No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we explain that the court of appeals: (I) erroneously applied the nondelegation doctrine (Pet. Br. 21-34); (II) lacked jurisdiction to review EPA's preamble statements on the scope of its authority to implement a revised ozone NAAQS (*id.* at 34-44); and (III) improperly restricted EPA's authority to implement the revised ozone NAAQS (*id.* at 44-56). In response, American Trucking Associations (ATA) and its supporters rewrite the questions presented, disregard controlling precedent, and ask for affirmance on alternative, but unpersuasive, rationales. We reply by reference to the three core questions that our petition places before this Court.[1]

I. The Court Of Appeals Erroneously Applied The Nondelegation Doctrine

Industry respondents and their amici offer three inconsistent defenses of the court of appeals' judgment: (A) APC argues that the Court should affirm the court of appeals' nondelegation ruling on the ground that *EPA* has not articulated an "intelligible principle" in setting NAAQS (APC Br. 22-35); (B) ATA argues that the Court can avoid the nondelegation issue by reinterpreting Section 109 of the

[1] We employ the following abbreviations: Brief for Massachusetts et al. (Mass. Br.); Brief for American Lung Ass'n (ALA Br.); Brief for American Trucking Ass'ns et al. (ATA Br.); Brief for Appalachian Power Co. et al. (APC Br.); Brief for Ohio et al. (Ohio Br.); Amici Brief for California et al. (Calif. Br.); Amici Brief for New York et al. (N.Y. Br.); Amici Brief for Clean Air Trust et al. (CAT Br.), Amicus Brief for United States Public Interest Research Group (USPIRG Br.); Amicus Brief for General Electric Co. (GE Br.); Amici Brief for American Institute of Certified Public Accountants, et al. (AICPA Br.); Amici Brief for Intel Corp. et al. (Intel Br.); Amici Brief for Senator Orrin Hatch et al. (Hatch Br.); Amici Brief for Gary E. Marchant et al. (Marchant Br.); Amici Brief for Institute for Justice et al. (IFJ Br.); Amici Brief for the Manufacturers Alliance/MAPI, Inc. et al. (Mfrs. Br.); Amici Brief for Pacific Legal Foundation et al. (PLF Br.); Amici Brief for the Lincoln Institute for Research and Education et al. (LI Br.).

Clean Air Act (CAA) to require EPA to consider compliance costs in setting NAAQS (ATA Br. 7-25); and (C) diverse amici argue that the Court should revise the nondelegation doctrine to curtail government regulation of all sorts (see, *e.g.*, AICPA Br. 4-5; IFJ Br. 11-13; LI Br. 27-30). Only the first theory defends the court of appeals' reasoning, and none of the theories finds support in this Court's decisions.[2]

A. *Section 109 of the CAA is constitutional under this Court's established nondelegation jurisprudence.* The initial issue before this Court is whether Section 109 of the CAA violates the nondelegation doctrine. This Court has articulated and reaffirmed the basic rule:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946).

Mistretta v. *United States*, 488 U.S. 361, 372-373 (1989); accord, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 424-425 (1944); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 144-146 (1941). See Pet. Br. 21-22; Mass. Br. 28-29; ALA Br. 17-18.

The Court's oft-repeated statement resolves the nondelegation issue here. Section 109 of the CAA states that EPA shall set NAAQS at levels that are "requisite" to protect "public health" and "public welfare." 42 U.S.C. 7409(b)(1) and (2). Thus, Congress has clearly delineated "the general

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[2] The States of Ohio, Michigan, and West Virginia and a group of electronics industry amici make no attempt to defend the court of appeals' nondelegation ruling. See Ohio Br. 10; Intel Br. 25.

policy" and "the public agency which is to apply it." *Mistretta*, 488 U.S. at 373. In addition, Congress has set out, in extraordinary detail, "the boundaries of this delegated authority" (*ibid.*) by specifying the factors that EPA must consider, a body of experts that it must consult, and a rigorous set of procedures that EPA must follow in setting the NAAQS. See Pet. Br. 23-26; see also Mass. Br. 29-35.[3]

Accordingly, Section 109, by its plain terms, amply satisfies nondelegation requirements. Congress has fulfilled its *legislative* function by making the fundamental policy choice to set NAAQS at a level requisite to protect public health and public welfare.[4] Congress has properly assigned to EPA the *executive* responsibility to determine, based on current scientific knowledge and extensive public input, the specific numerical values.[5] There is, accordingly, no sound basis for asserting that Section 109 is unconstitutional under this Court's established nondelegation jurisprudence.[6]

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[3] The nondelegation doctrine does not prevent Congress from directing an agency to make scientific inquiries and to exercise judgment in the face of scientific uncertainty. See, *e.g.*, *Yakus*, 321 U.S. at 425 ("It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework."); accord *Opp Cotton Mills*, 312 U.S. at 146.

[4] See, *e.g.*, *Opp Cotton Mills*, 312 U.S. at 144 ("The adoption of the declared policy of Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function.").

[5] See, *e.g.*, *Yakus*, 321 U.S. at 424 (The Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.").

[6] Several amici (*e.g.*, PLF Br. 5-6; GE Br. 6-7) argue that this case is similar to the only two cases in which the Court has invalidated federal legislation on nondelegation grounds. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935) (fair competition provisions of the

APC attempts to avoid the clear import of this Court's decisions by asserting that the nondelegation doctrine imposes constitutional constraints on agency action. Relying on the court of appeals' reasoning, APC argues that *EPA's construction* of Section 109 violates a "weak" form of the nondelegation doctrine because *EPA* has not announced an "intelligible principle" to "guide its exercise of public health risk management judgment." APC Br. 22-23. APC's argument makes a muddle of this Court's nondelegation decisions. The question in a nondelegation challenge is whether *Congress* has conferred legislative power. Thus, the Court has stated that *Congress* must set out an "intelligible principle" in legislation to ensure that *Congress* does not delegate legislative power. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 771 (1996). APC's assertion that EPA must articulate an "intelligible principle" when promulgating NAAQS borrows the Court's words, but places them in a context that distorts their meaning.[7]

National Industrial Recovery Act (NIRA)); *Panama Refining*, *supra* ("hot oil" provisions of the NIRA). Those comparisons are preposterous. In *Schechter*, Congress had delegated rulemaking power to private parties. See *Schechter*, 295 U.S. at 537. See also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating provisions of the Bituminous Coal Conservation Act on similar substantive due process grounds). And in both *Schechter* and *Panama Refining*, "Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7 (emphasis added). See *Schechter*, 295 U.S. at 541; *Panama Refining*, 293 U.S. at 415. Section 109 possesses none of those characteristics and, indeed, illustrates the very type of legislative authorization the Court considered permissible. See *Schechter*, 295 U.S. at 530 (Congress may "perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."); accord *Panama Refining*, 293 U.S. at 421.

[7] If APC disagrees with EPA's construction of Section 109, then it may articulate that issue as a nonconstitutional challenge to an agency's interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845

The Court has never suggested that the Constitution requires an agency to announce an "intelligible principle" as a precondition for implementing the underlying statute. To the contrary, the Court has repeatedly emphasized that, so long as Congress has set out an intelligible principle, the agency is entitled to exercise discretion in carrying out the congressional program.[8] In exercising that discretion, the agency may describe the governing principles at the outset, or it may make its determinations on a case-by-case basis.[9] If Congress has not mandated a precise course for the agency, then the agency has discretion in determining how to effectuate congressional intent. See *Chevron*, 467 U.S. at 843. The courts play an important role in ensuring that the agency ultimately complies with statutory directives, see, *e.g.*, *American Power & Light*, 329 U.S. at 105, but the courts carry out that role by applying the congressionally prescribed standards for judicial review of agency action, see, *e.g.*, *id.* at 108-112. See Pet. Br. 26-31.

(1984). But APC cannot rationally contend that EPA has itself violated the nondelegation doctrine.

[8] See, *e.g.*, *Mistretta*, 488 U.S. at 378 ("our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy"); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."); accord *American Power & Light*, 329 U.S. at 105; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940).

[9] See *American Power & Light*, 329 U.S. at 106 ("Nor is there any constitutional requirement that the legislative standards be translated [by the agency] into formal and detailed rules of thumb prior to their application to a particular case. If [the] agency wishes to proceed by the more flexible case-by-case method, the Constitution poses no obstacle. All that can be required is that the [agency] conform to the statutory language and policy."); cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978).

At bottom, APC's objection to EPA's actions in this case has nothing to do with separation-of-powers principles. Rather, APC disputes EPA's methodology for setting NAAQS and its specific judgments in selecting the levels for the revised ozone and PM NAAQS. See APC Br. 24-33. Congress has directed, however, that those questions should be resolved under the CAA's standards for judicial review. See CAA § 307(d)(9), 42 U.S.C. 7607(d)(9). The court of appeals failed to resolve those questions under the prescribed statutory standard. That standard requires the court to examine the whole record—which includes EPA's full rationale and the scientific evidence on which it relies—to decide whether EPA's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 7607(d)(9)(A). APC's arguments do not address—and certainly provide no basis for excusing—the court of appeals' fundamental error. See Pet. Br. 30-31.[10]

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[10] In making their nondelegation claims, the industry respondents distort many specific aspects of EPA's regulatory decision and the record below. Those mischaracterizations are irrelevant to the nondelegation issue, and we do not dwell on them here. We trust that, if the court of appeals conducts a careful review of the agency's actions on remand in accordance with the CAA's requirements, see 42 U.S.C. 7607(d)(9), it will discern that EPA revised the NAAQS based on a comprehensive and reasoned analysis of the significance and reliability of new scientific knowledge about the health and welfare effects of the pollutants at issue. See, *e.g.*, 62 Fed. Reg. 38,655-38,679 (1997) (rationale for the revised PM primary NAAQS); *id.* at 38,859-38,874 (rationale for the revised primary ozone NAAQS); see also PM and Ozone Staff Papers and Criteria Documents (lodged with the Clerk of the Court). Contrary to the industry respondents' repeated claims (*e.g.*, ATA Br. 11; APC Br. 24), EPA has never claimed boundless discretion to set NAAQS. See, *e.g.*, Pet. Br. 28-29 & n.22, 31-34.

The comments of some of supposedly disinterested amici warrant brief mention. The Marchant amici and two members of Congress assert that EPA engages in a "science charade" in which the agency improperly purports to set NAAQS based on science alone, without regard to policy considerations. See Marchant Br. 3-4, 9; Hatch Br. 1. Those amici simply ignore the rulemaking record. For example, EPA prepared a detailed

B. *There is no warrant for the Court to amend Section 109.* ATA makes little effort to defend the court of appeals' reasoning. Rather, ATA argues that the court of appeals has consistently erred, beginning with its decision in *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980), in holding that Section 109 requires EPA to set NAAQS without regard to compliance costs. ATA Br. 7. ATA asserts that "the nondelegation problem that produced the decision below is readily resolved by rejecting *Lead Industries* and allowing the Administrator to formulate new ozone and PM NAAQS constrained only by the requirement that she overtly and systematically consider all logically relevant factors in setting those standards." *Id.* at 11. ATA's position has three basic flaws.

First and foremost, despite ATA's rhetoric to the contrary (see, *e.g.*, ATA Br. 1-2), there is simply no merit to ATA's construction of Section 109. The statutory text, its historical origins, its underlying policy, and Congress's repeated reaffirmations conclusively establish that Congress has directed EPA to establish NAAQS based solely on consideration of the public health and public welfare effects caused by the presence of criteria pollutants in the ambient air. See, *e.g.*, 99-1426 Fed. Resp. Br. 17-31; 99-1426 Mass. Br. 15-28; 99-1426 ALA Br. 1-25, 29-32; 99-1426 Calif. Br. 5-30; 99-1426 CAT Br. 5-29. EPA and the court of appeals have consistently adhered to that construction of Section 109—

"Policy Assessment of Scientific and Technical Information" in each rulemaking "to evaluate the policy implications of the key studies and scientific information contained in [the Criteria Document]"). See PM Staff Paper, at I-1 (lodged with the Clerk); accord Ozone Staff Paper; see also Pet. Br. 4 (describing Staff Papers). Moreover, although Marchant portrays himself as a disinterested law professor (see Marchant Br. 19), he actually served as one of ATA's primary counsel in the proceedings below. See *ATA* v. *EPA*, 175 F.3d 1027, 1031-1032 (D.C. Cir. 1999). The congressional amici acknowledge that their brief was funded by a private organization called "Citizens for a Sound Economy." Hatch Br. 1 n.1.

and rejected industry's shopworn arguments that NAAQS should take into account the compliance costs—because it is the only rational construction of the statutory text.[11]

Second, this case does not present a "nondelegation problem" (ATA Br. 11). Congress has satisfied the nondelegation doctrine by providing intelligible principles in the CAA—such as requiring that NAAQS be set, based on the Section 108 "criteria," at levels "requisite" to protect public health and public welfare—that constrain EPA's exercise of discretion. What ATA posits as "nondelegation problems" (*id.* at 15-21) are simply its disagreements with judgments that EPA has made in exercising its statutory discretion. ATA may raise such objections in the rulemaking process, and it may seek judicial review of EPA's final rules on the basis of properly preserved objections under the CAA's "arbitrary or capricious standard." 42 U.S.C. 7607(d)(9). But ATA's objections are not matters of constitutional character. Hence, even if Section 109's plain language were ambiguous, there would be no need to adopt a narrowing construction to avoid confronting a nondelegation problem. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237-239 (1998); see also 99-1426 Fed. Resp. Br. 47-48; 99-1426 USPIRG Br. 5-12.

Third, even if Section 109 were ambiguous and it legitimately presented "nondelegation problems," ATA's pro-

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[11] See Pet. App. 19a-21a; *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *NRDC* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. dismissed, 498 U.S. 1075, and cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); see also *NRDC* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*); A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 102 (1987) ("national primary ambient air quality standards are to be established not in light of what is 'feasible' or 'reasonable' (a formulation that would enable counterbalancing costs to be offset against the benefit of clean air) but rather on the sole basis of what is 'requisite to protect the public health'").

posed construction would exacerbate, rather than ameliorate, those problems. *Lead Industries* and subsequent cases hold that Congress made a policy choice to cabin EPA's discretion by requiring the agency to set NAAQS on the basis of a specific body of information: the latest scientific knowledge on the public health and welfare effects caused by the presence of criteria pollutants in the ambient air. Under ATA's construction, EPA's Administrator would be "constrained only by the requirement that she overtly and systematically consider *all logically relevant factors* in setting those standards." ATA Br. 11 (emphasis added). That construction broadens—rather than constrains—EPA's discretion. See 99-1426 Fed. Resp. Br. 47-49.[12]

C. *There is no need for this Court to revise its nondelegation jurisprudence.* Amici representing diverse special interest groups, ranging from accountants to gun owners, argue that this Court should reformulate its nondelegation jurisprudence in various ways, ranging from subjecting Congress to a "clear statement" requirement (AICPA Br. 4) to ignoring its 20th century decisions altogether (LI Br. 27-30). Those amici implicitly acknowledge that Section 109, which has been in place for 30 years, could be invalidated only if the

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[12] ATA might suggest that EPA's discretion would be constrained if EPA were further required to make decisions on a strict cost-benefit basis, formally weighing all "logically relevant" costs against all "logically relevant" benefits. But that reasoning is flawed in two additional respects. First, as we explain in No. 99-1426, the process of quantifying the nationwide environmental costs and benefits of NAAQS is highly subjective and fraught with uncertainty. 99-1426 Fed. Resp. Br. 45-47. If EPA attempted to set NAAQS on the basis of a strict cost-benefit analysis, it would need to exercise additional discretion in identifying and monetizing projected costs and benefits. That process would simply create new and different controversies. Second, this Court should be particularly reluctant to direct an agency to engage in strict cost-benefit analysis in the absence of clear direction from Congress. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 510 (1981).

Court radically altered nondelegation principles that have been in place for more than 60 years. See, *e.g.*, Pet. App. 59a-60a (Tatel, J., dissenting).[13]

There is clearly no warrant for doing so, and particularly not here, where Congress has not only carefully specified EPA's responsibilities, but has also carefully monitored EPA's actions.[14] As Massachusetts and New Jersey chronicle in their brief, Congress and the Executive Branch have engaged in a decades-long collaborative effort to protect the public from air pollution, and that collaboration has led to ongoing legislative refinements based on the federal and state experience in formulating and implementing the NAAQS. See Mass. Br. 7-19. The CAA illustrates how "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 517 U.S. at 773. That cooperative effort has produced consistent improvements in air quality and, in turn, unquestioned public health and public welfare benefits. Judged even by the industry respondents' preferred criterion—cost-benefit analysis—the program has been a tremendous success. See

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[13] As Judge Tatel noted in dissent, the CAA's grant of authority "is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than 60 years." Pet. App. 97a. See *Loving*, 517 U.S. at 771 (noting that the Court has "upheld, without exception, delegations under standards phrased in sweeping terms"); *Mistretta*, 488 U.S. at 373-374 (collecting a sampling of those cases); see also *id.* at 415-416 (Scalia, J., dissenting). As the amici rightly perceive, the Court cannot invalidate Section 109 without calling into question countless Acts of Congress.

[14] Indeed, to the extent that the amici urge altering the court of appeals' remand order in a manner not presented by the questions on which this Court has granted review, the contentions are not properly before the Court. See R. Stern et al., *Supreme Court Practice* 363 (7th ed. 1993); see also note 17, *infra*.

EPA, *The Benefits and Costs of the Clean Air Act: 1970 to 1990* (Oct. 1997).[15]

II. The Court Of Appeals Lacked Jurisdiction To Review EPA's Preamble Statements

As we explain in our opening brief, the court of appeals erred in dictating how EPA should implement the ozone NAAQS before EPA has taken judicially reviewable agency action—including additional notice and comment rulemaking—to implement that NAAQS. Pet. Br. 34-44. The industry respondents and their supporters fail to provide a defensible justification for the court of appeals' decision to address an issue that was not yet before it. Indeed, only Ohio and APC meaningfully attempt to defend the court's jurisdictional decision, and their arguments highlight why the court of appeals erred.

As Ohio acknowledges, several midwestern States and the industry parties argued below that EPA lacked statutory authority *to revise* the ozone NAAQS because future implementation of a revised NAAQS would conflict with the CAA's Subpart 2 scheme for implementing the existing NAAQS. See Ohio Br. 32-33.[16] EPA had considered that argument and rejected it in the rulemaking. See Pet. Br.

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[15] Although many benefits of the CAA cannot be quantified in monetary terms, EPA has estimated that the Act as a whole yielded approximately 22 *trillion* dollars in quantifiable benefits between 1970 and 1990, compared to direct compliance costs of approximately 0.5 trillion dollars over the same period. See EPA, *supra*, at ES-8 (summarizing results); see also 99-1426 Mass. Br. 12-13. EPA expects that the CAA will continue to produce substantial public health and public welfare benefits in the next decade. See EPA, *The Benefits and Costs of the Clean Air Act, 1990-2010: Report to Congress* 61, 102 (Nov. 1999).

[16] Ohio expressly states that this case "is about EPA's power to revise the ozone standard at all" and "that is precisely the issue presented and briefed before the court of appeals." Ohio Br. 32-33. See also ATA Br. 45 ("the true focus of the implementation debate in the Court of Appeals was squarely on the argument by parties to the ozone rulemaking that Subpart 2 precludes any revision of the ozone NAAQS").

App. 1a-6a (62 Fed. Reg. at 38,884-38,885). The court of appeals correctly affirmed EPA's determination that it had "power to revise" the ozone NAAQS. Pet. App. 34a-37a. The court of appeals' decision has therefore conclusively resolved that matter. See generally Pet. Br. 34-35.[17]

We do not question that the court of appeals was entitled to resolve whether EPA had statutory authority to revise the ozone NAAQS. The problem here is that the court did not stop at that point, but went on to issue an advisory opinion on another important matter that would be the subject of *future* rulemaking—namely, how EPA should *implement* the revised ozone NAAQS in conjunction with the CAA's Subpart 2 scheme for implementing the pre-existing 1-hour ozone NAAQS. See Pet. App. 37a-43a. The court of appeals directed that, when the time comes for EPA to issue rules governing implementation of the revised ozone NAAQS, "EPA must enforce any revised primary ozone NAAQS under Subpart 2 [of Title I of the CAA]." *Id.* at 43a.

The federal parties objected to the court of appeals' *sua sponte* ruling on that matter at the first opportunity by filing a petition for rehearing explaining that EPA had not yet taken any final agency action to implement the revised ozone

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[17] In disregard of this Court's procedures, Ohio has resurrected and extensively briefed that issue (as well as others) without filing a cross-petition for writ of certiorari. Ohio Br. 10-31. ATA and APC have also improperly suggested that this Court should reverse the court of appeals' determination on the statutory basis that Ohio puts forward, even though they did not file a cross-petition on the issue. APC Br. 49-50; ATA Br. 25. A cross-petition is necessary because their argument does not provide an alternative ground for affirming any question presented in our petition. Instead, their argument would require the Court to alter the judgment below. If this Court accepted their contention that the CAA's Subpart 2 provisions implicitly prohibit revision of the ozone NAAQS, the Court would be required to invalidate the revised ozone NAAQS outright, rather than to remand the case to the agency to develop an "intelligible principle" for revising the ozone NAAQS. See R. Stern et al., *supra*, at 363 (under "established doctrine, * * * a party must cross-appeal or cross-petition if such party seeks to change the judgment below or any part thereof").

NAAQS. The court of appeals nevertheless justified its decision on the basis that EPA's *preamble statements* describing why it had authority to *revise* the ozone NAAQS constituted final agency action for purposes of determining how EPA should *implement* the ozone NAAQS. Pet. App. 77a-79a. As our opening brief explains, EPA's preamble statements describing the possible content of future rules do not constitute final agency action that is ripe for review—they are not themselves agency actions that affect legal rights. See Pet. Br. 36-44. Ohio suggests no persuasive basis for treating EPA's preamble statements as final agency action. Ohio simply treats the preamble statements as if they were themselves rules. See Ohio Br. 34-39.

APC takes a similar approach. It argues that "EPA's determination of its authority *to revise* the ozone NAAQS is final action." APC Br. 36 (emphasis added). But the issue here is whether EPA has taken final action on how it will "*[e]nforce*" the revised ozone NAAQS. Pet. App. 37a (emphasis added). APC simply conflates what the court of appeals itself treated as two distinct questions, and then confuses the picture still further by mischaracterizing EPA's actions in the ozone rulemaking. According to APC, EPA issued "*a rule* that simultaneously established a more stringent 8-hour ozone NAAQS and made a 1-hour ozone NAAQS and related Subpart 2 program automatically inapplicable to an area once EPA determines that its air quality meets the 1-hour NAAQS. *40 C.F.R. 50.9(b) & 50.10*." APC Br. 37 (emphasis added). But as the citations following APC's statement make clear, EPA issued two rules, and APC is improperly treating those two distinct rules as one. As we explain in our opening brief, EPA issued 40 C.F.R. 50.9(b) to change the way that the *existing 1-hour ozone NAAQS* would be implemented in the future. Pet. Br. 39 n.26. That rule is final agency action, but it does not implement the revised 8-hour ozone NAAQS. EPA issued a

separate rule promulgating the revised ozone NAAQS, 40 C.F.R. 50.10. That rule is also final agency action, but it likewise does not implement the revised ozone NAAQS. Indeed, if this Court merely examines the text of the two rules, it will discern that neither rule specifies how EPA will enforce the revised ozone NAAQS. See Pet. Br. 39 n.26 (40 C.F.R. 50.9(b)); Pet. App. 104a (40 C.F.R. 50.10).[18]

The tortuous arguments that Ohio and the industry respondents make in defense of the court of appeals' jurisdictional ruling underscore why courts should respect the basic procedural principles that govern judicial review of agency action. The CAA specifies a methodical, step-by-step approach to carry out the complex task of promulgating and implementing NAAQS. That approach provides opportunities for public participation and judicial review at critical stages of the sequential decisionmaking process. See Pet. Br. 3-8; Mass. Br. 3-6. Each of those stages presents complicated scientific and legal questions that deserve careful consideration before proceeding to the next stage of the process. The court in this case leapfrogged over critical steps in the administrative process and prescribed the outcome for future administrative proceedings before the agency has itself

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[18] As we note in our opening brief, no party in this case specifically challenged 40 C.F.R. 50.9(b), and the court of appeals did not review that rule. Even if a party had challenged 40 C.F.R. 50.9(b) and the challenge were successful, that could properly have resulted merely in invalidation of *that* rule. It would not have given the court license to prescribe how EPA should implement *the revised ozone NAAQS*, which remains a subject for *future* rulemaking. APC notes that an environmental group challenged 40 C.F.R. 50.9(b) after the time period for seeking review of that rule had run, and the government objected to that challenge on that basis. APC Br. 39-40. Contrary to APC's implication, there is nothing inconsistent in the government's objection. In that case, the environmental group had filed an untimely challenge to 40 C.F.R. 50.9(b), while in this case, the States and industry parties—which filed a timely challenge to the revised ozone NAAQS, 40 C.F.R. 50.10—did not challenge 40 C.F.R. 50.9(b) before the court of appeals.

determined its course through final regulatory action that is ripe for review. The consequences are particularly serious in the case of the CAA, which creates a regulatory program of extraordinary scope and complexity. If a court intervenes prematurely, it improperly injects itself into a policymaking role and increases the likelihood that it will err.

III. If The Court Reaches The Question, It Should Rule That EPA May Simultaneously Implement The One-Hour And Eight-Hour Standards

If this Court decides to reach the question, it should reject the court of appeals' limits on how EPA may enforce the revised ozone NAAQS. We reply by reference to the brief of the amici Intel *et al.*, which provides a defense of the court of appeals' decision on this point that, while mistaken, is more cogent than the others proffered in this case. As Intel points out (Intel Br. 3, 6), every party that addresses the issue agrees that the court of appeals' initial ruling—that "EPA must enforce any revised primary ozone NAAQS under Subpart 2" (Pet. App. 43a)—is untenable and would produce "absurd results." See also Pet. Br. 47-48. Intel posits two alternatives: "either the revised NAAQS cannot be implemented at all *or* implementation of the revised NAAQS must occur under Subpart 1." Intel Br. 4, 11.

The first alternative—which ATA and APC espouse (ATA Br. 25; APC Br. 49-50)—is illogical and precluded by those portions of the court of appeals' judgment that the respondents have not challenged. The court of appeals correctly rejected industry's argument that EPA lacks authority to revise the ozone NAAQS. Pet. App. 34a-37a.[19] No party has

[19] Indeed, the court of appeals' conclusion is compelled by the CAA's plain language. As the court of appeals correctly explained (Pet. App. 34a), Section 109(d) categorically requires EPA periodically to review and revise all of the NAAQS in light of new scientific information, and Section 109(d) makes no exception for the ozone NAAQS. 42 U.S.C. 7409(d)(1). See generally 62 Fed. Reg. at 38,884-38,885 (reproduced at Pet. Br. App.

filed a cross-petition for writ of certiorari on that issue, see note 17, *supra*, and it is therefore beyond dispute that EPA not only has the power, but also the obligation, to revise the ozone NAAQS periodically in light of new scientific information. It is absurd to suggest that Congress would have required that EPA periodically undertake the elaborate process of reviewing and revising the ozone NAAQS, but at the same time prohibited EPA from implementing the revisions.[20] Thus, the first alternative that Intel offers is foreclosed.

1a-6a). The court of appeals also correctly concluded (Pet. App. 36a-37a)—although it did not need to reach the issue—that Section 107(d) authorizes EPA to designate areas as nonattainment for "revised [NAAQS]." 42 U.S.C. 7407(d)(1)(B). ATA's new argument (ATA Br. 39) that EPA must designate areas as "unclassifiable" for the revised ozone standard is not properly before the Court because ATA did not cross-petition on the issue and a ruling in favor of ATA would alter the court of appeals' judgment. It is also plainly inconsistent with the definitions of "nonattainment" and "unclassifiable." 42 U.S.C. 7407(d)(1)(A)(i) and (iii).

[20] See, *e.g.*, *American Paper Inst.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (the Court will not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other."). ATA incorrectly argues, from a rewriting of legislative history, that Congress enacted the 1990 Clean Air Act Amendments—and specifically Subpart 2—to eliminate EPA's authority to implement a revised ozone standard under Subpart 1. See *e.g.*, ATA Br. 36-38. Contrary to ATA's premise, Subpart 1 does not consist of "ghettoized" pre-1990 provisions (ATA Br. 38). Section 172 of newly-created Subpart 1 contains new attainment date and classification authority to implement revised standards, 42 U.S.C. 7502(a)(1) and (2), together with additional new authorities for implementing all NAAQS in all nonattainment areas. See, e.g., 42 U.S.C. 7502(c); H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 223-224 (1990) ("revised section 172(c) establishes requirements for all nonattainment area plans, *including those for ozone * * * nonattainment areas*") (emphasis added); see also Pet. Br. 7-8, 44-46. Congress added Subpart 2 to provide *additional provisions*, and a specific attainment date scheme in Section 181(a), for the limited purpose of addressing attainment of the then-existing ozone standards. See Pet. Br. 46-48; see also 42 U.S.C. 7511-7511f ("Subpart 2—Additional Provisions for Ozone Nonattainment Areas").

Intel properly focuses on the second alternative. Intel recognizes that EPA must implement the revised NAAQS under Subpart 1, and the only question, therefore, is *how* EPA should reconcile its responsibility to implement the revised ozone NAAQS under Subpart 1 with the statutory provisions of Subpart 2. The court of appeals' revised opinion addresses the question opaquely, stating that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. Intel urges, in accordance with Judge Tatel's concurring opinion, that EPA cannot enforce the revised 8-hour ozone NAAQS under Subpart 1 in the areas subject to Subpart 2 until those nonattainment areas have had the opportunity to attain the pre-existing 1-hour NAAQS in accordance with the timetable set out in Subpart 2. See Intel Br. 4, 11. That question, however, presents a matter within EPA's special expertise. See *Chevron*, 467 U.S. at 844-845. EPA maintains that Congress intended the agency to implement and enforce the revised 8-hour ozone NAAQS on a nationwide basis in accordance with the statutory deadlines established under Subpart 1. In EPA's view, those areas that remain subject to Subpart 2 because they have not attained the pre-existing 1-hour NAAQS must continue to work toward achieving that goal, but they must also work toward attaining the stricter 8-hour NAAQS in accordance with the statutory timetable and substantive programs for the revised NAAQS.[21]

Intel argues that EPA should delay implementing the revised ozone NAAQS in the "1989 nonattainment areas" described in Subpart 2 because Congress enacted Subpart 2 as "a detailed and comprehensive framework" for implementing the 1-hour ozone NAAQS that was then in exis-

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[21] Despite the court of appeals' confusion on the matter (*e.g.*, Pet. App. 79a-81a), EPA has consistently explained its preliminary view that the revised ozone NAAQS should be implemented in accordance with Subpart 1. See 62 Fed. Reg. at 38,873, 38,885.

tence. Intel Br. 12-15. But Congress clearly did not intend that the 1-hour ozone NAAQS would be the final word in protecting the public from ozone hazards. Congress also directed EPA to revise the ozone NAAQS if new scientific information showed that the 1-hour standard did not adequately protect public health and public welfare. See note 19, *supra*. Congress did not explicitly direct EPA to give the "1989 nonattainment areas" special treatment if EPA found it necessary to revise the ozone NAAQS, and a court should not lightly infer that Congress intended to exempt particular areas from a NAAQS that EPA has revised specifically to protect the public from harm. Contrary to Intel's suggestions (Intel Br. 15), simultaneous implementation of the preexisting 1-hour NAAQS and the revised 8-hour NAAQS would neither conflict with the CAA's "[p]lain [l]anguage" nor "[n]ullify" Subpart 2.

First, as our opening brief explains (Pet. Br. 45-46), there is no statutory basis for delaying implementation of the revised ozone NAAQS in Subpart 2 nonattainment areas. Section 172(a) of the CAA—within Subpart 1 of Part D—authorizes EPA to establish classifications and attainment dates for all areas designated as "nonattainment" for the revised NAAQS. See 42 U.S.C. 7502(a)(1)(A) and (2)(A). Section 172(a) does not apply to nonattainment areas for which classifications and attainment dates are "specifically provided" under other provisions of the CAA. See 42 U.S.C. 7502(a)(1)(C) and (2)(D). But no provisions of the CAA, other than Section 172(a), provide for classifications and attainment dates for areas designated as nonattainment under the revised ozone NAAQS. See Pet. Br. 47-48.[22] EPA

[22] Intel correctly observes that "Section 181(a)(1), Table 1—within Subpart 2 of Part D—'specifically provides' classifications and attainment dates for areas that are not in attainment with the existing one-hour, 0.12 ppm ozone standard." Intel Br. 16-17. See 42 U.S.C. 7511(a)(1). Indeed, Section 181(a)'s caption—"Classification and attainment dates for 1989 nonattainment areas"—makes that point clear. See Pet. Br. 46. But

has accordingly expressed the view that it should implement the revised ozone NAAQS under the implementation schedule that Section 172(a) sets out for "any revised standard." 42 U.S.C. 7502(a)(1)(A).

Second, Intel errs in asserting that simultaneous implementation of the pre-existing and revised ozone NAAQS would "so undermine the purposes of Subpart 2 as to render Subpart 2 a nullity." Intel Br. 18. Three of Subpart 2's five compliance deadlines have already passed, and only a small number of areas are entitled to additional time for compliance with the pre-existing 1-hour standard. See CAA § 181(a)(1), 42 U.S.C. 7511(a)(1) (Table 1). Those areas, which have the most serious ozone nonattainment problems, will continue to have additional time to comply with the 1-hour standard. But there is no clear basis for inferring that, when Congress gave those areas of the country additional time to comply with that standard, it implicitly intended that EPA alter the statutory timetable set out in Subpart 1 for complying with a revised ozone NAAQS. The CAA creates *national* ambient air quality standards, and, in the absence of clear instruction from Congress, EPA can properly conclude that Congress wished to extend the benefits of any revised ozone NAAQS to the Nation's entire population—including persons residing in areas with the most serious ozone problems. Any intention by Congress to except certain areas from the generally applicable attainment deadlines is, at most, ambiguous. Subpart 2 certainly does not

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Section 181(a) does not provide classifications and attainment dates *for areas designated nonattainment under the revised ozone NAAQS*. See Pet. Br. 46; Mass. Br. 45-46. See also 42 U.S.C. 7407(d)(1)(A) and (B) (indicating that area designations are established by reference to particular standards). Indeed, Section 181(a), which predated the revised ozone NAAQS by seven years, could not provide classifications and attainment dates for an ozone NAAQS that had not yet been promulgated. See Pet. Br. 47-48; see also Mass. Br. 46-47; ALA Br. 38-44.

categorically require EPA to delay implementation of the revised ozone NAAQS in any area.[23]

Accordingly, if this Court concludes to reach the issue that the court of appeals addressed prematurely, then it should adhere to the timetable set out in Subpart 1 and to the CAA's explicit policy that all NAAQS are to be attained "as expeditiously as practicable." See CAA § 172(a)(2), 42 U.S.C. 7502(a)(2).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

GARY S. GUZY
General Counsel
Environmental Protection Agency

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[23] Intel speculates that, if EPA implements the revised ozone NAAQS in the "1989 nonattainment areas," that action would impose economic hardships on those areas. Intel Br. 19-24. But this Court is in no position to determine, on the record before it, whether those assertions are true or how much additional time particular areas might need to comply with the revised ozone NAAQS. Indeed, it is significant that most of the States that will face those supposed hardships, including New Jersey, California, Maryland, New York, and Pennsylvania, do not agree with Intel's construction. See Mass. Br. 43-50; N.Y. Br. 14-21. Furthermore, Intel's extra-record speculations on the question of hardship raise additional extra-record issues—for example, to what extent delaying implementation would subject sensitive populations, including children and asthmatics, to increased health risks. Intel's extra-record arguments simply underscore our point that the court of appeals has prematurely addressed the question of how EPA should reconcile its duties under Subpart 1 and Subpart 2 before EPA has taken any final agency action that properly places the issue before a reviewing court.