Nos. 20-1530, 20-1531, 20-1778, 20-1780

In the Supreme Court of the United States

WEST VIRGINIA, ET AL.
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR *AMICI CURIAE* THE MICHIGAN HOUSE OF REPRESENTATIVES AND THE MICHIGAN SENATE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED IN NO. 20-1531

Whether, in 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, Congress constitutionally authorized the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

Amici are the Michigan House of Representatives and the Michigan Senate. The Michigan legislature, like other state legislatures, is currently experiencing divided government, meaning that the governor's mansion is in the hands of one political party, while the legislature is controlled by another party. As a result, *amici* are particularly concerned about safeguarding the separation of powers. They recognize the unique injuries inflicted on legislatures when courts refuse to enforce the nondelegation doctrine and allow the executive to exercise lawmaking authority. These include decreasing the legislature's own lawmaking power and disincentivizing bipartisanship and compromise. While the present case raises the nondelegation question as applied to Congress and federal agencies, lower courts and state courts often look to this Court's guidance in state-law delegation cases as well. Therefore, to the extent this Court reaches the constitutional issue, this Court's ruling will likely affect the nondelegation doctrine as applied to state legislatures.

Reports of the nondelegation doctrine's death are greatly exaggerated: recent scholarship demonstrates that it is frequently invoked by state courts. *Amici* therefore urge this Court to learn from the experience of state courts and reinvigorate the nondelegation doctrine in the federal system by reversing the D.C. Circuit's decision and declaring the Clean Power Plan unconstitutional.

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. Petitioner and Respondent both filed blanket consents.

STATEMENT

In 1970, Congress passed the Clean Air Act, a law designed to reduce air pollution nationwide. It contained a small provision that allowed the Administrator of the EPA to prescribe regulations that set "standards of performance for existing sources" of pollution. 42 U.S.C. § 7411(d). Yet this provision was never used. When Congress was debating amendments to the CAA twenty years later, Senator David Durenburger (R-MN), the architect of the amendment called § 7411(d) "some obscure, never-used section of the law."[2]

All this changed in October 2015, when the EPA under the Obama administration finalized the Clean Power Plan, a regulation that would "lead[] global efforts to address climate change." JA.222. Through a strained interpretation of § 7411(d), the CPP required States to achieve reductions in carbon-dioxide emissions that the EPA admitted individual sources could not meet using current technologies and process improvements. JA.853–54. Instead, they created a credit system that would require power plants to subsidize "energy generated or save with zero associated CO_2 emissions" elsewhere. JA.1605, 1615–16. As written, the CPP would radically transform the electricity sector, forcing some power companies to invest in alternative energies, cut existing operations, or subsidize their competitors. It would also cost *billions* of dollars

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[2] *Clean Air Act Amendments of 1987: Hearings on S.300, S.321, S.1351 & S.1384 before the Subcomm. on Env't Pro. of the Comm. on Env't & Pub. Works*, 100th Cong. 13 (1987).

to implement and lead to much higher utility bills for consumers. JA.226.

In response, twenty-seven States sought to stay the enforcement of the CPP. While the D.C. Circuit refused, *West Virginia* v. *EPA*, No. 1501363 (D.C. Cir. Jan. 21, 2016), this Court granted the stay. *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016). The EPA, taking this Court's "not-so-subtle hint," reconsidered the rule, during which the lower courts held the case in abeyance. JA.88. In July 2019, the EPA repealed the CPP, concluding that it had "significantly exceeded" the agency's statutory authority for various reasons, most notably that it violated the major questions canon. JA.1725.

This prompted more litigation as more states sued the EPA, this time for *repealing* the CPP, while still more States (including Petitioners) sought to intervene. In January 2021, the D.C. Circuit concluded that the repeal had been unlawful, rejecting the EPA's narrow reading of § 7411(d) and finding that Congress had delegated to the EPA a general power to regulate power plants' greenhouse gas emission. JA.135-36.

Petitioners then sought certiorari review, which this Court granted.

SUMMARY OF ARGUMENT

This Court should reverse the D.C. Circuit's decision below in order to protect the unique interests of legislatures that are harmed whenever courts refuse to enforce the nondelegation doctrine. When courts allow executive agencies to peddle egregious interpretations of statutes, legislatures are harmed in at least two ways: (1) they are prevented from safeguarding their constitutional authority over lawmaking; and (2) individual legislators are disincentivized from engaging in bipartisanship and compromise.

Reports of the nondelegation doctrine's death have been greatly exaggerated. Recent scholarship demonstrates that the doctrine is alive and well, especially in state courts. This Court should consider these well-reasoned, nondelegation doctrine decisions that have been decided by state supreme courts around the country, as additional support—in addition to this Court's own precedents—for the principle that delegations of legislative authority (such as the EPA claimed to find here) are inappropriate.

ARGUMENT

I. This Court should reverse the D.C. Circuit's interpretation of § 7411(d) to protect legislatures' interests, which are harmed whenever courts allow executive agencies to egregiously depart from the text of a statute and to affirm that the nondelegation doctrine occupies an important place in American constitutional law.

"The legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard,* 23 U.S. 1, 46 (1825). These are not empty platitudes

cribbed from the lyrics of a *Schoolhouse Rock* song, but the bedrock of American constitutional law. Indeed, separating the powers of government between competing branches was critical to the Founders' design. As James Madison explained in *Federalist* 47: "When the legislative and executive powers are united in the same person or body[,] . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Those apprehensions continue to exist today regardless of whether the body exercising both powers is a president, a Congress, or the EPA. That is why this Court has stated that "Congress cannot delegate legislative power to [the executive branch] to exercise an unfettered discretion to make whatever laws [it] thinks may be needed or advisable." *A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 537–38 (1935).

Although this Court has not specifically struck down a statute under the nondelegation doctrine since *Schecter Poultry* was decided in 1935, that is not because it has forsaken the nondelegation principle: "While it has become the practice in our opinions to refer to 'unconstitutional delegations of legislative authority' versus 'lawful delegations of legislative authority,' in fact that latter category does not exist. Legislative power is nondelegable." *Loving* v. *United States*, 517 U.S. 748, 776–777 (1996) (Scalia, J., concurring). Instead, the legislature is allowed to assign responsibilities to the executive—some of which involve exercises of discretion. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 845 (2015) (Roberts, C.J., dissenting) ("As a general matter, Congress may pass statutes that delegate some discretion to those who administer laws.")

Indeed, scholars have noted that the spirit of the nondelegation doctrine has lived on in this Court's decisions, even if they have not invoked it by name. For example, Cass Sunstein argues that "[f]ederal courts commonly" use certain substantive canons to "vindicate not a general non-delegation doctrine, but a series of more specific and smaller, though quite important, non-delegation doctrines." Cass Sunstein, *Nondelegation Canons*, 67 Chi. L. Rev. 315 (2000). Through these "nondelegation canons"—which include a prohibition on agencies construing statutes in such a way as to raise constitutional doubt, the rule that tax exemptions should be construed narrowly, and the rule of lenity, among others—"courts hold that … agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so." *Id.* Other scholars believe that the substance of the nondelegation doctrine has been revitalized through this Court's renewed interest in the major question doctrine, which has seen a dramatic resurgence over the last decade. Jacob Loshin & Aaron L. Nielson, *Hiding Nondelegation in Mouseholes*, 62 Admin. L. Rev. 19 (2010). The major questions doctrine states that courts should not defer to agency statutory interpretation on "decisions of vast economic and political significance" without a clear statement from Congress that it should do so. *Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014). This Court is especially suspicious when agencies claim "to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This is because, as Justice Scalia memorably quipped,

"Congress … does not … hide elephants in mouseholes." *Whitman* v. *American Trucking Assocs.*, 531 U.S. 457, 468 (2001).

But the D.C. Circuit allowed the EPA to do just that here, fashioning a new rule instead which asked whether "it [was] *implausible* in light of the statute and subject matter in question that Congress authorized such unusual agency action." JA.135–36. The majority accepted as true the fact that the CPP would cost "billions of dollars" and would increase the electricity costs of "every electricity customer." JA.148. In light of that, there should have been no dispute that the Clean Power Plan was a "decision[] of vast economic and political significance," and therefore unlawful in the absence of a clear statement of Congressional intent. *UARG*, 573 U.S. *supra*, at 324. Yet by contorting the meaning of two words in an ancillary provision of the Clean Air Act beyond recognition, the majority not only upheld the CPP but found the EPA's subsequent *repeal* of the CPP unlawful.

To be clear, the consequences of this decision do not just undermine America's electricity sector—serious as that may be: they threaten our constitutional system of separation of powers itself. As Chief Justice Roberts once explained, "[s]eparation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of the other branches." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993). That is why in the past, this Court has found that legislatures have standing to sue over executive actions that inflict "institutional injur[ies[" on them," *Arizona State Legislature*, 576 U.S. at 802, such as rendering "their votes . . . completely nullified." *Raines* v. *Byrd*,

521 U.S. 811, 823 (1997) (discussing the holding of *Coleman* v. *Miller*, 307 U.S. 433 (1939)).

The D.C. Circuit's refusal to stop the EPA from discovering delegated power to unilaterally transform an entire sector of the economy has inflicted an "institutional injury" on Congress and harmed the legislative process in at least two ways: (1) it is impossible for Congress to protect their constitutional authority to make the law; and (2) it discourages legislatures from engaging in bipartisanship and compromise.

A. Courts' refusal to enforce the nondelegation doctrine make it impossible for executive legislatures to safeguard their constitutional authority to make law.

First, when courts do not enforce the nondelegation doctrine—or at least one of its spiritual successors—it prevents legislatures from being able to safeguard their constitutional authority over lawmaking. The U.S. Constitution states that "*[a]ll* legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. 1, § 1 (emphasis added). Most state constitutions do the same for their legislative bodies. When courts ignore this and allow executive agencies to enact far-reaching policies through the discovery of "elephants in mouseholes"—as the D.C. Circuit did below—they do so necessarily at the expense of the legislature. After all, "separation of powers is a zero-sum game." Roberts, 42 Duke L.J. at 1230. For the executive's authority to increase, the legislature's must shrink.

In particular, by letting the EPA off its leash, the D.C. Circuit has transformed the very constitutional

system designed to preserve Congressional authority over national policy into obstacles that prevent Congress from setting the agenda. Under our Constitution, when a bill passes both houses of Congress and secures a presidential signature, it not only becomes law but *remains* law unless a future Congress goes through the same onerous process to repeal it. This is true even if the law is unpopular with the public, difficult to implement, or future Congresses would not have chosen to enact it. Bicameralism and presentment ensures that it is just as difficult to overturn an act of Congress as it is to pass it in the first place. Critics call this the "dead hand problem," arguing that it is unfair for the acts of past legislatures—whose members may all be dead—to remain binding even when the current representatives of the people would be unwilling to pass the same law today. Andrew Coan, *The Dead Hand Revisited*, 70 Emory L.J. Online 1 (2020). But this is a feature of our constitutional system, not a bug—it ensures that Congress, as an institution, is respected, even as its members perpetually change. This is the price we pay for political stability. As Judge Frank Easterbrook explained, "Someone who loses a legislative battle today accepts that loss in exchange for certainty that next year's victory on some other subject will be accepted by other losers in their turn." Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1122 (1998).

But when courts allow legislatures to delegate away their constitutional authority over lawmaking, they turn this process on its head and create a perverted version of the dead hand problem that destroys the legislature's authority and encourages political in-

stability. "[A]gencies rely on old delegations not to retain the status quo but rather to create new rules that today's [legislature] would not enact." Aaron L. Nielson, *Deconstruction (Not Destruction)*, 150 Daedelus 143, 148 (Summer 2021). These problems are compounded dramatically when, as here, courts allow agencies to discover "elephants in mouseholes," and justify dramatic shifts in public policy through far-fetched interpretations of "vague terms or ancillary provisions." *Whitman* v. *American Trucking Assocs.*, 531 U.S. 457, 468 (2001). When this happens, the executive is allowed to promulgate rules that would not be enacted or approved by either today's legislature *or* the legislature that passed the enabling statute. Yet it is difficult for the legislature to reassert itself and overturn these executive rulemakings "since the very process set out in the Constitution to prevent policy from being created without widespread support [namely, bicameralism and presentment] stands in the way." Nielson, 150 Daedelus at 148.. In other words, courts allow the executive to bring a bazooka to the checks-and-balances knife fight.

B. Courts' refusal to enforce the nondelegation doctrine discourages bipartisanship and harms the legislative process.

Second, when courts fail to enforce the nondelegation doctrine—especially in the face of egregious executive overreach such as the EPA's interpretation of §7411(d) here—they do violence to the legislative process itself by making it more difficult for legislators to engage in bipartisanship and compromise. When laws are passed under such conditions—if they are passed at all—they tend to be omnibus bills like the PATRIOT ACT or the Affordable Care Act that delegate even

more discretion to agencies. As Third Circuit Judge Kent A. Jordan put it, "[t]he consequent aggrandizement of … executive power at the expense of the legislature leads to perverse incentives, as [the legislature] is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues." *Egan* v. *Delaware Riv. Port. Auth.*, 851 F.3d 263, 279 (3d. Cir. 2017) (Jordan, J. concurring).

Passing legislation is hard, especially during times of divided government. But when courts allow the executive branch to enact their favored policy preferences through contortions of opaque statutory terms, they make this process harder by removing the built-in incentives for legislators to engage in good faith negotiations with their colleagues on the other side of the aisle. Legislators who belong to the party that controls the White House or Governor's mansion can achieve their desired policy outcomes without having to compromise, allowing them to appear ideologically consistent in order to please their more extreme donors and placate their base.[3] Meanwhile, the opposition party—having been stripped of an important bargaining chip—has no reason to cede any more ground to their political opponents. Plus, they have two tailor-made campaign issues: reversing executive actions

[3] *See, e.g.* Nancy Pelosi, *Pelosi Statement on Fourth Anniversary of Implementation of DACA* (Aug. 15, 2016) ("With the implementation of President Obama's Deferred Action for Childhood Arrivals four years ago today, we honored our values as a nation.")

they disagree with and excoriating the incumbent administration for executive overreach.[4] In other words, both sides are incentivized to *not* legislate.

This has led to what two scholars have called "the fall of lawmaking by legislation." Jonathan H. Adler & Christopher J. Walker, *Delegation & Time*, 105 Iowa L. Rev. 1931, 1937 (2020). Regardless of whether one measures the total number of public laws passed or the number of *major* legislative initiatives enacted, Congressional productivity has plummeted over the last several decades.[5] Meanwhile, the number of federal regulations has ballooned. In 2016, "federal agencies reached a new regulatory record by filling over 95,000 pages of the Federal Register with adopted rules, proposed rules, and notices—nearly 20 percent more than the 80,000 or so pages published in 2015." *Id* at 1974. This problem is cyclical. "Without regular legislative activity, agencies are forced to get more creative with stale statutory mandates to address new problems and changed circumstances." *Id* at 1937. But the more creative agencies get, the more disincentivized legislatures will be to legislate on their own.

Consider the history of the ill-fated DREAM Act. In 2001, Senator Orin Hatch (R-UT) introduced the

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[4] *See, e.g.* Sheldon Whitehouse, *Surveillance Laws & Presidential Power* (Jan. 3, 2008) (criticizing President Bush's executive order authorizing wiretaps of American citizens).

[5] *See, e.g.* Ezra Klein, *Congressional Disfunction*, Vox (May 15, 2015) ("[R]ecent congresses have been some of the least productive since 1948, when we began keeping track of these numbers), https://www.vox.com/2015/1/2/18089154/congressional-dysfunction; J. Tobin Grant & Nathan J. Kelly, *Legislative Productivity of the U.S. Congress, 1789-2004*, 16, Pol. Analysis 303 (2004) ("Overall productivity . . . is currently at a level not seen since the 1920s").

first bill that, if passed, would have created a way for so-called Dreamers—those undocumented immigrants who were brought to this country illegally as children and have lived a majority of their lives here—to adjust their immigration status and obtain a green card, contingent on their completing certain prerequisites.[6] The bill, which was co-sponsored by twelve Democrats and six other Republicans, was reported favorably out of committee, but never received a vote from the full Senate. Nevertheless, it jump-started a decade-long debate over the status of Dreamers and whether Congress should create a way for them to obtain legal status. Between 2001 and 2011, at least twenty-six versions of this bill were introduced in Congress, at least one in the House and one in the Senate during each two-year term.[7] Nearly three-quarters of these were bipartisan.[8]

The closest the DREAM Act came to becoming law was in 2010, when different versions of the bill passed both the House and the Senate, but Congress failed to reconcile them.[9] Nevertheless, momentum was build-

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[6] S. 1291 - 107th Congress (2001-2002): DREAM Act, S. 1291, 107th Cong. (2002), https://www.congress.gov/bill/107th-congress/senate-bill/1291.

[7] For a summary of all of these bills, see Unsuccessful Dreamers Bills 2001-2017, https://tinyurl.com/s782ydjd.

[8] *Id.*

[9] Actions - H.R.5281 - 111th Congress (2009-2010): Removal Clarification Act of 2010, H.R.5281, 111th Cong. (2010), https://www.congress.gov/bill/111th-congress/house-bill/5281/all-actions.

ing. The following year, four different bills were introduced. The public supported the idea,[10] and it seemed only a matter of time before it would become law.

Instead, President Obama decided to act unilaterally. He instructed the Secretary of Homeland Security to issue an executive memorandum titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Known colloquially as Deferred Action for Childhood Arrivals, or DACA, the program allowed Dreamers who satisfied certain requirements to apply for work permits and renewable two-year deferments from prosecution. Reaction to the President's decision were mixed, with even *Saturday Night Live* portraying the President's action as an excessive power grab.[11]

The Congressional response to DACA was immediate. After over a decade of working towards a bipartisan compromise, interest in the DREAM Act on Capitol Hill appeared to dry up overnight. While there had been dozens of versions of the DREAM Act introduced in Congress during the years leading up to President Obama's executive memorandum, there was only a single attempt in the next six years to get the DREAM Act passed. While that effort, spearheaded by

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[10] *See* Ruy Teixeira, *Americans Support Immigration*, Center for American Progress (Oct. 3, 2011) (finding that 57% of Americans supported the DREAM Act), https://www.americanprogress.org/article/public-opinion-snapshot-americans-support-immigration/.

[11] Saturday Night Live, *How a Bill Does Not Become a Law*, (Nov. 23, 2014) (parodying *School House Rock*'s "How a Bill Becomes a Law" and depicting President Obama repeatedly shoving Kenan Thompson dressed as a bill down the Capitol's steps), https://www.youtube.com/watch?v=JUDSeb2zHQ0.

the so-called "Gang of Eight," got another version through the Senate, the House refused to take it up.[12]

This lesson is obvious: when the executive branch overreaches, the legislature's natural inclination is not to fight back but to pull back. This is because executive overreach distorts the conditions and processes that lead to effective legislative compromise over time.

II. The nondelegation doctrine is flourishing in the state courts, and this case presents an excellent vehicle for the Court to revitalize that doctrine in federal courts.

Fortunately, judicial application of the nondelegation doctrine can check this executive meddling, as the States—as our laboratories of democracy, *see Oregon* v. *Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—have demonstrated. State courts have deployed nondelegation as a serious constitutional principle throughout their history, showing that it is both functional and practical. Indeed, through much of American history, including since *Panama Refining* and *Schechter Poultry*, state courts have "interven[ed]" to invalidate legislative delegations "when the legislature had ceded power that threatened to undermine the system of checks and balances." Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 621 (2017); *see also Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935);

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[12] S.744 - 113th Congress (2013-2014): Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013) https://www.congress.gov/bill/113th-congress/senate-bill/744; *see also*

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935).

A. Reports of the nondelegation doctrine's death have been greatly exaggerated.

One of the most pervasive myths in constitutional law today is that the nondelegation principle, derived from the separation of powers and the three Vesting Clauses, is dead. One such scholar maintains that "the nondelegation doctrine ... is basically a dead letter." Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 145 (2005). Another contends that "we live in a constitutional world where the nondelegation doctrine remains dead." Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 839 (1997). Others suggest that the nondelegation principle is "a constitutional lost cause," Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol'y 87, 88 (2010), one that might "do more harm than good to [ ] clients' interests" by testing judicial patience and taxing the credibility of a litigant's more meritorious claims, Kenneth Culp Davis, *Administrative Law and Government* 55 (1960). Slightly more charitably, two scholars have regarded nondelegation—at least prior to *Gundy*—as being "on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it." Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1038 (2007). These scholars also called nondelegation a "nondoctrine." *Id*. at 1036.

Nothing could be further from the truth.

Contrary to popular belief, the nondelegation doctrine has not only survived, but thrived over the last eighty years. Scholars just haven't been looking in the right place, too preoccupied with Supreme Court litigation. The statistics speak for themselves. According to one study of nondelegation challenges heard by state supreme courts and lower federal courts, between 1940 and 2015 there were more than 5000 nondelegation challenges. While these challenges prevailed in federal courts just 3% of the time, they succeeded in state courts 16% of the time. *See* Iuliano & Whittington, *supra*, at 636. That's a lot for a doctrine that's supposed to be dead or on life support.

As such, it is obvious the New Deal did *not* wreak havoc on nondelegation challenges. "[N]ondelegation cases were just as common—if not more so—after the New Deal as they had been before." *See id.* at 633. In fact, since the "switch in time," federal and state courts have nullified about 750 laws—or approximately 10 statutes a year—on nondelegation grounds. *See id.* Additionally, around 15% of all nondelegation challenges leveled in federal and state courts have been successful. *See id.* at 636. Given that during this same period, only 20% of *all* constitutional challenges were successful before this Court and a miniscule proportion to one-third of all constitutional challenges were successful before state supreme courts, this 15% figure is not unusual. *See id.* at 636–37. Instead, it indicates that the nondelegation doctrine remains a mainstream constitutional principle.

In any event, even a low statistical rate of success would not mean that the nondelegation principle has been vitiated of its constitutional soundness any more

than the 10% success rate of Fourth Amendment claims has sounded the death knell for probable cause, criminal warrants, or anything else related to that constitutional provision. *See* Nancy Leong, *Making Rights*, 92 B.U. L. Rev. 405, 426 (2012). The same is true for the 10% success rate for First Amendment religious accommodation claims against public education requirements or the less than 1% success rate in federal courts and 5% success rate in state courts for habeas claims. *See* Lewis M. Wasserman, *Overcoming Obstacles to Religious Exercise in K-12 Education*, 40 J. Legis. 96, 133–34 (2014).

The persistence of nondelegation claims even after the New Deal cannot be explained by differences in the kinds of delegations. With respect to the type of power that was delegated after to the New Deal: Regulation (58%), Taxation (11%), Spending (7%), and Other (25%). That was not a substantial change from the pre-New Deal percent figures: Regulation (52%), Taxation (16%), Spending (7%), and Other (25%). *See* Iuliano & Whittington, *supra*, at 640. Likewise, regarding the objects of delegation, after the New Deal, the delegations were: Executive (3%), Agency (62%), Judiciary (9%), Local Government (11%), Voters (3%), and Other (13%). Before the New Deal, those figures had been: Executive (5%), Agency (38%), Judiciary (13%), Local Government (25%), Voters (11%), and Other (10%). *See id*. at 641. Certainly, "with the rise of the administrative state [principally during the Gilded Age], legislatures took to delegating authority horizontally (e.g., to executive agencies) rather than vertically (e.g., to lower levels of government or to the voters)." *See id*. (footnote omitted). But that does not correlate with any waning of the power of nondelegation challenges as a serious constitutional proposition.

Viewed in this light, nondelegation does not sound like a dead or even a moribund doctrine. After all, all aspects of the data accumulated shows that "the nondelegation doctrine not only survived the New Deal era, but increased in strength for decades after." *See id*. at 633. At most, it is a somewhat dormant doctrine *in this* Court, awaiting the right moment—crystallizing the attendant constitutional imperatives of text, history, and principles of power diffusion and accountability—to be restored to a vital life. That moment to bring it out of its relative desuetude has arrived.

1. State courts have been paving the way by example.

The experience of the state courts in the nondelegation space is most promising and should be instructive. State courts have been "strik[ing] down … statute[s] on nondelegation grounds" when "the legislature had … abdicated its responsibility to the public or shielded itself from electoral accountability." *See id*. at 621. Just between the 1990–2010 period, state courts invalidated 22 delegations of lawmaking, with Virginia, Texas, Florida, and Oklahoma showing particularly fecund activity on this front. *See* Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J. L. Econ. & Org. 27, 43, 44 (2018).

The States have also shown us that nondelegation works well in the real world by diffusing power among the branches of government and holding the appropriate actors accountable by preventing them from muddying attribution and responsibility of specific actions or omissions. It is neither particularly difficult nor

complicated—and is in fact *less* so than the current "intelligible principle" standard that is often applied by this Court.

The States' adherence to the nondelegation principle has deep roots and a powerful provenance. *See*, *e.g.*, *Steen* v. *Appellate Div., Superior Court*, 331 P.3d 136, 145 (Cal. 4th 2014) (emphasizing the importance of "maintaining clear lines of political accountability" during its evaluation of the constitutionality of a delegation of legislative power); *Schloss Poster Advertising Co.* v. *City of Rock Hill*, 190 S.C. 92 (1939) (observing that "the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, the two are applying for precisely the same privileges under the same circumstances."); *State* v. *Denny*, 21 N.E. 252, 258 (Ind. 1889) (finding a legislative delegation unconstitutional because it granted a politically unaccountable board "absolute and exclusive control over the construction of all sewers, the water supply, and supply of lights, with no voice in the matter left to the people of the city"); *Marr* v. *Enloe*, 9 Tenn. 452, 453 (1830) (delegating to courts the power to set taxes "upon all polls and property subject to taxation by the laws of this State"); *State* v. *Field*, 17 Mo. 529, 534 (1853) (invalidating legislative delegation to county courts to suspend a law's operation and observing "that the power which has been exercised by the court ... and which has the effect of determining what law shall be in force in the tribunals of the state ... is a part of the legislative power which cannot be entrusted to the county courts.").

In the modern day, the States have recognized, under their own constitutions (whose separation of powers provisions are materially indistinguishable from their federal counterpart), that nondelegation is a real doctrine with potent bite and is very much a player in the state constitutional calculus. It is worth examining several state court decisions that are emblematic of these precepts. Their core principle can thus be summed up (as it has been by the Supreme Court of Florida): Whereas "technical matters of implementation" are permissible spheres of executive functioning, the legislature may not delegate the "fundamental policy decision." *Brown* v. *Apalachee Reg. Planning Council*, 560 So. 2d 782, 785 (1990). Nor should there be anything surprising about this important distinction, which was much lauded and honored in the federal nondelegation doctrine before its neglect.

Justice Scalia[13] noted that "[t]he whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided, and can therefore assign its responsibility of making law to someone else." *Mistretta* v. *United States*, 488 U.S. 361, 417 (1989) (dissenting opinion). Those excuses would obviously be constitutionally unavailing. The theory is rather "that a certain degree of discretion … *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be." *Id.* (Scalia, J., dissenting) (collecting permissible-delegation cases). "The *true* distinction," this Court observed

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[13] *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Scalia, J.); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

in the late 19th century, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made." *Field* v. *Clark*, 143 U.S. 649, 693–94 (1892) (cleaned up and emphasis added). As the *Field* Court also observed, many federal statutes "depend[] on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that *the exercise of such discretion is the making of the law*." *Id.* at 694 (emphasis added).

A recent Michigan Supreme Court decision exemplifies this crucial distinction. *See In re Certified Questions From United States Dist. Ct., W. Dist. of Michigan, D. Div.*, 958 N.W.2d 1 (Mich. 2020). A Michigan statute (since repealed via an initiated law) stated that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." Mich. Comp. Laws § 10.31(1). Such "orders, rules, and regulations" ceased "to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* Governor Whitmer's COVID-19 state-of-emergency and lockdown orders were issued, in part, under this statute. She also issued several orders restricting public gatherings and business activities and imposing other limitations on Michiganders.

The Michigan Supreme Court pinpointed the pressure point of the whole dispute. It reasoned:

> The consequence of such illusory 'non-standard' standards in this case is that the Governor possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time. There is, in other words, nothing within either the 'necessary' or 'reasonable' standards that serves in any realistic way to transform an otherwise impermissible delegation of legislative power into a permissible delegation of executive power.

958 N.W.2d *supra*, at 24. And this is never truer than when the pertinent "statute … delegates power of immense breadth" and "is devoid of all temporal limitations." *Id*. And this makes sense because, as Justice Brennan once observed, "[t]he area of permissible indefiniteness narrows ... when the regulation invokes criminal sanctions and potentially affects fundamental rights." *United States* v. *Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

Other States are aligned with Michigan on nondelegation. State laws conferring power upon the executive branch are required to "clearly announce adequate standards to guide ... in the execution of the powers delegated." *Lewis* v. *Bank of Pasco Cnty., Fla.*, 346 So.2d 53, 55–56 (Fla. 1976). To this end, "[t]he statute[s] must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." *Id*. Because a Florida law gave the Department of State absolute and unbridled discretion to allow a candidate to withdraw after the forty-second day before an election, the state Supreme Court de-

clared it violative of the nondelegation principle emanating from the State Constitution's separation of powers. *See Florida Dept. of State* v. *Martin*, 916 So. 2d 763 (2005).

Similarly, the same court held that a Florida law permitting bank or trust company records to be made public so long as the Comptroller consents was an unconstitutional delegation of legislative authority because "[t]here are no restrictions, limitations, or guidelines provided in the statute to limit or regulate the action of the department in granting ... [or] withholding consent." *Lewis*, 346 So.2d supra, at 55. Another Florida law was invalidated for the same basic reason because it let the Governor decide, free from any statutory criteria, which deputy commissioners to fire. *See Orr* v. *Trask*, 464 So.2d 131, 134 (Fla. 1985).

And in the tragic Terry Schiavo case, the Florida Supreme Court invalidated a legislative delegation of authority to the Governor to "issue a one-time stay to prevent the withholding of nutrition and hydration from a patient." *Schiavo*, 885 So.2d supra, at 328–29, 336. Although the Florida law at issue spelled out *eligibility* criteria for this provision to be triggered, it did not supply any standards in accordance with which the Governor might determine whether he should issue a stay and for what duration. *See id.* at 334. Applying the nondelegation doctrine, the court held that omission was fatal. Similarly, the Florida courts have noted that the "specificity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *Askew* v. *Cross Key Waterways*, 372 So.2d 913, 918 (Fla. 1978).

That is also the approach taken by the South Carolina Supreme Court, which invalidated a legislative delegation to the Highway Department because it was standardless. *See S.C. State Hwy. Dept.* v. *Harbin*, 226 S.C. 585, 595–96 (1955). That delegation allowed the agency to decide, under some circumstances, when someone's driver's license could be revoked or suspended. *See id.* at 592–93. All the Highway Department had to go on was its own sense of when "for cause satisfactory" for a revocation or suspension had been met. *See id*. at 593. The South Carolina legislature had impermissibly delegated lawmaking authority when it when it committed policymaking to the executive.

State courts have not been persuaded by arguments that agencies will always exercise sound wisdom and ethics. Even the sincerest assurance that an administrative agency would not act "arbitrarily or capriciously" and would act only "when necessary for the safety of the public" does not say anything about whether the legislative delegation itself is permissible. *Id*. at 595. So when the New Hampshire Supreme Court considered a statute almost identical to *Harbin*'s—the statute allowed the executive to suspend a driver's license "for any cause which he may deem sufficient"—the court struck down that legislative delegation. *Guillou* v. *State*, 127 N.H. 579, 580, 585 (1986).

The administrative officialdom's assurances of technical expertise, exemplary judgment, good will, and good faith cannot save a delegation of legislative power. At least not in state courts. As the Supreme Court of Washington observed in 1924, "[w]hen courts are considering the constitutionality of an act, they should take into consideration the things, which the

act affirmatively permits, and not what action an administrative officer may or may not take." *Northern Cedar Co.* v. *French*, 131 Wash. 394, 230 P. 837, 843 (1924). To put it directly, "[t]he presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." 42 Am. Jur., Public Administrative Law, Section 45.

For its part, the Kentucky Supreme Court struck down in *Legislative Research Comm'n* v. *Brown, Ky.*, 664 S.W.2d 907 (1984), a state law delegating legislative power to the Legislative Research Commission when the legislature was adjourned on the ground that this delegation was devoid of "standards controlling the exercise of administrative discretion." *Id.* at 915. That court also invalidated a state law empowering the Transportation Cabinet with the authority to stop the spread of moving or flashing lighted signs because that law provided "no guidance" about how this authority was to be used. *Flying J Travel Plaza* v. *Commonwealth, Ky.*, 928 S.W.2d 344, 350 (1996).

The Kentucky Supreme Court additionally invalidated a legislative delegation to the Transportation Secretary regarding the regulation of billboard signs on the ground that this law did not contain "sufficient standards controlling the exercise of that discretion." *Diemer* v. *Commonwealth, Ky., Transp. Cabinet, Dep't of Highways*, 786 S.W.2d 861, 865–866 (Ky. 1990). And in nullifying a legislative delegation concerning pension benefits to an executive agency, the same court called out that delegation's lack of standards or "sufficient guidance" to the executive. *Board of Trustees* v. *Att'y. Gen. of Com.*, 132 S.W.3d 770, 785 (Ky. 2003).

Striking down a legislative delegation to a board to determine the appropriate wage rates on grounds other than nondelegation, the Kentucky Supreme Court nonetheless observed:

> There is simply nothing in this legislation which offers any clue to what the legislature intended should guide and control th[at] [b]oard's determination of proper 'prevailing wage' rates. Not only is the Board left completely adrift ... but no one, including this court, is furnished any criteria by which to determine whether the [delegated body] is carrying out the assumed legislative policy as the legislature intended.

Kerth v. *Hopkins Cty Bd. of Ed.,* 346 S.W.2d 737, 741 (Ky. 1961).

Kentucky's Court of Appeals struck down a Commonwealth statute that had empowered a county judge to issue pardons under inscrutable "terms and conditions." *Murphy* v. *Cranfill*, 416 S.W.2d 363, 365—66 (Ky. Ct. App. 1967). That court rejects nondelegation challenges when the statute at issue clearly states "the subject, nature and extent" of the delegation—"declar[ing] its policy and prescrib[ing] standards for the guidance of the administrative agency." *Young* v. *Willis*, 203 S.W.2d 5, 8 (Ky. Ct. App. 1947).

In each of these cases, the state courts have drawn the same distinction of which this Court in *Field* v. *Clark* and Justice Scalia in *Mistretta* spoke: When "the legislative body has prescribed standards or safeguards that so confine the administrative body's powers that it can be said that they do not exceed the scope of mere details in the execution," the legislative

scheme will be sustained; otherwise, it will be invalidated. *Miller* v. *Covington Dev. Authy.*, 539 S.W.2d 1, 4 (Ky. 1976). Or, in the words of Michigan's highest court, "the standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits." *Osius* v. *City of St. Clair Shores*, 344 Mich. 693, 698, 75 N.W.2d 25 (1956). Some subject matters naturally require more detailed directions for technical implementation than others do—that in itself does not turn a technical guide for implementation into a fundamental policy decision, or *vice versa*. The catch, of course, is that "[e]ven where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts." *Bush* v. *Schiavo*, 885 So.2d 321, 333 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005) (quoting *State, Dep't of Citrus* v. *Griffin*, 239 So.2d 577, 581 (Fla. 1970)).

State courts have examined these questions closely and have produced some deeply reasoned opinions that would benefit this Court's consideration as they seek to resolve the nondelegation issue here. They provide greater support—in addition to this Court's own precedent—that the doctrine is not just functional but also that it is deontologically required and sound as a constitutional proposition. Justice Brandeis' laboratories of democracy have done their work.

Here, it is clear Congress did not "prescribe[] standards or safeguards [for the EPA] that so confine [its] powers that it can be said that they do not exceed the scope of mere details in execution." *Miller* 539 S.W.2d, *supra*, at 4. This Court should therefore reverse the D.C. Circuit's affirmation of the CPP.

CONCLUSION

This Court should apply the nondelegation doctrine in order to reverse the D.C. Circuit's decision and preserve the unique interests of the legislature.

Respectfully submitted,

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