No. 20-1530

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, *ET AL.*,

Petitioners,

v.

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

Respondents.

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

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BRIEF OF *AMICI CURIAE* DOCTORS FOR DISASTER PREPAREDNESS AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

ANDREW L. SCHLAFLY
939 Old Chester Road
Far Hills, NJ 07931
(908) 719-8608
aschlafly@aol.com

Counsel for Amici Curiae

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QUESTION PRESENTED

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules – including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy – without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are Doctors for Disaster Preparedness, a group of scientists founded in 1984, and Eagle Forum Education & Legal Defense Fund, founded in 1981 by Phyllis Schlafly. *Amici* oppose direct and indirect modifications of the Constitution through litigation, and have opposed unlawful agency infringement on access to affordable energy.

Amici thus have a strong interest in this appeal.

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[1] *Amici* file this brief with written consent by all parties. The Consolidated Edison, *et al.*, respondents have provided written consent to the filing of this brief, and blanket consents have been filed by all other parties. No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Misuse of science for an agenda of political control is dangerous, and the sort of tyranny by factionalism that the Constitution safeguards against. The unchecked administrative state is the pathway by which this subterfuge creeps in. Disguise a method of control in the name of science, ostracize those who object to its lack of scientific basis, and *voilà*: the will of the People is thereby subverted. If current trends continue, a handful of unelected bureaucrats could virtually prohibit use of the combustion engine that traditional cars have efficiently used, and average Americans will become dependent on government allowance of electric charging stations in order to merely travel from point A to B.

This usurpation by agencies of congressional power has no resemblance to anything authorized by the Constitution, and it is long overdue to rein in the runaway administrative state that political activists have captured to advance their own agenda.

Here the Clean Air Act is being misused in ways never intended. Its lack of airtight wording is being exploited for the highly partisan political goal of controlling traditional energy under the guise of "climate change." While gun control increases dependency on government for protection, energy control increases dependency on government for heating, air conditioning, refrigeration, lighting, and travel. If our cars become dependent on government-controlled recharging stations because refineries are regulated out of existence, and our homes become dependent on rationed energy, then freedom is diminished. The harmful ideological goal of increased government control over energy should not prevail.

Section 7411(d) of Title 42 of the United States Code, if interpreted broadly, would seemingly allow an unelected federal agency to prohibit refineries necessary for automobiles, and coal-powered energy sources necessary for home electricity. More than 300 million Americans use mechanical devices that rely for energy on smokestacks that impact the air. It is unlikely that even Congress has the authority to inconvenience and control every American under the guise of improving air quality. A handful of bureaucrats in a federal agency certainly lacks that authority, and it would be unconstitutional for Congress to delegate such sweeping power to an unaccountable administrator.

Continued unfettered delegation to administrative agencies leaves a cavernous hole in the constitutionally balanced structure of checks and balances because agencies are prone to be arbitrary and unaccountable. "The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure." Marci Hamilton, *Representation and NonDelegation: Back to Basics,* 20 Cardozo L. Rev. 807, 821 (1999) ("*Hamilton*, *Representation* & *NonDelegation*").

Congress and many lower courts have already rejected tyranny by edict of the administrative state concerning the Covid-19 pandemic. *See, e.g.*, S.J. Res. 29 (Dec. 8, 2021) (bipartisan 52-48 vote by the U.S. Senate to disapprove the OSHA Covid-19 vaccine mandate against large employers). This Court should reject excess by the administrative state here concerning the fundamental issue of energy, too.

ARGUMENT

I. A Political Faction – Advocates of Strict Government Controls on Energy – Should Not Be Allowed to Circumvent Congress and the Constitution.

We must begin with the basics and recognize that our nation "was conceived in liberty." Abraham Lincoln, *Gettysburg Address* (1863) (referencing the Declaration of Independence 87 years earlier). Towards this end, the Founders designed a Constitution that would tend "to break and control the violence of faction." *The Federalist No. 10*, at 77 (J. Madison) (Clinton Rossiter, ed. 1961). James Madison explained:

> The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

Id. at 79. As James Madison explained later, a tyranny of the majority is every bit as dangerous as a tyranny of a single monarch. *See generally The Federalist No. 51* (J. Madison).

Today there is no greater factional "zeal", as James Madison put it, than the demand for increased government control over energy under a theory of a cataclysmic man-made climate change. This forecast has not materialized for more than a quarter-century of zealotry about it, but no matter as its proponents hope for judicial embrace anyway. Instead, this Court should embrace the Constitution and affirm that Congress exists to deal with such factions, as Madison helped devise.

The Constitution divides power between the federal sovereign and the state sovereigns. Then power is further diffused among the three branches of the federal government, *i.e.* the Legislative Branch, U.S. CONST. art. I, the Executive Branch, U.S. CONST. art. II, and the Judicial Branch, U.S. CONST. art. III.[2] The Bicameral Clause additionally diffuses federal legislative power by dividing Congress into two separate chambers, the Senate and the House of Representatives. U.S. CONST. art. I, §1.

Yet the power-grabbing administrative state seems to know no bounds, as measured by the number of agencies, their budgets and staffing. The number of regulations they issue has grown significantly over the last century. Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, Daedalus, the Journal of the American Academy of Arts and Sciences 33 (Summer 2021) ("Dudley, *Milestones*"). "Today, scores of federal agencies issue thousands of

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[2] *See Muskrat v. United States*, 219 U.S. 346, 352 (1911) ("That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either").

regulations every year. The Code of Federal Regulations contains 242 volumes and more than 185,000 pages." *Id*. at 33-34. Some have referred to the "administrative state as a 'state,' for it has become a sovereign power unto itself, an *imperium in imperio* regulating virtually every dimension of our lives." Charles J. Cooper, *Confronting the Administrative State*, National Affairs 96, 97 (Fall 2015) ("*Cooper*").

"The domain of the administrative state is vast, ranging from the most trivial to the most significant matters of public and private life." *Id.* Indeed, the instant petitions address how our tripartite system of government has been subverted by the expansion of the administrative state. *Id.* at 104.

This growth in the administrative state has created several constitutional problems. First, power to make the law, power to enforce the law, and power to interpret the law have been concentrated in the hands of each respective agency despite Madison's clear position in *Federalist No. 47*,[3] and the plain language of the vesting clauses in Articles I, II, and III of the Constitution. Second, agencies escape real oversight by the three enumerated branches. In other words, the agencies are not accountable to any elected official. Third, the plain language of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and the Oath Clause, U.S. CONST. art. VI, cl. 3, compel strict adherence to the Constitution, including the three vesting clauses.

Some commentators candidly question whether administrative law is law at all. Rather, they believe

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[3] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (J. Madison).

that administrative law "operate[s] as a sort of shadow constitution, channeling the actions of Article I legislators, Article II executives, and Article III judges and calibrating the balance of power among the three branches." Christopher DeMuth, *Can the Administrative State be Tamed*?, 8 Journal of Legal Analysis 121 (2016) (internal citation omitted).[4] "The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 707 (2012) ("*NFIB*") (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Benjamin Franklin spoke eloquently of the need to compromise between multiple viewpoints more than two centuries ago. During the Constitutional Convention, at a point when the convention was sharply divided, Dr. Franklin drew the following analogy between carpentry and legislation. He said:

> When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

1 *The Records of the Federal Convention of 1787*, 488 (Max Farrand ed., 1911). This compromise is difficult, if not impossible in an agency setting.

The legislative branch is the proper forum for competing theories about energy use, and it is for Congress to hash out theories of climate change that have never been proven in a court of law or elsewhere.

[4] https://doi.org/10.1093/JLA/law003 (viewed 12/14/21).

II. THE INTELLIGIBLE PRINCIPLES TEST DOES NOT APPLY BECAUSE SUBSECTION 7411(d) IS UNCONSTITUTIONAL.

Every Federal statute and regulation must, of course, comply with the entire Constitution. Subsection 7411(d) and the regulations promulgated thereunder do not come close. The yardstick used to examine the validity of a delegation is called the Intelligible Principles Test.

Under the Intelligible Principles Test, 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." *Mistretta v United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)). In addition, a delegation is always subject to the legislation that authorized it. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 953-54 (1983).

Before applying the Intelligible Principles Test, the Court may wish to examine the validity of the statutory grant to the agency. Such an examination is consistent with the long-standing principle of statutory construction that when a court is asked to construe a law, it has authority to determine if that law exists. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-447 (1993) ("*USNB*"). "There can be no estoppel in the way of ascertaining the existence of a law." *South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877). Furthermore, "a court may consider an issue 'antecedent to … and ultimately dispositive of' the dispute before it, ***even an issue the parties fail to***

identify and brief." *USNB*, 508 U.S. at 447 (emphasis added, internal citations omitted). This Court explained that:

> "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," … even where the proper construction is that a law does not govern because it is not in force.

USNB, 508 U.S. at 446 (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). The failure of litigants to argue the legal issues correctly does not render an appellate court powerless to address those issues properly:

> Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.

Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.) (en banc), *cert. denied*, 537 U.S. 823 (2002) (internal citation omitted). Indeed, appellate review of the proper law prevents misapplication of the law, injustice, and construction of hypothetical laws.

Because courts have independent authority to determine if a law exists, this Court may and should examine, *sua sponte,* the constitutionality of Subsection 7411(d). *Amici* alert the Court to two possible constitutional defects. First, the latent and patent ambiguities in the language of Subsection 7411(d) violate the Due Process Clause of the Fifth

Amendment. Second, the statute's language allegedly empowers the Administrator of the EPA to take regulatory actions which would "supplant" legislation in violation of the Bicameral and Presentment Clauses. *Chadha*, 462 U.S. at 952-54.

Subsection 7411(d) contains imprecise and vague language. To resolve ambiguities involving such delegation of regulatory authority, courts usually turn to the case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In just thirty-seven years, *Chevron* has become the most often cited Supreme Court case in history. Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. Cal. L. Rev. 1327, 1328 n.8 (2005) (observing that *Chevron* was cited approximately as many times as the combined total of citations to *Marbury v. Madison*, 5 U.S. 137 (1803), *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973)).

Although *Chevron* has been cited many thousands of times, the *Chevron* "two-step" test is incomplete. It should be replaced because *Chevron* test assumes, rather than questions, the validity of a statutory grant. In *Chadha,* the Court did not hesitate to find the legislative veto procedure unconstitutional despite its prior widespread use. In fact, the Court noted that in the fifty years preceding the case approximately three hundred such procedures were included in approximately two hundred statutes. The Court stated:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the

> hallmarks – of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:
>
> > Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes….

Chadha, 462 U.S. at 944-45 (internal citation omitted); *see also NFIB*, 567 U.S. at 550 (Roberts, C.J.) (commenting that the Court may not presuppose the existence of commercial activity to allow Congress to regulate it).

Amici respectfully request that the Court fill a chasm in the Court's delegation jurisprudence: the failure of courts to examine whether the statutory grant of regulatory authority to an executive or administrative agency complies with the Constitution.[5] By adding a step, which could be denominated either as "Step-Zero" or as "Step-Three", to *Chevron's* "two-step" approach, a more robust judicial approach to delegation of regulatory authority is possible. *See generally,* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (recommending an initial inquiry into whether the *Chevron* framework applies at all).

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[5] *See* Hamilton, *Representation & Nondelegation*, 20 Cardozo L. Rev. at 821 ("The Court has addressed delegation to administrative agencies with little rigor, leaving a gaping hole in the Constitution's balanced structure of checks and balances.") (footnote omitted).

Adding this step to the *Chevron* test is essential because our federal government is one of enumerated powers, not one of general powers. In *NFIB*, 567 U.S. 519, the Chief Justice began his opinion by recognizing that limited powers were granted to the federal government and its components, *e.g*. Congress. He stated:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that 'the question respecting the extent of the powers actually granted' to the Federal Government 'is perpetually arising, and will probably continue to arise, as long as our system shall exist.' *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819).

NFIB, 567 U.S. at 533-34 (Roberts, C.J.). As in *McCulloch* and *NFIB*, the Court must again determine the scope of authority delegated from Congress. In making that determination, the Court should reaffirm that the powers of each branch are limited by the Constitution and that there are no federal powers beyond those enumerated in the Constitution.

A. Considering Subsection 7411(d) Contains Vague and Imprecise Terms, the Due Process Clause Is Violated.

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. As this Court has stated: "[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government [albeit state or Federal] deprives them of [life, liberty, or] property." *United*

States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993) (internal citations omitted).

Because the "fundamental requisite of due process … is the opportunity to be heard … [t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Richards v. Jefferson County*, 517 U.S. 793, 799 (1996) (quoting *Mullane*); *Dusenbery v. United States*, 534 U.S. 161, 173 (2002) (Ginsburg, J., dissenting). When words are ambiguous, fair notice is impossible or, at the very least, obfuscated.

The Chief Justice has expressed his own jurisdictional concerns about vague delegations. In one dissent, he said: "When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous – expressing 'a mood rather than a message.'" *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).[6] Indeed,

> [s]uch ambiguity is endemic in the U.S. Code, since Congress often prefers to set a politically uncontroversial goal and leave it to the agencies to figure out the politically controversial means of achieving that goal. Indeed, a number of agencies have been given a regulatory carte blanche – authorization to regulate, for example, in the 'public interest' – and the Supreme Court has

[6] One commentator noted that in the *City of Arlington* case the Court had extended *Chevron* to questions of agency jurisdiction and had thereby gave agencies the ability to overrule courts. *Cooper* at 104.

> uniformly upheld such ***boundless delegations of legislative authority***.

Cooper, at 103 (emphasis added).

Delegation to an agency does not and indeed cannot exist *in vacuo*. As discussed above, it is derivative of a statutory grant of regulatory authority which itself must be constitutionally valid. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"). *Amici* believe the statutory grant in Subsection 7411(d) does not comply with the Constitution. Subsection 7411(d) contains several words and phrases that are vague or imprecise – unable to serve as a guidepost for EPA action. The Court should consider the fuzziness of the words "plan" and "similar".

The word "plan" is imprecise. It appears eight times in Subsection (d): four times it is qualified by the indefinite article "a"; twice it is qualified by the word "implementation"; once it is qualified by the adjective "such", but there is no antecedent plan with boundaries; and once by the adjective "satisfactory". It is the concatenation of the word "plan" with the word "satisfactory" that is truly troubling. It is troubling because it creates a dispensing power in the Administrator of the EPA.[7] As used in Subsection (d),

[7] When the EPA regulates without preset standards imposed by Congress, it turns rulemaking on its head – EPA rulemaking (and other actions) would control legislation instead of being controlled by the legislation. Such a doctrine – agency control of legislation – has no support in the Constitution. It asserts a principle which would provide the agency with an unlimited power, "a power entirely to control the legislation of [C]ongress, and paralyze the

the word "plan" is not constrained within metes and bounds. There are no criteria for the states, the EPA and others to follow.

Likewise, the word "similar" says nothing. The word "similar" provides no boundary. It is generally interpreted to mean:

> that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases "similar" may mean identical or exactly alike. It is a word with different meanings depending on the context in which it is used.

BLACK'S LAW DICTIONARY 1240 (5th ed. 1979) (quoting *Guarantee Mut. Life Ins. Co. v. Harrison*, Tex. Civ. App., 358 S.W. 2d 404, 406 (1962)).

In short, Subsection 7411(d) provides no marker or check to determine whether the EPA has exceeded the authority granted by Congress. *See generally Yakus v. United States*, 321 U.S. 414, 423-24 (1944); *Chadha*, 462 U.S. at 953.

B. Because Subsection 7411(d) Authorizes EPA Actions Which Supplant Legislation, the Bicameral and Presentment Clauses Are Violated.

Although not every administrative action is subject to the bicameralism and presentment requirements, those requirements must be met whenever legislative power is exercised. *See* U.S. CONST. art. I, §1 and §7,

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administration of justice." *Kendall v United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838).

cl. 2. It is apparent from reading the Constitution's other provisions and *The Federalist No. 51* that our Founders were concerned about the natural tendency of people to develop into factions that would promote their own self-interests. Therefore, the Founders designed a legislative process that, in theory and practice, would be modeled today as a series of non-cooperative games whereby a bill becomes a law if and only if the President, Senate and House reach the same equilibrium point by agreeing to identical statutory language. *Cf.* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944) (generally regarded as the formal beginning of game theory) and John Forbes Nash, *Non-Cooperative Games* (1950) (Princeton University Ph.D. Dissertation). Whether particular actions "exercise … legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Chadha*, 462 U.S. at 952 (internal citation omitted).

The legislative character of an action may be established by an examination of the Congressional action it supplants. This "Supplantation Principle" was used to analyze the legislative veto in *Chadha,* 462 U.S. at 952 ("The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants"). The Court should extend this principle to cover all "legislative actions," whether undertaken by an executive department, the judiciary, or an independent agency.

"In short, when Congress '[takes] action that ha[s] the purpose and effect of ***altering the legal rights, duties, and relations of persons*** … outside the Legislative Branch,' it must take that action by the

procedures authorized in the Constitution. See *Chadha*, 462 U.S. at 952-955." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 276 (1991) (brackets and ellipsis in original, emphasis added). Congress has not so acted, and instead the EPA has improperly altered rights.

III. CONGRESS MAY NOT CEDE LEGISLATIVE POWER TO ANOTHER BRANCH OR ENTITY.

This Court has repeatedly prevented Congress from ceding its own power. Congress cannot abdicate its responsibilities by voluntarily ceding its powers:

> That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. *See Freytag v. Commissioner*, 501 U.S. 868, 880 (1991); cf. *Chadha, supra*, at 942, n. 13.

Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

It is a fundamental principle of constitutional law that the chambers of Congress may not reallocate their own powers *inter sese*. The same is true of the reallocation of power between the branches. Only the People may reallocate those powers, and only through an Article V amendment. *See generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995); *Clinton*, 524 U.S. at 449; *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) ("Congress may not by legislation repeal other provisions of the Constitution.").

By failing to enforce the Non-Delegation Doctrine over the last 86 years, a *de facto* reallocation has occurred. It is time to revive and enforce the Non-Delegation Doctrine. Indeed, the Framers' "devotion to the separation of powers is, in part, what supports our 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." *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring in judgment).

The Court has repeatedly held "the lawmaking function belongs to Congress, U.S. CONST. Art. I, § 1, and may not be conveyed to another branch or entity." *See e.g. Loving v. United States*, 517 U.S. 748, 758 (1996) (internal citation omitted). Accordingly, "Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President ...." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

This Court has recognized "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States,* 505 U.S. 144, 182 (1992). The "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.* The improper delegations to the EPA and other agencies have allowed them to operate in an

extra-constitutional vacuum. Although agencies may be said to possess quasi-legislative, quasi-executive, and quasi-judicial powers, the real danger is that these agencies have become immune to our system of checks and balances, the Separation of Powers Doctrine, and the Constitution.

Likewise, Justice Thomas addressed the Court's duty head-on in *Association of American Railroads v. Department of Transportation*, when he ended his concurring opinion with the following words:

> We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that *concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus* that finds no comfortable home in our constitutional structure.

575 U.S. at 91 (Thomas, J., concurring, emphasis added).

CONCLUSION

For the foregoing reasons, Subsection 7411(d) and the regulations promulgated thereunder are void.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

Counsel for Amici Curiae

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