No. 24-354

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

CONSUMERS' RESEARCH ET AL,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Foreign Trade Council (NFTC) is the premier association for leadership, expertise, and influence on international tax and trade policy issues. Founded in 1914, the NFTC promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses. The Council works on behalf of its member companies to engage in advocacy and education on international tax, international trade, global supply chains, and national security policies.

The NFTC's mission is to promote efficient and fair global commerce by advocating public policies that foster an open international trade and investment regime. The NFTC's membership includes over 100 companies, representing most major sectors of the U.S. economy, including manufacturing, technology, energy, retail and agribusiness. The NFTC's membership consists primarily of U.S. firms engaged in all aspects of international business, trade, and investment. Its members represent over half of total U.S. exports and U.S. private foreign investment.

Neither amicus NFTC nor its members have any interest in the outcome of this case which involves a challenge to the statute administered by the petitioner Federal Communications Commission (FCC) that administers its Universal Service program, Respondents claim that the statute contains

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[1] Pursuant to Supreme Court Rule 37.6, undersigned counsel states that no party's counsel authored this brief in whole or in part and no person or entity other than the amicus or its counsel contributed money to its preparation or submission.

an unconstitutional delegation of legislative power in violation of Article I of the Constitution. Amicus does, however, have an interest in the application of the nondelegation doctrine as applied to various trade laws of the United States, in particular section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, as shown by the amicus brief that it filed in this Court in *American Institute for International Steel, Inc. v. United States,* No. 18-1317.

As this brief explains, the delegation at issue in this case is valid, whereas delegations like that in section 232 are invalid because they contain *no limits whatsoever* on the power of the President (or an administrative agency) to take action under the applicable law. The FCC statute, by contrast, contains significant boundaries that assure the agency will comply with Congress's directions. Moreover, if the objections raised by the Fifth Circuit and respondents were sustained, there would be nothing that Congress could do, short of directly managing the Universal Service Program itself, that would make the statute constitutional. Amicus recognizes that the Court cannot adjudicate the validity of the delegation in section 232 in this case, but it can and should provide guidance to implement the position of the dissenters in *Gundy v. United States,* 588 U.S. 128 (2019) that in some cases Congress has delegated powers to the executive branch that violate Article I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit held that the Universal Service Program, established by Congress and administered by the petitioner Federal Communications Commission, violated Article I of the Constitution by delegating legislative powers that only Congress may exercise. It found that the principal delegation to the FCC was problematic, as was its sub-delegation to the non-profit Universal Service Administrative Company (USAC), which the FCC created to administer the program, and that the combination of the two further violated the Constitution. Pet App. 10a-11a. This brief will only address the question of the propriety of the delegation to the FCC and on that question amicus agrees that the statute is constitutional.

Upholding this delegation should not be the end of the Court's work in this case because, as the dissent concluded in *Gundy v. United States*, 588 U.S. 128 (2019), the current "intelligible principle" test for determining excessive delegations has resulted in a number of cases in which Congress has, in effect, transferred its policymaking responsibility to the executive branch. However, the four Justices who did not join the four Justice plurality could not agree on the standard to employ in nondelegation cases, but they now appear to be joined by Justice Kavanaugh, who did not participate in *Gundy*. In a case involving the same issue as *Gundy,* Justice Kavanaugh indicated his willingness to reconsider the applicable test. *Paul v. United States,* 140 S. Ct. 342 (2019) (statement respecting denial of rehearing). Amicus agrees that in some cases that test has produced

results that are inconsistent with the principle of Article I that the legislative power belongs to Congress and that it cannot constitutionally delegate significant policy making functions to the executive branch. For that reason, they urge the Court to uphold the delegation here while also using this case to refine the existing test to assure that Congress retains its role as the policymaking branch of government.

Amicus also agrees with the *Gundy* dissenters that "the exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions ha[s] sometimes invited reasonable debate," 588 U.S. at 162, and that where to draw the line is the right question. They also agree that any new test must be careful not to "spell doom for what some call the 'administrative state.' " *Id.* at 172. To achieve these dual goals, amicus proposes two additional questions that should help the courts provide constitutional and workable ways to draw the line in this and other cases.

If a serious delegation challenge is made, the Court should ask, if this delegation is alleged to be excessive, what else could Congress have reasonably done to cure the defect? In *Gundy* the answer is that Congress could easily have decided whether the law should apply to crimes committed before the effective date, instead Congress passed on to the Attorney General what is a clear policy choice that the legislative, not the executive, branch should make. *Id.* at 169. In this case, however, given the changing world of telecommunications, and the widely varying needs of the numerous underserved communities, it is almost impossible to envision a way that the Fifth

Circuit majority would have been satisfied that Congress had properly done its job without Congress having to legislate the precise details of the proper extent and payments for universal service on an annual basis.

The second question assumes that the statute contains an "intelligible principle," such that Congress has made the basic policy choice. However, as the *Gundy* dissenters concluded, and amicus further demonstrates below, the question of whether the statute contains an intelligible principle is too forgiving because that question is typically answered at a high level of generality. As a result, it has been satisfied in every case since 1935, despite challenges to statutes in which Congress has provided no limits whatsoever on what the agency can or cannot do. In amicus's view, to avoid a claim of excess delegation, Congress must provide guardrails that the agency cannot exceed if the constitutional requirement that Congress, not the agency, must make the basic policy choices that are the essence of legislating. Accordingly, in order to detect unconstitutional delegation, the Court should examine the details of the law and ask, "is there any action that the agency may *not* take to carry out its intelligible principle?" If the agency (or the President) has no limits on their choice of actions, then the delegation is constitutionally excessive.

To illustrate the weakness in the intelligible principle standard, this brief will focus on section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (section 232), which permits the President to take a wide range of actions, including imposing tariffs, when "the national security" may be threatened. Not

only is that term capacious on its own, but the law places no limits on how much of an increase in tariff rates are permitted, for what period of time, and on which products it may be imposed. The law also allows the President to impose greater tariffs on products from some countries than for identical products from other countries, and he may create an exemption process that enables certain importers to avoid these tariffs. On top of that, there is no judicial review of any of the terms of these tariffs, with the result, being contrary to the principle of *Loper Bright Enterprises v. Raimondo,* 144 S. Ct 224 (2024), that it would be the executive branch, not Congress or the courts, that has the ultimate power to decide what the law is. It is the absence of any limits whatsoever on executive action that was the fundamental flaw in the law in *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), the last time that this Court found an unconstitutional delegation almost 90 years ago.

ARGUMENT

THE COURT SHOULD REVERSE THE JUDGMENT BELOW, AND IT SHOULD REFINE THE INTELLIGIBLE PRINCIPLE TEST USED TO DETERMINE WHETHER A STATUTE VIOLATES THE NONDELEGATION DOCTRINE.

Amicus agrees with the five Justices who did not join the plurality opinion upholding the statute at issue in *Gundy* that decisions of this Court have relaxed the intelligible principle test first set forth in *J. W. Hampton Jr. & Co. v. United States,* 276 U.S.

394 (1928), to the point where the Court has allowed Congress to delegate broad policymaking powers to federal agencies and the President to an extent inconsistent with Article I, which grants "all legislative powers" to the Congress. The *Gundy* dissent recognized the need for Congress to assign fact finding duties to agencies and to allow an intersticial policymaking role for the executive branch, with the difficult question in each case being one of line drawing.

Amicus also concurs with the overall assessment of the *Gundy* dissenters that the intelligible principle approach has not sufficed to stop serious cases of excessive delegation. Other than *Gundy* itself, which largely turned on whether the majority's interpretation of the statute at issue was viable, it is unclear in which prior cases the dissenters would come out the other way, and so amicus is not prepared to provide a full endorsement of their position. Because the principal interest of amicus on the delegation issue is in the trade area, their focus will be on *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which upheld the delegation in section 232. Before turning to that case, this brief will support the FCC in defending the delegations in the Universal Service Program assigned to it, including the application of the two questions that amicus proposes be added to the intelligible principle analysis: what else could Congress have reasonably done in assigning this program to the agency, and are there any limits on what the agency can do under the governing statute?

A. The Delegation to the FCC in 47 U.S.C. § 254 is Constitutional.

The goal of enabling services on a universal basis for all Americans was included in the 1934 act creating the predecessor of the FCC—the Federal Radio Commission. The current authority for the FCC to conduct the universal service program is contained in 47 U.S.C. § 254, which was enacted in 1996. The scope of the program and what is now covered under the term "telecommunications" are very different from the original version, but the overall goals of the program remain the same. Prior to 1996, the program was funded through a system in which telecommunications carriers were allowed to charge higher rates to large urban communities and lower rates to rural areas even though the costs of individual service were higher for the latter areas. Congress ended this cross-subsidy through the rates charged and instead required carriers to make direct payments into a fund that would pay for service that some consumers would otherwise be unable to afford.

The Fifth Circuit's focus in finding an excessive delegation related to the amounts that one of the challengers would have to pay, which it concluded was too open-ended to pass constitutional muster. However, two provisions of section 254—subsections (b)(4) and (d)— require that carrier payments be on "an equitable and nondiscriminatory" basis. Moreover, because the program had been in effect for 50 years before the change in the method of payment, Congress and the carriers knew quite well what the costs would be when the change took place, which helps explain why no carrier objected to the payment

method for almost thirty years until the current challenges. To be sure, costs have risen and the program has expanded significantly in that timeframe, as has the world of telecommunications, but so have many other federal programs. However, many of those increases, as well as complaints about ill-advised and unauthorized spending, are matters for Congress and not the nondelegation doctrine, contrary to what the court of appeals appeared to conclude. Pet. App. 8a-10a.

On the program and expenditure side, section 254(b)(3) is clear on

- Who is to benefit from the program: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas";
- What services they are entitled to receive: "telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas;" and
- What consumers should have to pay after the program's support payments: "rates that are reasonably comparable to rates charged for similar services in urban areas."

Subsection (b)(7) allows the FCC to expand the program but only where "necessary and appropriate

for the protection of the public interest, convenience, and necessity and [that] are consistent with this chapter."

There are other provisions discussed in petitioner's brief that further direct the FCC on how to manage this program, but the point is clear: section 254 is a far cry from what Justice Cardozo in his concurring opinion in *Schechter Poultry* saw as giving the President "a roving commission to inquire into evils and upon discovery correct them" and as "delegation running riot." 295 U.S. at 551, 553.

Turning to the two questions that amicus suggests be included when excess delegation claims are made, neither one would derail this statute. The Fifth Circuit was concerned about non universal service uses of the money raised (Pet. App. 27a-28a): "Nothing in the statute precludes FCC from, for example, imposing the USF Tax to create an endowment that it could use to fund whatever projects it might like." Of course, there is no specific prohibition against non-program related expenditures, and the court below pointed to nothing in the statute that comes close to suggesting that such a diversion of funds would be permitted. Moreover, the courts of appeals stand ready under 47 U.S.C. § 402 to prevent unlawful actions, as they were here, if a carrier objected to having to pay for such an expenditure.

If a delegation challenge is made to a statute, and, as here, there is no challenge to the "policy goal of making telecommunications services available to all Americans," Pet. App. 10a, the opponent should be asked what specifically could Congress have done in

the statute to narrow the delegation to an acceptable level, while still enabling the agency to achieve the stated goal? Cases like *Gundy* are easy because Congress could have decided to make the law prospective only, or fully or partially retroactive, instead of finding it "expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge." 558 U.S. at 169 (Gorsuch dissenting). Unlike the Universal Service Program, which will likely continue for decades and will almost certainly evolve as it does, Congress's decision in *Gundy* only had to be made once and with no need to consider future changes in circumstances.

It is unclear what the Fifth Circuit thought Congress needed to do, and could do realistically, to save section 254. Its focus was on the monetary assessments on the carriers, but that seems quite similar to the rate setting, based on facts found by agencies, that agencies have done for more than 150 years since the Interstate Commerce Commission was created. The goal of universal service, for what is expected to be a continuous program, is definite, and the principle of payments being made on an "equitable and nondiscriminatory" basis is enshrined in the law. Other than the unworkable solution of having Congress annually approve the specific payments to be made by the carriers and the details of the services to be provided to each of the varied constituencies that benefit from the program, there is no answer to the question of what else Congress should done. That is, unless the challenge is not to the details of the program, but to the concept of the

program itself and it being subsidized by other customers and their carriers, Congress could do no more.

For these reasons, section 254 readily passes any reasonable nondelegation test, and the contrary decision of the Fifth Circuit should be reversed.

B. This Court Should Refine Its Nondelegation Test to Require That the Statute Include Limits on What the Delegated Entity May *Not* Do Under the Law.

As the dissenters in *Gundy* recognized, the intelligible principle test has been read so expansively that it has not found a delegation to be unconstitutional since 1935. In the view of amicus, there are two related reasons why the test has become so toothless. First, the test is not really a test, but simply another way of announcing a court's conclusion that the law is constitutional. It does not ask any independent questions, but only seeks to decide whether a statute is definite enough so that it can be upheld, which is just another way of asking whether the law is constitutional.

Second, the courts typically employ a very high level of generality when asking whether the statute at issue contains an intelligible principle. Indeed, at some level of generality, every statute satisfies that test. Take the National Industrial Recovery Act, 48 Stat. 195, which this Court struck down in *Schechter Poultry*. The intelligible principle that Congress approved in that law was to turn over the regulation

of the entire economy to the President who would employ private associations to assist him in that endeavor. That is surely a principle, and its scope is intelligible, but if there are any limits to the power of Congress to delegate, asking the intelligible principle question on its own will not locate them.

Although not discussed by the dissent in *Gundy,* the decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), is an example of how the intelligible principle test was used to uphold a statute that effectively delegated to the President the power in the field of international trade "to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Schechter Poultry,* 295 U.S. at 537-38. The statute at issue in *Algonquin* was section 232 of the Trade Expansion Act of 1962, which gave the President power to "adjust imports" when the national security of the United States was threatened. In *Algonquin* the President had chosen to impose license fees, rather than tariffs or import quotas. Algonquin contended that the statute did not include license fees as an option, and, to support that position, it argued that if section 232 were read to permit the use of license fees, it would be an unconstitutional delegation of legislative authority. In that posture, with no other claim of excess presidential discretion, this Court upheld section 232 as providing the necessary intelligible principle and rejected the limited challenge made there.

Forty-two years later, President Trump exercised his authority under section 232 to impose a

25% tariff on most imported steel from all countries except Canada and Mexico. Proclamation No. 9705, 83 Fed. Reg 11625 (Mar. 15, 2018). At the same time, relying on the same section 232, he also imposed a 10% tariff on aluminum imports. Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018). A consortium of importers and users of steel products challenged the tariffs on delegation grounds, but their claims were rejected by the lower courts, which concluded that they were bound by *Algonquin*, and this Court denied review. *Am. Inst. for Int'l Steel v. United States,* 806 Fed.Appx. 982 (Fed. Cir), *cert. denied*, 141 S. Ct. 133 (2020).

The record in the steel tariffs case and the manner in which the President exercised his powers under section 232 presented a very different delegation picture than *Algonquin.* The prior case raised a narrow constitutional avoidance claim that was used to bolster a statutory defense, with nothing to indicate that the President had not acted in a way well within the four corners of section 232. By contrast, the steel tariffs case was a facial challenge to section 232, and as the record discussed below demonstrates, the President had imposed these tariffs without having any limits imposed in the statute passed by Congress.

For example, section 232(c) provides that, after the President receives a report from the Secretary of Commerce (which he is not obligated to follow), and he concurs that the importation of an article of commerce "may threaten to impair the national security", the President may, with no further restrictions,

> determine the nature and duration of the action that, in [his] judgment … must be taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security.

Section 232(d) includes an essentially unlimited definition of national security that goes far beyond national defense and foreign relations to encompass purely economic considerations and almost anything else as well.[2]

Section 232 also provides no limit or guidance on the type and scope of import adjustments the President may choose. The President may tax imports by increasing existing tariffs by any amount and may impose unlimited new tariffs on goods that Congress has not previously subjected to import duties. The President may also impose quotas—whether or not there are existing quotas—with no limit on the extent of the reduction from any existing quota or import level. In addition, the President could impose licensing fees for the subject article, either in lieu of, or in addition to, any tariff or quota already in place. And for all these actions, the President may

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[2] "[T]he Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, *without excluding other factors*, in determining whether such weakening of our internal economy may impair the national security." (Emphasis added).

select the duration of each such change without any limits on his choice—or allow the adjustment to last indefinitely—and he may make changes with no advance notice or delay in implementation.

Most significantly, section 232 contains no limits on the amount of any increase in tariffs, as illustrated by the President decision to add 25% to steel imports, but only 10% for aluminum. There is also no limit on the duration of these "adjustments", and no requirement that they be applied to steel from all countries (Mexico and Canada were initially excluded and others were added later), and the tariffs do not have to be the same for all countries. Indeed, on August 10, 2018, President Trump issued Proclamation No. 9772, which doubled the tariff on steel imported from Turkey—and no other country—from 25% to 50%. 83 Fed. Reg. 40,429 (Aug. 15, 2018). Eventually, the President rescinded the doubled tariffs on Turkish steel imports. Proclamation No. 9886, 84 Fed. Reg. 23,421 (May 21, 2019), Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 23, 2019).

The imposition of these section 232 tariffs continued into the next Administration where President Biden made further adjustments that illustrate the breadth of authority available to the President, including by

- exempting steel products from Ukraine. Proclamation No.10406, 87 Fed. Reg. 33,591 (June 3, 2022);
- extending the exemption for Ukraine to include Ukrainian steel products that are further processed in the European

> Union. Proclamation No. 10588, 88 Fed. Reg. 36,437 (June 5, 2023); and
>
> - creating new rules of origin for steel and aluminum products from Mexico to qualify for exemption from the tariffs. Proclamation No. 10783, 89 Fed. Reg. 57,347 (July 15, 2024) (steel), and Proclamation No. 10782, 89 Fed. Reg. 57339 (July 15, 2024) (aluminum).

There is another feature of section 232 that virtually guarantees the President may do whatever he wishes: section 232 does not provide for judicial review of orders issued by the President under it. Because the President is not an agency under 5 U.S.C. § 551(1), judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706. Furthermore, the Department of Justice, on behalf of the United States, has taken the position that once

> the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports that was appropriate "in the judgment of the President[,]" 19 U.S.C. § 1862(c), . . . his exercise of discretion is not subject to challenge [in court].

Defs.' Mot. to Dismiss at 16–17, *Severstal Export GMBH, et al. v. United States*, No. 18-00057 (Ct. Int'l Trade), 2018 WL 1779351 (#30); *id.* at 19 ("[T]he President's exercise of discretion pursuant to Section 232 is nonjusticiable.").

Judged by the approach of the dissenters in *Gundy*, President Trump's use of section 232 might not survive a constitutional challenge under the current intelligible principle test. But that conclusion would be reinforced by asking whether there is anything that the President *cannot* do regarding products imported into the United States if he is willing to conclude that the importation may threaten national security, a term that itself has almost no limits. If the President wishes to utilize tariffs, he can impose any percentage he chooses, for any length of time he prefers, and may do so selectively, imposing tariffs on products from some countries but not from others. He is also at liberty to direct the creation of an exclusion process, as he did through the Department of Commerce, to remove the tariffs on imports of certain products not produced in the United States. 83 Fed. Reg. 12106 (Mar 15, 2018). The President could even make the payment of section 232 tariffs not deductible as an ordinary business expense for federal income tax purposes because nothing in section 232 would preclude such action. Finally, even if someone objected to a presidential action, there is no judicial review of any of these decisions, which is understandable because there are no guardrails that confine the President in any meaningful way.

If there is literally nothing that the President or an agency cannot do under the applicable statute, that is the most direct evidence that Congress has unconstitutionally delegated the legislative power to make policy to the executive branch. Focusing on whether there are statutory limits that cannot be exceeded also has the advantage of posing a direct and objective question, in contrast to the intelligible principle approach which is both conclusory and

subject to manipulation based on the level of generality at which it is answered. And as amicus now shows, asking the "is there anything the agency cannot do" would not produce a different outcome in the nondelegation cases decided by this Court, as illustrated by asking that question for four of the most significant rulings.

C. There Are Meaningful Guardrails in the Statutes in this Court's Major Delegation Cases.

Whenever a court is asked to refine a test that it has used for decades, it should ask how the change would affect its prior rulings, in this instance, those that upheld statutes against an excess delegation challenge. This brief cannot examine all of this Court's delegation cases, but will discuss four: two trade cases, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (which spawned the intelligible principle test), and *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), and two recent decisions in which the Court dealt extensively with the issue, *Mistretta v. United States*, 488 U.S. 361 (1989), and *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). The Court sustained the laws in all four, and in all of them there were significant limits on the powers of the entity authorized to implement the challenged law.

In *Hampton*, duties could be imposed only in order to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue. 276 U.S. at 401 (quoting section 315 of title 3 of the Tariff Act of 1922, 42 Stat. 858). Production costs are an

objectively verifiable fact, which provide a concrete limit on when duties can be increased, and then the duties can only be used to "equalize" those costs, not in any amount that the President chose. Those duties can be applied only with respect to "the principal competing country" which further limited the statute's reach, and the statute expressly provided that any increase may not exceed "50 per centum of the rates specified in" existing law. *Id.* Those limits were enforceable through judicial review in the United States Customs Court and eventually in this Court. Because the intelligible principle and its boundaries were easy to discern in *Hampton*, asking amicus's questions would not have changed the decision upholding the statute.

Clark further illustrates how Congress can provide meaningful limits on the President's powers without having to write a law that eliminates his discretion entirely. The statute at issue there was limited to countries that produced any of five enumerated duty-free products. 143 U.S. at 680. If that country imposed "duties or other exactions upon the agricultural or other products of the United States," and if the President concluded that those duties were "reciprocally unequal and unreasonable," his only remedy was to suspend the duty-free status of the imported products from the offending country. Moreover, the President had no discretion as to the remedy: if he made the requisite findings, he was required to re-impose the suspended duties, but could not impose additional duties on his own. *Id.* at 693.

At issue in *Mistretta* was the constitutionality of the Sentencing Reform Act of 1984, 18 U.S.C. §

3501, *et seq,* in which Congress established the Sentencing Commission within the judicial branch. Congress assigned it the responsibility to create guidelines that district judges would be required to follow in imposing sentences for persons found guilty of federal crimes. This Court rejected a dual challenge on delegation and separation of powers grounds, with only Justice Scalia dissenting. The most legally significant boundaries were the statutory maximums (and in some cases minimums) that Congress had enacted and continued to enact and amend for every federal crime. Beyond those limits, the Court summarized in over four pages in the US Reports the many other prohibitions and requirements that Congress included in the statute. 488h U.S. at 374-77. Those directions did not provide answers to every question, nor completely eliminate the Commission's discretion. Thus, as Justice Scalia noted in his dissent, the law left open "decisions [that] . . . . are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments." 488 U.S. at 414. Whether those guidelines, which are now only advisory, would be upheld under the dissent in *Gundy* is unclear. What is clear is that, unlike section 232, there were significant limits on what the Commission could do.

The Clean Air Act at issue in *Whitman* directed "the EPA to set "ambient air quality standards … which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). 531 U.S. at 472. Those standards, which had to be reviewed every five years, could only be issued for air pollutants

found on a public list promulgated by the agency under 42 U.S.C. § 7408. *Id.* at 462. The opinion for the Court, written by Justice Scalia, who dissented in *Mistretta,* read the statute to require that these standards must " reflect the latest scientific knowledge," that "EPA must establish uniform national standards" and that the agency must set them "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air," and where requisite "mean[s] sufficient, but not more than necessary." *Id.* at 473. In upholding the delegation, the Court concluded that "we interpret [the law] as requiring the EPA to set air quality standards at the level that is 'requisite' that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety,' and that, as so construed, the Clean Air Act "fits comfortably within the scope of discretion permitted by our precedent." *Id.* at 475-76.

Given the inherent indeterminacy in deciding the proper level at which air pollutants were needed to protect the public health, and the sensible mandate to update those levels every five years to reflect the latest scientific knowledge, there is almost nothing that Congress could have done, short of taking on the standard setting job itself, to make the law more definite. As to amicus's second question, as construed by the *Whitman* Court, there is one significant policy choice that Congress made and did not leave for the EPA: the Act "unambiguously bars cost considerations from the NAAQS-setting process." *Id.* at 462. Although the Court recognized that EPA exercised considerable discretion under the Act, *id.* at

472-76, there were substantial limitations on what EPA could and could not do, unlike section 232.

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The intelligible principle test for deciding undue delegation cases is unhelpful in providing a method to separate necessarily flexible laws from those that turn over the decisions on major policy issues to the executive branch. This brief proposes that the Court ask two simple questions in delegation cases that can provide objective answers to the question of how much delegation is too much. The first asks what else could Congress have done, and the response can either be a basis to uphold the law or overturn it. If the answer is that "Congress must make all the decisions itself," as is answer for the FCC's Universal Service Program at issue here, then the law should be sustained. But if, as in *Gundy*, there was a simple one-time decision of choosing whether the law should apply retroactively and that Congress could make instead of passing the buck to the agency (and ducking responsibility), the Court should set aside the delegation.

The second inquiry is a one way street: if there are no limits in the statute on what the President (or agency) may do, which is the case with section 232, then the delegation is excessive and the law cannot stand. That should be true even if the delegation is not as much a blank check as was the National Industrial Recovery Act in *Schechter Poultry*. The answers to both these questions may not decide all nondelegation cases, but they will surely be an improvement of the current intelligible principle approach.

CONCLUSION

For these reasons, the Court should reverse the decision of the Fifth Circuit that 47 U.S.C. § 254 is unconstitutional as an excessive delegation of legislature power. It should also take this opportunity to refine the intelligible principle test by adding two questions for the courts to ask of statutes being challenged on delegation grounds: what else could Congress have done to avoid this delegation, and is there an action that the executive branch could *not* take because the statute precludes it?

Respectfully Submitted,

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