the union." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2367-2368 (2001) (citation omitted). And most agency regulations will never even get the President's sign-off. *See* Exec. Order No. 12,866, §§ 6-7, 58 Fed. Reg. 51735, 51740-51743 (Sept. 30, 1993) (creating a centralized process for White House review of only "significant regulatory actions"); Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 7, 12 (Sept. 3, 2019), https://sgp.fas.org/crs/misc/R43056.pdf (finding that only a small fraction of published regulations go through the centralized review process).

3. The limited powers allocated to the Executive Branch confirm that it cannot substitute for the Legislative Branch. The Constitution grants "[t]he executive Power" to the President. U.S. Const. art. II, § 1, cl. 1. It thus "vest[s] the President with 'supervisory and policy responsibilities of utmost discretion and sensitivity.'" *Trump* v. *United States*, 603 U.S. 593, 610-611 (2024) (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982)). But the Constitution does not give the President lawmaking power over domestic affairs. Instead, it requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That responsibility requires the President's judgment (to decide how best to "take Care"), but presumes that the laws enacted through bicameralism and presentment give the President enough guidance to be "faithful" to.

In short, the Constitution envisions a real distinction between legislative policymaking and permissible executive discretion. The task of policing that line—in assessing whether Congress ceded its authority to make laws or merely commanded the Executive Branch to implement laws—turns on both the question Congress directed the agency to decide and "the *degree* of generality contained in the authorization." *Mistretta* v. *United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting). Such questions of degree necessarily vary with the importance of the authority granted. *See* Lawson, *supra*, at 339-340, 396. The more significant the question, the more detail the statute must provide to ensure that the Executive is overseeing the "execution of the subsisting laws," rather than exercising the legislative powers vested solely in Congress. *The Federalist No. 75*, *supra*, at 388 (Alexander Hamilton).

B. This Court's Early Cases Apply A Proportionality Principle

A proportionality principle traces back to this Court's earliest nondelegation cases, predating the intelligible-principle test that grabbed hold in the 1940s. The Court explicitly endorsed a proportional approach to nondelegation in 1825 in *Wayman* v. *Southard*, and other early case law adopted that framework. In the subsequent two centuries, jurists and scholars have not improved on Chief Justice Marshall's work.

1. In *Wayman*, the Court confronted a constitutional challenge to a statute linking the "forms" and "executions" of "the writs" in federal courts to state law, but authorizing federal courts to make "alterations" when "expedient." 23 U.S. at 31. The central question was whether the statute constituted a "delegation of

legislative authority," which Congress "has not the power to make." *Id.* at 42.

Chief Justice Marshall, writing for the Court, grappled with the "delicate and difficult inquiry" of discerning between permissible and impermissible grants of authority. *Wayman*, 23 U.S. at 46. He explained that Congress has no power to delegate "powers which are strictly and exclusively legislative," yet it "may certainly delegate" other powers that it could—but need not—"rightfully exercise itself." *Id.* at 42-43. The difference, although murky at times, lay in the "extent" of the power given. *Id.* at 43. As Chief Justice Marshall put it, "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made." *Ibid.* For minor subjects, Congress need only provide "great outlines" within which the delegate must stay. *Id.* at 45. "[M]ore important" subjects could also be permissibly delegated, but would require the Legislature "to prescribe the manner" in which the delegate must act. *Id.* at 45-46. Meanwhile, the most "important subjects" "must be entirely regulated by the legislature itself." *Id.* at 43, 45.

Applying that tripartite framework, the Court held that the judicial-forms statute passed muster. *Wayman*, 23 U.S. at 45. That statute gave the judiciary "a power to vary minor regulations" concerning the "superintendence" of how the courts operated—which was an administrative matter "properly within the judicial province." *Id.* at 43, 45. Congress therefore needed only to supply the "great outlines" for "directing" the courts. *Id.* at 45.

2. This Court's other early cases are consistent with *Wayman*'s proportional approach. Throughout the nineteenth century, the Court upheld laws where Congress gave enough instruction as the significance of the delegation demanded.

The Brig Aurora, for example, upheld Congress's grant of authority to the President on the significant question of whether United States merchants could import goods from Great Britain and France. 11 U.S. 382, 388 (1813). Congress mostly supplied the answer to the question: no, so long as those countries continued "to violate the neutral commerce of the United States." *Id.* at 383. Congress gave the President only the obligation to issue a proclamation if either country "cease[d]" its violations. *Id.* at 384. Congress, in other words, did the bulk of the important policymaking work. The modest, fact-finding obligation it left to the President was not an abdication of legislative authority, and the Court could "see no sufficient reason" why Congress could not condition an embargo on the President's fact finding. *Id.* at 388.

Field v. *Clark* is another instructive example. 143 U.S. 649 (1892). There, Congress passed a law "permitting the free introduction of" certain agricultural products. *Id.* at 692. But if the President determined that another country had imposed "reciprocally unequal and unreasonable" "duties or other exactions upon the agricultural . . . products of the United States," he was required "to suspend . . . the provisions of th[e] act relating to the free introduction" of goods and instead to impose tariffs that Congress had "prescribed." *Id.* at 680, 692. This Court held that the law did not pose a nondelegation problem. Although the

law authorized the President to determine whether another country's duties were "reciprocally unequal and unreasonable," the Court found that determination was "simply in execution of the act of [C]ongress" and not "the making of law." *Id.* at 693. By setting tariffs and requiring reciprocity from other countries, Congress gave the President a clear method to determine whether other countries' duties were unreasonable—by comparing our tariffs and theirs. In other words, even though the statute authorized the President's exercise of discretion, Congress retained its lawmaking prerogative. *Ibid.*

C. Early Congresses Legislated Consistently With A Proportionality Principle

Early Congresses recognized the need to provide more instruction when delegating more significant power to the Executive or Judicial Branches. This early congressional practice provides strong evidence that a proportional approach is consistent with the Constitution's original meaning. *See Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 590 U.S. 448, 462 (2020).

1. When early Congresses granted modest administrative or implementation authority to the Judiciary or the Executive, they often provided minimal guidance.

Judicial procedures. In the Judiciary Act of 1789, the First Congress authorized the courts "to make and establish all necessary rules for the orderly conducting [of] business in said courts, provided such rules are not repugnant to the laws of the United States." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. In *Wayman*, the Court identified this statute as the quintessential example of a permissible grant of authority. 23 U.S. at 43.

The provision did not concern any "important subjects" to citizens, but rather touched on the administrative issue of how the judiciary could superintend its own procedures—so no further congressional instruction was required. *Id.* at 43. That the granted authority "seem[ed] to be properly within the judicial province" further bolstered the Court's conclusion that minimal instruction sufficed. *Id.* at 45.

Citizenship determinations. The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. The First Congress exercised this power itself, and tasked the courts with implementing its decision. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103-104. Congress decreed that a "free white person" who "shall have resided within . . . the United States for the term of two years" and was "of good character" could submit an "application" for citizenship "to any common law court of record." *Ibid.* If the applicant produced "proof to the satisfaction of such court" and took an oath to support the Constitution, he became a citizen. *Ibid.* The courts' discretion was thus limited to determining whether the application satisfied the "good character" requirement. And Congress could properly delegate that narrow question. *Cf.* Bradley Custer, *Being a Good College Student: The History of Good Moral Character Rules In State Financial Aid Programs, 1850 To Now*, 2020 B.Y.U. Educ. & L. J. 44, 50 ("The use of good moral character rules in American law is ubiquitous.").

2. When an issue was more important to citizens, Congress provided more instructions. Specifically, Congress both identified an object for the Executive to

achieve and supplied a route for the Executive to follow. A few examples illustrate the practice.

War pensions. Following the Revolutionary War, Congress faced the significant questions of whether to award pensions to veterans, and how much to award. Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490, 1540-1541 (2010). Congress itself made the choice to award the pensions. It gave the Executive some discretion in calculating them, but bounded that discretion in important ways. It authorized the President to award pensions for veterans wounded in the line of duty "at such rate of pay, and under such regulations as shall be directed," provided that pensions for fully disabled commissioned officers "never exceed . . . half . . . pay," and pensions for all other fully disabled veterans "never exceed five dollars per month." Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 121. Partially disabled veterans, in turn, would "receive only a sum in proportion to the highest disability." *Ibid.* Congress constrained the President's discretion by setting the maximum amount for each pension, and guided that discretion by providing a controlling principle (seriousness of disability) for partial-disability pensions. Both constraints clearly made some executive decisions out-of-bounds.

Location of the capital. One of the first important questions Congress confronted was where to establish a permanent capital for the federal government. Congress tasked three commissioners, appointed by the President, with locating the proper site. Act of July 16, 1790, ch. 28, §§ 1, 2, 1 Stat. 130. To achieve this object, Congress provided the commissioners with a set of constraints. The capital district had to be located "on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue." *Id.* § 1. It

had to be located on the "eastern side" of that river. *Id.* § 3. And it could "not exceed[] ten miles square." *Id.* § 1. Congress provided that once the commissioners found an appropriate location, they could purchase the land. *Id.* § 3. The commissioners' authority, however, was quite literally bounded.

Postal system. The establishment of the postal system was a significant issue at the Founding—so significant that Congress rejected a proposed bill that would have allowed the President to establish all of the postal "route[s]." 3 Annals of Cong. 229, 241 (1791). As Representative Page asserted, if such an important issue as the postal system could constitutionally be left to the President, then Congress could also "leave to him any other business of legislation," and they could all just "adjourn" and "mak[e] a short session of it." *Id.* at 233. At least four other representatives—including James Madison—similarly argued that a broad delegation to establish postal routes would be unconstitutional. *Id.* at 229-239. Congress thus settled on a much narrower grant of authority, naming as waypoints the cities that would be served by the postal roads, and leaving the Executive with the intermediate powers to temporarily extend the network and to fix the location of post offices as "necessary" for receiving and processing mail along the roads. Act of Feb. 20, 1792, ch. 7, §§ 1-3, 7, 1 Stat. 232-235. It also granted the Postmaster General various administrative powers, including the authority to "provide for carrying the mail . . . by stage carriage or horses, as he may judge most expedient," and to "prescribe such regulations" over his employees "as may be found necessary." *Id.* § 3. In other words, Congress decided the "important question of the day"—which

cities would get the roads—and left the "less significant" details to the Executive Branch. Wurman, *supra*, at 1511.

3. For the most significant questions, Congress recognized that it was the proper decisionmaker. Early Congresses resolved the most politically and economically consequential issues of the day for themselves, leaving the Executive with administrative and implementation duties.

Tax on all real property. One such critical question concerned whether to lay a direct tax on all real property in the country. Congress decided for itself to impose the tax, along with certain key attendant questions: the total amount of the tax ($2 million), the property that would be taxed (houses and real property), the property that would be exempted (government property and real property worth less than $100), how land should be valued, and how the tax would be apportioned among the States. Act of July 9, 1798, ch. 70, § 8, 1 Stat. 585; Act of July 14, 1798, ch. 75, §§ 1-2, 1 Stat. 597-598. After Congress decided those policy questions, all that was left for the Executive was to implement Congress's instructions. It was to send out local assessors to calculate the value of each individual parcel, and then to account for variations between assessors by "revis[ing], adjust[ing] and vary[ing]" valuations on a district-by-district basis at a "rate per centum[] as shall appear to be just and equitable[,]" keeping steady "the relative valuations" of property within each district. Act of July 9, 1798, ch. 70, § 22, 1 Stat. 589; *see* Wurman, *supra*, at 1552-1553.

Customs statutes. Another major issue before the First Congress concerned customs duties on imported

goods, which represented 90% of the federal government's total revenue for the first 20 years of the Republic. Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243, 262 (2021). Not surprisingly, Congress set out these vitally important customs duties in great detail. For example, Congress set 12 different duties on tea, taking into account the type of tea, country of origin, and nationality of the importing vessel. *See* Act of July 4, 1789, ch. 2, § 1, 1 Stat. 25-26 (taxing a pound of "bohea tea" at a rate of "six cents" when imported from China or India and "eight cents" when imported from Europe). Congress also legislated in similar detail when establishing the infrastructure for collecting those duties: it divided States into dozens of different customs districts, set the metes and bounds of each, and established each district's individual ports of entry and delivery. *See* Act of July 31, 1789, ch. 5, § 1, 1 Stat. 30-34. In the end, the First Congress made the key policy decisions itself, leaving to customs officials the administrative task of collecting customs duties. *See* Jennifer Mascott, *Early Customs Laws & Delegation*, 87 Geo. Wash. L. Rev. 1388, 1399-1400, 1404-1405 (2019).

To be sure, these early laws provide just a few examples of permissible grants of authority to other branches. They do not represent the full extent of Congress's ability to assign tasks to the Judiciary or Executive. But they still provide telling evidence of the type of authority that could permissibly be exercised at the Founding: Congress answered the important policy questions for itself, but it left the Executive either with

pure administrative duties or with implementation discretion cabined in proportion to the significance of the question.[2]

II. A PROPORTIONAL APPROACH TO NONDELEGATION IS BOTH WORKABLE AND DESIRABLE

The Court should return to this proportional approach to nondelegation. A revitalized nondelegation doctrine would prevent Congress from delegating significant swaths of power with the barest of goals. And although it could sometimes prove challenging at the margins, tests that give more scrutiny to more important questions are ubiquitous in constitutional law.

[2] The government cites various other statutes concerning domestic policy from early Congresses. *See* FCC Br. 21-23 (collecting statutes). Its various examples generally involve narrow authority and ample instructions, and thus fit the taxonomy here. *See, e.g.*, Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 213 (administrative statute authorizing the President to set "reasonable and proper" salaries for customs employees so long as "the aggregate amount" of those salaries does "not exceed seven per cent" of customs duties on "spirits distilled in the United States"); Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209 (authorizing the Secretary of the Treasury to return seized property if he makes certain findings, and authorizing him to impose "reasonable" "terms and conditions" in the narrow circumstance where he is returning seized "spirits" to "proprietors"); Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109-110 (authorizing certain executive officers to grant 14-year patents, with the instruction that a patent is warranted only for an "invention or discovery" that is "sufficiently useful and important" and shown to be "not before known or used"); Act of Aug. 12, 1790, ch. 47, §§ 1-2, 1 Stat. 186 (authorizing the Executive to allocate surpluses toward the purchase of debt securities and to regulate such purchases, with the instruction that purchases must be "made openly, and with due regard to the equal benefit of the several states," and must be at "market price, if not exceeding the par or true value thereof").

The advancement of critical constitutional values more than outweighs the modest costs of applying such a test here.

A. A Revitalized Nondelegation Doctrine Would Be Administrable

Perhaps the most frequently expressed concern about a revitalized nondelegation doctrine is administrability. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 326-327 (2000); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1302-1303 (2006). The proportional approach applied by early Congresses and courts is principled, consistent with existing doctrines, and familiar to courts.

1. A proportional approach is principled

As a practical matter, a proportionality principle can be operationalized into three categories: administrative and implementation power, significant decisions, and major decisions. Revitalizing the nondelegation doctrine would have little effect at either extreme. Grants of administrative and implementation authority would continue to pass muster, while delegations of the most important questions are already scrutinized under the separate (but related) major-questions doctrine. A proportional approach to nondelegation would primarily impose a reasonable constraint in the middle.

a. When Congress grants the Executive Branch the authority to carry out administrative or implementation tasks, minimal guidance will suffice. No one disputes that Congress can authorize another branch to "fill up the details" on minor questions. *See Loper Bright Enters.*, 603 U.S. at 395 (citing *Wayman*, 23

U.S. at 43). When Congress does so, it need only supply the "great outlines," such as an object to achieve. *Wayman*, 23 U.S. at 43.

So, for example, Congress may authorize the Secretary of Labor to define what an "outside salesman" is for purposes of exemptions to the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(1); *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). Congress can likewise authorize the Attorney General to ascertain whether the facts in a visa petition are true. 8 U.S.C. § 1154(b). Or it can give an agency the power to set a deadline for submitting bids on a procurement contract. 41 U.S.C. § 1708(e)(2). Nondelegation challenges to such administrative and implementation delegations will be infrequent and unsuccessful. Federal agencies regularly make interstitial decisions about how to carry out government programs, and under a proportional approach, the nondelegation doctrine is not concerned about with those minor subjects.

b. Where, however, Congress grants more than minor gap-filling authority, Congress must also "prescribe the manner" of execution to keep the Executive from pure policymaking. *Wayman*, 23 U.S. at 45-46. In other words, it is not enough for Congress to provide the agency with a destination to work toward—which is all that the current intelligible-principle test requires. Congress must also prescribe a route for the agency to get there.

Of course, Congress can use a variety of verbal formulations to provide a route for the Executive. In navigation, a route can take different forms. It can consist of step-by-step instructions ("go forward 20 paces and then turn 90 degrees"); it can provide waypoints ("go to the mountaintop and then you'll see the cabin"); it

can give a backstop ("if you see the river, you need to turn around"); or it can be conditioned on the existence of outside facts ("walk along the trail, so long as it is clear"). Similarly, there is more than one way for Congress to chart a path for an agency. It can give step-by-step instructions; it can establish milestones; it can set boundaries or guardrails that narrow the path; it can tell the agency to apply a particular standard to the facts that it finds; or it can tell the agency to proceed with a specified activity only so long as certain conditions are satisfied. *See Biden* v. *Nebraska*, 143 S. Ct. 2355, 2379-2380 (2023) (Barrett, J., concurring) (explaining that instructions can vary with context). Whatever the formulation, Congress must provide enough instruction to tell the agency where to go and how to get there, even if it does not prescribe every step along the way.

Such instructions are commonplace and varied. Congress, for example, has directed the Administrator of the EPA to establish effluent limitations when he determines that the discharge of pollutants "would interfere with the attainment or maintenance of that water quality" necessary to ensure five different outcomes. 33 U.S.C. § 1312(a); *see Loper Bright Enters.*, 369 U.S. at 395 n.6. Elsewhere, Congress has directed the Secretary of Transportation to "conduct a study comparing the safety of" different methods of transporting certain radioactive materials by train and to "consider[] the results of the study" when issuing regulations "appropriate to provide for the safe rail transportation" of such materials. 49 U.S.C. § 5105(b), (c). Employing still a different formulation, Congress has directed the Board of Governors of the Federal Reserve to consider seven

factors when evaluating a bank holding company's acquisition of a bank, along with a backstop: "the Board may not approve" an acquisition if the resulting entity would control more than 30% of bank deposits in a single State or 10% of all bank deposits nationwide. 12 U.S.C. § 1842(c), (d)(2). These routes, although differently formulated, each provide enough instruction to concretely guide the agency on how to proceed.

c. For the most "important subjects" with vast political and economic significance, Congress must "entirely regulate[]" for itself. *Wayman*, 23 U.S. at 43. As Chief Justice Marshall recognized, any delegation of decision-making authority on such subjects would amount to an impermissible transfer of the legislative power. *See id.* at 42-43. Under the nondelegation doctrine, Congress therefore must "expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce." *Paul* v. *United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

For those exceptionally important questions, this Court already patrols the line between the Legislature and the Executive under the major-questions doctrine. The two doctrines are "closely related." *Nat'l Fed. of Independent Bus* v. *Dep't of Labor*, *Occupational Safety & Health Admin.*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring). "Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Ibid.*

The doctrines simply approach the line between legislative and executive power from different perspectives. The major-questions doctrine is usually concerned

with the problem of the Executive's "exploit[ing]" unclear statutory language to overreach. *OSHA*, 595 U.S. at 125 (Gorsuch, J., concurring). The nondelegation doctrine, meanwhile, kicks in only if Congress intentionally passes the buck on its constitutional obligations to the Executive "to 'reduc[e] the degree to which they will be held accountable for unpopular actions.'" *Id.* at 124 (citing Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol'y 147, 154 (2017)); *see* Cass, *supra*, at 153-155 (contrasting "encroachment" with "delegation" as reciprocal separation-of-powers concerns).

As a real-world matter, the major-questions doctrine will likely continue to be more salient than the nondelegation doctrine. After all, we typically assume that Congress does not willingly give the Executive the authority to decide the most consequential issues of the day. Indeed, that is one of the justifications for the major-questions doctrine: "Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'" *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring) (citation omitted); *see West Virginia* v. *EPA*, 597 U.S. 697, 721-723 (2022) (collecting cases); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). But where Congress does clearly authorize the Executive Branch to make major policy decisions, the nondelegation doctrine acts as an important and independent backstop.

Whatever garb a challenge comes in, the results under the major-questions doctrine and a proportional nondelegation doctrine converge: Congress must give an agency "clear" authority to act. *West Virginia*,

597 U.S. at 723 (citation omitted). An agency may not seize—nor be given—the unbounded power to decide, for example, whether to criminalize physician-assisted suicide or to require all American workers to get a vaccine. *See Gonzales* v. *Oregon*, 546 U.S. 243, 262-263 (2006); *OSHA*, 595 U.S. at 117-118. Congress must make those decisions itself and must bound the agency's discretion over any ancillary issues with an object and a route.

2. Courts frequently apply proportional approaches in other constitutional contexts

Although any test based on proportionality will (and should) require more nuanced analysis than the current intelligible-principle test, this is familiar terrain. In other constitutional contexts, this Court routinely applies comparable tests. And while there will always be edge cases on which judges disagree, that has not disqualified other constitutional guarantees from enforcement.

Examples abound where this Court has imposed proportional or multi-tiered analyses to evaluate constitutional claims:

- The constitutionally required method for appointing an officer turns in part on the significance of the power the officer wields. When evaluating whether someone is an officer subject to the Appointments Clause, courts ask whether an individual "exercise[s] significant authority." *Lucia* v. *SEC*, 585 U.S. 237, 245 (2018). And when distinguishing between inferior and principal officers, the Court looks to several factors, including whether the officer has final decision-making authority. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 13-14 (2021).

- Under the Fourth Amendment, the applicability of the warrant requirement turns in part on the interests of the government in conducting a search and the interests of private parties in the property being searched. For example, a warrant is not required when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *Lange* v. *California*, 594 U.S. 295, 301 (2021) (citation omitted).
- For procedural due process claims, courts weigh the strength of the asserted private and governmental interests alongside "the risk of an erroneous deprivation" and the "probable value" of additional procedures. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Where the private interest "weigh[s] heavily," the risk of error is "unacceptabl[y]" high, and requiring additional procedures "creates no significant administrative burden," more process is due. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 54-59 (1993).
- For claims under the First Amendment and Equal Protection Clause, some statutes are subject to "most exacting scrutiny," while others receive only "an intermediate level of scrutiny," or even rational-basis review, depending on the nature of the interest at stake. *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 642 (1994) (First Amendment); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-441 (1985) (Equal Protection).

The list could stretch on. As these examples illustrate, federal courts are capable of tailoring their analysis to some assessment of importance, and they are frequently

called upon to do so when deciding constitutional claims. There will no doubt be some hard cases in determining whether Congress has provided enough instruction to satisfy nondelegation concerns, just as there are hard cases under all of the doctrines above. But experience has proved that courts are comfortable applying such tests in the vast majority of cases. There is little reason to doubt that they can do so here. Nor is there any reason why the limitations enshrined in Articles I and II should be less deserving of this kind of nuanced analysis.

B. A Revitalized Nondelegation Doctrine Would Promote Constitutional Values

A shift from today's intelligible-principle test to a proportionality-centered approach will prompt modest additional work for litigants, courts, and Congress. But the Constitution requires that work, which in all events produces a net benefit to our system of government.

1. The intelligible-principle test is insufficient

As it is currently applied, the intelligible-principle test has failed to stand guard over the Constitution's separation of powers. This Court has never invalidated a congressional delegation since it began employing that test in the 1940s. *Gundy*, 588 U.S. at 162, 164 (Gorsuch, J., dissenting). As the United States correctly explains, the test is "not demanding" and has historically been satisfied so long as Congress "articulate[s] *any* policy or standard." Pet. 11 (citing *Gundy*, 588 U.S. at 146 (plurality op.)). Commentators agree that the test "has become so ephemeral and elastic as to lose

its meaning." David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985). Courts routinely find intelligible principles "where less discerning readers find gibberish." Lawson, *supra*, at 329.

The current intelligible-principle test suffers from other flaws, too. Because it allows for limitless delegations, it enables Congress to "skirt the hard choices," claiming all the credit and none of the blame for a law. David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 740 (1999). It also allows federal agencies to leverage old statutes to address novel policy issues in ways that were wholly unanticipated by the enacting Congress and would not receive support in the current Congress. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931, 1945 (2020). And it undermines "rule-of-law values" by depriving "ordinary people" of the ability to shape the content of the law through their elected representatives and instead burying the "law" in the depths of the Federal Register. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 337 (1999).

2. A proportional approach would better protect important constitutional values

Requiring Congress to provide more instruction on more significant questions would better preserve the constitutional design—pushing Congress to perform its legislative role while still allowing the Executive to exercise appropriate discretion. That approach would have several benefits, while avoiding some of the pitfalls of more exacting proposed nondelegation tests.

a. A revitalized nondelegation doctrine would foster political accountability. When Congress broadly delegates its legislative power, the people can no longer "readily identify the source of legislation or regulation that affects their lives." *Ass'n of Am. R.Rs.*, 575 U.S. at 57 (Alito, J., concurring). That, in turn, allows "[g]overnment officials [to] wield power without owning up to the consequences." *Ibid.* A meaningful nondelegation doctrine would prevent such a diffusion of accountability. It would "ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Indus. Union Dep't., AFL-CIO* v. *Am. Petrol. Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). Questions of *how* the agency must act would remain in Congress's hands—subject to a public process with the constitutional checkpoints of bicameralism and presentment—instead of allowing each agency to quietly choose its own path.

A revitalized nondelegation doctrine would also "protect liberty." *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). "[T]he separation of powers is designed to preserve the liberty of all people." *Collins* v. *Yellen*, 594 U.S. 220, 245 (2021); *see Morrison* v. *Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). The Framers carefully structured the Constitution to separate the lawmaker from the executive official and the judge, recognizing that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *The Federalist No. 47*, *supra*, at 251 (James Madison) (citation omitted). Allowing unchecked delegations on signifi-

cant questions subverts the Framers' design and increases the risk that a supercharged Executive could run rampant over individual freedoms.

Finally, a revitalized nondelegation doctrine would promote federalism. "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). When that carefully calibrated allocation is ignored, agencies can run roughshod over States' traditional authority. *See e.g., Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (explaining that federal eviction moratorium "intrudes into an area that is the particular domain of state law: the landlord-tenant relationship"); *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (reasoning that defining federally regulated "navigable waters" to include "sand and gravel pit[s]" would "result in a significant impingement of the States' traditional and primary power over land and water use"); *Sackett* v. *EPA*, 598 U.S. 651, 679-680 (2023) (again rejecting broad agency interpretation of "navigable waters" and leaving States with greater leeway to regulate land and water use).

b. At the same time, a proportional approach avoids the pitfalls of an overzealous nondelegation approach, which could inundate Congress with endless minutiae. More extreme alternatives might prohibit the Executive from issuing rules based on any sort of "policy judgment," Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & Liberty 718, 781 (2019), or from exercising "*any* policymaking discretion" when issuing "rules that regulate the private rights of individuals in the domestic

sphere," Michael B. Rappaport, *A Two Tiered Categorical Approach to the Nondelegation Doctrine,* in *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* 156, 156-157 (Peter J. Wallison & John Yoo eds., 2022). Those categorical rules would hamstring the Executive, depriving it of its constitutional authority to make discretionary decisions.

A flexible and proportional approach to nondelegation is far superior. It leaves Congress with the option of giving authority to the Executive on most questions so long as it provides sufficient instruction—as Congress did at the Founding and often still does today. Indeed, the funding mechanism for the Universal Service Fund may very well satisfy a revitalized and proportional nondelegation doctrine, given the detailed instructions that Congress provided to the FCC in the relevant statute. *See, e.g.*, 47 U.S.C. § 254(b) (directing FCC to "base policies for the preservation and advancement of universal service" on certain principles); *id.* § 254(c) (instructing FCC to consider specified criteria in determining which services are supported by universal-service support mechanisms); *id.* § 254(d) (providing that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service"); *id.* § 254(e) (stating that carriers may receive support only "sufficient to achieve" the

purposes of universal service).[3] The key point is that the nondelegation doctrine does not exist to minimize the Executive or to "stop the wheels of government" altogether. *Field*, 143 U.S. at 694. It exists to keep each branch within its constitutionally prescribed role.

* * *

The Framers believed that the Legislature would "predominate[]" among the three branches, and that the "great security against a gradual concentration of the several powers in the same department" would be that each would have the "constitutional means and personal motives to resist encroachments of the others." *The Federalist No. 51*, *supra*, at 268-269 (James Madison). They likely did not foresee that the Legislature would willingly try to hand over significant power to the Executive. But even if they had, they would not have worried: they knew that the Judiciary would "keep[] [the] other[s] in their proper places." *Id.* at 267. This Court has the opportunity to restore the boundary between the Legislative and Executive Branches by embracing an administrable nondelegation test that is consistent with the text and structure of the Constitution, early Supreme Court precedents, and the approach of early Congresses. It should not let that opportunity pass.

---

[3] The Chamber takes no position on this issue. Neither the parties nor the Fifth Circuit had an opportunity to address the Universal Service Fund under this framework. Consistent with its usual practice, this Court should remand to the court of appeals to apply the appropriate test in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

MARIA C. MONAGHAN
CHRISTOPHER J. WALKER
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
ELIZABETH M. FRITZ
PETER L. BYRNE
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

Counsel for Amicus Curiae

JANUARY 16, 2025