No. 20-1530

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

BRIEF OF JULIAN DAVIS MORTENSON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners claim that 42 U.S.C. § 7411(d), a provision of the Clean Air Act, does not authorize the Clean Power Plan issued by the Environmental Protection Agency in 2015. And they urge this Court, in interpreting the Act, to begin by imposing a constriction: Congress must speak "with unmissable clarity" before authorizing an agency to resolve "major questions." Pet. Br. 14. This rule, they say, is needed to enforce a constitutional prohibition on legislative delegations of authority—a prohibition far stricter than any this Court has ever recognized. *Id.* at 44-49. Under the original understanding of the Constitution, however, there is no such prohibition to enforce, either

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

[2] Professor Bagley has recently taken a position in government service.

directly or through a "major questions" rule. Petitioners' arguments to that effect should be rejected.

At the Founding, prevailing legal and political tenets posed no barrier to legislative delegations of authority on matters of great importance. Eighteenth-century legislatures across the Anglo-American world had a long tradition of delegating broad discretionary rulemaking power to agents, who were not regarded as impermissibly "making law" when they exercised such power within the confines of a statutory mandate. Some writers maintained that the legislature could not *surrender* its legislative power by irrevocably transferring it elsewhere, a rule that reflected ascendant theories about political consent and the justifications for government. But none of these discussions related to statutory delegations of rulemaking power, exercised under the supervision and control of the legislature. Consistent with theory and precedent, legislative delegations were a pervasive feature of both pre- and post-independence state governance in America.

The Constitution's division of power among three branches, and its assignment of all "legislative Powers" to Congress, U.S. Const. art. I, § 1, did not introduce new restrictions on delegation. Nothing inherent in the text or structure of the Constitution requires any limit on Congress's power to delegate rulemaking authority, so long as Congress does not divest itself of its ultimate control over the legislative process. And the debates surrounding the Constitution's drafting and ratification betray no concern about legislative delegations.

This reading is confirmed by political practice in the early Republic, which decisively refutes the existence of any prohibition on delegation. In statute after statute, the First Congress enacted sweeping delegations of policymaking authority over the most crucial

problems facing the young nation, among them foreign commerce, patent rights, taxation, pensions, refinancing the national debt, regulating the federal territories, raising armies, and calling up the militia. These delegations routinely granted vast discretion to resolve major policy questions with little or no guidance. And they repeatedly permitted the executive branch to devise rules that intruded on private rights and conduct. Broad delegations of authority, in short, were ubiquitous in the early Republic.

Modern proponents of a strict nondelegation doctrine have fallen short in their efforts to account for this evidence. To explain away the powerful evidence of early congressional enactments, nondelegation proponents have devised various limiting principles: Congress may delegate questions involving public rights but not private rights, "overlapping" powers but not "core" legislative powers, the authority to "fill in the details" but not to resolve "important subjects." These distinctions, however, are entirely a modern invention. No one articulated them in the Founding era. Nor did anyone invoke them to justify early congressional delegations. Indeed, the few legislators who raised delegation concerns as the 1790s wore on did so precisely in the context of bills addressing public rights, foreign affairs, and the military—the very topics that some commentators now claim are exempt from delegation restrictions. Modern attempts to craft a more stringent nondelegation doctrine are thus not only at odds with early congressional practice—they are at odds with the failed *objections* to that practice.

As for those failed objections, sporadically raised by a small group of legislators in later Congresses, they undermine rather than support the existence of any shared belief in a prohibition on delegation. Constitutional arguments against delegation were almost

never voiced, were typically peripheral to the relevant debates, and repeatedly failed. Rather than restating accepted principles, these arguments were innovative attempts to create constitutional restrictions not previously recognized. At best, early discussions suggest that some individuals wanted to craft limits on Congress's delegation authority. But far from revealing a preexisting consensus on the matter, the novelty and failure of those arguments show the opposite.

Given the vast historical record from the Founding era, it should be easy to identify concrete, consistent evidence of widely understood limits on legislative delegations—if they existed. But the proponents of a newly invigorated nondelegation doctrine have not even mustered "ambiguous historical evidence," *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quotation marks omitted), to support it. Original meaning provides no basis for a strict nondelegation doctrine or its enforcement through a "major questions" rule.

ARGUMENT

I. Legislative Delegations Were Uncontroversial at the Founding.

In the eighteenth century, legislative power was understood to be inherently delegable. The legislature's authority had already been delegated by the people, *see* James Wilson, *Lectures on Law*, ch. V (1791), *reprinted in* 1 *Collected Works of James Wilson* 412 (Kermit L. Hall & Mark David Hall eds., 2011), and the propriety of further subdelegation was taken for granted, *id.* ch. XI, at 721. Indeed, British theory and practice placed no limits on statutory delegations of policymaking authority to agents outside the legislature. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 296-99 (2021). As the Whig hero Algernon Sidney

observed, even if the King could not "have the Legislative power in himself," Parliament could choose to give him the "part in it" that was "necessarily to be performed by him, as the Law prescribes." *Discourses Concerning Government* 459 (1698).

This theory was amply reflected in practice. Parliament had a long tradition of delegating rulemaking authority to the Crown and other agents. *See* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 19 (2016), https://ssrn.com/abstract=2802784 (discussing "prominent instances of rulemaking power accorded to administrators by Parliament from the sixteenth century onwards"). And this tradition continued through the eighteenth century. *See* Cecil T. Carr, *Delegated Legislation: Three Lectures* 48-56 (1921). Extraordinarily broad delegations of rulemaking authority covered matters such as commercial regulations, environmental law, and excise. *See* Craig, *supra*, at 19-27.

The only theoretical limit to these practices voiced by (some) writers was that a legislature had to retain ultimate control—just as the people themselves retained control over the legislature to which they made the initial delegation. *See* Henry St. John, Viscount Bolingbroke, *A Dissertation upon Parties* 209 (2d ed. 1735) ("the People of Great Britain *delegate, but do not give up,* trust, *but do not alienate* their Right and their Power" (emphasis added)); Edmund Burke, *Reflections on the Revolution in France* 294 (1790) ("the House of Commons cannot *renounce* its share of authority," because "the constitution[] forbids . . . such *surrender*" (emphasis added)).

What was prohibited, in other words, was the *alienation* of legislative power, which would sever the connection with the authority of the people. As John

Locke argued, "the legislative [body] 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." *Two Treatises of Government*, bk. II, ch. XI, § 141 (1690) (emphasis added).

Locke was assuredly *not* discussing statutory delegations of rulemaking authority to administrators. He was instead attacking the claim—a tenet of royal absolutism—that the people had not merely *delegated* legislative authority to their sovereign, but had *alienated* it entirely. *See* Mortenson & Bagley, *supra*, at 308-09 (surveying the arguments Locke was repudiating). To associate Locke with nondelegation sentiment is to impose modern concerns on his writings that have nothing to do with the historical conversation that was actually taking place. *E.g.*, Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 153 (2017) (claiming that Locke's concerns "apply equally to delegation").

Indeed, precious little among the writings that influenced the Founders concerns the legislature's ability to delegate policymaking authority. Those writings instead speak in broad strokes about separating government powers to prevent wholesale consolidation. Montesquieu, for example—as James Madison later explained—warned only of the "*whole* power of one department" being wielded "by the same hands which possess the *whole* power of another department." *The Federalist No. 47*, at 325-26 (J. Cooke ed., 1961). That danger could arise "if the king . . . possessed also the complete legislative power." *Id.* at 326. But that danger is absent where the king "cannot of himself make a law." *Id.*

Consistent with British precedent and contemporary theory, legislative delegations were a persistent feature of post-independence state governance in America, including in states that adopted a formal separation of powers as the federal Constitution later would. Virginia's constitution, for example, required the "legislative, executive, and judiciary" departments to be "separate and distinct, so that neither exercise the powers properly belonging to the other." Va. Const. of 1776, ¶ 4. Yet Virginia's legislature "delegated many special powers" to the governor and Council of State, including the power to restrict counterfeiting and "maintain fair prices." Session of Virginia Council of State (Jan. 14, 1778) (editorial note), https://founders.archives.gov/documents/Madison/01-01-02-0065.

Collectively, the states "expressly delegated" an immense range of legislative authorities to the Continental Congress. Articles of Confederation of 1781, art. II. That body, in turn, further delegated legislative authority to committees, boards, and officers on a plethora of subjects including medical services, the postal system, and settlement of the national accounts. *See* Mortenson & Bagley, *supra*, at 303-04.

In sum, when the Constitution was written and ratified, the prevailing concept of "legislative" power did not entail any limits on statutory delegations of rulemaking authority.

II. Constitutional Text and Structure Permit Broad Delegations of Rulemaking Authority.

To prevent the tyranny that an accumulation of "all powers . . . in the same hands" could enable, *The Federalist No. 47*, *supra*, at 324, the Framers assigned legislative, executive, and judicial authorities to three

separate branches. But that separation does not necessarily imply limits on Congress's ability to delegate rulemaking authority.

Article I vests Congress with "[a]ll legislative Powers herein granted," U.S. Const. art. I, § 1, but "there is nothing in the Constitution that specifically states . . . that Congress may not authorize other actors to exercise legislative power," Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335 (2002). "The text of the Constitution," rather, is "silent on the question whether or to what extent legislative power may be shared." Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2127 (2004). And "even if Congress cannot by statute confer power that is 'legislative' on others, the text does not tell us how to discern when that has happened." Nicholas R. Parrillo, *Supplemental Paper to "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power,"* at 3 (May 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902.

The question, in short, is not "whether the legislative power is vested exclusively in the Congress," but "whether a statutory grant of authority can ever violate the constitutional allocation," and if so, in what circumstances. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1729 (2002). "The Vesting Clause does not address that dispute." *Id.*

The word "legislative" does not resolve the matter. Although it has been argued that formulating "generally applicable rules of private conduct," even under statutory authority, is necessarily an "exercise of legislative power," *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment), the Founding-era passages typically

cited for that proposition do not address the issue. Nearly all references to "legislative power" in these sources merely say that it "is the power to make laws, or something to that effect," Merrill, *supra*, at 2124, without discussing (much less questioning) the legitimacy of rulemaking discretion under a duly enacted law.

Moreover, the Founders did not regard "legislative" and "executive" powers in such a rigid fashion; they viewed them instead in nonexclusive and relational terms. The same government action could be described as either "legislative" or "executive" depending on the actor, *see* Mortenson & Bagley, *supra*, at 313-32, in part because executive power was understood simply as the authority to carry out projects defined by a prior exercise of legislative power, *see* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1221-38 (2019); c*f. INS v. Chadha*, 462 US 919, 953 n.16 (1983) ("When the Attorney General performs his duties pursuant to [the Immigration and Nationality Act], he does not exercise 'legislative' power.").

That is why government officials with the power to craft binding rules, such as legislators and treatymakers, were regularly described as executive actors, "servants" of the people who were "accountable to them" for "how they execute" their delegated authority. *Republicus*, Ky. Gazette, Feb. 16, 1788, *reprinted in* 8 *Documentary History of the Ratification of the Constitution* 377 (John P. Kaminski et al. eds., 2009). Thus, Congress and its members were often described as "an executive body." *A Democratic Federalist*, Pa. Herald, Oct. 17, 1787, *reprinted in* 13 *id.* at 387. On the same understanding, rulemaking pursuant to statutory authorization was also described as "executive" power. *See* Mortenson & Bagley, *supra*, at 313-23.

Structural arguments are no more successful in identifying implicit constitutional limits on delegation. Indeed, to the extent the Constitution sheds light on the matter, it points against such limits. The Framers included explicit restrictions on Congress's legislative authorities, *see* U.S. Const. art. I, § 9, which weighs against inferring additional unwritten limits. And the Constitution empowers Congress to make "all Laws" that are "necessary and proper for carrying into Execution" Congress's legislative powers. *Id.* art. I, § 8, cl. 18. In the end, all that can safely be inferred from structure is that Congress may not *alienate* its legislative powers—the only outcome inconsistent with the vesting clauses.

Indeed, among all the records of the Constitutional Convention, the ratification debates, and *The Federalist*, there is "remarkably little evidence" that the Founders envisioned any limit on legislative delegations. Posner & Vermeule, *supra*, at 1733. This is unsurprising because their "principal concern was with legislative aggrandizement," not "grants of statutory authority to executive agents." *Id.* at 1733-34. By one recent count, the secondary literature "claims to have found thirteen references to legal limits on legislatures' capacity to delegate in American discourse from 1774 through 1788." Parrillo, *Supplement*, *supra*, at 8. These "scattered" references "mostly run to a paragraph or less," and many address delegations "categorically different from those that Congress makes to an agency." *Id.*; *e.g.*, *id.* at 43 (Pennsylvania's legislature gave "full" legislative power over all subjects to a "council of safety").

In short, "[t]he overall picture is that the founding era wasn't concerned about delegation." Posner & Vermeule, *supra*, at 1734.

III. The First Congresses Routinely Delegated Major Policy Questions to the Executive Branch.

Early congressional enactments offer "contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (quotation marks omitted). And they are devastating to the nondelegation case.

In the Republic's first decade, Congress routinely delegated virtually unguided policymaking authority on the most pressing questions facing the nation. These statutes conveyed authority over private rights and interests that went far beyond filling in details, finding facts, or organizing public structures. Almost as telling as the enactment of these statutes is the dearth of objections to them on delegation grounds, despite pervasive constitutional debate in the early Congresses.

A. Delegations of Authority by the First Congress

1. Regulating Commerce with Native American Tribes

"Nothing preoccupied the Federalist administration more than having to deal with [the] native peoples" of the trans-Appalachian West. Gordon S. Wood, *Empire of Liberty* 114 (2009). Committed to the settlement of the territories, fearful of provoking war, but believing that trade could foster good relations, President Washington and others advocated regulation of commerce with Indigenous peoples. *See* Mortenson & Bagley, *supra*, at 340-41.

Accordingly, the First Congress prohibited anyone from conducting "any trade or intercourse with the Indian tribes" without a license issued by the executive

branch, and it gave the president complete discretion over the licensing scheme—authorizing "such rules, regulations and restrictions, as . . . shall be made for the government of trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. Although the president's rules would "govern[]" any person receiving a license "in all things touching the said trade and intercourse," *id.*, the statute said nothing—not one word—about their content. And Congress gave the president even *more* discretion regarding "the tribes surrounded in their settlements by the citizens of the United States," *id.*, authorizing him to waive the license requirement whenever he "deem[ed] it proper." *Id.*

"This was indeed a broad statute that delegated authority to regulate private conduct," "giving the Executive complete discretion to decide whether, to whom, and why to grant such licenses." Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1543 (2021). President Washington's use of this authority illustrates the breadth of policymaking discretion the law conferred. His regulations adopted a host of rules that specified *who* could trade, *what* items could be traded, and *where*. *See* Mortenson & Bagley, *supra*, at 341. Yet there is no evidence anyone raised anything resembling a nondelegation objection.

The authority Congress delegated here was squarely within its own legislative wheelhouse. While the president has military and diplomatic authorities, Congress alone has the legislative power to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Attempts to explain the legislation away on other grounds are no more availing. The delegated authority governed the conduct of Americans within the boundaries of the individual states. And even as to its

application in the federal territories, the idea that legislative power could be delegated more freely in the borderlands, *see* Philip Hamburger, *Is Administrative Law Unlawful?* 105 (2014), is nothing but a *post hoc* rationale. No one at the time suggested such a thing. *See* Mortenson & Bagley, *supra*, at 341-42.

2. Exercising Police Power in the Federal Territories

One of Congress's first acts was to "continue" the Northwest Ordinance, which authorized territorial officials to adopt "such laws of the original States, criminal and civil, *as may be necessary, and best suited* to the circumstances of the[ir] district." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 (emphasis added). The statute delegated standardless discretion to craft the entire body of laws for the territories.

Notably, Congress made several changes to the Northwest Ordinance "to adapt [it] to the present Constitution," Act of Aug. 7, 1789, 1 Stat. at 51, thus specifically turning its attention to whether the legislation ran afoul of the new constitutional structure. But in doing so, Congress made only organizational changes to the appointment and reporting system; it made no changes to the Ordinance's sweeping delegation of substantive rulemaking authority. *See* Mortenson & Bagley, *supra*, at 335.

Territorial officials exercised these broad powers, adopting measures ranging from the regulation of taverns to the probate of wills, from liability for trespassing animals to the suppression of gambling. *See* Mortenson & Bagley, *supra*, at 335. If the Founders allowed a person to be publicly whipped for violating rules that Congress never enacted—as they did here, for instance, for petty larceny, *see id.*—it is difficult to

claim they were against delegations of authority over "private rights."

Whenever early Congresses created new territories, they routinely empowered their officials to adopt such rules. *See id.* at 336. No one protested that nonlegislative actors were unconstitutionally making laws, although Congress alone is empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. And if the Founders thought nondelegation had less purchase when it came to the territories, then surely someone, somewhere, would have said as much. No one ever did.

3. Refinancing the National Debt

"Delegation was the First Congress's solution to what was arguably *the* greatest problem facing our fledgling Republic: a potentially insurmountable national debt." Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81, 81 (2021).

To help pay off the nation's immense foreign debt, Congress authorized the president to borrow up to $12 million in new loans, Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 138, and to make other "contracts respecting the said debt *as shall be found for the interest of the [United] States*," *id.* (emphasis added). Twelve million dollars was an immense sum—equaling approximately $1.286 *trillion* today. Chabot, *supra*, at 124. And the only limit on the president's authority was a fifteen-year cap on the life of any restructured loans. Act of Aug. 4, 1790, § 2, 1 Stat. at 139. Key questions about the terms of new loans and the repayment of existing ones were all left to the president's complete discretion. In other words, Congress delegated to the president the power to restructure the nation's foreign

debt on terms that he thought best, with parties he thought best, under conditions he thought best. *See* Mortenson & Bagley, *supra*, at 344-45.

The First Congress also delegated broad policy-making authority to refinance the domestic debt. *See* Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186-87. It vested this authority in the president and the other members of a body known as the Sinking Fund Commission. *Id.* § 2, 1 Stat. at 186. Specifically, the president and the commission could purchase debt "in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act." *Id.* Thus, the entire responsibility for Congress's plan to reduce the public debt was vested in a commission given no meaningful guidance.

By delegating "decisions regarding borrowing and payment policies of the utmost importance to the national economy," Chabot, *supra*, at 81, Congress essentially instructed the executive branch to set national fiscal policy as it saw best. As James Madison said, the borrowing power alone was a delegation of "great trust," involving the "execution of one of the most important laws." 12 *Documentary History of the First Federal Congress of the United States of America* 1349, 1354 (Linda Grant DePauw et al. eds., 1972).

The debt legislation did prompt a constitutional discussion in Congress, where one legislator questioned "whether [Congress was] authorized to delegate such important power." *Id.* at 1349. But Madison and others supported the delegation, given that Congress had capped the amount to be borrowed, *id.* at 1351, ensuring that it was delegating "*less than* its whole borrowing power." Chabot, *supra*, at 119.

4. Granting Patent Rights

To foster commercial innovation and cultivate the nation's economy, the Constitution empowered Congress to secure to authors and inventors "the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

The First Congress promptly delegated this crucial power over the commercial life of the United States to a three-member board of executive officials, giving it ("or any two of them") the power to grant patents of up to fourteen years, with the only guidance being that the officials must "deem the invention or discovery sufficiently useful and important." Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110. Once a patent was granted, all other Americans were deprived of the "right and liberty of making, constructing, using and vending . . . the said invention or discovery." *Id.* Patentees could sue infringers and recover damages. *Id.* § 4, 1 Stat. at 111.

In other words, Congress left three executive officials to decide for themselves what counted as "sufficiently useful and important" to warrant a legally enforceable monopoly—a mandate that "certainly leaves a lot of discretion" to "alter the rights of private persons." Wurman, *supra*, at 1548; *see* Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. Marshall L. Rev. 269, 280 (1995) (the patent board was "left almost entirely to its own devices").

Exercising its delegated power, the executive branch crafted substantive and procedural standards that were nowhere to be found in the statute. *See* Mortenson & Bagley, *supra*, at 339; Chabot, *supra*, at 142-46 (describing the board's resolution of steamboat technology questions that "rendered . . . inventors' interests in existing state patents worthless").

5. Remitting Penalties for Customs and Maritime Commerce Violations

The bulk of the early federal government's income came from customs duties, and Congress accordingly devoted great attention to establishing a system of customs enforcement. Having done so, however, Congress gave the executive branch the "authority to effectively rewrite the statutory penalties for customs violations," delegating "Congress's own authority to determine what financial punishments the government would impose on private individuals for violations of the law." Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243, 306, 249 (2021).

Under the Remission Act, if the Treasury Secretary concluded that a violator acted without "intention of fraud," he could impose as much or as little of the penalty as he "deem[ed] reasonable and just." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23. No further standards were prescribed, and there was no appeal from the Secretary's decisions.

Moreover, Congress "repeatedly reauthorized the Act on a temporary basis, and it was subject to renewed challenge—including on nondelegation grounds—before finally becoming permanent in 1800." Arlyck, *supra*, at 7; *see id.* at 27 (describing failed nondelegation objection by one congressman in 1797).

As Joseph Story later wrote, the "power to remit penalties and forfeitures [was] one of the most important and extensive powers" of the government, which could "be exercised only in the cases prescribed by law." *The Margaretta*, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815) (Story, C.J.). And the discretion the Act conferred was not a matter of mere fact finding. Story contrasted this discretion with the "[v]ery different"

terms of another statute, under which remission was "mandatory . . . where the facts of the cases are brought within the statute," and "[i]f he is satisfied of the existence of such facts, he has no further discretion, but is bound to remit." *Id.* In other words, the Remission Act "allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is 'unfair' or 'unnecessary.'" *Am. Railroads*, 575 U.S. at 85 (Thomas, J.).

6. Other Delegations by the First Congress

In many other areas, Congress likewise delegated broad policymaking authority to the executive branch, with little or no specific guidance, and with barely (if any) constitutional objections being raised.

The First Congress repeatedly authorized executive officers to invade private property without a warrant and with little or no direction. To enforce taxes on domestic distilled spirits, Congress empowered officers to enter "all . . . houses, store-houses, [and] ware-houses" in daytime to examine "the quantity, kinds and proofs of the said spirits therein contained." Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206. Congress said nothing about the circumstances in which officers should employ this power.

Similarly, to enforce customs duties, port inspectors could board arriving ships "to examine the cargo or contents" and "perform such other duties according to law, as they shall be directed," Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164, while other officers could board "every ship or vessel" approaching the United States "to search and examine the same and every part thereof," *id.* § 64, 1 Stat. at 175. Again, Congress laid down no meaningful guidance about the circumstances

in which ships should be searched—effectively permitting the executive branch to craft those rules.

Although legislatures traditionally decided who should be placed on pension lists, Congress authorized the president to identify disabled military members to include on "the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President." Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121. Apart from limiting the size of awards, Congress offered little guidance.

For wounded veterans of the Revolutionary War, Congress delegated even more flexibility—specifying only that pensions begun under the Articles of Confederation should continue "under such regulations as the President of the United States may direct." Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95. No guidance was given concerning the content of these "regulations." And although *other* aspects of this pension regime garnered constitutional scrutiny, at no point did anyone raise a nondelegation objection. *See* Mortenson & Bagley, *supra*, at 343-44.

The First Congress also authorized the president "to call into service from time to time" whatever portions of the state militias "he may judge necessary" for "protecting the inhabitants of the frontiers." Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121. That is, Congress authorized the president to call up any state militias he pleased, at any time, in any numbers, to wherever on the frontier he pleased, so long as he acted in furtherance of Congress's general goal.

This list could go on and on. Sweeping delegations by the First Congress were anything but rare—they were routine.

And notably, the House of Representatives passed these statutes even as it approved a constitutional

amendment stating in part that the executive branch "shall not exercise . . . the power vested in the Legislative" branch. 1 Annals of Cong. 789 (1789). The House does not seem to have thought that the executive branch impermissibly "exercise[d]" Congress's "Legislative" powers, *id.*, when it wielded the authority to fashion policies under a statute.

B. Delegations of Authority by Later Congresses

1. Direct Taxation

Facing another threatened fiscal shortfall in 1798, Congress exercised its power to levy a "direct tax" on property. *See* Act of July 9, 1798, ch. 70, § 8, 1 Stat. 580, 585. Yet again, Congress delegated broad and coercive rulemaking authority, in what was unequivocally the domestic sphere.

The direct tax "fell upon literally every farmer, homeowner, and slaveholder" in the nation, subjecting them "to federal rulemakings that could determine their tax liabilities." Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1302 (2021). To ensure that direct taxes were apportioned among the states, Congress established an "administrative army" to estimate the value of virtually "all private real estate in every state." *Id.* at 1332-33; *see* Act of July 9, 1798, § 8, 1 Stat. at 585. To further ensure that valuations were consistent, Congress empowered commissioners "to revise, adjust and vary" these valuations by altering their tax burdens "as shall appear to be just and equitable." *Id.* § 22, 1 Stat. at 589.

The statute did not define "just and equitable," and the subjective nature of real estate valuation

meant that just about any approach could merit that label. Parrillo, *Assessment*, *supra*, at 1304. The only requirement was that the "relative valuations" of properties within an assessment district could not be altered. *See* Act of July 9, 1798, § 22, 1 Stat. at 589.

The valuation boards used their authorities in a "dramatic and sweeping" fashion. Parrillo, *Assessment*, *supra*, at 1306. Although their determinations decided the amounts that Americans would owe, with no opportunity for review, no one objected on delegation grounds. *Id.* at 1312.

2. Embargoes

In 1794, Congress gave the president unilateral and largely unfettered authority ("under such regulations as the circumstances of the case may require") to keep every ship in the nation at dock, authorizing him to lay an embargo "on all ships and vessels in the ports of the United States" whenever, "in his opinion, the public safety shall so require" and Congress was out of session. Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372.

An especially clear example of delegating the power to issue binding rules for private persons—on a matter of great economic and political importance—the statute was entirely open-ended, beyond its vague requirement that the president perceive a threat to "public safety." Yet no constitutional objection was recorded to the delegation.

3. Quarantine Power

The nation's first quarantine law empowered the president "to aid in the execution of quarantine, and also in the execution of the health laws of the states . . . *in such manner as may to him appear necessary*." Act of May 27, 1796, ch. 31, 1 Stat. 474, 474 (emphasis

added). That mandate "permitted the Executive to make trade-offs between competing policy goals." *Am. Railroads*, 575 U.S. at 79, 85 (Thomas, J.). But while the bill provoked fierce debate about the scope of the federal government's commerce power, *see* Mortenson & Bagley, *supra*, at 356-58, there was no delegation-related objection.

IV. Attempts to Reconcile Early Statutes with Modern Proposals for Strict Delegation Limits Hinge on Distinctions that the Founders Rejected.

As shown above, broad delegations of rulemaking authority were ubiquitous in the nation's first decade in areas of great economic and political significance. Proponents of a strict nondelegation doctrine often concede that these statutes conferred expansive policymaking discretion. But to explain this evidence away, they argue that these statutes all fall within categories in which nondelegation limits supposedly are diminished or nonexistent. These categories include (1) topics like military and foreign affairs that overlap with executive power, (2) government operations or benefits, as opposed to the regulation of private conduct, and (3) mandates to fill in details, as opposed to resolving "important subjects." Without these carveouts, it is impossible to reconcile Congress's early practice with a robust nondelegation doctrine.

But these exceptions are entirely a modern invention. No one made such distinctions in the Founding era. Nor did anyone invoke them to justify early congressional delegations. On the contrary, even the few legislators who raised delegation concerns in early debates *rejected* these distinctions. These categories are merely an attempt at *post hoc* rationalization—distortions of history that mold evidence to fit a conclusion, instead of the other way around.

A. Private Rights

Some have argued that delegation is prohibited only where it implicates private rights and conduct. Text and history foreclose that notion—decisively.

To begin, this artificial limitation cannot be reconciled with the text of Article I. The "legislative Powers" it confers, U.S. Const. art. I, § 1, include all forms of sovereign authority, affecting both public and private rights and drawing no distinction between them. *Id.* art. I, § 8. So too for the Constitution's express *limitations* on Congress's legislative powers. *See id.* art. I, § 9. It is simply not true, therefore, that "[w]hen it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

Even if constitutional text permitted it, there is no historical support for this definition of legislative power. *See, e.g.*, Parrillo, *Supplement*, *supra*, at 5 (dissecting each citation offered for this definition in the *Gundy* dissent); Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "Legislative (adj.)" solely as "Giving laws; lawgiving").

More to the point, proponents of nondelegation have been unable to identify a *single* statement from the Founding era that suggests any distinction in delegation limits between legislation that regulates private conduct and legislation that does not. *Amicus* is similarly unaware of any such evidence.

Even worse, the historical record refutes claims that any such distinction mattered to the Founders. The most substantial debate over delegation occurred in the Second Congress, in response to a proposal to allow the president to decide the routes of federal post

roads. *See infra* at 29-30. That proposal involved government operations and benefits—not "rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J.). "If there had been a consensus view that Congress could broadly delegate legislative authority to the executive when 'privileges' were at issue," the objections raised to the proposal "would have been pointless. And the proposal's supporters would likely have invoked the exception, instead of defending the proposal on the ground they actually did." Arlyck, *supra*, at 294.

Meanwhile, Congress repeatedly delegated broad authority to fashion rules governing private conduct. *See supra* Part III. Yet these bills prompted few (or no) constitutional concerns, and none on the ground that authority over "private rights" could not be delegated.

B. Military and Foreign Affairs

Another effort to reconcile early legislation with a nondelegation rule rests on the idea that Congress may delegate discretion "over matters already within the scope of executive power." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260 (1985).

Once again, no one articulated such a distinction in the Founding era. *See* Arlyck, *supra*, at 289-90 (debunking the few citations that have been suggested as indicating such a belief). The concept is instead a modern creation, tracing its roots to a twentieth-century decision, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), which does not actually support it, *see id.* at 315 (upholding a delegation concerning trade with foreign nations but expressly not addressing whether a comparable domestic delegation would be invalid).

Moreover, once again the historical evidence that *does* exist is plainly contrary, demonstrating that the Founding generation did not recognize any such distinction. Nearly all of the early objections to presidential delegations were made *precisely* in the context of bills implicating the military or foreign relations: a 1794 bill allowing the president to raise troops, *see* Mortenson & Bagley, *supra*, at 361 n.471; a 1798 statute empowering the president to raise a provisional army, *id.* at 360-63; and the notorious Alien Act, *id.* at 364-66. Yet "in no case did proponents of the proposed legislation defend it on grounds of a delegation exception for military and foreign affairs." Arlyck, *supra*, at 291.

The facts are inescapable: "all known articulations of the nondelegation principle by federal lawmakers in the 1790s occurred in foreign, military, or non-coercive areas that today's nondelegation proponents consider exceptions to the doctrine." Parrillo, *Supplement*, *supra*, at 13. These purported exceptions contradict the only evidence of nondelegation sentiment at the Founding.

C. "Important Subjects"

Some have claimed that the Constitution distinguishes between "important policy decisions," which Congress must resolve itself, and "filling up details and finding facts," which Congress may delegate. *Gundy*, 139 S. Ct. at 2145, 2148 (Gorsuch, J.). This too lacks any basis in original meaning.

No evidence from the Founding era has ever been unearthed to support an "important subjects" theory. Even as Congress enacted statute after statute granting immense discretion on crucial issues of national policy—and even as some lawmakers voiced reservations about certain delegations—there is no record of

anyone discussing delegation limits in terms of the subjective importance of the matters delegated.

Indeed, efforts to turn up evidence of an "important subjects" doctrine at the Founding backfire. Professor Wurman, for example, cites a single remark made in the Second Congress during the post roads debate, which seemed to suggest that the routes of the roads were more "important" than the locations of the post offices along those roads. 3 Annals of Cong. 230 (1791) (Rep. Livermore). But in the same breath, this speaker *foreclosed* any constitutional distinction based on importance: "the Legislative body being empowered by the Constitution 'to establish post offices and post roads,' *it is as clearly their duty to designate the roads as to establish the offices*." *Id.* at 229 (emphasis added).

Moreover, as shown above, the First Congress delegated major policy questions concerning the nation's most pressing issues, such as patent rights and the national debt, with little or no controlling guidance. So a rule against delegating "important subjects" cannot stand alone: it works only in tandem with other artificial limiting principles like those discussed above. *E.g.*, Wurman, *supra*, at 1538 (suggesting that "rules of private conduct" are inherently nondelegable "[i]mportant subjects").

In lieu of supporting evidence from the Founding, proponents of an "important subjects" rule have seized on a passage from *Wayman v. Southard*, 23 U.S. 1 (1825). But this ambiguous *dicta* from a case decided decades after Ratification does not supply the missing foundation for the rule.

To start, *Wayman* was not a nondelegation case; it was a federalism case, involving a statute that required federal courts to follow existing state court procedures, subject to their own alterations. The

plaintiffs insisted that federal courts also had to follow newly adopted state procedures, and they further argued that allowing the courts to alter such procedures would give them legislative authority. *Id.* at 13-16.

It is not correct that *Wayman* "upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make 'alterations and additions' did no more than permit courts to fill up the details." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J.). *Wayman* explained, rather, that "the right of the Courts to alter the[ir] modes of proceeding . . . does not arise in this case," because "[t]he question really adjourned" was whether newly enacted state laws could indirectly dictate those procedures. 23 U.S. at 48. The nondelegation argument was rejected because it proved too much. *Id.* at 47-48 ("If Congress cannot invest the Courts with the power of altering the modes of proceeding of their own officers, . . . how will gentlemen defend a delegation of the same power to the State legislatures?").

As for *Wayman*'s suggestion that there are "important subjects, which must be entirely regulated by the legislature itself," the opinion offers no citation, no examples of what those might be, or even any indication of what qualities are relevant, saying only that the line distinguishing them "has not been exactly drawn." *Id.* at 43. Those tentative musings betray the *absence* of any widely shared principles concerning delegation limits even in the nineteenth century. *See id.* at 46 (calling the topic "a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily").

The irrelevance of *Wayman*'s *dicta* is illustrated by this Court's approval, two years later, of a statutory delegation from the 1790s, which contained some of

the only language that prompted nondelegation objections in that era. *See* Mortenson & Bagley, *supra*, at 360-62. Writing for a unanimous Court, Justice Story rejected any claim that Congress could not delegate decisions over raising the militia to the president, *Martin v. Mott*, 25 U.S. 19, 29 (1827) ("there is no ground for a doubt on this point"), without citing *Wayman* or employing an "important subjects" framework. *See id.* ("The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature.").

The reliance that nondelegation proponents have placed on *Wayman*—ambiguous *dicta* in a single decision more than three decades after Ratification—only underscores the lack of Founding-era support for an "important subjects" rule.

V. The Post-Ratification Efforts of a Small Minority of Politicians to Create a Nondelegation Doctrine Were Unsuccessful.

Against the all-but-conclusive evidence of the statutes enacted in the nation's first decade, supporters of nondelegation have pointed to discussions that took place in the House of Representatives during this period. Such discussions contain the only evidence of anyone in the Founding era suggesting constitutional limits on statutory delegations. That evidence, however, undermines rather than supports the existence of any shared belief in delegation limits.

As discussed, the vast majority of the early statutes prompted no delegation objections at all, even as they handed off rulemaking authority over some of the most important matters in the new Republic. Increasingly during the 1790s, however, delegation arguments began to pop up sporadically in legislative debates, raised by a small number of congressmen.

These arguments, however, were voiced rarely, were almost always peripheral, and repeatedly failed. Moreover, they were typically vague and self-contradictory, as pointed out by their opponents. Rather than revealing a broad preexisting consensus on delegation principles, the very novelty (and failure) of these arguments shows the opposite.

Take, for instance, a discussion in the Second Congress about legislation establishing a postal system—the most frequently cited example of a nondelegation objection in the early Republic. In brief, lawmakers crafted a bill setting forth in painstaking detail the towns through which the post roads would run. They rejected a proposal to instead leave the designation of these routes up to the president. 3 Annals of Cong. 229, 241 (1791). In the preceding debate, however, no more than a handful of members invoked constitutional concerns about delegation. And far from indicating some shared understanding, these arguments "astonished" their opponents, *id.* at 235 (Rep. Barnwell), who pointed out their inconsistency with constitutional text, *e.g.*, *id.* at 236 (Rep. Benson) (explaining that Article I made no distinction between "post offices and post roads," and yet the bill left the locations of the offices entirely up to the executive), and with precedent, *e.g.*, *id.* at 232 (Rep. Bourne) (explaining that the proposed delegation was similar to one concerning tax districts in the previous year's distilled spirits statute). *See* Mortenson & Bagley, *supra*, at 350-55.

Moreover, while this particular proposal was defeated, the enacted statute delegated unfettered discretion to the executive branch to designate the locations of *additional* post roads, as well as all post offices, *see* Act of Feb. 20, 1792, ch. 7, §§ 2-3, 1 Stat. 232, 233-34, making it difficult, if not impossible, to read the rejection of the earlier amendment as an

endorsement of the constitutional objection. *See* U.S. Const. art. I, § 8, cl. 7 (giving Congress the legislative power to "establish Post Offices *and* post Roads" (emphasis added)).

Nothing about the post roads debate suggests common acceptance of a nondelegation doctrine among the Founders—much less its nature or scope. *Cf.* Wurman, *supra*, at 1514 (claiming only that the "best reading" of the evidence "is that there probably was some version of a nondelegation doctrine, although not everyone agreed on the principle's contours").

Later debates are no more helpful. Whether the subject was raising volunteer armies or summarily expelling noncitizens, constitutional arguments against delegation were always peripheral and voiced by a small minority of congressmen, and they consistently failed. *See* Mortenson & Bagley, *supra*, at 360-66. They supply no foundation for an unwritten constitutional rule against delegation—or its enforcement through a "major questions" doctrine.

CONCLUSION

For the foregoing reasons, this Court should reject Petitioners' arguments concerning constitutional limits on delegation.

Respectfully submitted,

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