No. 21-1124

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The Postal Regulatory Commission's Brief in Opposition elides the central question that the Petition presents: is it consistent with the nondelegation doctrine for Congress to specify general aims that an agency must accomplish, without specifying any bottom-line rules or standards to which the agency must conform?

Rather than wrestling with whether this specific question merits consideration, the Commission speaks in generalities, with its position boiling down to this: certiorari should be denied because the decision below is consistent with this Court's longstanding practice of giving Congress "nearly" unfettered authority to delegate. Br. in Opp. at 18.[1]

But that characterization of the case law—accurate as it may be—says nothing about what if anything the doctrine actually requires of Congress. Nor does it provide a theory under which the Court's decisions can be harmonized. Most importantly, it fails to explain how an award of unfettered authority can be squared with the Founders' vision and our government's tripartite structure.

The Petition raises an important question of federal law that has not been, but should be, settled by this Court, and this case is an exemplary vehicle for the Court to address it.

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[1] The Commission argues that the D.C. Circuit correctly interpreted the statute to allow the Commission to rewrite the postal rate-setting system wholesale, and that this aspect of the decision below does not merit review. *See* Br. in Opp. at 12–16. The Commission rightfully acknowledges, however, that Petitioners have not sought certiorari on that question. *Id.* at 15.

REASONS TO GRANT THE PETITION

I. The Court's Nondelegation Jurisprudence Cannot Be Harmonized and Has Invited Congress to Skirt Its Responsibilities.

A. *Schechter Poultry* and *Panama Refining* are indistinguishable from this case.

The Commission proclaims that "the Court has rejected nearly every nondelegation challenge it has confronted." Br. in Opp. at 18. The quoted sentence's inclusion of the word "nearly" is driven by this Court's decisions in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), which are virtually on all-fours with this case.

Schechter Poultry involved a statute that gave the President power "to approve 'codes of fair competition'" for slaughterhouses and other industries, if the President found, among other things, that the codes "impose no inequitable restrictions on admission to membership … and are truly representative," are not designed "to promote monopolies," and "will tend to effectuate the policy" behind the statute. 295 U.S. at 521–23.

The statute listed "a broad range of [eleven] objectives," including removing obstructions to the free flow of commerce, inducing united action of labor and management, promoting productivity, reducing unemployment, improving standards of labor, and conserving natural resources. *Id.* at 534–35.

The Court struck down the delegation because Congress had not declared an actual standard for the President to follow. *Id.* at 537–40. The Court found

no such standard or rule in the laundry list of objectives, which it dismissed as a statement of "general aims. 295 U.S. at 541.

Similarly, in *Panama Refining*, the Court considered a statute that authorized, but did not require, the President to regulate petroleum products that exceeded state-issued quotas. 293 U.S. at 406. As in *Schechter Poultry*, Congress had specified a laundry list of objectives for the President to consider, but it "prescribe[d] no policy for the achievement of [those] end[s]." *Id.* at 418.

The Court struck the delegation because it did "not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission." *Id.* at 415. "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. The laundry list of objectives did not cure the problem, in the Court's view, because they were a "general outline of policy" rather than a standard for when the President should act. *Id.* at 417.

The upshot of these decisions is that a list of objectives is different than the articulation of an actual standard or rule that governs the Executive's action. Congress cannot simply recite its general policy aims and then leave to the Executive the task of balancing those aims to arrive at the standard or rule for action.

The Commission relies on a single footnoted sentence from *Mistretta v. United States*, 488 U.S. 361

(2014), to dismiss *Schechter Poultry* and *Panama Refining*: "Congress 'had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.'" Br. in Opp. at 19 (quoting, and adding emphasis to, *Mistretta*, 488 U.S. at 373 n.7).

But that is just as true here. Under the Commission's interpretation of § 3622(d)(3), if the objectives have been unmet, the "statutory requirements" fall away and the agency can rewrite the ratemaking system wholesale, subject only to the objectives, which are indistinguishable from the statutory objectives in *Schechter Poultry* and *Panama Refining*. Indeed, Congress's abdication is even more pronounced here than it was in *Schechter Poultry* and *Panama Refining*, as Congress chose here to punt on an issue for which it had historically taken responsibility. *See* Pet. at 3–9.

The Commission asserts that Congress need not provide "granular instructions" or "minute detail" (*id.* at 22, 23), and "a conferral of authority is not defective merely because it requires an agency to exercise judgment and to balance competing considerations (*id.* at 23). This misses the qualitative point: the problem is not that Congress left *some* discretion to the agency or that it provided *insufficient* standards; it is that Congress provided no standard at all. As in *Schechter Poultry* and *Panama Refining*, the objectives are nothing but open-ended policy considerations, lacking boundaries or standards against which the Commission's system can be judged.

The Commission cites *American Power & Light v. SEC*, 329 U.S. 90, 105 (1946), for the proposition that a delegation is permissible if Congress delineates (1) the general policy to be pursued, (2) the public agency

which is to apply it, and (3) the boundaries of the delegated authority. Br. in Opp. at 18 & 20. The Commission errs, however, in claiming that Petitioners do not dispute that § 3622(d)(3) satisfies the "boundaries" requirement. *Id.* at 20. As Petitioners have explained above, and as they argued in their Petition (*see* Pet. at 30–32), under the Commission's interpretation of the statute, Congress failed to provide any standard or rule that would serve as a boundary on the Commission's action ten years hence.

The Commission asserts that the "boundaries" requirement is satisfied here because "the authority [the statute] confers consists of modifying or replacing the existing 'system for regulating rates and classes for market-dominant products' of the Postal Service." Br. in Opp. at 20 (quoting 39 U.S.C. § 3622(a)). But that is not a boundary; it is a recitation of the subject matter of the statute. The statutes at issue in *Schechter Poultry* and *Panama Refining* provided similar subject-matter direction, but that did not save them from invalidity.

Nor is it enough to claim that the requisite boundary is established by Congress's allowing a rewrite of the system only if the Commission first determines that the objectives have been unmet. *Cf.* Br. in Opp. at 21. The statute at issue in *Panama Refining* allowed the President to regulate only when affected products exceeded state-issued quotas (*id.* at 406), but that was not a sufficient boundary because it simply instructed the President on when he *could* act, not on when he *should* do so. Likewise, here, the statute tells the Commission that it *can* rewrite the statute when the objectives have been unmet, but it offers no standard—only open-ended objectives—for *how* the system should be rewritten. Thus, the nine objectives provide

"ample guidance" (Br. in Opp. at 21) only if one is prepared to disregard the holdings of *Schechter Poultry* and *Panama Refining*.

The Commission suggests that Congress's instruction to consider "each" objective "in conjunction with the others" somehow fixes the problem. Br. in Opp. at 24. In fact, the plethora of objectives exacerbates rather than ameliorates the concerns, for two reasons. First, a multi-objective recitation indicates that Congress has failed to prioritize among the relevant policy considerations, leaving it to the agency to assume that task. In this respect, § 3622(d)(3) is more like the statutes in *Shechter Poultry* and *Panama Refining* than like those in which Congress specifies a single consideration as paramount. *Cf. Whitman v. American Trucking Assocs., Inc.*, 531 U.S. 457 (1999) (upholding statute calling for EPA to set air quality standards "requisite to protect the public health"). Second, making matters worse, the objectives point in competing directions, which means that Congress has left the agency to implement not only a multitude of objectives, but to weigh some against others, which is quintessentially legislative work. It would be as if the statute in *Whitman* had obligated the EPA to devise air quality standards that advanced public health but that also minimized the regulation of oil and gas companies and maximized economic efficiency.

Finally, the Commission asserts that the "particular types of judgments that Congress entrusted to the Commission are especially well suited for an expert agency" because they involve the setting of rates. Br. in Opp. at 23. But that mischaracterizes the statute. The Commission is not setting rates; it is devising the *system* under which rates are set. Prices are set by the Governors of the Postal Service, which is a

different body than the Commission. The Governors set prices subject to the system's parameters. Thus, when Congress adopted the PAEA's "statutory requirements," including the CPI price cap, it was not engaging in rate-setting; it was declaring the overarching policy for how rates should be set—a task that, under the Commission's interpretation of the statute, was punted to the Commission ten years hence, in contravention of any but the most anemic characterizations of the nondelegation doctrine.

B. The Court's jurisprudence has grown increasingly muddled since *Schechter Poultry* and *Panama Refining* were decided.

Since *Schechter Poultry* and *Panama Refining*, the Court has upheld some statutes even though they offered little to guide the rulemaking process other than general pronouncements along the lines of advancing the "public interest, convenience, or necessity" or setting "just and reasonable" or "fair and equitable" rates. *See* Br. in Opp. at 21–22 (citing cases from 1943 and 1944).[2]

More recent decisions have suggested that the Court may be pulling back on giving a pass to such indeterminate statutes. *See* Pet. at 21–22. For example, the statute at issue in *Whitman*, 531 U.S. at 465, allowed the EPA to set air quality standards "requisite to protect the public health"—a directive not dissimilar from those found in the statutes quoted above. But rather than simply citing those cases and calling

[2] While the statutes in these cases offered little to guide the agency's rulemaking, they focused the agency on a single objective, rather than tasking the Executive with advancing a plethora of divergent considerations, as the statute here does.

it a day, the Court interpreted the statute narrowly, concluding that "requisite" means "not lower or higher than is necessary—to protect the public health with an adequate margin of safety." *Id.* at 476. And in *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019), the Court did not just narrowly interpret statutory language, it grafted a substantive limitation onto the statute, drawn from one of its earlier decisions, to provide the standard that the Attorney General had to abide. *See* Pet. at 22. The Court has also continued to defend the results in *Schechter Poultry* and *Panama Refining*. *See Mistretta*, 488 U.S. at 373 n.7.,

At the same time, however, the Court has occasionally described the nondelegation doctrine as requiring very little of Congress (*see, e.g., id.* at 372), which has led some Justices, scholars, and lower courts to conclude that the nondelegation doctrine is moribund. *See Gundy*, 139 S. Ct. at 2140 & n.62 (Gorsuch, J., dissenting and citing law review articles).

In light of this state of the jurisprudence, Congress has seen fit to punt policy conundra "into the lap of an administrative agency" (James Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 585-86 (1972)), precisely as it did here. *See* Pet. at 29. The state of the doctrine has also invited some lower courts to reflexively dismiss nondelegation arguments. Indeed, in this case, the D.C. Circuit dismissed the nondelegation question out of hand, devoting half a page of analysis to an argument that carried the day in *Schechter Poultry* and *Panama Refining*. *See* Pet. App. at 16a–17a. It is not an overstatement to say that the jurisprudence merits clarification from the Court and that the lack of clarity does violence to our tripartite system of government. *See* Pet. at 15–18, 27–29.

II. The Principle that Petitioners Advance Is Hardly Radical.

The rule that Petitioners advocate tracks the position that Justice Gorsuch took in dissent in *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting), mirrors the views advanced by many academics (*see* Pet. at 26–27), and is consistent with the Founders' vision (*see id.* at 15–18). It would also not call for overruling a long line of precedents, as Respondent claims. *Cf.* Br. in Opp. at 25. Indeed, many of the Court's decisions would be consistent with a more robust nondelegation test. *See, e.g.,* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1227, 1260–63 (1985); *Gundy* 139 S. Ct. 2140 (Gorsuch, J., dissenting).

To be sure, some of the Court's decisions, especially those issued in the 1940s, may be undercut by the Court's returning to first principles, but that is hardly a reason not to right the ship. As the Commission says, *stare decisis* serves many valuable ends (Br. in Opp. at 24–25), but it is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (internal quotation marks and citation omitted), and it "is at its weakest when we interpret the Constitution," *Agostini v. Felton*, 521 U.S. 208, 235 (1997).

In this case, several factors militate in favor of clarifying the doctrine, even if that were to come at the expense of some of the Court's more hands-off decisions. First, a regime in which Congress is allowed to throw a policy hot potato in the lap of an administrative agency strikes at the foundation of our governmental structure. *See* Pet. at 15–17. Second, the Court has not cogently explained why Congress should be relieved of the obligation the Founders en-

visioned for it, let alone why the benefits of such a departure outweigh its costs. *See, e.g.*, *Mistretta*, 488 U.S. at 372 (stating, without data, that "Congress simply cannot do its job" without virtually unfettered delegation authority and citing a 1941 case and a 1967 concurring opinion that made the same point in equally broad and unsubstantiated terms). Third, the muddled state of the law has proven unworkable, in that it has done nothing but encourage Congress to skirt its responsibilities by punting difficult decisions to the Executive, precisely as it did here. *See* Pet. at 29. Fourth, the diminution of the nondelegation principle has perversely affected other aspects of the Court's jurisprudence. *See id.* at 21–23. Finally, this is not an instance in which *stare decisis* considerations point in one direction, so while a clarification of the doctrine may weaken some of the Court's precedents, it would reaffirm others.

III. This Case Presents an Exemplary Vehicle to Clarify the Nondelegation Doctrine

The Respondent argues that this case is a poor vehicle for reconsidering the nondelegation doctrine because "Congress has provided ample guidance to the Commission by setting out nine statutory objectives and authorizing the Commission to modify or adopt an alternative to the existing system only if 'necessary to achieve th[ose] objectives.'" Br. in Opp. at 26. But as addressed above, the problem here is not that Congress provided insufficient standards for a new system, it is that, once the "statutory requirements" fall away, the statute provides no standard at all because the objectives are nothing more than open-ended policy considerations.

The Commission suggests that the Court should pass on this case because Congress's power to delegate

should be especially broad with respect to "the government's *own* operations," as distinct from the regulation of "any private party." Br. in Opp. at 22; *accord id.* at 20. But the Commission cites no authority for this proposition and does not explain why Congress should have carte blanche to revamp governmental operations, even ones that have enormous economic and structural effects. The system at issue here does not involve internal governmental operations, as, for example, a transfer of agency power might. Instead, it governs a vital part of the nation's business and communications infrastructure on which the nation relies. Mailers of market-dominant products paid more than $41.6 billion in postage in FY2021.[3] The system the Commission adopted will have a massive impact on those mailers, putting many of them out of business. *See* Pet. at 33–35. So while the new system might not regulate their conduct, it imperils their very existence.

And because Congress has abdicated responsibility for crafting the system, mailers cannot resort to the ballot box to voice their objection, compromising the central rationale behind the nondelegation doctrine: legislative accountability. *See* Schoenbrod, *The Delegation Doctrine*, 83 Mich. L. Rev. at 1224.

CONCLUSION

The Petition should be granted.

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[3] Postal Regulatory Commission, *Financial Analysis of United States Postal Service Financial Results and 10-K Statement*: Fiscal Year 2021, at 47 (May 18, 2022).

Respectfully submitted,

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