No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Cross-Respondents.

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Cross-Petitioner Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for Cross-Petitioners American Trucking Associations, Inc. and Chamber of Commerce of the United States

*Additional Parties and Counsel Listed on Inside Cover

February 28, 2000

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

QUESTION PRESENTED

1. Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

PARTIES TO THE PROCEEDINGS

Cross-Petitioners are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these cross-petitioners has any parent corporations, and no publicly traded company owns 10 percent or more of any of these cross-petitioners' stock.

Respondents, who were respondents in the court of appeals, are: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency.

The following additional entities have filed petitions for *certiorari* from the underlying judgment of the court of appeals: the American Lung Association, the Commonwealth of Massachusetts, and the State of New Jersey.

The following additional entities participated as parties in the court of appeals: Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association), American Forest and Paper Association, American Iron and Steel Institute, American Petroleum Association, American Public Power Association, Appalachian Power Company, Atlantic City Electric Company, Baltimore Gas and Electric Company, James Bassage, Carolina Power & Light Company, Centerior Energy Corporation, Central and South West Services, Inc., Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Power & Light Company, Chemical Manufacturers Association, CINergy Corporation, Citizens for Balanced Transportation, Cleveland Electric Company,

Columbus Southern Power Company, ComEd Company, Consumers Energy Company, Dayton Power & Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Energy Company, Duquesne Light Company, Edison Electric Institute, FirstEnergy Corporation, Florida Power Corporation, Michael Gregory, Idaho Mining Association, Illinois Power Company, Indiana Michigan Power Company, Indianapolis Power & Light Company, Jacksonville Electric Authority, Kansas City Power & Light Company, Judy's Bakery, Kennecott Energy and Coal Company, Kennecott Corporation, Kennecott Services Company, Kentucky Power Company, Kentucy Utilities Company, Louisville Gas and Electric Company, Madison Gas and Electric Company, David Matusow, Brain McCarthy, Meridian Gold Company, The State of Michigan, Midwest Ozone Group, Minnesota Power, Monongahela Power Company, National Association of Home Builders, National Indian Business Association, National Mining Association, National Paint and Coatings Association, National Petrochemical & Refiners Association, National Rural Electric Cooperative Association, National Stone Association, Nevada Mining Association, Newmont Gold Company, Northern Indiana Public Service Company, Oglethorpe Power Corporation, The State of Ohio, Ohio Edison Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas & Electric Company, PacificCorp, Plains Electric Generation & Transmission Cooperative, Inc., Phoenix Cement Company, The Potomac Edison Company, Potomac Electric Power Company, PP&L Resources, Public Service Company of New Mexico, Richard Romero, Salt River Project Agricultural Improvement & Power District, Small Business Survival Committee, South Carolina Electric & Gas Company, Southern Company, Tampa Electric Company, Toledo Edison Company, Union Electric Company, United Mine Workers of America, AFL-CIO, Virginia Power, Western Fuels Association, West Penn Power Company, The State of West Virginia, West Virginia Chamber of Commerce, and Wisconsin Electric Power Company.

The following participated as *amici curiae* in the court of appeals: Representative Tom Bliley, Senator Orrin G. Hatch, New York, Connecticut, New Hampshire, and Vermont.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Miscellaneous:

The American Trucking Associations, Inc., the Chamber of Commerce of the United States, and the other "Small Business Petitioners" below (collectively "ATA"), respectfully submit this conditional cross-petition. ATA requests that its cross-petition be granted or, at a minimum, held in abeyance if the Court grants *certiorari* on any form of the first question presented in the petition filed by the Environmental Protection Agency ("EPA" or "Agency").

ATA's cross-petition presents a statutory interpretation issue that inheres in the first question presented by EPA. It also provides a vehicle for avoiding the constitutional nondelegation issue on which EPA focuses. Specifically, this conditional cross-petition asks whether the court of appeals was correct when it held, based on *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980), and its D.C. Circuit progeny, that EPA must ignore all non-health factors, including costs, in setting the National Ambient Air Quality Standards ("NAAQS").

Despite its adherence to *Lead Industries*, the court below invalidated EPA's interpretation of the Act. While this Court could do likewise, it could not possibly *uphold* either EPA's interpretation, or the regulations based on it, without first considering whether those D.C. Circuit precedents – cases never examined by this Court – were correctly decided.

For the reasons discussed in Part C, pp. 27-30, *infra*, ATA submits that a cross-petition is not technically required to preserve this issue. Nevertheless, ATA cross-petitions both to ensure that the Court fully appreciates the statutory interpretation question presented by this case, and to avoid even a remote possibility that the Court might consider itself barred from considering any aspect of that question.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for rehearing (App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. On October 29, 1999, timely petitions for panel rehearing were granted in part and denied in part, with suggestions for *en banc* rehearing denied in their entirety. The petitions for *certiorari* were timely filed on January 28, 2000. Supreme Court Rule 12.5 and 28 U.S.C. § 1254(1) provide the basis for jurisdiction over this conditional cross-petition, which is timely filed under Supreme Court Rule 12.5.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are central to this case:

1. Article I, Section 1 of the United States Constitution provides in relevant part: "All legislative Powers herein granted shall be vested in a Congress of the United States."

2. Relevant portions of Sections 108, 109, and 307 of the Clean Air Act are set forth in the Appendix.

STATEMENT OF THE CASE

ATA provided a Statement of the Case in its Brief in Opposition and accordingly will focus here on only those aspects of the proceedings below that are pertinent to the matters covered by this cross-petition.

Acting pursuant to its jurisdiction under Clean Air Act ("CAA" or "Act") § 307(b)(1), 42 U.S.C. § 7607(b)(1), and 5 U.S.C. § 611, the court of appeals invalidated the interpretation of Section 109(b) and related provisions of the Act used by EPA in setting new NAAQS for ozone, fine particulate matter ("$PM_{2.5}$"), and coarse particulate matter ("PM_{10}"). The court of appeals did not hold these statutory provisions unconstitutional. Instead, it agreed with the argument made by ATA below that Section 109 and related provisions must be construed in light of the Act's text, background, purpose, and statutory context to provide an

"intelligible principle" to guide the exercise of EPA's discretion. *See* App. 5a-18a, 75a-76a.

Section 109(b)(1) directs EPA's Administrator to set a primary NAAQS that is "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In revising the ozone NAAQS, for example, EPA confronted a wide range of options differing in three separate dimensions: the level, form, and averaging period of the standard. EPA's proposal requested comment on levels of 0.07 to 0.09 parts per million ("ppm"). *See* 61 Fed. Reg. 65,716 (Dec. 13, 1996). For each level, EPA invited comment on several different forms, including standards ranging from the second- to the fifth-highest annual exceedance *or* concentration. *Id.* at 65,730-33. As to averaging time, EPA strongly advocated changing from a one-hour to an eight-hour standard. *See id.* at 65,727. In considering this array of options, EPA's Clean Air Scientific Advisory Committee ("CASAC") concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." J.A. (Ozone) 238.

These options differed markedly in their predicted costs and attainability. EPA estimated, for example, that the cost of bringing all areas of the country into compliance with its chosen ozone standard (a 0.08 ppm, fourth-highest, eight-hour measurement) by 2010 would amount to $9.6 billion *annually*. *See* J.A. (Ozone) 2934. These costs, not to mention the predictable impact on small businesses, could be substantially reduced by, for example, setting the standard at the fifth-highest rather than the fourth-highest reading – or even more significantly, by adjusting the level from 0.08 to 0.09 ppm. *See id.* at 1975, 2929, 2969, 2995. ATA argued below that these differences mattered, especially since CASAC had found the options considered by EPA to be effectively indistinguishable from a public health standpoint. *See* Ozone Br. of Small Bus. Pet'rs at 7-8, 19-20; Ozone Reply Br. of Small Bus. Pet'rs at 7.

The court of appeals nevertheless held that it was prevented by *Lead Industries* from requiring EPA to consider the costs and attainment consequences of its standards. *See* App. 7a, 15a. That said, the panel went on to hold that the health factors mentioned by EPA, while "reasonable" as a starting point, were insufficient because they "lack[ed] any determinate criteria for drawing lines." *Id*. at 5a-6a. The court illustrated EPA's failure to "speak to the issue of degree" by reference to the Agency's justification for choosing the 0.08 ppm level for the ozone NAAQS. *See id.* at 8a-11a. As the court explained, while EPA claims to have chosen 0.08 ppm over 0.09 ppm "because more people are exposed to more serious effects at 0.09 than at 0.08," it "never contradict[ed] the intuitive proposition, confirmed by data in its Staff Paper, that reducing the [0.08] standard to [0.07] would bring about comparable changes." *Id.* at 8a.

EPA responded that "a 0.07 standard would be 'closer to peak background levels,'" but "a 0.08 level, of course, is also *closer* to these peak levels than 0.09." *Id.* at 9a (emphasis in original). Indeed, in the case of the PM standard (where EPA estimated compliance costs of at least $37 billion *annually* by 2010, *see* J.A. (PM) 3470), the court observed that similar rationales "could also be employed to justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952." App. 11a; *see also id.* at 13a. The court of appeals thus found it inescapable that "EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power." *Id.* at 5a.

While the panel felt bound by *Lead Industries* and its progeny, it recognized that some form of cost-benefit test or similar analysis could functionally serve as the necessary "intelligible principle" to avoid an unconstitutional construction of Sections 108 and 109. *See id.* at 14a-15a. The court further acknowledged the difficulty of formulating an "intelligible principle" so long as EPA was barred from considering "any

factor other than health effects relating to pollutants in the air." *Id.* at 15a (internal quotation omitted), 18a.

The court conducted its analysis within the framework provided by this Court in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984). It thus concluded that the appropriate remedy was to remand for EPA to "develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, [to] modify the disputed NAAQS in accordance with that construction." App. 4a- 5a.

In response to EPA's petition for rehearing, the court of appeals reemphasized both that the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle," and that it is the job of EPA, not the court, to develop such an interpretation in the first instance. *See id.* at 75a. As the court explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of its delegated authority . . . . In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*." *Id.* at 76a (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*")).

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW WAS FORCED TO CONSIDER CONSTITUTIONAL NONDELEGATION ISSUES BECAUSE THAT COURT HAD MISCONSTRUED THE CLEAN AIR ACT IN *LEAD INDUSTRIES* AND SUBSEQUENT CASES.

This case is first and foremost about how to construe what all sides recognize are the most important provisions of the Clean Air Act. This Court has never accepted review of such a case, although it has declined review on at least four occasions. *See, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C.

Cir. 1981), *cert. denied sub nom. American Petroleum Inst. v. Gorsuch*, 455 U.S. 1034 (1982). Under the usual methods of statutory construction, the Court should first consider the statute and EPA's interpretation before addressing the lower court's use of the nondelegation doctrine as a construction tool – a tool that became relevant largely because non-health considerations were unavailable to serve as limiting principles under the *Lead Industries* line of D.C. Circuit precedent.

With *Lead Industries* as binding precedent, the court of appeals confronted an open-ended EPA interpretation that required it to use all of the tools at its disposal to determine whether EPA's construction was permissible. EPA explained its interpretation of the key statutory terms – "requisite to protect the public health" with an "adequate margin of safety" – as follows: "[T]he Administrator is not limited to any single approach to determining an adequate margin of safety and may, in the exercise of her judgment, choose an integrative approach, a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997); 62 Fed. Reg. 38,652, 38,688 (July 18, 1997).

Against such a standardless assertion of authority, the panel was surely correct to deploy the nondelegation canon – and to rely on this Court's pre-*Chevron* decision in *Benzene* – as a basis for invalidating EPA's unreasonable interpretation. This Court, however, is not fettered by *Lead Industries.* It is therefore free to construe the Act afresh and deploy the nondelegation canon (or not) depending on whether it is needed after the Court's interpretive work under *Chevron* is completed. *See* Part A below.

According to the lower court, *Lead Industries* precludes EPA from considering "any factor other than health effects relating to pollutants in the air" – a construction that curtails the range of "intelligible principles" that can be derived from the Act's standard-setting provisions. *See* App. 15a (internal quotation omitted); *id.* at 14a-15a, 18a. That construction

would not matter if *Lead Industries* and progeny were correctly decided. But, as summarized below, those cases were wrong when decided and are even more clearly wrong now, after this Court's decisions in *Benzene*, *Chevron*, *Chadha*, and all of the subsequent cases following their lead. *See* Part B below.

ATA acknowledges that the validity of *Lead Industries* is so intertwined with the lower court's invalidation of EPA's statutory interpretation that this conditional cross-petition is probably not required. In particular, the ability to assert a correct construction of the Act (and hence the invalidity of *Lead Industries*) is logically entailed by any fair reading of EPA's first question presented. Nevertheless, since this point involves subtleties that might not be apparent without a cross-petition, and since the jurisprudence of cross-petitions is not without its ambiguities, ATA submits this cross-petition for the reasons elaborated in Part C below.

A. Issues Arising under the Non-Delegation Construction Canon, *Chevron* Review, Arbitrary and Capricious Review, and Statutory Interpretation Are Tightly Intertwined in This Case.

1. The Court of Appeals Properly Rejected EPA's Interpretation under *Chevron*.

As explained above, *Lead Industries* is inextricably intertwined with the first question presented because it forced the court of appeals to employ the nondelegation doctrine as a tool of statutory *interpretation* to invalidate EPA's interpretation of Section 109. Although EPA's petition drops hints of statutory invalidation, and seeks to portray the court of appeals' decision as "a radical departure from settled law respecting the nondelegation doctrine," Pet. 9, nothing could be farther from the truth.

In particular, the court below never disputed that this Court is loathe to declare statutes unconstitutional on nondelegation grounds, or, for that matter, on any grounds. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 323 (1981) ("legislative Acts . . .

come to the Court with a presumption of constitutionality") (internal quotation omitted). Instead, the appellate court properly invoked this Court's line of cases that have construed statutes narrowly to provide an "intelligible principle" for guiding agency discretion. App. 14a, 74a-76a; *see also National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974) (interpreting statute "narrowly to avoid constitutional problems" under the nondelegation doctrine).

This Court's decision in *Benzene* is the most relevant such case. In *Benzene*, a four-justice plurality (in combination with a concurrence from then-Justice Rehnquist that would have gone farther still) held that the agency interpretation before it "would make such a sweeping delegation of legislative power that it *might* be unconstitutional." 448 U.S. at 646 (emphasis added and internal quotation omitted). The Court thereupon adopted a narrowing interpretation because "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* Like the court below, *Benzene* used the nondelegation construction canon to reject an agency's essentially standardless construction of its organic statute.

EPA's protestations notwithstanding, the court of appeals' rejection of EPA's statutory interpretation amounts to nothing more than applying these settled constitutional principles in the context of review after *Chevron*. Indeed, *Chevron* review has often been used by courts, including this one, to invalidate open-ended statutory interpretations quite analogous to the one rejected below. Just last term, for example, this Court used *Chevron* to reject the FCC's interpretation of the "necessary and impair" provisions of Section 251(d)(2) of the 1996 Telecommunications Act. It reasoned that, whereas the FCC had failed to give those terms any concrete meaning, "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999) (emphasis in original).

The D.C. Circuit has likewise used the second step of *Chevron* to reject standardless agency interpretations of key statutory terms, *see, e.g.*, *Abbott Labs. v. Young*, 920 F.2d 984, 987-88 (D.C. Cir. 1990), especially where, as here, the agency's interpretation is so limitless as to amount to almost no interpretation at all. *See City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991). The obvious flaw in such interpretations is that they "fail[] the second step of *Chevron* because the agency seeks to exploit the ambiguity rather than to resolve it, and to advance its own policy objectives rather than Congress'." *NRDC v.* , 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring).

Here, EPA treated the critical statutory terms – "requisite to protect the public health" with an "adequate margin of safety" – as if they conferred just the sort of "unprecedented power over American industry" that *Benzene* understandably rejected as "unreasonable." 448 U.S. at 645. Moreover, in this case, as in *Iowa Utilities*, the Agency refused to give real meaning to key terms, asserting instead that "the Administrator is not limited to any single approach to determining an adequate margin of safety and may, in the exercise of her judgment, choose an integrative approach, a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. at 38,883; 62 Fed. Reg. at 38,688.

As for ATA's contentions that EPA should set a "significant risk" cutoff in defining public health protection, or consider costs in setting an "adequate margin of safety," EPA unashamedly asserted that its decisions (1) need be based on "no generalized paradigm," (2) "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and (3) in any event, are "largely judgmental in nature." 62 Fed. Reg. at 38,883 (emphasis added); 62 Fed. Reg. at 38,688 (emphasis added). EPA's construction of the Act even allowed it to ignore record evidence from the Department of Energy, an OMB investigator (Lutter *et al*.), and, remarkably,

EPA's own internal analyst (Cupitt) – all of which indicated that reducing ground-level ozone by the amounts projected under EPA's revised NAAQS would lead to thousands of additional skin cancer and cataract cases each year. *See* Ozone Br. of Small Bus. Pet'rs at 21-24 (summarizing these studies); App. 45a, 47a-48a (invalidating this part of EPA's interpretation).

Confronted with this construction of the Act, the court of appeals, not surprisingly, found such *ad hoc* interpretation inherently tautological and unlawful:

> EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

App. 7a.

The statutory interpretation underpinnings of the holding below are further underscored by the court of appeals' remedy – remand to the agency, the traditional remedy after an agency interpretation has been invalidated under the second prong of *Chevron*. *See City of Kansas City*, 923 F.2d at 192 ("[W]here the agency's administrator has failed to provide us with a reasonable construction to which we can defer, we must remand to the agency for consideration of the statutory question in the first instance."); *Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C. Cir. 1994) ("The NLRA is ambiguous, so under *Chevron* we will be bound to accept any reasonable rule that the Board selects as an appropriate gap-filling measure. But the Board must select the rule."). The rationale underlying this principle is the compelling need "to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the

administrative agency.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Although EPA takes strenuous exception to the court of appeals' selection of the remand remedy, its objection is based on the incorrect premise that the court ordered the Agency to impose "artificial[]," or extra-statutory restraints on itself. *See* Pet. 9. In actuality, the court of appeals here did no more than ask EPA to do what many other agencies have done before it – interpret a statute in conformance with constitutional principles. *See, e.g.*, App. 14a. Agencies, like courts, are bound to interpret statutes to avoid constitutional questions. This Court has thus shaped administrative exhaustion requirements precisely so that agencies, not courts, will engage many such questions in the first instance. *See Public Util. Comm'n of Cal. v. United States*, 355 U.S. 534, 539-40 (1958); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 553 & n.22 (1954).

Nor is the fact that the Agency's interpretation was found unlawful after application of the nondelegation canon a reason to rule out categorically the traditional administrative law remedy. *See* App. 14a, 75a-76a. "[C]hoos[ing] among permissible interpretations of an ambiguous principle" is a task for the agencies, not the courts. *Id.* 75a (citing *Chevron*). Though this Court's *Benzene* decision employed a different remedy by fashioning a limiting principle on its own, that difference, far from "artificial" or "remarkable," is quite easily explained. As the D.C. Circuit noted, *Benzene* predates *Chevron*.

In sum, the court of appeals faced a recalcitrant agency that had consciously determined not to articulate a lawfully bounded or constitutionally sufficient interpretation of its authorizing act. In those circumstances, the court did precisely what a court is supposed to do under *Benzene*, *Chevron*, and most recently, *Iowa Utilities* – it rejected, not Section 109 itself, but the Agency's unlawful interpretation of Section 109. That invalidation could have been avoided, however, if EPA had

followed an "intelligible principle," including one of those that *Lead Industries* had foreclosed from consideration. *See* pp. 22-26 *infra* (discussing such principles).

2. The Statutory Interpretation Issues Presented Here Are Logically Intertwined with "Arbitrary and Capricious" Review.

There is nothing surprising about the court of appeals considering and rejecting the Agency's statutory interpretation before reaching respondents' "arbitrary and capricious" challenges. Although EPA makes extravagant claims of judicial overreaching, *see, e.g.*, Pet. 9, 16, the court was certainly within its authority in addressing statutory issues before conducting an "arbitrary and capricious" inquiry.

Statutory interpretation, including use of the nondelegation canon, is logically antecedent to "arbitrary and capricious" review. That is so because review under the "arbitrary and capricious" standard requires consideration of an agency's "applications of its statutory interpretation to the facts of the cases before it." *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 729 (D.C. Cir. 1996). In particular, the reviewing court must interpret the statute in order to determine "whether the decision was based on a consideration of the relevant factors," and whether the agency has made "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted); *see also Sullivan v. Zebley*, 493 U.S. 521, 528-29 (1990) (reversing agency based on statute's structure, consideration of which logically precedes the issue whether agency acted arbitrarily and capriciously).

Courts therefore routinely decide questions of statutory interpretation before undertaking "arbitrary and capricious" review – even where, as here, the statutory issues raise serious constitutional concerns. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Constr. Bldg. & Trades Council*, 485 U.S. 568, 574-

75 (1988) (rejecting agency's interpretation on basis of constitutional avoidance); *Chamber of Commerce v. FEC*, 69 F.3d 600, 604-07 (D.C. Cir. 1995) (rejecting agency definition of statutory term on ground that it presented "serious constitutional difficulties," before noting in *dictum* that the agency's rule was arbitrary and capricious as well); *District of Columbia v. Train*, 521 F.2d 971, 981-95 (D.C. Cir. 1975) (invoking avoidance canon before addressing "arbitrary and capricious"-based challenge), *vacated on mootness grounds sub nom. EPA v. Brown*, 431 U.S. 99, *reinstated in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

Although treating statutory issues first is both logical and conventional, ATA agrees that "arbitrary and capricious" principles are closely akin to review under *Chevron*'s second step, and that their application would provide a strong alternative basis for affirmance in this case. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741-42 (1996) (reading *Chevron* II to overlap with "arbitrary and capricious" review); *Animal Legal Defense Fund, Inc. v. Glickman*, No. 97-5009, 2000 WL 46028, at *4 (D.C. Cir. Feb. 1, 2000) (noting that *Chevron* II and "arbitrary and capricious" review "overlap at the margins") (internal quotation omitted). The relationship between statutory interpretation and "arbitrary and capricious" review is especially close where, as here, an Agency has essentially refused to identify any standard under which it would exercise its discretion. *See, e.g., Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (remanding agency determination because "[t]o refuse to define the [statutory] criteria . . . is equivalent to simply saying no without an explanation").

Accordingly, a separate D.C. Circuit panel has invalidated *a different* NAAQS rulemaking on arbitrary and capricious grounds very similar to the statutory grounds employed below. *See American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998) ("[U]nless [the Administrator] describes the standard under which she has arrived at this conclusion, supported by a plausible explanation, we have no basis for exercising our

responsibility to determine whether her decision is arbitrary [or] capricious") (internal quotations and citation omitted), *cert. denied*, 120 S. Ct. 58 (1999). Moreover, one D.C. Circuit judge strongly hinted that he would have invalidated the agency rules here on "arbitrary and capricious" grounds. *See* App. 96a (Silberman, J., dissenting) ("I am quite uncertain whether EPA's regulatory choice meets" the "arbitrary and capricious" test). And even the strongest objector to the use of the nondelegation canon refused to declare that EPA's rules are lawful under the "arbitrary and capricious" standard. *Cf. id.* at 68a (Tatel, J., dissenting) (arguing that the panel majority's concerns "relate to whether the NAAQS are arbitrary and capricious," but not resolving that question).

Although the court below did not need to reach respondents' "arbitrary and capricious" challenge, the strength and substance of that challenge further underscores the interrelated nature of the various alternative bases for affirmance – as well as the statutory interpretation underpinnings of those theories.

B. The Court Cannot Uphold EPA's Statutory Interpretation without Considering Whether *Lead Industries* and Its Progeny Are Correct.

As explained below, the validity of *Lead Industries* needs to be addressed if the Court grants *certiorari* on any form of EPA's first question presented. *First*, the D.C. Circuit decisions are now in clear tension with this Court's constitutional and administrative law jurisprudence. *Second*, those decisions are simply wrong on several critical interpretive issues that can never produce a split in the circuits. *And finally*, consideration of these decisions is essential both to interpreting the Clean Air Act as a whole and to affording the Court a basis, if it so chooses, to avoid constitutional nondelegation issues.

1. This Court's Decisions Have Steadily Eroded the Conceptual Underpinnings of *Lead Industries* at the Same Time the D.C. Circuit Has Steadily Expanded Its Reach.

Lead Industries, read today, is a monument to the pre-*Chevron* approach to statutory construction. Confronted with a dispute over the meaning of the Act's key statutory phrase ("requisite to protect the public health"), *Lead Industries* responded by brushing aside the statutory text with the assertion that "Section 109(b) does not specify precisely what Congress had in mind." 647 F.2d at 1152. Having made short work of the text, the court proceeded to rely extensively on snippets of legislative history – to the point of virtually codifying "adverse health effects," a term that appeared in a 1970 Senate committee report, but not in the statute itself. *Id*. Largely on the basis of two passages from that report, the court rejected (1) claims that a showing of effects that are "clearly harmful" is needed before EPA may regulate on public health grounds, *id*. at 1153-54, and (2) a related claim that "the Administrator must consider the economic impact of the proposed standard . . . in determining the appropriate allowance for a margin of safety." *Id*. at 1148.

Only five days after *Lead Industries* was decided, this Court cast serious doubt on its validity by issuing its *Benzene* decision. *Benzene* turned on statutory provisions expressed aspirationally, using terms much like Section 109's "requisite to protect public health with an adequate margin of safety" standard. Under the OSH Act, the Department of Labor is directed to set toxic material standards so that "no employee will suffer material impairment of health or functional capacity," subject to the overriding provision that standards must be "reasonably necessary or appropriate to provide safe or healthful employment." OSHA Act §§ 6(b)(5), 3(8), 29 U.S.C. §§ 6(b)(5), 3(8). These provisions, like CAA § 109(b), express goals but contemplate the setting of precise numerical standards that are to be broadly enforced across the entire economy.

Benzene's principal opinion, after a painstaking review of statutory text and structure, 448 U.S. at 642-46, and after concluding that the agency's interpretation "would make such a sweeping delegation of legislative power that it might be unconstitutional," *id*. at 646 (internal quotation omitted), determined that "Congress intended, at a bare minimum, that the Secretary [of Labor] find a significant risk of harm . . . before establishing a new standard" under the relevant statute. *Id.* at 644. Only after reviewing the statute and the agency's interpretation through the lens of constitutional avoidance, did *Benzene* turn (in a separate opinion section) to look for confirming "support" in legislative history. *See id*.

The erosion of *Lead Industries* begun by *Benzene* soon picked up steam, first in *INS v. Chadha*, 462 U.S. 919 (1983), and then in *Chevron*. *Chadha* relied on the constitutional requirements of bicameralism and presentment to invalidate a "single-House" veto provision. Although seemingly unrelated, *Chadha* in fact undermines the legitimacy of the sort of near-exclusive reliance on legislative history exemplified by *Lead Industries*. If Congress may not delegate lawmaking power to itself through a single-House veto, then surely it likewise may not delegate lawmaking authority to a House or Senate Committee, much less to a bill's sponsors or to members speaking individually. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 616 (1991) ("Petitioner does not – and obviously could not – contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating"); *United States v. McGoff*, 831 F.2d 1071, 1080 & n.19 (D.C. Cir. 1987) (same); *see generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997).

In a similar vein, while *Chevron* did announce its familiar rule of deference to agencies' statutory interpretations, it also made plain that this rule applies only to *reasonable* interpretations, and comes into play at all only if the court finds ambiguity after

deploying all the "traditional tools of statutory construction." 467 U.S. at 843 n.9, 845. A court's duty in construing Section 109 after *Chadha* and *Chevron* is therefore to do exactly what *Benzene* did: employ "traditional tools" (such as careful examination of text and structure), apply appropriate canons (including the canon of constitutional avoidance), and use legislative history judiciously and, if at all, only in a "supporting" role (not as a means of filling "a gap" in the statute, *see* 467 U.S. at 843-44).

Notwithstanding the serious doubts about its continuing validity, the D.C. Circuit has never seriously reexamined *Lead Industries*, even after *Benzene*, *Chadha*, and *Chevron*. The Circuit did, however, issue a brief treatment that reaffirmed *Lead Industries*, based on *Lead Industries*' own reasoning, in the "*Vinyl Chloride*" case. *See NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*).

Vinyl Chloride, however, only continues *Lead Industries*' erosion. The statute at issue in *Vinyl Chloride*, former Clean Air Act Section 112 (b)(1)(B), directed EPA to set hazardous air pollutant standards "at the level which in the [Administrator's] judgment provides an *ample* margin of safety to protect public health." CAA § 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B) (1982) (emphasis added). While conceding that the term "ample" implied a greater degree of health protection than the parallel term "adequate" in Section 109(b), *Vinyl Chloride* nonetheless relied on *Benzene* to find that the presence of a "significant risk" was a precondition to regulation. 824 F. 2d at 1153. In addition, the court went on to hold that Section 112 did not preclude EPA from considering non-health factors under a *Chevron* step one analysis and authorized EPA to consider compliance costs and related matters in setting the statutory "ample margin of safety." *Id*. at 1158, 1163-66. The fact that *Vinyl Chloride* reached conclusions opposite to *Lead Industries* on these key issues – especially in context of the more health-protective "ample margin of safety" formulation – strongly

suggests that even the D.C. Circuit itself now lacks confidence in *Lead Industries*' reasoning.

Even so, the D.C. Circuit has steadily extended *Lead Industries* precedential reach. *Lead Industries* directly addressed (and rejected) only the argument that cost had to be used in establishing "margins of safety" under Section 109, plus the argument that the Agency was required to show "clear" health effects before regulating to protect "public health." But under later decisions, *Lead Industries* has been read to preclude consideration of all factors of "cost and technology feasibility," *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981) – and even indirect health effects like "costs associated with alleged health risks from unemployment" caused by more stringent air quality standards. *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir.), *cert. dismissed sub nom. Alabama Power Co. v. NRDC*, 498 U.S. 1075 (1991). In fact, *Lead Industries* is so entrenched that the court below declined to address arguments that EPA's revised ozone standards reflect unsound "public health policy" because they would disrupt on-going, long-term, air-quality improvement efforts by the States. Ozone Br. of Non-State Clean Air Act Petitioners at 23.

2. *Lead Industries* Was Wrongly Decided.

Whenever this Court comes to review *Lead Industries*, it will find that the D.C. Circuit incorrectly decided issues of far-reaching economic and social consequence – issues that have been long delayed in reaching the Court because the D.C. Circuit's status as sole venue for reviewing NAAQS standard-setting, *see* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), ensures such issues can never gain the Court's attention by way of a circuit split.

By quickly brushing aside the statutory text, *Lead Industries* overlooked important indicia of Congressional intent that emerge from a careful reading of the statute. The essential text of Section 109(b) is as follows:

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1); *see also* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). The term "criteria" here is an important cross-reference to an informational document that the Act's Section 108(a)(2) directs EPA's Administrator to develop:

> Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Section 108 then goes on to lay out, in its subparagraphs (A), (B), and (C), three specific types of material that an air-quality criteria informational document "*shall*" – "to the extent practicable" – "*include*:" (A) "variable factors" which may alter the effects of the pollutant on "public heath or welfare;" (B) other "air pollutants" that "may interact" with the pollutant under study in the atmosphere "to produce an adverse effect on public health or welfare;" and (C) "any known or anticipated adverse effects on welfare." *Id*.

As demonstrated below, this statutory framework does not support the court of appeals' conclusions that "Congress has directly spoken to the precise question," *Chevron*, 467 U.S. at 842, of whether EPA is "*permitted* to consider the cost of implementing" air-quality standards, App. 19a (emphasis added), and responded with a negative answer. *Id*. While allegiance to circuit precedent is understandable, the court below should have recognized that *Lead Industries* is now in

significant conflict not only with this Court's precedents, including its interpretation of a similarly open-ended statute in *Benzene*, but also with the D.C. Circuit's own decisions, including its interpretation of a parallel text in *Vinyl Chloride*.

Even more problematic, however, *Lead Industries* was not at all persuasive when decided. In particular, *Lead Industries'* detours through legislative history resulted in shunting its principal discussion of statutory text and structure into a single footnote buried in the middle of the opinion – footnote 37. That footnote contains the whole of the two textual arguments identified as most important when *Lead Industries* was distinguished by the D.C. Circuit's *en banc* decision in *Vinyl Chloride*. 824 F.2d at 1159. The critical footnote begins by baldly asserting that the Administrator is not "allowed" to consider costs because Section 108(a)(2) "outlines *the criteria* on which air quality standards are to be based" and "makes no mention of such factors." *Lead Industries*, 647 F.2d at 1149 n.37 (emphasis added).

But that assertion is based on an obvious solecism – the court's failure to read the key statutory term ("criteria") in context. To be sure, outside the Clean Air Act, "criteria" can indeed refer to a standard on which "a decision may be based." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY at 307 (9th ed. 1987). But in the Section 108 context, "criteria" refers quite precisely to, not decisional standards, but an extensive informational compilation that the Act requires EPA to use in NAAQS standard setting – a compilation that the Agency itself usually refers to in capital letters as a "Criteria *Document*." *See, e.g.*, 62 Fed Reg. at 38,654 (PM rule); 62 Fed. Reg. at 38,857 (Ozone rule).

Once "criteria" is understood to mean a "criteria document," *Lead Industries*' misreading of Section 108 is apparent. Section 108 does specify certain information that criteria documents must *include* (but not be limited to) – the information listed in subparagraphs 108(a)(2)(A), (B), and (C). But that specification was never intended to be a listing of decisionmaking "factors,"

much less an exclusive one. In fact, subparagraphs (A), (B), and (C) quite evidently were added, not because of the importance of the listed information, but because consideration of the secondary matters of "variable factors," cross-pollutant interactions, and "welfare effects" might otherwise be overlooked entirely.

Lead Industries should have realized that (1) "criteria" refers to a *document*; (2) the statute's enumeration refers to information that must be compiled, not factors for decisionmaking; (3) this enumeration is mandatory, but not exclusive; and (4) to the extent Section 108 spells out informational requirements at all, it does so precisely because the information identified is of secondary importance. But in fact *Lead Industries* failed to grasp any of these points on its way to precluding EPA's consideration of costs and attainability.

Lead Industries's second footnote 37 argument, which *Vinyl Chloride* also emphasizes, fares no better. That argument consists entirely of a recitation of the following: States may consider "economic and technological feasibility in selecting the mix of [pollution] control devices;" they may do so "only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards;" and the EPA Administrator "may not consider" such factors in reviewing and approving these State plans. 647 F.2d at 1149 n.37. But these observations, while true, do not remotely prove *Lead Industries*' point. They show, rather, that the economic decisions taken by both EPA *and* States are *binding*. That is, States may not second-guess economic and pragmatic decisions that EPA makes in setting standards by declaring those standards infeasible, or extending "the strict deadlines for attainment of the standards." EPA likewise "may not consider," much less second-guess, a State's economic or pragmatic decisions by reviewing implementation plans on the basis of cost or cost-benefit considerations.

But neither of these points logically implies that EPA itself cannot consider economic or pragmatic factors in setting NAAQS. Indeed, given that States may not second-guess EPA's decisions, if non-health factors are *ever* to be given their proper role, they *must* be considered at the outset, in standard-setting. As demonstrated above, there is plainly nothing to preclude such consideration in view of the Act's text, the constitutional avoidance principles relied on in *Benzene*, and the textual analysis of parallel provisions in *Vinyl Chloride*.

3. This Court Should Address the Statutory Interpretation Issues Presented Here in Order to Increase the Likelihood of Avoiding Constitutional Issues.

The court of appeals could hardly have been more clear that permitting consideration of non-health factors in setting NAAQS would have helped to establish the "intelligible principle" needed to cabin EPA's discretion and permit meaningful judicial review. *See* App. 14a-15a, 74a-76a. This Court, if it grants *certiorari* on any form of the first question presented by EPA, should accordingly take care that it does not artificially (or accidentally) predetermine what it can and cannot consider in construing the Act. This suggestion is respectfully offered in order to enable the parties to frame the issues in the most helpful manner possible and to enable the Court, if it chooses, to resolve the case on a variety of non-constitutional grounds. To that end, ATA sketches the following arguments that, among others, ATA will likely present should *certiorari* be granted.

1. Permitting Consideration of Economic and Pragmatic Factors. The Act's standard-setting provisions say nothing on their face directing the absolute exclusion of indirect health effects, costs, and related considerations. Section 109(b)(1) says instead that EPA shall issue standards that are "requisite to protect the public health." That text does not contain a categorical directive even remotely comparable to those contained in statutes like the celebrated Delaney Clause. *See* 21

U.S.C. § 348(c)(3)(A) ("[N]o additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal."); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) (Williams, J.). By its terms, the key text of Section 109(b) rules in consideration of "public health," but fails to *rule out* consideration of anything.

Section 109 does include text, emphasized in *Lead Industries*, that says that air-quality standards shall be "based on" the Section 108 "criteria" document. But here again, the language Congress used is neither categorical nor exclusive. To the contrary, the Act elsewhere directs that EPA consider other informational sources too, including recommendations by a seven-member Scientific Review Committee, CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3), and "written comments, data, or documentary information" submitted by the public, CAA § 307(d)(4)(B)(i), 42 U.S.C. § 7607(d)(4)(B)(i). *Cf. Chevron*, 467 U.S. at 863 (at step two, courts must consider whether agency's "reasoning is supported by the public record developed in the rulemaking process").

That these other sources of information are to be considered *and acted upon* every bit as much as the information in criteria documents is clear from the requirement that EPA must respond to significant public "comments, criticism, and new data," CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B), and offer "an explanation of the reasons" for departures from Scientific Advisory Committee recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). EPA must therefore "base" its decisionmaking on the criteria information, but, as the statute repeatedly underscores, not *only* on the criteria information. Moreover, the absence of any express textual limits on what EPA can consider is supported (rather than undermined, as *Lead Industries* assumed) by the legislative history. That history memorializes the expectation of many members of Congress that "economic and social consequences" would indeed play a significant role in NAAQS standard setting. *See* H.R. Rep. No. 95-564 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502.

An additional confirmation that the Act anticipates a significant role for non-health factors is found in the otherwise inexplicable directive that EPA must issue – "simultaneously" with the criteria document and *before* EPA opens a NAAQS rulemaking – "information" on the "cost" of "air pollution control techniques." CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). The self-evident purpose of that requirement is to equip the States with the information necessary to critique effectively EPA's cost and attainability assessments in the NAAQS rulemaking proceedings. *Cf.* CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B) (EPA required to "respond to significant" public "comments, criticism, *and new data*") (emphasis added). The requirement that this cost information be provided *before* the rulemaking begins would serve no purpose if in the standard-setting rulemaking itself EPA were permitted to ignore costs altogether.

But the final confirmation that EPA may, and indeed should, consider costs, is the fact that EPA now *does* consider costs, albeit in back-door fashion. Even while the Agency was giving lip-service to *Lead Industries*, EPA issued, simultaneously with its final ozone and PM rules, a "soft" $10,000 (per ton of emissions reductions) compliance-cost cap. 62 Fed. Reg. 38,421, 38,429 (July 18, l997). Given this suggestive fact, and the role that pragmatic factors play in any rational decisionmaking process, this Court should now consider whether *Lead Industries*, as implemented by EPA, is partially fiction – and, if so, whether such a fiction serves mainly to impede reasonable standard-setting, encourage covert decisonmaking, and defeat effective review.

2. Requiring Significant Risk as a Precondition to Imposing New Measures to Protect Public Health. Wholly apart from any role that costs might play, Section 109's "requisite to protect the public health" test surely means that EPA can issue new or tightened standards only upon a showing that there is a "significant risk" to public health under the existing standards. Unlike its cognate statutory term, "the public welfare," the term

"public health" is left undefined by the Act. *Compare* CAA § 302(h), 42 U.S.C. § 7602(h) (defining "welfare"). This suggests that Congress expected that the latter term would take meaning from regulatory context and background legal principles. In fact, "Public Health Law" was a well-established field when Section 109 was added to the Act in 1970. Practiced mainly through local health boards, its principal objective has never been to achieve complete safety, much less "esthetic" enjoyment. Rather, the term "public health" has connoted the practical but "preventive" goal of eliminating unacceptable public health risks. *See* Frank P. Grad, PUBLIC HEALTH LAW MANUAL at 8-9 (1965).

That Congress expected EPA to regulate only "significant risks" to "public health" is strongly supported by the *Benzene* decision, not to mention this Court's analysis of "passive restraints" in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 51-59 (1983), and many lower court decisions. *See e.g., Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991); *Hess & Clark v. FDA*, 495 F.2d 975, 994 (D.C. Cir. 1974) (Leventhal, J); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 636-41 (D.C. Cir. 1973) (Leventhal, J).

EPA pretends to understand this point when it awkwardly conjoins a form of *Benzene*'s "significant risk" test with *Lead Industries*' regrettable misuse of the 1970 Senate report. EPA thus claims that the legislative report "indicates that the health effects justifying a NAAQS must be 'adverse' and therefore must be *medically significant* and not merely detectable." Pet. 15 (emphasis added). But that formulation only clouds the analysis that must be performed in any scientifically defensible determination of "significant risk." *See Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1264-67 (D.C. Cir. 1988). Importantly, EPA argued vigorously below that the *Benzene* "'significant risk of harm'" test is inapposite because "a 'test' under which the Administrator must first make a 'finding' that the existing standard permits a 'significant risk of

harm' to public health, and then demonstrate that the revised standard is 'needed to improve demonstrably the overall public health,'" would be "plainly inconsistent" with the text of the Act, and precluded by *Lead Industries*. EPA Ozone Br. 42 & n.40. This Court should accordingly take care not to conflate an illegitimately grounded concept of "medically significant" "health effects" espoused by EPA with something quite different – the term "significant risk" as used by this and other courts.

3. Requiring Consideration of Costs in Setting the Safety Margin. The Act contains an additional limitation that applies with respect to Section 109(b)(1)'s directive that the Administrator establish an "*adequate* margin of safety." The D.C. Circuit noted in *Vinyl Chloride* that "margin of safety" is derived from an engineering term meaning "a safety factor . . . meant to compensate for uncertainties and variabilities." 824 F.2d at 1152 (internal quotation omitted). Because no product has ever been engineered for complete safety, however, this derivation reconfirms the *Benzene* pronouncement that "safe" is not the equivalent of "risk free." Moreover, it suggests that Section 109 safety margins must trade off the costs and benefits of additional safety, just as designers strive to engineer "adequate" – but never complete – safety into every product they design. *Cf.* Karl T. Ulrich and Steven D. Eppinger, PRODUCT DESIGN AND DEVELOPMENT at 5 (2d ed. 1997) (managing "tradeoffs in a way that maximizes success" listed as the first "challenge" of product engineering). Tellingly, even the D.C. Circuit has acknowledged that costs *may* be used for setting safety margins in the context of former Section 112 of the Act – a provision that, as discussed above, is the close textual sibling to Section 109. *See Vinyl Chloride*, 824 F.2d at1157, 1165.

C. This Court Should Grant or Hold this Cross-Petition to Ensure that the Full Range of Statutory Interpretation Issues Is Properly Presented.

ATA recognizes that this conditional cross-petition very likely is not required. In particular, even a cursory look to EPA's first question reveals that it refers to EPA's "interpret[ation]" of the statute, *see* Pet. (i), which must necessarily include inquiry into any and all ways that the Act may be properly construed. Given how the Government itself has framed its first question, a cross-petition specifically raising statutory issues, such as overruling *Lead Industries*, appears unnecessary. *See* pp. 18-22, above; *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2127 (1999) (issue "intimately bound up" with primary question properly before the Court); *Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995) (issue "necessary for a proper determination of" primary question properly before the Court).

Likewise, alternative grounds for affirmance will be argued should *certiorari* be granted – alternative grounds arising not only from *Lead Industries* and other interpretive issues under the Act, but also from "arbitrary and capricious" review. Like the disposition below, those grounds would require a remand for new EPA proceedings. Accordingly, under this Court's familiar rule, no cross-petition should be needed: "A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to *preserve, and not to change, the judgment*." *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999) (emphasis added; internal quotation omitted); *accord United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924); Robert L. Stern *et al.*, SUPREME COURT PRACTICE § 6.35 at 363 (7th ed. 1993).

ATA nonetheless files this conditional cross-petition for two reasons. *First*, EPA has sometimes appeared to characterize the court of appeals' holding as an attack on the constitutionality of *Section 109 itself*, as opposed to an invalidation of *EPA's*

interpretation of Section 109. *See* pp. 7-8 above. Against this backdrop, a bold advocate might be tempted to read EPA's question so narrowly as to exclude the full set of statutory interpretation issues. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (construing question presented in light of argument advanced in petition).

Second, this Court's cross-petition jurisprudence does not directly resolve the question whether a cross-petition is required in the unusual circumstances presented here. Ordinarily, the court of appeals would have affirmed or reversed a district court judgment, and the effect of the court's rulings on the rights of the parties would be clear. Here, however, the court of appeals (1) undertook direct review of an agency rulemaking; and (2) did not make a binary, up-or-down determination on the validity of the NAAQS. Rather, the court "remand[ed] the cases to EPA for further consideration of all standards at issue" *without vacating the NAAQS.* App. 57a. The court's judgment is thus, out of deference to the Agency, deliberately vague: it leaves to EPA the tasks of developing a method for assessing in the first instance how to abide by the decision while remand proceedings are in progress.

In these circumstances, there can be no absolute certainty about how this Court's already somewhat flexible cross-petition jurisprudence might apply. *See* SUPREME COURT PRACTICE, § 6.35 at 366-68. In particular, overruling *Lead Industries* would not change the *form of the judgment*, because these cases would still be remanded for further consideration. On the other hand, the *substance of the remand* could be somewhat different compared to, say, affirming the D.C. Circuit's reasoning or remanding on "arbitrary and capricious" grounds. That is, if *Lead Industries* were overruled, EPA would be newly empowered to consider non-health factors, or engage in a "significant risk" inquiry, or apply some other principle identified by the Court.

Moreover, it is not possible to say categorically whether or not such a change would enlarge the respondents' rights – the traditional trigger for the need to file a cross-petition. *See, e.g.*, *Andrus v. Idaho*, 445 U.S. 715, 725 n.6 (1980). Any judgment on this score is further complicated by the fact that EPA is required by statute to undertake lengthy NAAQS rulemakings every five years. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). Accordingly, "remand" proceedings easily elide into entirely different "rulemakings," with the result that the practical effect of any given court decision becomes harder to discern.

ATA submits that a cross-petition could conceivably be required, but only where acceptance of an alternative theory offered to support the judgment would change either the range of substantive outcomes *available to*, or the procedural steps *required of*, the agency on remand. That test is clearly preferable to a rule that requires a cross-petition whenever the agency's action on remand would be affected by a change in rationale, for such a rule would require cross-petitions wherever the *reasoning* of this Court might differ from that of the court of appeals. This latter rule would be directly at odds with this Court's frequent pronouncements that a respondent may launch "an attack upon the reasoning of the lower court" without filing a cross-petition. *American Ry. Express* Co., 265 U.S. at 435; SUPREME COURT PRACTICE, § 6.35 at 363.

At least in the ozone and coarse PM rulemakings, even rejecting *Lead Industries* outright would not enlarge the substantive results EPA would be permitted to reach, nor require additional procedural steps. As to the ozone standard, EPA must in any event undertake a full-blown reconsideration of the record so that it can determine whether a revision can be justified in light of ozone's *net* effect on public health. *See* Opp. pp. 16-17. Likewise, the coarse PM standard will have to be reconsidered from the ground up as EPA reexamines its definition of a "coarse" particle. *See* App. 49a-53a. Fine PM might arguably present a different situation, because there

EPA's failure to abide by an "intelligible principle" provided the sole basis for remand. But this distinction appears wholly technical, given that EPA already has begun another statutorily-required round of review – proceedings that are just as extensive as the ones required as a matter of law for ozone and coarse PM. In sum, even assuming that the rule were as stated above, cross-petitions still clearly should not be required for the ozone and coarse particulate matter rulemakings, and perhaps not for the fine PM rulemaking as well.

CONCLUSION

For the foregoing reasons, this Court should either grant or hold this conditional cross-petition in the event that the Court grants *certiorari* on any form of the first question presented in EPA's petition.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for American Trucking Associations, Inc. and Chamber of Commerce of the United States

APPENDIX

CAA § 108, 42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For 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 –

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on –

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

****

CAA § 109, 42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator –

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

****

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

****

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CAA § 307, 42 U.S.C. § 7607. Administrative proceedings and judicial review

****

(d) Rulemaking

(1) This subsection applies to –

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

****

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall

specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of –

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

****

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information . . . .

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

****