No. 25-1079

In the Supreme Court of the United States

RMS OF GEORGIA, LLC, DBA CHOICE REFRIGERANTS,
Petitioner,

v.

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 AMICI CURIAE ADVANCING AMERICAN FREEDOM; AMERICAN ASSOCIATION OF SENIOR CITIZENS; CENTER FOR INDEPENDENT THOUGHT; FRONTIERS OF FREEDOM; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JCCWATCH.ORG; MEN AND WOMEN FOR A REPRESENTATIVE DEMOCRACY IN AMERICA, INC.; RIO GRANDE FOUNDATION; 60 PLUS ASSOCIATION; TAXPAYERS PROTECTION ALLIANCE; TEA PARTY EXPRESS; WOMEN FOR DEMOCRACY IN AMERICA, INC.; CATHY ADAMS, 2ND VP EAGLE FORUM; TIM JONES, FORMER SPEAKER, MISSOURI HOUSE, FOUNDER, LEADERSHIP FOR AMERICA INSTITUTE; MELISSA ORTIZ, PRINCIPAL & FOUNDER, CAPABILITY CONSULTING; AND HON. WILLIAM WAGNER (RET), DISTINGUISHED PROFESSOR OF LAW EMERITUS IN SUPPORT OF PETITIONERS

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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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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes American prosperity depends on ordered liberty and self-government.[3] AAF files this brief on behalf of its 155,355 members nationwide.

Amici

American Association of Senior Citizens; Center for Independent Thought; Frontiers of Freedom; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Men and Women for a Representative Democracy in America, Inc.; Rio Grande Foundation; 60 Plus Association; Taxpayers Protection Alliance; Tea Party Express; Women for Democracy in America, Inc.; Cathy Adams, 2nd VP Eagle Forum; Tim Jones, Former Speaker, Missouri

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[1] All parties received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., Conservatives Stalk the House: The Story of the Republican Study Committee, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

House, Founder, Leadership for America Institute; Melissa Ortiz, Principal & Founder, Capability Consulting; and Hon. William Wagner (Ret), Distinguished Professor of Law Emeritus believe that the government's compliance with the Constitution's limits on government power is essential to the preservation of American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is about passing the buck. For decades, Congress has been passing the buck to the Executive Branch. For decades, this Court, too, passed off its constitutional authority to Article II officials. Recently, however, in *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 378 (2024), the Court rightly reclaimed significant judicial authority for itself. Here, the Court has an opportunity to begin to restore to Congress its rightful constitutional authority and responsibility. It should grant the petition for certiorari and do so.

The American Innovation and Manufacturing (AIM) Act of 2020 directs the Environmental Protection Agency (EPA) to accomplish "an 85 percent reduction in U.S. production and consumption of [Hydrofluorocarbons (HFC)] by 2036." *IGas Holdings, Inc. v. Env't Prot. Agency*, 146 F.4th 1126, 1132 (D.C. Cir. 2025). Specifically, Congress directed the EPA to administer a cap-and-trade program. *Id.*

The AIM Act provides no direction to the EPA as to how to distribute 98% of the HFC allowances under the cap-and-trade program, leaving it purely to the agency's discretion which companies receive

allowances, and which do not. Petition for Certiorari at 2. Congress may not delegate such rulemaking power to the Executive Branch.

"No one, not even Congress, ha[s] the right to alter [the constitutional] arrangement" of powers. *Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting). "Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

The People, through the Constitution, conferred upon the federal government specified powers. To preserve their own liberty, they divided those powers among the legislative, executive, and judicial branches, enumerating to each the powers they were to exercise.

The nondelegation doctrine derives both from the Vesting Clause of Article I and the fundamental constitutional principle of limited government. Congress may not exercise powers not vested in it by the Constitution. Because Article I vests in Congress no power to delegate, Congress could only delegate power to the President if doing so were within the incidental powers granted to it in the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18. Because delegation of rule-making power is "[in]consist[ent] with the letter and spirit of the Constitution," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), it is not "proper" and therefore not a power vested in Congress.

Properly understood, the nondelegation doctrine prohibits Congress from delegating its Article I powers

to the Executive Branch. Article I's vesting of only certain enumerated powers in Congress served the dual purpose of ensuring that the federal government would be one of limited powers, and of ensuring that the government's most important powers, including royal prerogative powers under the British constitutional system, would be exercised by the people's representatives through the deliberative legislative process, not unilaterally by the President or by unelected bureaucrats.

Government officials may not alter the structures created by the Constitution except by the procedures the Constitution itself establishes for its own amendment. When those in government attempt to modify the constitutional arrangement apart from the established amendment procedures, they act beyond their legitimate power and usurp the powers "reserved to the States respectively, or to the people." U.S. Const. art. X.

The courts "were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority,"[4] and serve as a last line of defense for the people's liberty, without which "all the reservations of particular rights or privileges would amount to nothing."[5] The Court should play that role here.

For decades, the Court has allowed Congress to pass off significant power to the Executive Branch,

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[4] The Federalist No. 78 at 403 (Alexander Hamilton) (George Carey & James McClellan eds., The Liberty Fund 2001).
[5] *Id.*

reducing accountability and undermining the constitutional bargain between the people and the federal government. "Delegation," has been "running riot." *Gundy*, 588 U.S. at 161 (Gorsuch, J., dissenting) (internal quotation marks omitted) (quoting *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

Yet the Court has also long held that Congress's inability to "delegate its legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). This case provides the Court with a clear opportunity to begin to revitalize the nondelegation doctrine, and with it, the Constitution's limits on government powers.

The Court should grant the petition for certiorari.

ARGUMENT

I. The Nondelegation Doctrine is Required by the Vesting Clause, Separation of Powers, and Fundamental Constitutional Principles.

Article I of the Constitution vests "*[a]ll* legislative Powers" of the national government "in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). The Constitution's vesting of a power in Congress "is a bar on [that power's] further delegation." *FCC v. Consumers' Research*, No. 24-354, slip op. at 10 (June 27, 2025) (citing *Whitman v. American Trucking*, 531 U.S. 457, 472 (2001). The nondelegation doctrine, the Court's rule for enforcing this constitutional principle, "bars Congress from transferring its legislative power to another branch of

Government." *Gundy*, 588 U.S. at 132 (opinion of Kagan, J.). *But see, Gundy*, 588 U.S. at 135 (opinion of Kagan, J.) ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion.").

Congress cannot delegate any of its powers, whether legislative in nature or not, to the Executive Branch.[6] Congress only has those powers enumerated in the Constitution.[7] *McCulloch*, 17 U.S. at 405 (The federal "Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge.").

The Constitution, "rather than granting general authority to perform all the conceivable functions of government," "lists, or enumerates, the Federal Government's powers." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (opinion of Roberts, C.J.). An "enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *Id.* at 534 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)) (alteration in original). "If no enumerated power authorizes Congress to pass a certain law, that law may not be

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[6] Of course, when Congress empowers the President to take executive action, that is not a delegation of power.

[7] The Federalist No. 45 at 241 (James Madison) (George Carey & James McClellan eds., The Liberty Fund 2001) ("The powers delegated by the proposed constitution to the federal government, are few and defined.").

enacted." *Id.* at 535. Needless to say, there is no enumerated power to delegate.

Therefore, if Congress wanted to delegate any power to the Executive Branch, it would have to turn to the Necessary and Proper Clause. Article I, section 8 grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested by the Constitution in the Federal Government. U.S. Const. art. I, § 8, cl. 18. That Clause is not a grant of any independent power. *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 559 (Opinion of Roberts, C.J.) (alteration in original) (quoting *McCulloch*, 17 U.S. at 411) (explaining that the Necessary and Proper Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated.").

The Court has "been very deferential to Congress's determination that a regulation is 'necessary,'" upholding "laws that are 'convenient, or useful or conducive to the authority's beneficial exercise.'" *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 559 (Opinion of Roberts, C.J.) (quoting *United States v. Comstock*, 560 U.S. 126, 133-34 (2010)). But the Necessary and Proper Clause, interpreted according to its original meaning, grants significantly less discretion to Congress.

As Justice Thomas has explained, *McCulloch v. Maryland* created a two-part test to assess whether an exercised power is within the scope of the Necessary and Proper Clause:

> First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers

> expressly delegated to the Federal Government by some provision in the Constitution . . . Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

United States v. Comstock, 560 U.S. 126, 160-61 (2010) (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

First, delegation is not among "the powers expressly delegated to the Federal Government by some provision in the Constitution." *Id.* Congressional delegation of power, therefore, falls outside the plain language of the Necessary and Poper Clause's requirement that its power only extends to the powers vested in the federal government by the Constitution.

Further, delegation is "inconsistent with [the Constitution's] 'letter and spirit.'" *Id.*

Article I, section 8's powers are vested exclusively in Congress because the framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting).

In fact, many of the powers delegated to Congress in Article I, section 8 were royal prerogative powers in the British constitutional system. "Most of the prerogatives that had been exercised by the King, in whole or in substantial part, were transferred in their entireties to Congress. Eighteen royal prerogatives were removed entirely from the Executive and delegated to Congress."[8] "Fourteen of the twenty-five specific plenary powers that are vested in Congress in Article I, section 8" and four congressional powers that have been recognized under the Necessary and Proper Clause were formerly royal prerogative powers.[9]

Article I's vesting of powers in Congress was thus both about limiting the federal government's powers and about ensuring that important governmental powers were exercised by the people's representatives, not by the executive.

According to James Madison, there are two means of securing the liberty of the people against government abuse. "[T]he primary control on the government" is "a dependence on the people," but, he explained, experience had "taught mankind the necessity of auxiliary precautions."[10] When Executive Branch officials exercise legislative power, those protections would be undermined.

First, the most immediate source of the federal government's "dependence on," or accountability to, the people is the biennial election of members of the

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[8] Robert J. Reinstein, *The Limits of Executive Power* 59 Am. U.L. Rev. 259, 306 (2009).
[9] *Id.* at 306 n.276.
[10] Federalist No. 51 (James Madison) (George Carey & James McClellan eds., The Liberty Fund 2001).

House of Representatives. Because the vast majority of members seek reelection,[11] the American people in general have an opportunity every other November to hold Congress accountable in a meaningful way. And the people's representatives, responsible for a relatively small number of constituents, are more responsive to the needs of Americans as individuals and in communities.

On the other hand, it is much more difficult for the people to hold Executive Branch officials accountable. By design, the presidential election through the electoral college is part democratic and part state-based. That system works well for electing an executive that represents the country as a whole but not for holding a lawmaker accountable.

This is even more true when a president is in his second term and thus cannot face electoral accountability again. Delegation of Article I powers to the President thus undermines the first of Madison's precautions against government abuse.

Second, Executive Branch officials are not constrained by the deliberative legislative process. Because popular accountability is not always sufficient to restrain government excess, the Constitution's structural and textual limits on power act as "auxiliary precautions."[12] At the Founding, it was the "facility and excess of lawmaking" that

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[11] "Going back 80 years, the average number of House open seats has been 35," or less than 10% of the Houses members. *House retirements so far are at a historic low*, Roll Call (July 9, 2025 3:19 PM) https://rollcall.com/2025/07/09/house-open-seats-retirements-midterm-elections/.

[12] Madison, Federalist No. 51 *supra* note 10 at 269.

"seem[ed] to be the diseases to which our governments [were] most liable."[13] As a cure to those "diseases," "the framers went to great lengths to make lawmaking difficult." *Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting). While, "[s]ome occasionally complain about the arduous processes for new legislation," "to the framers these were bulwarks of liberty." *Id.*

These "arduous processes" "were also designed to promote deliberation," *id.*, because:

> The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.[14]

Of course, the executive's exercise of at least some delegations is limited by the Administrative Procedure Act. But these limitations, which are imperfect, are also not constitutionally endorsed.

Further, not only does congressional delegation of power to the Executive Branch undermine accountability and the limits on government power; it also hollows out the structural constraints that ensure liberty.

"No one, not even Congress, ha[s] the right to alter [the constitutional] arrangement" of powers. *Gundy*,

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[13] Federalist No. 62, 321-22 (James Madison) (George Carey & James McClellan eds., The Liberty Fund 2001).

[14] Federalist No. 73, 381-82 (Alexander Hamilton) (George Carey & James McClellan eds., The Liberty Fund 2001).

588 U.S. at 153 (Gorsuch, J., dissenting). Yet that is exactly what delegation accomplishes. If Congress can pass off its powers, those with which it, alone, was entrusted by the people, it can amend the Constitution by the vote of a bare majority of one Congress and the assent of the President.

When the President signs such a bill into law, he completes a process that is extremely difficult to undo. Presidents later cannot be relied upon to sign a bill in which Congress reclaims that power, but to override the President's veto of such a bill, Congress would need a two-thirds majority vote. U.S. Const. art. I, § 7, cl. 2.

The nondelegation principle, then, is at the core of constitutional design. When Congress delegates one of its enumerated powers to the Executive Branch, it undermines the bargain struck between the people and the government in the Constitution and undermines several of the protections the Constitution implements for the protection of the people's liberty.

Such delegation is not only "[in]consistent with," but destructive to, the "letter and spirit" of the Constitution, *Comstock*, 560 U.S. at 161 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421), and, therefore, is not within the scope of incidental powers vested in Congress by the Necessary and Proper Clause.

Therefore, because "all legislative power" granted to the federal government in the Constitution is vested in Congress; because Congress has only those powers vested in it and the power to delegate is not among

them; and because delegation would undermine the Constitution's liberty-protecting system of rule-making and thus is not within the scope of Congress's Necessary and Proper Clause power; Congress cannot delegate its enumerated powers to the Executive Branch.

II. The Nondelegation Doctrine Requires that Congress, Not Executive Branch Officials, Make Important Policy Decisions.

Legislative power is "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescribe the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'" *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton); *Fletcher v. Peck*, 6 Cranch 87, 136 (1810)).

According to Blackstone, "Legislators and their laws are said to compel and oblige."[15] As Professor Philip Hamburger explains:

> [T]he natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not . . . It therefore was assumed that the enactment of legally binding rules could come only from a representative legislature and that the resulting rules could bind only subjects, not other peoples . . . [T]he executive

[15] *Id.* (internal quotation marks omitted).

> could not make rules or duties that bound subjects, for these were legislative.[16]

To police the boundary between laws that legitimately empower the President to take executive action and laws that improperly delegate legislative power to the executive, the Court has held that Congress must "lay down . . . an intelligible principle to which the person or body authorized" to exercise the power in question must "conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). The intelligible principle test has, at times, allowed Congress to empower the President with "extraordinarily capacious standards," *Gundy*, 588 U.S. at 149 (Alito, J., concurring).

Although it is true that the Court has applied the nondelegation doctrine loosely, *Gundy*, 588 U.S. at 146 (plurality opinion) ("Those standards, the Court has made clear, are not demanding."), properly applied, it sets a high bar for congressional direction of presidential action. When the Court first used the term "intelligible principle" in 1928, "No one . . . thought the phrase meant to effect some revolution in this Court's understanding of the Constitution." *Gundy*, 588 U.S. at 162 (Gorsuch, J., dissenting). The difficulty in some cases of determining "the exact line between policy and details, law-making and fact-finding, and legislative and non-legislative functions" does not undermine the fact that "these [are] the relevant inquiries." *Id.*

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[16] *Id.*

Justice Gorsuch has explained how the Court can apply the nondelegation doctrine in a way that is more faithful to the Constitution's separation of powers:

> To determine whether a statute provides an intelligible principle, [courts] must ask: 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).

It is past time for the Court to adopt a more rigorous application of the nondelegation doctrine like the one Justice Gorsuch has proposed. The Constitution, adopted by the representatives of the people in the state ratifying conventions, grants Congress, not the other branches, those powers enumerated in Article I, section 8.

The Court's responsibility, to act "as an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority,"[17] requires that it strike down laws that would transfer the legislature's powers to the Executive Branch and

[17] Hamilton, *supra* note 4.

thereby to protect the liberty of the people. Otherwise, the Constitution's limitations and government power and protections for individual rights "amount to nothing."[18]

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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[18] *Id.*