No. 23-819

In the Supreme Court of the United States

ALLSTATES REFRACTORY CONTRACTORS, LLC,
Petitioner,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress delegated legislative power in violation of art. I, sec. 1 of the Constitution when it gave the Occupational Safety and Health Administration (OSHA) the power to make any workplace safety standard "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. To that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

This case interests Cato because the nondelegation doctrine is at the heart of the Constitution's separation of powers. The Framers understood that separating the legislative and executive powers was necessary to preserve individual liberty, and reinvigorating the nondelegation doctrine is vital to achieving that end.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The separation of powers is a fundamental aspect of our Constitution. The Framers understood that the "separate and distinct exercise of the different powers of government . . . [is] essential to the preservation of liberty." THE FEDERALIST NO. 51, at 289 (James Madison) (Clinton Rossiter ed., 1999). Yet inevitably, there is a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983). To protect liberty against this threat of encroachment, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, *supra*, at 290:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.

Id. at 289–90.

Intrinsic to this separation of powers scheme is the principle that no branch of government may delegate its assigned powers to the other branches. The judiciary has enforced this principle through the nondelegation doctrine. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). As stated in *A. L. A. Schechter Poultry Corp.*, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." 295 U.S. at 529.

The Occupational Safety and Health Act (the Act) violates this nondelegation doctrine. The Act grants the Secretary of Labor the authority to create any "occupational safety and health standard" so long as it is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). The Secretary has delegated this power to the Occupational Safety and Health Administration (OSHA).

The Act explicitly applies to every business "affecting commerce," *id.* § 652(5), which under this Court's current Commerce Clause doctrine can include even activities that are "local and . . . not . . . regarded as commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Therefore, the Act "confer[s] authority to regulate the entire economy on the basis of no more precise a standard than" what OSHA deems reasonable or appropriate. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001).

There is serious reason to doubt whether this Court's nondelegation test, the intelligible principle standard, is sufficient to preserve the complete separation of powers that the Framers designed, at least when that standard is applied with the permissive attitude this Court has taken for most of a century. *See Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting). But even applying the intelligible principle standard that this Court has articulated, the Act fails that test because it provides no real guidance for how OSHA should set safety standards.

If this Court upholds the Act, it is hard to see how any statute could ever violate the nondelegation doctrine. Given this Court's duty to hold Congress and

the executive accountable to constitutional limits, the complete abdication of the Court's role in policing this line would be lamentable.

ARGUMENT

I. THE NONDELEGATION DOCTRINE IS A KEY ASPECT OF THE CONSTITUTIONAL SEPARATION OF POWERS AND IT REQUIRES CONGRESS TO MAKE MAJOR POLICY DECISIONS.

The Founders justifiably feared what would happen if the legislative and executive powers were permitted to intermingle. Montesquieu, one of the thinkers most influential to the Founders, said that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (Franz Neumman ed., Thomas Nugent trans., Hafner Publ'g Co. 1949). James Madison agreed, proclaiming: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999).

When the separation of powers is eroded, it is easy to abuse power. A prosecutor can charge people with crimes and infractions never contemplated by the legislature, who are the representatives of the people. An unconstrained judge can rule against those he dislikes. The legislature can impose penalties on individuals for their past legal acts, or even just for who they are. And each can exempt themselves and their friends from legal accountability. As stated by

John Locke, another thinker with a profound influence on the Founders:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 74–75 (C. B. Macpherson ed., Hackett Publ'g Co. 2002) (1690).

Delegating legislative power also threatens accountability. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015). The result is a legislature whose members are less accountable both to their constituents and to each other. Delegation discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* When Congress delegates its power, it no longer needs to shoulder the responsibilities for the policies it has enabled. Instead, it retains plausible deniability as the executive confronts the hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 187 (Roger G. Noll ed., 1985). Rather than a clash of ambitions, "[l]awmakers may

prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." Rao, *supra*, at 1466.

Recognizing this danger, the Virginia Constitution of 1776, the Georgia Constitution of 1777, the Massachusetts Constitution of 1780, and the Vermont Constitution of 1786 all contained provisions explicitly prohibiting the legislative, executive, and judicial branches from exercising each other's powers. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 (2002); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291–92 (1993).

The nondelegation doctrine follows from these prohibitions on sharing government powers. If the executive cannot exercise legislative powers consistent with the Constitution, then the legislature cannot authorize the executive to do so by statute. As Locke explained:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.

LOCKE, *supra*, at 74–75.

The structure of the United States Constitution echoes these state constitutions and similarly requires a nondelegation doctrine. The Constitution vests the legislative, executive, and judicial powers in the legislative, executive, and judicial branches, respectively. *See* U.S. CONST. art. I, § 1; art. II, § 1, cl.

1; art. III, § 1. This implies that only the legislative branch may exercise legislative power, and so on—"[t]he Vesting Clauses, and indeed the entire structure of the Constitution, make no sense" if the branches of government may grant their distinct powers to each other. Lawson, *supra*, at 340. And because the federal government is one of limited and enumerated powers, the Constitution's lack of any affirmative grant of authority to delegate one branch's powers to another branch only further confirms that they have no such authority. *See id.* at 336–37.

For this reason, the Second Congress rejected an amendment that would have granted the president the power to determine postal routes. *Id.* at 402. One representative sarcastically announced that if the amendment passed he would "make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation." 3 Annals of Cong. 223 (1791). And Chief Justice Marshall similarly declared that "[i]t will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

This Court has never denied the validity of the nondelegation doctrine, despite the claims of some scholars that the doctrine is dead. *See, e.g.*, Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 624–25 (2017). Both *Panama Refining Co.* and *A. L. A. Schechter Poultry Corp.*, which struck down Congressional statutes for violating the nondelegation doctrine, are still good law. *See Gundy*, 139 S. Ct. at

2129 (plurality opinion). And all eight Justices who voted in the most recent nondelegation case, *Gundy*, affirmed the validity of the nondelegation doctrine in some form.

II. THIS COURT SHOULD REVISIT ITS NONDELEGATION JURISPRUDENCE.

The nondelegation doctrine is unquestionably important, but its importance alone does not answer how this Court should determine when a statute has unconstitutionally delegated legislative power. Although there may be some difficult cases, this Court must ultimately decide in each case whether Congress has impermissibly delegated to the executive the power to decide "those important subjects, which must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. (10 Wheat.) at 43.

The executive power to carry laws into effect frequently includes a degree of discretion. *See* Lawson, *supra*, at 338–39. Congress is not required to create "detailed codes which provide for every contingency." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960). If Congress were so required, it "simply c[ould] not do its job." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Therefore, there are many cases where the executive must make determinations regarding the meaning and content of a statute. Lawson, *supra*, at 339. Such decisions by the executive do not inherently involve the unconstitutional exercise of legislative power. *See Gundy* 139 S. Ct. at 2130 (plurality opinion) ("Congress may . . . confer substantial discretion on executive agencies to implement and enforce the laws.").

A. The Nondelegation Doctrine Requires Congress to Make Major Policy Decisions.

The line between permissible executive exercise of discretion and impermissible executive exercise of legislative power is the line between "those important subjects, which must be entirely regulated by the legislature itself" and "those 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." *Wayman*, 23 U.S. (10 Wheat.) at 43. Phrased differently, "there are cases in which . . . the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman* 531 U.S. at 487 (Thomas, J., concurring).

This Court affirmed that there is a nondelegation doctrine throughout the nineteenth century. In *Wayman*, this Court confronted a statute telling federal courts to apply state procedural laws "subject, . . . to such alterations and additions as the . . . Courts . . . shall, in their discretion, deem expedient." 23 U.S. (10 Wheat.) at 41. When this statute was challenged as unconstitutionally delegating legislative power to the courts, this Court upheld the statute on the grounds that Congress had made the major decision of what procedural rules the federal courts should use, and merely left the courts with authority to fill up the details. *See Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

Later cases followed this same principle. In *In re Kollock*, this Court reviewed a statute that imposed criminal penalties on retail dealers for selling margarine without properly marked and branded

packages, while granting the Commissioner of Internal Revenue the authority to determine what marks, brands, and packaging were proper. 165 U.S. 526 (1897). The Court upheld the law because Congress had thoroughly defined the crime and expressly granted an agency authority to make supplementary regulations to help execute the law. The Court contrasted this with an agency *itself* making an activity a crime by regulation, which would be impermissible. *See id.* at 534–35.

Admittedly, whether a statute crosses the line and unconstitutionally delegates legislative power can at times be difficult to discern. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). This difficulty has led some to argue that courts should not bother trying to enforce the line. *See, e.g.*, *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting) (arguing that the nondelegation doctrine "is not . . . enforceable by the courts"). However, "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). As Chief Justice Marshall wrote, "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

B. The Intelligible Principle Standard Is Contrary to the Constitution.

The intelligible principle standard, as this Court has applied it, strays from the constitutionally

mandated line that Congress must decide major policy questions.

Like many aspects of constitutional law, the "New Deal revolution" is the reason the nondelegation doctrine has strayed from its original meaning. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 826 (2018). The New Deal overturned traditional constitutional limits on federal power, separation of powers, and even state power. *See* Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997). The nondelegation doctrine was no exception. *See* Lawson, *The Rise and Rise of the Administrative State*, *supra*, at 1238–41.

"It is difficult to overstate how completely the New Dealers were alienated from" the Founding ideas of limited government and separation of powers. Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2136 (1999). The New Dealers fundamentally wished for the rule of experts insulated from checks and balances and even popular opinion. *See* Calabresi & Lawson, *supra*, at 830–31. Their revolution was largely successful because the populace granted the New Dealers some of the most sweeping electoral victories in American history in 1936 and 1940. *See* Griffin, *supra*, at 2130. During this period, the Court established a much weaker nondelegation doctrine by elevating the importance of a previously

insignificant quote in a previously insignificant opinion.

In *J.W. Hampton, Jr., & Co. v. United States*, this Court upheld against a nondelegation challenge a statute permitting the president to impose tariffs that compensated for lower costs of production in foreign countries compared to the United States. 276 U.S. 394 (1928). Noting that Congress can permit the executive to "fill up the details," the Court stated that "[i]f Congress shall lay down by legislative act an intelligible principle to which the [agency] . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

This language was not at the time thought to indicate some major doctrinal revolution, but rather to express the traditional nondelegation test. *See Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). In fact, the Justice who wrote this opinion seven years later wrote the opinions for both *Panama Refining Co.* and *A. L. A. Schechter Poultry Corp. See id.* Only in the post-New Deal era of the 1940s did this Court begin implementing its modern, more permissive intelligible principle standard. *See id.*

Under the modern intelligible principle standard, Congress no longer has to make the big decisions. This Court has not found a statute to violate the nondelegation doctrine since 1935. *See* Lawson, *The Rise and Rise of the Administrative State*, *supra*, at 1238–40. This Court has upheld delegations as broad and vague as the power to make regulations "as public convenience, interest, or necessity requires;"[2] "which

[2] *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214 (1943).

in his judgment will be generally fair and equitable;"[3] "necessary to avoid an imminent hazard to the public safety;"[4] and "requisite to protect the public health."[5]

It is hard to say that these statutes provide significantly more guidance than a statute telling an agency to make regulations that are "nice and good." *See* Lawson, *The Rise and Rise of the Administrative State*, *supra*, at 1240. And some of the statutes grant their respective agencies authority to make regulations affecting not just one aspect of one particular trade, but "the entire national economy." *Whitman*, 531 U.S. at 475. If the authority to make regulations affecting the entire economy based on what the regulator deems the public good is not the authority to decide major policy questions, nothing is.

C. A Majority of This Court Has Indicated Interest in Reconsidering the Intelligible Principle Standard.

A majority of the Justices of this Court have indicated an interest in reconsidering the current intelligible principle standard for the nondelegation doctrine.

When this Court previously considered the nondelegation doctrine in *Gundy v. United States*, the Court had only eight Justices, as newly appointed Justice Kavanaugh "took no part in the consideration or decision of th[e] case." 139 S. Ct. at 2130 (plurality

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[3] *Yakus v. United States*, 321 U.S. 414, 420 (1944) (internal quotation marks omitted).

[4] *Touby v. United States*, 500 U.S. 160, 163 (1991) (internal quotation marks omitted).

[5] *Whitman*, 531 U.S. at 472 (internal quotation marks omitted).

opinion). At the time, four Justices declined to reconsider the intelligible principle standard. *See id.* at 2123. Three Justices—Gorsuch, Thomas, and Chief Justice Roberts—contrarily argued that "the 'intelligible principle' . . . has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Id.* at 2139 (Gorsuch, J., dissenting). Although Justice Alito concurred with the judgment of the plurality and upheld the statute as containing an intelligible principle, he did so only because at the time no majority of sitting Justices was willing to reconsider the intelligible principle test. Alito stated that "[i]f a majority of this Court were willing to reconsider the approach we have taken [to the nondelegation doctrine] for the past 84 years, I would support that effort." *Id.* at 2131 (Alito, J., concurring). After Justice Kavanaugh took his seat on this Court, he too indicated his willingness to reconsider the nondelegation doctrine. *See Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring with the denial of cert.) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."). Thus, a total of five currently sitting Justices have indicated an interest in reconsidering the current intelligible principle standard. This case presents an ideal opportunity to do so.

III. THE OCCUPATIONAL HEALTH AND SAFETY ACT VIOLATES THE NONDELEGATION DOCTRINE.

The Occupational Health and Safety Act unconstitutionally delegates legislative power. Even

under the current intelligible principle standard, the Act violates the nondelegation doctrine. Thus, the Act is the perfect vehicle for revisiting this Court's nondelegation jurisprudence and reaffirming the vitality of the nondelegation doctrine.

The Act grants the Secretary of Labor (and, by delegation, OSHA) the authority to create "occupational safety and health standard[s]," 29 U.S.C. § 655(b), which the Act defines as "standard[s] . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.* § 652(8). This Court has held that this provision requires OSHA to find "a significant risk of material health impairment" before imposing a standard. *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 639 (1980) (plurality opinion). It is not clear the extent to which this requirement applies in cases not involving section 655(b)(5). *See* Pet. App. at 43a–46a.

For standards "dealing with toxic materials or harmful physical agents," the Act requires a standard that "most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity" even with lifetime exposure to the materials or agents. 29 U.S.C. § 655(b)(5). Section 655(b)(5) requires OSHA to "choose the most protective standard . . . consistent with feasibility," *Benzene Case*, 448 U.S. at 643 n.48, regardless of whether "the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction." *Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust)*, 452 U.S. 490, 506 (1981). However, for standards not involving toxic materials or harmful physical agents, section 652(8) provides the

only statutory guidance. *See Benzene Case*, 448 U.S. at 640 n.45. This Court has never determined the constitutionality of the Act in such a case.

A. The Act Unconstitutionally Grants OSHA the Authority to Decide Major Policy Questions.

The Act unconstitutionally grants OSHA the authority to decide major policy questions to an extent almost no other act does. Both the breadth of authority and the level of discretion it grants OSHA when making regulations are unsurpassed. Given that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," the combination present here makes the nondelegation case even stronger. *Whitman*, 531 U.S. at 475.

First off, the Act grants OSHA regulatory authority over "virtually every business in America." Pet. at 7. The Act states that "Each employer . . . shall comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. § 654(a)(2). The Act then defines "employer" as any "person engaged in a business affecting commerce who has employees," with the exception of all government employers.[6] *Id.* § 652(5). Furthermore, the phrase "affecting commerce" calls to mind *Wickard v. Filburn*, which held that Congress can regulate even activities "local and . . . not . . . regarded as commerce." 317 U.S.

[6] The United States Postal Service is, however, included within the sweep of the law. *See* 29 U.S.C. § 652(5). Furthermore, all other federal agencies are bound by OSHA standards under other parts of the Act. *See* Pet. at 7.

at 125. It would thus be exceedingly difficult to find an employer who is not covered by the Act.

Nor is it any real restriction that OSHA can only make standards regarding occupational health and safety. OSHA has successfully claimed the power to "regulate participants taking part in the normal activities of sports events or entertainment shows." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (Kavanaugh, J., dissenting). The D.C. Circuit's *SeaWorld* decision appears to allow OSHA to "ban . . . tackling in the NFL or excessive speed in NASCAR races" under the Act. *Id.* at 1220.

Furthermore, the scope of discretion granted to OSHA is enormous. Section 652(8) merely requires workplace safety standards "reasonably necessary or appropriate" in the disjunctive. Pet. at 31. How should OSHA determine what is "appropriate?" The Act does not say. Nor do "broad purpose statements that grant[] wide discretion" adequately provide a standard. *See* Pet. App. at 56a. The prohibition on using cost-benefit analysis does not apply to section 652(8), as it stems from section 652(b)(5)'s language. *See Cotton Dust*, 452 U.S. at 506. But the Act does not appear to *require* the use of cost-benefit analysis, either—instead, OSHA is given complete discretion whether to apply it or not. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1429 (2008). "A reader might be tempted to conclude that Congress has said, 'make things better,' without giving the Secretary guidance about how, exactly, he is to go about accomplishing that task." *Id.* at 1409. Ultimately, "OSHA's unilateral view of what is 'appropriate' . . . is no limit at all." Pet. at 3.

B. The Act Violates the Intelligible Principle Test.

Even under the intelligible principle standard for evaluating nondelegation claims that this Court currently applies, the Act is unconstitutional. *See* Sunstein, *supra*, at 1407. In fact, besides the Sixth Circuit's decision below, only two circuits have held that the Act does not violate the nondelegation doctrine, the Seventh and D.C. Circuits.

The Seventh Circuit's decision was made before this Court decided the *Benzene Case*. *See Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125–26 (7th Cir. 1978). Furthermore, the rejection of the nondelegation challenge was in part based on irrelevant provisions, including section 655(b)(5), which does not apply to safety and health standards not involving toxic materials or harmful physical agents, and section 655(b)(6), which governs exemptions from occupational safety and health standards, not the standards themselves.

The D.C. Circuit has upheld the Act against a nondelegation challenge three times. *See UAW v. OSHA (UAW I)*, 938 F.2d 1310 (D.C. Cir. 1991); *UAW v. OSHA (UAW II)*, 37 F.3d 665 (D.C. Cir. 1994); *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743 (D.C. Cir. 2011). The first two times, it upheld the Act based on narrowing constructions proposed by OSHA. *See* Sunstein, *supra*, at 1417–21. But this Court in *Whitman* rejected the idea that "an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," undermining the rationale of those cases. 531 U.S. at 473. When the D.C. Circuit again upheld the Act against a nondelegation challenge, it did so based on a single

paragraph of reasoning asserting that the Act's delegation of authority is no broader than those this Court has upheld in other cases. *See Nat'l Mar. Safety Ass'n*, 649 F.3d at 755–56.

That assertion is simply untrue: "No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope, and it is not difficult to distinguish [it] from statutes that the Court has upheld." Sunstein, *supra*, at 1448.

This Court in *Panama Refining Co.* and *A. L. A. Schechter Poultry Corp.* provided a two-part test to determine whether a statute violates the nondelegation doctrine: "(1) 'whether the Congress has required any finding by the President in the exercise of the authority,' and (2) 'whether the Congress has set up a standard for the President's action.'" Pet. App. at 34a (quoting *Panama Refining Co.*, 293 U.S. at 415). All previous intelligible principle decisions of this Court meet at least one of those two requirements. *See id.*

The statute upheld in *Whitman* was the broadest delegation this Court has upheld given the combination of a vague standard and huge economic impact. But that delegation was still less broad than this Act. *Whitman*'s statute required the EPA to impose air quality standards "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). This Court defined "requisite" to mean "sufficient, but not more than necessary." *Whitman*, 531 U.S. at 473 (internal quotation omitted). Dictionaries define "requisite" as "necessary or needed for a particular purpose." *Requisite*, CAMBRIDGE DICTIONARY (last visited Feb.

24, 2024);[7] *accord Requisite*, MERRIAM WEBSTER (last visited Feb. 24, 2024);[8] *Requisite*, DICTIONARY.COM (last visited Feb. 24, 2024).[9] This Court explicitly compared that standard to the Act's section 655(b)(5), which requires standards ensuring "to the extent feasible . . . that no employee will suffer any impairment of health." *Whitman*, 531 U.S. at 473. That provision restricted the Occupational Safety and Health Administration to "the most protective standard." *Benzene Case*, 448 U.S. at 643 n.48. Under section 655(b)(5), OSHA thus cannot consider cost-benefit analysis beyond feasibility. *See Cotton Dust*, 452 U.S. at 509–13. Both provisions also require the regulations to be based on criteria such as the "the latest scientific knowledge" or "the best available evidence." *Whitman*, 531 U.S. at 473; 29 U.S.C. § 655(b)(5).

The Act's section 652(8) alone has no such requirements. Rather than requiring standards "necessary" to protect workers' health, it merely requires those "reasonably necessary," which it associates with "appropriate." 29 U.S.C. § 652(8). This is a looser standard. Additionally, the Act appears to give OSHA discretion whether to use cost-benefit analysis when formulating standards. Even the statute in *Whitman* did not leave such a choice up to the agency. *See* Sunstein, *supra*, at 1431.

Finally, the Act does not require the best or latest scientific knowledge. It might not even require an agency finding that there is "a significant risk of

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[7] Available at http://tinyurl.com/4kjbxmkn.

[8] Available at http://tinyurl.com/2dabt5we.

[9] Available at http://tinyurl.com/y5825b7c.

material health impairment." *See* Pet. App. at 43a–46a (arguing that *Cotton Dust* clarified that section 652(8) only imposes that requirement when combined with section 655(b)(5)). The lack of obvious required criteria binding OSHA's discretion is a nondelegation warning flag. This last part is key—some of the statutes this Court upheld against nondelegation challenges contained language similarly fuzzy to "reasonably necessary or appropriate," but they all were accompanied by other provisions requiring certain fact-finding, situations, criteria, or considerations that this Act appears to lack. *See* Pet. App. at 53a.

Given the Act's clear unconstitutionality, if this Court wishes to reconsider its nondelegation jurisprudence, or even merely give the doctrine some teeth, there is no better case to do so than this one.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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