QUESTION PRESENTED

Whether Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effect an unconstitutional delegation of legislative power.

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INTEREST OF *AMICUS CURIAE*

The General Electric Company ("GE") is a diversified manufacturing and financial services company headquartered in Fairfield, Connecticut.[1] GE has numerous business units that provide a broad spectrum of goods and services throughout the United States and the world, including aircraft engines, appliances, capital services, industrial systems, lighting, medical systems, the NBC television network, plastics, power systems, and transportation systems.

GE's wide-ranging business activities are subject not only to the Clean Air Act, but all manner of administrative regulation. Accordingly, GE has an interest in the continuing vitality and proper implementation of the nondelegation doctrine of Article I of the Constitution and the separation of powers. The nondelegation doctrine ensures that important policy choices are made by the democratically accountable legislature, not by unelected agency officials. Because of the diversity of GE's business activities, it has broad experience from which to offer helpful guidance to this Court on the need for vigorous enforcement of the nondelegation doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals correctly held that EPA's interpretation of Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409, would violate the nondelegation doctrine. These provisions, as construed by EPA, do not merely authorize the agency to carry out or implement the statutory directives enacted by Congress, but effectively deputize EPA to engage in *lawmaking*. In administering Sections 108 and 109, EPA is

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of this Court.

going further than applying statutory factors prescribed by Congress or, in Chief Justice Marshall's words, "fill[ing] up the details" under the general provisions made by Congress. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

EPA itself takes the view that "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" before revising a National Ambient Air Quality Standard (NAAQS). Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 43 (D.C. Cir. filed Sept. 14, 1998). The Administrator need not even make a finding that her regulatory action is needed to protect against a "significant risk of harm." *Id.* "Nor is EPA required to follow any particular paradigm of decisionmaking." *Id.* at 29. Instead, according to EPA, Section 109 gives the Administrator broad authority to revise a NAAQS to any level that in her sole judgment reflects a "sufficient" level of risk reduction. *Id.* at 10, 29. "[T]he final choice of a standard is a quintessential policy judgment within the discretion of EPA," even though "[s]uch decisions present complex questions of science, law, and social policy." *Id.* at 28, 29 (internal quotations omitted). Hence, in issuing the rules under review, "EPA made policy judgments . . . concerning the point at which risks would be reduced sufficiently to protect public health with an adequate margin of safety." *Id.* at 10.

Hence, this case illustrates the very dangers addressed by the nondelegation doctrine – the risks that Congress will abdicate responsibility over critical policy judgments and that politically unaccountable agencies will seize the power to pursue their own policy agendas, asserting their own "discretion" as a shield to prevent meaningful judicial review.

The Government insists that Sections 108 and 109 satisfy the nondelegation doctrine because "EPA considers, among other public factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk." Govt. Br. in No. 99-1257, at 5. But these factors have been

selected by EPA. They were not adopted by Congress, and they are not set forth in the statute. This Court should make clear that an agency's self-imposed restraints cannot satisfy the requirements of the nondelegation doctrine that *Congress* codify adequate limits on agency action. The remand to the EPA ordered by the Court of Appeals in this case must therefore involve a search for congressionally enacted guidelines and boundaries, not simply an exercise of the agency's own discretion to formulate voluntary – and potentially temporary – limits to its rulemakings.

Further, the factors articulated by EPA fail to provide sufficient guidance to confine the agency and do not allow for meaningful judicial review of its decisions. The lack of clear congressional standards limiting EPA, coupled with the agency's unfettered discretion to establish its own guideposts, ensures that there is no adequate check on EPA's decisionmaking. The balance of authority contemplated by the separation of powers does not exist.

The Government suggests that the delegation here is no more expansive than those upheld by this Court in such cases as *Mistretta v. United States*, 488 U.S. 361 (1988), *United States v. Touby*, 500 U.S. 160 (1991), and *Loving v. United States*, 517 U.S. 748 (1996). That suggestion is false. In this case, Congress provided EPA with substantially *less* in the way of limiting standards and criteria for administrative decisionmaking than in any of the other cases cited by the Government. The delegation in this case is far beyond any upheld by this Court under the modern nondelegation doctrine.

The need for a vigorous nondelegation doctrine has only been heightened by the power accorded to administrative agencies since *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* announced a rule of deference to reasonable agency interpretations of ambiguous statutory provisions. Judicial deference to agency constructions of "ambiguous" statutory language presents risks to the constitutionally mandated separation of powers and principles of

legislative accountability. Without a vigorous nondelegation doctrine, agencies will be able to "find" ambiguities in ordinary language in order to arrogate to themselves the power essentially to make law – even though the unfettered ability to define as the law of the land any rationally supportable version of what a statute's words *might* mean is the very essence of the legislative authority granted to Congress by Article I.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized limits on Congress' power under the Commerce Clause in no small part because of a realization that the Government's constitutional theory knew no bounds. *See* 514 U.S. at 564. The same considerations are applicable here: if EPA's interpretation of Sections 108 and 109 were upheld, then virtually any congressional delegation of authority to an administrative agency would become permissible. Accordingly, this case presents an important opportunity not only to affirm the Court of Appeals' judgment invalidating EPA's unlawfully expansive interpretation of Sections 108 and 109 of the Clean Air Act, but also to establish a broader precedent affirming the continuing vitality of the nondelegation doctrine.

The judgment of the Court of Appeals invalidating EPA's interpretation of Sections 108 and 109 accordingly should be affirmed.

ARGUMENT

This case presents an important opportunity to reaffirm the limits on governmental power reflected in the nondelegation doctrine, just as a series of recent cases has enabled this Court to revitalize other notable restraints upon congressional and executive power. For example, this Court has affirmed the limits of the Article I commerce power. *See Jones v. United States*, 120 S. Ct. 1904 (2000) (construing federal arson statute narrowly); *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down civil suit provision in Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free

School Zones Act).

Similarly, this Court has held that Congress, acting under its Article I legislative powers, may not abrogate state Eleventh Amendment immunity by subjecting states to suit in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Congress may not commandeer state legislative processes or require state executive officials to enforce federal law. *New York v United States*, 505 U.S. 144 (1992) (nuclear waste statute); *Printz v United States*, 521 U.S. 898 (1997) (Brady law). Nor may Congress force a state to entertain a federal suit in state court. *Alden v. Maine*, 119 S. Ct. 2240 (1999) (federal overtime statute).

In addition, this Court has proclaimed important limits on federal power under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (patent remedy statute); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (Age Discrimination in Employment Act).

Just as these cases have offered this Court the opportunity to articulate basic *substantive* restraints on federal power in other contexts, the instant proceeding presents this Court with an opportunity to reaffirm the even more fundamental *structural* limits on governmental power imposed by the nondelegation doctrine. The need to reinvigorate the nondelegation doctrine is especially acute because that doctrine restrains not only *legislative* power – by preventing Congress from abdicating its responsibility for basic policy choices – but also *executive* authority, by preventing agencies from exercising the power to "make law."

I. THE NONDELEGATION DOCTRINE VINDICATES IMPORTANT PRINCIPLES OF GOVERNMENT ACCOUNTABILITY.

Under Article I and the separation of powers, "the lawmaking

function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). "Legislative power is nondelegable. Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees. What Congress does is to *assign responsibilities* to the Executive . . . ." *Id.* at 777 (Scalia, J., concurring in part and concurring in the judgment). The distinction is between impermissible delegation of *lawmaking* functions and permissible delegations of responsibility to *execute* or *administer* the laws:

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Loving, 517 U.S. at 758-59 (quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892)). The nondelegation doctrine mandates that Congress provide, at the very least, an "intelligible principle" to guide the exercise of power conferred on another branch. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Only then is the executive able, as Chief Justice Marshall expressed it, "to fill up the details" under the general provisions made by the legislature. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving*, 517 U.S. at 771.

In a series of decisions which remain governing precedent today, this Court has established important limits on the power of Congress to delegate authority to regulatory agencies. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), this Court invoked the nondelegation doctrine to invalidate an

Executive Order regulating interstate shipments of oil under the National Industrial Recovery Act. The Court held that the Act "establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. . . . So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935), this Court invalidated a statute purporting to delegate the authority to adopt codes of industrial conduct implementing the capacious standard of "fair competition." This Court opined that "[t]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. As Justice Cardozo put it, the legislation exemplified "delegation running riot," which created a "roving commission to inquire into evils and upon discovery correct them." *Id.* at 551, 553 (concurring opinion).

And in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), this Court applied *Schechter Poultry* to strike down a provision of the Bituminous Coal Conservation Act of 1935 delegating power to fix maximum hours of labor and minimum wages.

These cases remain governing precedent. Indeed, this Court has often applied the nondelegation doctrine to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). In *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974), for example, this Court cited *Schechter Poultry* with approval to support a narrow construction of a federal statute empowering the Federal Communications Commission to impose and collect certain fees from cable operators. The Court opined that serious constitutional questions would be raised by a congressional delegation of general taxing authority to an administrative agency. *Id.*

In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court refused to find an implicit congressional delegation of authority to the Department of Defense to administer a constitutionally questionable security clearance program. In the absence of a specific delegation, the agency was not empowered to act: "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* at 507; *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) (refusing to construe federal legislation as delegating to the Secretary of State the power to deny passports to persons refusing to disclose whether they had ever been Communists). Similarly, in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976), this Court held that the United States Civil Service Commission could not rely on foreign policy objectives in defending a regulation denying civil service jobs to resident aliens because Congress had not delegated foreign policy responsibilities to the Commission.

Moreover, Justice (now Chief Justice) Rehnquist recognized the continuing relevance of nondelegation principles in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), which invalidated an occupational benzene standard promulgated under the Occupational Safety and Health Act of 1970:

> [M]y colleagues manifest a good deal of uncertainty, and ultimately divide over whether the Secretary produced sufficient evidence that the proposed standard for benzene will result in any appreciable benefits at all. This uncertainty, I would suggest, is eminently justified. . . . I would also suggest that the widely varying opinions of [my colleagues] demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.

Id. at 672 (Rehnquist, now C.J., concurring in the judgment). Canvassing the legislative history, Chief Justice Rehnquist concluded that it "contains nothing to indicate that the language 'to the extent feasible' does anything other than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory." *Id.* at 681-82; *see also American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, now C.J., dissenting) (reiterating that the OSH Act was an improper delegation).

In recent years, this Court has invalidated at least four additional delegations of legislative authority. In *INS v. Chadha*, 462 U.S. 919 (1983), this Court held that Congress may not delegate power to one or even both of its Houses. In *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court held that Congress may not delegate authority over other than purely internal matters to an officer answerable to it. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), this Court held that Congress may not delegate decisionmaking authority to an airport "board of review" composed of nine members of Congress.

Most recently, and perhaps most significantly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court held that Congress may not empower the President to exercise a line item veto. Although this Court did not explicitly address the question whether the statute impermissibly delegated to the President the quintessentially legislative power to choose policy ends, *id.* at 448, the Court opined that the statute improperly "authorize[d] the President himself to effect the repeal of laws, *for his own policy reasons*," and that "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id.* at 444, 445 (emphasis added); *see also Chicago v. Morales*, 527 U.S. 41 (1999) (holding violative of due process an ordinance delegating police unguided discretion to order those "loitering" in public with "gang members" to disperse or be prosecuted criminally); *AT&T Corp.*

v. Iowa Util. Bd., 525 U.S. 366, 388 (1999) (invalidating FCC's interpretation of network element "unbundling" requirements of 1996 federal Telecommunications Act because agency construction failed to contain "limiting standards"); *Kolender v. Lawson*, 461 U.S. 352, 358, 359 (1983) (holding that "a legislature [must] establish minimal guidelines to govern law enforcement" and may not "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat").

II. THE NEED FOR THE NONDELEGATION DOCTRINE IS MORE ACUTE THAN EVER.

The principles that lie at the heart of the nondelegation doctrine remain at least as relevant today as they were when this Court decided *Panama Refining* and *Schechter Poultry*. Indeed, those principles are timeless. Quoting Montesquieu, James Madison wrote in Federalist 47: "When the legislative and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." THE FEDERALIST No. 47, at 303 (Clinton Rossiter ed., 1961). John Locke similarly expressed the view that "[t]he power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws and place it in other hands." John Locke, TWO TREATISES OF GOVERNMENT 408-09 (2d Treatise, New American Library 1965).

Limits on delegations of power are necessary to foster the political processes that check congressional action. Open-ended delegations are objectionable because they permit responsibility for government action to pass out of the hands of Congress and thereby undermine this electoral check. As Congressman Levitas once acknowledged: "When hard decisions have to be made, we

pass the buck to the agencies with vaguely worded statutes." 122 Cong. Rec. H10,685 (Sept. 21, 1976). One of his colleagues added: "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation . . . .'" *Id.* at H10,673 (statement of Rep. Flowers). Justice Brennan trenchantly observed: "[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive to the same degree to the people." *United States v. Robel*, 389 U.S. 258, 276 (1967) (concurring opinion). In short, "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. at 452 (Kennedy, J., concurring); *see also McGautha v. California*, 402 U.S. 183, 250 (1971) (Brennan, J., dissenting) (basic policy choices must "be made by a responsible organ of state government. For if they are not, the very best that may be hoped for is that state power will be exercised, not upon the basis of any social choice made by the people of the State, but instead merely . . . at the whim of the particular state official wielding the power").

Moreover, apart from enabling Congress to pass the buck on difficult choices, broad delegations allow agencies to aggrandize power in an impermissible manner, as demonstrated by EPA's own experience.[2] The checks and balances built into Article I are

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[2] For recent EPA actions that have been held in excess of the agency's authority or otherwise illegal, see, e.g., *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000) (vacating rule providing for "early cessation" program for combustion of hazardous waste because EPA failed to establish that program would have environmental or health benefits); *American Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (vacating regulation of oil-bearing waste waters from crude oil refineries as "solid wastes," in the absence of proper justification by EPA); *Association of Battery Recylers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (reversing EPA's attempt to regulate "in-process secondary materials" due to agency's improper interpretation of

"key elements of the constitutional scheme to preserve individual liberty." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708 (1997); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in [Article I], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

Agencies, however, are able to issue rules with the force of law without complying with the requirements of bicameralism. *See, e.g., Chadha*, 462 U.S. at 986-87 (White, J., dissenting) ("There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. . . . [However,] the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature."). As a result, unbridled delegations improperly leave important choices to administrative processes not subject to the lawmaking prerequisites of Article I and not always open to inputs from affected groups. Agencies are able to follow their own agendas, and open-ended mandates make meaningful

statutory term and vacating rule providing for test to determine toxicity of manufactured gas plant waste); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside EPA's "periodic monitoring guidance" for failure to follow proper rulemaking procedure); *Chlorine Chem. Council v. EPA*, 206 F.3d 1286 (D.C. Cir. 2000) (vacating chloroform standard under Safe Drinking Water Act as arbitrary and capricious and in excess of statutory authority); *Lignite Energy Council v. EPA*, No. 98-1525, 1999 U.S. App. LEXIS 26263 (D.C. Cir. Sept. 21, 1999) (summarily vacating boiler regulations as "seriously deficient"); *American Petroleum Inst. v. EPA*, 198 F.3d 275 (D.C. Cir. 1999) (holding that EPA exceeded its statutory authority, which permitted states to seek prohibition on sale of non-reformulated gasoline in classified non-attainment areas, by promulgating rule that would cover areas not so classified); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998) (vacating rule establishing treatment standard for aluminum process by-product because test for determining compliance with standard was arbitrary and capricious).

judicial review impossible. *See Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, now C.J., concurring) ("[T]he [nondelegation] doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."). Accordingly, some have proposed that Congress adopt a statute under which agency rules would not go into effect without being enacted by Congress. *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-94 (1984).

Even three decades ago, Judge J. Skelly Wright was moved to comment, after long experience with administrative law appeals, that agency discretion in the United States had become "intolerable." J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 576 (1972). He urged a reinvigoration of the nondelegation doctrine: "There is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies." *Id.* at 584. "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." *Id.* at 585.

Numerous other commentators and scholars have likewise urged a robust role for the nondelegation doctrine. *See, e.g.*, Providing Reorganization Authority to the President, Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before the Legislation and Nat'l Security Subcomm. of the House Comm. on Government Operations, 95th Cong. 76-89, 134-44 (1977) (statements of Laurence H. Tribe and Philip B. Kurland) (arguing that a proposed executive branch reorganization authority, which would have authorized the President to consolidate agencies or entirely abolish their functions, would be unconstitutional under the nondelegation doctrine); Kenneth Culp Davis, ADMINISTRATIVE LAW OF THE EIGHTIES 3:1, at 150 (1989) (proposing that the nondelegation doctrine be "reconstituted" and "given new life"); John Hart Ely, DEMOCRACY AND DISTRUST 131 (1980) ("Much of the law is . . . effectively left to be made

by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain. The point is not that such 'faceless bureaucrats' necessarily do a bad job as our effective legislators. It is rather than they are neither elected nor reelected, and are controlled only spasmodically by officials who are.").[3]

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[3] *See also* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 67 (1982) (suggesting renewed use of nondelegation doctrine because "the idea of a change in constitutional rules governing legislative delegations has acquired a fresh dignity" and it "should inspire a serious dialogue if not imminent action"); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402 (2000) ("*American Trucking* and [*AT&T Corp. v.*] *Iowa Utilities Board*, [525 U.S. 366, 388-89, 392 (1999),] confirm the emergence of a new delegation doctrine that has the potential to shift the terms of the current debate on delegation and democracy. The new doctrine . . . refocus[es] the inquiry on the exercise of delegated lawmaking authority. . . . By requiring agencies to articulate limiting standards, it ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty."); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352-53 (1987) (urging a "limited revival of the nondelegation doctrine," under which "[i]nitial consideration should be given to reading the statutory authority of the agencies and the President more narrowly if the language permits"); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 989-90 (1999) ("[A] revived delegation doctrine, which requires legislation to include 'intelligible principles' for measuring the scope and not just the goals of legislation, could play a critical role in confining agency discretion and ensuring agency accountability. . . . Properly pursued, the delegation doctrine would ensure that major policy decisions are made by an elected Congress and President, and not an appointive bureaucracy."); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 49-65 (1976) (nondelegation doctrine could be "an effective deterrent to congressional abdication of responsibility"); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 822 (1999) ("The principles underlying the nondelegation doctrine, which keep congressional, presidential, and bureaucratic power cabined and are drawn from each structure's peculiar characteristics, are valuable weapons in the courts' separation of powers arsenal. The

Of particular relevance here, Professor David Schoenbrod has extensively analyzed the Clean Air Act as a case study

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nondelegation doctrine could move the constitutional balance of power back toward the balance envisioned by the Framers by forcing legislators to make the law and by rendering it more difficult for the executive branch to enlarge its sphere of power."); Theodore J. Lowi, THE END OF LIBERALISM 298 (1969) ("The Court's rule must once again become one of declaring invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation."); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 303 (1987) (arguing for renewal of nondelegation doctrine and observing that " the terms of the delegation from Congress to the agency are so broad, containing such high-flown rhetoric about the goals, that any but an expansive interpretation would be contrary to the spirit of the statute"); Theodore J. Lowi, THE END OF LIBERALISM, THE SECOND REPUBLIC OF THE UNITED STATES 43-63 (1979) (arguing that aspirational statutes like the Clean Air Act and the Occupational Safety and Health Act dictate an ambitious result, such as pollution control, without standards of any kind for accomplishing the stated end, leaving agencies substantial discretion to achieve the stated result, and shifting the balance of power to make policy from the legislature to executive branch agencies); Judge Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977) (nondelegation doctrine "could do much to augment the quality – and effectiveness as a check against arbitrary or unauthorized administrative action – of judicial review in the occasional cases in which Congress ... chooses ... [to delegate] in order to get a bill enacted"); William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 CARDOZO L. REV. 939, 945 (1999) ("The delegation of legislative authority to executive agencies is clearly unconstitutional and should offend those who care about the Constitution."); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 457 (1978) (arguing for stricter standards on delegation, because the "strength of modern government, can [without them, effectively] become a monster which rules with no practical limits on its discretion"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 403 (broad delegations "weaken[] the legitimacy of administrative government"); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 CARDOZO L. REV. 361, 361 (1999) ("liberty is threatened when the law-making function of government is delegated to unelected, unaccountable bureaucrats").

illustrating the need for a reinvigorated nondelegation doctrine and has concluded that "the Clean Air Act delegates lawmaking authority [to EPA]." David Schoenbrod, *Symposium – The Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives: Delegation and Democracy*, 20 CARDOZO L. REV. 731, 743 (1999). *See generally* David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 61-67 (1993). Schoenbrod explains that the Clean Air Act represents a prime example of Congress' passing difficult policy choices to an agency: "With delegation, the floor fight is avoided because almost all legislators can vote for a bill that calls for clean air and jobs too. That is why the 1970 Clean Air Act passed almost unanimously. Without delegation, . . . [l]egislators have to stand up and be held accountable on the hard choices." Schoenbrod, 20 CARDOZO L. REV., *supra*, at 744-45. Indeed, one of the only contested provisions of the 1970 Clean Air Act related to what Schoenbrod described as the "one true law in the statute" – the congressionally enacted provision requiring new car makers to reduce emissions of three specified pollutants by ninety percent.[4]

The Government contends that the nondelegation doctrine must be "driven by a practical understanding" of "our increasingly complex society, replete with ever changing and more technical problems." Govt. Br. in No. 99-1257, at 21 (quoting *Mistretta*, 488 U.S. at 372). That is precisely the point. As government faces increasingly complex and difficult questions of public policy, the nondelegation doctrine ensures that value-laden policy choices are made by politically accountable legislators rather than faceless bureaucrats.

The need for a vigorous nondelegation doctrine has only been

[4] *See* Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7521(b)(1) (1994)); Schoenbrod, 20 CARDOZO L. REV., *supra*, at 745; Schoenbrod, POWER WITHOUT RESPONSIBILITY, *supra*, at 73.

heightened by the power accorded to administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* announced a rule of deference to administrative decisions with respect to agency interpretations of ambiguous statutes. Judicial deference to agency constructions of "ambiguous" statutory language presents risks to the separation of powers and principles of legislative accountability. An underenforced version of the nondelegation doctrine, in conjunction with *Chevron* deference, would greatly expand the number of statutes containing vague and precatory language within which agencies could "find" ambiguities in ordinary language in order to arrogate to themselves the power to make law. The unfettered power to define as the law of the land any rationally supportable version of what a statute's words *might* mean is the very essence of the legislative authority granted to Congress by Article I.

The distinction between the judicial and administrative functions illustrates the point. Judges interpret the law; they do not write rules or statutes. Judges "make [law] . . . as though they were 'finding' it – discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

Agencies, by contrast, both interpret the law and promulgate regulations with the force of law. If this administrative power is supplemented both with *Chevron* deference and with vague statutory delegations, agencies will be vested with largely unchecked authority to issues rules that reflect their own notions as to what the law should be, without accountability to the electorate and without the ability of the judiciary to engage in meaningful review of agency decisions.

Such agency actions amount to exercises of the power reserved to Congress by Article I. The similarity between agency and legislative action – and the difference between agency lawmaking and judicial interpretation – is illustrated by the principle that agencies, like legislators, cannot bind their

successors. Agencies, like legislatures, "make" rather than "find" law. Thus, this Court has held that a pre-*Chevron judicial* interpretation of a statute is binding on the agency, whereas an earlier *agency* selection of a statutory meaning is *not* binding on successor agencies. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

The danger is that agencies will seize the fundamental power not merely to say, as courts do, what the law is but also the power to make, as legislatures do, law out of whole cloth. Unless the nondelegation doctrine is taken with renewed seriousness, the bestowal of *Chevron* deference will give agencies such free rein that the process of agency "construction" of statutes will become more akin to the legislative process of literally *constructing* statutes (critically, without Congress' political accountability) than to the interpretive and implementing process in which an agency should rightfully engage. Agencies will thus exercise the power to make the truly basic policy decisions and trade-offs that are properly reserved for Congress under our constitutional system. These decisions will constitute neither the filling of interstitial gaps nor the identification of triggering contingencies, but rather the making of law, plain and simple. The result will be to install administrative agencies as mini-Congresses and mini-judiciaries at the same time.

III. SECTIONS 108 AND 109, AS INTERPRETED BY EPA, ARE INVALID UNDER THE NONDELEGATION DOCTRINE.

The Court of Appeals correctly held that EPA's interpretation of Sections 108 and 109 violates the nondelegation doctrine. For these provisions, as construed by EPA, do not merely authorize the agency to carry out or implement the statutory directives enacted by Congress, but effectively deputize EPA to engage in the sort of fundamental policy choices and balancing of complex

questions of science, law, and social policy that are the very essence of *lawmaking*. In addition, EPA has framed its authority so broadly as to eliminate the possibility of effective judicial review as a restraint on its rulemaking.

Two sections of the Clean Air Act govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS). Section 108 (42 U.S.C. § 7408) directs EPA to identify certain pollutants which "may reasonably be anticipated to endanger public health or welfare" and to issue air quality criteria for them. These air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air."

Section 109 (42 U.S.C. § 7409) directs EPA to propose and promulgate "primary" and "secondary" NAAQS for pollutants identified under Section 108. Those standards may then be reviewed and revised as "appropriate." Section 109(d)(1), 42 U.S.C. § 7409(d)(1). Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, as defined in section 109(b)(2), should "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air."

The statute instructs EPA to use its "judgment" in determining what is "an adequate margin of safety . . . to protect the public health." Section 109(b)(1), 42 U.S.C. § 7409(b)(1). As construed by EPA, Sections 108 and 109 prescribe absolutely no factors or criteria that would constrain the agency. Thus, in administering Sections 108 and 109, EPA is not applying statutory factors prescribed by Congress or, in Chief Justice Marshall's words, "fill[ing] up the details" under the general

provisions made by Congress. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Rather, EPA is making basic policy choices without any meaningful legislative guidance.

Even EPA's own defense of its rules reveals the constitutional flaw and the impossibility of effective judicial review. According to EPA, "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" before revising a NAAQS. Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 43 (D.C. Cir. filed Sept. 14, 1998). The Administrator need not even find that her regulatory action is needed to protect against a "significant risk of harm." *Id.* "Nor is EPA required to follow any particular paradigm of decisionmaking." *Id.* at 29. Instead, according to EPA, Section 109 gives the Administrator broad authority to revise a NAAQS to any level that in her judgment reflects a "sufficient" level of risk reduction. *Id.* at 10, 29. "[T]he final choice of a standard is a quintessential policy judgment within the discretion of EPA," even though "[s]uch decisions present complex questions of science, law, and social policy." *Id.* at 28, 29 (internal quotations omitted). Hence, in issuing the rules under review, "EPA made policy judgments . . . concerning the point at which risks would be reduced sufficiently to protect public health with an adequate margin of safety." *Id.* at 10.

EPA believes that ozone, and in all likelihood particulate matter (PM) as well, are nonthreshold pollutants presenting some possibility of adverse health impact (however slight) at any exposure level above zero. *See* Govt. Br. in No. 99-1257, at 14 ("EPA had reasonably assumed, for purposes of the quantitative risk assessment, that there is no 'effects threshold' for the categories of health effects measured."); Ozone Final Rule, 62 Fed. Reg. at 38,863/3 ("Nor does it seem possible, in the Administrator's judgment, to identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects are likely to occur."); National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg.

65,637, 65,651/3 (1996) (proposed rule) ("The single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur.").

The only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero. A standard of zero is impractical, of course, not only because of the unthinkable deindustrialization it would require but also because there are natural background sources of both ozone and PM. Under EPA's interpretation, however, the statute contains no factors at all under which the agency could select a higher exposure level. There are no determinate criteria for drawing lines or for determining how much risk is "too much." EPA is left entirely to its own devices in performing the essentially lawmaking task of selecting an acceptable exposure level. As the Court of Appeals opined, "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." 175 F.3d at 1037.

EPA's interpretation of Sections 108 and 109 thus shares the same constitutional flaw as the statute invalidated in *Panama Refining*. The relevant provision of the National Industrial Recovery Act of 1933 provided that "[t]he President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder . . . ." 293 U.S. at 406. The purpose of the law was hardly a mystery: to give the President authority to supplement state enforcement efforts by banning shipment of "hot oil" in excess of state allocation decisions. But the statute failed to provide any guidance to the President as to *when* this power should be exercised, or any factors to limit his discretion. "[T]he Congress has declared no policy, has established no standard, has laid down no rule. There

is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." 293 U.S. at 430. In the same way, EPA's construction of Sections 108 and 109 fails to provide the agency with any criteria when it sets a NAAQS above zero.

The constitutional defect in Sections 108 and 109, as interpreted by EPA, also resembles the constitutional flaw identified by Chief Justice Rehnquist in the provision of the OSH Act at issue in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). The statute instructed that the Secretary of Labor, "in promulgating standards dealing with toxic materials or harmful physical agents, . . . shall set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health." *Id.* at 612. The OSHA provision, while extreme, in fact provided greater guidance than Sections 108 and 109, because it directed OSHA to consider feasibility, to determine whether an impairment was "material," and to protect the health of each worker. By contrast, the decision of the level at which an NAAQS should be set is, according to EPA, a "policy judgment" within EPA's discretion for which no statutory guideposts need be followed.

In another instructive case, *International Union UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), the court of appeals held that § 3(8) of the OSHA Act, as interpreted by OSHA, was an unconstitutional delegation of legislative power. Section 3(8) stated that OSHA-ordered safety precautions must be "reasonably necessary or appropriate to provide safe or healthful employment," which OSHA interpreted as providing that, "once a significant risk is found, [the agency is empowered] to require precautions that take the industry to the verge of economic ruin (so long as the increment reduces a significant risk), or to do nothing at all." *Id.* at 1317. The court of appeals held that, thus read, the statute would violate the nondelegation doctrine because it would give OSHA unrestrained power "to roam" at will between "rigor" and "laxity" when issuing workplace safety

rules. *Id.* The court pointed out that the OSHA regulation encompassed all American enterprise, and warned that "'[w]hen the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise.'" *Id.* (citation omitted). The court also noted that giving an agency such unrestrained latitude "leaves opportunities for dangerous favoritism" and thus delegates the "power to decide which firms will live and which will die." 938 F.2d at 1318.

The same concern applies here – but on an even greater scale. Implementation of both the ozone and the particulate standards will cost, according to EPA, close to $47 billion annually – more than the Nation currently spends for all Clean Air Act programs combined.[5] The huge costs that EPA is able to impose in its discretion underscore the danger of the impermissible delegation at issue. The NAAQS standards, like the OSHA regulations in *International Union UAW*, encompass virtually all American enterprise. They are national in scope and will have substantial impacts in virtually every state in the nation. This situation begs for legislative standards that are "correspondingly more precise," 938 F.2d at 1317, so that the agency's tremendous impact on the country through its rulemaking are constitutionally authorized.

IV. EPA'S DEFENSES OF ITS STATUTORY CONSTRUCTION ARE FLAWED.

The Government insists that Sections 108 and 109, as construed by EPA, satisfy the nondelegation doctrine because "EPA considers, among other public factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of

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[5] *See* Innovative Strategies and Economics Group, EPA, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule 13-2 (1997); Office of Air and Radiation, EPA, The Benefits and Costs of the Clean Air Act: 1970 to 1990, at ES-2 (1997).

the sensitive populations at risk." Govt. Br. in No. 99-1257, at 5.

But this argument cannot possibly salvage EPA's interpretation of Sections 108 and 109. The factors cited by the Government have been voluntarily adopted by EPA; they are not contained in Sections 108 and 109, either expressly or by any process of implication that could fairly be attributable to Congress. *See* Ozone Final Rule, 62 Fed. Reg. at 38,883/2; EPA, Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper, at II-2 (July 1996).

EPA has simply selected these factors, and has chosen not to adopt others, as a matter of its own judgment. EPA is entirely free, under *Chevron*, to abandon these factors or otherwise to change its own interpretive views of the statute, so long as it provides an explanation for its altered position. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In this very case, the D.C. Circuit on rehearing noted the risk that EPA might change its mind in a future rulemaking. *See* 195 F.3d at 7. Plainly, an agency's self-imposed restraints cannot satisfy the requirements of the nondelegation doctrine that *Congress* adopt adequate limits on agency action.

In any event, the factors articulated by EPA fail to provide decisional principles adequate to guide the Administrator's discretion. For example, EPA explained that its decision to select an 0.08 ppm level for the ozone NAAQS rather than a level of 0.07 ppm rested on its judgment that effects are less certain and less severe at lower levels of exposure:

> The most certain O[3]-related effects, while judged to be adverse, are transient and reversible (particularly at O[3] exposures below 0.08 ppm), and the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects.

Ozone Final Rule, 62 Fed. Reg. at 38,868/2. But this analysis is virtually a tautology: higher concentrations of pollutants inevitably inflict a greater quantum of harm on public health, with a higher probability, than do lower concentrations. According to the record before EPA, there was nothing magical about the level of 0.07 ppm; even "group mean responses in clinical studies at . . . 0.08 ppm are typically small or mild in nature." 61 Fed. Reg. at 65,728. Further, EPA explained that the transient and reversible nature of health effects (such as those at 0.07 ppm) did not mean they were harmless: "On the other hand, repeated inflammatory responses associated with exposure to O[3] over a lifetime have the potential to result in damage to respiratory tissue such that individuals later in life may experience a reduced quality of life." *Id.*

In sum, EPA failed to explain why the cutoff point should be 0.08 ppm; why the risks entailed by exposure below that level were not worth preventing; or why the risks entailed by exposure above that level were not worth accepting. More importantly, nothing in Sections 108 and 109 provided a basis for EPA to make those determinations.

In this regard, the Government's newfound claim that 0.07 ppm represented "the level at which EPA's exposure assessment showed that exposures of public health concern were 'essentially zero,'" Govt. Br. in No. 99-1257, at 31-32 (quoting 61 Fed. Reg. at 65,728, 65,730), is misleading. The cited passage explains not that health effects would be absent but rather that "[e]stimated exposures to O[3] concentrations $\geq$ 0.08 ppm . . . are essentially zero at the 0.07 ppm standard level for most areas evaluated in the exposure analyses for the at-risk population of outdoor children." In other words, a NAAQS of 0.07 ppm would mean that outdoor children would not be exposed to ozone concentrations $\geq$ 0.08 ppm. However, such a conclusion does not imply that health effects at a NAAQS of 0.07 ppm would be

"zero." In its administrative decision, EPA reaffirmed that "it is likely that 'O[3] may elicit a continuum of biological responses down to background concentrations.' Thus, in the absence of any discernible threshold, it is not possible to select a level below which absolutely no effects are likely to occur. Nor does it seem possible, in the Administrator's judgment, to identify a level at which it can be concluded with confidence that no 'adverse' effects are likely to occur." 61 Fed. Reg. at 65,727. Indeed, "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O[3] exposures, including O[3] concentrations below the level of the current standard, with no discernible threshold at or below this level." *Id.* at 65,727-28. "Consequently, . . . 'the selection of a specific level . . . is a policy judgment.'" *Id.* at 65,727.

The Government also suggests that the delegation here is no more expansive than those upheld by this Court in such cases as *Mistretta v. United States*, 488 U.S. 361 (1988), *United States v. Touby*, 500 U.S. 160 (1991), and *Loving v. United States*, 517 U.S. 748 (1996). That suggestion is untenable. In fact, the delegation in this case is far beyond any upheld by this Court under the modern nondelegation doctrine. In sustaining the sentencing guidelines in *Mistretta*, for example, this Court noted the extensive constraints imposed by Congress cabining the Sentencing Commission's discretion and confining the Commission to interstitial decisionmaking.[6] By contrast,

[6] "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." 488 U.S. at 379 (internal citation omitted). Congress set out three "goals" for the Commission and further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate. *Id.* at 374. Congress instructed the Commission that sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maximums. Congress also required that for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2). Moreover, Congress directed the Commission to use current average sentences "as a starting point" for its structuring of the sentencing ranges. § 994(m). To guide the Commission in its formulation of offense categories, Congress directed the consideration of seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. §§ 994(c)(1)-(7). Congress also set forth eleven factors for the Commission to consider in establishing categories of defendants, including the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. § 994(d)(1)-(11). Congress also prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," § 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors, § 994(e).

Sections 108 and 109, as interpreted by EPA, contain no such limits.

Similarly, in *United States v. Touby*, 500 U.S. 160, 165-66 (1991), Congress provided the requisite constraint in a federal narcotics statute that required the Attorney General, when exercising her delegated power to invoke a special expedited procedure for designating a new narcotic as an illegal controlled substance, to find that doing so was "necessary to avoid an imminent hazard to the public safety." *Id.* at 166. This Court stressed that this "imminent hazard" requirement "meaningfully constrain[ed]" the government, because in making such a determination it was "required to consider" a list of statutorily specified factors that placed "a special emphasis" on the details of the "current pattern" and "scope, duration and significance" of

the "risk" that abuse of the designated drug posed to "the public health." *Id.* Here, there is no such constraint on EPA.

In *Loving v. United States*, 517 U.S. 748 (1996), this Court upheld a delegation to the President to prescribe aggravating factors for capital punishment in courts-martial, but only because of the special context of the military and the traditional role of the President as commander in chief of the armed forces.[7] Moreover, this Court warned that "[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight." *Id.* at 772. Unlike the President, EPA has no independent constitutional authority of its own.

The remaining aspects of the Government's argument are no more persuasive. The Government insists that Sections 108 and 109 satisfy the nondelegation doctrine because "[t]he Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow . . . ." Govt. Br. in No. 99-1257, at 25. Yet EPA itself has taken the view that, with respect to the central issue in dispute – the level at which a NAAQS is

[7] *See* 517 U.S. at 772-73 ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter . . . .' 'The military constitutes a specialized community governed by a separate discipline from that of the civilian,' and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline.") (citations omitted). Even so, this Court identified an important "principle limiting the President's discretion to define aggravating factors for capital crimes in Article 36: namely, the directive that regulations the President prescribes must 'apply the principles of law ... generally recognized in the trial of criminal cases in the United States district courts . . . ." *Id.* at 772.

to be set – "the final choice of a standard is a quintessential policy judgment within the discretion of EPA." Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 29 (D.C. Cir. filed Sept. 14, 1998). No amount of consultation with a body of scientific experts or procedural review by the courts can alter the absence of adequate congressional guidance with respect to the fundamental policy choice ultimately made by EPA. Indeed, the open-ended nature of EPA's interpretation of Sections 108 and 109, if upheld, would prevent meaningful judicial review. EPA itself contended in the D.C. Circuit that there are no determinate standards by which a court may overturn the exercise of the agency's judgment.

According to the Government's logic, Congress could create a single administrative agency with jurisdiction over all aspects of the national economy – from consumer safety to energy policy, environmental protection, and deceptive advertising – and direct it to adopt "appropriate rules," so long as the agency were obliged to consult a body of experts and engage in specified procedures for public comment and judicial review. Such an agency would, just like EPA in this case, operate according to a legal standard and under mechanisms for procedural review. But the very concept of such an omnipotent bureaucracy is utterly foreign to Article I and the separation of powers.

In *Lopez*, this Court recognized limits on Congress' commerce power in part because of a realization that the Government's constitutional theory knew no bounds. *See* 514 U.S. at 564 ("Under the theories that the Government presents, . . . it is difficult to perceive any limitation on federal power . . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

Precisely the same reasoning is applicable here: if this delegation passes muster, then anything goes. If EPA's interpretation of Sections 108 and 109 were upheld, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. . . .

Instead of performing its lawmaking function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." *Id.*[8]

CONCLUSION

The judgment of the Court of Appeals invalidating EPA's interpretation of Sections 108 and 109 should be affirmed.

Respectfully submitted.

[8] Even if the statute were construed, as GE urged in its *amicus* brief in No. 99-1426, to require EPA to "consider" compliance costs and risk trade-offs in setting a NAAQS, serious nondelegation questions would remain. For Congress has provided no guidance to EPA with respect to a host of scientific and policy issues, apart from consideration of costs, in judging the significance of risks. Further, EPA – which has strenuously resisted any claim that it is obliged to consider costs – has never identified any statutory limits to agency discretion in selecting among various potential *means* of considering and weighing costs, alternatives that differ so fundamentally as to reflect different *ends* altogether. The Court of Appeals' judgment vacating the agency action under review must accordingly be affirmed even if this Court holds that Sections 108 and 109 of the Clean Air Act require EPA to take costs and risk trade-offs into account.

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September 11, 2000