NO. 24-354 and 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 ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom advances the God-given right to live and speak the truth. It promotes religious freedom, the freedom of speech, the sanctity of human life, parental rights, and God's design for marriage and family. To advance constitutional freedoms for all Americans, ADF represents ordinary people who face extraordinary threats from government overreach. ADF has a strong interest in preserving constitutionally separated power to ensure that basic freedoms endure in this generation and those to come.

SUMMARY OF THE ARGUMENT

Article I vests legislative power in Congress. Legislative power is the power to make binding law. As the Constitution's text, structure, and history show, Congress alone can make binding law. It cannot give this power away. But Congress can delegate other authority. It can make the application of law turn on executive factfinding, allow other government branches to exercise their inherent constitutional power, and give the executive authority over public rights.

The current delegation rule has veered from this principle and collapsed separated power. This Court should restore separated power by adopting the following originalist rule:

> A statute unconstitutionally delegates legislative power when it (1) enables a government agent to make, outside its inherent

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

> constitutional authority, generally applicable rules that bind private conduct and (2) makes the content or effectiveness of those rules turn on the agent's policy judgment, rather than a factual contingency that could be subject to judicial review.

This rule respects the Constitution, works in practice, and restores an originalist understanding at a time of great need. In recent years, Government has swelled exponentially. The Code of Federal Regulation now has over 100 million words. Too many arise from Congress delegating its exclusive power. Restoring the original delegation doctrine keeps lawmaking power where it belongs—Congress.

ARGUMENT

I. Article I vests legislative power in Congress, prohibiting its further transfer.

Constitutional analysis starts with "the language of the instrument." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022). That language "offers a fixed standard for ascertaining what our founding document means." *Ibid.* (cleaned up). Article I of the Constitution states: "All legislative Powers herein granted shall be vested in a Congress of the United States." Because this provision vests all legislative power in Congress, it prohibits the transfer of legislative power to coordinate branches.

A. Congress has legislative power.

Article I vests legislative power in Congress. Legislative power is the power to make "generally applicable rules of private conduct." *Dep't of Transp.* v.

Ass'n of Am. Railroads, 575 U.S. 43, 70 (2015) (Thomas, J., concurring). As Alexander Hamilton said, "[t]he essence of the legislative authority is to enact laws"—to prescribe "rules by which the duties and rights of every citizen are to be regulated." *The Federalist* No. 78; accord 1 *William Blackstone*, *Commentaries* *44. Chief Justice Marshall agreed: "It is the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher* v. *Peck*, 10 U.S. 87, 136 (1810). Legislative power was no mere power to vote on legislation; it was the power to make general rules binding private conduct.

This power is distinct from executive and judicial power. Whereas core judicial power is the power to make binding judgments about binding rules in individual cases, core legislative power is the power to make binding rules. *The Federalist* No. 78 (Alexander Hamilton); Executive power is neither. It is the nation's strength, action, and force. *Ibid.*; see Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1122–25 (2023). It does not include the authority to create binding rules or judgments.

Binding rules impose legal obligation; nonbinding rules do not. Article I gives Congress authority to create some of both. As Alexander Hamilton said, "The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." *The Federalist* No. 78. Congress, for example, has the power to borrow and coin money, establish post roads, raise and support armies, provide and maintain a navy, and so forth. U.S. Const. art. I, § 8. "The physical establishing, constituting, supporting, and maintaining of such things"—and the directing of "executive officers" to

accomplish them—"[are] executive acts, vested in the executive." Hamburger, *supra*, at 1116.

Though "some of these powers, at least in conjunction with the Necessary and Proper Clause, could justify the making of binding laws, they more broadly" let Congress work through "nonbinding enactments." Hamburger, *supra*, at 1115–16. Congress must "authorize" such actions, but it may allow the executive to carry them out. *Id.* at 1116.

Authorizing laws do not legally obligate the public. Or as Hamilton would say: they do not prescribe "rules by which the duties and rights of every citizen are to be regulated." *The Federalist* No. 78. So Article I gives Congress limited power to form binding law—generally applicable rules of private conduct—*and* more "authority to make a range of relatively nonbinding rules." Hamburger, *supra*, at 1117.

B. Congress must keep its legislative power.

Article I then ensures that Congress *alone* may enact binding law. It says all legislative power "shall be vested" in Congress. U.S. Const. art. I, § 1. This mandatory text conveys legislative power to Congress *and fixes it there*. If Article I "had merely said that the legislative powers *are hereby vested* in Congress, one might [believe] the Constitution only transferred its powers, without any express textual indication that [those powers] must stay in Congress." Hamburger, *supra*, at 1172. But the Constitution says "shall be vested" instead—mandating both "the transfer" of legislative power and its fixed "location." *Id.* at 1173.

Because legislative power "shall be vested" with Congress, it shall *not* be vested elsewhere.

Article I's Necessary and Proper Clause does not undo this structure. It states: "Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. This "necessary and proper" limit is not conjoined. Consider the broader structure—though the executive may recommend measures it considers "necessary and expedient," U.S. Const. art. II, § 3, this provision ensures Congress may enact laws only that are "necessary and proper," *id.* art. I, § 8. This textual variation suggests that each adjective imposes a separate condition in its respective clause. *McCulloch* v. *Maryland*, 17 U.S. 316, 367 (1819). So Congress may not delegate powers as it pleases—only as "proper."

Shifting separated power is not "proper." Besides subverting Article I's Vesting Clause, such a grant would violate the Necessary and Proper Clause, which allows Congress to make laws enabling the exercise of powers only as "vested by [the] Constitution" in the three branches. U.S. Const. art. I, § 8; see Nathaniel Chipman, *Sketches of the Principles of Government* (Vt., J. Lyon 1793) (Congress is "empowered, to make all laws necessary and proper for carrying into effect, in the government, or any department, or office of the United States, all the powers, with which they are invested, by the constitution."). This provision doesn't allow Congress to redraw constitutional lines. It allows Congress to delegate authority within those lines. Hamburger, *supra*, at 1177–80.

History supports this construction. Start with the framers' well-documented commitment to the separation of powers. *Mistretta* v. *United States*, 488 U.S. 361, 380–81 (1989). Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than" the separation of powers. *The Federalist* No. 47 (James Madison). For "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." *Ibid.* So as the framers understood, separated power is "essential" to "liberty." *Mistretta*, 488 U.S. at 380; see *The Federalist* No. 47 (James Madison) (quoting Baron de Montesquieu: "There can be no liberty where the legislative and executive powers are united in the same person" or body of rulers.).

This liberty was not "freedom from all constraint," but the liberty "to have a standing rule to live by … made by the *legislative power*" and to be free from the "arbitrary will of another man." *Am. Railroads*, 575 U.S. at 75–76 (Thomas, J., concurring) (quoting John Locke, *Second Treatise of Civil Government* § 22, at 13 (J. Gough ed. 1947)). Central to this liberty were "the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule … not enacted by the legislature, then he was not truly free." *Id.* at 76; accord David Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* at 272 & n.268 (Univ. of Chi. Press 1985). This shows that the core legislative power that the framers sought to protect from consolidation with the executive was the power to make "generally applicable rules of private conduct." *Am.*

Railroads, 575 U.S. at 76 (Thomas, J., concurring); § I.A (defining legislative power).

To prevent consolidated power, the Constitution vests legislative, executive, and judicial power separately in three branches of government. That arrangement serves to bar further delegations of power. Take it from John Locke, who most profoundly influenced the framers' understanding of separated power, *Gundy* v. *United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J, dissenting); John Quincy Adams, *The Jubilee of the Constitution: A Discourse* (1839), https://perma.cc/JW63-7LAS:

> The power of the Legislative being derived from the People by a … voluntary Grant …, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.

John Locke, *Two Treatises of Government* 381 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690). Implicit in delegated political power is a bar on its further transfer; only with an additional grant of authority to make legislators could a legislature enable others to make binding law. See *Wayman* v. *Southard*, 23 U.S. 1, 42–43 (1825).

Ordinary Americans accepted this tenet. Consider American revolutionary James Otis, an early hero in the patriot cause of the 1760s. He endorsed Locke's words condemning the delegation of legislative power in his widely circulated 1763 pamphlet, "The Rights of the British Colonies Asserted and Proved." James

Otis, *The Rights of the British Colonies Asserted and Proved* (1763), archived at https://perma.cc/NLF8-TMNW ("The legislature cannot transfer the power of making laws to any other hands."). As did Thomas Jefferson in another widely circulated tract that condemned an act enabling King George III to reopen American wharves whenever he pleased. Thomas Jefferson Randolph, ed., *A Summary View of the Rights of British America (1774)*, *in* 1 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson* 112–13 (Colburn & Bentley 1829). Jefferson called this delegation of legislative power "despotism." *Ibid.*

This common understanding prompted the crisis that led to the framing of the U.S. Constitution. Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 Harv. J.L. & Pub. Pol'y 795, 836 (2022). When the Articles of Confederation were still in place, Congress sought to impose a tax on goods. *Id.* at 796. It needed the States' consent. But the New York Constitution proved to be a roadblock; it said "legislative power within this State *shall be vested* in two separate and distinct bodies of men"—the State's Assembly and Senate. *Id.* at 797 (emphasis added). It was accepted that this provision prohibited delegations of legislative power "within [the] State" (which suffices to support the construction of Article I here), but Hamilton said it did not forbid delegations *outside the State*, e.g., to a federal Congress. *Id.* at 821 (cleaned up). His nuanced point did not prevail, and New York rejected the tax—prompting calls for a constitutional convention where the American people (not the states) could review federal power. *Id.* at 826–27; Hamburger, *supra*, at 1161–62. Those calls were soon answered.

At the convention, legislative delegation arose when Madison proposed that the executive have, in addition to the power to carry into effect the national laws, the power to execute congressionally delegated powers. 1 *The Records of the Federal Convention of 1787* at 66–67 (Max Farrand ed., 1911). This proposal assumed the executive could *not* exercise congressionally delegated power without express constitutional authorization, and it provoked fear that "improper powers might … be delegated." *Id.* at 67. So Madison clarified his proposal to vest the executive with the "power to carry into effect, the national laws … and to execute such other powers *not Legislative nor Judiciary in their nature*, as may from time to time be delegated by the national Legislature." *Id.* at 66–67 (emphasis added; cleaned up).

After this edit, another member moved to strike the delegation provision—calling it "unnecessary" because such power is "included" in the "power to carry into effect the national laws." *Id.* at 67. Madison conceded the provision's excess but said keeping it may "prevent doubts and misconstructions." *Ibid.* Madison's measure failed, ensuring the executive *lacked* the power to execute congressionally delegated powers.

Post-ratification debates sounded much the same. In 1791, the House of Representatives debated a proposed bill establishing a network of post offices and post roads, during which someone introduced an amendment that would have allowed mail deliveries "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). This proposal sparked tension. One member said that because Congress

alone had the power "to establish post offices and post roads," it would be unconstitutional to give that power to the executive. *Id*. at 229–30. The amendment's sponsor answered not by denying Article I barred delegating legislative power, but by calling the power delegated by his proposal executive, rather than legislative, in nature. *Id*. at 230. Critically, no one defending the bill argued that Congress could delegate legislative power, which baffles if it were widely accepted that such power could be given. The measure failed.

Consider also the Alien and Sedition Acts of 1798, which were broadly condemned as unconstitutional. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 6 (Yale 2008). The Alien Act was criticized in part for enabling the president "to order all such aliens as he shall judge dangerous to the peace and safety of the United States … to depart out" of the country. 1 Stat. 570-71 (1798). A member denounced this provision because Congress alone can make general "rule[s] of action," and the Act empowered the president to "make the law" as he went. 8 Annals of Cong. 2007–08 (1798). Another said the Constitution forbids transferring power "in this manner." *Id*. at 1963. The Act, they warned, sanctioned "despotism." *Id*. at 2008. Though the Act passed, it quickly expired after severe condemnation. Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & Liberty 718, 747–48 (2019).

The same year, Congress debated another bill allowing the President, under certain conditions, to raise an army of no more than 10,000 men. 1 Stat. 558 (1798). Some objected that the act unconstitutionally delegated legislative power to the executive. 8 Annals of Cong. 1525, 1535 (1798). Others said it only allowed

the President to act "until a certain contingency" occurred. *Id.* at 1528. Then critics warned, if that were correct, Congress could let the President establish tax rates. *Id.* at 1529. Supporters disagreed, saying only Congress can fix a tax, but Congress could allow the President to collect the tax when he found that "a certain event" has occurred. *Id.* at 1530. The measure passed, but again, no one defending the law said Congress could delegate its legislative power to the president. And as will be shown below, neither this Act nor the Alien Act violated the separation of powers.

As text, structure, and history show, Congress alone can make general rules binding private conduct.

C. Congress may delegate other power.

This rule is clear, but it needs shape. *The Federalist* No. 37 (James Madison) ("[N]o skill in the science of government has yet been able to … define, with sufficient certainty," the line between "the legislative, executive, and judiciary."); *Wayman*, 23 U.S. at 46 (admitting this necessary but "difficult" task). When the application of a constitutional rule needs refining, "history" and "practice" show the way. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 35–36 (2022). Those guides show that Congress can, without delegating legislative power, (1) condition the application of law on executive factfinding, (2) enable the exercise of inherent constitutional power, and (3) give the executive authority over public rights.

1. Congress can make the application of law depend on executive factfinding.

Start with conditional legislation. During the Napoleonic Wars, Congress imposed a trade embargo on France and Great Britain until the president had determined that one side had changed its "edicts" to respect "the neutral commerce of the United States." 2 Stat. 606 (1810). This Court upheld that grant of power because Congress exercised legislative judgment in setting the rule while enabling the executive only to adjudicate whether a certain "fact" was true before it "[went] into effect." *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. 382, 387 (1813).

That's because factfinding is an inherent executive function. Gary Lawson, *Delegation & Original Meaning*, 88 Va. L. Rev. 327, 364 (2002); cf. Amy Coney Barrett, *Suspension & Delegation*, 99 Cornell L. Rev. 251, 293 (2014) ("Congress has passed contingent legislation since the early … Republic."). This issue reappeared a half-century later when Congress made construction of the Brooklyn Bridge turn on a finding by the Secretary of War that the bridge would not impede ships traveling on the East River. This Court upheld that delegation on the same logic. *Miller* v. *Mayor of N.Y.*, 109 U.S. 385, 393 (1883). Congress may, without delegating legislative power, condition the application of law on executive factfinding.

This logic justifies other early laws like the Direct Tax of 1798, in which Congress levied a tax to be raised in part based on property valuations made by executive officials. 1 Stat. 597, 598 (1798). Congress made the policy; it fixed the tax amount. Then, because the Constitution provided that direct taxes

must be proportional to the states' populations, Congress decided how each state would contribute— a 50-cent head tax on slaves and a fixed-rate tax on houses per their monetary value. Any shortfall would be covered by a land tax at a rate sufficient to satisfy the state's obligation. Finally, Congress settled whether houses should be taxed apart from land, to ensure that wealthy city dwellers, not rural farmers, would bear most of the burden. Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1550 (2021).

Having decided the policy, Congress sent officials to value the homes. A three-step process controlled their assessments: (1) initial assessors would value property based on its monetary worth considering local geography and circumstances; (2) principal assessors could then adjust those valuations up or down; and (3) commissioners could make further areawide adjustments if equitable and just. This layered review ensured impartiality and limited discretion—allowing adjustments only to "equalize" valuations. 1 Stat. 580, 588, § 20 (1798). Sure, Congress could have based home valuations on a more concrete measure—*e.g.*, the number of rooms, doors, and more—but such measures would not account for key factors like location that vastly affect home values. See 8 Annals of Cong. 1848 (1798) (Without layered, individualized review, "no equality of taxation could be expected."). Congress set the rule and sent officials to determine facts. Wurman, *supra*, at 1549–53. No problem. Cf. Hamburger, *supra*, at 1211 ("[A]s a matter of common law, assessments were not considered legislative.").

Congress could have exercised its legislative "judgment" in these cases without executive factfinding. *Brig Aurora*, 11 U.S. at 388. It could have decided

under what circumstances to impose the embargo, to build the bridge, or to raise the tax. But these historical examples show that, while "the Constitution's powers are exclusive," the "authority exercised under" those powers is sometimes not. Hamburger, *supra*, at 1145; *Am. Railroads*, 575 U.S. at 69 (Thomas, J., concurring). "[S]eparated powers come with much unseparated authority." Hamburger, *supra*, at 1145.

2. Congress can authorize the exercise of inherent constitutional authority.

Building on this principle, Congress may authorize executive and judicial rulemaking for internal administration. Take the Judiciary Act of 1789, which empowered federal courts "to make all necessary rules [to] orderly conduct[ ] [the] business" before them. 1 Stat. 73 (1789). This act gave the judiciary broad discretion to make rules regulating its internal administration, but because this power is "properly within the judicial province," no legislative power was given. *Wayman*, 23 U.S. at 45. While the legislative and judicial *powers* are vested exclusively in their respective branches, the *authority* to make rules of court is not exclusively legislative or judicial. See *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting). Congress may authorize the exercise of overlapping authority without delegating legislative power.

Similarly, when a statute gives wide discretion to the executive, no delegation problem arises if "the discretion is to be exercised over matters already within the scope of executive power." *Ibid.*; see David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260–65 (1985). The First Congress, for example, passed an act

allowing the President "to call into service from time to time [certain militia], as he may judge necessary," to protect American "frontiers." 1 Stat. 119, 121 (1790). This act gave the president discretion to pursue a specific foreign policy, but it did not transfer power because allocating military resources is quintessential executive work. Alexander Hamilton, *The Letters of Pacificus No. 1* (1793).

Indeed, early Congresses provided nearly "standardless regulatory authority" to the President in matters of war and foreign policy. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1300 (2006). One statute gave the president $40,000 annually to "support … such persons as he shall commission to serve the United States in foreign parts." 1 Stat. 128, 128 (1790). Another let him do whatever necessary to protect the public when France menaced. 1 Stat. 554, 555 (1798). The exercise of such authority arguably did not need statutory authorization. See *Little* v. *Barreme*, 6 U.S. 170, 177 (1804).

Contemporary commentators affirmed these statutes as consistent with the separation of powers. In the same part of his 1803 treatise in which he affirmed the rule against delegation of legislative power, George Tucker distinguished such early statutes from impermissible delegations of legislative power by noting they delegated powers to the president in an area in which he possessed inherent power. Saint George Tucker, 1 *Blackstone's Commentaries: with Notes of Reference, to the Constitution & Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 346–47 (Birch & Small

1803); see William Rawle, *A View of the Constitution of the United States of America* 196 (2d. ed. 1829).

As to war and foreign policy, Congress acts in "precedence over, not exclusion of, [e]xecutive authority." *Loving* v. *United States*, 517 U.S. 748, 767 (1996); *Gundy*, 588 U.S. at 170–71 (Gorsuch, J., dissenting) ("Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers."); cf. *United States* v. *Eliason,* 41 U.S. 291, 301 (1842) ("The power of the executive to establish rules and regulations for … the army, is undoubted").

3. Congress can delegate to the executive authority over public rights.

Finally, Congress may delegate to the executive broad authority over public rights. Article IV, section III states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Property belonging to the United States." An exercise of power under this clause is not subject to Article I's limitations. Congress can manage public property as it needs. *United States* v. *Gratiot*, 39 U.S. 526, 537 (1840) (Congress manages public "property … without limitation."). For example, it is "well established" that Congress manages public land as landowner rather than lawgiver. Schoenbrod, *supra*, at 1266; see *Am. Railroads*, 575 U.S. at 83 n.7 (Thomas, J., concurring) (distinguishing rules binding private conduct from rules for accessing "public land").

In the early republic, Congress enabled the executive to dispense public rights. Public rights included government-owned property interests, covering both

tangible interests, *e.g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855) (public servitudes), and intangible ones, *e.g. Commonwealth* v. *Duane*, 1 Binn. 601, 606–07 (Pa. 1809) (compliance with laws). See Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 566 (2007); 4 *William Blackstone, Commentaries* *7. Congress had nearly limitless discretion to regulate these rights. It could dispose property, allot benefits, and award franchises itself—with or without judicial review—or it could "adopt general rules according to which executive officials would dispense them." John Harrison, *Public Rights, Private Privileges, and Article III*, 54 Ga. L. Rev. 143, 158 (2019). When enabling executive adjudication, Congress could give officials "substantial discretion or none at all." *Ibid.*

In 1794, for example, Congress directed the Secretary of War to place on the invalid pension list individuals he found clearly within the provisions of an earlier act regarding pensions. 1 Stat. 392, 392–93 (1794). That Act called for the application of law to fact with no policy discretion. *Ibid.* A few years before, Congress authorized the president to set compensation for excise officials at amounts he deemed "reasonable and proper," provided his decisions were within a specified range. 1 Stat. 199, 213 (1791). Similarly, Congress enabled the president "to order all such aliens as he shall judge dangerous to the peace and safety of the United States … to depart out" of the country, 1 Stat. 570–71 (1798), and it let executive officials approve patents for inventions they "deem … sufficiently useful and important," 1 Stat. 109, 110 (1790). These were matters of license and privilege. In

nearly all these acts, Congress delegated to the executive broad discretion over public rights.

Then, in 1845, this Court rejected a constitutional challenge to a federal statute providing that a person who paid a duty under protest was entitled to a refund "whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that … more money has been paid … than the law requires should have been paid." *Cary* v. *Curtis*, 44 U.S. 236, 240–41 (1845). This was no delegation problem as the law did not enable the Secretary to issue general rules governing private conduct; instead, the law allowed the Secretary "to apply such rules to particular cases, a duty inherent in … executive power." Gordon, *supra*, at 755; see *Murray* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1855). True, that law appears to delegate judicial power: it makes the Secretary the sole "tribunal for the examination of claims." *Cary*, 44 U.S. at 242. But because the dispute is between government and citizen, the public-rights doctrine allows Congress to resolve it outside Article III courts—provided there was due process. *Murray*, 59 U.S. at 284; *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

In sum, in the early republic, Congress appropriately allowed the executive to exercise broad discretion over public rights.[2]

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[2] In modern practice, agencies can issue prospective decisions that do not penalize past conduct but declare legal rights or obligations going forward. *E.g. MCI Express, Inc.-Pet. for Declaratory Order-DSL Transp. Servs., Inc.*, 1999 WL 438985, at *1 (S.T.B. 1999) ("the [Surface Transportation] Board has discretionary authority to issue a declaratory order to terminate a

D. Congress must speak clearly.

Early practice shows that Congress may give discretion to other branches, and though the *scope* of that discretion was important, its *nature* was paramount.

For example, Congress had more latitude to delegate discretion when it enabled other government branches to exercise inherent constitutional power. But when making conditional legislation and allowing discretion that edged on private liberty, it spoke more precisely. Clarity is key. As Madison said, "[d]etails … are essential to the nature and character of a law." 17 *The Papers of James Madison* 303, 324 (David B. Mattern, et al. Perdue eds., 1991). Without "precise rules," a law could be so vague as to enable an exercise of power far beyond constitutional limits. *Ibid.*

The clarity required varies by the law. As Madison explained, all laws need sufficient detail to show their "true character" as laws, but those affecting private rights—a person's right to "life," "liberty," or "property"—require more precision. 17 *The Papers of James Madison* 325; see Wurman, *supra*, at 1512–14; Gordon, *supra*, at 747–48. When telling the IRS to design a stamp, for example, Congress need not give specific direction, *In re Kollock*, 165 U.S. 526, 533 (1897); but when Congress lets the Attorney General ban a drug, it must provide detailed instructions, *e.g.*, *Touby* v. *United States*, 500 U.S. 160, 166 (1991); A.J. Jeffries, *Making the Nondelegation Doctrine Work:*

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controversy or remove uncertainty."). Those decisions require no fair warning. That practice should be reviewed if this Court restores the nondelegation doctrine consistent with its original understanding. Gordon, *supra*, at 756–57.

Toward A Functional Test for Delegations, 60 U. Louisville L. Rev. 237, 253–57 (2021). "The specificity needed … will vary with the" type of authority that Congress is allowing. *Id*. at 257; cf. David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 247 (1997) (opining that delegation "must … be more narrowly defined, when the authority [given] is one the Framers specifically" reserved for Congress).

This means grants affecting private liberty require the most detail, while those authorizing inherent authority require less. Cf. Barrett, *supra*, at 318 n.286 (noting this sliding "scale"). But in all cases, Congress must provide standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed. *Gundy*, 588 U.S. at 158 (Gorsuch, J, dissenting) (quoting *Yakus* v. *United States*, 321 U.S. 414, 426 (1944)).

II. This Court should adopt an originalist rule.

Tying text, structure, and history together, a conceptual thread appears: A statute unconstitutionally delegates legislative power when it (1) enables a government agent to make, outside its inherent constitutional authority, generally applicable rules that bind private conduct and (2) makes the content or effectiveness of those rules turn on the agent's policy judgment, rather than a factual contingency that could be subject to judicial review. The current delegation test does not fully respect this rule. It veers from precedent and has collapsed separated power. This Court should affirm the originalist understanding of the separation of powers and right the republic.

A. The intelligible-principle rule is wrong.

This Court first introduced the intelligible-principle test in *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928), which involved a challenge to a tariff assessed on a shipment of barium dioxide. *Id.* at 400. The president set the tariff rate by proclamation per the Tariff Act of 1922. *Ibid.* That Act allowed him to adjust up or down a duty set by statute if he found that the duty did not "'equalize ... differences in costs of production [of the item to which the duty applied] in the United States and the principal competing country.'" *Id.* at 401 (quoting 19 U.S.C. § 154 (1925)). An importer challenged this authority as an unconstitutional delegation of legislative power. *Id.* at 404.

This Court affirmed that Congress could not delegate such power. But it nonetheless upheld the Act under newfound logic: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. This atextual and ahistorical rule veered sharply from precedent and inadvertently combined federal power.

1. The rule veered from precedent.

This broad rule also "rested on a narrow foundation." *Am. Railroads*, 575 U.S. at 78 (Thomas, J., concurring). When *J.W. Hampton* was decided, most congressional delegations to the executive, including the one at issue in that case, "had taken the form of conditional legislation." *Ibid.*; see *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683–89 (1892); see § I.C.1. And this Court affirmed that practice in *Brig Aurora*. The

president does not exercise legislative power when Congress makes the "rule of private conduct" while enabling the president only to find a fact "caus[ing] that rule to go into effect." *Am. Railroads*, 575 U.S. at 78 (Thomas, J., concurring).

As a result, *J.W. Hampton* required no new thinking. The conditional-legislation rule applied. In fact, this Court concluded its analysis in *J.W. Hampton* not by touting an intelligible principle but by citing *Field*—showing that the Tariff Act did *not* give the "President … the power of legislation, because" no policymaking was left to his discretion. 276 U.S. at 410; see *Field*, 143 U.S. at 692. Congress had conditioned the application of law on a "named contingency," and enabled the President "to ascertain and declare the event upon which" the law would "take effect." *J.W. Hampton*, 276 U.S. at 410–11; see *Am. Railroads*, 575 U.S. at 81 (Thomas, J., concurring). Neither *J.W. Hampton* nor *Field* suggests that the executive can make general rules binding private conduct.

To be sure, courts then had begun to uphold statutes under which the executive could make "subordinate rules within prescribed limits." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); see *id.* at 429. But "[t]o the extent that these cases endorsed authorizing the Executive to craft generally applicable rules of private conduct, they departed from the precedents on which they purported to rely." *Am. Railroads*, 575 U.S. at 82 (Thomas, J., concurring). Many such cases invoked *Wayman*, but that opinion "strongly suggests" that no one but Congress may create such rules. *Ibid.* Internal management rules differ from generally applicable rules of private conduct. § I.C.2. And two key premises lie beneath *Wayman*:

(1) the *quality*—not the *quantity*—of delegated discretion shows whether an authorization is constitutional, and (2) the rules "for which the legislature must expressly and directly provide" are those binding private conduct, not public officials. 23 U.S. at 46; see *Am. Railroads*, 575 U.S. at 83 (Thomas, J., concurring).

So when *Wayman* notes the "difficulty" in discerning exactly when Congress may delegate authority, it does not concern the "difficulty in discerning whether" Congress's guidance is "sufficiently defined," but instead "the difficulty in discerning which rules" bind private conduct and "which [do] not." *Ibid.* (citing *Panama Refining*, 293 U.S. at 429); accord *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting). This Court continues to "wrestle" with a similar distinction in its "decisions distinguishing between substantive and procedural rules both in diversity cases and under the Rules Enabling Act." *Am. Railroads*, 575 U.S. at 83 (Thomas, J., concurring); *e.g. Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 406–407 (2010).

2. The rule collapsed federal power.

J.W. Hampton's error collapsed federal power. The intelligible-principle test "is notoriously lax." Barrett, *supra*, at 318. It requires only a "minimal degree of specificity" for Congress to enable executive officials to "make rules having the force and effect of [binding] law." *Am. Railroads*, 575 U.S. at 85 (Thomas, J., concurring). It has allowed executive officials to decide politically what is "unfair," *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 104–05 (1946), pick policy goals, *Yakus*, 321 U.S. at 420, 423–26; *Entergy Corp.* v.

Riverkeeper, Inc., 556 U.S. 208, 218–23 (2009), and bind private conduct, *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 472–76 (2001).

But clarity is a *mean*—not the *end*. As a standalone rule, clarity has sapped the nondelegation doctrine. Modern precedent has turned the "nondelegation doctrine" into "no doctrine at all." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2364 (2001). Clarity is necessary but not sufficient to ensure that separated power is respected.

B. The originalist rule is right and best.

The intelligible-principle rule is wrong. But to restore separated powers, the originalist rule must be correct, § I, *and* "readily enforceable." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). Recall the correct rule: A statute unconstitutionally delegates legislative power when it (1) enables a government agent to make, outside its inherent constitutional authority, generally applicable rules that bind private conduct and (2) makes the content or effectiveness of those rules turn on the agent's policy judgment, rather than a factual contingency that could be subject to judicial review. This rule is readily administrable.

1. The rule works in practice.

Early cases are a good litmus. Go back to *Brig Aurora*. That ruling would be affirmed on two independent bases. First, it was conditional legislation allowing the president to implement a law if he found that another nation had changed its laws to respect "the neutral commerce of the United States." 2 Stat. 606 (1810). As the original holding shows, courts can

discern whether that predicate act had occurred. *Brig Aurora*, 11 U.S. at 387. They are well equipped to review the application of law to fact.

Second, because this legislation concerned foreign affairs, an area over which the president has inherent authority, § I.C.2, Congress could have curbed presidential judgment even less. In fact, a federal court had affirmed this same law on this exact logic a few years before. *United States* v. *The William*, 28 F. Cas. 614, 622 (D. Mass. 1808). *Brig Aurora* stands. As does *Wayman*: because the authority to regulate courts is "within the judicial province," Congress can authorize the judiciary to exercise its inherent power to formulate rules of court. 23 U.S. at 45. All good here.

Newer cases may stand but on different logic. Take *Lichter* v. *United States*, which affirmed under the intelligible-principle rule a provision in the Renegotiation Act that created a cause of action for the War Department to recover "excessive profits" from defense contractors. 334 U.S. 742, 746 (1948). The Act passes because Congress did not allow the Department to create generally applicable rules. Consider also *National Broadcasting Co.* v. *United States*, in which this Court deemed sufficiently "concrete" a statute allowing the Federal Communications Commission to grant broadcast licenses for the "public interest, convenience, or necessity." 319 U.S. 190, 193–94, 216 (1943). This rule passes because Congress had made radio operation a public right. § I.C.3. It banned running a radio apparatus without a license—binding private conduct—and let the Commission grant exceptions to that general rule in the form of license. An exemption from a general ban is a "privilege." William Baude, *Adjudication Outside Article III*, 133 Harv. L.

Rev. 1511, 1579 (2020). Congress made the rule binding private conduct; the Commission did not.

That does not mean all precedent will stand. Take *Gundy*, where this Court upheld as an intelligible principle SORNA's delegation to the Attorney General of authority to decide whether SORNA's terms would be applicable to "sex offenders convicted before" the act was passed. 34 U.S.C. 20913(d). This delegation "leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them." *Gundy*, 588 U.S. at 169 (Gorsuch, J., dissenting). It does not make application of SORNA turn on objective "fact-finding." *Id.* at 170. Nor does SORNA "involve an area of overlapping authority with the executive." *Ibid.* It allows an executive officer "to 'prescrib[e] the rules by which the duties and rights' of citizens are determined, a quintessential[ ] legislative power." *Id.* at 171 (quoting *The Federalist* No. 78 (Alexander Hamilton)). "If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people." *Ibid.*

Some may criticize as undefined the line between rules that bind private conduct and those that merely affect it. For example, the originalist rule approves of Congress enabling the executive to make rules covering the location of federal buildings and lands. § I.C.3. These choices can affect private people just as much as rules. But here, Government acts as owner, employer, or market participant rather than legislator—distinctions familiar in other legal contexts. *E.g. Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968) (First Amendment); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-

37 (1980) (Dormant Commerce Clause). Such activities may interfere with private conduct but do not bind it. Hamburger, *supra*, at 1116.

Others may criticize as too undefined the line between rules that go into effect based on a factual contingency and those that turn on a policy call. But courts routinely untangle fact from opinion. Take defamation law. An opinion expresses "a subjective view, an interpretation, a theory, conjecture, or surmise," while a fact is "objectively verifiable," *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993), meaning it can be "proved true or false" to a court, *Partington* v. *Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); accord *Cheng* v. *Neumann*, 51 F.4th 438, 444 (1st Cir. 2022); *McCafferty* v. *Newsweek Media Grp., Ltd.*, 955 F.3d 352, 359 (3d Cir. 2020). If these standards suffice when First Amendment freedom is at stake, they suffice here. Gordon, *supra*, at 789.

2. The rule restores the Constitution's original meaning at a time when it is sorely needed.

This Court should resurrect "the original understanding" of the separation of powers. *Am. Railroads*, 575 U.S. at 77 (Thomas, J., concurring). It has "not hesitated" to do so elsewhere. *Gundy*, 588 U.S. at 168 (Gorsuch, J., dissenting) (collecting examples).

True, adopting this rule would slow government. But it would strengthen deliberation. The framers accepted this trade, for while patience may defeat "a few good laws," it will prevent many "bad ones." *The Federalist* No. 73 (Alexander Hamilton). The evolution of the modern bureaucratic state shows that wisdom.

Between 1975 and 2016, the Code of Federal Regulations' page count grew from less than 75,000 to over 175,000, with its word count now exceeding 103 million. Gordon, *supra*, at 813. The restrictive-word count—a count of words like "shall," "must," "may not," "required," and "prohibited"—similarly increased over that span, from just under 500,000 to nearly 1.1 million. *Id*. at 813–14.

Unsurprisingly, that enormous regulatory growth has produced trouble. Take the case here. The Telecommunications Act of 1996 authorizes the FCC to establish "specific, predictable[,] and sufficient … mechanisms to preserve and advance universal service." 47 U.S.C. 254(b)(5). To fund these efforts, the Commission levies "contributions" to a Universal Service Fund from telecommunications carriers and distributes the money raised to other people and entities to expand and advance "universal service"—i.e., telecommunication services that Congress left undefined and committed to the Commission's discretion.

The Commission doesn't administer these universal service programs itself. Instead, it established a private nonprofit corporation—the Universal Service Administrative Company (USAC)—to bill contributors, collect contributions, and disburse universal service funds. USAC is managed by representatives from interest groups affected by and interested in universal service programs, who are nominated by their respective interest groups. Critically, the Commission delegates to USAC the responsibility of deciding the quarterly universal service fund contribution amount—a projection of the dollar value of demand for universal support programs and the costs of administering them—that telecommunications

providers must pay. Because carriers may pass these "contributions" on to their customers, they have a financial incentive to increase the size of universal service programs and may do so through the USAC.

The Commission has 14 days to review and revise the contribution amount, but it seems to accept the USAC's proposal uncritically and has no documented process for checking USAC's work. The Commission then uses USAC's contribution amount to impose an effective tax on America's telecommunication carriers, who then pass that tax on to consumers. That amount has risen exponentially in recent years. By the end of 2021, Universal Service Fund "contributions" totaled over $9 billion. Recent Universal Service Fund taxes have been set as high as 34.5%. Waste and fraud contributed to this growth. *Consumers' Research* v. *FCC*, 109 F.4th 743, 748–58 (5th Cir. 2024) (en banc) (detailing the Act's history). And carriers' customers—taxpayers—bear the burden of that tax.

This scheme combines separated powers. It allows the executive to decide the policy that preserves and advances "universal service." 47 U.S.C. 254(b)(5). This isn't contingent legislation. Congress gave no objective parameters for the "mechanisms" the executive must use to support universal service. Unlike the Direct Tax of 1798, for example, Congress did not fix the tax amount, decide the collection process, and curb executive discretion with specific factfinding controls. § I.C.1. Instead, Congress delegated all those policy decisions to the Commission—which then delegated those decisions to private actors. What's more, the executive has no inherent power to tax. And levying a nine-billion-dollar tax against nearly all Americans binds private conduct through a generally

applicable rule. This Court should reject this scheme as an unconstitutional delegation of exclusive legislative power. It's not a hard call to make.

Other modern grants should also fail. Take the Affordable Care Act's instruction to the Health Resources and Services Administration to promulgate "comprehensive guidelines" as to what "additional preventive care and screenings" insurers must provide for women. 42 U.S.C. 300gg-13(a)(4). It offers no direction as to what those guidelines should say, delegating to the agency full discretion to make the policy itself. This delegation allows the executive to issue general rules binding private conduct when the executive has no inherent power over healthcare. And Congress gave no rule turning only on agency fact-finding. Cf. Transcript of Oral Argument at 13:16-17, *Trump* v. *Pennsylvania*, 140 S. Ct. 918 (2020) (No. 19-454) (Justice Thomas questioning whether this provision violates nondelegation doctrine), https://perma.cc/87Q5-H2UP. The Government has admitted this law gives the agency total discretion to decide insurance policy. *Id*. at 12:16-22; Jeffries, *supra*, at 267. Under the originalist delegation test, this provision should fail.

Consider also the Magnuson-Moss Act, which enables the Federal Trade Commission to issue rules defining "unfair or deceptive trade acts or practices in or affecting commerce." 15 U.S.C. 57a. Those rules carry criminal and civil penalties. Under this delegation of power, the Commission can target any sector of the economy and any type of activity it pleases if the Commission, in its sole discretion, decides the activity is "unfair or deceptive." Cary Coglianese, *Dimensions of*

Delegation, 167 U. Pa. L. Rev. 1849, 1885–86 (2019). Nothing in the statute defines those terms.

As scholars note, this provision "bears a striking resemblance to the National Industrial Recovery Act's unconstitutional authorization of the President to adopt 'codes of fair competition.'" Coglianese, *supra*, at 1885 (cleaned up). And its threat is palpable. State attorneys general, for example, have misused a similar law to target pregnancy centers that promote views the state disagrees with. *E.g.* Pet. for a Writ of Cert.*, First Choice Women's Resource Centers, Inc.* v. *Platkin*, No. 24-781 (U.S. Jan. 21, 2025) (pending review). This delegation should likewise fail.

* * *

Restoring the original delegation doctrine would uphold constitutionally separated powers and keep lawmaking power where it belongs—Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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