No. 23-819

IN THE

Supreme Court of the United States

ALLSTATES REFRACTORY CONTRACTORS, LLC,
Petitioner,

v.

JULIE A. SU, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Congress has authorized OSHA to dictate whatever safety rules it deems "appropriate" for every workplace in the nation. The Government cannot seriously dispute that this is a massive grant of power over a major policy question. Nor does it deny that Congress has left OSHA to define "appropriate" safety rules wholly on its own. And it does not even attempt to dispute that this broad delegation is without parallel in the U.S. Code.

Indeed, the Government's breezy response does not say much at all. It never tries to defend the Sixth Circuit's reasoning below. It cavalierly dismisses the "nondelegation principle for major questions"—which dates back to Chief Justice Marshall, was noted by "then-Justice Rehnquist some 40 years ago," "built on" by Justice Gorsuch in his "thoughtful" *Gundy* opinion, and recently flagged by Justice Kavanaugh as worth "further consideration." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (*Paul*). Even the Government's supposed limiting construction adds next to nothing: On its own reading, OSHA has unbridled power to make up safety rules for any workplace in America whenever it identifies a "significant risk" (as defined by OSHA itself), so long as its chosen rule is not physically *impossible*. Those, of course, are not limits at all—at least if the nondelegation doctrine means anything.

But the Government's basic submission is that it is meaningless. The subtext of its brief is quite clear: The Court has rejected every nondelegation challenge for decades, and declined every recent petition urging a

change in course. No need to look closely at the details, please just add this one to the existing pile.

If that is the state of the nondelegation doctrine, it is time to let the rest of the country in on the secret. It is only fair to let members of Congress know that they can start skipping the hard votes and instead just tell bureaucrats to make "appropriate" rules on all the tough questions. And it is only right for ordinary Americans to be made aware that the real answer to "who decides" the laws that govern their lives is neither the President nor Congress—but instead, the vast (often wholly unaccountable) bureaucracy, which has been entrusted to "appropriately" cash the blank checks given to them by the political branches.

But to the extent the nondelegation doctrine *does* mean something, there is no better opportunity to say so. The Government essentially concedes that this is a clean vehicle. And it does not seriously contest that the statute here "expressly and specifically delegate[s]" to OSHA the "authority to decide [a] major policy question[]." *Paul*, 140 S. Ct. at 342. As even sympathizers of the administrative state can agree, this is a case where "the nondelegation problem … seems real." Cass. R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1409 (2008). And that is because this case squarely implicates the doctrine's very core.

As the Government tacitly accepts, this petition thus reduces to one question: Whether the nondelegation doctrine still has any vitality, or whether it should be permanently relegated to niche academic conferences and contrarian student notes. Either way, it is past time for the American people to know. And it is near impossible to imagine a better case to give the answer.

ARGUMENT

1. The Government cannot explain how the statute here could satisfy a constitutional "nondelegation principle for major questions." *Paul*, 140 S. Ct. at 342.

The Government does not deny that OSHA's authority to determine "appropriate" safety rules for every workplace in America implicates a major question of federal policy. Nor could it. This authority covers millions of businesses; concerns billions of dollars; and involves innumerable "hard choices" balancing worker safety and economic growth. *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 681 (1980) (Rehnquist, J., concurring in the judgment). That is about as major a question as it gets.

The Government's only reply is that any "nondelegation principle for major questions" is not implicated here, because Allstates has not "identif[ied] any specific permanent safety standard that … involves a major question." BIO 9-10. This misses the point.

The issue is not that OSHA lacks the *statutory authority* to enact some particular major regulation. The point is that OSHA's *statutory grant* is itself unlawful, because its uncanalized delegation violates Article I. Here, the delegation is the defect.

Suppose Congress passed a law telling the IRS to impose "appropriate" taxes. It would be no defense that this open-ended grant authorized the agency to set both major and minor tax policies. The constitutional infirmity would come from Congress handing such a remarkable swath of its legislative power over to a federal agency. *Any* exercise of that broad power would violate Article I. And the same is true here.

Simply put, the problem is that Congress has empowered OSHA to answer for itself a major question of federal policy—what are the "appropriate" safety standards for every workplace in the country? It does not matter *how OSHA* goes about answering that question. What matters is that it *is OSHA* answering the question—and not Congress.[1]

2. The Government nonetheless insists that this capacious grant of power is constitutionally kosher under this Court's precedents. But this argument flows from the same basic mistake.

As Justice Kavanaugh has explained, this Court has never encountered—let alone sanctioned—a federal statute that "expressly and specifically delegates" the "authority to decide [a] major policy question[]." *Paul*, 140 S. Ct. at 342. The Government offers no counterexample. Nor does it deny that the statute here does precisely that.

The Government simply responds that this Court has allowed some "very broad delegations" and—*ipso facto*—OSHA's must pass muster too. BIO 5. But again, none of those cases involved an express and specific delegation to an agency to resolve a major question. *See Gundy v. United States*, 139 S. Ct. 2116, 2140-41 (2019) (Gorsuch, J., dissenting). And none involved a delegation like this one, where Congress has given away *so much* power with *so little* guidance—as Judge Nalbandian catalogued below. Pet.App.53a-54a.

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[1] The Government's reference to *United States v. Salerno*, 481 U.S. 739 (1987), misses the mark. BIO 9. For a nondelegation challenge, the constitutional defect inheres within the grant of authority, not its application. Any use of that authority is thus unlawful; it is all fruit of the same constitutionally poisonous tree.

The Government engages with none of this, because it is quite apparent that it does not think it has to. Instead, it just offers up a string-cite and moves along—taking this Court's cases for the proposition that nondelegation is no longer a serious doctrine.[2]

Indeed, the Government thinks so little of the nondelegation doctrine that it even rejects the idea that Congress cannot punt major questions to agencies. BIO 8-10. At that point, though, it is hard to see what remains. Truly, if the nondelegation doctrine means *anything*, it means that "important choices of social policy" must be made by Congress alone. *Indus. Union*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2380-81 (2023) (Barret, J., concurring) ("[I]n a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"). And there is no reason to think this principle has become moribund since the New Deal. Rather, this Court has reaffirmed its vitality across all of its major-questions cases. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022); *see also Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting); *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

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[2] The Government does not argue that the *Benzene* Case addressed the nondelegation question here. Nor could it. There, on even the plurality's view, OSHA's permanent *health* standard authority passed muster only because it was coupled with the "highly protective standard" included in 29 U.S.C. § 655(b)(5). *Indus. Union*, 448 U.S. at 644 n.48. But no such additional mandate applies to *safety* standards; they simply must be "appropriate." *Id.* at 640 n.45.

For its part, the Government says a "nondelegation principle for major questions" would be nonsensical, as it would have no "concrete content or parameters." BIO 9. But that charge is just derivative of the Government's contempt for the doctrine, in general. Applying such a principle here would not be without "content"—it would be applying the precise body of major questions law that this Court has already adopted in the statutory context, for deciding when a policy question is in fact "major." And holding that Congress cannot punt major questions to bureaucrats would not involve overturning precedent. The opposite. It is exactly what this Court's bedrock cases already compel. *See, e.g.*, *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (Marshall, C.J.) (distinguishing "fill[ing] up the details" from "important subjects, which must be entirely regulated by the legislature.").

Whatever the precise bounds of the nondelegation doctrine, its core must be that Congress cannot "expressly and specifically delegate[]" to agencies the general authority to "decide major policy questions." *Paul*, 140 S. Ct. at 342. As for those questions, such "decisions must be made by Congress and the President," leaving "agencies the authority to decide less-major or fill-up-the-details" questions. *Id.*; *see also Indus. Union*, 448 U.S. at 684-85 (Rehnquist, J., concurring in the judgment) (Congress may use "broad delegations" for "a particular policy or situation," but cannot delegate away the "important choices of social policy").

3. There is no question that Congress failed that command here: It did not break up the question of workplace safety into "less-major" decisions across

specific industries; nor did it leave for OSHA only "fill-up-the-details" choices regarding such standards.

The Government does not even attempt to dispute this. Nor does it make any effort to defend the Sixth Circuit's misguided reasoning below. Instead, the Government briefly tries its own hand at divining limits on OSHA's authority, in an effort to concoct some "intelligible principle" to constrain the agency's otherwise unchecked power. But this Court has never held that a threadbare "intelligible principle" is enough when it comes to major questions. Rather, there are some "cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). And anyway, the Government's manufactured limits fail on their own terms—and fall short of any "intelligible principle," properly understood. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

First, the Government's lead point is that OSHA can regulate only "workplaces." BIO 5-6. But the fact the statute could be *even broader* is little answer to the charge it is already too broad. Again, if Congress gave the IRS the authority to set "appropriate" taxes, it would be no defense that the agency cannot also set border or healthcare policy. So too here. OSHA has an "immense" power to dictate safety rules for virtually "all American enterprise." *Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). That is more than enough to create a nondelegation problem on its own.

Second, the Government says OSHA needs to make a threshold "significant risk" finding before issuing any safety standard. BIO 6. This fails at each turn.

To start, OSHA does not. In the *Benzene* Case, this Court split on whether the statute required such a threshold finding for permanent standards. And in *Cotton Dust*, Justice Brennan—one of the *Benzene* dissenters—wrote for the Court that permanent *health* standards require a significant-risk finding. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.32 (1981). But as Judge Nalbandian explained below, this Court has never held that such a finding is required for permanent *safety* standards. *See* Pet.App.45a-46a.[3]

Regardless, even if such a finding were required, it would not matter for at least two reasons.

For one, this threshold finding limits only *when* OSHA can regulate, not *how* it can do so. Of course, Congress can make a legal rule contingent upon fact-finding by the Executive—but only when *Congress* sets the legal rule. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J. dissenting). But here, once the Executive makes its finding, there is no "rule" to apply. *Id.* Rather, OSHA can write whatever safety standard it deems "appropriate."

For another, requiring OSHA to identify a "significant risk" is hardly a requirement at all. The agency itself has substantial "leeway" in determining what it means, and when it is present. *See Indus.*

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[3] Allstates did not concede this point below. BIO 6. The district court misread Allstates' briefing, Pet.App.79a (citing D. Ct. Dkt. 23-1 at 6), which merely noted that the "plurality" in the *Benzene* Case required a significant-risk finding, D. Ct. Dkt. 23-1 at 6.

Union, 448 U.S. at 655-56 (plurality). That is why the Government cannot cite a single example of a federal court upsetting a significant-risk finding. *See id.* at 686 (Rehnquist, J., concurring in the judgment) (statute violates nondelegation doctrine when it "renders meaningful judicial review impossible"). And that is why OSHA has been wholly unburdened by it in practice—indicating that anything from employee stress to employee speech can render a workplace "unsafe." *See* Allstates C.A. Br. 47-48 (collecting OSHA publications).

Third, the last main limit the Government identifies is that any safety standard cannot be infeasible—*i.e.*, impossible. BIO 7. But requiring the agency to work within the bounds of reality is far from a meaningful limitation. And anyway, it is unclear what this even means: Impossible for whom? The average employer? The most sophisticated? The statute provides no guidance. And filling the gaps here is a fraught endeavor—especially given that when Congress wants to impose an actual feasibility requirement, it does so *expressly*, such as in § 655(b)(5).

Finally, the Government's other passing points offer no help. BIO 7-8. It notes that OSHA must explain itself when adopting certain standards—a mere *procedural* requirement. And it asserts OSHA derives "much meaningful content" from the statute's purpose and context. But it keeps that content a secret for now.

As these efforts only confirm, the statute really just means what it says: OSHA can set safety rules for virtually every business in America so long as it finds those rules "appropriate." Indeed, even the Government used to agree—at least when it did not need the

statutory haruspicy: "The phrase 'reasonably necessary or appropriate' is not a limitation on [its] powers or a substantive standard of any sort." Br. for Fed. Parties, at 43, *Indus. Union*, 448 U.S. 607 (1980) (Nos. 78-911, 78-1036). And frankly, even the Government's new view adds little: On its current account, OSHA can dictate any workplace safety standard it wants, so long as it discerns a "significant risk" (in the eyes of OSHA) and its chosen solution is not impossible (for an undefined set of industry). Either way, the open secret is OSHA can, in practice, do whatever it wants. The question is whether the Constitution has anything to say about it.

4. The Government does not raise any issues that would impede this Court's review. It barely tries.

First, the Government's only "vehicle" problems are rehashed versions of its merits arguments. BIO 11-12. But the Government does not identify a single bar to this Court *reaching* the merits. In fact, it confirms that no bar exists here, disclaiming the one (flawed) jurisdictional argument it raised below. BIO 4 n.*[4]

Second, the Government emphasizes that there is no split on the question presented. BIO 10-11. But as Allstates explained, that is unsurprising given the longstanding neglect of the nondelegation doctrine.

Tellingly, though, the Government does not dispute that this case *does* implicate a valid split over whether § 655(b) is mandatory or permissive. Instead, it says that Allstates did not seek cert on that question. BIO

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[4] While the Government suggests this case involves the issue of "universal injunction[s]," BIO 3, Allstates specifically disclaimed that relief below, *see* Allstates C.A. Br. 62-63.

11. But that issue is clearly encompassed within the question presented, as the "nondelegation inquiry always begins … with statutory interpretation." *Gundy*, 139 S. Ct. at 2123 (plurality). And if § 655(b) does *not* transgress the nondelegation doctrine, this Court will need to say what § 655(b) means—and in turn, resolve this (conceded) split. Indeed, reading § 655(b) as mandatory was *critical* to the Sixth Circuit's decision (although here too, the Government does not defend it). So this petition presents the Court with a rare two-birds-one-stone chance to clarify the law.

Third, the Government briefly urges denying review because of the purported policy consequences. BIO 12-13. But its heart is not in it. The Government observes that workplace safety has largely improved since the OSH Act's passage, but makes no effort to demonstrate that OSHA's permanent safety standards had anything to do with it. Further, it cites a handful of standards that it says will fall, but fails to explain why OSHA could not accomplish the same ends through its many other regulatory tools. Pet. 24. Nor does it give any reason to think that Congress or the States would be incapable of acting—as nearly half the States suggest they would. West Virginia Br. 22-23; *see also* Buckeye Br. 11-13. If the Government were actually worried about the risk to workplace safety that would result from following the Constitution, it surely would have offered something more.

This petition cleanly asks whether the nondelegation doctrine still has any vitality. Nothing stands in the way of this Court providing the answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 10, 2024

Respectfully submitted,

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