No. 22-3772

In the United States Court of Appeals for the Sixth Circuit

ALLSTATES REFRACTORY CONTRACTORS LLC,

Plaintiff-Appellant,

v.

JULIE A. SU,

in her official capacity as
Acting Secretary of Labor, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio (Zouhary, J.)
Case No.: 3:21-cv-01864

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ Sheng Li
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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself and includes the right of self-government—to have laws made by the nation's elected lawmakers through constitutionally prescribed channels. NCLA is concerned that, if the Secretary of Labor's unfettered authority under the Occupational Safety and Health ("OSH") Act to impose any "reasonably necessary or appropriate" occupational safety or health standard survives scrutiny, Article I's vesting of "[a]ll legislative Powers" in Congress will be rendered a nullity.

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)).

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[1] No counsel for a party authored this brief; and no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Appellant consented to the filing of the brief, and the government defers to the Court as to whether it will accept amicus briefs.

Under current doctrine, a delegation of legislative power is constitutional only if Congress supplies an intelligible principle to guide the exercise of such power. *Id.* No intelligible principle exists if the delegation is so broad or vague that it is "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). A provision of the OSH Act is an example of such an unconstitutional delegation. It states: "The Secretary may by rule promulgate … any occupational safety or heath standard," 29 U.S.C. § 655(b), that she deems "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," *id.* § 652(8). This boundless authority is not guided by any intelligible principle and instead is an unconstitutional divestment of *all* of Congress's legislative power—the agency can enact any rational requirement or do nothing at all.

The Panel's contrary conclusion rests on stark errors. It first misinterprets § 655(b)'s discretionary "may" language to mean "shall" (*i.e.*, mandate) in an attempt to conjure limits on the Secretary's unfettered discretion. Panel Opinion at 5. The Panel further misconstrues the power to enact any standard that is "reasonably necessary *or appropriate*," *id.* § 652(8) (emphasis added), to mean just "reasonably necessary." *Id.* Reconsideration is warranted because the Panel's conclusion that the OSH Act contains an intelligible principle cannot be sustained without these missteps.

ARGUMENT

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

"When the Constitution says the legislative powers *shall be vested in* Congress, it requires them to be there, not elsewhere." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. (forthcoming 2023) (manuscript at 68).[2] The earliest surviving academic lectures on the Constitution—given in 1791 by Virginia Judge St. George Tucker at the College of William and Mary—make clear 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."[3]

Thus, "the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards." Hamburger, *supra* at *68. Rather, Congress may not transfer legislative powers vested in it to another branch. *Whitman*, 531 U.S. at 473; *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). The prohibition against such delegation not only protects one branch of government from intrusion by another,

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[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247 (last visited October 12, 2023).

[3] 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.

but "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Legislative delegation collides with the Constitution's most important principle: consent of the people. 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)).

Transferring legislative powers to an executive agency undermines consent. While it does not deny anyone's right to cast a ballot, shifting Congress's legislative power to agencies diminishes the value of suffrage and 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 418-19 (J. Madison) (J. Cooke ed. 1961); THE FEDERALIST No. 63, at 423-25 (J. Madison) (J. Cooke ed. 1961). Presentment ensures that laws are subject to the possibility of a veto. Together, they ensure that lawmaking responsibilities reside in the two elected legislative bodies and an elected president—all of whom are personally accountable to the people.

Self-government means any law limiting liberty must be enacted by the people's representatives in Congress. 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). "It 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." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). Workplace safety laws demand hard legislative 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 bicameralism-and-presentment process and "improperly delegated th[ose] choice[s] to the Secretary of Labor[.]" *Id.* at 672, 685.

"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 unconstitutional 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.

II. THE PANEL FAILED TO APPLY THE SUPREME COURT'S NONDELEGATION PRECEDENT

The Supreme Court has repeatedly affirmed that the Constitution forbids Congress from giving lawmaking powers to executive officials. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892), explained "[t]hat congress 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." The Court has further held—repeatedly and in an unbroken line of cases—that statutes that empower the executive to act without supplying any standard to guide his discretion violate Article I's Vesting Clause by improperly conferring legislative power on executive officials.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), unanimously and emphatically rejected a statute that empowered the President to impose "codes of fair competition." *Id.* at 521–22. The Court held the Vesting Clause forbids Congress to "abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. And it pronounced the statute unconstitutional because it "supplies no standards" for guiding the President's discretion. *Id.* at 541. "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-38. The Supreme Court "has not overruled

or even questioned its decision in the *Schechter Poultry* case." Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008) (collecting cases).

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), confirmed that statutes empowering the executive must provide some semblance of criteria or factual findings to guide the executive's discretion to avoid being forbidden transfers of lawmaking power. The Court rejected a statute that authorized the President to prohibit the transportation of petroleum goods produced in excess of quotas, but that failed to provide any standard or guideline to the President regarding whether or to what extent he should use this power. In the Court's words, the statute "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

In deciding a delegation's constitutionality, the Supreme Court asks "whether Congress has supplied an intelligible principle to guide the deleg[at]ee's use of discretion." *Gundy*, 139 S. Ct. at 2123. While Justices have criticized this test's laxity, *see id.*, at 2139-40 (Gorsuch, J., dissenting), it is by no means toothless. The statute must supply intelligible principles that "are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the [agency] has conformed to those standards." *Yakus*, 321 U.S. at 426. A delegation is unconstitutional if "an absence of standards" makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Id.*; *see also Am. Power & Light Co. v. SEC*, 329 U.S. 90,

105 (1946) (delegation must allow "the courts to test" whether the agency is following Congress's guidance).

The OSH Act flunks the intelligible-principle test because it puts no limits on the Secretary's ability to enact "reasonably necessary or appropriate" safety and health standards. *See* 29 U.S.C. §§ 652(8), 655(b). To start, § 655(b)'s statement that the Secretary "may" promulgate any safety and health standard confers discretion whether to regulate or not in the first place. The Panel's contrary conclusion that "this 'may' is obligatory, not discretionary—in this context, it means 'must' or 'shall,'" Panel Opinion at 5, 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)*; see also Nat'l Wildlife Fed'n v. Sec'y of U.S. DOT*, 960 F.3d 872, 876 (6th Cir. 2020) ("The clearest case of 'discretion' is when an agency doesn't have to act—for instance, if a statute says 'may' rather than 'must' or 'shall.' "). The Panel notably cites no precedent to support its idiosyncratic construction of "may" to mean "shall." Nor could *amicus* find any. The Panel's conclusion that § 655(b)'s "may" language limits the Secretary's discretion is thus mistaken.

In *Int'l Union v. Chao*, 361 F.3d 249 (3d Cir. 2004), the Third Circuit unequivocally held that § 655(b)(2) *does not* require OSHA to regulate when a safety or health risk is identified, *id.* at 254 ("There is no reason to construe the statute to limit the Secretary's discretion" where "she determines a rule should not be promulgated, or if she is uncertain as to whether a rule should be promulgated."). Similarly, the D.C. Circuit has

held that "the [OSH] Act imposes no requirement to promulgate a permanent standard." *In re Nat'l Nurses United*, 47 F.4th 746, 754 (D.C. Cir. 2022). Rehearing is warranted to prevent a circuit split from developing.

Moreover, the Panel's misinterpretation fails even on its own terms. According to the Panel, because § 655(b)'s "may" means "shall," "OSHA *must* act when a particular hazard 'requires' its action, and it *cannot* issue any standard when the risk does not rise to that level." Panel Opinion at 5 (emphasis in original). But the Secretary may decide when a safety hazard rises to the requisite level and so retains discretion. Such discretion is unfettered given that no "significant risk" finding is required because that requirement applies only to toxic-materials standards under § 655(b)(5), not to general safety or health standards under § 655(b)(2). *Am. Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 513 n.32 (1981). In any event, even if there were a threshold requirement to find that "a place of employment is unsafe," *Indus. Union*, 448 U.S. at 642 (plurality opinion), it would present no meaningful limit because there are always *some* safety risks in every workplace—*e.g.*, an employee could trip while walking, *See* 29 C.F.R. § 1910.22 (OSHA safety standard for walking surfaces). Nothing in the OSH Act guides the Secretary's ability to identify a risk that triggers her supposedly mandatory duty to regulate, leaving her with unfettered discretion to decide whether to enact a safety or health standard.

When the Secretary exercises her discretion to regulate, the statute quite literally tells her to do whatever she believes is "reasonably necessary *or appropriate*." 29 U.S.C.

§ 652(8) (emphasis added). A statute of this sort cannot logically co-exist with *Schechter*—nor with a Constitution that "vests" legislative power in Congress rather than in the executive.

The Panel 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." Panel Opinion at 5 (emphasis added). That assertion ignores the "or appropriate" text. The disjunctive "or" allows the Secretary to enact any standard he believes is "appropriate" even if it is not "reasonably necessary." Scalia & Garner, *supra* at 116. "[A]ppropriate" is "the classic broad and all-encompassing term" that "leaves agencies with flexibility." *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (cleaned up). Nothing in the OSH Act explains what makes a standard "appropriate," and the only limit the Panel identifies is economic and technological feasibility. Panel Opinion at 5 (citing *Cotton Dust*, 452 U.S. at 513 n.31). But feasibility still leaves unfettered discretion "to require precautions that take the industry to the verge of economic ruin … or to do nothing at all." *Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). Thus, "the [feasibility] interpretation … is, in light of nondelegation principles, so broad as to be unreasonable." *Id.* at 1313.

Put another way, the Secretary's power to regulate occupational safety and health under the OSH Act is indistinguishable from that of Congress itself. She can impose any standard that is not irrational. By delegating power to enact any "reasonably necessary or appropriate" standard, "Congress instruct[ed] the agency: *Do what you believe*

is best. Act reasonably and appropriately. Adopt the legal standard that you prefer, all things considered." Sunstein, *supra*, at 1407. "[I]t would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" for the simple reason that the OSH Act expresses no discernible congressional will. *Yakus*, 321 U.S. at 426. As such, it amounts to an unconstitutional transfer of legislative power.

CONCLUSION

This Court should grant en banc review and reverse the district court opinion.

Respectfully submitted,

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October 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2023, an electronic copy of the foregoing brief *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Sheng Li

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(7)(B) because it contains 2,597 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Sheng Li