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.

BRIEFOF THE MANUFACTURERS ALLIANCE/MAPI INC., THE ALUMINUM ASSOCIATION, AND THE STEEL MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Filed September 11th, 2000

QUESTION PRESENTED

Whether the court of appeals correctly rejected the Environmental Protection Agency's standardless interpretation of Section 109 of the Clean Air Act, 42 U.S.C. § 7409 (1994).

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PERMISSION TO FILE AS *AMICI CURIAE*

This amicus curiae brief in support of Respondents is filed pursuant to Sup. Ct. R. 37.2. Letters of permission from each party have been filed with this Court.[1]

INTERESTS OF *AMICI CURIAE*

The Manufacturers Alliance/MAPI Inc. ("MAPI"),[2] the Aluminum Association, and the Steel Manufacturers Association were "industry associations" under the National Industrial Recovery Act of 1933, which this Court struck in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) ("Schechter Poultry").

These associations now represent corporations that are vitally concerned with the increased stringency of the National Ambient Air Quality Standards ("NAAQS") at issue in this case. The Clean Air Act ("Clean Air Act" or "CAA") grants the Environmental Protection Agency ("EPA") broad powers over states not attaining these standards. The states are forced to take action against businesses, local governments, and others – including placing sharp curbs on investment in new plant and

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its member, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] MAPI filed an amicus brief in support of Respondents' cross-petition for certiorari, in which MAPI provided a more detailed statement of MAPI's history and interest in the delegation doctrine.

equipment. If a state fails to take action needed to comply with the NAAQS, the EPA will impose sanctions on the state government and on private economic activity. 42 U.S.C. §§ 7503(a)(4), 7509 (1994). By tightening the NAAQS pursuant to its own policy judgment, the EPA has thrown much of the nation into long-term "nonattainment" and thereby increased its power with serious adverse consequences for the nation and members of MAPI.

The authors of this brief have filed amicus briefs in three previous cases implicating the delegation doctrine, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Raines v. Byrd*, 521 U.S. 811 (1997); *Loving v. United States*, 517 U.S. 748 (1996), to delineate the history, purposes, and constitutional significance of the delegation doctrine. They write this brief on behalf of MAPI, the Aluminum Association, and the Steel Manufacturers Association to explain how the delegation doctrine applies to this case.

One of the authors of this brief, Professor Schoenbrod, has a special relationship to the issues in this case, as he successfully represented environmental organizations throughout the 1970s in a series of cases that culminated in *Lead Industries Ass'n. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 1042 (1980) ("Lead Industries"), a precedent upon which the EPA critically and futilely relies. Schoenbrod argued for an interpretation of the Clean Air Act in the 1970s on behalf of environmental groups that is contrary to the EPA's claim in this case that it may choose the extent to which it protects public health

and thus the scope of its power over the states and the nation. *See infra.*

SUMMARY OF ARGUMENT

This case offers a classic example of the self-aggrandizement by government officials feared by the Framers of the Constitution. As James Madison stated, "[t]he truth was that all men having power ought to be distrusted to a certain degree."[3] The delegation doctrine is a fundamental separation of powers principle that requires the legislative branch to make the laws. In Montesquieu's words, which were taken seriously by the Framers: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Baron de Montesquieu, *The Spirit of Laws*, Book XI, part 6 (G. Bell & Sons, ed., London 1914).

The Framers' fundamental understanding of human nature continues to be relevant. Because the country is coming into increasing compliance with existing NAAQS, EPA is losing its power over areas designated in "attainment" with the NAAQS. By tightening those standards

[3] James Madison, *Notes of Debates in the Federal Convention of 1787* 272 (Adrienne Koch ed., Ohio Univ. Press 1966); *see also id.* at 266 ("From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it.") (statement of Col. George Mason)).

and thereby sharply raising the bar for attainment, it is attempting to renew its waning power.

One of the ways that the Framers sought to curb self-aggrandizement by officials was to require that "[a]ll legislative Powers herein granted shall be vested in a Congress . . . " U.S. Const., art. I, § 1. The delegation doctrine is a constitutional norm that reflects the letter of Article I, Section 1, and that prohibits unelected, unaccountable agency officials from unbounded discretion to impose regulations. In this case, the delegation doctrine is a powerful constitutional tool that should inform this Court's interpretation of Section 109 of the Clean Air Act. 42 U.S.C. § 7409 (1994).

The plain language, structure, and history of the Clean Air Act as well as common sense dictate a narrower interpretation of the statute than the EPA invoked. "Protect public health" in the CAA does not grant the EPA carte blanche to protect health to the extent it chooses, but rather only to protect health from *significant* risk. *See infra*. This correct and more reasonable interpretation pegs the EPA's authority to Congress's policy determination, satisfies this Court's delegation doctrine, and therefore corrects the constitutional violation found by the court below. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"). The EPA sidled towards this interpretation of the Act only after losing in the court below.[4] The EPA's last-

[4] In this Court, the Administrator has implied that she considers the significance of risks by stating that "the health effects justifying a NAAQS must be 'adverse' in the sense that they are medically significant and not merely detectable." EPA Br. 24 (internal citation omitted); *see also* EPA Cert. Pet. 15 (same). But during the rulemakings below, she asserted the right to render decisions that do *not* address "what risk is 'acceptable,' " through quantification "or any other metric;" that are based on "no generalized paradigm;" that are thus "largely judgmental in nature." 62 Fed. Reg. at 38,688 (PM), 38,883 (ozone) (1997). In the court of appeals, she continued to insist that "nothing in the statute requires [her] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Br. in 97-1441, at 43 (emphasis added). She specifically rejected the need to determine that there is a "significant risk of harm." *Id.* at 42.

minute conversion cannot redeem the rulemaking before this Court in this case, which was based on a constitutionally fatal interpretation of the CAA.

ARGUMENT

I. CONGRESSIONAL DELEGATION AND THE DELEGATION DOCTRINE

This Court's delegation doctrine requires that, at a minimum, Congress identify an "intelligible principle" to guide the exercise of delegated legislative power. *See, e.g., Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Schechter Poultry*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) ("Panama Refining"); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("J.W. Hampton"). The doctrine goes to the heart of the Constitution's separation of powers and, especially Congress's role in Article I, the plain language of which reposes all lawmaking authority solely in Congress. *See* U.S. Const., art. I,

§ 1. "The delegation doctrine [was] developed to prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 757.

In this case, the delegation doctrine is a background constitutional norm that drives the result. If the EPA's interpretation is correct, then the agency's actions are unbounded by congressional guidance and fail even the most lax interpretation of the delegation doctrine. In general, however, this Court has found it appropriate, as a coordinate federal branch, to interpret delegations of authority narrowly to avoid constitutional violations. *See, e.g., Benzene*, 448 U.S. at 646; *Kent v. Dulles*, 357 U.S. 116, 128-30 (1958); *Stoutenburgh v. Hennick*, 129 U.S. 141, 149 (1889). Such an interpretation is available here.

A. The Delegation Doctrine Has a Long Pedigree as a Fundamental and Enforceable Part of the Constitution

The principle against delegation precedes the drafting of the Constitution. While the Articles of Confederation were in place, Thomas Jefferson stated that "[o]ur ancient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise." Thomas Jefferson, *Jefferson's Notes on the State of Virginia*, Query XIII 173 (Merrill D. Peterson, ed., 1975). From the earliest days of the Constitution, there is ample evidence demonstrating that the Framers, this Court, and others believed that representatives should be required to make the hard policy choices. *See Ludecke v. Watkins*, 335 U.S. 160 (1948) (discussing Alien Act of 1789); *Cargo of the Brig*

Aurora v. United States, 11 U.S. (7 Cranch) 382, 388-89 (1813); Montesquieu, *supra*; Alexis de Tocqueville, *Democracy in America* 57-58 (Phillips Bradley ed. 1946); *The Virginia Report of 1799-1800, Touching of the Alien and Sedition Laws, Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970).

Our Constitution has been so successful because it assigns power to entities with meaningful limitations on their exercise of power. In Justice Scalia's words, "the most significant development in the law over the past thousand years is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, *How Democracy Swept the World*, Wall Street Journal, Sept. 7, 1999 at A24.

The often repeated proposition that Congress regularly violated the delegation doctrine from the beginning, *see, e.g.*, Cass R. Sunstein, *Delegation Canons*, 67 U. Chi. L. Rev. 315, 318 (2000), is simply wrong and springs from a falsely simplified understanding of what the doctrine requires. *See* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 30-33 (1993) (discussing examples from 18th and 19th centuries); Marci A. Hamilton, *Representation and Non-delegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999) (discussing Framers' intent).

On at least three occasions prior to 1928, this Court struck statutes on delegation grounds. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend, or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921)

(holding that a vague statute amounted to a delegation by Congress of legislative power to courts . . . "); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states). Thus, the often-repeated proposition that this Court never struck statutes for unconstitutionally delegating prior to 1935 is also wrong. *See, e.g.*, Sunstein, *supra*.

In 1928, this Court empowered an unelected commission to set tariffs. The Court announced a new test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. The "intelligible principle" in that case provided only limited direction to the commission so that the statute, in fact, delegated legislative power. President-elect Herbert Hoover objected to the new Commission on delegation grounds, saying that:

> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 Const. Rev. 98, 100 (1929) (quoting President Hoover's speech of Oct. 15, 1928).

Despite the broad and troubling language of *J.W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced the tremendous increase in the scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Industrial

Recovery Act, called it "delegation running riot." *Schechter Poultry*, 295 U.S. at 553. The constitutional potential in the *J.W. Hampton* rule is emphasized by the 9-0 and 8-1 votes finding Congress's delegation unconstitutional in *Schechter Poultry, id.* at 551, and *Panama Refining*, 293 U.S. at 433, respectively.

B. The Supreme Court's Delegation Jurisprudence Needs Reinforcement to Serve the Goals of the Delegation Doctrine

President Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the resolve of some members of the Court to invalidate congressional delegations. *See* Henry J. Abraham, *Justices and Presidents* 198 (1974). When the dust settled, it became clear that the fault was not altogether with the President. The Court itself had let the policy proclivities of some of the Justices unduly drive its jurisprudence, especially in substantive due process and federalism decisions. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935). Having been caught with its hand in the policy "cookie jar," and shaken by the court-packing plan, the Court retreated from the bedrock requirement of Article I that Congress take responsibility itself to make the law. As John Hart Ely has put it, the delegation doctrine suffered "death by association." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 133 (1980). The limitations on the scope of the federal government suffered a similar fate as the Court seemingly gave the "commerce power" a limitless interpretation. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941);

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Nonetheless, recognizing the bedrock purpose of the delegation doctrine, this Court has never completely abandoned it. It has not disowned *Panama Refining* and *Schechter Poultry*. Rather, it bent the test of delegation announced in *J.W. Hampton* to accommodate the changing times. Still, the delegation doctrine has retained some vitality. Various coalitions of Justices have struck particular agency laws on delegation principles. Note, for example, the following:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976), in which the Court struck a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *See id.* at 122 (Rehnquist, J., dissenting).
- *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court struck hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *See id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases requiring not only that the public be given notice of what is forbidden, but also that executive officials be denied the power to make law. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[5]
- Various cases stricking city ordinances and state or federal statutes delegating overly broad discretion to

[5] The void for vagueness doctrine applies to civil as well as criminal offenses, *see Jordan v. De George*, 341 U.S. 223, 231-32, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).

- Various cases interpreting statutes to avoid perceived delegation problems. *See, e.g., Benzene*, 448 U.S. at 646; *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974). Relatedly, in *AT&T Corp. v. Iowa Public Utilities Bd.*, 525 U.S. 366 (1999), the Court required an agency to reconstrue a statute to avoid delegation problems.[6]
- *Clinton v. City of New York*, 524 U.S. 417 (1998), in which the Court struck Line Item Veto Act on Presentment Clause grounds, where statute delegated to the President the legislative power to repeal items of spending.

Although this Court has struck agency laws on delegation grounds in many special circumstances, it has affirmed many delegations that appear extraordinarily broad. *See, e.g., Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting); *United States v. Rock Royal Co-op*, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the hit-or-miss enforcement of the delegation doctrine continues to cause harm to representative democracy and government accountability.

[6] Scholars recognize these cases as applications of delegation principles. *See, e.g.*, Lisa S. Bressman, *Essay: Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997); Cass R. Sunstein, *Delegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

Just as this Court has seen fit to rebuild the fences around Congress's power through its recent Commerce Clause and Fourteenth Amendment, Section 5, jurisprudence, it should reinforce its delegation doctrine now. *See, e.g., United States v. Morrison*, 120 S. Ct. 1740 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995). Because this case concerns EPA's interpretation of the CAA, it offers the opportunity for this Court to vindicate the core values of the delegation doctrine without having to reach a holding on the test that the delegation doctrine requires.

The doctrine plainly counsels against the sort of unlimited discretion that the unelected EPA Administrator claims here. The EPA's statutory interpretation should be rejected, because the statute's plain language affords an intelligible principle that Congress intended. "Protect public health" in Section 109 requires not the de minimis showing favored by the Administrator in this rulemaking but rather a showing of significant risk to health. Reading "public health" to require a showing of significant risk to health would provide a meaningful check on the EPA and save the Court from reaching a holding that the Clean Air Act violates the Constitution.

II. THIS COURT SHOULD REJECT THE EPA'S INTERPRETATION OF SECTION 109 OF THE CLEAN AIR ACT

As misinterpreted by the EPA in the rulemaking, Section 109 violates this Court's delegation doctrine, while the proper interpretation of the statute does not. This Court should correct the agency's error by reading the statute correctly.

A. The EPA's Interpretation Fails to Provide An Intelligible Principle to Bound Its Authority

Section 109 empowers the EPA to set the primary NAAQS at a level "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1) (1994). The EPA chose not to base the revised standards on significant risks to health. Rather, it embraced the power to set standards whenever it determined any threat to human health was sufficient, according to its determination. *See* note 4, *supra*. This circular formulation provides the EPA with an elastic standard that allows it to set the standard where it wants. In effect, it has arrogated to itself the power to determine the scope of its power over the states and the private sector, and has not been afraid to wield this power.

Common sense and the plain language of the Act, reinforced by the structure, institutional context, and the history of the statute, make clear that Congress enacted a law that requires a showing that the risk to public health is significant. In framing the Clean Air Act in 1970, it would have made no sense for Congress to mandate a zero-tolerance standard for NAAQS. Congress knew that most pollutants presented some risk to health at any level, no matter how low and had no intention of allowing the primary standards to be set at the zero level required to eliminate all risk. Reflecting on the clean air legislation of 1970, its principle sponsor, Sen. Edmund Muskie, stated:

> Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the

> time it was inaccurate, that there is a threshold. When we set the standards, we understood that below the standard that we set there would still be health effects.

Clean Air Act Amendments of 1977: Hearings Before the Subcom. On Environmental Pollution of the Senate Comm. On Environment and Public Health, 95th Cong., 1st Sess., pt. 3 at 8 (1977).

While the EPA has not set any NAAQS at zero, it failed in the rulemaking to identify the principle it employs to decide the extent to which it will protect health. The agency's position that the statute bars it from considering the cost or feasibility of achieving the NAAQS, precludes it from falling back on a traditional "public interest" standard because then it would have to consider costs. The only factor the EPA identified as relevant was the need to protect health, but that factor does not explain the basis for its deciding where to set the standards short of zero.

The agency not only fails to identify any intelligible principle, it also hides the basis of its decision. Even under a "public interest" standard, an agency must explain its reasoning and that reasoning is subject to judicial review. *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The EPA's interpretation would allow it to escape the need to explain its reasoning, and therefore would violate the delegation doctrine. Judicial review of agency policymaking is central to judicial efforts to square permissible delegation with the Constitution. *See Amalgamated Meat Cutters and Butcher Workmen v. Connolly*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three-judge panel); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Because the statute, as the EPA interprets it, fails to manifest an intelligible principle of decision and allows it to evade judicial review on the key choice in issue, it is unconstitutional under this Court's delegation doctrine. The requirement that a statute provide an intelligible principle is applied particularly strictly where, as here, the statute has an economy-wide impact, *Clinton*, 524 U.S. at 442, and where the agency would otherwise have a self-contradictory assignment. *Schechter Poultry*, 295 U.S. at 102.

The lack of an intelligible principle is also particularly worrisome where a federal agency would otherwise have broad discretion to grow its power over the states. The tougher the EPA makes its primary standard, the more power it has over the states. As this Court previously acknowledged, with the Clean Air Act, Congress "took a stick to the states." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). It is the EPA, with its power to sanction the states that wields that stick, and it makes that stick stouter when it tightens the NAAQS.

B. The EPA Erred in Overlooking the Clear Meaning of the Clean Air Act, Which Is Consonant with this Court's Delegation Doctrine

Contrary to the EPA's interpretation, the statute's clear meaning commands the EPA to set the primary standards to protect health against significant, but not insignificant threats to health. The pivotal words of the CAA, inserted in 1970, require the agency to set the

primary standards at a level which, "allowing an adequate margin of safety . . . protect[s] the public health." 42 U.S.C. § 7409(b)(1) (1994). In the context of this statute at that time, the phrase "protect the public health" meant that the EPA should protect people from threats to their health that are significant.

In enacting air pollution legislation throughout the 1960s and then, most importantly, in 1970, Congress worked closely with the public health professionals of the Public Health Service in the Department of Health, Education, and Welfare ("HEW").[7] Sen. Muskie, the chief author of the 1970 Clean Air Act, acknowledged that Congress, in crafting the provisions dealing with primary ambient air quality standards in 1970, "turned to the Public Health Service. We asked the Public Health Service to guide us . . . " 123 Cong. Rec. 18,055 (1977). At the same time as he signed the act, President Nixon created the EPA and assigned HEW's pollution control functions to it. *See Reorganization Plan No. 3 of 1970*, § 2(a)(3)-(4), 3 C.F.R. 1072 (1970), *reprinted in* 84 Stat. 2086 (1970).

Because Congress worked so closely with public health professionals in drafting the legislation and charged them with its implementation, its words should be understood from the perspective of the public health profession. The core concerns and methods of the public health profession, especially in 1970, were far different than those of contemporary environmentalism. A book published in 1965 under the sponsorship of the U.S.

[7] For a brief history of federal air pollution control prior to 1970, see Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 Houston L. Rev. 679, 696-702 (1999).

Public Health Service and the American Public Health Association acknowledged at the outset that "much of public health law derives historically from measures to prevent the spread of contagion and to control epidemics – and notions of an epidemiological nature still dominate much of public health law." Frank P. Grad, *Public Health Law Manual: A Handbook on the Legal Aspects of Public Health Administration and Enforcement* 8 (1965). The book went on to warn against a fashion

> in some circles of the public health professions to downgrade the importance of preventive epidemiologic measures, stressing the more positive aspects of the job of public health to a create an affirmative wholesome environment. . . . Although esthetic considerations and the aim of a better, cleaner, more enjoyable life may furnish important motivations in the enactment and enforcement of regulations to improve the environment, nevertheless, as a matter of law such provisions must have some *considerable relationship* to the maintenance of health and the prevention of disease.

Id. at 9 (emphasis added).

In dealing with air pollution in the time leading up to the insertion of Section 109 into the Clean Air Act in 1970, there was plenty of grist for the epidemiological mill. Key motivations for congressional action include a "Killer Smog" in London in 1962, blamed for 340 deaths; a similar inversion in New York in 1963, blamed for 200 deaths; and another episode in New York in 1966, blamed for 168 deaths. Reitze, 698-99 n.6, *supra*.

In the search for significant threats or benefits to public health, epidemiologists, and by extension, the public health and preventive medicine practitioners who rely upon epidemiology, are concerned with much more than statistical significance. As one of the leading figures in epidemiology wrote in the 1961 edition of his internationally recognized standard work on the topic:

> a difference can be very highly significant and yet of no real importance whatsoever. Given a large enough number of observations, an incidence of 60 per cent. must differ 'significantly' from an incidence of 59 per cent., but that difference of 1 per cent. may be no practical importance in the affairs of life. 'Significant' and 'important' are not synonymous.

Sir A. Bradford Hill, *Principles of Medical Statistics* 142 (7th ed. 1961). Hill punctuated the end of the 1971 edition with a further observation on the imperative to search for correlations that are not only statistically significant, but also important:

> This is what matters. This is what we want to know and should be told. For it is upon this difference that we shall base our future actions whether it is worthwhile exhibiting the drug or not. . . . Technical skills, like fire, can be an admirable servant and a dangerous master.

Hill, 323, *supra*.

In sum, the key language of the statute – "protect public health" – if read in the relevant context, yields an intelligible principle. That context is the world of the public health profession in 1970, which would have understood "protect public health" to mean protect it

from threats that are significant, not to try to make the world perfectly safe or as safe as the EPA finds it institutionally convenient.

An examination of the statute as a whole reinforces what common sense and the legislative history tell us. The requirement that the EPA include an "adequate," and not a "perfect," "margin of safety," connotes a cut-off based on the significance of the risk. 42 U.S.C. § 7409(b)(1) (1994). The NAAQS are based upon the criteria documents, which must evaluate both the "kind and extent" of a pollutant's impact on health. 42 U.S.C. § 7408(a)(2) (1994).

The distinction between concerns that rise to threats to "public health" and lesser concerns is buttressed by the differences between the primary and secondary standards. While the primary standards are to "protect public health," the secondary standards are to "protect welfare." The latter also bear on health. Section 302h of the statute defines public welfare to include "comfort and well-being." 42 U.S.C. § 7602(h) (1994). The 1970 statute thus put health concerns on a two-track system, with the significant ones dealt with under the primary standards.

In keeping with this two-track system, the 1970 legislation puts a far higher priority on achieving the primary standards. Section 110(a)(2)(A)(i), added to the CAA in 1970, established a schedule under which state implementation plans must meet the primary standards within three years, while the secondary standards must be met in a "reasonable time." Pub. L. 91-604, § 4(a), 84 Stat. 1680 (1970). Although the three-year deadline for the primary standards proved unrealistic, that deadline is shorn of

any sense if the NAAQS protect against all threats to health, no matter how trivial. In contrast, the primary standards embody the public health mandate to protect health from significant risks. The pursuit of less pressing objectives – "esthetic considerations and the aim of a better, cleaner, more enjoyable life," as Professor Grad put it – were left to the flexibly enforced secondary standards as well as other flexible provisions of the statute.[8] Grad, *supra*.

C. The EPA's Strategic Maneuvers

The agency's first set of primary standards issued in 1971 shed little light on its interpretation of Section 109 because its explanations were perfunctory. *See, e.g.*, 36 Fed. Reg. 8186-87 (1971). Moreover, none of these primary standards was subjected to judicial review. The battles over airborne lead pollution produced the first judicial and administrative pronouncements pertinent to the EPA's power to set standards based on public health.

In 1970, the most troubling air pollutant was lead. *See* Gregg Easterbrook, *A Moment on the Earth* 182 (1995). As to lead, Congress spoke as if the CAA required quick action and the EPA initially acted as if it would list lead as a criteria pollutant and regulate the lead content of the

[8] *See, e.g.*, 42 U.S.C. § 7411 (1994) (new source performance standards set to take account of cost); 42 U.S.C. § 7416 (1994) (states retain authority to make air cleaner than NAAQS).

leaded gasoline used by pre-1975 vehicles.[9] Faced with opposition, the EPA backed down.

Environmental groups represented by one of the authors of this brief (Schoenbrod) filed a petition for review alleging that the EPA had illegally delayed decision on regulating lead in gasoline and the D.C. Circuit ordered the agency to decide. *Natural Resources Defense Council v. EPA*, D.C. Cir. No. 72-2233 (Order, Oct. 28, 1973). Faced with intense controversy, the EPA promulgated a compromise regulation that left much of the lead in gasoline. *See* John R. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* 119-40 (1976).

To force the EPA to implement fully the statutory policy to protect public health on a timetable, Schoenbrod filed an action to require the EPA to list lead as a criteria pollutant. The EPA took the position that whether it lists a pollutant, and thus the extent to which it protects health from that pollutant, is within its discretion. The Second Circuit rejected this argument, in part on the basis that "the deliberate inclusion of a specific timetable for the attainment of ambient air quality standards incorporated by Congress in §§ 108-110 would become an exercise in futility if the Administrator could avoid listing pollutants . . . " *Natural Resources Defense Council v. Train*, 545 F.2d 320, 327 (2d Cir. 1976).

[9] *See* EPA Office of Air Quality Criteria Development, *Airborne Lead* (Draft, Jan. 7, 1971); 36 Fed. Reg. 1486 (1971) (advanced notice of rulemaking on lead in gas).

By the same logic, Sections 108-110 would be an exercise in futility if "protect public health" grants the EPA discretion to set the primary NAAQS wherever it desires. As the Second Circuit concluded, "[t]he Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging." *Id.* at 328. In sum, the extent to which it protects health from a criteria pollutant is a statutory policy that Congress has made and the EPA must implement, not an administrative policy choice for the agency to make.

In striking contrast to the Second Circuit, the D.C. Circuit, in the *Lead Industries* opinion upon which the EPA critically relies, agreed with the EPA that the extent to which the agency protects health is the agency's policy choice. *Lead Industries*, 647 F.2d at 1153 ("the broad discretion Congress gave [the Administrator] to decide what effects to protect against"). Strangely, however, the author of that opinion, Judge Skelly Wright, previously read the statute much as the Second Circuit did. The occasion was a petition to review the regulations to protect health from the leaded gasoline used in pre-1975 vehicles. The EPA had issued it under the "will endanger" standard of Section 211(c)(1)(A) of the CAA. 42 U.S.C. § 7545(c)(1)(A) (1994). The D.C. Circuit endorsed the Administrator's reading of that language to mean "presents a significant risk of harm" and further found that the language is analogous to the "protect public health" with "an adequate margin of safety" language of Section 109. *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc).

In a dissent from a panel decision reversing the regulation, Judge Wright found that the statutory mandate to

engage in the uncertain business of protecting against risk inevitably gives the agency some measure of discretion. *Ethyl Corp. v. EPA*, 5 Envtl. Law Rep. 20,096, 20,126-20,128 (D.C. Cir. Jan. 28, 1976). But, he cautioned:

> All this is not to say that Congress left the Administrator free to set policy on his own terms. To the contrary, the policy guidelines are freely prescribed, both in the statutory term "will endanger" and in the relationship of that term with other sections of the Clean Air Act. . . . "[W]ill endanger" contemplates regulation of emissions "present[ing] a significant risk of harm." But while Congress has made the basic policy decision, the Administrator is left, in his judgment, to interpret and apply it.

Id. at 20,128.

When Judge Wright's dissent became the basis for the majority opinion in the en banc decision upholding the regulation, the passage quoted was changed to grant the EPA far broader discretion. The revised opinion deletes the last sentence in the quoted passage, which had made clear that the EPA's job is to not to make policy, but to interpret and apply the policy that Congress has made. *Ethyl Corp.*, 541 F.2d at 29. Substituted in its place is the holding that the EPA's job is to make "choices of policy." *Id.* (quoting *Amoco Oil Co. v. EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974)).

Judge Wright viewed this expanded version of the EPA's discretion not just as a practical side effect of regulating in the face of uncertainty, but rather also as a deliberate judicial policy choice to favor health protection: "Regulators such as the Administrator must be

accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, *even in areas where certainty does not exist.*" *Id.* at 24 (emphasis added). In sum, a sharply divided D.C. Circuit decided that EPA may make "legislative policy judgments." *Id.* at 26.

Following the logic of his en banc opinion, Judge Wright's opinion affirming the EPA's NAAQS for lead approved the notion that the EPA performs an " 'essentially legislative task.' " *Lead Industries*, 647 F.2d at 1147 (quoting *Automotive Parts & Accessories Ass'n, Inc.*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

With the affirmation of the lead ambient standard, Schoenbrod had won a series of courtroom battles, but lost the war to get the EPA to protect a generation of children from the lead in gasoline used by pre-1975 vehicles. Although Congress had, in Sen. Muskie's words, promised that Congress had made "the hard choices" (116 Cong. Rec. 42,381 (1970)), there was enough play in the system for the EPA to make up the policy as it moved along, as exemplified by Judge Wright's view that the agency may make legislative policy on the extent to which it shall protect public health. Ironically, the children would have received more protection from lead if Congress had been prohibited from using delegation to duck the hard choice about regulation of lead in gasoline. David Schoenbrod, *Confessions of An Ex-Elitist*, Commentary, Nov. 1999 at 36, 38.

While the EPA's policymaking latitude harmed public health in the 1970s, it works another kind of harm today. Today the EPA feels different institutional imperatives.

Now, it can stand up to powerful industries. It has a large and influential constituency that wants pollution reduced regardless of evidence about its public health significance. Easterbrook, xiii-xv, *supra*. The EPA itself has the natural propensity of mature governmental institutions to prolong and enhance its mandate. *See* Pranay Gupte and Bonner R. Cohen, *Carol Browner, Master of Mission Creep*, Forbes, Oct. 20, 1997 at 170.

Of particular relevance to this case, because the nation is coming into increasing compliance with the current NAAQS, EPA's most important powers under the CAA are withering away. The real heft in the "stick" that the CAA gives EPA to wield against the states comes from the power to force them to take whatever action is necessary to attain the NAAQS. 42 U.S.C. §§ 7501-7515 (1995). Additionally, the power that Section 202(i) of the CAA gives EPA to increase the stringency of the emission limits on new cars and light duty trucks is available only if EPA determines that there is a "need for further reductions in emissions in order to attain or maintain" the NAAQS. 42 U.S.C. §§ 7521(i)(2)(A), (i)(3)(B)(i) (1994). Fortunately for the nation and unfortunately for EPA's power, there is, in EPA's words, "dramatic improvement" in air quality.[10] According to EPA's own data, the bulk of the nation's people live in areas in attainment with the current NAAQS.[11] Even as to the most widely violated of

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[10] EPA, *Latest Findings on National Air Quality: 1999 Status and Trends* (Aug. 2000), available at <http://www.epa.gov/airtrends/>, at 5.

[11] The number of people living in counties with air quality concentrations above the level of the current NAAQS in 1999 is

the current NAAQS, that for ozone, EPA foresees increasing compliance. In promulgating the strengthened ozone standard at issue in this case, EPA identified only nine areas predicted to be in violation of the current NAAQS. "Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule" (July 16, 1997) at 4-58.[12] With the strengthened NAAQS, EPA would renew its waning power by increasing the scope and the gravity of nonattainment.

While the EPA's institutional imperatives have changed since the 1970s, the language and meaning of Section 109 of the CAA have not. It still requires the EPA to gear the primary ambients standards to protect public health. The EPA departed from its public health roots not only by ignoring the significance of risk, but also by refusing to ever consider that reducing ozone will increase the incidence of skin cancer.[13] Caught out on a limb by the Court of Appeals, the agency attempted to crawl back. It did not apply for certiorari on whether it could ignore the beneficial effects of ozone. Rather, to

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as follows: carbon monoxide: 9.1 million; lead: .4 million; nitrogen dioxide: zero; ozone: 53.8 million; particulate matter: 20.3 million; sulfur oxides: zero. *Id.*

[12] An earlier, more specific analysis by the EPA identified only thirty-four counties that would be in nonattainment in 2007. Regulatory Impact Analysis for Proposed Ozone National Ambient Air Quality Standard (Draft, Dec. 1996) at VI-6. Most of these areas were predicted to be in only " 'marginal' nonattainment." *Id.*

[13] *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1051 (1999).

cover its trail of boundless discretion it now claims that it applied something like a standard of significance all along. *See* note 4, *supra*. This post-hoc rationalization cannot save a rulemaking based upon another interpretation of the statute, which is incorrect and violates the delegation doctrine. *Id.*

Sen. Muskie made clear his belief that the statute should be interpreted to avoid delegation problems. As he stated in 1970, "We have an obligation to lay down the standards." 1 *Legislative History of the Clean Air Act Amendments of 1970* at 232 (Senate Debates on S. 4358, Sept. 21, 1970) (statement of Sen. Muskie). He later elaborated:

> Often the statutory guidance is so detailed that EPA is left with little room for the exercise of discretion. Nevertheless, since the most detailed air pollution control decisions represented major social, economic, and political choices, the Congress had to be specific; these were the kinds of choices and balancing neither the agencies nor the courts should or probably would have made.

Edmund Muskie & Elliot Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 Maine L. Rev. 163, 168 (1973) (writing about air and water statutes).

The resulting statutory standard, geared to significant risk to health, satisfies this Court's present delegation doctrine. *See Benzene*, 448 U.S. 607 (1980). No doubt such a principle leaves the agency with some leeway, not only in evaluating the scientific evidence, but also in interpreting a standard of significance. But that leeway is cabined by the traditions of public health practice and,

eventually, the agency's prior interpretations. Even those who would read the delegation doctrine aggressively do not require that Congress answer all the questions in advance, but rather provide an understandable benchmark for subsequent application. *See* Schoenbrod, *Power Without Responsibility* 181-85 (1993). Whether Congress should be held to a higher standard, *id.* at ch. 12; Marci A. Hamilton, *Discussions and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, at 537-39 (1994), is a question not presented in this case.

The Court of Appeals panel felt precluded from avoiding the delegation problem by interpreting the statute itself for several reasons. First, the D.C. Circuit had previously interpreted Section 109 to grant the EPA broad discretion on the level at which to set the primary standard. That is no barrier to this Court. Second, the panel believed itself precluded by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), from taking the first step in interpreting the statute. But, Chevron should be no obstacle to the courts interpreting Section 109 of the CAA, where Congress intended not to delegate broad policymaking power. In any event, delegation is a core, structural constitutional principle that precedes the *Chevron* rule.

CONCLUSION

The Administrator's interpretation of Section 109 of the Clean Air Act is on a collision course with the fundamental principles of this Court's delegation doctrine. A more reasonable interpretation is available, however, which confines the Administrator's discretion as it saves the statute. The language of the Act, the legislative history, and plain common sense lead to the conclusion that "protect public health" means protect it from significant risk, not whatever risk the Administrator is moved to protect. For this reason, the decision below should be AFFIRMED.

Respectfully submitted,

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