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

BRIEF OF AMICUS CURIAE PROFESSOR ILAN WURMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

Amicus is the Julius E. Davis Professor of Law at the University of Minnesota Law School, where he teaches and writes about executive power, administrative law, constitutional law, and the separation of powers. He is the author of the casebook Administrative Law Theory and Fundamentals: An Integrated Approach (3d ed., Foundation Press 2025) and *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021), a leading article on the nondelegation doctrine and the original meaning of the Constitution. He writes this brief in support of respondents' claim that a nondelegation doctrine is supported by the text, structure, and history of the Constitution. The University of Minnesota is mentioned for identification purposes only.

SUMMARY OF THE ARGUMENT

Recent scholarship has suggested that there is essentially no historical evidence for a nondelegation doctrine. That is wrong. There is abundant evidence for a nondelegation doctrine, although the precise contours of the doctrine are less clear. Both an "intelligible principle" test and an "important subjects" test are plausible candidates to effectuate the doctrine. The regulation of private rights and conduct may be a factor in the analysis, but so is the breadth of the subject matter over which the agency is empowered to act.

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[*] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

ARGUMENT

I. There is abundant historical support for a nondelegation doctrine.

In a series of recent articles, scholars have cast doubt on originalist efforts to revive the nondelegation doctrine. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); 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 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Geo. L. Rev. 81 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243 (2021).

In the most provocative of these, Mortenson and Bagley argue that there was no nondelegation doctrine at the Founding. Rather, the Founding generation recognized governmental power to be "nonexclusive"; so long as Congress has authorized some action, that action could be characterized as executive. Mortenson & Bagley, *supra* at 324–32. Further, they argue, legislation from the First Congress demonstrates that the Founding generation routinely delegated vast powers. *Id.* at 332–56. Summarizing their findings, they write, "There was no nondelegation doctrine at the Founding, and the question isn't close." *Id.* at 367.

Nicholas Parrillo more narrowly argues that there may have been a nondelegation doctrine at the Founding but that it cannot have been particularly robust. Parrillo analyzes the direct-tax legislation of

1798. It reveals, he argues, that Congress delegated discretion over private rights. Chabot and Arlyck argue that early borrowing, patent, and remission legislation suggest that Congress often delegated important policy questions.

The evidence does not support the strong versions of these claims. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021). There is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little that clearly supports the proposition that Congress could freely delegate its legislative power.

First, there are many explicit arguments in favor of a nondelegation doctrine made over the course of several early debates in the first decade following ratification. *See* Wurman, *supra* at 1503–18. For example, in the 1791 post-roads debate Representative Sedgwick introduced an amendment to strike the enumerated routes and replace them with the provision "by such route as the President of the United States shall, from time to time, cause to be established." 3 Annals of Cong. 229 (1791) (Gales & Seaton 1849). The amendment was rejected. *Id.* at 241. Representatives Livermore, Hartley, Page, White, Vining, Gerry, and Madison all seem to have thought the motion unconstitutional because it would be transferring, alienating, or delegating the House's legislative power. Page argued, for example, that "if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation. . . . I look upon the motion as unconstitutional." *Id.* at 233–34.

Another example: In Madison's *Report of 1800*, he argued against the Alien Friends Act partly on non-

delegation grounds. "[A]ll 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." Certain details "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 merely a "general conveyance of authority, without laying down any precise rules," were allowed, then "it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws." Madison added that the inquiry is whether the delegation "contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger." James Madison, *The Report of 1800*, *in* 17 The Papers of James Madison 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

Madison's statement points to the importance of both the nondelegation doctrine and the nature of the right. His view was not idiosyncratic; in addition to the representatives who supported this view in the postal debate, Representatives Williams, Livingston, Nicholas, Gallatin, McDowell, Key, Rowan, John Jackson, Alexander Smyth, and finally John Quincy Adams and John Marshall, all agreed that there was a nondelegation principle. *See* Wurman, *supra* at 1514–18. Against all this evidence, the historical record contains only one statement that can be interpreted to the effect that there are no limits on what

Congress can delegate. 3 Annals of Cong. 232 (Bourne) ("The Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing.").

Second, there are many implicit statements supporting a nondelegation doctrine. Time and again, the Constitution's Framers and ratifiers argued that each department was structured so that it could exercise its function well. *See, e.g.*, The Federalist Nos. 53, 55, 62 (advantages of the legislature's structure); The Federalist No. 70 (importance of executive's structure); The Federalist No. 78 (judiciary's structure). These and similar statements at least imply that the vested powers must be exercised by their respective departments to obtain the benefits of this structure. Wurman, *supra* at 1523–26.

Third, many of the examples from Mortenson and Bagley occurred under the British Constitution. But these are inapposite. Parliament was not limited under the British constitution; that constitution was whatever institutions of governance happened to exist. *See, e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution 179 (enlarged ed. 1992). The point is best made by James Wilson, who contrasted the two systems specifically in the context of delegation. Because supreme power was lodged in Parliament, "the parliament may alter the form of the government," and the "idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain." That is why "[w]hen parliament transferred legislative authority to Henry the eighth [in the Statute of Proclamations], the act transferring

it could not, in the strict acceptation of the term, be called unconstitutional." In contrast, Wilson added, "To control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787). The implication is unmistakable: the delegation in the detested Statute of Proclamations—which William Blackstone wrote "was calculated to introduce the most despotic tyranny," 1 William Blackstone, Commentaries on the Laws of England *261 (1765)—was constitutional because Parliament could do whatever it pleased. But such a delegation would be unconstitutional under the American systems of government.

Fourth, the Founding generation did, of course, recognize that some governmental functions were not exclusive to any branch. *See Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," but "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."). And it is a widely shared understanding that the legislative veto exercised in *INS* v. *Chadha*, 462 U.S. 919 (1983), could be characterized as legislative, executive, or judicial. The notion of both *exclusive* and *nonexclusive* powers—or at least the idea of exclusive powers with some functional overlap—has significant textual, structural, and historical support. Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 Minn. L. Rev. 735 (2022). But just because the Constitution's vested powers are functionally overlapping in

certain cases does not mean they are in all cases or that they overlap in any particular case.

II. Early statutes are not inconsistent with a nondelegation doctrine.

Most of the early legislation upon which critics of the nondelegation doctrine rely was not nearly as broad as these critics suggest; it is often hard to imagine what more Congress could have decided. Wurman, *Nondelegation*, *supra* at 1541–42 (discussing, among other statutes, one that authorized collectors to conduct searches and seizures when they were "suspicious of fraud" or had "cause to suspect a concealment"). Others did not delegate "exclusively legislative" functions; many involved nonexclusive functions such as administering public rights, resolving claims against the government, or those already within the constitutional power of another branch. *Id.* at 1540 (military pensions); *id.* at 1542 (naturalization); *id.* at 1544 (judicial procedures); *id.* at 1548–49 (patent grants). And several involved delegations of local legislative power to the District of Columbia or the territories. *Id.* at 1543–44. Just as these governments do not exercise the judicial power "of the United States," they do not exercise the legislative power "of the United States."

The direct-tax legislation of 1798 is the strongest evidence in favor of a weak nondelegation doctrine, but even then Congress resolved all the important policy questions. It decided not only the amount to be raised, but also how each state was to contribute its share: first by a 50-cent head tax on every slave; next, by a valuation of houses, which were to be taxed at a rate fixed by Congress, depending on the valuation; and finally, any shortfall was to be made up by a tax

on land at a rate necessary to achieve the state's proportional amount of the tax. Congress also resolved the most politically controversial issue: whether houses should be taxed separately from land so that most of the tax burden would fall upon wealthy city dwellers with large houses rather than rural farmers with large tracts of land but modest accommodations. Wurman, *Nondelegation*, *supra* at 1550.

True, Congress's instruction to value houses and land based on what they were "worth in money" gave discretion to the tax boards, but arguably that is nothing more than a factual question. And higher-level commissioners could make adjustments, on a district-wide scale, if they believed such adjustments were "just and equitable." But this was the last of three layers of review that ensured the final valuations were as close as possible to the actual value "in money." The motivating concern was that local assessors might favor their local area by reducing the overall valuations to lower the tax burden. The inclusion of the just and equitable adjustment standard was intended to reduce discretion. The Treasury Secretary believed the statute required the boards to "equalize" the assessments to protect against local partiality. Wurman, *Nondelegation*, *supra* at 1551–53 (citing sources).

Over the next two decades, some laws were also modified or rejected entirely after nondelegation concerns were raised. Abraham Sofaer identified several such instances. He recounts how the House of Representatives, in one example particularly relevant here, "succeeded in deleting" from an excise tax bill "a grant of power to the President to set the salaries of revenue officers, partly on the ground that Congress

should 'retain the power of disposing of their own money.'" The Senate amendment did allow him to set salaries but limited that discretion substantially. Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 76 (Cambridge, MA: Ballinger Publishing Co. 1976) (citing An Act providing the means of intercourse between the United States and foreign nations, 1 Stat. 128, 129 (July 1, 1790); 2 Annals of Cong. 1873-75, 1884, 1965, 1971 (Joseph Gales ed., Washington: Gales & Seaton 1834); An Act repealing . . . , 1 Stat 199, 213 (Mar. 3, 1791)). In another instance, the power to call forth the militia was more narrowly cabined after similar opposition. *Id.* at 77.

In a debate over delegating to President Adams the discretion to raise an army, Congress narrowed the discretion to the circumstance if war were declared against the United States while Congress was not in session. *Id.* at 144-5. Congress similarly granted discretion to President Adams to provide a navy if there were a danger to the coast and Congress was not in session. *Id.* at 147. Sofaer also described how, in the leadup to the War of 1812 when the Senate wanted to give the President broad discretion to employ armed vessels to protect American commerce whenever he deemed it "expedient," the House rejected the amendment after several voiced concerns that it would effect an unlawful delegation of legislative power. *Id.* at 281.

III. The nature of the right and scope of the subject matter are relevant to the inquiry.

Overall, the picture the Founding-era history paints is one of a nondelegation doctrine, although there were lower-order disagreements over its scope.

On this score, the historical record and the insight about exclusive and nonexclusive functions casts some doubt on prominent defenses of the nondelegation doctrine that apply primarily to regulations of private conduct. Such accounts of the doctrine have focused on definitions of legislative power as the power to "prescribe rules for the regulation of the society." Wurman, *Nonexclusive Functions*, *supra* at 795–96 & n.294 (citing cases and literature). But the legislative power is the power to alter any legal relations, including those involving public rights and those involving government conduct. *Chadha*, 462 U.S. at 952. Thus, establishing post roads can be reached by the legislative power, as can structuring the government departments and creating programs for the distribution of welfare benefits (a classic public right).

Therefore, if only the legislative power can reach generally applicable rules of private conduct, it must be because the definitions of executive and judicial power do not extend to those functions. The private/public rights distinction is certainly relevant when thinking about executive power: Administration and distribution of government resources fall comfortably within any definition of executive power; making rules concerning private rights and conduct less so. Because establishing and distributing public rights is within the definition of legislative power, however, it also follows that Congress cannot freely delegate those matters merely because they involve public rights. Thus, the nondelegation doctrine should turn on whether "important subjects" have been addressed by the legislature, not merely on whether the matter involves private or public rights. *Wayman*, 23 U.S. at 42–43 (noting that resolution of

"important subjects" is a "strictly and exclusively legislative" function).

Under this approach, Congress, as noted, cannot freely delegate over public rights, but it is also not totally prohibited from delegating authority over private rights. The scope of the subject matter over which Congress has empowered the agency to regulate matters to the question of importance. *See, e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy."); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 435 (1935) (Cardozo, J., dissenting) (distinguishing a "roving commission to inquire into evils" from a narrow delegation over a specific question).

For example, a delegation to make codes of fair competition for the entire might be invalid, *see A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), but a narrow delegation to equalize valuations across tax districts might be valid even if it affects private rights. Or a delegation, as in the 1852 steamboat legislation, to make rules imposing passenger limits on ships and rules for the passing of ships—rules that would have altered private rights and obligations—may also be sufficiently narrow in scope. §§ 10, 29, 10 Stat. 61, 69, 72 (1852).

In this case, on the assumption that Congress's delegation involves taxation, which itself involves core private rights, the argument against the delega-

tion of power is stronger. Whether the granted discretion is over a relatively narrow decision or over a relatively broader decision—whether it is closer to "country elevators" or to codes of fair competition for an entire industry—may also factor into the analysis. In any event, respondents are correct that there is ample support in the text and history of the Constitution for a nondelegation doctrine.

CONCLUSION

Respondents are correct that there is abundant textual, structural, and historical support for a nondelegation doctrine. Although the breadth of the discretion granted to the executive surely matters to the analysis, so too does the nature of the right, as well as the scope of the subject matter over which the agency has been empowered to act.

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