No. 99-1257

IN THE SUPREME COURT OF THE UNITED STATES

CAROL M. BROWNER ADMINSTRATOR OF ENVIORONMENTAL PROTECTION AGENCY

V.

AMERICAN TRUCKING ASSOCTIATION INC

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENTS AMEIRCAN TRUCKING ASSOCIATIONS, INC., ET AL

FILED SEPTEMBER 11, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Whether the court of appeals correctly rejected the Environmental Protection Agency's standardless interpretation of Sections 108 and 109 of the Clean Air Act, and remanded for EPA to fashion and apply a proper interpretation of the Act.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Respondents, American Trucking Associations, Inc., *et al.*[1] Counsel for American Trucking Associations and fourteen other parties, as well as the Office of the Solicitor General, have consented by letter to the filing of this brief. Original letters of consent will be lodged with this Court. However, not all parties have responded, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest organization with thousands of supporters nationwide. Since its establishment in 1973, PLF has researched and litigated a broad spectrum of public interest issues. PLF advocates a balanced approach to agency rule making and believes that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved.

PLF devotes substantial resources to litigation involving environmental issues and becomes involved in cases that raise important public policy considerations that may create significant legal precedents. PLF is a frequent litigant in this Court and believes its public policy perspective in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

The California Chamber of Commerce (Chamber) is the largest and most broadly based employer representative in California with a membership base of more than 11,000

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

businesses. These businesses represent every sector of industry—small, medium, and large—and employ roughly 1.9 million people.

The California Chamber of Commerce recognizes the importance of clean air to protect human health and the environment; however, the Chamber has serious concerns about the economic impacts the Environmental Protection Agency's (EPA) revised National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone will have on California businesses. These rules have been promulgated despite the fact that California's air is significantly cleaner than it was 25 years ago and is getting better all the time. In addition, California is already operating under the most stringent air quality rules in the nation which places California businesses at a competitive disadvantage. These rules will only exacerbate this problem.

It will be more expensive for California to implement these rules than other states because of the incremental costs in making further emission reductions. Also, pollution controls like best available control technology, onerous permitting fees, and stringent enforcement practices will make operations more costly and complicated for businesses that are currently in compliance (or "attainment") areas, but will fall into non-compliance (or "nonattainment") areas because of the stricter rules.

Many of the new "nonattainment areas" have no experience in dealing with such stringent regulations, thus many businesses will move to "cleaner" districts or relocate to other states. In California alone, at least three areas will be added as "nonattainment areas" for particulate matter and ten others for ozone. These areas will have to develop plans by a specific date demonstrating how they will meet the new standards. If these areas do not comply, California could lose valuable highway funds. This will translate into job losses and reduced economic opportunities. Higher costs incurred by industries, including aerospace, electronics, energy, and pharmaceuticals, will only discourage new businesses and the expansion of existing facilities. One study predicts that California could lose

over 10,000 jobs. Moreover, according to the Reason Public Policy Institute, the new standards could cost California $9.1 billion to implement.

The Pacific Legal Foundation and the California Chamber of Commerce are particularly concerned about the unwillingness of EPA to consider impacts on small business and the lower court's determination that EPA must not consider costs and technological feasibility in setting air quality standards. This is particularly troubling because of concerns that the rules are not based on sound science.

According to the National Center for Policy Analysis (NCPA), *Brief Analysis*, No. 236, July 17, 1997, even members of EPA's own Clean Air Scientific Advisory Committee (CASAC) disagree on the need for stricter standards. Although the EPA Administrator claims the science supporting the new rules is indisputable, CASAC was split on what standards to set, if any. Some committee members thought "no standards are justified because there is no clear evidence that setting a standard would yield tangible health benefits." *Id.* at 2. The remaining members of the committee could not agree on whether current standards are too strict or not strict enough. *Id.*

Also, NCPA reports that the public never had an opportunity to review the relevant scientific data because the primary studies used to justify the ozone standards had not been released by the Harvard researchers—not even to the EPA. *Id.* Moreover, there is evidence that the new standards may have an adverse effect on public health and welfare.

Initially, the EPA estimated the new standard for particulate matter alone would save annually more than 40,000 people from premature death. *Id.* But later, the EPA "revealed that this figure is the total number of lives estimated to be saved by *all* clean air regulations." *Id.* Then the EPA claimed that 20,000 lives would be saved per year by the new particulate matter standard—50% less than its original estimate. *Id.* Three months after proposing the standard, "the EPA once again reduced its estimate after an outside researcher found a simple mathematical error in one of [EPA's] key studies." *Id.* "This time the EPA reduced the estimated lives saved by another 25

percent, to 15,000." *Id.* "The discovery of this error has led some analysts to question the EPA's entire statistical analysis." *Id.* It was Dr. Kay Jones, former senior advisor on air quality at the President's Council on Environmental Quality during the Carter administration, who discovered the error. Dr. Jones completely reanalyzed the EPA's estimates and concluded the number is closer to 840 lives saved. *Id.*

Moreover, ground-level ozone has health benefits EPA ignored. Ozone screens out potentially deadly ultraviolet radiation. *Id.* According to the Department of Energy, the required ozone reduction would: (1) "Increase malignant cancers, causing 25 to 50 new deaths a year;" (2) "Cause as many as 260 new cases of cutaneous melanoma and 11,000 new cases of nonmelanoma skin cancer;" and (3) "Cause between 13,000 and 28,000 new incidences of cataracts each year." *Id.*

Some analysts estimate that the revised ozone and PM rules "will eliminate 220,000 jobs and cost the average household about $1,200 per year in discretionary spending." *Id.* According to the American Thoracic Society, poverty is the number one risk factor for asthma; therefore, the new rules "will worsen health by increasing unemployment and lowering household income." *Id.* This is the conclusion of Dr. Wendy Gramm, former administrator of the Office of Regulatory Affairs in the United States Office of Management and Budget (OMB), and Susan Dudley, vice president and director of environmental analysis at Economists, Inc. *Id.* Based on OMB estimates "that for every $9 million to $12 million decline in aggregate personal income one life is lost and EPA cost estimates for the rules, Gramm and Dudley found that the new ozone standard alone could result in 7,000 deaths a year." *Id*

This is the type of balanced analysis the EPA should do, but has not done, to ensure its environmental regulations are reasonable and beneficial. Clearly, this case will set a precedent affecting numerous statutory schemes and literally millions of lives. Regulations that impose bureaucratically defined concepts for safety, environmental protection, or economic relationships must take into account the economic and social costs of those regulations.

For the foregoing reasons, Pacific Legal Foundation and the California Chamber of Commerce move to file a brief amicus curiae in this case.

DATED: September, 2000.

Respectfully submitted,

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STATEMENT OF THE CASE

The Clean Air Act sets up a scheme to regulate air pollutants the "emissions of which, in [the Administrator's] judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The Administrator must publish "air quality criteria" for these pollutants and establish national ambient air quality standards (NAAQS) based on these criteria. *See id.* §§ 7408-09. The standards are of two types—"primary" and "secondary." A "primary" standard indicates a concentration level "requisite to protect the public health" with an "adequate margin of safety." Whereas a "secondary" standard indicates a concentration level "requisite to protect the public welfare." *Id.* § 7409(b).

On July 18, 1997, the Environmental Protection Agency (EPA) adopted new, stricter national ambient air quality standards for ground-level ozone (smog) and particulate matter (soot). Public outcry over the severity of these standards resulted in congressional oversight hearings and scores of suits from industry, states, and other parties challenging the legality of the standards. Among others, the grounds for suit included an argument that the EPA construed Sections 108 and 109 of the Clean Air Act "so loosely as to render them unconstitutional." *American Trucking Associations v. Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*ATA*). The Court of Appeals agreed:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM [particulate matter] are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S.Ct. 348 (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and

> weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

ATA, 175 F.3d at 1034.

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, or pollutants that have some possibility of adverse health effects at any level above zero. Thus, the court found EPA's explanations for choosing one standard over another amounted to nothing more than assertions that stricter standards mean less pollution and less harm while less strict standards mean more pollution and more harm. According to the court:

> 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).

Id. at 1035.

Another ground for suit was the claim that the EPA must consider costs, technological feasibility, and other nonhealth factors in setting the ozone and PM standards. However, the court rejected this claim. Specifically, with respect to costs, the court held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d [1130,] 1148 (DC Cir. 1980)." *Id.* at 1040.

The court also rejected the argument that EPA erred in failing to consider detrimental health effects that are traceable to the cost of complying with the revised national ambient air quality standards. Citing a previous decision in the D.C. Circuit, the court held "it is only health effects relating to pollutants in the air that EPA may consider." *Id.* at 1041.

Nevertheless, the court did hold that EPA must consider not only the maleficent effects of a pollutant but also the beneficent effects. The court observed that the presence of ground-level ozone causes respiratory problems in some people but it also shields people from the deleterious effects of ultraviolet radiation that can cause certain forms of cancer. *Id.* at 1052.

Ultimately, the court determined that the standards not only violated the nondelegation principle but that the ozone standard could not be enforced due to restrictions in other provisions of the Clean Air Act. The court also invalidated the PM standard as arbitrary and remanded to the agency to select a new standard.

Both sides filed petitions for writ of certiorari in this Court. The EPA sought review of the nondelegation determination, among other things, while the opposing parties sought review of the scope of Section 109. Review was granted in both instances and separate briefing is required in each case. This case deals with the delegation issue.

SUMMARY OF THE ARGUMENT

Contrary to the claims of Petitioners, Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. Rather, the nondelegation doctrine is not satisfied because the authority granted EPA under the Clean Air Act is as sweeping as that struck down by this Court in *Schechter*. In addition, neither the EPA nor the Clean Air Act provide the Administrator with an "intelligible principle" to channel her discretion in setting NAAQS. And, as the court below found, because of a lack of a guiding principle, the Administrator acted arbitrarily when she adopted emissions standards for ozone and particulate matter.

However, to avoid the harsh remedy of invalidating the Clean Air Act, or one of its provisions, this Court should adopt a construction of the Act that avoids the constitutional conflict. In both *Greene* and *Yamasaki*, this Court "assumed that Congress intended" to afford those affected by the agency action certain constitutional safeguards. This Court read into

the statute or law a construction that avoided a constitutional issue. This rationale applies equally to the nondelegation doctrine. This Court should assume, as it did in *Greene* and *Yamasaki*, that, whether the statute expressly states so or not, Congress intended EPA to apply the Clean Air Act in a manner that would not allow EPA unfettered discretion to usurp the role of Congress in making the basic policy choices covered by the law. Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action. Therefore, Section 109 of the Clean Air Act requires the Administrator of the EPA to base her decisions on clearly articulable standards that demonstrate for the court that EPA is acting consistent with the will of Congress.

The court below believed an "intelligible principle" could be extracted from Section 109 of the Clean Air Act and even suggested some possibilities. One approach suggested by the court, the most practical approach, would involve a cost-benefit analysis. However, the court argued this approach was precluded by the cases in the D.C. Circuit that held EPA may not consider nonhealth factors in setting NAAQS. But these cases are wrong. They don't adequately account for the plain text of the Act that requires EPA to set emission standards with an "adequate margin of safety." Where a pollutant, such as ozone or particulate matter, poses a health risk at any level above zero, the EPA must consider nonhealth factors, including cost. For these reasons, this Court should require EPA to identify determinate and binding principles to guide the Administrator's decision making as to the level of emissions required to protect public health and safety and declare, as a matter of law, that cost-benefit analysis is such a principle.

ARGUMENT

Petitioners claim that "[b]ecause Section 109 [of the Clean Air Act] plainly satisfies the nondelegation doctrine, there is no need to consider . . . whether EPA should have read Section 109 more narrowly to avoid a constitutional issue." Brief for the Petitioners at 26 n.20. But Petitioners are wrong. Section 109, at least as interpreted by EPA, does not plainly satisfy the nondelegation doctrine; therefore, this Court should read the statute to avoid a constitutional issue.

I

THE CLEAN AIR ACT DOES NOT PLAINLY SATISFY THE NONDELEGATION DOCTRINE

The nondelegation doctrine is not satisfied in this case because (1) EPA exercises unprecedented power through the Clean Air Act; (2) neither the statute nor EPA provide any guiding principles for determining the level at which emission standards must be set; and (3) because of a lack of guiding principles, EPA has acted arbitrarily in setting NAAQS for ozone and particulate matter.

A. This Case Involves a Sweeping Delegation of Power on a Par with *Schechter*

In noting that this Court has only twice struck down a statute based on nondelegation—*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)—Kenneth Davis argues that the key may lie in the scope of the challenged law. As to the *Panama* case, "parts of the Act provided for 'delegation running riot.' " Kenneth Culp Davis, *Administrative Law Treatise* 176 (Second Printing 1979). And,

> [t]he *Schechter* case involved the most sweeping congressional delegation of all time. True, the standards, in the sense of the statutory phrases expressing policy, were the same as those in the *Panama* case–the statements in Title I of the National Industrial Recovery Act. But the delegation was not merely of a small power to determine whether and when a prescribed provision should become effective; the delegation included power to approve detailed codes to govern all business subject to federal authority. Not the vagueness of all the standards but the scope of the delegation distinguishes the *Schechter* case from all others. The Court's opinion is devoted mainly to discussion of standards, but the court did declare: "In view of the

> scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Id.

This case involves a similarly sweeping delegation. To meet its statutory mandate to establish NAAQS "requisite to protect the public health" with an "adequate margin of safety," the court below acknowledged that EPA could eradicate health risks by setting emission limits to zero, even if it meant dismantling the industrial state:

> A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty). First, PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero. *See* PM [EPA] Staff Paper at IV-1. Second, the combustion associated with pastoral life appears to be rather deadly. *See* World Bank, *World Development Report 1992: Development and the Environment 52* (1992) (noting that "biomass" fuels (i.e., wood, straw, or dung) are often the only fuels that "poor households, mostly in rural areas" can obtain or afford, and that indoor smoke from biomass burning "contributes to acute respiratory infections that cause an estimated 4 million deaths annually among infants and children").

ATA, 175 F.3d at 1038 n.4.

Likewise, in his article critiquing the case at bar, Michael Dimino alludes to the broad scope of agency power under the Clean Air Act and concludes:

> [T]he delegation to the EPA in the Clean Air Act authorizes the EPA to balance public health against the entire industrial economy. This exceeds any delegation of authority previously upheld under Article I.

Michael Richard Dimino, *D.C. Circuit Revives Nondelegation Doctrine . . . Or Does It?*, 23 Harv. J.L. & Pub. Pol'y 594 (Spring 2000). *See also City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290, 299 (1975) ("the desideratum should be safeguards proportionate to the grant; the larger the grant, the greater the safeguards required").

Thus without some intelligible principle to guide the Administrator's broad discretion under Section 109, the Clean Air Act—much like the statutory provisions involved in *Panama* and *Schechter*—does not plainly satisfy the nondelegation doctrine.

B. Neither the Statute Nor EPA Provide Any Guiding Principles to Determine the Level at Which NAAQS Must Be Set

What the court below found most troubling about the standard-setting process under Section 109 of the Clean Air Act was the Administrator's failure to articulate an "intelligible principle" to channel her consideration of the various factors she must weigh in setting NAAQS. *See ATA*, 175 F.3d at 1034. "The nondelegation doctrine," the court concluded, "requires such a principle." *Id.* As the court explained:

> Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

Id.

Although the court approved the factors the Administrator considers to establish NAAQS, such as the severity of effect, certainty of effect, and size of population affected, the court

believed these considerations did not go far enough in defining an acceptable level of risk.

> These criteria, long ago approved by the judiciary, *see Lead Industries Ass'n v. EPA*, 208 U.S. App. D.C. 1, 647, F.2d 1130, 1161 (D.C. Cir. 1980) ("*Lead Industries*"), do not themselves speak to the issue of degree.

ATA, 175 F.3d at 1035.

As the court points out, EPA is given to defending its decision not to adopt a more severe emission limit on the basis that there is greater uncertainty about health effects at the lower levels. In this case, for example, EPA claims it is inappropriate to reduce the ozone standard from 0.08 to 0.07 ppm because the more serious effects are less certain at the lower limit and the lower limit is closer to background levels. *Id.* at 1036. But, the court correctly observes that "the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much." *Id.* After all, the same could be said for the 0.08 ppm level as for the 0.07 ppm level. 0.08 ppm has less certain health effects than 0.09 ppm and it is closer to background levels too. The principle EPA invokes to set each level of emissions is, according to the court, simply that it is "possible, but not certain" that health effects exist at that level. *ATA*, 175 F.2d at 1036. But this principle could just as easily justify a standard of zero. *Id.*

In this case, EPA has provided no limiting principle, nor pointed to such a principle in the statute. Rather, EPA's explanations for its ozone and particulate matter standards amount to mere 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).

Id. at 1035.

The result of the EPA's indefinite approach to setting NAAQS is that the Administrator is "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog," whereby 4,000 deaths in one week are attributed to high levels of soot in the air. *Id.* at 1037. Thus, in the absence of an intelligible principle to guide the Administrator in setting NAAQS, the statute does not plainly satisfy the nondelegation doctrine.

C. Because of a Lack of Guiding Principles the EPA Acted Arbitrarily in Setting NAAQS for Ozone and Particulate Matter

In support of their claim that the Administrator is cabined by strict standards, Petitioners recite the complexity of the Clean Air Act, the opportunity for public input and the specific criteria that the Administrator must consider to set NAAQS. *See* Brief for the Petitioners at 24-25. But these factors do not go to the crucial question of degree (critical to the court below). Nor do they constitute a meaningful guide for, or constraint on, agency rule making as evidenced by the EPA's arbitrary adoption of ozone and particulate matter standards in this case. The court below had good cause to find the Administrator acted capriciously and remand the rules back to the agency for reconsideration and adoption of determinate and binding standards.

Although Petitioners imply the experts the Administrator consulted were supportive of her adoption of the 0.08 ppm ozone standard, nothing could be further from the truth. Section 109(d) of the Act establishes the Clean Air Scientific Advisory Committee or CASAC. This eminent scientific committee reviews the evidence on which the Administrator relies and makes recommendations for NAAQS. With respect to the ozone standard, however, the advisory committee was unable to make a scientific recommendation. Citing lack of conclusive studies and the fact that ozone is a nonthreshold pollutant that could have adverse health effects at any

concentration, the committee acknowledged the selection of an ozone standard above zero must be a matter of policy rather than science. Thus, the CASAC members offered only what they termed "personal preferences." Four experts favored an ozone standard of at least 0.09 ppm, whereas three experts favored 0.08 ppm, and one expert favored a range of 0.08-0.09 ppm. *See* Brief for Cross-Petitioners (related case 99-1426) at 7. The court below rejected the CASAC "recommendations" as baseless. *ATA*, 175 F.3d at 1035-36.

Moreover, the EPA refused to allow CASAC to review scientific literature that showed the positive health effects of ground-level ozone. Brief for Cross-Petitioners at 8. The United States Department of Energy sought to impress the importance of this literature on CASAC with testimony that the ozone standard proposed by the Administrator would produce approximately 2,000 to 11,000 additional cases of skin cancer per year, including 25 to 30 deaths per year, and 28,000 additional cases of cataracts annually. *Id.* at 9. The Office of Management and Budget also concluded that the adverse effects of the Administrator's ozone standard would be comparable in magnitude to the positive effects of the standard. *Id.* CASAC members expressed an interest in reviewing the literature on this subject and "EPA conceded that DOE's concern 'could be big,'" but the Administrator prohibited a consideration of the data. *Id.* This crabbed view of what the Clean Air Act required caused the circuit court to opine:

> [I]t seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only half of a substance's health effects in determining the maximum level of that substance.

ATA, 175 F.3d at 1052.

Scientific support for the EPA's particulate matter standard was no greater than that provided for ozone. CASAC was split on the level of emissions that should be regulated for certain types of particulate matter. With respect to fine particulate matter only two of the twenty-one experts on the advisory committee endorsed the standard proposed by the

Administrator while eight experts opposed any such standard. Brief for Cross-Petitioners at 15. According to the CASAC report, those in opposition "'were influenced, to varying degrees, by the many unanswered questions and uncertainties regarding the issue of causality,'" particularly the inconclusiveness of epidemiological studies on which the Administrator relied. *Id.*

Moreover, these epidemiological studies were not made available for public review and comment. Only after the regulations had been adopted and Congress demanded a review of the data did EPA submit the data to the Health Effects Institute (HEI) for re-analysis. HEI only recently released the results of its study, about three years after the EPA finalized its regulations. While EPA claims the data prove that particulate matter in the air is responsible for thousands of deaths each year, justifying onerous regulations and billions in costs, HEI was considerably less certain. The institute guardedly concluded: "[I]t is important to bear in mind that the results of our reanalysis alone are insufficient to identify causal relations with mortality." *Association of Particulate Matter Components with Daily Mortality and Morbidity in Urban Populations*, Part II, Sensitivity Analysis, Research Report 95, Health Effects Institute, 236 (August 2000).

Contrary to Petitioners' assertions, the statutory and administrative standards that apply to NAAQS do not cabin the discretion of the Administrator. To the contrary, her arbitrary selection of emission limits for ozone and particulate matter in this case demonstrates, as the lower court concluded, the danger inherent in a rule-making process that is not guided by a specific and intelligible principle. Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. Therefore, this Court should read the statute to avoid a constitutional conflict.

II

THIS COURT SHOULD READ THE STATUTE TO AVOID A CONSTITUTIONAL ISSUE

Petitioners recognize that the nondelegation doctrine is "'rooted in the principle of separation of powers.'" Brief for

Petitioners at 21 (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)). They also recognize that"'[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., art. I, § 1, and may not be conveyed to another branch or entity.' " Brief for Petitioners at 21 (quoting *Loving v. United States*, 517 U.S. 748, 758 (1996)). Nevertheless, the EPA Administrator asserts she may set National Ambient Air Quality Standards pursuant to her own policy preferences without pointing to any guiding principles to avert arbitrary decision making. According to the Administrator, the selection of NAAQS is "largely judgmental in nature" and she is obliged to follow "no generalized paradigm." 62 Fed. Reg. 38,688 (1997) (to be codified at 40 C.F.R. pt. 50).

Petitioners hold in disdain the lower court's determination that the Administrator must establish a " 'determinate criterion for drawing lines' " and suggest such a standard is contrary to the purpose of the nondelegation doctrine and requires EPA to "supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the 'right' level." Brief for the Petitioners at 26-27. But this hyperbolic reading of the decision below is inaccurate both as to the court's holding and the result of that holding.

The D.C. Circuit did not require EPA to set a "single principle" to control NAAQS or to satisfy the court's subjective belief as to the "right level" of emissions. Rather, the court directed EPA to develop "determinate, binding standards for itself" to reduce the likelihood that the Administrator will "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *ATA*, 175 F.3d at 1038. This is in full harmony with the purposes of the nondelegation doctrine and the precedents of this Court. This Court has said:

> Only if we could say that there is an absence of standards for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose
> . . . .

Mistretta, 488 U.S. at 379 (quoting *Yakus*, 321 U.S. at 425-26).

The "absence of standards for the guidance of . . . [agency] action" is apparent in this case. Under EPA's interpretation of the Clean Air Act, it is impossible for a court to determine whether the will of Congress has been obeyed. This is a clear violation of the nondelegation doctrine which would require overriding the statute. However, as the court below observed, the harsh result of invalidating the Act can be avoided by proper statutory construction—a construction that recognizes Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action.

Consider the case of *Greene v. McElroy*, 360 U.S. 474 (1959). In that case, this Court considered whether the President or Congress had delegated to the Department of Defense, in an industrial security program, the authority to deny an individual the opportunity to follow his chosen private profession without the safeguard of a fair hearing. The petitioner was general manager of a private corporation that developed for the Armed Forces goods involving military secrets. Under regulations adopted by the Secretary of Defense, petitioner was denied security clearance without access to adverse information or an opportunity to cross-examine witnesses that allegedly established his Communistic sympathies. Consequently, petitioner was fired and he was unable to obtain employment elsewhere. Petitioner sued claiming the revocation of his security clearance was unlawful.

The Secretary argued that the President has inherent authority to maintain military secrets inviolate and that a statutory grant of authority to revoke a security clearance without a full hearing may be inferred from congressional legislation dealing with the armed services. *Id.* at 495. However, this Court reframed the question:

> But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program.

Id. at 496.

After a recitation of certain principles that "have remained relatively immutable" in this Court's jurisprudence, such as the right to confront one's accusers, this Court found that neither the President nor Congress had expressly delegated to the Secretary authority to deprive a private contractor of his security clearance without a full evidentiary hearing. An explicit statement, this Court held, is constitutionally required.

> [I]t must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.

Id. at 507.

And further,

> [t]hey must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters v. Hobby*, supra, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Id.

However, this Court concluded that where administrative action raises serious constitutional questions, this "Court has assumed that Congress or the President intended to afford those affected by the action" traditional constitutional safeguards. *Id.* That is, this Court assumed a statutory construction that avoided a constitutional conflict, and read into the law a requirement for a fair hearing.

This reasoning is applicable to the case at bar. Like *Greene*, this case raises serious constitutional questions about congressionally delegated authority. As immutable as the right to confront one's accusers is the bedrock principle of separation of powers that is upheld by the nondelegation doctrine inherent in Article I. Indeed, as this Court has noted, the nondelegation doctrine is "rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. at 371. Thus, this Court may assume that Congress intended to afford those affected by the Clean Air Act the traditional constitutional safeguard of a legitimate delegation of power.

In *Greene*, this Court found a hearing is statutorily required for revocation of security clearance although no statute specifically required such. Likewise, this Court should find a requirement for a guiding principle in the establishment of NAAQS under the Clean Air Act.

This Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), which relied on *Greene*, further illustrates this point. *Yamasaki* involved a question of procedure under the Social Security Act. Section 204 of the Act authorized the government to recoup overpayments of social security benefits by adjusting future payments. The normal practice allowed the Secretary of the Department of Health, Education, and Welfare to make an *ex parte* determination of overpayment. Only after that determination would the recipient have an opportunity for an oral hearing, if the recipient requested it.

This Court found no express provision in the Act requiring a prerecoupment hearing. However, to avoid a constitutional conflict, this Court assumed that such a hearing is *statutorily* required.

> Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality, *see Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result), counsels against unnecessary constitutional adjudication. And if "a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), a court should adopt that construction. *In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary.* See *Greene v. McElroy*, 360 U.S. 474, 507-508 (1959).

Yamasaki, 442 U.S. at 692-93 (emphasis added; brackets in original).

Thus, this Court read into Section 204 of the Social Security Act a requirement of constitutional regularity that provided traditional safeguards but avoided the harsh remedy of invalidating the statute or one of its provisions. This rationale applies equally to the nondelegation doctrine. This Court should assume, as it did in *Greene* and *Yamasaki*, that whether the law expressly states so or not, Congress intended the Clean Air Act to be administered by EPA in a manner that would not allow EPA unbridled administrative discretion so as to usurp the role of Congress in making the basic policy choices covered by the law. Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action. Therefore, Section 109 of the Clean Air Act requires the Administrator of the EPA to base her decisions on clearly articulable standards that demonstrate for the court that EPA is acting consistent with the will of Congress.

III

AN INTELLIGIBLE PRINCIPLE CAN BE EXTRACTED FROM SECTION 109 OF THE CLEAN AIR ACT THAT CHANNELS THE EPA'S DECISION MAKING

Although the lower court found that EPA's interpretation of the Clean Air Act violated the nondelegation doctrine, the court remanded the case to the agency rather than invalidate the statute.

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. Lockout/Tagout I, 938 F.2d at 1313.

ATA, 175 F.3d at 1038.

Remand, the court said, serves the rationales of the nondelegation doctrine of reducing the likelihood that the agency will "exercise the delegated authority arbitrarily" and enhancing "the likelihood that meaningful judicial review will prove feasible." *Id.*

Although the court acknowledged the difficulties inherent in articulating an intelligible principle that will guide the Administrator in setting the level of emissions for NAAQS, the court was optimistic that EPA could find such a principle. Kenneth Davis is equally optimistic:

> The weakness of a judicial requirement of *statutory* standards is that legislators are often unable or unwilling to supply them. The strength of a judicial requirement of *administrative* standards is that, with the right kind of judicial prodding, the administrators can be expected to supply them.

Kenneth Culp Davis, *Administrative Law Treatise* 211 (Second Printing 1979).

The lower court even offered some suggestions. For example, the court seemed to approve a standard suggested by the dissent that emission limits reflect controllable human activity and not uncontrollable natural levels. The problem in this case was that the EPA never suggested it.

> EPA's language, coupled with the data on background ozone levels, may add up to a backhanded way of saying that, given the national character of NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively *extracting* chemicals from nature. That may well be a sound reading of the statute, but EPA has not explicitly adopted it.

ATA, 175 F.3d at 1027, 1036.

The court suggested the familiar "more probable than not" criterion might be appropriate in some cases and even recommended EPA take a close look at the standards utilized by the State of Oregon (which the court discussed at length) in establishing its health plan for the poor. *Id.* at 1039.

But the most practical standard the court suggested for an "intelligible principle" is a cost-benefit analysis. *Id.* at 1038. This approach would address the concerns of Respondents and avoid a constitutional conflict. The only problem the court found with this approach is the circuit's own cases that interpret Section 109 to bar EPA from considering any nonhealth factors in setting NAAQS. However, these cases are wrong.

As we argued in the companion case (99-1426) to this case, Section 109 of the Clean Air Act requires the EPA to set ambient air quality standards to protect public health and welfare, but with "an adequate margin of safety." That term implies discretion and requires the EPA to consider nonhealth factors. In interpreting a similar term under Section 112, that requires the EPA to set standards for hazardous pollutants with "an ample margin of safety," the D.C. Circuit Court of Appeals determined that term does not preclude the EPA from considering costs, technological feasibility, or other nonhealth

factors. *See Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1147 (D.C. Cir. 1987) (*Vinyl Chloride*). Rather, the court determined the text of the statute granted considerable discretion to the EPA to set emission standards and that such discretion is necessary because of the scientific uncertainty associated with determining a safe level of exposure for substances for which there may be no "risk-free" limit. The court held that a determination of what is "safe" must be made only with a consideration of health-related factors, but that the EPA had wide latitude in what it could consider to set the appropriate margin of safety.

The language of Section 109 is almost identical to the language of Section 112. Therefore, the term "adequate margin of safety" should be understood to mean, as with Section 112, that EPA can consider nonhealth factors in setting NAAQS. In fact, since ozone and particulate matter are considered "nonthreshold" substances—substances that may affect health at any exposure level above zero—it would be hard to credit how the EPA could set an "adequate margin of safety," except at zero emissions, without a consideration of nonhealth factors.

For these reasons, this Court should determine that EPA must extract an "intelligible principle" from Section 109 of the Clean Air Act to channel its decision making and that a cost-benefit analysis is, as a matter of law, such a principle.

CONCLUSION

Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. To the contrary, without an "intelligible principle" by which to measure the level of risk, the Act plainly violates the nondelegation doctrine. However, this Court can avoid a constitutional conflict by assuming, as it has in other cases, that Congress intended the EPA to apply the Clean Air Act in a constitutional manner; that is, with some

"intelligible principle" that would avert arbitrary agency action. Such a principle is the cost-benefit analysis. The Act does not preclude such analysis. It requires it.

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Respectfully submitted,

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