No. 24-354

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

2. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund.

3. Whether the Commission violated the nondelegation doctrine by using the Administrator's financial projections in computing universal service contribution rates.

4. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to the Administrator violates the nondelegation doctrine.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Supreme power resides solely in the people. Through the Constitution, the people granted limited power to the government. The Constitution separates and vests the legislative, executive, and judicial powers in their respective branches to ensure a government that is both responsive and effective.

In Article I, the people conferred "*legislative* Powers" and "vested [them] in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

(emphasis added). Article I's additional separation of powers "forces Congress to exercise those 'Powers' through an elaborate process of enacting the same legal text in two legislative chambers and presenting the passed bill to the President for approval." Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 164 (2019).

The Convention of 1787 adopted the doctrine of separation of powers between the three branches "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect the separation of powers, the nondelegation doctrine, as traditionally understood, prohibits the transfer of "quintessentially legislative powers—the power to make laws—to actors outside the legislative branch." Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 Emory L.J. 417, 424 (2022). For "the legislative can have no power to transfer their authority of making laws, and place it in other hands." John Locke, *Second Treatise of Government* 75 (C.B. Macpherson ed., 1980). When Congress allows agencies or private parties to create rules and regulations with the effect of laws, Congress has abdicated the lawmaking function.

Some legislators and courts seem to treat the intelligent principle doctrine as permission to delegate rather than a restriction on delegation. But that is backwards. The Court should recognize that the nondelegation doctrine restricts delegation and honors the separation of powers.

Some members of the Court have explored alternatives to the intelligible principle test, see, *e.g.*, *Gundy* v. *United States*, 588 U.S. 128, 157–159 (2019) (Gorsuch, J., dissenting), to revive the nondelegation doctrine. For example, under the "Gorsuch-*Gundy*" test, Congress can only give power: "(1) to 'fill up the details'; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign nonlegislative responsibilities to either the judicial or executive branch." Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 Duke L.J. 175, 177 (2020) (quoting *Gundy*, 588 U.S. at 157–159 (Gorsuch, J., dissenting)). While the Gorsuch-*Gundy* test properly looks to history and the Court's pre-intelligible principle cases, the Court must ensure that an alternative test does not render the nondelegation doctrine ineffective, see, *e.g.*, *Rogers* v. *Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of cert.) (noting that "[i]nstead of following the guidance provided in *Heller*, [lower] courts minimized that decision's framework. . . . They then 'filled' the self-created 'analytical vacuum'").

The "filling up the details" framework seemingly restricts the broad intelligible principle test. However, "the devil is in the details." A detail to one may be a fundamental concept to another—depending on the context or how it affects a person. The Court should provide a baseline for congressional enactments to limit the holes where filling up the details could overwhelm the principles of the nondelegation doctrine.

ARGUMENT

"I am still alive, and while I am alive, I intend to live." – The nondelegation doctrine. [2]

I. The nondelegation doctrine plays an important role in determining what powers have—and can be—delegated.

When assessing laws that allegedly grant authority to the executive branch, three fundamental questions must be answered: (1) Does Congress possess constitutional authority to regulate the matter in question; (2) Did Congress delegate regulatory authority to another branch; and (3) Is Congress permitted to delegate this authority to another branch?

The answer to the first question naturally depends on an examination of the powers granted to Congress in Article I and in other sections of the Constitution.

For the second, the Court must analyze the statute's language. If the language suggests a broad delegation of authority, the Court applies the major questions doctrine and examines "the closely related domain of review for unconstitutional vagueness," Walters, *supra*, at 432 (citing *Sessions* v. *Dimaya*, 584 U.S. 148, 216 (2018) (Thomas, J., concurring). This approach is taken because "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'" *Biden* v.

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[2] Quote adapted from Letter from Everett Ruess to his friend Bill (Mar 9, 1931), *in* W.L. Rusho, *Everett Ruess: A Vagabond for Beauty & Wilderness Journals* 31 (Peregrine Smith Books 1983).

Nebraska, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring) (quoting *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). The Court applies the major questions doctrine "in service of the constitutional rule" that answers the third question: "Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy*, 588 U.S. at 167 (Gorsuch, J., dissenting).

As one scholar noted,

> [t]he nondelegation doctrine reflects deep and unresolved ambiguities about the extent to which the U.S. Constitution requires that the three branches of government be hermetically sealed off from one another, subject to certain explicit exceptions where the framers chose to subject the exercise of one power to the checks of a coordinate branch of government.

Walters, *supra*, at 424. While the Framers understood that a complete hermetic seal would not allow the nation to thrive, *Buckley* v. *Valeo*, 424 U.S. 1, 120–121 (1976), certain limits and precautions against the "accumulation of all powers, legislative, executive, and judiciary, in the same hands," The Federalist No. 47, at 273 (James Madison) (Fall River Press ed. 2021), had to be instituted.

The separation of powers is much like an airlock and the nondelegation doctrine acts like the doors. Before passing contents (powers) from one side (the legislature) to the other (the executive), the former side must complete certain tasks like decompression

(lawmaking). If those tasks are not completed before opening the doors, the system fails.

The current nondelegation test is a weak seal if not an open door. The test requires Congress to articulate an "intelligible principle." "[I]n a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Gundy*, 588 U.S. at 146 (quoting *Am. Power & Light Co.* v. *Sec. & Exch. Comm'n*, 329 U.S. 90, 105 (1946)). Because that standard is "not demanding," *id.*, it has proven insufficient in policing unconstitutional delegation.

"For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." *Immigr. & Naturalization Serv.* v. *Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting). "The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's hard to keep up." *Caring Hearts Pers. Home Servs., Inc.* v. *Burwell*, 824 F.3d 968, 969 (10th Cir. 2016) (Gorsuch, J.). "There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4) provides that a 'rule' is an agency statement 'designed to implement, interpret, or *prescribe law or policy*.'" *Chadha*, 462 U.S. at 986 (White, J., dissenting) (emphasis added); see also *id.* at 989 (White, J., dissenting) (noting that the Court agrees that agency rulemaking resembles

legislation, the Court has described agency rulemaking as "'quasi-legislative' in character," and that "[s]uch rules and adjudications by the agencies meet the Court's own definition of legislative action"). These regulations "may pre-empt state law and grant rights to and impose obligations on the public. In sum, they have the force of law." *Id.* at 986 (White, J., dissenting) (internal citations omitted).

The broken valve of the intelligible principle test has allowed nearly every incomplete law to slip past the seal between Article I lawmaking powers and Article II enforcement powers. It has simply failed to stop impermissible delegations. See, *e.g.*, *Gundy*, 588 U.S. at 146 (Gorsuch, J., dissenting) (noting that the Court has rarely found an impermissible delegation); *Chadha*, 462 U.S. at 985 (White, J., dissenting) ("In practice, [ ] restrictions on the scope of the power that could be delegated diminished and all but disappeared."); *Allstates Refractory Contractors, LLC* v. *Su*, 144 S. Ct. 2490, 2490 (2024) (Thomas, J., dissenting from the denial of cert.) (noting that the Occupational Safety and Health Administration's power "to impose whatever workplace-safety standards it deems 'appropriate'" "may be the broadest delegation of power to an administrative agency found in the United States Code"). The intelligible principle test "serves to encourage broader and vaguer delegations by the implicit promise (which, as a practical matter, can rarely be redeemed) that actions pursuant to those delegations will be scrutinized by Congress; and its major effect is augmentation of the power of" Congress, see Brief of American Bar Association as Amicus Curiae at *46, *INS* v. *Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-

2170, 80-2171), 1982 U.S. S. Ct. Briefs LEXIS 1633 (Antonin Scalia as co-counsel).

II. Congress should not be "liberated" from the constitutional lawmaking process.

The filling-up-the-details exception to the nondelegation doctrine—and to a greater extent the intelligible principle test—are premised on the notion that Congress cannot do it all and we must liberate it from some of its responsibilities. See John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 193 (2007). But this is no excuse for sloppy or incomplete lawmaking. Indeed, "[e]ven the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking." *Id.* at 198. "The very point of the structural element of the Constitution is to make some things difficult." Colleen Walsh, *Challenging the Constitution*, Harvard Gazette (Sept. 18, 2009), https://tinyurl.com/4npbwnyp (quoting Justice Souter). As Locke recognized, the large and slow nature of a legislative body is a benefit for lawmaking because "the creation of rules of private conduct should be an irregular and infrequent occurrence. The Framers, it appears, were inclined to agree." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment) (citing John Locke, *Second Treatise of Civil Government* 72, 80 (J. Gough ed. 1947)).

While it may be more efficient for administrative agencies to handle certain *administrative* details, the fundamental task of lawmaking is better left to—and constitutionally remains with—Congress.

The "regulations" outlined in the Code of Federal Regulations—setting out standards supposedly derived from Congress's broad policy statements—demonstrate that lawmakers can draft precise laws. If Congress does not draft and pass legislation as specific as the federal agencies, it is likely due to a lack of political will. If such political will is lacking, this indicates that the Constitution's structure is functioning as intended.

And Congress has shown that it can legislate with great detail and precision when it has the political will to do so. Just a few examples:

- The Internal Revenue Code is highly detailed, specifying tax rates, deductions, credits, penalties, and reporting requirements. Indeed, it even details the rules for charitable contribution deductions, including percentage limits, record-keeping requirements, and restrictions on certain types of donations. 26 U.S.C. § 170. Congress delegated only the detail of prescribing regulations to verify the charitable contribution. 26 U.S.C. § 170(a)(1).
- The Americans with Disabilities Act (ADA) includes detailed provisions on accessibility, employment discrimination, public accommodations, and enforcement mechanisms. See, *e.g.*, 42 U.S.C. § 12182. The ADA defines "public accommodations" and specifies the types of businesses covered under the ADA. 42 U.S.C. § 12181.
- The Social Security Act governs Social Security benefits and includes detailed requirements

and benefit formulas. See, *e.g.*, 42 U.S.C. § 415. It even sets forth the criteria for disability benefits, including medical conditions and work history requirements. 42 U.S.C. § 423.

- The Public Safety and Recreational Firearms Use Protection Act, enacted in 1994 and sunsetting in 2004, provided very specific descriptions of characteristics of banned firearms and included a long list of specific firearms, leaving few details to any agency. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110101–110105, 108 Stat. 1796, 1996–2010 (1994).

These laws—and many others—show that Congress can do it—it just does not want to.

By "requiring legislators to agree on a relatively specific form of words, the nondelegation principle seems to raise the [political] burdens and costs associated with the enactment of federal law." Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 Admin. L. Rev. 19, 55 (2010) (quoting Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 320 (2000)). If Congress must make laws with precision and care, it imposes a crucial safeguard for individual liberty. *Id.* (citation omitted). They "ensure that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words." *Id.* (citation omitted).

And the argument that Congress should be liberated of its lawmaking responsibility because it lacks the expertise of agencies holds little weight. The

Constitution's nondelegation principle does not prevent Congress from adopting rules and regulations suggested by agencies or private parties through the constitutionally prescribed lawmaking process. See Brief of American Bar Association as Amicus Curiae, *supra*, at *44 ("Instead of conferring authority to promulgate rules, it may confer authority to propose legislation—which was the power it originally granted to the Federal Trade Commission."). Congress could even utilize the agencies to collect and summarize comments on proposed laws, like what agencies do now when rulemaking. This collaboration ensures an accountable and responsive government that adheres to the processes outlined in the Constitution.

III. The "Gorsuch-*Gundy*" test is a useful starting point for an originalist nondelegation test.

While Congress has proven that it can legislate with precision and detail, it certainly does not always do so. Until now, the Court has not insisted that Congress always do so. So, the Court can and should repair the nondelegation door seal so fewer incomplete laws leak through to the executive branch.

In *Gundy*, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, outlined three circumstances where Congress may permissibly grant authority to another branch. *Gundy*, 588 U.S. at 157–159 (Gorsuch, J., dissenting); see also *Paul* v. *United* States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of cert.) (noting that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation in his *Gundy* dissent may warrant further consideration in future cases"). According to

the "Gorsuch-*Gundy*" test, Congress can only give power: "(1) to 'fill up the details'; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign nonlegislative responsibilities to either the judicial or executive branch." Hall, *supra*, at 177 (quoting *Gundy*, 588 U.S. at 157–159 (Gorsuch, J., dissenting).

The latter two circumstances should, generally, raise little disagreement. When Congress makes the application of a rule contingent on certain executive fact-finding, it has not only decided the policy but also established specific standards that will trigger the law. See, *e.g.*, *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (citing approvingly of "a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country"). The executive's role then is merely to determine whether the necessary conditions have been met. It is essentially a mathematical equation: If A, then B; If not A, then C. Congress has not delegated lawmaking authority, it has simply given instructions on how to execute the law.

Similarly, assigning nonlegislative responsibilities to the judicial or executive branches—provided that such responsibilities rightfully belong to those branches—does no more than having Congress determine a policy and assigning tasks already within the scope of the assignee's powers. There is no delegation concern as Congress is not delegating any of its powers.

The first circumstance, however, remains imprecise. While the "filling up the details" language originates in this Court's early explorations of nondelegation, see *Wayman*, 23 U.S. (10 Wheat.) at 43, few judicial guardrails have been established to determine what constitutes "a detail." The Court's intelligible principle test is premised on the idea that if Congress sets forth an overarching policy, it can delegate the "details"—no matter the scope—to an agency. See Hall, *supra*, at 189 (noting that requiring a "guiding principle" and "filling up the details" are "ideas mirrored two sides of the same issue"). It is now up to the Court to ensure that both Congress and the courts can clearly understand and faithfully adhere to the test.

A. The Court should establish a clear baseline for lawmaking to avoid improper delegation disguised as details.

There are some types of details that few would claim constitute unlawful delegation. For example, delegating administrative or procedural rules necessary for executing the law—such as hiring and firing employees, setting work hours for employees, determining the time and location of administrative hearings, deciding radio frequency allocations, or the design of tax stamps. See, *e.g.*, *Wayman,* 23 U.S. at 41–43 (finding no delegation problem where federal courts are allowed to make procedural rules and adopt rules enacted by state law up to that point); *In re Kollock*, 165 U.S. 526, 533 (1897) (finding no delegation problem where Congress "fully and completely" defined the offense requiring packages to be marked and branded before sale, and the "regulations simply

described the particular marks, stamps, and brands to be used"); see also *United States* v. *Eaton*, 144 U.S. 677, 685 (1892) (not questioning the authority to require wholesale dealers to keep logbooks through the general grant of authority to "make all needful regulations for the carrying into effect" the law, but finding that failing to abide by the regulation is not failing "to do a thing 'required by law . . .' so as to be liable to the penalty prescribed by" the law); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1538 (2021) (noting possibly permissible details). Other details might include processes, due dates (within parameters), steps to reach a required result, or finer points that help explain how a law will be enforced.

Such details, however, should not include broad discretion to interpret what a written law means. While some interpretation may be necessary, as laws cannot always be drafted with perfect precision, the establishment of standards by an agency that are intended to interpret broad policies, "or prescribe law or policy," represents too wide a discretion to qualify as mere details. Cf. *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). Similarly, laws conferring the power to levy taxes without setting the amount or rate of the tax, unless it has a clear mechanism for calculating the tax, as revenue raising is the quintessential legislative power. See Resp'ts' Reply Br. at 19–42; U.S. Const. art. I, § 8, cl. 1 (granting Congress the power "to lay and collect Taxes, Duties, Imposts and Excises").

To prevent details from replacing the lawmaking process, the Court should establish a baseline for what

is required of Congress. Initially, laws should articulate a policy that allows courts to evaluate whether a rule or regulation deviates from the statutory intent. Beyond that, a realistic baseline should at least provide the following, where applicable:

> (1) clearly describe the activity or item(s) to be regulated; (2) clearly identify the regulated entities, and—where applicable—those entities not to be regulated; (3) well-defined standards and guidelines for applying those standards; and (4) designate the agency authorized to enforce the standards and the manner in which it can enforce the standards.

While this proposed baseline may not capture all of the improper delegations, it ensures that the holes to be filled are limited. A couple of examples of how Congress could have met the baseline—but failed to do so—show how Congress can avoid an improper delegation.

In the Occupational Safety and Health Act of 1970 (OSH Act), Congress delegated to the Occupational Safety and Health Administration (OSHA) the authority to promulgate "any occupational safety or health standard . . . ." See 29 U.S.C. § 655(b). Congress defined an occupational safety or health standard as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). But what "reasonably necessary or appropriate" means in this context is anyone's guess—

including OSHA's. It is no overstatement to characterize OSHA's actions as guesses because, even as OSHA conducts studies, attempts to balance costs and benefits, consults with industry, and even seeks comments under the Administrative Procedures Act, it still can only guess what Congress meant when it charged the agency with deciding what is reasonably necessary or appropriate. OSHA now "claims authority to regulate everything from a power lawnmower's design, 29 C.F.R. § 1910.243(e) (2023), to the level of 'contact between trainers and whales at SeaWorld,' *SeaWorld of Florida, LLC* v. *Perez*, 748 F.3d 1202, 1220 (C.A.D.C. 2014) (Kavanaugh, J., dissenting)." *Allstates Refractory Contractors, LLC*, 144 S. Ct. at 2490 (Thomas, J., dissenting from the denial of cert.).

To fix this improper delegation, Congress could have, for example, stated: (1) that it is regulating the design of powered lawnmowers, see 29 C.F.R. § 1910.243(e); (2) that the law applies only to "businesses affecting interstate commerce,"[3] see 29 U.S.C. § 651(b)(3); (3) that "[a]ll power-driven chains, belts, and gears shall be so positioned or otherwise guarded to prevent the operator's accidental contact therewith, during normal starting, mounting, and operation of the machine," 29 C.F.R. § 1910.243(e)(1)(ii); and (5) that OSHA can enforce the law through citations, see 29 U.S.C. § 658(a).

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[3] While the scope of the Interstate Commerce Clause is broad, it is not unlimited. See, *e.g.*, *United States* v. *Lopez,* 514 U.S. 549, 553 (1995) ("[L]imitations on the commerce power are inherent in the very language of the Commerce Clause.").

As this example shows, Congress improperly delegated the two most crucial elements of the law—(i) that the law is regulating the design of powered lawnmowers and (ii) that all power-driven chains, belts, and gears shall be so positioned or otherwise guarded to prevent the operator's accidental contact therewith, during normal starting, mounting, and operation of the machine—in a manner to be decided by the agency. These intentional holes are not details to be filled by the agency. They are standards governing private conduct—laws—to be determined by Congress.

Another current example of an overly broad delegation "running riot," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)—if ultimately upheld—is the FTC's recent rule banning non-compete agreements. Relying on its broad statutory authority to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce," 15 U.S.C. § 45(a)(2), the FTC declared non-compete agreements as unfair methods of competition and banned their use for certain categories of employees, explicitly nullifying legally entered agreements, 16 C.F.R. § 910. See, *e.g.*, *Ryan L.L.C.* v. *FTC*, No 24-10951 (5th Cir. appealed on Oct. 18, 2024).

The law uses the ambiguous term "unfair method of competition." This term is undefined and allows for the implementation of whatever policy the FTC chooses to implement. Congress could have avoided this impermissible delegation if it had written in the law (1) a description of what specific types of non-

compete agreements are deemed unfair methods of competition, e.g., employment, post-employment, key employee provisions, business sale incentive provisions, or agreements to protect trade secrets; (2) identify what types of entities are regulated, e.g., only entities with locations in multiple states, only businesses with a certain number of employees, or business that are not classified as "small businesses" as defined elsewhere; (3) the terms of non-compete agreements that make them prohibited, e.g., geographic scope or specific duration; and (4) what the penalties are for non-compliance, who can enforce them, and how. See generally 16 C.F.R. § 910. Examples of permissible "details" would be allowing the FTC to choose which statutorily specified administrative or judicial actions to use to enforce the ban, how to determine if a non-compete agreement is to facilitate the sale of a business, and other unforeseen—but statutorily consistent—issues.

B. History illustrates that the Framers understood the distinction between filling up the details and lawmaking.

Many of the First Congress's acts appropriately imposed limits on executive discretion. See Wurman, *supra*, at 1540–1544 (examining early acts and concluding that they are consistent with nondelegation principles). For example, when the first Congress established military pensions, "Congress decided all the important subjects: that the disabled veterans shall be paid, and how much. The President then merely had to decide when the payments should be made—the statute required they be made within

one year . . .—and what proofs would be necessary." *Id.* at 1540.

When Congress began delegating broad legislative authority, however, influential Founders voiced their concerns. For instance, in An Act Concerning Aliens, 1 Stat. 570 (1798), Congress empowered the president to order the deportation of "aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government." The act also granted the president the discretion to issue residence licenses, require bonds of indeterminate amounts, and revoke such licenses. *Id.*

Thomas Jefferson called the law "a most detestable thing" and was "glad" "that laws of the US. subsequent to a treaty, controul [sic] it's operation, and that the legislature is the only power which can controul [sic] a treaty." Letter From Thomas Jefferson to James Madison (May 31, 1798), https://tinyurl.com/48nzt9ud.

James Madison similarly responded and made clear that each of the powers granted by the act violated the nondelegation principle. Madison declared that

> [h]owever difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of

> an executive or judicial nature; and may for that reason be unconstitutional.

James Madison, *The Report of 1800* (Jan. 7, 1800), https://tinyurl.com/bdf3fz43 (emphasis added). Madison then expounded on "details":

> Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. *If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws.* A delegation of power in this latitude, would not be denied to be a union of the different powers.
>
> To determine then, whether the appropriate powers of the distinct departments are united by the act authorising [sic] the executive to remove aliens, it must be enquired whether it contains such details, definitions, and rules, as appertain [sic] to the true character of a law . . . .

Id.

Madison pondered whether a power could be "well given in terms less definite, less particular, and less precise" than allowing the President to judge an alien "dangerous to the peace and safety of the United States," or to "suspect" that they "are concerned in any treasonable, or secret machinations" against the government. *Id.* For these terms are not "legal rules or certain definitions. They leave every thing to the President. His will is the law." *Id.*

Madison concluded that the law not only gave legislative power to the president, but

> [h]e is to stand in the place of the judiciary also. His suspicion is the only evidence which is to convict: his order the only judgment which is to be executed. . . .
>
> It is rightly affirmed therefore, that the act [unconstitutionally] unites legislative and judicial powers to those of the executive.

Id.

At least two members of Congress expressed concerns about nondelegation when the act was debated. Wurman, *supra*, at 1513. Representative Williams stated that "it is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to transfer power in this manner." *Id.* at 1514. And Representative Livingston argued that "[l]egislative power prescribes the rule of action; the Judiciary applies that general rule to particular cases, and it is the province of the Executive to see that the laws are carried into full effect." *Id.* Livingston further

contended that the act granted the president legislative power because it empowered the president alone "to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill." 8 Annals of Cong. 1963 (1798). He concurred with Madison that the act unconstitutionally vested the president with all three powers. See Wurman, *supra*, at 1514.

IV. The Court should reexamine and revive the not-quite-dead-yet nondelegation doctrine.

Delegating authority to prevent "unfair competition," *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), to fix prices that "will be generally fair and equitable," *Yakus* v. *United States*, 321 U.S. 414, 420 (1944), to create standards that are in the "public interest," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225–226 (1943), or are "appropriate," *Allstates Refractory Contractors, LLC*, 144 S. Ct. at 2490 (Thomas, J., dissenting from the denial of cert.), or any other broad delegation is no different than forbidding "all transactions that fail to promote goodness and niceness." "These words are not literally gibberish, but they are so vacuous that any attempt to implement th[e] law would amount to creation of a new law." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002). The language "leaves so much undetermined that it would constitute an act of legislation to attribute any meaning to it." *Id.* Likewise, if a court tried to give the statute effect, it would not be exercising the judicial power because it could not engage in "interpretation." *Id.*

The nondelegation doctrine has been injured, put to sleep, and ignored, but is not dead. On the other

hand, the intelligible principle doctrine should be carted away. See Monty Python and the Holy Grail (Python (Monty) Pictures 1975). It just does not work.

Congress did not finish its lawmaking job when enacting 47 U.S.C. § 254. The law appears to, as a whole, provide a policy adequate for the courts to compare to the FCC's actions. And Congress did state that the law applies to "telecommunications carriers"; that telecommunications carriers may be "required to contribute to the preservation and advancement of universal service"; and that the FCC shall regulate the program. But that is not enough to satisfy prong (3) above. Congress left many of the key terms and conditions to be determined by the FCC. Congress should have taken "into account advances in telecommunications and information technologies and services," 47 U.S.C. § 254(c)(1), and specified which of those technologies and services were to be regulated—rather than telling the FCC to do it. Further, Congress should have set forth the "standards" to be enforced, specifically the rates that telecommunication carriers would be required to pay. Even though adjustments may need to be made because of the "evolving level of telecommunications services," *id.*, those changes should be made by Congress. It could have at least limited the tax rates, or set formulas based on usage or some other metric. Congress created the Internal Revenue Code; surely it can formulate this tax as well.

CONCLUSION

The Court should ensure that Congress produces legislation with the necessary precision, rather than delegating its lawmaking function to executive agencies. The Court should affirm the holding below.

Respectfully submitted,

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