No. 25-1079

IN THE

Supreme Court of the United States

RMS OF GEORGIA, LLC, D/B/A CHOICE REFRIGERANTS,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

Here, AFPF writes to highlight the separation of powers issues that underlie this case, which presents a familiar question: which branch of government is responsible for making public policy and how? Under the Constitution, it is not the role of Article III courts to set public policy by judicially revising statutes and, in effect, doing Congress's job for it. Nor is it the job of unelected federal bureaucrats. Indeed, the Constitution categorically bars administrative bodies from exercising legislative power. Instead, it

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

exclusively tasks the democratically elected, politically accountable branches—Congress and the President—with resolving policy questions through the deliberately arduous legislative process, subject to constitutional limits on federal power.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound public policy. The questions whether the American Innovation and Manufacturing Act of 2020's ("AIM Act") cap-and-trade phasedown of hydrofluorocarbons ("HFCs") is wise policy and how the Environmental Protection Agency ("EPA") should allocate allowances are not before this Court. Those policy questions are for Congress to answer and beside the point. Instead, this case is about who decides, and by what process: unelected bureaucrats housed in the Executive branch, life-tenured federal judges, or, as the Constitution promises, Congress.

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution, which exclusively tasks the People's elected representatives with making policy choices. And under the Constitution, the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus. Toward this end, the Constitution flatly prohibits Congress from transferring any of its legislative power to other entities. Instead, such matters "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

Here, Congress has done that which the Constitution forbids by transferring the power to make legislative policy choices to unelected administrators. A single sentence in the AIM Act grants EPA the power to choose which businesses receive the coveted allowances to produce or consume HFCs, and in what amount. Tellingly, although the AIM Act is a model of legislative drafting and precision in many respects, it adopts a Choose-Your-Own-Adventure approach on this key (politically fraught) question, providing *zero* guidance or constraints on EPA's ability to choose which businesses survive. This allows EPA to decide the fates of affected businesses however it wants, for whatever reason it wants.

As an original matter, the AIM Act violates Article I's Vesting Clause because it grants EPA the power to make generally applicable policy choices that legally bind private parties. Even under this Court's modern light-touch nondelegation doctrine—which strays from the Constitution's original public meaning—this delegation is unlawful because it is devoid of *any* principle, let alone an *intelligible* principle, to bound EPA's discretion or for courts to use to ascertain whether EPA has obeyed Congress's will. Anemic as it might be, this Court's nondelegation doctrine as currently articulated requires Congress to provide at least *some* guidance. Here, there simply is none.

It is no answer for Article III courts to stand in Congress's shoes and act as councils of revision, as happened here. The panel did not so much interpret as rewrite the AIM Act to supply the guidance Congress omitted—an exercise of Article I *legislative*, not Article III *judicial*, power. It thereby arrogated to

itself power to make hard policy choices the Constitution reserves to Congress, "usurp[ing] legislative power" and "dictat[ing] its own terms for Congress's surrender." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 745 (2025) (Gorsuch, J., dissenting).

There is no way to sweep this constitutional disorder under the rug by conjuring away nondelegation violations under the guise of statutory interpretation. It is long past time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment), by "hewing" the nondelegation doctrine "from the ice," Antonin Scalia, *A Note on the Benzene Case*, Reg., July/Aug. 1980, at 28.

The Petition provides an ideal opportunity to put Congress on notice that it must do its job and cannot abdicate its nondelegable duty to make politically difficult policy choices to unelected bureaucrats or, alternatively, unelected judges. Our constitutional Republic will be healthier for it. For the foregoing reasons, this Court should grant the Petition.[2]

ARGUMENT

I. Separation of Powers Protects Liberty.

"[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty

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[2] This Court should also grant the Petition in *Pheasant v. United States*, No. 25–6911, and hear both cases alongside one another.

than are the later adopted provisions of the Bill of Rights." *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in judgment). "'If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.'" *Myers v. United States*, 272 U.S. 52, 116 (1926) (citation omitted).

Toward this end, "[t]he Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 247 (2020) (Thomas, J., concurring in part, dissenting in part) (citations omitted). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman*, 23 U.S. (10 Wheat.) at 46. "These grants are exclusive." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment). Thus, "the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201–02 (1928).

The Founders divided these powers "to ensure ours would indeed be a Nation ruled by 'We the People.'" *Consumers' Rsch.*, 606 U.S. at 744 (Gorsuch, J., dissenting) (citation omitted). The point is "not merely to assure effective government but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727 (1988); *see Collins v. Yellen*, 594 U.S. 220, 245 (2021); *see also* Federalist No. 47 (Madison). This separation "might seem inconvenient and inefficient

to those who wish to maximize government's coercive power." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). But for the Founders, it was not merely a matter of abstract political theory; the division of powers provided "practical and real protections for individual liberty[.]" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). History has proven the Founders right.

II. The Constitution Bars Congress From Transferring Its Legislative Power.

Congress is not allowed to duck and weave its way out of the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 595 U.S. 109, 124–25 (2022) (per curiam) (Gorsuch, J., concurring); *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring). Toward this end, the Constitution bars Congress from transferring "powers which are strictly and exclusively legislative" to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42. Instead, such matters "must be entirely regulated by the legislature itself[.]" *Id.* at 43.

Article I's text makes this pellucidly clear: "All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. "This text permits no delegation of those powers[.]" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Constitution's structure reenforces this point. *See* Philip Hamburger, *Nondelegation Blues,* 91 Geo. Wash. L. Rev. 1083, 1175–76 (2023). It makes clear that "when it comes to legislative power, Congress is the principal and executive officials are the agents."

Learning Res., Inc. v. Trump, 146 S. Ct. 628, 653 (2026) (Gorsuch, J., concurring). Not vice versa. Indeed, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting) (citation omitted).

III. The AIM Act Grants EPA Boundless Discretion to Make Policy Choices.

The AIM Act's cap-and-trade scheme runs roughshod over the Constitution's structural guardrails, granting EPA untrammeled power to reshape a multi-billion-dollar industry to achieve whatever policy aims it may conjure.

"The AIM Act directs the EPA to 'phas[e] down the production [and consumption] of regulated substances . . . through an allowance allocation and trading program.'" *Heating, Air Conditioning & Refrigeration Distributors Int'l ("HARDI") v. EPA*, 71 F.4th 59, 64 (D.C. Cir. 2023) (quoting 42 U.S.C. § 7675(e)(3)(A)–(B)). "An allowance is like a license; without one, 'no person shall . . . produce' or 'consume' HFCs."[3] *Id.* at 62 (quoting 42 U.S.C. § 7675(e)(2)(A)). "By placing a cap on allowances, Congress created a kind of 'zero-sum' game for the HFC industry. Any gain in permits that one firm gets must be offset by a loss to another firm and vice versa." *RMS of Ga., LLC v. EPA*, 64

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[3] Violations of AIM Act regulations carry substantial civil, administrative, and even criminal consequences, including imprisonment. *See* 42 U.S.C. § 7675(k)(1)(C); *id.* § 7413(a)–(d).

F.4th 1368, 1374 (11th Cir. 2023). The statute tasks EPA with creating and designing the "allowance allocation and trading program." 42 U.S.C. § 7675(e)(3). This gives EPA great power, effectively allowing EPA to decide which businesses survive, implicating core private rights.

Tellingly, certain provisions in the AIM Act resemble "a math equation" or otherwise give EPA "detailed instructions." *HARDI*, 71 F.4th at 66–67. Congress, however, punted the critical—and politically difficult—policy choice of *who* should receive the allowances to unelected Executive officials, providing literally no guidance whatsoever as to how they are supposed to do this. *See* 42 U.S.C. § 7675(e)(3). As EPA itself acknowledged: "In contrast to the significant detail provided in the AIM Act on how to establish production and consumption baselines and the required set percentage reductions in specific years from that baseline, the AIM Act provides EPA considerable discretion in determining how to establish the allowance program and how to allocate allowances[.]"[4] 86 Fed. Reg. 55,116, 55,142 (Oct. 5, 2021). That is an understatement.

In practical terms, what this means is that EPA has unfettered power to choose, if it wants, to allocate allowances entirely to domestic producers, thereby shutting importers out of the market, or vice versa.

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[4] Elsewhere, EPA has put it more plainly: "There is no congressional guideline on EPA's discretion." Oral Arg. 1:12:40–46, *HARDI v. EPA*, No. 21-1251 (D.C. Cir. Nov. 18, 2022), https://media.cadc.uscourts.gov/recordings/docs/2022/11/21-1251.mp3.

Likewise, EPA can choose between favoring small or large businesses, established companies or new market participants. In short, EPA has unbounded discretion to choose between the various stakeholders that produce or consume HFCs in allocating allowances. There is nothing in the statute itself that bounds EPA's discretion to refuse to allocate *any* allowances to disfavored entities. Nor does the statute constrain EPA's power to subsidize entire categories of favored market participants. *That* is legislative power to make policy choices impacting core private property and economic liberty rights. *Cf. INS v. Chadha,* 462 U.S. 919, 952 (1983) (government actions that "alter[] the legal rights, duties, and relations of persons" are "legislative").

In sum, "Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out." *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

IV. Section 7675(e)(3) Lacks Any Principle, Let Alone An Intelligible Principle.

Under this Court's modern precedent, "Congress must 'lay down by legislative act an intelligible principle'" when it "confers decisionmaking authority upon agencies[.]" *Whitman*, 531 U.S. at 472 (citation omitted). This "test is context dependent." *Consumers' Rsch.*, 606 U.S. at 739 (Gorsuch, J., dissenting). For example, this Court has said "'the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.'" *Id.* at 673 (majority op.) (citation omitted). But Congress must at a minimum "ma[k]e clear both 'the general

policy' that the agency must pursue and 'the boundaries of [its] delegated authority.'" *Id.* (citation omitted). And in all cases, delegations must supply standards that "are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the" agency "has conformed to those standards." *Yakus v. United States*, 321 U.S. 414, 426 (1944). *Cf. Indus. Union Dep't, AFL-CIO*, 448 U.S. at 686 (Rehnquist, J., concurring in judgment).

Carefully parsed, this Court's precedent "requires a court to analyze a statute for two things: (1) a fact-finding or situation that provokes Executive action or (2) standards that sufficiently guide Executive discretion—keeping in mind that the amount of detail governing Executive discretion must correspond to the breadth of delegated power." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 776 (6th Cir. 2023) (Nalbandian, J., dissenting). *Cf. Gundy,* 588 U.S. at 166 (Gorsuch, J., dissenting). Neither condition obtains here.

First, EPA's power under § 7675(e)(3) to allocate allowances however it deems fit to whoever it wants is not contingent on fact finding or the existence of any particular situation. Instead, EPA "is free to select as [it] chooses . . . and then to act without making any finding[s]," *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 432 (1935), as it "roam[s] at will" "in that wide field of legislative possibilities," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935).

Second, § 7675(e)(3) provides zero guidance on what standards EPA should use to allocate the vast

majority of all allowances for U.S. industry.[5] "Congress has declared no policy, has established no standard, has laid down no rule." *Panama Ref. Co.*, 293 U.S. at 430. Section 7675(e)(3) "provide[s] literally no guidance for the exercise of discretion," *Whitman*, 531 U.S. at 474, by EPA to decide *who* should receive those allowances and what share. This "absence of standards" makes it "impossible . . . to ascertain whether the will of Congress has been obeyed[.]" *Yakus*, 321 U.S. at 426.

There simply is no standard "such that Congress, the courts and the public can ascertain whether the agency has conformed to" it. *Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div.*, 312 U.S. 126, 144 (1941). For example, there is no way for a court reviewing EPA's allowance allocations to employ the arbitrary and capricious test to determine whether EPA "has relied on factors which Congress has not intended it to consider," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as Congress has not provided any. For that matter, the statute lacks a declaration of policy, statement of legislative purpose, or even findings for the agency to

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[5] The AIM Act specifies that some allowances must be granted on a priority basis to six types of HFC users. *See* 42 U.S.C. § 7675(e)(4)(B)(iv). But those six temporarily prioritized uses account for less than 3 percent of regulated HFC consumption. *See* 87 Fed. Reg. 61,314, 61,316–17 (Oct. 11, 2022). That Congress provided guidance for what amounts to roughly 2 percent of the allowances underscores Congress's failure to do so for the other *98 percent.* Tellingly, too, Congress has shown it *does* know how to provide guidance for allocating allowances in other analogous programs. *See, e.g.*, 42 U.S.C. § 7671c(a).

"rummage[]" around in for an intelligible principle. *See Nichols*, 784 F.3d at 674 (Gorsuch, J., dissenting from denial of rehearing en banc).

While this Court's current precedent indicates this lack of guidance might be acceptable for small-bore matters like "defin[ing] 'country elevators,'" *Whitman*, 531 U.S. at 475, the policy question of how to dismantle a domestic industry is not that. That fundamental policy choice is no mere detail or fill-in-the-blank factfinding exercise. *Cf. Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting). Instead, "[t]hat is a 'quintessential legislative' choice and must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

At least in theory, "the intelligible principle test is not toothless." *Consumers' Rsch.*, 606 U.S. at 703 (Kavanaugh, J., concurring). At least it is not supposed to be. "If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution." *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024). Such is the case here. And any suggestion that Congress's decision to provide detailed instructions in other provisions of the AIM Act regarding other aspects of the cap-and-trade phasedown somehow cures Congress's failure to provide *any* instructions as to how EPA decides *who* receives the allowances and in what quantity should be rejected. That Congress provided adequate guidance on *some* policy choices in a statutory scheme does not allow it to abdicate its duty to make *all* legislative policy choices.

V. The Blue-Pencil Treatment Compounds the Legislative Delegation Disease.

It is also no answer for Article III courts to revise Congress's legislative handiwork to comply with constitutional requirements and thereby make policy choices that Congress should have made. This transcends the judicial role. Worse, "by repeatedly doing what it thinks the political branches ought to do" over time the judiciary "encourages [Congress's] lassitude and saps the vitality of government by the people." *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004). That is exactly what happened here.[6] *See* Pet. 21–26; App. 16–18. This, too, should not stand.

Simply put, under our system of separated powers, "courts cannot take a blue pencil to statutes[.]" *Murphy v. NCAA*, 584 U.S. 453, 489 (2018) (Thomas, J., concurring). This is because "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). "It is not for [a court] to rewrite the statute so that it covers only what

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[6] The core problem is that § 7675(e)(3) is "so vacuous that any attempt to implement this law would amount to creation of a new law. If a court tried to give the statute effect in an adjudication, it would not be engaging in 'interpretation' and therefore would not be exercising the judicial power." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002). Put another way, how EPA must allocate allowances is a "problem [that] cannot be resolved as a matter of statutory interpretation" but rather is a bare "policy choice." *United States v. Arthrex, Inc.*, 594 U.S. 1, 32 (2021) (Gorsuch, J., concurring in part, dissenting in part). And that choice is not for an Article III court to make.

[it] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 678 (2020).

"[T]he power of judicial review does not allow courts to revise statutes," *Seila Law*, 591 U.S. at 253 (Thomas, J., concurring in part, dissenting in part), including "'to conform it to constitutional requirements,'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted). "Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation." *Seila Law*, 591 U.S. at 230; *see Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). It "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication[.]" *CFTC v. Schor*, 478 U.S. 833, 841 (1986). That is because "the prescription of the standard that Congress had omitted" is "an exercise of the forbidden legislative authority." *Whitman*, 531 U.S. at 473.

The decision below ignored these bedrock limits on Article III judicial power, instead "seiz[ing] the drafting pen," *Consumers' Rsch.*, 606 U.S. at 730 (Gorsuch, J., dissenting), and "conjur[ing] standards and limits from thin air to construct a supposed intelligible principle" to sustain the delegation. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting).[7] The panel's

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[7] Here, the panel superimposed the historical-market-share approach adopted by Title VI of the Clean Air Act to give

"willingness to imagine bounds on delegated authority goes so far as to render" Article I's bar against Congress transferring its lawmaking power to the Executive "nugatory." *Id.* (Brown, J., dissenting).

In so doing, the panel arrogated to itself the hard policy choices the Constitution reserves to Congress and thereby "usurp[ed] legislative power, rewr[o]te the statute, and dictate[d] its own terms for Congress's surrender" of its constitutional responsibility to make policy choices. *Consumers' Rsch.*, 606 U.S. at 745 (Gorsuch, J., dissenting). That was error. And it was far from constitutionally harmless. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921) (striking down vague criminal law in part because it transferred legislative power to judges and juries).

VI. This Court Should Restore Equilibrium Among the Branches.

This Court should not turn a blind eye to these serious constitutional problems. "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial

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substance to the AIM Act's HFC-allowance scheme even though Congress declined to do so, yet "expressly incorporated" *other* portions of Title VI into the AIM Act. *See* App. 16–17. On top of this, the panel transplanted Title VI's "implementing regulations" into the AIM Act statute. *See* App. 19.

of rehearing en banc) (cleaned up). It is past time for this Court to protect our system of representative self-government by enforcing the Constitution's structural guardrails and accountability checkpoints.

A. Delegation Run Riot Has Had Awful Effects on Our Constitutional Republic.

At a broader jurisprudential level, the stakes could not be higher and involve "basic questions about self-government, equality, fair notice, federalism, and the separation of powers."[8] *West Virginia v. EPA*, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring).

To begin, unconstitutional "[d]elegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015). This "drives a wedge between the personal interests of legislators and the institutional interests of Congress,

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[8] The baseline Article I sets is that agencies have no authority to act unless and until Congress confers power on them, *see FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022), deliberately making it difficult to alter this liberty-tilted baseline, *see* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 191, 235 (2023). By contrast, legislative delegations have "the effect of inverting the decision-making process[.]" Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & Liberty 718, 802 (2019). This "reverses the burden that the Constitution places on those who want to expand the powers of government[.]" David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 739 (1999).

undermining the collective legislative process established to promote the public good." *Id.* at 1477. More broadly, "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

On top of this, delegations of legislative power to putative agency experts undermine rational decisionmaking—the supposed justification for these delegations—as these administrators often labor under confirmation, specialization, and size biases. *See* Hamburger, 91 Geo. Wash. L. Rev. at 1187–92. The rules they promulgate cater to "the concerns of small cadres of elites. And as those cadres turn over from administration to administration, the rules revolve, too, inflicting whiplash on those who must live under them." *Consumers' Rsch.*, 606 U.S. at 745 (Gorsuch, J., dissenting).

Further still, "the transfer of legislative power to agencies dilutes voting rights." Hamburger, 91 Geo. Wash. L. Rev. at 1181. Such power-transfers are also slanted against disfavored groups. *See id.* at 1183–87. In short, "[d]elegation is never just about delegation. It also is about rendering legislation unrepresentative" and "diluting the value of equal suffrage[.]" *Id.* at 1187.

Even worse, unconstitutional delegations undermine political stability, leading to "administratively induced irresponsibility, alienation, and political conflict." *Id.* at 1192. This state of affairs "tends to infantilize the Constitution's elements of

government," "leaving Americans with ever less confidence in government." *Id.* at 1193. It "deprives Americans of their sense of connection to government," leaving "growing numbers of Americans, left and right, feel[ing] politically alienated." *Id.* at 1194.

Finally, delegation of legislative power to administrative bodies contributes to political polarization. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 7 (2022) ("Delegation by Congress probably has the most pervasive polarizing effects."). "The breadth of centralized legislative power" housed within the Executive branch today "displaces much state politics. It also reaches deep into private institutions and life." Hamburger, 91 Geo. Wash. L. Rev. at 1195. This "not only nationalizes American politics but also politicizes American life." *Id.*

B. This Court Should Jettison the "Intelligible Principle" Remark.

This Court should confront the root cause of these serious constitutional problems: "the modern, enfeebled form of the intelligible principle test[.]" *Consumers' Rsch.*, 606 U.S. at 746 (Gorsuch, J., dissenting). "[T]he standard this Court currently applies to determine whether Congress has impermissibly delegated legislative power largely abdicates [this Court's] duty to enforce that prohibition[.]" *Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2490 (2024) (Thomas, J., dissenting from denial of certiorari) (cleaned up). For good reason "at least five Justices have already expressed an interest in reconsidering" it. *Id.* at 2491.

This Court should now take up that constitutionally necessary task.

The current "intelligible principle" test is "notoriously lax," Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014), "has historically not packed much punch," *Consumers' Rsch.*, 606 U.S. at 705 (Kavanaugh, J., concurring), and indeed "has become a punchline," *Consumers' Rsch. v. FCC*, 88 F.4th 917, 929 (11th Cir. 2023) (Newsom, J., concurring). "[T]he nondelegation doctrine has been more honored in the breach than in the observance," *Rettig*, 993 at 410 (Ho, J., dissenting from denial of rehearing en banc), and "over the years, the guardrails have crumbled," *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). Today, it "serves as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite."[9] Hamburger, 91 Geo. Wash. L. Rev. at 1091. It is past time to close and padlock it.

The "mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the modern "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or

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[9] *INS v. Chadha*, 462 U.S. 919, exacerbated the problems flowing from legislative delegations. As Justice White warned, the legislative veto's "importance to Congress can hardly be overstated," describing it as "a central means by which Congress secures the accountability of executive and independent agencies." *Id.* at 967–68 (dissenting). By removing this check without invalidating the underlying delegations, this Court broke the legislative bargain and dramatically expanded Executive power. *Cf. id.* at 1013–16 (Rehnquist, J., dissenting).

even in the decision from which it was plucked." *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting); *see Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Consumers' Rsch.*, 88 F.4th at 928 (Newsom, J., concurring in judgment); *id.* at 938 (Lagoa, J., concurring); Hamburger, 91 Geo. Wash. L. Rev. at 1095 ("[T]he current nondelegation doctrine has no originalist foundation."); *see also Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring); *Allstates*, 79 F.4th at 788 n.17 (Nalbandian, J., dissenting). And "the phrase 'intelligible principle' has taken on an entirely different meaning than it once held."[10] *Consumers' Rsch.,* 606 U.S. at 737 n.15 (Gorsuch, J., dissenting).

This Court should clearly announce the end of this failed experiment. *Cf. Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 411–12 (2024). After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. I, § 1). While the "doctrine long seemed acceptable while the shift of legislative and judicial powers to the executive was moderated by political

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[10] It appears the origin story of the modern "intelligible principle" test is similar to that of the now-repudiated *Chevron* doctrine: stray dicta somehow morphs over time into black-letter law. *Compare Gundy*, 588 U.S. at 162–65 (Gorsuch, J., dissenting), *with* Thomas Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 275–78 (2014).

restraint," "such restraint has been thrown to the winds[.]" Hamburger, 91 Geo. Wash. L. Rev. at 1093.

C. Line-Drawing Questions Cannot Justify Ignoring the Constitution's Demands.

Nor should line-drawing challenges stand in the way of enforcing the Constitution's bar against subdelegation of legislative power. "Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting). This raises the question what is "legislative power" that Congress may not delegate.[11]

To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters of "less interest" that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43; *see West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring) ("Doubtless, what qualifies as an important subject and what constitutes a detail may be debated."). And "the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others." Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference under Separated Powers*, 17 NYU J.L. & Liberty 1, 36 (2023). Indeed, "[i]t may never be possible perfectly to distinguish between legislative

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[11] "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).

and executive power[.]" *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring).

"But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Id.* at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). *Cf.* Federalist No. 78 (Hamilton) (Courts' "duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."). And "the difficulty of the inquiry doesn't mean it isn't worth the effort." *Nichols*, 784 F.3d at 671 (Gorsuch, J., dissenting from denial of rehearing en banc). No matter the difficulty of the task, the Judiciary is dutybound to search for the line and could do so on a case-by-case basis. And just as the Constitution bars Congress from punting its legislative responsibilities to other entities, this Court should not punt on its "duty" "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

D. There Are Judicially Manageable Standards For Enforcing Nondelegation.

More than sufficient ink has been spilled to allow this Court to begin to articulate judicially manageable standards over time. *See generally West Virginia*, 597 U.S. at 750 n.11 (Gorsuch, J., concurring) (collecting scholarship). And "[d]evelopments in the modern administrative state suggest the time has come to articulate judicially manageable standards for identifying delegations of legislative power." Rao, 90 N.Y. U. L. Rev. at 1508.

"[H]istorical practice and [this Court's] cases suggest other guides, beyond the intelligible principle test, for assessing when Congress has impermissibly

ceded legislative power[.]" *Consumers' Rsch.*, 606 U.S. at 746 (Gorsuch, J., dissenting); *see Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting) (surveying other guides). For that matter, there may well be "multiple nonexclusive" nondelegation principles. Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 263 (2022). And as in other areas of constitutional law, judgment and nuance may be required over a series of cases. But it is well worth it.

E. Enforcing Article I's Vesting Clause Will Have Salutary Effects.

The sky will not fall if this Court enforces Article I's demands. *See Gundy*, 588 U.S. at 172–73 (Gorsuch, J., dissenting). Common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be run by legislators"—are constitutionally irrelevant and lack merit. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring); *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010) ("One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.").

Congress has shown that it is perfectly capable of making the policy choices associated with allowances for analogous phasedown regimes by enacting legislation, as the Constitution requires it to do. *See, e.g.*, 42 U.S.C. § 7671c(a); *id.* § 7651c(e); *id.* § 7651d. And Congress is free to fix the AIM Act's constitutional problems, if it wishes to do so. *Cf. Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023). Nor would invalidating the AIM Act be

disruptive, as it was recently enacted and has not engendered longstanding reliance interests.

On the other side of the ledger, the benefits of putting Congress back in the driver's seat of setting public policy—where the Constitution puts it—are immense. And "[t]he educational effect on Congress" of invalidating the AIM Act "might well be substantial." Scalia, *supra*, 28.

CONCLUSION

This Court should grant the Petition.

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