Nos. 24-354 & 24-422

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

SHLB COALITION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

BRIEF OF JULIAN DAVIS MORTENSON AND NICHOLAS BAGLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Julian Davis Mortenson and Nicholas Bagley are professors at the University of Michigan Law School. Mortenson is a specialist on the history of executive authority and the separation of powers. Bagley is a leading scholar in administrative law. They are the co-authors of *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021), a leading article examining Founding-era constitutional principles regarding legislative delegations of authority, and *Delegation at the Founding: A Response to the Critics*, 122 Colum. L. Rev. 2323 (2022).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Telecommunications Act of 1996, the Federal Communications Commission must establish several internet-access programs that fund specific types of services, for specific types of recipients, financed by specific types of commercial entities, guided by specific principles, after consideration of specific factors. *See* 47 U.S.C. § 254. Despite these constraints on the purpose and scope of the delegation, the Fifth Circuit expressed "grave concerns" about the constitutionality of Congress's decision to give the FCC even this limited discretion to implement its statutory mandate.

The restrictions on delegation articulated by the decision below are at odds with the Constitution's history and original meaning. As originally understood,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

the Constitution did not limit delegations of policy-making authority to administrators under duly enacted laws. And from the beginning, Congress has delegated remarkably open-ended discretion to the executive branch to implement such laws.

Indeed, delegation was familiar and uncontroversial at the Founding. Prevailing legal and political tenets posed no barrier to delegation, and legislatures across the Anglo-American world had long delegated broad rulemaking power to the executive, ministers, and other agents. These agents were not regarded as impermissibly "making law" when they exercised discretion within the confines of a statutory mandate. Some writers maintained that legislatures could not *surrender* their power by irrevocably transferring it elsewhere, a stance that reflected ascendant theories about the social contract. But none of those discussions had anything to do with statutory delegations of rulemaking power to administrators, exercised under the supervision and control of the legislature. Consistent with theory and precedent, delegations were pervasive in America both before and after independence, including in states that adopted a separation of powers.

The Constitution's vesting of legislative authority in Congress was not meant to prevent Congress from delegating. Nothing in the constitutional text or structure requires such a limit, so long as Congress retains ultimate control over the legislative process. And the debates surrounding the Constitution's drafting and ratification betray no concern about legislative delegations or any notion that the Constitution would restrict them—much less agreement on the contours of what such a restriction would entail.

Congressional practice in the early Republic decisively refutes any shared understanding that the

Constitution prohibited delegation. In statute after statute, the First Congress enacted sweeping delegations of policymaking authority over the most crucial issues facing the young nation, among them trade restrictions, patent rights, property taxation, refinancing the national debt, regulating the federal territories, embargoes, quarantines, search-and-seizure authority, pensions, raising armies, and calling up the militia. These delegations routinely granted vast discretion to resolve critical policy questions with little or no guidance. And they repeatedly permitted the executive branch to devise rules that intruded on private rights. Simply put, broad delegations of authority were ubiquitous in the early Republic.

Modern proponents of a strict nondelegation doctrine cannot account for this evidence, and their efforts to explain away the historical record hinge on convenient but anachronistic distinctions: Congress may delegate questions involving public rights but not private rights, "overlapping" powers but not "core" legislative powers, the authority to "fill in the details" but not to resolve "important subjects." These distinctions, however, are modern inventions. No one articulated them in the Founding era or invoked them to justify early congressional delegations. Indeed, the few legislators who raised delegation concerns in the 1790s did so precisely in the context of bills addressing public rights, foreign affairs, and the military—the very topics that some commentators now claim are exempt from delegation restrictions. Modern attempts to craft a more stringent nondelegation doctrine, therefore, contradict not only early congressional practice but even the failed contemporaneous *objections* to that practice.

As for those failed objections, sporadically raised by a small group of legislators in later Congresses, they undermine rather than support the existence of

any shared commitment to nondelegation. Constitutional arguments against delegations were almost never voiced, were typically peripheral to the relevant debates, and repeatedly failed. Rather than reaffirming accepted principles, these arguments were innovative attempts to create constitutional restrictions not previously recognized. At best, early discussions suggest that some individuals wanted to craft limits on Congress's delegation authority. But far from revealing a preexisting consensus on the matter, the novelty and failure of those arguments show the opposite.

Given the vast historical record from the Founding era, it should be easy to identify concrete, consistent evidence of widely understood limits on legislative delegations—if any existed. Yet proponents of a newly invigorated nondelegation doctrine have come up short. That may explain why their own prescriptions differ so radically from each other. *See* Mortenson & Bagley, *Response*, at 2346-47. Original meaning provides no basis for the strict nondelegation doctrine envisioned by the court below.

ARGUMENT

I. Delegation Was Uncontroversial at the Founding.

In the eighteenth century, legislative power was understood to be inherently delegable. The legislature's authority had already been delegated by the people. *See* James Wilson, *Lectures on Law*, ch. V (1791), *reprinted in* 1 *Collected Works of James Wilson* 412 (Kermit L. Hall & Mark David Hall eds., 2011). And the idea that delegated authority could not be further delegated, *see* Pet. App. 55a (No. 24-354) (citing the maxim *delegata potestas non potest delegari*), was entirely absent from discussions of public law and

constitutional doctrine. *See* Mortenson & Bagley, *Delegation*, at 296-98.

Indeed, British theory placed no limits on statutory delegations of policymaking authority to agents outside the legislature. *See id.* As the Whig hero Algernon Sidney observed, although the King alone could not "have the Legislative power in himself," Parliament could choose to give him the "part in it" that was "necessarily to be performed by him, as the Law prescribes." *Discourses Concerning Government* 459 (1698).

This theory was amply reflected in practice. Parliament had a long tradition of delegating legislative authority to the Crown, ministers, and other agents, *see* Cecil T. Carr, *Delegated Legislation: Three Lectures* 48-56 (1921), including broad rulemaking authority over commerce, environmental management, welfare and vagrancy policy, and other matters. *See* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 19-27 (2016), https://ssrn.com/abstract=2802784 (discussing "prominent instances of rulemaking power accorded to administrators by Parliament from the sixteenth century onwards").

The only theoretical limit to these practices voiced by (some) writers was that a legislature had to retain ultimate control—just as the people retained control over the legislature to which they made the initial delegation. *See* Henry St. John, Viscount Bolingbroke, *A Dissertation upon Parties* 209 (2d ed. 1735) ("the People of Great Britain *delegate, but do not give up,* trust, *but do not alienate* their Right and their Power" (emphasis added)); Edmund Burke, *Reflections on the Revolution in France* 294 (1790) ("the House of Commons cannot *renounce* its share of authority," because "the

constitution[] forbids ... such *surrender*" (emphasis added)).

What was prohibited, in other words, was the *alienation* of legislative power, which would sever the connection with the authority of the people. As John Locke argued, "the legislative [body] 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." *Two Treatises of Government*, bk. II, ch. XI, § 141 (1690) (emphasis added). Notwithstanding invocations of this passage by modern commentators, Locke was *not* discussing delegations of authority to administrators. He was instead attacking the claim—a tenet of royal absolutism—that the people had irrevocably *alienated* legislative authority to their sovereign. *See* Mortenson & Bagley, *Delegation*, at 308-09 (surveying the arguments Locke was repudiating); *cf.* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 153 (2017) (claiming only that Locke's concerns "apply equally to delegation"). Moreover, there is no evidence that Founding-era Americans misinterpreted Locke as targeting administrative delegations. *See* Mortenson & Bagley, *Response*, at 2342.

Indeed, precious little among the writings that influenced the Founders concerns the legislature's ability to delegate policymaking authority. Those writings instead speak in broad strokes about separating government powers to prevent wholesale consolidation. Montesquieu, for example—as James Madison later explained—warned only of the "*whole* power of one department" being wielded "by the same hands which possess the *whole* power of another department." *The Federalist No. 47*, at 325-26 (J. Cooke ed., 1961). That danger could arise "if the king ... possessed also *the*

complete legislative power," but there was no such threat as long as the king "cannot of himself make a law." *Id.* at 326 (emphasis added).

Consistent with British precedent and contemporary theory, delegation was a persistent feature of post-independence state governance in America, including in states that adopted a formal separation of powers. *See* Mortenson & Bagley, *Response*, at 2340-41 n.82. For instance, although New York's constitution provided that "the supreme legislative power … shall be vested in … the legislature," N.Y. Const. of 1777, art. II, that legislature nonetheless delegated policymaking discretion to the executive branch, *e.g.*, 1784 N.Y. Laws ch. 57 (delegating authority to quarantine vessels for "such Time and in such Manner as the Governor … shall think proper to direct"). Virginia's constitution likewise kept the "legislative, executive, and judiciary" departments "separate and distinct, so that neither exercise the powers properly belonging to the other." Va. Const. of 1776, ¶ 4. Yet the legislature "delegated many special powers" to the governor and Council of State, including the power to "maintain fair prices." Session of Virginia Council of State (Jan. 14, 1778) (editorial note), https://founders.archives.gov/documents/Madison/01-01-02-0065; *see also* 1785 Va. Acts ch. 2 (delegating authority over harbor regulations); 1785 Va. Acts ch. 74 (delegating authority to restrict tavern licenses).

Collectively, the states "expressly delegated" many legislative powers to the Continental Congress. Articles of Confederation of 1781, art. II. That body, in turn, further delegated legislative authority on a plethora of subjects to committees, boards, and officers. *See* Mortenson & Bagley, *Delegation*, at 303-04.

II. Broad Delegations of Authority Are Consistent with Constitutional Text, Structure, and History.

Given the widespread acceptance of delegations in the Founding era, the Constitution would have broken stunning new ground if it introduced restrictions on delegation. But constitutional text and structure do not compel such restrictions, and there is no evidence that the Framers collectively read such restrictions into the document.

The Framers divided power among three branches to prevent the tyranny of consolidating "all powers ... in the same hands." *The Federalist No. 47*, *supra*, at 324. That separation, however, does not necessarily imply limits on Congress's ability to delegate. While Article I vests Congress with "[a]ll legislative Powers herein granted," U.S. Const. art. I, § 1, "there is nothing in the Constitution that specifically states ... that Congress may not authorize other actors to exercise legislative power," Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335 (2002).

Rather, the text is "silent on the question whether or to what extent legislative power may be shared." Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2127 (2004). And "even if Congress cannot by statute confer power that is 'legislative' on others, the text does not tell us how to discern when that has happened." Nicholas R. Parrillo, *Supplemental Paper to "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power,"* at 3 (May 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902.

The question, in short, is not "whether the legislative power is vested exclusively in the Congress," but

"whether a statutory grant of authority can ever violate the constitutional allocation," and if so, in what circumstances. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1729 (2002). "The Vesting Clause does not address that dispute." *Id.*

The word "legislative" does not resolve the matter. Although it has been suggested that formulating "generally applicable rules of private conduct" is necessarily an "exercise of legislative power," *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment), the Founding-era passages typically cited for that proposition do not address the issue. Nearly all references to "legislative power" in these sources merely describe it as "the power to make laws, or something to that effect," Merrill, *supra*, at 2124, without discussing rulemaking under a duly enacted law.

Moreover, the Founders did not regard "legislative" and "executive" powers in such a categorical fashion, but instead in relational terms. The legislative power was "no more than the general will of the state," expressed though authoritative edicts. 1 Charles de Secondat Montesquieu, *The Spirit of Laws*, *in The Complete Works of M. de Montesquieu* 201 (London, 1777). Executive power was simply the authority to carry out projects defined by a prior exercise of legislative power. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1221-38 (2019). The same government action could be described as either "legislative" or "executive" depending on the actor. Thus, Congress was often described as "an executive body" in relation to the people. *A Democratic Federalist*, Pa. Herald, Oct. 17, 1787, *reprinted in* 13 *Documentary History of the Ratification of the Constitution* 387

(John P. Kaminski et al. eds., 2009). And rulemaking under a statute was described as "executive" in relation to the legislature's instructions. *See* Mortenson & Bagley, *Delegation*, at 313-23.

In the end, all that can safely be inferred from constitutional text and structure is that Congress may not *alienate* its legislative powers—the only outcome inconsistent with the vesting clauses.

Indeed, among the vast records of the Constitutional Convention, the ratification debates, and *The Federalist*, there is "remarkably little evidence" that the Founders envisioned any limit on delegation. Posner & Vermeule, *supra*, at 1733. After all, "the Framers' principal concern was with legislative aggrandizement," not "grants of statutory authority to executive agents." *Id.* at 1733-34. By one count, the secondary literature "claims to have found thirteen references to legal limits on legislatures' capacity to delegate in American discourse from 1774 through 1788." Parrillo, *Supplement*, at 8. These "scattered" references, mostly "a paragraph or less," were "rejected by majorities of their audiences, or involved types of delegations categorically different from those that Congress makes to an agency." *Id.*

Given the abundance of historical material documenting the Constitution's drafting and ratification, it should be easy to find clear evidence that Article I's vesting clause was understood to limit Congress's power to delegate. Instead, "[t]he overall picture is that the founding era wasn't concerned about delegation." Posner & Vermeule, *supra*, at 1734.

Because delegation "was not an object of sustained constitutional discussion," Parrillo, *Supplement*, at 7, modern critics of delegation rely on dubious inferences from murky scraps of evidence. For instance, some

highlight the Constitutional Convention's consideration of an early proposal empowering the executive "to execute such other powers not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature." 1 *The Records of the Federal Convention of 1787*, at 67 (Max Farrand ed., 1911). This rejected proposal, however, was *separate* from the executive's "power to carry into effect the national laws." *Id.* And the sparse record of this episode leaves entirely unclear what the proposal actually meant and whether its rejection implies anything about delegation in the context of implementing laws. If this is the best evidence of the Framers' shared commitment to nondelegation, it speaks volumes.

III. The First Congresses Routinely Delegated Vast Discretion to the Executive Branch.

Early congressional enactments offer "contemporaneous and weighty evidence of the Constitution's meaning." *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416, 432 (2024) (quotation marks omitted). And they are devastating to the case for a strict nondelegation doctrine.

In the Republic's first decade, Congress routinely delegated virtually unguided policymaking discretion over the most pressing issues facing the nation. These statutes conveyed authority over private rights and interests that went far beyond filling in details, finding facts, or organizing public structures. Almost as telling as the enactment of these statutes is the dearth of objections to them on delegation grounds, despite pervasive constitutional debate in the early Congresses.

A. Delegations of Authority by the First Congress

1. Regulating Commerce with Native American Tribes

Relations with Native Americans preoccupied the early Republic, *see* Gordon S. Wood, *Empire of Liberty* 114 (2009), and Congress alone was given the power to "regulate Commerce … with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3. But the First Congress delegated that power to the executive branch wholesale, giving the president free rein to devise the rules that regulated such commerce.

Specifically, Congress prohibited anyone from conducting "any trade or intercourse with the Indian tribes" without a license. Congress then gave the president complete discretion over the licensing scheme, authorizing "such rules, regulations and restrictions, as ... shall be made for the government of trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

The statute offered nothing—not even an "intelligible principle"—to guide the content of the president's rules, although those restrictions would "govern[]" any person receiving a license "in all things touching the said trade and intercourse." *Id.* Congress gave the president even *more* discretion regarding "the tribes surrounded in their settlements by the citizens of the United States," *id.*, authorizing him to waive the license requirement whenever he "deem[ed] it proper," *id.*

"This was indeed a broad statute that delegated authority to regulate private conduct," "giving the Executive complete discretion to decide whether, to whom, and why to grant such licenses." Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490,

1543 (2021). Taking full advantage of this discretion, President Washington established a host of regulations that specified *who* could trade, *what* items could be traded, and *where*. *See* Mortenson & Bagley, *Delegation*, at 341. Yet no one raised anything resembling a nondelegation objection to this conferral of unguided rulemaking authority.

Attempts to explain away this legislation are unavailing. While the president has military and diplomatic authorities, the power delegated here was within Congress's exclusive legislative wheelhouse. It governed the private commercial activity of Americans within the boundaries of their own states. And even as applied in the federal territories, or to "cross-border" conduct, the idea that legislative power could be delegated more freely in these contexts is merely a *post hoc* rationale. No one at the time suggested such a thing. *See* Mortenson & Bagley, *Response*, at 2357-58.

2. Exercising Police Power in the Federal Territories

Congress is empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. One of Congress's first acts was to delegate this power—a legislative authority assigned to Congress alone—by handing federal officers the entirety of its police power over federal lands. Congress did so by readopting the Northwest Ordinance, which authorized territorial officials to establish "such laws of the original States, criminal and civil, *as may be necessary, and best suited* to the circumstances of the[ir] district." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 (emphasis added).

The statute, in short, delegated standardless discretion to craft the entire body of laws for the

territories, including restrictions on private conduct. Territorial officials, not Congress, decided what were "needful" rules and regulations.

Notably, Congress made several changes to the Northwest Ordinance "to adapt [it] to the present Constitution," Act of Aug. 7, 1789, 1 Stat. at 51, demonstrating that Congress considered whether the legislation ran afoul of the new constitutional structure. But Congress made only certain organizational changes, leaving intact the Ordinance's sweeping delegation of substantive rulemaking authority. *See* Mortenson & Bagley, *Delegation*, at 335.

Territorial officials exercised these broad powers, adopting measures ranging from the regulation of taverns to the probate of wills, from liability for trespassing animals to the suppression of gambling. *Id.* If the Founders allowed a person to be publicly whipped for violating rules Congress never enacted—as they did here, for instance, for petty larceny, *see id.*—it is difficult to claim they were against delegations of authority over "private rights."

Whenever early Congresses created new territories, they routinely empowered their officials to adopt such rules. *Id.* at 336. No one protested that these officials were unconstitutionally making laws. Nor did anyone justify these measures by asserting that Congress had more leeway to delegate its power to regulate federal property than its other powers.

3. Refinancing the National Debt

"Delegation was the First Congress's solution to what was arguably *the* greatest problem facing our fledgling Republic: a potentially insurmountable national debt." Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81, 81 (2021). Congress has the power "to pay the Debts …

of the United States" and to "borrow Money on the credit of the United States." U.S. Const. art. I, § 8, cl. 1, 2. To help pay off the nation's immense foreign debt, Congress delegated those powers to the executive, with little guidance.

Specifically, Congress authorized the president to borrow up to $12 million in new loans, Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 138, and to make other "contracts respecting the said debt *as shall be found for the interest of the [United] States*," *id.* (emphasis added). Twelve million dollars was an immense sum—equaling approximately $1.286 *trillion* today. Chabot, *supra*, at 124.

The statute left key questions about the implementation of this mandate to the president's complete discretion. In effect, Congress delegated to the president the power to restructure the nation's foreign debt on terms that he thought best, with parties he thought best, under conditions he thought best. *See* Mortenson & Bagley, *Delegation*, at 344-45. The only limit was a fifteen-year cap on the life of any restructured loans. Act of Aug. 4, 1790, § 2, 1 Stat. at 139.

The First Congress also delegated broad policy-making authority to refinance the domestic debt. It vested this authority in the president and the other members of a body known as the Sinking Fund Commission. *See* Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186-87. The president and the commission could purchase debt "in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act." *Id.*

Thus, the entire responsibility for reducing the public debt was vested in a commission given no meaningful guidance. Congress essentially instructed the commission to set national fiscal policy as it saw best.

As Madison said, the borrowing power alone was a delegation of "great trust," involving the "execution of one of the most important laws." 12 *Documentary History of the First Federal Congress of the United States of America* 1349, 1354 (Linda Grant DePauw et al. eds., 1972).

The debt legislation prompted one congressman to question the delegation's permissibility. *See id.* at 1349 (Rep. Smith) ("Congress [is] vested with the power of borrowing money. The question is whether [it] can delegate that power to [the] President."). But in support of the delegation, other congressmen emphasized "the President's general constitutional power to execute laws passed by Congress," while still others noted that a statutory limit on the amount to be borrowed meant that Congress was delegating "*less than* its whole borrowing power." Chabot, *supra*, at 119. "Much of the debate acknowledged that the law would award great discretion to the Executive Branch." *Id.*

4. Granting Patent Rights

To foster commercial innovation and cultivate the nation's economy, the Constitution empowered Congress to secure to authors and inventors "the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

The First Congress promptly delegated this crucial power over the nation's commercial life to a three-member board of executive officials, allowing them to grant patents of up to fourteen years. Congress's only guidance was that the officials must "deem the invention or discovery sufficiently useful and important." Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110. Once a patent was granted, all other Americans were deprived of the "right and liberty of making, constructing, using and vending" the invention or discovery. *Id.*

Patentees could sue infringers and recover damages. *Id.* § 4, 1 Stat. at 111.

In other words, Congress left three executive officials to decide for themselves what counted as "sufficiently useful and important" to warrant a legally enforceable monopoly—a mandate that "certainly leaves a lot of discretion" to "alter the rights of private persons." Wurman, *supra*, at 1548. In exercising this discretion, the patent board was "left almost entirely to its own devices." Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. Marshall L. Rev. 269, 280 (1995). It crafted substantive and procedural standards that were nowhere to be found in the statute. *See* Mortenson & Bagley, *Delegation*, at 339.

While some commentators dismiss this legislation as concerning only public privileges, the board's policies for granting exclusive patents determined the scope of private rights. *E.g.*, Chabot, *supra*, at 142-46 (describing the board's resolution of steamboat technology questions that "rendered ... inventors' interests in existing state patents worthless"). Moreover, there is no indication that anyone believed such distinctions mattered to the question of delegation. *See* Mortenson & Bagley, *Response*, at 2357.

5. Remitting Penalties for Customs and Maritime Commerce Violations

Nearly all the early federal government's income came from customs duties, and Congress accordingly established a detailed system of customs enforcement. Having done so, however, Congress gave the executive branch the "authority to effectively rewrite the statutory penalties for customs violations," delegating "Congress's own authority to determine what financial punishments the government would impose on private individuals for violations of the law." Kevin Arlyck,

Delegation, Administration, and Improvisation, 97 Notre Dame L. Rev. 243, 306, 249 (2021).

Under the Remission Act, if the Treasury Secretary concluded that a violator acted without "intention of fraud," he could impose as much or as little of the penalty as he "deem[ed] reasonable and just." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23. No further standards were prescribed, leaving the Secretary to develop policies for determining a violator's intent and choosing the appropriate penalty. There was no appeal from the Secretary's decisions.

Congress "repeatedly reauthorized the Act on a temporary basis, and it was subject to renewed challenge—including on nondelegation grounds—before finally becoming permanent in 1800." Arlyck, *supra*, at 7; *see id.* at 27 (describing one congressman's failed nondelegation objection).

As Joseph Story later wrote, the "power to remit penalties and forfeitures [was] one of the most important and extensive powers" of the government, which could "be exercised only in the cases prescribed by law." *The Margaretta*, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815) (Story, C.J.). The discretion the Act conferred was not a matter of mere factfinding. Story contrasted this discretion with the "[v]ery different" terms of another statute, under which remission was "mandatory ... where the facts of the cases are brought within the statute." *Id.* ("If he is satisfied of the existence of such facts, he has no further discretion, but is bound to remit."). In other words, the Remission Act "allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is 'unfair' or 'unnecessary.'" *Am. Railroads*, 575 U.S. at 85 (Thomas, J., concurring in the judgment).

6. Other Delegations by the First Congress

In many other areas, Congress likewise delegated broad policymaking authority to the executive branch, with little or no guidance, and with barely (if any) constitutional objections being raised.

The First Congress repeatedly authorized executive officers to invade private property without a warrant and with little or no direction. To enforce taxes on domestic distilled spirits, Congress empowered officers to enter "all ... houses, store-houses, [and] warehouses" in daytime to examine "the quantity, kinds and proofs of the said spirits therein contained." Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206. Congress said nothing about the circumstances in which officers should employ this power.

Similarly, to enforce customs duties, port inspectors could board arriving ships "to examine the cargo or contents" and "perform such other duties according to law, as they shall be directed," Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164, while other officers could board "every ship or vessel" approaching the United States "to search and examine the same and every part thereof," *id.* § 64, 1 Stat. at 175. Again, Congress laid down no meaningful guidance about the circumstances in which ships should be searched—effectively permitting the executive branch to craft those rules.

Although legislatures traditionally decided who should be placed on pension lists, Congress authorized the president to identify disabled military members to include on "the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President." Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121. Apart from limiting the size of awards, Congress offered little guidance.

For wounded Revolutionary War veterans, Congress delegated even more flexibility—specifying only that pensions begun under the Articles of Confederation should continue "under such regulations as the President of the United States may direct." Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95. No guidance was given concerning the content of these "regulations." And although *other* aspects of this pension regime garnered constitutional scrutiny, no one raised a nondelegation objection. *See* Mortenson & Bagley, *Delegation*, at 343-44.

The First Congress also authorized the president to call into service whatever portions of the state militias "he may judge necessary" for "protecting the inhabitants of the frontiers." Act of Apr. 30, 1790, § 16, 1 Stat. at 121. That is, Congress authorized the president to call up any state militias he pleased, at any time, in any numbers, anywhere on the frontier, so long as he acted in furtherance of Congress's general goal.

This list could go on. Sweeping delegations of policymaking discretion were anything but rare in the First Congress—they were routine.

Notably, the same House of Representatives that passed these statutes also approved a constitutional amendment stating in part that the executive branch "shall not exercise ... the power vested in the Legislative" branch. 1 Annals of Cong. 789 (1789). The House does not seem to have thought that the executive branch impermissibly "exercise[d]" Congress's "Legislative" powers, *id.*, when it wielded the authority to fashion policies under a statute.

B. Delegations of Authority by Later Congresses

1. Embargoes

Congress has the power to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Delegating this power, Congress gave the president unilateral and largely unfettered authority to lay an embargo "on all ships and vessels in the ports of the United States" whenever, "in his opinion, the public safety shall so require" and Congress was out of session. Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372. The president could exercise this power—potentially keeping every ship in the nation at dock for months—"under such regulations as the circumstances of the case may require." *Id.* Given the "magnitude of maritime commerce," this was "a remarkable delegated power" over the national economy. Nicholas R. Parrillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress's Delegation of Power to Lay Embargoes in 1794*, 172 U. Pa. L. Rev. 1803, 1808 (2024).

An especially clear example of delegating power to issue binding rules for private persons, the statute was entirely open-ended, beyond requiring that the president perceive a threat to "public safety." It did not specify the target, the trigger circumstances, any substantive limitations, any procedural safeguards, or even a particular purpose. Yet no constitutional objection was recorded to the delegation. Instead, congressmen argued that speed and secrecy meant that deciding whether and how to impose an embargo was "better performed" by the president than by Congress. 4 Annals of Cong. 503 (1794) (Rep. Sedgwick).

2. Quarantine Power

The nation's first quarantine law empowered the president "to aid in the execution of quarantine, and also in the execution of the health laws of the states ... *in such manner as may to him appear necessary*." Act of May 27, 1796, ch. 31, 1 Stat. 474, 474 (emphasis added). That mandate "permitted the Executive to make trade-offs between competing policy goals." *Am. Railroads*, 575 U.S. at 79, 85 (Thomas, J., concurring in the judgment). But while the bill provoked fierce debate about the scope of the federal government's commerce power, *see* Mortenson & Bagley, *Delegation*, at 356-58, there was no objection concerning delegation.

3. Direct Taxation

In 1798, Congress delegated broad, coercive authority under its power to levy a "direct tax," Act of July 9, 1798, ch. 70, § 8, 1 Stat. 580, 585, subjecting every property owner in the nation "to federal rulemakings that could determine their tax liabilities," Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1302 (2021). Having established a system to estimate private real estate values, Congress empowered federal boards "to revise, adjust and vary" these valuations "as shall appear to be just and equitable." Act of July 9, 1798, § 22, 1 Stat. at 589. The statute did not define "just and equitable," requiring only that the relative valuations of properties within a district not be altered. *Id.*

The boards used their authority in a "dramatic and sweeping" fashion. Parrillo, *Assessment*, at 1306. Although their determinations decided the amounts that

Americans would owe, with no opportunity for review, no one objected on delegation grounds. *Id.* at 1312.

The Fifth Circuit dismissed the boards' work as mere factfinding. But deciding how to appraise property values was a subjective, politically fraught question that pitted regional interests against one another. Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue with My Critics*, 71 Drake L. Rev. 367, 376 (2024). Valuation required "selection among divergent possible definitions of value and methods for determining it (on which Congress in 1798 deliberately gave no direction)." *Id.* Despite the Fifth Circuit's eye-of-the-beholder claim that Congress made all the "important" policy decisions itself, valuation "was recognized by contemporaries as uncertain and contested, and was the object of intense conflict." *Id.* Like the other delegations described above (which the Fifth Circuit did not discuss), this one involved significant policymaking discretion.

IV. Attempts to Reconcile Early Statutes with Modern Proposals for Strict Delegation Limits Hinge on Distinctions that the Founders Rejected.

Proponents of a strict nondelegation doctrine often concede that the statutes discussed above conferred broad policymaking authority. To explain this evidence away, they argue that these statutes all fall within categories in which nondelegation limits supposedly are diminished or nonexistent. Among them: (1) topics like military and foreign affairs that overlap with presidential power, (2) government operations or benefits, as opposed to the regulation of private conduct, and (3) mandates to fill in details, as opposed to resolving "important subjects."

These exceptions are modern inventions, attempts at *post hoc* rationalization unmoored from history. No one made these distinctions in the Founding era or invoked them to justify early delegations. On the contrary, even the few congressmen who raised delegation concerns in this period *rejected* these distinctions. And without these untenable carveouts, it is impossible to reconcile Congress's early practice with a robust non-delegation doctrine.

A. Private Rights

Some have argued that delegation is prohibited only where it implicates private rights and conduct. Text and history foreclose that notion—decisively.

To begin, this limitation cannot be reconciled with the text of Article I. The "legislative Powers" it confers, U.S. Const. art. I, § 1, include all forms of sovereign authority, affecting both public and private rights and drawing no distinction between them. *Id.* art. I, § 8. It is simply not true, therefore, that "[w]hen it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting).

Even if constitutional text permitted it, there is no historical support for this definition of legislative power. *See, e.g.*, Parrillo, *Supplement*, at 5 (dissecting each citation offered for this definition in the *Gundy* dissent); Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "Legislative (adj.)" solely as "Giving laws; lawgiving"). Moreover, no one has identified a *single* statement from the Founding era suggesting that, when it came to limits on delegation, laws regulating private conduct were viewed any

differently than other laws. *Amici* are similarly unaware of any such evidence.

Indeed, the historical record refutes claims that any such distinction mattered to the Founders. The most substantial debate over delegation occurred in the Second Congress, regarding a proposal to allow the president to decide the routes of federal post roads. *See infra* at 30. That proposal involved government operations and benefits—not "rules of conduct governing future actions by private persons." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting). "If there had been a consensus view that Congress could broadly delegate legislative authority to the executive when 'privileges' were at issue," the objections to the delegation "would have been pointless," and its supporters "would likely have invoked the exception, instead of defending the proposal on the ground they actually did." Arlyck, *supra*, at 294.

Meanwhile, Congress repeatedly delegated broad authority to fashion rules governing private conduct. *See supra* Part III. Yet these bills prompted few (or no) constitutional concerns, and none on the ground that authority over "private rights" could not be delegated.

B. Military and Foreign Affairs

Another effort to reconcile early legislation with a nondelegation rule rests on the idea that Congress may delegate discretion "over matters already within the scope of executive power." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260 (1985).

Again, no one articulated such a distinction in the Founding era. *See* Arlyck, *supra*, at 289-90 (debunking the few citations that have been suggested to indicate such a belief). The concept is instead a modern creation, tracing its roots to a twentieth-century

decision, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), which does not actually support it, *see id.* at 315 (upholding a delegation concerning trade with foreign nations but expressly not addressing whether a comparable domestic delegation would be valid).

The historical evidence that *does* exist demonstrates that the Founding generation recognized no such distinction. Most of the early objections to delegations were made *precisely* in the context of bills implicating the military or foreign relations: a 1794 bill allowing the president to raise troops, *see* Mortenson & Bagley, *Delegation*, at 361 n.471; a 1798 statute empowering the president to raise a provisional army, *id.* at 360-63; and the notorious Alien Act, *id.* at 364-66. Yet "in no case did proponents of the proposed legislation defend it on grounds of a delegation exception for military and foreign affairs." Arlyck, *supra*, at 291.

The facts are inescapable: "all known articulations of the nondelegation principle by federal lawmakers in the 1790s occurred in foreign, military, or non-coercive areas that today's nondelegation proponents consider exceptions to the doctrine." Parrillo, *Supplement*, at 13.

C. "Important Subjects"

Some have claimed that the Constitution distinguishes between "important policy decisions," which Congress must resolve, and "filling up details and finding facts," which Congress may delegate. *Gundy*, 588 U.S. at 174, 179 (Gorsuch, J., dissenting). This theory too lacks any basis in original meaning.

No evidence from the Founding era has been unearthed to support an "important subjects" theory. Even as Congress enacted statute after statute granting immense discretion on crucial issues of national

policy—and even as some lawmakers voiced reservations about certain delegations—limits on delegation were not discussed in terms of the subjective importance of the matters delegated.

Indeed, efforts to turn up evidence of an "important subjects" doctrine at the Founding backfire. Some, for example, have cited a single remark made in the Second Congress during the post roads debate, which seemed to suggest that the routes of the roads were more "important" than the locations of the post offices along them. 3 Annals of Cong. 230 (1791) (Rep. Livermore). But in the same breath, this speaker *foreclosed* any constitutional distinction based on importance: "the Legislative body being empowered by the Constitution 'to establish post offices and post roads,' *it is as clearly their duty to designate the roads as to establish the offices*." *Id.* at 229 (emphasis added).

Lacking supporting evidence from the Founding, proponents of an "important subjects" rule have seized on a passage from *Wayman v. Southard*, 23 U.S. 1 (1825). But this ambiguous *dicta* from a case decided decades after the Constitution's ratification does not supply the missing foundation for the rule.

To start, *Wayman* was not a nondelegation case; it was a federalism case, involving a statute that required federal courts to follow existing state court procedures, subject to their own alterations. The plaintiffs insisted that federal courts also had to follow newly adopted state procedures, and they further argued that allowing courts to alter those new procedures would give the courts legislative authority. *Id.* at 13-16. But *Wayman* did not resolve whether "the right of the Courts to alter the[ir] modes of proceeding" gave them impermissible legislative authority. *Id.* at 48. That issue "does not arise in this case," the Court explained, because "[t]he question really adjourned"

was whether newly enacted state laws could indirectly dictate federal court procedures. *Id.* The statute's reliance on state procedures meant that the plaintiffs' nondelegation argument proved too much: "If Congress cannot invest the Courts with the power of altering the modes of proceeding of their own officers, … how will gentlemen defend a delegation of the same power to the State legislatures?" *Id.* at 47-48.

As for *Wayman*'s suggestion that there are "important subjects, which must be entirely regulated by the legislature itself," the opinion offers no citation, no examples of what those might be, or even any indication of what qualities are relevant, saying only that the line distinguishing them "has not been exactly drawn." *Id.* at 43. Those tentative musings betray the *absence* of any widely shared principles concerning delegation limits even well into the nineteenth century. *See id.* at 46 (calling the topic "a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily"). Moreover, Marshall's comment "merely observed the importance of powers that were exclusively legislative," without proposing "that importance should be used as a standard." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1100 (2023).

The irrelevance of *Wayman*'s *dicta* is illustrated by this Court's approval, two years later, of a statutory delegation from the 1790s, which contained some of the only language that prompted nondelegation objections in that era. *See* Mortenson & Bagley, *Delegation*, at 360-62. Writing for a unanimous Court, Justice Story rejected any claim that Congress could not delegate decisions over raising the militia to the president. *Martin v. Mott*, 25 U.S. 19, 29 (1827) ("there is no ground for a doubt on this point"). He did so without citing *Wayman* or employing an "important subjects"

framework. *See id.* ("The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature.").

The reliance that nondelegation proponents have placed on *Wayman*—ambiguous *dicta* in a single decision more than three decades after the Constitution's ratification—only underscores the lack of Founding-era support for an "important subjects" rule.

V. The Post-Ratification Efforts of a Small Minority of Politicians to Create a Nondelegation Doctrine Were Unsuccessful.

Against the all-but-conclusive evidence of the statutes enacted in the nation's first decade, supporters of a strict nondelegation doctrine have pointed to discussions that took place in the House of Representatives during this period. Such discussions contain the only evidence of anyone in the Founding era suggesting constitutional limits on statutory delegations. These discussions, however, undermine rather than support the existence of any shared belief in delegation limits.

As discussed, the vast majority of the early statutes prompted no delegation objections, even as they handed off authority over some of the most important matters in the new Republic. Increasingly during the 1790s, delegation arguments popped up sporadically in legislative debates, raised by a small number of congressmen. These arguments, however, were voiced rarely, were almost always peripheral to the debate, and repeatedly failed. Moreover, they were typically vague and self-contradictory, as their opponents pointed out. Rather than revealing a broad preexisting consensus on delegation principles, the very novelty (and failure) of these arguments shows the opposite.

Take, for instance, a discussion in the Second Congress about legislation establishing a postal system—the most frequently cited example of an early nondelegation objection. In brief, lawmakers crafted a bill setting forth the towns through which the post roads would run. They rejected a proposal to leave the matter to the president. 3 Annals of Cong. 229, 241 (1791). In the preceding debate, however, no more than a handful of members invoked constitutional concerns about delegation. And far from indicating some shared understanding, these arguments "astonished" their opponents, *id.* at 235 (Rep. Barnwell), who pointed out their inconsistency with constitutional text, *id.* at 236 (Rep. Benson) (explaining that Article I made no distinction between "post offices and post roads," and yet the bill left the locations of the offices entirely up to the executive), and with precedent, *id.* at 232 (Rep. Bourne) (explaining that the delegation was similar to one concerning tax districts in a previous statute). *See* Mortenson & Bagley, *Delegation*, at 350-55.

Moreover, while this proposal was defeated, the enacted statute delegated unfettered discretion to designate the locations of *additional* post roads, as well as all post offices. *See* Act of Feb. 20, 1792, ch. 7, §§ 2-3, 1 Stat. 232, 233-34. That makes it difficult, if not impossible, to interpret the rejection of the earlier amendment as an endorsement of the constitutional objection. *See* U.S. Const. art. I, § 8, cl. 7 (giving Congress the power to "establish Post Offices *and* post Roads" (emphasis added)).

Nothing about the post roads debate suggests common acceptance of a nondelegation doctrine among the Founders—much less its nature or scope. *Cf.* Wurman, *supra*, at 1514 (claiming only that the "best reading" of the evidence "is that there probably was

some version of a nondelegation doctrine, although not everyone agreed on the principle's contours").

Later debates are no more helpful. Whether the subject was raising volunteer armies or summarily expelling noncitizens, constitutional arguments against delegation were always marginal and voiced by a small minority of congressmen, and they consistently failed. *See* Mortenson & Bagley, *Delegation*, at 360-66. They supply no foundation for an unwritten constitutional rule against delegation, much less the strict new limits envisioned by the Fifth Circuit.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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