No. 25-1079

In the Supreme Court of the United States

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

v.

UNITED STATES 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* STATES OF WEST VIRGINIA AND 20 OTHER STATES IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Far too often, Congress decides it doesn't want to make a tough decision and instead punts to another. This case involves another such unfortunate case.

Here, Congress offloaded critical choices about our nation's markets to the Environmental Protection Agency. In the American Innovation and Manufacturing Act of 2020, Congress set a cap on hydrofluorocarbons. As the multi-billion-dollar industry reduces its size, the Act requires businesses to produce or consume HFCs through "allowance[s]." 42 U.S.C. § 7675(b)(2). But instead of just telling EPA how to allocate these newly scarce resources, Congress left it to the agency to draft its own criteria for 98% of the allowances. So the substantive law appears not in the United States Code but in the Federal Register. And Congress can wash its hands of any responsibility for whatever painful consequences might follow.

Congress harms our whole constitutional order when it divests itself of legislative power like this. *Amici* States in turn suffer real harms; they lose their ability to regulate their own citizens in areas of traditional concern and shed their signature character as "laboratories of democracy." But because Congress has both a proclivity and an incentive to delegate its lawmaking power, this problem will likely worsen over time. Only this Court can draw the lines necessary to remedy these constitutional imbalances.

To be sure, this Court looked at the nondelegation doctrine not too long ago. *FCC* v. *Consumers' Rsch.*, 606 U.S. 656 (2025). But the Court there focused on whether

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[1] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

"tax statutes—and probably all revenue-raising statutes—have to satisfy a special nondelegation rule." *Id.* at 673. *Amici* States aren't asking for topic-based exceptions to the rule. Rather, they are asking for a tough, close reevaluation of the entire nondelegation doctrine—and whether it's working in any context. It's not.

So the time for another close look is now. In the AIM Act, Congress has allowed EPA to partition national markets all on its own, even though "the basic and consequential tradeoffs involved in such a choice are ones that Congress" typically makes. *West Virginia* v. *EPA*, 597 U.S. 697, 730 (2022). "If perchance Congress possesses power to manage the [HFC] business within the various states, authority to do so cannot be committed to another." *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 382-83 (1939) (McReynolds & Butler, J.J., dissenting). And lower courts can't supply the missing standards by spelunking through legislative history, as happened here. See App.16-18. Legislative history has no place in the face of an unambiguous statute. *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 458 (2012). This statute is unambiguously *silent*.

The Petition asks whether the nondelegation doctrine retains any independent force. If "intelligible principles" are to mean anything, then they can't mean vague handwaving from Congress followed by on-the-fly supplementation from agencies or courts. And if the intelligible-principles test doesn't foreclose even this shoddy legislative work, then the Court should ditch it and return to a truer understanding of the doctrine. The *Amici* States thus ask the Court to grant the Petition and provide a clear and robust nondelegation doctrine—restoring the powers to their proper places.

SUMMARY OF ARGUMENT

I. The Framers purposefully separated lawmaking authority between Congress and the States. Yet as the administrative state grows, Congress offloads important policy decisions to the President's agencies. Despite earlier Court intervention—and a history of consistent separation of powers line-drawing—the Court's nondelegation doctrine has eroded into the all-but-toothless "intelligible principles" test.

II. The present test conflicts with just about everything in the Constitution. It finds no grounding in the Constitution's text, structure, convention history, and the earliest legislative precedents. It also conflicts with the sovereign lawmaking separation between Congress and the States: stripping States of their signature "laboratories of democracy" character. Unfortunately, no other separation of powers principles can structurally restore the proper lawmaking power balance.

III. Despite confusion in the lower courts, hope is not lost. This Court can still draw on principles from the Constitution's text, early cases, and State examples to reinvigorate the nondelegation doctrine. The Court should act now to give Congress, States, agencies, and lower courts the clarity they need. The AIM Act at least offers the means to do that.

REASONS FOR GRANTING THE PETITION

I. Congress Cedes Legislative Power Away With No Meaningful Check.

A. The Framers envisioned a nation free from the abuses that accompany concentrated power. See THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

So they first identified the three essential government powers: the power to make the law, the power to execute it, and the power to construe its commands. THE FEDERALIST NO. 47 (J. Madison); THE FEDERALIST NOS. 78, 80, 81 (A. Hamilton); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). They then divided those powers between three branches—Congress, the Executive, and the Judiciary—to "counteract ambition." See THE FEDERALIST NO. 51 (A. Hamilton or J. Madison); U.S. CONST. arts. I, II, III; Philip B. Kurland, *The Constitution: The Framers' Intent, the Present and the Future*, 32 ST. LOUIS UNIV. L. J. 17, 19 (1987).

As a further check on concentrated power, the Framers "split the atom of sovereignty" between the States and the federal government. *Gamble* v. *United States*, 587 U.S. 678, 688 (2019). As dual sovereigns in this system, the States "claim[] the powers inherent in sovereignty." *Murphy* v. *NCAA*, 584 U.S. 453, 470 (2018). Among other things, they carry "the power[] of legislation[] delegated to them by the[ir] State Constitutions." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 387 (1798). So, like Congress, States have the power to make laws "to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence." *Id.* at 388.

The Framers thus expected that well-balanced horizontal and vertical separation would keep power in check. And "[t]his devotion to the separation of powers is, in part, what supports [the Court's] enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it." *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring). Applying this "exclusivity" conception, deciding who does what should

be relatively straightforward. Courts would need only to ask whether a given power is legislative and, if so, whether a statute deprives Congress of exclusive control over the exercise of that power. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (applying the Executive Vesting Clause).

B. Since the founding, the federal government has undergone a structural renovation. Meanwhile, an equal balance among the branches (and between the States and federal government) has become a distant memory.

The "size and scope of the [federal] administrative state ha[s] grown over the past century." Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 33 (2021). Largely a product of FDR's New Deal era, the President's administrative agencies ballooned from George Washington's original three to now well over 400—commanding more than two million civilian employees. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1277 (2006); *Federal Register: Agencies*, NAT'L ARCHIVES, https://tinyurl.com/48yff9n6 (last accessed Apr. 7, 2026); *Executive Branch Civilian Employment Since 1940*, OPM, https://tinyurl.com/46jskbfh (last accessed Apr. 7, 2026). Contrast that Leviathan with the size of the legislative and judicial branches: their employees *combined* numbered only about 75,000 in 2020. GPO, FY 2020 BUDGET OF THE U.S. GOVERNMENT 73 (2020), https://tinyurl.com/dr97ej3w. The administrative state has become so pronounced that some even refer to it as a "fourth branch" of government. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (cleaned up).

Unprecedented executive expansion came with opportunities and temptations. Initially, Congress broadened its use of executive agencies "to tackle the new and vexing problems that were arising" during the New Deal era. See Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 160 (2021). But seeing an opportunity to offload political accountability, Congress instituted regulatory regimes with broad and vague authorizations, pawning off important policy choices to executive agencies. See Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference under Separated Powers*, 17 NYU J. L. & LIBERTY 1, 24 (2023); see also generally R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371 (1986). Indeed, Congress has "persistent incentives for delegation to agencies, because it is often easier to serve [its] interests through shaping administration than by passing legislation." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 NYU L. REV. 1463, 1463 (2015).

At the same time, administrative agencies "carv[ed] out space for presidential control between the lines of statutory text," Ashraf Ahmed, et al., *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2143 (2024), to bring within their regulatory ambit "vast swaths of American life," *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring). As of 2024, the President's agencies had promulgated "roughly 200,000 pages of *agency-generated rules*—approximately nine to ten times as many pages as the congressionally-passed laws—that are enforced through threat of criminal punishment, civil penalties, denial of valuable privileges, loss of benefits, and damaging publicity." Ronald A. Cass, *Deference to*

Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State, 19 THE FEDERALIST SOC'Y REV. 54, 58 (2024). This expansion executed a "hidden revolution" of constitutional magnitude. See William J. Novak, *The Administrative State in America*, *in* 1 THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW: THE ADMINISTRATIVE STATE 98, 100 (2017).

C. When the President and Congress have tried to swap functions, this Court has often acted to keep the powers separate. When the President tried to exert "emergency" powers to act without congressional blessing, for instance, the Court blocked the power grab. See generally *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). When the President wanted to shield himself from criminal subpoenas, the Court enforced what Congress required. See generally *United States* v. *Nixon*, 418 U.S. 683 (1974). The Court warded off the unchecked legislative veto, see generally *INS* v. *Chadha*, 462 U.S. 919 (1983), and deemed the line-item veto unconstitutional, see generally *Clinton* v. *City of New York*, 524 U.S. 417 (1998). And it emphasized divided powers when Congress tried to criminalize executive actions. See generally *Trump* v. *United States*, 603 U.S. 593 (2024). So the Court repeatedly and emphatically draws the separating line between the powers.

For a time, the Court was equally vigilant in policing efforts to delegate the lawmaking power to the executive. In *Panama Refining Company* v. *Ryan*, the Court found that Congress could not delegate legislative authority to the President to regulate petroleum transport against the States. 293 U.S. 388, 415, 421, 430 (1935). Again, in *A.L.A. Schechter Poultry Corporation* v. *United States*, a unanimous Court held that Congress supplied no

standards for any trade, industry, or activity to guide the President leaving his judgment "virtually unfettered." 295 U.S. 495, 541-42 (1935). Then, in *Carter* v. *Carter Coal Company*, the Court shunned legislative delegation of labor hours to private industry parties. 298 U.S. 238, 310-12 (1936). So, the Court has enforced the nondelegation doctrine more than once. See David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 224-35 (2020) (collecting cases).

But things soon came apart. Despite this Court's traditional adherence to separation-of-powers principles, the nondelegation doctrine has atrophied from its once-muscular form in *Panama*. Under its current form, Congress must set out little more than general policies in a statute. See *Consumers' Rsch.*, 606 U.S. at 673. This looser standard was said to be justified because of our "increasingly complex society, replete with ever changing and more technical problems." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). But while "it's a new world," [i]t's the same Constitution." Tr. of Oral Arg. at 34, *Trump* v. *Barbara*, No. 25-365 (U.S. argued Apr. 1, 2026) (Roberts, C.J.). And less concern was shown for the principles underlying the Vesting Clauses, which should impose "strict limits." *Ortiz* v. *United States*, 585 U.S. 427, 476 (2018) (Alito, J., dissenting).

The Constitution has thus become a frail guardian against delegation. The "intelligible principle" standard, first articulated in *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928), may have started with the best of intentions; it sought to resolve a "seeming dilemma" that Congress need decide everything under a strict nondelegation doctrine. David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*,

83 MICH. L. REV. 1223, 1224 (1985). But the amorphous test "has allowed the interpretation of the [non]delegation doctrine to swing like a pendulum with the changing politics of the Court and the times." *Id.* Under the "intelligible principles" test, the Court has upheld "utterly vacuous statutes," "simply recit[ing]" the Court's "past holdings and wearily mov[ing] on." Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994).

"[I]t is the demise of [the nondelegation] doctrine that has allowed the Congress both to augment and to fragment the executive branch by establishing federal agencies within the executive tasked with making policy pursuant to broad mandates." Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010). But "[i]f the aim of the Article I Vesting Clause … is to ensure that Congress wields the legislative power that the Constitution grants it, then delegations of unilateral authority to the President are particularly concerning." David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REG. 60, 63 (2024) (footnotes omitted). In other words, the test has tended to encourage the precise *opposite* of what the Framers intended in setting out the respective roles of the three branches.

II. The "Intelligible Principles" Test Must Go.

A. The "intelligible principles" test not only eludes a definitive standard: it finds no grounding in the Constitution's text, structure, convention history, nor early legislative precedent. The test therefore "does not adequately reinforce the Constitution's allocation of

legislative power." *Ass'n of Am. R.R.*, 575 U.S. at 77 (Thomas, J., concurring).

First, the test conflicts with the Constitution's text. The first line of the first section of the first article of the Constitution vests "[a]ll legislative Powers" "in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. And "[w]hat is a legislative power, but a power of making laws?" THE FEDERALIST NO. 33 (A. Hamilton) (citation modified); see also M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 28-29 (2d ed. 1998) (1967). Nowhere does the Constitution say that the legislative powers are committed to the President's agencies or that Congress need provide only an "intelligible principle" to the agency. Instead, the "true nature" of the lawmaking power commits to Congress the responsibility to "pass all laws" "necessary and proper" "for the execution of that power." THE FEDERALIST NO. 33 (A. Hamilton) (cleaned up); U.S. CONST. art. I, § 8, cl. 18. All means all.

Second, the test is inconsistent with the Constitution's broader structure. Instead of suggesting delegated authority to agencies, the powers are separated between three institutions in the Constitution. U.S. CONST. arts. I, II, III. The executive power is vested in the President, the legislative powers in Congress, and the judicial power in the Court. *Id.* The way the Constitution commands these institutions to interact also demands separation. For example, the legislative process of bicameralism and presentment require separate legislative bodies within Congress and an isolated President. U.S. CONST. art. I, § 7. And the Constitution names only three sources of law: the Constitution, laws, and treaties, each of which

Congress—not agencies—holds the authority to make and ratify. U.S. CONST. art. VI, cl. 2.

Third, the Framers designed the Constitution to confer legislative powers exclusively on Congress in the Constitutional Convention—an aim that an ambiguous nondelegation doctrine undermines. Each of the constitutional plans proposed vesting the legislative power in a national legislature and no other body. Compare *Variant Texts of the Plan Presented by Alexander Hamilton to the Federal Convention – Texts A-E*, YALE L. SCH., https://tinyurl.com/428kk8su (last accessed Apr. 7, 2026); with *Variant Texts of the Plan presented by William Patterson – Texts A-C*, YALE L. SCH., https://tinyurl.com/y2teyhsj (last accessed Apr. 7, 2026); and *Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Fed. Convention, May 29, 1787 – Texts A-C*, YALE L. SCH., https://tinyurl.com/3dzuew4k (last accessed Apr. 7, 2026); and *The Plan of Charles Pinckney (South Carolina), Presented to the Federal Convention*, YALE L. SCH., https://tinyurl.com/ym6tm3b9 (last accessed Apr. 7, 2026).

Statements by the members of the convention mirror that design. In rejecting the idea that the judicial branch be empowered to revise Congress's laws, representatives argued that the branches' functions "must [be] separate"—"Judges must interpret the Laws they ought not to be legislators." See, *e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 108 (Max Farrand ed., 1911) (June 4, 1787, Rufus King). They saw that "the power of making [law] ought to be kept distinct from that of expounding[] the laws." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 75 (Max Farrand ed., 1911) (July 21, 1787, James Madison); see also Aaron

Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718, 744-47 (2019).

Fourth, the first Congress guarded its legislative prerogatives on important topics. The first several congressional debates and Acts show that, despite claims to the contrary, *e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), "Congress could not, and did not, delegate discretion over 'important subjects' to the Executive," Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021). For example, in debating post-road establishment, Congress rejected a proposal to delegate this determination to the President. Gordon, *supra*, at 744-47. "Generally speaking, the acts of early Congresses were very detailed and left little to administrators." Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152, 158 (2023). So, long "[b]efore the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld." *Gundy v. United States*, 588 U.S. 128, 160 (2019) (Gorsuch, J., dissenting).

The founding-era evidence thus points to a robust nondelegation doctrine—much stronger than the present "intelligible principle" test—because Congress's legislative power is exclusive to its institution.

B. Accompanying the Constitution's three-branch design is an equally important structural check on concentrated lawmaking power—separation between the States and the national government. States possess a unique role in our constitutional order that Congress must respect. When Congress impermissibly delegates lawmaking power "it also risks intruding on powers reserved to the States." See *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring).

The Constitution created "a legal system unprecedented in form and design, establishing two orders of government, each with its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (cleaned up). In this system, the Framers split lawmaking power unequally between the States and the national government. State legislative authority is far-reaching: a state legislature "may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases," "they may [even] command what is right, and prohibit what is wrong." *Calder*, 3 U.S. (3 Dall.) at 388. All this to "promote the peace, comfort, convenience, and prosperity" of the States' citizens. *Escanaba & Lake Mich. Transp. Co.* v. *City of Chi.*, 107 U.S. 678, 683 (1883). On the other hand, Congress's lawmaking power is limited. Congress may legislate on things like taxes, commerce, immigration, currency, post offices, patents, etc. U.S. CONST. art. I, § 8. But "[a]ll powers not delegated to [the federal government], or inhibited to the states, are reserved to the states or to the people." *Briscoe* v. *Bank of Commw. of Ky.*, 36 U.S. (11 Pet.) 257, 317 (1837); see also U.S. CONST. amend. X.

Lawmaking at the federal level is best left to Congress because it has an interest in protecting the "integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Each chamber of Congress is an assembly of representatives from the *States*. U.S. CONST. art. I, § 2. And these representatives are in turn beholden to local "[v]oters who like or dislike the effects of [a] regulation [and] know who to credit or blame." *Murphy*, 584 U.S. at 473. Wide representation thus "connect[s] the members of Congress with the people, ensuring that various interests of individuals and

regions [are] part of the deliberations within Congress." Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FL. L. REV. 1, 27 (2018); see also Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 779 (2021) ("[S]ingle-member districts promote[] legislative responsiveness to constituents, local civic and political organizations, and local governments.").

Other institutional characteristics tie Congress to the States. For instance, the States hold an integral role in federal elections. See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). States apply political party pressure, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1130 (2014), and lobby Congress as well, see Comment, *The Lesson of Lopez: The Political Dynamics of Federalism's Political Safeguards*, 119 HARV. L. REV. 609, 621-22 (2005). So, "the role of the [S]tates in the composition and selection of the central government," among other things, "is intrinsically well adapted to … restraining new intrusions by the center on the domain of the [S]tates." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

Administrative agencies, on the other hand, are ill-suited to protecting State interests. "Agency officials are not directly accountable to voters," they are "focused on federal needs and powers rather than state interests," and practically speaking, "agencies are not set up to evaluate and protect state regulatory powers." Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 26 (William W. Buzbee ed., 2009). Agencies can "preempt

nearly any sort of state regulation simply by referencing a subordinate federal purpose that is somehow impeded by state law." *Id.* So, "[m]embers of Congress … blatantly evade the political safeguards of federalism and electoral accountability by delegating authority to agencies." Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 58 (2008).

Congress's impermissible delegations then work as a "negative" on the States' right to regulate their own citizens, "consolidate[ing]" the States into one entity. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 28 (July 17, 1787, James Madison). That consolidation "disgust[s] all the States" and our dual system of sovereignty—that's why the Framers voted against it in the beginning. See *id.* When States are unlawfully confined to regulate according to the whims of agency administrators and private delegates, States lose their signature character as "laboratories of democracy." DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993); see also Alexandra Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1709-12 (2008).

So an amorphous "intelligible principles" standard strips States of their power to hold lawmakers accountable and robs them of their experimental character, too.

C. Some believe the nondelegation doctrine's interests are already served through the major questions doctrine and the "best reading" standard in *Loper Bright*. See *Consumers' Rsch.*, 606 U.S. at 705 (Kavanaugh, J., concurring); Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. 539, 576 (2024). Though

these principles represent steps toward a healthier separation of powers, a close analysis reveals how they fall short of the structural protections offered by a robust nondelegation doctrine.

Begin with the major questions doctrine. The major questions doctrine asks whether Congress clearly authorized an agency to use the power the agency claims. See *West Virginia*, 597 U.S. at 723. It "is about preventing agencies from exploiting Congress's delegation of power." Anita S. Krishnakumar, *What the New Major Questions Doctrine is* Not, 92 G.W. L. REV. 1117, 1124 (2024); see also Samuel Joyce, *Testing the Major Questions Doctrine*, 43 STAN. ENV'T L. J. 52, 93 (2024). So, it "explicitly allows broad or significant delegations of power to administrative agencies—so long as Congress clearly and explicitly authorizes the delegation." Krishnakumar, *supra*, at 1124. For example, in *Biden v. Nebraska*, the Department of Education sought to forgive student loan debt under the COVID-19-related HEROES Act. 600 U.S. 477 (2023). The Department relied on emergency-time "waiver" language to do so. *Id.* at 488. The relevant question was only whether that language gave the Department authority it claimed. *Id.* at 501.

The nondelegation doctrine is different. "[T]he nondelegation doctrine is about restricting Congress's ability to give away too much power." Krishnakumar, *supra*, at 1124. For instance, in this case, no one contests that Congress delegated broadly to EPA the authority to determine how HFC allowances are assigned. The question is whether Congress can legitimately allow EPA to make this choice. Put differently, this case is not one where a parent hires a babysitter to watch her young children over the weekend and gives the babysitter a credit card, saying, "Make sure the kids have fun." See

Biden, 600 U.S. at 513 (Barrett, J., concurring). It's more like giving the kids to the babysitter for a year—an improper, wholesale delegation of the parental function.

Similarly, the Court's recognition that judges—not agencies—determine the meaning of statutes does not address the structural separation of powers issues at play. Judges can ascertain the "best reading" of a statute to be that Congress delegated lawmaking authority. See *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394-95 (2024). But the Court must still review the statute under the APA to "effectuate the will of Congress subject to *constitutional limits*." *Id.* (emphasis added). If no independent delegation limit arises from the nondelegation doctrine, then no nondelegation enforcement would arise under *Loper Bright*. Again, this is no answer to whether Congress can delegate its lawmaking power to the agency in the first place. And even worse, courts might be tempted to do what the lower court did here, reading in intelligible standards in the guise of construing the statute. See A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 456 (2017) (describing cases in which "the non-delegation doctrine was wholly defanged" in part because "the Court invented restrictions" on agency power that were not in the statute).

Just as neither of the doctrines here touch on structural separation of powers issues, they fail to address the problem of power reclamation. Under any of these doctrines, Congress can delegate lawmaking power. But none provide a mechanism—or even a reason—Congress can reclaim power already delegated. See Joseph Diedrich, *Delegation Running Ratchet*, 104 TEX. L. REV. ONLINE 205, 220 (2026). Without a robust nondelegation

doctrine, Congress's delegations act as a "one-way ratchet toward the gradual but continual accretion of power in the executive branch." Tr. of Oral Arg. at 72, 74, *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628 (2026) (No. 24-1287) (Gorsuch, J.).

At bottom, "[s]tate sovereign interests … are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). Those procedural safeguards can't be text on a cold page with nothing more.

III. The Court Can and Should Strengthen the Nondelegation Doctrine.

A. There's still hope for a more constitutional, workable, and meaningful nondelegation doctrine. Most of the Court has signaled it believes as much. *Gundy* v. *United States*, 588 U.S. 128, 164-65 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 148-49 (Alito, J., concurring); *see also Paul* v. *United States*, 589 U.S. 1087 (2019) (Kavanaugh, J., statement respecting denial of cert.). Perhaps the Court is waiting for the right opportunity to restore meat to the nondelegation doctrine's frail frame. *See Learning Resources, Inc.*, 146 S. Ct. at 668 n.6 (2026) (Gorsuch, J., concurring); *Consumers' Rsch.*, 606 U.S. at 662, 698 (Kavanaugh, J., concurring and Roberts, C.J., joining the majority). If so, the wait should be over.

This case is ideal because the AIM Act "likely fail[s] even [*J.W.*'s] forgiving test." Amy C. Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 320 (2014). Congress's delegation to EPA gives no standard on how to allocate multi-billion-dollar HFC allowances that shape

the contours of an entire industry. The AIM Act gives no guidance to the agency; no general policy to follow; nor ascertainable boundaries for the Courts and the public to know whether EPA is allocating the allowances in line with Congress's will. See Pet.16-21. At minimum, then, the lower court's judgment should be reversed.

If the Court decides this case, it could provide much-needed clarity to the lower courts. It's not just that lower courts have been confused about administering precious resources like the HFC allowances in this case. Lower courts have also been confused about how to apply the "intelligible principle" test in everything from SEC actions, see *SEC* v. *Jarkesy*, 603 U.S. 109 (2024) (not reaching the nondelegation issue), to OSHA safety standards, see *Allstates Refractory Contractors, LLC* v. *Su*, 144 S. Ct. 2490 (2024) (denying cert.), to horseracing activities, see, *e.g.*, *Oklahoma* v. *United States*, 144 S. Ct. 2679 (2024) (denying cert.). Lower courts even struggle to apply the doctrine when it comes to criminal sanctions on public lands. See Pet. for Cert., *Pheasant* v. *United States*, No. 25-6911 (U.S. filed Feb. 20, 2026). At an absolute minimum, the Petition provides a welcome chance to remind these courts that "intelligible principles" are not imaginary ones and must apply across these cases.

B. But really, this case gives the Court everything it needs to clarify and strengthen the nondelegation doctrine in a way that's more consistent with the Constitution and State interests.

First principles are key here. "It will not be contended that Congress can delegate to the Courts [or to anyone else] powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. at 42. However, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself" but which are not

"legislative powers." *Id.* at 43. Among those powers is the rulemaking power. "The rulemaking power … is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976). But while "[t]he line has not been exactly drawn which separates" lawmaking from rulemaking, several things confirm that Congress overstepped in the AIM Act. *Wayman*, 23 U.S. at 43.

First, rulemaking becomes lawmaking when Congress allows agencies to regulate, in some "real sense," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892), "important … interest[s]," *Wayman*, 23 U.S. at 43. Impermissible rulemaking involves "general provisions," or "primary standard[s]." *Id.*; see also *Buttfield* v. *Stranahan*, 192 U.S. 470, 96 (1904). The broader the provision, the more suspect the rulemaking. The AIM Act regulates an important interest in a real sense: setting all the terms for how—and even *if*—a business can operate in a multi-billion-dollar industry.

Second, Congress must set a "policy," "a certain course of procedure[,] and certain rules of decision" for the agency to perform its functions. *Panama*, 293 U.S. at 432, 430 (quoting *Wichita R. & Light Co.* v. *Pub. Utils. Comm'n of the State of Kansas*, 260 U.S. 48, 59 (1922)). Broad declarations of policy are insufficient. *Id.* at 418. If Congress sets inadequate policies, procedures, or rules, the purported rulemaking is lawmaking. Here, Congress gave EPA no policies, procedures, or rules on how to allocate 98% of the allowances. And the lower court assumed that the policies underlying an earlier statute could be penciled into this one.

Third, rulemaking involves fact-finding. *Marshall Field & Co.*, 143 U.S. at 693; *see also Panama*, 293 U.S. at

415 (considering "whether the Congress has required any finding by the President"). If rulemaking does not involve fact-finding, it is more likely lawmaking. EPA does not find any facts to allocate allowances under the AIM Act, except as it deems them legally relevant. EPA lays out the law on allowances, then declares whether the company meets the criteria for the allowance.

Fourth, the Congressional authorization must comport with traditional "precedents in legislation." *Marshall Field & Co.*, 143 U.S. at 683-90. If close analogues to this kind of authorization exist historically, it would more likely be rulemaking. But they're absent here. Congress knows how to make cap-and-trade programs with sufficient detail to avoid nondelegation concerns in other multi-billion-dollar industries. For example, in the Clean Air Act, Congress named about 110 individual power plants and then their relevant generators and allocated specific allowances for SO_2 emissions for Phase I. 42 U.S.C. § 7651c(e) (Table A). Congress further dictated detailed instructions on allowance calculations in Phase II. *See id.* § 7651d. The AIM Act, by contrast, is anomalous in how much detail it lacks.

Beyond lessons gleaned from this Court's jurisprudence, "[w]e all can learn from the states' experiments." Adam J. White, *Learning from Laboratories of Liberty*, 46 HARV. J.L. & PUB. POL'Y 303, 303 (2023). States often consider nondelegation challenges to state statutes. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636-43 (2017). They are well-positioned to advise the Court on what has worked within their "laboratories of democracy." Benjamin Silver, *Nondelegation in the States*, 75 VANDERBILT L. REV. 1211, 1260-62 (2022). The Court

might consider, for example, a Florida nondelegation standard: the existence of "legislative delineation of priorities among competing areas and resources." Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 293 (2022) (quoting *Askew* v. *Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978)).

At bottom, federal courts have seemed unwilling to address delegation problems because of a fear that Congress might not be up to the task of more legislating. But evidence shows otherwise. Congress provided detailed allowance rules as to many scarce resource allocation scenarios like radio-wave spectrum auctions, 47 U.S.C. § 309(j); peanut, tobacco, and sugar quotas, 7 U.S.C. §§ 1311–14 (repealed), 1357–1359a (repealed), 1359aa-1359jj; airport landing slots, 49 U.S.C. §§ 41714-41718, and water, 43 U.S.C. §§ 617-617u. Yet it provided no legislative priorities in allocating allowances in the AIM Act. It's not too much to ask Congress to return to the drawing board and bring with it the same attention to the task that it has applied in these and other contexts.

* * *

"[E]ven those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court's making an example of one—just one—of the many enactments that appear to violate the principle." Antonin Scalia, *A Note on the Benzene Case*, 4 AEI J. ON GOV'T & SOC'Y 25, 28 (1980). The AIM Act's standardless, market-shifting delegation provides a clear shot at that.

CONCLUSION

The Court should grant the petition.

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