No. 23-819

IN THE

Supreme Court of the United States

ALLSTATES REFRACTORY CONTRACTORS, LLC,

Petitioner,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation, founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging government overreach and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Few statutes are so broad or limitless as the Occupational Safety and Health Act, 29 U.S.C. §655(b), which authorizes OSHA to create, issue, and enforce "any occupational safety or health standard" it deems "appropriate." 9 U.S.C. §655(b). This delegation "confer[s] significant power to OSHA to oversee large sections of our economy" by making safety rules for virtually every American workplace. Pet. App. 22a. Petitioner, a small business that has never experienced a major work-related injury, faces tens of thousands of dollars in fines if it violates any one of OSHA's many arbitrary standards—standards that OSHA creates, defines, and enforces. That scheme is inconsistent with the Constitution's nondelegation principle.

From the start, the Framers acknowledged at least some version of a nondelegation doctrine. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1514 (2021). To protect against tyranny, they separated the powers of government. *See* The Federalist No. 47 (J. Madison). Even though "not everyone agreed on the principle's contours" or its "application in particular cases," nearly all agreed there were some delegations that exceeded Congress's authority. Wurman, *supra,* 1494. Indeed, Founding-era history "[o]verall" shows "a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over 'important subjects.'" *Id.* at 1497. Yet this Court has all but disregarded the nondelegation doctrine for nearly a century. *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 86

(2015) (Thomas, J., concurring in judgment). And it has allowed Congress to "escap[e] the sort of accountability that is crucial to the intelligible functioning of a democratic republic" by delegating its legislative power to the Executive. James Ely, *Democracy and Distrust: A Theory of Judicial Review,* 132 (1980). This Court should no longer let it do so.

Though cases involving the nondelegation doctrine sometimes involve a "delicate and difficult inquiry," this case does not. *Wayman v. Southard*, 23 U.S. 1, 46 (1825) (Marshall, C.J.). Congress has handed over significant legislative power to OSHA that will affect millions of Americans and the entire American economy. The Court should grant the petition and clarify that the unfettered delegation to OSHA in 29 U.S.C. §655(b) violates Article I. And it "should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power." *Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring in judgment).

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. The original meaning of Article I at a minimum prohibits Congress from expressly delegating "important subjects" to the Executive.

A. Congress may authorize the Executive to "fill up" certain "details," but it may not delegate its legislative powers.

The separation of powers is an "essential precaution in favor of liberty." The Federalist No. 47 (J. Madison). Indeed, the "ultimate purpose" of the separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). But "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny," the Framers formed a government that would keep those powers "separate and distinct." The Federalist No. 47, *supra*. They adopted a Constitution that "set[] out three branches and vest[ed] a different form of power in each—legislative, executive, and judicial." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part).

From the start, the Framers recognized the lines between those powers were sometimes difficult to define. Madison wrote that "no skill in the science of government has yet been able to discriminate and define,

with sufficient certainty, its three great provinces—the legislative, executive, and judiciary." The Federalist No. 37 (J. Madison); *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Naturally, then, though the "allocation of powers in the Constitution" is "absolute," "it does not follow that there is no overlap between the three categories of governmental power." *Ass'n of Am. R.R.*, 575 U.S. at 69 (Thomas, J., concurring in judgment). Other branches may perform "[c]ertain functions" without "exceeding [their] enumerated powers under the Constitution." *Id.* For example, Congress may delegate non-legislative functions to the Executive or discretion "as to [a law's] execution." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892).

But "[d]elegating 'the making of law' itself" is "off limits." Pet. App. 27a (Nalbandian, J., dissenting); *see also Marshall Field & Co.*, 143 U.S. at 693; *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (denying that Congress may "invest administrative officials with the power of legislation"). Congress "improperly delegates'" its power "when it authorizes an entity other than itself to make a determination that requires an exercise *of legislative power*." *Ass'n of Am. R.R.*, 575 U.S. at 68 (Thomas, J., concurring in judgment) (emphasis added). As Chief Justice John Marshall put it: Congress may not "delegate … powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. at 42. The Framers understood the legislative power "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133. In other words, legislative power is the power to "'prescrib[e] the rules by which the duties and rights of every citizen are to be

regulated,' or the power to 'prescribe general rules for the government of society.'" *Id.* Indeed, the ability to bind private citizens cuts to the "core of the legislative power." *Am. R.R.*, 575 U.S. at 76 (2015) (Thomas, J., concurring in judgment); *see also* Philip Hamburger, *Is Administrative Law Unlawful?* 84 (2010); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1392 n.17 (2019). The Framers thus chose to place the power to bind private rights in the hands of the representatives closest to the people. *See* The Federalist No. 78 (A. Hamilton); *Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring in judgment).

Under this scheme, Congress must itself "generate the rules and policies imposing new limitations and obligations on private actors." Mascott*, supra*, at 1391 (2019). While the Executive may be given authority to "fill up the details" on certain regulatory matters, it cannot simply hand over that power to the Executive. There are some "important subjects, which must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. at 43. The Framers believed that it "would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.'" *Gundy,* 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Indeed, "[i]t would dash the whole scheme if Congress could give its power away to an entity" constrained only by the Administrative Procedure Act, 5 U.S.C. §§551-59, rather than the Constitution's demanding legislative design. *Am. R.R.*, 575 U.S. at 61 (2015) (Alito, J., concurring).

B. Founding-era history and practice confirms this view.

From the start, the Framers acknowledged at least "some version of a nondelegation doctrine." Wurman, *supra*, 1514. Even though "not everyone agreed on the principle's contours" or its "application in particular cases," nearly all agreed there were some delegations that exceeded Congress's authority. *Id.*; *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring in judgment). "Overall," the Founding-era history reveals "a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over 'important subjects.'" Wurman, *supra,* at 1497. Several examples from the first few Congresses and early executive branch practices are illustrative.

The Nondelegation Amendment. During the first Congress, James Madison proposed a nondelegation amendment as a part of the Bill of Rights that would have "specified explicitly that no department of the national government could ever exercise the powers delegated by the Constitution to another branch." Wurman, *supra*, at 1504; 1 Annals of Cong. 789 (1789) (Joseph Gales ed., 1834). When Representative Sherman objected that such an amendment would be superfluous because the Constitution already prohibited such delegation, Madison agreed. Wurman, *supra*, at 1504; 1 Annals of Cong. 760-61 (1789) (Joseph Gales ed., 1834). Madison then explained that while it was already "admitted that the powers ought to be separate and distinct," the amendment might "tend to an explanation of some doubts that might arise respecting the construction of the Constitution." *Id.* This belt-and-suspenders approach carried the day in the House

of Representatives but died during secret Senate deliberations. Wurman, *supra,* at 1505. The objections raised by his fellow Congressmen, and Madison's defense of his amendment as intentionally duplicative, illustrate the Framers' understanding that the Constitution already prevented one branch from delegating its powers to another. *Id.* at 1504-05.

Land Office. Congress also "discussed constitutional delegation restraints" in the context of managing the nation's territories. Mascott, *supra*, at 1445-46. In the summer of 1789, the House considered a bill authorizing the Secretary of the Treasury "to conduct the sale of" unappropriated lands "belonging to the United States, in such a manner as he shall be by law directed." *Id.* (citing Documentary History of the First Federal Congress of the United States of America (4 Mar. 1789-3 Mar. 1791), *reprinted in* 10 Debates in the House of the Representatives, 1079 (Charlene Bangs Bickford at al. eds., 1992) (Debates)). Finding this language too broad, the House instead "changed the provision to authorize the Secretary to 'execute such services respecting the sale of the lands' as the law required." *Id.*

Six months later, the House debated the Treasury Secretary's report "regarding the establishment of offices to manage land sales in the northwestern territory." *Id.*; 14 Debates, *supra*, at 196. Under the proposal, the land office would "fix the sale price for federal land." *Id.* Several members balked at the idea of "leaving the price-setting, or even establishment of a range of prices, up to the land office" rather than Con-

gress itself. *Id.* They thus voted to set the price themselves at "30 cents per acre to be paid in either silver or gold." *Id.*

The Post-Roads Debate. The Second Congress took up the nondelegation principle in a more extensive debate over how it should establish "Post Offices and post Roads[.]" U.S. Const. art. I, §8, cl.7; Ilan Wurman, *As-Applied Nondelegation*, 96 Tex. L. Rev. 975, 991-93 (2018). The initial House committee bill proposed a detailed list of cities to place post roads. Wurman, *supra*, 1506 n.77. But Representative Sedgwick proposed to forgo the detailed list and provide only that the postal road locations would be determined "by such route as the President of the United States shall, from time to time, cause to be established." Wurman, *supra*, at 1506; 3 Annals of Cong. 229 (1791).

The House swiftly rejected this amendment, with several prominent members objecting that it unconstitutionally delegated Congress's power to the President. Wurman, *supra,* at 1506-12. Representative Vining, for example, explained to his fellow members that "[t]he Constitution has certainly given *us* the power of establishing posts and roads, and it is not even implied that it should be transferred to the President; his powers are well defined." *Id.* at 1507; 3 Annals of Cong. 233 (1791) (emphasis added). Representative Hartley likewise told the members that "*we* are constitutionally vested with the power of determining upon the establishment of post roads" and thus "ought not delegate the power to any other person." Wurman, *supra*, at 1509; 3 Annals of Cong. 231 (1791) (emphasis added). And Representative Page quipped that if Sedgwick was right and Congress could "leave to [the

President]" the post roads and "any other business of legislation," he would simply save the body "a deal of time and money" by "mov[ing] to adjourn and leav[ing] all the objects of legislation" to the President's "sole consideration and direction." Wurman, *supra*, at 1507; 3 Annals of Cong. 233-34 (1791).

Ultimately, the final legislation "list[ed] the post roads quite precisely," but "nevertheless granted the Postmaster General the authority 'to establish such *other* roads as post roads, as to him may seem necessary'" and to decide where the post offices should be in the congressionally chosen city. Wurman, *supra*, at 1510 (emphasis in original); 3 Annals of Cong. 230. Those choices, however, were far less significant since the "important question of the day was which cities would get the roads." *Id.* And Congress itself had "specified the starting and ending point for each postal road and detailed which towns and cities must be included along each route." Mascott, *supra*, at 1447. In other words, Congress had addressed the key policy itself and left only certain logistics to the Postmaster General. That approach made sense, since "[i]t is one thing to establish an intricate network of post roads and grant the Postmaster General discretion to extend the specific roads if necessary; it is quite another to give the Executive total discretion to decide where any and all the post roads should be." Wurman, *supra*, at 1510. After all, one choice is "merely a matter of detail while the other is the whole game." *Id.* at 1512.

The Alien Friends Acts. Just a few years later, James Madison forcefully rejected the Alien Friends Acts on nondelegation grounds. Wurman, *supra*, at 1512. The bill would have allowed the President to

unilaterally remove aliens he believed were acting contrary to the interests of the United States. Madison believed that such a "vague and undefined" law "could create an unconstitutional transfer of legislative power to another department." *Id.* at 1513. In his Report of 1800, he wrote:

> However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional … If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

See Wurman, *supra*, at 1513 (citing James Madison, *The Report of 1800*, *in* 17 The Papers of James Madison 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)).

While much of the early debate focused on the policy behind the Alien and Sedition Acts (as the combined program came to be known), Representatives Williams and Livingston also lamented the unconstitutional transfer of power from the Congress to the

President. Williams declared: "it is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to transfer power in this manner." *See* Wurman, *supra*, at 1514. 8 Annals of Cong. 1963 (1798). Livingston's critique of the bill was even more forceful: if "the President alone is empowered to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill" he explained, it would be "completely within the definition of despotism—a union of Legislative, Executive, and Judicial powers." *Id.*; 8 Annals of Cong. 1963 (1798); *see also* Aaron Gordon, *Nondelegation,* 12 NYU. J. L. & Liberty 718, 744-50 (2019). While the act ultimately prevailed, these forceful denouncements on constitutional grounds illustrate the Founding-era understanding of the nondelegation principle.

Early Executive Branch Practices. Early executive branch practices further confirm this view. "[A]ctions from this era" show "an understanding that not only was Congress the preferable body to take action, but that regulation by legislation was constitutionally required." Mascott, *supra*, at 1395. For example, even after Congress established the Treasury Department, it "continued to engage in detailed legislating." *Id.* Indeed, Congress "solicited reports and recommendations" from Treasury Secretary Alexander Hamilton "[r]ather than employing [his] expertise through policy delegations to the Treasury Department." *Id.* "Congress believed input and expertise from Secretary Hamilton was crucial. But statements by both Secretary Hamilton and Congress suggest they thought it was important for Congress as the legislative body to

take legislative action to impose such proposals, not the Treasury Department." *Id.*

Hamilton himself was painstakingly circumspect about reporting to Congress the ambiguities, contradictions, and other legal questions that arose while executing the law. *See id.* at 1443-45. Even when ports were frozen over, the Treasury Secretary turned to Congress to authorize port location alterations. *Id.* Indeed, "[r]ather than believing themselves to have the discretion to slightly alter the location of one of the customs ports of delivery, the Treasury Department turned to Congress for a legislative fix." *Id.* At bottom, "Congress and the Treasury Secretary collectively believed that it was Congress's responsibility to change laws even for matters as relatively minor as slightly altering the location of the unloading of goods." *Id.*

In another instance, the House ordered the Treasury Secretary "to submit a statement accounting for the money that each state had repaid into the federal treasury." *Id.* at 1449. But both Hamilton and the Register of the Treasury "expressed concern that Congress had not legislatively specified the proper conversion rate for calculating the value of old continental bills of credit." *Id.* So the treasury officers reported the numbers "as accurate as the treasury records will admit," but stated that they "could not presume to affix a scale not warranted by any act of the Legislature." *Id.* And they instead "felt compelled to rely on a legislative determination of the proper valuation of old continental currency." Mascott, *supra*, at 1149.

These examples show that, from the start, the political branches both understood the nondelegation doctrine to be an important part of the Constitutional

system. And that it forbid Congress from delegating its legislative power—at the very least regarding "important subjects"—to the Executive. *Wayman*, 23 U.S. at 43.

II. The Court should hear this case to revive the nondelegation doctrine.

As history shows, the Framers agreed that "Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power." *Ass'n of Am. R.R.*, 575 U.S. at 68 (Thomas, J., concurring in judgment). Yet federal courts have "tiptoed around the idea that an act of Congress" could ever be invalidated "as an unconstitutional delegation of legislative power" for nearly a century. Pet. App. 24a (Nalbandian, J., dissenting). In place of the nondelegation principle, this Court has designed a rule, by which Congress needs only to give an "intelligible principle" for the Executive to follow. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also*, *Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 472 (2001). That test does not reflect the Framers' understanding of delegation nor the underlying principles of the Constitution. *See Gundy*, 139 S. Ct. at 2139-40 (Gorsuch, J., dissenting). As Petitioners explain, "at some point, delegation crosses into abnegation, and the status quo's approach to policing that line" is "gravely out of step with the Constitution's structure and original meaning." Pet. 12. This Court should hear this case to "correct the misimpression that the nondelegation doctrine is a constitutional relic that imposes no real limit on Congress's ability to pass the buck on legislative decisionmaking." *Id.* at 11.

Here, Congress authorized OSHA to write all "reasonably necessary or appropriate" workplace-safety standards. That delegation is inherently legislative and thus violates Article I. *See Ass'n of Am. R.R.*, 575 U.S. at 70 (Thomas, J., concurring in judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power."). It gives OSHA the unilateral power to regulate every workplace in America, and it cedes "significant power to OSHA to oversee large sections of our economy." Pet. App. 22a. This Court has never allowed Congress to "expressly and specifically delegate to [an] agency the authority both to decide [a] major policy question and to regulate and enforce [it]." *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh J., dissenting from denial of certiorari). If that does not violate Article I, nothing does.

That this Court has never let the Executive unilaterally make major policy makes sense. Delegation issues "raise[] fundamental questions about democracy, accountability, and the enterprise of American governance." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002). Indeed, the structural division of powers "ensure[s] that the representative interests of people electing legislators from throughout the country are represented in policy proposals in a way that would not be possible via regulatory decisions made by a singular, centralized administrative entity." Mascott, *supra*, at 1395-96. "The acts of such administrative entities are accountable, if at all, back to just one centralized elected official, not to elected decisionmakers from throughout the nation."

Id. Thus "enforcement of relatively strict nondelegation principles" is "critical to preserving the structural constitutional principle that the federal government is to reflect the interests of both individual members of the electorate as well as the interests of the states." *Id.*

Under our Constitution, sometimes the "significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). Those "important choices of social policy" must be made by Congress—and Congress alone. *Indus. Union Dept., AFL-CIO v. Am. Petro Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment). When Congress fails to make those choices itself, our legislators "escap[e] the sort of accountability that is crucial to the intelligible functioning of a democratic republic." Ely, *supra*, at 132.

The nondelegation doctrine sometimes involves a "delicate and difficult inquiry," but not in this case. *Wayman,* 23 U.S. at 46. Congress has relinquished significant legislative power to OSHA that will affect millions of Americans and the entire American economy. In doing so, OSHA seeks to "apply legally binding rule[s] that [are] not enacted by Congress pursuant to Article I." *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring in judgment). This Court should no longer "look the other way" and allow it to do so. *Id.*

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

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