No. 23-819

In the Supreme Court of the United States

ALLSTATE 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 *AMICI CURIAE* STATE OF WEST VIRGINIA, 22 OTHER STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress's delegation of authority to the Occupational Safety and Health Administration to write "reasonably necessary or appropriate" workplace-safety standards, 29 U.S.C. §§ 652(8), 655(b), violates Article I of the U.S. Constitution.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Name a high school civics course that fails to recite that the Constitution separates powers because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is a tyranny. THE FEDERALIST NO. 47 (J. Madison). Most go to the next step, too, explaining that this abstract ideal needs concrete checks to do any good—structural tools so that one branch's ambition will "counteract" another's, THE FEDERALIST NO. 51 (J. Madison). Yet one might wager too few classes explain how our system deals with a scenario that would have made many a Founder scratch their head: a branch's willing choice to cede its own power away. When that happens, it shouldn't take an A+ student to recognize that the watchdog judiciary must step up.

Originally, the Court did just that with the nondelegation doctrine. The Court knows that keeping legislative power out of the executive's hands is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892). So it put separation-of-powers principles into action through the nondelegation doctrine: Congress "can[not] delegate to the Courts, or to any other tribunals" (or to anyone else, really), "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 23 U.S. 1, 42 (1825); accord

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[*] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

Gundy v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.).

But some early good years for the doctrine have given way to now nine *decades* of courts "avert[ing] [their] eyes while Congress has enacted a host of expansive delegations with only minimal policy guidance." Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 143-44 (2011). And the costs keep worsening as the daylight grows between government on constitutional parchment and government in the real world.

The *amici* States and legislature have sounded this alarm before. See, *e.g.*, Br. of *Amici Curiae* State of West Virginia et al., *Consumers' Res.* v. *FCC*, No. 23-743 (U.S. Feb. 8, 2024); Br. of *Amici Curiae* State of West Virginia et al., *Altagracia Sanchez* v. *Off. of the State Super. of Educ.*, No. 22-543 (U.S. Jan. 4, 2023). Congress's near-hands off approach to limiting the Occupational Safety and Health Administration's power in this case makes us do so again. Though *amici* share Congress's strong interest in protecting employees from workplace hazards, we cannot support its incredible delegation in the Occupation Safety and Health Act. That Act says that the Secretary of Labor can choose permanent safety standards for all industries and for almost every business in the United States. Nothing meaningfully limits that discretion—so long as the standard is reasonably necessary or appropriate in the Secretary's view, Congress says "go." And the compliance costs for these oversight-less mandates cost the businesses in our States well into hundreds of millions of dollars each year. Pet.7-8.

Congress at least needs to provide meaningful guidelines and limits before setting OSHA loose in every aspect of our economies. After all, "no matter how laudable its purposes, the actions of our government are always subject to the limitations of the Constitution." *Barr* v. *DOJ*, 819 F.2d 25, 25 (2d Cir. 1987). This Court has not hesitated in holding Congress to those limits when it tries to shrink the other branches' powers: It has stopped Congress from "confer[ring] the Government's 'judicial power' on entities outside Article III," for instance, *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011), and policed legislative efforts to control executive branch officials, *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2207 (2020). It should do the same when Congress gives up its own authority. The Court should grant the Petition and reverse the decision below.

SUMMARY OF ARGUMENT

I. The nondelegation doctrine is vital to our constitutional system. But over time, courts have allowed Congress to slough off its legislative mandate in the name of (supposed) regulatory efficiency. Minimizing the nondelegation doctrine in this way has left lower courts confused and transformed agencies into junior-varsity Congresses. The separation of powers is too important to wait on bringing the nondelegation doctrine back into circulation.

II. Lurking under anemic delegation limits is the myth that the nondelegation doctrine cannot meet modern legislative needs: Congress may not act fast enough to respond to problems, or perhaps it lacks agencies' expertise in filling regulatory gaps. As a legal matter, the Constitution already weighed the

tradeoffs when prescribing the federal government's mutually self-limited frame. As a factual matter, these fears rest on little empirical (or any other) data. And on the other side of the scale, the nondelegation doctrine protects the States' interests because the separation of powers guards federalism. States have more ability to make their voices heard when laws are written in the U.S. Code instead of the Code of Federal Regulations. A nondelegation doctrine with teeth also keeps Congress's incentives and accountability better focused on the States and on our residents' needs.

III. This case is strong to address these issues. OSHA's delegation here is one of the broadest Congress has enacted; it should fall under even the existing test. So taking up this case would give the Court options whether to take on some or all of the nondelegation challenge, and how to tackle it. And given OSHA's other rulemaking powers and the States' tools and incentives to protect workers, the Court can address the issue without putting America's workforce at risk. It should do so.

REASONS FOR GRANTING THE PETITION

I. The Nondelegation Doctrine Is In Crisis.

A. The nondelegation doctrine "ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB* v. *OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring). While agencies are a reality of modern life and may fill in statutory gaps with "judgments of degree," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (cleaned up), Congress must make "fundamental policy decisions"

itself—"the hard choices." *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). The nondelegation doctrine, then, demands that Congress provide "sufficiently definite and precise" guidance to know whether the agency is or is not staying within its lane. *Yakus* v. *United States*, 321 U.S. 414, 426 (1944).

For a long while, the doctrine was rarely called up. Early "regulatory statutes … contain[ed] detailed and limited grants of authority to administrative bodies." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001). "Before the 1930s," in fact, "federal statutes granting authority to the executive were comparatively modest and usually easily upheld." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting). In short, they tracked the originalist understanding that had contemplated a true divide between legislating and executing—an understanding on all fours with a full-throated nondelegation doctrine. See generally, *e.g.*, Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 663 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

But as Petitioner explains, see Pet.28, that changed as the Court traded the originalist view for the intelligible principle approach to delegation. See, *e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 371 (2002). In its earlier version, the new theory said that a congressional act does not violate the separation of powers if Congress

articulates "an intelligible principle" to which the agency is directed to conform. *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928). A limp standard to be sure, but not one doomed from the get-go. It left room for the ideas that while "some judgments … must be left to the officers executing the law," *Mistretta* v. *United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting), Congress cannot ask the executive to set "the criteria against which to measure" its own decisions, *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). And at first, these constitutional first principles gave the intelligible principle doctrine some heft. When the Court confronted overly broad legislative decisions in 1935, it rebuffed them—standing against "delegation running riot." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 551 (1935); *id.* at 553 (Cardozo, J., concurring); *Panama Refin. Co.* v. *Ryan*, 293 U.S. 388, 432-33 (1935).

Things unraveled fast. The standard has now "mutated" into something with no footing "in the original meaning of the Constitution, in history, or even in" *J.W. Hampton* itself. *Gundy*, 139 S. Ct. at 2139-41 (Gorsuch, J., dissenting). It has no bite left, either. Under it, "sweeping grants of what appear[ed] to be embarrassingly legislative powers [were] consistently upheld." Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1231-32 (2018). Now effectively any standard will do, based on the belief that "in our increasingly complex society," "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372 (Scalia, J., dissenting). So, for instance, this Court "found that [statutes] merely

directing agencies to regulate in the public interest or to adopt standards requisite to protect the public health suffice." Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1018 (2023) (citing *Whitman*, 531 U.S. at 473-76). And agencies have run with this "notoriously lax" test. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014). Constitutional order may be under threat, but the administrative state is flourishing—thanks in large part to the intelligible principle doctrine, "hundreds of federal agencies pok[e] into every nook and cranny of daily life," *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

B. Set aside (momentarily; see *infra* Part II.B.) the harms that have come with the nondelegation doctrine's "one good year, and 211 bad ones (and counting)." *Cass R. Sunstein, Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). The most direct call for the Court to intervene is that the evolving "intelligible principle" doctrine has left many confused. See *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 76-86 (2015) (Thomas, J., concurring in the judgment) (tracing the doctrine's long decline). Forty years ago, scholars called it "so ephemeral and elastic as to lose its meaning." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1231 (1985). Little has changed since: scholars *still* attack the current test's "untruth," "laxity," and "fictional" nature, raising the question why we go through the farce of applying it at all. Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1091-92 (2023). Where courts have "found intelligible principles," for instance, others have decried only "gibberish."

Lawson, *supra*, at 329. In fact, even those who oppose the doctrine know that its "continual appearance in the case law has confused administrative law as a whole." Kathryn A. Watts, *Rulemaking As Legislating*, 103 GEO. L.J. 1003, 1007 (2015).

Intensifying the uncertainty, several members of the Court openly question at least some aspects of the present doctrine. See *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., with Roberts, C.J., and Thomas, J., dissenting); *Paul* v. *United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari); *United States* v. *Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissental). The Court also may—or may not—be creeping back toward using the nondelegation doctrine without saying so directly. At least one scholar described the Court's decision in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), as a "non-delegation doctrine case masquerading as a bicameralism and presentment case." Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton *v.* City of New York, 99 NW. U. L. REV. 77, 85 (2004). And other commenters have called out where related-yet-distinct doctrines may be "narrow[ing] the field in which the nondelegation doctrine remains underenforced." See, *e.g.*, Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. FORUM 693, 703 (2022) (discussing the major questions doctrine).

All of this leaves the lower courts adrift. Faced with a feeble modern doctrine, some judges lament that it means nothing as courts "conjure[] standards

and limits from thin air to construct a supposed intelligible principle." *Mich. Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting). Others have questioned the nondelegation doctrine's vitality overall. See *Bradford* v. *U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 846 n.8 (D. Colo. 2022). Should both these camps of judges instead be taking the message that a "set of seemingly disparate cases" from the Court's more recent Terms "actually constitute … the contemporary nondelegation doctrine?" *Nondelegation Canons*, *supra*, at 316-17. Still other judges, after all, have been finding room to adopt, at least in bits, the history-based ideas in Justice Gorsuch's *Gundy* dissent. See, *e.g.*, *Jarkesy* v. *SEC*, 34 F.4th 446, 460 (5th Cir. 2022), *cert. granted* 143 S. Ct. 2688 (2023); *United States* v. *Melgar-Diaz*, 2 F.4th 1263, 1266-68 (9th Cir. 2021); *Granados* v. *Garland*, 17 F.4th 475, 480 (4th Cir. 2021).

Optimistically for *amici* and others who take the nondelegation doctrine seriously, these "[r]ecent events have upended any assumption that [it] will continue to go unenforced in the federal courts." Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 408 (2023). But what does renewed enforcement mean? At best, "[t]he only certainty about the federal nondelegation doctrine is that it is sure to change." Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1271 (2022). At worst, what should be a liberty-preserving safeguard will remain on life support until this Court intervenes. And no one will know what to do with it in the meantime.

II. The States Need A Strong Nondelegation Doctrine—And Modern Regulation Can Survive It.

With the nondelegation doctrine in a compromised state, the Court should grant this Petition to give it back energy and clear meaning. "[C]lassifying governmental power" is no doubt an "elusive venture," "[b]ut it is no less important for its difficulty." *Dep't of Transp.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). The Constitution requires "call[ing] foul" when necessary, after all. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). So the Court should not "shy away from tackling the difficult questions and enforcing the Constitution's checks on delegation." Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with A Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395, 448 (2020). Particularly not from *this* difficult question, as Madison called protecting the separation of powers "the great problem to be solved." THE FEDERALIST NO. 48 (J. Madison). Here, the costs for the States and our residents are too great to hold back. And to the extent they matter, worries that stepping in will stymie instead of protect American governance are overblown.

A. Starting first with the expected naysaying: Modern legislation will be fine with a more than in-name-only nondelegation doctrine. Practical worries should not be enough to upset the Constitution's structure, particularly when they turn on critiques inherent to deliberative lawmaking—a feature of our Republic and not a bug. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (explaining that the Founders "went to great lengths to make lawmaking

difficult"). Regardless, evidence doesn't support the idea that a robust separation of powers must give way to modern governance's realities.

For one thing, legislating by notice-and-comment rulemaking is not faster than legislating the old-fashioned way. Congress can act quickly when it wants to. President Bush signed the PATRIOT Act just three days after it was introduced. See Pub. L. No. 107-56, 115 Stat. 272 (2001). Congress moved fast during the coronavirus pandemic, too. See *Tiger Lily, LLC* v. *U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). Nor do agencies have the upper hand outside emergency situations: Agency rules take on average about 18 months. See Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (2012). For OSHA specifically, a study of 58 significant health and safety standards over 30 years saw that average balloon to *93 months*—almost two presidential terms. See U.S. GOV'T ACCOUNTABILITY OFF., GAOI-12-330, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 8 (2012), http://tinyurl.com/2dsvbxan.

Next, some say that Congress lacks agencies' assumed expertise, so revitalizing the nondelegation doctrine will hurt lawmaking. But even taking agency expertise as a (sometimes dubious) given, any benefits from "expert" bodies, insulated from the political process, cannot outweigh the Constitution. See *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting). Too much faith in "administrative expertise stands at odds

with" originalist understandings of "democracy itself." D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 88 (2017). The premise that Congress cannot harness enough subject-matter expertise to legislate is wrong, as well. Congress has its own experts to help ensure that laws are technically sound. Fact-gathering and investigation are the very reasons committees and subcommittees exist. Congress, too, can elicit testimony from others or commission reports from the executive branch, agencies like OSHA included. And these agencies could use their expertise to suggest laws for Congress to pass rather than enacting laws outside bicameralism-and-presentment limits as they currently do.

A more robust nondelegation doctrine also need not disrupt appropriate efficiency gains through delegation. Congress can keep any existing regulations it likes by adding them to the U.S. Code. It already does. See *Whitman*, 531 U.S. at 472 (noting "a subsequent Congress had incorporated the regulations into a revised version of the statute"). And going forward, it need not draft every fine detail into law. A more robust nondelegation doctrine would require Congress to *meaningfully* legislate—the kind of work it has shown itself more than equipped to do. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) (predicting that "[t]here should not be many" "extreme cases" requiring the Court to strike down "open-ended grants of authority," even under a more rigorous conception of the doctrine). As long as Congress makes the judgments critical to legislating and gives genuine guidance for agencies to fill in the gaps, agencies can still use lawful delegation to execute the law.

Our experience on the state level also gives confidence here. In many ways the "nondelegation doctrine has much greater practical significance" for the States than it does "at the federal level." MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 450 (4th ed. 2014). And many state courts have rebuffed the intelligible principle approach in favor of truer versions of the nondelegation doctrine—as of seven years ago state-court litigants had found success in nondelegation challenges at least 150 times. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017).

To be sure, these judicial moves change "legislative behavior and curb[] delegation." Walters & Ash, *supra*, at 415 (finding "some evidence" of these real-world changes when state courts enforce the nondelegation doctrine). But not in a negative way. Michigan's legislature, for instance, stepped up when the Michigan Supreme Court reinvigorated its state-law-based nondelegation doctrine and invalidated certain executive orders. See Samuel Dodge, *Whitmer bill signings include tightened sex offender registration protocols, boosts in medical staffing*, MLIVE (Dec. 30, 2020, 11:09 a.m.), https://bit.ly/3WXARXC. Life moved on in Michigan even though the state court "reached a result far out of step with federal law." Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 394 (2023). Indeed, "even the vast majority of [so-called] *weak* nondelegation state courts invalidate statutes from time to time on nondelegation grounds," yet no one has sounded the alarm in those States, either. *Id.* at 393. Real-world experience thus

confirms that the federal approach to nondelegation is the odd man out—and that a meaningful shift "would not lead to apocalyptic results." Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 305 (2022).

B. In contrast, a real nondelegation doctrine really matters to the States because it keeps their voice heard in the matters that affect them and their residents.

Federalism walks hand-in-hand with the separation of powers as two of the "most important" "structural protections" in our constitutional system. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). Separating powers on the federal level preserves the "integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Indeed, the "structure of the Federal Government" is the Constitution's "principal means" "to ensure the role of the States." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). So letting the federal government ignore these structural "constraints" comes "at the expense of state authority." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001).

We've seen that happen in the nondelegation context—an illusory doctrine helps explain the rise in the "hard questions" about federalism that infuses modern administrative-law cases. Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 53 (2008); see also Eric Berger, *Constitutional*

Conceits in Statutory Interpretation, 75 ADMIN. L. REV. 479, 505-08 (2023) (showing how nondelegation and federalism concepts jointly underlie several of the Court's recent administrative-law decisions). Little surprise there: Congress can be better "relied upon to respect the States." Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887, 891 (1997). So letting Congress give up too much statutory document control leads to a worse deal for the States.

Part of the reason is that "[m]embers of Congress are more responsive to the concerns of [their] local" constituencies than "centralized regulatory agencies." Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 221 (2001). State-focused "political checks and Congress' political accountability"—like state political party pressure and lobbying efforts—help, too. D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 633 (1985). Congress also has "peculiar institutional competence" in "adjusting … power relationships," including those between the States and the federal government. Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 696 (1976).

Even more practically, the legislative process has "more opportunities and more access points to provide input to Congress" than rulemaking does to the President and executive agencies. Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 365 (2010). The "'political safeguards'

that give states a voice" in lawmaking simply do not extend to a "voice in the executive branch's activities." Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 640 (2003). Again, that idea matters more than as an abstraction: OSHA provides "a kind of boilerplate" statement when it issues regulations, Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1425 (2008), but it doesn't explain how it weighs the costs and benefits. And while *amici* often argue the harms from excess regulation, here some insist OSHA rules are on the lower end of cost-per-life-saved, which potentially "suggests" "further opportunities for life-saving" measures. *Id.* at 1443. The States' lack of input combined with OSHA's missing congressional direction thus makes it hard to tell if OSHA is doing too much *or* too little. The nondelegation doctrine, by contrast, helps ensure that the on-ramps for meaningful state input remain open for all legislation.

The gains from all these structural protections get diluted if Congress can delegate at the broadest conceptual level. It's human nature to work more carefully when others are watching, after all. The nondelegation doctrine helps protect liberty by keeping lawmaking power "with the people's elected representatives" and away from unaccountable agency officials, *NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring)—while a weakened doctrine both "expand[s] the power of executive agencies" and "unravel[s] the institutional interests of Congress," Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015). At the same time, half-loaf approaches to nondelegation—such as

enforcing it through a canon of constitutional avoidance—can undermine accountability by upsetting "the fruits of legislative compromise." John M. Manning, *The Nondelegation Doctrine As A Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000).

Keeping lawmaking power in Congress is also important because lawmakers (like the rest of us) sometimes avoid tough decisions. Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017); see also Jonathan H. Adler & Christopher J. Walker, *Delegation & Time*, 105 IOWA L. REV. 1931, 1937 (2020) (pointing to "the fall of lawmaking by legislation"). That's what Justice Rehnquist thought was happening when Congress passed OSHA's governing statute: He found it "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 . . . to hammer out in the legislative forge." *Am. Petroleum Inst.*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment).

Worse, not enforcing nondelegation lets Congress both take unfair "credit for addressing a pressing social problem" it functionally offloaded to the executive, and then "blam[e] the executive" for whatever headaches that follow. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Legislators have admitted that happens. One confessed, for example, that "[w]hen hard decisions have to be made, [Congress] pass[es] the buck to the agencies with vaguely worded statutes." 122 CONG. REC. 31,628 (1976). Again, no wonder here. When "reasonableness

is enough to make a delegation proper," courts "allow[] the legislature to pass off responsibility for legislating, thereby endangering the liberties of the people." *In re Certified Questions From United States Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 47 (Mich. 2020). A meaningful nondelegation doctrine ensures Congress can't shirk—decisionmakers reap the benefits *and* bear the blame.

All of this is why the *amici* have long been beating this drum in all the administrative-law contexts that matter. We have urged the Court to keep agencies within the lines Congress *does* draw and to protect meaningful judicial review for agency rulemaking. See, *e.g.*, Br. of *Amici Curiae* State of West Virginia et al., *Corner Post, Inc.* v. *Bd. of Governors of the Fed. Res. Sys.*, No. 22-1008 (U.S. Nov. 20, 2023) (statute of limitations for challenges to agency rules); Br. of *Amici Curiae* State of West Virginia et al., *Loper Bright Enters.* v. *Raimondo*, No. 22-451 (U.S. July 24, 2023) (*Chevron* deference); Br. for Pet'r's, *State of West Virginia et al.* v. *EPA*, 597 U.S. 697 (2022) (No. 20-1530) (limits on agency rulemaking for major questions in areas of traditional state sovereignty). The nondelegation doctrine matters in those areas, too—in major-questions analysis, for instance, "without knowing what [the] nondelegation theory is, it becomes much harder to accurately apply a rule that ostensibly exists 'in service of' that underlying doctrine" (at least to some). Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 300 (2022) (quoting *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting)).

More to the point, lower courts' continued decisions upholding broad delegations show how agency

accountability only gets so far without holding Congress to task, as well. When Congress tells an agency—clearly—to go forth and regulate without guardrails, it's not the agency's fault when it does just that. But while Congress may sometimes be satisfied with that state of play, the States—and the Constitution, and the People whose liberty it protects—are not. The Court should intervene.

III. This Case Is A Good Vehicle.

This case is an excellent opportunity to revive the nondelegation doctrine.

OSHA's governing Act stands nearly alone in its delegatory breadth: "No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope." *Is OSHA Unconstitutional?*, *supra*, at 1448. The Secretary of Labor "may by rule promulgate, modify, or revoke any occupational safety or health standard" as part of Congress's directive to address the conditions of "every working man and woman in the Nation." 29 U.S.C. §§ 655(b), 651(b). That power "is not contingent on a fact-finding inquiry." Pet.App.43a. Instead—when it comes to the permanent safety standards at issue here—the only thing binding the Secretary's discretion is her judgment that a standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §§ 651(b)(3), 652(8). With a mandate like that, "it is not difficult to distinguish" the Act "from statutes that the Court has upheld" before. *Is OSHA Unconstitutional?*, *supra*, at 1448. In other words, this case offers the Court options to revitalize the nondelegation doctrine by

giving it new weight or by just making clear existing law still holds sway.

Start with reinvigorating the current test. OSHA's permanent-safety-setting authority flunks it; it "authorizes the making of codes" of conduct instead of "prescribe[es]" them. *Schechter Poultry*, 295 U.S. at 541. Under any ordinary understanding, "reasonably necessary" and "appropriate" do not provide intelligible limits when piled on in separate disjunctives. "'[N]ecessary" does not mean 'absolutely necessary,'" but what is convenient or useful. *United States* v. *Comstock*, 560 U.S. 126, 134 (2010). And Congress softened the agency's duty further to only what is "reasonably necessary." *Is OSHA Unconstitutional?*, *supra*, at 1408. "Appropriate," too, is an "all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015). But again, because Congress paired it with "reasonably necessary," the delegation may not "require" OSHA to incorporate any specific factors in its "rule of decision." *Is OSHA Unconstitutional?*, *supra*, at 1431.

Limits to open-ended language like this ("if any" even exist) thus "depend[] on the statutory context." Pet.App.55a. But OSHA's context is little help. The permanent safety standards test comes from "a mere definitional clause," not any "substantive provision instructing the Secretary what, exactly, [s]he is supposed to consider in deciding what to do." *Is OSHA Unconstitutional?*, *supra*, at 1408.

To be sure, the past ninety years have shown the intelligible principle test to be a tricky doctrine. Cf. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting)

(explaining the test's elements are not "readily enforceable by the courts"). But while the Court could take up this case to scrap it for something closer to the originalist view of acceptable delegation, it wouldn't have to. Darkening the line between "intelligible" and ephemeral would itself go a long way.

Along similar lines, the Court could use this case to tackle an important slice of the problem instead of all of it at once: The test for particularly broad delegations involving major policy questions. Pet.11-14. Perhaps the Act's expansive delegation could be justified if it conferred only "temporary" power, for instance, *Yakus*, 321 U.S. at 419, or reached only one industry, *N.Y. Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932) (railroad); *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 214 (radio); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 387 (1940) (coal). Instead, it gives the Secretary "broad power over *every* industry that has a workplace (probably all of them)." Pet.App.64a (emphasis in original). The host of regulations that follow bring compliance costs into the billions. See Harvey S. James Jr., *Estimating OSHA Compliance Costs*, 31 POL'Y SCIS. 297, 321-41 (1998) (estimating compliance with OSHA regulations in 1993 cost $33 billion).

Some judges have already reasoned that as Congress's delegations grow in scope, they "must be correspondingly more precise." *Synar* v. *United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (three-judge panel). Delegations that "encompass[] all American enterprise," for example—like this one—should require more rigorous standards than those limited to "a single industry." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.,*

UAW v. *OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). So again, this case comes with options how best to bring life into a nondelegation doctrine left too long to wither on the vine.

Finally, this case is a strong candidate for review because reversal would give meaningful relief to the States and to our residents—and in an area where the States could fill any gaps from paring back delegation. Regulations are expensive and regulated entities pass those costs onto consumers. On average, consumers face nearly 1% price increases for every 10% increase in overall federal regulation. D. Chambers, C.A. Collins, A. Krause, *How Do Federal Regulations Affect Consumer Prices? Analysis of the Regressive Effects of Regulation*, 180 PUB. CHOICE 57, 59 (2019), https://bit.ly/3rxlH0Q. OSHA's regulations obviously affect the bottom lines of the businesses in our States, too. Here, for instance, a small business with four full-time employees spends thousands of dollars annually complying with myriad regulations that may not even make their workplace safer. Pet.8-9.

Nor would granting review hurt the important goal of workplace safety. As Petitioner emphasizes, the case is about only one aspect of OSHA's regulatory authority. Pet.4, 23-24. So taking it up would bring accountability to a particularly standardless delegation, not erase OSHA's mandate wholesale. The States also have a vested interest in keeping workers safe, and their existing tools to do so will stay standing. States retain their federal-financing incentives to adopt workplace-safety plans "at least as effective" as OSHA's. 29 U.S.C. § 667(b), (c)(2). Currently, "22 OSHA-approved State Plans" exist for "both private sector and state and local government

workers," as well as seven "covering only state and local government workers." State Plans, U.S. DEP'T OF LABOR, http://tinyurl.com/25ucrc58 (last visited Feb. 27, 2024). The National Institute for Occupational Safety and Health will still provide States financial and technical support in integrating health and safety strategies into targeted workplaces. *State Occupational Safety & Health Surveillance Program*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://tinyurl.com/3hn93bex (last visited Feb. 27, 2024). And States have their own workplace-safety laws and regulations, as well as workers compensation laws that can further sharpen the incentives to make workplaces safe. See 6 David B. Torrey & Andrew E. Greenberg, *Secondary purpose: The safety objective*, *in* PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE § 1:24 (4th ed., Sept. 2022 update) (discussing studies showing workers-compensation-regimes' effects in reducing the level of fatalities in the workplace).

All told, delegation needs to be accountable. This is a strong case for the Court to make it so again.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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