No. _____

In the
Supreme Court of the United States

TNT CRANE & RIGGING, INC.,
Petitioner,

v.

EUGENE SCALIA, SECRETARY OF LABOR; OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

OSHA's ground-conditions standard requires a construction site's ground conditions to be sufficiently firm, drained, and graded to ensure the safe operation of cranes used at that site. The standard expressly assigns responsibility for ensuring safe ground conditions to the construction site's "controlling entity," typically the site's general contractor. That assignment makes sense both because having a single responsible party is critical and because the general contractor is generally on-site for months and thus far more familiar with ground conditions than a crane operator on a one- or two-day assignment. Despite the standard's express assignment of responsibility for ground conditions to the controlling entity, and the industry's resulting uniform understanding and custom, OSHA issued Petitioner, a crane operator, a citation for failing to ensure sufficient ground conditions. The citation was not based on a theory that Petitioner, a subcontractor on site for only two days, was the site's "controlling entity," but on the novel view that the responsibilities expressly assigned to the controlling entity extend to crane operators as well. The Fifth Circuit denied a petition for review, adopting an interpretation of the standard that conflicts with the regulatory text and history and that radically transforms the allocation of responsibility on construction sites under OSHA and the many state tort regimes that follow OSHA.

The question presented is:

Whether 29 C.F.R. §1926.1402(b), for which OSHA expressly assigned responsibility to controlling entities, also imposes a duty on crane operators.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner discloses the identity of the following interested parties:

1. TNT Crane & Rigging, Inc.

2. FR TNT Allison Corp. (Parent of TNT Crane & Rigging, Inc.)

3. FR TNT Holdings LLC. (Parent of TNT Crane & Rigging, Inc.)

4. FR TNT Holdings II Corp., Inc., (Parent of TNT Crane & Rigging, Inc.)

5. FR TNT Management LP, (Parent of TNT Crane & Rigging, Inc.)

6. North American Lifting Holdings, Inc., (Parent of TNT Crane & Rigging, Inc.)

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceeding in the United States Court of Appeals for the Fifth Circuit:

- *TNT Crane & Rigging, Inc. v. Occupational Safety and Health Review Commission*, No. 19-60745 (5th Cir. 2020), judgment entered Aug. 4, 2020.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

In 2010, OSHA promulgated new safety standards for construction sites on which cranes or derricks are used. One critical component of OSHA's action was the ground-conditions standard, as insufficient ground conditions—*i.e.*, conditions not sufficiently firm or level to support a crane—have historically been a major cause of crane-related injuries. The new standard not only sets forth substantive ground-conditions requirements, but also assigns responsibility for satisfying those requirements to the worksite's "controlling entity," which is typically the general contractor. As OSHA explained at the time, this express assignment of responsibility was crucial because, under the prior regime, the various entities at a worksite often failed to agree on who would bear responsibility for correcting ground-conditions problems, which often resulted in those problems going uncorrected. Thus, someone needed to be responsible. And assigning the responsibility to the controlling entity was an easy call, because, as OSHA explained, the controlling entity is typically present at the worksite throughout the entire project and thus has the most familiarity with the worksite and the necessary authority to remedy any defects. OSHA expressly rejected calls to assign responsibility to crane operators, explaining that they are typically short-term subcontractors with less knowledge about the worksite and little or no authority to remedy defects. This is a case in point: while the controlling entity/general contractor was on-site throughout the four-month project, Petitioner was present for just two days.

This case arose out of a crane-related accident on a construction site at which Petitioner TNT was the subcontracted crane operator. On the second night of TNT's two-night job, one of the crane's outriggers pierced the ground surface, causing the crane to tip backwards and injuring the crane operator. OSHA investigated the accident and determined that the ground conditions were insufficient under the ground-conditions standard. OSHA issued a citation for the violation—but rather than issuing it to the project's general contractor, OSHA issued it to TNT, the crane operator. OSHA did not do so based on some esoteric or case-specific view that TNT, and not the general contractor, was the "controlling entity." Instead, in direct conflict with its own regulation, its own prior description of that regulation, and the industry's uniform understanding and custom, OSHA asserted that the ground-conditions standard actually assigns responsibility for ground conditions to *both* the controlling entity *and* the crane operator.

The Fifth Circuit upheld that interpretation in a decision that defies the regulatory text, disregards the agency's contemporaneous explanation of that text, and fundamentally misperceives OSHA's charge. Contrary to the Fifth Circuit's instinct to read OSHA standards as broadly applicable prohibitions, OSHA's mandate is to ensure workplace safety, not necessarily to regulate the conduct of every third party that enters the worksite. In the ground-conditions standard, as in many others, OSHA determined that workplace safety is better served when responsibility for eliminating a specific hazard is assigned to one specific entity with control over the worksite, rather than diffusing responsibility or assigning responsibility for

permanent conditions at the worksite like ground condition to parties with only an episodic relationship with the worksite. By ignoring this express regulatory choice and deeming crane operators jointly responsible for ground conditions, the decision below not only misreads the statutory text but disregards the statutory and regulatory design and reintroduces the very problems the regulation was designed to solve.

Worse still, the decision works a radical transformation in the allocation of responsibility at construction sites. Precisely because the regulatory text and OSHA's prior explanations were clear, general contractors and crane operators alike have long understood that ensuring safe ground conditions is the responsibility of the general contractor, not a subcontracted crane operator like TNT with a transient presence on the worksite and without the expertise, equipment, or authority to repair deficient ground conditions. If permitted to stand, the Fifth Circuit's interpretation will force crane operators to undertake an immense burden for which OSHA itself has recognized they are ill-equipped, to the detriment of workplace safety. And the stakes are much higher than just OSHA fines and compliance burdens, as almost every state's tort law treats OSHA citations as proof of negligence per se or evidence of a violation of the standard of care, meaning that OSHA's Copernican shift of responsibility opens crane operators up to tort liability in nearly every state.

This Court's immediate intervention is warranted. Crane operators do not have the luxury of waiting to come into OSHA compliance or declaring

their non-acquiescence in OSHA's (mis)construction of its regulation and its (mis)allocation of responsibilities for ground conditions. At construction sites across the country, the regime of clear responsibility for the controlling entity will come to an abrupt end. The immediate result will be blurred lines of responsibility and disputes between crane operators and general contractors over the sufficiency of ground conditions and who bears responsibility for remedying them. Moreover, because OSHA's novel interpretation saddles crane operators with liability for ground conditions without giving them any additional authority to remedy them, OSHA's rule will needlessly increase construction costs. Rather than allowing the Fifth Circuit's counterproductive decision to become the entrenched rule, this Court should grant certiorari and restore the proper interpretation of the ground-conditions standard.

OPINIONS BELOW

The Fifth Circuit's opinion is available at 821 F.App'x 348 and reproduced at App.1-13. The decision of the Administrative Law Judge from the Occupational Safety and Health Review Commission is available at 2019 WL 4267108 and reproduced at App.14-49.

JURISDICTION

The Fifth Circuit issued its decision on August 4, 2020. On March 19, 2020, this Court extended the deadline to file any certiorari petition due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

REGULATORY PROVISION INVOLVED

The relevant regulatory provision is reproduced in the appendix.

STATEMENT OF THE CASE

A. OSHA and the Cranes and Derricks Rule

Congress enacted the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act") to "assure safe and healthful working conditions for working men and women." Pub. L. No. 91-596, 84 Stat. 1590 (1970). The Act authorized the Secretary of Labor to promulgate occupational safety and health standards, 29 U.S.C. §655, and created the the Occupational Safety and Health Administration (OSHA) to enforce those standards by inspecting worksites and issuing citations when violations occur. *See* 29 U.S.C. §§657-58; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012) (delegating authority to the Assistant Secretary for Occupational Safety and Health).

In the OSH Act, Congress also created the Occupational Safety and Health Review Commission ("Commission") as an independent commission to, among other things, adjudicate enforcement disputes, *i.e.*, employer contests of OSHA citations and orders for alleged violations of the OSH Act or OSHA's implementing standards. *See* 29 U.S.C. §661. Commission hearings are governed by the hearing standards of the Administrative Procedure Act, 5 U.S.C. §551, *et seq*., and are conducted in the first instance by ALJs employed by the Commission. *See id.* Review of ALJ decisions by the Commission is discretionary, and further review by an appropriate

federal court of appeals is allowed as a matter of right. *See* 29 U.S.C. §660.

OSHA's first safety standard on cranes, derricks, hoists, elevators, and conveyors in construction went into effect in 1971. *See* Linda Levine, Cong. Rsch. Serv., *Worker Safety in the Construction Industry: The Crane and Derrick Standard* 8 (Nov. 21, 2008). The 1971 standard was based on industry consensus standards from the 1960s, and apart from minor revisions in 1988 and 1993, the standard remained unchanged for nearly 40 years. *Id.* at 8-9. In 2010, however, OSHA revised the standard "to update and specify industry work practices necessary to protect employees during the use of cranes and derricks in construction." Cranes and Derricks in Construction ("Final Rule"), 75 Fed. Reg. 47906-01 (Aug. 9, 2010).[1] The Final Rule explained that the new standard was necessary in light of "[c]onsiderable technological advances" since 1971, and noted that "a number of industry stakeholders … believed that an updated standard was needed" to reduce the number of accidents on construction sites. *Id.* at 47907.

The portion of the standard relevant to this case concerns the "ground conditions" for operating cranes and derricks. The standard first defines "ground conditions" in paragraph (a) as "the ability of the ground to support the equipment (including slope, compaction, and firmness)." 29 C.F.R. §1926.1402(a)(1). As the Final Rule explains, "[a]dequate ground conditions are essential for safe

[1] The Final Rule followed from a Proposed Rule issued in 2008. *See* Proposed Rule on Cranes and Derricks in Construction, 73 Fed. Reg. 59714-01 (Oct. 9, 2008).

equipment operations because the equipment's capacity and stability depend on such conditions being present." 75 Fed. Reg. at 47931.

The standard then sets out the substantive ground-conditions requirements in paragraph (b). *See* 29 C.F.R. §1926.1402(b). The requirements are as follows:

> The [crane] must not be assembled or used unless ground conditions are firm, drained, and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met.

While paragraph (b) sets forth the substantive ground-conditions requirements in the abstract, the very next paragraph, paragraph (c), makes clear who is responsible for complying with the paragraph (b) requirements. The responsible party is the "controlling entity," which is elsewhere defined as the "prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project—its planning, quality and completion." 29 C.F.R. §1926.1401. In particular, paragraph (c)(1) provides: "The controlling entity must … [e]nsure that ground preparations necessary to meet the requirements in paragraph (b) of this section are provided." *Id.* §1926.1402(c)(1).

Other parts of the ground-conditions standard assign different responsibilities apart from complying with the substantive standards of paragraph (b). For

example, paragraph (c)(2) states that the "controlling entity must" inform the crane operator of any underground hazards of which it has actual or constructive knowledge. *Id.* §1926.1402(c)(2). As a contingency in case "there is no controlling entity for the project," paragraph (d) assigns responsibility for ensuring ensuring adequate ground conditions to "the employer that has authority at the site." *Id.* §1926.1402(d). And to ensure workplace safety even if the controlling entity is unfamiliar with the requirements of any equipment being used, paragraph (e) states that if the equipment operator or assembly/disassembly director determines "that ground conditions do not meet the requirements in paragraph (b) of this section, that person's employer must have a discussion with the controlling entity regarding the ground preparations that are needed." *Id.* §1926.1402(e).

B. Factual and Procedural History

Petitioner TNT Crane & Rigging, Inc. was hired as a subcontractor to conduct a two-day job using a crane to lift air conditioners onto the roof of a Wal-Mart store in Corpus Christi, Texas. App.2. The general contractor on the site—who all agree was the site's "controlling entity"—was Better Built Enterprises ("BBE"). App.2. BBE was on site for the four-month life of the project. *See* Hearing Tr. Vol. 1 at 52, 63. During this type of job, the crane is supported and balanced with a combination of outriggers, steel mats, and counterweights. App.18. Outriggers, which have "feet" or "floats," are retractable legs that extend outward from the crane to provide it with a wider and more stable base. App.18.

The feet are typically set upon steel mats, which distribute the load over a larger surface area to prevent the outrigger's feet from sinking into the surface. App.18.

On the second night of the job, in violation of TNT policy and his training, a TNT crane operator attempted to use the crane to position the steel mats underneath its own outriggers. When the crane operator swung the crane to pick up a steel mat, one of the outriggers punctured the concrete, causing the crane to tip over and resulting in an injury to the employee. App.20-21.

After an investigation, OSHA alleged that TNT violated the ground-conditions standard, 29 C.F.R. §1926.1402(b), and issued a citation. In support of this citation, OSHA stated that "[o]n or about March 23, 2017, at this location, the employer did not ensure that equipment was assembled and/or operated on ground that could support the mobile crane structure." App.24. TNT contested the citation and sought review by the Commission. *See* 29 U.S.C. §659(a). The ALJ held a hearing on December 3-4, 2018. *See* App.15. On July 11, 2019, the ALJ issued a Notice of Decision and Decision and Order affirming the Citation and Notification of Penalty. The ALJ determined that 29 C.F.R. §1926.1402(b) applied to TNT as the crane operator, despite noting that the controlling entity must ensure adequate ground conditions under 29 C.F.R. §1926.1402(c). *See* App.29. The ALJ based his conclusion on a determination that §1926.1402(b) places a shared responsibility on the crane operator and the controlling entity with respect to ground conditions, as he found that "the controlling entity

must ensure adequate ground conditions under §1402(c), and the operator must ensure that such conditions are, in fact adequate, before it can operate or assemble the crane under §1402(b)." App.29. The Commission declined review, making the ALJ's decision final. TNT timely petitioned the court of appeals for review on October 4, 2019.

The Fifth Circuit denied the petition for review, adopting essentially the same reasoning as the ALJ. According to the decision below, "[p]aragraphs (b) and (c)(1) list distinct violations." App.6. Whereas paragraph (c)(1) "requires that the controlling entity provide necessary ground preparations," paragraph (b) "prohibits equipment from being assembled or used unless certain conditions are met," App.6, and it "clearly imposes [this] duty on those who assemble and use equipment whether they are the controlling entity or not." *Id.* And because "TNT was responsible for assembling and using the crane," the court held that TNT violated paragraph (b). *Id.* The court also expressed its belief that interpreting the standard to make only the controlling entity responsible for ground conditions "would make paragraph (b)'s conditional prohibition against assembling or using equipment at best toothless and at worst surplusage." App.5-6.

REASONS FOR GRANTING THE PETITION

This case presents a critically important issue regarding the allocation of responsibility at thousands of active construction sites each and every day. It endorses a clear departure from regulatory text and industry understanding that clouds clear lines of authority that are vital in the construction industry.

The ground-conditions standard that OSHA promulgated ten years ago was designed to promote workplace safety by assigning responsibility for ground conditions to the entity that unmistakably is best suited to identify and remedy any deficiencies—*i.e.*, the controlling entity. The ground-conditions standard could not be any clearer on this point: It expressly states that "the controlling entity must" ensure that ground conditions are suitable. And while it expressly assigns *other* responsibilities to the crane operator, it conspicuously does not assign the crane operator the responsibility to ensure suitable ground conditions.

In its Final Rule promulgating the ground-conditions standard, OSHA explained exactly why it took the approach that it did. It chose to assign responsibility for ground conditions to one specific entity instead of several entities jointly because past experience proved that shared or fragmented responsibility inevitably results in stalemates over who will shoulder the burden on any given site, causing inadequate ground conditions to go uncorrected. And it chose to assign the responsibility specifically to the controlling entity because—as its name implies—it has control of the worksite and the requisite knowledge and authority to arrange for adequate ground conditions. Crane operators, in contrast, are transient presences on construction sites who typically have neither the equipment nor the authority to make substantial changes to the ground conditions.

Despite the clear regulatory text and OSHA's equally clear explanation, and contrary to the settled

understanding of crane operators and general contractors alike, the Fifth Circuit concluded that responsibility for ground conditions is shared jointly by the controlling entity and the crane operator. While the court acknowledged that the standard makes controlling entities expressly responsible for ground conditions, it asserted that the standard also places an independent duty on crane operators not to use or assemble cranes on unsuitable ground conditions. That reading is triply dubious, as TNT was not cited for violating any such no-use-or-assembly duty (as opposed to a ground-conditions violation), responsibility for *all* aspects of the paragraph (b) requirements are clearly assigned to the controlling entity, and a different paragraph—paragraph (e)—imposes a different and far more modest obligation on the crane operator (merely to notify the controlling entity if the crane operator actually identifies a problem). More broadly, the Fifth Circuit's interpretation conflicts with the two main policy judgments reflected in the standard and is inconsistent with the standard's overall design.

To the extent the Fifth Circuit simply deferred to the Secretary's view of his regulation, such deference was wholly unwarranted. Not only is the Secretary's interpretation inconsistent with unambiguous regulatory text, it is an *ad hoc* position that is directly in conflict with the agency's contemporaneous statements and the interpretive guidance it issued shortly after the standard's promulgation.

This Court's immediate intervention is needed. This Court has not looked favorably on decisions that disregard text and context to embrace *ad hoc* agency

interpretations upsetting long-settled industry practices. The decision below does just that, unsettling industry understandings and blurring lines of accountability that OSHA itself previously recognized needed to be clear. The stakes go far beyond the payment of OSHA fines, as most states treat an OSHA violation as either negligence per se or strong evidence of negligence. Thus, as a practical matter, the decision below will have immediate effect nationwide. If paragraph (b) actually imposes a duty on crane operators, they cannot treat that duty as optional. Instead, they must immediately begin second-guessing judgments of controlling entities, despite the latter's greater familiarity with the worksite. Moreover, because OSHA's novel interpretation imposes liability without enhancing crane operators' authority to remedy problems, it cannot help but increase costs for much-needed infrastructure improvements. In short, the Fifth Circuit's decision is both wrong and disruptive, and it should not stand as the last word on an issue of tremendous real-world importance.

I. The Fifth Circuit's Decision Is Wrong On The Merits.

A. The Controlling Entity Bears Sole Responsibility for Ensuring Suitable Ground Conditions.

1. In promulgating the ground-conditions standard, OSHA made a conscious and sensible decision to place responsibility for ground conditions on the single entity that is most familiar with the worksite and has the authority and equipment to correct any ground-conditions problems. Those

attributes make the controlling entity the obvious choice. The general contractor is a constant presence on the worksite throughout the life of the project and is well-positioned to identify and correct problems with the ground conditions. The crane operator, by contrast, typically does not have advance access to the worksite, is present only for a short period of time, and lacks overall authority on the worksite. This case well illustrates the difference: While the controlling entity was present during the four-month life of the project, TNT was subcontracted for a discrete two-day task. OSHA's sensible choice is reflected unmistakably in the standard itself and throughout the agency's own contemporaneous explanation of the standard.

The standard's substantive ground-conditions requirement is set forth in paragraph (b), which provides, in relevant part:

> The equipment must not be assembled or used unless ground conditions are firm, drained, and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met.

29 C.F.R. §1926.1402(b).

Paragraph (b) itself states its ground-conditions requirements in the abstract without specifying the entity responsible for ensuring that they are met, but the very next paragraph fills that gap. In particular, paragraph (c)(1) assigns responsibility for compliance with paragraph (b) to the "controlling entity": "The controlling entity must … [e]nsure that ground

preparations necessary to meet the requirements in paragraph (b) of this section are provided." 29 C.F.R. §1926.1402(c)(1). Therefore, by the plain language of paragraph (c), the controlling entity is the entity tasked with compliance with the substantive requirements set forth in paragraph (b). No clause in the ground-conditions standard imposes a similar duty on the crane operator (and a separate paragraph—(e)—imposes a different and more modest obligation on the crane operator), making clear that the controlling entity is the sole party with responsibility for ensuring suitable ground conditions, and thus the only party that can be cited if paragraph (b) is violated.

OSHA's contemporaneous description of paragraphs (b) and (c)(1) confirms what the text plainly provides. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 877 (2000) (relying on promulgating agency's contemporaneous explanation to interpret regulation). When OSHA promulgated the standard, it explained both the importance of assigning ground-conditions responsibility to one specific entity and its reasons for making that entity the "controlling entity" rather than the crane operator. As to the former, OSHA explained "that it is necessary to specify who will have ground condition responsibility because in many instances the parties are unable to agree on who will have (or has) that contractual responsibility, with the result that often no one corrects inadequate ground conditions." 75 Fed. Reg. at 47933. OSHA reiterated the same point in responding to a commenter's suggestion that controlling entities be permitted to delegate their ground-conditions responsibility, explaining that "[t]o permit a

controlling entity to divest itself of its ground condition responsibilities would unduly fragment responsibility for ground conditions, thus defeating one of the goals of the section." *Id.* at 47935. In light of these concerns, OSHA decided to assign responsibility to a single entity. *Id.*

OSHA then confirmed, in no uncertain terms, who that entity is: "The final standard places responsibility for providing sufficient ground conditions on the 'controlling entity.'" *Id.* at 48100. And OSHA explained why it chose to place that responsibility on the controlling entity rather than the crane operator: "[T]he controlling entity, due to its control of the worksite, has the requisite authority and is in the best position to arrange for adequate ground conditions." *Id.* at 47933. Moreover, "the controlling entity often possesses documents obtained or developed during the ordinary course of business that identify the location" of various "hazards beneath the equipment set-up area (such as voids, tanks, and utilities, including sewer, water supply, and drain pipes)." *Id.* In contrast, the crane operator—which usually arrives to an already active worksite to perform a discrete, short-term task—"typically do[es] not have the equipment or authority to make such preparations." *Id.; see id.* at 47931 (noting that a subcontractor "typically has neither control over ground conditions nor knowledge of hidden hazards"). For these reasons, OSHA expressly rejected the suggestion raised by several commenters that the obligation for ground conditions be placed on the crane operator. *See id.* at 47934.

2. This straightforward reading of paragraphs (b) and (c)(1) is confirmed by the standard's other provisions, all of which reflect that the controlling entity and only the controlling entity is responsible for ground conditions. Paragraph (c)(2) requires the controlling entity to inform the crane operator "of the location of hazards beneath the equipment set-up area (such as voids, tanks, utilities)" if the controlling entity has actual or constructive knowledge of such hazards. 29 C.F.R. §1926.1402(c)(2). This provision underscores that the controlling entity, with its long-term access and familiarity with the entire worksite, is likely to possess (and must share) information about ground conditions that the crane operator, as a short-term contractor, is unlikely to have. *See* 75 Fed. Reg. at 47933.

Paragraph (d) is a backstop provision that explains who becomes responsible for ground conditions "[i]f there is no controlling entity for the project." 29 C.F.R. §1926.1402(d). Even in that case, the crane operator is not the party responsible for ground conditions. Instead, in such a case, "the requirement in paragraph (c)(1) of this section must be met by the employer that has authority at the site to make or arrange for ground preparations needed to meet paragraph (b) of this section." *Id.* This provision doubly reinforces that crane operators are not responsible for paragraph (b) compliance. First, if the crane operator were jointly responsible for ground conditions and paragraph (b) compliance, paragraph (d) would be unnecessary, as the crane operator would already serve as the backstop when there was no controlling entity (as paragraph (b) can come into play without a controlling entity, but not without a crane

operator). Second, by making the backstop "the employer that has authority at the site to make or arrange for ground preparations," OSHA reiterated its view that the entity responsible for ground conditions should be one with broad authority over and familiarity with the worksite, not a short-term subcontractor like the crane operator.

Paragraph (e) further confirms that compliance with paragraph (b) is the duty of the controlling entity and not the crane operator by imposing a different and far more modest duty on the crane operator. Paragraph (e) accounts for the possibility that the crane operator might notice a problem with ground conditions that escaped the notice of the controlling entity. But instead of making the operator jointly responsible for surveying the ground conditions and correcting any defects (and thereby inviting the same buck-passing and finger-pointing that plagued the prior standard), paragraph (e) imposes only an information-sharing duty on the crane operator triggered by actual knowledge of problematic conditions:

> If the [assembly/disassembly] director or the operator determines that ground conditions do not meet the requirements in paragraph (b) of this section, that person's employer must have a discussion with the controlling entity regarding the ground preparations that are needed so that, with the use of suitable supporting materials/devices (if necessary), the requirements in paragraph (b) of this section can be met.

29 C.F.R. §1926.1402(e). In other words, paragraph (e) directs the crane operator, upon finding that conditions do not meet the requirements of paragraph (b), to tell the controlling entity so that the controlling entity can meet its obligations under the standard. Like paragraph (c), paragraph (e) explicitly assigns the responsibility for compliance with paragraph (b) to the controlling entity. Therefore, from start to finish, the language and structure of Section 1926.1402 dictate that the requirements of paragraph (b) apply only to controlling entities.

B. The Fifth Circuit Badly Misconstrued Section 1926.1402.

1. The Fifth Circuit's contrary interpretation cannot be squared with the text or purpose of the ground-conditions standard. With scant analysis, the Fifth Circuit concluded that 29 C.F.R. §1926.1402(b) imposes a duty on entities other than the controlling entity—in particular, on the crane operator—largely just because paragraph (b) discusses ground-conditions requirements in the abstract. That conclusion ignores the relationship between paragraphs (b) and (c), disregards the plain meaning of the standard, and fails to comport with this Court's decision in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), which requires that in determining the plain meaning of a regulation, a court must exhaust all "'traditional tools' of construction." *Id.* at 2415 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984) (adopting the same approach with respect to statutory interpretation)). To make this effort, as the Court explained in *Kisor*, "a court must 'carefully consider' the text, structure, history, and

purpose of a regulation." *Id.* at 2415 (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). This Court has "insisted that a court bring all its interpretive tools to bear" in ascertaining a regulation's meaning. *Id.* at 2423. The Fifth Circuit did none of those things, essentially deferring to the agency's latest interpretation instead of engaging with the regulatory text, structure, and context.

The Fifth Circuit acknowledged that controlling entities are expressly responsible for ensuring compliance with paragraph (b)'s ground-conditions requirements. *See* App.6 ("Paragraph (c)(1) requires that the controlling entity provide necessary ground preparations."). And it further acknowledged that TNT was merely the project's crane operator, not the controlling entity. *See* App.5 (identifying the general contractor as the controlling entity). But instead of connecting those two dots and holding that TNT was not responsible for the ground conditions, the Fifth Circuit insisted that paragraph (b) implicitly imposes a separate duty on crane operators—namely, a duty not to assemble or use the crane unless ground conditions are suitable. *See* App.5-6. The Fifth Circuit opined that it was a violation of this latter duty for which TNT was cited. *Id.*

There are multiple fatal problems with the Fifth Circuit's interpretation. First, as a factual matter, TNT was not cited for improperly *assembling* or *using* the crane. Rather, the citation alleges that TNT failed to ensure that ground conditions were suitable—a responsibility that, even under the Fifth Circuit's interpretation, belongs only to the controlling entity.

In particular, the citation states that TNT "did not ensure that equipment was assembled and/or operated on ground that could support the mobile crane structure," App.3, and as the government conceded below, "the citation's description of the violation alleges that TNT failed to ensure that the ground could support the crane," Gov't Br. at 17 n.8, not that it improperly assembled or used the crane. Thus, even if the Fifth Circuit were right that paragraph (b) imposes an implied duty on operators not to assemble or use a crane under certain circumstances, TNT was not cited for violating that prohibition. The citation, therefore, cannot be upheld on that basis.

Second, the no-assembling, no-using duty that the Fifth Circuit felt compelled to assign by implication to the crane operator is already *explicitly* assigned to the controlling entity. The portion of paragraph (b) on which the court focused states, in the passive voice, that "equipment must not be assembled or used unless ground conditions [are suitable]." 29 C.F.R. §1926.1402(b). Paragraph (b) itself does not identify which entity is responsible for ensuring that equipment is not assembled or used in non-suitable ground conditions, and the Fifth Circuit assumed that the responsible entity must be the operator. But that assumption is dispelled by very next paragraph, which assigns responsibility for complying with the entirety of paragraph (b) and explains that it is "[t]he controlling entity" who is responsible for satisfying "the requirements in paragraph (b)." *Id.* §1926.1402(c)(1). Thus, the controlling entity—who, after all, has control over the worksite—is responsible for ensuring both that ground conditions are "firm,

drained, and graded" and that "[t]he equipment [is not] assembled or used" until then. *Id.* §1926.1402(b); *see also Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir. 1977) ("General contractors normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite.")

That the no-assembling, no-using duty is expressly assigned to the controlling entity is confirmed by paragraph (c)'s use of the plural "requirements." 29 C.F.R. §1926.1402(c)(1) ("The controlling entity must … [e]nsure that ground preparations necessary to meet the *requirements* in paragraph (b) of this section are provided." (emphasis added)). If the controlling entity were responsible only for the requirement in the second half of paragraph (b)—to ensure that ground conditions are firm, drained, and graded—but not the requirement in the first half of paragraph (b)—to ensure that equipment is not used or assembled on inadequate ground conditions—the regulation would not have used the plural "requirements." *Cf. Life Techs. Corp. v. Promega Corp.*, 137 S.Ct. 734, 742 (2017) ("[W]hen Congress said 'components,' plural, it meant plural, and when it said 'component,' singular, it meant singular."). Thus, the Fifth Circuit's observation that the regulation "list[s]" two "distinct violations" does not justify its conclusion that the regulation charges the crane operator with preventing one of those violations. In reality, the responsibility for complying

with the entirety of paragraph (b) is expressly assigned by paragraph (c) to the controlling entity.[2]

Third, the Fifth Circuit's interpretation ignores that the regulations assign a different and more modest burden to the crane operators. As noted, if paragraph (b) assigned crane operators an independent duty to not operate or assemble equipment unless they first ensured that the ground conditions complied with paragraph (b), then paragraph (e), which expressly assigns a lesser duty to crane operators becomes both superfluous and inexplicable. Why expressly impose on crane operators the modest duty of notifying the controlling entity of identified deficiencies in ground conditions if there is a broader, free-standing implicit duty on crane operators not to use or assemble equipment unless they ascertain full compliance with paragraph (b)? By interpreting a provision—paragraph (b)—not specifically addressed to crane operators to render superfluous another provision—paragraph (e)—specifically addressed to crane operators, the Fifth Circuit violated cardinal principles of statutory construction. *Me. Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1323 (2020) (courts should not "adopt an interpretation … which renders superfluous another portion of that same law.").

The problems do not end there. The Fifth Circuit's interpretation conflicts with the two main policy judgments reflected in the standard—namely,

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[2] The fact that the controlling entity is responsible for ensuring that equipment is not assembled or used without proper ground conditions dispels the Fifth Circuit's concern about rendering the no-use, no-assembly language "surplusage." *See* App.5-6.

that responsibility for ground conditions should be assigned to a single entity and that crane operators are comparatively ill-suited to shoulder that responsibility. *See supra* pp.15-16. With respect to the former, by holding that the controlling entity and the crane operator have overlapping responsibilities for ground conditions, the Fifth Circuit's interpretation creates the very fragmentation the standard sought to eliminate. With respect to the latter, the Fifth Circuit's interpretation vests responsibility for identifying and potentially correcting ground conditions in crane operators like TNT, who, back when OSHA promulgated the rule, were determined to be ill-suited for that responsibility because—unlike controlling entities with broad knowledge of and authority over the worksite—they have only a transitory relationship with the worksite and lack special knowledge of the underlying conditions and the authority to correct them.

The Fifth Circuit likewise ignored OSHA's overarching purposes. The OSH Act is directed at making the workplace safe and thus focuses on those with significant control over the workplace; it is not a general tort law designed to regulate the conduct of every third party who enters a construction site. *See* 29 U.S.C. §651(b). Accordingly, contrary to the Fifth Circuit's instinct to read paragraph (b) as a broad prohibition binding everyone at the construction site, OSHA's determination was that workplace safety is better achieved by vesting the one specific entity with significant control over the multi-employer worksite with the duty to ameliorate a specific workplace hazard. *See* 73 Fed. Reg. at 59731-33 (describing "OSHA's authority to place requirements on

employers that are necessary to protect the employees of others"). By failing to heed that regulatory judgment, the Fifth Circuit's decision undermines the very safety goals it perceived itself to be advancing.

Finally, to the extent the Fifth Circuit was concerned that not interpreting the standard as imposing a duty on crane operators would leave those operators unregulated, the court was badly mistaken. The Cranes and Derricks Rule contains dozens of standards other than the ground-conditions standard, and many of those relate to the assembly and use of cranes. For example, §1926.1417, titled "Operation," provides that "[t]he operator must not engage in any practice or activity that diverts his/her attention while actually engaged in operating the equipment," 29 C.F.R. §1926.1417(d), that "[t]he operator must not leave the controls while the load is suspended" except in certain enumerated circumstances, *id.* §1926.1417(e), and that if equipment repairs are necessary, "[t]he operator must, in writing, promptly inform the person designated by the employer to receive such information," *id.* §1926.1417(j), among several other requirements. In short, the Fifth Circuit's felt need to impose an implicit obligation on the crane operator appears to have stemmed from its failure to realize that the regulation already expressly assigns other obligations to crane operators specifically and in unmistakable terms—while leaving the obligation to ensure sufficient ground conditions just as unmistakably with the controlling entity.

2. In addition to expanding the standard to bind entities who are not bound by its plain terms, the Fifth Circuit further erred by expanding the standard to

reach conduct that its plain terms do not reach. In particular, the Fifth Circuit failed to recognize that Paragraph 1926.1402(b) governs only ground conditions, instead holding that it also contains a separate requirement to use supporting materials that meet the crane manufacturer's specifications.[3] *See* App.7 (holding that "paragraph (b)'s standard isn't limited to only whether the ground is firm, drained, and graded," but also covers the failure "to use supporting materials"). That determination is wrong for several reasons.

First, by its text and structure, Paragraph 1926.1402(b) applies only to ground conditions. The regulation is contained within the section on "Ground Conditions." The standard puts forth a single substantive benchmark: that ground conditions are "firm, drained, and graded." 29 C.F.R. §1926.1402(b). The additional language addressing "in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment" serves to modify the ground-conditions requirement, not to impose a separate requirement. This is made clear by the words "so that," which connect the ground-conditions requirement to the supporting materials modifier. Put differently, the reference to "supporting materials" may serve to provide additional information as to the nature of the required ground conditions, but it does not put forth a separate requirement. Indeed, the requirement for "[b]locking

[3] "Supporting materials" is defined as "blocking, mats, cribbing, marsh buggies (in marshes/wetlands), or similar supporting materials or devices." 29 C.F.R. §1926.1402(a)(2).

material," *i.e.*, a supporting material intended to "sustain the loads and maintain stability" is found separately at 29 C.F.R. §1926.1404(h)(2). Therefore, it cannot be held to also be found in the ground-conditions requirement of paragraph 1926.1402(b).

Second, the Fifth Circuit did not properly evaluate the structure of Section 1926.1402 as a whole. As detailed above, paragraph (c) expressly imposes a duty on the controlling entity to comply with the requirements of paragraph (b). In promulgating paragraph (c), OSHA described that responsibility as one involving "ground conditions." 75 Fed. Reg. at 47933. Therefore, when read in its entirety, it is evident that the requirements of paragraph (b) pertain specifically to ground conditions.

Finally, the history and purpose of paragraph (b) indicate that it pertains only to ground conditions. In promulgating the regulation, OSHA explained that it was concerned with a particular type of accident, which is caused by "ground that is wet or muddy, poorly graded, or that is loose fill (or otherwise disturbed soil) that has not been compacted." *Id.* at 47932. As a result, OSHA "determined that requiring adequate ground control will prevent many of these accidents." *Id.* There is no similar indication in the regulation's history that this paragraph had anything to do with supporting materials.

In sum, here too, the Fifth Circuit failed to follow the plain meaning of the regulation. As a result, its holding that the standard contains a separate requirement for supporting materials is erroneous.

C. The Secretary's Unreasonable, *Ad Hoc* Position Does Not Warrant Any Deference.

1. Where, as here, an agency is interpreting its own regulation, it is owed deference if the regulation is ambiguous and the agency's interpretation is not inconsistent with the regulation, reflects the agency's fair and considered judgment, and is not in conflict with prior interpretations. *Auer v. Robbins*, 519 U.S. 452 (1997); *see also Kisor*, 139 S.Ct. at 2414. But *Auer* deference is not warranted if the regulation is not genuinely ambiguous, the agency's interpretation is inconsistent with the regulation, or if the agency's interpretation does not reflect the agency's fair and considered judgment as evidenced by conflict with prior interpretations. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154-55 (2012). "Before concluding that a rule is genuinely ambiguous, a court must exhaust all 'traditional tools' of construction." *Kisor*, 139 S.Ct. at 2415 (citing *Chevron*, 467 U.S. at 843 n.9).

Even then, not every reasonable agency reading of a genuinely ambiguous rule receives *Auer* deference. *See id.* Even if a rule is genuinely ambiguous, a court must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. *See id.*; *Christopher*, 567 U.S. at 155. Although not an exhaustive test, some "especially important markers for identifying when *Auer* deference is and is not appropriate" consist of:

> [1] the regulatory interpretation must be the agency's authoritative or official position,

> rather than any more ad hoc statement not reflecting the agency's views … [2] the agency's interpretation must in some way implicate its substantive expertise … [3] an agency's reading of a rule must reflect fair and considered judgment, … [not] a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack.

Kisor, 139 S.Ct. at 2416-18 (quotation marks and alterations omitted).

Thus, no deference is owed to "a merely convenient litigating position," or to "a new interpretation[] … that creates 'unfair surprise' to regulated parties." *Id.* (citing *Christopher*, 567 U.S. at 155 and *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (2016). When *Auer* deference is not appropriate, the Secretary's interpretation is only accorded the amount of deference based on the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give the power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). But here, *Skidmore* provides no assistance to the Secretary, as deferring to his position would result in inconsistent enforcement contradicting the language of the regulation, the regulatory history, and OSHA's previous interpretations.

2. The Secretary's position here—that 29 C.F.R. 1926.1402(b) applies to crane operators—does not come close to qualifying for *Auer* deference: It is

inconsistent with an unambiguous regulation and does not reflect the agency's fair and considered judgment. Regulatory language "cannot be construed in a vacuum." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989) (applying established rules of statutory construction to discern the plain language of the statute at issue). Analyzing the regulatory text at issue according to its plain language, the context of its placement within the standards, and OSHA's previous interpretation, should have resulted in a finding that no violation existed.

First, as already explained above, the text of 29 C.F.R. §1926.1402(b) is unambiguous. Paragraphs (b) and (c), especially when read together with paragraph (e), make clear beyond cavil that the onus regarding ground conditions is on the "controlling entity," not the crane operator. Paragraph (c)(1) expressly assigns responsibility for ground conditions to the controlling entity; no other paragraph redundantly assigns that same responsibility to anyone else; and the only paragraph in Section 1926.1402 that assigns *any* responsibility to crane operators requires them only to "have a discussion" with the controlling entity, not to carry out the controlling entity's responsibilities under paragraph (b). If the text alone were not enough, the regulatory history makes unmistakable that OSHA thoughtfully and intentionally placed responsibility for ground conditions solely on the controlling entity, not on the crane operator. *See supra* Part I.A.

Even if the regulation were deemed to have some lingering ambiguity, all of the same arguments would apply with equal, if not greater, force in explaining why the Secretary's interpretation is unreasonable.

See Kisor, 139 S.Ct. at 2416 (agency's interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools"). The Secretary's position clouds lines of authority that need to be clear and improperly places an onerous, impractical burden on crane operators at odds with the standard and OSHA's own prior explanations of that standard, which made clear that the obligation for ground conditions lies with the controlling entity alone.

Finally, even if Section 1926.1402 were truly ambiguous, and even if the Secretary's proffered interpretation were not blatantly unreasonable, it *still* would not be entitled to any deference because it represents an *ad hoc* position not based on the Secretary's fair and considered judgment. *See Kisor*, 139 S.Ct. at 2417-18. Indeed, OSHA had previously *rejected* the suggestion raised by several commenters to the rule that the obligation for ground conditions should be placed on the crane operator. *See* 75 Fed. Reg. at 47934. Instead, OSHA explained that it had addressed the possibility that controlling entity would lack the relevant expertise in two ways. First, if the controlling entity is not familiar with the crane's requirements, it "must make sure that someone who is familiar with those requirements and conditions provides what is required by §1926.1402(b)." *Id.* Second, OSHA included paragraph (e) of the regulation, which requires the crane operator to *discuss* the ground conditions with the controlling entity *if* it determines that the ground conditions are not sufficient; there is no obligation for the crane operator to conduct an investigation or analysis of the ground conditions under the standard. *See id.* at

47934-35. In other words, as the regulatory history underscores, paragraph (e) "is a mechanism for a controlling entity to obtain information to facilitate *its* compliance with §1926.1402(c)(1)." *Id.* at 47935 (emphasis added).

The Secretary's position is also inconsistent with an interpretation letter OSHA issued two years after promulgating the standard. In response to a letter asking which entity is responsible for ensuring adequate ground conditions, OSHA explained that it is "ultimately the controlling entity's responsibility to make sure sufficient improvements to ground conditions are made for the crane to be assembled or used within the requirements of section 1926.1402(b)." *See* Letter from James G. Maddux, OSHA, to Richard Marshall, 2012 WL 11879065 (Oct. 1, 2012). OSHA further explained that paragraph (c)(1) requires that the "controlling entity must ensure that ground preparations necessary to meet the requirements in paragraph (b) of this section are provided." *Id.* Indeed, OSHA specifically stated it "requires the controlling entity to be responsible for ground conditions because the controlling entity has the authority to improve ground conditions and is more likely to be able to have the necessary equipment provided." *Id.*

The Secretary's position that §1402(b) applied to TNT instead of the "controlling entity" is an *ad hoc* position that deviates from the Secretary's earlier and more considered judgments. It therefore is not entitled to any deference. When *Auer* deference is not appropriate, the Secretary's interpretation is only accorded the amount of deference based on the

thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give the power to persuade. *Skidmore*, 323 U.S. at 140. But here, deferring to the Secretary's position results in inconsistent enforcement contradicting the language of the regulation, the regulatory history, and OSHA's previous interpretations.

II. The Fifth Circuit's Erroneous Decision Radically Transforms The Allocation Of Responsibility At Construction Sites And Warrants Immediate Review.

The Fifth Circuit's decision unsettles long-settled industry understandings and customs and creates immediate and untenable consequences for worksites across the Nation. The basic question of whether crane operators are responsible for ground conditions has tremendous practical significance for the crane industry. For more than a decade, in accordance with the plain terms of the regulation, the crane industry widely understood that the controlling entity had the sole duty of ensuring that ground conditions where the crane is to be operated can support the crane. Consistent with OSHA's own views, the industry understood that lines of responsibility needed to be clear and that shared or diffused responsibilities produced finger-pointing, a lack of accountability, and ultimately suboptimal ground conditions.

The 2010 ground-conditions standard appeared to settle the matter, and industry customs conformed to the sensible resolution that the controlling entity, with its responsibility for the overall worksite and authority to remedy problems with ground conditions,

was the sole responsible party. Simply put, when it comes to ground conditions, the buck stopped with the controlling entity. And in the unusual case where a job lacked a controlling entity, the buck stopped with whoever functionally controlled the overall site. Under no circumstances was the crane operator, generally on-site for just a short interval and lacking authority to remedy ground conditions, primarily responsible for ground conditions. That does not mean that crane operators were unregulated or had no responsibility vis-à-vis ground conditions. Instead, they were responsible for notifying the controlling entity about observed deficiencies in the ground conditions, 29 C.F.R. §1926.1402(e), and for other aspects of crane operation within their control, *see, e.g.*, *id.* §1926.1417.

The decision below unsettles that settled practice and blurs lines of responsibility that have been and need to be clear. This Court has not looked favorably on analogous decisions embracing *ad hoc* agency interpretations that upset long-settled industry practices. In the FLSA context, for example, the Court has explained that it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. This case involves a regulatory enforcement action rather than a FLSA lawsuit, but the effect on settled expectations and industry practices is the same. In fact, this case is even more problematic, as leaving the Fifth Circuit's decision undisturbed would further embolden a federal agency with broad, nationwide jurisdiction to disregard the plain language of its own

regulations to issue citations upsetting the settled industry practices that its own prior actions have engendered.

The decision below places crane operators in an untenable position by saddling them with responsibility for ground conditions without giving them any additional authority to remedy deficient ground conditions. The effects on worksites across the country will be destabilizing and immediate. In an area where all recognize that lines of authority and responsibility need to be clear, crane operators will be required to second-guess decisions of controlling entities in ways that cannot help but to produce delays and added expenses. Indeed, because crane operators have responsibility for ground conditions without any real authority to remedy them, they will have little choice but to raise their rates to account for this added risk, which will needlessly raise construction costs at a particularly inopportune time.

Moreover, while the amount of a fine for a single violation of the ground-conditions standard is typically small, the citation carries outsized impact in tort litigation. "The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005). That is just as true in the OSHA context as others. *See, e.g.*, *Hargis v. Baize*, 168 S.W.3d 36, 41-42 (Ky. 2005); *Zorgdrager v. State Wide Sales, Inc.*, 489 N.W.2d 281, 284 (Minn. Ct. App. 1992); *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 34 (Tenn. 1988); *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977). And in jurisdictions that do not treat

OSHA violations as negligence per se, OSHA violations remain admissible and powerful evidence of deviations from the standard of care. *See* Rory Thomas Skowron, *Treating OSHA Violations As Negligence Per Se*, 61 B.C. L. Rev. 3043, 3063 n.150 (2020). Accordingly, the Fifth Circuit's decision not only subjects crane operators to new and unjustified OSHA citations, but also effectively extends the reach of tort laws in nearly every state.

In light of OSHA's nationwide jurisdiction and the collateral consequences of an OSHA violation, further percolation is not a realistic option. Crane operators do not have the luxury of declaring themselves in a position of non-acquiescence vis-à-vis OSHA's view that they now share responsibility for ground conditions at worksites nationwide. Thus, absent this Court's review, the immediate consequence of the decision below will be to convert a regime of clearly delineated responsibilities to one of blurred lines, where crane operators will have little choice but to undertake independent investigations and second-guess determinations of controlling entities.

That reality underscores the tremendous costs that denying or delaying review would impose at the thousands of active construction sites each and every day. Crane operators on those sites now have no choice but to undertake new and costly responsibilities for which OSHA itself has acknowledged that they are ill-equipped. And this is not a situation in which doubling the number of responsible parties doubles the safety of worksites. To the contrary, as OSHA initially recognized when it promulgated the standard, diffuse responsibility is more likely to lead

to worksite disputes and stalemates than it is to timely and effective remediation of ground-conditions issues. Rather than allowing this costly and counterproductive decision to become entrenched, this Court should grant certiorari and restore the well-founded industry understanding that "[t]he controlling entity must" ensure that ground conditions are suitable. 29 C.F.R. §1926.1402(c)(1).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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