No. 23-819

In the

Supreme Court of the United States

ALLSTATE REFRACTORY CONTRACTORS, LLC,
Petitioner,
v.
JULIE A. SU, ACTING SECRETARY OF LABOR, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE AND THE MANHATTAN INSTITUTE IN SUPPORT OF PETITIONER

David C. Tryon
Counsel of Record
Alex M. Certo
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

Ilya Shapiro
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies. Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government, including by filing lawsuits and amicus briefs.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs opposing government overreach.

This case interests *amici* because the expansive regulatory authority that the district court decision permits the Occupational Safety and Health Administration ("OSHA") to exercise without adequate statutory guidance is inconsistent with the structure of the Constitution.

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici,* made any monetary contribution toward its preparation or submission. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

Everyone wants a safe workplace: employers and employees; insurers, shareholders, and industry groups; even politicians. These aligned incentives have led to American workplaces being far safer now than ever before.

While Congress intended the Occupational Safety and Health Act of 1970 ("OSH Act") to improve workplace safety and health, data and history show that the OSH Act is not the only—or even best—mechanism to achieve that safety. Since 1970, OSHA, like most government agencies, has grown in size and power, not through further acts of Congress, but by its own mission creep and industry acquiescence.

The OSH Act treats health and safety standards differently. The difference in the wording of the statute is subtle but meaningful. The OSH Act defines the term "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, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). In this section, safety and health are treated the same—contemplating actions that are "reasonably necessary or appropriate." *Id.* But Congress explicitly recognized "the fact that occupational health standards present problems that are often different from those involved in occupational safety." 29 U.S.C. § 651(b)(6). As to health standards, i.e., "toxic materials or physical agents," Congress added somewhat intelligible direction by providing details—

inapplicable to safety regulations—on how to regulate those "agents." 29 U.S.C. § 655(b)(5), (7).

By contrast, Congress gave no direction or clarification on what is "reasonably necessary or appropriate" to provide a "safe" "employment or place of employment." 29 U.S.C. § 652(8). It simply ordered employers to "comply with occupational safety . . . standards promulgated under this [act]." 29 U.S.C. § 654(a)(2). What "reasonably necessary or appropriate" means in this context is anyone's guess—including OSHA's. It is no overstatement to characterize OSHA's actions as guesses because, even as OSHA conducts studies, attempts to balance costs and benefits, consults with industry, and even seeks comments under the Administrative Procedures Act, it still can only guess what Congress meant when it charged the agency with deciding what is reasonably necessary or appropriate.

These guesses affect millions of workers, Margaret Seminario, *The Occupational Safety and Health Act at 50–A Labor Perspective*, 110 Am. J. Pub. Health 621, 642 (2020), and "cost employers about $71 billion each year," Nat'l Safety Council, *Safety Regulations Cost Country Billions, Manufacturers Group Says*, Safety+Health (Sept. 10, 2014), https://perma.cc/Z3R9-5UNP. But regardless of whether one agrees with those guesses or finds the associated compliance costs reasonable, Congress cannot delegate its authority in a way that forces regulators to make such guesses without running afoul of the nondelegation doctrine.

Importantly, setting aside invalid OSHA safety *regulations* does not leave workers without safety

protections. Workers and workplaces are governed in many other ways, with rules and mechanisms that would remain in place while Congress determines the statutory guidance necessary for OSHA to do its job without guessing.

This case presents the issue of whether a congressional directive of "reasonably necessary or appropriate" is an unconstitutional delegation of legislative power, unclouded by ancillary issues, and it is of great importance to the millions of workplaces regulated through an unconstitutional mechanism. This is an appropriate time for the Court to reinvigorate and enforce the nondelegation doctrine.

ARGUMENT

I. Congressionally mandated safety regulations have evolved beyond constitutional authority.

States passed workplace safety laws as early as 1870. *E.g.*, 1870 Pa. Laws 6–9, http://tinyurl.com/1870PALaws (establishing state regulations of coal mines). When Congress first enacted safety regulations, it supplemented state laws and limited the federal government's enforcement role. *E.g.*, Federal Coal Mine Safety Act, Pub. L. No. 82-552, 66 Stat. 692 (1952). In 1910, Congress created the Bureau of Mines within the Department of the Interior. An Act to Establish in the Department of the Interior a Bureau of Mines, Pub. L. No 61-179, 36 Stat. 369 (1910). The Bureau's safety and health role was limited to research and investigation without inspection authority. *Id.* In 1952, the Federal Coal Mine Safety Act allowed federal inspectors to enter

coal mines and for penalties for failure to allow an inspector into a mine, but it did not provide any enforcement penalties. Federal Coal Mine Safety Act §§ 202–203, 66 Stat. at 694–95.

In other instances, Congress addressed issues not addressed by the states. For example, in 1893, Congress passed "the 'coupler bill' which banned the notoriously dangerous link-and-pin method of coupling railroad cars." Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, U.S. Dep't of Labor, http://tinyurl.com/3h49v8h9 (last visited Feb. 21, 2024).

As time went on, Congress sought to regulate more industries and tried to delegate more authority to the executive branch. In 1969, Congress added a new section to the Contract Work Hours Standards Act, 40 U.S.C. § 333, "to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries." Occupational Safety & Health Admin., U.S. Dep't of Labor, *Regulatory Review of 29 CFR 1926, Subpart P: Excavations* 7 (2007). The amendment "significantly strengthened employee protection by requiring the promulgation of occupational safety and health standards for employees of the building trades and construction industry working on federally-financed or federally-assisted construction projects." *Id.*

It was not until 1970 that a comprehensive federal statute regulated health and safety in the workplace. MacLaury, *supra*. Until then, states had regulated health and safety generally and the federal government had regulated specific industries in

specific ways—and even then, the federal government often only acted in an advisory role as opposed to a mandatory role with enforcement powers. However, Congress did not directly regulate health and safety with the OSH Act. Instead, it created a new agency to do Congress's work. See 29 U.S.C. § 651. Indeed, the OSH Act does not provide a single health or safety standard. See *id*.

One might respond that Congress has created numerous agencies for this very purpose—to take over the work of enacting detailed regulations—and some consider this normal and acceptable. But what is not acceptable is delegating broad legislative power to the agencies without clear direction, including constraints or limitations. Directing OSHA to promulgate safety regulations that are "reasonably necessary or appropriate" is just as vague—and unconstitutional—as telling OSHA to "make the country safe."

II. If the Court strikes down part of OSHA's regulatory scheme, employees will still be protected through other government and non-governmental means.

A. The OSH Act contains many safety provisions that are constitutional.

Amici do not contend that OSHA cannot do anything to protect worker safety without violating the non-delegation doctrine. Indeed, Petitioners and *amici* object only to the promulgation of mandatory standards under the amorphous "reasonably necessary or appropriate" standard. The congressional mandate under 29 U.S.C. § 651 directs the Secretary of Labor to take action to provide "safe and healthful

working conditions" via many specific actions, only a few of which might conceivably run afoul of the nondelegation doctrine. First, the OSH Act "imposes a general duty on employers to provide their employees with a workplace free from known hazards that will result or will likely result in death or serious physical harm." *OSHA Compliance Legally Required for Employers*, Justia, http://tinyurl.com/4t9mbhk8 (last visited Feb. 26, 2024).

Next, it directs the Secretary to take over a dozen more specific actions which fall into the categories of (a) working with others, e.g. employers, employees, unions, and states, to act to provide safe working environments, (b) encouraging voluntary employer actions, (c) gathering information, (d) conducting research that others can use to promote safety, (e) providing training programs, and (f) providing grants to the states. See 29 U.S.C. § 651. This is the bulk of the congressional directives.

The last of the congressional directives is to "set mandatory occupational safety . . . standards." *Id.* § 651(b)(3). Congress expected the vast bulk of the Secretary's work to focus on non-enforcement activities. Even OSHA recognizes that because it "can inspect only a fraction of 7 million U.S. worksites each year in its efforts to ensure safe and healthy working conditions, the agency has increasingly supplemented enforcement with 'voluntary compliance strategies' to reach more employers and employ its resources most effectively." U.S. Government Accountability Office, *Workplace Safety and Health: OSHA's Voluntary Compliance Strategies Show Promising Results, but Should be Fully Evaluated Before They Are Expanded*,

GAO (Mar. 19, 2004), http://tinyurl.com/GAO-Workplace-Safety.

B. OSHA admits that there are multiple other worker protection laws and resources.

1. While conventional wisdom provides that OSHA is the overseer that keeps workers safe in the workplace, the reality is quite different. There are nearly 1,000 OSHA standards. *OSHA Safety Regulations: Training Requirements and Best Practices*, SafetySkills, http://tinyurl.com/SafetySkillsOSHA (last visited Feb. 21, 2024). There is no doubt that OSHA established them to try to keep workers safe. And there is no doubt that some of them have improved worker safety. However, that does not show that in the absence of the *mandatory* OSHA regulations worker safety would be compromised. Indeed, OSHA seems to concede the opposite. "Federal OSHA is a small agency; with our state partners we have approximately 1,850 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation — which translates to about one compliance officer for every 70,000 workers." *Commonly Used Statistics*, U.S. Dep't of Labor, http://tinyurl.com/OSHA-Common-Stats (last visited Feb. 13, 2024). It is impossible for them to inspect every business every year, let alone daily or hourly. Worker protection is based almost entirely on voluntary compliance. See *id.* (noting that in 2023, there were only 34,267 total federal inspections).

2. Besides issuing mandatory standards, the OSH Act directs OSHA to provide occupational safety research, 29 U.S.C. § 651(b)(5), provide training

programs, *id.* § 651(b)(8), "encourag[e] the States to assume the fullest responsibility" for their respective OSHA-type laws, *id.* § 651(b)(11), and encourage joint labor-management safety efforts, *id.* § 651(b)(13). None of these programs are affected by the challenged provision.

For example, OSHA operates the Alliance Program, through which the agency "establishes formal relationships with groups committed to worker safety and health, and collaborates with them to prevent workplace fatalities, injuries, and illnesses. These groups include trade and professional associations, labor unions, educational institutions, community and faith-based groups, and government agencies." Occupational Safety & Health Admin., U.S. Dep't of Labor, DCSP FS-3645, *OSHA Fact Sheet: The OSHA Alliance Program* (2020). "OSHA works with Alliance participants to share information with workers and employers, and educate workers and employers about their rights and responsibilities." Occupational Safety & Health Admin., U.S. Dep't of Labor, CSP 04-01-003, *OSHA Instruction* 2 (2020). "Each year, OSHA's Alliances reach millions of employers and workers, providing them with safety and health information, tools, and resources through newsletters, social media posts, presentations at conferences and meetings, training, and other projects." *Annual Report on the Alliance Program (2020)*, U.S. Dep't of Labor, https://www.osha.gov/alliances/alliance-successes (last visited Feb. 21, 2024). As of 2020, there were 232 OSHA Alliances/Ambassadors. *Id.* The Alliance Program has produced hundreds, if not thousands, of brochures, fact sheets, guidelines, reference guides,

"toolbox talks," and training programs on subjects from Aerial Devices and Elevating Equipment to Window Cleaning. *Alliance Program Participants Developed Products*, U.S. Dep't of Labor, www.osha.gov/alliances/products (last visited Feb. 21, 2024).

3. OSHA's Voluntary Protection Program ("VPP") is yet another safety program which recognizes companies with a high level of safety performance. Occupational Safety & Health Admin., U.S. Dep't of Labor, *OSHA Fact Sheet: Voluntary Protection Programs* 1 (2009). To "focus its inspection resources on higher-risk establishments," OSHA allows certain employers to manage their safety plans voluntarily. *Id*. "OSHA believes an effective safety and health management system is the best way to prevent occupational illnesses and injuries. . . . Management leadership and employee participation, in addition to company self-evaluations, are key elements of this process." *Id*.

Formally announced in 1982, the VPP program grew to 1,996 participants by 2022. *Industries in VPP Federal and State Plans*, U.S. Dep't of Labor (last updated Sept. 21, 2022), www.osha.gov/vpp/bynaics. "All states with approved occupational safety and health programs offer VPP programs." *OSHA Fact Sheet: Voluntary Protection Program*, *supra*. During 2020, "[o]n average, rates for site-based non-construction VPP participants [were] 55 percent below the Bureau of Labor and Statistics (BLS) Total Case Incident Rate (TCIR) and 53 percent below the BLS Days Away from Work, Restricted Work Activity, or Job Transfer (DART) rate for their respective

industries." *Voluntary Protection Programs Annual Evaluation of Calendar Year 2020 Injury and Illness Rates*, U.S. Dep't of Labor, https://tinyurl.com/yn9e789h (last visited Feb. 21, 2024). "[S]ite-based construction and mobile workforce VPP participants [were] 74 percent below the BLS TCIR rate and 60 percent below the BLS DART rate for their respective industries." *Id*. These voluntary industry programs provide significant protection.

Even with all of these resources and initiatives, OSHA does not take full credit for the improvement of worker safety. "In roughly half a century, OSHA and our state partners, coupled with the efforts of employers, safety and health professionals, unions and advocates, have had a dramatic effect on workplace safety." *Commonly Used Statistics*, supra.

C. States provide significant workplace safety laws and regulations.

Long before OSHA, workers' compensation laws incentivized employers to implement safety measures. "It appears that many large firms in the years between 1910 and the Depression responded to the advent of [workers'] compensation [laws] by installing more safety appliances on their machinery. Many companies also established safety training programs for workers and managers." Robert Asher, *Organized Labor and the Origins of the Occupational Safety and Health Act*, 24 New Solutions 279 (2014). Indeed, a full decade after the passage of the OSH Act, one study concluded that "[w]orkers' compensation represents by far the most influential governmental program for reducing workplace fatalities." Michael Moore & W. Kip Viscusi, *Promoting Safety Through Workers'*

Compensation: The Efficiency and Net Wage Costs of Injury Insurance, 20 RAND J. Economics 499, 513 (1989).

Today, workers' compensation laws continue to provide a useful safety net for workers who are injured on the job. "In 2019, workers' compensation covered an estimated 144.4 million U.S. jobs, a 1.2 percent increase from the previous year." Griffin Murphy et al., *Workers Compensation: Benefits, Coverage, and Costs (2019 Data)* 11 (2021).

The workers' compensation insurance system does more than compensate injured employees after injuries occur—it also prevents accidents. In Ohio, like many states, "all employers with one or more employees must, by law, have workers' compensation coverage or risk paying out of pocket for workplace injuries." *Workers Compensation Coverage*, Ohio Bureau of Workers' Compensation, https://perma.cc/PV9E-FCHR (last visited Feb. 21, 2024). A poor safety record will increase workers' compensation premiums significantly, while a good safety record will decrease the premiums. For example, in Ohio, rates are first based on industry classification. *Calculating Rates*, Ohio Bureau of Workers' Compensation, https://perma.cc/E9D4-NZNU (last visited Feb. 21, 2024). The Ohio Bureau of Workers' Compensation then computes an "experience modification, which is the percentage of credit or debit [the Bureau applies] to the base rate to determine the employer's premium." *Experience-Rated Employers*, Ohio Bureau of Workers' Compensation, https://perma.cc/3BYH-N4PJ (last visited Feb. 21, 2024). Accordingly, workers' compensation

incentivizes workplaces to engage in safety measures. And given the slight chance of "being caught" by an OSHA enforcement inspector, worker compensation financial incentives are more effective than OSHA regulations to create a safe workplace.

In addition to state workers' compensation laws, "[t]he OSH Act provides matching funds and oversight for states choosing to operate their own programs on the condition that participating states operate a regime that is 'at least as effective as'" that of federal OSHA. Courtney Malveaux, *OSHA Enforcement of the "As Effective As" Standard for State Plans: Serving Process or People?*, 46 U. Rich. L. Rev. 323, 323 (2011). "There are currently 22 OSHA-approved State Plans covering both private sector and state and local government workers, and seven State Plans covering only state and local government workers." *State Plans*, U.S. Dep't of Labor, https://www.osha.gov/stateplans/ (last visited Feb. 21, 2024). And, of course, states can establish their own—independent—OSHA-type regulations if they have not done so. Furthermore, the National Institute for Occupational Safety and Health ("NIOSH") provides extensive research and guidelines for states if OSHA declines to regulate or is legally unable to. U.S. Dep't of Health & Hum. Servs., *State Occupational Safety & Health Surveillance Program*, Nat'l Inst. for Occupational Safety & Health, www.cdc.gov/niosh/oep/statesurv.html (last visited Feb. 21, 2024).

D. Most industries—especially those with particular hazards—have their own safety standards.

"For many years over four hundred standard-setting organizations have operated in this country . . . ." Robert Heidt, *Industry Self-Regulation and the Useless Concept 'Group Boycott'*, 39 Vand. L. Rev. 1507, 1565–66 (1986). They "spend more than $500 million annually on the development of standards." *Id* at 1598 n.204. They create safety standards, educate the industry on the standards, and advocate for specific safety laws. Indeed, "[i]ndustry standard setters intimately familiar with current industry developments [] are better able than the government to update standards in light of technological developments." *Id*. at 1559.

For example, The American Society of Safety Professionals includes 35,000 safety professionals who provide education, standards development, and advocacy. *ASSP Fact Sheet*, Am. Soc. of Safety Professionals, www.assp.org/about/assp-fact-sheet (last visited Feb. 13, 2024). The National Safety Council promotes accident prevention programs and provides consulting, research, and workplace training. See Nat'l Safety Council, *About the National Safety Council*, NSC, https://www.nsc.org/company (last visited Feb. 21, 2024). The American National Standards Institute—ANSI—publishes standards for over 140 associations or groups, including well-known associations such as the National Fire Protection Association and Underwriters Laboratories. Am. Nat'l Standards Inst., *Publisher Collections*, ANSI

Webstore, https://webstore.ansi.org/Info/Sdolist (last visited Feb. 21, 2024).

Separately and together, these organizations implement worker safety. "In general, industry self-regulators can act more swiftly and more subtly than a government bound by due process standards and can avoid the bureaucratic intrusiveness of a government police force." Heidt, *supra*, at 1563. It is not a stretch to expect that these industry groups are likely more effective here than government agencies.

E. Perhaps most importantly, managers and owners themselves promote safety.

In many instances, those who run or manage businesses and the specialized machines and equipment used in businesses are better qualified than outsiders—such as OSHA inspectors—to spot and correct safety issues. OSHA inspectors know paperwork and written standards. However, "[t]he technical expertise of the staff of most government regulators cannot match that of an industry's members." *Id*. at 1561. For example, the safety services manager at R.R. Donnelly & Sons Company, the world's largest commercial printer—explained that when OSHA inspectors inspect the gigantic printing presses, they "[do not] know where to start. . . . They do not know our industry, yet try to cite us as if they do." Raymond Keating, *Warning: OSHA Can Be Hazardous to Your Health*, Found. for Econ. Freedom (Mar. 1, 1996), fee.org/articles/warning-osha-can-be-hazardous-to-your-health/. Ultimately, it

is up to the business owners and managers to create and maintain a safe workplace—and most do it well.

F. Federal law provides other safety protections.

Independent from OSHA, the National Institute for Occupational Safety and Health is "a research agency focused on the study of worker safety and health, and empowering employers and workers to create safe and healthy workplaces." U.S. Dep't of Health & Hum. Servs., *About NIOSH*, Nat'l Inst. for Occupational Safety & Health, https://tinyurl.com/ms3zzc9n (last visited Feb. 21, 2024). Its mandate is "to assure 'every man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'" *Id.* NIOSH is to investigate workplace safety issues and create reports on such issues. John Howard, *NIOSH: A Short History*, 110 Am. J. Pub. Health 629, 629 (2020). NIOSH's research assists OSHA and enables the state legislatures and Congress to properly enact health and safety laws. The removal of OSHA's legislative authority to mandate and enforce workplace safety rules would not alter NIOSH's mission. See 29 U.S.C. § 671.

III. OSHA has not significantly improved worker safety.

The point of OSHA's safety regulations is to improve worker safety. But, as early as 1999, "the vast majority of studies ha[d] found no statistically significant reduction in the rate of workplace fatalities or injuries due to OSHA. . . . Even using the most optimistic estimates, OSHA would be responsible for

lowering workplace injuries in the United States by no more than 5 percent." Cato Inst., *Cato Handbook for Congress: Policy Recommendations for the 106th Congress* 356 (1999).

That conclusion was reaffirmed in 2013:

> During the 40 years of its existence, workplace fatalities and nonfatal injuries and illnesses have fallen, but OSHA is not the major cause of this decline. Since the OSH Act was passed, workplace fatalities have fallen substantially, . . . but this decrease is a continuation of a trend that began long before 1970. Empirical studies that control for the other influences causing worker safety to improve over time generally find OSHA having only a modest impact on worker safety.

Nathan Hale & John Leeth, *Evaluating OSHA's Effectiveness and Suggestions for Reform*, Mercatus Center (Apr. 23, 2013), https://tinyurl.com/3bn9ehnt. Indeed, "OSHA's inspection efforts have reduced worker injuries by a modest four percent." *Id.*

As recently as 2016, the Labor Department's Office of Inspector General concluded that "OSHA could not demonstrate whether its [special emphasis programs] were effective in improving safety and health conditions for workers in high-hazard industries and occupations." Office of Inspector Gen., U.S. Dep't of Labor, No. 02-16-201-10-105, *OSHA Does Not Know if Special Emphasis Programs Have Long-Term Industry Effect* (2016). Even OSHA's website, while providing reams of rules and regulations,

provides no information on the impact of its regulations on worker safety. One would expect that if OSHA claimed it had improved worker safety, it would say so and provide supporting data. But OSHA no longer even submits the previously required annual report to Congress, which was to report "the progress toward achievement of the purpose of [the OSH] Act." *Sec. 26. Annual Report*, U.S. Dep't of Labor, www.osha.gov/laws-regs/oshact/section_26 (last visited Feb. 21, 2024).

If OSHA cannot show the efficacy of its regulations, then the agency can hardly argue that the invalidation of any of the OSH Act will undermine worker safety. And without any metrics to measure what worker safety OSHA has facilitated, it cannot demonstrate that any of its regulations have been—or indeed will be—"reasonably necessary or appropriate" to keep workers safe.

IV. OSHA regulations come at a high cost.

While OSHA regulations are not without some value, neither are they free. OSHA's regulatory costs come in two flavors: (1) the cost to businesses to comply with the regulations and (2) fines. Both are often undervalued or misunderstood in regulatory analysis. For example, the U.S. Chamber of Commerce explained that "proposals like OSHA's occupational noise interpretation 'reflect a troubling pattern of efforts by the agency to impose substantial burdens on American businesses without regard to the cost of those efforts.'" Laura Walter, *House Hearing Criticizes OSHA's Impact on Jobs, Business*, EHS Today (Feb. 16, 2011), https://tinyurl.com/mwb29c8j. For example, OSHA ignored the concerns of small businesses and

promulgated a silica regulation even though it would "cost the economy $7.2 billion a year and 27,000 jobs over ten years." Andrew Wimer, *Small Businesses Will Pay a Big Price for New Silica Rule*, NFIB (Mar. 24, 2016), https://tinyurl.com/2uv2ywve.

While OSHA is required to estimate the impact of its regulations on businesses, it does not conduct any *ex ante* analysis to determine the actual impacts, especially on small businesses. Small businesses make up 99.9 percent of businesses in the U.S. and employ 46.4 percent of the Nation's employees. *2022 Small Business Profile United States*, U.S. Small Business Admin., http://tinyurl.com/SBA2022Profile (last visited Feb. 21, 2024). These are small companies that can be put out of business by onerous and costly regulations. They do not have the time to read and draft comments on the proposed regulations and cannot afford lobbyists. In 2005, the U.S. Small Business Administration's Office of Advocacy explained the high cost of regulations on small businesses, noting that "occupational safety and health regulations alone accounted for 53 percent of the compliance costs of all workplace regulations in the 2005 study. These were by far the largest element within the workplace regulations category." Nicole Crain & W. Mark Crain, U.S. Small Business Admin., *The Impact of Regulatory Costs on Small Firms* (2010) (internal citations omitted).

OSHA's fines can be arbitrary in practice. Fines vary between $0 and $13,653 per "nonserious" violation. Occupational Safety & Health Admin., U.S. Dep't of Labor, DOL-OSHA-DEP-2021-001, *2021 Annual Adjustments to OSHA Civil Penalties* (2021).

Each paperwork error, each employee mistake, each employer safety oversight—no matter how slight or inadvertent—can be an infraction. And every day of unabated infractions can trigger the same fine over and over again. The penalties can quickly add up and become exorbitant.

V. OSHA safety regulations violate the nondelegation doctrine.

"The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("*NFIB*"). And "[i]f Congress could hand off all its legislative powers to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *Id.* (Gorsuch, J., concurring) (quoting *Dep't of Transp. v. Assoc. of Am. R.Rs.*, 575 U.S. 43, 61 (2015)).

The challenged portion of the OSH Act violates the nondelegation doctrine. The OSH Act mandates that employers "shall comply with *occupational safety and health standards* promulgated under this [act]." 29 U.S.C. § 654(a)(2) (emphasis added). "The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard . . . ." 29 U.S.C. § 655(b). "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). But what exactly does "reasonably necessary or appropriate" mean? It is anyone's guess, and OSHA has been guessing for decades now.

Necessary is defined as something that is "essential" or "absolutely needed." *Necessary*, Merriam-Webster, www.merriam-webster.com/dictionary/necessary (last visited Feb. 22, 2024). Directing OSHA to promulgate necessary regulations thus provides an intelligible principle. But adding "reasonably" to describe "necessary" makes it unintelligible.

Congress added an additional layer of vagueness by adding "or appropriate" to the definition. 29 U.S.C. § 652(8). There simply is no guiding or intelligible principle as to what Congress would view as an "appropriate" standard to "provide a safe" place of employment. And that is likely why—outside of the OSH Act—Congress has almost never used that modifier in directing agencies how to regulate.

By allowing OSHA to issue any "appropriate" safety standard, Congress made OSHA into a "roving commission to inquire into evils and upon discovery correct them." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). OSHA—emboldened by years of unbridled expansion into every aspect of the workplace as it deems "appropriate"—even tried to mandate that employers enforce its COVID vaccine requirement. *NFIB*, 142 S. Ct. at 663–664. In response, the Court, relying on the major questions doctrine, stayed OSHA's vaccine mandate because the

agency lacked the authority to issue the vaccine mandate, and at least one member of the Court recognized that the nondelegation doctrine lives. *Id.* at 668–669 (Gorsuch, J., concurring). As in *NFIB*, the statutory addition of "or appropriate" "certainly impose[s] no 'specific restrictions' that 'meaningfully constrai[n]' the agency." *Id.* at 669 (Gorsuch, J., concurring) (quoting *Touby v. United States*, 500 U.S. 160, 166–167 (1991)).

OSHA seems to recognize the impossible position that Congress put it in. In 1991, the D.C. Circuit—anxious to avoid the nondelegation doctrine—imposed upon the words "reasonably necessary and appropriate" the concept of weighing benefits to society versus costs to society. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Occupational Safety & Health Admin.*, 938 F.2d 1310, 1321, *supplemented*, No. 89-1559, 1991 WL 223770 (D.C. Cir. 1991).

However, there are two problems with using the benefits versus costs "to society" approach to interpret the four words: "reasonably necessary or appropriate." First, the court was simply impressing upon the statute the terms of Executive Order No. 12,291. *Id.* at 1321. But Congress did not supply such a directive. Second, the court's opinion suggests that the statute is directed solely to what is necessary and appropriate "to society." *Id.* Congress did not write the statute that way, the law addresses workplace safety, not general societal benefits.

The Court has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of

the statute." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001). "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Id.* at 473.

A statute is unconstitutional if it "has delegated legislative power to the agency." *Id.* at 472. The text of Article I, § 1 of the Constitution "permits no delegation of those powers . . ." *Id.* (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)). If Congress confers decision-making authority on agencies, it—not the agency—must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The challenged provision fails that test.

CONCLUSION

When Congress passed the OSH Act to improve worker safety—a laudable goal—it granted legislative authority to the Labor Secretary. It did not provide an "intelligible principle" upon which OSHA's major regulatory structure can be judged. After more than 50 years of mission creep, it is time to examine if OSHA's enabling act enabled too much. This case cleanly presents a nondelegation challenge in this area, unclouded by ancillary issues, and it is of great importance to the millions of workplaces regulated through an unconstitutional mechanism.

Congress is free to pass laws and to delegate with a directive containing an "intelligible principle," but it is imperative that the Court remind the other two branches of government that the Constitution

imposes limits on that kind of delegation. The Court should grant the petition for writ of certiorari and reverse the lower court.

Respectfully submitted,

David C. Tryon
Counsel of Record
Alex M. Certo
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

Ilya Shapiro
Counsel for the Manhattan Institute
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Counsel for Amici Curiae