Nos. 19-1231 & 19-1241

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, et al.,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, et al.,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, et al.,
Respondents.

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

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BRIEF OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

The Federal Communications Commission is at the center of many major public-policy debates about the Internet, broadcast and print media, satellite communication, and more. TechFreedom has accordingly developed extensive expertise on the FCC, its workings, and how the agency and its powers could be reformed. *See*, *e.g.*, Comments of TechFreedom, *Section 230 of the Communications Act of 1934*, FCC Docket RM-11862, https://bit.ly/31XVlpe (Sept. 2, 2020); Ex parte Comments of TechFreedom, *Use of the 5.850-5.925 GHz Band*, FCC Docket 19-138, https://bit.ly/31W58fe (Aug. 7, 2020); Berin Szóka, *Only Congress, Not the FCC, Can Fix Net Neutrality*, Wired.com, https://bit.ly/3mCC9Fh (May 17, 2017).

The FCC's powers are constrained by statute. On key issues, including net neutrality and Section 230 of the Communications Act of 1934, TechFreedom has fought what it views as attempts by the agency to exceed those constraints. Too often, in TechFreedom's view, the FCC has tried to act as a "junior varsity Congress." Lawrence Lessig, *It's Time to Demolish the FCC*, Newsweek.com, https://bit.ly/35UREBH (Dec.

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[*] No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission. All parties have consented in writing to the brief's being filed.

22, 2008). TechFreedom does not come to the FCC's defense often or lightly.

In this case, however, the FCC is clearly in the right. It has faithfully carried out directives set forth by statute, and it is *judges* who have tried to act as a junior-varsity Congress. This Court should reverse.

SUMMARY OF ARGUMENT

In Section 202(h) of the Telecommunications Act of 1996, Congress instructed the FCC to periodically review its media ownership rules, and to modify or repeal the ones that it "determine[s]" are, "as a result of competition," no longer "necessary in the public interest." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Fox Television Stations v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002). A rule is to stand, in other words, *only* if the FCC finds that, *despite* the effects of competition, it *remains* "necessary in the public interest." *Id*. It is "in the public interest," the FCC has concluded, to promote localism and five types of diversity, of which the most important is viewpoint diversity. No. 19-1231, Pet. Br. 5.

Citing "dramatic changes in the marketplace," the FCC has tried repeatedly to change or repeal various antiquated broadcast ownership rules. No. 19-1241, Pet. App. 67a-69a. It has tried, for example, to help television broadcasters achieve economies of scale and compete with new, less regulated entities, such as cable, satellite, and streaming providers, by loosening (though not eliminating) local television-market merger restrictions. *Id*. at 140a. Similarly, it has sought to repeal a rule barring the ownership of both

a daily print newspaper and a television (or radio) station in one region. This rule, it observed, is the product of "a time long past when consumers had access to only a few sources of news and information in the local market." *Id.* at 101a. The FCC has tried, in short, to repeal rules that are hurting broadcasters' ability to compete in a media and information age wholly different from the one in which the rules were created.

The FCC embarked on this deregulatory push back in 2003. A single, divided panel of the Third Circuit has been obstructing the agency ever since. The panel majority has vacated the FCC's reforms three times. In this case, it vacated the FCC's order, in its entirety, not because the FCC failed to do something explicitly required by Section 202(h), but because the court would like the FCC to analyze more closely whether the rules the FCC seeks to repeal would promote race and gender diversity. Laudable though the promotion of those forms of diversity may be, the statute does not require the FCC to consider them as it loosens or repeals rules that hinder local broadcasting—an industry in crisis—from innovating.

The Third Circuit's ruling both (a) ignores Congress's command to heed the effects, on broadcasters, of new competition and (b) replaces the FCC's conception of the public interest with the court's own. So there are at least two ways to frame the Third Circuit's error in this case. The *first* way is to observe that Congress directed the FCC to change or repeal rules rendered unnecessary to the public interest by *competition*, and to explain that the Third Circuit has obstructed the FCC's reforms by injecting extra-statutory (*i.e.*, non-competition) factors into the analysis. In this telling, the court below has misapplied the law

altogether. The *second* way is to hew closer to the Third Circuit's understanding of *what* it did—determine whether the FCC assessed the public interest in an arbitrary and capricious manner—but to critique *how* it did it. "Public interest" is a broad term, and the court below tried to force the FCC to fulfill *the judges*' construction of it. The second approach sets to one side whether the court below exceeded the bounds of the statute, and focuses instead on its attempts to commandeer the FCC's discretion to use an open-ended statutory term to make policy.

Although we think the Third Circuit erred in *both* ways, this brief explores the effects of the second error. Those effects are formidable—they rattle the foundations of administrative law as we know it.

It is widely assumed that Congress could not legislate, and that the executive could not operate, without the help of an array of administrative agencies. Only by relying on those agencies' expertise, it is supposed, can the government address the needs of an ever-more complex society. To ensure that the agencies can obtain, and then wield, sufficient authority, this Court has (1) removed almost all limits on Congress's ability to delegate power to the agencies and (2) declared that the judiciary will generally defer to the agencies' interpretation of ambiguous provisions in the laws they administer. This delegation-plus-deference framework can be found in many of this Court's decisions, including its recent confirmation of the narrow non-delegation doctrine in *Gundy v. United States*, 139 S. Ct. 2116 (2019), and its famous formulation of a broad deference rule in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The delegation-plus-deference framework can only work *if it is left* to work. If courts try to snatch the agencies' statutorily granted policymaking discretion for themselves, it defeats the purpose of the entire setup. In place of decision by expert specialist, there is decision by roving generalist. And in place of a relatively predictable regulatory process, there is a protracted tug-of-war between the agencies and the courts, with each side cheered on by swarms of lawyers. Private parties struggle to follow the interminable proceedings, continuously prepare to adapt to new obligations, and pay piles of legal bills. A system that was supposed to help a complex society solve problems instead winds up making that society yet more complex.

The case for the delegation-plus-deference framework stands almost entirely on a single pragmatic consideration: it is defended as a complexity-coping mechanism. If that pragmatic ground is illusory—if the framework in practice generates conflict, instability, and added expense—why keep it? Why not take a step back toward the orthodox constitutional structure, under which (of course) the legislature writes the law, the executive follows the law, and the judiciary resolves legal disputes and maintains the constitutional lanes? Not only is that the separation-of-powers structure of the Framers' design; it is a structure that promotes legal certainty and political accountability. It is a structure, moreover, that the judiciary could approach cautiously and in steps. A simple, modest bolstering of the "intelligible principle" standard of non-delegation would, for instance, lead naturally to a simple, modest narrowing of the space for agency discretion.

Upholding decisions like the Third Circuit's would give the proponents of less delegation and less deference an important, possibly even dispositive, argument in their favor. They could contend that the judiciary's bending of the constitutional structure, in response to a plausible claim of an urgent need, was in fact a futile, even counterproductive, exercise. And they would be on to something: the Third Circuit's decision is fundamentally at odds with a functional system of delegation plus deference.

The upshot is obvious. Those who favor the delegation-plus-deference framework—those who believe in the validity of decisions like *Gundy* and *Chevron*—should be zealous to overturn the court below.

ARGUMENT

THE DECISION BELOW UNDERMINES THE NARROW NON-DELEGATION DOCTRINE AND BROAD AGENCY DEFERENCE RULES.

The delegation-plus-deference framework is supposed to help society deal with its own complexity. The Third Circuit's decision does quite the opposite. It thus undermines the primary, likely the only, colorable basis for even having a delegation-plus-deference framework. There are solid arguments, meanwhile, for returning to a different system—the *original* system; a system of more clearly separated powers. For the defenders of the delegation-plus-deference framework, therefore, it is critically important that the Third Circuit be reversed.

A. The Narrow Non-Delegation Doctrine and Broad Agency Deference Rules are Meant to Help Agencies Regulate a Complex Society.

"The rise of administrative bodies" was arguably "the most significant legal trend" of the twentieth century. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). Those administrative agencies now "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington v. FCC*, 569 U.S. 290, 312-13 (2013) (Roberts, C.J., dissenting). The agencies have "deranged our three-branch legal theories"—"all recognized classifications have broken down." 343 U.S. at 487 (Jackson, J., dissenting). Yet the courts have strained to fit them, by hook or by crook, "within the separation-of-powers scheme of the Constitution." *Id.*

Two judicial doctrines, in particular, have enabled the rise of agency power. *First*, this Court has narrowed, to the vanishing point, the core constitutional principle that only Congress may wield legislative power. *See Gundy*, 139 S. Ct. at 2121. The Court has repeatedly blessed open-ended delegations of rulemaking authority from Congress to the agencies. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943). To validly hand sweeping power to an agency, the Court has held, Congress need merely "suppl[y] an intelligible principle to guide the [agency's] use of discretion." *Gundy*, 139 S. Ct. at 2123. And even that already forgiving rule has been

applied loosely: the Court has "steadfastly found intelligible principles where less discerning readers find gibberish." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 328-29 (2002).

Second, the Court has declared that judges must often defer to an agency's understanding of the law it administers. This agency deference doctrine is a natural corollary of the narrow non-delegation doctrine. If Congress can convey authority to the agencies in open-ended terms, after all, the agencies need discretion to flesh out what those open-ended terms mean. Broad statutory terms are generally treated, therefore, as a "delegation of authority to the agency to elucidate . . . [a] statute by regulation." *Chevron*, 467 U.S. at 844. When Congress delegates authority to an agency in an ambiguous statute, and the agency then interprets that statute, a court may not reject the agency's reading of the statute "simply because the agency's chosen resolution" strikes the court as "unwise." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The court must, rather, "accept the agency's position if . . . the agency's interpretation is reasonable." *Id.*

Why have the courts let Congress grant so much power to "a veritable fourth branch of the Government"? 343 U.S. at 487 (Jackson, J., dissenting). Although there are multiple reasons, perhaps the most important is that the agencies are widely viewed as "seemingly necessary bodies." *Id.* A central tenet of modern administrative law is that the political branches, to govern effectively, need a great deal of assistance from specialized expert agencies. Hence the two doctrines. The delegation doctrine stands on "a practical understanding that in our increasingly

complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Similarly, the deference doctrine assumes that Congress needs help from agencies with "significant expertise," and that the courts must therefore grant "broad deference" to agencies' "exercise of judgment." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

"[I]t is entirely appropriate," under this regime of delegation plus deference, for "an agency to which Congress has delegated policy-making responsibilities" to "make . . . policy choices." *Chevron*, 467 U.S. at 865. This framework is meant to provide a few distinct advantages. It is designed, above all, to ensure that policy is shaped by the agencies' unique ability to gather and consider a wide array of perspectives, on a given issue, through the notice-and-comment process. *See* 5 U.S.C. § 553. All policymakers must grapple with what's known as the knowledge problem—the fact that useful information is dispersed throughout society. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945). "The goal of notice-and-comment rulemaking" is to help an agency address that problem—to enable it "to fill gaps in knowledge and to see what might have been overlooked." Cass R. Sunstein, *The Cost-Benefit Revolution* 88 (2018). "If the agency has inaccurately assessed the costs and benefits [of a proposed rule], public participation can and often will supply a corrective." *Id*. Thanks to the notice-and-comment process,

the agencies are usually adept at "collect[ing] dispersed knowledge" and "bring[ing] it to bear on official choices." *Id*.

The FCC enjoys the benefits of the delegation-plus-deference framework. Indeed, this Court has applied that framework often in cases involving the FCC's efforts to set media-ownership rules. *See*, *e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference"); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978) (observing that the FCC's "regulations codifying its view of the public-interest licensing standard" need merely be based on "permissible factors" and "otherwise reasonable"); *Nat'l Broad. Co.*, 319 U.S. at 218 ("We would be asserting our personal views . . . were we to deny that . . . the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the [regulations in question].").

The system for setting media-ownership rules is, in fact, a quintessential illustration of the modern delegation-plus-deference structure in action. Congress instructed the FCC to set media-ownership rules as "public convenience, interest, or necessity requires." 47 U.S.C. § 303. It later directed the FCC to periodically review those rules, to determine which ones remain "necessary in the public interest," and to repeal those that are "no longer in the public interest." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). The periodic review process requires the FCC to exercise precisely the sort of "judgment regarding how the

public interest is best served" that is "entitled to substantial judicial deference" under the delegation-plus-deference framework. *WNCN Listeners Guild*, 450 U.S. at 596; *see* No. 19-1231, Pet. App. 48a (Scirica, J., dissenting) ("The FCC's Section 202(h) review typifies agency policymaking entitled to deference.").

B. By Adding Confusion, Expense, and Unpredictability to the Regulatory Process, Judicial Adventures in Policymaking Undermine the Delegation-Plus-Deference Framework.

The delegation-plus-deference framework aims to give agencies space within which to craft informed policies that competently address societal complexity. Agencies cannot craft such policies—they cannot fulfill a mandate to regulate as "public convenience, interest, or necessity requires"—if judges disrupt the regulatory process, blocking regulation (and deregulation) that offends their peculiar policy priors.

Courts are neither legitimate nor capable policymakers. They "are not part of either political branch of the Government," *Chevron*, 467 U.S. at 865; and they "lack both expertise and information" to resolve "policy disagreements," *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866.

Judicial interference with valid agency policymaking leads not only to delegitimate (because undemocratic) and suboptimal (because ill-informed) outcomes, but also to unpredictability. Judges are bound

to vary in their personal policy views, the strength of those views, their confidence in those views, and their willingness to impose their views on society. If judges block those regulatory actions they happen to dislike, the regulatory process is disrupted haphazardly—by *some* courts, *some* of the time. These disruptions can create gratuitous circuit splits; and, as occurred here, they can produce horrific delay. Agencies must duplicate their work, and regulated parties must operate under uncertain rules. Parties that favor the status quo are incentivized to file weak appeals, in the (not unreasonable) hope that they'll get lucky convincing a court to block the latest round of agency action. The entire process becomes both more expensive and more confusing, as the executive and judicial branches fight over whose policy preferences are to prevail.

Instead of helping the government *cope* with societal complexity, as the delegation-plus-deference framework is supposed to do, a system of delegation plus deference *mixed* with sporadic judicial stabs at policymaking simply *increases* that complexity. "Complex societies, by their very nature, tend to experience cumulative organizational problems. As systems develop more parts, *and more complex interactions among these parts*, the potential for problems, conflicts, and incongruities develops disproportionately." Joseph A. Tainter, *The Collapse of Complex Societies* 116 (1988) (emphasis added). Instead of helping to fight this natural tendency, judicial would-be policymakers accelerate it. Judges who engage in regulatory stickups, in which they demand obeisance to their desired policies as the price of letting the regulatory process proceed further, thereby thwart efforts to facilitate innovation, encourage free enterprise,

promote consumer protection, or even reform the system itself. The snags, surprises, and dead ends they throw up create—in fact, *are*—precisely the sort of "cumulative organizational problems" and convoluted "interactions among . . . parties" that take an advanced society to a point "where continued investment in complexity yields a declining marginal return." *Id.* at 117. They are the kind of systemic malfunction, in other words, that leads to stagnation, disorder, and decline.

This case is an arresting display of the problems that arise when judges throw their policy wrenches in the regulatory motor. Congress ordered the FCC to regularly review its media-ownership rules with an eye, in each instance, to repealing those rules that, in the FCC's considered expert opinion, have been rendered obsolete (*i.e.*, contrary to "the public interest") by market competition. *Since 2003*, the FCC has been trying to repeal rules that, given the growth of "types of media available," "outlets per-type of media," and "programming options available to the public," no longer make sense. *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd 13,620, 13,667 (2003). But for almost two decades, two judges on a single court of appeals panel have blocked reform because *their* extra-statutory policy goals have not been promoted to their satisfaction.

Even when these judges began their quixotic campaign, it was clear that local newspapers and broadcasters faced intense competitive pressure from a proliferation of new cable, satellite, and Internet media outlets. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 436 (3d Cir. 2004) (Scirica, J., dissenting). In the

years since, the all-too-predictable effect of that pressure has materialized: newspaper advertising revenue has collapsed, and cord-cutting has grown common. *See*, *e.g.*, Pet. App. 99a ("[P]rint newspaper advertising revenue ha[s] decreased . . . nearly 70 percent since 2003."); Karl Bode, *Cable TV Execs Move Past Denial Stage, Now Fully Expect A 'Cord Cutting' Bloodbath*, Techdirt, https://bit.ly/3882S8L (Oct. 30, 2020) ("[I]ndustry insiders now expect 25 million U.S. households to cancel their pay-TV service over the next five years. That's on top of the 25 million homes that have already cut the cord since 2012.").

Yet the panel majority has held firm. "[I]n a world [now] characterized not by information scarcity, but by media abundance," 373 F.3d at 447 (Scirica, J., dissenting), they have hung local newspapers and broadcasters out to dry, blocking them from engaging in efficient mergers and achieving economies of scale. An unknown (and unknowable) portion of the local newspapers and broadcasters that have gone bust, as the market has evolved, could have survived by adopting an ownership arrangement that the FCC would allow, but that a single court has barred. And untold hours have been billed by lawyers, some trying to unclog the system, others trying to keep it clogged. The harm wrought by the panel majority's "undue judicial interference with [an agency's] lawful discretion" is incalculable. *Norton*, 542 U.S. at 66.

"A court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We can now see why. The regulatory process is already difficult and circuitous. The approach taken by the Third Circuit in this case makes the process

longer, messier, more expensive, more perplexing, more uncertain, and more wasteful still. It takes a process that is supposed to benefit society and makes it into something harmful.

C. Courts that Obstruct Valid Agency Action Create a Ground for Expanding the Non-Delegation Doctrine and Narrowing the Agency Deference Rules.

For the delegation-plus-deference framework to work, it bears repeating, the agencies must be allowed the space to fulfill broad congressional mandates. Regardless whether Congress has demanded regulation or, as here, *de*regulation—the unifying theme of the Telecommunications Act of 1996—the system breaks down if judges get to bushwhack the rulemaking process. Once the judiciary arrogates to itself the power to intervene in the agencies' policymaking, the process no longer facilitates governance of an "increasingly complex society." *Mistretta*, 488 U.S. at 372. Instead, it *generates* complexity in the form of interbranch turf wars, erratic regulatory outcomes, and waste, aggravation, and bewilderment for government personnel and private parties alike.

Someone who supports the system of delegation plus deference, therefore, should roundly oppose what the Third Circuit has done here. For if courts do not allow the delegation-plus-deference scheme to work as designed—especially where, as here, Congress has directed an agency to *de*regulate, to *remove* rules, to *simplify*; in short, to combat complexity—the serious arguments made by those who support an expanded non-delegation doctrine, along with less (or no) judicial deference to agencies, become all the stronger.

Requiring Congress to shoulder greater legislative responsibility would be more faithful to the constitutional plan. As we've seen, the defense of broad modern delegations tends to rely almost entirely on *ad hoc* pragmatic grounds. Justice Stevens went so far as to insist that "it would be both wiser and more faithful to what [the Court] ha[s] actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'" *Whitman v. Am. Trucking Assn., Inc.*, 531 U.S. 457, 488 (2001) (concurring op.). The glaring problem with such an admission is that Article I vests "*all* legislative Powers" in Congress. Const. Art. I, § 1 (emphasis added). The Constitution "contain[s] a discernable, textually grounded nondelegation principle that is far removed from modern doctrine." Lawson, *supra*, 88 Va. L. Rev. at 333. Although there are topics "of less interest" on which the executive may "fill up the details," there are also "important subjects" that "must be entirely regulated by the legislature itself." *Wayman v. Southard*, 10 Wheat. 1, 43 (1825) (Marshall, C.J.). If Congress is truly to wield "all legislative Powers," in other words, there must be "cases in which . . . the significance of the delegated decision is simply too great" to be handed to an executive agency. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

A more vigorous non-delegation doctrine would likely bring pragmatic benefits of its own. Consider, for example, its effect on democratic governance. Under a system of broad delegation, legislators can "seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue."

Gundy, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Forcing the legislature to do the legislating, by contrast, enables "the sovereign people [to] know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Id.* at 2134.

And adopting a more robust version of the non-delegation doctrine would not necessarily even require ditching the "intelligible principle" test. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), offers a path forward for non-delegationists that is consistent with that test, carefully applied. The Court recently claimed that *Schechter Poultry* strikes down key parts of the National Industrial Recovery Act of 1933 because "Congress had failed to articulate *any* policy or standard" in that law. *Gundy*, 139 S. Ct. at 2129. The Court made this claim to distinguish *Schechter Poultry* from later cases holding that phrases like "in the public interest" convey a valid "intelligible principle." But the NIRA empowered the president to approve "codes of unfair competition," presented to him by trade or industry groups, if he concluded, among other things, that they "tend[ed] to effectuate the policy" set forth in NIRA Section 1. The "policy" in Section 1, in turn, was a set of goals, such as to "reduce and relieve unemployment," to "avoid undue restriction of production," and to "rehabilitate industry." The NIRA thus offered *more* of an "intelligible principle" than the various laws, later upheld by the Court, that direct an agency simply to act "in the public interest." The Court struck the NIRA down for "set[ting] up no standards, *aside from* the statement of the general aims of rehabilitation . . . described in section 1." 295 U.S at 541-42 (emphasis added). As *Schechter Poultry* shows, the

Court could revive the non-delegation doctrine simply by taking the "intelligible" in "intelligible principle" more seriously.

If Congress must always supply a true "intelligible principle"—something more than a phrase that amounts to "make good policy" (or, as in *Schechter Poultry*, "make good industrial policy")—there will be fewer cases in which a court must defer to an agency's reading of a statute. Under *Chevron*, for instance, a court must, before granting any deference to an agency, use "traditional tools of statutory construction" to see if the statute contains an "unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (discussing *Chevron*, 467 U.S. at 843 n.9). It is through such statutory ambiguity that Congress delegates policymaking authority to an agency in the first place. *See id.* at 1629. No ambiguity, no delegation. No delegation, no cause for deference. Narrowing the scope of permissible delegation naturally narrows the range of deference to agency discretion.

Regardless whether it occurred simply by revival of the non-delegation doctrine, or instead by judicial repudiation of *Chevron*, a narrowing of the deference bestowed on agencies would bring the courts into fuller compliance with the Administrative Procedure Act's command that "the reviewing court . . . interpret statutory provisions." 5 U.S.C. § 706. More than that, it would ensure that the judiciary fulfills its constitutional "duty . . . to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see also* The Federalist No. 78 (A. Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

In a system that allows less delegation by Congress, and that affords less deference to agencies, each government institution sticks more closely to its constitutionally assigned role. Congress makes the people's laws; the agencies follow the comparatively detailed guidance provided by the legislators; and the courts interpret the law, holding the agencies to their statutory instructions.

Perhaps these sorts of arguments for a more disciplined conception of the constitutional structure fail when the alternative is a functional system of delegation plus deference. But when decisions like the Third Circuit's are left to stand, the proponents of the more rigid structure are handed an additional, potentially decisive point. They can note that the current framework is in fact a dysfunctional mélange of habitual delegation, occasional deference, regular gridlock, escalating inter-branch conflict, and pervasive waste, expense, and confusion.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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