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, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF OF RESPONDENT AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITIONERS

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RULE 29.6 DISCLOSURE

American Lung Association (ALA) adopts the Rule 29.6 disclosure set forth in ALA's opening brief at ii.

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GLOSSARY

ALA	American Lung Association
APC	Appalachian Power Company
ATA	American Trucking Associations
CD	Criteria Document (ozone)
CDPM	Criteria Document (particulate matter)
EPA	Environmental Protection Agency
JAO	Joint Appendix in D.C. Cir. No. 97-1441 (Ozone NAAQS)
JAPM	Joint Appendix in D.C. Cir. No. 97-1440 (Particulate Matter NAAQS)
NAAQS	National Ambient Air Quality Standard(s)
O3	ozone
PM	particulate matter
ppm	parts per million
RTCPM	Response to Comments (particulate matter)

I. THE CLEAN AIR ACT COMPLIES WITH THE NONDELEGATION DOCTRINE.

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy this Court's Nondelegation Precedent, Which Does Not Require a "Determinate Criterion."

The core of the D.C. Circuit's nondelegation ruling is the assertion that a delegation must be limited by a "determinate criterion for drawing lines" in order to pass constitutional muster. App. 6a.[1] Remarkably, in nearly 500 pages of briefing, industry and its allies fail to cite even one decision of this Court that supports this central assertion. In contrast to this telling silence, American Lung Association (ALA) and others have cited numerous decisions in which this Court not only upheld highly nondeterminate delegations, but expressly *defended* their nondeterminacy against nondelegation attack. *See, e.g.*, ALA Br. 28-29.[2] And indeed industry itself has retreated from the "determinate criterion" test, arguing that the nondelegation doctrine does not require "a *rule* that defines precise outcomes in all circumstances," but instead "a *standard* against which an agency's exercise of discretion may be tested." ATA Br. 16-17 (emphasis in original).

This is a test that the Clean Air Act NAAQS provisions easily meet. It is simply unsustainable to concede that open-ended standards such as "[r]easonableness,

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[1] Appendix citations refer to the appendix filed by the Environmental Protection Agency with its petition for certiorari.

[2] References to briefs are to those in No. 99-1257 unless otherwise expressly indicated.

fairness, justice, equity, and the public interest are *not* lawless standards," Hatch Br. 13 n.9 (emphasis added), while asserting that the far more specific congressional guidance governing NAAQS-setting fails to provide intelligible principles. *See* ALA Br. 18-22; Mass/NJ Br. 12-19.

Industry claims that nondeterminacy is of special concern here, because NAAQS "affect the whole economy," and could theoretically be set at zero. ATA Br. 9-10, 10-11. Industry does not believe its own argument, however, because it vigorously advocates – as an alleged *solution* to the supposed nondelegation problem – an interpretation of the Act that is far *less* determinate than EPA's: specifically, the open-ended assertion that NAAQS must not be based solely on health effects of air pollutants, but must encompass weighing of the "pros and cons," including cost and any other factors which someone might deem "*logically* relevant." *Id.* 22-23, 11 (emphasis added). *See* ALA 99-1426 Br. 40 (quoting ATA), 43-44; Assn. of Amer. Physicians & Surgeons Br. 26.

This interpretation would not in any way reduce the breadth of the applicability of NAAQS: under industry's interpretation, as under EPA's, NAAQS would be *national* standards that potentially have widespread implications for the economy. Moreover, far from preventing EPA from setting stringent NAAQS (even at zero), industry's interpretation would *expand* the opportunities for EPA to do so – either by assigning very high monetary values to benefits (such as human life and health) whose quantification necessarily involves policy judgment, or by invoking nonquantifiable factors such as distributional equity, moral or ethical concerns, or a right to breathe clean air. AEI-Brookings 99-1426 Br. 10; ALA 99-1426 Br. 36-37; 116 Cong. Rec. 32903/2 (1970) (Senator Muskie: "it is time to

write . . . into law" the policy that "all citizens have an inherent *right* to the enjoyment of pure and uncontaminated air") (emphasis added); *id.* 42521/3 (Congressman Hechler); United States Public Interest Research Group Education Fund (USPIRGEF) 99-1426 Br. 24-26. And of course, industry's interpretation would also expand the opportunities for EPA to promulgate *less* stringent NAAQS. ALA 99-1426 Br. 34. By proffering this open-ended, nondeterminate reading as the *only* constitutionally permissible construction of the Act, ATA Br. 11, industry is not only issuing a *Lochner*-esque invitation for the Court to enshrine industry's preferred regulatory policy approach in the Constitution, USPIRGEF 99-1426 Br. 26-30 – it is also conceding the bankruptcy of the proposition that nondeterminacy is *unconstitutional*.

Under a proper reading of the Act, EPA's attention is far more narrowly focused, addressing the protection of human health from air pollutants. While industry and its allies claim that a health-only approach cannot be implemented for "non-threshold" pollutants, that argument is a makeweight, as demonstrated by ATA's claim that *even if there were an effects threshold*, the nondelegation doctrine would still be violated unless EPA "found that *no* health risks exist below that level." ATA Br. 18 (emphasis added). In any event, ALA and others have already shown that if standards are based on adverse effects documented by scientific evidence (and on margins of safety), they need not be set at zero or background levels even for nonthreshold pollutants. ALA 99-1426 Br. 42-43; Mass/NJ 99-1426 Br. 41-43.

To be sure, it is impossible to reduce the setting of a NAAQS – especially a margin of safety – to a determinate

formula: in particular, one of the key purposes of a margin of safety is to account for scientific *uncertainty*. S. Rep. 1196, 91st Cong., 2d Sess. 10 (1970); Mass/NJ Br. 15-17. The D.C. Circuit's demand for a *quantification* of uncertainty – for a "principle [that] reveals how much uncertainty is too much" (App. 10a) – is simply impossible to satisfy. By their nature, scientific uncertainties include important qualitative elements that cannot be precisely calculated based on current scientific information – such as gauging the health significance of certain observed biological effects (*see, e.g.*, 62 Fed. Reg. 38868/1-2 ¶ 5, JAO 13) and assigning safety factors for sensitive populations such as children. Thus, Congress necessarily entrusted to EPA the duty – subject to normal requirements of reasoned decisionmaking – to make judgments concerning how such uncertainties should be factored into standard-setting. Contrary to ATA's suggestion (ATA Br. 18), the Constitution does not require Congress to avoid such agency judgments by mandating a zero-risk policy.

While NAAQS do have implications for the economy, ATA Br. 9, far broader multi-industry delegations have been upheld by this Court. App 60a; ALA Br. 31-32. Indeed, unlike the agency actions authorized by the statutory provisions upheld in those cases, NAAQS do not directly regulate industry, but rather are narrowly addressed to specifying pollution concentrations sufficient to protect health. The implications for industry become concrete only through subsequent implementation actions by the states or (if the states fall short) by EPA. These implementation actions take years, and offer ample opportunity for Congress to intervene and make adjustments to avoid excessive socioeconomic effects – as

it has done repeatedly in the past. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989) (rejecting nondelegation challenge: "Congress . . . can modify [agency] . . . rulings it considers improper") (citation omitted).

Industry's attempts to distinguish this Court's nondelegation precedent are unavailing. In particular, that precedent offers no support for the notion (ATA Br. 12-13) that more specificity is required for delegations with "general and prospective effect" or for those involving setting of numeric values. *See, e.g., Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (approving authority to set "fair and equitable" prices). Likewise, this Court's precedent approving broad delegations involving balancing of competing considerations (ATA Br. 13-14) supports rather than undermines the validity of the Clean Air Act's far narrower NAAQS provisions, where Congress did the balancing and directed EPA to set standards based on health. Finally, industry irrelevantly cites cases that were not even decided under the constitutional "intelligible principle" test, but instead involved other kinds of separation of powers arguments[3] or claims that government

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[3] *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 n.10 (1986) (striking down statute that assigned executive functions to an official subject to removal only by Congress; nondelegation doctrine distinguished); *INS v. Chadha*, 462 U.S. 919, 952 n.16 (1983) (striking down statute that authorized congressional veto; nondelegation doctrine distinguished); *Clinton v. New York*, 524 U.S. 417 (1998) (striking down statute that authorized Presidential line item veto); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (striking down statute that authorized board of review consisting of nine members of Congress).

action impinged on constitutionally protected liberties[4] – or were decided on nonconstitutional grounds.[5]

In short, the key point remains: industry has failed to cite a single decision of this Court supporting the D.C. Circuit's assertion (App. 6a) that the constitutional nondelegation doctrine requires a "determinate criterion for drawing lines." Indeed, recognizing that the Court's nondelegation precedent offers no basis for overturning the carefully circumscribed delegation at issue here, some allies of industry *attack* that precedent and urge the Court to abandon it. *See, e.g.*, Inst. Justice/Cato Br. 11-13. ALA respectfully submits that these arguments are misguided: if industry and its allies believe that the Clean Air Act's mandate should be changed, they should seek such change from the democratically elected Congress, not the unelected judiciary.

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[4] *See, e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Greene v. McElroy*, 360 U.S. 474 (1959). The "void for vagueness" cases (see Mfrs. Alliance Br. 10) likewise involve protection of individuals' liberty and property interests against liability, and are irrelevant for another reason as well: § 109 imposes *neither* civil *nor* criminal liability on the regulated community, but rather directs *EPA* to promulgate regulations.

[5] *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) ("*the Act* requires the FCC to apply *some* limiting standard") (first emphasis added).

B. Because the Clean Air Act Is Undisputedly Constitutional, There Was No Basis for the D.C. Circuit to Undertake a Constitutionally Based Examination of EPA's Interpretation, Much Less to Require a Constitutionally Based Narrowing of That Interpretation.

The foregoing discussion demonstrates the error in the D.C. Circuit's requirement that EPA adopt a narrowing construction of the Act. Like the statute at issue in *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976), the Clean Air Act's NAAQS provisions are "clearly sufficient to meet any delegation doctrine attack." *Accord*, ATA Rsp. to Cert. Petitions at 15 (§ 109 is "undisputedly" constitutional). Accordingly, just as the Court rejected the request for a narrowing construction there, it should do the same here. *See also* USPIRGEF 99-1426 Br. Pt. II.

Moreover, industry has failed to cite a single decision of this Court supporting the D.C. Circuit's ruling – characterized by one of industry's own allies as "novel" and "unprecedented" (Mercatus Br. 13) – that *Congress's* constitutionally conferred legislative power can be protected by requiring an *Executive Branch agency* to enunciate an intelligible principle. As another of industry's allies notes, if the Act's NAAQS provisions set forth an intelligible principle to guide EPA, then the agency's alleged "failure to articulate that principle, while legally troubling on other grounds," would "*not* implicate the nondelegation doctrine." Inst. Justice/Cato Br. 29 (emphasis added). *See also* Hatch Br. 30 n.22.

Finally, the specific interpretation requested by industry – that EPA must balance health against cost and other factors – would *broaden* the Act's mandate (*see* pp.

2-3, *supra*), and thus does not constitute a "narrow" construction within the meaning of *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). ALA 99-1426 Br. 40. And because industry's interpretation is contrary to clear congressional intent, *id.* 29-32, its adoption would constitute, not a "construction" of the Act at all, but a congressionally unauthorized *amendment*. *See* USPIRGEF 99-1426 Br. 11.

C. Nonconstitutional Remedies Are Available to Challenge Any Alleged Failure by EPA to Follow Congressional Mandates or to Engage in Reasoned Decisionmaking.

Industry's true objections to EPA's NAAQS are statutory, not constitutional. The assertion that EPA has taken actions "incompatible with the scope of authority delegated . . . by Congress" (APC Br. 2; *see also id.* 32) is reviewable as a claim that EPA has acted "not in accordance with law." CAA § 307(d)(9)(A). *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (setting forth a two-step process for reviewing such claims). The contention that EPA has failed to "explain the statutory standard that guides [its] . . . exercise of rulemaking discretion and how consideration of relevant science is applied in reference to that standard" (APC Br. 29) is reviewable as a claim that the agency acted in an "arbitrary" and "capricious" manner. CAA § 307(d)(9)(A). Indeed, Appalachian Power concedes that "the Clean Air Act unquestionably provides law to apply," APC Br. 28 – from which it necessarily follows that the Act provides a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Thus, the Act offers

an intelligible principle sufficient to permit judicial review, and the D.C. Circuit's recourse to the constitutional nondelegation doctrine – instead of to normal nonconstitutional review – was error.[6]

Arguing the contrary, Appalachian Power unpersuasively suggests that, although "there are several ways the lower court could have reached the same result" (including constitutional nondelegation review as well as nonconstitutional arbitrary-and-capricious or statutory interpretation review), "[w]hichever basis for decision one chooses, the essential principle is the same: an agency must explain what it does in light of Congress' delegation of authority." APC Br. 23. In short, Appalachian Power is asserting that the D.C. Circuit had the choice between deciding this case on constitutional and nonconstitutional grounds, and chose the *constitutional* ground. This approach stands the doctrine of constitutional avoidance on its head.

Moreover, Appalachian Power's attempt to equate the D.C. Circuit's nondelegation ruling with garden variety nonconstitutional judicial review is refuted by the

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[6] The argument that EPA failed to provide sufficient protection against health effects (Hatch Br. 29) is not a constitutional argument, but rather a nonconstitutional administrative law challenge under CAA § 307(d)(9)(A). *See, e.g., American Lung Association v. EPA*, 134 F.3d 388 (D.C. Cir. 1998) (responding to plaintiffs' arguments that EPA had failed to provide sufficient health protection, court reviewed and remanded an EPA decision under § 109(b)(1)); Cross-petition of Citizens for Balanced Transportation at 8-12 (arguing that the 1997 PM NAAQS is insufficiently health-protective, but emphasizing that that claim is a *nonconstitutional* claim that raises no nondelegation issues).

D.C. Circuit itself. That court "agree[d]" with circuit precedent holding that, "when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the 'policy judgment' to set the standards at one point within the relevant range rather than another." App. 12a. But the court shunted that precedent aside, asserting that "none of those panels addressed *the claim of undue delegation* that we face here." *Id.* (emphasis added). Thus, the D.C. Circuit clearly believed that its invocation of the constitutionally based nondelegation doctrine made possible a ruling that the court would not have been able to issue on nonconstitutional grounds. *See* App. 96a (Silberman, J., dissenting).

The conclusion that the D.C. Circuit's constitutional ruling was error fully disposes of EPA's Question #1, and the Court need not and should not address industry's nonconstitutional judicial review arguments. While these arguments are not before the Court, ALA offers a few brief observations in response to industry's attacks on the evidence underlying the NAAQS. First, industry's assertion that EPA did not rely on the adverse nature of health effects occurring at pollution levels allowed by the prior NAAQS (APC Br. 6) is simply wrong: EPA made express findings of adverseness for both PM and ozone. 62 Fed. Reg. 38657/1 (1997), JAPM 7; 62 Fed. Reg. 38864/1-2 (1997), JAO 9.

Moreover, the assertion that these effects are not "demonstrated" by the scientific evidence (APC Br. 6) is equally mistaken. For PM, the Criteria Document expressly noted "recent studies providing evidence that serious health effects (mortality, exacerbation of chronic

disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current [i.e., pre-1997] U.S. PM standards.*" CDPM 13-1, JA 1779 (emphasis added). *See also* 62 Fed. Reg. 38665/2, JAPM 15 (evidence that pre-existing NAAQS do not adequately protect health is "strong"). Contrary to industry's assertions (ATA Br. 21; APC Br. 12 n.27), EPA did not rely solely on the statistical significance of these studies, but also concluded on the basis of extensive analysis that the observed effects were unlikely to have been caused by other factors (such as other pollutants), *see, e.g.*, PMSP V-55 to 56, JAPM 2012-14; RTCPM A-22, JAPM 344; CDPM 13-57, JAPM 1835; 62 Fed. Reg. 38660-61, JPM 10-11, and that the consistency and strength of the statistical association was substantial enough to support a finding of causation. RTCPM 68, A22-23, JAPM 295, 344-45; 62 Fed. Reg. 38658-59, JAPM 8-9.

For ozone, EPA examined human clinical studies – studies that "relate known O3 exposures directly to responses in individuals," 62 Fed. Reg. 38872/1, JAO 17 – and concluded that these studies provide "clear evidence" of health effects (including adverse effects) at ozone levels allowed by the prior NAAQS. *Id.* 38863-64, JAO 8-9. Likewise, epidemiological studies provided "strong evidence" of adverse effects at ozone concentrations below the prior NAAQS. CDO 7-171, JAO 1624.

For both PM and ozone, this compelling evidence is more than sufficient demonstration of adverse health

effects, especially in light of the Act's precautionary mandate. See ALA Br. 20-21; App. 54a-56a.[7]

II. THE D.C. CIRCUIT ERRED IN LIMITING EPA'S AUTHORITY TO IMPLEMENT A NEW OZONE NAAQS.

A. EPA Has Authority Under Subpart 1 to Implement a More Protective Ozone NAAQS.

Though conceding that EPA has authority to promulgate a more protective ozone NAAQS, ATA Br. 39, ATA erroneously claims that EPA lacks authority to implement it. *Id.* 29.

Classifications and attainment dates – areas with design value ≥0.121. The core of the D.C. Circuit's ruling (as modified on rehearing) is that Subpart 2 sets forth classifications and attainment dates *under the 1997 ozone NAAQS* for areas with design value ≥0.121. ATA argues that this ruling means that the 1997 NAAQS cannot be implemented at all for areas with design value ≥0.121. ATA Br. 29 (the Act precludes implementation "in any fashion" of a more stringent ozone NAAQS). To the contrary: if Subpart 2 sets forth classifications and attainment dates for such areas under the 1997 NAAQS, the third sentence of § 181(a)(1) would clearly require that the "primary standard attainment date for ozone" be the

[7] EPA's statement that the *risk assessments* do not constitute demonstrated effects (APC Br. 6 n.6) does not purport to address the evidence documenting adverse effects at PM and ozone concentrations below the prior NAAQS – but rather, characterizes EPA's attempts to predict *how often individuals would come into contact* with such concentrations. Such assessments are not a required component of NAAQS-setting. ALA 99-1426 Br. 49-50.

appropriate date specified in § 181(a)(1)'s Table 1. For many areas, the Table 1 dates had already expired as of the July 1997 promulgation date of the new NAAQS. ALA Br. 40-41, 45.

ATA cannot have it both ways: if the first sentence of § 181(a)(1) is to be read broadly to encompass all ozone nonattainment areas, and not just those under the 1979 NAAQS, then the third sentence of that provision must be given a similarly broad reading consistent with its unqualified scope. Instead, ATA's interpretation treats that sentence's unqualified reference to "the primary standard attainment date *for ozone*" as a scrivener's error – and amends it to read "the primary standard attainment date *for the 1979 ozone NAAQS.*"

In short, the hybrid approach advocated by ATA (that the first sentence of 181(a)(1) applies broadly to any ozone NAAQS, but the third sentence applies only to the 1979 NAAQS) is not an available reading of the statutory text. Instead, this case presents two choices for areas with design value ≥0.121: either (1) Subpart 2 specifies classifications and attainment dates under the 1997 NAAQS, and those attainment dates for many areas had already expired when the NAAQS was promulgated in July 1997 (*i.e., both* the first sentence *and* the third sentence of § 181(a)(1) apply to the 1997 NAAQS), or (2) Subpart 2 specifies no classifications or attainment dates for the 1997 NAAQS (*i.e., neither* the first sentence *nor* the third sentence of § 181(a)(1) applies to the 1997 NAAQS). Because interpretation #(1) "makes no sense" (Ohio Br. 30) (citation omitted) and is "absurd" (Intel Br. 9), interpretation #(2) is the only plausible reading of the Act. Thus, because Subpart 2 specifies no classifications or attainment dates under the 1997 NAAQS for areas with

design value ≥0.121, the ouster clauses of § 172(a)(1)(C) and (a)(2)(D) do not apply, and the Subpart 1 classification and attainment date provisions govern.

Classifications and attainment dates – areas with design value <0.121. ATA likewise argues that the 1997 ozone NAAQS cannot be implemented at all for areas with design value less than 0.121. ATA Br. 28-29. *But see* App. 89a (Tatel, J., concurring). Once again, ATA's reading ignores the plain language of the statute. If the first sentence of § 181(a)(1) is read to encompass areas designated nonattainment under the 1997 NAAQS, that same sentence would expressly provide that "*[e]ach*" such area "*shall* be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area, based on the design value for the area." (Emphasis added.) But by ATA's own admission, such classification is *impossible* for areas with design value <0.121, because Table 1 establishes classifications (and attainment dates) "*only* for areas with ozone levels *above* 0.12 parts per million ("ppm") – the level of the 1979 ozone NAAQS." ATA Br. 28 (second emphasis added). ATA's reading, by assigning to § 181(a)(1) nonattainment areas that cannot be classified under Table 1, would treat as a scrivener's error § 181(a)(1)'s unqualified mandate that "[e]ach" Subpart 2 area "shall" be classified under that table. In short, for areas with design value <0.121, the choice is not between an absurd reading and a sensible one – it is between an *impossible* reading (that § 181(a)(1) applies to nonattainment areas under the 1997 NAAQS with design value <0.121) and a possible one (that § 181(a)(1) does not apply to such areas). Thus, because Subpart 2 specifies no classifications or attainment dates under the 1997

NAAQS for areas with design value <0.121, the ouster clauses of § 172(a)(1)(C) and (a)(2)(D) do not apply, and the Subpart 1 classification and attainment date provisions govern.

Control Measures. Strikingly, industry and Ohio offer no defense whatsoever of the D.C. Circuit's ruling (App. 34a) that the 1997 NAAQS must be implemented only in accordance with the "control measures" of Subpart 2, and no response to ALA's refutation of this ruling. *See* ALA Br. 42-44. In particular, they have pointed to no statutory ouster provision (comparable to § 172(a)(1)(C) and (a)(2)(D)) that even colorably could be said to displace the § 172(b) and (c) provisions concerning submission and content of pollution control plans. Instead, by arguing broadly that the new NAAQS cannot be implemented "in any fashion" (ATA Br. 29) – an assertion which if accepted would override the pollution control plan provisions of § 172(b) and (c) – ATA treats as a scrivener's error the absence from § 172(b) and (c) of an ouster provision.

ATA's argument must be rejected for another reason as well. If ATA were correct that § 181(a)(1) applies to all nonattainment areas under the 1997 ozone NAAQS, then many areas with design value ≥0.121 would by the express terms of the Act be required to submit – by dates that had already expired when the 1997 NAAQS was promulgated – pollution control plans providing for attainment of that NAAQS. ALA Br. 42-44. What was said above concerning classifications and attainment dates for such areas applies here also: a hybrid reading (under which the first sentence of § 181(a)(1) applies to areas designated nonattainment under the new NAAQS, but the pollution control plan submission requirements of

§ 182(b)(1)(A)(i) and (c)(2)(A) apply only to the 1979 NAAQS) is not an available reading of the statute. ATA's attempt to advance such a hybrid argument reduces the broad language of § 182(b)(1)(A)(i) and (c)(2)(A) – which refers to plans to attain "the national primary ambient air quality standard for ozone" and "the ozone national ambient air quality standard," rather than just the 1979 standard – to a scrivener's error.

Designation of nonattainment areas. ATA's argument that EPA may not designate nonattainment areas under the new NAAQS, ATA Br. 39, 41, must (assuming *arguendo* it is properly before the Court) be rejected – as it was by the D.C. Circuit. App. 36a-37a. Aside from being based on the erroneous premise that § 181(a)(1) applies to the new NAAQS, ATA's argument ignores the plain language of 107(d), which provides that, "not later than 1 year after promulgation of a *new or revised*" NAAQS, "the Governor of *each* State *shall* . . . submit to the Administrator a list of *all* areas (or portions thereof) in the State, designating as . . . nonattainment, *any* area that does not meet" that NAAQS. § 107(d)(1)(A) (emphasis added). Once again, ATA attempts to treat comprehensive and mandatory statutory language as a scrivener's error.[8]

[8] Contrary to ATA (Br. 39, 41), where available information indicates an area is violating a revised NAAQS, the area cannot be designated as "unclassifiable" for that NAAQS. Such a designation is available only for an area that "*cannot* be classified on the basis of available information as meeting *or not meeting*" NAAQS. § 107(d)(1)(A)(iii) (emphasis added).

B. The 1990 Amendments Left Unchanged EPA's Pre-existing Authority to Promulgate Revised NAAQS.

Recognizing that EPA cannot plausibly be barred from implementing a NAAQS that it has validly promulgated, Ohio argues that the 1990 Amendments stripped EPA of authority to promulgate a revised ozone NAAQS in the first place. Ohio Br. 29-31. This argument – again, assuming *arguendo* it is properly before the Court – must be rejected. As the D.C. Circuit correctly held, the 1990 Amendments made no change in EPA's duty to review – and, as appropriate, revise – NAAQS at least every five years. App. 34a (citing § 109(d)(1)). Neither Ohio nor anyone else has pointed to a shred of evidence in the statutory text (or even legislative history) that the 1990 Amendments intended to limit or abrogate this fundamental duty, which is the very heart of the Act's health-protection mandate. *See generally* ALA 99-1426 Br. Incredibly, Ohio cites as support for *precluding* tightening of the 1979 ozone NAAQS a committee report that recognized such tightening might well be necessary to protect public health. S. Rep. 228, 101st Cong., 1st Sess. 6-7 (1989). *See* Ohio Br. 22, 23, 25.

Far from revoking EPA's pre-existing revision authority, the 1990 Amendments enacted § 172(e), which clearly presupposes that EPA retains authority to revise NAAQS. App. 35a. The D.C. Circuit found "[t]elling[ ]" the failure of industry and Ohio to address § 172(e), *id.*, and their continuing failure to do so in this Court is even more striking.[9]

[9] Contrary to Appalachian Power's implication, APC Br. 49-50, EPA's revision authority is not *limited* to promulgating

C. The Structure of the Act's NAAQS Revision and Implementation Provisions Offers No Basis for Overriding the Statute's Express Language.

Deprived of its purported textual argument, industry is left with the vague assertion that Congress intended Subpart 2 to be the exclusive ozone program for the nation, thus displacing Subpart 1. ATA Br. 32-38; APC Br. 47-49; Ohio Br. 21-26. But Congress specified, in the ouster provisions of § 172(a)(1)(C) and (a)(2)(D), the exact extent to which it wanted Subpart 2 to displace Subpart 1 – and those ouster clauses do not apply to the new ozone NAAQS.

Where the ouster clauses are inapplicable, application of Subpart 1 not only does not disserve congressional intent – it is necessary in order to obey Congress's intent that Subpart 1 apply to "*any* revised standard, including a revision of *any* standard in effect on November 15, 1990." § 172(a)(1)(A) (emphasis added). Far from being a preexisting relic that Congress "abandoned" (Ohio Br. 9) or "ghettoized" (ATA Br. 38), Subpart 1 was extensively rewritten in 1990, and thus reflects the contemporaneous intent of the same Congress that enacted Subpart 2. Indeed, the 1990 House committee report – the *same* report cited by industry as evidence of the alleged exclusiveness of Subpart 2 (APC Br. 47; ATA Br. 33; Ohio Br. 13) – expressly reaffirms the applicability of Subpart 1 to ozone. ALA Br. 42. Thus, the Act's language, as well as its

relaxations of NAAQS. Section 172(e), while clearly establishing the 1990 Congress's intent that EPA retain its NAAQS revision authority, does not itself confer such authority. Rather, EPA's NAAQS revision authority emanates from § 109, which clearly requires the agency to promulgate *whatever* revised NAAQS are "appropriate" in light of the health effects evidence.

legislative history, refute the notion that Subpart 2 was intended to be the nation's sole ozone abatement program.

Moreover, the argument that implementation of the new NAAQS under Subpart 1 will undermine Subpart 2 is meritless. First, for areas that are in attainment of the 1979 NAAQS, Subpart 2 specifies no classifications and attainment dates. *See* pp. 14-15, *supra*. Accordingly, application of Subpart 1 in such areas could not possibly conflict with the Subpart 2 program. *See* App. 84a-88a (Tatel, J., concurring).

Second, for areas that are in nonattainment status under the 1979 standard, application of Subpart 1 will likewise not undermine Subpart 2. EPA has expressly decided that the 1979 NAAQS – and the associated Subpart 2 implementation strategies – will remain in place for each such area until the area meets the 1979 NAAQS. In the meantime, EPA requires areas to move towards compliance with both standards, thus respecting the clear timetables of § 172, and avoiding the adverse impacts that would flow from sequential implementation: specifically, requiring implementation of the 1997 NAAQS to await attainment of the 1979 NAAQS would prolong the time period during which the public suffers adverse health impacts, ALA Br. 49, and would also be less efficient for industry and for government anti-pollution officials, who would need to gear up for two rounds of pollution reductions addressing largely the same emissions sources.[10]

[10] In any event, EPA has stated that there is only one area where compliance with the 1997 standard could be required at the same time as with the 1979 standard. App. 88a. While Intel notes that areas must have three years of clean data in order to

CONCLUSION

The Court should grant the relief requested in ALA's opening brief (at 50). In doing so, the Court should reject industry's argument (ATA Br. 47-48) that EPA's Question #3 challenges only the rationale of the D.C. Circuit's decision: the D.C. Circuit's Subpart 2 implementation ruling was not a rationale for the court's ruling concerning EPA's authority to revise the NAAQS and designate nonattainment areas, but rather was a separate ruling reached only after the court had disposed of the revision and designation issues. App. 34a-43a. Finally, if this Court reaches the revision and designation issues, it should affirm the D.C. Circuit's ruling on those issues.

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Respectfully submitted,

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be considered in attainment of the 1997 NAAQS by the Subpart 1 deadline, Intel Br. 20-21, it fails to point out that three years of clean data are also required in order for areas to be considered in attainment of *the 1979 NAAQS by the Subpart 2 deadlines*. App. 32a n.6.