BRADFORD V. U.S. DOL: ROUGH WATER AHEAD

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ABSTRACT

On June 28, 2024, the Supreme Court sent a shockwave through administrative jurisprudence with its decision in *Loper Bright v. Raimondo*.[1] This decision, which overturned *Chevron* deference, marked a return to the traditional role of the judiciary in interpreting Congressional Acts. Under *Chevron* deference, agencies enjoyed significant latitude in implementing and interpreting laws passed by Congress. Courts were instructed to defer to the federal agencies' interpretations of ambiguous statutes. However, this arrangement presented constitutional issues because of the sometimes broad delegation of legislative authority by Congress.

Section I of this Note illustrates the historical foundation of a doctrine aimed at this delegation issue—the nondelegation doctrine—and charts over two centuries of caselaw regarding the doctrine.[2] Section II discusses a recent Tenth Circuit opinion called *Bradford v. U.S. Department of Labor*,[3] and how it raised the nondelegation issue.[4] Section III. A then argues, in agreement with the *Bradford* dissent, that the federal statute at issue in *Bradford* is an unconstitutional grant of legislative authority to the President.[5] Next, Section III. B transitions to a discussion about the demise of *Chevron* deference and how the changing administrative law landscape might impact the outcome of similar issues in future litigation.[6] Section III. C explains why, even though the Supreme Court denied the *Bradford* appellants' petition for certiorari,[7] the nondelegation doctrine remains relevant to the issues facing our federal government today.[8] Finally, Section III. D, by highlighting examples from other developed countries, illustrates how the separation of powers intended by the Founding Fathers can still provide a workable framework in the modern world.[9]

INTRODUCTION

Duke Bradford (Duke) is the founder of Arkansas Valley Adventures (AVA) and the central actor in *Bradford v. U.S. Department of Labor*.[10] Duke grew up in Nebraska but fell in love with Colorado's

1. 603 U.S. 369 (2024).
2. *See* discussion *infra* Section I.
3. 101 F.4th 707 (10th Cir. 2024).
4. *See* discussion *infra* Section II.
5. *See* discussion *infra* Section III.A.
6. *See* discussion *infra* Section III.B.
7. *Bradford*, 101 F.4th 707 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1047 (2025).
8. *See* discussion *infra* Section III.C.
9. *See* discussion *infra* Section III.D.
10. *Outdoor Adventure Guides Battle the President's Unlawful Workplace Power Grab*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/case/co-river-outfitters/ (last visited Jan. 1, 2025).

mountains while skiing once a year as a child.[11] Duke planned to attend law school after graduating from the University of Nebraska-Lincoln, but the allure of Colorado's peaks proved too strong.[12] So instead, Duke spent two seasons as a snowmobile guide and ski patroller after graduating, where he hatched the idea of opening a rafting company.[13] In 1998, AVA was born.[14] Like many small business success stories, AVA grew rapidly over the next twenty-plus years.[15] Now, AVA employs 250 people and provides a variety of outdoor experiences for all four seasons.[16] Even with these changes, Duke still considers the guided, multi-day river rafting wilderness trips to be AVA's premier offering: "After 24 hours without cell phones, people begin to embrace their unplugged environment, connect with nature, and reconnect with themselves."[17]

AVA employs river guides who embody the ideals and passion that prompted Duke to found the outfit over two decades ago.[18] They are fellow outdoor enthusiasts, college students spending their breaks working in Colorado, and nomads who have turned their passion for the outdoors into a lifestyle.[19] Guides often work in different states or countries depending on the season.[20] In Colorado, spring is the busy season, and guides will almost always work more than forty hours per week.[21] Nevertheless, hours and workweeks vary, so AVA pays guides a flat fee per trip, which is based on the federal minimum wage plus a fixed wage above that rate.[22] Guides also customarily accept gratuities from customers.[23] This arrangement, long an industry standard, allows outfitting firms like AVA to serve millions of tourists every year.[24] However, in 2022, a new federal rule threatened to wipe out the entire business model.[25] The changing regulatory environment was poised to run AVA, which Duke had built through two decades of his life, out of business in the blink of an eye and the stroke of a newly minted President's autopen.[26]

I. BACKGROUND

After a brief but iconic statement of intent, which begins with "We the People," the drafters of the United States Constitution quickly and directly vested legislative power in Congress and Congress alone.[27] In

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *See* U.S. CONST. pmbl.; U.S. CONST. art. I, § 1.

Article I, the Constitution vests "[a]ll legislative Powers . . . in a Congress of the United States."[28] This commandment, placed at the very beginning of our nation's guiding document, gave birth to the nondelegation doctrine.[29] Under the nondelegation doctrine, the Constitutional prohibition against Congress ceding legislative power to the President is viewed as vital to the integrity and maintenance of the United States federal government.[30] The Supreme Court upholds the nondelegation doctrine because it is fundamental to the separation of powers, keeping the Executive, Judicial, and Legislative branches of the United States government at arm's length from one another.[31]

This is not to say that the prohibition against Congress delegating legislative authority to its sister branches is absolute.[32] Admittedly, the Supreme Court has allowed Congress to obtain the assistance of coordinate branches. These constitutional delegations occur when an intelligible principle, controlling the conduct of the party to whom power is delegated, is provided for in the legislative act delegating the power.[33] This intelligible principle necessarily requires the delegation to be limited by "common sense and the inherent necessities of governmental co-ordination."[34]

In 1928, Chief Justice Taft—quoting Judge Ranney of the Ohio Supreme Court—endorsed a useful explanation of the distinction between a violation of the nondelegation doctrine and a constitutional grant of discretion:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[35]

For instance, the Constitution tasks Congress with regulating interstate commerce.[36] As part of this regulation, Congress sets rates for interstate carriers of passengers and merchandise.[37] These rates are "myriad," and it would be impossible for Congress to fix every necessary rate.[38] Instead, Congress created the Interstate Commerce Commission, requiring the Commission to fix the rates after allowing interested parties to present evidence and argument, while directing the Commission to only lay down

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28. U.S. CONST. art. I, § 1.
29. *See* Mistretta v. United States, 488 U.S. 361, 371–72 (1989).
30. *See* Field v. Clark, 143 U.S. 649, 692 (1892).
31. *See Mistretta*, 488 U.S. at 371.
32. *Id.* at 372.
33. *Id.* (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).
34. *J.W. Hampton*, 276 U.S. at 406.
35. *Id.* at 407 (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Clinton Cnty. Comm'rs, 1 Ohio St. 77, 88–89 (1852)).
36. U.S. CONST. art. 1, § 8.
37. *J.W. Hampton*, 276 U.S. at 407.
38. *Id.*

rates which are "just and reasonable considering the service given and not discriminatory."[39] In other words, Congress requires fact-finding by the Commission while providing a standard for any action.[40] There, the intelligible principle laid down by Congress to the Interstate Commerce Commission is fixed according to common sense and the inherent necessities of the task.[41]

Intelligible principles fall into one of two buckets.[42] The first bucket of intelligible principles require the President to engage in fact-finding before acting upon the congressionally delegated authority.[43] The second bucket of intelligible principles hold the President's actions to a specific standard provided by Congress.[44] Developed in tandem with these two buckets is another principle of Article I's nondelegation doctrine—a larger grant of power requires more constraints to pass constitutional muster.[45] Some statutes challenged under the nondelegation doctrine were so narrow in their delegation that they required a less detailed intelligible principle.[46] A helpful summary of "over two centuries worth of caselaw," thus, is that a court deciding whether a delegation of authority is constitutional must look for either (1) a fact-finding requirement or (2) a sufficient standard to guide the delegee, while keeping in mind that each will need to be more detailed as the extent of the delegation expands.[47] Only then is a congressional delegation of power constitutional under Article I.[48] Nevertheless, the Supreme Court has sometimes emphasized that these standards do not place strong demands on Congress.[49]

When Congress passes a law that delegates the ability to simply "fill up the details" in "general provisions," it will rarely pose nondelegation issues.[50] However, the Supreme Court does require Congress to include a standard that is "sufficiently definite and precise" to allow Congress, the courts, and the general public to determine whether the executive has

39. *Id.* at 407–08.
40. *Id.* at 408.
41. *Id.* at 406-08.
42. Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755, 773 (6th Cir. 2023) (Nalbandian, J., dissenting).
43. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).
44. *Panama Refin.*, 293 U.S. at 415; *see Schechter Poultry Corp.*, 295 U.S. at 530.
45. *Allstates Refractory*, 79 F.4th at 776 (Nalbandian, J., dissenting).
46. *Id.*; *see* Gundy v. United States, 588 U.S. 128, 130, 138, 139, 144, 147 (2019) (plurality opinion) (labeling a particular delegation as narrow because it (1) granted "only temporary authority," which was "distinctly small-bore" when compared to other delegations; (2) allowed discretion in the form of "time-limited latitude" of an "implementation delay," "[b]ut no more than that" "to address . . . various implementation issues"; and (3) "enabled the Attorney General *only* to address (as appropriate) the 'practical problems' involving pre-Act offenders before requiring them to register . . . [which] was a *stopgap, and nothing more*") (emphasis added).
47. *Allstates Refractory*, 79 F.4th at 776 (Nalbandian, J., dissenting).
48. *Id.*
49. *See Gundy*, 588 U.S. at 146.
50. Wayman v. Southard, 23 U.S. 1, 43 (1825).

properly exercised the granted power.[51] Only then can a reviewing court fulfill its constitutional obligation of review because, otherwise, the court cannot be confident of what "general policy" a delegee is to pursue and the boundaries of the delegee's authority to do so.[52] Without standards, it is "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," a sure sign of an unconstitutional delegation of congressional authority.[53] Neither a "general outline of policy,"[54] nor a statement of "general aims,"[55] carries the strength required by the Constitution to guide executive action. "[S]uch a preface of generalities as to permissible aims," without more, is a "delegation of legislative power [] unknown to our law," and "utterly inconsistent with the constitutional prerogative and duties of Congress."[56] Standards that pass constitutional muster and guide executive action are sometimes in the form of mandatory factors that the executive must conform to when acting under the grant of authority.[57]

The overriding principle promulgated by the Supreme Court, "that the more power a law delegates, the more the law must limit that delegation," must remain ever-present in this nondelegation doctrine analysis.[58] Indeed, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[59]

II. *BRADFORD V. U.S. DEPARTMENT OF LABOR*

This Section discusses *Bradford*. Section II. A describes the facts of the case and its procedural history. Section II. B touches on the majority opinion's major points. Section II. C summarizes the dissenting opinion's disagreements with the majority.

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51. Yakus v. United States, 321 U.S. 414, 426 (1944); *see* Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., 312 U.S. 126, 144 (1941).
52. *Gundy*, 588 U.S. at 146 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).
53. *Yakus*, 321 U.S. at 426.
54. Panama Refining Co. v. Ryan, 293 U.S. 388, 417 (1935).
55. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935).
56. *Id.* at 537.
57. Mistretta v. United States, 488 U.S. 361, 374–76 (1989) (relating to a law requiring the Sentencing Commission to consider "seven factors," a "specific tool" of the "guidelines system," "three goals," "four 'purposes," and "prohibited" factors) (quoting 28 U.S.C. § 991(b)(1)); *see e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (relating to a law requiring the President to consider "criteria" before taking any action); *Am. Power & Light Co.*, 319 U.S. at 105 (same); Nat'l Broad. Co. v. United States, 319 U.S. 190, 204 (1943) (same); *Yakus*, 321 U.S. at 419 (same); Touby v. United States, 500 U.S. 160, 166–67 (1991) (same); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001) (same).
58. Bradford v. U.S. Dep't of Labor, 101 F.4th 707, 735 (2024).
59. *Whitman*, 531 U.S. at 475; *see* Wayman v. Southard, 23 U.S. 1, 43 (1825) ("To determine the character of the power given to the Courts by the Process Act, we must inquire into its extent."); *c.f.* Gundy v. United States, 588 U.S. 128, 147 (plurality opinion) (asserting that a narrow delegation that granted "only temporary authority" "was a stopgap, and nothing more"); *Yakus*, 321 U.S. at 419 (relating to "temporary wartime" measures).

A. Facts and Procedural History

"My lips are chapped from the winds of change."[60]

On February 12, 2014, President Obama directed the Department of Labor, via Executive Order, to establish a federal minimum wage for federal contractors and subcontractors.[61] The authority to dictate such rules purportedly came from the Federal Property and Administrative Services Act (FPASA).[62] Therein, Congress delegated to the President the authority to make policy and announce directives that the President "considers necessary"[63] to make the federal system for "procuring and supplying property and nonpersonal services" both economical and efficient.[64] In response to President Obama's directive, the Department of Labor issued a Rule mandating a $10.10 per hour minimum wage plus overtime for hours worked in excess of forty hours in a workweek.[65] This directive applied to all new "contracts or contract-like instruments," which the Department of Labor interpreted broadly to include employers like AVA, which utilize special-use permits for federal lands.[66] President Obama's Executive Order stated that this change sought "to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government" because "[r]aising the pay of low-wage workers increases their morale and the productivity of their work, lowers turnover and its accompanying costs, and reduces supervisory costs."[67]

Four years later, on May 25, 2018, President Trump directed the Department of Labor, via Executive Order, to exempt outfits operating on federal lands (like AVA) from the federal minimum wage for federal contractors and subcontractors.[68] President Trump's Executive Order stated that this change was in response to the threat posed by the implementation of President Obama's Executive Order to outfitters and guides operating on federal lands.[69] President Trump's Order discussed distinguishing characteristics of the trade, including "irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate."[70] Furthermore, President Trump's Order claimed that President Obama's Executive Order "threaten[ed] to raise significantly the cost of guided hikes and tours on Federal lands, preventing many visitors from enjoying the great beauty

60. SARAH VOWELL, RADIO ON: A LISTENER'S DIARY 10 (1997) (Sarah Vowell is an American historian, author, journalist, essayist, social commentator, and actress; she also voiced Violet Parr in the 2004 animated film *The Incredibles* and its 2018 sequel).
61. Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014).
62. Federal Property and Administrative Services Act, 40 U.S.C. §§ 101–126.
63. 40 U.S.C. § 121(a).
64. 40 U.S.C. § 101(1).
65. Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 60634 (Oct. 7, 2014) (to be codified at 29 C.F.R. §§ 10.5(a), 10.24(a)).
66. Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 60634, 60652 (to be codified at 29 C.F.R. § 10.2).
67. Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014).
68. Exec. Order No. 13838, 83 Fed. Reg. 25341 (May 25, 2018).
69. *Id.*
70. *Id.*

of America's outdoors."[71] As such, applying the minimum wage hike did not foster the economy or efficiency of the procurement of these services by "those who seek to enjoy our Federal lands."[72]

Finally, on April 27, 2021, President Biden directed the Department of Labor, via Executive Order, to revoke the exemption for recreational services on federal lands.[73] President Biden also raised the minimum wage from $10.10 per hour to $15.00 per hour, an increase of almost fifty percent.[74] President Biden's administration did not explain why the exemption was being scrapped.[75] On November 23, 2021, the Department of Labor issued its final Rule (the Biden Rule) implementing the order, effective January 30, 2022.[76] The Department of Labor confirmed that the Biden Rule's $15 per hour minimum wage applied to recipients "of special use permits issued by the Forest Service, Commercial Use Authorizations (CUAs) issued by the National Park Service (NPS), and outfitter and guide permits issued by the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (USFWS), respectively."[77]

From Duke and AVA's perspective, three successive presidents had utilized a 1940s-era procurement statute to sidestep Congress and force their respective social agendas on anyone who contracts with the government.[78] Particularly abhorrent is the idea that an entire business model and the livelihoods of many can be wiped out by the whims of the current inhabitant of 1600 Pennsylvania Avenue.[79] The Department of Labor itself estimated that more than 500,000 private firms, including approximately 40,000 firms that provide concessions or recreational services pursuant to special use permits on federal lands, would be affected by the Biden Rule.[80] Further, the Department of Labor estimated that the Biden Rule would result in "transfers of income from employers to employees in the form of higher wage rates" of "$1.7 billion per year over 10 years" with "average annualized direct employer costs" of "$2.4 million" for each firm.[81] Though the Biden Rule recognized that these significant cost increases, as well as other costs such as "regulatory familiarization costs and [] implementation costs," would likely be passed on to the government itself, the repercussions for recreational firms holding permits to use federal lands would be far more severe.[82] In fact, the Department of Labor recognized that these firms are "[n]on-procurement," as they do not sell

71. *Id.*
72. *Id.*
73. Exec. Order No. 14026, 86 Fed. Reg. 22835 (Apr. 27, 2021).
74. *Id.*
75. *See id.*
76. Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126 (Nov. 11, 2021).
77. *Id.* at 67147.
78. *Outdoor Adventure Guides Battle the President's Unlawful Workplace Power Grab*, *supra* note 11.
79. *Id.*
80. Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. at 67194–96.
81. *Id.* at 67194.
82. *Id.* at 67204.

goods or services to the government.[83] As a result, the Biden Rule "may result in reduced profits" for such firms, or outright losses, ameliorated only to the extent consumers are willing to pay "higher prices."[84] The Department of Labor did not address these concerns.[85] As previously noted, the Department of Labor did not include any reasoning in the Biden Rule for revoking the exemption that had been in place for three years.[86] Accordingly, Duke was left with two choices: lie low, try to survive the Biden presidency, and hope that the next President would look upon his industry favorably, or seek out the help of the judiciary to declare the President's action unconstitutional.[87]

On December 7, 2021, about two months before the Biden Rule was set to take effect, Duke, AVA, and the Colorado River Outfitters Association (collectively, the Appellants) filed a complaint in the United States District Court, District of Colorado, with three claims for relief against the Department of Labor, President Biden, the U.S. Secretary of Labor, and the acting head of the Department of Labor's Wage and Hour Division (collectively, the Appellees).[88] Two days later, on December 9, 2021, the Appellants moved for a preliminary injunction to prohibit the Appellees from enforcing the Biden Rule pending final judgment in the underlying suit.[89] The three claims for relief in the underlying suit were: (1) violation of the Administrative Procedure Act[90] by an agency rule in excess of statutory authority, (2) violation of the Administrative Procedure Act by an arbitrary and capricious agency action, and (3) violation of the U.S. Constitution, nondelegation doctrine, and separation of powers.[91]

The district court ultimately denied the Appellants' request for a preliminary injunction on January 24, 2022, "[b]ecause [the Appellants] ha[d] not shown a likelihood of success on the merits of any of their claims."[92] Because the district court disagreed with the Appellants' legal theory of the case, the preliminary injunction was denied without the need for the district court to address the remaining preliminary injunction factors.[93]

On January 26, 2022, now four days before the Biden Rule was set to take effect, the Appellants filed a notice of interlocutory appeal.[94] The next

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83. *Id.* at 67206.
84. *Id.*
85. *See id.* at 67129.
86. *See id.*
87. *See Outdoor Adventure Guides Battle the President's Unlawful Workplace Power Grab*, *supra* note 11.
88. Complaint, Bradford v. U.S. Dep't of Labor, 582 F.Supp.3d 819 (D. Colo. 2022) (No. 1:21-cv-03283), 2021 WL 5822401.
89 Motion for Preliminary Injunction, Bradford v. U.S. Dep't of Labor, 582 F.Supp.3d 819 (D. Colo. 2022) (No. 1:21-cv-03283), 2021 WL 12290512.
90. 5 U.S.C. § 706(2)(C).
91. Complaint, *supra* note 88, at ¶¶ 51–77.
92. Bradford v. U.S. Dep't of Labor, 582 F. Supp. 3d 819, 848 (D. Colo. 2022).
93. *Id.*
94. Appellants Brief at 14, Bradford v. U.S. Dep't of Labor, 101 F.4th 707 (10th Cir. 2024) (No. 1:21-CV-3283), 2022 WL 819031.

day, the Appellants filed a motion for an injunction pending appeal with the district court.[95] The district court denied that motion on February 28, 2022.[96] In response, the Appellants filed a motion for injunction pending appeal with the Tenth Circuit Court of Appeals.[97] Finally, on February 17, 2022, the injunction was granted pending appeal.[98] In support, the court concluded that the Appellants "demonstrated an entitlement to relief from the Minimum Wage Order," and accordingly "enjoin[ed] the government from enforcing the Minimum Wage Order in the context of contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands," pending further order.[99]

On appeal, the Appellants challenged the district court's decision to deny their motion for a preliminary injunction.[100] First, the Appellants argued that the district court erred in finding that success on the merits is unlikely on the claim that (1) the Department of Labor exceeded the authority granted under the FPASA, and (2) that the Biden Rule is arbitrary and capricious.[101]

B. Opinion of the Court

A three-judge panel made up of Chief Judge Holmes, Circuit Judge Ebel, and Circuit Judge Eid heard the appeal.[102] Chief Judge Holmes wrote the two-judge majority opinion.[103] In it, the majority affirmed the district court's decision.[104] The majority concluded that the Appellants failed to show a substantial likelihood of success in either showing that the Biden Rule was issued without statutory authority or that the Biden Rule was arbitrary or capricious.[105]

In response to nondelegation concerns, the court remarked, "we recognize[] that [the] FPASA provides an 'intelligible principle' by only authorizing actions that promote economy and efficiency in procurement and supply."[106] The majority compared the statute at issue with the statute in *Whitman v. American Trucking Associations*,[107] where authority was delegated "to set air quality standards that, 'in the judgment of the [EPA] Administrator' and in conformity with certain statutory criteria, 'are

95. *Id.*
96. *Id*.
97. *Id.*
98. *Id.*
99. *Id.* at 15.
100. Bradford v. U.S. Dep't of Labor, 101 F.4th 707, 718 (10th Cir. 2024).
101. *Id.*
102. *Id.* at 712.
103. *Id.* at 713.
104. *Id.* at 714.
105. *Id.*
106. *Id.* at 730.
107. 531 U.S. 457 (2001).

requisite to protect public health.'"[108] The *Whitman* Court held that "[t]he term 'requisite' channeled agency discretion because the term authorized only actions taken to protect public health that are 'sufficient, but not more than necessary.'"[109] The majority felt that the FPASA's authorization of "executive orders that 'the President considers *necessary*'" similarly restricts the President's actions under the FPASA.[110] In other words, the majority's view is that the FPASA is constitutional because, in it, Congress provided an intelligible principle to both guide and restrict the President's actions.[111] Namely, the President is not authorized to take actions which, in the President's subjective opinion, are not necessary to promote the economical and efficient system for procuring and supplying goods and services.[112]

C. Dissenting Opinion

Circuit Judge Eid wrote the dissent and proposed that Congress violated the nondelegation doctrine by enacting the FPASA.[113] Circuit Judge Eid summarized her dissent:

> Because I would hold the FPASA unconstitutional under the nondelegation doctrine, I also respectfully decline to join the majority on whether the Department of Labor's conduct (1) exceeded the authority granted under the FPASA or (2) was arbitrary and capricious under the FPASA. Given that I would hold that the FPASA is invalid in itself, I would go no further into how the Department of Labor used the invalid delegation of power. That said, I note that it would be hard to imagine any scenario where an agency rule exceeds the FPASA's vast grant of power after the President used "econom[y]" and "efficien[cy]" as the justifications of executive action.[114]

The dissent posits that the FPASA violates the nondelegation doctrine because Congress failed to provide an intelligible principle to guide executive action in what is a particularly broad delegation.[115] Indeed, the FPASA essentially allows the President to "regulate *any* industry of someone who has a contract-like instrument with the federal government."[116]

III. ANALYSIS

The court incorrectly decided *Bradford* because the FPASA, and thus the President's Executive Order based on the power granted in the FPASA, are unconstitutional as applied to the Appellants. As such, the Appellants have shown a likelihood of success on the merits of their claim, and the

108. *Bradford*, 101 F.4th at 729 (emphasis added) (quoting *Whitman*, 531 U.S. at 472).
109. *Id.* (quoting *Whitman*, 531 U.S. at 473).
110. *Id.* (quoting 40 U.S.C. § 121(a), 101(a)).
111. *Id.*
112. *Id.*
113. *Id.* at 733 n.1 (Eid, J., dissenting).
114. *Id.* (quoting 40 U.S.C. § 101(1)).
115. *Id.* at 735.
116. *Id.*

district court should have granted their preliminary injunction against the Department of Labor's rulemaking. First, Section A argues that the dissenting opinion correctly analyzes the nondelegation issue in this case. Section B then hypothesizes the impacts *Loper Bright*, and the end of the deference standard first announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[117] will have on cases like *Bradford*. Next, Section C explains why the nondelegation doctrine is more relevant than ever, despite the Supreme Court's decision not to take the *Bradford* Appellants' case on appeal. Finally, Section D counterbalances the common argument in support of broad delegations to administrative agencies: that only administrative agencies can handle the often-technical decisions required in interpreting Congressional mandates.

D. The FPASA Contains no Intelligible Principle and is Thus Unconstitutional.

As correctly identified by both the *Bradford* majority and dissent, the nondelegation doctrine requires that Congress provide an intelligible principle to accompany a delegation of power to the President.[118] Though the majority claims to have parsed out an intelligible principle in the FPASA's mandate, legitimate guardrails are not apparent.[119] Under the FPASA, the President may create policies and directives that the President deems necessary to carry out the FPASA and which are consistent with the purpose of the FPASA.[120] The FPASA's purpose statement declares that it seeks to "provide the Federal Government with an *economical* and *efficient* system for . . . [p]rocuring and supplying property and nonpersonal services."[121] In the words of Circuit Judge Eid, "That is it. That is all the FPASA gives us—no floor of what specific situations must arise, no ceiling on what the President may find economical or efficient to do."[122]

The breadth of Congress's delegation to the President in the FPASA must not be understated. The mandate contained in the FPASA essentially allows the President to regulate any nonpersonal service via any contract-like instrument.[123] With this power, the President may prescribe any policy and enact any directive that the President subjectively believes to be economical and efficient, thereby regulating entire industries without involving Congress.[124] Although the Supreme Court's requirements for what constitutes an intelligible principle are not demanding, a law such as

117. 467 U.S. 837 (1984).
118. *Bradford*, 101 F.4th at 728, 733.
119. "Some people wait a lifetime for a" clear limitation like this; "[s]ome people search forever for that" constitutional delegation that fits. *See generally* KELLY CLARKSON, *A Moment Like This*, SINGLE (RCA Music Grp. 2002).
120. 40 U.S.C. § 121(a).
121. 40 U.S.C. § 101(1) (emphasis added).
122. *Bradford*, 101 F.4th at 735 (Eid, J., dissenting).
123. *Id.*
124. *Id.*

the FPASA, which delegates broad power, must contain a more powerful limitation than one that delegates narrow powers.[125]

1. The FPASA Requires No Fact-Finding by the President

Again, if a delegation is to find safe harbor in the first bucket of constitutional intelligible principles, the question is whether Congress requires fact-finding by the President before authority can be exercised.[126] The FPASA is notably devoid of an intelligible principle that falls into this bucket. In fact, the *Bradford* majority does not claim to have discovered such a limitation.[127] The President is not required to conduct any fact-finding before prescribing policies, directing agencies to act, and regulating private businesses.[128] Neither the President nor the Department of Labor is required to collect data, listen to arguments, or justify any changes to existing regulations.[129] The FPASA also does not describe a circumstance that Congress has predetermined would require presidential involvement.[130]

Instead, Congress was silent regarding fact-finding or situations warranting Presidential action under the FPASA, leaving policymaking power to the President's whims and subjective beliefs. The FPASA states that the President "may prescribe policies and directives that [they] consider[] necessary to carry out" the "[p]rocuring and supplying" of "nonpersonal services" or other "related functions."[131] Accordingly, the FPASA does not fit into the Supreme Court's first bucket of intelligible principles because the decision *when* to act is solely within the President's own discretion.[132] There does not need to be a pending threat to the economy or efficiency of federal procurement before the President can do whatever the President believes to be necessary.[133] Even if there *was* a pending threat to the federal procurement system, the FPASA explains that the President "may" not "shall" act.[134] So, the FPASA is really an "open invite" to the President to act, or not act, in any manner at all, and regulate industries like the outfitter industry via contracts or contract-like instruments such as permits.[135]

125. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 475 (2001); Wayman v. Southard, 23 U.S. 1, 43 (1825); *c.f.* Gundy v. United States, 588 U.S. 128, 138–48 (2019) (plurality opinion) (stating that a narrow delegation that granted "only temporary authority" was "a stopgap, and nothing more"); Yakus v. United States, 321 U.S. 414, 419, 426 (1944).
126. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).
127. *See Bradford*, 101 F.4th at 728–31.
128. 40 U.S.C § 121(a); *see Schechter Poultry*, 295 U.S. at 541–42; *Panama Refin.*, 293 U.S. at 417–18.
129. J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 405 (1928); *see* Opp Cotton Mills v. Adm'r of Wage & Hour Div., 312 U.S. 126, 145 (1941) (finding an intelligible principle because, in addition to requiring the executive to consider certain "factors," the law required "basic facts to be ascertained administratively").
130. Radio Corp. of Am. v. United States, 341 U.S. 412, 416 (1951).
131. 40 U.S.C. §§ 101(1), 121(a); *see Bradford*, 101 F.4th at 736 (Eid, J., dissenting).
132. *Bradford*, 101 F.4th at 736 (Eid, J., dissenting).
133. *Id.* (quoting 40 U.S.C. § 101(1)).
134. *Id.* (quoting 40 U.S.C. § 121(a)).
135. *Id.* (quoting 40 U.S.C. § 121(a)).

There are no prerequisites to the President's exercise of authority under the FPASA. Thus, the FPASA does not have an intelligible principle under the first bucket for this broad grant of Executive authority. Instead, reviewing courts must look to see if the FPASA has an intelligible principle under the second bucket.[136]

2. Congress Has Provided No Standard for the President's Action

The second bucket of intelligible principles strong enough to support a delegation of legislative authority is when Congress creates a standard for the President's actions.[137] This allows reviewing courts to determine whether the President is obeying the will of Congress behind the delegation.[138] Here, the majority decided that the FPASA satisfies this variety of intelligible principles because it "only authorizes executive orders that 'the President considers *necessary*.'".[139] Drawing parallels to *Whitman*, the majority held that this italicized term sufficiently tethers the President's authority because it "encompass[es] only actions that the President considers necessary to increase productivity or quality of service in procurement and supply with little or no waste."[140]

Contrary to the majority's assertion, though, the language in the FPASA is different from that in *Whitman* because it is a restriction in name only. Indeed, the Supreme Court was clear in *Panama Refining Co. v. Ryan*[141] and *A.L.A. Schechter Poultry Corp. v. United States*[142] that a general outline of policy,[143] or statement of general aims,[144] alone cannot form an intelligible principle. As Circuit Judge Eid points out, "'[s]uch a preface of generalities as to permissible aims,' without more, is a 'delegation of legislative power [] unknown to our law,' [and] 'utterly inconsistent with the constitutional prerogatives and duties of Congress.'"[145]

Nevertheless, the majority's comparison to *Whitman* states that, there, a provision of the Clean Air Act "provided an intelligible principle by merely delegating authority to set air quality standards that, 'in the judgment of the [EPA] Administrator' and in conformity with certain statutory criteria, 'are *requisite* to protect the public health."[146] The majority explained that "[t]he term 'requisite' channeled agency discretion because the term authorized only actions taken to protect public health that are 'sufficient, but not more than necessary.'"[147] However, as Circuit Judge

136. Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755, 776 (2023) (Nalbandian, J., dissenting).
137. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).
138. Yakus v. United States, 321 U.S. 414, 426 (1944).
139. *Bradford*, 101 F.4th at 729 (emphasis in original) (quoting 40 U.S.C. §§ 101(1); 121(a)).
140. *Id.*
141. 293 U.S. 388 (1935).
142. 295 U.S. 495 (1935).
143. Panama Refining Co. v. Ryan, 293 U.S. 388, 417 (1935).
144. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935).
145. *Bradford*, 101 F.4th at 737 (quoting *Schechter Poultry*, 295 U.S. at 537).
146. *Id.* at 729 (emphasis in original) (quoting 42 U.S.C. § 7409(b)(1)).
147. *Id.* (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 473 (2001)).

Eid explains, with more context the differences between the statute in *Whitman* and the FPASA emerge.[148] For one, "the phrasing of the FPASA makes the term 'necessary' *give* rather than *limit* power."[149] This effect comes about because "the FPASA does not require that the President's policies actually *be* necessary, only that [they] subjectively '*consider*[] [them] necessary' to do whatever [they] want under the act."[150] In *Whitman*, the Clean Air Act's statutory language directed the Administrator to consider "a discrete set of pollutants and [was] *based on* published air quality criteria that reflected the latest scientific knowledge," under which the "EPA *must* establish uniform national standards *at a level that is requisite* to protect public health from the adverse effects of the pollutant in the ambient air."[151] The term "requisite," when properly read in the context of the statute as a whole, is not based upon the subjective whims and opinions of one individual—whether the President or the Administrator of the EPA.

The import of the language used in the Clean Air Act could not be further from the import of the language in the FPASA—one fences in the possible actions of a potentially overzealous regulator, whereas the other only limits the President by the bounds of their own imagination.[152] The difference is really between the strength of an objective standard and a subjective one.[153] Lest one believe that the President would only act in an explainable manner to avoid political pressure, it must be restated that President Biden's revocation of the outfitter exemption did not contain even a nominal explanation of the reasoning behind the change.[154] Such is the President's power under the FPASA.[155]

The *Bradford* majority then points to Tenth Circuit precedent, namely *City of Albuquerque v. Department of Interior*,[156] as an argument that the FPASA has already been found to be a valid delegation of authority.[157] There, Albuquerque argued under the Administrative Procedure Act "that the Department of Interior violated an executive order issued pursuant to FPASA by selecting office space in a manner that conflicted with procedures dictated under the order."[158] The *Albuquerque* court held "that directions in the executive order 'concerning the consideration of locations within [a] central business area are sufficiently related to [the FPASA] to be a valid exercise of the Act's delegated authority.'"[159] This result, the *Bradford* majority submits, means that it already "recognized that FPASA

148. *See id.* at 738 (Eid, J., dissenting).
149. *Id.* (emphasis in original).
150. *Id.* (emphasis in original) (quoting 40 U.S.C. § 121(a)).
151. *Whitman*, 531 U.S. at 473 (emphasis added).
152. *See Bradford*, 101 F.4th at 738 (Eid, J., dissenting).
153. *See id.*
154. *See* Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67129 (Nov. 11, 2021).
155. *See Bradford*, 101 F.4th at 738 (Eid, J., dissenting).
156. 379 F.3d 901 (10th Cir. 2004).
157. *Bradford*, 101 F.4th at 729.
158. *Id.*; *see also* City of Albuquerque v. Dep't of Interior, 379 F.3d 901, 904–05, 913 (2004).
159. *Bradford*, 101 F.4th at 730 (quoting *City of Albuquerque*, 379 F.3d at 914).

provides an 'intelligible principle' by only authorizing actions that promote economy and efficiency in procurement and supply."[160] On this basis, the *Bradford* majority agreed with the Appellees that Tenth Circuit precedent foreclosed any nondelegation concern regarding the FPASA.[161]

Upon further examination of *City of Albuquerque*, though, it is apparent that the court gave no more than a cursory explanation of the mechanics of a valid delegation without actually analyzing whether the FPASA violated the nondelegation doctrine, as that was not at issue on appeal.[162] Instead, the discussion in *City of Albuquerque* that the *Bradford* majority references focuses on whether Albuquerque had prudential standing to challenge the Department of the Interior's processes under the FPASA.[163] The Department argued that "the City [did] not meet the prudential standing requirements because it '[was] not within the "zone of interests" of a statute supporting standing under the [Administrative Procedure Act].'"[164] The Department asserted that neither the Executive Order purportedly governing site selection processes nor the FPASA on which the Executive Order is based "evidences congressional intent to provide non-bidders a private right of action under the executive order."[165] In this specialized circumstance, the court was tasked with determining whether the Executive Order in question had a "specific statutory foundation."[166] If so, the Executive Order could be given the effect of a congressional statute and was thus enforceable under the Administrative Procedure Act.[167]

In *City of Albuquerque*, the Executive Order that governed the Department of the Interior's selection of a location for a federal office space was also purportedly based upon the general grant of power to the President contained within the FPASA.[168] The Department of the Interior argued that the Executive Order lacked a specific statutory foundation because the FPASA did not specifically contain "any directive addressing location of federal office space" like those at issue.[169] The court, however, found that the FPASA did provide a sufficient statutory foundation for the Executive Order at issue.[170] However, important to note is what the court *did not find*. The court did not find—as the question was not at issue—

160. *Id.* at 730 (quoting *City of Albuquerque*, 379 F.3d at 914–15).
161. *Id.* at 741 (Eid, J., dissenting).
162. *Id.*; *see City of Albuquerque*, 379 F.3d at 914–15.
163. *City of Albuquerque*, 379 F.3d at 913.
164. *Id.*
165. *Id.*
166. *Id.* at 914.
167. *Id.* at 913–14 (discussing the three requirements for an executive order to be enforceable under the Administrative Procedure Act: 1) specific statutory foundation; 2) no preclusion of judicial review; and 3) an objective standard by which a court can judge the agency's actions.)
168. *Id.* at 914.
169. *Id.*
170. *Id.*

whether the FPASA itself was constitutional.[171] On this issue, the *Albuquerque* court made a few observations. First, the court explained that "it is well established that Congress may delegate responsibility to the executive branch so long as Congress provides an 'intelligible principle.'"[172] This is an apt—if somewhat high-level—summary of the nondelegation doctrine. Then, the court stated that Congress "chose to utilize a relatively broad delegation of authority" through the FPASA.[173] Yes, broad in the sense that it delegated nearly unfettered power to the President. Finally, the court stated the general purpose of the FPASA, that "the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property."[174] Beyond these general statements, there is nothing to indicate that the *Albuquerque* court decided the nondelegation doctrine question. This is evidenced by the court's narrow conclusion that the Executive Order's "directions concerning the consideration of locations within the central business area are sufficiently related to the [FPASA] to be a valid exercise of the Act's delegated authority."[175]

As Judge Eid states in the *Bradford* dissent, this is "a predictable outcome given how far-reaching the FPASA is."[176] Importantly, though, this is a different question than the one posed in *Bradford*. The question in *City of Albuquerque* was whether the Executive Order issued was a valid exercise of authority under the FPASA. The question in *Bradford* is whether the FPASA itself is a constitutional delegation of legislative authority by Congress. As such, the *Bradford* majority erroneously affords "precedential weight to an opinion's discussion that alludes to a constitutional doctrine (that was *not* before the Court) in the mix of determining another issue (that *was*)."[177] Here, the nondelegation question as applied to the FPASA is a matter of first impression for the Tenth Circuit.[178] And, as the FPASA contains a broad delegation of legislative authority to the President and does not contain an intelligible principle, it violates the nondelegation doctrine.

E. Post-Chevron Deference, the Nondelegation Doctrine May Hold Additional Significance.

Cases like *Bradford*—which tee up major nondelegation questions—hold additional significance following the Supreme Court's decision to

171. Bradford v. U.S. Dep't of Labor, 101 F.4th 707, 741 (10th Cir. 2024) (Eid, J., dissenting); *see City of Albuquerque*, 379 F.3d at 913–16.
172. *City of Albuquerque*, 379 F.3d at 914 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); *see Bradford*, 101 F.4th at 741 (Eid, J., dissenting).
173. *City of Albuquerque*, 379 F.3d at 914.
174. *Id.*
175. *Id.*
176. *Bradford*, 101 F.4th at 741 (Eid, J., dissenting).
177. *Id.*; *see e.g.*, Thompson v. Weyerhaeuser Co., 582 F.3d 1125, 1129 (10th Cir. 2009) (considering as dicta "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand").
178. *Bradford*, 101 F.4th at 741 (Eid, J., dissenting).

overturn *Chevron* deference. Practitioners, judges, Congress, and legal commentators are trying to divine how much Agency power is too much in this new era. While one may survey the history of the nondelegation doctrine and uncover where it has fit in our constitutional framework, its current position is less clear. American administrative law is currently in a well-publicized period of transition.[179] It seems "[t]he judiciary, sometimes alarmed by the perceived excesses of the administrative state, is reexamining the deference traditionally afforded agency interpretations as law."[180] *Loper Bright* stands out as a signpost along this transitional road. As Professor Adrian Vermuele[181] has suggested, the *Loper Bright* opinion "'expressed a mood,' as Justice Frankfurter once said of Congress in a somewhat different administrative law context. The mood is that "'We the Judges say what the law is.'"[182]

Loper Bright's impact may be overblown in terms of real changes to the operation of the federal government. However, the Supreme Court did overrule the traditional *Chevron* test, which directed courts to defer to an agency's reading of ambiguous statutory language so long as it is reasonable.[183] In doing so, the Supreme Court concluded "that courts have a constitutional and statutory obligation to exercise their 'independent judgment' when deciding whether a federal administrative agency has acted within its statutory authority."[184] The Court created a foundation for the decision by referencing Article III of the U.S. Constitution.[185] Therein, the federal judiciary is assigned the "responsibility and power to adjudicate 'Cases' and 'Controversies'—concrete disputes with consequences for the parties involved."[186] The Framers of the Constitution predicted that laws drafted by Congress would often be ambiguous when applied to specific circumstances and "envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"[187] In fact, "[t]o ensure the 'steady, upright and impartial administration of the laws,' the Framers structured the Constitution to allow judges to exercise that

179. Christopher Yukins, Kristen Ittig & Nicole Williamson, *The Sentinel Stirs: Government Procurement Law After Loper Bright Enterprises*, 24-9 BR. PAPERS 1 (Aug. 2024); *see generally* Anthony Zurcher, Nada Tawfik, Lisa Lambert & Kayla Epstein, *The Chevron Deference, and Why It Mattered*, BBC NEWS (June 28, 2024), https://www.bbc.com/news/articles/c51ywwrq45qo; Matthew Daly, *What It Means for the Supreme Court to Throw Out Chevron Decision, Undercutting Federal Regulators*, AP NEWS (June 28, 2024, 11:09 AM), https://apnews.com/article/supreme-court-chevron-regulations-environment-4ae73d5a79cabadff4da8f7e16669929; Jess Bravin, *Supreme Court Pares Back Federal Regulatory Power*, WALL ST. J. (June 28, 2024), https://www.wsj.com/us-news/law/supreme-court-pares-back-federal-regulatory-power-954a101c.

180. Yukins, Ittig & Williamson, *supra* note 179, at 1.

181. Ralph S. Tyler Professor of Constitutional Law, Harvard Law School.

182. Adrian Vermuele, *Chevron by Any Other Name: From "Chevron Deference" to "Loper Bright Delegation,"* THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name.

183. Yukins, Ittig & Williamson, *supra* note 179, at 1.

184. Chris S. Leason & Liam Vega Martin, *Supreme Court Overrules Chevron*, 54 ENV'T. L. REP. 10731 (2024).

185. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384 (2024).

186. *Id.*

187. *Id.* at 385 (quoting The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison)).

judgment independent of influence from the political branches."[188] Consistent with that Article III role, Chief Justice Marshall in *Marbury v. Madison*[189] famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[190]

In many ways, the current Court's analysis on this issue represents a return to the original precepts set by the Framers in the Constitution. Article III requires the judiciary, not the political branches, to interpret laws as they are applied to individuals before them.[191] The Framers knew that a non-political branch would best be able to interpret the laws, rather than attach a meaning that is politically expedient at the time of trial.[192]

Almost perfectly intertwined with this logic is the nondelegation doctrine. Article I requires the Congress of the United States to exercise all legislative powers.[193] This way, the lawmakers are directly accountable to their constituents for the laws passed. But that's not all; of course, the Executive branch is also politically accountable. The key difference relates to the makeup of both branches. The power of the Executive branch is vested in one individual—the President—accountable to the Nation as a whole. Congress, on the other hand, is made up of individual representatives accountable to their constituents back home. While developing policy and drumming up enough votes to get legislation passed, Congress is more likely to account for the interests of regional parties like Duke and AVA.

Accordingly, strengthening the nondelegation doctrine is the next step in returning to the correct balance between the three branches of the United States government.[194] Only then can the political process work as the Founders intended.

F. The Nation Needs the Court to Strengthen the Nondelegation Doctrine

Bradford was the ideal opportunity for the Supreme Court to reinforce the nondelegation doctrine and provide an explanation of how clear Congress must be when it wishes to cede law-making power to the Executive. Unfortunately, the Nation's highest Court declined to do so.[195]

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188. *Id*. (quoting The Federalist No. 78, at 522 (J. Cooke ed. 1961) (A. Hamilton).
189. 1 Cranch 137 (1803).
190. *Loper Bright Enters.*, 603 U.S. at 385 (quoting *Marbury*, 1 Cranch at 177 (1803)).
191. *See* U.S. CONST. art. III, § 2.
192. *See Loper Bright Enters.*, 603 U.S. at 385.
193. *See* U.S. CONST. art. I, § 1.
194. *See* Fed. Commc'ns Comm'n v. Consumers' Rsch., 606 U.S. 656, 705 (2025) (Kavanaugh, J., concurring) (treating the rejection of *Chevron* deference and the Court's current application of the major questions canon of statutory interpretation as mitigations of "broader structural concerns about expansive delegations" from Congress to the Executive branch of government).
195. Bradford v. U.S. Dep't of Labor, 101 F.4th 707 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1047 (2025). It is unclear whether President Trump's return to the White House, which would come seven days after the Court denied certiorari in *Bradford*, played a role in the Court's decision.

1. *Gundy v. United States*: A Promise Made

Prior to *Bradford*, there was an apparent appetite among the Justices on the Supreme Court to tackle this issue.[196] In 2019, the nondelegation doctrine was squarely within the crosshairs of the Court in *Gundy v. United States*.[197] The Plaintiff in *Gundy*, Herman Gundy, was convicted of failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA).[198] Gundy "plead[] guilty under Maryland law for sexually assaulting a minor," a year before SORNA was enacted and the requirements for registering as a sex offender under the Act came into effect.[199] Gundy argued that "Congress unconstitutionally delegated legislative power when it authorized the Attorney General to 'specify the applicability' of SORNA's registration requirements to pre-Act offenders."[200]

Despite this grant of authority to the Executive branch, Justice Kagan, writing a plurality opinion for four Justices, found an intelligible principle in the disputed statute and declared the statute constitutional.[201] Justice Alito provided the fifth vote necessary to uphold the statute, but indicated a willingness to join the dissenters once a majority could be assembled to reevaluate the nondelegation doctrine.[202] The three dissenters—Justice Gorsuch, Justice Thomas, and Chief Justice Roberts—argued in favor of bolstering the requirements that Congress must meet to constitutionally delegate legislative authority.[203]

In the dissenting opinion, Justice Gorsuch conceded that a more stringent intelligible principle test, or at least one that actually holds Congress to the requirements of Article I, is a complex question.[204] Indeed, "Chief Justice Marshall agreed that policing the separation of powers 'is a subject of delicate and difficult inquiry.'"[205] Nonetheless, Justice Gorsuch offered up a potential new test in the form of three guiding principles utilized by the Framers.[206]

In Justice Gorsuch's test, the first principle is that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"[207] Very early on in the

196. *See* Gundy v. United States, 588 U.S. 128, 149 (2019) (plurality opinion) ("If a majority of this Court were willing to reconsider the approach [to the nondelegation doctrine] we have taken for the past 84 years, I would support that effort." (Alito, J., concurring)) ("Respectfully, I would not wait." (Gorsuch, J., dissenting)).
197. 588 U.S. 128 (2019) (plurality opinion).
198. *Gundy*, 588 U.S. at 134.
199. *Id.*
200. *Id.*
201. *Id.* at 135.
202. *Id.* at 149 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").
203. *See id*. at 149–79 (Gorsuch, J., dissenting).
204. *Id*. at 156–59.
205. *Id*. at 157 (quoting Wayman v. Southard, 23 U.S. 1, 22 (1825)).
206. *Id*. at 157–59.
207. *Id.* at 157.

Court's jurisprudence, "Chief Justice Marshall distinguished between those 'important subjects, which must be entirely regulated by the legislature itself,' and 'those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.'"[208] To be constitutional under this principle, Congress must announce a controlling policy and present "residual authority to make 'alterations and additions'" that permit the designee branch to fill up the details.[209] In line with the traditional second bucket of the nondelegation doctrine, this principle follows "the theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[210]

The second principle of Justice Gorsuch's test is that "once Congress prescribes the rules governing private conduct, it may make the application of that rule depend on executive fact-finding."[211] Congress does not abdicate its authority when delegating such power.[212] Instead, Congress "simply declare[s] that, upon a certain fact being established," the delegee should act in a manner predetermined by Congress.[213] This principle mirrors what is traditionally the first bucket of constitutional intelligible principles in the Court's nondelegation doctrine jurisprudence.

The third and final principle of Justice Gorsuch's test is that "Congress may assign the executive and judicial branches certain nonlegislative responsibilities."[214] This principle refers to situations in which the legislative authority vested in Congress "overlaps with authority the Constitution separately vests in another branch."[215] While not expressly part of the traditional nondelegation doctrine analysis, this principle is almost implicit. Justice Gorsuch explains that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"[216] For example, statutes delegating certain foreign-affairs-related powers to the executive branch might be covered by this principle.[217]

With a new test such as the one proposed by Justice Gorsuch and the *Gundy* dissenters, the judiciary might finally be empowered to curb the unconstitutional delegation of legislative authority, which has grown exponentially over the last century.[218] *Bradford* was seemingly the ideal

208. *Id*. at 157 (quoting *Wayman*, 23 U.S. at 43).
209. *Id*. at 157–58.
210. *Id.* at 158 (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).
211. *Id*.
212. *Id.* at 159.
213. *Id.* (quoting Miller v. Mayor of New York, 109 U.S. 385, 393 (1883)).
214. *Id*. at 159.
215. *Id.*
216. *Id.* (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).
217. *Id*. 159.
218. *Id.* at 160.

vessel for the Court to "put its foot down." The FPASA arguably does not fall within the first two principles laid down by Justice Gorsuch.[219] As such, its survival would depend on the third principle: Whether the authority granted to the president under the FPASA overlaps with authority already granted to the President by the Constitution.[220] As Justice Gorsuch found with SORNA in *Gundy*, the FPASA "does not involve an area of overlapping authority with the executive."[221] Instead, the FPASA allows the President to dictate laws that regulate millions of Americans depending upon the social agenda of the current President's party. This is the essence of an unconstitutional delegation of legislative power and would likely not stand under Justice Gorsuch's new-look formulation of the nondelegation doctrine.

2. *Federal Communications Commission v. Consumers' Research*: A Nondelegation Stumble

Since the *Gundy* decision, Justice Kavanaugh and Justice Coney Barrett have replaced Justice Kennedy and Justice Ginsburg, respectively.[222] You may be thinking that these two new additions—who seemingly occupy the same end of the political spectrum as the *Gundy* dissenters—would embolden Justice Alito and lend enough votes to finally reinforce the nondelegation doctrine. And you might be right eventually. But just last year, in *Federal Communications Commission v. Consumers' Research*,[223] the Supreme Court faced a nondelegation doctrine question, and Justice Gorsuch again found himself penning the dissent.[224] This time, he had lost Chief Justice Roberts and gained Justice Alito, while Justice Thomas remained on his side.[225] Neither Justice Coney Barrett nor Justice Kavanaugh joined in the dissent.[226]

In *Consumers' Research*, the Court upheld the Federal Communications Commission's (FCC) universal-service contribution scheme in the face of nondelegation challenges.[227] The statute at issue tasked the FCC with achieving "universal service," which means making communications services available at affordable prices to all Americans.[228] In 1996, Congress amended the statute to require "every carrier providing interstate telecommunications services to 'contribute,' in line with the statute and FCC rules, to a fund designed to 'preserve and advance universal

219. *See supra* Sections III.A.1, III.A.2.
220. *See Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting).
221. *Id.* at 170.
222. Johnathan Hall, *The Gorsuch Test:* Gundy v. United States *Limiting the Administrative State, and the Future of Nondelegation*, DUKE L.J. (2020).
223. 606 U.S. 656 (2025).
224. Fed. Commc'ns Comm'n v. Consumers' Rsch., 606 U.S. 656, 710 (2025) (Gorsuch, J., dissenting).
225. *Id.*
226. *Id.*
227. *Id.* at 691 (majority opinion).
228. *Id.* at 662–63.

service.'"[229] Essentially, Congress delegated the authority to determine how much each carrier must contribute to the fund to the FCC.[230]

A non-profit organization called Consumers' Research challenged the FCC's December 2021 calculation of a 25.2% contribution for the first quarter of 2022.[231] This contribution calculation meant that each carrier would have to pay 25.2% of its projected revenue to the FCC.[232] Then, this significant outlay could be "pass[ed] along to its customers."[233] Using interstate telecommunications carriers as a middleman, the FCC could tax Americans at whatever rate it decides sufficient to carry out its universal service mission.[234] For the majority of the Court, this arrangement was of no real concern.[235]

Instead, the majority compared Congress's use of the word "sufficient" in the statute with a theoretical pizza party where you instruct a friend to order "sufficient" pizza for five people.[236] In the same way the FCC was enabled to collect sufficient funds to conduct its universal-service mission—not too much and not too little—your friend cannot choose to order 500 boxes of pizza any more than he can decide not to order pizza at all.[237] The majority then asked whether the statute at issue properly cabined the ends which Congress intended the FCC to pursue with these sufficient funds.[238] Indeed, if the "Sufficient for what" question was indeterminate, the FCC would be free to "operate—and collect contributions 'sufficient' for—either the most barebones or the most extravagant program."[239] After examining a selection of sections of the statute, the majority held that "the statutory policy is clear and the statutory boundaries specific."[240]

In response, the dissent characterized the majority as "swallow[ing] a delegation beyond anything yet seen in the U.S. Reports."[241] Nevertheless, Justice Gorsuch predicted that the nondelegation doctrine would soon see proper enforcement by the Court, stating that "[b]ecause today's misadventure 'sits unmoored from surrounding law,' I have reason to hope its approach will not stand the test of time."[242] The dissent found that the universal-service contribution scheme was essentially Congress delegating the power to tax to an unelected FCC.[243] As "[t]axation ranks among the

229. *Id*. at 666 (quoting 47 U.S.C. § 254(d)).
230. *Id.* at 668–69.
231. *Id.* at 670.
232. *Id.* at 669.
233. *Id.*
234. *Id*. at 711(Gorsuch, J., dissenting).
235. *See id.* at 698 (majority opinion).
236. *Id.* at 682.
237. *Id.*
238. *Id.*
239. *Id.* at 682–83.
240. *Id.* at 686.
241. *Id.* at 711 (Gorsuch, J., dissenting).
242. *Id.* at 711 (quoting Loper Bright Enters. v. Raimondo, 603 U.S. 369, 425 (2024)).
243. *Id.* at 719–20 (Gorsuch, J., dissenting).

government's greatest powers," the intelligible principle necessary to support such a delegation must provide a significant limit on the agency's discretion.[244] This idea should sound familiar because a famous slogan attributed to Boston politician James Otis in 1765, and utilized by American teachers to summarize a major cause of the American Revolution, sums it up nicely: "[T]axation without representation is tyranny."[245] Unsurprisingly, the statute's qualitative cap—the word sufficient—mixed with the concept of universal service, which changes with technology and consumer preferences for different types of telecom services, does not provide the type of intelligible principle necessary for Congress to delegate the power to tax to an executive agency.[246]

Because Justice Coney Barrett did not file a concurring or dissenting opinion, it is difficult to hypothesize whether she joined the majority because of the specific delegation at issue in *Consumers' Research* or because she is skeptical of a beefed-up nondelegation doctrine.[247] Justice Kavanaugh, on the other hand, drew an interesting contrast in his concurrence between "congressional delegations to *independent* agencies, as distinct from delegations to the President and *executive* agencies."[248] Because the FCC is not formally an independent agency, Justice Kavanaugh saw no impermissible delegation.[249] Justice Kavanaugh went on to say that "[i]f the FCC were an independent agency . . . then a serious Article II delegation problem would arise."[250] Justice Kavanaugh suggested a few possible solutions to this theoretical situation, such as overruling Supreme Court precedent "so that the heads of all or most independent agencies are removable at will by the President" or "apply[ing] a more stringent version of the nondelegation doctrine to delegations to independent agencies."[251] In Justice Kavanaugh's opinion, other actions by the Supreme Court, like ditching *Chevron* deference and modernizing the application of the major questions doctrine, have mitigated the need to bolster the nondelegation doctrine outside of the independent agency context.[252] Perhaps these changes have dampened the Justices' interest in carrying out Justice Gorsuch's proposition in his *Gundy* dissent. Current events, however, make it clearer than ever that the nondelegation doctrine has an important role in patrolling the Constitutional separation of powers and curbing potential abuses by any one branch of government.

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244. *Id.* at 723.
245. DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21–23 (Routledge, 1998).
246. *See Consumers' Rsch.*, 606 U.S. at 727-28 (Gorsuch, J., dissenting).
247 . *See* Transcript of Oral Argument at 126:6–8, Fed. Commc'ns Comm'n v. Consumers' Rsch., 606 U.S. 656 (2025) (Coney Barrett, J.) (remarking that the idea of requiring a quantitative cap on the amount of funds the FCC can raise as a solution to a potential nondelegation doctrine "[k]ind of seems like a meaningless exercise").
248. *Consumers' Rsch.*, 606 U.S. at 707 (Kavanaugh, J., concurring) (emphasis in original).
249. *Id.* at 708.
250. *Id.* at 709.
251. *Id.*
252. *Id.* at 705–06.

3. *Perkins Coie LLP v. U.S. Department of Justice*: A Pressing Concern

Although the Supreme Court declined to re-examine the FPASA via the *Bradford* petition for certiorari, Congress's broad delegation of authority in that statute continues to allow Presidents from both parties to chase all sorts of controversial objectives. Less than two months into his second term in the White House, President Trump rocked the legal community with Executive Order 14230, *Addressing Risks From Perkins Coie LLP* (Order).[253] The Order targets Perkins Coie, a law firm that represented Hillary Clinton's 2016 campaign, by limiting its ability to work with government agencies and government contractors.[254] Section 3 of Executive Order 14230 instructed government contracting agencies to "require Government contractors to disclose any business they do with Perkins Coie and whether that business is related to the subject of the Government contract" "[t]o prevent the transfer of taxpayer dollars to Federal contractors whose earnings subsidize, among other things, racial discrimination, falsified documents designed to weaponize the Government against candidates for office, and anti-democratic election changes that invite fraud and distrust."[255] Heads of all agencies were further instructed to "review all contracts with Perkins Coie or with entities that disclose doing business with Perkins Coie."[256] Then, the agency heads must "take appropriate steps to terminate any contract, to the maximum extent permitted by applicable law, including the Federal Acquisition Regulation, for which Perkins Coie has been hired to perform any service."[257]

Executive Order 14230 was widely panned by legal critics as a retaliatory move against a private law firm by the President of the United States.[258] Indeed, the United States District Court for the District of Columbia agreed, granting summary judgment and permanent injunctive relief to Perkins Coie.[259] The court declared Executive Order 14230 "unlawful because it violates the First, Fifth, and Sixth Amendments to the U.S. Constitution."[260] The most interesting aspect of Executive Order 14230 and *Perkins Coie LLP v. U.S. Department of Justice*,[261] at least in

253. Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 6, 2025).
254. Bart Jansen, *Trump Halts Security Clearances of Perkins Coie, Cites Links to Hillary Clinton*, USA TODAY (Mar. 6, 2025, 8:42 p.m.), https://www.usatoday.com/story/news/politics/2025/03/06/trump-suspends-security-clearances-perkins-coie/81830556007/.
255. Exec. Order No. 14230, 90 Fed. Reg. 11781 § 3(a) (Mar. 6, 2025).
256. *Id.* § 3(b).
257. *Id.* § 3(b)(i).
258. *See* Mitchell Bernard & Michael Wall, *We Frequently Disagree with Perkins Coie in Court—but Today, We Stand with Them*, NRDC (Apr. 11, 2025), https://www.nrdc.org/bio/mitchell-bernard/we-frequently-disagree-perkins-coie-court-today-we-stand-them.
259. Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105, 164, 180-81 (D.D.C. 2025) ("Viewed in conjunction with the facts and context of the instant case, the Covington Memorandum, Jenner EO, and WilmerHale EO support the plaintiff's description of a 'broader campaign,' of President Trump using the power of the presidency to target individual lawyers and law firms associated with them based on personal dislike of their legal work—in other words, for retribution.").
260. *Id.* at 181.
261. 783 F. Supp. 3d 105 (D.D.C. 2025).

the context of this Note and the nondelegation doctrine, is that the Government relied upon the procurement power delegated to the Executive by Congress in defending the President's ability to target Perkins Coie.[262]

In fact, the Government cited the same section of the FPASA that was central in the *Bradford* case, stating that it "specifically references the President's ability to prescribe policies necessary to carry out" the President's power to manage "[f]ederal properties and the organization of the General Services Administration."[263] According to the government, these delegations from Congress plainly display "[t]he [e]xecutive's ability to tie its procurement procedures, i.e., to choose whom it will do business with, to the fulfillment of its public policy goals, including those involving national security and civil rights."[264] It seems quite clear, as pointed out by Circuit Judge Eid in her *Bradford* dissent, that statutes like the FPASA seem to empower the President to target parties that he subjectively believes are bad for federal procurement systems. This remains true regardless of whether the belief is grounded in any kind of reality or factual findings, and regardless of the President's political party. The Government has appealed the *Perkins Coie* decision to the U.S. Court of Appeals for the D.C. Circuit, and perhaps the Supreme Court will get another bite at the apple sooner rather than later.[265]

D. Even in the Modern World, Less Reliance on Agency Governance is Still Workable

Although the U.S. Constitution is unique, there are other developed countries with similar governments and similar problems. Around the world, scholars have often "sought to strike the appropriate balance between promoting useful, expert agency action and limiting lawless, unaccountable agency behaviors."[266] Historically, excessive judicial review and unchecked legislative delegation represent the extremes of this balancing test, and both have led to unintended consequences.[267] For instance, "limited judicial review and limitless legislative delegation to the executive gave foundation to the Nazis' rise to power in 1930s Germany."[268] Conversely, "extreme skepticism of bureaucracy and

262. Defendants' Opposition to Plaintiff's Motion for Summary Judgment at 15–16, Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105 (D.D.C. 2025) (No. 1:25cv716).
263. *Id.* at 15.
264. *Id.*
265. Petition for Writ of Certiorari, Perkins Coie LLP v. U.S. Dep't of Just., (No. 25-5241); *see also* Abbie VanSickle, *What is The Nondelegation Doctrine?*, NY TIMES (Nov. 5, 2025), https://www.nytimes.com/2025/11/05/us/politics/nondelegation-doctrine-tariffs.html (discussing the current challenge to President Trump's use of tariffs purportedly based on the International Emergency Economic Powers Act, which is being challenged on nondelegation grounds in front of the Supreme Court in *Learning Resources, Inc. v. Trump*, 145 S. Ct. 2811 (2025).
266. Kent Barnett & Lindsey Vinson, *Chevron Abroad*, 96 NOTRE DAME L. REV. 621, 622 (2020).
267. *Id.* at 622–23.
268. *Id.*; *see* Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341, 1361–71 (2004) (discussing impact of Weimar-era delegation with Nazi empowerment).

overbearing judicial review in the Ukraine has stunted the maturation of Ukrainian agencies."[269]

A common argument in response to nondelegation concerns is that strong deference to agency expertise is fundamental to a functioning, modern government because "[c]ourts are ill-equipped to handle the complexities of the administrative state."[270] While it may be true in some circumstances that "[j]udges generally do not have the specialized training, education, and real-world experience to second-guess the reasonable opinions of a government agency,"[271] it may be helpful to study other modern countries and how they approach agency review. Only then is it possible to definitively close the door to the judiciary fulfilling its constitutional role because of concerns regarding their intellect or training.

For instance, one may look to Germany, the United Kingdom, Australia, Israel, France, or the European Union as a whole to find Western countries with legal systems somewhat similar to the United States and determine how they approach deference to agency interpretations.[272] "While German law does recognize an exception according to which, in cases where courts confront 'indefinite legal terms,' they should provide some 'margin of appreciation' to agencies' interpretations, that exception is an incredibly narrow one in practice."[273] In the United Kingdom, there exists a somewhat more broad exception to the rule that courts "say what the law is."[274] U.K. courts "have recognized the possibility of deference on questions of law . . . when interpretations of statutory terms are made by the U.K. tribunal system which conducts . . . administrative adjudication in the U.K."[275] This does not include "many consequential forms of administrative policymaking outside the tribunal system."[276] In Australia, the "idea of explicit judicial deference to the administration on questions of law . . . would be almost heretical."[277] Indeed, "no deference is allowed," due in large part to the principle of constitutional separation of powers.[278] In Israel and France, like Australia, judges "have full control over determining the meaning of statutory terms applied by executive

269. Barnett & Vinson, *supra* note 266, at 622; *see* Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047, 1062–63 (2017) (considering how Ukraine reviews agency interpretations of statutes and regulations).
270. Michael M. Epstein, *Agency Deference After Loper: Expertise as a Casualty of a War Against the "Administrative State,"* 89 BROOK. L. REV. 871, 878 (2024).
271. *Id.*
272. *See* Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. 801, 911–14 (2024).
273. *Id.* at 912 (quoting NIGEL G. FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM & LAWS 256-57 (3d ed. 2002)); *see* Hermann Pünder & Anika Klafki, *Administrative Law in Germany*, *in* COMPARATIVE ADMINISTRATIVE LAW: ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES 89 (René Seerden ed., 4th ed. 2018).
274. Tamir, *supra* note 272, at 912.
275. *Id.*
276. *Id.* at 912–13 (2024); *see, e.g.*, PETER CANE, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION 269–72 (2010) (discussing important differences and characteristics of the U.K. tribunal system).
277. Tamir, *supra* note 272, at 913.
278. *Id.*

departments."[279] Finally, in the European Union judicial system, "courts also deny the existence of any formal deference to administration on questions of law."[280]

The United States is a unique country. Nevertheless, other modern, democratic countries illustrate the varied ways in which America's governance problems could be addressed. Despite what some might claim, the fact that these countries do not uniformly rely on agency technocrats to make policy decisions suggests that these decisions are not necessarily beyond the capabilities of Congress or the judiciary. Agency deference cannot be the sole formula for the survival of a modern government with complex problems. The separation of powers envisioned by the Founding Fathers still has a place in today's world. As such, the judiciary should not be afraid of couching Congress's delegation of legislative power to those within constitutional bounds.

CONCLUSION

This Supreme Court has shown a willingness to claw back traditional separation of powers ideals through decisions such as *Loper Bright*. Although the Court declined to address one of these traditional ideals in *Bradford*—the nondelegation doctrine—it is imperative that it eventually bolsters this doctrine. The current White House inhabitant appears highly motivated to use statutory grants of authority in new and creative ways. This is possible in large part because of the Supreme Court's toothless enforcement of the nondelegation doctrine in the face of broad and ambiguous delegations of legislative authority by Congress. The Court must now seize the opportunity to properly delineate the roles of our three branches of government. Only then may we avoid the sprawl and abuses which accompany unchecked executive power.

279. *Id.*
280. *Id.* at 914.