No. 11-711

# In the Supreme Court of the United States

NATIONAL MARITIME SAFETY ASSOCIATION, PETITIONER

*v.*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION


DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

M. PATRICIA SMITH
*Solicitor of Labor*

JOSEPH M. WOODWARD
*Associate Solicitor*

CHARLES F. JAMES
*Counsel for Appellate Litigation*

EDMUND C. BAIRD
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

## QUESTION PRESENTED

Whether 29 U.S.C. 652(8), a provision of the Occupational Safety and Health Act of 1990, 29 U.S.C. 651 *et seq.*, that authorizes the Secretary of Labor to adopt regulations "necessary or appropriate to provide safe or healthful employment and places of employment," is an unconstitutional delegation of legislative power.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:

Cases—Continued: Page



Statutes:



Miscellaneous:

# In the Supreme Court of the United States

No. 11-711

NATIONAL MARITIME SAFETY ASSOCIATION, PETITIONER

*v.*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 649 F.3d 743.

## JURISDICTION

The judgment of the court of appeals was entered on June 17, 2011. A petition for panel rehearing was denied on September 12, 2011 (Pet. App. 23a). The petition for a writ of certiorari was filed on December 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Occupational Safety and Health Act (OSH Act or Act) was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). The Act authorizes the Secretary of Labor to "promulgate, modify, or revoke any occupational safety or health standard." 29 U.S.C. 655(b). Section 3(8) of the Act, 29 U.S.C. 652(8), defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The Secretary of Labor has delegated the authority to set occupational safety and health standards to the Occupational Safety and Health Administration (OSHA). 72 Fed. Reg. 31,160 (June 5, 2007).

On December 10, 2008, OSHA published a final rule regulating vertical tandem lifts (VTLs), a practice utilized by marine cargo handlers to move two or more intermodal containers at the same time while loading and unloading ships. Pet. App. 2a-3a; 73 Fed. Reg. 75,246.[1] OSHA issued the rule after making a threshold

[1] Most maritime cargo is shipped in standardized intermodal containers, large rectangular steel boxes that are of uniform dimension and weigh between two and five tons when empty. Pet. App. 3a, 7a. Intermodal containers stacked on the decks of ships are held in place by interbox connectors (also called twistlocks), which engage the corresponding corner openings of the upper and lower boxes to hold them together. Pet. App. 3a; 73 Fed. Reg. at 75,252-75,253. In the VTL technique, a crane attaches to the corner openings of the top container, and the second container is suspended from the top one by twistlocks. Pet. App. 3a; 73 Fed. Reg. at 75,246-75,247. The VTL technique allows

finding that "unregulated VTL operations" pose a "significant risk" to worker safety. Pet. App. 10a-11a (quoting 73 Fed. Reg. at 75,251); see *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (*Benzene*) (plurality opinion) (reading 29 U.S.C. 652(8) to require a "threshold finding" of significant risk); see also *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 504-505 & n.25, 513 n.32 (1981) (adopting *Benzene* significant-risk standard).

2. Petitioner National Maritime Safety Association, an association of marine terminal operators and stevedores, sought review of the VTL standard in the court of appeals, arguing, *inter alia*, that 29 U.S.C. 652(8) is an unconstitutional delegation of legislative power. Pet. App. 2a. The court of appeals granted the petition for review in part on grounds not relevant to this petition. *Id.* at 15a-17a. The court rejected petitioner's nondelegation challenge. *Id.* at 20a-21a.

In rejecting petitioner's nondelegation argument, the court of appeals explained that this Court's precedents suggest that "the Court believes the Act, as interpreted in *Benzene*, contains an intelligible principle for promulgating health standards." Pet. App. 20a. Further, the language of 29 U.S.C. 652(8), which limits OSHA's power to set safety standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," "is no broader than other delegations" that this Court has upheld. Pet. App. 20a-21a. The court of appeals concluded that "[i]n light of these precedents, one cannot plausibly argue that 29 U.S.C. § 652(8)'s 'reasonably necessary or appropriate to provide safe or healthful employment and

---

ships to be loaded and unloaded more quickly than single lifts. 73 Fed. Reg. at 75,281-75,282.

places of employment' standard is not an intelligible principle." *Id.* at 21a (internal citation, quotation marks, and alterations omitted). The court of appeals also rejected petitioner's claim that OSHA failed to support its significant-risk finding. *Id.* at 11a-13a.

**ARGUMENT**

Petitioner contends (Pet. 13-14) that the OSH Act "is unconstitutional as written," and that "the standard setting process" long used by OSHA departs from the plain text of the OSH Act and "is itself unconstitutional." The court of appeals correctly concluded that Section 3(8) of the OSH Act provides an intelligible principle to guide agency decision making and that the OSH Act does not give rise to an unconstitutional delegation of legislative power. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. This Court's decisions hold that there is no unconstitutional delegation of legislative power when a statutory grant of authority sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). As this Court has observed, it has found only two statutes that lacked the necessary "intelligible principle"—and it has not found any in the last 70 years. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); see *Loving* v. *United States*, 517 U.S. 748, 771 (1996) (same); *Mistretta*, 488 U.S. at 373 (same); see *id.* at 416 (Scalia, J., dissenting) (explaining that the

Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

The court of appeals correctly concluded that the OSH Act's grant of authority in 29 U.S.C. 652(8) provides an "intelligible principle" that limits the agency's decision making. The Act requires that any "occupational safety and health standard" be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Ibid.* Section 3(8) has been construed by this Court to require "a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices." *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality opinion); see *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 504-505 & n.25, 513 n.32 (1981) (*Cotton Dust*). This standard limits the agency's discretion and does not result in an unconstitutional delegation of legislative power.

As the court of appeals correctly recognized (Pet. App. 20a-21a), this standard is no broader than the ones in other statutes that this Court has found to contain such an "intelligible principle." Those other statutes authorize an agency to adopt ambient air quality standards that are "requisite to protect the public health," *Whitman*, 531 U.S. at 472, 475-476; to regulate the airwaves in the "public interest," *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); to fix prices of commodities that "will be generally fair and equitable," *Yakus* v. *United States*, 321 U.S. 414, 420 (1944); and to reorganize corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not

"unfairly or inequitably distribute voting power among security holders," *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946). Further, the significant-risk standard is bolstered by the additional statutory requirement that a safety standard "provide a high degree of employee protection." See *International Union, UAW* v. *OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) (*Lockout/Tagout II*) (citing 29 U.S.C. 651(b), 655(a) and (b)(8), 654(a)(1)).[2]

Petitioner nonetheless contends (Pet. 4-6, 13-14) that this Court's decision in *Benzene* left open the question whether the OSH Act embodies an unconstitutional delegation of legislative power. Petitioner's contention is incorrect. In *Benzene*, a plurality of this Court indicated that *if* the Act were read to permit OSHA to promulgate standards without first quantifying the risk "sufficiently to enable the Secretary to characterize it as significant," the Act might pose a nondelegation problem. 448 U.S. at 646. But the plurality read 29 U.S.C. 652(8) to impose a significant-risk criterion, and a majority of this Court approved the *Benzene* plurality's construction of the Act the following year in upholding OSHA's cotton dust standard. See *Cotton Dust*, 452 U.S. at 504-505 & n.25, 513 n.32. Indeed, a majority of the *Cotton Dust* Court rejected the position that the Act's grant of authority to the Secretary to issue health standards violates nondelegation principles. *Id.* at 541 & n.75.

Nor is there any conflict among the courts of appeals on this question. The courts of appeals consistently read

---

[2] Petitioner misreads the D.C. Circuit's decision in *Lockout/Tagout II* as requiring OSHA to adopt "self-imposed limits" (Pet. 8) "that are not required by the text of the OSH Act" (Pet. 14). Rather, *Lockout/Tagout II* found support for OSHA's construction in the text of the Act itself. See 37 F.3d at 668-669.

29 U.S.C. 652(8) to impose the intelligible significant-risk principle. See, *e.g.*, *Public Citizen Research Group* v. *United States Dep't of Labor*, 557 F.3d 165, 170, 186-187 (3d Cir. 2009); *Alabama Power Co.* v. *OSHA*, 89 F.3d 740, 745 (11th Cir. 1996); *AFL-CIO* v. *OSHA*, 965 F.2d 962, 975-976 (11th Cir. 1992); *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1444 (4th Cir. 1985); *ASARCO, Inc.* v. *OSHA*, 746 F.2d 483, 490-495 (9th Cir. 1984). And the D.C. Circuit has now twice held that the provision "satisf[ies] the demands of the nondelegation doctrine." *Lockout/Tagout II*, 37 F.3d 669; see Pet. App. 20a-21a. In short, there is no "open constitutional question" (Pet. 14) for this Court to decide here.

Petitioner also suggests (Pet. 8-9, 13-14) that the intelligible principles that guide OSHA's authority under the OSH Act are self-imposed standards that do not derive from the statutory text. Petitioner premises that argument on this Court's observation in *Whitman* that an agency cannot cure an unconstitutional delegation of legislative power by voluntarily adopting a self-limiting approach to its authority. See 531 U.S. at 473. Yet as the plurality recognized in *Benzene*, the requirement that the Secretary make a threshold finding of significant risk flows directly from the text of 29 U.S.C. 652(8). 448 U.S. at 642 ("[A] workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm."). So too does the requirement that standards be economically and technologically feasible. This Court has made clear that feasibility, no less than significant risk, is a statutory limitation on the Secretary's delegated authority to promulgate health and safety standards alike: "[*A*]*ny* standard that was not economically or technologically feasible would *a fortiori*

not be 'reasonably necessary or appropriate'" under 29 U.S.C. 652(8). *Cotton Dust*, 452 U.S. at 513 n.31 (emphasis added).

Petitioner's suggestion (Pet. 7) that safety standards such as the VTL standard are constitutionally suspect because they are not subject to the feasibility mandate of 29 U.S.C. 655(b)(5) that applies to health standards is similarly unfounded. As just explained, this Court concluded in *Cotton Dust* that 29 U.S.C. 652(8) itself requires a standard to be economically and technologically feasible. In its *Lockout/Tagout* decisions, the D.C. Circuit questioned whether the Act's authority to promulgate safety standards might be problematic if it allowed OSHA, once it had identified a significant safety risk, to "choose freely among levels of stringency, from adopting no standard at all to adopting the most stringent standard feasible." *Lockout/Tagout II,* 37 F.3d at 668 (citing *International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991) (*Lockout/Tagout I*)). But the court of appeals upheld the Secretary's interpretation of the Act as requiring OSHA to promulgate safety standards providing "a high degree of worker protection," a criterion not substantially different from that applicable to health standards under 29 U.S.C. 655(b)(5). *Lockout/Tagout II*, 37 F.3d at 669; see also *Supplemental Statement of Reasons*, 58 Fed. Reg. 16,614-16,616 (Mar. 30, 1993) (explaining statutory criteria applicable to OSHA safety standards); 73 Fed. Reg. at 75,249 (applying criteria to standard at issue here). OSHA does not, as petitioner alleges (Pet. 14), depart from the plain text of the OSH Act. As the D.C. Circuit recognized in *Lockout/Tagout II*, under OSHA's interpretation of its statutory mandate, "*the Act* guides its choice of safety stan-

dards enough to satisfy the demands of the nondelegation doctrine." 37 F.3d at 669 (emphasis added).

2. Petitioner contends (Pet. 15-16) that review in this case is necessary because the VTL standard will disrupt the flow of foreign commerce into the United States by foreclosing VTLs of more than two empty containers. Petitioner does not explain how this contention relates to the sole legal question petitioner has presented. Petitioner's argument about the potential effects of the particular regulation at issue here is irrelevant to the question whether the statute impermissibly delegates legislative power.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*

M. PATRICIA SMITH
*Solicitor of Labor*

JOSEPH M. WOODWARD
*Associate Solicitor*

CHARLES F. JAMES
*Counsel for Appellate Litigation*

EDMUND C. BAIRD
*Attorney*
*Department of Labor*

MARCH 2012