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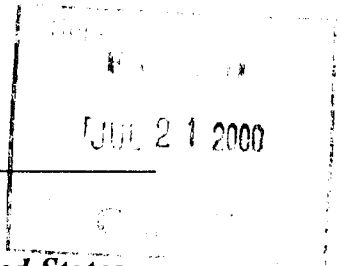

IN THE
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Respondents.

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MAINE, MARYLAND, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN SUPPORT OF PETITIONERS

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The States of New York, California, Connecticut, Maine, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Vermont respectfully submit this brief as *amici curiae* in support of the petitioners United States Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA.

The *amici* States seek reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *rehearing en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), which overturned EPA's revised National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter. These NAAQS were promulgated pursuant to section 109 of the Clean Air Act (the Act), 42 U.S.C. § 7409, which requires that NAAQS be set at a level "requisite to protect the public health with an adequate margin of safety."

INTEREST OF THE *AMICI*

Residents of the *amici* states suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and fine particulate matter in the ambient air. EPA promulgated the revised NAAQS for these pollutants after an

extensive study of the latest scientific knowledge revealed that the existing NAAQS for ozone and particulate matter did not sufficiently protect the public from adverse health effects and thus did not satisfy section 109 of the Act.

The scientific record of the rulemaking at issue establishes that the revised standards will have a profoundly beneficial impact on public health, eliminating thousands of premature deaths attributable to air pollution each year, preventing tens of thousands of instances of respiratory illness attributable to exposure to ozone and fine particulate matter, and improving the quality of life of the children and adults who suffer from asthma. As *parens patriae*, the *amici* States have a paramount interest in protecting their residents from the debilitating and potentially life-threatening effects of asthma and other respiratory illnesses.

The States, however, face significant obstacles in attempting to protect their residents because air pollution is a national problem. Even if individual States were to set their own air quality standards, many would find their ability to meet their own standards undermined by dirty air blowing in from other States. Furthermore, economic pressures would prevent many States from enacting environmental requirements imposing significantly greater costs on their businesses than imposed on businesses in other States. The *amici* States have an interest in avoiding the "destructive race among states to attract industry by adopting the least stringent emissions-limits." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1355 (5th Cir. 1996), *cert denied*, 519 U.S. 1055 (1997). These scientific and political realities prevent most of the

States from unilaterally implementing or meeting state-specific standards; these same realities require the exercise of federal power, such as that at issue here.

Finally, the decision below has implications for the health and safety of the citizens of the States with respect to matters other than air pollution. By invoking the nondelegation doctrine to invalidate a broad congressional delegation of authority to a federal agency, the court below cast doubt on the validity of similar delegations in other areas. For example, the decision raises questions about the constitutionality of federal statutes governing pesticide residues in foods and hazardous waste transportation. *See, e.g.*, 21 U.S.C. § 346a(b) (EPA may establish a tolerance for levels of particular pesticides on food if it determines "that there is a reasonable certainty" that no harm will result from exposure); 42 U.S.C. § 6923(a) (requiring EPA to promulgate such standards for the transportation of hazardous waste "as may be necessary to protect human health and the environment"). EPA's discretion in adopting new or revised NAAQS is at least as circumscribed as the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a); *see also* 49 U.S.C. § 44701(d) (Federal Aviation Authority must act "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation"). The *amici* States have a fundamental interest in seeing that the health and safety of their residents do not

suffer as a result of the disruption of regulation in these other areas, which also by their nature demand a leading federal role.

SUMMARY OF ARGUMENT

In invalidating EPA's revised ozone and particulate matter (PM) NAAQS, the D.C. Circuit concluded that the constitutionality of Section 109's delegation of authority to EPA depends on whether the regulated substance is a threshold or a non-threshold pollutant and on the specific standards that EPA selected to minimize their presence in the ambient air. There is nothing in this Court's jurisprudence to suggest that a statute's constitutionality can possibly depend on the specific scientific categorization of the regulated object or the rules promulgated to address it.

The D.C. Circuit's further insistence that the statute can only be "saved" if EPA devises a mechanistic regulatory principle that explains precisely why it selected one standard rather than another has never been imposed by this Court. Instead, this Court has recognized, in other cases addressing non-threshold pollutants, that agencies implementing statutes to protect public health and safety in areas of scientific uncertainty must often make policy judgments when they select a regulatory point and should not be constrained by a mathematical straitjacket.

Finally, the D.C. Circuit's determination that EPA must enforce the revised eight-hour ozone NAAQS promulgated in 1997 in accordance with the classifications and attainment dates adopted by Congress in 1990 ignored the unambiguous

congressional intent that EPA is required to update, adopt and enforce more stringent standards as necessary to protect public health. The D.C. Circuit's cramped decision will create innumerable practical problems for those seeking to implement the Nation's clean air goals. Indeed, the panel's determination is consistent only with its staunch refusal to address the realities of air pollution – a reality *amici* States confront every day.

ARGUMENT

I. THE DELEGATION OF AUTHORITY TO THE EPA IN SECTION 109 OF THE CLEAN AIR ACT IS CONSTITUTIONAL.

The court below erred in concluding that section 109 is an unconstitutional delegation of congressional authority to an executive agency. In finding that section 109 does not contain the requisite "intelligible principle" to guide EPA's regulation of non-threshold pollutants, the court found an apparently constitutional difference in the type of pollutant being regulated and the degree of scientific knowledge available. In so doing, the D.C. Circuit departed from decades of precedent upholding substantially broader delegations, improperly limited congressional power to advance environmental health and safety, and crippled EPA's ability to effectuate Congress's intent.

Despite the D.C. Circuit's characterization of EPA's discretion as essentially unlimited, the Clean Air Act provides sufficiently tight reins on EPA's discretion to regulate air

pollution. EPA must set national ambient air quality standards that in its judgment are "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "accurately reflect the latest scientific knowledge." Moreover, the standards must be based on the air quality criteria specified in 42 U.S.C. § 7409(b)(1), which must themselves be "based on" the latest scientific information regarding the "kind and extent" of effects on public health and environment of the pollutant at issue. 42 U.S.C. § 7408(a)(2). Finally, EPA's discretion is further limited by the requirement that the proposed criteria and supporting documents be provided to the Clean Air Science Advisory Committee (CASAC) for review and that EPA justify any departure from CASAC's recommendations. 42 U.S.C. § 7607(d)(3).[1]

Congress thus recognized in the Clean Air Act that it was ordering EPA to act on the very frontiers of scientific knowledge. While EPA was given detailed guidance, and mandated to follow scientific advice, Congress recognized that, in the end, EPA would need to make a judgment call. This Court has noted and approved of Congress's need to direct agencies to operate in areas where practical limitations overwhelm scientific certainty. As the Court said in rejecting a recent nondelegation challenge to the authority given the Sentencing Guidelines Commission:

[1] In this case, where the CASAC recommendations for the ozone standard all fall into the range of .08 to .09 parts per million (ppm), EPA was effectively limited to the choice of a standard within that very narrow range. 175 F.3d at 1059.

> applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.

Mistretta v. United States, 488 U.S. 361, 371 (1989).

The decision below, however, rejects the wisdom of both Congress and this Court. It finds constitutional significance in the current scientific categorization of a pollutant and demands a level of scientific certainty that is simply unavailable. Where Congress understood it was ordering EPA to use its best judgment in light of available knowledge, the panel below prefers to pretend that no judgment is needed.

In invalidating EPA's revised ozone and $PM_{2.5}$ NAAQS, the D.C. Circuit seized on the fact that ozone and $PM_{2.5}$ are characterized as "non-threshold pollutants," which must be treated as if exposure might cause some adverse health effects in some people at any point along a continuum beginning at just above zero. According to the D.C. Circuit, section 109 of the Clean Air Act unconstitutionally delegates legislative power to EPA if the agency selects a point along a continuum of risk at which to set a national standard for non-threshold pollutants without being able to precisely explain why that point is "requisite to protect the public health" whereas a point slightly more or less stringent is not. If, however, EPA

had decided that zero was the only appropriate standard for non-threshold pollutants such as ozone and $PM_{2.5}$, or if it had instead determined that ozone and $PM_{2.5}$ are threshold pollutants, its application of section 109 would, by the D.C. Circuit's own account, have survived nondelegation attack. *See* 175 F.3d at 1038.[2] This rationale makes no constitutional sense. A statute's constitutionality cannot possibly depend on the specific standards selected to implement it. Nor can the distinction between threshold and non-threshold pollutants possibly determine the constitutionality of Congress's delegation of authority to regulate them.

Premising Congress's regulatory authority on that distinction also makes no scientific sense. The D.C. Circuit's insistence that EPA identify precisely how tall is "too tall" according to an imaginary yardstick of health effects demands a level of scientific certainty that is simply not available in the existing clinical and epidemiological evidence. As the court below has recognized in other cases, at the "frontiers of scientific knowledge," where the available information "may be insufficient to permit fully informed factual determinations," the EPA Administrator's decisions must rest "largely on policy judgments where no factual certainties exist." *Lead Industries Association v. United States Environmental Protection Agency*, 647 F.2d 1130, 1147 (D.C. Cir.), *cert. denied*, 449 U.S. 1042

[2] Although a zero standard would have avoided the D.C.Circuit's perceived nondelegation problem, the absurdity of a zero standard was recognized by the court when it stated that particulate matter would remain in the atmosphere even if the country entirely deindustrialized. *See* 175 F.3d at 1038 n. 4.

(1980). In such a situation, the court added, the Administrator should acknowledge the absence of scientific certainty and "go on to identify the considerations he found persuasive." *Id.* at 1147. Otherwise, EPA will be unable effectively to protect the public from these ubiquitous pollutants simply because the existing scientific evidence supports a narrow range of possibilities within which EPA selected a standard rather than a precise point along the continuum of risk.

The approach taken by the court below is not supported by any of this Court's nondelegation precedents, which have sustained administrative selection of standards along a continuum of possibilities without requiring Congress to provide a rigidly determinate principle to explain the precise point selected. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding congressional delegation to agency to fix prices of commodities at a level that "will be generally fair and equitable" in order to prevent "abnormal"price increases, "abnormal" market conditions and inflationary reductions in the standards of living of people on fixed incomes).

This Court has upheld broad delegations made necessary not only by the exigencies of war, but also by the exigencies of our limited scientific knowledge. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (the "*Benzene*" case), this Court implicitly rejected the D.C. Circuit's view that EPA must justify its selection of a health standard along a spectrum of increasing harm with a precision that is unattainable on the basis of existing scientific evidence. Eight members of the *Benzene*

Court sustained section 3(8) of the Occupational Safety and Health Act of 1970, authorizing the Occupational Safety and Health Administration (OSHA) to regulate workplace processes or pollutants if "reasonably necessary and appropriate to provide safe or healthful employment or places of employment." 29 U.S.C. § 652. Four of those eight Justices construed the standard as first requiring the agency to find a "significant risk of harm" before regulations could be promulgated as "reasonably necessary and appropriate." 448 U.S. at 642-43 (Stevens, J., announcing judgment of the Court).[3] Four others saw no need to engage in this very modest judicial narrowing of the standard. *See* 448 U.S. at 708-11 (Marshall, J., dissenting). But all eight Justices agreed that Congress could delegate authority to OSHA to select a regulatory point under either the statute's broad standard or one very slightly narrowed by judicial construction. Even though benzene is a non-threshold pollutant, like ozone and particulate matter, this Court saw no constitutional problem with

[3] Three members suggested that this narrowing interpretation averted nondelegation problems that might otherwise have arisen, *see* 448 U.S. at 646; another Justice expressed "no view" on whether a "different interpretation of the statute would violate the nondelegation doctrine," *see* 448 U.S. at 664, n.1 (Powell, J., concurring); and four Justices perceived no nondelegation problem with the statute as written, *see* 448 U.S. at 723-24. (Marshall, J., dissenting). Justice Rehnquist would have held that the nondelegation doctrine was violated by the congressional grant of broad authority to OSHA on grounds unrelated to this case (Rehnquist, J., concurring in judgment). *See* n.10 at page 15, *infra*. Although *Benzene* is not a constitutional holding, the nondelegation issue permeated the decision and its various opinions are relevant to the constitutional issue presented here.

Congress's delegation to OSHA of the authority to select the point on benzene's continuum of risk that should be characterized as "significant."

Indeed, as Justice Burger noted in concurrence, there is an implicit "policy judgment" in setting standards where there is no absolute scientific guidance. Moreover, he noted, it is acceptable for Congress to authorize the Secretary of Labor to make such policy judgments in determining whether a "risk of health impairments is significant in terms of the policy objectives of the statute." 448 U.S. at 663 (Burger, C.J., concurring).

Likewise, section 109 of the Clean Air Act acknowledges that the Administrator must make a policy determination, and explicitly authorizes her to do so, based on air quality criteria that reflect the latest scientific knowledge, as to whether existing or new standards are "requisite to protect the public health" with "an adequate margin of safety." Only by somehow conjuring up levels of scientific knowledge that are currently beyond our grasp, could Congress provide more detailed guidance to EPA or avoid having EPA exercise some policy judgment.

Nor has this Court ever held that a mechanistic regulatory principle, such as cost-benefit analysis, is required in areas of scientific uncertainty in order to save an otherwise constitutional delegation to an administrative agency.[4] To the

[4] The D.C. Circuit below suggested that cost-benefit analysis could accomplish precise line-drawing, but held that that approach was not available to cure section 109's supposed constitutional infirmity because

(continued...)

contrary, this Court has clearly sustained Congress's delegation of authority to OSHA to regulate workplace hazards and pollutants under a broad standard of preventing "significant risk" while refusing to require cost-benefit or similar formulaic analyses to limit the agency's discretion in selecting which exposure level along a spectrum of increasing harm creates a risk that is "significant." Indeed, as the *Benzene* plurality noted, "the requirement that a 'significant' risk be identified is not a mathematical straitjacket" and imposes no regulatory duty to "calculate the exact probability of harm." *Benzene*, 448 U.S. at 655.

Similarly, in *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1983) (the *Cotton Dust* case) this Court specifically rejected the argument that sections 3(8) and 6(b)(5) of the Occupational Safety and Health Act require OSHA to determine, before setting the level for a harmful physical agent "which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment

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[4](...continued)
Congress had prohibited EPA from considering costs under Section 109. 175 F.3d at 1038. However, quantifying the benefits of a lower death rate in the monetary terms necessary to compare those benefits with the costs of obtaining them is not the precise exercise apparently desired by the D.C. Circuit. In fact, cost-benefit analysis can be used by an agency to mask its policy judgments in the supposedly neutral balancing of costs and benefits. For example, the very program cited approvingly by the panel below -- Oregon's allocation of medical treatment to the poor by dividing cost by "quality adjusted life years" -- was initially disapproved by the United States Department of Health and Human Services because it undervalued the quality of life of the disabled in violation of the Americans with Disabilities Act. 175 F.3d at 1039, n.4.

of health," 29 U.S.C. § 655(b)(5), that the health benefits to textile workers of its cotton dust standard outweigh the standard's costs.[5] The Court concluded that "Congress did not contemplate any further balancing by the agency for toxic material and harmful physical agents and we should 'not impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'" *Id.* at 513 (citation omitted).[6]

As this Court in *Cotton Dust* also made clear, "'[t]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere – in Congressional and Executive oversight or amendatory legislation.'" 452 U.S. at 540 (quoting *Benzene*, 448 U.S. at 663 (Burger,

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[5] Section 6(b)(5) of OSHA differs from section 109 of the Clean Air Act because the OSHA Administrator, unlike the EPA Administrator, can broadly consider costs in determining whether its standard is "feasible." 29 U.S.C. §655(b)(5). However, the OSHA Administrator must first determine the existence of a "significant risk" at a point along a spectrum of risk. Thus, OSHA and EPA must operate in the same areas of scientific uncertainty in determining the "significance" of a risk or what is "requisite to protect the public health" and must make judgments that cannot be supported with the degree of scientific certainty required by the D.C. Circuit.

[6] In *Cotton Dust* and *Benzene*, then-Justice Rehnquist found a nondelegation problem with section 3(8) of OSHA because Congress did not decide whether cost-benefit analysis was authorized but instead left that decision to the agency. *See* 452 U.S. at 547. He added, however, that no nondelegation issue would have arisen if Congress had clearly authorized the Secretary of Labor to set exposure standards without "any kind of cost-benefit analysis." *Cotton Dust*, 452 U.S. at 545. Here, Congress, and not EPA, made the decision that EPA cannot consider costs in promulgating NAAQS for criteria air pollutants and therefore satisfied Justice Rehnquist's concern.

C.J., concurring)). In invalidating EPA's revised ozone and PM NAAQS, the D.C. Circuit has overridden this basic principle and improperly forced its view of sound environmental policy upon EPA and the democratically elected Congress.

The Clean Air Act effects a constitutional delegation of authority to EPA. Although the D.C. Circuit would have preferred EPA to rely on a mechanistic regulatory principle in setting the revised ozone and PM NAAQS, Congress's mandate that the agency exercise its judgment in areas of scientific uncertainty to protect the public health was fully constitutional.

II. THE D.C. CIRCUIT ERRED IN FINDING THAT THE NEW EIGHT-HOUR OZONE STANDARD MUST BE IMPLEMENTED IN ACCORDANCE WITH THE PROVISIONS APPLICABLE TO IMPLEMENTATION OF THE OLD ONE-HOUR STANDARD.

The D.C. Circuit erred in holding that the provisions of subchapter I, part D, subpart 2 of the Act, intended to govern implementation of the old one-hour ozone standard, 42 U.S.C. §§ 7511(a)-(f), also govern implementation of the revised eight-hour ozone standard. The D.C. Circuit's conclusory finding that section 181 – a section within subpart 2 – is applicable simply because it "clearly encompasses non-attainment designations" made under a new or revised ozone NAAQS, 175 F.3d at 1050, is inconsistent with the text of

section 181 and ignores practical realities. The classification scheme set forth in section 181 is incomprehensible when applied to the revised standard and its deadlines for compliance that passed in the 1990s are nonsensical when applied to a revised standard that would not be implemented until after 2000.

At the core of the D.C. Circuit's holding is its view of section 181(a)(1) of the Act, which is entitled "Classification and attainment dates for 1989 nonattainment areas." 42 U.S.C. § 7511(a)(1). This section has as its centerpiece a table that lists the air quality classifications and attainment deadlines for meeting the .12 ppm standard in effect at the time of the 1990 Amendments to the Act:

> **(a) Classification and attainment dates for 1989 nonattainment areas**
>
> (1) *Each area designated nonattainment for ozone pursuant to section 7407(d)* [*i.e.* § 107(d)] of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1. [emphasis supplied].

TABLE I

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

The crux of the D.C. Circuit's error lies in its unwarranted view of the cross-reference to § 107(d) [42 U.S.C.§ 7407(d)] in the first sentence of § 181(a)(1). Section 107(d)(4) provides for designations under specified standards, including the old one-hour ozone standard. *See* 42 U.S.C. § 7407(d)(4). Section 107(d)(1) provides for designations under a new or revised NAAQS. *See* 42 U.S.C.§ 7407(d)(1). Relying solely on the fact that the cross-reference is to section 107(d), rather than to section 107(d)(4) specifically, the court below concluded that section 181(a)(1) unambiguously encompasses implementation of the revised .08 ppm standard. *See* 175 F.3d at 1048-50. Finding no ambiguity, the court below then shoved

a round peg in a square hole, insisting on its reading despite its clearly unworkable results.

First, under the panel's reading, the deadlines simply make no sense. Section 181(a)(1) contains, on its face, classifications and deadlines that are pegged to the one-hour .12 ppm standard existing at the time of the 1990 Amendments, rather than to the lower .08 standard.[7] Attempting to apply these classifications and deadlines to the .08 standard has absurd consequences. For example, under the D.C. Circuit's holding, areas with ozone levels in the range of .120-.138 and .138-.160 were required to comply with the new eight-hour standard in 1993 and 1996, respectively, even though that standard was not promulgated until 1997. On the other hand, because the section 181(a)(1) compliance schedule is geared towards compliance with the .12 one- hour standard, it contains no deadlines for areas with design values between .08 (the level of the new standard) and .12. This means that areas in compliance with the old standard but out of compliance with the revised standard need never comply with the revised standard because they are subject to no deadlines under section 181(a)(1) for compliance with that standard. Requiring areas with design levels in excess of .12 to meet the new standard immediately (because the deadlines have already passed) while holding less polluted (but still noncompliant) areas to no compliance deadline at all is, at best, bizarre. It is also contrary to the intent of the section 181(a)(1) deadlines to provide more

[7] Even the D.C. Circuit recognized that the "design value" set forth in table 1 "is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary ozone standard." 175 F. 3d at 1046.

polluted areas with more, not less, time to come into compliance.

Second, the panel's reading results in methodological incoherence. Section 181(a)(1) provides that pollution levels that form the basis for the classifications (the "design value") should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Under the D.C. Circuit's interpretation, EPA would be bound by potentially obsolete pre-1990 methodologies in calculating the design values applicable under revised standards promulgated years later. Similarly, the panel's insistence that section 181 applies to the new standards leaves the process for reclassification, from attainment to nonattainment, unworkable.[8]

Finally, the panel decision leaves the States and EPA in an enforcement quandary: what exactly can they do when?[9]

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[8] Under section 181(b)(1), areas that are reclassified to nonattainment with the old one-hour .12 standard are subject to the classification dates of section 181(a)(1), but with an extension equal to the time between enactment of the 1990 Amendments and reclassification as nonattainment. Thus, if an area is redesignated from attainment to marginal nonattainment with the one-hour standard in 2000 (10 years after the 1990 Amendments), it will have until 2003 (ten years after the original 1993 attainment deadline for marginal nonattainment areas) to comply with the standard. However, section 181(b)(1) specifies that this provision applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1). How to handle classification of nonattainment with the new standard is left unclear.

[9] The panel and Judge Tatel were unable to agree on a way to (continued...)

The panel below could not agree on what EPA was left room to do; certainly almost any action will lead, at the least, to litigation and delay.

If the impracticalities of the result were not enough to show the error of the panel's decision, a broader look at the context of the provision makes the error plain. Section 181(a) is entitled "Classification and attainment dates for *1989 nonattainment areas*." (emphasis added).[10]

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[9](...continued)
conform the provisions of subpart 1 with the classifications and deadlines found in section 181. On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." 195 F. 3d at 11. However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1," 195 F. 3d at 13, appears to conflict directly with the panel's holding that it is section 181 of "[s]ubpart 2, not subpart 1, [that] provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS," 175 F. 3d at 1050 (emphasis supplied). Furthermore, Judge Tatel's interpretation that implementation of the revised standard under subpart 1 can begin in the vast majority of the nation that has attained the old standard is also inconsistent with the panel's determination, on rehearing, not to vacate the new standard pending remand "because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with subpart 2." 195 F. 3d at 10.

[10] In *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947), the Court held that the title of a section, which was "but a short-hand reference to the general subject matter involved," would not "take the place of the detailed provisions of the text." In the instant case, by contrast, it is the title that clearly and precisely limits the reach of a provision whose language is ambiguous.

This Court has found, under similar circumstances, that the title of a statute provides valuable evidence of congressional intent in enacting an otherwise ambiguous statute. In *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), the Court interpreted a regulation that, on its face, prohibited any employment of deportable aliens. However, in light of the provision's title, "*Condition against unauthorized employment*," the Court held that the regulation prohibited not any employment of deportable aliens, but only *unauthorized* employment of such aliens. *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (considering the title of a section, and its legislative history, in construing a statute); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (holding that possible ambiguity of statute is resolved by the title of subsection at issue); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959) (the Title of an Act is "a useful aid in resolving an ambiguity").

Finally, the D.C. Circuit's decision is inconsistent with this Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that courts must defer to an agency's reasonable interpretation of ambiguous provisions in statutes they are charged with administering. Instead of deferring to an agency interpretation of section 181(a) of the Clean Air Act that is consistent with the substance and title of the provision, the D.C. Circuit elevates form over substance, substituting its own highly technical reading of the statute for the practical reading adopted by EPA. The cross-reference in section 181(a)(1) to section 107(d) rather

than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates at most an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (noting that "it would be difficult" to find a statute unambiguous in light of two dissents and a conflicting opinion of another court). Under these circumstances, the D.C. Circuit should have deferred to EPA's reasonable interpretation of the provisions at issue – an interpretation that effectuates the general statutory scheme, makes sense of the specific statutory provisions, and is consistent with the title of section 181(a)(1). *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (reemphasizing the need to give deference to an agency interpretation that is "reasonable in light of the legislature's revealed design") (citation omitted).

The D.C. Circuit's interpretation of section 181 is unworkable and irrational, and has no basis in proper statutory construction. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). The D.C. Circuit should instead have deferred to EPA's reasonable interpretation of the Act.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted,

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