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 AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND RESTAURANT LAW CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress's delegation of authority in the Occupational Safety and Health Act, 29 U.S.C. §§ 652(8), 655(b), to write "reasonably necessary or appropriate" standards for a "safe" workplace violates Article I of the U.S. Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Constitution, Statutes, and Regulations

TABLE OF AUTHORITIES—continued

Page(s)

Miscellaneous

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

The American Farm Bureau Federation (AFBF) was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF's mission is to protect, promote, and represent the interests of American farmers and ranchers.

The National Association of Home Builders (NAHB) is a trade association whose mission is to enhance the climate for housing and the building industry. NAHB seeks to provide and expand opportunities for safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 120,000 members are home builders or remodelers, who construct 80% of all homes in the United States. The remaining members are associates working in closely related fields within the housing industry, such as environmental consulting, mortgage finance and building products and services. Among other things, NAHB provides educational resources to its members, including the International Builders' Show, which is the world's largest show for the residential and light commercial construction industry and features more than 100 education sessions. Further, NAHB provides a robust array of educational

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief.

resources, safety training materials, and other content to educate employers and employees about workplace safety, including the Safety 365 initiative to keep construction workers safe.[2]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the be voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federal of Independent Business (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C., and all 50 state capitals.

The Restaurant Law Center (Law Center) is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States.

Thousands of *amici*'s members are employers who are subject to workplace-safety standards issued by the Occupational Safety and Health Administration (OSHA) under the Occupational Safety and Health Act (the Act), 29 U.S.C. § 655(b). The Sixth Circuit's

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[2] NAHB, *Safety 365*, https://nahb.org/advocacy/industry-issues/safety-and-health/ safety-365.

decision rejecting Allstates' challenge to OSHA's authority to issue workplace-safety standards directly impacts *amici*'s members' interests in ensuring that the workplace-safety rules to which they are subject are validly enacted.

Amici each proactively participate as party litigants or *amici* where litigation involves issues that impact their members' interests. To that end, *amici* offer insights to aid this Court's consideration of Allstates' petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to explain the importance of a strong nondelegation doctrine, which is a "fundamental, founding principle" of our Constitution. *Allstates Refractory Contractors LLC* v. *Walsh*, 79 F.4th 755, 770 (6th Cir. 2023) (Nalbandian, J, dissenting) (cited hereafter to the Petition Appendix). That doctrine has become a virtual dead letter, as then-Professor Kagan wrote. Elena Kagan, *Presidential Administration*, 114 Harvard L. Rev. 2245, 2364 (2001) ("It is . . . a commonplace that the nondelegation doctrine is no doctrine at all"); see also Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 & n.285 (2014) (discussing the "notoriously lax 'intelligible principle' test"); *Guedes* v. *Bureau of Alcohol*, 66 F.4th 1018, 1031 (D.C. Cir. 2023) (Walker, J., dissenting from denial of rehearing) (describing the "light-touch nondelegation doctrine"). Serious application of the doctrine, however, is necessary to safeguard multiple aspects of the Framers' constitutional design.

First, the text of the Constitution vests the "legislative powers" *exclusively* in the legislature. U.S.

Const. art. I, § 1. Accordingly, the Framers' plain language requires meaningful scrutiny to determine whether another branch of government is improperly undertaking legislative tasks.

Second, protection of the broader separation of powers principle, which does not appear explicitly in the constitutional text but unquestionably defines the shape of our government, similarly necessitates a meaningful look at whether Congress has impermissibly authorized another branch of government to exercise legislative powers.

Third, the Constitution embodies the Framers' intention to create a republican form of government. But this form of American government does not authorize the people's agent—Congress—to then delegate that power to another branch of government. See *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting) ("Republican liberty demands not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people") (cleaned up). Congressional delegation of the legislative power threatens the republican form of government guaranteed by the Constitution. See U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

This Court's jurisprudence currently requires Congress to provide an "intelligible principle" to govern an agency's exercise of discretion in performing its delegated duties. As Judge Nalbandian concluded in dissent in the Sixth Circuit, 29 U.S.C. § 652(8) does not supply an intelligible principle to guide OSHA in its promulgation of safety standards. Pet.App. 41a-42a. Far from it: the unbounded and sweeping delegation to OSHA of the powers both to create workplace-

safety standards—a legislative function—and then to enforce those rules against countless employers cannot be tolerated under existing precedent. As the dissent below properly concluded, OSHA's permanent-standards provision falls far short of supplying an "intelligible principle" because it "requires no fact-finding or situation to arise before agency actions tak[e] place" and "provides no standard that sufficiently guides the exercise of the broad authority vested in the Secretary" of Labor. Pet. App. 41a.

That said, the malleable and often laxly applied "intelligible principle" standard provides inadequate protection for core constitutional values. As a majority of this Court has recognized, it is ripe for reconsideration. See *Gundy* v. *United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting) (joined by Roberts, C.J., and Thomas, J.) (discussing "the abused 'intelligible principle' doctrine"); *id.* at 2031 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken [with regard to the nondelegation doctrine] for the past 84 years, I would support that effort"); *Paul* v. *United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"). It is time for this Court to revisit the "intelligible principle" standard and to replace or refine it to better serve the purpose of the nondelegation doctrine. This case is an excellent vehicle in which to do so.

The common defense of the lax approach to delegation is that the much greater complexity of modern society compared to the United States of the late Eighteenth Century means that Congress must have

latitude to alienate its legislative powers to specialist agencies because it lacks the knowledge itself to legislate clear standards for agencies to follow. But the Framers intended the passage of legislation to be a difficult task carefully undertaken by the branch of government most directly responsive to the will of the people. See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2618 (2022) (Alito, J., concurring) ("[T]he framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto"). Indeed, "[t]he Framers understood that lawmaking involved 'hard choices.'" Pet. App. 25a (quoting *Tiger Lilly, LLC* v. *U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring)). And Congress has been able to enact many complex statutes that confer specific enough guidance to agencies, along with a permissible amount of executive discretion to implement that guidance, without violating the nondelegation principle of Article I. In short, Congress is certainly up to the tough tasks the Constitution assigns it of being the sole source of federal legislation.

ARGUMENT

I. Core constitutional attributes require the application of a strong nondelegation rule.

This Court's review is needed because a strong nondelegation standard is necessary to safeguard keystone features of our Constitution. The decades-long judicial path towards a watered-down nondelegation test—perpetuated by the Sixth Circuit ruling here that the intelligible principle standard "permit[s] broad delegations," Pet. App. 8a—is inconsistent with the exclusive reservation of the legislative power to

Congress and with the role of the people as the ultimate source of that legislative power.

In the absence of a rigorous nondelegation doctrine, this Court has developed substitutes that seek to narrow ambiguous statutory delegations or more directly curtail agency discretion. Doctrines like "void for vagueness," the rule of lenity, and a host of clear statement rules, including the "major questions" doctrine (see *NFIB* v. *Dep't of Lab.*, 142 S. Ct. 661 (2022); *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022)), fill in for some of the functions of the nondelegation principle. So does the principle that statutes will be read narrowly to avoid constitutional problems. *E.g.*, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974) ("Whether the present Act meets the [nondelegation] requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional questions"). None of those approaches, however, fully serve the constitutional principles we now discuss.

A. The Constitutional text

The Vesting Clause of Article I provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. By its plain text, that is an exclusive grant of authority to Congress to exercise the "legislative powers" of government. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The text "permits no delegation of those powers." *Ibid.* Simply, "[w]hen the Government is called upon to perform a function that requires an exercise of legislative . . . power, only the vested recipient of that power can perform it." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 68

(2015) (Thomas, J., concurring). And "[n]o one, not even Congress, ha[s] the right to alter that arrangement." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Accordingly, an agency cannot correct an insufficiently specific delegation by adopting its own narrowing set of operating constraints: as this Court said in *Whitman*, "[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472.

Article I also provides Congress with the power to "make all Laws which shall be necessary and proper for carrying into execution" its powers. U.S. Const. art. I, § 8. This Necessary and Proper Clause reinforces that legislative power lies with Congress alone, because it authorizes Congress to enact provisions that task another branch of government to assist with the execution of the law. In that way the plain text of Article I's Vesting and Necessary and Proper Clauses draws a jurisdictional distinction between legislative and executive powers.

B. The separation of powers principle

Article I, § 1 parallels the separate executive and judicial Vesting Clauses in Article II, § 1 and Article III, § 1, respectively. Together, those clauses articulate the separation of powers principle embedded in Constitution. See *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2229 (2020) (Kagan, J., concurring in part) (the separation of powers principle is "carved into the Constitution's text" in the "first three articles").

Thus, separation of powers "'[is] not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.'" *I.N.S.* v.

Chadha, 462 U.S. 919, 946 (1983) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976)). "Of all 'principles in our Constitution,' none is 'more sacred than that which separates the legislative, executive and judicial powers.'" Pet. App. 25a (Nalbandian, J., dissenting) (quoting *Myers* v. *United States*, 272 U.S. 52, 116 (1926)) (cleaned up).

As James Madison wrote, the necessity of separating the three branches of government prevents concentration of too much power in the hands of any one branch. The Federalist No. 47, at 324-31 (Madison) (Jacob E. Cooke ed., 1961). And the system of checks and balances—illustrated for instance in the Presentment Clause of Article I, § 7, requiring all laws to be presented by Congress to the President for signature or veto—"reinforces the principle that one branch should not exercise another branch's powers." Gabriel Clark, *The Weak Nondelegation Doctrine and* American Trucking Associations *v.* EPA, 2000 B.Y.U.L. Rev. 627, 631 (2000) (citing The Federalist No. 48 (Madison) (Jacob E. Cooke ed., 1961)); see *Clinton* v. *City of New York*, 524 U.S. 417, 448 (1998) (striking down the Line Item Veto Act because it delegated legislative power to the President, circumventing the Presentment Clause).

Protecting the separation of powers, this Court has recognized, is the purpose of the nondelegation doctrine. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government").

C. The political philosophy embodied in the Constitution

To the Framers, the legislature must have "an immediate dependence on, & an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." The Federalist No. 52 at 355 (Madison) (Jacob E. Cooke ed., 1961). Delegation of legislative power to an unelected administrative bureaucracy would remove the legislative function from the "immediate dependence on" and the "intimate sympathy with" the people that Madison declared essential to our political system. *Ibid*. As Judge Nalbandian recognized below, the Framers "placed the legislative powers into the hands of the branch that was most accountable to the people" and "'the people could respond, and respond swiftly' to remedy any 'misus[e] of power.'" Pet. App. 25a (quoting *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring)).

As John Hart Ely explained, "by refusing to legislate" in favor of passing the buck to unelected agencies, "our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 132 (1980). The lax version of the intelligible principle test allows Congress to refuse to legislate and instead pass the buck to unelected executive officials: as so applied, the doctrine "largely leaves Congress to self-police." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

D. Invocation of the nondelegation rule by founding-era Congress

These fundamental points—based on constitutional text, context, structure, and underlying framing-era political philosophy—all point to the necessity of engaging in a searching inquiry to determine whether Congress delegated its legislative powers in a particular instance. The early Congresses shared this understanding. For instance, one of the specifically enumerated legislative powers is the authority to "establish post offices and post roads." U.S. Const. art. I, § 8, cl. 7. During the Second Congress, the House considered a bill to establish the national post office that also detailed specific "post routes." Chad Squitieri, *Towards Nondelegation Doctrines*, 86 Mo. L. Rev. 1239, 1253-54 (2021). Representative Sedgwick introduced an amendment that replaced the detailed routes with a provision that allowed the President to establish the particular post roads as he saw fit. *Id*. at 1254. In rejecting that amendment, several congressmen invoked the nondelegation rule. Representative Livermore stated that Congress could not "with propriety delegate that power, which they were themselves appointed to exercise." *Ibid*. Representative Hartley agreed, arguing that Congress "ought not to delegate the power to any other person." *Ibid*. And Madison stated that "there did not appear to be any necessity for alienating the powers of the House, and that if this should take place, it would be a violation of the Constitution." *Ibid*. (citing 3 Annals of Congress 229-39 (1791) (Joseph Gales ed., 1849)). Congress has since expressly delegated to the Postal Service the power to structure postal routes to meet its statutory universal service obligation, but the debate during the Second Congress shows how seriously the Framers' generation took the nondelegation rule.

E. The long-acknowledged need for judicial intervention

This Court long ago recognized the need for judicial enforcement of the nondelegation doctrine. See *Field* v. *Clark*, 143 U.S. 649, 692 (1892); *Wayman* v. *Southard*, 23 U.S. 1, 43 (1825). Otherwise, as then-Professor Scalia pointed out, it would ultimately be courts, not Congress, that upon reviewing agency action would have to supply the legislative content that Congress failed to adopt. See Antonin Scalia, *A Note on the Benzene Case*, 4 Regul. 25 (July/Aug. 1980). And that constitutional difficulty is all the more severe now that the doctrine of *Chevron* deference to agency interpretations of ambiguous statutes is in decline, if not already completely dead. See Br. of Eight National Business Organizations as *Amici Curiae* In Support of Ptn'rs at 8-18, *Loper Bright Enters*. v. *Raimondo*, No. 22-451 (S. Ct.) (arguing that *Chevron* is irreconcilable with separation of powers, the Administrative Procedure Act, and jurisprudential history). Absent deference, the buck passed by Congress falls ultimately on the courts, though they are designated by Article III to exercise only the judicial and not the legislative power. See *Whitman*, 531 U.S. at 473 (for judges to supply "the standard that Congress had omitted" is an exercise of "forbidden legislative authority").

The best way out of this bind is for courts to dutifully enforce the nondelegation doctrine—starting in cases like this which involve the delegation of major, nationwide policy questions with important consequences for American industry. As Justice Gorsuch has stated, "[t]he framers knew" that "the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by

Congress; often enough, legislators will face rational incentives to pass problems to the executive branch." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Therefore, meaningful judicial enforcement of the nondelegation doctrine is necessary to "respec[t] the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law." *Ibid.* Neither executive agencies nor courts should be legislating; enforcing the nondelegation doctrine will ensure they do not do so.

F. A strong nondelegation analysis does not unduly impede government.

Critics suggest that strong judicial policing of legislative delegations is inconsistent with the increasingly complex demands of modern society. To be sure, the Court has recognized that "common sense and the inherent necessities of the governmental co-ordination" require Congress to delegate discretion in the implementation of its policies. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). But even the increasing complexities of the modern world do not permit Congress to shift its prerogative to set policy to an executive administrative apparatus. Madison acknowledged that the constitutional design—requiring bicameral support for legislation and then approval of the chief executive—makes it difficult to pass laws. See *West Virginia*, 142 S. Ct. at 2618 (Alito, J., concurring). But that is a feature of the constitutional system, not a flaw. And this case does not involve the executive bureaucracy merely filling in minor details of a scheme that has been well defined by Congress, but the delegation of major policy decisions with great practical scope and effect—precisely the

sort of policy that Congress, as the branch of government most responsive to the people, is charged with setting.

Further, Congress understands how to cabin agency discretion with regard to health and safety standards by providing sufficient statutory guidance, even in technically complex areas. For instance, Congress in the Clean Air Act authorized the EPA to regulate certain sources of hazardous air pollutants, which are defined in 42 U.S.C. § 7412. Section 7412(b)(1) lists specific pollutants, while § 7412(b)(2) allows the EPA to add additional pollutants. But the latter provision provides specific, detailed guidance on what pollutants may be added by the agency:

> [P]ollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.

Id., § 7412(b)(2). "Adverse environmental effect" is further defined in the statute as "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." *Id.*, § 7412(a)(7). And Congress expressly

adopted the criteria EPA had set forth in its "Guidelines for Carcinogenic Risk Assessment," permitting the agency to revise them "subject to notice and opportunity for comment." *Id.*, § 7412(a)(11).

Another example is the design and construction requirements that Congress set forth in the antidiscrimination provisions of the Fair Housing Act, 42 U.S.C. § 3604, which closely guide the Department of Housing and Urban Development's implementing regulations. Those provisions, which apply to multi-family housing, require that in covered housing "the public use and common use portions" are "readily accessible to and usable by handicapped persons"; "all the doors designed to allow passage into and within all premises" are "sufficiently wide" to allow passage by wheelchairs; and that apartments contain "an accessible route into and through the dwelling," "light switches, electrical outlets, thermostats, and other environmental controls in accessible locations," "reinforcements in bathroom walls to allow later installation of grab bars," and wheelchair-maneuverable "kitchens and bathrooms." *Id.*, § 3604(f)(3)(C). And it provides that "[c]ompliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as 'ANSI A117.1')" satisfies the requirements for accessible dwellings. *Id.*, § 3604(f)(4).

These examples show how Congress may retain its policy-setting power and pass a law that allows an executive agency to make relevant fact-findings and to assist with the execution of the statute. They also illustrate that Congress is capable of availing itself of the expertise of an agency and adopting its considered recommendations (such as EPA's cancer risk

guidelines) into law, and of looking to standards developed by industry experts and approved by organizations such as the American National Standards Institute. Congress is capable of setting clear, detailed standards to guide agencies, and at the same time leaving room for agency input. A strong nondelegation doctrine thus would not unduly impede Congress or prevent it from carrying out its constitutionally mandated duties in technically complicated areas.

II. OSHA's workplace safety rules are an unconstitutional delegation of the legislative powers.

Amici agree with Judge Nalbandian's thorough analysis showing that the essentially standardless grant of discretion to create workplace-safety rules is an unconstitutional delegation by Congress of its legislative powers to an executive branch agency. *Amici* also agree with petitioner's analysis that the Sixth Circuit majority's decision cannot be squared with this Court's precedent such as *Panama Refining Co.* and *A.L.A. Schechter Corp*. As discussed above, the Framers intended that only Congress could make laws, including the broad authority to regulate commerce. U.S. Const. art. I, § 8, cl. 3. Further, the Framers expressly provided Congress with the authority to enact statutes that were necessary and property to execute those laws. *Id.*, § 8, cl. 18. But instead of passing such laws, Congress impermissibly abdicated its duties and directed OSHA to both enact and execute workplace-safety laws.

This Court's current precedent holds that the nondelegation doctrine "does not prevent Congress from obtaining the assistance of its coordinate Branches" so long as it "'shall lay down by legislative act an intelligible principle to which the person or body authorized

to exercise the delegated authority is directed to conform.'" *Mistretta*, 488 U.S. at 372 (alteration omitted) (quoting *J.W. Hampton*, 276 U.S. at 409). The problem with that standard is that it is vague and malleable and is applied differently by different judges, resulting in inconsistent enforcement of the nondelegation principle. For the reasons described in Part I, this Court should grant plenary review and give teeth to—or replace—the intelligible principle standard and should reject the watered down version used by the panel majority. Here, to hold that Congress must legislate policy and agencies only implement it would require also holding that Congress failed to provide a sufficiently definite and discernible principle for creation of workplace safety regulations in the Act.

Striking down Congress's delegation of power to OSHA to adopt any safety standard it deems "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. § 652(8)) would not result in the elimination of such standards generally. To begin with, petitioner seeks only an injunction limited to the parties. Furthermore, 29 U.S.C. § 655(a) provides for safety rules based not on a vague direction to OSHA to do what it deems "appropriate," but on "any national consensus standard." And 29 U.S.C. § 652(9) defines that term in a concrete manner to mean a standard that "has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption" (subject to certain procedural safeguards). There is no reason to believe that any significant number of safety standards would fall as a result of following the Constitution's mandate.

Certainly, *amici* do not advocate the elimination of workplace-safety rules. To the contrary, workplace safety is a critical part of NAHB's mission and NAHB devotes significant resources to providing employers and employees with training and tools to safeguard construction workers and others in the workplace. Likewise, AFBF, NFIB, and Law Center members rely on safety standards in operating their businesses. But the sources of those rules must be the subject matter experts in the industry, who unquestionably have the most knowledge about the operation of housing construction sites, as Congress recognized in § 652(9). Or the source must be Congress itself through duly enacted legislation that provides more specific direction to OSHA.

As pointed out by Judge Nalbandian and petitioner, a broad delegation of policy-making power to an administrative agency to set such rules is not only irreconcilable with the principles upon which the American government rests but also may be contrary to the best-practices employers have developed from experience for their own industry and work sites. In any event, employers and employees alike should desire adherence to the basic principle that Congress, as the people's agent directly subject to the people's will, is the only branch of federal government that can create laws, leaving agencies like OSHA to implement them. As Justice Gorsuch observed in *Gundy*, "while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'" 139 S. Ct. at 2148 (quoting *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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