No. 22-543

In the Supreme Court of the United States

ALTAGRACIA SANCHEZ, DALE SORCHER, AND JILL HOMAN,

Petitioners,

v.

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION AND DISTRICT OF COLUMBIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 7 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

A District of Columbia administrative agency promulgated regulations requiring day-care providers to obtain a college degree (on top of existing, extensive training requirements) to care for children ages zero to three. The agency imposed these regulations with no guidance from the legislature and no mechanism in place for review by a court.

1. Does the Due Process Clause require complete and total judicial deference to these regulations?

2. Does the nondelegation doctrine impose any limits on delegating to administrative agencies the power to enact such regulations?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

The nondelegation doctrine might seem like an idea only an academic could love. But the concept is really a simple one: Congress cannot pass off the important work of lawmaking to an executive or that executive's agencies. So the doctrine should serve a vital role in our constitutional system. Yet for a great long while, the Court has seemed reluctant to apply it with any real vigor. Although the doctrine has spurred plenty of law-review articles and debate over the years, it has generated regrettably few court decisions against administrative overreach and broad executive assertions of lawmaking power.

This case shows how letting the nondelegation doctrine lie dormant for too long offends more than just legal theory—it can hurt real people. Altagracia Sanchez and Dale Sorcher want to earn a living by caring for children in the District of Columbia, and they seem well-qualified to do that under any ordinary person's understanding. Jill Homan wants to find quality, affordable care for her daughter in the city. Yet they have all been thwarted by a D.C. statute that gives the Office of the State Superintendent of Education breathtakingly broad power to regulate day-care providers. Left free to do effectively whatever it wants, the Office has imposed an onerous requirement that D.C. daycare providers must hold a specific kind of college degree. Voters hate the rule. But shielded by the broad statutory language that empowers it, the Office has left its unpopular daycare-diploma mandate in place.

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[*] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

The amici States of West Virginia, Alaska, Idaho, Montana, Nebraska, South Carolina, Texas, and Utah have concededly little interest in one D.C. childcare regulation—but they have a substantial interest in preventing unelected administrators from asserting broad powers that should be left to accountable lawmakers. After all, "strict adherence to federal lawmaking procedures arguably has a larger influence upon the working balance of our federalism than the formal distribution of authority between the nation and the states." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1325 (2001) (cleaned up). In other words, "we ought to tighten the non-delegation doctrine" for the sake of federalism. Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J.L. & PUB. POL'Y 175, 215 (1994).

This case is a strong example of why the Court should restore the nondelegation doctrine to its proper place in our constitutional order. Lawmakers should be making decisions of this sort, not agencies. And when agencies like the Office can exercise broad lawmaking powers with effectively no supervision, burdensome regulations and licensing requirements become almost inevitable. Essential rights like the right to work become easy targets for administrative personnel acting in favor of narrow industry interests rather than the voting public. Our economy and our liberties suffer.

The Court should grant the Petition and remind courts that the nondelegation doctrine is not just a matter of concern for the law-review crowd. It is a constitutional imperative of the first degree.

SUMMARY OF ARGUMENT

"[T]o abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002). The Court should grant the Petition to make plain that it has not in fact left the nondelegation doctrine behind.

I. The nondelegation doctrine plays a foundational role in our constitutional system. But after acknowledging the limits that the doctrine should impose on executive assertions of legislative power, the Court has largely stepped aside. Meanwhile, lower courts and others have been left to question whether the doctrine has any real purpose anymore. The Court should take the case and say directly that it does.

II. Unsurprisingly, the vacuum left by the nondelegation doctrine has been filled—and filled with a vengeance. Occupational licensing has exploded over the last seven decades with bad results across the board. This case shows what happens when unaccountable agency staffers exercise wholesale legislative discretion: The States, their citizens, and everyday people looking to make a living all take a hit. Unfortunately, these Petitioners are not the first to suffer under unchecked agency rule. Unless the Court intervenes, they will not be the last.

REASONS FOR GRANTING THE PETITION

I. The Court Should Revive The Nondelegation Doctrine.

A. The Founders thought the greatest threat to liberty is governmental power—especially concentrated power. THE FEDERALIST No. 47 (J. Madison) (describing how the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is a tyranny). So they limited the sum amount of power the government could hold and then divvied that up by kind—legislative, executive, and judicial—among three co-equal branches. Divided power, the Founders said, would force one branch's ambition "to counteract" another's. THE FEDERALIST No. 51 (J. Madison). And as part of that division, keeping legislative power out of the hands of the executive has been "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892).

The nondelegation doctrine puts these separation-of-powers principles into action. It says Congress may not give away legislative power: It "can[not] delegate to the Courts, or to any other tribunals," or to anyone else, really, "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 23 U.S. 1, 42 (1825); accord *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). For nearly 200 years, the Court's nondelegation cases have at least recognized that much. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Touby* v. *United States*, 500 U.S. 160, 165 (1991); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *J. W. Hampton & Co.* v. *United*

States, 276 U.S. 394, 406 (1928) *ICC* v. *Goodrich Transit Co.*, 224 U.S. 194, 214 (1912); *Marshall Field*, 143 U.S. at 693-94.

Of course, not everything that might look like a delegation of legislative power is. For instance, Congress can condition a statutory trigger on an executive official's fact-finding. See, *e.g.*, *Marshall Field*, 143 U.S. at 693. Or it may delegate powers shared by itself and another branch. *Wayman*, 23 U.S. at 45. And Congress "may authorize another branch to 'fill up the details'" so "long as Congress makes the policy decisions when regulating private conduct." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. at 43).

But aside from restrained exceptions like these, the tautology holds: Legislators legislate, and the executive must stick to executing.

B. For a while, at least some of the Court's decisions lined up with these tenets, and Congress conducted itself accordingly. And when the Court eventually confronted overly broad legislative delegations in the 1930s, it rebuffed them. *Schechter Poultry*, 295 U.S. at 551; *Panama Refining*, 293 U.S. at 432-33. The Court at that time stood against "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

But as the 20th century marched on, the Court's nondelegation jurisprudence began to unravel. "To the confusion of lower courts and the frustration of legal scholars, sweeping grants of what appear[ed] to be embarrassingly legislative powers [were] consistently upheld against nondelegation challenges." Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1231-32 (2018). Particularly "[f]or the past seventy-five"

(now, nearly ninety) "years, the Court has averted its eyes while Congress has enacted a host of expansive delegations with only minimal policy guidance." Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 143-44 (2011). A meaningful nondelegation doctrine gave way to a growing indifference toward sweeping legislative delegations.

The Court often pushed nondelegation concerns aside by applying a looser understanding of the intelligible-principle standard. See, *e.g.*, Lawson, *supra*, at 371 ("After 1935, the Court abandoned any serious nondelegation analysis … [and] announced the search for an 'intelligible principle.'"). In its earlier version, the theory said that a congressional act does not violate the separation of powers if Congress articulates "an intelligible principle" to guide an agency's discretion. *J.W. Hampton*, 276 U.S. at 409. But this standard has since "mutated" into one with no footing "in the original meaning of the Constitution, in history, or even in" *J.W. Hampton* itself. *Gundy*, 139 S. Ct. at 2139-41 (Gorsuch, J., dissenting). Now, effectively *any* standard will do. And under this "notoriously lax" test, Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014), the administrative state has flourished, "with hundreds of federal agencies poking into every nook and cranny of daily life," *City of Arlington* v. *FCC*, 569 U.S. 290, 215 (2013) (Roberts, C.J., dissenting).

Nor is the intelligible-principle standard the only problem. Some later cases say, for example, "that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475 (cleaned up). Yet it is not the *amount* of power that matters in a separation-

of-powers analysis, but its *nature*. Only the legislative branch can create generally applicable rules governing private conduct, big or small. Were it otherwise, Congress could delegate plenary power over entire industries to the executive branch so long as it split the industry into enough bite-size parts and regulated it piecemeal. This outcome perverts the separation of powers, but courts like the one below embrace it anyway. See Pet.App.21a-24a (applying *Whitman* to say that executive discretion may be exercised without guiding standards because childcare staff qualifications are a matter within a particular industry).

C. This decades-long watering down of the nondelegation doctrine has left many confused. See *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 76-86 (2015) (Thomas, J., concurring in the judgment) (tracing the doctrine's long decline). It is not even clear today whether the nondelegation doctrine has any role to play. And even those that oppose the doctrine have said that its "continual appearance in the case law has confused administrative law as a whole." Kathryn A. Watts, *Rulemaking As Legislating*, 103 GEO. L.J. 1003, 1007 (2015).

Several members of the Court have also now openly questioned at least some aspects of the present doctrine, intensifying the uncertainty. See *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., with Roberts, C.J., and Thomas, J., dissenting); *Paul* v. *United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari). Even aside from express statements like these, the Court had seemed to be creeping back toward using the nondelegation doctrine for years, but *without* using the word "nondelegation." See, *e.g.*, Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton *v.* City of New

York, 99 NW. U. L. REV. 77, 85 (2004) (calling *Clinton* a "non-delegation doctrine case masquerading as a bicameralism and presentment case").

Lower courts have begun noting that this Court's "nondelegation jurisprudence appears to be in a state of flux." Pet.App.26a (Randolph, J., concurring). Most still try to apply the (problematic) existing precedent—that is, a modern, mutated version of the intelligible-principle formula. See, *e.g.*, Pet.App.18a-23a; *Am. Inst. for Int'l Steel, Inc.* v. *United States*, 806 F. App'x 982, 990 (Fed. Cir. 2020); *Big Time Vapes, Inc.* v. *FDA*, 963 F.3d 436, 443 (5th Cir. 2020); *United States* v. *Lopez-Alvarado*, 812 F. App'x 873, 879 & n.3 (11th Cir. 2020). Others have begun adopting, or at least using bits of, the history-based ideas in Justice Gorsuch's *Gundy* dissent. See, *e.g.*, *Jarkesy* v. *SEC*, 34 F.4th 446, 460 (5th Cir. 2022); *United States* v. *Melgar-Diaz*, 2 F.4th 1263, 1266-68 (9th Cir. 2021); *Granados* v. *Garland*, 17 F.4th 475, 480 (4th Cir. 2021). And still others have questioned the vitality of the nondelegation doctrine entirely. See *Bradford* v. *U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 847 n.8 (D. Colo. 2022).

In short, "[t]he only certainty about the federal nondelegation doctrine is that it is sure to change." Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1271 (2022).

D. The Court should grant this Petition to dispel the confusion and contradictions in its treatment of the nondelegation doctrine. "[C]lassifying governmental power" is no doubt an "elusive venture," "[b]ut it is no less important for its difficulty." *Dep't of Transp.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). Madison even called it "the great problem to be solved." FEDERALIST NO. 48. After all, the Constitution requires

"call[ing] foul" when necessary. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

The Court should therefore tackle the problem and reinvigorate the nondelegation doctrine's health.

Remember that the nondelegation doctrine protects liberty by keeping policy decisions where the voters can see them—in Congress. It is human nature to work more carefully when others are watching and can hold you to account. Accountability when managing liberties is thus essential to healthy government. See *Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring) ("Liberty requires accountability."). The nondelegation doctrine does its part "to protect liberty," *id.* at 61, by keeping lawmaking power "with the people's *elected* representatives" and away from unaccountable officials hidden inside bureaucracies, *Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (emphasis added). At the same time, half-loaf approaches to nondelegation—such as enforcing it through a canon of constitutional avoidance—can *undermine* accountability by upsetting "the fruits of legislative compromise." John M. Manning, *The Nondelegation Doctrine As A Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000).

Keeping lawmaking power in Congress is also important because lawmakers—like everyone else—would sometimes rather shirk tough decisions. See Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017). Worse, they might try "to take credit for addressing a pressing social problem by" offloading it to the executive and then "blaming the executive for the problems that attend whatever measures he chooses to pursue." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting); see *Indus. Union Dep't, AFL-*

CIO v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) (explaining that Congress did exactly this when it "pass[ed] this difficult choice" of how to address benzene exposure on to OSHA). A meaningful nondelegation doctrine ensures that the decisionmakers reap the benefits and bear the blame.

E. No doubt many would urge the Court to stay away from this Petition for fear of what a real nondelegation doctrine might mean. But their objections do not hold.

For instance, some think agencies act faster than Congress—but Congress can legislate quickly when it wants to. President Bush signed the PATRIOT Act just three days after it was introduced. See Pub. L. No. 107-56 (2001 H.R. 3162); see also *Tiger Lily, LLC* v. *U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (giving more examples). Legislating by notice-and-comment rulemaking is not faster than legislating by bill in non-emergency situations, either. On average, it takes about 18 months. See Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (2012). Anyway, deliberative lawmaking is a feature of our republic—not a bug. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (stating the Founders "went to great lengths to make lawmaking difficult").

Some also regard agencies as better experts, but that is not necessarily so. Congress can ensure that laws are technically sound by using its own experts, eliciting testimony from others, or commissioning reports from executive-branch experts. The Congressional Budget Office has top-notch experts on financial, economic, and

budget matters, for example. *Tiger Lily, LLC*, 5 F.4th at 675 (Thapar, J., concurring). And fact-gathering and investigation is the very reason committees and (especially) subcommittees exist. So Congress can get its hands on the same information that executive branch agencies have.

A more robust nondelegation doctrine also need not disrupt efficient governing. Most obviously, Congress can adopt existing regulations as statutes—it already does. See *Whitman*, 531 U.S. at 472 (noting "a subsequent Congress had incorporated the regulations into a revised version of the statute"). Michigan's legislature did just that when the Michigan Supreme Court reinvigorated its state-law-based nondelegation doctrine and invalidated certain executive orders. See Samuel Dodge, *Whitmer bill signings include tightened sex offender registration protocols, boosts in medical staffing*, MLIVE (Dec. 30, 2020 11:09 a.m.), https://bit.ly/3WXARXC. Dozens of other state-court decisions have invalidated statutes on nondelegation grounds without catastrophic effect, either. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (cataloguing 151 successful nondelegation challenges in state courts). So real-world experience confirms that a meaningful nondelegation doctrine "would not lead to apocalyptic results." See Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 305 (2022).

F. This case—and its strikingly overbroad delegation—presents an excellent vehicle to address the tepid state of nondelegation law.

The statute here says only that the "Mayor shall promulgate all rules necessary to implement the

provisions of this subchapter," including, among other things, "[m]inimum standards of operation of a child development facility concerning staff qualification, requirements and training." D.C. CODE § 7-2036(a)(1)(A). The D.C. Circuit found an intelligible principle in the definition of "child development facilities"—a "structure" "that provides care and other services, supervision, and guidance for children, infants, and toddlers on a regular basis." *Id.* § 7-2031(3). This thin provision, the court said, shows that minimum qualifications must "relate to the care, supervision, and guidance of children." Pet.App.23a.

Even under the current test, the statute has no intelligible principle. "Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them." *Schechter Poultry*, 295 U.S. at 541. It delegates to a single person—the Mayor—absolute discretion to do whatever she feels is "necessary." This statute contains no direction, no goal, no mission, no policy—just the naked command to go forth and regulate. The D.C. Council could not manage to include the vaguest of guiding standards—not even regulating in the "public interest." See, *e.g.*, *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 225-26 (1943). And digging an intelligible principle out of the definition section is categorical error. Statutory definitions merely explain what the legislating body means when it uses certain terms; they are descriptive, not prescriptive.

But really, the Court should not go hunting for a nonexistent intelligible principle—it should strike this statute down as a delegation of raw legislative power in its original sense. The D.C. Office's standards are "general rules for the government of society," *Fletcher* v. *Peck*, 10 U.S. 87, 136 (1810), that regulate the "rights of every citizen," FEDERALIST NO. 78 (A. Hamilton); they are "generally applicable rules of conduct," *Gundy*, 139 S. Ct.

at 2133 (Gorsuch, J., dissenting), that govern private persons' future actions. This statute is not a delegation of fact-finding or shared power. And it is "hard," if not impossible, "to see how [it] leaves the [Mayor] with only details to fill up." *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting). Promulgating these standards-cum-laws is an exercise of legislative power and so properly within the D.C. Council's province alone.

* * * *

Continuing uncertainty over nondelegation is doing no one any good. And the issue's urgency is only growing given this Court's recent "major questions" cases—for "without knowing what [the] underlying [nondelegation] theory is, it becomes much harder to accurately apply a rule that ostensibly exists 'in service of' that underlying doctrine." Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 300 (2022) (quoting *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting)). The Court should grant the Petition and take this issue head on.

II. Overbroad Delegations Invite Oppressive Regulations.

A toothless nondelegation doctrine has real-world consequences. Just ask Petitioners. Unrestricted delegation of legislative power to the Mayor led to a regulation that compels Ms. Sanchez to close her doors while she takes college courses. Pet.5-7. It treated Ms. Sorcher's graduate degrees as less valuable than the paper they were printed on. Pet.App.32a. And it justifiably concerned Ms. Homan that the quality of her young daughter's care would plummet while its price soared. *Id.*

Petitioners' stories are not one-offs. Many of our residents have been denied the freedom to "function[] without being ruled by functionaries" over the years. *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Under the status quo, many more are sure to face the same—especially in the world of occupational licensing. The hit to interstate migration, the burdens to consumers and workers, the lack of any real structure or control when a bad regulatory proposal sails through—all of it flows from unaccountable agencies filling the vacuum left by an atrophic nondelegation doctrine.

A. Occupational licensing has taken the American economy by storm. Halfway through the twentieth century, licensing laws covered less than five percent of the workforce. See MORRIS M. KLEINER, BROOKINGS INST., REFORMING OCCUPATIONAL LICENSING POLICIES 3 (2015). Seventy years later, that number has seen a five-factor increase—nearly one out of every four workers must now obtain and maintain a license to gain and keep their jobs. See Bureau of Labor Statistics, *Certification and licensing status of the civilian noninstitutional population 16 years and over by employment status, 2020 annual averages* (2021), https://bit.ly/3jCM3KO (last visited Jan. 3, 2023). This growth mostly came from "an increase in the number of professions that require a license"—as of 2015, about 1,100 in at least one State and nearly 60 in all States—along with a "changing composition of the workforce" as a whole. OFF. OF ECON. POLICY, U.S. DEP'T OF THE TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3-4 (2015), https://bit.ly/3WxlmFV.

This licensing boom is a growing headache for the States and the country. For one thing, the ever-increasing variance and complexity of state-specific licensing

regimes stifles interstate migration. JANNA E. JOHNSON & MORRIS M. KLEINER, IS OCCUPATIONAL LICENSING A BARRIER TO INTERSTATE MIGRATION? 2 (2017), https://bit.ly/3G3rdvB ("[I]ndividuals in a variety of licensed occupations … move across states at a significantly lower rate than others."). This kind of "national patchwork of stealth regulation" is bound to "restrict[] labor markets, innovation, and worker mobility." NAT'L CONF. OF STATE LEGISLATURES, THE STATE OF OCCUPATIONAL LICENSING 5 (2017), https://bit.ly/3CaEoKi (cleaned up). Workers may decide moving to another State is just not worth the cost of securing all the licenses needed to keep working. And these individual decisions add up. While the toll varies from State to State, "[a]t the national level" it "cost[s] the economy between 1.8 and 1.9 million jobs" and up to $7.1 billion and almost $200 billion annually in "lost output" and "misallocated resources," respectively. MORRIS M. KLEINER & EVGENY S. VOROTNIKOV, AT WHAT CO$T?: STATE AND NATIONAL ESTIMATES OF THE ECONOMIC COSTS OF OCCUPATIONAL LICENSING 5 (2018), https://bit.ly/3QeNsUp.

B. The on-the-ground struggles of people like Petitioners bring these figures into stark focus. "The right to work," purportedly "the most precious liberty that man possesses," has become often honored in name only. *Barsky* v. *Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). Occupational licensing has imposed "inconsistent, inefficient, and arbitrary" burdens on particular "workers, employers, and consumers" along the way. OFF. OF ECON. POLICY, U.S. DEP'T OF THE TREASURY ET AL., *supra*, at 7.

For starters, the whole scheme creates "an enormous bias toward incumbents." THOMAS SOWELL, KNOWLEDGE

AND DECISIONS 200 (1996) (cleaned up). As qualification standards go up, "existing practitioners" are "almost invariably exempt[ed]" from meeting them and freed to "reap increased earnings from the contrived scarcity, without having to pay the costs they impose on new entrants in the form of longer schooling." *Id.*; cf. Pet.App30a (discussing exemption for certain positions after 10 or more years of continuous service). Strict licensing "almost invariably reduces the quantity of new practitioners through various restrictive devices." SOWELL, *supra*, at 200. At the same time, third parties leech off this process. Governments collect licensing fees, and "education[al] institutions … collect[] the tuition for the courses that those workers need to take in order to qualify for"—or, in some cases, keep—"a license." *Professor Morris Kleiner: Licensing of More Occupations Hurts the Economy*, UNIV. OF MINN. HUBERT H. HUMPHREY SCH. OF PUB. AFFAIRS (Jan. 23, 2018), https://bit.ly/3Q0Sqnq.

With the flow of newcomers stemmed, incumbents can "artificially raise[]" the price of services. SOWELL, *supra*, at 200. This supply constraint "inflates earnings significantly above what workers would make absent licensing." Kleiner & Vorotnikov, *supra*, at 17. Who, then, "bear[s] the cost of [these] economic returns"? *Id.* The consumer-citizens of our States. And if that were not bad enough, paying these "above market rates" allows the benefiting industries to escape "the pressure … to innovate or improve" their services—causing our residents to suffer even more. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 384 (2012). Empirically, "across a broad range of professions," licensing has had "a null or negative effect

on service quality." Tzirel Klein, *Occupational Licensing: The Path to Reform Through Federal Courts and State Legislatures*, 59 HARV. J. ON LEGIS. 427, 433 (2022).

The child-care sector has felt all these effects. With childcare licensed in 44 States, see LISA KNEPPER, ET AL., INSTITUTE FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 19 (3d ed. 2022), https://bit.ly/3G2vAqT, is it any surprise that, in 2022, those costs ate up over 20% of the incomes of over half of the households that pay for childcare? *This Is How Much Child Care Costs In 2022*, CARE.COM (June 15, 2022), https://bit.ly/3C9SRGh. A fifth of parents responded by leaving the workforce entirely. *Id.* In areas like Washington, D.C., where the cost of daycare is 85% above the national average, options like leaving the workforce, the District, or both become increasingly enticing. *Id.* And with the Bureau of Labor Statistics projecting that the childcare-worker occupation will grow at less than half the rate of the national average workforce over a 10-year period, this problem is poised to get worse, not better. *Childcare Workers*, DATAUSA (2022), https://bit.ly/3WvBiZv (last visited Jan. 3, 2023). At the same time, childcare workers like Ms. Sanchez and Ms. Homan face challenges of their own. Climbing educational and other licensing costs put the squeeze on workers who are already operating at thin margins. "Low-income workers"—those for whom the costs "represent a larger share of their income than the[ir] … higher-income" colleagues—are "disproportionately affect[ed]." NAT'L CONF. OF STATE LEGISLATURES, *supra*, at 7.

C. The most frustrating aspect of this predicament is also the simplest one: These problems are the kind that citizens elected their representatives to solve—not by shuffling the job to an agency, but by gauging what the

public wants and legislating their way to an answer themselves. But when "a regime administered by a ruling class of largely unaccountable 'ministers'" takes over, *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11 (A. Hamilton)), the problems either persist, or, as this case shows, intensify.

Occupational licensing ought to "provide for the general welfare of [the] people" by "secur[ing] them against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889). The State has a duty "to protect the public from those who seek … to obtain its money" through "untrustworthy, [] incompetent, or [] irresponsible" means." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). And licensing rules can help "consumers … separate the" real professionals "from the quacks." Klein, *supra*, at 432. But in taking these measures, the State must relate requirements to the "calling or profession" and make them attainable by "reasonable study and application," lest they infringe the "right to pursue a lawful vocation." *Dent*, 129 U.S. at 122. Legislators are best positioned to perform those tasks.

As this case illustrates all too well, legislatures often opt to shunt their licensing-related work to regulatory bodies. This institutional avoidance gives legislators the double benefit of avoiding "the hard work of ironing out the details" and being able to "blame unaccountable bureaucrats for any unpopular effects or decisions," such as invasions of liberty. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1226 (2003). In fact, "many licensing boards are composed of

midlevel bureaucrats with unmitigated authority to make licensing decisions." Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 323, 339 (2019). These boards and agencies then assume roles akin to the medieval guilds of old—imposing by-their-leave edicts that "specify[] which individuals should be permitted to follow particular pursuits" without direct accountability to the real people they regulate. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-38 (3d ed. 2002).

Empowering a state-sanctioned "cartel immune from fair competition" departs from what the Constitution and this Court ever envisioned. Sandefur, *supra*, at 385; cf. *N.C. State Bd. of Dental Exam'rs* v. *FTC*, 574 U.S. 494, 505 (2015) (warning about the special concerns that arise when a "State seeks to delegate its regulatory power to active market participants"). And legislation with a "discriminatory or protectionist nature represents a breakdown of the mechanism of democratic government," Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 443 (1982)—a problem even harder to correct when the culprit is someone whose name never appeared on a ballot.

Reinvigorating the nondelegation doctrine would be a major step toward dialing back these concerns and the burdensome occupational regulations they spark.

First, the doctrine would force Congress to reevaluate its broad licensing delegations for places like the District of Columbia, military bases, national parks, and other federal lands. It would also require Congress to take ownership over the many other industry-wide licensing and occupational requirements that proliferate at the federal level. Telling Congress that *it* must own these

licensing issues would be timely considering the "increasingly prominent role that the federal government plays in regulating occupational licensing." Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1920 (2018).

Second, this Court's nondelegation decisions influence how state courts apply the doctrine under their own constitutions. See, *e.g.*, Postell & May, *supra*, at 287 ("Most states apply a weak nondelegation doctrine[] similar to that of the U.S. Supreme Court."). So if the Court works to restore the nondelegation doctrine here, then it should have a secondary effect of shifting power back to state-level legislatures, too.

This work must be done; the total reign of regulators over occupational licensing needs to end. It is one thing for the people's elected leaders to govern using others' technical "expertise." *Seila L. LLC* v. *CFPB*, 140 S. Ct. 2183, 2207 (2020) (cleaned up). It is something else entirely when those elected leaders abdicate their responsibility to agencies staffed with bureaucrats unable or unwilling to wield that expertise with deftness. Cf. Pet.6 (describing how the D.C. Council repeatedly "ordered [the Office] to 'conduct a study to assess the impact of [the college requirement] on staff members and the cost of child care in the District,'" but the Office has not done so). The academic report on which the regulation here was based concedes that the "existing research" on its key recommendation is "inconclusive." Nicholas Clairmont, *D.C.'s Misguided Attempt to Regulate Daycare*, THE ATLANTIC (July 11, 2017), https://bit.ly/3Cbn087. The "rest of the report doesn't exactly lead one to the conclusion that this policy is a good idea," either. *Id.* In fact, the rule was so off-base that it even baffled one of the report's editors: The report looked

at "the question of requiring degrees for child-care workers" as a theory to consider, not a policy to implement. *Id.* It did not probe the theory's "real-world implications" in areas like "the labor market and cost." *Id.* (cleaned up).

Allowing agencies near-unchecked power to implement policies that fly against "the logic of the science" and hurt real people, see Clairmont, *supra*, should be unacceptable in a republic like ours. The Court should grant the Petition to say at least that.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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