No.

In the Supreme Court of the United States

NATIONAL POSTAL POLICY COUNCIL,
AMERICAN CATALOG MAILERS ASSOCIATION,
MAJOR MAILERS ASSOCIATION,
NEWS MEDIA ALLIANCE, AND
NATIONAL NEWSPAPER ASSOCIATION,
Petitioners,

v.

POSTAL REGULATORY COMMISSION AND
UNITED STATES POSTAL SERVICE,
Respondents,

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

AYESHA N. KHAN
Counsel of Record
WILLIAM BAKER
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, NW, Suite 700
Washington, DC 20004
(202) 836-7136
akhan@potomaclaw.com

Counsel for Petitioners

QUESTION PRESENTED

Congress has long established the legal requirements for the postal rate-setting system, a quintessentially legislative task with vast and important policy implications for the country. In 2006, Congress passed the Postal Accountability and Enhancement Act, which imposed various requirements that the system had to meet, including an inflation-adjusted price cap that reflected Congress's policy judgment that preventing rates from rising faster than inflation would maximize incentives for the Postal Service to reduce costs and increase efficiency. The Act tasked the Postal Regulatory Commission with filling in the system's details, subject to the statutory requirements.

As interpreted by the court below, the Act also gave the Commission power, ten years later, to throw out the statutory requirements and to rewrite the system from scratch, subject only to broad, open-ended, and often competing goals.

The Commission-crafted system subjects mailers to price increases that vastly exceed the rate of inflation and imperil many mailers' very existence—a result for which Congress has no accountability in light of its having "throw[n] the mess into the lap of an administrative agency." James Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 585-86 (1972).

The question presented is whether the nondelegation doctrine should be strengthened to disallow Congress from transferring to a federal agency the power to rewrite the postal rate-setting system without establishing any requirements that the system would have to meet.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court below are listed on the caption, except:

- The Counsel for Alliance of Nonprofit Mailers, Association for Postal Commerce, and MPA-The Association of Magazine Media were petitioners and intervenor-respondents below, but are not Petitioners here; and
- Valpak Franchise Association, Inc. was granted intervenor status, but subsequently sought and obtained withdrawal, in the court below.

RULE 29.6 STATEMENT

The Petitioners have no parent or publicly held company owning 10% or more of their stock.

RELATED PROCEEDING

The only proceeding in state or federal trial or appellate courts directly related to this case is:

- *Nat'l Postal Policy Coun. v. Postal Regulatory Comm'n*, No. 17-1276, U.S. Court of Appeals for the D.C. Circuit. Decided Nov. 12, 2021, in a decision reported at 17 F.4th 1184.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF CONTENTS—continued

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL & STATUTORY PROVISIONS

TABLE OF AUTHORITIES—continued

Page(s)

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

OPINIONS & ORDERS BELOW

The opinion below (Pet. App. A) is reported at 17 F.4th 1184.

The Commission issued 23 Orders in this docket, all of which can be found at https://www.prc.gov/dockets/doclist/RM2017-3/Orders_Responses-to-Orders?page=3 (last visited Feb. 1, 2022).[1]

JURISDICTION

The D.C. Circuit entered judgment on November 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Article I, Section 1 of the U.S. Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The relevant provisions of the Postal Accountability and Enhancement Act (Pet. App. E) appear at 39 U.S.C. § 3622.

---

[1] These 23 orders encompassed 1,400+ pages, almost all of which are irrelevant to this Petition. Because it would have been cost-prohibitive to include all of these orders in an Appendix, Petitioners have included only those portions of the Commission's orders that are pertinent to the question presented. The full text of the excerpted orders, and of the Commission's other substantive orders, were included in the Joint Appendix below. *See* JA Doc. Nos. 1, 5, 6, 12, 26, 31. That Joint Appendix is cited herein as "JA."

INTRODUCTION

Congress has long established the policy governing the operations of what is today the U.S. Postal Service. An important facet of that role has been to legislate how postal rates are to be set, a consideration that necessarily rests on policy judgments and has vast implications not only for the Service but for the country.

The most recent iteration of this was the 2006 Postal Accountability and Enhancement Act ("PAEA"). The PAEA imposed various requirements on the ratemaking system and tasked the Postal Regulatory Commission with filling in the system's details, subject to the statutory requirements.

Under the interpretation of the Act adopted by the court below, however, the Act also gave the Commission power, ten years later, to throw out the statutory requirements and to rewrite the system from scratch, subject only to broad, open-ended, and often competing goals, without any rules to limit its discretion.

Using its new authority, the Commission adopted a system that subjects Petitioners and their members to extraordinary rate increases that will impede the Postal Service's ability to serve its intended purpose and imperil the very existence of many mailers.

As interpreted, the statute sounds all of the alarms that have caused Justices and scholars to criticize this Court's nondelegation doctrine, which licenses Congress to evade responsibility for hard policy questions by passing them to administrative agencies, thereby frustrating the Founders' vision for the country and undermining representative government.

In light of the vast policy implications for the country and the breadth of the congressional delegation involved, the Court should take this opportunity to clarify the doctrine and to restore the proper balance between the executive and legislative branches of government.[2]

STATEMENT

A. Congress's Longstanding Exercise of Responsibility for Establishing the Rules Governing Postal Rates

Since this country's founding, Congress has wrestled with how to provide for a well-functioning postal service. Different eras and developments have brought new challenges and, each time, Congress weighed the policy considerations and stepped up to the plate with a legislative solution.

The founding era. The country's founders believed that the widespread dissemination of information was central to national unity. In 1775, before the Declaration of Independence was even signed, the Continental Congress turned the Constitutional Post into the Post Office for the colonies, whose operations became the first—and for many citizens, the most consequential—function of the new government. U.S. Postal Serv., *The United States Postal Service: An American History* 4 (2020),

[2] The Court may clarify its nondelegation doctrine in *West Virginia v. Environmental Protection Agency*, No. 20-1530. Accordingly, the Court should hold this petition pending the ruling in that case, which could call for a summary reversal or a GVR here. If the Court were to decide that case without addressing the nondelegation doctrine, however, this case would remain an apt vehicle for the Court to offer much-needed clarification on the doctrine's contours.

https://about.usps.com/publications/pub100.pdf [hereinafter "*USPS History*"]; Jane Kennedy, *Development of Postal Rates*, Vol. 33, No. 2, Jour. of Land Economics 97 (May 1957) [hereinafter "*Development of Postal Rates*"].

Article I, Section 8 of the U.S. Constitution empowered Congress "[t]o establish Post Offices and post Roads." The first law dealing with the Post Office, enacted in 1782, provided for the government's monopoly on letter mail. *Development of Postal Rates* at 94. Thereafter, Congress enacted the Post Office Act of 1792, which, among other things, established post roads and a general post office, and encouraged the exchange of newspapers and magazines by allowing them to travel through the mail at low postage rates, but set fairly high rates for letters (i.e., six to twenty-five cents, depending on distance). *See* An Act to Establish the Post-Office and Post Roads within the United States, Act of Feb. 20, 1792, ch. 7, §§ 9 & 10, *available at* http://njpostalhistory.org/media/pdf/postact1792.pdf (last visited Feb. 1, 2022). Some have referred to this as a "Robin Hood scheme" in which high-priced postage for letters, then sent mostly by businessmen and lawyers, subsidized the delivery of cheap, uncensored newspapers, thereby fostering a robust political culture. *See* Winifred Gallagher, *A Brief History of the United States Postal Service*, 95 Smithsonian Magazine (Sept. 2020), *available at* https://www.smithsonianmag.com/smithsonian-institution/brief-history-united-states-postal-service-180975627/ [hereinafter "*A Brief History*"].

1845 Act. By the 1840s, because of improvements in transportation and the rapid increase of commerce, and because postal rates for private letters were high (sending a letter more than 150 miles cost around

twenty cents, or roughly six dollars today), people increasingly relied on cheaper private carriers, imperiling the Post Office's viability. *See A Brief History*; *Development of Postal Rates* at 95. In response, in 1845, Congress converted the post into a public service and slashed letter postage to between five and ten cents, depending on the distance an item was to travel. *See A Brief History*. This was apparently a congressional compromise between the groups that favored a five-cent rate for all mail routes, and those groups (Post Office officials and some southern legislators) that wanted a much less radical change or no change at all. *Development of Postal Rates* at 96.

Congress continued to set policy in the next four decades. *Id.* In 1851, postage was set at three cents for all destinations except the Far West, with the policy goals of benefiting the frontier population, disseminating knowledge, and spreading literacy. *Id.* (citing Senate and House Reports). *Id.* By 1863, Congress had removed even that distinction, with all non-local letters being charged three cents per half ounce, and in 1883, it reduced that further to two cents, based on the policy judgment that the government should not use its monopoly to place an unfair share of postal costs on letters. *Id.*

1970 Postal Reorganization Act. Over time, due to low charges and other dynamics, the volume of mail exploded and the department racked up big deficits. In response, in 1970, Congress enacted the Postal Reorganization Act, which replaced the cabinet-level Post Office Department with the United States Postal Service, which was to operate in a more businesslike and self-sufficient manner. *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 520

(1984); *Direct Mail Advertising Ass'n, Inc. v. U.S. Postal Serv.*, 458 F.2d 813, 817 (D.C. Cir. 1972).

To achieve that policy agenda, Congress mandated that rates and rate increases were to be set so that revenues would equal costs. Pub. L. No. 91-375, 84 Stat. 760 (codified in former 39 U.S.C. § 3621); *see also* Order 4257, JA387; Order 5763, JA2315. Congress tasked the U.S. Postal Service and a new Postal Rate Commission, the predecessor to the current Postal Regulatory Commission, with setting rates for the various categories of mail, subject to the cost-of-service principle and other requirements. *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 340 n.2 (D.C. Cir. 2019).

B. 2006 Postal Accountability and Enhancement Act.

Over time the Service was confronted by a series of challenges, including declining volume caused by, among other things, electronic diversion from physical mail. *See, e.g.,* S. Rep. No. 108-318, at 2–3 (2004); H.R. Rep. No. 109-66, at 42 (2005). Furthermore, in Congress's view, the cost-of-service structure gave the Postal Service "little or no incentive … to control costs because all costs are ultimately passed through to the consumer regardless of how efficiently or inefficiently the Postal Service operates." H.R. Rep. No. 109-66, pt. 1, at 48; *accord* S. Rep. No. 108-318, at 6.

Congress started considering postal reform legislation in the mid-1990s to address these dynamics. James I. Campbell, Jr., *Summary of the Legislative History of the Postal Accountability and Enhancement Act, Public Law 109-435 (2006)* 1–2 (Sept. 2007), https://www.jcampbell.com/united-states/paea/20160829_PAEA%20leg%20hist%20refor

mat_sum_only.pdf. Various House and Senate committees held dozens of hearings and considered several postal reform bills in the ensuing decade. *See id.* at 2–6 & nn.2–15.

What emerged from these painstaking deliberations was H.R. 6407, which was signed into law by President George W. Bush on December 20, 2006. *Id.* at 7. The Act classified the Postal Service's mail products into two categories: "competitive" and "market-dominant," 39 U.S.C. § 3642(b)(1). Competitive products (not at issue in this case) are those for which the Service faces competition from private entities like FedEx and United Parcel Service, while the market-dominant products at issue in this case are those over which the Service either "enjoys a statutory monopoly" or "exercises sufficient market power so that it can effectively dictate the[ir] price … without risk of losing much business to competing firms." *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 744 (D.C. Cir. 2015). To protect mailers from the harms that can attend monopoly power, the new statute gave the Commission "enhanced review and oversight responsibilities for market-dominant products." S. Rep. No. 108-318, at 6–7, 19.

The Act reformulated the Postal Rate Commission as the Postal Regulatory Commission, an "independent establishment of the executive branch" (39 U.S.C. § 501), which was instructed to "establish" a ratemaking system for market-dominant products within eighteen months. 39 U.S.C. § 3622(a), Pet. App. 194a. The statute effectuated Congress's policy choices by imposing several "requirements" that the system had to meet. 39 U.S.C. § 3622(d), Pet. App. 197a. Foremost among these was a mandatory price-setting metric: the Act replaced the cost-of-service model with a

price cap limiting the annual price increase for classes of mail to the change in the Consumer Price Index for All Urban Consumers. 39 U.S.C. § 3622(d)(1), Pet. App. 197a. This embodied Congress's policy judgment that an inflation-adjusted price cap would protect mailers from the "'unreasonable use of the Postal Service's statutorily-granted [and de facto] monopoly' power while creating new pricing flexibility, incentives for the Postal Service to reduce costs, and the opportunity for the Postal Service to earn a profit." *U.S. Postal Serv.*, 785 F.3d at 745 (citing S. Rep. No. 108-318, at 19, brackets in original).

To protect mailers' interests, Congress also required, among other things, that the system include a schedule whereby rates would change at regular intervals by predictable amounts, provide an opportunity for notice and comment regarding adjustments, and limit the Service's ability to carry over into future years authority that it chooses not to use. 39 U.S.C. § 3622(d)(1), (2), Pet. App. 197a–200a.

Subject to these statutory requirements, the Commission was authorized to fill up by regulation the details for the ratemaking system, guided by nine objectives and fourteen factors. 39 U.S.C. § 3622(b) & (c), Pet. App. 194a–197a. The objectives were general goals—such as "maximiz[ing] incentives to reduce costs and increase efficiency" and "maintain[ing] high quality service standards"—rather than requirements. *See id.* at 194a–195a. The Commission was instructed to "appl[y]" each objective "in conjunction with the others." 39 U.S.C. § 3622(b), Pet. App. 194a. The factors were likewise general policy considerations rather than hard-and-fast rules. 39 U.S.C. § 3622(c), Pet. App. 195a–197a (noting the "importance of pricing flexibility," the "need for the Postal Service

to increase its efficiency and reduce its costs," and "the policies of [the PAEA] as well as such other factors as the Commission determines appropriate"). The Act empowered the Commission to "revise" its work from "from time to time," but the statutory requirements remained sacrosanct. 39 U.S.C. § 3622(a), Pet. App. 194a.

Another provision of the statute, however, required the Commission, ten years after the Act's enactment, to review the system to determine whether the objectives were being met. Pet. App. 200a–201a. "If the Commission determines … that the system is not achieving th[ose] objectives," "taking into account the factors," the Commission "may, by regulation, make such modification or adopt such alternative system for regulating rates … for market-dominant products as necessary to achieve the objectives." *Id.* at 201a. As described in more detail below, the D.C. Circuit interpreted this language to authorize the Commission to jettison the statutory requirements and to replace the ratemaking system wholesale. Pet. App. 12a–17a.

C. The Commission's Ten-Year Review

The Commission began its ten-year review in December 2016 by inviting public comment on how to define the nine objectives and measure whether they had been achieved. Order 3673, JA1–12. After receiving comments, the Commission issued Order 4257, which concluded that various dynamics, including the 2007 economic downturn, ever-increasing delivery points, declining mail volume caused by technological changes, and retirement-funding obligations imposed

on the Service by the PAEA[3] had left the Service with a deficit and impeded its ability to meet its financial obligations or retain earnings. *See* Order 5763, JA2316–18.

Given these findings, the Commission determined that the system had precluded the Service from achieving several of the Act's objectives, to wit, maintaining "financial stability," maximizing "incentives to reduce costs and increase operational efficiency," and achieving "reasonable rates." *Id.* at JA2318–21.

This teed up the question of the scope of the Commission's power to revise the ratemaking system and, in particular, to disregard the statutory requirements. On this issue, throughout the process, Petitioners took the position that, by its terms, the price cap and other statutory requirements were mandated by the PAEA and that the Commission lacked authority to change them; that if the statute were ambiguous on this point, the nondelegation doctrine required the statute to be interpreted as Petitioners advocated; and that a contrary interpretation would cause the statute to run afoul of that doctrine. *See* Order 4258, Pet. App. 166a–177a (discussing comments); Order 5337, Pet.

---

[3] Prior to the PAEA's enactment, the Service paid its share of health-insurance premiums for current retirees and their survivors on a pay-as-you-go basis. *See* Order 5763, JA2412. Congress altered this in the PAEA by requiring the Service to make payments to the U.S. Treasury to *prefund* long-term health benefits for current employees, retirees, and their survivors. *See id.* at JA2413; *see also* 5 U.S.C. § 8906(g)(2)(a), (b). No other governmental or private-sector entity is required to prefund retiree health benefits at this level. Order 5763, JA2413 & n.143.

App. 103a–122a (same); Order 5763, Pet. App. 61a–90a (same).

The Commission rejected these arguments, concluding and reiterating in several orders that the ability to "revise" the initial system under § 3622(a) was narrower than its ability to "adopt an alternative system" under § 3622(d)(3); that the latter clause unambiguously gave the Commission power to jettison the statutory requirements and to replace the existing system wholesale, subject only to the objectives in 39 U.S.C. § 3622(b); that to the extent the statute was ambiguous on this point, deference was due the Commission's interpretation under *Chevron* step two; and that, so interpreted, the statute did not run afoul of the nondelegation doctrine. Order 4258, Pet. App. 177a–193a; Order 5337, Pet. App. 122a–158a; Order 5763, Pet. App. 40a–93a.

Over the course of the docket, the Commission issued several sets of proposed modifications, seeking public comment each time. *See* Order 5763, JA2322–31. It ultimately issued a final rule in Order 5763, JA2305–2788, published at 85 Fed. Reg. 81,124 (Dec. 15, 2020). The final rule allowed the Postal Service to rely on three "authorities" to seek increases beyond the rate of inflation. Order 5763, JA 2328–2330.[4]

---

[4] These were a density authority to recover costs attributable to declines in mail density (Order 5763, JA2328); a retirement authority to recover the amounts that the Service is statutorily obligated to pay for its retirees (*id.* at JA2328–29); and a non-compensatory authority that would increase the prices for classes whose revenues do not cover the costs incurred to provide them (*id.* at JA2329–30).

On July 19, 2021, the Commission formally approved price increases of 6.814% for First-Class Mail, 6.814% for Marketing Mail, 8.771% for Periodicals, 8.804% for Package Services, and 6.808% for Special Services. Order 5937 at 2, Table I-1, *available at* https://www.prc.gov/docs/119/119291/Order%20No.%205937.pdf. These increases are dramatically higher than the CPI-related increases during the PAEA era, which ranged from 0.8-3.8%. *See* Order 4257, JA469, Table II-3. The new rates went into effect on August 29, 2021. *See* Pet'rs' Mot. for Stay at 3 (July 23, 2021).

D. The D.C. Circuit's Rulings

Six mailer organizations filed three petitions (D.C. Cir. Case Nos. 17-1276, 20-1505, and 20-1510) under 39 U.S.C. § 3663, seeking review from the Commission's Orders 4257 and 5763. In general, the mailers alleged that the Commission lacked authority to disregard the statutory requirements, including the inflation-adjusted price cap, and that the final rule was arbitrary and capricious. The Postal Service intervened in support of the Commission in all three of these cases, and also filed its own petition from Order 5763 (D.C. Cir. Case No. 20-1521), alleging that the order was arbitrary and capricious because it did not sufficiently address the Service's financial concerns. The mailers intervened in the Service's case. The D.C. Circuit consolidated the petitions. D.C. Cir. Order (Dec. 31, 2020).

In December 2020, before the precise amount of the new rate increases had been determined, the mailers asked the Commission to stay the Commission's new rule, which the Commission declined to do. Order 5818, JA2823–48. The mailers then sought a stay

from the D.C. Circuit, which denied the motion but expedited consideration of the appeal. D.C. Cir. Order (Mar. 1, 2021). The mailers renewed their stay motion after the rate increases were approved, but the D.C. Circuit again denied the motion. D.C. Cir. Order (Aug. 24, 2021).

After briefing and oral argument, the D.C. Circuit ruled in the Commission's favor on all four petitions. *See* Pet. App. A. The Court applied the two-step *Chevron* framework, which calls for a court to give effect to the unambiguous terms of a statute and to defer to an agency's interpretation insofar as the statute is ambiguous and the agency's interpretation is a permissible construction of the statute. Pet. App. 49a (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984)). The court concluded that under the statute's plain terms, § 3622(d)(3) permitted the Commission, as part of its ten-year review, to "either make minor changes to the ratemaking system or replace it altogether." Pet. App. 12a. This would include the power to replace the price cap and the other statutory requirements. *Id.* at 13a. The court reasoned that there would otherwise be no meaningful difference between the power to "revise" the ratemaking system under § 3622(a) and the power to adopt an "alternative" ratemaking system after ten years. *Id.* at 14a–15a.

In rejecting the mailers' argument that jettisoning the statutory requirements would leave the Commission with no statutory limitations on its authority in contravention of the nondelegation doctrine, the court reasoned as follows:

> A statutory delegation of authority is constitutional so long as Congress has provided an "intel-

> ligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). To date, the Supreme Court has found "the requisite 'intelligible principle' lacking in only two statutes, 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 the economy by assuring 'fair competition.'" *Id.* at 474 (citing *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). Section 3622(d)(3), by contrast, provides an intelligible principle to guide the Commission by requiring that alterations to the ratemaking system be "necessary to achieve the objectives" in § 3622(b), which enumerates nine criteria.

Pet. App. at 16a–17a.

The court also rejected arguments that the revamped system was arbitrary and capricious. *Id.* at 17a–30a. As the court explained, its review of the Commission's revamped system was necessarily limited because the PAEA's objectives amounted to a balancing test and the court's "review of agency decisions based on multi-factor balancing tests … is necessarily quite limited." *Id.* at 18a (internal quotation marks and sources omitted).

REASONS FOR GRANTING THE PETITION

I. The Court's Nondelegation Doctrine Imperils Our System of Representative Government and Requires Clarification.

A. The nondelegation principle was essential to the Founders' understanding of our constitutional order.

It is axiomatic that our government is one of limited and enumerated powers. The Constitution vests the authority to exercise different aspects of the people's sovereign power in distinct entities: In Article I, the Constitution entrusted the federal government's legislative power to Congress; in Article II, it assigned the executive power to the President; and in Article III, it gave independent judges the task of applying the laws to cases and controversies.

The Founders emphasized the need to distinguish among "the several classes of power, as they may in their nature be legislative, executive, or judiciary." The Federalist No. 48, at 256 (Madison) (G. Carey & J. McClellan eds. 2001) [hereinafter all references to The Federalist Papers are to this edition]. The division of powers among the three branches of government was seen to "provide[] a critical protection against usurpation of the rights of the people." Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 152 (2017) [hereinafter "Cass"].

To be sure, this Court, and Madison before it, have acknowledged that the lines among these powers are not always clear. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825); The Federalist No. 37, at 182 (Madison). But however difficult it may be to delineate these powers at the margins, the Constitution

"clearly places such a distinction at the center of its structure." Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 342 (2002) [hereinafter "Lawson"].

Chief Justice Marshall put the distinction among these powers most succinctly when he said that the legislature makes, the executive executes, and the judiciary construes. *Wayman*, 23 U.S. (10 Wheat.) at 46. More specifically, the founders understood the legislative function to refer to the power to adopt generally applicable prospective rules of conduct and the power to prescribe general rules for governing society. *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (citing sources).

Congress cannot delegate this legislative power to another branch of government. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Wayman*, 23 U.S. (10 Wheat.) at 42. As John Locke, one of the thinkers who most influenced the framers' understanding of the separation of powers, described it:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.

John Locke, *The Second Treatise of Gov't* § 141 (1690), *available at* https://www.gutenberg.org/files/7370/7370-h/7370-h.htm#CHAPTER_III.

As Justice Gorsuch pointed out in dissent in *Gundy*, 139 S. Ct. at 2134, the framers insisted on this arrangement in part to forestall an "excess of lawmaking," which the framers deemed one of "the diseases to which our governments are most liable." The Federalist No. 62, at 321 (Madison). They also did so

to ensure that laws were preceded by full-throated deliberation. As Alexander Hamilton explained, "[t]he oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it," and "the less must be the danger of those errors which flow from want of due deliberation, or of those mi[s]steps which proceed from the contagion of some common passion or interest." The Federalist No. 73, at 381 (Hamilton) (discussed at *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting)).

Restricting the task of legislating to Congress was also designed to promote fair notice and the rule of law, and to allow the populace to hold Congress accountable for its decisions. *See Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). Professor Schoenbrod has put it thusly: "Unchecked delegation would undercut the legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered general laws." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) [hereinafter "Schoenbrod"]. Politicians could take credit for addressing a problem by sending it to the executive for resolution, but then turn around and blame the executive for the problems that arise from the measures the executive pursues. The executive, in turn, could point to Congress as the source of the problem, thereby allowing both sides to "'disguise ... responsibility for the consequences of the decisions.'" Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U.L. Rev. 1463, 1478 (2015) (quoting 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)).

Finally, the nondelegation doctrine "prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." *Arizona v. California,* 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). For this reason, the Court said in *Yakus v. United States*, 321 U.S. 414, 426 (1944), that Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether the executive "has conformed to those standards."

B. The nondelegation doctrine has become so elastic as to have lost any clear meaning.

Despite the importance of the doctrine to our constitutional order, this Court has not consistently applied a workable test in its nondelegation decisions. As one commentator has said, the operative "intelligible principle" test is so vague that it has "allowed the interpretation of the delegation doctrine to swing like a pendulum with the changing politics of the Court and the times." Schoenbrod, 83 Mich. L. Rev. at 1226.

Things were not always this way. In 1935, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down a statute that transferred to the President the power "to approve 'codes of fair competition'" for slaughterhouses and other industries, if the President finds, among other things, that the codes are not designed "to promote monopolies" and "will tend to effectuate the policy" behind the statute. 295 U.S. 495, 521–523 (1935). The policies behind the statute "embrace[d] a broad range of objectives," including removing obstructions to the free flow of commerce, providing for the general welfare, promoting cooperative action among trade groups, inducing

united action of labor and management, eliminating unfair competition, promoting productivity of industries, avoiding undue restrictions on production, increasing the consumption of industrial and agricultural products by increasing purchasing power, reducing unemployment, improving standards of labor, rehabilitating industry, and conserving natural resources. *Id.* at 534–35. The Court struck down this regime on the ground that it "sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion," which the Court characterized as "a preface of generalities." *Id.* at 537, 541. The Court contrasted the statute at issue with ones in which Congress "'declar[es] the rule which shall prevail in the legislative fixing of rates,' and then remit[s] 'the fixing of such rates' in accordance with its provisions 'to a rate-making body.'" *Id.* at 541 (quoting *J.W. Hampton*, 276 U.S. at 409).

The same year, in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Court considered a statute that authorized the President to decide whether and how to prohibit the interstate transportation of petroleum produced or withdrawn from storage in excess of state-set quotas. Congress had specified the objectives of the statute—removing obstructions to the free flow of commerce, encouraging productivity, and conserving natural resources—but the Court struck down the statute nonetheless, because "[a]mong the numerous and diverse objectives broadly stated, the President was not required to choose." *Id.* at 418. That is, "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430.

Since the Court decided *A.L.A. Schechter* and *Panama Refining Co.*, however, the nondelegation doctrine has been hijacked by an intelligible-principle test that fails to provide clear parameters for how and when Congress can delegate to the executive branch. This Court first used that phrase in *J.W. Hampton,* 276 U.S. at 401, where the Court considered legislation that directed the President to "investigat[e]" the relative costs of production for American companies and their foreign counterparts and impose tariffs or duties that would "equalize" those costs. In upholding the statute, the Court remarked that a statute "lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform" satisfies the separation of powers. *Id.* at 409.

To be sure, this language sounds as if a statute must provide an actual rule if it is to pass constitutional muster. And that may indeed have been what the Court meant. *See Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). But in the ensuing years, the phrase was sometimes interpreted to mean that Congress need only pronounce a vague set of goals, even if these announced goals bear no resemblance to standards or rules and, indeed, conflict with one another. *See* Schoenbrod, 83 Mich. L. Rev. at 1229. On occasion, the pendulum swung so far in this direction that the Court upheld statutes in which Congress offered almost nothing to guide the rule-making process other than, perhaps, general pronouncements about advancing the public interest. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (upholding portions of the Home Owners Loan Act of 1933 authorizing the Federal Home Loan Bank Board to prescribe regulations and conditions for the liquidation of savings and loan associations); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939) (upholding Agricultural

Marketing Agreement Act authorizing the Secretary of Agriculture to fix minimum prices for farm commodities at levels that would "provide adequate quantities of wholesome milk and be in the public interest").

In more recent years, the pendulum has swung the other way. This has principally taken the form of the Court's narrowing statutes to impose standards and rules not explicit on the face of statutes themselves. In 1974 Justice Douglas wrote for the Court in *National Cable Television Association v. United States*, 415 U.S. 336, 342 (1974), invoking nondelegation concerns to narrow a statute that appeared to delegate Congress's power to levy taxes. Similarly, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), five Justices voted to overturn an action taken under the Occupational Safety and Health Act. Four of them reached this result by, *inter alia*, narrowly interpreting the Act to avoid an unconstitutionally broad delegation. *Id.* at 645–46. The fifth, Justice Rehnquist, argued that this portion of the Act should in fact be struck down as unconstitutional. *Id.* at 671–88 (Rehnquist, J., concurring).

In *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (1999), the Court considered § 109(b)(1) of the Clean Air Act, which authorized the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator [of the Environmental Protection Agency] … are requisite to protect the public health." In upholding the statute, the Court stated that it was "interpret[ing the statute] as requiring the EPA to set air quality standards at the level that is 'requisite'—

that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety." *Id.* at 475–76.

Most recently, in *Gundy*, the Court addressed the federal Sex Offender Registration and Notification Act (SORNA), which imposed registration requirements on those found guilty of a sex offense but gave the Attorney General discretion to specify the applicability of the statute to individuals convicted of a sex offense before SORNA's enactment. The majority relied on a case that this Court had previously decided—*Reynolds v. United States*, 565 U.S. 432 (2012)—to conclude that the statute required the Attorney General to register pre-Act offenders "as soon as feasible," even though SORNA itself said no such thing. 139 S. Ct. at 2130. This prompted the dissenters to opine that the majority was "reimagin[ing]" and rewrit[ing]" the statute to allow it to avoid "the chopping block." *Id.* at 2148 (Gorsuch, J., dissenting). *See also id.* at 2141 (describing *Touby v. United States*, 500 U.S. 160 (1991), as involving a situation in which the Court recast the statute as conferring on the Attorney General a fact-finding responsibility).

The Court has also invoked other doctrines—especially the major-questions doctrine—to place limits on the power of Congress to delegate. *See*, *e.g., King v. Burwell*, 576 U.S. 473, 485–86 (2015) (holding that, with respect to questions of deep economic and political significance, step-two *Chevron* deference would not apply). *See also Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting) (discussing other doctrines that have taken up the slack).

These developments have been driven in part by the fact that the nondelegation doctrine has become "unavailable to do its intended work." *Id.* at 2141.

And while narrowing a statute's reach may serve to limit congressional delegations to the executive, it gives rise to a different problem: "If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment, it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute's conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process." John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S.C.T.R. 223, 224 (2000). Narrowing constructions are also in tension with a textualist's approach to statutory interpretation. *Cf. id.* at 226.

C. Scholars and Justices have agreed that the doctrine needs a reboot.

Justices, lower court judges, and academics have roundly acknowledged that the nondelegation doctrine has come loose from its moorings, with substantial consequence to our democratic ideals.

Several Justices currently sitting on the Court have opined that the mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution and that the doctrine begs for refinement. *See, e.g., Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting, with Roberts, J., and Thomas, J., joining); *id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *see also Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has be-

come, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power."); *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) ("On a future day, …, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

Scholars on all sides of the political spectrum have likewise urged the Court to bring its case law in line with constitutional principles. Schoenbrod, 83 Mich. L. Rev. at 1236 ("Thinkers as diverse as Skelly Wright, John Ely, William Douglas, and James Freedman have expressed interest in the [nondelegation doctrine's] revival.") (internal footnotes and citations omitted); *see also Gundy*, 139 S. Ct. at 2140 & n.62 (Gorsuch, J., dissenting) (collecting sources). Academics have not minced words. Professor Lawson has said that some of this Court's cases have declared the intelligible-principle standard "satisfied by any collection of words that Congress chose to string together." Lawson, 88 Va. L. Rev. at 371. Professor Cass has said that the "even the vaguest, most incoherent set of mutually incompatible goals can satisfy the 'intelligible principle' test" and has criticized the Court for giving "flaccid and contradictory instructions." Cass, 40 Harv. J.L. & Pub. Pol'y at 167, 170. And Professor Hamburger has stated that "the notion of an 'intelligible principle' sets a ludicrously low standard for what Congress must supply." Philip Hamburger, *Is Administrative Law Unlawful* 378 (2014).

Judges and scholars have also appreciated the dire consequences of retaining this "ludicrously low standard" (*id.*): "[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic

republic." John Hart Ely, *Democracy and Distrust, a Theory of Judicial Review* 132 (1980). As Judge Skelly Wright has observed:

> When Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the "public interest" which tells the agency, in effect, to get the job done. But while this observation is no doubt correct, it seems to me to argue for a vigorous reassertion of the delegation doctrine rather than against it. An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy.

Beyond Discretionary Justice, 81 Yale L.J. 575, 584–85 (1972).

So by what more precise standard should a delegation be judged? The Court's seminal formulation of the test was that it is not enough for Congress simply to specify a "broad range of objectives," "preface of generalities," or "statement of … general aims." *A.L.A. Schechter*, 295 U.S. at 534, 537, 541. Instead, Congress must "declar[e] the rule which shall prevail." *Id.* at 541 (quoting *J.W. Hampton*, 276 U.S. at 409); *see also Panama Refining Co.*, 293 U.S. at 430 (requiring Congress to lay down a rule); *Am. Power & Light Co. v. Sec. and Exch. Comm'n*, 329 U.S. 90, 105 (1946) (asking whether Congress had made clear to the delegee the "boundaries of this delegated authority").

Most recently, Justice Gorsuch has opined that we must ask:

> Does the statute assign to the executive only the responsibility to make factual findings?

> Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

Gundy, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

Many academics have likewise taken the position that Congress cannot simply lay out a vague set of goals, but must set rules that the agency must abide. *See, e.g.,* Schoenbrod, 83 Mich. L. Rev. at 1254. Allowing Congress to pass "goals statutes," which enable legislators to escape the difficult, value-laden choices implicit in balancing competing policy goals and distributing rights and benefits among different groups in the population, frustrates judicial review and congressional electoral accountability. *Id.*

As Professor Redish has explained, while legislators need not make every conceivable choice embodied in a statute, they must make those choices that are necessary to ensure the political responsibility contemplated by the Constitution's scheme of representation. *See* Martin H. Redish, *The Constitution as Political Structure* 135–61 (1995). For Professor Barber, Congress has behaved permissibly "as long as it can be said that Congress has arrived at a clear policy decision among salient alternatives and that the delegations in question are instrumental to such decisions." Sotirios A. Barber, *The Constitution and the Delegation of Congressional Power* 40–41 (1975). Similarly, Professor Lawson has taken the position that Congress must make "the central, fundamental decisions,

but … can leave ancillary matters to the President or the courts." Lawson, 88 Va. L. Rev, at 377.[5]

The "job of keeping the legislative power confined to the legislative branch [cannot] be trusted to self-policing by Congress." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Accordingly, only the judicial branch—and, in particular, this Court—can bring about this needed realignment.

II. The PAEA Sounds All of the Alarms That the Nondelegation Principle Is Designed to Address.

The conferral of power to the Commission to rewrite postal ratemaking policy via the PAEA's ten-year review process is a blatant delegation of legislative power under any standard other than the most watered-down version of the intelligible-principle test. Absent the Court's intervention, this delegation will have massively deleterious consequences for the Petitioners and, indeed, for the country.

---

[5] Academics and Justice Gorsuch in his *Gundy* dissent have explained that many of the results the Court has reached under the intelligible-principle doctrine are consistent with a more robust nondelegation test. *See, e.g.,* Schoenbrod, 83 Mich. L. R. at 1227; *Gundy* 139 S. Ct. 2139 (Gorsuch, J., dissenting) (discussing *J. W. Hampton*, 276 U.S. 394)); *id.* at 2140 & n.65 (citing *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989)). Still other decisions were correct because they involved delegations regarding matters already within the scope of executive power. *See* Schoenbrod, 83 Mich. L. Rev. at 1260–63; *Gundy*, 139 S. Ct. at 2140 & n.64 (Gorsuch, J., dissenting) (discussing *Loving v. U.S.*, 517 U.S. 748 (1996)).

A. As interpreted by the court below, the PAEA reflects congressional abdication of responsibility for making difficult and important policy choices.

As Judge J. Skelly Wright has observed, it comes "at the expense of democratic decisionmaking" when Congress decides that it no longer wishes to wrestle with a problem and "passes some 'soft' statutes which throw the mess into the lap of an administrative agency." *Beyond Discretionary Justice*, 81 Yale L.J. 575, 585-86 (1972).

Under the interpretation given to the PAEA by the court below, that is exactly what happened here. For over 200 years, Congress took responsibility for considering the alternatives and making the hard policy decisions about the role the Postal Service should play in the country and how to ensure that it operates effectively and efficiently. Congress went from setting prices directly, to requiring postal rates to keep pace with the Service's costs, to limiting rate increases to the rate of inflation. *See supra* Statement. The deliberative process that led to the adoption of the inflation-adjusted approach was ten years in the making. Congress held hearings, weighed options, and reconciled the differences between the bills passed by each chamber of Congress. *See id.*

In every one of these iterations, Congress set the overall rules to govern the postal rate-setting system and then, starting in 1970, let an executive agency fill up the details. But then, under the D.C. Circuit's interpretation of the PAEA, Congress threw up its hands: If, ten years after the passage of the Act, the Commission concluded that the system Congress devised was not working, the Commission was free to re-

place the system wholesale. Pet. App. 12a–17a. Senator Collins, the primary Senate sponsor of the conference bill, described this arrangement as follows:

> After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system. While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why [the conferees] have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal [Regulatory] Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires.

152 Cong. Rec. S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). Senator Collins's statement shows that Congress viewed the PAEA's price cap as reflecting important legislative work over which Congress had deliberated at length, but that, under the Senator's interpretation of the statute, Congress was empowering the Commission unilaterally to undo that legislative compromise and to substitute its own judgment on how postal rates should be set ten years hence. One would be hard-pressed to find a more clear-cut instance of Congress's passing legislative work to an executive agency.

B. The statutory objectives that Congress laid out lack any prescriptive effect.

The D.C. Circuit held that, pursuant to its ten-year-review authority, the Commission was free to jettison all of the congressional requirements and start from scratch in building a postal rate-setting system. Pet. App. 12a-17a. This did not create a nondelegation problem, in the panel's view, because the objectives in § 3622(b) enumerate nine criteria that provide sufficient guidance to serve as an intelligible principle that saves the scheme from infirmity. Pet. App. 16a–17a.

These objectives are to: (1) "maximize incentives to reduce costs and increase efficiency"; (2) "create predictability and stability in rates"; (3) "maintain high quality service standards"; (4) "allow the Postal Service pricing flexibility"; (5) "assure adequate revenues, including retained earnings, to maintain financial stability"; (6) "reduce the administrative burden and increase the transparency of the ratemaking process"; (7) "enhance mail security and deter terrorism"; (8) "maintain a just and reasonable schedule for rates"; and (9) "allocate the total institutional costs of the Postal Service appropriately between market-dominant and competitive products." 39 U.S.C. § 3622(b), Pet. App. 194a–95a.

This is nothing more than a "broad range of objectives" or "statement of … general aims." *A.L.A. Schechter*, 295 U.S. at 534, 541. The objectives simply do not declare a "rule which shall prevail." *Id.* at 541 (quoting *J.W. Hampton*, 276 U.S. at 409). For example, how do we know when and if incentives have been maximized enough? At what point do rates become inflexible, unpredictable, or unstable? When are service standards too low? How much revenue is enough

or too little to ensure financial stability? When is the administrative burden too high and when does the process become too opaque? When is mail security or the risk of terrorism compromised too much? The objectives provide no answers to these questions. By enacting them, Congress "has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which [action] is to be allowed or prohibited." *Panama Refining Co.*, 293 U.S. at 430. Indeed, the objectives are so loose that nothing would have prevented the Commission from reverting to the cost-of-regime system that Congress created in 1970 and then abolished in 2006.

To make matters worse, many of these objectives point in competing directions, as both the Commission and the court below recognized. "[S]ome aspects of the objectives are in tension with each other, whereas other aspects may overlap." Order 5763, JA2592. The Commission explained, for example, that disallowing greater-than-inflation increases would further one objective, but frustrate others; while allowing the Commission to recover all of its costs would further some objectives at the sacrifice of others. *Id.* at JA2608. In light of these tensions, the Commission acknowledged that it had to exercise judgments on "tradeoffs." *Id.* at JA2608–09. The court below similarly recognized the tension between, for example, achieving financial stability, on the one hand, and incentivizing cost-cutting and efficiency improvements and achieving predictable and stable rates, on the other hand. Pet. App. 27a–28a.

But balancing competing objectives and making judgments on tradeoffs is precisely what legislating is. And while we might be prepared to allow agencies to

fill in the details, or even to make tradeoffs on subsidiary issues once Congress has laid out broad governing rules, here, Congress laid out no rules at all. And while the statute provides that the Commission shall "appl[y]" each objective "in conjunction with the others" (39 U.S.C. § 3622(b), Pet. App. 194a), it sets no standard for how the balancing of competing considerations is to be done.

Furthermore, because Congress failed to set any such standard, it is impossible for the courts to engage in any meaningful judicial review of the agency's choice of priorities among competing policy goals or to determine whether Congress's directions have been followed. So long as the agency followed statutory procedures, gave lip service to each goal, and cloaked its decision with a modicum of rationality, the Commission has unfettered discretion in assigning weight to each goal. As the D.C. Circuit said here, the court's "review of agency decisions based on multi-factor balancing tests … is necessarily quite limited." Pet. App. 18a. Thus, by adopting a regime that punts the issue to an administrative agency, subject only to an amorphous balancing test, Congress has avoided meaningful accountability not only for itself, but even for the agency to which it punted.

C. The country and its mailers will experience substantial harm under the Commission's regime, for which Congress is now unaccountable.

The "basic function" of the Postal Service is "to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. § 101(a). The Service heralds this role:

> At every home and business, and in every community in America, the United States Postal Service plays an indispensable role in the daily experience of the American public. The secure, affordable, reliable, and universal delivery of mail and packages we provide helps drive commerce, connect people to one another, and bind the nation together as we have done throughout our rich history.

U.S. Postal Serv., *Fiscal Year 2021 Annual Report to Congress*, https://about.usps.com/what/financials/annual-reports/fy2021.pdf.

The Covid-19 pandemic has highlighted the critical nature of this role. As the Service itself explains, "[w]e're on the front lines—delivering needed medicines, supplies, benefit checks, financial statements and the important correspondence every family counts on." U.S. Postal Serv., *Delivering for America during COVID-19*, https://about.usps.com/newsroom/covid-19/); *see also* Popular Science, *The Postal Service helps keep millions of Americans alive and well* (Aug. 20, 2020), https://www.popsci.com/story/science/us-postal-service-keeps-americans-healthy/.

The nation's needs and how best to fulfill them have figured prominently in past congressional deliberations in this area. But by having punted to an executive agency, Congress can now avoid responsibility for what ensues. Consumer Reports will pay an additional $1.78 million in postage in the next year, and more than $9 million cumulatively in extra postage from 2021–2025. *See* Ex. 10 to Pet'rs' Mot. for Stay, Brophy Decl. at ¶ 13. The American Lung Association will spend an additional $400,000 in postage next year, and more than $1.5 million in extra postage from

2021–2015. *See id.* at Ex. 11, Finstad Decl. at ¶ 11. Disabled American Veterans estimates that it will pay "nearly half a million dollars in additional costs this year alone, and one and a half million dollars in additional costs in 2022." *Id.* at Ex. 12, Burgoon Decl. at ¶ 10.

For smaller mailers such as local or regional newspaper and magazine publishers, these increased postage costs will be devastating. *See id.* at Ex. 13, Wood Decl. at ¶¶ 17-18 (stating that increased postage costs of $194,298 this year will exceed Wisconsin publishing company's average net earnings over the past three years "and cause the company to continue to lose money even with planned efficiency changes to our operation"); *id.* at Ex. 14, Trowbridge Decl. at ¶ 5 (stating that $93,727 in additional postage costs this year will wipe away half of Yankee Magazine's margins).

These increased costs will force some mailers to reduce mailings and correspondingly diminish their ability to inform, educate, and advocate to the public. *See, e.g., id.* at Ex. 13, Wood Decl. at ¶ 19 (stating that Wisconsin publishing company will be "reducing news coverage and providing less service to our customers" because of increased postage costs). And many mission-driven organizations will be forced to divert funds from critical activities that benefit vulnerable populations. *See, e.g., id.* at Ex. 15, Hamre Decl. at ¶ 11 (explaining that the additional $1.7 million in postage fees that the Wounder Warrior Project will need to pay in the coming year will compromise the nonprofit's ability to provide veterans with much-needed mental health services); *id.* at Ex. 12, Burgoon Decl. at ¶ 11 (explaining that increased postage costs will translate into reduced mailings and, in turn, impact

Disabled American Veterans' ability to provide veterans with rides to medical appointments and counseling services).

These are grave—and for some mailers, existential—consequences, but because it did not devise the system under which the country and Petitioners now labor, Congress is not accountable for them. Only by righting the constitutional regime and requiring Congress to assume responsibility for legislative judgments, can this lack of accountability be redressed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AYESHA N. KHAN
Counsel of Record
WILLIAM BAKER
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, NW,
Suite 700
Washington, DC 20004
(202) 836-7136
akhan@potomaclaw.com

Counsel for Petitioners

FEBRUARY 2022