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 Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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 Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs supporting the separation of powers as a way to protect liberty and promote democratically accountable government.

This case concerns MI because it implicates the nondelegation doctrine, which helps ensure that the legislative branch performs its function rather than delegating it to unelected administrative agencies.

SUMMARY OF ARGUMENT

The American Innovation and Manufacturing act of 2020 (AIM Act) is an unconstitutional delegation of legislative power to the executive branch. It contains no rules, no guidelines, and no instructions on how the EPA should carve up a multi-billion-dollar industry. The only way the lower court was able to ascertain a "rule" was by smuggling in guidelines from a different statute that is not referenced in the AIM Act. This case is an opportunity for the Court to reassess the viability of the nondelegation doctrine and to say whether the intelligible-principle test is still valid.

The nondelegation doctrine is crucial to the history and theory of the Constitution. It goes to the heart of America's Founding and plays a central role in ensuring the proper separation of powers. James Madison and members of the first Congress debated non-

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. 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.

delegation soon after ratification and considered it an integral part of maintaining a democratically accountable government that preserves liberty. The Constitution's tripartite structure creates an obvious need for the nondelegation doctrine, to ensure that no branch usurps another's powers nor divest itself of its own.

Over the years, the test for nondelegation has become increasingly vague and lax, such that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 105 (1946). That means that even vague statutes calling for regulation in "the public interest" can pass muster under the intelligible-principle test. Some on this Court are skeptical that the rule is either functional or constitutionally faithful. *See, e.g., Gundy v. United States*, 588 U.S. 128, 160–69 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 589 U.S. 1087 (2019) (Kavanaugh, J., respecting denial of certiorari).

This case demonstrates how far we have moved away from a robust, proper, and even meaningful nondelegation doctrine. The delegation to the EPA by Congress was so broad that the government did not hide that it had an essentially unlimited authority to allocate hydrofluorocarbon (HFC) allowances. It even relied on this Court's lax delegation jurisprudence in responding to comments, saying this Court has "over and over upheld even very broad delegations." Pet.11. The D.C. Circuit then doubled the constitutional harm by supplying an "intelligible principle" for the AIM Act transplanted from Title VI of the Clean Air Act. Pet.13–14. Oddly, the court did that despite the EPA's claiming during rulemaking that it was not obligated

to follow Title VI's market-share approach. Pet.14. That not only creates a second violation of separation-of-powers principles, Pet.21–25, but makes the woeful state of the nondelegation doctrine even worse. Now, not only does Congress not have to supply intelligible principles for guidance—or any principle at all, as in this case—but agencies that administer many complex statutes (*i.e.*, most of them) can now use those statutes as a kind of cross-referencing tool to defend rule-makings. That is so even when, as here, one statute explicitly doesn't incorporate the other.

That makes this a good case for the Court to provide greater doctrinal clarity. The guideline-less AIM Act, combined with D.C. Circuit overreach, could ensure that nondelegation is truly dead, even though this Court has not (officially) killed it. After all, nondelegation challenges to agency actions are likely to go through the D.C. Circuit, which has now authorized itself *sua sponte* to comb through multiple statutes to conjure otherwise absent intelligible principles.

Also, this case touches on unique policy questions, so giving nondelegation more jurisprudential weight need not undermine broader precedents and agencies. There are many agencies that rely on delegated congressional power, and many statutes that give authority in different ways. Those statutes usually supply more than *nothing* for guidance, but here "the Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). Plus, environmental policy is quite separate from issues of inherent executive authority that intertwine questions of Article I and Article II powers. This case also features a recent delegation to the EPA and a subsequent troublesome

ratification by the lower court. It provides a clean vehicle for clarifying the nondelegation doctrine.

The lack of enforcement of the nondelegation doctrine has served as cover for vast delegations of lawmaking authority from the legislative branch to the executive branch. These delegations are increasingly creating problems of democratic accountability and excessive political conflict as power is centralized around control over the presidency and the administrative state. Agencies create most of the rules Americans live under, and the country experiences policy whiplash each time the presidency changes.

Well before the American Revolution, John Locke wrote that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." John Locke, *Second Treatise of Government* §141 (1690). Locke expressed what became written in the Constitution: the over-delegation of legislative power endangers liberty. Nondelegation serves as a bulwark for protecting each branch by preventing divestment. The Court should take this case to ensure a robust and functional nondelegation doctrine.

ARGUMENT

I. THE NONDELEGATION DOCTRINE IS AN INTEGRAL PART OF CONSTITUTIONAL STRUCTURE AND HISTORY

While courts, including the D.C. Circuit in this case, have often reduced nondelegation to an empty platitude, it has deep roots in our history. The principle is a cornerstone of liberal, democratic government. *First*, it was understood and applied at the Founding. From the earliest debates in the first sessions of

Congress, representatives were concerned about Congress doing its job rather than giving it away to the executive branch. *Second*, nondelegation fits into the broader constitutional structure and serves to separate the powers between the different branches of government. And *third*, the nondelegation of legislative power protects democratic accountability and political stability within our system of government.

A. Nondelegation Was Important to the Framers and Members of Early Congresses

In 1789, during the first Congress under the new Constitution, James Madison proposed an amendment for the Bills of Rights related to nondelegation. This amendment would have specified that no branch of government could exercise the powers delegated to another branch. Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1504–05 (2021). Rep. Sherman argued that the amendment was "unnecessary, inasmuch as the Constitution assigned the business of each branch of the Government to a separate department." 1 Annals of Congress 760 (Joseph Gales ed., 1834). Madison agreed but noted that the amendment might allay some fears by clarifying that the "powers ought to be separate and distinct." *Id.* The amendment would pass the House but was blocked in the Senate for unknown reasons.

Madison believed nondelegation was already present in the Constitution but sought to make it explicit. Many state constitutions had specific separation-of-powers clauses, such as the Virginia Constitution of 1776 and the New Hampshire Constitution of 1784. Often, those clauses in state constitutions were not clear and later changes needed to be made to account for necessary checks and balances. Philip Hamburger,

Nondelegation Blues, 91 Geo. Wash. L. Rev. 1083, 1131–34 (2023). Moreover, the needs of those state governments often made it difficult to abide by those clauses in a strict sense. The clause in New Hampshire's constitution, for example, called for strict separation of powers "as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." *Id.* at 1133 (quoting N.H. Const. of 1784, art. XXXVII). This is likely one reason Madison's amendment did not pass the Senate; legislators may have felt that the Constitution's structure already ensured proper separation of powers, such that a more explicit clause could add confusion, as it surely did in New Hampshire.

In 1791, during the Second Congress, the first great debate around the nondelegation doctrine emerged. A bill was proposed to establish a post office and post roads throughout the country—legislation arising from an enumerated power of Congress. Wurman, *supra*, at 1506–12. Theodore Sedgwick, a representative from Massachusetts, proposed an amendment that replaced the part precisely describing where the roads would go with "by such route as the President of the United States shall, from time to time, cause to be established." *Id.* at 1506–07. The amendment was rejected, and several representatives took issue with the bill's delegation of power to the president.

For example, Rep. Hartley argued that "the Constitution seems to have intended that we should exercise all the powers respecting the establishing [of] post roads we are capable of," and added, "[w]e represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to

delegate the power to any other person." 3 Annals of Cong. 231 (1791). Rep. Page agreed, offering a joking suggestion that they "could save a deal of time and money" by leaving the "business of the Post Office to the President" as well as "any other business of legislation" and then the Congress could adjourn and go home. *Id.* at 233–34. Madison noted that "there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution." *Id.* at 238–39. In total, five representatives made statements opposing Sedgwick's amendment on nondelegation grounds.

Moreover, reporters of the second Congress commented that Sedgwick "thought it sufficient that the House should establish the principle and then leave it to the Executive to carry it into effect." *Id.* at 230. It seems that even Sedgwick did not argue for an open-ended delegation, because he thought that the "House should establish the principle" to guide the executive. That is more than is supplied by the AIM Act here.

There is further evidence of a well-grounded nondelegation doctrine from the Alien and Sedition Acts controversy in the late 1790s. After the acts were enacted, two states, Kentucky and Virginia, passed resolutions condemning them as unconstitutional. Madison wrote the Virginia Resolution and also a report that explained the resolution and his opposition.

The report pointed out that the Alien Friends Act, one of the four laws that made up the Alien and Sedation Acts, authorized the "President of the United States . . . to order all such aliens as he shall judge dangerous to the peace and safety of the United States" to depart the country. Wurman, *supra*, at 1512. For Madison, this was too broad of a delegation

that did not contain "details, definitions, and rules, as appertain to the true character of a law." James Madison, The Report of 1800 (Jan. 7, 1800), *Founders Online,* Nat'l Archives, https://tinyurl.com/2s34x6h2. He observed that the act gives powers to the executive that are "so general and undefined, as to be of a legislative, not of an executive or judicial nature." *Id.* Because the vague delegation did not lay "down any precise rules," then it might as well be the case that the "whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws." *Id.*

Although written at a time of partisan rancor—and when Madison didn't hold office—the father of the Constitution continued his opposition to delegation without "any precise rules" that he had maintained since the first Congress. And some members of Congress shared that objection, such as Rep. Livingston, who argued the act "empowered [the president] to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill." 8 Annals of Cong. 2008 (1798).

The historical record—Madison's proposed amendment, debates around the Post Roads Clause, and the response to the Alien and Sedition Acts—shows that the founding generation embraced the idea of nondelegation of powers between government branches.

B. The Nondelegation Doctrine Is Vital to Our System of Separation of Powers

Ask someone on the street what he knows about the Constitution beyond the Bill of Rights, and you might get "separation of powers." Not many may be able to

define it, but the concept sticks in the mind. Rightfully so, as it's a core element of the structural Constitution.

The principle of nondelegation emerges organically from the separation of powers and the vesting of those powers in specific branches. Our constitutional structure was informed by political theorists such as John Locke, who clearly opposed delegation, especially delegation of legislative power. Locke, *supra*, §141. Yet, even without resorting to political philosophers—who most average colonists of course hadn't read—the nondelegation doctrine was crucial to consensual government. The generation that rallied under the slogan "no taxation without representation" was keen on having legislative power derive from the people. Consent came from representation—and only one part of the government, the House, directly represented the people in the original Constitution. Over-delegation undermines consensual government. *Cf. Morrison v. Olson*, 487 U.S. 654, 727 (1988) (explaining that powers are separated "not merely to assure effective government but to preserve individual freedom").

Accordingly, the Constitution "vests" power in each of the three branches. More specifically, the Constitution says that the powers "shall be vested" in each branch of government. This phrasing is not accidental. "Shall be" denotes not only the transfer of power, but where that power is located—it *shall be* in the Congress, or *shall be* in president, etc. Thus, "[a]ccompanying that assignment of power to Congress is a bar on its further delegation." *Gundy*, 588 U.S. at 135 (Gorsuch, J., dissenting). A power that is vested could theoretically be divested, but a power that "shall be vested" not only grants the specific powers to each branch of government but also commands their

location. The nondelegation doctrine is the glue that ensures that this vesting of power in each branch remains true to the constitutional mandate.

This textual analysis is not simply hair-splitting literalism; it emerges from basic constitutional theory. The principle of the separation of powers was a cherished idea of political thought for the 18th-century American colonists. Madison noted that the separation of powers was an "essential precaution in favor of liberty" and that "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." Federalist No. 47 (Madison). Madison had read the French political theorist Baron de Montesquieu, the "preeminent theorist of separation." Hamburger, *supra*, at 1129. Montesquieu wrote that the three powers of government—legislative, executive, and judicial—need to be divided: "there is no liberty, if the power of judging be not separated from the legislative and executive" lest "the judge would be then the legislator." 1 Baron de Montesquieu, *The Spirit of Laws* 216 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1758) (1748). Montesquieu noted that in despotic Turkey, where the three powers were united in the Sultan, "the subjects groan[ed] under the . . . oppression." *Id.* at 216–17.

Yet separation of powers is combined with checks and balances, so Madison also noted that no branch could be "totally separate and distinct from each other." Federalist No. 47 (Madison). Exceptions to the separation of powers are explicit and limited, such as the presidential veto power and its congressional override. These limited exceptions ensure that separation

of powers does not become an empty platitude but is grounded in the Constitution's structural roots.

Delegating a power that "shall be" vested in one branch is a proscribed divestment. The nondelegation doctrine protects the specific powers of each branch and preserves the Framers' overall equilibrium.

C. The Doctrine Helps Ensure Democratic Accountability and Political Stability

The Constitution divides power between branches according to the branch's proper function in a republican government. The laws start with Congress, which represents the people most directly, then they are executed by the president, who has some democratic accountability but not enough to declare sweeping and binding laws. When powers are delegated between branches differently than envisioned by the Constitution, this structure is distorted.

The president is not representative of the people in all their specificity as the Congress is. Executive agencies are certainly not representative. Delegating legislative power to the executive may not forbid anyone from voting, but it certainly dilutes the value of a vote for and in Congress. Unelected bureaucrats who are delegated legislative power have essentially taken power out of the hands of the individual voter.

The contours of our Constitution thus protect democratic accountability—and nondelegation is the tool through which courts can stop the devaluation of voting rights by returning legislative power to Congress. While there are few cases that precisely delineate the nondelegation doctrine, that does not preclude the Court from invoking it now. As Justice Gorsuch noted when reflecting on the concept of *stare decisis*, "a past

decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 423 (2024) (Gorsuch, J., concurring).

Indeed, the Court has recently taken steps to stop the usurpation of democratic authority in other areas. For example, in *Dobbs*, it overruled precedent that had usurped voters' prerogative by establishing a federal right to abortion through judicial fiat. The Court specifically noted that *Roe v. Wade* and *Planned Parenthood v. Casey* had "short-circuited the democratic process by closing it to [a] large number of Americans." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 269 (2022). *Dobbs* affirmed that "[t]he Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address." *Id.* at 338 (Kavanaugh, J., concurring).

This Court has also recently taken action to stop aggressive executive action and ensure that rulemaking for important constitutional powers such as taxes and tariffs remain in the hands of Congress. In *Learning Resources, Inc. v. Trump*, the Court struck down the president's attempted use of a broad statute to establish tariffs. That opinion did not invoke nondelegation, but the Court was emphatic that "[i]n a very real sense, then, when it comes to legislative power, Congress is the principal and executive officials are the

agents." *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 653 (2026) (Gorsuch, J., concurring).

Increased democratic accountability can also promote political stability, because over-delegation has enabled the rapid expansion of the administrative state. Congress simply transfers hard regulatory questions to agencies, allowing it to wash its hands of complex questions of lawmaking. *See generally*, David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (2008). What results is the slow eradication of consensual lawmaking; the laws that bind Americans increasingly are not being consented to through voting for elected representatives. And Congress has incentives to abdicate its responsibility because it can "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).

All of this can create alienation among a public that is losing faith in their representatives' ability to meaningfully create law. As of February 2026, only 16% of Americans approve of Congress's performance, which is roughly on par with the past few years of polling. *Congress and the Public*, Gallup, https://tinyurl.com/7w6atwr9. This dynamic breeds resentment and eventually political conflict. The party of the president becomes more important as executive fiat replaces legislative action in the Congress. "And when a President of the opposite party enters office, newly empowered agency heads can often change the rules 180 degrees." John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 6 (2022). As a result, the rules "reflect not the public deliberations of elected representatives, but the concerns of

small cadres of elites. And as those cadres turn over from administration to administration, the rules revolve, too, inflicting whiplash on those who must live under them." *FCC v. Consumers' Research*, 606 U.S. 656, 745 (2025) (Gorsuch, J., dissenting).

II. THE INTELLIGIBLE-PRINCIPLE TEST HAS BECOME UNWORKABLE—AND WILL BE EFFECTIVELY MEANINGLESS IF THE DECISION BELOW IS ALLOWED TO STAND

Current Supreme Court doctrine seeks to implement ideas of nondelegation through the "intelligible principle" test. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). But many judges and scholars have noted that the test is ineffective. It "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting). Indeed, some scholars have referred to the test as a "fiction." *See* e.g., Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in Seila Law Makes CFPB's Unlawful Structure Even Worse*, U. Chi. L. Rev. Online (2020), https://perma.cc/UF49-4B5R.

There are very few guidelines for what constitutes an "intelligible principle." For example, anyone from the attorney general to even semi-private bodies like Amtrak can be delegated authority. *See Gundy*, 588 U.S. at 135–36; *Dep't of Transp. v. Ass'n of Am. R.R.*,

575 U.S. 43, 53–54 (2015). Additionally, it is unclear if the intelligible-principle test is a static rule or if it changes over time, allowing for evermore broad directives as society gets more complex and creating strict statutory guidelines becomes harder. This Court's "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

The nondelegation doctrine once had teeth, with a unanimous vote of this Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and an 8–1 vote in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *Panama Refining* is most apt here. The Court observed that "the Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. That guideline-less, over-delegation was so extreme that

> were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body.

Id.

That warning in 1935 seems to be the world we live in now. The AIM Act is as deficient as the "hot oil" act was in *Panama Refining*. The AIM Act simply authorizes the EPA to phase down HFCs within a 15-year period. But as to the allowances of who can continue to use HFCs, only a few instructions are given covering 2% of the market. The remaining 98% of HFC users, however, are given market share at the discretion of the EPA. Pet.17–18. This is beneath the most basic "constitutionally sufficient" threshold that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co.*, 329 U.S. at 105.

The AIM Act may have a general policy, and it may apply to a specific agency, but it has no boundaries to its delegated authority. The lower court argues that allocating "allowances in a cap-and-trade program is the sort of 'technical issue' for which little guidance is necessary." *Igas Holdings, Inc., et al., v. EPA*, 146 F.4th 1126, 1140 (D.C. Cir. 2025). However, this "technical issue" is a question of whether thousands of businesses will be able to produce and consume HFCs. Many companies in the refrigerant industry could face extinction, all at the whims of the EPA. If the AIM Act passes muster with the intelligible-principle test, then it seems there is no test at all. As Justice Kavanaugh recently noted, the intelligible-principle test "has historically not packed much punch in constricting Congress's authority to delegate." *Consumers' Research*, 620 U.S. at 705 (Kavanaugh, J., concurring). *See also Ass'n of Am. R.R.*, 575 U.S. at 77 (Thomas, J., concurring) (noting that "the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition").

The government has already essentially admitted that there is no intelligible principle. The lower court found one in a different statute. So the question here is not whether the AIM Act constituted an excessive delegation of authority but rather whether the Court has abandoned "all pretense of enforcing a qualitative distinction between legislative and executive power." *Id.* at 84 (Thomas, J., concurring).

III. THIS CASE IS A GOOD, LIMITED VEHICLE FOR REVIEWING THE NONDELEGATION DOCTRINE

It is unlikely that blocking a portion of the AIM Act will upend other delegations. Whereas previous delegations of lawmaking authority rested on a minimum directive, the AIM Act provides no guidelines. So the Court can comfortably explain that no guidance is a bridge too far, while not necessarily imperiling statutes that give at least some principles, whether "intelligible" or not.

In other words, the HFC portion of the AIM Act is a specific and relatively limited piece of legislation that won't immediately endanger other reliance interests. Administrative rulemaking has a deep basis in U.S. law. Rulemaking authority comes in many forms and derives from many statutes. The AIM Act is of relatively recent vintage and contains a particularly overbroad delegation. Legislation that delegates authority to agencies like the FCC, SEC, FINRA, or the USDA is deeply settled and unlikely to be thrown into jeopardy.

Moreover, to some degree "the scope of the problem [with the intelligible principle test] can be overstated." *Gundy*, 588 U.S. at 165 (Gorsuch, J., dissenting). Some statutes may seem to lack an intelligible principle but

implicate inherent executive authority. *See*, *e.g.*, *Loving v. United States*, 517 U.S. 748 (1996) (holding that the president's power to prescribe aggravating factors in military justice is connected to inherent presidential authority). Other statutes delegate a relatively open-ended type of fact-finding. *See*, *e.g.*, *Touby v. United States*, 500 U.S. 160 (1991) (upholding a broad delegation to the attorney general to temporarily add substances to the Controlled Substance Act after making certain factual determinations). Fact-finding delegations as in *Touby* might require a different standard than the monolithic intelligible-principle test, but that is unclear because this Court hasn't much developed the test. *Cf. Gundy*, 588 U.S. at 166 (Gorsuch, J., dissenting) ("To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings?"). The AIM Act doesn't implicate these questions.

The Court could consider articulating a strengthened intelligible-principle test that ensures the continued separation of powers and restores democratic responsibility to the Congress. Alternatively, the Court might consider doing away with the test entirely and presenting a new approach to nondelegation that would similarly seek to uphold the Constitution's separations of power and democratic accountability.

Regardless, in rearticulating the nondelegation doctrine, the Court should ensure that its jurisprudence preserves liberty by maintaining that substantive rules and policies ultimately derive from elected representatives, not civil servants. With the current regime, "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." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Voters often does not know whom to blame—or credit—for a policy, and, even if they did, their votes are unlikely to change most regulations.

Some type of delegation is likely needed and even warranted by the Constitution. But that reality should not bar the Court from reasserting basic constitutional norms. The rapid expansion of the administrative state and lawmaking executive agencies has created an unstable and undemocratic situation wherein Congress allows bureaucrats to make most of the rules by which we live our daily lives.

CONCLUSION

The Court should clarify if the nondelegation doctrine still has constitutional legs. For the foregoing reasons, and those stated in the petition, the Court should grant certiorari.

Respectfully submitted,

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