ton of metal HAP removed. That figure is between 16 and 123 times higher than the EPA's long-established cost-effectiveness limit of $1.3 million per ton metal HAP.[12]

1. Congress committed the determination of whether a technology is "available" under Section 112(i)(4) to the President's discretion

The Act does not specify when a technology should be determined "available" for purposes of Section 112(i)(4).[13] Instead, Congress has committed such determination to the President's discretion. This is clear from the text of Section 112(i)(4), which authorizes an exemption "if the President determines" the requisite criteria are met, without provision for judicial second-guessing of that determination.[14]

The Supreme Court has recognized that where "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[15] Such is the case here, where Congress explicitly authorized the President to determine whether a technology is "available," at his discretion and only with the added requirement that "[t]he President shall report to Congress with respect to each exemption (or extension thereof)."[16]

2. The radical cost ineffectiveness of the requisite controls warrants a finding of technological unavailability

Here, the radical cost ineffectiveness of the requisite controls supports a finding of technological unavailability. As leading scholars of administrative and regulatory law have long observed, common sense dictates that a technology is not "available" if it is radically cost-ineffective:

[12] *See* 88 Fed. Reg. 55858, 55879 (Aug. 16, 2023) (coke oven proposed NESHAP revisions). These engineering-based cost estimates are much higher than the EPA anticipated during rule development.

[13] Nor to FMMI's knowledge has any court meaningfully interpreted the scope of "available" under Section 112(i)(4).

[14] It is clear from the statute, moreover, that to the extent Congress contemplated a check on the President's authority, the relevant check was its own (i.e., Congress's) ongoing oversight, not judicial review. *See* 42 U.S.C. § 7412(i)(4) (providing that the President "shall report to Congress" on each exemption).

[15] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Haig v. Agee*, 453 U.S. 280, 294 (1981) (concluding that on the matter of passport controls, "Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject" through authorizing legislation); *see also Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA.") (internal quotation marks and citation omitted); *Am. Int'l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 440–41 (D.C. Cir. 1981) (applying Justice Jackson's tripartite *Youngstown* framework and determining that the President was "acting pursuant to an unequivocal statutory grant of authority"; "we perceive no erosion of the constitutional principle of the separation of powers in upholding the actions").

[16] 42 U.S.C. § 7412(i)(4).