No. 22-816

In the

Supreme Court of the United States

THE SCHOOL OF THE OZARKS, INC., DBA COLLEGE OF THE OZARKS,

Petitioner,

v.

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that it is the duty of the judicial branch to enforce structural provisions of the Constitution in order to protect individual liberty. The Center has participated as amicus in a number of cases before this Court addressing the issue of administrative agency action and separation of powers, including: *Loper Bright Enterprises, et al. v. Raimondo*, No. 22-451; *Bohon v. Federal Energy Regulatory Comm'n*, No. 22-256; *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); and *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012), to name a few.

SUMMARY OF ARGUMENT

The Constitution embeds a finely tuned separation of powers in the frame of government as a means of protecting individual liberty. Congress is granted all of the legislative power assigned to the federal government, but that power is constrained by bicameralism and presentment requirements. Recognizing that the

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[1] All parties received timely notice of the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

lawmaking power is the most potent power of government, and thus the greatest threat to individual liberty if not exercised with care, the Constitution makes it purposefully difficult to enact laws. This Court has on numerous occasions acted to prevent a circumvention of the constitutional procedures limiting the lawmaking power of Congress.

By contrast, administrative agencies were not contemplated by the drafters and ratifiers of the Constitution. Indeed, they would have been horrified at the notion that lawmaking power would be wielded by Executive agencies, led by unelected ministers, with little or no procedural limits on that power.

The Constitution vests lawmaking power in the hands of elected representatives that must stand for reelection on a regular basis and thus must answer to the electorate for the laws they enact. Administrative agencies, by contrast, are insulated from political accountability. The founders of the administrative law movement saw insulation from political accountability as an important feature of the administrative state. Woodrow Wilson set forth the intellectual basis for administrative law noting that administrators should be insulated from public opinion and thus not bothered by what Wilson considered the uninformed voices of the populace.

This extreme view was moderated somewhat by the Administrative Procedures Act which, for even "informal rulemaking," requires notice and an opportunity for public comment on proposed rules before those new substantive legal requirements are imposed on the regulated community. The purpose of this procedure was to require the agency to consider input from those who would be most affected by the

proposal. Even when stringently enforced, however, this notice and comment requirement is not even a pale reflection of the procedures built in to the Constitution to regulate the lawmaking power of Congress. Elected representatives are not involved, there is no bicameralism requirement, and there is no requirement to present the regulation to a competing branch of government for approval. Yet administrative agencies chafe at this "burden" on their lawmaking power and seek to circumvent those restrictions.

In the case before the Court, review is required because the lower court decided, in conflict with other United States Courts of Appeals, that an agency's decision to ignore the notice and comment procedures of the APA is not reviewable by a court until the agency actually enforces the new legal standard. The regulated community must either conform to the unlawful regulation or they must risk fines, administrative penalties, and hundreds of thousands of dollars in legal fees defending against the illegal agency action. Such a rule only encourages illegality by administrative agencies.

REASONS FOR GRANTING THE WRIT

I. The Separation of Powers Principal Embedded in the Constitution Require the Courts to Guard Against Delegations of Lawmaking Power and Circumvention of Procedural Limitations on that Power.

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional

separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST No. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST No. 47, *supra*, at 301-02 (James Madison); FEDERALIST No. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST No. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.*

This Court has also recognized that separation of powers is the core structural principal of the Constitution that protects personal liberty. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

The design of government embedded in the Constitution does not envision lawmaking by administrative agencies. First, the Constitution assigns lawmaking exclusively to Congress. U.S. Const. art. I, § 1; *Gundy*, 139 S.Ct. at 2121; *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through which laws are to be made. U.S. Const. art. I, § 7, cl. 2. Agencies do not follow that procedure when promulgating regulations. *See* 5 U.S.C. § 553. In this case, the agency did not even follow the limited procedures required by the Administrative Procedures Act. The argument that the agency can do so free from judicial scrutiny calls out for review by this Court.

Article I, section 1, clause 1 of the Constitution provides: "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." This is the first of the three "vesting clauses" that set out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under a vesting clause cannot be ceded to or usurped by another. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 67-68 (2015) (Thomas, J., concurring).

The legislative power is the power to alter "the legal rights, duties and relations of persons." *See Chadha*, 462 U.S. at 952. This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy." These are "laws" that impose "legally binding obligations or prohibitions" on individuals. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 123 n.4 (Thomas, J., concurring). It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress.

A law enacted in violation of these principles can be challenged by those who are subject to the law. *Cf. Bond v. United States*, 564 U.S. 211, 223 (2011) (Individuals injured by legislative enactment that was not presented to the President for approval have standing to challenge that legislative act). There is no need to wait for prosecution. *Cf. Free Enterprise Fund v. Public Co. Accounting Oversight Bd*, 561 U.S. 477, 487-88

(2010) (accounting firm under investigation challenged constitutionality of agency conducting the investigation). This Court has held that administrative rules can be challenged by a regulated entity even if the entity has not yet been cited for violation of the rule. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 154 (1967) ("But there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions."). If the rule requires immediate change of practice by the regulated entity, the challenge is ripe. The Court should grant review to determine whether that same principle should apply here. Review is especially important because lawmaking by administrative agencies erodes the design of separation of powers meant to guard individual liberty.

II. Protection of the Core Principle of Separation of Power Requires Special Judicial Vigilance of Administrative Agency Lawmaking.

Although the text of the Vesting Clause "permits no delegation" of the lawmaking power, this Court has permitted Congress to delegate power to administrative agencies when constrained by an "intelligible principle" within which the agency is permitted to act. *Whitman*, 531 U.S. at 472. The problem, however, is that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."

Gundy, 139 S.Ct. 2116, 2130-31 (Alito, J., concurring in the judgment).

Justice Gorsuch argues that the point of the procedural requirements of Article I for the exercise of the lawmaking power is to "promote deliberation." *Id*. at 2134 (Gorsuch, J., dissenting). The Founders sought to subject proposed laws to the scrutiny of people from a variety of backgrounds and interests. *Id.* From the Founders' point of view, the more people involved in the lawmaking process the better.

Although administrative lawmaking escapes the constitutional procedures imposed on Congress, the Administrative Procedure Act does impose some procedures that agencies must follow. Section 553, for instance, requires notice of new proposals and an opportunity for interested parties to participate in the lawmaking by submission of comments. 5 U.S.C. § 553. This public participation component was one of the four basic purposes of the Administrative Procedures Act. Attorney General's Manual on the Administrative Procedures Act (1947) at 9. These notice and comment requirements are meant to ensure not only that the agency is informed of the impacts of the proposed rule, but also the "adequate protection of private interests." *Id*. at 31. Denial of these procedures, then, is an attack on the protection of individual liberties. This Court should grant review to hold that individuals affected by the illegal regulation have standing to bring a challenge to agency promulgation of new legal standards without following the notice and comment procedures mandated by the APA.

Perhaps more importantly, however, the renewed interest of members of this Court in enforcing the non-

delegation principles of Article I counsels for an increased vigilance of lawmaking by administrative agencies. Although the notice and comment procedures for lawmaking under the APA provide some procedural protections for the public, they are nothing like the procedures mandated by the Constitution. Notice and comment do not require consideration by elected representatives. The APA does not require a division of lawmaking authority. It does not require presentation of new laws for approval by a separate branch of government. Yet with congressional delegation of lawmaking powers to unelected ministers and executive branch employees, the APA procedures are all that is left to protect at least a semblance of separation of powers.

In the eyes of Woodrow Wilson, administrators should have "large powers and unhampered discretion." Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Quart. 197, 213 (1887). While that view may be popular for those looking for more efficient exercise of power (*id.*), it is not a principle of American government. Our founding generation recognized that large powers coupled with unhampered discretion is a recipe for tyranny. *See* FEDERALIST No. 51, *supra*, at 321-22 (James Madison); FEDERALIST No. 47, *supra*, at 301-02 (James Madison); FEDERALIST No. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams, *supra*. The restrictions on the lawmaking power incorporated into Article I and the entire design of separated power is the means by which the founding generation sought to preserve liberty for future generations. *Id.* Delegating lawmaking power to administrative agencies defeats this design of government. This attack on the

design of government is only made worse by insulating an agency's decision to ignore the APA's procedural limitations on agency lawmaking from judicial review. This Court should grant review to maintain a check on agency lawmaking and indeed, to revisit and revivify the nondelegation doctrine itself.

CONCLUSION

This Court should grant review to decide that regulated industries have standing to challenge an agency's lawmaking in violation of the notice and comment procedures required by the APA.

March 2023 Respectfully submitted,

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