No. 18-247

IN THE

Supreme Court of the United States

ANIMAL LEGAL DEFENSE FUND, DEFENDERS OF WILDLIFE, AND CENTER FOR BIOLOGICAL DIVERSITY,
PETITIONERS,

V.

U. S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States District Court for the Southern District of California

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does granting the Secretary of Homeland Security unbounded discretion to suspend federal and state laws violate the non-delegation doctrine?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framers' design.

INTRODUCTION AND SUMMARY OF ARGUMENT

The essence of the separation of powers is that Congress may not give another branch the power to do what it alone may do. This principle has held true from Montesquieu to Madison, was made law by the Constitution's Vesting Clauses, and reaffirmed by the Supreme Court. *See*, *e.g.*, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That 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.") Yet here the law does just that.

Under the law at issue, the Secretary of Homeland Security has sole power to suspend *all* legal

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and consented to its filing. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

requirements to ensure the construction of border roads and walls. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 ("IIRIRA"). By this grant, the act confers the power to make policy judgments only Congress can make.

The Court has recognized the Constitution allows an amount of cooperation and overlap between legislative and executive branches. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). Where Congress has laid out an "intelligible principle"—clearly directing a policy, designating an agent, and setting the boundaries of authority the agent may exercise—there is purportedly no delegation. But it has also recognized that incidental overlap does not permit blatant delegation. "Extraordinary conditions do not create or enlarge constitutional power . . . . Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

The Vesting Clauses in the Constitution's first three articles establish a tripartite government of divided authority. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). While they may overlap at the margins, each branch retains a core set of powers such that it may check and balance the others. To permit delegation from one to another undermines that original design. Congress has no need to deliberate, make judgments, and remain accountable for its laws when it can license the executive to apply purportedly greater wisdom or expertise. Plato may have expected *ad hoc* policy judgments from the philosopher kings of his republic, but our Constitution neither expects nor tolerates such monarchical dictates.

The "intelligible principle" test, originally laid out in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928), was meant to preserve the separation of powers. The Court laid out three prongs to prevent over delegation: Congress must delineate a general policy, clearly designate an agent to enforce the policy, and set boundaries for this delegated authority. *Mistretta*, 488 U.S. at 373. Here there is nothing but unbounded discretion. The law gives no guidelines, no considerations, not even factors for a balancing test of any kind to gauge when the executive may waive laws.

The lower court incorrectly reasoned that the object of building a wall somehow bounded the granted discretion. But unlimited power to build a wall is not a limitation of power. Indeed, the Constitution grants similarly limitless power to Congress to fulfill its enumerated objectives: Congress has the power to "make all Laws necessary and proper" to "regulate Commerce" or "establish Post Offices and post Roads." U.S. Const. art. I Sec. 8. IIRIRA gives as much power and discretion to the executive branch as the Constitution gives to Congress. Unbounded discretion is unbounded power to make policy decisions; it is a violation the third prong of the intelligible-principle test, and thus of the non-delegation doctrine.

The Court has a history of properly defining the non-delegation doctrine but improperly enforcing it. The intelligible-principle test laid out in *J. W.* Hampton was meant to preserve the non-delegation doctrine. It has morphed into a standard by which Congress can delegate "acceptable" levels of power.

The frailty of the intelligible-principle test lies in its third prong. Currently, Congress must set "boundaries of the delegated authority." *Mistretta*, 488 U.S.

at 373, (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). But this already concedes that delegation is happening. Originally the non-delegation doctrine meant exactly that: no delegation of *legislative* power. The Court slowly began slipping away from this clear meaning, positing that "the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 685–86 (1980). This test is so weak that the Court has only used it twice to strike down delegations, both times in 1935.

Congress has numerous ways to achieve its ends without delegating its authority. Here, it could have enumerated and suspended specific laws preemptively; it could have given criteria for when conflicting laws must be suspended; it could have specified facts that would trigger suspension of laws automatically. Any legal scheme in which Congress retains judgment and discretion while delegating fact-finding and execution to the agency is constitutional. Even under the current flawed test Congress must set limits to the discretion it delegates. It declined to do so.

The Court should check the unlawful delegation of congressional responsibility. Constitutional structure exists to protect our liberty, and so we must protect it.

ARGUMENT

I. THE NON-DELEGATION DOCTRINE IS ESSENTIAL TO CONSTITUTIONAL STRUCTURE

A. The Vesting Clauses Establish Separate Spheres of Authority

"The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta*, 488 U.S. at 371. Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. I, § 1. In conjunction with the vesting clauses that open Articles II and III, the Article I Vesting Clause sets the core design of our constitutional structure. This is not a disposable organizational chart. Instead, the Framers laid out separate spheres of authority because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). Recognizing this, they dividid both function and responsibility, making each branch answerable to the others, since "[a]mbition must be made to counteract ambition." The Federalist No. 51 (Madison).

No branch may delegate its assigned sphere to any other. Without that principle, the structure itself would be a nullity. Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002) ("The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]."). This point is not new. In the second Congress, members rejected a law to grant the president power to determine postal routes. *Id.* at 402. One representative, with a bit of cheek, announced that if that

law passed he would "make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation." 3 Annals of Cong. 223 (1791). Considering a grant of authority to the judiciary, Chief Justice Marshall declared some years later that "[i]t will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42–43 (1825).

Delegation also removes accountability from Congress. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U.L. Rev. 1463, 1465 (2015). The result is a Congress whose members are less accountable both to their constituents and to each other. It discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* Under this framework, Congress need not shoulder the responsibilities for the policies they've enabled, instead retaining plausible deniability as the executive confronts the hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *Regulatory Policy and the Social Sciences* 175, 187 (Roger G. Noll, ed., 1985). In place of a clash of ambitions, "[l]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." Rao, *supra*, at 1466.

Recognizing these concerns, the Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. As then-Justice Rehnquist explained:

> First, and most abstractly, [the non-delegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, 448 U.S. at 685–86 (Rehnquist, J., concurring) (internal citation omitted).

Here, it may have been expedient for Congress to delegate how to make difficult choices for a controversial wall. But the Constitution grants them no such expediency. The non-delegation doctrine prohibits this abrogation of responsibility. *See*, *e.g.*, *Dep't of Transp. v. Ass'n of Am. R.R.,* 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("[T]he separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.").

B. The Non-Delegation Doctrine Requires Limits on Discretion to Be Effective

This Court has often been understandably hesitant to overturn legislative grants of discretion to the executive. This reluctance comes in part from the inherent difficulty of drawing clean lines between different branches' prerogatives. *See Mistretta,* 488 U.S. at 415 (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."); *Wayman*, 23 U.S. at 43 (Marshall, C.J.) ("The line has not been exactly drawn which separates those important subjects").

Yet "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.,* 135 S. Ct. at 1237 (Alito, J., concurring). The Court's hesitation to police the constitutional boundary has allowed legislative delegations to metastasize, such that today "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *Id. (*quoting *Arlington* v. *FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)).

Indeed, he Court does not decline to enforce other constitutional protections due to line-drawing problems. What exactly constitutes an "undue burden" on the right of a woman to choose an abortion? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). How does one distinguish between "conduct" and "speech?"

Wisconsin v. Mitchell, 508 U.S. 476 (1993). What is a sufficiently "substantial" relation to an "important" government interest when assessing distinctions on the basis of sex? *Craig v. Boren*, 429 U.S. 190 (1976). When is a search "reasonable?" *Whren v. United States,* 517 U.S. 806 (1996). These questions are not self-answering. Yet the Court has answered them in case after case—and lower courts have subsequently weighed in. The accretion of case law has created doctrines that can now be applied and continually refined through that application. The paucity of guidance and clarity on the non-delegation doctrine is simply a function of this Court's skittishness in giving it shape.

"[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality." *Schechter Poultry*, 295 U.S. at 529. Indeed, the Court has often walked with a light step while treading on Congress's judgment. *See, e.g. N.Y. Cent. Sec. Corp. v. United States,* 287 U.S. 12, 25 (1932) (holding that regulating in the "public interest" was "not a concept without ascertainable criteria"). But "the constant recognition of the necessity and validity of such provisions . . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Schechter Poultry,* 295 U.S. at 530.

The non-delegation principle does "not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372, and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co.*, 276 U.S. at 406. Obtaining such assistance does not license the avoidance of difficult questions. Congress's rulemaking authority, as ratified by this Court, does not come from

Congress being "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting).

Here, the secretary has been given no boundaries on the powers that have been delegated, thus failing the third prong of the intelligible-principle test. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 416 (1935). While it is entirely within Congress's power to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy," *id.* at 426, there is no primary standard here, nor a secondary or tertiary one. The statute simply provides that "the Secretary of Homeland Security shall have . . . authority to waive all legal requirements [in his] sole discretion [he] deems necessary" 34 U.S.C. § 20913(d). She may waive criminal or tort laws, environmental or labor protections. She may consult the laws of the various states or various astrological charts. IIRIRA grants him "an unlimited authority to determine the policy . . . as he may see fit." *Panama Ref.*, 293 U.S. at 416.

Even those cases that suggest deference toward delegation acknowledge that a statute cannot survive if there is "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). Yet here the statute delegates to the executive a standard-less discretion to make policy choices between different laws.

Moreover, the Court has emphasized that it is not important whether the choice the executive makes could be defended as sound or restrained: "The idea that an agency can cure an unconstitutionally standard-less delegation of power by declining to exercise

some of that power seems to us internally contradictory." *Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S 457, 473 (2001). The question is whether the statute, on its face, is an impermissible delegation, not whether the path chosen travels too far afield, because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority." *Id.*

If the delegation here is allowed, what would remain of the non-delegation doctrine and the protections to liberty it affords? Could Congress outlaw "all transactions in interstate commerce that fail to promote goodness and niceness," and leave it to the secretary of commerce to determine the details? Lawson, *supra*, at 340. As an English sentence, that statute is "not literally gibberish," *id.,* and *amicus* does not suggest the secretary would do her duty with anything but honor. Yet what is left, at that point, of the separation of powers? Indeed, what are we left with but a philosopher-king of commerce?[2] Before one objects to this theater of the absurd, notice that Prof. Lawson's hyperbole provides more notice, more guidance, and more intelligibility than Congress did in IIRIRA; it at least requires the promotion of goodness and niceness rather than mere "necessity."

The Court has struck down two legislative delegations, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating

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[2] True, it's a philosopher-king who must go through notice-and-comment rulemaking—perhaps. *See generally Auer v. Robbins*, 519 U.S. 452 (1997).

the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474. Petitioner should prevail here because the law provides no guidance in the most literal sense. Reversing the decision below would not be a bold new journey where no court has gone before, but a reassertion of the basic outer bounds of delegable authority.

II. THE INTELLIGIBLE-PRINCIPLE TEST NEEDS REFORM TO PROTECT THE NON-DELEGATION DOCTRINE

A. Early Delegations Granted Fact-Finding Powers with Limited Discretion

In the beginning, the Court established the non-delegation doctrine. *Cargo of the Brig Aurora v. United States*, 11 U.S. 382 (1813). The Court's early precedents preserved the doctrine quite well. In both *Aurora* and *J.W. Hampton* the Court allowed conditional exercises of "legislative power" if and when the executive made a specific finding of fact.

In *Aurora,* during one of the Anglo-French wars, Britain refused to recognize American ships as "neutral" because they were trading with both France and the British Isles. Congress passed a non-importation act barring importation of goods from Britain, on pain of forfeiture. The forfeiture provision would automatically be revoked upon the president's finding that Britain had repealed its edicts and recognized U.S. neutrality. The president proceeded accordingly, but then revoked his proclamation, automatically reinstituting the cargo ban. The Aurora, carrying goods from Britain, was seized for violating the non-importation act. The owner sued, alleging that the revival of the act was unconstitutional because it was only revived by presidential decree.

The Court unanimously disagreed, holding that Congress was well within its rights to make the enactment or revival of a statute conditional upon a finding of fact. "[W]e can see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of March 1, 1809, either expressly or conditionally, as its judgment should direct." *Id.* at 388. The president had no discretion for when the law should be suspended or revived, and no independent influence upon the substance of the law. His only power was a finding of fact. Factually "triggered" laws were plainly safe within non-delegation territory. The statute did *not* say the president had unbounded discretion to choose whether to enact the law based on his own "discretion" that it would be "necessary."

In *J. W. Hampton*, Congress passed legislation that allowed the president to raise or lower tariffs upon a factual finding there was an imbalance in the costs of production between the United States and foreign nations. *J. W. Hampton*, 276 U.S. at 401. Congress specified factors the executive had to consider in determining when a relevant change occurred, including "conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries." *Id.* at 402. Congress had initially set a tariff rate, which the president then raised. Plaintiff sued on the grounds that only Congress could set tariffs and the law impermissibly granted legislative power to the executive.

Writing for a unanimous court, Chief Justice Taft found that the law laid out an "intelligible principle" for the executive to follow and was not a delegation of legislative power. *Id.* at 409. The Court explained the

law gave mandatory guidelines restricting the executive's discretion. Once the executive found the costs of production to be unequal, he was required to adjust the tariffs, using the factors Congress laid out.

In both cases the executive was *required* to act based on a factual finding. Congress took careful pains to detail what facts allowed the executive to perform a specific act. Neither law granted unbounded discretion. In both cases a court would have clear criteria for testing whether the executive had acted within the boundaries set by Congress. Without some limit to discretion, the Court would have no ability to test whether the executive had breached the delegated boundaries of his powers.

B. Refining the Non-Delegation Doctrine Requires Courts to Identify Laws that Give the Executive Branch the Same Level of Unlimited Discretion the Constitution Gives to Congress

Within the bounds of its constitutionally enumerated powers, Congress has discretion to determine how and why it will use those powers. That discretion ultimately comes from the Constitution and is checked by the democratic process.

This Court should not and generally does not interfere with Congress's constitutionally authorized discretionary judgments. For example, the Constitution gives Congress the power to "establish Post Offices and post Roads." U.S. Const. art. I, § 8. Congress thus has the discretion to determine where those post offices and roads shall go, and this Court will not respond to petitions asking to overturn those judgments. Aside from the impropriety of usurping the prerogatives of a

co-equal branch of government, what standards could a court use to determine where post offices and roads should go? If voters are upset with the placement of their post offices, they can make it known at the polls.

Congress would be giving the same uncheckable discretion to the executive branch if it granted an agency the power to determine where it's "necessary" to put post offices and roads. If this Court were called upon to overturn the executive agency's discretionary determinations of where they were "necessary," however, it would be unable to do so for the same reasons it could not overturn Congress's determinations.

And there's the rub. When the grant of power is so limitless that no court could feasibly second-guess an executive agency's judgments, then that agency has been essentially raised to the level of Congress, the very definition of a delegation of legislative power. The argument here is not that courts should be constantly reviewing the discretionary judgments of executive agencies. They often should not if Congress has appropriately cabined the agency's discretion. Instead, the appropriate question is whether the discretion is limitless in the way Congress's constitutionally authorized discretion is limitless. The difference, of course, is that executive agencies are not checked by voters. Policing the boundaries of the non-delegation doctrine requires determining when such unbounded discretion has been shifted to the executive branch, which is a difficult but not impossible line to draw.

This Court has understandably expressed recurring doubts about restricting necessary delegations in an increasingly complex economic and geopolitical world. *See Whitman*, 531 U.S. at 473. But this Court need not fear that a stronger and more clearly defined

intelligible principle test will thwart good government. Indeed, there are multiple touchstones the Court could use to revive the test's protections while maintaining efficient regulatory agencies.

Prof. David Schoenbrod suggests that the Court could distinguish between laws that merely set "goals" and laws that set "rules." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?,* 83 Mich. L. Rev. 1223, 1253 (1985). For his model, "rules" are laws that clearly regulate private conduct, while goals set general government policy. While Congress can pass both, it is the only body that can pass "rules" that control people's actions. *Id.* at 1254. Congress could not delegate power to an organization through a goal-making law because that would have to give law-making power to an agency.

For instance, Congress could set regulations limiting the amount of pollution from power plants, setting the emissions at certain levels. The *rule* clearly prohibits a specific amount of pollution; the actors know what they can and cannot do. However, Congress could not empower an agency to set controls on power plants for an undefined level of pollution; this would leave the rule of action to the agency to define. There are certainly democratic protections in this standard: "A rules statute requires the legislature to assume more responsibility and hence be more accountable for the bearing of that responsibility than does a goals statute . . . a goals statute empowers the agency to complete the job by making rules of conduct." *Id.*

Another possible standard is Prof. Martin Redish's "political commitment" principle: Statutes that fail to make . . . a [political] commitment, instead effectively amounting to nothing more than a mandate to an

executive agency to create policy, should be deemed unconstitutional." Martin Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis,* 72 S. Cal. L. Rev. 673, 679–82 (1999). Redish's principle emphasizes congressional accountability as its touchstone and bears some similarity to Schoenbrod's "rules/goals" distinction. He argues that courts will be able to determine whether an essential power is being delegated by deciding "whether the voters would be better informed about their representatives' positions by learning how their representatives voted on the statute." *Id.*

Prof. Lawson critiques both approaches, noting that "all roads led back to Chief Justice Marshall's seemingly unsatisfying formulation for improper delegations. In essence . . . 'Congress must make whatever policy decisions are sufficiently important to the statutory scheme that Congress must make them.'" Lawson, *supra*, at 377. But he notes that this has not, barred the Court from beginning to refine other doctrines that are equally circular and important:

> Many issues of structural constitutionalism end up in a circle. An officer of the United States for the purposes of the Appointments Clause is an employee who is important enough to be considered an officer. A principal officer for purposes of the Appointments Clause is an officer who is important enough to be considered principal. These kinds of circular formulations are inevitable whenever categorizations depend on substance rather than form, and the lines among the legislative, executive, and judicial powers are substantive rather than formal lines. Whenever line-

> drawing involves an element of judgment, one cannot eliminate the need for judgment by a verbal formulation; one can only conceal or obscure it. Accordingly, Chief Justice Marshall's and my formulation for the nondelegation doctrine is not truly circular. Rather, it points directly to the appropriate inquiry, however difficult that inquiry may prove to be in particular cases.

Id.

Whatever touchstones the court may wish to employ, be it "rule making" or sufficient "accountability", there are numerous ways to begin reviving and honing a non-delegation doctrine on a case-by-case basis without starting from scratch or overturning large swaths of precedent. So long as the Court begins defining the doctrine again, it will be moving in the right direction.

C. Limited Discretion Is the Key First-Step to an Effective Intelligible-Principle Test

The current frailty of the intelligible-principle test lies in its third prong: Congress must set "boundaries of the delegated authority." *Mistretta*, 488 U.S. at 373, (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Implicit in this prong is the principle that the law must define and curtail the delegated power in such a way that the discretion has limits. Only with limits on discretion can the Court begin to create contours to the doctrine. Indeed, in the only two cases in which the court struck down laws under the non-delegation doctrine, the Court did so on the grounds that the discretion was limitless.

In *Schechter Poultry*, Congress approved a general goal of regulating commerce, and delegated to the

president the powers to set the specifics of the rules. The Court noted, "Under the Act, the President, in approving a code, may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the Act." 295 U.S. at 538.

In *Panama Refining*, the Court again struck down a law granting the executive branch unlimited discretion to regulate the transporting of petroleum through interstate commerce in violation of state caps. The law, like IIRIRA, used the capacious and limitless term "necessary," granting the president "full authority to designate and appoint such agents and to set up such boards and agencies as he may see fit, and to promulgate such rules and regulations as he may deem necessary." *Panama Ref. Co.*, 293 U.S. at 407.

In striking down laws that granted unlimited discretion, the Court harmonized cases like *Panama Refining* with those like *J. W. Hampton* where the court upheld delegations of broad regulatory powers. While both types of cases involved laws that set a general goal, the *J. W. Hampton* laws set boundaries for executive discretion and *Panama Refining* did not. This distinction is the key to refining the intelligible-principle test. Congress is free to delegate non-legislative powers according to an intelligible principle. But a preliminary test for whether it has delegated bounded or unbounded power is whether it created any testable limits to the discretionary use of that power. If the law confers unlimited discretion, the grant violates the intelligible principle test and the non-delegation doctrine. If discretion is unlimited the delegation is presumed unconstitutional.

The Court should begin a case-by-case revival and refinement of the non-delegation doctrine, whether it retains, discards, or modifies the intelligible-principle test. The Court need not detail all the nuances of the doctrine in one stroke. But if the doctrine means anything, it must mean that an unlimited grant of discretion is too much.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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