

October 16, 2025

Mr. David Keeling
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave NW, Washington, DC 20210

Re: “Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities” Proposed Rule, Docket No. OSHA–2025–0041, 90 Fed. Reg. 28370 (July 1, 2025)

Dear Assistant Secretary Keeling,

Governing for Impact (“GFI”) submits this comment on the proposed rule, Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities (“the Proposed Rule”), issued by the Occupational Safety and Health Administration (“OSHA”).¹ GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for working Americans.² We appreciate the opportunity to comment and write in opposition to the Proposed Rule.

The Occupational Safety and Health Act’s (“OSH Act”) General Duty Clause requires employers to furnish workplaces “free from recognized hazards that are causing or are likely to cause death or serious physical harm,” even where no specific OSHA standard applies.³ The Proposed Rule would interpret this general obligation as not applying to certain “inherently risky employment activities.”⁴ OSHA claims “it must” adopt this limit to comply with the major questions doctrine (“the MQD”),⁵ relying on a dissent by then-Judge Kavanaugh in *SeaWorld of Florida, LLC v. Perez*.⁶ In that case, the D.C. Circuit upheld a General Duty Clause citation after a SeaWorld trainer’s death during a killer whale show.⁷ Dissenting, Judge Kavanaugh opined that OSHA lacked the authority to “eliminate familiar sports and entertainment practices.”⁸

The Proposed Rule is misguided for four reasons. First, it is at odds with the General Duty Clause’s plain language, inventing statutory exemptions out of whole cloth. Second, the Proposed Rule’s language vaguely applies to any “professional . . . occupation,” and it is not clear whether the Proposed Rule applies to particular *activities* across a range of sectors (including logging and other traditionally dangerous fields), or applies broadly across various activities within the entertainment and sports *sectors*. As a result, while the Proposed Rule’s plain text appears to merely implement existing limits on the General Duty Clause, the regulation could be read to reach much further than its narrow framing suggests. If any final rule would in fact have such sweeping reach, the Proposed Rule would have provided insufficient notice to commenters. Third, the Proposed Rule is based on flawed reasoning. In suggesting the MQD’s application to unrealistic hypothetical actions justifies constraining OSHA’s own authority, it relies on an erroneous reading of that doctrine, and regardless General Duty Clause enforcement in the context of inherently risky jobs would not “transform[]” OSHA’s authority. Finally, consistent with well-established disclosure requirements under the

¹ Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities, 90 Fed. Reg. 28370 (Jul. 1, 2025).

² Governing for Impact, <https://www.governingforimpact.org/>.

³ 29 U.S.C. § 654(a)(1).

⁴ 90 Fed. Reg. at 28375.

⁵ *Id.* at 28371.

⁶ 748 F.3d 1202 (D.C. Cir. 2014).

⁷ *Id.* at 1204–05.

⁸ *Id.* at 1222 (Kavanaugh, J., dissenting).

Administrative Procedure Act (“APA”), if OSHA has already used artificial intelligence in this rulemaking but not disclosed that use, that provides an additional reason why OSHA must withdraw the Proposed Rule, and at minimum OSHA must disclose any use of AI as part of this rulemaking.

I. The proposed regulatory text contradicts the General Duty Clause’s plain language.

OSHA disregards the terms of the statute by rewriting the OSH Act to exempt certain employers from the duty owed by all employers. The OSH Act provides that “[e]ach employer” shall comply with the General Duty Clause.⁹ *Black’s Law Dictionary* explains that “each” “refers to every one of the persons or things mentioned.”¹⁰ It “permits no exceptions.”¹¹ And the OSH Act defines “employer” broadly as “a person engaged in a business affecting commerce who has employees.”¹² By purporting to exempt certain employers from this blanket obligation, the Proposed Rule attempts to rewrite the statute to either replace the word “each” with “some” or modify the definition of “employer” to exclude employers in inherently risky fields.

The OSH Act does not provide OSHA such discretion over the application of the General Duty Clause.¹³ Congress knows how to exempt certain industries or employers from the OSH Act’s coverage, but it declined to do so for the industries listed in the Proposed Rule.¹⁴ Congress also legislated a detailed process for how OSHA can grant exemptions from particular standards (“variances”) to individual employers,¹⁵ but did not delegate any authority to grant industry-wide exemptions from the General Duty Clause. “When Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”¹⁶ The Proposed Rule seems to claim authority from the OSH Act’s provision that the Secretary of Labor shall “prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this Act.”¹⁷ That delegation of authority to issue regulations necessary to carry out OSHA’s statutory responsibilities, including the responsibility to cite employers who violate the broadly imposed General Duty Clause, does not delegate authority to rewrite the text of the statute.¹⁸

⁹ 29 U.S.C. § 654(a) (emphasis added).

¹⁰ *Each*, Black’s Law Dictionary (4th ed. Rev. 1968), available at <https://archive.org/details/blacks-law-dictionary-4th-edition-1968-by-unknown-z-lib.org/pdf-blacks-law-dicti/page/596/mode/2up>.

¹¹ *Dickenson-Russell Coal Co., LLC v. Sec’y of Lab.*, 747 F.3d 251, 258 (4th Cir. 2014).

¹² 29 U.S.C. § 652(5).

¹³ It would be wrong to characterize this action as a decision to not take enforcement action that is committed to agency discretion, given the Proposed Rule purports to simply exempt certain categories of employers and jobs from the General Duty Clause altogether rather than adjust OSHA’s enforcement of the Clause. This is closer to “a general policy” that is so extreme as to amount to an abdication of its statutory responsibilities” than a “decision not to take enforcement action.” *Heckler v. Chaney*, 470 U.S. 821, 832, 833 n.4 (1985) (citing *Adam v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

¹⁴ See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, tit. 1, 136 Stat. 4459, 4844 (exempting farms and employers in certain low-hazard industries with ten or fewer employees).

¹⁵ See 29 U.S.C. §§ 655(b)(6), (d).

¹⁶ *United States v. Johnson*, 529 U.S. 53, 58 (2000); see, e.g., *NRDC v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 2005) (holding unlawful EPA’s attempt to exempt construction sites of less than five acres from a statute covering “industrial activity,” reasoning that “if construction activity is industrial in nature, . . . EPA is not free to create exemptions from permitting requirements for such activity”); see also *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1381 (D.C. Cir. 1977) (holding unlawful an attempt by EPA to exempt certain sources of pollution from a statutory requirement that “any addition of any pollutant to navigable waters from any point source” requires a permit, 33 U.S.C. § 1311, 1362(12) (1975)).

¹⁷ 90 Fed. Reg. at 28375 (citing, inter alia, 29 U.S.C. § 657).

¹⁸ OSHA may assert, as the government did in *Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992), that it has the inherent authority to make “de minimis” exceptions to the OSH Act. See *id.* at 1306. But OSHA could not assert that applying the General Duty Clause to inherently dangerous jobs would be both de minimis (a “trifling,”

II. The proposed regulatory text is unclear and fails to provide fair notice to commenters.

The Proposed Rule is not clear whether it applies only to particular activities or more broadly to entire sectors, nor does it define what it means by “professional” occupations, potentially chilling enforcement beyond the rule’s purported scope and risking a final rule out of step with this purportedly narrow proposal. Subsection (a) of the Proposed Rule’s regulatory text seeks to narrow the General Duty Clause such that it “does not require employers to remove hazards arising from inherently risky employment activities, where” certain requirements are met—including that the “activity is integral to . . . a *professional* or performance-based occupation.”¹⁹ Then, subsection (b) states: “Such *sectors* may include, but are not limited to” several sectors such as live entertainment, animal handling, extreme sports, etc. However, the regulation does not include the word “sector” prior to subsection (b). Thus, the regulation is unclear as to whether it (1) bars the General Duty Clause’s application to particular essential activities across any “professional . . . occupation” whose hazards are impossible to eliminate, regardless of the sector; or (2) generally narrows the General Duty Clause’s application in the listed sectors.

If it is the former, the Proposed Rule might apply to a wider range of inherently dangerous professions like “construction, metal pouring, logging, welding, firefighting, roofing, electrical power line installation, handling explosives, [etc.],” as the *SeaWorld* majority recognized in response to Judge Kavanaugh’s dissent.²⁰ With no definition of “professional,” the Proposed Rule appears to potentially limit the General Duty Clause’s application in a nebulous set of professions—not just the entertainment and sports occupations that the Proposed Rule foregrounds. A law firm that defends companies against OSHA citations, Fisher Phillips, is encouraging employers to submit comments to this docket “in support of not limiting the rule to just the industries listed” on the grounds that doing so would push OSHA to lean more on its standard-setting authority.²¹ And non-entertainment and sports industry interests like the National Roofing Contractors Association and the Associated General Contractors of America have expressed interest in the rulemaking.²² Thus, rather than just affect the entertainment and sports industries, this rulemaking has the potential to undermine OSHA’s General Duty Clause more generally, limiting—without sufficiently reasoned decisionmaking—a critical OSHA authority to prevent hazards that OSHA would be unable to predict and prevent through its standard-setting power.

If any final rule resulting from the Proposed Rule applies to a broader set of industries than expected, the rulemaking will not have provided sufficient notice to commenters. The APA’s notice-and-comment requirement demands that agencies provide “fair notice”²³ in the regulatory proposal of the final rule’s contents in order to “afford[] interested parties a reasonable opportunity to participate in the rulemaking process.”²⁴ The Proposed Rule indicates that the list of industries in subsection (b) is “non-exhaustive” but

“trivial,” “pointless expenditure[] of effort,” *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) and major (“extraordinary,” “sweeping and consequential,” “significan[t],” *West Virginia v. EPA*, 597 U.S. 697, 721 (2022)).

¹⁹ 90 Fed. Reg. at 28375 (emphasis added).

²⁰ *SeaWorld*, 748 F.3d at 1212–13.

²¹ *OSHA Proposes Major Limit on Enforcing General Duty Clause Violations – What It Means for Employers in High-Risk Industries*, Fisher Phillips (July 8, 2025), <https://www.fisherphillips.com/en/news-insights/osha-proposes-major-limit-on-enforcing-general-duty-clause-violation.shtml>.

²² Nat’l Roofing Contractors Ass’n, Comment Letter on Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities (Aug. 8 2025), <https://www.regulations.gov/comment/OSHA-2025-0041-0495>; Associated Gen. Contractors of Am., Comment Letter on Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities (Jul. 25, 2025), <https://www.regulations.gov/comment/OSHA-2025-0041-0015>.

²³ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

²⁴ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation omitted).

“illustrative,” and asks for comment on whether the list should instead be “exclusive.”²⁵ That question seems to indicate that the only outcomes for that list are that it is either “illustrative” or “exclusive”—i.e., that any final rule would only ever apply in entertainment and sports (either to all sub-industries within entertainment and sports, or just to those listed in subsection (b)). However, the Proposed Rule also requests comment on whether “there [are] any other potential industry sectors or occupations to which the proposed provision may apply.”²⁶ It is unclear whether that request asks for more sectors within entertainment and sports, or invites other industries to request their own exemptions. Commenters might not reasonably conclude that the Proposed Rule’s vague reference to “professional” jobs would mean that any final rule will apply far beyond the proposal’s entertainment and sports framing.

On the other hand, even if any final rule instead only applies to entertainment and sports, it would discourage enforcement in those sectors generally despite the special importance of the General Duty Clause in those professions. By “preliminarily concur[ring] with the [*SeaWorld*] dissent’s concerns,”²⁷ the Proposed Rule seems to endorse Judge Kavanaugh’s conclusion that OSHA could not regulate SeaWorld’s killer whale show because “[m]anagement and participants in the relevant sports or entertainment industry must initially decide what their competition or show consists of and how to market it to spectators.”²⁸ Because “SeaWorld ha[d] decided that close contact between SeaWorld trainers and whales is an important aspect of its shows,” OSHA could play no role in working with SeaWorld to create a safer version of its show following the death of a trainer.²⁹ If OSHA’s finalization of the Proposed Rule maps onto the *SeaWorld* dissent’s proposed approach, the result will be unique deference to entertainment and sports industry determinations of what is “integral” to their business, with no role for OSHA to question that assertion. But the flexible tool of the General Duty Clause is especially important in industries like this, where workplaces present “unique circumstances”³⁰ for which OSHA cannot set standards ahead of time.

III. The major questions doctrine does not justify using unrealistic hypothetical enforcement actions to constrain OSHA’s authority and, even if it could, the hypotheticals outlined in the Proposed Rule would not “transform” OSHA’s authority.

Notably absent from the Proposed Rule is any attempt to interpret the OSH Act—any attention to its text or structure, for example—in support of OSHA’s proposal. “As always,” OSHA should have “start[ed] with the text.”³¹ Instead, OSHA asserts that it is bound by the MQD to stop regulating inherently risky jobs.³² But as explained below, OSHA’s reliance on the MQD is misplaced. Because OSHA “has misconceived the law,”³³ the Proposed Rule cannot be finalized based on OSHA’s concerns with respect to the MQD.

a. The MQD does not justify using an unrealistic hypothetical enforcement action to restrict the agency’s own authority.

OSHA has never asserted the authority the Proposed Rule identifies as a violation of the MQD—citing an employer under the General Duty Clause for inherently risky activity integral to an occupation where the hazard cannot be eliminated without fundamentally altering the activity. Nor could it, unless the circuit courts veer from their current, uniform rule. The only “major” questions arise in OSHA’s unrealistic hypotheticals, and thus the Proposed Rule arbitrarily proposes a solution in search of a problem. OSHA’s “solution” could, however, inappropriately tie the agency’s hands in the future.

²⁵ 90 Fed. Reg. at 28372.

²⁶ *Id.*

²⁷ *Id.* at 28371.

²⁸ *SeaWorld*, 748 F.3d at 1219.

²⁹ *Id.*

³⁰ *Id.* at 1207 (quoting H.R. Rep. No. 91-1291, at 21–22 (1970)) (emphasis omitted).

³¹ *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024).

³² 90 Fed. Reg. at 28371.

³³ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

Taking OSHA at its word that the Proposed Rule is narrow in scope,³⁴ we have been unable to find a single OSHA citation that the proposal would have prevented. As then-Judge Kavanaugh emphasized in dissent, *SeaWorld* was the first time that OSHA cited an entertainment employer for dangerous conduct that was part-and-parcel of a performance.³⁵ And even that citation would likely not have been prevented by the Proposed Rule, given it only bars General Duty Clause applications that would “fundamentally alter[]” the dangerous activity. In *SeaWorld*, the D.C. Circuit held that the hazard could be eliminated without “chang[ing] the essential nature of [SeaWorld’s] business”; even with the physical barriers or other technical solutions OSHA suggested, “[t]here [would] still be human interactions and performances with killer whales.”³⁶ The majority was right: notwithstanding its holding, *SeaWorld* still puts on killer whale shows today that feature physical contact between humans and orcas.³⁷ After *SeaWorld*, OSHA has rarely if ever issued citations related to danger inherent to performances. OSHA cited, for instance, a Broadway show after cast members were injured in flying routines—though not due to any inherent danger of flying, but rather due to improperly secured harnesses.³⁸ OSHA has not enforced the General Duty Clause more broadly in part because existing case law limits OSHA’s authority to only requiring hazard abatement where there exist “feasible means” to do so.³⁹ Just as the Proposed Rule bars enforcement of the General Duty Clause where it would require “fundamentally altering or prohibiting the activity,” the *SeaWorld* majority already provided that means are not “feasible” where the “only remedy” is to “fundamentally alter”⁴⁰ or end the activity.⁴¹

³⁴ See Section II for a discussion of the Proposed Rule’s unclear reach.

³⁵ *SeaWorld*, 748 F.3d at 1220 n.3 (Kavanaugh, J., dissenting).

³⁶ *Id.* at 1210.

³⁷ See, e.g., EchoBeluga, *Orca Encounter (Full Show) - SeaWorld Orlando - December 30, 2024*, YouTube at 01:28 (Feb. 1, 2025), https://youtu.be/LTtVp15L1TE?si=DvUW3eHP0w_Dakck&t=88.

³⁸ *US Department of Labor’s OSHA Cites Spider-Man Broadway Musical Production Company Following Injuries to Cast Members*, OSHA (Mar. 4, 2011), <https://web.archive.org/web/20220714195941/http://www.osha.gov/news/newsreleases/region2/03042011>. OSHA also cited a production company after a stuntman fell to his death, *U.S. Department of Labor Imposes Maximum Fines on Motion Picture Company for Failing to Adequately Protect From Fall Hazards*, OSHA (Jan. 5 2018), <https://web.archive.org/web/20220821080421/https://www.osha.gov/news/newsreleases/region4/01052018>, though a jury in a wrongful death suit found that the company was negligent in its safety precautions around the stunt. See *Stalwart Films LLC v. Bernecker*, 855 S.E.2d 120, 122–24 (2021) (describing the jury verdict, and reversing it on grounds that the Georgia’s workers compensation statute provided the exclusive remedy). And an Administrative Law Judge upheld an OSHA citation for a bullet wound sustained by a performer during a staged reenactment of an Old West-style shootout—finding that the employer could have prevented the hazard by simply inspecting the firearms performers used, rather than trusting each performer to ensure the safety of their own gun. *W. World, Inc.*, 24 BL OSHC 2116, 2013 WL 7208643, at *13–14 (No. 07-0144, 2013) (ALJ).

³⁹ *SeaWorld*, 748 F.3d at 1207; accord *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007); *Gen. Dynamics Corp. v. Occupational Safety & Health Rev. Comm’n*, 599 F.2d 453, 458 (1st Cir. 1979); *Carlyle Compressor Co., Div. of Carrier Corp. v. Occupational Safety & Health Rev. Comm’n*, 683 F.2d 673, 676 (2d Cir. 1982); *W. World, Inc. v. Sec’y of Lab.*, 604 F. App’x 188, 192 (3d Cir. 2015); *Bristol Steel & Iron Works, Inc. v. Occupational Safety & Health Rev. Comm’n*, 601 F.2d 717, 724 (4th Cir. 1979); *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (requiring that the hazard be “preventable”); *Nelson Tree Servs., Inc. v. Occupational Safety & Health Rev. Comm’n*, 60 F.3d 1207, 1209 (6th Cir. 1995); *Caterpillar Inc. v. Occupational Safety & Health Rev. Comm’n*, 122 F.3d 437, 440 (7th Cir. 1997); *St. Joe Mins. Corp. v. Occupational Safety & Health Rev. Comm’n*, 647 F.2d 840, 844 (8th Cir. 1981); *Mont. Med. Ass’n v. Knudsen*, 119 F.4th 618, 628 (9th Cir. 2024); *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Rev. Comm’n*, 660 F.2d 439, 444 (10th Cir. 1981); *UHS of Del., Inc. v. Sec’y of Lab.*, 140 F.4th 1329, 1338 (11th Cir. 2025).

⁴⁰ *SeaWorld*, 748 F.3d at 1215.

⁴¹ See *id.* at 1210 (discussing *Pelron Corp.*, 12 BNA 1833, 1986 WL 53616 (No. 82-288, 1986) (ALJ)), where an Administrative Law Judge found that the hazard was not “preventable” because “the only remedy would have been to close the plant”).

Unable to cite any actual OSHA citations that would undergird the Proposed Rule’s major questions concerns, the Proposed Rule instead relies on hypotheticals. For example, the Proposed Rule quotes Judge Kavanaugh’s dissent arguing that the OSH Act does not authorize OSHA to regulate “punt returns in the NFL” or “speeding in NASCAR.”⁴² But major questions only arise when agencies assert major authority, not when they joust at, or dissenting judges propose, hypotheticals. OSHA disclaimed the authority the dissent conjured then⁴³ and has not exercised it since. Regardless, if in any given enforcement action OSHA, contrary to its stated concerns, were to assert impermissibly major authority, the courts could step in to keep OSHA in its lane—as the Supreme Court did in *National Federation of Independent Business v. Department of Labor* (“*NFIB*”).⁴⁴ The Proposed Rule’s position relies on an assertion that the General Duty Clause’s application to risky occupations is *in general* a major question based on the risk that *specific* hypothetical OSHA enforcements could be a major question. But just because those hypothetical applications may be major questions, which can be addressed “when and if OSHA attempts” them,⁴⁵ does not mean that the much more modest applications like the one at issue in *SeaWorld* are also major questions. OSHA should not rely on unrealistic hypotheticals to justify preemptively constraining the agency’s authority, particularly where the exception contemplated by the Proposed Rule does not have a basis in statute.

b. The MQD does not otherwise support the Proposed Rule.

Even if OSHA could use hypotheticals as a basis for invoking the MQD to limit its own authority or if the final rule is more expansive than the Proposed Rule’s framing, the enforcement OSHA seeks to proscribe would not transform the agency’s authority and so would not implicate the MQD.

Agency action implicates the MQD if it “represent[s] a ‘transformative expansion in [the agency’s] regulatory authority.’”⁴⁶ The Supreme Court has already indicated to OSHA what is transformative under the MQD—“regulat[ing] the hazards of daily life”—and what is not—regulating “work-related dangers.”⁴⁷ In *NFIB*, the Court rejected OSHA’s attempt to require a vaccine mandate for employers, holding that it “would significantly expand OSHA’s regulatory authority” by “regulat[ing] the hazards of daily life” and “public health more generally” rather than regulating “work-related dangers”—OSHA’s core authority.⁴⁸ Although the Court defined the nature of OSHA’s standard-setting authority in *NFIB*, rather than its General Duty Clause authority, both fulfill the same workplace-focused purpose, and the General Duty Clause “fill[s] whatever gaps may exist after rules delineating specific standards have been promulgated.”⁴⁹ If anything, then, the General Duty Clause covers broader ground than OSHA’s standard-setting authority, as the latter is meant to regulate “*unique* circumstances that no standard has yet been enacted to cover.”⁵⁰

⁴² 90 Fed. Reg. at 28371 (quoting *SeaWorld*, 748 F.3d at 1222 (Kavanaugh, J., dissenting)).

⁴³ *SeaWorld*, 748 F.2d at 1213.

⁴⁴ 595 U.S. 109 (2022) (per curiam).

⁴⁵ *SeaWorld*, 748 F.2d at 1212.

⁴⁶ *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In addition to being “transformative,” the MQD also requires agency action to be novel or “unprecedented,” *id.* at 727, and have “vast economic and political significance,” *id.* at 714 (quoting *Util. Air*, 573 U.S. at 324). An action is only “major” if it meets all three requirements. *See* Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Plaintiffs-Appellees 6–7, *V.O.S. Selections, Inc. v. Trump*, No. 2025-1812 (filed Fed. Cir. Jul. 8, 2025).

⁴⁷ *NFIB*, 595 U.S. at 118.

⁴⁸ *Id.*

⁴⁹ *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir. 1996); *see also* *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1197 (5th Cir. 1997) (“[T]aken together, subsections (a)(1) and (a)(2) of the General Duty Clause are exclusively focused on an employer’s duty to prevent hazardous conditions from developing, either in employment or the place of employment.”).

⁵⁰ *SeaWorld*, 748 F.2d at 1207 (quoting H.R. Rep. No. 91-1291, at 21–22 (1970)) (emphasis in original).

Unlike the “hazards of daily life,” the types of risks the Proposed Rule seeks to exempt from application of the General Duty Clause are quintessentially work-related and therefore fall within the heartland of OSHA’s authority. In *NFIB*, for example, the Court observed that OSHA *would* have been able to “regulate researchers who work with the COVID-19 virus.”⁵¹ Arguably, researching the COVID-19 virus is (to borrow the Proposed Rule’s terms) an “inherently risky employment activit[y]”; that research “is integral to the essential function of a professional . . . occupation”; and the hazard of contracting COVID-19 may be difficult to “eliminate[] without fundamentally altering or prohibiting the activity.”⁵² Nevertheless the Supreme Court did “not doubt” that OSHA could regulate that risk without transforming OSHA’s bedrock workplace safety authority.⁵³ And although OSHA has never regulated “punt returns in the NFL” or “speeding in NASCAR,”⁵⁴ it has long regulated the traditional “inherently risky” jobs like logging, where risk can be mitigated even if not eliminated.⁵⁵ Because exercising OSHA’s General Duty Clause authority against hazards in inherently risky work activities is not transformative, it does not present a major question, and the MQD provides no support for the Proposed Rule.

IV. Any use of artificial intelligence in this rulemaking must be disclosed.

Finally, OSHA must disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public comment.⁵⁶ Under the APA’s reasoned decisionmaking requirement, “[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model.”⁵⁷ Moreover, the public must have notice of, and an opportunity to comment on, agencies’ uses of models and data, AI-enhanced and otherwise, to regulate.⁵⁸ Such disclosures are “[t]he safety valves in the use of . . . sophisticated methodology.”⁵⁹

Beyond being legally required, disclosure of AI usage is prudent policy. Administrative agencies should uphold the values of transparency and public participation.⁶⁰ In particular, the Administrative Conference of the United States has recognized that “[a]gencies’ efforts to ensure transparency in connection with their AI systems can serve many valuable goals,” and it therefore recommends that “agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities.”⁶¹ Among other things, disclosure of AI usage allows the public to confirm that agencies are adhering to relevant laws, apply technical expertise to improve agencies’ use of technology, assess the risk that federal policies might be influenced by biased or otherwise faulty methods or products, and learn about an emerging and important field of technology. Indeed, the Office of Management and Budget recently recognized that the government, in using AI, must

⁵¹ *Id.* at 666.

⁵² 90 Fed. Reg. at 28375.

⁵³ *NFIB*, 595 U.S. at 119.

⁵⁴ 90 Fed. Reg. at 28371 (quoting *SeaWorld*, 748 F.3d at 1222 (Kavanaugh, J., dissenting)).

⁵⁵ *See SeaWorld*, 748 F.2d at 1212–13.

⁵⁶ We adopt the definition of artificial intelligence at Pub. L. 115-232, § 238(g), 132 Stat. 1697–98.

⁵⁷ *Owner-Operator Ind. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (quotation omitted).

⁵⁸ *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transp. Ass’n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

⁵⁹ *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

⁶⁰ *See* Attorney General’s Manual on the Administrative Procedure Act 9 (1947) (describing the APA’s purposes to include “requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules” and “provid[ing] for public participation in the rule making process”).

⁶¹ Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence, 86 Fed. Reg. 6612, 6616 (Jan. 22, 2021).

“provide improved services to the public, while maintaining strong safeguards for civil rights, civil liberties, and privacy.”⁶²

Consistent with these requirements and principles, OSHA must disclose, first, whether it has used or plans to use AI as part of this rulemaking, including to develop substantive policy, produce supporting analysis, or respond to public comments. If so, OSHA must disclose the particular AI product it has used and why it was selected, how that product was procured, whether the product was fine tuned, what prompts or inputs the agency used to elicit responses from the product, and the responses the product produced. OSHA must also disclose how agency staff used AI-produced information, including any quality control, peer review, or other validation performed. And OSHA must disclose what measures it took to ensure that its use of AI complied with applicable data security and privacy requirements. To that end, it must disclose whether and to what extent any persons and entities not employed by the agency developed, modified, provided access to, or used AI in the course of the agency’s decisionmaking process. To the extent the disclosed use of AI is significant, OSHA must provide an additional opportunity for public comment.

V. Conclusion.

Rather than carefully interpret the bounds of the OSH Act, the Proposed Rule relies on a dissenting circuit court opinion to battle with hypotheticals. Any final rule resulting from this proposal will discourage OSHA enforcement against safety hazards in some of the most dangerous industries, while doing nothing to prevent OSHA’s nonexistent “major” overreach. The agency should withdraw the Proposed Rule.

Sincerely,

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⁶² Memorandum for the Heads of Executive Departments and Agencies from Russell T. Vought, Director, Office of Management & Budget 1, M-25-21 (Apr. 3, 2025), *available at* <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf>.