No. 99-1426

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Petitioners,
v.

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

BRIEF OF AMICUS CURIAE UNITED STATES

PUBLIC INTERESTS RESEARCH GROUP
EDUCATION FUND IN SUPPORT OF
CROSS RESPONDENTS

Filed SEPT 11, 2000

QUESTION PRESENTED

Should the Court construe section 109 of the Clean Air Act, 42 U.S.C. § 7409, to require EPA to consider cost in setting national ambient air quality standards?

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INTEREST OF AMICUS CURIAE

The United States Public Interest Research Group Education Fund is a non-profit organization promoting democratic decision-making and environmental protection, with a long history of advocacy at the state and federal levels for clean air.[1] It has an interest in the protection the new ozone and particulate standards offer and in the legal principles that allow Congressional intent to control the implementation of laws protecting significant public interests.

INTRODUCTION

Industry and its supporters ask the Court to avoid deciding their non-delegation claim by construing section 109 of the Clean Air Act (Act), 42 U.S.C. § 7409, to require EPA to consider cost in setting National Ambient Air Quality Standards (NAAQS). *See* Opening Brief for Cross-Petitioners American Trucking Associations *et al.* at 24, 50 [hereinafter ATA Br.]; Opening Brief of Ohio, Michigan, and West Virginia in Support of Cross-Petitioners at 4-10. In addition, Industry urges this Court to invent a new clear statement rule, requiring agency consideration of cost absent explicit statutory language barring its consideration. *See* Opening Brief of Cross-Petitioner Appalachian Power *et al.* at 46-47 [hereinafter AP Br.]; Brief of Amicus General Electric in Support of Cross-Petitioners at 18 [hereinafter GE Br.]. This brief focuses upon these pleas for extraordinary construction of the Act.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress has actively considered the statutory changes that Industry seeks from this Court, but has chosen not to amend section 109. Elected representatives, rather than unelected judges, should decide whether to revise the Act. *See United States v. Rutherford*, 442 U.S. 544, 555 (1979) (federal courts do not sit as councils of revision).

Statutory construction to avoid mere claims of unconstitutional delegations can subvert democratic values by improperly modifying numerous statutes. *See generally Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998). Because most statutes have their vagaries, any good lawyer can identify a "hard question" that a statutory provision does not answer. If the existence of an unanswered question triggers extraordinary judicial construction of a statute, then the judiciary may rewrite much of the United States Code. Furthermore, since judges can add specificity to statutes in several different ways their constructions will necessarily reflect their policy judgments. Addition of cost to section 109, however, renders it less intelligible by adding a factor without specifying which cost sensitive principle should govern the NAAQS. Proper application of the rule that only "grave" constitutional doubts trigger construction to avoid a constitutional issue precludes extraordinary construction of section 109 and avoids subversion of democratic values.

Industry's proposed clear statement rule, which would require agencies to consider cost absent an explicit contrary statutory statement, also subverts democratic values. The Industry clear statement rule conflicts with precedent designed to assure that administrative agencies and courts implement legislative policy. That precedent

directs agencies (and therefore reviewing courts) to base their decisions on the factors the statute explicitly makes relevant to agency decisions. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971); *Union Electric Co. v. EPA*, 427 U.S. 246, 257-65 (1976); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 507-12 (1981). The Industry clear statement rule conflicts with this precedent by generally requiring consideration of a factor not listed in authorizing legislation.

This Court should not enact a clear statement rule to advance contemporary policy preferences that receive regular consideration in Congress. Industry encourages this Court to engage in Lochner-like review of the reasonableness of the policy of protecting public health from pollution, hoping to convince the Court to use a clear statement rule to favor consideration of cost. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706, does not justify this approach to statutory "interpretation." Basing statutory construction on judicial assessment of the reasonableness of statutory policies would undermine objective statutory interpretation and democratic control.

Adding cost to section 109 would make reasoned decision-making under the APA more difficult. It increases the need for policy judgments that are difficult to rationalize, such as judgments about how to value human life and health. This change of statutory policy would make section 109 less "determinate" than it is now.

Industry's proposal for a clear statement rule favoring a cost-benefit test invites a return to the days when the Court discredited itself by creating general principles of law advancing contemporary economic theory. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J. dissenting). This Court should decline the invitation.

ARGUMENT

I. ELECTED REPRESENTATIVES SHOULD DECIDE WHETHER TO REVISE SECTION 109 TO INCLUDE COST CONSIDERATIONS.

In recent years, elected officials have actively considered revisions to the Act like the revision of settled law Industry seeks from this Court. The 104th Congress, for example, considered, but rejected, legislation that might have applied a cost-benefit test to the Act and, indeed, substantially all government regulation. *See* H.R. 9, 104th Cong. § 422(a)(2), (b)(1) (March 10, 1995); S. 343, 104th Cong. § 623(a) (1995); 141 Cong. Rec. H2252 (1995) (bill would supersede Clean Air Act's "adequate margin of safety" requirement); S. Rep. 104-90, at 135 (1995) (additional views). That Congress also rejected revision of the Act in the legislation it did enact, The Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48, which only requires cost-benefit analysis (CBA) of major rules when the underlying law allows for consideration of cost. *See* 2 U.S.C. § 1532(a). Subsequent Congresses repeatedly rejected bills that might amend section 109. *See e.g.* S. 981, 105th Cong. (1998). Several of the Congressional amici urging this Court to modify section 109 sponsored some of these failed bills and have introduced legislation now before Congress to convert the Act into a cost-benefit statute. *See* S. 2362 § 703(c)(1)(A), 106th Cong. (2000).

Article I of the Constitution vests legislative authority in elected representatives so that citizens can democratically control significant policy choices, *see Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), like the choice about whether to change cost's role under the Act, *cf. Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) (states may

consider cost in writing regulations of pollution sources to achieve the NAAQS); Reina Steinzor, *Devolution and the Public Health*, 24 Harv. Envtl. L. Rev. 351, 352 (2000) (citing "consistent public support for more stringent environmental regulation"). Congress is far better equipped than a court to consider the many contending factual and policy arguments that bear on the issue of whether to require consideration of cost in section 109. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997). *See e.g. Thomas O. McGarity, A Cost-Benefit State*, 50 Admin. L. Rev. 7, 46-49 (1998) (debunking claim that regulatory costs cause serious health problems). Judicial revision of section 109 would be inappropriate.

II. THE NON-DELEGATION DOCTRINE DOES NOT JUSTIFY JUDICIAL REVISION OF SECTION 109.

The non-delegation doctrine only requires that Congress include an intelligible principle (i.e. a general policy directive) in laws delegating authority to administrative agencies. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). To convert this doctrine into an engine for reconstruction of statutes with policies as clear as section 109(b)(1)'s health protection principle would promote judicial, rather than democratic, governance, thereby subverting the non-delegation doctrine's principle aim.

A. SINCE ONLY "GRAVE DOUBTS" ABOUT CONSTITUTIONALITY TRIGGER CONSTRUCTION TO AVOID A CONSTITUTIONAL ISSUE, THE AVOIDANCE CANON DOES NOT APPLY HERE.

Allowing litigants to secure favorable constructions of statutes by raising colorable, but not terribly persuasive, constitutional claims undermines democratic values.

See Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998). For that reason, construction of statutes to avoid a constitutional issue is only appropriate when, in the words of Justice Holmes, "grave doubts" arise about a statute's constitutionality. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Judges properly invoke this canon only when they believe that "the alternative is a serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres*, 523 U.S. at 238.[2] *See e.g. Jones v. United States*, 526 U.S. 227, 239-51 (1999) (extensively analyzing case law before concluding that a grave constitutional doubt exists). Even constitutional objections that have "some force" do not create "grave doubts" triggering application of the avoidance canon. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (constitutional claims about restrictions on abortion counseling).

This "grave doubt" limitation helps avoid creation of "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres*, 523 U.S. at 237-38. Congress often lacks the practical ability to overrule erroneous judicial construction, given all of the matters pressing for its attention. *See* Richard Posner, *The Federal Courts: Crises and Reform* 285 (1985). So adherence to this limitation is necessary to avoid distorting elected representatives' policy choices. *See Almendarez-Torres*, 523 U.S. at 238.

No grave doubt (indeed no colorable claim) can exist about section 109's constitutionality. This Court has

[2] This Court has never questioned *Almendarez-Torres'* treatment of the avoidance canon. *Cf. Apprendi v. New Jersey*, 120 S. Ct. 2348, 2360-63 (2000) (distinguishing *Almendarez-Torres'* constitutional holding).

repeatedly upheld delegations of authority pursuant to general principles much broader (and less determinate) than the standard governing the NAAQS.

B. CONSTRUCTION TO AVOID MERE NON-DELEGATION CLAIMS CAN UNDERMINE DEMOCRATIC VALUES BY AUTHORIZING UNGUIDED JUDICIAL RECONSTRUCTION OF NUMEROUS STATUTORY PROVISIONS.

The policy supporting the grave doubt requirement has special force in the non-delegation context. A practice of construing statutes to avoid mere claims of unconstitutional delegations would severely undermine democratic governance.

1. A LITIGANT CAN RAISE A NON-DELEGATION CLAIM UNDER ANY STATUTE DELEGATING AUTHORITY.

Since legislation almost always leaves some issues unresolved, litigants can raise non-delegation claims about almost every statute relying upon executive branch implementation. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999) (Congress probably cannot anticipate all applications of a general policy). And, absent adherence to the precedent discussed above, raising such a claim could trigger unusual constructions of a statute.

In particular, if an issue about the intelligibility of the principle of protecting public health with an adequate margin of safety can trigger special construction, judicial reconstruction of statutes will become frequent indeed. A general statutory principle often fails to provide a "determinate criterion" that functions like an algorithm, dictating a precise result for each application of the statute. If

every problem that requires discretionary line-drawing without legislative "determinate criterion" presents an occasion for extraordinary construction, the judiciary, meaning every federal and state trial and appellate judge that interprets federal law, would have authority to reconfigure much of the United States Code. *Cf. Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 864-66 (1984) (democratic principles require that agencies, not courts, interpret ambiguities in statutes).

The avoidance canon does not now control most statutory construction, because the Constitution's specific provisions usually present problems in somewhat limited areas. For example, free speech claims may arise in libel[3], but arise seldom (if at all) in the environmental context, where the law limits pollution rather than communication. The non-delegation doctrine, by contrast, involves a general theory of legislation, so litigants can raise non-delegation claims about a wide variety of statutes.

2. SINCE MANY DIFFERENT CONSTRUCTIONS CAN CLARIFY A STATUTE, JUDGES' SELECTION OF SAVING CONSTRUCTIONS WILL REFLECT THEIR POLICY PREFERENCES.

Application of the avoidance canon in the non-delegation context will usually force judges to shape saving constructions reflecting their individual views of sound policy. Many different constructions serving many different values may clarify a statutory mandate. For example,

[3] *See e.g. New York Times v. Sullivan*, 376 U.S. 254 (1964).

imagine a statute requiring EPA to write "sound environmental regulations." A judge could clarify this by requiring that costs not exceed benefits or that no individual suffer health impairment. The choice between these views (and other possibilities) would necessarily reflect a judicial policy preference.

In other cases, the first party to litigate a non-delegation issue will have an opportunity to secure its preferred saving construction. This explains why this case poses a question of whether to require consideration of cost, instead of whether to add specificity to section 109 by requiring, for example, that EPA protect against all health effects more likely than not to harm 100 or more people. *Cf. American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038-39 (D.C. Cir. 1999).

Under other constitutional doctrines, the nature of the constitutional problem controls the policy direction of constructions avoiding constitutional questions. The avoidance canon tends to encourage free speech,[4] protect criminal defendants,[5] and limit regulation of churches,[6] because of the substantive content of the constitutional provisions underlying the constructions. Therefore, the substantive policies that the judicial constructions implement have roots in constitutional values, rather than judicial policy decisions lacking constitutional foundation.

This problem of frequent unprincipled reconstruction of statutes to avoid non-delegation issues has not

[4] *See e.g. Int'l Ass'n of Machinists v. S. B. Street*, 367 U.S. 740, 749-50 (1961).

[5] *See e.g. Jones v. United States*, 526 U.S. 227, 239-40(1999).

[6] *See e.g. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (construing statute to avoid NLRB jurisdiction over church-operated schools).

bedeviled courts in the past because the non-delegation doctrine clearly permits Congress to delegate pursuant to general standards. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). This explains why only one of this Court's recent majority opinions has construed a statute to avoid a non-delegation claim. *See National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974). And that case arose in the tax area, where, according to Justice Douglas' majority opinion, a long tradition of non-delegation supports an inference that Congress does not intend to delegate its constitutional authority to tax at all. *See id.* at 340-41.

The plurality opinion in the *"Benzene"* case mentioned the non-delegation doctrine without explicitly invoking the avoidance canon, stating that the Occupational Safety and Health Act "might" offend the non-delegation doctrine absent the construction the plurality adopted. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). A footnote in *Mistretta*, 488 U.S. at 373 n. 7, characterizes this statement as a use of the non-delegation doctrine to narrow a statute, but the *Benzene* plurality states that its resolution of the case "turns, to a large extent" on the analysis of two specific statutory subsections (which the opinion parses at length before briefly mentioning non-delegation). *"Benzene"*, 448 U.S. at 639. *Cf. American Trucking Ass'ns v. EPA*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Judge Silberman dissenting) (characterizing *Benzene*'s reference to non-delegation as a "make-weight"). In any case, *Benzene* does not involve explicit consideration of the intelligible principle issue or a majority opinion on application of the avoidance canon. Any reinterpretation of the dormant non-delegation doctrine that brings the Act into doubt would encourage non-

delegation claims in conjunction with requests for novel statutory construction, rather than avoidance of constitutional questions.

C. CONSTRUING SECTION 109 TO INCLUDE COST CREATES A STATUTE FOREIGN TO WHAT THE ENACTING CONGRESS INTENDED.

The avoidance canon requires judges to limit themselves to constructions "not plainly contrary" to Congressional intent. *See Miller v. French*, 120 S. Ct. 2246, 2255 (2000) (declining to apply canon). This limit prevents judicial creation of statutes foreign to the enacting Congress' intentions. *Almendarez-Torres*, 523 U.S. at 238.

Yet Industry invokes the canon to transform a health protective statute into a cost-benefit statute. The enacting Congress clearly sought to overcome Industry resistance to cleaning up pollution by excluding cost considerations from the Act's goal setting provision. *See Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980). Industry seeks to incorporate selected teachings of the largely subsequent law and economics movement into the Act, but the Congress of 1970 was not among the pupils. Other briefs will discuss Congressional intent in detail.

D. INCLUDING COST EXACERBATES ANY CONSTITUTIONAL DIFFICULTY BY MAKING SECTION 109'S PRINCIPLE LESS INTELLIGIBLE.

The avoidance canon only authorizes constructions that avoid constitutional issues. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). It does not authorize constructions that fail to resolve or exacerbate a constitutional problem.

If, however, section 109 creates grave constitutional doubts, construing it to require consideration of cost exacerbates the constitutional problem by making the Act's principle less intelligible than it is now. The Act now contains a policy of protecting the public from air pollution's ill effects. Adding cost considerations makes that policy less clear. It raises questions about whether EPA may allow a population of people to die or become ill from air pollution, a question that the current statute resolves clearly.

Requiring consideration of cost would introduce pervasive vagueness into section 109. A requirement to consider cost does not establish a policy about how cost factors should influence decisions. EPA may take cost into account by writing standards reflecting all economically feasible health protections. *See e.g. American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981). This approach involves assessment of industry's financial capacity for compliance expenditures, rather than a comparison between costs and benefits. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 609-10 (1997). Alternatively, Congress may require one of several possible relationships between costs and benefits. *See e.g. id.* 582-85 (benefits must exceed cost contrasted with benefits must equal cost); *Donovan*, 452 U.S. at 506 (reasonable relationship). So requiring EPA to consider cost hardly provides a more intelligible principle than the principle that EPA should protect public health from air pollution. Indeed, it establishes no principle at all; it just adds a factor.

III. INDUSTRY'S PROPOSED CLEAR STATEMENT RULE SUBVERTS DEMOCRATIC VALUES.

Industry urges the Court to adopt a clear statement rule requiring agencies to consider cost unless Congress specifically states that the agency may not consider cost. GE Br. at 18; ATA Br. at 45-46. Industry would require consideration of "risk-risk" tradeoffs as well. *See* GE Br. at 18. But no case or controversy exists over a "risk-risk" issue, as distinct from the cost issue. *See American Trucking*, 175 F.3d at 1051-53 (requiring EPA to consider the relationship between ground-level ozone and ultra-violet rays on remand). *Cf.* GE Br. at 2-3.

The proposed clear statement rule, if adopted, would subvert democratic values. It would make judges agents of statutory revision rather than honest interpreters of Congressional intent. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) (we must put aside our views of the wisdom of Congressional action in reviewing a statute). It would therefore undermine Congressional control of policy.

A. INDUSTRY'S CLEAR STATEMENT RULE MAKES ADMINISTRATIVE AGENCIES MORE LIKE LEGISLATURES.

Presumptively requiring agencies to weigh all of the pros and cons of their actions makes them more similar to special purpose legislatures. *See generally* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 605-13 (1997). Weighing all of the pros and cons of a policy choice is the quintessential legislative activity. *See generally Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("it is for the legislature . . . to balance the advantages and disadvantages of the new requirement."). Having

weighed the pros and cons, Congress decided to have EPA execute a rather specific policy, a policy of protecting public health and welfare from air pollution. *See* 42 U.S.C. § 7409. *Cf. American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981) (Congress chose a balance between costs and benefit in favoring worker health). Industry's proposal to presumptively require agencies to employ a legislative ethos broadening the range of potential outcomes, rather than criteria reflecting specific Congressional policy choices, conflicts with its call for more "determinate" statutory criteria.

B. INDUSTRY'S CLEAR STATEMENT RULE CONFLICTS WITH PRECEDENT DESIGNED TO ASSURE THAT AGENCIES AND COURTS RESPECT LEGISLATIVE POLICY DECISIONS.

The major purpose of judicial review of agency action has been to ensure that agencies carry out Congressional mandates. The Industry clear statement rule seeks instead to use judicial review as a means of revising statutes to make them conform to Industry's view of sound risk management legislation. *See* AP Br. at 4; GE Br. at 1.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), reveals that this Court created "hard look" judicial review precisely to ensure that agencies focus exclusively on factors relevant to implementing specific Congressional policy decisions, rather than engage in open-ended cost-benefit balancing. This Court interpreted the APA to require reviewing courts to consider "whether the decision was based on consideration of the relevant factors and whether there has been a clear error in judgment." *Overton Park*, 401 U.S. at 416. The Court used the term "relevant factors" to refer to the factors the

governing statute explicitly makes relevant, not all factors that might be considered relevant if the agency were a legislature. In particular, the Court interpreted a mandate barring construction of federally funded highways through parkland "unless there is no feasible and prudent alternative . . . " *Id.* at 411. The Court rejected the government's argument that this provision authorizes "a wide-ranging balancing of competing interests." *See id.* at 411-12. The Court held that the Secretary of Transportation could only permit destruction of parkland if "he finds that alternative routes present unique problems." *Id.* at 413. This Court remanded so that the District Court could ascertain whether the Secretary undertook the limited inquiry the statute required, or violated the statute by engaging in "wide-ranging balancing." *See id.* at 413, 415-16, 420.

In case after case, this Court focuses not on the question of what factors can be relevant to a decision in an abstract sense (weighing pros and cons), but on what factors the statute commands the agency to consider in order to carry out a prior Congressional policy. Thus, in *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), the Court rejected claims that EPA may consider cost and feasibility in deciding whether to approve a state implementation plan, the package of regulations states write to generate the emission reductions needed to meet the NAAQS, *see Train v. Natural Resources Defense Council*, 421 U.S. 60, 65-67 (1975). The Act listed factors that EPA must take into account in reviewing state plans. *See Union Electric*, 427 U.S. at 257. The Act did not list cost and feasibility. *Id.* This Court held that the Administrator cannot consider cost and feasibility unless these factors can be found among the "eight criteria" listed. *Id.* The Court analyzed the issue of whether cost and feasibility

can be found, not by reference to any presumptive policy preference, but by parsing the language and legislative history of the Act. *See id.* at 257-65 (parsing the Act and concluding that Congress had decided to force pollution sources to develop control devices that might appear "economically or technically infeasible").

Similarly, in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981), this Court rejected an argument that the Occupational, Safety and Health Administration must conduct CBA. Since the governing statute explicitly required a determination of feasibility, i.e. what is capable of being done, the Court declined to require a reasonable relationship between costs and benefits. *Id.* at 506-09. CBA is not required, said the Court, because feasibility analysis is. *Id.* at 509.

Donovan rejects the notion that costs are balanced against benefits absent a contrary statement. *Donovan* states that "Congress uses specific language" when it intends that "an agency engage in cost-benefit analysis." *Id.* at 510-11. The Court justifies this statement by citing statutory provisions that expressly say that Congress wants costs and benefits weighed against each other, provisions unlike section 109 or the statutory provision before the *Donovan* Court. *Id.* at 510. This lack of a statement requiring CBA supported the Court's holding that Congress meant to require none. *See id.* at 510-12. Similarly here, section 109 does not mention cost at all, so it does not include it. *See Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980) (Congress expressly directs EPA to consider costs when it intends them to be considered). Hence, Congress intends to focus agencies exclusively on the criteria it writes to guide their decisions. *See e.g. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 34, 46-48 (1983) (failure to

consider availability of airbags makes recission of rule requiring passive restraints arbitrary and capricious under a statutory "mandate . . . to achieve . . . safety").

All of these cases reject judicial broadening of narrowly focused statutes. Rather, this Court construes statutes with the goal of confining the agency to the factors Congress expressly lists, since Congress makes policy choices by selecting limited criteria to govern agency decisions. Industry's proposal conflicts with this precedent by presumptively adding a factor in order to change policy.

C. THE CONSTITUTION DOES NOT AUTHORIZE JUDGES TO ENACT THEIR VIEWS OF SOUND RISK MANAGEMENT INTO LAW.

Although federal courts have no general law making power, *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), Industry asks this Court to establish a broad risk management principle requiring consideration of cost in all regulatory settings, *see* GE Br. at 1. Congress rather than the judiciary chooses the principles governing pollution control. The judiciary should limit itself to assessing Congressional intent without the use of a clear statement rule biasing that assessment toward Industry's view of desirable policy.

1. CLEAR STATEMENT RULES GENERALLY REQUIRE A QUASI-CONSTITUTIONAL FOUNDATION.

Clear statement rules serve to protect only "weighty and constant" values, often derived from constitutional structure. *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). *See e.g. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (rule discourages interference with

state sovereign powers under our constitutional scheme). *See generally* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). Industry does not identify any constitutional foundation for its clear statement rule.

Constitutional values often justify the risk of judicial distortion of Congressional policy choices that adherence to a clear statement rule entails. For a clear statement rule sometimes may lead to constructions that stray from the most natural contextually appropriate meaning of statutory language. *See e.g. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-06 (1979) (holding that the NLRB lacks jurisdiction over teachers at religious schools without examining broad statutory language defining employer and employee); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262-63 (1991) (dissenting opinion) (clear statement rules compel selection of "less plausible" constructions and exclude extrinsic aids to interpretation); *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994) (recognizing that Congress superseded *EEOC v. Arabian Am. Oil Co.'s* holding). Industry cannot and does not argue that protecting public health from air pollution without considering cost is irrational as a matter of "substantive" due process. *See* GE Br. at 18 n. 37. The protection of public health through air quality standards is obviously related to a legitimate public purpose. *See Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955). Nevertheless, Industry invites this Court to revise section 109 based on its views of the reasonableness of the health protection principle. *See* ATA Br. at 25; GE Br. at 4-12.

2. JUDICIAL REVIEW OF LEGISLATION'S REASONABLENESS SHOULD NOT GUIDE STATUTORY INTERPRETATION.

This Court should reject Industry's invitation to base a canon of construction (or any statutory interpretation) on its assessment of the wisdom of a legislative principle, such as the principle of protecting the public from air pollution's ill effects. The Court's proper role in interpreting statutes is to determine Congressional intent. *See Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.). If federal and state judges develop substantive canons derived from their assessment of the reasonableness of legislation, the canons and the interpretations they lead to will necessarily reflect judges' views of sound policy.

Policy arguments that Congress regularly considers, such as arguments about cost considerations, form an inappropriate basis for a clear statement rule. *See Almendarez-Torres*, 523 U.S. at 267 (dissenting opinion) (we presume that Congress agreed with traditional practice or common law, not "our current policy judgments"). A clear statement rule ensures that the legislature faces a constitutional issue that it may otherwise neglect. *See Gregory*, 501 U.S. at 461 ("clear statement" rule "assures that legislature has faced" the federalism issue) [citations omitted]. Since Congress considers cost issues central to environmental law, a clear statement rule on this subject does not force a confrontation with a neglected constitutional value; rather, it distorts Congressional choices about contemporary policy issues.

This Court has rejected searching judicial review of the reasonableness of economic legislation precisely because judges tend to enact their economic and social

views into law when making rulings based on an assessment of reasonableness. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (repudiating unreasonableness test for substantive due process, because it leads judges to "strike down laws" thought "unwise or incompatible with some particular economic or social philosophy."). The *Lochner* Court framed the constitutional question economic legislation raised as whether the legislation was "an unreasonable, unnecessary, and arbitrary" interference with personal liberty or a "reasonable . . . exercise of the police power." *Lochner v. New York*, 198 U.S. 45, 56 (1905). The Court reached a conclusion that a law limiting bakers to a ten hour work day is arbitrary by adopting reasoning very much like that which Industry invites this Court to apply in the case at bar. The Court speculated that the law "might" prove counterproductive in terms of its own objectives. *Compare id.* at 59 (limits on hours of employment "might seriously cripple the ability of the laborer to support . . . his family.") *with* GE Br. at 10 (pollution control costs "could" increase asthma). And the *Lochner*-era Court frequently used difficulties in justifying precise line drawing to question the rationality of economic legislation. *Compare Lochner*, 198 U.S. at 62 (calling conclusion that 10 hours of work does not endanger health, but 10 and a half hours does "entirely arbitrary"); *Adkins v. Children's Hospital*, 261 U.S. 525, 556-57 (1923), *overruled, West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (board "probably found it impossible to follow the indefinite standard of the statute" authorizing a minimum wage for women, "and brought . . . different factors into the problem") *with* GE Br. at 17-18 (because scientific information cannot "definitively determine" a precise air quality standard, implementing a health criterion is impossible and EPA considers cost factors). Finally, that

Court often treated a failure to weigh all pros and cons as unreasonable. *See Adkins*, 261 U.S. at 557 (failure to consider cost to employer of providing a minimum wage). *Contra Parrish*, 300 U.S. at 397 (rejecting this approach).

Justice Brandeis warned of the danger of enacting judicial "prejudices into legal principles" through review of social and economic legislation under the "arbitrary" and "capricious" standard of substantive due process. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting). This Court ultimately concluded that it should abandon the kind of evaluation of legislative reasonableness that Industry seeks, because it had led to the creation of legal principles based on judges' economic and social views. *See Ferguson*, 372 U.S. at 729-30; *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

For the same reason, this Court should reject judicial assessment of the reasonableness of a legislative principle as the basis for a clear statement rule. Such an approach will invite the creation of clear statement rules erecting the views of state and federal judges into legal principles governing statutory "construction". Clear statement rules should have roots in constitutional substance, not the contemporary policy preferences of unelected judges.

3. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT JUSTIFY A NEW SUBSTANTIVE CANON.

Since the constitution does not authorize judicial revision of statutes based on rationality review, *see United States v. Rutherford*, 442 U.S. 544, 555 (1979) (federal judges may not "rewrite legislation in accord with their own conceptions of prudent public policy."), Industry

invokes the APA as a quasi-constitutional justification for extraordinary judicial construction. General Electric, for example, asks this Court to hold that agency action under a regulatory statute "is not reasoned unless the agency considers" compliance costs (and risk tradeoffs), invoking the APA's arbitrary and capricious standard. GE Br. at 1-2, 4, 12. It then asks the Court to construe "[a]cts of Congress" in light of this abstract judicial assessment of reasonableness. *Id.* at 12.

A holding that a particular agency action is unreasoned under the APA and parallel provisions, i.e. arbitrary or capricious, could never justify a statutory construction, it would simply justify a remand to the agency. *See* 5 U.S.C. § 706(2) (only authorizing courts to "hold unlawful and set aside" agency action found arbitrary and capricious); 42 U.S.C. § 7607(d)(9) (only authorizing reversal of such action). If section 109 precludes cost consideration, then EPA consideration of cost would be arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."). So EPA's failure to consider cost can be arbitrary and capricious only if one assumes what Industry is trying to prove, that section 109 requires consideration of cost. *Cf. Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (EPA's failure to consider river's degraded state not arbitrary and capricious, because that status is not an important factor under a correct reading of the law); *Natural Resources Defense Council (NRDC) v. Administrator*, 902 F.2d 962, 978 (D.C. Cir. 1990) (petitioner's "real dispute is not with EPA but with Congress").

Industry cannot secure review of its abstract claim that all agency action not considering cost is unreasoned

under the APA, *see* GE Br. at 1, because the Court does not have before it all of the reasons that government agencies have supplied or might supply in the future to justify their actions. This claim requires review of prior D.C. Circuit holdings that EPA has provided satisfactory explanations for several NAAQS without considering cost. *See NRDC*, 902 F.2d at 968-74; *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1183-87 (D.C. Cir. 1981); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1156-67 (D.C. Cir. 1980). These holdings show that Industry's claim that setting health-based standards without considering cost is impossible is simply wrong. *Cf.* GE Br. at 17. But the relevant records are not before the Court, and the APA only authorizes on the record review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). And Industry's argument requires an inappropriate hypothetical assessment of reasoning that agencies have not yet provided, since the argument encompasses an abstract claim that all future actions will be unreasoned. *Cf. Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (declining to adjudicate claim that agency cannot inspect plants without knowing agency reasons for inspecting a particular plant).

Industry questions the reasonableness of the legislature requiring an agency to protect health without considering cost, while framing its request for a new canon of construction as a mere application of the APA. It goes far beyond the record that would form the basis for APA review, *see Overton Park*, 401 U.S. at 419, and deploys the full range of policy arguments it uses before Congress to question the wisdom of the health protection principle. Industry's claim that all possible applications of the principle that health should be protected regardless of cost are unreasonable is tantamount to claiming that the

health protection principle itself is unreasonable. *Cf. Secretary of Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982) (equating a claim that law is incapable of valid application with a claim that law itself is invalid); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (allegation that ordinance advances no legitimate state interest no matter how applied states a facial claim about the law itself). The APA simply does not authorize presumptive judicial legislation based on judges' views of the reasonableness of existing law. *Cf.* S. 981 § 627(d), 105th Cong. (1998) (rejected bill that might have generally authorized courts to set aside agency action that did not take cost into account).

D. ADDING COST CONSIDERATIONS TO SECTION 109 WILL CHANGE POLICY, NOT IMPROVE EPA'S REASONING.

General Electric states that "neither science nor health considerations alone can *definitively* determine" the level of a standard. *See* GE Br. at 17 [emphasis added]. But combining cost considerations with health considerations will not "definitively determine" the level of a standard either. In either case, EPA will have to make some judgment in interpreting complicated and often incomplete scientific evidence. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103-06 (1983) (court must be "at its most deferential" in evaluating agency actions involving scientific determinations). If costs are added EPA must make further judgments that are even harder to rationalize.

In order to compare costs and benefits, EPA would have to make numerous policy choices in deciding how much weight to give the benefits. In order to estimate the numbers of deaths and illnesses a proposed standard would avert, EPA would have to make judgments about how to deal with data gaps. *See* Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Assessment*, 92 Colum. L. Rev. 562, 572 (1992) (National Academy of Sciences has identified almost fifty decisional points in risk assessment). It would have to, in other words, judge the adequacy of a margin of safety in extrapolating seemingly precise damage estimates from incomplete data. EPA would then have to decide how much weight to give the benefits it identified. These kinds of policy choices, not the science or cost data, would determine the standards.

Its choice of valuation methodology would become extremely important, involving EPA in a whole new set of judgments that would be difficult to defend rationally. Suppose that EPA decides to value health benefits by estimating how much a polluter would have to pay a pollution victim to accept a predicted illness or death. A pollution victim might well refuse to accept even a trillion dollars to accept the pollution that will cause her demise. *See* E.J. Mishan, *Cost-Benefit Analysis* 171 (1982). Hence, this willingness to accept methodology coupled with a strong perfect information assumption might lead the regulator to prohibit any pollution predicted to kill people or cause serious illness.

The regulator might, on the other hand, ask how much the victim would be willing to pay to abate pollution. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 589-90 (1997). This would generate very different results, especially if the regulator assumed that the victim does not know that she herself will die or experience illness. *See id.* at 588-591; Mishan, *supra* at 171 (wealth limits price a person will pay for a

good, but price a person may demand to forego a good "can be infinite"). Indeed, even if one treated the core methodology as a given, numerous policy judgments would still come into play in applying the methodology. The raw scientific and cost information would not determine a standard. Adding cost to section 109 changes legislative policy, but it makes reasoned decision-making under the APA harder, not easier.

E. THE COURT SHOULD NOT CREATE A LEGAL RULE REFLECTING AN ECONOMIC THEORY LACKING CONSTITUTIONAL FOUNDATION.

In his *Lochner* dissent, Justice Holmes chided the Court for deciding the case "upon an economic theory which a large part of the country does not entertain," *see Lochner*, 198 U.S. at 75, although laissez-faire theory enjoyed a strong following among the lawyers of his day. *See* William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, 82-83 (1998).

Industry urges this Court to follow a practice that discredited the *Lochner*-era Court, allowing a contemporary economic theory to heavily influence the creation of general legal principles lacking constitutional foundation. Industry's clear statement rule's push toward CBA, *see e.g.* ATA Br. at 30, reflects neoclassical economic theory. That theory defines optimal public policy as the product of an economic analysis of costs and benefits, *see e.g.* Mishan, *supra* at 141-48, thus supporting the view that CBA should precede all important public policy decisions.

Many voters may not subscribe to neoclassical economic theory, especially as applied to the setting of environmental goals. A very common view holds that pollution causing death or serious illness should simply cease, regardless of cost. *See e.g. Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions-Part 2 Before the Subcomm. on Health and Env't. and the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 48, 49 (1997) (statement of Richard L. Brodsky, Chairman, New York State Assembly Committee on Environmental Conservation) (calling a cost-benefit approach to human health protection "morally repugnant").

This view has deep roots in the common law maxim *sic utere tuo ut alienum non laedas* (roughly, do no harm), which often implied regular imposition of strict liability. *See* III William Blackstone, *Commentaries on the Laws of England* 217 (Dawsons of Pall Mall ed. 1966); Morton J. Horowitz, *The Transformation of American Law* 1780-1860 32 (1977). While some courts relaxed the strict approach in subsequent years, many 19th and early 20th century courts repudiated balancing of equities and ordered plants to abate their pollution or shut down. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907) (Holmes J.) (allowing "possible [economic] disaster" because the petitioning State "has the last word as to whether . . . its inhabitants shall breathe pure air"); *Seacord v. The People*, 13 N.E. 194, 200-01 (Ill. 1887) (rule against balancing conveniences is well settled); *Bowman v. Humphrey*, 100 N.W. 854, 855 (Iowa 1904) (evidence that a defendant's business provides "great benefit and profit to the . . . public" held inadmissable); *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913) (enjoining operation of a pulp mill even though abatement may cost far more than

the damage inflicted); *Sullivan v. Jones & Laughlin Steel Co.*, 57 A. 1065, 1071 (Pa. 1904) (enjoining coal dust emissions and declining to balance conveniences); *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 902 (Md. 1890) (rejecting "reasonable use" limitation and CBA when damage is non-trivial). *Cf. Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870, 871-73, 875 (N.Y. 1970) (explaining that New York's settled rule requires automatic injunction of a continuing nuisance, but choosing to abandon this rule in light of need for public regulation).

Contemporary critics of CBA object to it on both practical and normative grounds. Many critics believe that bureaucrats ought not and cannot attach a monetary value to human life. *See* Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 Tex. L. Rev. 1243, 1294-95 (1987). *See also* Mark Sagoff, *The Economy of the Earth* 26-29 (1988) (public policy should reflect qualitative value choices rather than summation of preferences). And critics claim that, in practice, a weighing of costs and benefits will give short shrift to environmental and public health considerations that cannot be easily quantified. *See e. g.* Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7, 11 (1998) (CBA will "invariably" reduce statutes' environmental protection); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 541-49 (1997) (explaining how a cost-benefit requirement and hard look judicial review ended regulation under section 6 of the Toxic Substances Control Act).

To be sure, a requirement to consider cost does not specify how it should be considered, and therefore does not mandate full compliance with the theory of optimal pollution. But the *Lochner*-era Court did not consistently and fully adopt laissez-faire theory either. William M.

Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, 7 (1998). Rather, the Court's decisions reflected the influence of laissez-faire views and contemporary elite distaste for labor laws. *See id.* at 9-10, 86, 140-43, 159-61, 178. This was enough to earn it a reputation as unprincipled and ideological. *See id.* at 142-43, 160-61, 178, 201. Industry's proposed statutory canon similarly reflects deep antipathy toward environmental law and the embrace of an economic theory.

Typically, discussions of the *Lochner*-era address constitutional rulings, the specific focus of Holmes' *Lochner* dissent. But, the Court's statutory interpretation reflected its laissez-faire like views as well. *Lochner* itself held that a statute requiring a sixty-hour work week for bakers violated "liberty of contract" and thus the due process clause of the Fourteenth Amendment. 198 U.S. at 46 n. 1, 53, 64. The Court also tended to view labor actions as "coercive" interference with rights protected by due process and construed anti-trust laws to authorize injunction of strikes and boycotts. *See e.g. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-66, 478-79 (1921) (boycott coercively interferes with a "property right"); *American Steel Foundries v. Tri-Cities Cent. Trades Council*, 257 U.S. 184, 202, 205 (1921) (picketers coercively interfere with a property right). *Cf. United States v. E.C. Knight Co.*, 156 U.S. 1, 9, 16-18 (1895) (anti-trust laws do not regulate sugar monopoly). The *Lochner*-era Court's adoption of statutory interpretation reflecting its anti-labor laissez-faire policy views contributed to that Court's poor reputation as an ideological court. *See Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products*, 311 U.S. 91, 102-03 (1940) (discussing Congressional findings of "abuses of judicial power" and misinterpretation of anti-trust law). This Court repudiated these labor injunction cases in 1940, just

as it repudiated much of the *Lochner*-era's constitutional legacy. *See id.*

Industry's arguments invite this Court to emulate the *Lochner*-era vice of treating a policy running afoul of an economic theory as irrational. This Court should decline the invitation and leave Congress the task of deciding whether to conform existing law to a contemporary economic theory.

CONCLUSION

We ask the Court to affirm the Court of Appeals ruling confirming that EPA may not consider cost in writing the NAAQS.

Respectfully submitted,

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