APPENDIX

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APPENDIX A

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File Name: 23a0194p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLSTATES REFRACTORY CONTRACTORS, LLC, *Plaintiff-Appellant*, *v.* JULIE A. SU, in her official capacity as Acting Secretary of Labor, U.S. Department of Labor; DOUGLAS L. PARKER, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health; OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR; UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO, *Defendants-Appellees*.	No. 22-3772

Appeal from the United States District Court for the
Northern District of Ohio at Toledo.
No. 3:21-cv-01864—Jack Zouhary, District Judge.

Argued: April 27, 2023

Decided and Filed: August 23, 2023

Before: COOK, GRIFFIN, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Brett A. Shumate, JONES DAY, Washington, D.C., for Appellant. Courtney L. Dixon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Brett A. Shumate, John M. Gore, Anthony J. Dick, Brinton Lucas, JONES DAY, Washington, D.C., Christopher M. McLaughlin, JONES DAY, Cleveland, Ohio, J. Benjamin Aguiñaga, JONES DAY, Dallas, Texas, for Appellant. Courtney L. Dixon, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Michael Pepson, AMERICANS FOR PROSPERITY FOUNDATION, Arlington, Virginia, Timothy S. Bishop, Brett E. Legner, MAYER BROWN LLP, Chicago, Illinois, Jeffrey D. Jennings, LIBERTY JUSTICE CENTER, Chicago, Illinois, Sheng Li, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., David C. Tryon, THE BUCKEYE INSTITUTE, Columbus, Ohio, Oliver J. Dunford, PACIFIC LEGAL FOUNDATION, Palm Beach Gardens, Florida, Luke A. Wake, PACIFIC LEGAL FOUNDATION, Sacramento, California, Nicolas A. Sansone, Allison M. Zieve, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., Pamela M. Newport, BRANSTETTER, STRANCH & JENNINGS, PLLC, Cincinnati, Ohio, Brianne J. Gorod, CONSTITUTIONAL ACCONTABILITY CENTER, Washington, D.C., Ben Seel, DEMOCRACY FORWARD FOUNDATION, Washington, D.C., Alex Hemmer, OFFICE OF THE ILLINOIS ATTORNEY

GENERAL, Chicago, Illinois, Sean H. Donahue, DONAHUE & GOLDBERG, LLP, Washington, D.C., Ian Fein, NATURAL RESOURCES DEFENSE COUNCIL, San Francisco, California, Sanjay Narayan, SIERRA CLUB ENVIRONMENTAL LAW PROGRAM, Oakland, California, Craig Becker, AFL-CIO, Washington, D.C., Randy Rabinowitz, OSH LAW PROJECT, LLC, Washington, D.C., for Amici Curiae.

GRIFFIN, J., delivered the opinion of the court in which COOK, J., joined. NALBANDIAN, J. (pp. 16–44), delivered a separate dissenting opinion.

OPINION

GRIFFIN, Circuit Judge.

More than fifty years ago, Congress passed, and President Nixon signed into law, the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 651 *et seq*. Throughout the next half century, challenges to the constitutionality of the Act have been uniformly rejected. *See Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin.*, 649 F.3d 743 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 936 (2012); *Blocksom & Co. v. Marshall*, 582 F.2d 1122 (7th Cir. 1978).

This case presents the same simple but poignant challenge: whether Congress's delegation to the Occupational Safety and Health Administration (OSHA) to set workplace-safety standards is constitutional. Plaintiff Allstates Refractory Contractors, a general contractor subject to OSHA's oversight, challenges OSHA's authority to set "reasonably necessary or appropriate" workplace-safety standards, 29 U.S.C. §§ 652(8), 655(b), as a violation of the nondelegation doctrine. The district court concluded that the delegation provided an

"intelligible principle" and thus rejected Allstates's challenge. We agree and now join our sister circuits in holding OSHA's delegation to be constitutional.

I.

Allstates is a full-service industrial general contractor that employs people throughout the country. As an employer subject to the OSH Act, it must comply with OSHA's workplace-safety standards and expend resources to ensure that it does so. It has also been the subject of enforcement actions in the past, including a $10,000 fine for a catwalk injury that occurred in 2019.

In this facial challenge to the OSH Act against the relevant governmental defendants, Allstates contends that, because the only textual constraint on setting workplace-safety standards is that they be "reasonably necessary or appropriate," 29 U.S.C. § 652(8), OSHA does not have the constitutional authority to set those standards under § 655(b) and employers do not have a duty to comply with OSHA's standards under § 654(a). In the district court, it moved for summary judgment, requesting a permanent nationwide injunction. But, instead, the district court granted the government's cross motion for summary judgment. The court concluded that the "reasonably necessary or appropriate" standard provided an "intelligible principle" to satisfy the nondelegation doctrine because the Supreme Court has repeatedly upheld similar delegations; so the court "decline[d]" Allstates's "invitation" to "disregard these precedents." *Allstates Refractory Contractors, LLC v. Walsh*, 625 F. Supp. 3d 676, 681–84 (N.D. Ohio 2022). Allstates timely appealed here.

II.

Allstates raises the same argument on appeal that it presented to the district court—that the OSH Act violates the nondelegation doctrine. Eventually conceding that we are bound by the "intelligible principle" test,[1] Allstates argues that the OSH Act provides no such principle. On de novo review, *see United States v. Green*, 654 F.3d 637, 649 (6th Cir. 2011), we agree with the district court that the Act comfortably falls within the ambit of delegations previously upheld by the Supreme Court.

A.

Our Constitution vests "[a]ll legislative Powers . . . in a Congress of the United States." U.S. Const. art. I, § 1. The nondelegation doctrine, therefore, is "rooted in the principle of separation of powers that underlies our tripartite system of Government," the maintenance of which "mandate[s] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). But while the Constitution permits no delegation of *legislative* powers, it does "not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* at 372. For nearly a century, this inquiry has been determined according to the

[1] It first presents threshold arguments that the "intelligible principle" test violates the original meaning of the Constitution, asserting that members of the Supreme Court have suggested reconsidering this approach. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2138–42 (2019) (Gorsuch, J., dissenting). But we are bound by that test as long as it is good law. *See Worldwide Equip. of TN, Inc. v. United States*, 876 F.3d 172, 181 (6th Cir. 2017).

"intelligible principle" test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

This test balances Congress's need for flexibility with the Constitution's prohibition on legislative delegation. On one hand, it enforces the underlying principle of the nondelegation doctrine "that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 693–94 (1892). But it has also long been grounded in the practical notion that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Id.* (citation omitted). For this reason, in determining what Congress must do to constitutionally obtain help from another branch, "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr.*, 276 U.S. at 406.

Accordingly, the intelligible-principle test is satisfied and the statute is constitutional "if Congress clearly delineates the general policy, the public agency

which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372–73 (quoting *Am. Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)). This inquiry is one of statutory interpretation in which we consider the act's delegated "task," the "instructions it provides," and whether it "sufficiently guides" the agency's discretion. *Consumers' Rsch. v. F.C.C.*, 67 F.4th 773, 788 (6th Cir. 2023) (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion)). In these inquiries, we must interpret the standard, not in "isolation," but with regards to "the purpose of the Act, its factual background and the statutory context in which [it] appear[s]." *Am. Power & Light*, 329 U.S. at 104. Further, while the "'degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,'" we nonetheless "apply one universal intelligible-principle test regardless of the type of statute at issue." *Consumers' Rsch.*, 67 F.4th at 788 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001)). However, this inquiry does not consider any limiting construction the agency has adopted—"[w]hether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Whitman*, 531 U.S. at 473.

The Supreme Court, in examining non-delegation challenges, has almost uniformly upheld "delegations under standards phrased in sweeping terms." *See Loving*, 517 U.S. at 771; *see also* 32 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8122 (2d ed. 1995). Historically, the Court upheld broad delegations. *See, e.g., Marshall Field & Co.*, 143 U.S. at 692–93 (finding proper a delegation to the

President to impose retaliatory tariffs if he "deemed" that American business was being treated unequally); *United States v. Grimaud*, 220 U.S. 506, 517, 521 (1911) (holding a delegation constitutional because Congress had established the "penalties" and the agency could properly "fill up the details" through administrative rules). This acceptance laid the foundation for the intelligible-principle test, such that the Court has continued to permit broad delegations. For example, the Supreme Court upheld delegations to the President to adjust tariff prices if he, "so far as he finds it practicable . . . [took] into consideration" various economic factors, *J.W. Hampton, Jr.*, 276 U.S. at 401–02, to a commission to consider the "public interest" in authorizing railroad acquisitions, *N. Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24–25 (1932), to a national coal commission to set "just and equitable" prices that were in the "public interest," *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 387, 397 (1940), to the Federal Communications Commission to regulate radio stations when the "public convenience, interest, or necessity requires," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214 (1943), and to the President to set "fair and equitable" prices under the Emergency Price Control Act, *Yakus v. United States*, 321 U.S. 414, 427 (1944).

This trend has persisted, even in more recent years. For one, the Court in *Mistretta* considered and found constitutional the delegation of authority to the Sentencing Commission. 488 U.S. at 374. While Congress granted the Commission ample discretion in making the Sentencing Guidelines, that did not mean the act was unconstitutional: "our cases do not at all suggest that delegations of this type may not carry

with them the need to exercise judgment on matters of policy." *Id.* at 377–78. A later delegation to the Attorney General to set temporary schedules of controlled substances "necessary to avoid an imminent hazard to the public safety" was proper. *Touby v. United States*, 500 U.S. 160, 165–67 (1991). And the Court upheld a delegation of authority to the EPA to establish national air standards that were "requisite to protect public health." *Whitman*, 531 U.S. at 473. "Requisite" meant "sufficient, but not more than necessary," and, because similar standards had been considered and upheld, the delegation fit "comfortably within the scope of discretion permitted by our precedent." *Id.* at 473, 475–76.[2]

On only two occasions—both in 1935 as part of its resistance to New Deal legislation—has the Court found a violation of the nondelegation doctrine. In one, the delegation was to the President to prohibit the transportation of petroleum. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 406 (1935). But that statute gave

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[2] Indeed, one of the "precedents" considered in *Whitman* was a challenge to another provision of the OSH Act in *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980): the "requisite" limitations "also resemble the [OSH Act] provision requiring 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'—which the Court upheld in [*Industrial Union*], and which even then-Justice Rehnquist, who alone in that case thought the statute violated the nondelegation doctrine, would have upheld if, like the statute here, it did not permit economic costs to be considered." *Whitman*, 531 U.S. at 473–74 (internal citations omitted). *See also* 29 U.S.C. § 655(b)(5); *Indus. Union*, 448 U.S. at 646 (plurality opinion); *id.* at 671 (Rehnquist, J., concurring in the judgment).

no limitation or guidance on how the President was to regulate oil transportation: "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415. And in the other, the President had the ability to regulate nearly the whole economy by merely promoting "fair competition." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). Such a "sweeping delegation" had no support in caselaw: the act's delegation was "without precedent" as it authorized the President to create rules of conduct, meaning his discretion to essentially enact laws was "virtually unfettered." *Id.* at 539, 541–42.

B.

Before applying the "intelligible principle" test to the OSH Act, we must consider the context of the Act, as it sets the stage for our analysis. *See Am. Power & Light*, 329 U.S. at 104–05. Congress passed the OSH Act in 1970, *see* Pub. L. 91-596, 84 Stat. 1590 (1970), finding that "personal injuries and illnesses arising out of work situations" imposed a substantial burden on the economy, 29 U.S.C. § 651(a). The overarching goal of the Act is therefore "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* § 651(b). It then lays out several specific purposes for the Act, including reducing workplace-safety hazards, increasing research into better safety standards, encouraging states to improve their own safety standards, and providing appropriate reporting procedures. *Id.*

To accomplish these purposes, the Act authorizes the Secretary of Labor to set occupational safety and health standards, *id.* § 651(b)(3), a "standard which *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," *id.* § 652(8) (emphasis added). This definition is the main "statutory criteria" providing "direction" to OSHA's promulgation of permanent safety standards and national consensus standards under § 655(a) and (b). *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 640 n.45 (1980) (plurality opinion). OSHA "may" promulgate and modify those standards via the prescribed process when it determines a rule is needed "in order to serve the objectives of this chapter," 29 U.S.C. § 655(b), (b)(1), and it may grant variances only under specific circumstances, *id.* § 655(b)(6). Then there are specific procedures described in the Act, with checks and balances, for adopting these standards—"a rigorous process that includes notice, comment, and an opportunity for a public hearing." *See Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 663 (2022) (*NFIB*). For example, interested persons have 30 days post-promulgation to submit comment, OSHA must adopt the rule within 60 days, and then parties may again file written objections and obtain a hearing. 29 U.S.C. § 655(b)(1)–(3).

Individuals subject to these standards must comply with them. Employers must provide a workplace free from recognized hazards, and they must comply with the agency's occupational safety and health standards. *Id.* § 654. Employees are similarly obligated to comply

with standards applicable to them. *Id.* If a violation occurs, the agency has the authority to issue citations. *Id.* § 658. The Act also sets out specific civil penalties or fines for violations. *See id.* § 666. But certain serious infringements, including those causing death to an employee, can lead to imprisonment. *Id.* § 666(e)–(g).

We also do not perform our review of the Act's provisions on a blank slate, for the Supreme Court has previously considered, and construed, the "reasonably necessary or appropriate" language. Prior to *Industrial Union*, OSHA interpreted that language as having "no legal significance or at best merely requir[ing] that a standard not be totally irrational." *Indus. Union*, 448 U.S. at 639 (plurality opinion). But *Industrial Union* changed the calculus. There, a plurality of the Court interpreted the OSH Act as requiring the agency, before issuing any permanent safety standard, "to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices." *Id.* at 642. Because the agency did not make such findings and "did not even attempt to carry its burden of proof" when promulgating a standard that lowered the permissible level of benzene exposure, a plurality of the Court rejected the permanent safety standard at issue. *Id.* at 653–59. Justice Rehnquist concurred in the judgment but opined that the "to the extent feasible" language of a separate provision, § 655(b)(5), violated the nondelegation doctrine. *Id.* at 682–88. In his opinion, this "feasibility" requirement did nothing "other than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory." *Id.* at 681–82.

Following *Industrial Union*, the Court cited approvingly OSHA's attempts to make that threshold determination that a particular safety issue carried a significant risk of harm. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 505–06 & n.25 (1981) (*Cotton Dust*); *see also id.* at 513 n.32 ("[A]ll [§ 655(b)(5)] standards must be addressed to 'significant risks' of material health impairment."). While we have not yet done so, other circuits have held that *Cotton Dust* "adopted the significant risk requirement." *See, e.g.*, *Nat'l Mar. Safety Ass'n*, 649 F.3d at 750 n.8. Finally, the Court has limited the "reasonably necessary or appropriate" standard to those that are "economically or technologically feasible." *See Cotton Dust*, 452 U.S. at 513 n.31 ("[A]ny standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or appropriate' under the Act.").

C.

Considering this statutory context and Supreme Court caselaw, we hold that the OSH Act's "reasonably necessary or appropriate" standard passes the "intelligible principle" test and is therefore constitutional. To begin, the OSH Act sets forth a host of principles, purposes, and goals that the agency must consider or fulfill. *See* 29 U.S.C. § 651(b). Then, the Act directs OSHA to set standards to further these purposes—the agency "shall" establish standards and modify them as necessary to serve the needs of the Act. *Id.* § 655(a), (b)(1). These goals guide the agency's decision-making in setting its standards, and they provide "overarching constraints" on its discretion. *Mistretta*, 488 U.S. at 376. In particular, these guidelines limit OSHA's oversight to the workplace

and restrict its standards to those that facilitate workplace safety, not, for example, public health policy in general. *See NFIB*, 142 S. Ct. at 665 ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.").

Next, the Act significantly limits OSHA's discretion in deciding whether it may issue a particular occupational safety and health standard. OSHA cannot merely issue any standard it likes; rather, a safety risk must be one that "requires" some action for a safe workplace. 29 U.S.C. § 652(8). In this context, "requires" substantially limits the agency's discretion. *See Whitman*, 531 U.S. at 475–76 (noting that a standard that is "'requisite,' that is, not lower or higher than is necessary . . . fits comfortably within the scope of discretion permitted"). The risk involved must be sufficient to warrant OSHA's involvement. Thus, any occupational safety and health standard that the agency issues is one that is genuinely needed to protect the safety of workers.

Further, OSHA *must* take action and issue standards in response to safety issues. Look to § 655(b), the section at issue here. While the Act states that OSHA "may" promulgate standards in the prescribed manner, this "may" is obligatory, not discretionary—in this context, it means "must" or "shall." *See The American Heritage Dictionary of the English Language* 808 (1969) (defining "may" as pertinent here as "[o]bligation or function, with the force of *must* or *shall*, in statutes, deeds, and other legal documents: '*Congress may determine the time of choosing the electors*.'"); *see also Keen v. Helson*, 930 F.3d 799, 802 (6th Cir. 2019) ("When interpreting the words of a statute, contemporaneous dictionaries are the best

place to start."). That is a substantial and twofold limitation on OSHA's discretion: OSHA *must* act when a particular hazard "requires" its action, and it *cannot* issue any standard when the risk does not rise to that level. This easily comports with the Supreme Court's interpretation of the statute as requiring OSHA to "make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices." *Indus. Union*, 448 U.S. at 642 (plurality opinion); *see also Cotton Dust*, 452 U.S. at 505–06 & n.25. The agency has no discretion in determining *whether* to set these permanent safety standards—it must do so.

As for the standards themselves, OSHA may adopt only those conditions that are "reasonably necessary or appropriate" to improve workplace safety. These standards do not need to *completely* resolve the issue, for "'safe' is not the equivalent of 'risk-free.'" *Indus. Union*, 448 U.S. at 642 (plurality opinion). Thus, a condition is "reasonably necessary or appropriate" in the context of the OSH Act if it is something that OSHA can do to ameliorate or mitigate, but not necessarily eliminate, an unsafe condition. *See id.* Contemporaneous dictionaries also demonstrate the contours of the three terms: "Reasonable" is "[w]ithin the bounds of common sense"; "necessary" is "[n]eeded for the continuing existence or function of something; essential; indispensable"; and "appropriate" is "[s]uitable for a particular person, condition, occasion, or place; proper; fitting." *The American Heritage Dictionary of the English Language* 64, 877, 1086 (1969). So standards that are "necessary or appropriate to provide safe or healthful employment"

are those that are needed for or suited to the purpose of keeping workers safe in their employment. That they be "reasonabl[e]" means that they need to be largely feasible or within the bounds of common sense. *Cf. Anderson v. Messinger*, 146 F. 929, 943 (6th Cir. 1906) (noting the difference between "reasonably necessary" and "absolutely necessary"). This comports with other language in the Act requiring OSHA to consider the economic or technological feasibility of standards. *See Cotton Dust*, 452 U.S. at 513 n.31 ("[A]ny standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or appropriate' under the Act."). So while we agree with our sister circuits that *Cotton Dust* adopted the limitations espoused in *Industrial Union*, *see Nat'l Mar. Safety Ass'n*, 649 F.3d at 750 n.8, we note that there was good reason for it to have done so: the "feasibility" and "significant risk" constructions are rooted in the language of the Act itself, not, for example, in any agency-imposed limitation. *Whitman*, 531 U.S. at 472–73. In short, "reasonably necessary or appropriate," in context, means that the standards adopted should be needed to improve safety but not to the exclusion of all else. This is not a broad, discretionary purpose statement but a real standard to guide the agency's actions.

This limit on Congress's delegation is materially similar to those previously considered by the Supreme Court. And the Court has upheld those delegations time and again. *See, e.g.*, *Sunshine Anthracite*, 310 U.S. at 387 ("just and equitable"); *Nat'l Broad. Co.*, 319 U.S. at 215–16 ("public interest"); *Yakus*, 321 U.S. at 420–23 ("fair and equitable"); *Touby*, 500 U.S. at 163 ("necessary to avoid an imminent hazard to the public

safety"); *Whitman*, 531 U.S. at 472–76 ("requisite to protect the public health"). All these standards provided ample discretion to an agency or coordinate branch to deal with the issue as it saw fit—but each also set reasonable guidelines as to how the entity must respond to the problem.

So too here. Congress has directed that OSHA *must* set standards to provide for public health in the workplace when its action is required. OSHA, as the entity with greater experience in health and safety, then has discretion to determine those standards. In this "complex" area with "ever changing and more technical problems," Congress may seek OSHA's assistance. *Mistretta*, 488 U.S. at 372. But while Congress gave OSHA significant discretion, that does not render the delegation unconstitutional. The agency's standards must still be reasonably needed—that is, not more or less stringent than is needed to respond to, but not eliminate, a safety risk in the workplace. *Id*. at 377; *Whitman*, 531 U.S. at 472–76. These standards do not exist in a vacuum: they must further the policy objectives of the Act, thereby fitting within the "hierarchy" developed by Congress. *Mistretta*, 488 U.S. at 377. And Congress, not OSHA, has detailed the penalties that apply to violations—a crucial factor in the nondelegation analysis. *See Grimaud*, 220 U.S. at 517 ("[Congress] could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."). Therefore, Congress has indeed laid out the general policy (a safe working

environment), the agency to apply it (OSHA), and the boundaries of that authority (necessary standards to mitigate significant risks of harm). *Mistretta*, 488 U.S. at 372–73. The Act describes the agency's task (protecting workers from unsafe conditions), provides instructions (requiring standards reasonably necessary and appropriate to respond to those risks), and guides the agency's discretion in doing so. *See Consumers' Rsch. v.* 67 F.4th at 788; *Gundy*, 139 S. Ct. at 2123 (plurality opinion). In short, the agency's discretion is not unbridled. Rather, because the delegation of power in the OSH Act fits within the delegations previously upheld by the Court, the delegation is constitutional.

Finally, as previously noted, our holding finds support in the caselaw of our sister circuits, two of which have concluded that the OSH Act satisfies the nondelegation doctrine. In *Blocksom & Co. v. Marshall*, the Seventh Circuit rejected such a challenge, concluding that the plaintiff's arguments were "without persuasive merit." 582 F.2d at 1125–26. It was not necessary for the Act to prescribe the exact regulations OSHA could promulgate; instead, it was sufficient that "Congress has chosen a policy and announced general standards which guide the Secretary in establishing specific standards to assure the safest and healthiest possible working environments, and which enable the courts and the public to test the Secretary's faithful performance of that command." *Id*. at 1126. The D.C. Circuit similarly rejected this challenge in *National Maritime*, as the delegation of power to OSHA was "no broader" than other delegations upheld by the Supreme Court. 649 F.3d at 755–56. "In light of these precedents, one

cannot plausibly argue that [the OSH Act's] standard is not an intelligible principle." *Id.* at 756 (citation omitted).

D.

Allstates and the dissent resist this, contending that the delegation here is similar to the two cases in which the Supreme Court held an act violated the nondelegation doctrine. But *Panama Refining* and *A.L.A. Schechter Poultry* do not alter our conclusion. While these two cases are binding on us, we must not read them in isolation, overlooking the many times that the Court upheld delegations of authority. Instead, we must *also* follow the "broad leeway" that Congress has under the Court's entire nondelegation jurisprudence. *See Consumers' Rsch.*, 67 F.4th at 788 (citing *Whitman*, 531 U.S. at 474–75). Even so, the OSH Act satisfies the analysis in these cases, for Congress *has* required OSHA to make a "finding" and *has* "set up a standard" governing the agency's action. *Panama Refin.*, 293 U.S. at 415; *accord Shechter Poultry*, 295 U.S. at 534–35. OSHA must set standards when certain unsafe "conditions" exist that "require[]" action, and those standards must be "reasonably necessary or appropriate"—that is, needed to ameliorate those unsafe conditions but not to the exclusion of all else. 29 U.S.C. §§ 652(8), 655(b)(1). This standard passes muster when considering the sum of the Supreme Court's jurisprudence.

Moreover, these two cases are readily distinguishable from the present case. For one, this case does not involve a delegation with *no* standards, as in *Panama Refining*. Congress aptly declared what purposes OSHA must consider and how the agency's

standards must be reasonably needed to respond to Congress's concerns. Thus, Congress *has* declared a policy, established a standard, and laid down a rule. *Cf. Mistretta*, 488 U.S. at 372–73. And this is distinguishable from the "virtually unfettered" delegation in *Schechter Poultry*. There, the President could regulate essentially the entire economy and make whatever law he desired so long as it promoted "fair competition"—a term that was not defined in the act and that incorporated essentially all the act's purposes. The breadth of the delegation needed a corresponding level of guidance that was missing in the act. By contrast, the OSH Act is cabined to workplace-safety standards—it does not allow OSHA to go beyond that. *See NFIB*, 142 S. Ct. at 665. Further, the "reasonably necessary or appropriate" guidance is far more restrictive than simply promoting "fair competition." In short, OSHA does not have "virtually unfettered" discretion, *cf. Schechter Poultry*, 295 U.S. at 542, for its discretion is limited to the "hierarchy" established by Congress, *Mistretta*, 488 U.S. at 377. For that reason, it instead resembles other constitutional delegations, not *Panama Refining* and *Schechter Poultry*. These two cases—the *only* times the Supreme Court has determined a nondelegation violation has occurred—do not control here.[3]

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[3] Allstates also argues that this case implicates the "major questions" doctrine, but this is not a major-questions case. That doctrine applies in "'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown &*

Further, while it is "true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," *Whitman*, 531 U.S. at 475, and Congress has allowed OSHA to regulate much of the economy, we cannot conclude that the OSH Act confers too much discretion. For one, the Act substantially limits OSHA's discretion, meaning that the "degree of agency discretion" here is not so great. *Id*. The text and overall purposes of the Act substantially limit OSHA's playing field to the "workplace." *Cf. NFIB*, 142 S. Ct. at 665. And the threshold limitations discussed in *Industrial Union* and adopted in *Cotton Dust* are rooted in the language of the Act. When accepting those limitations (as we should) and reading them in context with the rest of the OSH Act, the Act clearly delineates *when* and *how* the agency must act. *See, e.g.*, 29 U.S.C. § 655. A health risk must require a standard which should be both reasonably feasible and no more than necessary to mitigate a safety risk. *See id*. at §§ 652(8), 655(a),

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Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (second alteration in original)). In short, it applies when the question presented is "whether Congress in fact meant to confer the power the agency has asserted." *Id*. But Allstates does not contend that OSHA has taken a specific action that exceeds the power that Congress delegated to OSHA. *Cf. id*. at 2610–16 (holding that Congress did not give the EPA the authority to devise emissions caps because the statute never gave "clear congressional authorization" to do so); *NFIB*, 142 S. Ct. at 665 (holding that OSHA's vaccine mandate exceeded its delegated authority). Rather, its argument is that the OSH Act itself is unconstitutional because Congress's delegation is improper—in other words, that Congress was not specific enough in its delegation, rather than was silent about whether it delegated a particular power.

(b)(1); *cf. Whitman*, 531 U.S. at 475–76. This falls comfortably within the limitations accepted by the Supreme Court. *See Yakus*, 321 U.S. at 427 (collecting cases).

In addition, the Supreme Court has consistently upheld analogous delegations even when the "scope of the power congressionally conferred" is similarly large. *Whitman*, 531 U.S. at 475. Many prior cases addressed broad delegations implicating large and important areas of American life. For example, railroad, coal, and radio were ubiquitous in American society in the 1930s and 1940s, yet the Court permitted broad regulatory delegations over those industries. *See N. Y. Cent. Secs. Corp.*, 287 U.S. at 24–25; *Nat'l Broad. Co.*, 319 U.S. at 214; *Sunshine Anthracite*, 310 U.S. at 387. And it is impossible to say that OSHA's sphere of regulation is greater than, or even equal to, the delegation of authority upheld in *Yakus*—to allow the President to set "fair and equitable" prices for any product in the national economy. *See* 321 U.S. at 427. So while Congress has conferred significant power to OSHA to oversee large sections of our economy, the discretion conferred by the OSH Act nowhere near approaches the line where the scope of its power is too great for the standard imposed. *See Whitman*, 531 U.S. at 475. The mere fact that the Act applies to a large portion of the American economy does not transform this constitutional limitation into an unconstitutional one.

III.

In sum, the OSH Act provides an overarching framework to guide OSHA's discretion, and the Act's standards comfortably fall within those limits previously upheld by the Supreme Court. So the Act

passes constitutional muster. We therefore hold the standard prescribed by the OSH Act to be a constitutional delegation of authority. "To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process." *Sunshine Anthracite*, 310 U.S. at 398.

We affirm the judgment of the district court.

DISSENT

NALBANDIAN, Circuit Judge, dissenting. For 88 years, federal courts have tiptoed around the idea that an act of Congress could be invalidated as an unconstitutional delegation of legislative power. The majority continues the trend. But, in my view, that streak should end today. In the Occupational Safety and Health Act ("OSHA"), Congress granted the Secretary of Labor nearly unfettered discretion in fashioning permanent occupational health and safety standards. Because OSHA's permanent standards provision (1) does not require any preliminary factfinding or a particular situation to arise to trigger agency action and (2) does not contain a standard that sufficiently guides the exercise of the broad discretion OSHA delegates to the Secretary, the provision does not have an intelligible principle. So, under Supreme Court precedent, it violates the nondelegation doctrine.

I.

"[I]t is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 688 (D.C. Cir. 2008), (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010). Fourteen words start us off: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. art. I, § I.

Article I vests the "Senate and House of Representatives" (and them alone) with "[a]ll legislative powers." *Id.* That means that Congress, not some official in the Executive Branch, creates laws.

And only after, does the Executive come in and do its job—it may enforce the laws, not create them. As James Madison and the public originally understood, any attempt at "*alienating* the powers of the House . . . would be a violation of the Constitution." Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1506 (2021) (quoting 3 *Annals of Congress* 238–39 (1791) (James Madison)). Indeed, proceeding otherwise would defy the constitutional separation of powers.

Of all "principle[s] in our Constitution," none is "more sacred than . . . that which separates the legislative, executive and judicial powers." *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 *Annals of Congress* 581 (1791) (James Madison)); *see Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."). And perhaps that's because of the democratic values it protects.

The Framers understood that lawmaking involved "hard choices." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). So they placed the legislative power into the hands of the branch that was most accountable to the people. And if any problems arose, "the people could respond, and respond swiftly" to remedy any "misuse[]" of power. *Id.*

Along with accountability was "the bedrock principle that dividing power among multiple entities and persons helps protect individual liberty." *PHH*

Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 187 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *abrogated by Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *see* The Federalist No. 51 (James Madison) (C. Rossiter ed. 1961) ("[The] separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty[.]"). And it does so by slowing down the ability to legislate. "Bicameralism and presentment make lawmaking difficult *by design*." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) (cleaned up). The Framers thought that these drawn-out processes not only limited the government's ability to restrict fundamental freedoms, but also promoted deliberation and safeguarded unpopular minorities from the tyranny of the majority. *See* The Federalist No. 73 (Alexander Hamilton), No. 51 (James Madison). In all, the separation of powers shields the public's interests in accountability and individual liberty. And Article I is one way to ensure that separation.

A.

Born out of Article I was what courts call the nondelegation doctrine. It stands for a simple proposition—Congress alone has legislative powers, and it cannot delegate them away. With that in mind, the Supreme Court has applied the doctrine to clarify how courts can determine whether a power delegated to the executive is actually legislative (and thus a violation of Article I).

Keeping in mind the fundamental, Founding principle that "the legislature makes, the executive executes, and the judiciary construes the law," courts

have adjudicated Congress's ability to delegate power. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46, 50 (1825) (upholding a delegation of power to federal courts to regulate their own procedures and holding that state legislatures could not interfere with that delegation). That said, within a few decades after ratification, Congress did "commit something to the discretion of the other [Branches]." *Id.* at 46 (noting that court determinations of "the precise boundary of this power is a subject of delicate and difficult inquiry"). But Chief Justice Marshall and the Court understood that Congress could not delegate "powers which are strictly and exclusively legislative." *Id.* at 42. Still, they allowed Congress to delegate other "powers which the legislature may rightfully exercise itself." *Id.* at 43. As Chief Justice Marshall went on to say, the "line" separating "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest," which allow others to "fill up the details" in a "general provision," was not "exactly drawn." *Id.* So the Court began to try to clarify where that line fell.

At first, the Supreme Court focused on the "extent" or "character of the power" that Congress conferred. *Id.* Delegating "the making of law" itself was off limits. *Marshall Field & Co.*, 143 U.S. at 693; *see Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (denying that Congress may "invest administrative officials with the power of legislation"). But the Supreme Court still permitted Congress to vest others with the "authority or discretion as to [a law's] execution." *Marshall Field & Co.*, 143 U.S. at 693–94 (citation omitted). Indeed, for over a century after the Founding, courts allowed "Congress . . . to use officers of the [E]xecutive branch

within defined limits, to secure the *exact effect* intended by its acts of legislation." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (emphases added) (collecting cases). And importantly, those "defined limits" were what courts called "intelligible principle[s]." *Id.* at 406, 409.

Indeed, Congress fashioned laws that included various constraints to guide the Executive on what it could and couldn't do. For instance, some laws required Executive officials to find facts before taking action, and others limited Executive responses to specific situations. *See id.* at 405 (noting that a statute "provided [the President] with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments" of foreign trade); *Marshall Field & Co.*, 143 U.S. at 693–94 (conditioning the President's "duty to issue a proclamation" on a fact-finding inquiry into whether exports from a country were "reciprocally unequal and unreasonable"). Other laws required the officials to consider specified criteria before doing something. *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (requiring the Interstate Commerce Commission to consider criteria before permitting acquisition of a railroad in the "public interest," including the "adequacy of transportation service," "economy and efficiency," and the "best use of transportation facilities"). And others concerned grants of power so discrete in themselves that no more direction from Congress was necessary. *See Union Bridge Co. v. United States*, 204 U.S. 364, 366, 387 (1907) (granting the Secretary of War the authority to provide bridge owners with notice and a reasonable amount of time to make structural changes to their

bridges); *see also Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 435 n.3 (1930) (requiring the Secretary of Agriculture to go through a "full hearing" before establishing "just and reasonable rates and charges" for "the furnishing of stockyard services" (citation omitted)).

Long story short, "in every case in which the question [of delegation was] raised, the Court . . . recognized that there are limits of delegation which there is no constitutional authority to transcend." *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935). And what confined those delegations in each case was some sort of limitation that someone outside the Legislative Branch had to abide by. *Id.* Those constraints became known as a law's "intelligible principle." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.

B.

But it wasn't until 1935 that the Court found that Congress had pushed its limits. In *Panama Refining v. Ryan*, the Court held for the first time that a congressional grant of power was an unconstitutional delegation. 293 U.S. at 430, 433. Congress had delegated regulatory authority over the transportation of petroleum and petroleum products to the President. *Id.* at 414–15. In evaluating whether this delegation was constitutional, the Court "look[ed] to the statute" to test whether Congress violated Article I when delegating powers to the Executive Branch. *Id.* at 415. Importantly, the Court provided some considerations to determine whether a congressional act "shall be prohibited by law [a]s obviously one of legislative policy":

> Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Id.

Keeping these considerations in mind, the *Panama Refining* Court found that the law had no "intelligible principle" by which the President was "directed to conform." *Id.* at 430 (citation omitted). Although Congress provided a "general outline of policy" on the "transportation of petroleum or petroleum products," *id.* at 417, Congress did not "lay[] down [a] policy of limitation" or "policy for the achievement" of the "conservation of natural resources," *id.* at 418. Instead, in "general terms," it seemed as if the "broad outline [wa]s simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined . . . by . . . subsequent sections." *Id.* But the law didn't further define the general policy. *Id.* at 430.

Indeed, the law "laid down no rule" on what actions the President had to make if certain situations arose, *id.*, and "nothing as to the circumstances or conditions" that would prompt him to prohibit transportation, *id.* at 417. No "determination as to any facts or circumstances" had to be made, and no situation had to come about before the President could exercise discretion under the law. *Id.* at 418.

Instead, Congress vested the President with the discretion to make petroleum-transportation

standards and enforce accordingly. *Id.* at 420–21. And Congress didn't provide him with a standard to guide his discretion. *Id.* Said otherwise, Congress did not require the President to consider a "primary standard"—some set of criteria or considerations—that would limit his discretion in "'fill[ing] up the details' under . . . general provisions." *Id.* at 426 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43). Contrary to other acts of legislation, the law did not "legislate[] on the subject as far as was reasonably practicable." *Id.* at 427 (quoting *Buttfield*, 192 U.S. at 496). Rather, Congress's wide grant of discretion allowed the President to *choose* "[a]mong the numerous and diverse objectives broadly stated." *Id.* at 418. And so, with no factual prerequisite or standard guiding his authority, he could act "as he pleased" in regulating petroleum transportation. *Id.* As a result, the Court held that Congress unconstitutionally delegated its legislative power.

Soon after came *A.L.A. Schechter Poultry Corp. v. United States*. 295 U.S. 495 (1935). In *Schechter Poultry*, Congress delegated regulatory authority to the President to set "codes of fair competition" in certain trades and industries—in this case, the poultry industry. *Id.* at 521–22. Before getting into the analysis, the Court pointed out that the Constitution gives "Congress the necessary resources of flexibility and practicality . . . in laying down policies and establishing standards." *Id.* at 530. But the Court explained that Congress could only delegate to "selected instrumentalities" if Congress also "prescribed limits and the determination of facts to which [a] policy as declared by the Legislature [wa]s to apply." *Id.*

Relying on *Panama Refining*, the Supreme Court "look[ed] to the statute to see whether Congress . . . overstepped these limitations"—that is, the Court determined whether Congress provided an intelligible principle by "establish[ing] the standards of legal obligation" or whether it didn't "by . . . fail[ing] to enact such standards" and thereby "attempt[ing] to transfer that [legislative] function to others." *Id.* In the end, the Court held that Congress didn't provide an intelligible principle. *See id.* at 534, 537–38 ("Congress [could not] delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for" a "broad range of objectives," including "rehabilitation and expansion of trade or industry.").

In finding an Article I violation, the Court turned to two considerations also identified in *Panama Refining*. The Court held that the law didn't (1) list "rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Id.* at 541. Nor did the law (2) contain "standards [that could guide Executive discretion], aside from the statement of the [law's] general aims of rehabilitation, correction, and expansion." *Id.*

Besides some general goals, no considerations limited what the President could do. And the *Schechter Poultry* Court spelled out a few reasons why the law didn't have an adequate standard. First, the Court found that the law's general "statement of the authorized objectives," *id.* at 534, was a "broad declaration" that still left the President's discretion "virtually unfettered," *id.* at 541–42. Next, it found that the two procedural "condition[s]" the President had to meet before promulgating did not limit "the

permissible scope" of his regulatory authority because they still allowed him to act "as he may see fit." *Id.* at 538. And last, the Court recognized that the broad grant of power to the President required Congress to be more specific in how it guided the President's discretion. *Id.* at 541.

The Court noted the difference between laws concerning smaller grants of discretion (like those dealing with "rules of miners as to mining claims" and "the standard height of drawbars"), and the law in *Schechter Poultry* (which granted "a sweeping delegation of legislative power" over codes affecting the "rehabilitation and expansion of . . . trades or industries"). *Id.* at 537; *see id.* at 539 (noting that the delegated "authority relate[d] to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country"). The Court concluded that a delegation of that magnitude, with no intelligible principle to limit Executive discretion, was "unknown to our law, and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537. Taken together, the law in "no way limit[ed]" the "breadth of the President's discretion." *Id.* at 538–39. So as in *Panama Refining*, the law in *Schechter Poultry* had no "intelligible principle" limiting the President's discretion. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409; *Schechter Poultry*, 295 U.S. at 551.

After *Panama Refining* and *Schechter Poultry*, at least one thing became clear: Congress's "general outline of policy," *Panama Refin.*, 293 U.S. at 417, or "statement of . . . general aims," *Schechter Poultry*, 295

U.S. at 541, was not enough to form an intelligible principle. Knowing that, the Supreme Court began to focus its nondelegation analysis on two considerations: (1) "whether the Congress has required any finding by the President in the exercise of the authority," and (2) "whether the Congress has set up a standard for the President's action." *Panama Refin.*, 293 U.S. at 415; *see Schechter Poultry*, 295 U.S. at 530. As I'll explain, the intelligible principles identified throughout later Supreme Court precedent fall into one of these two buckets.

C.

With *Panama Refining* and *Schechter Poultry* remaining good law, the Court has further refined the "intelligible principle" framework.[1] Since 1935, most

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[1] The Supreme Court has not held that any act of Congress unconstitutionally delegates legislative power since those two cases. Rather, the Court has upheld each law before it while developing what we call the intelligible-principle test. *See generally* Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 & n.285 (2014) (describing the test as "notoriously lax"). And at least from 1940 to 2015, it appears that only one nondelegation challenge has been successful in lower federal courts without being reversed on appeal. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 636 (2018).

Some jurists have pointed out that the test actually allows Congress to delegate "legislative power"—but only if the delegation is "adequately limited by the terms of the authorizing statute." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment); *see Dep't of Transp.*, 575 U.S. at 86 (Thomas, J., concurring in the judgment) ("Our reluctance to second-guess Congress on the *degree* of policy judgment is understandable; our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing

(if not all) nondelegation cases have involved legislation that has granted the Executive some form of policy-making power. And each time that's happened, the Supreme Court has upheld the legislation by finding an intelligible principle in two ways—two ways that track the two considerations present in *Panama Refining* and *Schechter Poultry*.

First, a "finding by the President in the exercise of the authority to enact the prohibition." *Panama Refin.*, 293 U.S. at 415. The Supreme Court has upheld laws that require certain situations or fact-finding to occur before the Executive can act under a statute. *See Opp Cotton Mills v. Adm'r of Wage & Hour Div. of Dep't of Lab.*, 312 U.S. 126, 143–45 (1941) (upholding a law that allowed the Executive to fix the minimum wages contingent on "basic facts to be ascertained administratively" while considering a list of

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private conduct."). And others have noted that "the Constitution does not speak of 'intelligible principles'" in the first place, which prompts the question of when the Supreme Court will revisit the nondelegation doctrine again. *Whitman*, 531 U.S. at 488 (Thomas, J., concurring) ("On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."); *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) ("Th[e] mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Mem.) (Kavanaugh, J., statement respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases."); *Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring) ("[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why.").

"prerequisites" and "further requirements"); *Radio Corp. of Am. v. United States*, 341 U.S. 412, 416 & n.5 (1951) (involving a law that required a commission "to promulgate standards for transmission of color television that result in rejecting all but one of the several proposed systems" "as public convenience, interest, or necessity required]" but only "given a justifiable fact situation").

Second, "a standard." *Panama Refin.*, 293 U.S. at 416. When a law does not condition the Executive's grant of regulatory authority on a set of facts, the Supreme Court has looked for a standard. Indeed, a law would be unconstitutional if "an absence of standards" makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). With that in mind, any standard must be "sufficiently definite and precise" so as "to enable Congress, the courts and the public to ascertain whether the [Executive official] . . . has conformed to those standards." *Id.*; *Opp Cotton Mills*, 312 U.S. at 144; *see Gundy*, 139 S. Ct. at 2129 (plurality) ("The Court has stated that a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of his authority." (cleaned up)). And in making an assessment, "standards need not be tested in isolation." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Courts can "derive much meaningful content from the purpose of the [legislation], [the] factual background and the statutory context in which the[] [standards] appear." *Id.*

After *Schechter Poultry*, broad purpose statements that granted wide discretion and general phrases in a

law were not enough to satisfy the Court's intelligible-principle test. But the Court has favored standards that specify what the Executive "must conform to," such as a list of "standards" and "criteria" that guide regulation. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397–98 (1940) (upholding a law that allowed the Executive to "fix maximum prices" on bituminous coal "when . . . the public interest . . . deem[ed] it necessary in order to protect the consumer against unreasonably high prices" while being bound by "standards" and "criteria"); *see Am. Power & Light Co.*, 329 U.S. at 105 (upholding a law that allowed the Executive to help preserve corporate structures, but only if it complied with "a veritable code of rules" within the law's "express recital of evils," "general policy declarations," "standards for new security issues," and "conditions for acquisitions of properties and securities," and its specification of the "nature of the inquiries contemplated"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 204, 225–26 (1943) (upholding a law allowing for the rejection of a broadcasting network program for the "public interest, convenience, and necessity" because "[t]he purpose of the Act, *the requirements it imposes*, and the context of the provision in question" provided an intelligible principle (citation omitted) (emphasis added)).

From mandatory "factors" that the Executive *must* consider to "prohibited" factors that the Executive *cannot* consider, the Court has upheld delegations that give specific guidance—guidance that the Executive cannot disregard. *Mistretta v. United States*, 488 U.S. 361, 375–76 (1989) (requiring the Sentencing Commission to form guidelines while considering, among many things, "seven factors" of the offenses, the

"specific tool" of the "guidelines system," "three goals," "four 'purposes,'" and "prohibited" factors (citation omitted)).

Some of those required considerations might take the form of "the latest scientific knowledge." *Whitman*, 531 U.S. at 473 (requiring the Executive to set air quality standards "[f]or a discrete set of pollutants . . . based on published air quality criteria that reflect the latest scientific knowledge" and "at a level that is . . . sufficient, but not more than necessary" to "protect public health from the adverse effects of the pollutant in the ambient air" (citation omitted)). Whereas others might be specific considerations or restrictions relating to the power vested. *See Touby v. United States*, 500 U.S. 160, 166–67 (1991) (allowing the Attorney General to schedule a drug if it is "necessary to avoid an imminent hazard to the public safety" while also "requir[ing] [the Attorney General] to consider . . . multiple specific restrictions," including "three factors" related to drug abuse, the risk to public health, and "criteria for adding a substance to each of the five schedules"); *Yakus*, 321 U.S. at 419, 427 (noting that the law provided "directions" for the Executive, to fix prices as a "temporary wartime measure," but only when "consideration [is] given to prices prevailing in a stated base period" and the prices be "fair and equitable").

Importantly, one other trend permeated the development of Article I's nondelegation requirement: Laws that vest more power require more constraints. To be clear, regardless of the breadth of delegation, standards must still be "sufficiently definite and precise," *Yakus*, 321 U.S. at 426, and Congress must still express "the boundaries of . . . delegated authority"

even when "delineat[ing] [a] general policy," *Am. Power & Light Co.*, 329 U.S. at 105, 113 (blessing a statutory provision vesting a narrow scope of power to the SEC to "ensure that the corporate structure or continued existence of any company in a particular holding-company system" conformed to enumerated standards).

But the body of Supreme Court cases we have requires more detail when Congress confers more power. "It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475 (comparing the minimal "direction" needed to delegate the task of defining "country elevators" to the "substantial guidance [needed to] set[] air standards that affect the entire national economy"); *see Touby*, 500 U.S. at 166 (explaining that "greater congressional specificity" may be needed in certain contexts).

Indeed, the Court has identified some statutes that were so narrow that they required less detail. *See Gundy*, 139 S. Ct. at 2125, 2128, 2130 (explaining that the delegation was narrow because it (1) granted "only temporary authority," which was "distinctly small-bore" when compared to other delegations; (2) allowed discretion in the form of "time-limited latitude" of an "implementation delay," "[b]ut no more than that" "to address . . . various implementation issues"; and (3) "enabled the Attorney General *only* to address (as appropriate) the 'practical problems' involving pre-Act offenders before requiring them to register . . . [which] was a *stopgap, and nothing more*" (citation omitted) (emphases added)); *Nat'l Broad. Co.*, 319 U.S. at 216 (interpreting "'public interest, convenience, or

necessity' . . . by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services" because the criterion was only "as concrete as the . . . field of delegated authority permi[ted]" (citation omitted)); *see also Yakus*, 321 U.S. at 419, 426 (noting that a "temporary wartime" law's "authority to fix prices . . . to prevent inflation [wa]s no broader than the authority" vested by other laws).

In sum, the Supreme Court, over two centuries worth of caselaw, has developed a test to determine whether a congressional delegation of power is constitutional under Article I. That test is aimed at an "intelligible principle." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409. And that in turn requires a court to analyze a statute for two things: (1) a fact-finding or situation that provokes Executive action or (2) standards that sufficiently guide Executive discretion—keeping in mind that the amount of detail governing Executive discretion must correspond to the breadth of delegated power. *See Schechter Poultry*, 295 U.S. at 541–42; *Panama Refin.*, 293 U.S. at 430; *Whitman*, 531 U.S. at 475. If neither of these exist, under Supreme Court precedent, there is no intelligible principle. Rather, that law would be an unconstitutional grant of legislative power under Article I.

II.

Never have we or the Supreme Court decided whether the permanent standards provision under OSHA constitutes an unconstitutional delegation of power.[2] OSHA vests the Secretary of Labor with the

[2] As I later explain, the Supreme Court has only dealt with OSHA's "toxic materials or harmful physical agents" provision

power to "set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). And under OSHA's permanent standards provision, the Secretary "may by rule promulgate, modify, or revoke any occupational safety or health standard." *Id.* § 655(b). If that delegation sounds like a lot of power—it is. It gives the Secretary broad discretion to create mandatory safe and healthy working conditions for "every working man and woman in the Nation." *Id.* § 651(b). And the only thing binding his discretion is that he must believe that a standard is "reasonably necessary *or appropriate* to provide safe or healthful employment and places of employment." *Id.* §§ 651(b)(3), 652(8) (emphasis added).

Bound by the Supreme Court's development of the "intelligible principle" test, I believe the delegation of power under these provisions violates Article I. That's because the provisions provide (1) no fact-finding or situation that prompts Executive action and (2) no standard that sufficiently guides discretion on what health and safety standards are appropriate. And that's even more so the case because the broad scope of delegated power here—creating permanent standards "for every working man and woman in the

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under 29 U.S.C. § 655(b)(5). *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980). Importantly, this was a different provision. And it didn't take long for the Supreme Court to note that its holding on § 655(b)(5) does not affect how courts should interpret § 652(8)—the definition provision on which OSHA's permanent standards provision solely depends. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 & n.32 (1981) (explicitly leaving open "all the applications that [§ 652(8)] might have, either alone or together with [§ 655(b)(5)]").

Nation"—demands that Congress be correspondingly detailed in how it limits agency discretion. *Id.* § 651(b). Under a faithful application of Supreme Court precedent, Congress failed to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] . . . is directed to conform." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.

Our "nondelegation inquiry" into OSHA begins and ends with statutory interpretation. *Gundy*, 139 S. Ct. at 2123 ("[I]ndeed, once a court interprets the statute, it may find that the constitutional question all but answers itself."). To determine "whether Congress has supplied an intelligible principle to guide the . . . use of discretion," we "constru[e] the challenged statute to figure out what task it delegates and what instructions it provides." *Id.* And as described above, we can find an intelligible principle from two considerations: (1) a fact-finding or situational requirement that provokes Executive action or (2) standards that sufficiently guide Executive action. At the same time, we assess "whether the law sufficiently guides executive discretion to accord with Article I," *id.*, which means that we look at whether "the degree of agency discretion . . . accord[s] to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475.

With that framework in mind, *what* I look for is an intelligible principle from the considerations set out in *Panama Refining* and *Schechter Poultry*. And *where* I look is OSHA's provisions—few as they may be.

A.

To start, OSHA's permanent standards provision requires no (1) fact-finding or situation to occur before

the Secretary acts. *See Schechter Poultry*, 295 U.S. at 541–42; *Panama Refin.*, 293 U.S. at 417–18, 430. As an initial matter, OSHA gives the Secretary the option of consulting an advisory committee before promulgating a standard, 29 U.S.C. § 655(b)(1), but it does not require him or the committee to "obtain[] needed data" or to determine "the facts *justifying*" any changes to health and safety standards. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 405 (emphasis added). And even if the committee gives the Secretary "recommendations and findings in relation to the making of codes," they are not binding—they "have no sanction beyond the will of the [Secretary], who may accept, modify, or reject them as he pleases." *Schechter Poultry*, 295 U.S. at 539. So the Secretary's power to regulate permanent standards is not contingent on a fact-finding inquiry. *Marshall Field & Co.*, 143 U.S. at 693–94. There are no "basic facts to be ascertained administratively." *Opp Cotton Mills*, 312 U.S. at 145.

And the act doesn't limit the Secretary's scope of power by requiring that he only respond to "a justifiable fact situation." *Radio Corp. of Am.*, 341 U.S. at 416. No threat or harm to health or safety must arise before the Secretary creates a standard. And even if a threat or harm were to arise, nothing requires that the Secretary actually combat it. *See* 29 U.S.C. § 651(b)(3) ("authorizing the Secretary of Labor to set mandatory" standards, but not requiring him to do so); *id.* § 655(b) (providing that the Secretary "*may*," not shall, "promulgate, modify, or revoke any . . . standard" (emphasis added)).

And this is *not* like other provisions in OSHA that require some sort of fact-finding. The Secretary and other defendants point us to *Benzene*, a Supreme

Court case interpreting another provision of OSHA to require a fact-finding inquiry of a "significant risk of material health impairment." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980) ("*Benzene*"). Importantly, that case involved the "toxic materials or harmful physical agents" provision in OSHA, which falls under 29 U.S.C. § 655(b)(5)—a provision that is *not* at issue here. *Id.* at 612. A four Justice plurality assessed "the meaning of and the relationship between" OSHA's toxic materials provision and a provision that does apply in this case—§ 652(8), "which defines a health and safety standard as a standard that is 'reasonably necessary and appropriate to provide safe or healthful employment.'" *Benzene*, 448 U.S. at 639 (quoting 29 U.S.C. § 652(8)). The plurality said that § 652(8) "appl[ies] to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment." *Id.*[3]

At first blush, the four-Justice plurality in *Benzene* may seem to answer the question of whether the permanent standards provision in OSHA requires fact-finding. But no majority binds our analysis. And as others have recognized, the *Benzene* case is not a

[3] Ironically, the government's stance in *Benzene* is the opposite of that argued in this case. Before, the government argued that § 652(8) "*imposes no limits* on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be 'reasonably necessary' to eliminate all risks of any harm from their workplaces." *Benzene*, 448 U.S. at 641. Now, the government argues that § 652(8) serves as a limiting principle to OSHA's permanent standards provision.

model of clarity. *See, e.g.*, Antonin Scalia, *A Note on the Benzene Case*, Am. Enter. Inst., J. on Gov. & Soc., July- Aug. 1980, at 25 (stating that *Benzene* produced "a three-one-one-four split decision that literally provides no conclusive answer to any legal question").

That aside, the Supreme Court later attempted to clarify what we can take away from *Benzene*. *See Am. Textile Mfrs. Inst., Inc. v. Donovan* (*Cotton Dust*), 452 U.S. 490, 513 & n.32 (1981). *Cotton Dust* was the Court's attempt to make sense of *Benzene*. It noted that § 652(8)'s "reasonably necessary or appropriate" language "might . . . impose additional restraints" on OSHA," but *only* when combined with § 655(b)(5)'s "toxic materials" language.[4] *Id.* For example, the Court specified that only through the combination of § 652(8) and the toxic materials provision could the Court get to *Benzene*'s "significant risk" requirement.[5]

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[4] The majority opinion also recognizes this clarification from *Cotton Dust*. (Maj. Op. at 9 ("[A]ll [§ 655(b)(5)] standards must be addressed to 'significant risks' of material health impairment." (quoting *Cotton Dust*, 452 U.S. at 513 n.32)).

[5] Almost every court to have addressed whether the "significant risk" requirement applies *only* uses the test in relation to OSHA's toxic materials standards, *not* its permanent safety standards. *See Pub. Citizen Health Rsch. Grp. v. U.S. Dep't of Lab.*, 557 F.3d 165, 176 (3d Cir. 2009); *Ala. Power Co. v. OSHA*, 89 F.3d 740, 745–46 (11th Cir. 1996); *Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 720, 737 (5th Cir. 1988); *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442, 1444 (4th Cir. 1985); *ASARCO, Inc. v. OSHA*, 746 F.2d 483, 490, 495 (9th Cir. 1984). And the one case where this Court mentions "significant risk" was in dicta. *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 21 F.4th 357, 376 (6th Cir. 2021), *stay application granted by Nat'l Fed'n of Indep.*

Id. ("In addition, if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five respirators was 'technologically and economically feasible,' and OSHA thus insisted on the use of five, then the 'reasonably necessary or appropriate' limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard."). Put differently, it's the combination of those two provisions—§ 652(8) and § 655(b)(5)—not the individual provisions in themselves, that get us to a "significant risk" fact-finding.

So *Cotton Dust* made it clear that the Supreme Court has not answered what "substantive content" § 652(8) has and that *Benzene* did not answer that question. *Id.* (citation omitted). And rather than address the issue, it explicitly left open the question of "all the applications that [§ 652(8)] might have, either alone or together with [§ 655(b)(5)]." *Id.* Thus, the Supreme Court has not told us what § 652(8) means or how it works with OSHA's permanent health and safety standards.[6]

Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (involving an emergency temporary standard, not a permanent standard).

[6] On that note, we have yet to address the issue, and the two decisions of our sister circuits should not control our analysis in this case. The D.C. Circuit has decided that *Benzene*'s "significant risk" requirement applies to OSHA's permanent standards provision without much explanation. *See Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 750 n.8 (D.C. Cir. 2011). Rather than analyzing OSHA's text, the court only reasoned that OSHA's permanent standards provision requires a "significant risk" fact-finding based on a "reading of subsequent Supreme Court precedent" that dealt exclusively with OSHA's "toxic materials"

With that, we have to figure it out ourselves. To do so, we must analyze whether some sort of fact-finding requirement forms from the combination of OSHA's definition of a standard, 29 U.S.C. § 652(8), and its permanent standards provision, *id.* § 655(b). It doesn't. Start with the permanent standards provision. *See id.* Again, it provides that the Secretary "may," not shall, "promulgate, modify, or revoke any . . . standard"—it provides nothing else. *Id.* And although "may" is sometimes obligatory in a statute—and context informs that determination—the ordinary meaning of "may" is permissive. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive[.]"). And a host of contemporaneous dictionary definitions confirm the permissive nature of

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provision. *Id.* (citing *Bldg. & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1263 (D.C. Cir. 1988) (discussing the Supreme Court's approach to toxic materials under OSHA)). So its conclusion is questionable. *Cf. Panama Refin.*, 293 U.S. at 416 ("It will be observed that each of these provisions contains restrictive clauses as to their respective subjects. Neither relates to the subject of [the section that was an unconstitutional delegation].").

Next, the Seventh Circuit addressed a challenge to the "entire Act," not just the permanent standards provision. *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125 (7th Cir. 1978). And the court found an intelligible principle under OSHA by pointing to many provisions that do not apply to the permanent standards provision. *See id.* at 1125–26. So its analysis does not help us here. All this to say, neither the Supreme Court or any circuit has answered whether the *text* of the permanent standards provision could be interpreted to also require the "significant risk" test or some other fact-finding. That's why today's case matters so much.

"may" in ordinary usage.[7] S*ee Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012) ("That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense."); *see also, e.g.*, *Nat'l Wildlife Fed'n v. Sec'y of U.S. Dep't of Transp.*, 960 F.3d 872, 877 (6th Cir. 2020) ("The clearest case of 'discretion' is when an agency doesn't have to act—for instance, if a statute says 'may' rather than 'must' or 'shall.'"); *Minor v. Mechanics' Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 64 (1828) (exploring the difference between "may" and "must" and explaining that "[t]he ordinary meaning of the language, must be presumed to be intended, unless it would manifestly defeat the object of the provisions"); *Dawson v. Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 201 (1980) ("The statute states that a patentee may do 'one or more' of these permitted

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[7] *See May*, Random House Dictionary 886 (1967) (explaining that "may" is used "to express possibility, opportunity, or permission"); *May*, Black's Law Dictionary 1131 (1968) (defining "may" as "[a]n auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency" and that "may" is construed as "shall" or "must" only "to the end that justice may not be the slave to grammar"); *May*, Webster's Third New International Dictionary 1396 (1971) (explaining that "may" means to "be in some degree likely to" but can mean "must" in some "deeds, contracts, and statutes"); *May*, The American Heritage Dictionary of the English Language 808 (1969) (listing multiple meanings, among them "Possibility," "Ability or capacity," and "Desire or fervent wish" but explaining that "may" can mean an "[o]bligation or function with the force of *must*" in some legal documents); *May*, The American College Dictionary 753 (1970) (explaining that "may" is "used as an auxiliary to express . . . possibility, opportunity or permission" but noting that it may mean "must" (when used not to confer a favor, but to impose a duty)").

acts, and it does not state that he must do any of them.").

And context matters here. *See Dubin v. United States*, 143 S. Ct. 1557, 1565 (2023) (explaining that where there are "various definitions" to a word, "we will look not only to the word itself, but also to the statute and the surrounding scheme, to determine the meaning Congress intended" (cleaned up)). Congress knew how to use obligatory language when it wanted to in OSHA.

For example, comparing OSHA's permanent standards provision to its toxic materials provision (at issue in *Benzene*) shows how bare it is. Unlike the permanent standards provision, the toxic materials provision lists considerations and requirements. *See* 29 U.S.C. § 655(b)(5). It specifies that the Secretary "*shall* set the standard which most adequately assures, to the extent feasible, . . . 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.* (emphasis added). And before getting to that decision, it requires the Secretary to base his decision on "the best available evidence," including "research, demonstrations, experiments, and such other information as may be appropriate." *Id.*

And that's not all. The toxic materials provision also lists "other considerations" that the Secretary *must* consider, including "the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws." *Id.* By contrast, the permanent standards provision contains *no* criteria or considerations that

guide how the Secretary creates a standard for workplaces across the Nation. *See infra* Part II.B.

The next relevant provision is OSHA's definition of a standard. 29 U.S.C. § 652(8). OSHA broadly defines "occupational safety and health standard" as a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes" that the Secretary thinks "reasonably necessary or *appropriate* to provide safe or healthful employment and places of employment." *Id.* (emphasis added); *see infra* Part II.B. By pairing the two provisions together, the meaning is clear: OSHA authorizes the Secretary to make standards that he believes are "appropriate." But that's it. There's no more to it. No fact-finding is required. As a result, I find no intelligible principle under *Panama Refining* and *Schechter Poultry*'s fact-finding or specific-situation consideration.

One could argue that because the Secretary must provide standards that ensure "safe or healthful employment and places of employment," 29 U.S.C. § 652(8), he must first find "unsafe" or "unhealthful" employment and places of employment. Again, the text does not indicate that such a finding must take place. But even if we were to broadly read that requirement into the text, Supreme Court precedent informs us that a statute's "general outline of policy" is not enough. *Panama Refin.*, 293 U.S. at 417. We cannot just take the inverse of every general phrase in a statute to fabricate a rule that it never had. *Cf. Schechter Poultry*, 295 U.S. at 541. And even if we did, here it would still leave the Secretary's power "virtually unfettered." *Id.* at 542. Unlike *Benzene*, we are not just talking about toxic materials. Rather,

permanent standards can address anything that the Secretary deems not conducive to "safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Indeed, the scope of power here (general safety and health in every workplace) is broader than just toxic materials in some workplaces (like in *Benzene*). So the constraint, if any, does not make a meaningful difference on the Secretary's power to find any standard appropriate.

B.

Second, given the large scope of power that Congress conferred, the permanent standards provision does not contain standards that sufficiently guide the Secretary's discretion. *See Schechter Poultry*, 295 U.S. at 541–42; *Panama Refining*, 293 U.S. at 417–18, 430; *Whitman*, 531 U.S. at 475. OSHA's permanent standards provision specifies nothing that the Secretary "must conform to"—no "criterion" to guide what standards he should make. *Sunshine Anthracite Coal Co.*, 310 U.S. at 397–98. It does not require that the Secretary consider any "factors" or that he ignore "prohibited" factors while formulating a standard. *Mistretta*, 488 U.S. at 375; *see also Touby*, 500 U.S. at 167 ("It is clear that . . . Congress has placed multiple specific restrictions on the Attorney General's discretion[.]"). Unlike other provisions, even within OSHA, *see* 29 U.S.C. § 655(b)(5), the permanent standards provision does not require consideration of "the latest scientific knowledge" or the like. *Whitman*, 531 U.S. at 473. Nor does it provide "directions" or "consideration" of something like a "base" level of safety. *Yakus*, 321 U.S. at 419, 427.

The main provision that the Secretary and other defendants claim provides some sort of limit on the Secretary's discretion is OSHA's definition of an "occupational safety and health standard." 29 U.S.C. § 652(8). Read in tandem with the permanent standards provision, the Secretary "may" set mandatory standards, *see id.* § 655(b), that employers and employees must "comply with," *id.* § 654, including "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes," *id.* § 652(8).[8] As the Secretary and other defendants argue, those "conditions" or "the adoption" of means or the like must also be "*reasonably necessary or appropriate* to provide safe or healthful employment and places of employment." *Id.* (emphasis added). And

[8] The majority opinion reasons that "OSHA cannot merely issue any standard it likes; rather, a safety risk must be one that 'requires' some action for a safe workplace." (Maj. Op. at 9 (citing 29 U.S.C. § 652(8)). I read the statute differently. Again, the Secretary "may," not must, issue a standard. 29 U.S.C. § 655(b). And that standard will "*require*[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes." 29 U.S.C. § 652(8) (emphasis added). Importantly, that "require[ment]" language pertains to employees or employers, *not* the Secretary. *Id.* So this is unlike cases that have required the Executive to meet a certain set of criteria. *See Whitman*, 531 U.S. at 473 (requiring an agency—not those it regulates—to consider "the latest scientific knowledge" before promulgating standards "requisite to protect public health"). Here, the Secretary is not bound by this "requires" language. 29 U.S.C. § 652(8). Put simply: The Secretary *may* create any "conditions, . . . practices, means, methods, operations, or processes" in workplaces, and employees and employers *must* abide by those requirements. *Id.* So rather than limiting the Secretary's discretion to issue a standard, it strengthens his delegated authority by "requir[ing]" others to comply with the standards he may create. *Id.*; *see id.* § 654.

it's this phrase, "reasonably necessary or appropriate," *id.*, that supposedly limits the Secretary's power to set permanent standards.[9]

Before getting to the phrase, it's worth pointing out that no Supreme Court case has found that the phrasing of a law—i.e., the usage of the phrase "reasonably necessary or appropriate" in § 652(8)—alone creates an intelligible principle. True, the Supreme Court has "over and over upheld" what appear to be "even very broad delegations." *Gundy*, 139 S. Ct. at 2129 (plurality). For example, it has approved delegations to various agencies to regulate in the "public interest," *Nat'l Broad. Co.*, 319 U.S. at 216, has allowed agencies to set "fair and equitable" prices and "just and reasonable" rates, *Yakus*, 321 U.S. at 420, 427 (citation omitted), and has affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health," *Whitman*, 531 U.S. at 472 (citation omitted). But in each case, other factors—whether it be fact-finding, situations, criteria, or considerations—provided an agency sufficient guidance on the "boundaries of [its] authority." *Gundy*, 139 S. Ct. at 2129 (plurality) (citing

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[9] The Secretary and other defendants argue that, under *Cotton Dust*, the statutory phrase "reasonably necessary or appropriate" in 29 U.S.C. § 652(8) limits the Secretary to promulgating only permanent standards that are "economically" and "technologically feasible." 452 U.S. at 513 n.31. But that stretches *Cotton Dust* too far. *Cotton Dust* clarified that the Court only addressed how § 652(8)'s language works together with the toxic standards provision—the provision that explicitly requires standards to ensure that no employee will suffer a "material impairment of health" "to the extent feasible." 29 U.S.C. § 655(b)(5); *see Cotton Dust*, 452 U.S. at 513 n.32; *supra* Part II.A.

Am. Power & Light Co., 329 U.S. at 105); *see supra* Part I.B–C. Those factors are what constituted intelligible principles—not one, isolated phrase that doesn't create a fact-finding requirement. *See supra* Part II.A; *Cotton Dust*, 452 U.S. at 513 n.31.

Even so, if phrasing matters, it doesn't change the game here. The word "or" in the phrase, "reasonably necessary *or* appropriate," creates two alternatives for the Secretary to choose from. 29 U.S.C. § 652(8) (emphasis added); *see* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 116 (discussing the disjunctive canon of interpretation). That disjunctive phrase allows the Secretary to set mandatory standards that are "reasonably necessary."[10] 29 U.S.C. § 652(8). Or he can set standards if he believes them to be "appropriate"—they need not also be "reasonably necessary." *Id.*

Seeing that OSHA provides no other definition, criterion, or consideration for what it means to be "appropriate," I turn to its definition at the time of OSHA's enactment. *See Keen v. Helson*, 930 F.3d 799, 802 (6th Cir. 2019) ("When interpreting the words of a statute, contemporaneous dictionaries are the best place to start."). The term "appropriate" means "[s]uitable for a particular person, condition, occasion or place; proper; fitting." *Appropriate*, The American Heritage Dictionary of the English Language 64

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[10] The phrase, "reasonably necessary," might be narrower than the other phrase, "appropriate." 29 U.S.C. § 652(8). But it is still broad. The phrase offers no indication of how the Secretary can determine what is "reasonably necessary." Because the Secretary's choice to set standards that are merely "appropriate" could be broader though, my analysis focuses on that option.

(1969). [11] And because OSHA "authoriz[es] the Secretary" (and him alone) "to set mandatory [permanent] standards," 29 U.S.C. § 651(b)(3), as well as the discretion to "by rule promulgate" them, he alone "may," *id.* § 655(b), determine what standard is "appropriate," *id.* § 652(8).

With that in mind, the term "appropriate" and its implications are far-reaching. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1431 (2008) ("[T]he 'reasonably necessary or appropriate' clause is plausibly different" from other clauses in other cases "because that phrase seems to allow (but not to require) the agency to use some form of cost-benefit analysis as a rule of decision."). Indeed "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (citation omitted). Notably, "this term leaves agencies with flexibility," *id.*, because the language is "open-ended," *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (citation omitted). And its limit, if any, depends on the statutory context that Congress places the term in. *Id.*; *see Michigan*, 576 U.S. at 752.

The problem here is that OSHA's context does not inform what "appropriate" refers to. The term, working in tandem with the permanent standards provision, doesn't seem to require anything but the

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[11] Other dictionaries from around 1970 have almost identical definitions. *See, e.g.*, *Appropriate*, The American College Dictionary 62 (1970) ("suitable or fitting for a particular purpose, person, occasion, etc."); *Appropriate*, The Random House Dictionary of the English Language 74 (1967) (same).

Secretary asking: "What seems appropriate in workplaces around the nation?" Knowing this, the term "appropriate" could encompass almost anything in a workplace setting because the term means whatever the Secretary himself finds suitable.

Against that premise, however, the Secretary and other defendants direct us to general purpose statements in OSHA that the Secretary may—though, is not required to—consider before implementing a standard. "As [OSHA's] name suggests," Congress tasked the Secretary "with ensuring *occupational* safety," *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 663 (2022), or in other words, ensuring "safe and healthful working conditions" "so far as possible," 29 U.S.C. § 651(b). So to address "personal injuries and illnesses arising out of work situations," *id.* § 651(a), Congress sought "to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," *id.* § 651(b).

These purpose statements "in no way limit the authority which [OSHA] undertakes to vest in the [Secretary] with no other conditions than those there specified." *Schechter Poultry*, 295 U.S. at 539. Nothing limits the "breadth of the [Secretary's] discretion" or narrows the "wide field of legislative possibilities." *Id.* at 538. "Congress cannot delegate legislative power to the [Secretary] to exercise an unfettered discretion to make whatever laws he thinks may be" appropriate for safe and healthful working conditions across the country. *Id.* at 537–38. Even though the general purposes of OSHA give the Secretary a few possible

considerations, nothing requires him to consider them in determining what's appropriate given any situation. *See Panama Refining*, 293 U.S. at 431–32.

Congress, when enacting OSHA's permanent standards provision, did not specify *what* safe and healthful working conditions governed almost every business in the United States. Instead, OSHA vests the Secretary of Labor with that power—the discretion of whether to create a standard and of what standard to create. OSHA "authoriz[es] the Secretary . . . to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). It does not mandate that the Secretary enforce a specific standard or even that he create one—just that he "may" create one.[12] *Id.*

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[12] And OSHA doesn't *require* the Secretary to promulgate and modify permanent standards to serve the act's objectives. The only provision that requires that some standard be made, 29 U.S.C. § 655(a), is *not* the permanent standards provision, § 655(b). Looking at those two provisions, the Secretary was required to promulgate a permanent "occupational health and safety standard" under OSHA within its first two years of enactment. 29 U.S.C. § 655(a) ("[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate . . . an occupational safety or health standard[.]"). Once that requirement was met—and it was—the Secretary was no longer obligated to promulgate any other permanent occupational health and safety standard.

So it's optional at this point. And what makes that clear is reading the permanent standards provision—the only provision at issue here. *Id.* § 655(b). It explains that "[t]he Secretary *may*"—not *shall*—"by rule promulgate, modify, or revoke any occupational safety or health standard." *Id.* (emphasis added). And if the Secretary chooses to do so in his discretion, he is then subject to some procedural requirements that do not limit the

§ 655(b). Said differently, OSHA does not direct the Secretary to act "simply in execution of the act of [C]ongress."[13] *Marshall Field & Co.*, 143 U.S. at 693.

"To hold that [the Secretary] is free to select as he chooses from the many and various objects generally described in [OSHA's purpose statements], and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him

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scope of what those standards may require. *See infra* pp. 27–28. And yes, if the Secretary wants to regulate, then he must take certain steps (i.e., he "shall" publish a rule in the Federal Register and "shall" afford interested persons time to respond). *Id.* § 655(b)(2). But again, those procedural requirements, *id.* § 655(b)(1)–(4) (including that the Secretary "shall" conform to a few procedural requirements), are all conditioned on him making the decision to promulgate in the first place, *id.* § 655(b) ("The Secretary *may* by rule promulgate . . . [a] standard *in the following manner*[.]" (emphasis added)). I would instead read § 655(b)'s clear prefacing condition to "relate[] to all [its] following . . . subparts." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 156 (discussing the scope-of-subparts canon); *see Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

[13] The majority states that "Congress has indeed laid out the general policy (a safe working environment)." (Maj. Op. at 15.) To be clear, that kind of general policy does not itself establish the required intelligible principle. *See Schechter Poultry*, 295 U.S. at 541–42. As explained, general "statement[s] of the authorized objectives," *id.* at 534, or "broad declaration[s]"—like OSHA's general purpose statements—that leave Executive discretion "virtually unfettered" do not provide a policy that fixes a nondelegation problem, *id.* at 542.

with an uncontrolled legislative power." *Panama Refin.*, 293 U.S. at 431–32.

Other than a "general outline of policy," *id.* at 417, Appellants point to three other sections in OSHA that supposedly affect the Secretary's enforcement of permanent standards. By no means do the sections limit the Secretary's discretion in creating a standard. Thus, they cannot function as an intelligible principle.

First, OSHA's procedural requirements. *See* 29 U.S.C. § 655(b)(1)–(3). Like other rule makings, *see* 5 U.S.C. § 553(b), (c), the Secretary must first publish the proposed standard in the Federal Register and allow interested persons thirty days to submit comments or request a hearing. 29 U.S.C. § 655(b)(2). After that, the Secretary has the choice of consulting an advisory committee that may submit *optional* recommendations. *Id.* § 655(b)(1). At that point, it's up to the Secretary to decide whether to issue a rule, so long as he does so within a designated time frame. *Id.* § 655(b)(2). And if the rule "differs substantially" from an existing national standard, he must state the "reasons" for why the adopted rule would "better effectuate the purposes of" OSHA.[14] *Id.* § 655(b)(8).

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[14] The Secretary and other defendants argue that this requirement—to explain why the new standard will "better effectuate" the purposes of OSHA—serves as a limitation. 29 U.S.C. § 655(b)(8). But, as they acknowledge, the requirement only kicks in when the Secretary "regulates in an area that is addressed by national consensus standards." (Secretary's Br. at 18.) The provision doesn't apply to situations in which no national consensus standard governs already. *See* 29 U.S.C. § 655(b)(8) (only applying when the Secretary promulgates a rule that "substantially differs from an existing national consensus standard"). And more importantly, merely explaining why the Secretary is implementing a new standard does not limit the

These common procedural requirements, however, relate only to *how* the Secretary must promulgate, "not to the permissible scope of such [standards]." *Schechter Poultry*, 295 U.S. at 538. So they do not require the Secretary to enforce a specific policy, nor do they limit what standard he can create.

Second, OSHA's penalties provisions get tacked on as a punishment to any standard the Secretary promulgates. Depending on how employers violate a standard, they may face a citation, civil penalties, or even imprisonment. 29 U.S.C. §§ 658, 666. True enough, the Secretary cannot alter these penalties. "But [they] leave virtually untouched the field of policy envisaged by" OSHA's permanent standards. *Schechter Poultry*, 295 U.S. at 538. Nothing in OSHA's penalties provisions constrains "that wide field of legislative possibilities." *Id.* Indeed, the Secretary "may roam at will," promulgating a standard "as he may see fit." *Id.*; *see also id.* at 523 (finding a delegation violation, even when the statute specified that violations of current or future codes could result in a misdemeanor and a daily accruing fine). As with OSHA's procedural requirements, its penalties don't guide the Secretary on how to create a workplace standard.

"permissible scope" of any congressional standard. *Schechter Poultry*, 295 U.S. at 538. If it did, every regulation that required some sort of explanation could fix a latent nondelegation problem. But as we know, that's not the case. *See Whitman*, 531 U.S. at 473 (rejecting the idea that an agency "can cure an unconstitutionally standardless delegation of power"). For the same reason, OSHA's requirement that the Secretary include a "statement of the reasons" when adopting "any standard" does not limit his discretion. 29 U.S.C. § 655(e).

Third, OSHA specifies that "[i]n the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. § 655(a). The Secretary and other defendants claim that this provision serves as a limit. But for the same reasons explained, this requirement to promulgate the provision with a greater effect on safety does not limit the "permissible scope" of what the Secretary can regulate. *Schechter Poultry*, 295 U.S. at 538. For any "conflict" to arise, 29 U.S.C. § 655(a), the Secretary would need to promulgate at least two standards—standards (1) that Congress did not make itself and (2) that the Secretary has wide discretion in crafting. And if a conflict between any old and new standard were to arise, it seems that the Secretary must choose the broader of the two. 29 U.S.C. § 655(a). So the provision doesn't limit discretion—it seems to only expand discretion by requiring the Secretary to do more than he did the last time around. And in any case, allowing the Secretary to limit himself based on a previous standard that he also created would seem to allow him to "cure an unconstitutionally standardless delegation of power" rather than leaving that to Congress—which we cannot allow. *Whitman*, 531 U.S. at 473.

So looking at all of these provisions, I would find OSHA's permanent standards provision unconstitutional because the "absence of standards" here makes it "impossible . . . to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. How can we test what is appropriate given the broad field of delegated power? The simple answer: We can't. That's because Congress has not "made clear"

whether any "boundaries of . . . authority" exist. *Gundy*, 139 S. Ct. at 2129 (plurality) (quoting *Am. Power & Light Co.*, 329 U.S. at 105). Because Congress failed to provide the Secretary "with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,'" I would hold that a "delegation of legislative authority trenching on the principle of separation of powers has occurred." *Skinner v. Mid- Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta*, 488 U.S. at 379) (reaffirming this "longstanding principle"); *see Yakus*, 321 U.S. at 426.

Even if one were to derive some broad standard, it would not *sufficiently* guide the Secretary's discretion. Again, the amount of guidance Congress must provide to carry out its legislation varies by how much power it delegates to a federal agency. *Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *Wayman*, 23 U.S. (10 Wheat.) at 43 ("To determine the character of the power given to [an entity] by the [legislation], we must inquire into its extent."); *Tiger Lily, LLC*, 5 F.4th at 672 (recognizing the same and that "unfettered power would likely require greater guidance"); *see also Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) ("When the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise."), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). Sure, "Congress need not provide any direction" when the field of power is narrow in itself—such as a delegation to define "country elevators" which would be "exempt from" the new regulations. *Whitman*, 531 U.S. at 475 (citing 42 U.S.C. § 7411(i)).

But when the grant of power is bigger, such that it can "affect the entire national economy," Congress "must provide substantial guidance." *Id.*

Surely OSHA—a statute affecting practically every business in the United States—falls into the latter of the two. *See* Sunstein, *supra*, at 1429 ("[B]ecause OSHA covers essentially all American workers, the existence of untrammeled discretion would be a serious problem."). This isn't a statute that only pertains to one industry. *See N.Y. Cent. Secs. Corp.*, 287 U.S. at 24–25 (railroad); *Nat'l Broad. Co.*, 319 U.S. at 214 (radio); *Sunshine Anthracite*, 310 U.S. at 387 (coal). And the power vested is not just "temporary." *Yakus*, 321 U.S. at 419 ("temporary wartime measure"). Nor does the power seem to be a traditional executive function.[15] *See id.* at 424. Instead, OSHA

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[15] Another trend—one that does not relate to the delegation in this case—focuses on "whether the particular function" vested by a legislative act "requires the exercise of a certain type of power." *Dep't of Transp.*, 575 U.S. at 69 (Thomas, J., concurring in the judgment); *see id.* at 70 ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power."). Indeed, "Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2137 (2019) (Gorsuch, J., dissenting). Many cases, for instance, granted powers that would seem to fall in the Executive's job description, such as matters dealing with war and foreign exchange. *See generally Yakus*, 321 U.S. at 420, 426–27 (vesting the inherently executive warpower to an official to control pricing of commodities if doing so was "fair and equitable" after considering a list of factors); *Marshall Field & Co.*, 143 U.S. at 692–93, 697 (enforcing foreign trade suspension under the policy established by Congress); *J.W. Hampton, Jr., & Co.*, 276 U.S. at 411 (enforcing a price-fixing policy over foreign and domestic products

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. [16] In other words, OSHA allows the

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because the President was a "mere agent of the lawmaking department"); *see generally Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.").

[16] What should make us especially skeptical of the lack of guidance here is that the Secretary gets "authority to regulate an area—public health and safety—traditionally regulated by the States." *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 267 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc); *see id.* at 287 (Bush, J., dissenting from the denial of initial hearing en banc) ("Part and parcel of that traditional police power—and thus an authority 'reserved to the States'—is the power to regulate public health." (citing U.S. Const. amend. X; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905))). "There is no question that state and local authorities possess considerable power to regulate public health." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring). "[S]everal extant legal bodies possess significant authority to clamp down on unreasonable dangers: Congress, state legislatures, state regulators, courts applying state tort law." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1222 (D.C. Cir. 2014) (Kavanaugh, J., dissenting). That's because the states enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012); *see* U.S. Const. amend. X.

Secretary to regulate private conduct in workplaces by any means "appropriate."[17] 29 U.S.C. § 652(8). And

[17] Though I believe that the Plaintiffs here ought to prevail under existing doctrine, were the Court to revisit how nondelegation under Article I operates, it ought to consider what Congress historically delegated to federal officials around the Framing. Some scholars have recognized that early delegations to the Executive are different from the delegations we typically see today. That's because, before, the statutes authorized the executive to create rules that were only "binding" on executive officials, not members of the public. Philip Hamburger, *Is Administrative Law Unlawful?* 89 (2014); *see id.* at 84 (explaining that early delegation "statutes . . . assumed that executive officers could issue directions merely to lesser officers, not to the rest of the public"); *see id.* at 95 ("What was controversial was the extent to which executive interpretations and instructions could direct inferior officers and what this meant, not whether such directives bound the public."); Wurman, *supra*, at 1556 ("Private rights and conduct are undoubtedly more important than official conduct or public privileges, but that does not mean Congress could delegate unlimited discretion over the latter, and no discretion over the former."); *see also* Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 247–48 (2022) (discussing Professor Jonathan Adler and Professor John Harrison's views on how the nondelegation doctrine works with statutes delegating rulemaking authority over private conduct).

Some Justices have already noted this issue. *See, e.g.*, *Dep't of Transp.*, 575 U.S. at 86 (Thomas, J., concurring in the judgment) ("We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."); *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."); *see also Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million

there is no telling what the Secretary might deem "appropriate" to do—especially in a post-COVID world where the "place[] of employment" might include your house.[18] *Id.*

Given that OSHA's permanent standards provision vests large power in the Secretary, the details limiting his discretion must be correspondingly detailed. Yet they're not. OSHA's very few requirements do not constrain the Secretary's broad power.

True, the standards that the Supreme Court has approved in the face of nondelegation challenges "are not demanding." *Big Time Vapes, Inc. v. FDA.*, 963 F.3d 436, 442 (5th Cir. 2020) (Smith, J.) (quoting *Gundy*, 139 S. Ct. at 2129 (plurality)). Even so, OSHA fails to match even these minimal standards. Thus, I find no intelligible principle based on *Panama*

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people."); *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("Congress can't punt to the President the job of devising a competition code for the chicken industry . . . . Such widely applicable rules governing private conduct must be enacted by the Legislature.").

[18] The Secretary and other defendants argue that OSHA's scope is limited because it "empowers the Secretary to set *workplace* safety standards, not broad public health measures." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (involving a COVID-19 vaccine mandate). That may be true. But nothing changes OSHA's explicit vesting of broad authority that the Secretary has the power to create "safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. § 651(b). All he must do is find a standard "appropriate" for some rhyme or reason. *Id.* § 652(8); *see Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665–66 ("Where [COVID-19] poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible.").

Refining and *Schechter Poultry*'s second consideration—that is, there is no sufficient standard here.

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OSHA's permanent standards provision does not have an intelligible principle.[19] That's because it (1) requires no fact-finding or situation to arise before agency actions takes place and (2) provides no standard that sufficiently guides the exercise of the broad authority vested in the Secretary. As a result, OSHA violates Article I as an unconstitutional delegation of legislative power. So I respectfully dissent.

I recognize that successful nondelegation cases are few and far between. But I emphasize that—even under the minimal requirements needed to find an "intelligible principle"—OSHA's permanent standards provision does not pass muster.

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[19] The Secretary and other defendants appeal to the canon of constitutional avoidance, arguing that this Court should avoid holding that the permanent standards provision is unconstitutional because a constitutional interpretation of the text exists. (Secretary's Br. at 18.) But that canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (citation omitted); *see* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 247 (discussing the constitutional-doubt canon). As explained, this is *not* a time when we have "more than one plausible construction." *Jennings*, 138 S. Ct. at 842. So "the canon simply has no application" here. *Id.* (cleaned up).

III.

For these reasons, I respectfully dissent and would reverse the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Allstates Refractory Contractors, LLC, Plaintiff, -vs- Martin J. Walsh, et al., Defendants.	Case No. 3:21 CV 1864 *MEMORANDUM OPINION* JUDGE JACK ZOUHARY

INTRODUCTION

Plaintiff Allstates Refractory Contractors, LLC ("Allstates") filed this suit against the Secretary of Labor and the Occupational Safety and Health Administration (collectively "OSHA"). Allstates asks this Court to declare OSHA's statutory power to promulgate permanent "safety standards" unconstitutional, and to issue a permanent injunction preventing OSHA from enforcing those standards. The parties filed dueling Motions for Summary Judgment, which is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Federal Civil Rule 56(a). This Court heard oral argument and the matter is fully briefed (Docs. 23–26).

BACKGROUND

OSHA Permanent Safety Standards

Congress passed the Occupational Safety and Health Act ("Act") in 1970, declaring the Act's "purpose and policy" was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). Under the Act, Congress gave the Secretary of Labor the power "to set mandatory occupational safety and health standards," 29 U.S.C. § 651(b)(3), and vested the Secretary with "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980) ("*Benzene*")).

The Act tasks OSHA with ensuring "safe and healthful working conditions" in American workplaces. 29 U.S.C. § 651(b). OSHA accomplishes this goal by issuing and enforcing health and safety standards. 29 U.S.C. § 655(b). There are three types of standards: interim, permanent, and emergency. Relevant here are the permanent standards issued under Section 6(b).

Allstates

Allstates is a general contractor that provides furnace services to various glass, metal, and petrochemical facilities (Doc. 23-1 at 13). The company has four full-time employees, but also hires "up to 100" part-time employees, depending on the job (*id.* at 14). "Allstates prides itself on its commitment to worker safety" and spends "thousands" on training employees and complying with OSHA safety standards (*id.*). Allstates has also experienced OSHA penalties firsthand. In 2019, OSHA cited the company for

standards violations, including a "serious violation after a catwalk brace fell and injured a worker below" (Doc. 24-1 at 14). Allstates did not contest the citation or seek judicial review (*id.* at 15). Instead, it settled the violation for $5,967 in December 2019 (*id.*).

Allstates argues that OSHA's authority to issue safety standards under Section 6(b) is unconstitutionally broad. It further alleges OSHA imposes penalties in a way that is "arbitrary and abusive" (Doc. 23-1 at 9), and that "a number of OSHA standards are unnecessarily burdensome or dangerous" (*id.* at 14).

JURISDICTION

Before turning to the merits of the constitutional challenge, this Court must first address the threshold issue of jurisdiction. The answer to that question lies in the Act's administrative-review framework.

There are essentially two types of challenges to OSHA safety standards -- enforcement and pre-enforcement. Section 658(a) controls enforcement challenges, i.e., situations where OSHA has issued a citation against a company. An employer has fifteen days to notify OSHA that it plans to contest the standard. If the employer timely challenges the standard, it is entitled to an administrative hearing and administrative appeal. Section 655(f) outlines the specific process for "pre-enforcement" challenges, i.e., situations in which OSHA has issued a standard, but not yet enforced that standard against the employer. Any "petition challenging the validity" of an OSHA safety standard must be filed: (1) "prior to the sixtieth day after such standard is promulgated," and (2) "with the United States court of appeals for the circuit

wherein [the petitioner] resides or has [their] principal place of business." 29 U.S.C. § 655(f). This 60-day limit is strictly enforced. *See Am. Fed'n of Labor & Cong. of Indus. Orgs. v. OSHA*, 905 F.2d 1568, 1570 (D.C. Cir. 1990) (noting that "statutory time limits on petitions for judicial review of agency action have been held 'jurisdictional and unalterable'") (citations omitted).

Defendants argue the administrative-review framework applies in this case -- meaning Allstates is too late and in the wrong court. But can Allstates sidestep the procedural bars outlined above? According to Allstates, it "is challenging the facial constitutionality of OSHA's *enabling statute*, not its *standards*, rendering the [G]overnment's jurisdictional objection beside the point" (Doc. 25 at 5).

Generally, procedures "designed to permit agency expertise to be brought to bear on particular problems . . . are to be exclusive." *Whitney Nat'l Bank in Jefferson Par. v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 420 (1965). Judicial review is barred where the "statutory scheme" displays a "fairly discernible" intent to limit jurisdiction, and the claims at issue "are of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994) (citation and internal quotation marks omitted). However, judicial review is not always foreclosed by a statutory framework. As noted by the Supreme Court, "we presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S.

477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 212–213). So the question becomes: Does this type of constitutional challenge fall within the OSHA administrative-review framework?

Plaintiff points to *Free Enterprise Fund*, where the Supreme Court examined a challenge to the Public Company Accounting Oversight Board, created under the Sarbanes-Oxley Act of 2002. 561 U.S. 477. The Board, composed of five members selected by the Securities and Exchange Commission ("SEC"), had the authority to investigate all details of an accounting practice, including hiring, promotion, business relationships, internal-inspection protocols, and professional ethics. *Id.* at 485. The SEC had oversight of the Board, but could remove members only for good cause. *Id.* at 486. Similarly, the President could remove the SEC Commissioners only for good cause, meaning they could not be removed absent "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)). This resulted in a dual layer of "good-cause tenure." *Id.* The Supreme Court held that the statutory-review scheme did not bar judicial review, because: (1) forcing plaintiff to wait to be sanctioned was not a "meaningful" avenue of relief; and (2) the constitutional claims were "outside the Commission's competence and expertise," "and the statutory questions involved do not require technical considerations of agency policy." *Id.* at 490–91 (cleaned up).

The same logic applies here. First, Allstates has no other meaningful avenue of relief. If this Court does not have jurisdiction to hear this constitutional claim, Allstates would be forced to "bet the farm" by waiting

to incur OSHA penalties in order to challenge the constitutionality of OSHA itself (Doc. 25 at 19). Second, Congress did not intend for the agency to review such a claim. Indeed, OSHA has no expertise in adjudicating "broad, systemic constitutional challenges to the [Act] and [OSHA's] administration of it that are not tied to any individual enforcement challenges." *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 22 (D.D.C. 2011). *See also Ohio Coal Ass'n v. Perez*, 192 F. Supp. 3d 882, 898 (S.D. Ohio 2016) (holding that *Thunder Basin* does not strip the district court of jurisdiction where the "claims do not germinate from a 'violation[] of the Act and its regulations'" or "challenge . . . an enforcement action taken by the [OSHA]").

In short, Allstates challenges the constitutionality of the underlying statute -- not any particular safety standard. Because this challenge is "'collateral' to any [OSHA] orders or rules from which review might be sought," *Free Enterprise Fund*, 561 U.S. at 490, this Court proceeds to address the merits of the claim.

CONSTITUTIONALITY

To demonstrate a permanent injunction is warranted, a party must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The parties agree that the irreparable-injury prong is satisfied. And "the

harm to the opposing party and the public interest factors merge when the Government is the opposing party." *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (citation and internal quotation marks omitted). To prevail, Allstates must show "actual success" on the merits with respect to the constitutionality of OSHA's permanent safety standards. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (citation omitted).

Permanent Standards

So what is an acceptable permanent safety standard? The Act defines an "occupational safety or health standard" as a standard "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Before a standard may be enacted, OSHA "must make 'a threshold finding that a place of employment is unsafe -- in the sense that significant risks are present and can be eliminated or lessened by a change in practices.'" *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 750 (D.C. Cir. 2011) (quoting *Benzene*, 448 U.S. at 642). The standards "must also be developed using" a rigorous process that includes notice, comment, and an opportunity for a public hearing. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 663 (2022) (citing 29 U.S.C. § 655(b)).

There are two types of permanent safety standards: (1) health, dealing with "latent hazards, such as carcinogens"; and (2) safety, addressing "hazards that cause immediately visible physical harm." *Int'l Union v. OSHA*, 938 F.2d 1310, 1313 (D.C. Cir. 1991). The first category involves "toxic materials or harmful physical agents." 29 U.S.C. § 655(b)(5). The second involves "permanent standards other than those

dealing with toxic materials and harmful physical agents." *Benzene*, 448 U.S. at 640 n.45. These standards regulate things such as hand tools, equipment, signage, and working surfaces.

Non-Delegation Doctrine

Allstates' argument in support of an injunction is straightforward -- Congress violated the Constitution by delegating to OSHA the authority to write permanent safety standards. Article I of the Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." This principle, known as the "nondelegation doctrine," prevents Congress from "transfer[ing] to another branch powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citation and internal quotation marks omitted). "But Congress may confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* In doing so, "Congress must lay down an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 458 (2001) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). "The standards for that principle are not demanding." *Gundy*, 139 S. Ct. at 2120. "Only twice in this country's history has the Court found a delegation excessive, in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 373, n.7 (1989)). *S*ee *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935).

To determine if there is an intelligible principle here, we must first examine the section of the Act that enables OSHA to promulgate safety standards. Allstates does not challenge OSHA's authority to promulgate health standards. That section of the Act requires OSHA to set standards that "most adequately assure[], 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." 29 U.S.C. § 655(b)(5). The Supreme Court has elaborated that, under this provision, OSHA must "enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility," with no room for "any further balancing" of costs and benefits. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 495, 513 (1981).

However, there is no similar provision in the statute for safety standards. Instead, the guidance for these standards comes from the Act's definition section, which states: "The term 'occupational safety and health standard' means a standard which 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). The Court outlined in *Benzene* that "safe" in this context requires OSHA to make "a threshold finding that a place of employment is unsafe -- in the sense that significant risks are present." 448 U.S. at 642. The Court has not yet addressed the

meaning of "reasonably necessary or appropriate," but appellate courts have weighed in. 29 U.S.C. § 652(8).

In *National Maritime Safety Association v. OSHA*, plaintiff claimed that Congress did not provide an intelligible principal to guide OSHA's promulgation of health and safety standards. 649 F.3d 743 (D.C. Cir. 2011). The D.C. Circuit flatly rejected the argument:

> The delegation of power to OSHA under the [ ] Act to set health or safety standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," 29 U.S.C. § 652(8), is no broader than other delegations that direct agencies to act in the "public interest," or in a way that is "fair and equitable," or in a manner "requisite to protect the public health," or when "necessary to avoid an imminent hazard to the public safety," . . . In light of these precedents, one cannot plausibly argue that 29 U.S.C. § 652(8)'s "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" standard is not an intelligible principle.

649 F.3d at 755–56 (cleaned up). Previously, in *Blocksom & Co. v. Marshall*, the Seventh Circuit did the same:

> It is true that no one could necessarily predict from the statutory scheme exactly what regulations would be promulgated in any given industry, but that is not necessary. What is perfectly clear is that the Congress has chosen a policy and announced general standards which guide the Secretary in establishing specific standards to assure the safest and healthiest

> possible working environments, and which enable the courts and the public to test the Secretary's faithful performance of that command. Nothing more is required.

582 F.2d 1122, 1126 (7th Cir. 1978). Plaintiff fails to distinguish, or even mention, these cases. And Plaintiff makes no new argument that would cast doubt on their reasoning.

Plaintiff concedes the Act requires a threshold finding of significant risk (Doc. 23-1 at 6). OSHA next must determine what standards are "reasonably necessary or appropriate" to mitigate that risk. 29 U.S.C. § 652(8). This is enough guidance to overcome the non-delegation challenge. *Whitman* is instructive on this point. In that case, the Court upheld the EPA's authority to set air-quality standards. *Whitman*, 531 U.S. 457. Allstates claims *Whitman* is distinguishable, because there, Congress empowered the EPA to "set air quality standards 'requisite to protect the public health'" (Doc. 25 at 6). But that's not the whole story. The EPA was given authority to set standards "at the level that is 'requisite' -- that is, not lower or higher than is necessary -- to protect the public health with an *adequate* margin of safety." *Whitman*, 531 U.S. at 475–76 (emphasis added). Thus, Congress delegated to the EPA the discretion to determine the adequate level of public safety, and then set standards based on that determination. So too here.

After OSHA makes the threshold finding of significant risk, the agency has discretion to determine what safety standards are "reasonably necessary or appropriate" to mitigate that risk. 29 U.S.C. § 652(8). As the Court noted, "even in sweeping

regulatory schemes we have never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much of the regulated harm is too much.'" *Whitman*, 531 U.S. at 475. The Court has never "require[d] the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even . . . how 'hazardous' was too hazardous." *Id.* (citation omitted).

Context also matters. The purpose of the Act was, among other things, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). And to effectuate that purpose, Congress "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards." 29 U.S.C. § 651(b)(3). And OSHA may only promulgate permanent standards that "differ[] substantially from an existing national consensus standard" if the agency explains why the new standard "will better effectuate the purposes" of the Act. 29 U.S.C. § 655(b)(8). These provisions provide guidance to construe the Act's definitions. Take for instance *New York Central Securities Corporation v. United States*, where the Court found the Interstate Commerce Commission's authority to regulate in the "public interest" was sufficient when the purpose of the enabling statute was related to "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." 287 U.S. 12, 25 (1932). Or *National Broadcasting Company v. United States*, where the Court held the Federal Communications Commission's authority to regulate in the "public interest" was sufficient to provide an intelligible

principle because that phrase effectuated the purpose of "encourag[ing] the large and more effective use of radio." 319 U.S. 190 (1943). And again, in *Yakus v. United States*, the Court approved the delegation of power to the Office of Price Administration to fix wartime commodities prices at a level that "in [the Administrator's] judgment will be generally fair and equitable and will effectuate the purposes of th[e] Act." 321 U.S. 414, 420 (1944).

"[T]he Court has over and over upheld even very broad delegations." *Gundy*, 139 S. Ct. at 2117. Plaintiff asks this Court to disregard these precedents -- an invitation this Court declines.

CONCLUSION

Section 6(b) safety standards cover dozens of workplace concerns -- everything from walking surfaces and fall-protection to respiratory gear and eyewash stations (*see* Doc. 1 at 10–15). Plaintiff asks this Court to enjoin OSHA from enforcing this broad range of standards against all employers nationwide. This Court is skeptical of district court injunctions "ordering the [G]overnment to take (or not take) some action with respect to those who are strangers to the suit." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). "Injunctions like these [] raise serious questions about the scope of courts' equitable powers under Article III." *Id. See also Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, J., concurring) (noting that "a district court should think twice -- and perhaps twice again -- before granting universal anti-enforcement injunctions against the federal government").

In any event, this Court agrees that Congress must impose "specific restrictions that meaningfully constrain the agency" for a delegation of power to pass constitutional muster. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (cleaned up). The Supreme Court has "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." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

With no binding or persuasive authority supporting its argument, Plaintiff falls short of demonstrating actual success on the merits. OSHA's discretion is sufficiently limited. Plaintiff's Motion (Doc. 23) is denied; Defendants' Motion (Doc. 24) is granted.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

September 2, 2022

APPENDIX C

No. 22-3772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLSTATES REFRACTORY CONTRACTORS, LLC, Plaintiff-Appellant, v. JULIE A. SU, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR; DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH; OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR; UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO, Defendants-Appellees.	ORDER

BEFORE: COOK, GRIFFIN, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

[*] Judge Stranch recused herself from participation in this ruling.

APPENDIX D

U.S. Const. art. I, § 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

29 U.S.C. § 651
Congressional statement of findings
and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review

Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U.S.C. § 652
Definitions

For the purposes of this chapter—

(1) The term "Secretary" mean [1] the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this chapter.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

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[1] So in original. Probably should be "means".

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which 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.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1),[2] has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

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[2] So in original. The comma probably should not appear.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this chapter.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this chapter.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this chapter.

29 U.S.C. § 654
Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. § 655
Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

> **(1)** Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or

political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the

expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, 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. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into

compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided,* That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such

variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of

Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new

hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b), and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer

must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.