No. 24-354, 24-422

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

v.

CONSUMERS' RESEARCH, *et al.*,

Respondents.

SCHOOLS, HEALTH & LIBRARIES BROADBAND 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* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

BRADEN H. BOUCEK
Counsel of Record
CELIA HOWARD O'LEARY
JORDAN RAND MILLER
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Road, Suite 104
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

Counsel for Amicus Curiae

February 18, 2025

120252

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Constitutional Provisions

Cited Authorities

Page

Statutes, Rules and Other Authorities

Page

Page

INTEREST OF AMICUS CURIAE[1]

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly fifty years, SLF has advocated, both in and out of the courtroom, to protect individual liberty by restoring constitutional balance. This aspect of its advocacy is reflected in its regular representation and support of those challenging government overreach and other actions in violation of the constitutional framework. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109 (2018); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014). SLF also regularly files amicus curiae briefs with this Court about issues of agency overreach and deference. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Kisor v. Wilkie*, 588 U.S. 558 (2019).

SUMMARY OF ARGUMENT

A cornerstone of our nation's founding is the doctrine of separation of powers, a principle that not only upholds but also distinctly defines the three branches of our government. The Framers "insist[ed]" on such because "[t]hey believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty" and that "[a]n 'excess of law-making' was, in their words, one of 'the diseases to which our governments are most liable.'" *Gundy v. United States*, 588 U.S. 128, 154 (2019) (Gorsuch, J., dissenting)

1. Rule 37 statement: No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

(quoting The Federalist No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961)). In the opening section of the Constitution's first article, the Framers prescribed a preventative treatment for this disease by vesting all legislative authority in Congress alone, deliberately withholding such powers from executive branch officials. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). Not only does this treatment ensure separation of powers, but it places the whole of legislative power in the governmental body most connected and responsible to the citizenry.

The nondelegation doctrine prohibits Congress from abdicating its responsibility under the Constitution and passing legislative power to the executive branch. Moreover, under the doctrine, where Congress grants authority to the executive, it must do so with specificity such that courts can determine whether the executive branch has acted within the scope of the delegation. A weak nondelegation doctrine allows unelected career bureaucrats to set key policies through rulemaking. Those same officials then enforce their own hand-crafted rules. In this respect, modern erosions of the nondelegation doctrine cut away at the role of Congress under Article I much like *Chevron*[2] deference cut away at the role of the judiciary under Article III.

Despite these concerns, it has been ninety years since this Court last invalidated a law on nondelegation grounds.

---

2. *See Chevron U.S.A, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters.*, 603 U.S. 369.

See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). During that time, Congress has delegated powers to executive agencies thousands of times. Congress would have a remarkable record if it had actually enacted all those laws without once crossing the line and delegating its legislative power to the executive. This is as implausible as it sounds. Congress has overstepped its authority for decades and is doing so once again.

At issue here, Congress delegated to the FCC the responsibility to establish "specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service." 47 U.S.C. § 254(d); *see also id.* § 254(b)(5), (f). To facilitate the advancement of universal service, the law requires telecommunications carriers to pay contribution fees toward this endeavor while allowing the FCC to "exempt a carrier or class of carriers from this requirement." *Id.* § 254(d). The law does not define universal service or set any concrete goals for attaining universal service; instead, it provides the FCC with seven principles to follow, including maintaining "just, reasonable, and affordable rates"; ensuring access in "rural and high cost areas" at rates "comparable" to those charged in existing areas; and "other principles" the FCC believes protects the "public interest." *Id.* § 254(b).

This delegation features three hallmarks of an eroded nondelegation doctrine: (1) Congress failed to define terms central to the delegation, leaving that duty to the FCC; (2) the guiding principles provided by Congress are contradictory and open-ended given that the FCC may impart its own considerations into the principles; and (3) Congress has delegated authority in an area where

it was capable of legislating but decided it was more convenient to leave it to the FCC to formulate key policy details. Just one of these erosions harms separation of powers by transferring policymaking authority, and the ability to pick winners and losers, to the executive. A delegation featuring all three effectively amounts to the delegation of "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825). To ensure a limited government, this Court must restore pertinence to the nondelegation doctrine and clearly state that *Panama Refining* and *A.L.A. Schechter Poultry* remain controlling law.

The Court should not refrain from reinvigorating the nondelegation doctrine because doing so could effect agency purview. Generally, this Court has been quick to reject the notion that practical implications should trump faithful interpretation of the law. *See*, *e.g.*, *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021) ("[P]leas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" (quoting *Pereira v. Sessions*, 585 U.S. 198, 217 (2018))); *McGirt v. Oklahoma*, 591 U.S. 894, 936 (2020) ("[D]ire warnings are . . . not a license for us to disregard the law."). And upholding the constitutional cornerstone of separation of powers should never fall victim to practical implications. But if practical implications are to play any role, the Court could always take the approach it invoked just last term in *Loper Bright Enterprises* wherein it upheld separation of powers principles over agency overreach while being sure to "not call into question prior cases that relied on the *Chevron* framework." 603 U.S. at 412.

ARGUMENT

I. The nondelegation doctrine promotes this nation's founding principles, including separation of powers.

"The Constitution as a whole embodies the bedrock principle that dividing power among multiple entities and persons helps protect individual liberty." *PHH Corp. v. CFPB*, 881 F.3d 75, 187 (D.C. Cir. 2018) (Kavanaugh, J. dissenting). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Article I, Section 1, the very first provision of our Constitution, provides the textual hook for legislative delegations by Congress violating separation of powers principles.

It reads: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. "As James Madison and the public originally understood, any attempt at '*alienating* the powers of the House . . . would be a violation of the Constitution.'" *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting) (quoting Illan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1506 (2021) (quoting 3 *Annals of Congress* 238–39 (1791) (James Madison))). Accordingly, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

There is a reason the Framers vested all legislative powers in a single branch of government, leaving no room for executive officers or judges to serve as legislators. The Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting). In their view, "[a]n 'excess of law-making' was . . . one of 'the diseases to which our governments are most liable.'" *Id.* (quoting The Federalist No. 62, at 378 (James Madison)).

To prevent the spread, the Framers took two steps when formulating the legislative power. First, they placed lawmaking authority with the branch of government most responsive and responsible to the people by "ensur[ing] that any new laws governing the lives of Americans are subject to the robust democratic process the Constitution demands." *NFIB v. Dep't of Labor, OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J. concurring). "If Congress could hand off all its legislative powers to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *Id.* at 125 (quoting *DOT v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J. concurring)). "That's why our Founders deliberately designed the legislative power to be exercised 'only by elected representative in a public process'—so that 'the lines of accountability would be clear' and '[t]he sovereign people would know, without ambiguity, whom to hold accountable.'" *Texas v. Rettig*, 993 F.3d 408, 409–10 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc) (quoting *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting)). Accordingly, "[t]he

nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring).

Second, "the framers went to great lengths to make lawmaking difficult." *Gundy*, 588 U.S. at 154 (Gorsuch, J. dissenting). By placing *all* legislative power in a single branch, the Framers relied on a natural restraint to limit lawmaking: time. A legislature has limited time to address a wide range of issues and must then prioritize the most pressing issues, effectively limiting the number of issues on which it can legislate. *Allstates Refractory Contractors, LLC*, 79 F.4th at 770 (Nalbandian, J., dissenting) (discussing how Framers devised Article I to "slow[] down the ability to legislate" and that "these drawn-out processes not only limited the government's ability to restrict fundamental freedoms, but also promoted deliberation and safeguarded unpopular minorities from the tyranny of the majority" (citing The Federalist No. 73 (Alexander Hamilton), No. 51 (James Madison))). The diverse and deliberative nature of a legislature and the need for it to reach difficult compromises enhances the constraint of time and helps preserve liberty. *See United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Lucero, J., dissenting from denial of rehearing en banc) ("[B]y restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty.").

These constraints are unique to a legislature. Unlike Congress and its 535 diverse members, an executive agency is staffed with thousands—often tens of thousands—of bureaucrats serving at the pleasure and direction of the agency head and the President. *See PHH Corp.*, 881 F.3d at 187 (Kavanaugh, J., dissenting) (noting that the executive branch is "the one exception to the Constitution's division of power among multiple parties within the branches" and that "multi-member bodies—the House, the Senate, the Supreme Court—do better than single-member bodies in avoiding arbitrary decisionmaking and abuses of power, and thereby protecting individual liberty"). Forsaking the separation of powers by permitting broad delegations to the executive unleashes a pandemic of excess law-making.

It seems the Court has concerns that it "deliberately departed from the separation, bowing to the exigencies of modern Government that were so often cited in cases upholding challenged delegations of rulemaking authority." *Ass'n of Am. Railroads*, 575 U.S. at 84 (Alito, J., concurring). A historical review of the evolution, or as it may be the devolution, of the nondelegation doctrine proves this point.

II. Providing an overview of key historical changes in congressional delegations.

Early delegations of authority were, in actuality, commandments to the executive to act when a future event occurs or on the finding of a very specific fact. *See Marshall Field & Co.*, 143 U.S. at 680–81 (delegating authority to President to suspend free trade upon determination that foreign country was not acting in a reciprocal manner); *The Cargo of the Brig Aurora v. United States*, 11 U.S. 382,

383–85 (1813) (delegating authority to President to suspend or place embargo on trade with France or Great Britain upon other nation changing its trade stance). In other words, Congress commanded that if X event happened or the President found X fact, the executive branch *must* take Y action. *See Marshall Field & Co.*, 143 U.S. at 694 ("The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." (quoting *Locke's Appeal*, 72 Pa. 491, 498 (Penn. 1873))). These delegations have always been uncontroversial, as they merely involve the *execution* of the law, contingent upon the occurrence of a clearly defined event, triggering *mandatory* action by the executive. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) ("Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive (so, for example, forfeiture of assets might be required if the executive finds a foreign country behaved in a specified manner).").

In sum, in this early era, it was well recognized that "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be . . . cannot be done." *Union Bridge Co. v. United States*, 204 U.S. 364, 382 (1907) (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs*, 1 Ohio St. 77, 88–89 (Ohio 1852)). Rather, a permissible delegation was one "'conferring authority or discretion as to [a law's] execution'" to "'some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing [the law].'" *Id.* at 382–83 (first quoting *Cincinnati, Wilmington & Zaneville, R.R. Co.*,

1 Ohio St. at 88, then quoting *Moers v. City of Reading*, 21 Pa. 188, 202 (Pa. 1853)).

"[U]pheaval in [the Court's] delegation jurisprudence occurred during the Progressive Era, a time marked by an increased faith in the technical expertise of agencies and a commensurate cynicism about principles of popular sovereignty." *Ass'n of Am. Railroads*, 575 U.S. at 84, n.8 (Alito, J., concurring) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 129–30 n.6 (2015) (Thomas, J., concurring)). In the early 1900s, the Court permitted Congress to state a policy but delegate to the executive the responsibility of "fill[ing] up the details." *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quotation marks omitted). This was a prelude to a new way of governing. This test became known as the "intelligible principle" test. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Under this test, if Congress laid "down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not forbidden delegation of legislative power." *Id.* Application of this test can only be described as "notoriously lax." Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014). Thus, intended or not, the intelligible principle test opened the floodgates for expansive congressional delegations to the bureaucratic state.

Whatever teeth remained on the nondelegation doctrine following the Progressive Era were sawed down to nubbins by the Post-New Deal Era Court. In the late 1930s and 1940s, the Court revolutionized the "intelligible principle" test much in the way it revolutionized and expanded Commerce Clause jurisprudence. *See* Keith

E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 380, 385–86 (2017). Three key erosions to the nondelegation doctrine are responsible for this revolution.

First, Congress lowered the degree of specificity it used when stating its policy goal and the principle(s) to guide executive implementation thereof. Vague terms such as "public interest," "convenience," and "necessity" flooded delegations. *See Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 215 (1943) (quoting 47 U.S.C. § 303); *see also Yakus v. United States*, 321 U.S. 414, 428 (1944) (delegating language granted authority to act "in the interest of the national defense and security and necessary to the effective prosecution of the present war" and authorized an executive officer to impose price caps when "in his judgment [doing so] will be generally fair and equitable"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (delegating language allowed executive to set bituminous coal rates based in part on what was "in the public interest" and "necessary . . . to protect the consumer against unreasonably high prices"); *United States v. Lowden*, 308 U.S. 225, 230 (1939) (delegation identified advancing "public interest" as policy goal).[3]

3. It is unsurprising that Congress's use of vague terms is a key problem in its delegations as the nondelegation doctrine and the void-for-vagueness doctrine are related, with both protecting against the executive arbitrarily acting in a manner that infringes the liberty of the people. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 337 & n.171 (1999) (describing the nondelegation doctrine and the void-for-vagueness doctrine as "backdoor[s]" for each other and describing the nondelegation doctrine as "serving the same fundamental goals"

Congress continues to use overly generalized language to state its policy goals and directives when delegating authority. *See*, *e.g.*, 29 U.S.C. §§ 652(8), 655 (authorizing Secretary of Labor to establish occupational safety and health standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment"); 42 U.S.C. § 7409(b)(1) (authorizing EPA to set ambient air quality standards that "protect the public health" with "an adequate margin of safety"); 43 U.S.C. § 1733(a) (authorizing Secretary of Interior to "issue regulations *necessary* to implement the provisions of this Act with respect to the management, use, and protection of public land . . . " (emphasis added)). Each time Congress employs overly generalized language it shifts the policymaking role to the executive. And because the generalized language is open to multiple interpretations, it is far too easy for a faceless executive officer to claim that, in his or her judgment, a regulation advanced the "public interest" or a rate was "reasonable." Moreover, as such officers are not held accountable through the electoral process, they do not face consequences for adopting a regulation that proves not to be in the public's interest.

Second, the concept of limiting principles on a delegation has fallen by the wayside. Whereas Congress once identified a single specific triggering event or factual

---

by "by cabining the discretionary authority of enforcement officials, who might otherwise act abusively or capriciously"); *see also Gundy*, 588 U.S. at 167–68 (Gorsuch, J., dissenting) ("A statute that does not contain 'sufficiently definite and precise' standards 'to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens." (quoting *Yakus*, 321 U.S. at 426)).

finding, it now often gives the executive a list of factors to consider in devising policy and regulations. *See*, *e.g.*, 43 U.S.C. § 1701(a)(8) (directing Secretary of Interior to enact land-use regulations that will protect "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, [] archeological values," the "natural condition" of the land, "food and habitat for fish and wildlife and domestic animals," and "will provide for outdoor recreation and human occupancy and use").

These factors frequently invoke diverse and competing interests, with Congress giving no guidance on how to weigh the factors or which factors to prioritize. Moreover, Congress has sometimes included a catchall factor in its delegations, allowing the executive to consider matters an executive agency official thinks are important to the law's policy objectives, but that Congress did not specifically identify. *See* 16 U.S.C. § 1533(a)(1) (listing four specific factors for Secretary to consider when classifying species as endangered or threatened and then permitting Secretary to list species as endangered based on "other natural or manmade factors affecting its continued existence"). These catchall factors obliterate any limiting principle found within the specifically delineated factors.

Where a delegation features competing factors or a catchall factor, any half-competent bureaucrat can pigeonhole just about any regulation into the delegation. Even worse, some delegations give the executive discretion on whether to act at all, making any action, or total inaction, permissive. *See*, *e.g.*, 43 U.S.C. § 1734 (permitting Secretary to "establish," "change," or "abolish" fees). As such, one must question whether delegations authorizing executive action based on competing or catchall factors

have any limiting principle. *Cf. Panama Ref. Co.*, 293 U.S. at 415 (concluding delegation is unconstitutional if it "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit").

Third, the Court has shown a readiness to allow broader delegations, grounded in practical considerations, indeed practical conveniences. It has done so under the notion that if Congress would find it difficult and time consuming, albeit feasible, to fully legislate in an area, Congress should be permitted to delegate de facto policymaking authority so it may turn its attention to other matters. *See Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div.*, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing."). The Court has gone so far as to emphasize "a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. But that merely raises the question of whether Congress is fulfilling its constitutional obligation under Article I, Section 1 by giving a "broad general directive[]."

One common argument for affirming this view is that executive agencies, staffed with experts, are better equipped than Congress to draft laws and regulations. *See Sunshine Anthracite Coal Co.*, 310 U.S. at 398 ("[B]urdens of minutiae would be apt to clog the administration of the law and deprive the agency of that

flexibility and dispatch which are its salient virtues."). Regardless of whether this is correct, it does not reflect the structure of government devised by the Framers. Rather, it flouts two of the Framers' primary concerns about government: excess law-making and accountability to the people. The Framers intentionally addressed these problems by granting only Congress legislative powers.

The delegation to the FCC at issue here demonstrates why these cases present the Court with an opportunity to restore meaning to the doctrine.

III. The pitfalls of the delegation to the FCC provide an opportunity to reinvigorate the nondelegation doctrine and *Panama Refining*.

A. Congress's delegation to the FCC features the hallmarks of an enfeebled nondelegation doctrine.

Even a cursory review of Congress's stated principle behind this delegation—found at 47 U.S.C. § 254(b)—reveals the three hallmarks of a toothless nondelegation doctrine. While § 254(b) may state intelligible principles in the common parlance of that phrase, it does not state an intelligible principle for constitutional purposes.

Section 254(b) directs the Federal-State Joint Board on universal service ("Joint Board") and the FCC to "base policies for the preservation and advancement of universal service on [seven] principles." These principles call for both maintaining "just, reasonable, and affordable rates" and providing access to "rural" and "high cost areas" "at rates that are reasonably comparable to rates charged

for similar services in urban areas." *Compare* § 254(b)(1), *with* § 254(b)(3). A conflict between these principles clearly exists. As coverage expands into rural and high cost areas, contribution fees are assessed; the carriers then pass the fees onto existing customers, increasing those customers' rates despite providing the same quality service. *Cf.* 47 C.F.R. § 54.712(a) ("Federal universal service contribution costs may be recovered through interstate telecommunications-related charges *to end users*." (emphasis added)). Doing so, however, does not further the policy goal of maintaining "just," "reasonable," and "affordable rates," especially where many urban areas are also lower-income areas. Yet Congress made no effort to guide the balancing of these competing interests.[4]

The competing nature of the specific principles is compounded by Congress's inclusion of a catchall principle. The seventh principle governing the preservation and advancement of universal service directs the Joint Board and the FCC to consider "[s]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with

4. This, notably, is not a situation where Congress was incapable of guiding the balance of these principles. For instance, Congress could have utilized the first six principles in § 254(b) but limited discretion under those principles by instructing that (1) only X amount of contribution fees may be collected each year; (2) the expansion of access may result in a carrier redistributing costs resulting in the recovery of contribution costs from existing customers of not more than X% of the customer's bill; or (3) the Joint Board and FCC shall ensure that coverage is expanded to at least X square miles of land or Y number of rural and high cost customers a year. Congress's failure to take this step is a symptom of a weak nondelegation doctrine.

this Act." 47 U.S.C. § 254(b)(7). This catchall principle *explicitly* permits the Board and FCC to impart their own considerations and preferences into the process. Accordingly, whatever limiting principle remained (despite the six competing principles) was wiped away by the catchall principle.

If the competing nature of the guiding principles combined with the inclusion of a catchall principle did not render the delegation limitless, the words Congress chose to describe the principles certainly do. In setting rates, the Joint Board and FCC must assure that rates are "just, reasonable, and affordable" and that rates in rural and high cost areas "are reasonably comparable" to rates in urban areas. *Id.* § 254(b)(1), (3). To help ensure this, all telecommunication providers "should make an *equitable* and nondiscriminatory contribution" toward the achievement of universal service. *Id.* § 254(b)(4) (emphasis added). And to top things off, the catchall provision lets the Joint Board and Commission consider principles it determines are "*necessary and appropriate* for the protection of the *public interest*, *convenience*, and *necessity*. . . ." *Id.* § 254(b)(7) (emphasis added). Nowhere does Congress define "just," "reasonable," "affordable," "equitable," "necessary," "appropriate," "public interest," "convenience," or "necessity." *See id.* at §§ 251–62. Rather, these vague terms are left to the judgment of the Joint Board and FCC.

Where these terms are crucial and essential to the statute's implementation, Congress's use of vague and undefined language raises a separation of powers and nondelegation doctrine issue, closely resembling the *Chevron* problem. Through *Chevron*, the judicial branch

gave away its Article III role of interpreting statutes, deferring instead to executive agency interpretation. Through delegations supported by competing principles and the use of amorphous language, Congress gives away its Article I, Section 1 policymaking role, deferring instead to the judgment of executive agencies. Similar to this Court's recent decision in *Loper Bright Enterprises*, this Court should restore the separation of powers between Congress and the Executive. A revitalization of this Court's decision in *Panama Refining* provides just such a path.

B. Revitalizing *Panama Refining* provides a path to restoring separation of powers principles.

In *Panama Refining* the Court held that a delegation by Congress violates the Constitution where it "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." 293 U.S. at 415. The actual delegation in *Panama Refining* that failed to satisfy this standard is worthy of a close examination.

There, a law authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order. . . ." *Id.* at 406 (quoting 15 U.S.C. § 709(c) (1933)). The law further authorized the President "to prescribe such rules and regulations *as may be necessary* to carry out the purpose" of the

aforementioned quoted provision.[5] *Id.* at 407 (emphasis added) (quoting 15 U.S.C. § 710(a)).

This delegation looks quite similar in detail to many of the delegations that have passed constitutional muster under the intelligible principle test. But in the Court's view, the law included only a general statement of policy insufficient to support a delegation of authority because it "left the matter to the President without standard or rule, to be dealt with as he pleased." *Id.* at 418. Moreover, the Court remarked that policy statements directing the executive "to remove obstructions to the free flow of interstate and foreign commerce" or to advance the "conservation of natural resources" are insufficient for a delegation to survive constitutional scrutiny. *Id.* at 417–18 (quotation marks omitted). And, speaking about practical considerations and conveniences, the Court stated, "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained*." *Id.* at 421 (emphasis added).

Since the Court's warning in *Panama Refining*, all three erosions have proliferated, and they are all present in the delegation to the FCC. Comparing the FCC delegation to *Panama Refining*, the generalized language describing the principles guiding the Joint Board's and

5. Under this delegation, the executive announced limits on production and, to ascertain and ensure compliance, required producers, purchasers, and shippers to keep detailed and inspectable books of petroleum production and shipments. *Id.* at 408.

FCC's authority and actions—"just," "reasonable," "affordable," "equitable," "necessary," "appropriate," "public interest," "convenience," or "necessity," *see* 47 U.S.C. § 524(b)—are no more concrete than a directive to "to remove obstructions to the free flow of interstate and foreign commerce" identified as insufficient in *Panama Refining*, 293 U.S. at 417–18 (quotation marks omitted). Thus, *Panama Refining* provides the precedent needed to reject the delegation to the Joint Board and FCC.

Panama Refining remains good law. *See Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 474 (2001) (positively citing *Panama Refining*). Some lower courts, however, have begun to doubt its purview. *See*, *e.g.*, *Chamber of Com. of the United States v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("[W]e very much doubt that the alternative holding of *Panama Refining* has a great deal of separate vitality today; even the basic doctrine of unconstitutional delegation, while by no means repudiated, remains only a shadowy limitation on congressional power." (citation omitted)); *United States v. Yoshida Int'l, Inc.*, 63 C.C.P.A. 15 (Ct. of Customs and Patent App. 1975) (pondering whether *Panama Refining* and *A.L.A. Schechter Poultry* "rest on a rusted concept" and are "still viable"). To be fair, this criticism is reasonable, as it is difficult to advance an intellectually honest argument distinguishing the generalized and limitless delegations in *Panama Refining* and *A.L.A. Schecter Poultry* from the generalized and limitless delegations in later cases like *Yakus* and *National Broadcasting Co. See* Jeffrey A. Wetkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 Geo. L.J. 1055, 1067 (2002) ("The Court weakly attempted to distinguish *Yakus* from *Schechter*, but the real difference

between the cases was not factual but rather a decision to devalue nondelegation principles."); *cf.* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 370 n.167 (2002) (describing the delegated authority in *Panama Refining* as "relatively specific and limited" compared to other delegating statutes).

This Court should now apply *Panama Refining* and reinvigorate the nondelegation doctrine, for the deficiencies and ambiguities that doomed the delegation in *Panama Refining*'s delegation are equally present and fatal to the delegation to the FCC.

IV. Practical concerns should not prevent this Court from faithfully applying separation of powers and Article I, § 1 of the Constitution.

The Court should prioritize faithful interpretation and application of the law over catering to a parade of horribles that may never materialize. No doubt, restoring strength to the nondelegation doctrine will affect the balance of power between Congress and executive agencies. And many laws and regulations may fail once the Court realigns the nondelegation doctrine with separation of powers principles. Such concerns have not and should not impede the Court's duty to interpret the Constitution and honor the well-crafted precedent of *Panama Refining*.

The Court in *Panama Refining* recognized that, against a faithful application of the nondelegation doctrine, "[i]t is no answer to insist that deleterious consequences follow" from the action prohibited by the executive under an unconstitutional delegation. 293 U.S. at 418. In more

recent years, this Court has refused to bow to weighty practical concerns when interpreting other areas of law. In *Pereria* and *Niz-Chavez*, for instance, the Court interpreted an immigration statute that upended the process used by the Department of Homeland Security for notices to appear and invalidated the stop-time date for almost every immigrant awaiting a removal hearing, allowing those immigrants to argue for cancellation of removal. Against these very real and extensive practical concerns, this Court merely retorted that "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" *Niz-Chavez*, 593 U.S. at 169 (quoting *Pereira*, 585 U.S. at 217). Likewise, in the context of Indian law, although the practical implications of properly interpreting a treaty resulted in the inapplicability of state and local criminal law jurisdiction over thousands of square miles, this Court still gave the treaty the interpretation it thought best. And although the Court's interpretation drew into question a vast number of convictions and predictably flooded courts with new cases, this Court merely remarked that "dire warnings are . . . not a license for us to disregard the law." *McGirt*, 591 U.S. at 936. The Court should apply the same logic to practical concerns raised regarding reviving the nondelegation doctrine.

But to the extent practical concerns and principles of *stare decisis* give the Court pause, the Court can take the same approach it adopted in *Loper Bright Enterprises*. There, in reviving separation of powers principles in the related agency deference context, the Court issued a protectively prospective judgment that specifically did "not call into question prior cases that relied on the

Chevron framework." *Loper Bright Enters.*, 603 U.S. at 412.

Here, the Court could take one of two approaches. First, it could revitalize the nondelegation doctrine while not calling into question those delegations it, or even circuit courts, have already reviewed. Second, if this approach still causes too much heartburn over the practical ramifications of a revitalized nondelegation doctrine, the Court could issue a ruling applicable to this case and to future acts of Congress. Under either approach, the Court can account for various practical concerns without fearing that it was taking a "freakish" approach that "single[d] out the provision at issue . . . for special treatment." *See Gundy*, 588 U.S. at 149 (Alito, J., concurring). Rather, even a prospective restoration of the nondelegation doctrine will restore balance between the branches and force Congress to satisfy its constitutional responsibilities when legislating.

CONCLUSION

The Court should affirm the judgment of the en banc panel of the Fifth Circuit and, in so doing, revive separation of powers principles and the nondelegation doctrine, as exemplified by *Panama Refining*.

Respectfully submitted,

Braden H. Boucek
Counsel of Record
Celia Howard O'Leary
Jordan Rand Miller
Southeastern Legal Foundation
560 West Crossville Road, Suite 104
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

February 18, 2025 *Counsel for Amicus Curiae*