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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

The question presented is:

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

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation ("PLF") is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judiciary as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023) (application of Clean Water Act's "waters of the United States" provision to wetlands); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (restriction on President's ability to remove CFPB Director); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (nondelegation doctrine); *Lucia v. SEC*, 585 U.S. 237 (2018) (SEC administrative law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co.,* 578

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[1] Pursuant to this Court's Rule 37.2, PLF has provided timely notice of its intent to file this amicus brief. Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person outside of PLF made a monetary contribution to the preparation or submission of this brief.

U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same). Additionally, PLF attorneys, including Counsel of Record, have developed extensive scholarship on separation of powers issues. *E.g.*, Luke A. Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J. L. & Liberty 751 (2022); Luke A. Wake & Damien Schiff, *Practical Applications of the Major Questions Doctrine*, 47 Harv. J. L. & Pub. Policy (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4737015.

PLF's adherence to constitutional principles and broad litigation experience offer the Court an important perspective that will assist it in deciding whether to grant Petitioner Allstates Refractory Contractors, LLC's ("Allstates") Petition for Writ of Certiorari. Because the challenged statute and erroneous decision below violate the core separation of powers principle that Congress may not delegate its legislative powers, PLF supports Allstates' petition and urges reversal.

SUMMARY OF ARGUMENT

Congress makes law in our Republic—not the Executive Branch. This Court has always affirmed this principle by stating that Congress cannot delegate its lawmaking powers. Indeed, in 1935, it famously struck down two provisions in the National Industrial Recovery Act under the nondelegation doctrine. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

This Court has never backed away from the principle, acted upon in *Schechter* and *Panama Refining*, that Congress may not delegate its legislative powers; however, this Court has not found a violation of the intelligible principle test since 1935. In that 89-year span, this Court has upheld broad delegations in various acts. This has led lower courts to uniformly conclude that delegations of rulemaking power—however broad—must invariably survive nondelegation scrutiny.

As exemplified by the Sixth Circuit's decision in this case, lower courts have rendered the nondelegation doctrine a dead letter. Although this Court's precedents only allow delegations authorizing the Executive to find facts or delegations governed by a precise standard, lower courts repeatedly ignore these rationales and neuter the nondelegation doctrine by upholding broad delegations based on the "general policy" behind statutes. With such misapplication of precedent, the test they apply no longer resembles the test this Court used in *Panama Refining* and *Schechter*. This shows that lower courts need guidance.

This case is the ideal vehicle to reinvigorate the nondelegation doctrine and to offer practical guidance to lower courts for confronting capacious delegations. The Occupational Safety and Health Act ("OSH Act") delegates a sweeping power to the Occupational Health and Safety Administration ("OSHA") to set safety standards in whatever manner the agency believes—in its sole discretion—is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). This is possibly the broadest and most

sweeping delegation Congress has enacted since the NIRA. And for that reason, it is important that the Court take this case to demonstrate the nondelegation doctrine still has bite.

ARGUMENT

I. THIS CASE IS THE IDEAL VEHICLE FOR THE COURT TO BREATH LIFE BACK INTO THE NONDELEGATION DOCTRINE

A. The OSH Act Delegates Truly Sweeping Powers Without a Governing Standard

This case is the ideal vehicle for revitalizing the nondelegation doctrine because the OSH Act represents, arguably, the broadest delegation by Congress to the Executive Branch since the NIRA. Congress delegated power for the Occupational Health and Safety Administration ("OSHA") to impose any workplace safety rule—affecting any aspect of business, for any given industry[2]—based on nothing more than the subjective judgment of the Secretary of Labor that the rule is either "reasonably necessary or appropriate." 29 U.S.C. § 652(8). "No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope ...." Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1448 (2008). Indeed, OSHA gets to determine not only when

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[2] The power Congress has granted to OSHA is truly extensive, as the Act essentially allows OSHA to regulate workplace safety on an economy-wide scale. *See* Pet.App.10a (noting that OSHA covers "'every working man and woman in the Nation'" (citation omitted)); Pet.App.63a (Nalbandian, J., dissenting) ("OSHA [is] a statute affecting practically every business in the United States ...."); *see also* Sunstein, *supra*, at 1429 ("OSHA covers essentially all American workers ....").

a safety risk is significant enough to warrant a rule but also whether the costs imposed by the rule are worth the benefits—all without any guidance from Congress on either issue. *See id.* at 1410.

The OSH Act leaves everything to the sole discretion of the agency because nothing within the operative text speaks to whether or under what conditions the Secretary of Labor should impose, modify, or withdraw safety standards. For that matter, there is no requirement that the Secretary make any specific findings to justify new or modified safety standards. And because the text is phrased in the disjunctive, the Secretary remains free to ignore any consideration of the economic impacts when imposing safety standards. *Cf. Michigan v. EPA*, 576 U.S. 743, 752 (2015) (concluding that a directive to make "appropriate" regulatory changes entails a requirement to consider the likely economic impact).

Simply put, the Secretary exercises ungoverned discretion when setting workplace safety standards affecting all manner of business. But such unfettered discretion is the hallmark of a nondelegation violation. The delegation here differs starkly from the sort of delegations that this Court has historically affirmed. As Justice Gorsuch emphasized in *Gundy*, this Court has only previously allowed delegations where Congress (1) has made a policy decision and therein provided a precise governing standard that allows the agency room only to "fill up the details"; (2) makes application of a "rule depend on executive fact-finding"; or (3) assigns another branch certain non-legislative responsibilities if the discretion is to be exercised over matters already within the scope of that branch's power. 139 S. Ct. at 2136–37 (Gorsuch,

J., dissenting); *see also* Pet.App.35a–36a, 63a–64a & n.15 (Nalbandian, J., dissenting).

As such, this Court should grant certiorari because the OSH Act's delegation of authority to impose any safety standard deemed "reasonably necessary or appropriate" flies in the face of first principles. Section 652(8) does not require OSHA to make any findings of fact as a prerequisite for imposing a rule. Nor does it contain a standard precise enough to cabin OSHA's extraordinary discretion over the national economy. And, of course, the Act delegates rulemaking authority to an agency that has no inherent rulemaking power.[3] After all, agencies are creatures of statute and possess only those authorities bestowed on them by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

B. The Panel's Decision Is Emblematic of a Prevailing Assumption That Every Delegation Will Pass Muster

Unable to point to any textually grounded standard governing the Secretary's exercise of discretion, the Sixth Circuit upheld Section 652(8) on the errant assumption that the OSH Act's indeterminate remedial goals provided an intelligible principle. *See* Pet.App.10a–13a. But Congress's putative goal of assuring safe working conditions

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[3] Rather than giving OSHA discretion over an inherently executive power, § 652(8) gives OSHA "authority to regulate an area—public health and safety—traditionally regulated by the States." *In re MCP No. 165, OSHA, Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 267 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). This authority does "not traditionally fall within the Executive Branch's wheelhouse." Pet.App.64a (Nalbandian, J., dissenting).

cannot save the Act because it tells us nothing as to when a theoretical risk shall be deemed an intolerable workplace safety issue.

This Court has never relied on a statute's general purpose alone in upholding statutory delegations. *See Indus. Union Dep't,* 448 U.S. at 682–84. For that matter, this Court rejected the notion that the remedial goals of a statute may be sufficient in the absence of any textually grounded governing standard in both *Schechter* and *Panama Refining*. *Schechter* found no intelligible principle in the directive to adopt codes of fair competition that "will tend to effectuate the policy" of the NIRA. 295 U.S. at 538–39. Likewise, *Panama Refining*, found that there was no "policy" speaking to "the circumstances or conditions in which the transportation of [excess oil] ... should be prohibited" even after looking to Congress's broad goals and findings. 293 U.S. at 417–18. This Court found nondelegation violations in those cases notwithstanding the fact that everyone understood the NIRA was intended to enable rulemaking to stabilize the economy in the midst of a national emergency.

As such, the Sixth Circuit's decision in this case contravenes *Schechter* and *Panama Refining* because the panel errantly presumed that an appeal to Congress's remedial goals was sufficient to uphold the OSH Act. But this approach renders the nondelegation doctrine dead letter. Indeed, if an appeal to a statute's aspiration goals were enough to satisfy the intelligible principle test, then every delegation would be upheld because there is some putative goal behind every statute.

Unfortunately, the Sixth Circuit's errant approach predominates throughout the lower courts. Time and again, we've seen lower courts sidestep this Court's guidance in *Schechter* and *Panama Refining* on the view that this Court has generally endorsed broad delegations since 1935. For example, in *Big Time Vapes, Inc. v. FDA*, the Fifth Circuit upheld a delegation because the Family Smoking Prevention and Tobacco Control Act had the "general policy" of "(1) protecting public health and (2) preventing young people from accessing (and becoming addicted to) tobacco products." 963 F.3d 436, 444 (5th Cir. 2020). Such general goals allow FDA to decide what tobacco products are subject the Act's regulatory requirements. And relying on *Big Time Vapes*, the Western District of Texas recently upheld a delegation that authorized the Secretary of Labor to decide what sort of salaries employers must pay exempt employees without a textually grounded standard limiting or even guiding the Secretary in this line-drawing exercise. *Mayfield v. U.S. Dep't of Labor*, __ F. Supp. 3d __, 2023 WL 6168251, at *8 (W.D. Tex. Sept. 20, 2023) (rejecting a nondelegation challenge on the view that the Fair Labor Standards Act had a "general policy of 'correcting and eliminating' the 'existence of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers'" (citation omitted) (cleaned up)).

Likewise, during the pandemic, the Western District of Louisiana concluded that landlords challenging the Centers for Disease Control and

Prevention's nationwide eviction moratorium were unlikely to prevail on a nondelegation claim because the Public Health Services Act has the "general policy" of "'prevent[ing] the introduction, transmission, or spread of communicable diseases.'" *Chambliss Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 117 (W.D. La. 2020) (citation omitted). The CDC was claiming power to regulate every aspect of civil society because Congress had delegated authority to impose orders as deemed necessary to control the spread of contagious disease. In a related case, the Sixth Circuit warned that the CDC was claiming "near-dictatorial power." *Tiger Lily, LLC v. U.S. Dep't of Housing & Urban Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (holding the statute did not authorize agency action). Yet, under the rationale in both *Allstates* and *Chambliss*, the Sixth Circuit would presumably have upheld this delegation under an impotent version of the intelligible principle test.

And the court in *Doe v. U.S. Department of Justice* upheld a delegation without any textually grounded governing standard because the Sex Offender Registration and Notification Act has the "broad principle of protecting the public from sex offenders." 650 F. Supp. 3d 957, 1004 (C.D. Cal. 2023). It upheld the statute because this "broad principle" purportedly "guides the Attorney General's broad discretion." *Id.* But if this were enough to defeat a nondelegation challenge, then *Schechter* would have been decided differently. After all, the codes of competition there at least had to be "fair."

The Sixth Circuit's decision merely confirms a systemic problem in our nondelegation jurisprudence.

Unless and until this Court grants certiorari to clarify that the nondelegation doctrine has bite—consistent with *Panama Refining* and *Schechter*—we can expect more of the same. Indeed, if this Court "invalidat[es] an occasional statute just to remind Congress [and lower courts] of the importance of legislative, rather than executive, policymaking," this will have an "'educational effect on Congress [that] might well be substantial.'" Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 Geo. Wash. L. Rev. 1079, 1133 (2021) (quoting Antonin Scalia, *A Note on the Benzene Case*, 4 AEI J. on Gov't & Soc. 25, 28 (1980)). But, until this Court does so, lower courts will continue to rubberstamp capacious delegations by appealing to the supposed remedial goals of statutes—under which standard every delegation will pass muster.

II. THE COURT SHOULD TAKE THIS CASE TO AFFIRM THAT CONGRESS MAY NOT DELEGATE MAJOR QUESTIONS

Allstates asks this Court to take the case to clarify "[w]hether Congress's delegation of legislative authority over major policy questions violates Article I." Pet.2. This is an important question that would allow this Court to tie the nondelegation doctrine back to Chief Justice Marshall's pronouncement that Congress must make laws on "important subjects[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). And this case provides an attractive vehicle to make explicit what was left implicit in *Schechter*: Congress must provide clear standards when delegating rulemaking authority on "major questions."

Schechter concerned Section 3 of NIRA, which authorized the President to, upon the application "'by

one or more trade or industrial associations or groups, ... approve a code or codes of fair competition for [a] trade or industry[.]'" 295 U.S. at 521 n.4 (quoting 15 U.S.C. § 703(a)). Just as in *Panama Refining*, this Court invalidated section 3 because (1) rather than having a specific policy, it contained only a "broad declaration"; (2) "[i]t supplie[d] no standards for any trade, industry, or activity" and instead gave the President "virtually unfettered" discretion; and (3) it did not "prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Id.* at 541–42. But although there was overlap with *Panama Refining*, this Court also suggested the *Schechter* delegation was in a category all by itself.

Section 3 was "without precedent" because it allowed the President to "enact[] laws for the government of trade and industry throughout the country." *Id.* at 541–42. Indeed, this Court noted that the question presented by section 3 was "distinct from that which was before us in the case of the Panama Refining Company" because at least there, "the subject of the statutory prohibition was defined." *Id.* at 530. Section 9(c) was limited to a single commodity —"petroleum and petroleum products"—and a single occurrence—when this commodity was "produced or withdrawn from storage in excess of the amount permitted by state authority." *Id.* In contrast, the Section 3 "authority relate[d] to a host of different trades and industries ... with the vast array of commercial and industrial activities throughout the country." *Id.* at 539; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (emphasizing that one of the reasons why section 3 was unconstitutional was

because it "conferred authority to regulate the entire economy" (citing *Schechter*, 295 U.S. 495)).

Thus, *Schechter* was the original major questions nondelegation case. And Allstates' case stands on all fours with *Schechter*. After all, the economy-wide scale of the OSH Act's delegation to decide what shall constitute safe workplace conditions mirrors the scale of the NIRA.

And of course, looking to the "extent" of the power Congress has granted to OSHA is consistent with the approach Chief Justice Marshall required when the Court first held that Congress must decide the important matters and can delegate authority only for agencies to fill less consequential details. *Wayman*, 23 U.S. (10 Wheat.) at 43 ("To determine the character of the [delegated] power ... we must inquire into its extent."). The regulation of workplace safety for practically every worker in the nation is unquestionably an "important subject[], which must be entirely regulated by the legislature itself[.]" *Id.* It is not a subject "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Id.*[4] Instead, Congress has given OSHA "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated[.]'" *Gundy*, 139 S. Ct. at 2133 (quoting *The Federalist No. 78*, p.

[4] For instance, it is not as if Congress has made a fundamental policy decision about when a certain risk should be deemed unsafe. And Congress has not enacted a precise standard that leaves OSHA with only a fact-finding mission guided by criteria Congress wants it to apply.

465 (C. Rossiter ed. 1961) (A. Hamilton)) (Gorsuch, J., dissenting).

III. CONGRESS IS CAPABLE OF DECIDING IMPORTANT ISSUES AND CAN PROVIDE ADEQUATE GUIDANCE TO FEDERAL AGENCIES

If this Court breathes life back into the nondelegation doctrine, it will not spell the end of the administrative state because Congress is capable of deciding important issues. After all, that is why the Framers created Congress. *Wayman*, 23 U.S. (10 Wheat.) at 43 (stating that "important subjects ... must be entirely regulated by the legislature itself"). The following three reasons demonstrate this point:[5]

First, if this Court holds § 652(8) violates the nondelegation doctrine and invalidates the "handful of safety standards that would be affected," Pet.23, this will not prohibit the federal government[6] from adopting safety standards. It will simply mean that Congress, rather than the executive branch, will do the lawmaking. Indeed, if our elected representatives want to adopt OSHA's now-current workplace safety rules, nothing prevents Congress from quickly

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[5] That § 652(8) was enacted fifty-four years ago is not a reason to insulate it from review. This Court has not hesitated to find for litigants on constitutional or statutory grounds regarding statutes that were not reviewed by this Court for similar periods of time. *See, e.g.*, *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021) (holding 15 U.S.C. § 53(b) does not authorize FTC to obtain equitable monetary relief forty-eight years after it was enacted); *INS v. Chadha*, 462 U.S. 919 (1983) (holding one-House veto violated separation of powers fifty-one years after the first such provision was enacted).

[6] States also retain the ability to regulate workplace safety through their inherent police powers. *See supra* n.3.

engaging in bicameralism and presentment to enact them as statutes. Or, if Congress believes different standards should be adopted, it can draw on the diverse viewpoints of its Members, engage in deliberation, and adopt standards that gain widespread approval, which would "ensur[e] the people would be subject to a relatively stable and predictable set of rules." *Gundy*, 139 S. Ct. at 2134 (citation omitted) (Gorsuch, J., dissenting).

Second, should Congress believe it lacks expertise on workplace safety, nothing prevents it from using existing tools to obtain expert opinions from outside the legislative branch. For example, relevant committees in either the House or Senate (or both) could hold hearings to obtain advice from executive branch and non-governmental witnesses. While OSHA would no longer be able to enact sweeping regulations on this issue, OSHA witnesses could still testify as to what laws they believe Congress should pass, and Congress could defer to OSHA's views to the extent it found OSHA's policy considerations persuasive.

Third, should Congress believe it lacks expertise on workplace safety (or any other topic), nothing prevents it from creating new Article I expert agencies to provide expertise. As Judge Thapar has noted, Congress currently has "nonpartisan structures like the Congressional Budget Office and the Joint Committee on Taxation—which are housed under Article I and ultimately accountable to Congress's leadership—[and] have provided Congress with 'technical expertise' that 'safeguards the legislative process from executive and interest-group encroachment.'" *Tiger Lily*, 5 F.4th at 675 (quoting

Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1544 (2020)) (Thapar, J., concurring). Unlike executive experts, these Congressional experts would make recommendations, instead of regulations, thus, "leav[ing] the law-making power with the people's representatives—right where the Founders put it." *Id.*

For these three non-exhaustive reasons, this Court should not hesitate to grant the petition and reverse. Congress still has ample ability to acquire expertise and regulate workplace safety.[7]

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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[7] Following this Court's recent Article II removal cases, *see, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the administrative state is still alive and well, and Allstates correctly argues that "adopting a nondelegation principle for major questions would not spell" its end. *See* Pet.24.