No. 19-1115

In the
Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION,
Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

By statute, federally-chartered community credit unions are limited to serving "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district," but Congress left the definition of those key terms to the National Credit Union Administration. 12 U.S.C. §§ 1759(b)(3), (g)(1). Petitioner is right to point out that this statutory scheme expanded step two of *Chevron* deference beyond permissible bounds. But the problem is even more profound than that. By adopting statutory terms that have no meaning until defined by an administrative agency, as the D.C. Circuit held, Congress has delegated its lawmaking authority to an unelected agency without any governing principle, much less an intelligible one. Subsumed in the Question Presented in the Petition itself should therefore be the following:

> When a statute expressly directs an agency to define key statutory terms, has Congress unconstitutionally delegated its lawmaking power?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that, under the Constitution, the lawmaking power is vested in Congress and cannot be delegated to others. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing this issue and urging revival of this important non-delegation doctrine, including *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 140 S.Ct. 789 (2020); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015); and *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015).

SUMMARY OF THE ARGUMENT

As the branch of government closest to the people, Congress is the branch constitutionally empowered and constitutionally *expected* to grapple with the policy tradeoffs that are at the heart of the lawmaking role. To be sure, this Court has always recognized that Congress may authorize the Executive to fill necessary gaps in the law Congress creates. The "intelligible principle" doctrine is ostensibly how Congress

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made made a monetary contribution to fund the preparation and submission of this brief.

can do that: by offering an intelligible principle to which an agency can conform, Congress can set down the law and the agencies have only to, as Chief Justice John Marshall expressed it, "fill up the details." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). But delegations modernly upheld by this Court as "intelligible"—broad and amorphous direction like "just and reasonable" (*Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930)) and "public interest" (*New York Central Securities Corp. v. United State*s, 287 U.S. 12 (1932))—offer nothing meaningful to guide and constrain the agencies in their gap-filling role. Thus, unconstrained discretion has been left to unelected agency administrators, which has amounted to functional delegations of lawmaking power in contravention of the Constitution. This is a serious threat to separation of powers principles, and by extension, liberty.

The Court should return its non-delegation jurisprudence to constitutional standards, and ensure that Congress "performs its essential legislative function" and does not "attemp[t] to transfer that function to others." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). It should start by requiring that Congress provide intelligible principles *with teeth*: clearly articulated, specific limits on agency discretion.

In this case, even under the current, highly permissive delegation status quo, the D.C. Circuit's interpretation of the significance of an express delegation of definitional power amounts to pure, unfettered delegation of lawmaking power. This case thereby offers an excellent opportunity for the Court to reinvigorate

the non-delegation doctrine and restore this key component of the Constitution's separation of powers. The petition for writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. The "Intelligible Principle" Status Quo Amounts To Unconstitutional Delegation of Lawmaking Power To Agencies

The Constitution is not shy about its intentions as to who has the power to make law. Its very first command is unequivocal: "All legislative powers herein granted shall be vested in a *Congress* of the United States." U.S. Const. art. I, § 1 (emphasis added). Even so, this Court has rightly recognized that Congress may authorize an agency to fill in necessary gaps as long as it provides a principle intelligible enough to ensure that *Congress*'s policy judgment is being furthered; such is not an unconstitutional delegation of legislative power but rather a permissible grant of authority to implement the law *Congress* adopted. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). But the "intelligible principle" doctrine has, in practice, provided little or no constraint on agency action. As a result, and as this case shows, modern delegations amount to nothing short of lawmaking by unaccountable agencies rather than by Congress.

To maintain separation of powers and the integrity of our constitutional order, the legitimacy of a delegation should rise in direct relationship to the clarity with which Congress articulates the policy that it alone is constitutionally empowered to determine. As

such, this Court should return its non-delegation jurisprudence to constitutional principles by requiring that Congress provide *truly* intelligible principles to which agencies must conform. The Court should grant certiorari in this case to precipitate that return.

A. Delegation by Congress to an agency to "gap-fill" *can* be constitutionally legitimate.

Congress cannot specify all particulars of all policies, nor should it. Experts at administrative agencies who are "familia[r] with the ever-changing facts and circumstances surrounding the subjects regulated" (*Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)) may understand relevant issues in ways Congress never can. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("Agencies . . . have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances'" (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991)).

None of this is controversial. Such delegations of authority can accomplish Congress's policy goals by allowing agencies to "fill any gap left, implicitly or explicitly, by Congress" with respect to scientific or technical requirements, and thereby be legitimate. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Thus, the question is not whether Congress *can* empower agencies to adopt regulations, the question is when such regulatory power crosses the line and becomes legislative power. The "intelligible principle" doctrine has been the Court's answer to the question of constitutional

legitimacy, but the doctrine has been so loosely applied as to be meaningless.

B. The "intelligible principle" doctrine, as applied, has been far too permissive.

To account for the gaps that Congress might leave, the Court in *J.W. Hampton* hit upon the idea of an "intelligible principle." Ostensibly, an intelligible principle is a policy determination by Congress to which an administrative agency is directed to conform as it executes that policy: since Congress has intelligibly articulated the policy guiding execution, empowering agencies to adopt regulations to fill in technical details necessary to achieve that policy is legitimate. *See J.W. Hampton*, 276 U.S. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [implement the policy] is directed to conform, such legislative action is not a forbidden delegation of legislative power"). This "intelligible principle" doctrine was good in theory but has been badly applied in practice.

J.W. Hampton itself applied a fairly tight understanding of the "intelligible principle" doctrine The case involved a challenge to the constitutionality of a provision in the Tariff Act of 1922 that authorized the President to increase or decrease a duty that was set by the statute. *Id*. at 401. From the text of the Congressional act, not from President Coolidge's administration of the Act, the Court gathered a specific, clear policy:

> Its plan was to *secure by law the imposition of customs duties* . . . which should *equal the dif-*

> *ference* between the cost of producing in a foreign country the articles in question and [selling] them in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only *secure revenue*, but at the same time *enable domestic producers to compete* on terms of equality with foreign producers in the markets of the United States.

Id. at 404 (emphasis added). With a clear mandate to equalize via tariffs the difference between the cost of domestically produced goods and those of imports, the President's authority to adjust the tariff was cabined to Congress's goal of cost equalization. Congress thus conditioned the executive use of discretion on changes of factual circumstances (there, the differences in costs), and the Court found this condition to be "perfectly clear and intelligible." *Id.* at 404. Because the provision was conditional, the Court found that it "did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President." *Id.* at 410. Thus, the provision was not "a forbidden delegation of legislative power." *Id.* at 409.

Much broader delegations were thereafter upheld, however. Today, the intelligible principle test "requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 85 (2015) (Thomas, J., concurring). In short, *J.W. Hampton's*

"intelligible principle" doctrine has been all but abandoned in favor of outright delegations of lawmaking power pursuant to which agencies have attained enormous control over private conduct, particularly in relationship to the economic affairs of the country. The Court has upheld such notoriously broad and amorphous formulations as "just and reasonable," *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); the "public interest," *New York Central Securities Corp. v. United State*s, 287 U.S. 12 (1932); "public convenience, interest, or necessity," *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); and "unfair methods of competition," *FTC v. Gratz*, 253 U.S. 421 (1920).

To say that a regulation must be in the "public interest" or "just and reasonable" or for "public convenience, interest, or necessity," is to state what is obvious, and nothing more. The "public interest" is an intelligible principle for the existence of government generally; it does absolutely nothing to *offer direction* to a person or body authorized to implement a specific policy—the standard espoused in *J.W. Hampton*. As Justice Thomas has noted, because the current conception of what qualifies as an "intelligible principle" from Congress is functionally meaningless, "the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power." *Ass'n of Am. Railroads*, 575 U.S. at 84 (Thomas, J., concurring). As such, delegations under the "intelligible principle" status quo frequently violate separation of powers principles and are unconstitutional. The Court should get the non-delegation jurisprudence back on track in a way that would require Congress to

adopt truly intelligible principles that direct the agencies toward the policies that *Congress*—not the Executive agencies themselves—determines. This case presents an ideal opportunity to restore this important and core constitutional principle.

II. The Court Should Take This Opportunity To Update Its Non-Delegation Jurisprudence To Require Intelligible Principles With Teeth

The key failure at the heart of current non-delegation jurisprudence is that the courts have not required Congress to clearly and specifically limit the discretion it gives to Executive agencies to further Congress's adopted policies. When they do so, lawmaking power will reside once again with Congress, the branch of American government most accountable to the people—whose conduct the laws, policies and rules propose to regulate.

A. Congress, not the agencies, must be making the essential policy tradeoffs that are at the heart of the lawmaking function.

The founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997). The warnings of Mon-

tesquieu and others against the dangers of consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 321 (Clinton Rossiter, ed., 1961); James Madison, Federalist 47, *supra* at 301-02; Alexander Hamilton, Federalist 9, *supra* at 72; see also Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959).

The branch with the lawmaking power is the branch closest to the people: "The members of the legislative department . . . are numerous . . . they dwell among the people at large . . . they are more immediately the confidential guardians of the rights and liberties of the people." James Madison, Federalist 49, *supra* at 316. Since lawmaking inherently requires grappling with policy tradeoffs that impact citizens' daily lives in deeply meaningful and personal ways, it is right that Congress alone should be entrusted with the discretion to "formulate generally applicable rules of private conduct." *Ass'n of Am. Railroads*, 575 U.S. at 84 (Thomas, J., concurring). It is dangerous and antithetical to liberty-protecting separation of powers principles to permit Congress to pass its legislative discretion over to unelected agency administrators without clear, specific limits on the scope of that discretion.

B. An "intelligible principle with teeth" is a clearly articulated, specific limit on agency discretion.

Returning non-delegation jurisprudence to the separation of powers principle mandated by the Constitution will require Congress to provide intelligible

principles *with teeth*—that is, clearly articulated, specific limits on agency discretion in furtherance of policy judgments made *by Congress*—and may comprehend one or more approaches.

This Court has already considered, and found sufficient, one approach: conditional legislation such as that at issue in *J.W. Hampton*, *supra*. Such an approach "makes the suspension of certain provisions and the going into operation of other provisions of an act of congress depend upon the action of the president based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 683 (1892). Thus, "Congress create[s] a 'named contingency,' and the President '[is] the mere agent of the law-making department to ascertain and declare the event upon which its expressed will [is] to take effect." *Ass'n of Am. Railroads*, 575 U.S. at 81 (Thomas, J., concurring).

It was against the backdrop of *Field* and *J.W. Hampton* that this Court invalidated two congressional provisions on nondelegation grounds. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), the Court noted that the fact that Congress has "flexibility" to authorize gap-filling power cannot be allowed to "obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." There, the Court struck down a provision of the National Industrial Recovery Act that authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum that was produced in excess of the amount permitted by state authority. *Panama Refining*, 293 U.S. at 405-06. The

Court found that Congress did "not state whether or in what circumstances or under what conditions the President [was] to prohibit the transportation" of the petroleum; Congress "establishe[d] no cr[i]terion to govern the President's course" and did not require the President to "ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary." *Id*. at 415, 418. In this way Congress "left the matter to the President without standard or rule, to be dealt with as he pleased," which amounted to "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down," as he saw fit, and thereby essentially "commit[ted] to the President the functions of a Legislature." *Id*. at 418.

Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down another provision of the National Industrial Recovery Act, which authorized the President to approve "codes of fair competition" for trades and industries. The Court found that Congress had provided "no standards for any trade, industry, or activity," nor did it "undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Id*. at 542. Congress had not even defined the term "fair competition." *Id*. at 531. Instead, the statute granted the President authority to "impose his own conditions, adding to or taking away from what is proposed as 'in his discretion' he [thought] necessary 'to effectuate the policy' declared by the act." *Id*. at 538-39. Handing such "virtually unfettered" authority to the President was an unconstitutional delegation of legislative power. *Id*. at 542.

The schemes struck down in *Panama Refining* and *A.L.A. Schechter Poultry* are little different from the delegations of lawmaking power upheld more recently. A return toward the jurisprudence demonstrated in those two cases—requiring Congress to "perform its essential legislative function," *id*. at 530, by offering clearly articulated, specific limits on agency discretion in the form of conditional legislation that authorizes the President to proceed only under certain conditions or findings of fact—would go a long way toward reinforcing separation of powers principles and the liberties they guard. It would do so by precluding such sweeping delegations of power tethered to so-called intelligible principles as vague as "the public interest," "fair and equitable," or "unduly and unnecessarily complicated." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001) (Thomas, J., concurring).

III. Even Under The Weak "Intelligible Principle" Status Quo, The D.C. Circuit's Decision Allows An Unconstitutional Delegation Of Lawmaking Power

According to the D.C. Circuit, the terms at issue in this case—"local community" and "rural district"—essentially have no meaning outside of what the National Credit Union Administration (NCUA), in its own discretion, decides they mean. This is pure, unfettered delegation and fails constitutional muster even under the Court's current minimal "intelligible principle" requirements, because, as the NCUA interprets express congressional delegation, an intelligible principle is not even required. The Court should grant certiorari at the very least to correct the holding of the

D.C. Circuit, which "hears a significant proportion of the cases involving rulemaking by federal agencies," and whose misguided lead the Seventh, Fourth, and Sixth Circuits have already followed. Petn. App. 25.

In the National Credit Union Act, Congress directed the NCUA to define the terms "local community" and "rural district" by regulation. 12 U.S.C. § 1759(g)(1). When NCUA issued its regulations, it defined "local community" to encompass up to 2.5 million people, and "rural district" to encompass up to 1 million people, and allowed for both to stretch across multiple states in some cases. *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649 (D.C. Cir. 2019). The D.C. Circuit upheld the agency's definitions. *Id.*

The D.C. Circuit held that "[a]n express delegation of definitional power 'necessarily suggests that Congress did not intend the [terms] to be applied in [their] plain meaning sense,' . . . that they are not 'self-defining,' . . . and that the agency 'enjoy[s] broad discretion' in how to define them," *Id.* at 663 (quoting *Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 1000 (D.C. Cir. 1989) and *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016)). If the D.C. Circuit's interpretation of an express delegation of definitional power is true—that Congress must not intend a term to be applied in its plain meaning sense—then the NCUA, and every agency in receipt of an express delegation of definitional power, is in receipt of a golden ticket indeed: no specific guidance from Congress as to its conception of the terms in question, and no requirement that the plain meaning of the term be considered. Here, then, the concepts of "local community" and "rural district" know no limits but those of

NCUA's own imagination. Ironically, under the D.C. Circuit's logic, *Chevron* should not even come into play. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). How can a term be ambiguous if, without a plain meaning to consider, it can have no more than one meaning, namely, whatever meaning the NCUA dictates? The D.C. Circuit's treatment of express delegation of definitional power amounts to pure delegation and therefore must be invalidated.

CONCLUSION

It is for Congress, not the Executive—and certainly not unelected agency administrators—to grapple with the policy tradeoffs that are at the heart of the lawmaking power. The Court should return its delegation jurisprudence to constitutional principles by holding Congress to its duty to provide clearly articulated, specific limitations on Executive discretion. This case squarely presents an opportunity to do so, and the Court should grant certiorari.

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Respectfully submitted,

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