

THE NONDELEGATION CLIFFHANGER:
IMPLICATIONS OF THE POTENTIAL DOCTRINAL
SHIFT ON ENVIRONMENTAL LAW AND THE ROLE OF
ENVIRONMENTAL ADVOCACY

BY
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*Change is likely on the horizon for the current administrative state. In 2019, the Supreme Court decided *Gundy v. United States* and rejected a nondelegation doctrine challenge. However, despite the plurality failing to find justification for reviving the nondelegation doctrine, an assertive dissent by Justice Neil Gorsuch, joined by two other Justices, has indicated a clear intention to reexamine the doctrine and shift power away from administrative agencies. With the current 6-3 majority on the Supreme Court, the nondelegation doctrine has a real chance to disrupt the administrative state. In particular, a more restrictive interpretation of the nondelegation doctrine could have a profound impact on environmental law, essentially undoing years of successful agency action under these statutes.*

*This Article surveys a group of environmental laws and analyzes each under two of the three tests announced in the *Gundy* decision. The review illustrates that various environmental laws are vulnerable to a restrictive interpretation of the nondelegation doctrine, and that revival would be harmful to the current operation of agencies tasked with implementing these statutes. Additionally, this Article proposes ways to utilize environmental advocacy tactics if the nondelegation doctrine is resurrected, which could ultimately result in benefits in the context of environmental law.*

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I. INTRODUCTION

Environmental advocacy has played an essential role in society for decades as it often brings to light individuals' contributions to negative environmental complications, such as climate change and per- and polyfluoroalkyl substances (PFAS) contamination, while also providing a path toward correcting these problems. To illustrate this point, consider a statement from Dr. Patricia Westerford, an environmental advocate in the book *The Overstory*, that explains the interaction of society and the environment. In a memorable passage, Dr. Westerford opines that “[p]eople aren’t the apex species they think they are. Other creatures—bigger, smaller, slower, faster, older, younger, more powerful—call the shots, make the air, and eat sunlight. Without them, nothing.”¹ This statement seems to accurately depict a rather common mentality within society—that the environment is often considered second to people despite its inherent role in sustaining human life.²

Fortunately, the law has provided a buffer for this sort of mentality in which government agencies, such as the United States Environmental

¹ RICHARD POWERS, *THE OVERSTORY* 285 (2019). Throughout the novel, Richard Powers uses Dr. Westerford to illustrate the importance of environmental advocacy and how society does not always make appropriate decisions with regards to the environment. *Id.* Consider Dr. Westerford’s comical example from her final speech:

When the world was ending the first time, Noah took all the animals, two by two, and loaded them aboard his escape craft for evacuation. But it’s a funny thing: He left the plants to die. He failed to take the one thing he needed to rebuild life on land, and concentrated on saving the freeloaders!

Id. at 451.

² See POPE FRANCIS, *ON CARE FOR OUR COMMON HOME* 3 (2015) (“We have come to see ourselves as [Mother Earth’s] lords and masters, entitled to plunder her at will.”).

Protection Agency (EPA), have the broad authority to take actions that support the continued health of the environment and people.³ However, this successful legal system could soon face a drastic restructuring that would change the future landscape of environmental law, ultimately removing protections from the people first mentality. In 2019, the Supreme Court of the United States (Supreme Court) decided *Gundy v. United States*,⁴ in which it held that the registration requirement provision of the Sex Offender Registration and Notification Act⁵ (SORNA) did not violate the nondelegation doctrine.⁶ While the decision did not alter the landscape of the administrative state, an assertive dissent by Justice Neil Gorsuch, accompanied by Chief Justice John Roberts and Justice Clarence Thomas, signaled a desire to reevaluate the confines of the nondelegation doctrine and left society to wonder when the Supreme Court would officially resuscitate it.⁷ While the three Justices alone could not resurrect the presumably dead doctrine (also in part due to Justice Samuel Alito's failure to join the dissent), the addition of Justices Brett Kavanaugh and Amy Coney Barrett, who were both confirmed to the Court after *Gundy*, could result in a majority sufficient for revival. While a resurrected nondelegation doctrine would have an impact on the administrative state generally, it could have a profound impact on environmental law in particular, essentially undoing years of successful agency action under numerous environmental statutes or even preventing further agency action.

This Article considers the impacts of a revived nondelegation doctrine on environmental law and the role environmental advocacy could play moving forward. Part II provides a brief historical overview of the nondelegation doctrine, its minimal use, and subsequent lack of use for over eight decades. Part III examines the *Gundy* decision, as well as *Paul v. United States*,⁸ in which Justice Kavanaugh indicated a desire to also reconsider the boundaries of the nondelegation doctrine.⁹ Part IV considers the impact of a revived nondelegation doctrine on specific environmental laws. This Part is not meant to be exhaustive, but rather to provide examples of potentially vulnerable areas of environmental law. Finally, Part V considers the role that environmental advocacy may play if the nondelegation doctrine is revived, and how such advocacy could benefit environmental law.

³ *E.g.*, *infra* Part IV.A.1. (discussing EPA's broad authority under the Clean Air Act).

⁴ 139 S. Ct. 2116 (2019).

⁵ Sex Offender Registration and Notification Act, 34 U.S.C. § 20913 (2018).

⁶ 139 S. Ct. at 2121.

⁷ *Id.* at 2131.

⁸ 140 S. Ct. 342 (2019).

⁹ *Id.* at 342.

II. A BRIEF HISTORICAL OVERVIEW OF THE NONDELEGATION DOCTRINE

Given the vast scholarship on the nondelegation doctrine, this Part provides a general overview to lay an appropriate foundation of the doctrine's history and present state prior to the current majority's desired shift pronounced in the *Gundy* and *Paul* decisions.¹⁰ Until the Supreme Court strikes down a congressional delegation, the intelligible principle test, discussed below, remains the current standard under federal law despite *Gundy* and *Paul*.

The nondelegation doctrine is an important component of both constitutional and administrative law.¹¹ Despite its importance, the doctrine is not explicitly found within the text of the United States Constitution.¹² Rather, the root of the doctrine stems from enumerated powers within Article I, which grant Congress the exclusive right to exercise legislative authority.¹³ Because of this exclusive power, the nondelegation doctrine is meant to stop other branches of government from exercising legislative authority.¹⁴ In a more practical sense:

Executive officials generally cannot exercise legislative powers on their own initiative because they are not granted any such power by the Constitution. Nor can Congress confer such authority by passing vacuous statutes for officials to 'execute,' because those statutes . . . will therefore exceed Congress's enumerated powers under . . . Article I.¹⁵

However, the administrative state in the United States does not necessarily function in this way. The executive branch often has vast discretion in exercising certain legislative authority based on a theory of

¹⁰ See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 405 (2008) (recognizing that "[t]he nondelegation doctrine is the subject of a vast and ever-expanding body of scholarship").

¹¹ See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, U. PA. L. REV. 379, 380–82 (2017) (describing the integral role the nondelegation doctrine played in the formation of the administrative state and taking note of the sensitivity to nondelegation held by constitutional scholars).

¹² *Id.* at 389. It is also worth noting that a debate in the nondelegation doctrine literature exists as to its origin. See Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490, 1494, 1503, 1556 (2021) (arguing that the nondelegation doctrine existed at the founding generation). Cf. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 294–96, 366–67 (2021) (arguing that there was no nondelegation doctrine at the founding generation and that Congress could delegate broadly).

¹³ U.S. CONST. art. I, § 1 (stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

¹⁴ See U.S. CONST. amend X (stating "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 714 (1969) ("The original purpose of the non-delegation doctrine was to prevent the delegation of legislative power.").

¹⁵ Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002).

“common sense and the inherent necessities of . . . governmental coordination.”¹⁶ In fact, the discretionary authority given to the executive branch is almost never invalidated on delegation grounds as long as Congress “lay[s] down by legislative act an intelligible principle to . . . the person or body authorized.”¹⁷ The intelligible principle standard, since its inception, has been interpreted broadly and only really requires that Congress provide some sort of guidance or direction to the body whom authority has been delegated to.¹⁸ Only twice, during the New Deal period, has the Supreme Court actually found no intelligible principle and ultimately a violation of the nondelegation doctrine.¹⁹

Both cases that invalidated congressional delegations occurred in 1935. In the first, *Panama Refining Co. v. Ryan*,²⁰ the Supreme Court considered whether Section 9(c) of the National Industrial Recovery Act²¹ (NIRA) validly authorized the President to prohibit interstate and foreign transportation of oil in excess of state quotas.²² The Court found that the President’s use of an executive order under Section 9(c) was a violation of the nondelegation doctrine as Section 9(c) did not provide any guidance for the President to reasonably rely on, but rather gave him unfettered discretion.²³ Similarly, *A.L.A. Schechter Poultry Corp. v. United States*²⁴ also concerned a provision of NIRA.²⁵ In that case, the Supreme Court considered whether Section 3 of NIRA validly authorized the President to approve codes of fair competition for certain trades and industries.²⁶ As in *Panama Refining Co.*, the Court found that Section 3 did not provide any guidance or standards for the President to consider when exercising the authority granted in the statute.²⁷

Despite the doctrine’s affirmative use in the 1930s, the Supreme Court has yet to strike down other congressional delegations.²⁸ However, some Justices over the years have expressed an interest in revisiting the doctrine. Notably, in *Industrial Union Department v. American Petroleum*

¹⁶ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

¹⁷ *Id.* at 409; see Davis, *supra* note 14, at 713 (noting that “[t]he non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power.”).

¹⁸ Whittington & Iuliano, *supra* note 11, at 401–02.

¹⁹ *Id.* at 402–04.

²⁰ 293 U.S. 388 (1935).

²¹ National Industrial Recovery Act, Pub. L. No. 73-67, § 9(c), 48 Stat. 195, 200 (1933) *invalidated by* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Congress failed to reauthorize the diminished Act).

²² *Panama Refining Co.*, 293 U.S. at 415–16.

²³ *Id.* at 431–33.

²⁴ (*Schechter Poultry*), 295 U.S. 495 (1935).

²⁵ *Id.* at 525.

²⁶ *Id.* at 530.

²⁷ *Id.* at 541–42. *Panama Refining Co.*, 293 U.S. at 431–33.

²⁸ *But see* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (noting that state courts have been less hesitant to invalidate delegations under the nondelegation doctrine).

*Institute*²⁹—often referred to as the *Benzene* case—the late Justice Rehnquist found that Section 6(b)(5) of the Occupational Safety and Health Act³⁰ violated the nondelegation doctrine in his concurring opinion.³¹ Additionally, Justice Thomas has also noted an intention to revisit the nondelegation doctrine on at least two occasions.³²

III. A SHIFT IN THE NONDELEGATION DOCTRINE

While no Supreme Court case has really come close to invalidating congressional delegations, other than *Panama Refining Co.* and *Schechter Poultry*, the appointment of three new Justices during Donald Trump’s presidency has greatly increased the potential for revival of the nondelegation doctrine.³³ In fact, during the 2019 and 2020 terms, the Supreme Court’s current majority signaled a clear intent to begin invalidating delegations, starting with *Gundy*.³⁴

Gundy involved a delegation challenge to SORNA.³⁵ The provision at issue stated the following: “The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders.”³⁶ Given this broad authority, “the Attorney General issued an interim rule in February 2007, specifying that SORNA’s registration requirements apply in full to ‘sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.’”³⁷ Because of this retroactivity component, Herman Gundy, who was a pre-Act offender, was convicted for failing to register.³⁸ While no majority opinion resulted in *Gundy*, the plurality upheld the delegation on traditional, intelligible principle grounds.³⁹ The plurality opined that “[t]he text, considered alongside its context, purpose, and history” sufficiently provided an intelligible principle for the Attorney General in that such authority did not permit a determination of whether or not to apply SORNA to pre-Act

²⁹ (*Benzene*), 448 U.S. 607 (1980).

³⁰ Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b)(5) (2018).

³¹ *Benzene*, 448 U.S. at 675 (Rehnquist, J., concurring).

³² Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring); *Whitman v. Am. Trucking Ass’n, Inc. (Whitman)*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

³³ Pamela King, *Where Supreme Court Justices Stand on EPA, Climate*, E&E NEWS (Nov. 3, 2021), <https://perma.cc/YX59-6NBF>.

³⁴ See Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV’T L. J. 379, 401 (2021); *Gundy*, 139 S. Ct. 2116, 2121 (2019).

³⁵ *Gundy*, 139 S. Ct. at 2121.

³⁶ *Id.* at 2122 (quoting 34 U.S.C. § 20913(d) (2018)).

³⁷ *Id.* (quoting Sex Offender Registration and Notification, 72 Fed. Reg. 8,897, 8,897 (Feb. 28, 2007)).

³⁸ *Id.*

³⁹ *Id.* at 2129.

offenders; rather, the delegation was determining the feasibility in applying the registration requirements.⁴⁰

In Justice Gorsuch's assertive dissent, he would have invalidated the provision at issue on delegation grounds, claiming that the decision to uphold the Attorney General's authority was "delegation running riot."⁴¹ As a result of his displeasure with the plurality, Justice Gorsuch took the opportunity to provide a set of "guiding principles," or tests, to use moving forward, which would eliminate the longstanding intelligible principle standard.⁴² Under the first guiding principle:

[A]s long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.' . . . Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether' Congress's guidance has been followed.⁴³

As per the second guiding principle, "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."⁴⁴ Finally, under the third guiding principle, "Congress may assign the executive and judicial branches certain non-legislative responsibilities."⁴⁵ Ultimately, Justice Gorsuch found none of these principles satisfied based on the language of SORNA.⁴⁶ "Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations."⁴⁷

For purposes of this Article, it is also worth noting that during his explanation of the guiding principles, Justice Gorsuch specifically omitted certain precedent, in which it can likely be assumed would not withstand delegation challenges; of particular interest is the environmental law case *Whitman v. American Trucking Ass'n*,⁴⁸ which involved a nondelegation challenge to the Clean Air Act⁴⁹ (CAA).

Had Justice Kavanaugh been confirmed prior to the oral arguments in *Gundy*, it is very possible that the decision could have had a different result, considering Justice Alito did not want to change the scope of the nondelegation doctrine without a majority of the Court willing to do so.⁵⁰

⁴⁰ *Id.* at 2123–24.

⁴¹ *Id.* at 2148 (quoting *Schechter Poultry*, 295 U.S. 495, 553 (1935)).

⁴² *Id.* at 2135–36, 2141.

⁴³ *Id.* at 2136 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2137.

⁴⁶ *Id.* at 2143.

⁴⁷ *Id.* at 2132.

⁴⁸ 531 U.S. 457 (2001).

⁴⁹ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018); Heinzerling, *supra* note 34, at 384.

⁵⁰ *Gundy*, 139 S. Ct. at 2131.

However, not long after *Gundy*, Justice Kavanaugh issued a statement respecting the denial of certiorari in *Paul*.⁵¹ The statement provided a clear signal that another Justice was now willing to reconsider the scope of the nondelegation doctrine, and that he considered Justice Gorsuch's approach in *Gundy* to have merit.⁵² In specifically considering situations involving major policy decisions that would regulate private conduct, Justice Kavanaugh opined that "Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce."⁵³

With Justice Kavanaugh's statement, at least five Justices, a majority, appear ready to reconsider the scope of the nondelegation doctrine. Justice Barrett could also provide another vote for restructuring the nondelegation doctrine, but it is unclear based on her scholarship or prior decisions as a circuit court judge where she stands on this issue.⁵⁴ Because it is foreseeable that the Supreme Court could revive the nondelegation doctrine in the near future, it is important to consider the profound impact such decision could have on environmental law, which will likely be a target of delegation attacks.

IV. ENVIRONMENTAL STATUTES AND A REVIVED NONDELEGATION DOCTRINE

Environmental laws are an integral part of society. They help protect and preserve land, natural resources, and habitats, while also providing protection to society.⁵⁵ However, despite the clear importance, environmental law is often a topic of debate, and as a result, has been subject to fluctuations across different presidential administrations.⁵⁶

⁵¹ 140 S. Ct. 342, 342 (2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See, e.g., Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 317–19 (2014). Before her confirmation to the Supreme Court, Justice Barrett noted that while "Congress enjoys broad leeway in most cases [involving nondelegation doctrine questions, it] does not mean that this freedom applies across the board." *Id.* at 318. In particular, "certain types of laws—namely those restricting fundamental rights or employing suspect classifications—merit heightened scrutiny because of the particular constitutional guarantees they implicate." *Id.* As such, "certain constitutional provisions might limit Congress's otherwise expansive power to implement legislation as it sees fit." *Id.*

⁵⁵ *Environmental Conservation Laws*, NATURE (Feb. 10, 2020), <https://perma.cc/GT7N-FEMV>.

⁵⁶ See, e.g., Richard J. Lazarus, Reaction, *Presidential Combat Against Climate Change*, 126 HARV. L. REV. F. 152, 152 (2013) ("President Obama publicly renewed his commitment to address climate change."); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B. U. L. REV. 1357, 1376 (2018) ("Early proposals and actions by the Trump Administration, especially in the environmental law arena, reflect a broad claim of presidential and agency power to reverse course with little constraint.");

While the current administration is placing an emphasis on environmental regulation, the revival of the nondelegation doctrine puts environmental laws in jeopardy regardless of these efforts.⁵⁷ This Part will consider aspects of various environmental laws that could be vulnerable to a revived nondelegation doctrine. In particular, this Part examines designation or listing type provisions, as well as liability schemes within environmental statutes. These provisions will be placed in the context of the first and second guiding principles announced in the *Gundy* dissent. The purpose of this examination is to ultimately show that a revived nondelegation doctrine would drastically change the current landscape of the administrative state, and ultimately severely restrict environmental regulation at the agency level.

A. Designation and Listing Provisions

Designation and listing provisions are common in environmental statutes.⁵⁸ These provisions often provide discretion to agencies, such as EPA, to classify types of pollutants as harmful to the environment.⁵⁹ Because these types of provisions give vast discretion to agencies, it is likely that if the nondelegation doctrine is revived under Justice Gorsuch's more restrictive approach, industries could successfully challenge such provisions on delegation grounds.⁶⁰ An environmental statute that has already been challenged on delegation grounds is the CAA.⁶¹ This Part will provide an in-depth look at the CAA provisions and then provide a more general overview of other similar designation and listing provisions that could be challenged on delegation grounds.⁶²

1. The Clean Air Act: Sections 108 and 109

The most prominent environmental law case involving the nondelegation doctrine is *Whitman*, which, as previously noted, was omitted from a list of cases likely to pass muster under Justice Gorsuch's more restrictive approach to the nondelegation doctrine.⁶³ *Whitman* involved a challenge to Section 109 of the CAA, which allows EPA to

David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 DUKE ENV'T L. & POL'Y F. 49, 90, 92, 94 (2014) (evaluating various methods of regulating environmental issues).

⁵⁷ Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order. No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021).

⁵⁸ See, e.g., Clean Air Act, 42 U.S.C. § 7409(a)(1) (2018) (designating of powers to EPA to determine ambient air quality standards).

⁵⁹ See, e.g., *id.* § 7408(a)(1) (delegating authority to establish air quality standards for air pollutants which may "endanger public health or welfare").

⁶⁰ See, e.g., *id.*

⁶¹ *Whitman*, 531 U.S. 457, 462 (2001).

⁶² See *contra* Cass R. Sunstein, *Is the Clean Air Act Constitutional?*, 98 MICH. L. REV. 303, 356, 361 (1999) (arguing that the CAA is constitutional in terms of the nondelegation doctrine).

⁶³ See *supra* text accompanying notes 48–49.

promulgate National Ambient Air Quality Standards (NAAQS) for air pollutants listed as criteria air pollutants under Section 108.⁶⁴ The particular language in dispute was as follows: “ambient air quality standards the attainment and maintenance of 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.”⁶⁵ The challenge to this provision arose when EPA revised the NAAQS for particulate matter (PM) and ozone, which are two of only six criteria air pollutants.⁶⁶ Ultimately, the Supreme Court reversed the D.C. Circuit’s decision and upheld the delegation of authority, finding that the language of the statute limited EPA to implement NAAQS that are “sufficient, but not more than necessary” to protect public health; such limitation was found to be similar to other cases in which delegation was upheld.⁶⁷ While Section 109 is an important designation-type provision, and would likely be challenged again if the nondelegation doctrine were to regain life, such provision is not the centerpiece to an examination of vulnerable CAA provisions. Rather, background on Section 109 is useful for the following discussion pertaining to Section 108, which was not in dispute in *Whitman* since PM and ozone were already designated as criteria air pollutants at the time.⁶⁸

As previously noted, Section 108 of the CAA allows the EPA to designate certain air pollutants as criteria air pollutants.⁶⁹ This is one of the designation, or listing, provisions in the CAA.⁷⁰ The statutory language of Section 108 specifically provides that “[f]or the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant.”⁷¹ Because this language provides broad authority to EPA, it is a ripe provision for a delegation challenge.

A specific challenge that seems plausible is if EPA decided to regulate greenhouse gases (GHG) and formally add them to the list of criteria air pollutants. In fact, it is possible that EPA will regulate GHGs in the near future. On March 4, 2021, the former Acting Administrator of EPA, Jane Nishida, officially withdrew the Trump Administration’s denial of the 2009 Petition asking EPA to set NAAQS for carbon dioxide.⁷² In withdrawing such denial, EPA has officially committed to considering

⁶⁴ *Whitman*, 531 U.S. at 462; 42 U.S.C. §§ 7408–09 (2018).

⁶⁵ *Whitman*, 531 U.S. at 472 (alteration in original) (quoting 42 U.S.C. § 7409(b)(1)).

⁶⁶ *Id.* at 463.

⁶⁷ *Id.* at 473.

⁶⁸ *Id.* at 457.

⁶⁹ *Id.* at 462.

⁷⁰ CAA Section 112 is also another designation provision and specifically focuses on hazardous air pollutants. *See* Clean Air Act, 42 U.S.C. § 7412 (2018). While it is possible Section 112 could also face delegation challenges, this Article will not address Section 112 further.

⁷¹ *Id.* § 7408(a)(1).

⁷² Letter from Kassie Siegel et al., Director, Ctr. for Biological Diversity, to Michael Regan, Administrator, U.S. Env’t Prot. Agency (Apr. 14, 2021).

the 2009 Petition further.⁷³ Therefore, after EPA finishes reviewing the 2009 Petition, and if the agency decides to list GHGs as criteria air pollutants, the inquiry becomes whether EPA's action of adding GHGs to the criteria air pollutant list passes muster under the guiding principles, or tests, announced in *Gundy*.

Under the first test, a valid delegation occurs if “Congress makes the policy decisions when regulating private conduct;” in such a situation, an agency, like EPA, would then be authorized to “fill up the details.”⁷⁴ In considering this first test, it is plausible that the issue would need to involve a major policy question based on the *Paul* decision.⁷⁵ As a result, in the context of designating GHGs as criteria air pollutants, the inquiry requires a determination of 1) whether the designation under 108 is a major policy decision, and 2) whether such designation regulates private conduct.⁷⁶ While the scope of a major policy concern is not entirely clear, considering the Supreme Court's discussion of the major questions doctrine in *Gundy*,⁷⁷ along with the analysis of why Justice Gorsuch did not find the first test/guiding principle satisfied, a logical assumption might be that major policy questions will turn on economic and political consequences.⁷⁸

In considering such rationale, adding GHGs to the list of criteria air pollutants would likely fall within the scope of a major policy decision. Once an air pollutant is classified as a criteria air pollutant, it triggers the NAAQS process under Section 109—meaning, industries that emit GHGs would now need to comply with NAAQS that correlate to GHGs. From an economic standpoint, this would mean industries need to implement sufficient changes, such as potential technological changes, to comply with the GHG standards. Consider this point from the perspective of costs expended to comply with NAAQS for ozone and PM. In 2020, the Trump Administration retained the 2015 NAAQS established under the Obama Administration.⁷⁹ The energy sector challenged these Obama-era changes to ozone, claiming the revised NAAQS were too protective, which would directly correlate to increased costs for compliance.⁸⁰ In fact, the costs of ultimately complying with the revised ozone NAAQS were estimated to range from \$1.5 to \$5.9 billion annually, a substantial cost

⁷³ *Id.*

⁷⁴ *Gundy*, 139 S. Ct. 2116, 2136 (2019).

⁷⁵ *Paul*, 140 S. Ct. 342, 342 (2019) (specifically noting that Congress must make “the major policy” decisions).

⁷⁶ *See id.* (“Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.”).

⁷⁷ *Gundy*, 139 S. Ct. at 2141.

⁷⁸ *See* Heinzerling, *supra* note 34, at 386–89.

⁷⁹ *EPA Finalizes Ozone NAAQS, Retaining Current Standards*, U.S. ENV'T PROT. AGENCY (Dec. 23, 2020), <https://perma.cc/RQ2R-8PP8>.

⁸⁰ *Murray Energy Corp. v. U.S. Env't Prot. Agency*, 936 F.3d 597, 608 (D.C. Cir. 2019).

to the energy sector.⁸¹ As well, the 2013 changes to NAAQS for PM, which were ultimately retained under the Trump Administration, faced backlash for similar reasons.⁸² EPA had estimated that the cost of complying with the new NAAQS for PM would range from \$53 to \$350 million annually, a less substantial cost as compared to ozone.⁸³ While the cost to the energy sector is unclear, it is likely that complying with GHG NAAQS, similar to ozone and PM, could be expensive. Further, it is worth noting that economic consequences are likely to result from NAAQS for GHGs as EPA does not consider costs or technological feasibility when setting air quality standards—meaning, the agency is simply determining the appropriate level requisite to protect public health and environment without any consideration to the impact on the regulated entities.⁸⁴ Designating GHGs as criteria air pollutants would likely have political consequences as well, adding support to the action resembling a major policy decision. Environmental law is often an area of debate and dispute, especially in recent years regarding concerns such as climate change.⁸⁵ In fact, the Supreme Court has even considered and found that regulating GHGs in certain contexts would have major political implications, adding greater support that a criteria air pollutant designation could have political consequences.⁸⁶

Further support that designating GHGs as criteria air pollutants would be a major policy decision is Justice Gorsuch's reliance on *Wayman v. Southward*.⁸⁷ Justice Gorsuch opined that *Wayman* did not deal with a major policy decision as "Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and [that] the residual authority to make 'alterations and additions' did no more

⁸¹ *What's the True Cost of New NAAQS Ozone Standards?*, PPM CONSULTANTS (2018), <https://perma.cc/2S9B-NMJC>. While at first glance the cost seems to be substantial to the energy sector, studies have shown that the health and ecological benefits of the CAA NAAQS outweigh the costs to regulated entities. See CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT 4 (2009) (listing examples of studies that show benefits of the CAA NAAQS outweighing the regulatory costs); see also Howard M. Crystal et al., *Returning to Clean Air Act Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 GEO. ENV'T L. REV. 233, 258 (2019) (discussing the economic benefits of greenhouse gas regulation).

⁸² See *Nat'l Ass'n of Mfrs. v. U.S. Env't Prot. Agency*, 750 F.3d 921, 921, 923 (D.C. Cir. 2014) (showing backlash against EPA changes to NAAQS for PM).

⁸³ ROBERT ESWORTHY, CONG. RSCH. SERV., R42934, AIR QUALITY: EPA'S 2013 CHANGES TO THE PARTICULATE MATTER (PM) STANDARD 21 (2015).

⁸⁴ *Lead Indus. Ass'n v. U.S. Env't Prot. Agency*, 647 F.2d 1130, 1149 (D.C. Cir. 1980) ("The legislative history of the Act also shows the Administrator may not consider economic and technological feasibility in setting air quality standards; the absence of any provision requiring consideration of these factors was no accident; it was the result of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals.")

⁸⁵ MARK BOND, SABIN CTR. FOR CLIMATE CHANGE L., CAN AND SHOULD GREENHOUSE GASES BE REGULATED AS HAZARDOUS AIR POLLUTANTS UNDER CLEAN AIR ACT SECT. 112? 17 (2015).

⁸⁶ *Util. Air Regul. Grp. v. U.S. Env't Prot. Agency*, 573 U.S. 302, 324 (2014).

⁸⁷ 23 U.S. 1 (1825).

than permit courts to fill up the details.”⁸⁸ Unlike the Court in *Wayman*, which found Congress to have made the major policy decision regarding federal courts’ borrowing of state court procedural rules, Section 108 does not appear to provide such a specific directive.⁸⁹ Rather, Section 108 affords EPA the sole discretion to determine which air pollutants warrant designation as criteria air pollutants.⁹⁰ The present situation could have been likened to *Wayman* had Congress specifically provided a list of criteria air pollutants, but allowed for, as the statute in *Wayman*, certain alterations and additions.⁹¹ In such a situation, Congress would have been determining which air pollutants fall within the scope of the CAA (similar to Congress determining that federal courts could borrow state procedural rules), and ultimately which air pollutants are regulated; it is then at least plausible that EPA could have removed or even added to the list established by Congress.⁹² However, Section 108 does not provide this lesser amount of discretion as EPA was provided the sole task of determining the criteria air pollutant list from its inception.⁹³ As a result, the current majority on the Supreme Court would likely find that this is a major policy decision that does not simply allow EPA to fill in details, and subsequently subjects industries (i.e., private entities) to regulatory compliance.

While Section 108 would likely not survive under Justice Gorsuch’s first test, it would mean that Congress must designate GHGs as criteria air pollutants (i.e., make the major policy decision). If that were the case, it is worth noting that an argument could be made that Section 109, the NAAQS provision at issue in *Whitman*, is still a valid delegation despite its omission from cases likely to survive a delegation challenge in *Gundy*. The argument might be that after Congress designates GHGs as criteria air pollutants, EPA can then “fill up the details” under Section 109. This is a plausible argument as the major policy decision is placing GHGs under the NAAQS regulatory regime through Section 108, not implementing the NAAQS themselves under Section 109. The interconnectedness of the two provisions also further supports this position. That is, Section 109 is inapplicable unless there is a Section 108 designation.⁹⁴

⁸⁸ *Gundy*, 139 S. Ct. 2116, 2136 (2019).

⁸⁹ *Wayman*, 23 U.S. at 5.

⁹⁰ Clean Air Act, 42 U.S.C. § 7408(a)(1) (2018).

⁹¹ *Wayman*, 23 U.S. at 8.

⁹² It could also be the case that even if Congress did establish a criteria air pollutant list and allowed for alterations and additions, EPA would not be permitted to add to the list per the first test in *Gundy*. While Congress would have been the body making the original determination, it might be argued that adding any additional air pollutants to the list would in fact be a major policy decision because it subjects entities to regulation who may not have been previously subject to the CAA.

⁹³ 42 U.S.C. § 7408(a)(1)(A)–(C).

⁹⁴ *See id.* §§ 7408(a)(2), 7409(a)(1)–(2) (showing how Section 109 is dependent on the criteria born out of Section 108’s procedures).

If a designation provision looks like it would fail under the first test, it is also worth making an argument under the second test announced in *Gundy*. In addition to Congress making the major policy decisions that regulate private conduct, “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”⁹⁵ This would be a situation in which an agency goes through a process of gathering factual information to ultimately determine whether or not the statute applies.⁹⁶ Unlike the first test, Section 108 could potentially pass muster under this second test. The argument would likely be that in enacting Section 108, Congress prescribed a rule that would govern private conduct (i.e., subject industries to national air quality standards for certain air pollutants), but the rule would only apply upon specific findings by EPA. These findings, which are better classified as certain criteria that must be met, include the following: 1) the air pollutant must reasonably be anticipated to endanger the public health or welfare, 2) the air pollutants must come from either mobile or stationary sources, and 3) air quality criteria for the air pollutant were not in place prior to the enactment of the CAA.⁹⁷ As a result, the proper description for Section 108, in order to satisfy the second test, would be that it is conditional legislation that only applies when the three criteria are met.

Section 108 shares resemblances to the authorities Justice Gorsuch relied on in considering adequate conditional legislation. In one of the examples, *Cargo of Brig Aurora v. United States*,⁹⁸ the Supreme Court found it reasonable for Congress to either expressly or conditionally impose an embargo on France or Great Britain if either were interfering with American trade.⁹⁹ Justice Gorsuch also derived authority from *Miller v. Mayor of New York*,¹⁰⁰ in which the Supreme Court found that Congress made the construction of the Brooklyn Bridge conditional upon a finding that it would not interfere with navigation.¹⁰¹ As found in those cases, Section 108 could be considered conditional legislation. Congress has made the national regulation of air pollutants subject to a showing that a particular air pollutant satisfies the three criteria previously noted. Further support that Section 108 is conditional legislation is the current list of criteria air pollutants. Since the enactment of the CAA, only six air pollutants have been designated as criteria air pollutants.¹⁰² This shows that EPA does not have unfettered discretion to implement Section 108 and list any potentially harmful air pollutant.

⁹⁵ *Gundy*, 139 S. Ct. 2116, 2136 (2019).

⁹⁶ Jonathan Hall, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L. J. 175, 201 (2020).

⁹⁷ 42 U.S.C. § 7408(a)(1)(A)–(C).

⁹⁸ 11 U.S. (7 Cranch) 382 (1813).

⁹⁹ *Id.* at 388.

¹⁰⁰ 109 U.S. 385 (1883).

¹⁰¹ *Id.* at 393.

¹⁰² *Criteria Air Pollutants*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/9LUP-AC9L> (last visited Nov. 16, 2021).

Despite the plausibility that Section 108 might be considered conditional legislation, it could also be argued that the provision still does not meet the criteria for the second test. Consider again *Cargo of Brig Aurora*. The core of the case involved the date that Congress intended the statute, which authorized the embargo on France or Great Britain, to take effect.¹⁰³ The Supreme Court found no issue with allowing Congress to make the effective date of the statute depend on a finding that Great Britain or France interfered with American trade.¹⁰⁴ At first glance, and noted previously, the case shares resemblances to Section 108. So, what is different aside from the obvious that one situation involves determining an effective date to limit trade and the other involves determining a limitation on the amount of air pollutants that can be emitted? For one, the determination regarding the effective date appears to be that of a somewhat ministerial task.¹⁰⁵ Conversely, the determination regarding which air pollutants warrant listing seems more akin to a combination of policy making and fact-finding, and less ministerial in nature given the fact that concluding which air pollutants reasonably pose a risk to human health and the environment is not necessarily as clear as a directive explicitly specifying when a statute should take effect.¹⁰⁶ Additionally, considering the previous discussion of what constitutes policy decisions—economic and political consequences—may also lend support to Section 108 resembling more of a policy and fact-finding combination. As noted, listing GHGs, for example, would have economic consequences on the regulated industries given the need to comply with the subsequent establishment of NAAQS. On the same note, however, it would also seem logical that determining the effective date of a statute that imposes an embargo creates some sort of economic impact for both countries involved, and therefore could at least appear as a combination of policy making and fact-finding. However, a distinction between the two situations is that Congress had pre-determined that an embargo would be appropriate when a particular action occurs (i.e., interference with American trade), whereas Congress did not actually specify the appropriate air pollutants to list under Section 108 even though it did specify what actions warrant listing air pollutants (e.g., a reasonable endangerment to public health).

Notwithstanding ambiguity over whether Section 108 combines both fact-finding and policy making, the provision could potentially pass muster under the second test, and would likely have a greater chance of success as opposed to the first test.

¹⁰³ *Cargo of Brig Aurora*, 11 U.S. at 385–86.

¹⁰⁴ *Id.* at 388.

¹⁰⁵ See Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L. J. 941, 983 (2000) (arguing that ministerial requirements within environmental statutes “are virtually immune to nondelegation claims”).

¹⁰⁶ *Id.* at 984.

2. Other Designation and Listing Provisions

As noted at the outset of Subpart A, designation and listing provisions are common among environmental statutes. While the CAA was the focus of the previous subpart, given its prior delegation attacks, other designation provisions could be vulnerable under the *Gundy* tests. For example, the Clean Water Act¹⁰⁷ (CWA); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹⁰⁸ (CERCLA); and the Resource Conservation and Recovery Act of 1976¹⁰⁹ (RCRA) each have a provision that permits the EPA to designate hazardous substances.¹¹⁰ Similar to the CAA Section 108, these provisions provide discretion to EPA and could likely face scrutiny. Such provisions are of particular importance, currently, given PFAS contamination in water and soil.¹¹¹ PFAS chemicals are ubiquitous in the environment and are believed to include the following health implications: “developmental effects to fetuses during pregnancy and infants (e.g., low birth weight, altered puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., changes in antibody production and immunity), thyroid effects related to developmental outcomes, and other effects (e.g., cholesterol changes).”¹¹² If the nondelegation doctrine were resurrected and modified to the standards in *Gundy*, EPA might not have the authority to designate PFAS as hazardous under the CWA, CERCLA, or RCRA. In another scenario, if EPA does designate PFAS as hazardous, such designation could ultimately become invalidated.

Beyond the hazardous designation under the three statutes, other environmental statutes could be vulnerable as well. For example, the Endangered Species Act¹¹³ (ESA) gives the United States Fish and Wildlife Services and the National Marine Fisheries Service discretion to list species as either endangered or threatened.¹¹⁴ Under a strict interpretation of the nondelegation doctrine, these agencies may not have the necessary discretion to continue listing species that require protection.

The commonality connecting these provisions is the discretion provided to administrative agencies. As a result, understanding that many environmental statutes with designation and listing provisions

¹⁰⁷ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2018).

¹⁰⁸ 42 U.S.C. §§ 9601–9675 (2018).

¹⁰⁹ 42 U.S.C. §§ 6901–6992k (2018).

¹¹⁰ 33 U.S.C. § 1321(b)(2)(A); 42 U.S.C. § 9602; *id.* § 6921.

¹¹¹ *Per- and Polyfluorinated Substances (PFAS) Factsheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/YGY8-FVY8> (last updated Aug. 16, 2021).

¹¹² U.S. ENV'T PROT. AGENCY, EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN 13 (2019); See Frederick A. McDonald, Note, *Omnipresent Chemicals: TSCA Preemption in the Wake of PFAS Contamination*, 37 PACE ENV'T L. REV. 139, 147 (2019) (noting the dangers of PFAS).

¹¹³ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

¹¹⁴ *Id.* § 1533.

could be vulnerable to a revived nondelegation doctrine is important as the success of such statutes, at least in part, has been through agency use of these provisions as opposed to Congressional designations or listings.

B. Liability Schemes

While designation and listing provisions are likely vulnerable to delegation challenges, liability schemes could also face scrutiny. In particular, liability schemes not found within environmental statutes, such as joint and several liability, are vulnerable. However, liability schemes that can be more readily discerned from a statute, such as strict liability, will be less vulnerable.

1. Joint and Several Liability

Joint and several liability originated in common law and tort law.¹¹⁵ As per the Restatement of Torts, “[i]f the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable for the recoverable damages caused by the tortious conduct.”¹¹⁶ In other words, when multiple parties cause a harm each person can be liable for the full extent of such harm. Despite its origin in common law, joint and several liability has been adopted in the context of certain environmental laws, specifically CERCLA and RCRA. For purposes of the joint and several liability scheme, the focus will be on CERCLA.

CERCLA was enacted in 1980 as an effort “[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”¹¹⁷ Despite the statute ultimately resulting in numerous cleanups of contaminated sites across the country, it is often criticized for its lack of clarity.¹¹⁸ One court has opined that “the legislative history of CERCLA gives more insight into the ‘Alice-in-Wonderland’-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature.”¹¹⁹ A prime example of this confusion is joint and several liability, which does not appear anywhere in the statute. Rather, in looking to legislative history, Congress originally included joint and several liability in the statute but

¹¹⁵ See RESTATEMENT (THIRD) OF TORTS § A18 cmt. a (AM. L. INST. 2000) (discussing the origins of joint and several liability).

¹¹⁶ *Id.* § A18.

¹¹⁷ Pub. L. No. 96–510, 94 Stat. 2767, 2767 (1980).

¹¹⁸ See, e.g., John Copeland Nagle, *CERCLA’s Mistakes*, 38 WM. & MARY L. REV. 1405, 1406 (1997) (referencing CERCLA’s confusing language and poor drafting); George Clemon Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAWYER 215, 215 (1986) (noting the statute’s lack of clarity and the dilemma of those forced to interpret it).

¹¹⁹ *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993).

subsequently took it out prior to CERCLA's enactment.¹²⁰ Ultimately, courts were responsible for originally asserting that joint and several liability was appropriate in the context of CERCLA.¹²¹ In *United States v. Chem-Dyne Corp.*, the first matter to conclude that CERCLA incorporated joint and several liability, the court looked to legislative history on the question of liability.¹²² In doing so, the court observed the criticism that joint and several liability received in Congress, which led to its subsequent removal.¹²³ Ultimately, the court determined, "[a] reading of the entire legislative history in context reveal[ed] that . . . joint and several liability w[as] deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results."¹²⁴ As a result:

[T]he term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.¹²⁵

Following the ruling in *Chem-Dyne Corp.*, other courts aligned with the decision¹²⁶ which eventually led to EPA adopting a regulatory regime around joint and several liability for CERCLA cleanups.¹²⁷

The potential vulnerability associated with joint and several liability is that it does not appear anywhere in the statute, was a result of judicial determination, and the judicial findings led to EPA's adoption of the regulatory scheme. Because Congress did not explicitly speak to the liability scheme for CERCLA, it is possible that EPA's adoption of joint and several liability could violate the nondelegation doctrine under the

¹²⁰ Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 STAN. L. REV. 191, 216 (2018).

¹²¹ See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Oh. 1983) (using common law tort liability principles to determine liability under CERCLA).

¹²² *Id.* at 805.

¹²³ *Id.* at 806–07.

¹²⁴ *Id.* at 808.

¹²⁵ *Id.*

¹²⁶ The Supreme Court has recognized that *Chem-Dyne Corp.* was the first case to consider whether CERCLA incorporated joint and several liability. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009) (explaining that *Chem-Dyne Corp.* was the seminal opinion on apportionment under CERCLA and that its approach has been fully embraced by the Court of Appeals).

¹²⁷ *Superfund Liability*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/BQE5-UQD8> (last visited Nov. 4, 2021); Memorandum from Cynthia L. Mackey, Dir. Off. of Site Remediation Enft, U.S. Env't Prot. Agency, to Regional Counsels, Regions 1-10, Superfund National Program Managers on Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018.

Gundy tests.¹²⁸ Under the first test, it is quite plausible that EPA's adoption of joint and several liability would be a major policy decision that regulates private conduct, and therefore is not merely filling in details. In considering whether this would constitute a major policy decision, from an economic standpoint joint and several liability can subject Potentially Responsible Parties (PRPs) to all, some, or no costs for remediation at Superfund sites; this has clear economic impacts. As per the 2018 Fiscal Year Superfund Success Report, EPA, through its enforcement mechanisms, collected over \$450 million in PRP commitments to clean up Superfund sites and was reimbursed approximately \$80 million for past costs associated with remediation.¹²⁹ Considering site specifics, some cleanups cost as much as \$300 million if not more.¹³⁰ Aside from economic implications, from a political viewpoint the application of joint and several liability also has the potential to fall within the scope of a major policy decision. Specifically, the question of liability was never actually decided in Congress other than that courts should refer to common law; no language regarding liability appears in the statute. Finally, the joint and several liability scheme applies to anyone that falls within the applicable categories of PRPs under CERCLA, and therefore regulates private conduct.¹³¹

Further support that joint and several liability would likely get classified as a major policy decision that regulates private conduct is language from *Gundy*. In finding that SORNA violated the nondelegation doctrine under the first test, Justice Gorsuch opined that “[b]ecause members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.”¹³² Joint and several liability under CERCLA seems to directly illustrate the separation of powers situation in which Justice Gorsuch is concerned over based on this language. In other words, Congress left the issue of liability, and any “later problems,” to the courts.

As with the first test, it is useful to consider whether joint and several liability could pass muster under the second test in *Gundy*—executive fact-finding. Unlike the CAA Section 108, which has a potential argument that the provision is conditional legislation and would satisfy the executive fact-finding test, joint and several liability seems different.

¹²⁸ Freeman, *supra* note 118, at 227 (“To read the statute as EPA urges and to leave Superfund’s key provisions for completion by the judiciary is totally incompatible with separation of powers principles, under which policy decisions are to be made by representatives and senators who can be reelected or voted out of office at the next election.”).

¹²⁹ U.S. ENV’T PROT. AGENCY, SUPERFUND: TRANSFORMING COMMUNITIES, ACCOMPLISHMENTS REPORT 6 (2018).

¹³⁰ See KATHERINE N. PROBST, SUPERFUND 2017: CLEANUP ACCOMPLISHMENTS AND THE CHALLENGES AHEAD 5 (2017) (noting that the Tar Creek mining site had over \$300 million in remediation costs and the Hudson River PCB site has over \$1.5 billion in remedial costs).

¹³¹ CERCLA, 42 U.S.C. § 9607(a)(1)–(4) (2018); *Superfund Liability*, *supra* note 127.

¹³² *Gundy*, 139 S. Ct. 2116, 2143 (2019).

First, Congress specifically omitted joint and several liability from CERCLA, and instead left the judiciary to consult common law when determining the liability scheme.¹³³ This situation is different than that of *Cargo of Brig Aurora* where the court found that Congress had already made the decision to impose an embargo, which meant the President only needed to determine whether American trade had been sufficiently interfered with to implement the statute.¹³⁴ In the context of CERCLA liability, Congress never made the decision on a liability scheme and did not even explicitly say to refer to common law in the statute; rather such position can only be ascertained from legislative history. The situation of CERCLA liability could have been likened to *Cargo of Brig Aurora* had Congress specifically added language that common law governs. In such a situation, Congress would have made the decision that common law controls, and therefore determining the scope of liability (i.e., whether joint and several liability is appropriate) might be merely executive fact-finding. Second, unlike the CAA Section 108 that specifies criteria for determining whether an air pollutant can be listed as a criteria air pollutant, the liability provision of CERCLA—Section 107—does not provide any criteria for determining joint and several liability.¹³⁵ Rather, the criteria for whether joint and several liability applies (i.e., indivisibility of harm), as well, is derived from the courts.¹³⁶

Therefore, because Congress explicitly omitted joint and several liability from CERCLA, it is likely that such liability scheme could be vulnerable to a revived nondelegation doctrine.

2. *Strict Liability*

Similar to joint and several liability, strict liability has its origins in common law and tort law.¹³⁷ As per the Restatement of Torts, strict liability “is not based upon any intent of the defendant to do harm to the plaintiff . . . nor is it based upon any negligence . . . [Rather], [t]he defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued.”¹³⁸ In other words, an individual is liable for harm regardless of intent and simply needs to have acted in a prohibited manner. This regime has subsequently been adopted in the context of environmental law, such as the CWA and CERCLA.

¹³³ Pidot & Ratliff, *supra* note 120, at 217.

¹³⁴ *Cargo of Brig Aurora*, 11 U.S. (7 Cranch) 382, 387–88 (1813).

¹³⁵ Compare 42 U.S.C. § 7408(a)(1) (2018) (providing the Administrator with criteria for making a list of air pollutants), *with id.* § 9607(a) (listing who can be held liable but providing no criteria for joint and several liability).

¹³⁶ See, e.g., *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721–22 (2d Cir. 1993) (explaining that courts have combined joint and several liability alongside common law to limit the scope of CERCLA liability).

¹³⁷ See David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENV'T L. 267, 277 (2009).

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (AM. LAW INST. 1977).

As with the joint and several liability scheme discussed in the previous section, strict liability is often not explicit in environmental statutes. For example, in the context of the CWA, legislative history illustrated an intent for the statute to be strictly applied—meaning no intent required.¹³⁹ Subsequently, courts have construed the CWA to be a strict liability statute.¹⁴⁰ However, despite Congress not explicitly stating that environmental statutes, like the CWA, would incorporate strict liability, an important distinction can be made between strict liability and joint and several liability. That is, the language of at least the CWA reads as a strict liability statute. Consider language from Section 301 of the CWA: “the discharge of any pollutant by any person shall be unlawful.”¹⁴¹ The plain language does not require any intent or causation, but rather a showing that the prohibited act occurred. While this language seems clear, it is at least worth noting that questions regarding ambiguity may exist. If the CWA is meant to be a strict liability statute, why did Congress not make this explicit in the statute and say strict liability? Why did Congress leave this major decision to the courts? Despite the potential for ambiguity, the aspect that saves strict liability, in at least the context of the CWA, is the plain language of the statute that does not require any showing of intent. Given the current structure of the Supreme Court, it is likely that the plain language of the CWA would be sufficient for most if not all the Justices given its clear, plain language. Another important distinction between the two liability schemes is that, at least in the context of the CWA, Congress meant the statute to hold parties strictly liable, unlike CERCLA’s joint and several liability scheme which was omitted from the statute.¹⁴²

Therefore, because strict liability is easily interpreted from the plain language of the statute, and that Congress clearly intended a strict liability structure, it seems plausible that such liability scheme would at least be less vulnerable, if not safe, from a delegation challenge.

C. Additional Considerations

As illustrated with the discussion of designation and listing provisions, as well as liability schemes, the nondelegation doctrine has the potential to impact a variety of statutes in various ways. In addition to the provisions noted in this Article, Professor Sandra Zellmer once considered the impact of a revived nondelegation on certain environmental laws in the wake of the D.C. Circuit’s revival of the

¹³⁹ Michael M. Wenig, *Strict Liability Under Section 311 of the Clean Water Act: Cleaning Up Respondeat Superior and Negligence*, 10 COLUM. J. ENV’T L. 149, 163 (1985).

¹⁴⁰ See, e.g., *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (rejecting Earth Sciences argument that the statute is written to make “only the *intentional* discharges of pollutants” unlawful, as “Congress intended strong regulatory enforcement”).

¹⁴¹ 33 U.S.C. § 1311(a) (2018).

¹⁴² Drelich, *supra* note 137, at 277.

doctrine in *Whitman*.¹⁴³ While the provisions Professor Zellmer considered were not within the context of *Gundy*, it is worth mentioning some as challenges could arise if the Supreme Court officially revives the doctrine. Such provisions include the issuance of patents for mineral deposits under the Mining Act of 1872,¹⁴⁴ technology-based standards under the CWA,¹⁴⁵ designations of national monuments under the Antiquities Act of 1906,¹⁴⁶ decisions that ensure forest resources are available for multiple uses under the Multiple Use Sustained Yield Act,¹⁴⁷ and the issuance of grazing permits under the Taylor Grazing Act.¹⁴⁸

The purpose of examining the various environmental provisions in this Article, as well as noting others that could be susceptible per Professor Zellmer, in conjunction with the nondelegation doctrine tests announced in the *Gundy* dissent, is to illustrate the potential wide-ranging vulnerability of environmental statutes. Additionally, while it is possible certain provisions might survive under the executive fact-finding test as opposed to the major policy decision test, it is impossible to determine which test the Justices would give the most weight to. It is also impossible to know whether the tests announced in *Gundy* will end up being the new tests for the nondelegation doctrine. However, understanding the correlation between environmental laws and the nondelegation doctrine is vital considering the Supreme Court's recent grant of certiorari in *West Virginia v. EPA*.¹⁴⁹ Given the noted support in *Gundy* and *Paul*, it seems likely that the three tests announced could soon become the new standards when determining the appropriateness of delegations.

V. THE POTENTIAL ROLE OF ENVIRONMENTAL ADVOCACY

The administrative state is currently in an interim period in which the nondelegation doctrine is still deceased, and therefore it is unclear how or when the doctrine will be applied in future cases. With uncertainty and the potential power of the nondelegation doctrine analyzed in Part IV, agencies must now grapple between taking further actions to address environmental problems, which could result in delegation challenges, and taking an inaction approach to avoid an invalidated delegation. However, and despite this period of uncertainty, it is more likely than not that the nondelegation doctrine will receive an untimely revival given the current majority on the Supreme Court. As such, it is worth considering how the

¹⁴³ Zellmer, *supra* note 105, at 983–84.

¹⁴⁴ 30 U.S.C. § 29 (2018).

¹⁴⁵ 33 U.S.C. §§ 1311(b)(2)(A), 1314(b).

¹⁴⁶ 16 U.S.C. § 431 (2012).

¹⁴⁷ 16 U.S.C. § 528–531 (2018).

¹⁴⁸ 43 U.S.C. § 315a–315r (2018); Zellmer, *supra* note 105, at 984–89.

¹⁴⁹ *West Virginia v. U.S. Env't Prot. Agency*, 985 F.3d 914 (D.C. Cir. 2021), *cert. granted*, (Oct. 29, 2021) (No. 20-1530). On February 28, 2022, the Supreme Court heard oral arguments in *West Virginia v. EPA*.

nondelegation doctrine could be utilized as a benefit to environmental law, and ultimately how environmental advocacy on the part of non-governmental organizations (NGOs) could play a role moving forward, as NGOs are often at the frontiers of cutting edge environmental litigation and general environmental activism.¹⁵⁰ Considering the role of environmental advocacy is also important given the political disputes over environmental law and the unlikely potential for action on the part of Congress—such as amending environmental statutes in a way that conforms with a more restrictive interpretation of the nondelegation doctrine—to address the impacts of a more restrictive test.¹⁵¹

A. Nondelegation Challenges in the Context of Environmental Laws

While environmental laws are vital to society, they are imperfect.¹⁵² As such, one way to utilize the nondelegation doctrine is for NGOs to assert delegation challenges to problematic aspects of environmental laws. On its face, this recommendation may seem irrational. The obvious concern is that challenging environmental statutes on delegation grounds is essentially opening Pandora's Box and placing particular provisions of these statutes at risk of invalidation. This is of course a valid concern. However, potentially addressing problematic aspects of environmental law that hinder environmental protection could outweigh these concerns.¹⁵³

An example of an aspect of environmental law that could warrant challenges is the use of cost-benefit analysis. The general “premise of cost-benefit analysis is that government regulation should not be undertaken if the costs of complying with the regulation will exceed the value of the environmental benefits achieved by the regulation.”¹⁵⁴ Over the years,

¹⁵⁰ See David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENV'T L. REP. NEWS & ANALYSIS 10,644, 10,649 (2010) (finding NGOs drive climate change litigation).

¹⁵¹ Scholars have noted that political disputes in Congress have resulted in a lack of comprehensive environmental legislation for several decades. See, e.g., Shi-Ling Hsu, *Introduction: Environmental Law Without Congress*, 30 J. LAND USE & ENV'T L. 1, 1 (2014) (As of 2014, “[i]t has been twenty-five years since Congress last passed any meaningful environmental legislation”).

¹⁵² See generally Jan G. Laitos & Lauren Joseph Wolongevicz, *Why Environmental Laws Fail*, 39 WM. & MARY ENV'T L. & POL'Y REV. 1 (2014) (discussing the problems with environmental laws).

¹⁵³ It may also be worth noting that if NGOs were to assert these types of challenges, Congress could take notice. In other words, Congress may feel more inclined to take the necessary steps to amend environmental statutes in a way that conforms with a restrictive interpretation of the nondelegation doctrine if it feels that this form of advocacy is in fact harmful to environmental law instead of helpful.

¹⁵⁴ Karl S. Coplan, *The Missing Element of Environmental Cost-Benefit Analysis: Compensation for the Loss of Regulatory Benefits*, 30 GEO. ENV'T L. REV. 281, 283–84 (2018).

cost-benefit analysis has been hotly criticized and debated.¹⁵⁵ Some of these critiques include the challenge of monetizing environmental and health benefits, problems with misallocating economic resources, and the overall subjectivity associated with cost-benefit analysis.¹⁵⁶ Given the criticism, attacking cost-benefit analysis seems like a plausible place to start. Also, cost-benefit analysis is an aspect of environmental law that could be prone to a successful nondelegation doctrine challenge as Congress does not always explicitly state when it should be used.¹⁵⁷ Specifically, in the context of environmental law, the only statute that explicitly mandates the use of a formal cost-benefit analysis is the Safe Drinking Water Act,¹⁵⁸ while other statutes offer less explicit variations of cost-benefit analysis.¹⁵⁹ In fact, the Supreme Court in *Whitman* noted that it would not find an implicit requirement of cost-benefit analysis when a statute is ambiguous on this point, suggesting courts should look for explicit language mandating cost-benefit analysis.¹⁶⁰

A second example of an aspect of environmental law that may warrant challenges could be under certain waiver provisions within environmental statutes. Consider the National Environmental Policy Act¹⁶¹ (NEPA) waiver provision found within the Council of Environmental Quality (CEQ) regulations. The CEQ regulations state that “[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the C[EQ] about alternative arrangements” for compliance with section 102(2)(C) of NEPA.¹⁶² While the regulation provides for “alternative arrangements,” the provision could be problematic in certain situations in which NEPA procedures are waived, perhaps justifying a delegation challenge. Further, while it is common practice for agencies to implement regulations accompanying statutes,

¹⁵⁵ See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1563 (2002) (“[C]ost-benefit analysis of environmental protection fails to live up to [its] hopes and claims.”).

¹⁵⁶ Coplan, *supra* note 154, at 292–94. Some scholars argue that cost-benefit analysis is beneficial in the context of environmental law. See, e.g., Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 495–501 (2008).

¹⁵⁷ Benjamin Minhao Chen, *What’s in a Number: Arguing About Cost-Benefit Analysis in Administrative Law*, 22 LEWIS & CLARK L. REV. 923, 925 (2018).

¹⁵⁸ 42 U.S.C. § 300g–1(b)(3)(C)(i–iii) (2018); Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY & ENV’T L. REV. 287, 288 (2019).

¹⁵⁹ See, e.g., Coplan, *supra* note 154, at 309–14 (examining statutes such as the Toxic Substances Control Act, CWA, and CAA).

¹⁶⁰ *Whitman*, 531 U.S. 457, 467 (2001). Cf. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217–26, 235 (2009) (explaining that the court should have followed *Whitman* for guidance). See *Michigan v. U.S. Env’t Prot. Agency*, 576 U.S. 743, 744, 755–56 (2015) (distinguishing *Whitman* and holding that the phrase “appropriate and necessary” forces EPA to consider costs).

¹⁶¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

¹⁶² 40 C.F.R. § 1506.11 (2020).

what seems questionable with the emergency waiver is that NEPA does not contain any language authorizing this sort of authority, which is not hard to ascertain given the brevity of the statute. As a result, it has been noted that this regulation, which was implemented by the CEQ, essentially delegates such authority to the CEQ despite no congressional intention to do so.¹⁶³

B. Nondelegation Challenges in the Context of Environmentally Destructive Laws

Challenging environmental statutes on delegation grounds could be unsettling and risky, despite the potential benefits noted above. However, another viable option is challenging environmentally destructive laws on delegation grounds. A recent example of this concerns the Illegal Immigration Reform and Immigrant Responsibility Act¹⁶⁴ (IIRIRA). Under Section 102(c) of IIRIRA, “[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.”¹⁶⁵ In *Center for Biological Diversity v. Wolf*,¹⁶⁶ the Secretary of Homeland Security waived requirements under the ESA and NEPA to continue construction of the border wall.¹⁶⁷ The argument in *Center for Biological Diversity* was that the Secretary’s broad discretion in waiving requirements of other laws, such as the ESA and NEPA, violated the nondelegation doctrine.¹⁶⁸ The Supreme Court ultimately denied the petition for certiorari, leaving in place the district court’s decision which found no violation of the nondelegation doctrine.¹⁶⁹

¹⁶³ Kate R. Bowers, *Saying What the Law Isn’t: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENV’T L. REV. 257, 286–87 (2010). Bowers also considers other waiver provisions, such as the Coastal Zone Management Act, which could be vulnerable to nondelegation doctrine challenges. *Id.* at 296–97.

¹⁶⁴ 8 U.S.C. § 1103 (2018).

¹⁶⁵ *Id.*

¹⁶⁶ 447 F. Supp. 3d 965 (D. Ariz. 2020).

¹⁶⁷ Memorandum in Support of Motion for Summary Judgment at 36, *Ctr. for Biological Diversity v. Wolf*, No. 4:17-cv-00163-CKJ (Jul. 24, 2020). Claire Fisher, *Waiving Hello to the Wall: The Supreme Court’s Denial of a Constitutional Challenge to Environmental Law Waivers at the U.S.-Mexico Border*, GEORGETOWN LAW LIBRARY (Feb. 14, 2019), <https://perma.cc/2BY4-CTPT>.

¹⁶⁸ *Id.* at 29.

¹⁶⁹ *Center for Biological Diversity v. Wolf*, 447 F. Supp. 3d 965 (D. Ariz. 2020), *cert. denied*, 141 S. Ct. 158 (2020); see Hope Babcock, “*Something There is that Doesn’t Love a Wall.*” *A Reflection on the Constitutional Vulnerabilities of the Southwest Border Wall*, 67 LOY. L. REV. 13, 15, 27, 29, 30 (2020) (arguing that the construction of the border wall is unconstitutional in the context of IIRIRA despite the failed nondelegation doctrine claim and that IIRIRA may violate the First and Ninth Amendments).

Aside from challenges to Section 102(c) under the IIRIRA, as well as the Real ID Act,¹⁷⁰ most non-environmental laws do not provide waivers or exemptions from complying with environmental laws.¹⁷¹ However, another notable exception may be yearly defense bills, commonly passed under the National Defense Authorization Act¹⁷² (NDAA), that provide certain exemptions for the Department of Defense (DOD) regarding national security concerns.¹⁷³ One example comes from 2003 in which Congress amended the Marine Mammal Protection Act¹⁷⁴ (MMPA) through the NDAA.¹⁷⁵ In doing so, the MMPA now permits the Secretary of the DOD, after conferring with the Secretary of Commerce or Interior, to “exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of [MMPA Section 101], if the Secretary determines that it is necessary for national defense.”¹⁷⁶ The changes authorized under the NDAA, including the exemption, can effectively “destroy local populations of marine mammals, outside the eye of the public notice.”¹⁷⁷ Provisions, like this, that result from the NDAA could be vulnerable on delegation grounds as it appears to provide unrestrained discretion to the DOD if it finds national security warrants such exemption. It is also worth noting that while it seems plausible that such provisions could be vulnerable to a delegation challenge, national security measures are important. As a result, an NGO should be cautious with a challenge to a provision stemming from the NDAA as an unfavorable ruling for the DOD could have unintended national security consequences.

¹⁷⁰ REAL ID Act of 2005, Pub. L. No. 109–13, Div. B, 119 Stat. 302, 306 (2005); Section 102 has also been challenged in the context of the REAL ID Act. *See, e.g.*, *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120–21 (D. D.C. 2007).

¹⁷¹ While inapplicable for purposes of this Article, it is worth noting that some statutes that relate to natural disaster situations do provide exemptions from certain environmental laws, often NEPA. However, such statutes are very selective in this and do not provide discretionary authority on the part of an agency. *See, e.g.*, *Stafford Disaster Relief and Emergency Assistance Act*, 42 U.S.C. §§ 5121, 5159 (2018).

¹⁷² *See* BRENDAN W. MCGARRY & VALERIE HEITSHUSEN, CONG. RSCH. SERV., IF10516, DEFENSE PRIMER: NAVIGATING THE NDAA (2021) (“The NDAA establishes policy and authorizes appropriations for the [Department of Defense].”).

¹⁷³ *See* Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger*, 25 VA. ENV'T L. J. 105, 125–130 (2007) (noting the military’s success in lobbying the Congress to amend the Marine Mammal Protection Act); *see also* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 287–89 (2013) (noting that Congress has been known to delegate waiver authority in the context of national security).

¹⁷⁴ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2018).

¹⁷⁵ Babcock, *supra* note 169, at 128–30.

¹⁷⁶ 16 U.S.C. § 1371 (2018).

¹⁷⁷ Babcock, *supra* note 169, at 129–30.

VI. CONCLUSION

As illustrated throughout this Article, a revived nondelegation doctrine could have a profound impact on environmental law, especially under *Gundy*'s strict interpretation. While the doctrine's revival seems inevitable, given the current majority on the Supreme Court, it is worth noting that despite the prediction in this Article and others examining *Gundy*,¹⁷⁸ the nondelegation doctrine's revival is only a prediction. However, the Supreme Court's recent grant of certiorari in *West Virginia v. EPA* signals a clear intention that such prediction could come to fruition in the very near future.

Unsurprisingly, *West Virginia* will once again place the CAA in jeopardy. In particular, the Supreme Court will determine whether in CAA 111(d), "Congress constitutionally authorized the Environmental Protection Agency to issue significant rules . . . without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements."¹⁷⁹

Though likely, the prediction of a revived nondelegation doctrine could still fail. Where Justice Barrett lies on this issue has yet to be seen.¹⁸⁰ As well, perhaps a situation arises where the facts of a particular case just do not sit well with another Justice in the current majority, which could play a key role in whether the doctrine is revived. With Justice Barrett and another Justice, the nondelegation doctrine would likely remain deceased. Further, some have even suggested that if the Supreme Court does hear another nondelegation case or *West Virginia v. EPA* revives the doctrine, such a change may be modest without a profound impact.¹⁸¹

¹⁷⁸ See Mortenson & Bagley, *supra* note 12, at 279 ("For the first time in modern history, a working majority on the Supreme Court may be poised to give the nondelegation doctrine real teeth.")

¹⁷⁹ Petition for Writ of Certiorari at I, *West Virginia v. U.S. Env't Prot. Agency*, (2021) (No. 20-1530). Cases attacking the Affordable Care Act are also raising nondelegation doctrine issues and could eventually get to the Supreme Court. See, e.g., Ian Millhiser, *There's a New LawsUIT Attacking Obamacare — and it's a Serious Threat*, VOX (Apr. 2, 2021), <https://perma.cc/3SM4-XUBS> (discussing *Kelley v. Becerra*, which raises non-delegation issues). It is worth noting that the Supreme Court may be able to avoid addressing the nondelegation doctrine in *West Virginia v. EPA*. One of the arguments is that the petitioners do not have standing in the case because there is currently no rule in place, and therefore no case or controversy. Based on oral arguments, however, it is impossible to know whether the justices will be persuaded by this procedural argument or still reach the merits of the case. Mark Joseph Stern, *Biden's Climate Agenda Gives the Supreme Court Bad Vibes*, SLATE (Feb. 28, 2022), <https://perma.cc/943W-MSHF>.

¹⁸⁰ See *supra* text accompanying note 54; see also STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 60–62 (2021) (attempting to debunk the current classification of "conservative majority" through an illustration of inconsistencies in recent case outcomes).

¹⁸¹ E.g., Randolph J. May, *Justice Ginsburg's Replacement Won't Decimate the Administrative State*, YALE J. REG. (Sep. 25, 2020), <https://perma.cc/PLH6-AGXE> ("[A]ny change is likely to be more modest than melodramatic."). Cf. Dan Farber, *The Nondelegation Doctrine and its Threat to Environmental Law*, LEGALPLANET (Mar. 22, 2021), <https://perma.cc>

Putting speculation aside, it is important that environmental advocates, such as NGOs, consider how the nondelegation doctrine could be used as a benefit and not merely an obstacle to environmental protection. Possible problematic aspects of environmental law and other laws that are environmentally destructive are potential starting points.¹⁸² However, other options certainly exist that could prove viable moving forward. Ultimately, utilizing the nondelegation doctrine in a proactive approach could be a small fix once it is revived and until Congress begins making changes to environmental laws that avoid delegation implications.

/TY3G-F3DB (noting that while throwing out complete environmental statutes seems unlikely, “a return to the 1935 approach will weaken environmental regulation just at the time when climate changes requires more vigorous government action than ever”).

¹⁸² A potential hurdle to this recommendation could be standing, which has been described as “the most persistent constitutional quandary for environmental law.” Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENV'T L. REP. NEWS & ANALYSIS 10,956, 10,956 (2010). Standing requires that an aggrieved plaintiff show (1) that he has “suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) ‘actual or imminent, not conjectural or hypothetical;” (2) that there is “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;” and (3) “that the injury will be ‘redressed by a favorable decision.”” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). An NGO bringing such a challenge would be required to have organizational standing, which can be satisfied in two different ways. First, the NGO can sue on behalf of itself. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). Second, the NGO can sue on behalf of its members, which would require the organization to show that (1) at least one member would “have standing to sue [o]n their own,” (2) “the interests it seeks to protect are germane to the organization’s purpose,” and (3) that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977) (granting a Washington state commission standing on behalf of its members).