No. 99-1257

In The

Supreme Court of the United States

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

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL DEFENSE, ET AL. ON BEHALF OF PETITIONERS

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July 21, 2000

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INTEREST OF *AMICI CURIAE*

Amici curiae Environmental Defense (formerly Environmental Defense Fund), Clean Air Council, East Michigan Environmental Action Council, Environmental Law and Policy Center of the Midwest, Hoosier Environmental Council, Inc., Illinois Environmental Council, The Izaak Walton League of America, Inc., Legal Environmental Assistance Foundation, Inc., Michigan Environmental Council, Ohio Citizen Action, The Ohio Environmental Council, Southern Environmental Law Center, Tennessee Environmental Council, and Valley Watch, Inc., are fourteen not-for-profit organizations working to improve public health and environmental quality throughout the United States. Environmental Defense, et al. seek healthier air quality on behalf of their many thousands of members who live and raise families in communities across the country that have air pollution concentrations in excess of the ozone and particulate matter standards under review in this case.[1]

SUMMARY OF ARGUMENT

The D.C. Circuit followed a constitutionally impermissible path in remanding, on nondelegation grounds, the regulations challenged in this case. Instead of determining whether the Clean Air Act provided an "intelligible principle" to guide the agency's exercise of its discretion, the D.C. Circuit scrutinized the agency's explanation for how it chose to set the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The D.C. Circuit's approach does not promote

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, and the corresponding documentation is simultaneously being filed with the Court.

the key purpose of the nondelegation doctrine – that core political decisions be made by Congress – and improperly constitutionalizes the requirement in the Administrative Procedure Act (APA) that an agency adequately explain its actions.

Moreover, the D.C. Circuit's insistence that EPA constrain its discretion in a manner that is binding on future Administrations places impermissible limits on how the democratic process functions. Its approach threatens the connection of administrative agencies to the political process, which legitimates administrative action.

Because it dispensed with any analysis of the statute, the D.C. Circuit overlooked the considerable guidance that sections 108 and 109 of the Clean Air Act give EPA on how to set the NAAQS. This guidance easily is more extensive and no less determinate than the guidance at issue in several cases in which the Court rejected nondelegation challenges, and clearly meets the Court's "intelligible principle" standard.

Finally, the D.C. Circuit was mistaken in holding that the nonattainment provisions of the Clean Air Act constrain EPA's authority to implement the challenged NAAQS for ozone. The D.C. Circuit believed that this conclusion was necessary to accord the same meaning to the same words used in different parts of the statute. In fact, however, this objective can be achieved only by concluding that the Clean Air Act does not constrain EPA's implementation authority. More generally, the structure of the nonattainment provisions compels the conclusion that EPA's authority to implement the challenged standard is not constrained. At the very least, EPA's interpretation to that effect is permissible and is not inconsistent with the clear intent of Congress.

ARGUMENT

I. THE D.C. CIRCUIT'S REMAND OF THE EPA REGULATIONS IS BASED UPON A CONSTITUTIONALLY IMPERMISSIBLE APPLICATION OF THE NONDELEGATION DOCTRINE

The D.C. Circuit's justification for remanding the challenged NAAQS bears no resemblance to any accepted application of the constitutional doctrine of nondelegation. The Court repeatedly has held that the most important purpose of the nondelegation doctrine is to ensure that core political decisions are made by Congress, and that where Congress delegates authority to an administrative agency it provides an "intelligible principle" to guide the exercise of the agency's discretion. See *Loving* v. *United States*, 517 U.S. 748, 771 (1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co.* v. *United States*, 276 U.S. 394, 409 (1928).

Despite the Court's clear articulation of these central concerns of the nondelegation doctrine, the D.C. Circuit did not even attempt to analyze the nature of the constraints *Congress* placed on the agency's exercise of discretion. Instead, it delved immediately into the *agency's* explanations for the choice it made pursuant to that discretion. The opinion states explicitly: "We begin with the criteria EPA has announced for assessing health effects in setting the NAAQS for non-threshold pollutants." Pet. App. 6a. The D.C. Circuit's holding similarly focused on EPA's exercise of its discretion: "We find that the construction of the Clean Air Act *on which EPA relied* in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power." Pet. App. 4a (emphasis added).

The D.C. Circuit's preoccupation with the agency rather than Congress – the institution that is the focus of the nondelegation doctrine's concern – is particularly problematic given the circuit's own admission that the approach it took does not serve "the third key function of non-delegation doctrine [sic]", which is to ensure " 'that important choices of social policy are made by Congress.' " Pet. App. 14a. (quoting *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (*Benzene*) (Rehnquist, J., concurring)). This "third" function, which the D.C. Circuit chose to leave unfulfilled, is the only rationale for the nondelegation doctrine on which the Court has consistently relied. See, *e.g.*, *Loving*, 517 U.S. at 771-72; *Touby*, 500 U.S. at 164-66; *Mistretta*, 488 U.S. at 371-73; see also Pet. App. 95a n.2 ("It is . . . only this so-called 'third' purpose . . . that has any connection to the doctrine's constitutional source.") (Silberman, J., dissenting from the denial of rehearing en banc).

In explaining why it was choosing a remedy that did not serve the key function of the nondelegation doctrine, the panel noted, citing *Mistretta*: "[W]e do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence [in the *Benzene* case]." Pet. App. 14a. But the nondelegation doctrine simply does not have a "weak" version that is served by setting aside regulations as well as a "strong" version that compels declaring statutes unconstitutional. There is only one nondelegation doctrine, and its focus is on the actions of Congress.

The D.C. Circuit advanced two rationales for ordering the agency to constrain its discretion: to discourage the agency from "exercis[ing] the delegated authority arbitrarily" and to promote "meaningful judicial review."

Pet. App. 14a. But both these goals are served by "arbitrary and capricious" review under the APA. See 5 U.S.C. § 706(2)(A); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97-98 (1983).[2] Given the broad oversight exercised by the courts pursuant to this APA provision, a further constitutionally based requirement designed to serve essentially the same purposes is wholly unnecessary.

Not only is the D.C. Circuit's approach to the nondelegation doctrine analytically unsound, but it is virtually unsupported by precedent. The D.C. Circuit repeatedly cited a prior decision, *International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1316-18 (D.C. Cir. 1991) (*Lockout-Tagout I*), in which it similarly misapplied the nondelegation doctrine to invalidate a regulation. See Pet. App. 11a-15a.

The only other case on which the D.C. Circuit relied, *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J., for a three-judge court), is inapposite. See Pet. App. 14a. Unlike the opinion below, Judge Leventhal's analysis began, as is appropriate under the nondelegation doctrine, with an exhaustive analysis of the legislative materials. See *Amalgamated Meat Cutters*, 337 F. Supp. at 747-58. Following this review, Judge Leventhal stated that administrative discretion also is confined by "the requirement that any action taken by the Executive under the law . . . must be in accordance with further standards as developed by the Executive." *Id.* at 758. Judge Leventhal viewed this requirement as one of "intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective." *Id.* at 759. Nowhere does the opinion state that

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[2] The Clean Air Act's judicial review provisions call for "arbitrary and capricious" review. See 42 U.S.C. § 7607(d)(9)(A).

the requirement of administrative explanation derives from the Constitution's nondelegation doctrine.

In fact, subsequent cases make clear that the requirement that agencies provide detailed explanations for their regulations is an integral part of "arbitrary and capricious" review under the APA, and, in particular, of the "hard look" doctrine. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983); *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980).

The intellectual foundation for the D.C. Circuit's approach appears to come from Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969).[3] Davis urged courts to "acknowledge that the nondelegation doctrine is unsatisfactory and to *invent* better ways to protect against arbitrary administrative power." *Id.* at 713 (emphasis added). Davis added that the purpose of the nondelegation doctrine "should no longer be either to prevent delegations of legislative power or to require meaningful statutory standards." *Id.*; see also *id.* at 725. Instead, he proposed shifting "[t]he focus of judicial inquiries . . . from statutory standards to administrative safeguards and administrative standards." *Id.* Like Davis, the D.C. Circuit freely acknowledged that under its approach, "[t]he agency will make the fundamental policy choices." Pet. App. 14a.

Davis' position had no doctrinal grounding at the time that it was made; his use of the term "invent" is revealing on this score. Moreover, the Court has never

[3] Although the only time that the D.C. Circuit cited the Davis article it gave it a "but see" signal, Pet. App. 76a, the approach of the court below bears a strong resemblance to Davis'.

accepted his invitation to reconceptualize the nondelegation doctrine, and has continued to view this doctrine as a constraint on congressional – not administrative – action.

In summary, as Judge Silberman stated, the D.C. Circuit's approach is "fundamentally unsound." Pet. App. 92a (Silberman, J., dissenting from the denial of rehearing en banc). The nondelegation doctrine cannot "be employed to force an agency to narrow a broad legislative delegation from Congress." *Id.*

II. THE D.C. CIRCUIT'S APPROACH IMPERMISSIBLY INTERFERES WITH THE PROPER FUNCTIONING OF THE DEMOCRATIC PROCESS

The D.C. Circuit's approach also places impermissible constraints on the democratic process. In its opinion on the petitions for rehearing, the panel majority made clear that no administrative explanation – no matter how well-reasoned or detailed – would satisfy its approach to the nondelegation doctrine unless it contained an express constraint on the agency's *future* discretion. For example, EPA had explained in the regulatory materials that it had set the annual standard for particulate matter on the basis of evidence of adverse health effects that was statistically significant at the 95th confidence level, and that it had set the ozone standards to protect against adverse health effects that were not transient. Pet. App. 73a & nn. 1-2; see *infra* Part III.B. The D.C. Circuit reacted to this argument as follows:

> To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a

> later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects.

Pet. App. 73a. Thus, the D.C. Circuit insisted that EPA's approach to these matters be frozen not only with respect to future NAAQS for ozone and particulate matter – the contaminants at issue in this case – but also for NAAQS for all other contaminants.

The D.C. Circuit's approach threatens an important source of the legitimacy of agency action: the connection of administrative agencies to the political process. As the Court has observed:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837, 865-66 (1984).

It is inconsistent with long-established norms concerning the role of administrative agencies to hold, as the D.C. Circuit did, that where Congress vests regulatory discretion in an agency, the first Administration that exercises this discretion is *required* to bind all future Administrations. Instead, if a statute does not prescribe a particular outcome, different Administrations should be able to exercise congressionally delegated discretion in different ways. See *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider . . . the wisdom of its policy on a continuing basis."); *State Farm*, 463 U.S. at 42 ("[R]egulatory agencies do not establish rules of conduct to last forever and . . . must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.") (citations omitted).

The Court has held that the APA requires an agency that changes a prior policy to explain the reasons for this change. See *State Farm*, 463 U.S. at 41-42. It has never held, however, that the Constitution prevents an agency from changing its policy altogether. Given the nature of the policy dispute in this case, such a position would be particularly destructive of the connection between agency action and political legitimacy. Should a future Administration that favors more stringent environmental regulation be precluded from regulating on the basis of a lower confidence level – say 90% instead of 95%? *Cf. National Lime*, 627 F.2d at 454 n.139 ("Agencies are not limited to scientific fact, to 95% certainties."). Or should such an Administration be barred from concluding that transient effects can be adverse? The D.C. Circuit's approach would compel affirmative answers to both these questions, contrary to the key reason why our constitutional scheme has periodic presidential elections: so that the voters can put in place Administrations that are responsive to their views.

III. SECTIONS 108 AND 109 OF THE CLEAN AIR ACT DO NOT RUN AFOUL OF THE NON-DELEGATION DOCTRINE

A. The Clean Air Act gives considerable guidance to EPA on how to set the NAAQS

The congressional delegation relevant to this case is primarily contained in sections 108 and 109 of the Clean Air Act. 42 U.S.C. §§ 7408, 7409. Section 108 – which the D.C. Circuit's panel majority overlooked altogether –

requires EPA to establish air quality criteria that will serve as the basis for the agency to then set the NAAQS under section 109.

Section 108(a)(1) requires the EPA Administrator to list the pollutants for which NAAQS will eventually be set. The Administrator must place on this list each air pollutant that meets two principal requirements:

> (A) [the] emissions of [the pollutant], in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; [and]
>
> (B) the presence of [the pollutant] in the ambient air results from numerous or diverse mobile or stationary sources.

42 U.S.C. § 7408(a)(1). Thus, only pollutants "which may reasonably be anticipated to endanger public health or welfare" can be regulated. Moreover, such pollutants can be regulated only if they have an effect on the "ambient air" – as opposed to, for example, on indoor air. Even pollutants that do have an effect on ambient air can be regulated only if they are produced by "*numerous or diverse* mobile or stationary sources." (emphasis added).

Following the listing of a pollutant, the Administrator must prepare air quality criteria. 42 U.S.C. § 7408(a)(2). The statute provides:

> 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.

42 U.S.C. § 7408(a)(2). Thus, such criteria must be based on "the latest scientific knowledge," and must indicate "all identifiable effects on public health and welfare." The statute also requires the consideration of interactions among pollutants.

Section 109(b)(1) prescribes the level at which primary NAAQS must be set:

> 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.

42 U.S.C. § 7409(b)(1). The statute therefore provides that the primary NAAQS must meet three requirements: they must be "based on" the air quality criteria developed under section 108, they must be "requisite to protect the public health," and they must provide "an adequate margin of safety."

In turn, section 109(b)(2) prescribes that the secondary standards must also be "based on" the air quality criteria and must be "requisite to protect the public welfare." *Id.* § 7409(b)(2). For the latter inquiry, both "known or anticipated" adverse effects must be taken into account. Section 302(h), moreover, contains a statutory definition of the term "public welfare," which requires

EPA to take account of an extensive set of factors in fashioning the secondary standards. See 42 U.S.C. § 7602(h).

Section 109 further requires the Administrator to review, at least at five-year intervals, the air quality criteria as well as both the health-based primary standards and the welfare-based secondary standards. In undertaking this review, the Administrator must "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 . . . and subsection (b) of . . . section [7409]". *Id.* § 7409(d)(1). Thus, the statutory requirements that govern the initial promulgation of the standards apply also to their revision.

The statute also prescribes an institutional structure to aid the Administrator in revising the criteria and standards. For this purpose, the Administrator must "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." *Id.* § 7409(d)(2)(A). This committee "shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate." *Id.* § 7409(d)(2)(B). If the regulations establishing the NAAQS depart in any important respect from the recommendations of this group, EPA must explain the reasons for such a departure. *Id.* § 7607(d)(3).

The Clean Air Act's legislative history provides further guidance on the level at which the NAAQS should be set. The report of the Senate Committee on Public Works stresses that concern with health effects must extend to particularly sensitive populations: "[I]ncluded among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." S. Rep. No. 91-1196, at 10 (1970). The report states, however, that the NAAQS "will not necessarily provide for the quality of air required to protect those individuals who are otherwise dependent on a controlled internal environment." *Id.*

The report makes clear that the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals. Under this approach, ambient air quality sufficiently protects sensitive populations if there is an "absence of adverse effect on the health of a statistically related sample of persons in sensitive groups." *Id.* The report further specifies that "a statistically related sample is the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air." *Id.*

Thus, the legislative history explains that the determination of adverse health effects must be made with respect to certain groups in the general population. It also explains what counts as a group for this purpose.

In summary, Congress gave considerable guidance to EPA on how to set the NAAQS. In failing to examine the nature of the legislative direction, the D.C. Circuit missed the central point of the nondelegation doctrine.

B. The D.C. Circuit's suggestion that EPA was free to set the NAAQS at any level between zero and the concentration of London's Killer Fog stems from a misunderstanding of the Clean Air Act

The preceding analysis of the legislative guidance shows that the D.C. Circuit was simply mistaken when it stated, with rhetorical flourish, that EPA is "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." Pet. App. 13a. The D.C. Circuit's characterization stems from an erroneous understanding of the statutory scheme, and in particular, of the trigger for revisions of the NAAQS, the manner in which adverse effects on public health are determined, and the types of sensitive populations that the standards are designed to protect.

The D.C. Circuit recognized that the London Killer Fog "led to 4,000 excess deaths in a week." Pet. App. 11a. It is difficult to imagine any plausible interpretation of the statutory command that would allow such a calamity. See 42 U.S.C. § 7409(b)(1) (NAAQS must be set at levels that "allowing an adequate margin of safety, are requisite to protect the public health").

Similarly, the Administrator would be able to set a standard of zero only if such a standard is "requisite to protect the public health," "allowing an adequate margin of safety." *Id.* The Clean Air Act's legislative history, discussed in Part III.A, *supra*, makes clear that even if some *individual's* health would be promoted by a standard of zero, the Administrator is precluded from promulgating such a standard if at this level there is no statistically significant evidence of an adverse health effect in a *population*.

An examination of the administrative record illustrates the nature of these constraints on EPA's discretion. In the case of ozone, EPA began, consistent with the legislative command, by defining the sensitive populations – the populations that experience adverse health effects at the lowest concentrations. EPA determined that three populations were particularly sensitive: active children, outdoor workers, and individuals with preexisting respiratory disease (for example, asthma or chronic obstructive lung disease). 61 Fed. Reg. 65,716, 65,721-22 (1996).

The agency then considered what should count as an "adverse health effect" for these sensitive populations. To make this determination, EPA looked to guidelines published by the American Thoracic Society, which used the following definition:

> [M]edically significant physiologic or pathologic changes generally evidenced by one or more of the following: (1) Interference with the normal activity of the affected person or persons, (2) episodic respiratory illness, (3) incapacitating illness, (4) permanent respiratory injury, and/or (5) progressive respiratory dysfunction.

Id. at 65,722; see 62 Fed. Reg. 38,856, 38,860 (1997).

In justifying a need for a revision of the existing standard pursuant to section 109(d), see Part III.A, *supra*, EPA noted that "a significant body of information" that became available after the promulgation of the ozone NAAQS then in effect provided "clear evidence from human clinical studies" of adverse health effects at concentrations permitted by the then-existing standard. 61 Fed. Reg. at 65,727; see 62 Fed. Reg. at 38,859.

One of the ways in which EPA revised the NAAQS for ozone was to extend the averaging period from 1 hour to 8 hours on the ground that "[t]he 8-hour averaging

time is more directly associated with health effects of concern at lower [ozone] concentrations than is the 1-hour averaging time." 61 Fed. Reg. at 65,727; 62 Fed. Reg. at 38,861. This change reflects the conclusion that a high concentration during one hour might not cause adverse health effects if it is followed by sufficiently lower concentrations in subsequent hours.

Because under an 8-hour averaging period a high concentration during one hour can be offset by a sufficiently lower concentration in other portions of the 8-hour period, EPA determined that the 1-hour 0.12 parts per million (ppm) standard then in effect was essentially equivalent to a 0.09 ppm standard with an 8-hour averaging period. See 61 Fed. Reg. at 65,729; see also *id.* at 65,725, 65,728; 62 Fed. Reg. at 38,864.

EPA then determined that a standard of 0.08 ppm was preferable to one of 0.09 ppm in light of the statutory mandate of section 109(b). First, children active outdoors would experience significantly higher decreases in lung function and pain on deep inspiration under a standard of 0.09 ppm as compared to a standard of 0.08 ppm. Under a standard of 0.09 ppm between 40 and 65 percent more children would experience such effects, and there would be 120 percent more yearly occurrences of such effects. These percentages would translate into tens of thousands of more affected children and hundreds of thousands more yearly occurrences. Second, a risk assessment revealed that a 0.09 ppm standard would result in 40 more yearly hospital admissions for respiratory causes of asthmatics in New York City alone (a 40 percent increase). Third, a standard of 0.09 ppm would allow more than three times as many children to experience exposures of concern. Fourth, EPA determined that these

examples were indicators of public health impacts in the broader population. See 62 Fed. Reg. at 38,867-68.

Moreover, as Judge Tatel discussed at length in his dissent, EPA determined that setting the standard at a more stringent level – 0.07 ppm – was unwarranted under section 109(b). Pet. App. 64a (Tatel, J., dissenting). He observed that no single member of EPA's scientific review committee had recommended setting the standard below 0.08 ppm. *Id.* He also pointed to EPA's explanation that the adverse health effects below 0.08 ppm were qualitatively different. *Id.*; see 62 Fed. Reg. at 38,868 (at a level of 0.07 ppm, the most serious adverse health effects of ozone "are less certain, both as to percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects"); see also Pet. App. 64a-65a (Tatel, J., dissenting) (referring to EPA's additional technical explanation for its decision).

EPA followed a comparable approach in revising the NAAQS for particulate matter (PM). It defined five categories of sensitive populations: (1) individuals with respiratory and cardiovascular disease, who are at greater risk of premature mortality and hospitalization; (2) individuals with infectious respiratory disease, who are at greater risk of premature mortality and morbidity; (3) elderly individuals, who are at greater risk of premature mortality and hospitalization for cardiopulmonary causes; (4) children, who are at greater risk of increased respiratory symptoms and decreased lung function; and (5) asthmatic children and adults, who are at risk of more serious symptoms. See 61 Fed. Reg. 65,638, 65,644 (1996).

EPA justified the need for revising the NAAQS for particulate matter as follows:

> [S]ince the last review of the PM criteria and standards, the most significant new evidence on the health effects of PM is the greatly expanded body of community epidemiological studies. The Criteria Document stated that these recent studies provide "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban airsheds even at concentrations below current U.S. PM standards."

61 Fed. Reg. at 65,641; see 62 Fed. Reg. 38,652, 38,655 (1997).

EPA paid considerable attention to how the standard should be derived from the epidemiological studies. The Administrator based the annual standard on the level at which the concentration of particulate matter was linked to statistically significant increases, at a 95% confidence level, see Part II, *supra*, in the risk of adverse health effects across a number of study locations. See 62 Fed. Reg. at 38,676; 61 Fed. Reg. at 65,641-44.

In summary, EPA's discretion was constrained by the legislative direction of the Clean Air Act. The agency followed the congressional direction in finding a need for revising the existing standards and for determining that more stringent standards were necessary to fulfill the statutory mandate in section 109(b). EPA was also constrained by the legislative command to protect populations rather than individuals. The preceding analysis thus clearly establishes that the D.C. Circuit erred in suggesting that the Clean Air Act permits EPA to set the NAAQS

at any level between a concentration of zero and the concentration present during the London Killer Fog.

C. The Court's jurisprudence establishes that the Clean Air Act does not violate the nondelegation doctrine

In the over 200 years of its history, the Court has struck down a statute on nondelegation grounds in only two cases. See *Mistretta*, 488 U.S. at 373. These cases, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), were both decided in 1935 and both involved challenges to the National Industrial Recovery Act (NIRA) – one of the economic recovery statutes of the New Deal. Both are inapposite for reasons discussed in Part III.D, *infra*.

Since 1935 the Court has validated broad delegations in a variety of areas. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 746, 785-86 (1948) (recovery of "excessive profits" under the Renegotiation Act); *Yakus* v. *United States*, 321 U.S. 414, 420, 426-27 (1944) (establishment of "fair and equitable prices" under the Emergency Price Control Act); *National Broad. Co.* v. *United States*, 319 U.S. 190, 215, 225-26 (1943) (regulation pursuant to a "public interest, convenience, or necessity" standard under the Communications Act). In each of those cases, Congress provided guidance that was less extensive and no more determinate than that provided by sections 108 and 109 of the Clean Air Act, as described in Part III.A, *supra*.

In one of the more recent nondelegation cases, *Touby v. United States*, 500 U.S. at 160, the Court unanimously upheld a delegation that employed guidance similar to that at issue here. *Touby* involved a delegation to the Attorney General under the Controlled Substances Act to

establish categories or "schedules" of controlled substances that are to be regulated by the Act. The statute authorized the Attorney General to schedule a substance through an expedited procedure when doing so is "necessary to avoid an imminent hazard to the public safety." *Touby*, 500 U.S. at 163 (quoting section 201(h) of the Act).

Citing *Lichter*, *Yakus*, and *National Broadcasting*, the Court stated that in light of its nondelegation precedents "one cannot plausibly argue that [the] 'imminent hazard to the public safety' standard is not an intelligible principle." *Id.* at 165. By comparison, the terms "endanger public health or welfare" in section 108 of the Clean Air Act, and "requisite to protect the public health" and "requisite to protect the public welfare" in section 109 are no broader than the "imminent hazard to the public safety" standard upheld in *Touby*. Moreover, the other forms of congressional guidance contained in the Clean Air Act and discussed in Part III.A, *supra*, were absent in *Touby*.

Furthermore, the Court held that the delegation at stake in *Touby* "passes muster even if greater congressional specificity is required in the criminal context." *Id.* at 166. In contrast, under sections 108 and 109 of the Clean Air Act, which do not give rise to risks to individual liberty, such heightened congressional guidance is not required.

Only four years ago, in *Loving* v. *United States*, 517 U.S. 748 (1996), the Court unanimously reemphasized the breadth of permissible delegations: "Though in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms." *Id.* at 771.

The Clean Air Act's guidance – the constraints on the reach of agency authority in section 108, the statutory

standards in section 109, the required consultation with expert scientists, the definition of public welfare in section 302(h), and the legislative history's determination of what groups should be protected by the NAAQS – is considerable. Certainly, the grant of legislative authority in the Clean Air Act provides no warrant for departing from more than half a century of consistent practice upholding congressional delegations.

D. The D.C. Circuit's reliance on *Schechter Poultry* is misplaced

The panel majority's arguments casting doubt on the constitutionality of the congressional delegation rely primarily on *Schechter Poultry*. See Pet. App. 12a. None of these arguments, however, has any merit.

The D.C. Circuit stated that "[t]he standards in question affect the whole economy, requiring a 'more precise' delegation than would otherwise be the case." Pet. App. 12a. Like almost all regulations, the NAAQS "affect the whole economy" in the sense that they affect the price of certain goods, which in an interrelated economy, may affect the prices of other goods and services. But the NAAQS regulate only the concentration of air pollution, and as discussed in Part III.A, *supra*, apply only to a subset of air pollutants, only to pollutants in ambient air, and only to pollutants emitted by certain types of sources. That is a far cry from the all-encompassing, multifaceted delegation of the NIRA, which gave the President the authority to establish "codes of fair competition" governing a broad set of issues, including wages and hours as well as marketing and competitive practices for a broad set of industries. See *Schechter Poultry*, 295 U.S. at 521-24; *Panama Refining*, 293 U.S. at 405-10.

Furthermore, the delegation under the Clean Air Act does not exhibit the features that were problematic in *Schechter Poultry*. First, there is no delegation to private individuals. See *Mistretta*, 488 U.S. at 373 n.7; *Yakus*, 321 U.S. at 424; *Schechter Poultry*, 295 U.S. at 537.

Second, the D.C. Circuit itself acknowledged that EPA's interpretation of the terms "endanger public health" in section 108(a)(1)(A) and "requisite to protect the public health" in section 109(b)(1) is informed by the meaning these terms have in the medical community. See Pet. App. 15a-16a. In contrast, in *Schechter Poultry*, the concept of "fair competition" had no meaning that could be ascertained from external sources. See *Schechter Poultry*, 295 U.S. at 531-33.

A third problem with the NIRA was the absence of administrative procedures, which made it difficult for the courts to assess how the President had carried out his delegated discretion. See *Schechter Poultry*, 295 U.S. at 533-34; *Panama Refining*, 293 U.S. at 431-32. The Clean Air Act, in contrast, contains extensive procedural protections. Section 307(d) requires the Administrator to follow notice-and-comment rulemaking procedures that are more extensive than those prescribed in the APA. Compare 42 U.S.C. § 7607(d)(2)-(7) with 5 U.S.C. § 553(b)-(c). For example, section 307(d) requires EPA to establish a "rulemaking docket" open to the public; to place in this docket communications with the Office of Management and Budget pursuant to any interagency review process; and to provide interested persons with an opportunity for "oral presentation of data, views, or arguments." 42 U.S.C. § 7607(d)(2), (4)(A), 4(B)(ii), (5). Moreover, as discussed in Part III.A, *supra*, the Administrator must appoint an independent scientific committee to review and recommend revisions to the criteria documents and

the NAAQS, and must explain her reasons for departing from the committee's recommendations. See 42 U.S.C. §§ 7409(d)(2), 7607(d)(3).

In summary, the Clean Air Act does not present any of the problems that led the Court to declare unconstitutional the delegation at issue in *Schechter Poultry*.

E. The D.C. Circuit also is mistaken in maintaining that broad delegations are permissible only in special circumstances

The D.C. Circuit also suggested that this case is unlike ones in which broad delegations were upheld because it does not involve " 'special theories' justifying vague delegations such as the war powers of the President or the sovereign attributes of the delegatee." Pet. App. 12a. But, as discussed in Part III.C, *supra*, in recent years, the Court has upheld broad delegations in cases that do not implicate such "special theories." See, *e.g.*, *Touby*, 500 U.S. at 165-67 (delegation to the Attorney General to designate controlled substances); *Mistretta*, 488 U.S. at 371-79 (delegation to the U.S. Sentencing Commission to promulgate sentencing guidelines).

IV. THE D.C. CIRCUIT ERRED IN HOLDING THAT EPA'S AUTHORITY TO IMPLEMENT THE 8-HOUR OZONE STANDARD IS CONSTRAINED BY SECTION 181 OF THE CLEAN AIR ACT

A brief review of the structure of the nonattainment provisions of the Clean Air Act reveals why the D.C. Circuit was mistaken in holding that section 181 constrains EPA's authority to implement the 8-hour ozone

standard of 0.08 ppm promulgated in 1997.[4] The Clean Air Act's nonattainment provisions govern the regulation of areas that do not meet the NAAQS. Subpart 1, entitled "Nonattainment Provisions in General," applies to all of the pollutants for which EPA has promulgated NAAQS. See 42 U.S.C. §§ 7501-7509a. Subparts 2 through 5 deal with additional pollutant-specific provisions. See *id.* §§ 7511-7514a. In particular, Subpart 2, entitled "Additional Provisions for Ozone Nonattainment Areas," applies to ozone. See *id.* §§ 7511-7511f.

Both the general provisions of Subpart 1 and the specific provisions of Subpart 2 prescribe dates by which the NAAQS must be attained. In Subpart 1, section 172(a)(2) provides, in language added by the 1990 amendments, that primary standards must be met

> as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation of nonattainment . . .

Id. § 7502(a)(2)(A). (Two additional one-year extensions are also possible. *Id.* § 7502(a)(2)(C).) Section 172(a)(2) also requires that secondary standards be met "as expeditiously as practicable" but imposes no outside limit on that time. *Id.* § 7502(a)(2)(B).

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[4] This brief focuses on the merits rather than the justiciability of the implementation issues. *Amicus* Environmental Defense has argued before the lower courts that EPA did not resolve important implementation issues in the NAAQS rulemaking with finality. See *Environmental Defense Fund* v. *Browner*, No. 98-1363 (D.C. Cir.); *Idaho Clean Air Force* v. *EPA*, Nos. 99-70289 & 99-70576 (9th Cir.).

In addition, section 172(a)(2) defines when the attainment dates in Subpart 1 are inapplicable: "This paragraph shall not apply with respect to nonattainment areas for which attainment dates are *specifically provided* under other provisions of this part." *Id.* § 7502(a)(2)(D) (emphasis added). As exceptions to the general rule of section 172, provisions containing such attainment dates must be construed narrowly. See *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989).[5]

Section 181 in Subpart 2, which was also added by the 1990 amendments, contains such "specifically provided" attainment dates: "[T]he primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." *Id.* § 7511(a)(1). The outside time limits for attainment contained in table 1 range from 3 years after November 15, 1990, in the case of areas in which the level of nonattainment is "marginal" to 20 years after November 15, 1990, in the case of areas in which the level of nonattainment is "extreme." *Id.*

Section 181(a)(1), however, provides only "the *primary standard* attainment date." 42 U.S.C. § 7511(a)(1) (emphasis added). Because attainment dates for the secondary standards are not "specifically provided" in section 181 or elsewhere in Subpart 2, the attainment of such standards is governed by the general provisions of section 172(a)(2) in Subpart 1. Thus, nothing in section 181 can constrain EPA's authority to require attainment of the secondary standards "as expeditiously as practicable." In

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[5] Thus, this is not a situation in which the statute contains a general provision and a specific provision but does not specify how they interrelate. The canon that "the specific governs the general" is therefore inapplicable. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

granting in part the petition for rehearing, the D.C. Circuit recognized as much, retracting an inconsistent conclusion in the original panel opinion: "Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS 'as expeditiously as practicable.' " Pet. App. 80a-81a.

Moreover, the attainment dates in section 181 apply to only one primary standard for ozone: the 1-hour primary standard of 0.12 ppm, which was the only ozone NAAQS in effect in 1990 at the time section 181 was added to the Clean Air Act. See 44 Fed. Reg. 8202 (1979) (codified at 40 C.F.R. § 50.9(a)). Indeed, the outside time limits for attainment contained in table 1 classify nonattainment areas by reference to the amount by which their ambient air quality levels – referred to as "design value[s]" in the statute – exceed the 0.12 ppm standard. See 42 U.S.C. § 7511(a)(1). So, for example, if EPA were to revise the 1-hour standard to 0.10 ppm, the outside time limits for areas with design values between 0.10 ppm and 0.12 ppm simply could not be determined on the basis of table 1, since the table does not provide such time limits – "specifically" or otherwise – for areas with concentration below 0.12 ppm.

Even with respect to areas with design values higher than 0.12 ppm, the congressional balancing between environmental protection and economic growth reflected in the outside time limits for attainment in table 1 would no longer be applicable. This balancing was performed for a standard of 0.12 ppm and would not necessarily be the same if subsequent information, giving rise to the promulgation of the more stringent standard of 0.10 ppm, revealed that the environmental problem was more serious than was known at the time of the adoption of the 0.12 ppm standard.

There is another reason why the scheme in section 181 cannot apply to the standard under review. The 0.12 ppm standard in effect at the time of the 1990 amendments used a 1-hour averaging period. 44 Fed. Reg. at 8218. (For this reason, it is referred to as the 1-hour standard.) In contrast, the NAAQS under review uses an 8-hour averaging period. 62 Fed. Reg. at 38,861-63. The ambient air quality levels computed under these different averaging periods are not directly comparable.

As indicated in Part III.B, *supra*, if two ambient standards prescribe the same maximum permissible concentration but have different averaging periods, the standard with the longer averaging period is the less stringent one. Lower concentrations during part of the longer period can offset higher concentrations during another part of that period in a way that would not be possible if the averaging period were shorter. If after section 181 was enacted, EPA had retained the 0.12 ppm level but extended the averaging period to 8 hours, there is no reason to believe that Congress would have wanted to apply the outside time limits set forth in section 181 to these less stringent standards. It might, for example, have believed that the less stringent standards should be attained in shorter time periods.

The D.C. Circuit's principal argument in support of its conclusion that section 181 in Subpart 2 constrains EPA's authority to implement the 8-hour standard of 0.08 ppm is wholly without merit. According to the D.C. Circuit, great weight must be placed on the fact that section 181(a)(1) in Subpart 2 makes a reference to section 107(d), 42 U.S.C. § 7407(d): "Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, . . . based on the

design value for the area." 42 U.S.C. § 7511(a)(1); see Pet. App. 37a-43a, 79a-80a. The D.C. Circuit reasoned that if section 181 was intended to apply only to the NAAQS for ozone in effect at the time of the 1990 amendments, the reference in section 181 would have been, instead, to section 107(d)(1)(C) and (d)(4). See Pet. App. 38a-42a, 79a-80a. Both section 107(d)(1)(C) and (d)(4) deal with the designation of nonattainment areas immediately following the 1990 amendments: section 107(d)(1)(C) applies generally whereas section 107(d)(4) specifically covers ozone. See 42 U.S.C. § 7407(d)(1)(C), (d)(4).

The argument conerning the reference to section 107(d) is far from convincing because it would strain neither logic nor the English language to read the reference to section 107(d) as applying only to the portions of section 107(d) that are relevant to the setting of the attainment dates under section 181. For example, it would not be unnatural to say that section 110 of the Clean Air Act constrains interstate pollution that contributes to the nonattainment of the NAAQS when in fact this requirement is to be found in section 110(a)(2)(D)(i)(I). See 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Moreover, as the preceding discussion shows, the application of section 181 to ozone NAAQS other than the 1-hour 0.12 ppm standard in effect at the time of the 1990 amendments would give rise to a number of illogical results. The reference to section 107(d) cannot trump the analysis showing why section 181(a)(1) does not "specifically provide[ ]" attainment dates for other ozone NAAQS, particularly since there is a plausible interpretation of this reference that avoids such illogical results. Neither should this reference be read to stand in the way of EPA's authority to implement standards that it revises, pursuant to congressional direction, under section 109(d).

Finally, a more searching statutory inquiry wholly disposes of the D.C. Circuit's core argument. Section 172, like section 181, refers to the "designation of an area as a nonattainment area pursuant to section 7407(d)." 42 U.S.C. § 7502(a)(1)(A); see *id.* § 7502(a)(2)(A). But, the references to section 107(d) designations in section 172 cannot possibly refer to section 107(d)(1)(C) and (d)(4), which apply to the designations for the 1-hour ozone standard in effect at the time of the 1990 amendments. Unquestionably, the classifications and corresponding attainment dates for the pre-existing 1-hour 0.12 ppm ozone NAAQS are "specifically provided" for these areas in section 181 of Subpart 2.

Therefore, the reference to section 107(d) contained in section 172 cannot refer to all of section 107(d). Instead, it must refer only to those portions of section 107(d) that are relevant to the establishment of attainment dates under section 172: section 107(d)(1)(A), (B) and (d)(3). See 42 U.S.C. § 7407(d)(1)(A), (B), (d)(3). It follows that the reference to section 107(d) contained in section 181 should be interpreted, in the same way, to mean only the portions of section 107(d) – namely, subsections (d)(1)(C) and (d)(4) – that are relevant to the establishment of attainment dates under section 181.

The D.C. Circuit correctly invoked the standard canon of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " Pet. App. 80a (citing *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995)). But the D.C. Circuit erred in applying the canon: the only way that the references to section 107(d) in section 172 and 181 can be given the same meaning is by interpreting these references to apply only to the portions of section 107(d) that

are relevant for the establishment of the attainment dates under the respective provisions.

In summary, an understanding of the structure of the nonattainment provisions of the Clean Air Act compels the conclusion that section 181 does not constrain EPA's authority to implement the 8-hour standard of 0.08 ppm promulgated in 1997. At the very least, it follows that EPA's interpretation to that effect is permissible and not inconsistent with the clear intent of Congress. See 62 Fed. Reg. at 38,884-85. Thus, *Chevron*, 467 U.S. at 842-43, requires courts to accord deference to this interpretation.

CONCLUSION

For the foregoing reasons the judgment of the D.C. Circuit should be reversed. The promulgation of the NAAQS for ozone and particulate matter did not give rise to any nondelegation problems and nothing in section 181 constrains EPA's authority to implement the ozone standard.

Respectfully submitted.

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July 21, 2000