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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Thomas A. Berry
Counsel of Record
Brent Skorup
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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QUESTION PRESENTED

Whether Congress violated the Vesting Clause of Article I by giving an executive agency unbounded discretion to choose which private parties are entitled to participate in a multibillion-dollar market.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in constitutional law cases.

This case interests Cato because the nondelegation doctrine is central to the Constitution's separation of powers. The Framers understood that separating the legislative and executive powers was necessary to preserve individual liberty, and the nondelegation doctrine is vital to achieving that end. The AIM Act's unconstrained delegation of market-allocation power to the EPA threatens that indispensable constitutional principle.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission. All parties were timely notified of the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Justice Scalia once remarked that "[t]he real key to the distinctiveness of America is the structure of our government." *Considering the Role of Judges Under the Constitution of the United States*, U.S. SENATE COMM. ON THE JUDICIARY, at 00:40:21 (Oct. 5, 2011).[2] That structure is maintained only if courts police and demarcate the boundaries separating legislative from executive power.[3] Implicit in this design is the principle that the political branches may not reallocate authority among themselves for the sake of convenience. Accordingly, this Court has long recognized that Congress may not freely delegate the legislative powers vested in it by the Constitution.

To enforce this separation of powers, this Court has articulated a "nondelegation doctrine," which holds that Congress must provide executive agencies with an "intelligible principle" to govern the exercise of delegated authority. Unfortunately, during the exigencies of the Second World War, the doctrine entered a period of dormancy, as wartime decisions

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[2] Available at https://tinyurl.com/2k3u2m3v.

[3] The Constitution vests the legislative, executive, and judicial powers in the legislative, executive, and judicial branches, respectively. U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.

deferential to the political branches[4] truncated its development. Congress has since proceeded to avoid difficult policy choices by granting broad authority to agencies, undermining the separation of powers and diminishing individual liberty.

The statute here is the starkest example yet of this trend, in that it delegates industry-destroying power to an agency and fails to meet even the lenient intelligible principle standard. In fact, the statute provides no guidelines or restraints at all.

Petitioner Choice Refrigerants is a business that produces refrigerant blends, including a patented hydrofluorocarbon ("HFC") one, for a multibillion-dollar domestic market. Pet. Br. 5. In 2020, the American Innovation and Manufacturing Act ("AIM Act") was enacted, mandating an 85 percent phasedown of HFC production and consumption by 2036 through a cap-and-trade program administered by the Environmental Protection Agency ("EPA"). Pet. Br. 1, 6; 42 U.S.C. § 7675(b)(1), (e)(2)(C). To implement the phasedown, the Act requires the EPA to allocate production-and-consumption "allowances"—no person

[4] *See National Broadcasting Co. v. United States*, 319 U.S. 190, 215–16 (1943) (sustaining a broad delegation to the Federal Communications Commission); *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (sustaining a broad delegation to the President and his military advisors); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (sustaining a broad delegation to an economic administrator).

may lawfully produce or consume HFCs without these permission slips. *Id.* § 7675(b)(2), (e)(2)(A)–(D).

Yet Congress provided no guidance on *how* the EPA should distribute some 98 percent of those allocations.[5] The EPA acknowledged that it possessed "considerable" and "significant discretion,"[6] and conceded that no statutory principle constrained its choices beyond ordinary Administrative Procedure Act ("APA") standards. *See* EPA, *Phasedown of Hydrofluorocarbons: Response to Comments* 91–92 (June 2023).[7]

Choice challenged this arrangement as an unconstitutional delegation of legislative power. The D.C. Circuit rejected that challenge, but only by reading into the AIM Act an "intelligible principle" that Congress never enacted: the court divined from snippets of legislative history an implicit congressional intent to incorporate a market-share allocation methodology drawn from Title VI of the Clean Air Act—a separate statutory provision that the AIM Act

[5] The statute's only substantive allocation instruction covers a narrow class of "essential uses" that EPA calculated as constituting a mere 2 percent of total allowances. Pet. Br. 7–8; 42 U.S.C. § 7675(e)(4)(B)(i), (iv).

[6] Pet. Br. 7; 86 Fed. Reg. 27,166, 27,178.

[7] Available at https://perma.cc/25HG-P67E.

nowhere cross-references or incorporates. *See* App. 15–21.

This case warrants review because it presents a separation-of-powers violation. If the decision below stands, the executive will be able to legislate via administrative fiat by rewriting the content of vague statutes. Instead of going through the constitutional process of legislative bicameralism and presidential presentment, the meaning of these laws will whipsaw based on who controls the agency. Regulated parties like Choice will be left to deal with the consequences of an Etch A Sketch legal landscape.

This Court should grant the petition for certiorari and overrule the decision below.

ARGUMENT

I. THE NONDELEGATION DOCTRINE PRESERVES THE CONSTITUTIONAL SEPARATION OF POWERS.

The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." 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). So while Congress may "vest discretion in" agencies "to make public regulations interpreting a statute," that discretion must be "within defined limits" to preserve the separation of powers. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

The separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). They viewed the principle as "the central guarantee of a just government," *Freytag v. Commissioner*, 501 U.S. 868, 870 (1991), and understood that the "separate and distinct exercise of the different powers of government . . . [is] essential to the preservation of liberty." THE FEDERALIST NO. 51 (James Madison).[8] As Justice Kennedy observed, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

In particular, the Founders feared the commingling of the legislative and executive powers and wanted to prevent the abuses they had experienced as British subjects. James Madison, citing Montesquieu, concluded, "There can be no liberty where the legislative and executive powers are united in the

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[8] *See also* THE FEDERALIST NO. 48 (James Madison) (stating that the separation of powers is "essential to a free government."); *Bowsher* v. *Synar*, 478 U.S. 714, 730 (1986); *Myers v. United States*, 272 U.S. 52, 116 (1926); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) ("To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.").

same person, or body of magistrates . . . .” THE FEDERALIST NO. 47 (James Madison); *see* BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (Franz Neumman ed., Thomas Nugent trans., Hafner Publ’g Co. 1949).

The dormancy of the nondelegation doctrine—beginning with the wartime Court—has invited Congress to delegate sweeping authority to the executive, contrary to the Framers’ design. These broad delegations undermine the separation of powers, “not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress.” Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015). The result is a legislature whose members are less accountable to both their constituents and each other. Delegation discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* at 1465–66. When Congress delegates its power, it no longer needs to bear the responsibility for the policies it enables. Instead, it retains plausible deniability as the executive confronts the hard questions of governing.

Despite claims that the nondelegation doctrine is dead, this Court has never abandoned it. *See, e.g.*, Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 624–25 (2017). In *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), this Court

invalidated a section of the National Industrial Recovery Act ("NIRA") authorizing the President to prohibit the interstate transportation of petroleum produced in excess of state-allowed quotas. The Court reasoned that Congress "ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule." *Id.* at 430. The statute "left the matter to the President . . . to be dealt with as he pleased." *Id.* at 418. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court held that another section of the NIRA violated the nondelegation doctrine. The statute authorized the President to approve "codes of fair competition" in certain industries "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest," and to "provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary." *Id.* at 534. The Court again observed that Congress's grant of authority was open-ended, "set[ting] up no standards, aside from the general aims of rehabilitation, correction and expansion described in section one [of the NIRA]." *Id.* at 541. Both decisions remain good law, *see FCC v. Consumers' Research*, 606 U.S. 656, 683 (2025), and every Justice currently on this Court affirmed the validity of the doctrine in some form just last Term. *Id.* at 661.

II. THE COURT SHOULD APPLY A ROBUST FORM OF THE INTELLIGIBLE PRINCIPLE TEST TO PROTECT THE SEPARATION OF POWERS.

The Framers envisioned the federal courts as "the bulwarks of a limited Constitution against legislative encroachments" and "an intermediate body between the people and the legislature." THE FEDERALIST NO. 78 (Alexander Hamilton). Consistent with that role, this Court has a proud tradition of judicial engagement: when government conduct has implicated fundamental individual rights, this Court has vigorously scrutinized those impingements to ensure that the political branches comport with constitutional commands.[9]

When it comes to delegation, however, courts have taken a too-lax approach for the better part of a century. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 674–75 (1980) (Rehnquist, J., concurring) ("[T]he principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud").[10] Less

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[9] *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (First Amendment); *Musser v. Utah*, 333 U.S. 95, 97 (1948) (Fifth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (Second Amendment).

[10] In the early twentieth century, several attempts to relinquish legislative powers were struck down. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter the maritime law"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87–88 (1921) (holding that the Lever Act, which made it unlawful for any person to charge unreasonable prices for "necessaries," amounted to a delegation by Congress of legislative power to courts); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 164 (1920)

than a decade after *Panama Refining* and *Schechter Poultry*, the wartime Court sustained—against nondelegation challenges—a system of concentration camps for Japanese Americans,[11] a regime of content regulation for broadcast media,[12] and nationwide rent control,[13] each resting on open-ended or manipulable statutory language. That deference calcified into doctrine: so long as a statute contains a mere "intelligible principle" to guide executive action, the

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(invalidating improper delegation of maritime law to the states). In other cases, delegations were upheld; but in each of these instances, this Court made it clear that delegated authority must be accompanied by adequate congressional guidance. *See*, *e.g.*, *Union Bridge Co. v. United States*, 204 U.S. 364, 386 (1907) ("[T]he Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power"); *Buttfield v. Stranahan,* 192 U.S. 470, 496 (1904) ("[The Tea Act] does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable").

[11] *Korematsu*, 323 U.S. at 217–18 (sustaining region-wide, ancestry-based internal deportations against a nondelegation challenge).

[12] *National Broadcasting Co.*, 319 U.S. at 215–16 (sustaining Congress's delegation to the Federal Communications Commission to regulate broadcast stations and their program content in the "public interest, convenience, and necessity" against a nondelegation challenge).

[13] *Bowles*, 321 U.S. at 517 (sustaining Congress's delegation to an administrator to fix rental rates which are "generally fair and equitable," but no lower than prevailing rates in April 1940, against a nondelegation challenge).

Court has refused to second-guess Congress "regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474–75 (internal quotation marks omitted).

This deferential posture has permitted the Executive Branch to aggrandize itself at Congress's expense, usurping Congress's role as the predominant policymaking branch. The Court's hesitation to police the constitutional boundary has allowed legislative delegations to metastasize, such that today "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *DOT v. Ass'n of Am. R.R.,* 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting)). This case offers the Court a chance to begin correcting that imbalance.

The Court should seize it by applying a robust form of the intelligible principle test. *See Gundy v. United States*, 588 U.S. 128, 164, 166 (2019) (Gorsuch, J., dissenting) (proposing a three-pronged inquiry based on "prior teachings");[14] *see generally* Todd Gaziano &

[14] Justice Gorsuch proposed that three questions must be asked to "determine whether a statute provides an intelligible principle":

Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 45–70 (Peter J. Wallison & John Yoo eds., 2022).

III. THE AIM ACT IMPERMISSIBLY DELEGATES LEGISLATIVE AUTHORITY.

Even under the intelligible principle standard this Court has long applied, the AIM Act fails. It transfers to an agency the power to determine which private parties may participate in an industry—a quintessentially legislative decision—and it does so without any textual constraint whatsoever. The statute simply commands that EPA "issue a final rule . . . phasing down the production of [HFCs] in the United States through an allowance allocation and trading program." 42 U.S.C. § 7675(e)(3)(A). That is the entirety of Congress's guidance on allocation. As shown below, it is not enough.

> Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

Gundy, 588 U.S. at 166 (Gorsuch, J., dissenting).

This Court has held that Congress may delegate regulatory power only if it provides "ascertainable and meaningful guideposts" for the agency to follow. *Consumers' Research*, 606 U.S. at 681; *see also Mistretta v. United States*, 488 U.S. 361, 372 (1989). Last Term, the Court upheld a broad delegation to the FCC to set contribution levels for telecommunications subsidies because the Court found that Congress had made the relevant policy choices and confined the agency to implementing them: the statute (under this Court's reading) specified the program's beneficiaries, set mandatory criteria for subsidized services, and limited the agency to raising amounts "sufficient" to fund that bounded program. *Consumers' Research*, 606 U.S. at 681–84. The delegation survived because, in this Court's estimation, Congress had done its job. *Id.* at 681.

Congress did not do its job here. The AIM Act tells EPA to phase down HFC production "through an allowance allocation and trading program." 42 U.S.C. § 7675(e)(3), but the Act says nothing about *how* to allocate—which is the central question in any cap-and-trade regime. Aside from narrow carve-outs for certain "essential uses" and certain specialized products during the first five years, Congress provided no direction at all for allocating the overwhelming majority of allowances.[15]

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[15] The law specifies guidance for roughly 2 percent of allowances—covering "essential uses" and certain specialized

The resulting discretion is unbounded in the way that mattered in *Panama Refining* and *Schechter Poultry*: because the AIM Act provides no allocation criteria, any methodology the EPA selects will, by definition, "comply" with the statute. The EPA can allocate allowances by market share, by auction, by lottery, by political favor, or by any other method it devises. So long as the agency follows its procedural rules, no court could say that any of those approaches violated the AIM Act's directive because the Act simply contains no directive to violate. That is the hallmark of an unconstitutional delegation—not the exercise of executive discretion within legislatively prescribed bounds.

The EPA has effectively conceded the point. It has acknowledged that it possesses wide discretion to allocate allowances however it sees fit, so long as its decisions are "reasonable and reasonably explained." EPA, *Phasedown of Hydrofluorocarbons: Response to Comments* 91–92. But that is simply the APA's baseline requirement for any agency action. If mere APA compliance satisfies the intelligible-principle test, the test imposes no limit whatsoever. An arbitrary and capricious standard[16] does not provide agencies with any intelligible principle to guide the exercise of the delegated task.

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applications, s*ee* § 7675(e)(4)(B)(i), (iv), and is silent on the remaining 98 percent, *see* § 7675(e)(3).

[16] 5 U.S.C. § 706(2)(A).

The D.C. Circuit attempted to cure this deficiency by supplying an intelligible principle that the statute itself does not contain—inferring from legislative history and perceived structural similarities that Congress must have intended Title VI's baseline-year allocation formula to serve as a "model." Pet. App. 15–16. But that is not interpretation; it is revision. The Act says nothing about allocating by historical market share, nowhere cross-references Title VI's formula, and does not incorporate 42 U.S.C. § 7671d(b)—even though Congress expressly incorporated other Clean Air Act provisions elsewhere in the same Act. *See* 42 U.S.C. § 7675(k)(1)(C). This Court has cautioned courts against "read[ing] into statutes words that aren't there"[17] and held that differences in statutory language "convey differences in meaning."[18] Moreover, courts must not lightly assume Congress omitted requirements it intended to impose—especially where Congress demonstrated it knew how to make such incorporation express. *Jama v. ICE*, 543 U.S. 335, 341 (2005). Pet. Br. 23. Legislative history cannot do the work that the enacted text does not. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) ("legislative history is not the law"). The Constitution requires Congress—not an Article III court reconstructing after the fact a legislative judgment Congress never made—to cabin

[17] *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 215 (2020).

[18] *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017).

agency discretion. Allowing courts to perform that function does not solve the separation-of-powers problem; it compounds it.

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Congress cannot "unconstitutionally diminish [its own] authority" any more than it can intrude upon the province of the courts or the president. *Mistretta*, 488 U.S. at 395. It is entirely within Congress's power to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy." *Panama Refining*, 293 U.S. at 426. But there is no primary standard here, nor a secondary or tertiary one. The statute gives no guidelines, no considerations, not even factors for a balancing test of any kind. It simply assigns to the executive sole, unmoored discretion to answer the statute's central question. That is precisely the "gradual concentration of the several powers in the same department" that the Framers designed the Constitution to prevent. THE FEDERALIST NO. 51 (Madison).

IV. PERMITTING THIS STATUTE TO STAND WOULD LICENSE THE EXECUTIVE TO LEGISLATE, THREATENING THE RULE OF LAW.

The nondelegation problem here also poses a rule-of-law problem. The nondelegation doctrine ensures that the rights and obligations of private citizens are fixed by legislation enacted through the Constitution's demanding procedures of bicameralism and presentment. The AIM Act's unconstrained delegation

of allocation authority to the EPA threatens that guarantee.

The Act creates allowances and makes them indispensable to commercial survival, but it does not specify the rules governing who receives them. That omission means the operative law will be written not by Congress but by whichever administration controls the EPA at a given moment.

The delegation here presents a case study in how standardless delegations transform fixed law into shifting executive policy. The EPA is free to allocate the overwhelming majority of allowances as it sees fit. Pet. Br. 11. The breadth of this discretion is apparent in the record. When proposing its allocation methodology, the EPA identified a vast and contradictory range of policy options it was free to pursue—ranging from allocations based on past use, to prioritizing "minority- and woman-owned small businesses" to address "systemic racism." Pet. Br. 8–9; 86 Fed. Reg. 27,177, 27,203 (May 19, 2021).

Because the statute imposes no constraints on the agency's choice among an infinite and widely divergent set of options, a future administration—with different priorities, different constituencies, and different policy preferences—is equally free to reverse course. An administration that favors incumbent industries could allocate all general-pool allowances by historical market share. One that favors competition could redirect allowances to new entrants. One that pursues environmental goals could auction allowances and

retire the winning bids. One that favors industrial policy could condition allowances on compliance with domestic-sourcing requirements or other programmatic objectives. That is not an agency implementing a law. It is an agency drafting one.

A company like Choice Refrigerants can invest millions of dollars in developing products, building market share, and planning for the future, only to find that a change in administration—or even a change in EPA leadership—wipes out its market position because the agency decided to fill the statutory void differently.

"Vague laws invite arbitrary power." *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring). And if this statute survives, vague statutes may become even better vehicles for executive abuse. The consequences are profound. The resulting regime is one in which legal rights and obligations fluctuate with the vagaries of administrative preferences. The Constitution does not tolerate that arrangement.

Where Congress has provided genuine standards and guidance, regulated parties can predict the contours of agency action, courts can assess whether the agency has remained within its delegated authority, and the public can hold both Congress and the executive accountable. Where, as here, Congress

has provided no principle at all, none of those rule-of-law functions can be performed.

Congress cannot abdicate the legislative power vested in it by Article I of the Constitution. The Republic must be governed by law enacted through the legislative process, not by decrees imposed through executive fiat. This statute empowers administrators to do just that.

CONCLUSION

Separation of powers is not an abstraction or a mere technicality. It is a vital component of the Constitution that restrains the government and protects the rights of the people. For the foregoing reasons, this Court should grant the Petition and reverse the decision below.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Brent Skorup
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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