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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified Petitioner and Respondent of NCLA's intention to file this brief on January 30, 2024.

was designed to prevent. This unconstitutional state within is the focus of NCLA's concern.

Section 6(b) of the Occupational Safety and Health ("OSH") Act of 1970 authorizes the Secretary of Labor ("Secretary") to "by rule promulgate, modify, or revoke any occupational safety … standard." 29 U.S.C. § 655(b). "The only substantive criteria given for … permanent standards for safety hazards … are set forth in § 3" of the OSH Act, *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 640 n.45 (1980) (plurality), which defines a safety standard as "a standard which requires conditions, or the adoption or use of one or more practices … reasonably necessary or appropriate to provide safe or healthful employment and places of employment," 29 U.S.C. § 652(8). This all-encompassing definition enables the Secretary to impose whatever standards he deems "reasonably necessary or appropriate," thereby delegating to the Executive Branch unchecked authority to enact workplace safety laws. If this standardless delegation of lawmaking powers survives scrutiny, Article I's vesting of "[a]ll legislative Powers" in Congress and Congress alone will be rendered a nullity.

NCLA writes separately to explain that the modern nondelegation doctrine rests on several fundamental errors. In practice, it permits virtually unlimited delegation of legislative powers, which undermines self-governance and destroys the distinctive constitutional role of each of the three branches. NCLA urges this Court to restore a nondelegation doctrine that is faithful to the Constitution's text and purpose.

SUMMARY OF ARGUMENT

"Article I, § 1 of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (cleaned up). Accordingly, "Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). However, the "test [that courts] have applied to distinguish legislative from executive power largely abdicates [their] duty to enforce that prohibition." *Dep't of Transp. v. Ass'n of Am. RR*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment).

The treatment of the OSH Act by the decision below lays bare this abdication. The Act authorizes the Secretary to "by rule promulgate, modify, or revoke any occupational safety … standard" he deems "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §§ 652(8), 655(b). The Sixth Circuit's conclusion that this obvious transfer of lawmaking power to an executive agency passes muster under the nondelegation doctrine does not demonstrate that the OSH Act is constitutional, but rather that the doctrine does not faithfully implement Article I, § 1.

In recent years, a majority of justices have expressed skepticism at the modern nondelegation doctrine's fidelity to Article I's Vesting Clause. *See Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring in the judgment); *id.* at 2133-42 (Gorsuch, J., joined by

Roberts, C.J. and Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari). This petition presents an ideal opportunity to realign the doctrine to the Constitution's text and purpose. The OSH Act's grant of power to enact whatever safety standards the Secretary deems "reasonably necessary or appropriate" for virtually all workplaces in the country is the most open-ended transfer of lawmaking authority in the federal code. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1448 (2008) ("No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope[.]"). If the nondelegation doctrine is to have any meaning, this transfer of unfettered legislative power must be stopped. The Court should grant review.

ARGUMENT

I. CONGRESS MAY NOT DIVEST POWER THAT THE CONSTITUTION VESTS IN IT

The Constitution grants Congress—and Congress alone—the power to legislate, *i.e.*, make binding rules that limit the liberty that citizens would otherwise enjoy. U.S. CONST. art. I, § 1. The location of this power in Congress is essential to a fundamental principle of self-government: citizens must consent, through their elected representatives, to all legal limits on their liberty. But it is not only this underlying principle that should guide this Court in barring any relocation of legislative power. Both the drafting debates and the Constitution's text make clear that legislative power cannot be shared or otherwise transferred.

A. The Constitution Forbids All Legislative Delegation

The delegation of power was to be done solely by the people in the Constitution, not by Congress. So, it is difficult to understand how Congress—for example, in § 652(8)—could delegate binding lawmaking power to executive agencies. This point rests not merely on underlying principles but on the text.

The Constitution says each of its tripartite powers "shall be vested" in its own branch of government. U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1. If it had used the word "vested" as one might in grant of property, saying merely that the legislative powers are hereby vested in Congress, then there arguably could be a transfer of powers between branches. But in declaring that its powers "shall be vested," the Constitution not only vests legislative, executive, and judicial power in respective branches, but says where such powers "shall," and thus must, be located.

This separation-of-powers requirement was made clear in the earliest surviving academic lectures on the Constitution, which were given in 1791 by the Virginian Judge St. George Tucker at the College of William and Mary. He explained that "all the powers granted by the Constitution are either legislative, executive, or judicial; and to keep them forever separate and distinct, except in the Cases positively enumerated, has been uniformly the policy, and constitutes one of the fundamental principles of the American Government." St. George Tucker, *Law Lectures*, p. 4 of four loose pages inserted in volume 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62,

Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

> When the Constitution says the legislative powers *shall be vested* in Congress, it requires them to be there, not elsewhere. That is, when legislative powers are shared with the executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction that they *shall be vested* in Congress. The Constitution does not say that the legislative powers, including the power to regulate commerce, 'shall be vested in a Congress of the United States *and such other bodies as Congress specifies*.'

Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1174 (2023) (footnote omitted; emphasis in original).

The phrase "shall be vested" thus reinforces what already should be clear, that "the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards." *Id.* Rather than merely vest all legislative powers in Congress, the Constitution further mandates that all such powers may not be delegated to another branch. *Am. Trucking*, 531 U.S. at 472 (confirming that the Constitution's "text permits no delegation of [legislative] powers"); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) ("[I]n carrying out that constitutional division into three branches it is a breach of the national fundamental law if

Congress gives up its legislative power and transfers it to the President[.]").

B. Transferring Legislative Powers Undermines Self-Government

The Constitution's prohibition against delegating legislative power is not only necessary to protect one branch of government from intrusion by another, but "[t]he structural principles secured by the separation of powers protect the individual as well." *Ass'n of Am. RR*, 575 U.S. at 43 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). That is because legislative delegation collides with the Constitution's most important principle: consent of the people. Without consent, a government would be illegitimate, and its laws would be without obligation.

Consent of the people was essential not only for the adoption of the Constitution but also for the enactment of statutes. Such consent must come through the election of representatives to the legislature—the body vested with legislative power. As American colonists declared: "the first Principle in Civil Society, founded in Nature and Reason, that no Law of the Society can be binding on any Individual[], without his Consent, given by himself in Person, or by his Representative of his own free Election[.]" Resolutions of the Boston Town Meeting (Sept. 13, 1768), in *A Report of the Record Commissioners of the City of Boston*, Containing the Boston Town Records, 1758 to 1769, at 261 (Boston: Rockwell & Churchill, 1886).

The displacement of legislative power to administrative agencies, not least in § 652(8), threatens this self-governance. It deprives Americans

of their freedom to rule themselves through their elected representatives. Judge Thapar recently explained that the Framers designed "Congress [to be] the [branch] most responsive to the will of the people … for a reason: Congress wields the formidable power of 'prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated.' If legislators misused this power, the people could respond, and respond swiftly." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (quoting THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

The transfer of legislative powers to a less accountable branch necessarily undermines consent. To be sure, the dislocation of legislative power does not deny anyone's right to cast a ballot. But shifting legislative power out of the legislature and into agencies diminishes the value of suffrage. The form remains, but the reality is to debase the currency of voting. And if violations of voting rights are worrisome even at a retail level, there should be at least as much concern about wholesale assault presented by transferring lawmaking power from elected representatives to unelected bureaucrats.

The transfer of legislative powers to agencies also weakens accountability by allowing an evasion of bicameralism and presentment. Bicameralism makes lawmaking difficult by design—to limit corruption and unjust passions and encourage prudence. THE FEDERALIST No. 62, at 420–21 (J. Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST No. 63, at 426–28 (J. Madison) (Jacob E. Cooke ed., 1961). Presentment ensures that laws are subject to the possibility of a veto. Together, the requirements ensure that

lawmaking responsibilities reside in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people.

However, "Congress has an incentive to insulate itself from the consequences of hard choices" by "transfer[ring] … hard choices from Congress to the executive branch." *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). In *American Petroleum Institute*, Justice Rehnquist explained that "[i]t is difficult to imagine a more obvious example [than the OSH Act] 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, if not impossible, to hammer out in the legislative forge." 448 U.S. at 687 (Rehnquist, J., concurring in the judgment). Workplace safety laws require hard choices that "balanc[e] statistical lives and industrial resources." *Id.* at 685. Instead of making these "important choices of social policy"—and thus risk being held accountable by voters—Congress evaded the Constitution's democratic bicameralism-and-presentment process and "improperly delegated th[ose] choice[s] to the Secretary of Labor[.]" *Id.* at 672, 685.

When Congress transfers its legislative power to an administrative agency, "the people lose control over the laws that govern them. … [T]he public loses the right to have both its elected representatives and its elected president take personal responsibility for the law." David Schoenbrod, *Power Without Responsibility* 99–105 (Yale U. Press 1993). Indeed, "the citizen … can perhaps be excused for thinking that it is the agency really doing the legislating." *City*

of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

"By shifting responsibility [to enact workplace safety laws] to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). Because this shift is the product of collusion between Legislative and Executive Branches, the people must rely on the Judicial Branch to prevent unconstitutional delegation of legislative power. The nondelegation doctrine in its current form has proven inadequate to the task.

II. THE MODERN NONDELEGATION DOCTRINE ENABLES CONSTITUTIONAL VIOLATIONS

A person who says he will do one thing but in fact does the opposite is dishonest. A legal doctrine is no different. The nondelegation doctrine purports to bar Congress from delegating legislative power. *See Am. Trucking*, 531 U.S. at 472. In fact, it notoriously permits the wholesale transfer of such power. *See Gundy*, 139 S. Ct. at 2139–40 (Gorsuch, J., dissenting); *Ass'n of Am. RR*, 575 U.S. at 77 (Thomas, J., concurring). By saying one thing and doing another, the nondelegation doctrine amounts to judicial doublespeak. It tells Americans that courts are policing delegations of legislative power even while promiscuously permitting them. The very notion of nondelegation is also misleading in suggesting that what limits congressional transfers of legislative power is the malleable, court-created intelligible-principle test, as opposed to a prohibition based on the Constitution's clear text.

A. How It Started: The Nondelegation Doctrine Developed to Enforce Constitutional Boundaries

For over 150 years after the founding, this Court faithfully acted to keep legislative power where it belongs, *i.e.*, where the Constitution vested it. *See, e.g.*, *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406 ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *see also Wayman v. Southard*, 23 U.S. 1, 20 (1825) ("It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative.").

As the administrative state took root in the 1930s and 40s, the Court took care to define what Congress must do before it could delegate regulatory authority. Specifically, it was not sufficient for Congress to identify broad policy goals. Rather, Congress also must set standards that would be applied in accomplishing such goals, establish rules of decision and conduct, and do so in a manner that would allow courts and the public to determine whether the acts of the executive were consistent with the legislative intent expressed in a statute. *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); *Opp Cotton Mills v. Adm'r of Wage and Hour Div.*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944).

In *Panama Refining*, the Court held § 9(c) of the National Industrial Recovery Act unconstitutional. 293 U.S. at 430–33. Section 9(c) authorized the President to prohibit the transportation of "hot" oil, but provided no standards for when he should do so. After finding no standards for or constraints on this specific power in § 9, the Court turned to the broader statute. *Id.* at 414–16. The Act's "declaration of policy" identified at least twelve policy objectives such as "to promote the fullest possible utilization of the present productive capacity" and "to conserve natural resources." *Id.* at 416–17. The Court found that this "general outline of policy" did nothing to establish a standard for when the granted authority should be used. *Id.* at 417. Rather, it left the President to perform the legislative function of establishing the standard for when to apply governmental power. *Id.*

The Court distinguished other cases where delegations of authority had been permissible. *Id.* at 421–30. In those cases, Congress had established not only policies, but specific standards or rules of conduct, leaving the executive to develop "subordinate" rules or to find facts needed to apply the legislative rule. *Id.* at 421; *see also id.* at 422–26. In such instances, the President "was the mere agent of the law-making department to ascertain and declare the event upon which [the legislature's] expressed will was to take effect." *Id.* at 426.

Further, the Court rejected the idea that it had previously approved something so vague as "public convenience, interest, or necessity" as a sufficiently limiting standard. *Id.* at 428. Ultimately, the Court struck § 9(c) because "Congress has declared no policy, has established no standard, has laid down no rule"

specifically as to the transportation of hot oil. *Panama Refining*, 293 U.S. at 430; *see also id.* at 432 (Congress must establish "rules of decision" to prevent "a pure delegation of legislative power").

Later the Court struck another part of the Act, holding that Congress must "itself establish[] the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S. at 530. "[F]ailure to enact such standards" amounted to an "attempt[] to transfer [the legislative] function to others." *Id.* When the purpose of a statute is not to establish law, but to authorize the executive to make "new and controlling prohibitions through codes of law[,]" and when any restrictions "leave virtually untouched the field of policy envisaged[,]" Congress has exceeded its bounds. *Id.* at 535, 538. A statute that "does not undertake to prescribe rules of conduct," but instead "authorizes the making of codes to prescribe [rules of conduct,]" is "an unconstitutional delegation of legislative power." *Id.* at 541–42; *see also Opp Cotton Mills*, 312 U.S. at 145 ("The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct."); *id.* at 144 (where a statute sets up standards for the guidance of the administrative agency "such that Congress, the courts[,] and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function").

The Court once properly applied standards for legislation requiring Congress to do more than make grand statements of policy. Those days have passed.

B. How It's Going: The Nondelegation Doctrine Now Endorses Divesting Legislative Power

Today, the standard that purports to confine legislative power to Congress is impotent. The nondelegation doctrine is viewed as moribund and in practice is wholly ineffective.

The Court had previously stated that, "[e]xtraordinary conditions do not create or enlarge constitutional power[,]" and government actors "are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." *Schechter Poultry*, 295 U.S. at 528–29. By 1946, however, the Court had a different view, stating that "[n]ecessity … fixes a point beyond which it is unreasonable and impracticable [for] Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

While the Court feigned a nod to the demand for congressionally established standards as well as policy, it made the "standards" requirement meaningless. The Court curtly stated that since it had previously approved "public interest" and like expressions as sufficiently definitive, it was now compelled to sanction similar standards. *Id.* A review of the cases it cited, however, demonstrates that the Court had not, in fact, approved such vague and broad standards, standing alone, to complete the task of legislating. *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (interpreting "public interest"

criterion more precisely in proper statutory context to mean "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities"); *Yakus*, 321 U.S. at 421 (upholding agency's authority to "stabilize prices, wages and salaries 'so far as practicable' on the basis of the levels which existed on Sept. 15, 1942").

By 1989, the Court admitted its retreat from enforcing the constitutional demand that "all" legislative power be vested in Congress. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court remarked that "Congress *generally* cannot delegate its legislative power." 488 U.S. at 372 (emphasis added). The Court acknowledged that its "jurisprudence has been driven by a practical understanding that … Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* This reasoning confirmed that since 1946, so long as Congress provided "general directives" through an "intelligible principle," Congress was free of further demands.

The true nondelegation doctrine has collapsed, and congressional delegation of legislative power has become the rule. A panel on the Tenth Circuit noted that the nondelegation doctrine has been long dormant, to the point of being deemed a "dead letter" never properly interred. *United States v. Rickett*, 535 F. App'x 668, 674–75 (10th Cir. 2013) (citing *Mistretta*, 488 U.S. at 373); *see also Am. Trucking*, 531 U.S. at 474; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002). The panel continued, "if there is anything clear or obvious about the nondelegation doctrine, it is that, viewed through

its lens, virtually any statute will be deemed valid." *Rickett*, 535 F. App'x at 675 (citing *Am. Trucking*, 531 U.S. at 474–75; *Mistretta*, 488 U.S. at 373 n.7).

While other courts may not yet state that the nondelegation doctrine is defunct, they view it as "lax," "lenient," or a low threshold, unworthy of meaningful analysis. The First Circuit, for example, held that discretion constrained to "the public interest" and "substantial justice" "indisputably satisfies the lax 'intelligible principle' standard under our precedents and those of the Supreme Court." *United States v. Diggins*, 36 F.4th 302, 319 n.19 (1st Cir. 2022) (citing *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012)); *see, e.g., CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 184 (2d Cir. 2023) (referring to "the nondelegation doctrine's lenient standard") (cert. pet. filed June 21, 2023); *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir. 2014) ("under controlling nondelegation doctrine jurisprudence, the hurdle for the government … is not high"); *Granados v. Garland*, 17 F.4th 475, 480 (4th Cir. 2021) ("intelligible principle is not an exacting standard"); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (since the Supreme Court found that "in the 'public interest, convenience, or necessity'" was a sufficient intelligible principle, there is a "low threshold for validation under the nondelegation doctrine"); *Consumers' Research v. FCC*, 88 F.4th 917, 924 (11th Cir. 2023); *id.* at 929 (Newsom, J., concurring in judgment) ("Their challenge fails, as I see it, only because non-delegation doctrine has become a punchline.").

Effectively, the "nondelegation doctrine" has become a "pro-delegation doctrine." *See* Hamburger, *supra* p. 6, at 1086.

III. FALSITY, FICTION, AND OTHER FAULTS RIDDLE THE NONDELEGATION DOCTRINE

The nondelegation doctrine has become either a misnomer or doublespeak, and it rests on fictions that can neither be honestly maintained nor justified. Hamburger, *supra* p. 6, at 1091–95.

A. 'Delegation' Falsely Implies an Easily Revocable Transfer

When statutes improperly divest legislative power, they do not merely "delegate" it. When a political officer "delegates" power, she retains the authority to unilaterally revoke the delegation. So, a Secretary of Labor who "delegates" statutorily authorized powers to a subordinate may terminate that arrangement at any time, for any reason.

That is not the case when a statute has conferred lawmaking powers. A statutory divesting of power ties the hands of Congress until another statute can be passed. Congress may revoke the "delegation" only via the cumbersome bicameralism and presentment process of Article I, § 7. The President is empowered to veto any effort to withdraw powers that a statute vests, so Congress cannot unilaterally revoke a divesting of authority that a predecessor Congress made via statute. Congress must obtain the President's assent, or else it must secure veto-proof supermajorities in both houses of Congress—an exceedingly difficult task.

It is therefore highly misleading to discuss divesting of legislative power in terms of "delegation."

B. The Nondelegation Doctrine Rests on Fictions

The nondelegation doctrine rests on further fictitious assumptions.

One such fiction is that agency lawmaking is merely "specifying" or "filling in the details" of a statutory standard. *See, e.g., United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations").

But even where authorizing statutes offer governing standards, the authorized agencies often are not merely filling in details. As is widely understood, such statutes frequently leave the most difficult legislative questions to the agencies—indeed, members of Congress notoriously use such statutes to avoid making difficult legislative decisions. *See Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("Because Congress could not achieve the consensus necessary to resolve the hard problems …, it passed the potato" to an agency "freed from the need to assemble a broad supermajority[.]"); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. L. & PUB. POL'Y 213, 219 (2020).

A second fiction is that an "intelligible principle" provided by Congress ensures that it is delegating something less than legislative power. As summarized above and as Justice Gorsuch has accurately recounted, courts have gradually relaxed

the "intelligible principle" standard so that it no longer prevents Congress's divestment of legislative powers. *See Gundy*, 139 S. Ct. at 2140 (the Court's "intelligible principle" remark "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. … Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle 'test' began to take hold") (Gorsuch, J., dissenting) (citations omitted).

Every act of Congress is ostensibly constrained by the Constitution's enumerated powers, and there is almost always some semblance of an "intelligible principle" that may be found in an agency's enabling statutes. But that does not demote an agency's liberty-impinging laws to something less than an exercise of legislative power.

Hence, an "intelligible principle" does not save agency rulemaking from being legislative. Current doctrine is sheer fiction in suggesting otherwise.

C. Today's Nondelegation Doctrine Interferes with Article III

Another fault with the current nondelegation doctrine is that courts cannot perform their constitutional duty if Congress can delegate lawmaking after providing no more than an open-ended policy suggestion. *See* Mark Chenoweth & Richard Samp, "Reinvigorating Nondelegation with Core Legislative Power," in *The Administrative State Before the Supreme Court*: *Perspectives on the Nondelegation Doctrine* 81, 93–95 (Peter J. Wallison & John Yoo eds., 2022). Legislation must be

"sufficiently definite and precise" so as to permit courts (and the public) "to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 425–26; *Opp Cotton Mills*, 312 U.S. at 144 (where a statute sets up standards "such that Congress, the courts[,] and the public can ascertain whether the agency has conformed to the standards …, there is no failure of performance of the legislative function"). In order to accomplish this task, a statute must "mark[] the field within which the [agency] is to act so that it may be known whether [it] has kept within it in compliance with the legislative will." *Yakus*, 321 U.S. at 425.

Importantly, to "mark the field within which the [agency] is to act," is not accomplished by merely establishing the outer limits of an agency's jurisdiction and setting aspirational goals. For example, *Yakus* examined an emergency wartime price control act. *Id.* at 420. The Court noted that § 1 declared its purposes or policy objectives, while § 2 and an amending statute provided the standards to be used in fixing maximum prices. *Id*. at 420–21. In the standards, Congress required reference to prices prevailing on specific dates with further standards for when deviations may be appropriate. The executive was required to "conform to standards." *Id*. at 423. It was the standards, not the policy, that "define[d] the boundaries within which prices having [the purpose of furthering the policy] must be fixed." *Id.* The Act was a sufficient exercise of legislative power because it "stated the legislative objective, … prescribed the method of achieving that objective … and laid down standards to guide the administrative determination" of when to exercise price-fixing power *and* the prices that could be set. *Id.* The Court reiterated that the

essential of the legislative function was not only the determination of policy, but its "formulation and promulgation as a defined and binding rule of conduct." *Id.* at 424.

Virtue-signaling aspirational policy goals are not standards. *See Panama Refining*, 293 U.S. at 418–20; *Chenoweth & Samp*, *supra* p. 19-20, at 91. In the absence of discernible, enforceable standards that create rules of conduct for delegated authority, Congress has not completed the task of legislating. Likewise, in the absence of identifiable standards, courts have done no more than improperly defer to administrative agencies' opinion that their action advances statutory policy goals. *Schecter Poultry*, 295 U.S. at 538; *Chenoweth & Samp*, *supra* p. 19, at 106. In doing so, the court is not completing its task of independently determining and applying the law.

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The nondelegation doctrine has expired. It no longer protects the principles enshrined in our Constitution. The Court can begin to resuscitate those protections by granting certiorari.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESTORE THE VESTING CLAUSE

This case provides an ideal vehicle for this Court to revisit and clarify the nondelegation doctrine because the statute at issue here so clearly divests legislative power that Article I, § 1 of the Constitution vests in Congress and Congress alone.

If the nondelegation doctrine exists, the Court must find unconstitutional a statute that simply "instructs the agency: Do what you believe is best. Act reasonably and appropriately. Adopt the legal

standard that you prefer, all things considered." *Sunstein*, *supra* p. 4, at 1407. Yet, as Professor Sunstein explained, "the core provision of … the Occupational Safety and Health Act … is not easy to distinguish from the hypothesized statute." *Id.*

This Court considered the constitutionality of the OSH Act in 1980, in the context of the grant of authority to promulgate workplace *health* standards, which is narrower than the act's grant of authority to issue *safety* standards in this case. *Am. Petroleum Institute*, 448 U.S. at 607. Then-Justice Rehnquist found that delegation was unconstitutional. *Id.* at 685 (Rehnquist, J., concurring in the judgment). "Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources." *Id.* But instead of making that tradeoff, "Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary." *Id.* In doing so, it violated the Vesting Clause requirement "that legislatures are to make laws, not [other] legislators." *Id.* at 686.

The plurality found the OSH Act's grant of authority to promulgate *health* standards to be unlawful on narrower grounds: the government must determine that a toxic substance poses a "significant" workplace health risk before regulating it. *Id.* at 646. Otherwise, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning." *Id.* (quoting *Schechter Poultry*, 295 U.S. at 539). That 'significant risk" limitation, which the plurality said was needed to prevent a violation of the nondelegation doctrine in the health standard-issuing context, is missing from the OSH Act's grant of authority to issue

safety standards too. *See Int'l Union v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991).

Rather, the only guidance is that the Secretary must enact a "reasonably necessary or appropriate" rule, which is no standard at all. *Id.* When addressing the phrase "appropriate and necessary" in the Clean Air Act, the Supreme Court explained that "[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). Section 652(8)'s "reasonably necessary or appropriate" language is even more capacious because it is framed in the disjunctive. The OSH Act thus tells the Secretary to do whatever she believes is appropriate.

The majority below's attempt to avoid this conclusion by inventing limitations on the Secretary's authority is heroic, albeit meritless. It misreads § 655(b)'s statement that the Secretary "may" promulgate any safety standard as a *limit* on her discretion, asserting "this 'may' … means 'must' or 'shall.'" Pet.App.14a. In doing so, the panel turns upside down "[t]he traditional, commonly repeated rule … that *shall* is mandatory and *may* is permissive." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). The majority cites no precedent to support its idiosyncratic construction of "may" to mean "shall."

The panel next asserts that "'reasonably necessary or appropriate' … means that the standards adopted should be needed to improve safety but not to the exclusion of all else." Pet.App.16a. That might be so if the statute required safety standards to be necessary *and* appropriate. But the "or" disjunctive

allows the Secretary to enact any standard she believes is "appropriate" even if it is not "reasonably necessary." Scalia & Garner, *supra* p. 23, at 116. That standard is entirely subjective and is impervious to being tested by courts to determine whether the Secretary has followed Congress's command.

In short, the majority could avoid the conclusion that the OSH Act lacks any ascertainable limits on the Secretary's authority to enact workplace safety mandates only by rewriting the statute, effectively replacing "may" with "shall" and "or" with "and." Pet.App.14a-16a. That sort of statutory rewriting is beyond the scope of proper judicial construction. If a statute of this sort can pass constitutional muster, Article I's Vesting Clause is a nullity.

CONCLUSION

The Court should grant the Petition and take this opportunity to establish workable boundaries that enable the lower courts to identify and enforce the constitutional limitation on divesting legislative power found in Article I's Vesting Clause.

Respectfully submitted,

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