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.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*), violates the nondelegation doctrine by empowering the Secretary of Labor to issue occupational safety standards.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Allstates Refractory Contractors, LLC v. *Su*,
No. 22-3772 (Aug. 23, 2023)

United States District Court (N.D. Ohio):

Allstates Refractory Contractors, LLC v. *Walsh*,
No. 21-cv-1864 (Sept. 2, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 79 F.4th 755. The opinion of the district court (Pet. App. 69a-82a) is reported at 625 F. Supp. 3d 676.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2023. A petition for rehearing was denied on December 20, 2023 (Pet. App. 83a-84a). The petition for a writ of certiorari was filed on January 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (Act), Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*), empowers the Secretary of Labor, acting through the Occupational Safety and Health Administration

(OSHA), to promulgate and enforce standards for safety and health in the workplace. See 29 U.S.C. 655. An employer who violates a standard is subject to civil penalties and, in some cases, to criminal punishment. See 29 U.S.C. 666.

The Act authorizes three types of standards: national consensus standards, see 29 U.S.C. 655(a); permanent standards, see 29 U.S.C. 655(b); and emergency standards, see 29 U.S.C. 655(c). This case concerns permanent standards, which the Secretary may issue only after notice-and-comment rulemaking and the opportunity for a hearing. See 29 U.S.C. 655(b). A permanent standard must require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8).

2. Petitioner is a general contractor that serves the glass, metal, and petrochemical industries. See Pet. App. 70a-71a. In 2019, after an incident in which a "catwalk brace fell and injured a worker below," *id.* at 71a (citation omitted), OSHA assessed a civil penalty against petitioner for violating occupational safety standards for falling-object protection and cited petitioner for violating standards involving hand and power tools, see Pet. 9. Petitioner settled the matter with the agency, agreeing to pay a penalty of $5967. See Pet. App. 71a.

Two years later, petitioner filed this suit in the United States District Court for the Northern District of Ohio. See Compl. 1. Petitioner claimed that the Act violates the nondelegation doctrine by empowering the Secretary to issue permanent safety standards. See Compl. 30-31. It sought a declaration that the provision

authorizing such standards violates the Constitution, as well as a universal injunction prohibiting the agency from enforcing the standards against employers. See Compl. 31.

The district court granted summary judgment for the government. See Pet. App. 69a-82a. It explained that Article I allows Congress to grant rulemaking power to an executive agency so long as Congress prescribes an "intelligible principle" to guide the agency's exercise of authority. *Id.* at 76a (citation omitted). The court concluded that the Act satisfies that test by requiring "a threshold finding of significant risk" and by requiring standards to be " 'reasonably necessary or appropriate' to mitigate that risk." *Id.* at 79a (citation omitted).

3. The Sixth Circuit affirmed. See Pet. App. 1a-68a. The court determined that the Act "passes the 'intelligible principle' test." *Id.* at 13a. It emphasized that the Act "sets forth a host of principles, purposes, and goals that the agency must consider or fulfill"; that the Act "significantly limits OSHA's discretion in deciding whether it may issue a particular occupational safety and health standard"; and that "OSHA may adopt only those conditions that are 'reasonably necessary or appropriate' to improve workplace safety." *Id.* at 13a-15a.

Judge Nalbandian dissented. Pet. App. 24a-68a. He expressed the view that the "permanent standards provision (1) does not require any preliminary factfinding or a particular situation to arise to trigger agency action and (2) does not contain a standard that sufficiently guides the exercise of the broad discretion [the Act] delegates to the Secretary." *Id.* at 24a.

ARGUMENT

Petitioner renews its contention (Pet. 10-34) that the provision of the Occupational Safety and Health Act authorizing the Secretary to issue permanent safety standards, 29 U.S.C. 655(b), violates the nondelegation doctrine. The court of appeals correctly rejected that contention, which seeks to invalidate a statutory provision that was enacted more than 50 years ago and has been the basis for the issuance of numerous safety standards that have greatly reduced occupational injuries and deaths over that time. The decision below does not conflict with any decision of this Court or of any other court of appeals, and indeed two other courts of appeals have likewise rejected nondelegation challenges to the Act. The petition for a writ of certiorari should be denied.*

1. Article I vests the "legislative Powers" granted by the Constitution in Congress. U.S. Const. Art. I, § 1. Although Congress may not delegate legislative powers to the Executive, it may seek the Executive's "assistance" by "vesting discretion in [executive] officers to make public regulations interpreting a statute and directing the details of its execution." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). If a statute sets forth an "intelligible principle to which the person or body authorized to [act] is directed to conform," it effects a permissible grant of implementing authority to the Executive rather than a forbidden delegation of legislative power. *Id.* at 409.

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* Relying on this Court's decision in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), the government argued to the district court that it lacked jurisdiction over this case. See Pet. App. 71a-74a. But the government did not renew that argument in the court of appeals and does not rely on it here.

Applying those principles, this Court has "over and over upheld even very broad delegations." *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion). For example, the Court has upheld statutes that empowered executive agencies to regulate in the "public interest," see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); to set prices that are "fair and equitable," see *Yakus* v. *United States*, 321 U.S. 414, 422 (1944); and to establish air-quality standards that are "requisite to protect the public health," see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472-476 (2001).

The Occupational Safety and Health Act likewise complies with the Constitution. The Act sets forth an intelligible principle to guide the Secretary's issuance of permanent safety standards: A standard must require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8). As the court of appeals observed, that criterion is "materially similar" to other statutory criteria for agency action—such as "'public interest,'" "'fair and equitable,'" and "'requisite to protect the public health'"—that this Court has upheld as sufficient to guide the agency vested with statutory authority. Pet. App. 16a-17a (citations omitted).

2. Petitioner argues that the "'reasonably necessary or appropriate'" standard is "no standard at all" and that the Act imposes no "meaningful constraint" on the Secretary's power. Pet. 27 (citation and emphasis omitted). That contention is incorrect.

To begin, a permanent safety standard must concern "'*occupational* safety'"—that is, the safety of "employ-

ment and places of employment." 29 U.S.C. 652(8) (emphasis added). The statute thus authorizes only "*workplace* safety standards" addressing "'work-related dangers,'" not "broad public health measures" addressing "the hazards of daily life." *National Federation of Independent Business* v. *OSHA*, 595 U.S. 109, 117-118 (2022) (*NFIB*) (per curiam) (citation omitted). For example, this Court recently held that the Act did not empower the Secretary to issue a COVID-19 vaccine mandate, which crossed the line between addressing "occupational risk" and addressing "risk more generally." *Id.* at 119.

In addition, a standard must be "reasonably necessary or appropriate to provide *safe* * * * employment and places of employment." 29 U.S.C. 652(8) (emphasis added). In *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*), a plurality of this Court determined that "'safe' is not the equivalent of 'risk-free'" and that the Secretary may issue a permanent safety standard only if she makes a threshold finding that workers face "a significant risk of harm." *Id.* at 642 (opinion of Stevens, J.). A year later, the Court adopted the plurality's interpretation in *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490 (1981) (*Cotton Dust*). See *id.* at 513 n.32. Although petitioner now suggests that the statute "requires no fact-finding by OSHA before it acts," Pet. 27, it "concede[d]" in the district court that "the Act requires [OSHA to make] a threshold finding of significant risk," Pet. App. 79a.

Petitioner's contention that no fact-finding by OSHA is required before it acts is further refuted by other provisions of the Act. The Act provides for the Secretary to initiate the standard-setting process if she "determines"

—on the basis of information submitted by organizations of employers or employees, national standard-setting organizations, the National Institute for Occupational Safety and Health (NIOSH), or a State, or on the basis of information developed by the Secretary—that "a rule should be promulgated to serve the objectives of [the Act]." 29 U.S.C. 655(b)(1). The Secretary then must institute a rulemaking proceeding that includes publication of a proposed rule for public comment and an opportunity for a hearing. 29 U.S.C. 655(b)(2)-(4). Those elaborate provisions thus establish a factual record to support a decision by OSHA to issue or decline to issue a permanent safety standard.

Even when OSHA determines that a significant risk exists, moreover, a permanent safety standard must be "reasonably necessary or appropriate" to address that risk. 29 U.S.C. 652(8). "[A] standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or appropriate' under the Act." *Cotton Dust*, 452 U.S. at 513 n.31. The Act thus requires that a safety standard be economically and technologically feasible.

Other provisions of the Act further constrain and guide the Secretary's authority. For example, the Act directed the Secretary, within the first two years after enactment, to promulgate "'national consensus standard[s]'"—that is, standards that accord with those adopted by "nationally recognized standards-producing organization[s]"—and "any established Federal standard" promulgated under other federal law. 29 U.S.C. 652(9), 655(a). If the Secretary later issues a permanent standard that "differs substantially from an existing national consensus standard," she must explain why the permanent standard "will better effectuate the pur-

poses" of the Act. 29 U.S.C. 655(b)(8). Those preexisting consensus standards represent a significant body of experience and expert judgment for the aspects of workplace safety addressed by those standards—as well as some guidance for approaches the Secretary might take more generally in adopting other standards to protect against significant workplace risks. And again, research and recommendations by NIOSH and others, as well as OSHA's own expertise and accumulated experience, enhance the foundation on which OSHA acts. The Act's terms thus also "derive much meaningful content from the purpose of the Act, its factual background, and the statutory context in which they appear." *American Power Co.* v. *SEC*, 329 U.S. 90, 106 (1946).

In sum, the Act provides meaningful guideposts for, and imposes meaningful constraints on, the Secretary's issuance of permanent safety standards. Only by ignoring those provisions can petitioner assert that the Act lacks an intelligible principle or that it grants the Executive "'nearly unfettered discretion' to make whatever workplace safety rules it wants." Pet. 3 (citation omitted).

3. Petitioner also argues (Pet. 14) that this Court should adopt a new nondelegation test under which a statute violates Article I if it empowers an executive agency to resolve "major policy questions." That theory, too, is incorrect.

For the last 96 years, this Court has resolved nondelegation challenges by asking whether the statute lays down an "intelligible principle" to guide the executive agency's exercise of discretion. *J.W. Hampton*, 276 U.S. at 409. Applying that test, the Court has "over and over upheld even very broad delegations." *Gundy*, 139

S. Ct. at 2129 (plurality opinion). Petitioner asks the Court (Pet. 28) to revisit those precedents and to adopt a new nondelegation test, and one with no identifiable concrete content or parameters. But the doctrine of *stare decisis* counsels against revising the approach that the Court has applied—and on which Congress, the Executive, and the Nation have all relied—for nearly a century.

Petitioner, moreover, fails to show that the Act violates even the new test that it proposes, much less that this case would be an appropriate one in which to consider it. Petitioner does not identify (Pet. 20) any specific permanent safety standard that, in its view, involves a major question—that is, an "extraordinary" issue of "staggering" "'economic and political significance.'" *Biden* v. *Nebraska*, 600 U.S. 477, 502-503 (2023) (citation omitted). If the Secretary were to issue a novel standard of such extraordinary significance, the Court could determine whether, under the major-questions doctrine, the Act should be read to authorize the standard in the first place. See *NFIB*, 595 U.S. at 117-120 (applying the major-questions doctrine to hold that the Act did not authorize a COVID-19 vaccine mandate). If the Act did not authorize such a standard, the Court would have no occasion to consider whether that the Act violates the Constitution.

Petitioner has, in addition, challenged the Act on its face and in the abstract, not as applied to a particular set of concrete circumstances. See Pet. App. 4a. In order to prevail on that challenge, petitioner must show that the provision authorizing the Secretary to issue permanent safety standards is "unconstitutional in all its applications." *Bucklew* v. *Precythe*, 587 U.S. 119, 138 (2019); see *United States* v. *Salerno*, 481 U.S. 739, 745

(1987). But petitioner has not shown that *all* permanent safety standards involve major questions. Petitioner cannot credibly maintain (Pet. 20), for instance, that the standards governing protection from falling objects, see, *e.g.*, 29 C.F.R. 1926.950, resolve an "extraordinary" issue of "staggering" "'economic and political significance.'" *Nebraska*, 600 U.S. at 502-503 (citation omitted). That alone defeats petitioner's nondelegation claim.

Petitioner asserts (Pet. 20) that, even if each safety standard is "inoffensive on its own," the "collective sum" of the standards constitutes "a major policy initiative." But this Court has never suggested that Congress's grant of authority to an executive agency violates Article I on the theory that the "collective sum" of the agency's acts is "major." Petitioner cites (Pet. 28) *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), but in those cases, the Court held that Congress had acted unconstitutionally by failing to prescribe an intelligible principle to guide the Executive's exercise of discretion. See *Schechter Poultry*, 295 U.S. at 537-538 ("an unfettered discretion to make whatever laws he thinks may be needed or advisable"); *Panama Refining*, 293 U.S. at 430 ("Congress has declared no policy, has established no standard, has laid down no rule."). As explained above, Congress has laid down an intelligible principle here, see pp. 4-5, *supra*, together with other provisions to guide and constrain the Secretary's actions.

4. As petitioner concedes (Pet. 23), "the question here does not involve a circuit split." The three courts of appeals that have considered the question—the Sixth, Seventh, and D.C. Circuits—have all determined

that the statutory provision empowering the Secretary to promulgate permanent safety standards complies with the nondelegation doctrine. See Pet. App. 22a-23a (6th Cir.); *Blocksom & Co.* v. *Marshall*, 582 F.2d 1122, 1125-1126 (7th Cir. 1978); *National Maritime Safety Ass'n* v. *OSHA*, 649 F.3d 743, 755-756 (D.C. Cir. 2011), cert. denied, 566 U.S. 936 (2012).

Petitioner contends (Pet. 23) that the decision below created "a circuit split" with the Third and D.C. Circuits "as to whether [29 U.S.C. 655(b)] is mandatory"—that is, whether "OSHA *must* regulate in the face of a significant risk." But petitioner has not sought certiorari on the question whether the statute requires the agency to regulate if it finds a significant risk to safety in a particular context. See Pet. i. And petitioner, which was cited under and apparently objects to permanent standards that OSHA *did* issue, is not well-positioned to raise a concern that OSHA might decline to issue a standard in such a situation. Granting the petition for a writ of certiorari thus would not give this Court an opportunity to directly address that alleged circuit conflict. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, of fairly included therein, will be considered by the Court.").

5. Even if this Court were inclined to accept an invitation to reconsider its approach to the nondelegation doctrine in some setting, this case would be a poor vehicle for doing so. Petitioner's claim rests on the premise (Pet. 3) that the Act empowers OSHA "to make whatever workplace safety rules it wants for almost every company in America." The Act, however, requires that a permanent safety standard be "reasonably necessary or appropriate" to provide safe employment and places of employment. And as explained above, petitioner's

premise conflicts with this Court's cases interpreting the Act. Those cases make clear, for example, that permanent safety standards must address occupational risk rather than risk in general, that the Secretary may issue such standards only after finding a significant risk, and that such standards must be technologically and economically feasible. See pp. 5-8, *supra*. Notably, the Court adopted those limiting constructions partly in order to avoid nondelegation concerns. See, *e.g.*, *Benzene*, 448 U.S. at 646 (opinion of Stevens, J.). In addition, the Secretary may adopt or revise permanent safety standards only by following extensive procedures that ensure broad input and the creation of a factual record on which to base her decisions. Petitioner, however, asks the Court to ignore those limits and then to invalidate the Act on the ground that the Secretary's authority lacks meaningful limits. The Court should decline that invitation.

Petitioner also states that the petition for a writ of certiorari asks, "[a]t bottom," "whether Article I includes a 'nondelegation principle for major questions.'" Pet. 3 (citation omitted). Yet petitioner fails to identify any particular standard that, in its view, involves a major question. See p. 9, *supra*. This case accordingly would not afford this Court an opportunity to consider the new theory that petitioner advocates.

Finally, petitioner errs in suggesting (Pet. 23) that "holding this delegation unconstitutional will reinvigorate the nondelegation doctrine without causing severe practical consequences." Before the Act's enactment, "workplace safety was addressed in a patchwork manner by federal and state regulations and, to a degree, employers' voluntary efforts." *Kiewit Power Constructors Co.* v. *Secretary of Labor*, 959 F.3d 381, 385 (D.C.

Cir. 2020) (citing S. Rep. No. 1282, 91st Cong., 2d Sess. 3-4 (1970)). But those "measures were largely ineffective," and "[i]n the four years preceding the Act's adoption, more Americans were killed at work than in the Vietnam War." *Ibid.*

Since the Act's enactment, the incidence rates of nonfatal occupational injuries and illnesses have fallen significantly—from 10.9 cases per 100 full-time-equivalent workers in 1972 to 2.8 cases per 100 full-time-equivalent workers in 2018. See Jeff Brown, U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Nearly 50 years of occupational safety and health data* (July 2020). Workplace fatalities have also decreased substantially, "from about 38 worker deaths a day in 1970 to 15 a day in 2022." OSHA, U.S. Dep't of Labor, *Commonly Used Statistics*. Today, safety standards promulgated under the Act protect workers from hazards such as being struck by foreign objects, see 59 Fed. Reg. 16,334 (Apr. 6, 1994); electric shock, see 79 Fed. Reg. 20,316 (Apr. 11, 2014); asphyxiation and chemical burns, see 80 Fed. Reg. 25,366 (May 4, 2015); fires, see 45 Fed. Reg. 60,656 (Sept. 12, 1980); and falls, see 81 Fed. Reg. 82,494 (Nov. 18, 2016). Adopting petitioner's theory apparently would invalidate those and other permanent safety standards, undermining Congress's efforts "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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