No. 23-___

IN THE

Supreme Court of the United States

ALLSTATES REFRACTORY CONTRACTORS, LLC,
Petitioner,

v.

JULIE A. SU, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress gave the Occupational Safety and Health Administration (OSHA) the power to write permanent safety standards for virtually every business in America. Both the majority and dissent below agreed that this rulemaking authority, which imposes billions of dollars of costs each year, tasks OSHA with resolving "important choices of social policy." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment). The government has never contended otherwise. And the sole statutory limit on this sweeping power over major policy questions is that these standards must, in OSHA's view, be "reasonably necessary or appropriate" for a "safe" workplace. 29 U.S.C. §§ 652(8), 655(b).

The question presented is:

Whether Congress's delegation of authority to write "reasonably necessary or appropriate" workplace-safety standards violates Article I of the U.S. Constitution.

PARTIES TO THE PROCEEDING

Petitioner Allstates Refractory Contractors, LLC was the plaintiff in the district court and appellant in the court of appeals.

Respondents Julie A. Su, United States Department of Labor, James Frederick, and the Occupational Safety and Health Administration were defendants in the district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Allstates Refractory Contractors, LLC, is a corporation that has no parent corporation. Allstates is not publicly held, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet.App.1a) is reported at 79 F.4th 755. The opinion of the United States District Court for the Northern District of Ohio (Pet.App.69a) is reported at 625 F. Supp. 3d 676.

JURISDICTION

The Sixth Circuit issued its judgment on August 23, 2023, and denied both panel rehearing and rehearing *en banc* on December 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces Article I, § 1 of the U.S. Constitution, and 29 U.S.C. §§ 651, 652, 654, 655.

INTRODUCTION

This case presents a question of exceptional importance: Whether Congress's delegation of legislative authority over major policy questions violates Article I. The statute at issue confers power on the Executive Branch to enact "any occupational safety … standard" that OSHA deems "appropriate." 29 U.S.C. §§ 655(b), 652(8). Both the majority and dissent below agreed—and the government never denied—that this delegation "confer[s] significant power to OSHA to oversee large sections of our economy" by making safety rules for virtually every workplace. Pet.App.22a; *see* Pet.App.41a, 63a-66a. Indeed, even some of the most ardent defenders of the administrative state have admitted this grant of authority is perhaps the most extraordinary delegation of legislative power in the U.S. Code today. "No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope, and it is not difficult to distinguish [it] from statutes that the Court has upheld." Cass. R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1448 (2008).

If there is any case in which the Court should stand up for the principle that Congress, not agencies, must write major rules affecting the American people, this is it. Congress has empowered OSHA not only to enact major occupational safety rules but also to enforce them against "practically every business in the United States," Pet.App.63a, from manufacturers and accounting firms, to the "sports and entertainment industry," *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) (Kavanaugh., J., dissenting).

At the same time, Congress has given OSHA virtually no instruction on how to use this vast lawmaking authority. Instead, OSHA has "nearly unfettered discretion" to make whatever workplace safety rules it wants for almost every company in America. Pet.App.24a. As Judge Nalbandian explained in dissent, the Act puts one question to OSHA—"What seems appropriate in workplaces around the nation?"—and gives the agency far-reaching power to dictate whatever its answer may be. Pet.App.56a. OSHA's unilateral view of what is "appropriate" is no "general check" on its authority; it is no limit at all. *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 681 (1980) (Rehnquist, J., concurring in the judgment).

This delegation is as unconstitutional as it is unparalleled among modern agencies. And it was adopted precisely so Congress could avoid making the "hard choices" innate to balancing worker safety with industry costs—the sort of legislative choices the Constitution requires *Congress* to make. *Id.* at 687.

The Sixth Circuit nevertheless upheld this delegation, reasoning that this Court's precedents have virtually foreclosed lower federal courts from *ever* invalidating a congressional delegation of legislative authority. In its view—and in the view of practically every appellate court nationwide—the Constitution's limits on such delegations are moribund until this Court says otherwise.

This is the case to do so. At bottom, this petition asks whether Article I includes a "nondelegation principle for major questions." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (*Paul*) (citing *Gundy v. United States*, 139 S.

Ct. 2116, 2136-2148 (2019) (Gorsuch, J., dissenting), and *Indus. Union*, 448 U.S. at 685-86 (Rehnquist, J., concurring in the judgment)). Whatever the current state of nondelegation doctrine for *non*-major questions, this Court has never allowed Congress to "expressly and specifically delegate to [an] agency the authority both to decide [a] major policy question and to regulate and enforce." *Id.*; *see, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). But that is *exactly* what Congress has done here. This petition thus challenges a statute that implicates the doctrine's very core—and in turn, is the natural place for this Court to announce that reports of the nondelegation doctrine's death have been greatly exaggerated.

This case is also an excellent vehicle. It presents a standalone constitutional challenge; raises no other issues; and harbors no impediments to review.

If the nondelegation doctrine means anything, this Court should reverse the decision here. And if not, this Court should grant review to afford it a proper eulogy.

STATEMENT OF THE CASE

1. In 1970, Congress passed, and President Nixon signed, the Occupational Safety and Health Act. The Secretary of Labor soon delegated the Act's powers to OSHA, whereunder OSHA wields authority to issue "three different kinds of standards—national consensus standards, permanent standards, and temporary emergency standards." *Indus. Union*, 448 U.S. at 640 n.45 (plurality). This case exclusively concerns "permanent standards"—not national consensus standards, 29 U.S.C. § 655(a), or emergency temporary standards, *id.* § 655(c), such as the vaccine mandate from *NFIB v. OSHA*, 595 U.S. 109 (2022) (per curiam).

OSHA's power to issue permanent standards stems from § 655(b), which provides that it "may by rule promulgate … any occupational safety or health standard[s]." The Act defines such a "standard" as anything that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).

2. This case concerns only permanent safety standards, not permanent health standards. Safety standards are those addressing "hazards that cause immediately visible physical harm" (*e.g.*, falling objects); health standards, by contrast, are those dealing with "latent hazards," like toxic materials or other harmful physical agents (*e.g.*, carcinogens). *Int'l Union v. OSHA*, 938 F.2d 1310, 1313 (D.C. Cir. 1991).

The Act's definitional provision states that both safety standards and health standards must be "*reasonably necessary or appropriate* to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (emphasis added). But the Act contains no further requirements for safety standards. *See id.* Thus, unlike with other standards, the Act does not provide *any* other textual guidance regarding the content of safety standards—*e.g.*, what issues they should cover, what requirements they should impose, or what criteria should go into any new regulation.

Health standards are different, in that they are subject to far more statutory direction. For health standards, OSHA "shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will

suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *Id.* § 655(b)(5).

In the "*Benzene* Case," this Court held that the Act's health-standards provisions do not violate the nondelegation doctrine—but just barely. The Court readily acknowledged that a plain reading of those provisions would "make such a sweeping delegation of legislative power that it might be unconstitutional." *Indus. Union*, 448 U.S. at 646 (plurality). But taking §§ 652(8) and 655(b)(5) in tandem, a plurality held the Act was best read as requiring OSHA to find a "significant risk of [a] material health impairment" before issuing any health standard. *Id.* at 639; *see Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.32 (1981) ("[A]ll § 6(b)(5) standards must be addressed to 'significant risks' of material health impairment."). Then-Justice Rehnquist, concurring in the judgment, would have held that § 655(b)(5) violated the nondelegation doctrine, notwithstanding the plurality's attempted saving construction. *Indus. Union*, 448 U.S. at 687-88.

This Court has never considered OSHA's authority to promulgate *safety* standards, or whether § 652(8)'s "reasonably necessary or appropriate" metric—the sole constraint on OSHA's safety-standard authority—violates the nondelegation doctrine.

3. OSHA's power to promulgate safety standards for "every working man and woman in the Nation" is no small deal. 29 U.S.C. § 651(b). Rather, it is undeniably a major grant of authority.

To start, OSHA's authority extends over virtually every business in America. The Act mandates that every "employer" must comply with OSHA's safety standards, 29 U.S.C. § 654(a)(2), and defines an "employer" as any "person engaged in a business affecting commerce who has employees," *id.* § 652(5). According to OSHA, that definition includes "[a]ny employer employing one or more employees," with a narrow exception for a "farm employer" employing only "immediate family." 29 C.F.R. § 1975.4(a), (b)(2). OSHA even maintains "[c]hurches or religious organizations" are covered, so long as "they employ" a single person who happens to be engaged in "secular activities." *Id.* § 1975.4(c).

OSHA's domain does not stop at the private sector. The Act requires all federal agencies—save for the Postal Service—to create their own occupational safety and health programs that are "consistent with the standards promulgated" by OSHA. 29 U.S.C. § 668(a); *see id.* § 652(5). And Congress has used its spending power to "encourage States to accept federal funding—up to 50% of the total cost of each state plan—in return for adopting an OSHA-approved state plan," which "must be at least as effective as the federal standards required" by OSHA itself. *In re MCP No. 165*, 20 F.4th 264, 270-71 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). Given these incentives, 22 States have adopted an OSHA-approved plan. U.S. Dep't of Lab., OSHA, *State Plans*, https://perma.cc/NV68-N4PD.

Complying with OSHA's standards is expensive, running well into eight figures every year. *See* Harvey S. James Jr., *Estimating OSHA Compliance Costs*, 31 POLICY SCIENCES 297, 321-341 (1998) ("the total annual

cost of compliance with OSHA's regulations in 1993 are estimated at approximately $33 billion"); Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* 30 (2010) (estimating that occupational safety and health regulations cost $65 billion annually). As just one recent example, OSHA is currently considering a workplace-violence standard for the healthcare industry projected to cost employers $1.22 billion annually. *See* OSHA, *Workplace Violence SBREFA, Prevention of Workplace Violence in Healthcare and Social Assistance, SBREFA Materials for Review – Issues Document and Preliminary Interim Regulatory Flexibility Analysis* (PIRFA), https://perma.cc/A254-5FZT.

It is also enormously costly for an employer to violate OSHA's standards. Transgressors face penalties up to $16,131 per violation, with willful or repeated offenses triggering sanctions up to $161,323. 29 U.S.C. §§ 666(a), (c); *see* 28 U.S.C. § 2461 note; U.S. Dep't of Lab., OSHA, *OSHA Penalties*, https://perma.cc/XX7S-YC5E. And OSHA has not been shy about visiting these sanctions. In 2022-2023, the agency conducted over 21,000 inspections, issued over 58,000 citations, and imposed over $261 million in penalties. U.S. Dep't of Lab., OSHA, *Industry Profile for an OSHA Standard Results ALL*, https://perma.cc/YR2Z-A8AU.

4. Allstates typifies just how far OSHA reaches, and just how onerous its standards are on businesses across the country. Allstates is an Ohio-based general contractor that provides furnace services to the glass, metals, and petrochemical industries. R.23-2, at 258. It has been in business for almost 30 years and has only four full-time employees. *Id.* at 258-59.

Despite its small size, Allstates is an American business, and thus finds itself within OSHA's ambit. As a result, every year, Allstates must spend thousands of dollars complying with OSHA's many standards, along with hours upon hours training its employees about their many demands. *Id.* at 260-263.[1]

It does so, because it must. And it does so even though OSHA's top-down regulations are often *more* dangerous than what Allstates would do on its own. *Id.* at 264-65. For example, OSHA's safety standards for fall protection and confined spaces are unsafe in the high-heat environments in which Allstates works, because they do not allow employees to move quickly enough to avoid injury from heat exposure. *Id.* But OSHA requires Allstates to adhere to these dangerous rules on pain of substantial penalties.

Allstates prides itself on its commitment to safety. Over the past 200,000 hours worked by its employees—an amount of time that took *years* to reach, given its size—Allstates has not experienced a single OSHA-recordable work-related injury. *Id.* at 259. Allstates' experience modification rate—a statistic that measures the likelihood a business will have a worker's compensation claim—reveals it is much safer than most of its peers. *Id.* at 260. But in 2019, OSHA fined Allstates for violating its standards for falling-object protection, and cited Allstates for violating its standards for hand and power tools. *Id.* at 263.

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[1] For a sample of the safety standards Allstates is subject to, all promulgated under § 655(b), *see* 29 C.F.R. § 1910.140 (fall protection); § 1910.137 (electrical protective equipment); §§ 1910.132, .133, .135, .136, .138 (personal protective equipment); §§ 1910.155 to .165 (fire protection).

5. In 2021, Allstates brought a facial challenge under Article I to OSHA's authority to promulgate permanent safety standards. R.1.

Following cross-motions for summary judgment, the district court granted judgment in OSHA's favor. Pet.App.69a-82a. The court agreed that this Court had "not yet addressed the meaning of 'reasonably necessary or appropriate'" in this context, Pet.App.77a-78a, but upheld OSHA's permanent-safety-standard delegation as falling within this Court's "intelligible principle" precedents, Pet.App.76a-77a, 81a.

A divided Sixth Circuit panel affirmed. Joined by Judge Cook, Judge Griffin held that OSHA's grant of authority fell "comfortably" within the delegations that this Court has already sanctioned. Pet.App.22a. Judge Nalbandian dissented, finding an "unconstitutional delegation of legislative power." Pet.App.67a. The panel denied rehearing, and the full circuit declined *en banc* review. Pet.App.84a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT.

The nondelegation doctrine is well known, yet rarely seen. Since the early Republic, this Court has recognized that while the Executive Branch can be given authority to "fill up the details" on certain regulatory matters, there remain some "important subjects, which must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (Marshall, C.J.). But this Court has not directly enforced that rule since the New Deal, and the lower courts have drawn a clear conclusion: Until this Court says something further, the nondelegation doctrine is dead. Pet.App.7a-10a, 19a-20a, 22a, 24a, 34a n.1.

This Court should correct the misimpression that the nondelegation doctrine is a constitutional relic that imposes no real limit on Congress's ability to pass the buck on legislative decisionmaking. And this is the case to start, as it reaches the *core* of that doctrine: the bar on Congress "expressly and specifically" giving an agency "authority to decide major policy questions." *Paul*, 140 S. Ct. at 342; *see Schechter Poultry*, 295 U.S. at 541-42; *Gundy*, 139 S. Ct. at 2136, 2145, 2147 (Gorsuch, J., dissenting); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); *Indus. Union*, 448 U.S. at 685-87 (Rehnquist, J., concurring in the judgment).

That is precisely what Congress has done here, giving OSHA the unilateral power to set "appropriate" safety standards for every workplace in America (save the family farm), and thereby ceding "significant power to OSHA to oversee large sections of our economy." Pet.App.22a; *see* Pet.App.41a, 63a-66a. If that does not violate Article I, nothing does. And if not, this Court should at least make express what the lower courts have taken as implicit, and lay the nondelegation doctrine to rest for good.

A. Article I at Least Precludes Congress From Delegating Major Questions.

Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. This grant of power to Congress bars its transfer to another branch. As Chief Justice Marshall put it: Congress may not "delegate … powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. at 42-43.

This doctrine is indispensable to the separation of powers "that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). It ensures "that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands," *NFIB*, 595 U.S. at 124-25 (Gorsuch, J., concurring), and guards against a "government by bureaucracy supplanting government by the people," A. Scalia, *A Note on the Benzene Case*, 4 AEI, J. ON GOVT. & SOC. 25, 27 (1980) (Scalia).

Of course, simply delegating policymaking discretion does not violate the separation of powers. And where Congress has made somewhat tailored delegations, this Court has in turn "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,'" *Whitman*, 531 U.S. at 474-75; *see Indus. Union*, 448 U.S. at 684-85 (Rehnquist, J., concurring in the judgment) ("[T]his Court has abided by a rule of necessity, upholding broad delegations of authority where it would be 'unreasonable and impracticable to compel Congress to prescribe detailed rules' regarding a particular policy or situation."). But even still, a majority of this Court has reaffirmed that at *some* point delegation crosses into abnegation, and that the *status quo*'s approach to policing that line may be gravely out of step with the Constitution's structure and original meaning.[2]

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[2] *See, e.g.*, *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring in the judgment); *id.* at 2133-42 (Gorsuch, J., joined by Roberts, C.J. and Thomas, J., dissenting); *Paul*, 140 S. Ct. at 342; *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 76-77 (2015) (Thomas, J., concurring in the judgment).

Whatever the line when it comes to delegations more generally, this Court has *never* sanctioned Congress "expressly and specifically delegat[ing] to [a federal] agency the authority both to decide [a] major policy question and to regulate and enforce [it]." *Paul*, 140 S. Ct. at 342; *see Schechter Poultry*, 295 U.S. at 541-42. In other words, this Court has never let the Executive unilaterally make major policy. For good reason. In our system of government, sometimes the "significance of the delegated decision is simply too great for" it to be made by anyone but Congress, *Whitman*, 531 U.S. at 487 (Thomas, J., concurring), which holds exclusive power to legislate on "major questions," *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

Instead, under the Constitution, the rules of the road for "important choices of social policy" must be made by Congress—and only Congress. *Indus. Union*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). That has been true from the get-go. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1497 (2021) ("Overall, the picture the Founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over 'important subjects'"). And it is why "a merely plausible textual basis" can support an agency action "[i]n the ordinary case," but not when "major policy decisions" are at stake. *West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022) (noting the "separation of powers" underlies this distinction); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2380-81 (2023) (Barrett, J., concurring) ("[I]n a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'").

Overlooking this distinction, the lower federal courts have drawn all the wrong lessons from this Court's precedents. They have given *all* nondelegation challenges the back of the hand for decades. But this is a grave misreading of this Court's cases, with grave consequences for the separation of powers to boot. At bottom, delegating the power to make rules on major questions of policy is not an *application* of this Court's precedent, but an *extension* of it—and one this Court has *never* sanctioned. *See Paul*, 140 S. Ct. at 342; *Schechter Poultry*, 295 U.S. at 541-42.

That is precisely what happened in this case below, where the panel majority reasoned, in essence, that this Court has shut the door on all nondelegation challenges. Pet.App.7a-10a. Other recent examples are not hard to find. *See, e.g.*, *Consumers' Research v. FCC*, 88 F.4th 917, 924 (11th Cir. 2023); *id*. at 929 (Newsom, J., concurring in judgment) ("Their challenge fails, as I see it, only because non-delegation doctrine has become a punchline."); *id*. at 938-39 (Lagoa, J., concurring). The lower federal courts now uniformly believe that *any* stripe of nondelegation challenge is doomed to fail under this Court's precedent.

Thus, this Court must say something to preserve the constitutional truth that only Congress may legislate on major policy questions. Unless it corrects the misimpression that the nondelegation doctrine is a curious artifact—something for law school exams, but not real cases—the lower federal courts will continue to heed what they think is the message. And Congress will continue to pass the buck to the Executive, unbound by an unenforced limit.

B. Congress Delegated to OSHA the Power Over a Major Policy Question.

Congress "expressly and specifically" delegated to OSHA the power to set permanent safety standards for virtually every business in the country. *Paul*, 140 S. Ct. at 342. According to OSHA, it has the power to do everything from regulate the minutiae of how Allstates employees use power tools, to "eliminate familiar sports and entertainment practices, such as punt returns in the NFL, speeding in NASCAR, or the whale show at SeaWorld." *SeaWorld*, 748 F.3d at 1222 (Kavanaugh, J., dissenting) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). And in addition to giving OSHA power to make these major rules, Congress also empowered it to enforce them with steep monetary penalties—or at times, even prison. 29 U.S.C. §§ 654(a)(2), 652(5), 666(a), (c), (e).

"If that delegation sounds like a lot of power—it is. It gives [OSHA] broad discretion to create mandatory safe and healthy working conditions for 'every working man and woman in the Nation.'" Pet.App.41a (quoting § 651(b)). Even the Sixth Circuit acknowledged—and the government never disputed—that "Congress has allowed OSHA to regulate much of the economy." Pet.App.21a. Section 655(b) "isn't a statute that only pertains to one industry." Pet.App.63a. "Nor does the power seem to be a traditional executive function." *Id.* "Instead, [the Act] delegates broad power over *every* industry that has a workplace (probably all of them)—power to create *permanent* health and safety standards that would not traditionally fall within the Executive Branch's wheelhouse." Pet.App.63a-64a. "In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed," OSHA's discretion to

promulgate safety standards "is virtually unfettered." *Schechter Poultry*, 295 U.S. at 541-42; *see NFIB*, 595 U.S. at 117 (OSHA has the off-the-shelf power to impact a "vast number of employees" by its fiat alone).

This has all borne out in practice. OSHA standards cost employers tens of billions of dollars each year, with each new rule adding a few billion more to the ledger. *See supra* at 7-8. On top of these compliance costs, OSHA annually singles out thousands of employers for inspections, citations, and millions of dollars in fines. *Id.* OSHA often wields its vast enforcement power in "arbitrary" ways by drawing "head-scratching distinctions" between employers. *SeaWorld*, 748 F.3d at 1221 (Kavanaugh, J., dissenting). Indeed, OSHA has a long track record of growing its vast domain to "storm[] headlong into … new regulatory arena[s]." *Id.* at 1218.

As the D.C. Circuit put it decades ago, "the scope of" OSHA's regulatory domain "is immense, encompassing all American enterprise." *Int'l Union*, 938 F.2d at 1317; *see* Sunstein, *supra*, at 1429 (OSHA wields an "untrammeled discretion" over "essentially all American workers"). And all in an "area—public health and safety—traditionally regulated by the States." *MCP No. 165,* 20 F.4th at 267 (Sutton, C.J., dissenting from the denial of initial hearing en banc); *see also* Pet.App.64a n.16; *SeaWorld*, 748 F.3d at 1218, 1222 (Kavanaugh, J., dissenting).

This Court has a word to describe a delegation that is "immense," giving a federal agency "broad discretion" over "all American enterprise," a "vast number" of its employees, and in a regulatory area traditionally managed by the State—"major." *West Virginia*, 597 U.S. at 721-22. Regardless of any other tenet of the

nondelegation doctrine—or any supposed agency expertise—the authority to decide the major policy question regarding the "appropriate" safety standards for all employers nationwide abides in Congress alone. *Paul*, 140 S. Ct. at 342; *see also Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Schechter Poultry*, 295 U.S. at 541-42; *Indus. Union*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment).

But Congress has passed it off on OSHA. Absent the Court's intervention, this will remain the new normal. If all Congress needs to do to resolve a major policy question is identify it, and tell an agency to solve it as "appropriate," federal legislation will continue to devolve into "nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him." *West Virginia*, 597 U.S. at 739 (Gorsuch, J., concurring). Whatever the merits of that approach, it is not the Framers' government. It is instead a "blueprint" for totally leveling our "system of checks and balances." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 500 (2010).

C. The Major Questions Doctrine Informs the Standard, But Cannot Solve the Problem.

This Court's recent major questions cases make the question presented here ripe for resolution—but they do not (and cannot) solve the delegation problem.

The major questions doctrine is a tool for reading ambiguous grants of statutory authority; it presumes that Congress does not intend to delegate away its authority on major questions. But it offers little help where Congress makes such a delegation unambiguous. Where Congress forces the issue and clearly delegates a

major question to a federal agency—as it did here—it is the nondelegation doctrine alone that can do the job. *Schechter Poultry*, 295 U.S. at 541-42. In this situation, the major questions doctrine can only inform the "nondelegation principle" by helping to identify when a delegation is in fact "major." *Paul*, 140 S. Ct. at 342.

1. The major questions doctrine has been a feature of this Court's jurisprudence (under one name or another) for "at least 40 years." *Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring). It provides a workable and sensible standard for deciding when a legislative policy decision is so significant that it must be made by Congress alone.

"Because the Constitution vests Congress with all legislative Powers, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch." *Id.* at 2380. Americans expect Congress "to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J, dissenting from the denial of rehearing *en banc*). The doctrine is thus a "commonsense" one, as shaped by our political tradition's common sensibilities. *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring); *see Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

Applying these intuitions, this Court's cases have marked the touchstones for when a legislative policy decision is too weighty to be resolved by anyone other than the people's elected representatives in Congress. For instance, a policy is major if it reaches a "significant portion of the American economy" or involves "billions of dollars in spending by private

persons or entities"; concerns a subject of "great political significance"; or would "intrud[e] into an area that is the particular domain of state law." *West Virginia*, 597 U.S. at 743-44 (Gorsuch, J., concurring). In each instance, the issue is "significant" enough to require Congress's voice alone. *Id.* at 744.

2. The major questions doctrine therefore prevents federal agencies from discovering elephants in mouseholes. But it cannot stop an agency that has been explicitly gifted a pachyderm. That is, where Congress "expressly and specifically delegate[s] to the agency the authority … to decide [a] major policy question," the major questions doctrine does not stand in its way; the only thing that would is "nondelegation." *Paul*, 140 S. Ct. at 342; *see NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring) (nondelegation doctrine is necessary to prevent "Congress from intentionally delegating its legislative powers" in the first place).

This case is a prime example. There is no doubt OSHA has been handed authority over major policy questions here. *See supra* at 6-8. As clear, however, is the fact that the major questions doctrine can do nothing about it. As the panel below noted, "this is not a major-questions case," Pet.App.20a n.3, as Congress clearly told OSHA to write "*any* occupational safety … standard," § 655(b) (emphasis added); *see NFIB*, 595 U.S. at 120 ("Congress has indisputably given OSHA the power to regulate occupational dangers").

The dispute here is thus not whether Congress *has* given OSHA extraordinary power over every workplace in America—it has. The issue is whether Congress *can* do so. As for *that* question, the major questions doctrine can inform the answer, but cannot provide it.

3. The major questions doctrine thus cannot solve the constitutional problem presented here. And that is a serious deal, for this Court's major question cases also make another thing apparent: The doctrine is trying to treat the symptoms of a far more deep-rooted disease.

The fundamental problem is that Congress has made it a steady practice to write broader and broader laws, with vaguer and vaguer standards, delegating away its legislative power over greater and greater swaths of American life. "The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). To be sure, the major questions doctrine has proven essential in nipping the most offensive outgrowths of that system. But it can only do so much, limited to discrete rules that transgress specific statutory provisions.

This is deeply inadequate, because it fails to address the deeper constitutional ill. When Congress delegates a major policy question to an agency, that delegation is what contravenes the Constitution's structure. But if left to rule-by-rule adjudication, the delegation itself will almost always escape scrutiny. How an agency goes about *answering* the major question it has been tasked with resolving will rarely trigger the major questions doctrine. It will be a falling-object standard here; a power-tools rule there. While each independent rule may seem inoffensive on its own, their collective sum will be a major policy initiative developed entirely by federal bureaucrats, unaccountable to the people. *See id.* at 313-14. But it makes no difference to the separation of powers whether an agency decides a

major question over a series of rules, or in one fell swoop. For law as in life, a death by a thousand cuts is a death all the same.

Accordingly, without a nondelegation doctrine that prevents major delegations at the outset, this Court will be consigned to a never-ending game of constitutional whack-a-mole: It will be called upon to police the worst excesses of agencies wielding their major delegated powers, which will embroil the Court in controversy time and again as it clashes with the most aggressive parts of the President's agenda. The only way to fix this problem is to make clear that such major delegations are forbidden in the first place, putting the "hard choices" back in the hands of "the elected representatives of the people." *Indus. Union*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment). This is the case to start.

II. THIS CASE IS AN IDEAL VEHICLE.

This case presents a clean nondelegation challenge to perhaps the most open-ended delegation of legislative authority in the U.S. Code. Sunstein, *supra*, at 1448. It is an excellent vehicle to address the scope of that doctrine and, in particular, whether the Constitution contains a "nondelegation principle for major questions." *Paul*, 140 S. Ct. at 342.

First, this case indisputably involves the delegation of a major policy question to an agency, Pet.App.21a-22a, 41a, 63a-66a, so resolving it does not necessitate any wholesale reevaluation of the nondelegation doctrine for everything else. No party is asking this Court to raze its precedent, without a plan for what comes next. *Cf. Haaland v. Brackeen*, 599 U.S. 255, 279-80 (2023). The Court can decide this case by simply

holding that "major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch." *Paul*, 140 S. Ct. at 342 (citing *Indus. Union*, 448 U.S. at 685-86 (Rehnquist, J., concurring in the judgment)). Nor would this case involve this Court adopting a standard that poses too many known unknowns. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring). Rather, a straightforward way to resolve this case is to ask whether the Constitution bars Congress from delegating major questions of policy. And if so, the Court would have its existing body of major questions cases to guide when Congress has done so.

Second, addressing this issue does not require reevaluating or overturning any existing precedent. This Court has never "decided whether the permanent [safety] standards provision under OSHA constitutes an unconstitutional delegation of power," Pet.App.40a-41a & n.2, nor endorsed the notion that Congress may delegate a major policy question to an agency. Said otherwise, and as discussed more below, the delegation here is different in kind from all of those this Court has previously upheld. Pet.App.53a.

Third, this case cleanly tees up the question. The complaint asserts a single claim—a facial challenge to the constitutionality of § 655(b). Moreover, Allstates is seeking only a declaratory judgment and a party-specific injunction. Nor are there any threshold impediments to reaching the merits: Allstates undisputedly has standing, and the courts below all found there to be subject-matter jurisdiction.

Fourth, although the question here does not involve a circuit split—unsurprisingly, given the lower-court consensus that the "non-delegation doctrine has become a punchline," *Consumers' Research*, 88 F.4th at 929 (Newsom, J., concurring in judgment)—§ 655(b) has long generated "uncertainty" as to how to give content to its open-ended provisions. *Indus. Union*, 448 U.S. at 672 (Rehnquist, J., concurring in the judgment). That independently highlights the need for this Court's review. Indeed, while the opinion below agreed with the D.C. and Seventh Circuits that § 655(b) does not violate the Constitution, it *did* engender a circuit split as to whether § 655(b) is mandatory (*i.e.*, OSHA *must* regulate in the face of a significant risk) or permissive (as the D.C. and Third Circuits have held, *see infra* at 31-32).[3] Should this Court hold § 655(b) unconstitutional, it would cut through this Gordian knot outright. But to the extent it does not, it would still need to resolve what § 655(b) *means* as part of upholding its constitutionality. So either way—win or lose—this petition warrants review.

Fifth, holding this delegation unconstitutional will reinvigorate the nondelegation doctrine without causing severe practical consequences. OSHA has identified only a handful of safety standards that would be affected by holding this delegation unconstitutional. OSHA C.A. Br. 5-6. The vast majority of OSHA's

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[3] As Judge Nalbandian explained, neither the D.C. nor the Seventh Circuits analyzed the constitutional question presented here at any length, and neither offers a sound reason for how § 655(b) squares with the nondelegation doctrine. Pet.App.46a-47a n.6 (discussing *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 750 n.8 (D.C. Cir. 2011); *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125 (7th Cir. 1978)).

regulations would be unaffected by a ruling for Allstates because they rest on alternative sources of rulemaking authority: this suit does not challenge OSHA's ability to issue national consensus standards, temporary emergency standards, or even permanent *health* standards—all of which involve different, narrower grants of authority than the one at issue here. *See Indus. Union*, 448 U.S. at 688 n.8 (Rehnquist, J., concurring in the judgment); *NFIB*, 595 U.S. at 114.

Moreover, even in the absence of an applicable regulation, OSHA has "regulatory tools … at its disposal to ensure that employers are maintaining hazard-free work environments." *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). For example, OSHA could directly enforce the statute's mandate to keep workplaces "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). OSHA has also issued "a broad collection of guidance materials" addressing "health and safety issues." Dep't of Labor's Resp. to Emergency Pet. for a Writ of Mandamus 5, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. filed May 29, 2020). And even if OSHA were unable to address a particular safety hazard, nothing that the Court says about § 655(b) would affect the ability of the states to establish their own workplace safety regimes in an area "traditionally regulated by the States." Pet.App.64a n.16; *see* 29 U.S.C. §§ 651(b)(11), 667(a)-(b); *supra* at 7.

More broadly, adopting a nondelegation principle for major questions would not spell the end of the administrative state. As one of its chief defenders put it: vindicating Article I here "would be less radical than it might seem." Sunstein, *supra*, at 1448. If anything,

holding OSHA's safety-standard delegation unlawful would "have a democracy-forcing function, one that would spur a degree of national deliberation about how best to protect American workers" and would likely "produce a greatly improved statute" through the legislative process in Congress. *Id.* at 1447-48.

So too for agencies and statutes beyond OSHA. "The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government." *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting). Unlike other constitutional commands that serve as "an absolute impediment to governmental action," the nondelegation doctrine "merely requires the action to be taken in a different fashion." Scalia, *supra*, at 28. So Congress could still "delegate to agencies the authority to decide less-major or fill-up-the-details decisions," even through broad statutory language. *Paul*, 140 S. Ct. at 342; *see also Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

But the one thing Congress cannot do is what it did here: give the Executive the unilateral power to decide a major question of federal policy. Of course, "lawmaking under our Constitution can be difficult." *West Virginia*, 597 U.S. at 738 (Gorsuch, J., concurring). But the difficulty of creating new laws is a feature of our constitutional system of government, not a bug. Congress must live within those strictures; and this Court must hold it to those bounds.

III. THE DECISION BELOW IS WRONG.

If the nondelegation doctrine means anything, then OSHA's safety standards power is unconstitutional. The Sixth Circuit held otherwise based on two main premises: One, that the Act could be read as conferring

a narrower grant of power; and two, that in all events, this Court's cases have blessed such delegations. Both are wrong, and neither can sustain the unlawful delegation here.

A. Section 655(b) Violates Article I.

Article I's "text permits no delegation of" Congress's legislative "powers," *Whitman*, 531 U.S. at 472, but the Act violates that rule from any vantage point.

As detailed above, perhaps the most straightforward way the Act violates the nondelegation doctrine is that it confers on OSHA the "authority to decide [a] major policy question[]" through legislative rulemaking. *Paul*, 140 S. Ct. at 342; *see supra* Part I.B. Adopting this principle, then-Justice Rehnquist's *Benzene* opinion provides a clear roadmap for resolving this case. Indeed, it follows *a fortiori*, given the Act's grant of authority for permanent *safety* standards is far broader than its grant for permanent *health* standards, which Justice Rehnquist found violated the separation of powers. *Indus. Union*, 448 U.S. at 685-86 (Rehnquist, J., concurring in the judgment). Even more here than there, the Act's delegation entrusts to OSHA the task of "balancing statistical lives and industrial resources" in the workplace—and in so doing, setting rules that trade off the safety of employees versus the economic growth of industry across almost every business in the nation. *Id.* at 685. Those "important choices of social policy," however, must be "made by Congress." *Id.*; *see West Virginia*, 597 U.S. at 730. Nothing more is required to hold the delegation here unconstitutional.

Moreover, even if Congress *could* delegate some major policy questions to agencies, this one would still be unlawful, because the statute fails to provide an

"intelligible principle," under this Court's cases—at least properly understood. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (discussing "misunderstandings of the intelligible principle 'test'"). Under those precedents, Congress must "meaningfully constrain[]" the agency through "specific restrictions" on its "discretion." *Touby v. United States*, 500 U.S. 160, 166-67 (1991). In particular, a statute must either provide "(1) a fact-finding or situation that provokes Executive action or (2) standards that sufficiently guide Executive discretion." Pet.App.40a (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry*, 295 U.S. 495).

The statute here fails to do so, as Judge Nalbandian explained at length below. The Act's only constraint is that a standard must be "reasonably necessary *or* appropriate"—a disjunctive that allows OSHA to act if either is met. 29 U.S.C. § 652(8) (emphasis added). And if the term "appropriate" amounts to a meaningful constraint, those words have no meaning. Rather, "appropriate" is the *textbook* "all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). The Act thus "doesn't seem to require anything but the Secretary asking: What seems appropriate in workplaces around the nation?" Pet.App.55a-56a.

That is an unconstitutional delegation. "Appropriate" is in the eye of the beholder; but a standard that is all things to all people is no standard at all. And here, the term "appropriate" requires no fact-finding by OSHA before it acts, nor does it provide the federal courts with any ascertainable standard with which to evaluate those actions. Pet.App.50a, 61a.

Moreover, while that open-ended delegation would be bad enough, it is constitutionally disastrous in light of the scope of OSHA's power. "[W]hen the grant of power is big[], such that it can affect the entire national economy, Congress must provide substantial guidance.'" Pet.App.63a. And it has not done so. This is thus one of those rare cases that flunks *Panama Refining* and *Schechter Poultry*, because Congress has given the Executive "virtually unfettered" discretion to write "laws for the government of trade and industry throughout the country." Pet.App.50a; *Schechter Poultry*, 295 U.S. at 542.

This Court has never upheld such a major delegation of legislative power as in this case, and thus there is no need to overturn any precedent here. But to the extent this Court's cases do bless the delegation at issue here, they should be overturned. This Court's "intelligible principle" test fits poorly with the Constitution's original public meaning—as a majority of this Court has documented. *See supra* n. 2; *see also* Pet.App.65a-66a n.17. The Framers understood the term "legislative power" in Article I "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). "And yet ... the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). While the Constitution permits the Executive to "fill up the details" of legislation as part of executing the law, it does not allow the Executive to determine the law's basic

demands. *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting). *That* was "the legislative power that the Framers" entrusted to Congress, and also "sought to protect from consolidation with the executive." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring in the judgment).

The "intelligible principle" test fails to properly safeguard this distinction. And here, but for that test's all-too-forgiving standard for evaluating congressional delegations, the Act's delegation to OSHA in § 655(b) would be unlawful, because it clearly allows the Executive to perform what the Framers understood to be "legislative power."

B. The Court of Appeals Erred in Failing to Hold § 655(b) Unconstitutional.

The Sixth Circuit nevertheless upheld this unconstitutional delegation. It did so foremost by grafting onto the Act limitations it does not contain—and further held that even if OSHA's delegation was rather capacious, it was no more so than those this Court has already tolerated. As Judge Nalbandian explained, neither of those arguments persuades. And neither offers a reason for this Court to decline review of the decision below.

1. Perhaps aware of the problems that would come with reading the Act as written, the court of appeals tried to narrow § 655(b) in four ways. None works in light of the statute's text; more fundamentally, none solves the underlying nondelegation problem.

First, the court held that OSHA was constrained by the "host of principles, purposes, and goals" the Act states it furthers. Pet.App.13a. But these high-level policy statements—all geared generically to improving

safety, *see, e.g.*, 29 U.S.C. § 651(b)—do not bind OSHA in any sense, or provide any real guidance as to how it should execute its discretion. In telling OSHA to further these broad goals as "appropriate," Congress has at most "'merely announce[d] vague aspirations and then assign[ed] [OSHA] responsibility of adopting legislation to realize its goals.'" *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

That is not enough. In essence, the Act's overarching statements of policy are too high-level to matter, and make none of the hard choices or tradeoffs that are supposed to be done by the legislature. OSHA has been simply told the goal is safety (whatever that means), and that it should get there as appropriate (whatever that means). As Judge Nalbandian explained, these "purpose statements 'in no way limit the authority which [the Act] undertakes to vest in [OSHA] with no other conditions than those there specified.'" Pet.App.56a.

Second, the court held that OSHA could only issue a safety standard when "required," such that the standard must be one that "is genuinely needed to protect the safety of workers." Pet.App.14a. But this rests on a clear misreading of the statute. The statute *defines* a standard as something that "requires" something of regulated parties. 29 U.S.C. § 652(8). But that is about what a standard *does*, not when a standard can be *issued*. As for the latter, the same provision makes explicit OSHA may issue a standard anytime doing so is either "reasonably necessary or appropriate." *Id.*; *see also* Pet.App.52a n.8 (this "'require[ment]' language pertains to employees or employers, *not* the Secretary").

Third, the court relied upon dictionary definitions for "reasonable" and "necessary" to conclude that the "standards adopted should be needed to improve safety but not to the exclusion of all else." Pet.App.16a. But the statute says that the agency has the discretion to issue safety standards that are "reasonably necessary *or* appropriate," and that language is plainly disjunctive, not conjunctive. *Supra* Part III.A. So even if the court of appeals' definition of "reasonably necessary" is right, it is incomplete. The statute also allows OSHA to issue whatever safety standards are "appropriate." And *that* word's definition is the quintessential all-the-above term, maximizing discretion and minimizing restraint. Pet.App.55a-56a.

Fourth, the court held OSHA's discretion was also constrained, because the Act is *mandatory*, such that the agency "*must* take action and issue standards in response to safety issues." Pet.App.14a. For starters, even if this were a plausible reading of the Act, it is hard to see how it helps: *Forcing* an agency to exercise its unbounded discretion to issue major rules whenever it deems fit would seem to make any nondelegation problem *worse*, not better.

Regardless, the court's reading is implausible. The Act states that OSHA "may" issue safety standards when doing so is "reasonably necessary or appropriate." 29 U.S.C. §§ 655(b), 629(8). And the panel offered no reason—none—why "may" would mean "must" in this context. Pet.App.14a. Nor could it, as Judge Nalbandian detailed. Pet.App.47a-49a. Indeed, as touched on above, the only other appellate courts to consider whether § 655(b) is mandatory or permissive have come out in the latter camp, as compelled by the Act's plain text, coupled with the tremendous practical

complications of a *mandatory* regulation-issuing provision in this setting. *See In re Nat'l Nurses United*, 47 F.4th 746, 754 (D.C. Cir. 2022); *Int'l Union v. Chao*, 361 F.3d 249, 254 (3d Cir. 2004).

Accordingly, none of the attempts by the court of appeals to cabin OSHA's discretion work on a plain reading of the statute. Of course, trying to rewrite a statute to save it from a nondelegation problem is a doubtful practice in its own right, because imposing bounds on a boundless law "would *itself* be an exercise of the forbidden legislative authority." *Whitman*, 531 U.S. at 473. But in all events, each attempt by the court to do that here is irreconcilable with the text. By design, the Act gives OSHA the power to set any and all workplace safety standards for the entire nation, so long as those standards are "appropriate."

More fundamentally, even if the Sixth Circuit were right about how to read § 655(b), it would not solve the core constitutional problem here. Again, perhaps the central defect with § 655(b) is its *scope*—the ability of a federal agency to decide for itself a major question of federal policy. And nothing above reduces OSHA's function to "decid[ing] less-major or fill-up-the-details decisions." *Paul*, 140 S. Ct. at 342. The constitutional defect here, simply put, is inescapable.

2. The court of appeals also reasoned that, however one reads § 655(b), it says enough to survive review under this Court's cases. Pet.App.16a-20a. But as already noted, that is a grave misreading of this Court's precedent, which has never sanctioned Congress "expressly and specifically delegat[ing] to [an] agency the authority … to decide [a] major policy question."

Paul, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari).

Indeed, as Judge Nalbandian catalogued, this Court has never faced a delegation like the one here. In each of its earlier cases, "other factors—whether it be fact-finding, situations, criteria, or considerations—provided an agency sufficient guidance on the boundaries of its authority." Pet.App.53a; *see Gundy*, 139 S. Ct. at 2129 (plurality); *Indus. Union*, 448 U.S. at 684-85 (Rehnquist, J., concurring in the judgment). But not § 655(b). *See* Sunstein, *supra*, at 1431 (as compared to the law in *Whitman*, "Congress left [OSHA] at sea").

That includes the *Benzene* Case—even if it is hard to glean a clean holding from it. *See* Scalia, *supra*, at 25 (the case is a "three-one-one-four split decision that literally provides no conclusive answer to any legal question more general than whether the benzene exposure regulation" was valid). For one, that case turned on a separate provision governing health standards, 29 U.S.C. § 655(b)(5), which "requir[ed] the agency to '"set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health."'" *Whitman*, 531 U.S. at 473. Here, by contrast, "the only substantive criteria" for safety standards, *Indus. Union*, 448 U.S. at 640 n.45 (plurality), are that they be "reasonably necessary or appropriate," 29 U.S.C. § 652(8). Moreover, even there, the plurality read the Act to require (i) a specific factual-finding on the part of the agency (a "significant risk" of a material health impairment), before (ii) the Executive could exercise a power separately cabined by another provision (§ 655(b)(5)). *See Indus. Union*, 448 U.S. at 646 (plurality). None of those hallmarks exists

when it comes to OSHA's power to issue safety standards. Pet.App.43a-47a.

In short, nothing in this Court's precedents blesses the sweeping delegation here. Rather, the Court has not yet decided whether to "adopt[] a nondelegation principle for major questions." *Paul*, 140 S. Ct. at 342. That is why this case "matters so much." Pet.App.46a-47a n.6.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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