No. 23-819

IN THE

# Supreme Court of the United States

ALLSTATES REFRACTORY CONTRACTORS, LLC,

*Petitioner*,

v.

JULIE A. SU, ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

**BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER**

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## BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

### INTEREST OF *AMICUS CURIAE*

*Amicus curiae* AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the critical importance of answering the question presented by Petitioner and the stakes for representative self-government, separation of powers, federalism, and individual liberty.

### SUMMARY OF ARGUMENT

This case is not about what constitutes sound policy. "The question here is not whether something should be done; it is who has the authority to do it." *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023). "That

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

is what this suit is about. Power." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. "The Constitution imposes important limits on how the government goes about doing its job." *Consumers' Research v. FCC*, 88 F.4th 917, 938 (11th Cir. 2023) (Newsom, J., concurring in judgment), cert. pending, No. 23-743. Our Constitution exclusively tasks the People's elected representatives with making policy choices. And the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus. Toward that end, the Constitution flatly prohibits Congress from transferring *any* of its legislative power to other entities. U.S. Const. art. I, § 1. This means that "important subjects" "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.).

Here, Congress has done that which the Constitution prohibits by subdelegating to unelected administrators legislative power to make important public policy choices impacting the entire private economy. This is emblematic of a broader problem: "the vast subdelegation of legislative authority that permeates modern government." Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 853 (2019). "The administrative degradation of consensual lawmaking is eating away at our

government's legitimacy." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1108 (2023). There is no way to sweep this constitutional disorder under the rug.

"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. . . . [T]hat streak should end today." Pet. App. 24a (Nalbandian, J., dissenting). It is long past time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, C.J., concurring in judgment), by "hewing" the nondelegation doctrine "from the ice," Antonin Scalia, *A Note on the Benzene Case*, Reg., July/Aug. 1980, at 28. This case provides an ideal opportunity to do so.

For the foregoing reasons, this Court should grant the Petition.

## ARGUMENT

### I. The Separation of Powers Protects Liberty.

"The key principle underlying the formation of the United States was consent—in particular, consent by an elected representative body." Hamburger, 91 Geo. Wash. L. Rev. at 1108. Toward that end, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Underscoring this, the Constitution "begins by declaring that 'We the People

. . . ordain and establish this Constitution.' At the time, that was a radical claim, an assertion that sovereignty belongs . . . to the whole of the people." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

In that document, the People agreed on a system of checks and balances. "The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring) (citations omitted). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman*, 23 U.S. (10 Wheat.) at 46. "That is the equilibrium the Constitution demands." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 673 (6th Cir. 2021) (Thapar, J., concurring).

"Of all 'principle[s] in our Constitution,' none is 'more sacred than . . . that which separates the legislative, executive and judicial powers.'" Pet. App. 25a (Nalbandian, J., dissenting) (quoting *Myers v. United States*, 272 U.S. 52, 116 (1926)). For good reason. "[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Canning*, 573 U.S. 513, 571 (2014). "The purpose of the separation . . . of powers" required by the Constitution is "not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). Indeed, "[t]he primary protection of individual liberty in our constitutional system comes from the separation of powers[.]" Brett M. Kavanaugh, *Our*

*Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014).

To protect liberty, "the framers went to great lengths to make lawmaking difficult," requiring "that any proposed law must win the approval of two Houses of Congress . . . and either secure the President's approval or obtain enough support to override his veto." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). These accountability checkpoints "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). "[B]ut to the framers these were bulwarks of liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

After all, "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty[.]" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). "The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *INS v. Chadha*, 462 U.S. 919, 959 (1983). History has confirmed that the Framers were right. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–55 (1952) (Jackson, J., concurring in judgment).

## II. The Constitution Bars Congress From Transferring Its Legislative Power.

Congress may not duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 595 U.S. 109, 124–25 (2022) (per curiam) (Gorsuch, J., concurring). "Article I vests the 'Senate and House of Representatives' (and them alone) with '[a]ll legislative powers.'" Pet. App. 24a (Nalbandian, J., dissenting) (quoting U.S. Const. art. I, § 1). The Constitution thus bars Congress from transferring "powers which are strictly and exclusively legislative" to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42. Instead, "important subjects" "must be entirely regulated by the legislature itself[.]" *Id.* at 43. This means "the hard choices" "must be made by the elected representatives of the people." *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, C.J., concurring in judgment). And "Congress, not some official in the Executive Branch, creates laws." Pet. App. 24a (Nalbandian, J., dissenting).

Article I's text makes this pellucidly clear: "All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. "This text permits no delegation of those powers[.]" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Constitution's structure reenforces this point. Indeed, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J.,

dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

## III. The OSH Act Tasks OSHA With Deciding Major Policy Questions.

The OSH Act breaks "[t]he Constitution['s] promise[] that only the people's elected representatives may adopt new federal laws restricting liberty," *id.* at 2131 (Gorsuch, J., dissenting), by delegating to OSHA sweeping legislative authority to make policy choices on an "important subject[]," *see Wayman*, 23 U.S. (10 Wheat.) at 43.

Congress enacted the OSH Act in 1970 with the amorphous goal of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). "[T]he scope of the regulatory program" at issue "is immense, encompassing all American enterprise," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991), in "an area—public health and safety—traditionally regulated by the States," *In re MCP No. 165*, 20 F.4th 264, 267 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). Indeed, "OSHA covers essentially all American workers[.]" Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1429 (2008).

Congress, however, purposely punted the policy choices necessary to achieve this broad, abstract aim to unelected Executive officials, "authorizing the Secretary of Labor to set mandatory occupational

safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). As Professor Cass Sunstein has explained, that was precisely the point: "When the statute was originally enacted in 1970, Congress did not seriously grapple with" the difficult policy questions raised by occupational safety and health regulation. Sunstein, 94 Va. L. Rev. at 1431. "Instead, it was largely content simply to recognize the existence of a problem and the need for a regulatory solution." *Id.* In other words, "Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out." *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

Indeed, "Congress expressly and specifically delegate[d]" to OSHA "authority to decide major policy questions[.]"[2] *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari); *see NFIB v. OSHA*, 595 U.S. at 120 ("Congress has indisputably given OSHA the power to regulate occupational dangers"). Specifically, Section 6(b) of the OSH Act grants the Secretary

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[2] "It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (cleaned up). The panel majority thus erred by construing the statute to add atextual limitations. *See* Pet. App. 13a–14a, 16a; Pet. App. 52a n.8, 57a n.12 (Nalbandian, J., dissenting). OSHA likewise "cannot choose its own intelligible principle." *State of W.Va. v. Dep't of the Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023). Any effort by OSHA to save the statute by proposing a limiting construction should therefore be rejected. *See Whitman*, 531 U.S. at 472.

sweeping legislative power to "promulgate . . . any occupational safety or health standard," 29 U.S.C. § 655(b), as binding law that employers across the United States must comply with, *id.* § 654(a)(2); *see id.* § 652(5) (defining "employer" broadly as "a person engaged in a business affecting commerce who has employees"), or suffer steep civil and criminal consequences, *see id.* § 666.

On top of this, "Congress granted the Secretary of Labor nearly unfettered discretion in fashioning permanent occupational health and safety standards." Pet. App. 24a (Nalbandian, J., dissenting); *see also* Sunstein, 94 Va. L. Rev. at 1448 ("No other federal regulatory statute confers so much discretion on federal administrators[.]"). Under the statute, OSHA may do this whenever "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). "One does not need to open up a dictionary in order to realize the capaciousness of this phrase." *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (addressing "appropriate *and* necessary" (emphasis added)). Moreover, Congress deliberately chose to write this provision in the disjunctive, meaning that OSHA may issue safety standards that are *either* "reasonably necessary *or* appropriate."[3] 29 U.S.C. § 652(8) (emphasis added).

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[3] Indeed, 29 U.S.C. § 652(8) speaks in the disjunctive "or" no less than six times in a single sentence, underscoring the statute's clearly intended breadth. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (statute that "uses the disjunctive word 'or' three times" "bespeaks breadth").

Other than that, the statute's text does not cabin the agency's power to set permanent safety standards, providing no meaningful guidance as to what makes a safety standard "reasonably necessary or appropriate." Nor did Congress otherwise provide "meaningful guidance. It did not, for example, reference any pre-existing common law [of workplace safety]. And it did not announce rules contingent on executive fact-finding." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

Taken together, this means that "[a]ll the Secretary must do is find a standard 'appropriate' for some rhyme or reason." Pet. App. 66a n.18 (Nalbandian, J., dissenting) (quoting 29 U.S.C. § 652(8)). "It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, C.J., concurring in judgment). *Cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 938 F.2d at 1317 (observing OSH Act poses "a serious nondelegation issue"). To borrow Justice Cardozo's words, "[t]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . This is delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring).

## IV. This Case Is an Ideal Vehicle to Restore Equilibrium Among the Branches.

This Court should not turn a blind eye to the serious problems that flow from transfers of legislative power to administrative bodies. "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing en banc) (cleaned up). That well describes the sweeping and unprecedented subdelegation of legislative power at issue here. "[T]his wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting). And it should not be allowed to stand. It is past time for this Court to protect our Republic by enforcing the Constitution's structural protections.

### A. Impermissible Delegation Has Had Awful Effects on Our Constitutional Republic.

The stakes here could not be higher and involve "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." *West Virginia v. EPA*, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring). Among other things, "[t]ransfers of the Constitution's tripartite powers violate the principle of representative consent" and "come with profound social and governmental dangers." Hamburger, 91 Geo. Wash. L. Rev. at 1090; *see West Virginia v. EPA*, 597 U.S. at 739–40 (Gorsuch, J., concurring) (surveying dangers). Unconstitutional "[d]elegations have weakened

accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators." Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015). This "drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process[.]" *Id.* at 1477.

In addition, "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). On top of this, unconstitutional delegations of legislative power to putative agency experts undermine rational decision making—the supposed justification for these delegations—as these administrators often labor under confirmation, specialization, and size biases.[4] *See* Hamburger, 91 Geo. Wash. L. Rev. at 1187–92.

Even worse, unconstitutional delegations undermine political stability, leading to "administratively induced irresponsibility, alienation, and political conflict." *Id.* at 1192. This state of affairs "tends to infantilize the Constitution's elements of government," "leaving Americans with ever less confidence in government." *Id.* at 1193. It "deprives Americans of their sense of connection to government," leaving "growing numbers of

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[4] "OSHA's top-down regulations are often *more* dangerous than what Allstates would do on its own." Pet. 9.

Americans, left and right, feel[ing] politically alienated." *Id.* at 1194.

Finally, delegation of legislative power to administrative bodies contributes to political polarization. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 7 (2022) ("Delegation by Congress probably has the most pervasive polarizing effects."). "The breadth of centralized legislative power" housed within the Executive branch today "displaces much [of] state politics. It also reaches deep into private institutions and life." Hamburger, 91 Geo. Wash. L. Rev. at 1195. This "not only nationalizes American politics but also politicizes American life," turning Presidential elections into "do-or-die battles" in which "[a]n almost irresistible incentive exists to suppress opponents and their views—abandoning all traditions of cooperation [and] tolerance[.]" *Id.*

### B. The Time Has Come to Jettison the "Intelligible Principle" Canard.

This Court should confront the root cause of these serious constitutional problems: the judicially created intelligible-principle regime.

As jurists and scholars alike have observed, this Court's modern delegation precedent has strayed from the Constitution's original public meaning. *See, e.g.*, *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting); *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 76–77 (2015) (Thomas, J., concurring in the judgment); *Consumers' Research*, 88 F.4th at 928 (Newsom, J., concurring); *id.* at 938 (Lagoa, J., concurring);

Hamburger, 91 Geo. Wash. L. Rev. at 1095; *see Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring); Pet. App. 65a n.17 (Nalbandian, J., dissenting); *see also Rettig*, 993 F.3d at 417–18 (Ho, J., dissenting from denial of rehearing en banc).

This case provides an ideal vehicle to make clear "th[e] mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the modern "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting); *see* Hamburger, 91 Geo. Wash. L. Rev. at 1095 ("[T]he current nondelegation doctrine has no originalist foundation.").

Making matters worse, this judicially created and essentially unfalsifiable nondelegation test has opened the floodgates for Congress to shirk its duty to make policy choices—even and especially politically difficult and important ones—by transferring its power to administrative bodies. *See Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Consumers' Research*, 88 F.4th at 929 (Newsom, J., concurring) ("non-delegation doctrine has become a punchline"); *Rettig*, 993 F.3d at 410 (Ho, J., dissenting from denial of rehearing en banc) ("Admittedly, the nondelegation doctrine has been more honored in the breach than in the observance.").

Today's "nondelegation doctrine serves as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite." Hamburger, 91 Geo. Wash. L.

Rev. at 1091. It is long past time to have a meaningful check at the gate. This Court should clearly announce the end of this failed experiment. After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. I, § 1). While the "doctrine long seemed acceptable while the shift of legislative and judicial powers to the executive was moderated by political restraint," "such restraint has been thrown to the winds[.]" Hamburger, 91 Geo. Wash. L. Rev. at 1093. Although it may be difficult to identify the line between important subjects and so-called filling in the gaps, it does not follow that this Court should not start looking for it. "[A] constitutional reckoning cannot be put off indefinitely." *Id.* at 1094. Why wait?

### C. The Major Questions Doctrine Cannot Substitute for Directly Enforcing Article I.

Experience has also shown that the major questions doctrine treats the symptoms but cannot cure the constitutional ills caused by Congress's refusal to do its job. Stronger medicine is needed.[5] In

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[5] The major questions doctrine appears to have emerged in the wake of the judicially created "intelligible principle" regime as an alternative to enforcing Article I's Vesting Clause. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *NFIB. v. OSHA*, 595 U.S. at 125 (Gorsuch, J., concurring).

any event, "this is not a major-questions case." *See* Pet. App. 20a–21a & n.3. That is so for at least two reasons. *First*, Petitioner is not challenging a specific agency action, instead bringing a facial challenge to 29 U.S.C. § 655(b). *See* Pet. 22. *Second*, the major questions inquiry asks not if Congress may permissibly delegate but whether it has in fact done so clearly. Here "Congress has expressly and specifically delegate[d]" to OSHA "authority to decide major policy questions," *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting denial of certiorari), leaving only "the separate argument that [this] statutory delegation exceeds constitutional limits." *Biden v. Nebraska*, 143 S. Ct. at 2381 n.4 (Barrett, J., concurring).

More broadly, the major questions doctrine cannot substitute here for directly enforcing Article I's Vesting Clause because while Congress has indisputably and intentionally empowered OSHA to decide a major policy question, in the main OSHA does this in piecemeal fashion. *See* Pet. 20–21. With exceptions, *see, e.g., NFIB v. OSHA*, 595 U.S. at 117, most of OSHA's administrative edicts do not have national political and economic importance and are thus not the stuff of the major questions doctrine. Indeed, the whole problem here is that because Congress expressly and intentionally granted OSHA sweeping, standardless rulemaking powers, OSHA's rules will generally fall comfortably within OSHA's statutory authority. Yet *all* of OSHA's permanent safety standards are exercises of core legislative power to make policy choices—and *all* are equally unconstitutional.

### D. Line-Drawing Questions Cannot Justify Ignoring the Constitution's Demands.

Nor should line-drawing challenges stand in the way of enforcing the Constitution's bar against subdelegation of legislative power. "Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting). This raises the question what is "legislative power" that Congress may not delegate. To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43. And "the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others." Ronald A. Cass, *Separating Powers in the Administrative State: Understanding Delegation, Discretion, and Deference*, C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 23-22, at 36 (Sept. 20, 2023).[6] Indeed, "[i]t may never be possible perfectly to distinguish between legislative and executive power[.]" *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring).

"But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Id.* at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). *Cf.* Federalist 78 (Hamilton) (Courts' "duty it must be to declare all acts contrary to the

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[6] https://administrativestate.gmu.edu/wp-content/uploads/2023/08/23-22_Cass-1.pdf.

manifest tenor of the Constitution void."). And "the difficulty of the inquiry doesn't mean it isn't worth the effort." *Nichols*, 784 F.3d at 671 (Gorsuch, J., dissenting from denial of rehearing en banc).

No matter the difficulty of the task, the Judiciary is dutybound to search for the line and could do so on a case-by-case basis. *See, e.g.*, *United States v. Pheasant*, No. 21-cr-24, 2023 WL 3095959, at *8 (D. Nev. Apr. 26, 2023) (unpublished) (finding nondelegation violation), appeal filed, No. 23-991; s*ee* Pet. 21–25. More than sufficient ink has been spilled to allow this Court to begin to articulate judicially manageable standards. *See, e.g.*, Hamburger, 91 Geo. Wash. L. Rev. 1083; The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (Peter J. Wallison & John Yoo eds. 2022); Cass, *supra*; *see West Virginia v. EPA,* 597 U.S. at 750 n.6 (Gorsuch, J., concurring) (collecting scholarship). This case is an ideal vehicle to begin.

### E. Enforcing Article I's Vesting Clause Will Have Salutary Effects.

As Petitioner explains, *see* Pet. 21–22, 23–25, the sky will not fall if this Court enforces the Constitution's demands on a case-by-case basis. Common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be run by legislators"—are constitutionally irrelevant and, in any event, lack merit on their own terms. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring).

On the other side of the ledger, the benefits of putting Congress back in the driver's seat of setting public policy—where the Constitution puts it—are immense. *See* Scalia, *supra*, 28. Enforcing Article I's Vesting Clause would ameliorate some of the awful effects discussed above that have flowed from failure to enforce the Constitution's bar against Congress transferring legislative power to other entities.

Sketching out the contours of the Constitution's bar against subdelegation of legislative power would also provide much-needed clarity as to the major questions doctrine's metes and bounds. As this Court has explained, the major questions doctrine is grounded in "both separation of powers principles and a practical understanding of legislative intent[.]" *West Virginia v. EPA*, 597 U.S. at 723. This case provides an ideal opportunity for this Court to elucidate the relationship between Article I's Vesting Clause and the major questions doctrine. This would answer a concern expressed by some that "the Court's failure to say anything about nondelegation creates genuine conceptual uncertainty about what exactly it was doing in these cases, a conceptual uncertainty that will matter for future cases." Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 297 (2022). It would also provide Congress with much-needed guidance on the universe of today's important subjects that cannot constitutionally be assigned (clearly or otherwise) to administrative bodies. *See Wayman*, 23 U.S. (10 Wheat.) at 43.

## V. The Decision Below Is Wrong Under Any Standard.

The decision below overread and misapplied this Court's precedent. As a matter of first principles, it is also inconsistent with the Constitution's original public meaning.

### A. As an Originalist Matter, the Act Violates Article I's Vesting Clause.

"When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); *see Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment); *Consumers' Research*, 88 F.4th at 929–30 (Newsom, J., concurring). *Cf.* Philip Hamburger, Is Administrative Law Unlawful? 84 (2014) ("In general, the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not."). "[L]egislative power most basically involves an exercise of will in ordaining legally binding rules. This power to will binding rules is the natural core of legislative power." Hamburger, 91 Geo. Wash. L. Rev. at 1113; *see also Chadha*, 462 U.S. at 952 (government actions that "alter[] the legal rights, duties, and relations of persons, . . . all outside the Legislative Branch" are "legislative"). Among other things, that includes the power to "make the policy decisions when regulating private conduct[.]" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

By that measure, the OSH Act allows unelected officials at OSHA to exercise legislative power and is

thus unconstitutional. That is because it grants OSHA free-floating power to issue legislative rules backed by civil and criminal penalties that bind private businesses and impact private rights to liberty and property. Those fundamental policy choices are no mere details or fill-in-the-blank factfinding exercises. *Cf. id.* at 2135–37 (Gorsuch, J., dissenting). This holds true *a fortiori* because the OSH Act delegates to OSHA the power to regulate essentially all private businesses in all sectors of the national economy. That should be the end of the analysis.

### B. The Act Fails This Court's Modern "Intelligible Principle" Test.

Contrary to the split-panel majority, *see* Pet. App. 22a–23a, even under the modern nondelegation doctrine, the delegation at issue here fails to pass constitutional muster, as Judge Nalbandian found, *see* Pet. App. 67a.

Under this Court's current jurisprudence, "Congress must 'lay down by legislative act an intelligible principle[.]'" *Whitman*, 531 U.S. at 472 (citation omitted). Delegations must in all cases contain standards that "are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the" agency "has conformed to those standards." *Yakus v. United States*, 321 U.S. 414, 426 (1944). This Court has also said "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475; *see also* Pet. App. 38a (Nalbandian, J., dissenting) ("Laws that vest more power require more constraints."). Thus, "when the grant of power is bigger, such that it can 'affect the

entire national economy,' Congress 'must provide substantial guidance.'" Pet. App. 63a (Nalbandian, J., dissenting) (quoting *Whitman*, 531 U.S. at 475).

The intelligible-principle regime thus "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. If neither of these exist, . . . there is no intelligible principle." Pet. App. 40a (Nalbandian, J., dissenting); *see also Panama Ref. Co. v. Ryan,* 293 U.S. 388, 415 (1935). *Cf. Gundy,* 139 S. Ct. at 2141 (Gorsuch, J., dissenting). Neither condition is met here.

*First*, OSHA's power to set permanent safety standards is not contingent on fact finding or the existence of any particular situation. *See* Pet. App. 41a–51a (Nalbandian, J., dissenting). Instead, OSHA "is free to select as [it] chooses . . . and then to act without making any finding[s]," *Panama Ref. Co.*, 293 U.S. at 432, as the agency "roam[s] at will" "in that wide field of legislative possibilities," *Schechter*, 295 U.S. at 538.

*Second*, the statute provides no standards to cabin OSHA's permanent-safety-standard powers, let alone sufficiently detailed standards for the sweeping scope of OSHA's regulatory authority over the entire private economy. Here, "everything turns on whether the phrase 'reasonably necessary or appropriate' sets out an intelligible principle." Sunstein, 94 Va. L. Rev. at 1429. It does not. *See* Pet. App. 51a–67a (Nalbandian,

J., dissenting). That is no principle at all, let alone an intelligible one.

Because Congress wrote the statute in the disjunctive, the Secretary may set "any" permanent safety standard whenever she deems it "appropriate." *See* 29 U.S.C. § 655(b); Pet. App. 52a n.18, 54a–57a & n.12 (Nalbandian, J., dissenting). This gives the Secretary discretion to set whatever standard she wants for whatever reason she wants. "Congress has declared no policy, has established no standard, has laid down no rule." *Panama Ref. Co.*, 293 U.S. at 430. The statute "provide[s] literally no guidance for the exercise of discretion," *Whitman*, 531 U.S. at 474, by OSHA to set permanent safety standards. This "absence of standards" makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed[.]"[7] *Yakus*, 321 U.S. at 426. As Judge Nalbandian put it: "How can we test what is appropriate given the broad field of delegated power? The simple answer: We can't." Pet. App. 61a (Nalbandian, J., dissenting). Exactly so.

While this Court's current precedent indicates this lack of guidance might be acceptable for small-bore matters like "defin[ing] 'country elevators,'" *Whitman*, 531 U.S. at 475, the policy choices involved in setting "appropriate" safety standards that almost every private business in the United States must follow are not that. Instead, these are "'quintessential legislative' choice[s that] . . . must be made by the elected representatives of the people, not by

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[7] It also "provides impermissibly vague guidance to affected citizens." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

nonelected officials in the Executive Branch." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, C.J., dissenting).

"If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution." *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023). *Cf. Pheasant*, 2023 WL 3095959, at *8 (nondelegation violation where statute failed to cabin rulemaking authority). Such is the case here.[8] That conclusion holds true *a fortiori* because Congress not only granted OSHA sweeping power to choose whether and how to regulate the entire private economy, *see* Pet. App. 66a & n.18, but also create its own criminal code, *see* 29 U.S.C. § 666 (civil and criminal penalties). *Cf. Pheasant*, 2023 WL 3095959, at *7–*8. In all events, the decision below blessing Congress's abdication of its legislative duties should not be allowed to stand. The time has come to enforce the separation of powers.

## CONCLUSION

This Court should grant the Petition.

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[8] Federalism principles buttress this conclusion. *See* Pet. App. 64a n.16 (Nalbandian, J., dissenting); *In re MCP No. 165*, 20 F.4th at 267 (Sutton, C.J., dissenting from denial of initial hearing en banc). *Cf. Schechter*, 295 U.S. at 554 (Cardozo, J., concurring) (noting "far-reaching and incurable" Commerce Clause violation).

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