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 AMICI CURIAE ENVRONMENTAL DEFENSE AMERICAN PUBLIC HEALTH ASSOCIATION,ET AL. ON BEHALF OF CROSS-RESPONDENTS
CROSS RESPONDENTS

Filed SEPT 11, 2000

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

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INTEREST OF *AMICI CURIAE*

Amici curiae Environmental Defense (formerly Environmental Defense Fund), American Public Health Association (the oldest and largest organization of public health professionals in the world), Clean Air Council, East Michigan Environmental Action Council, Environmental Law and Policy Center of the Midwest, Hoosier Environmental Council, Illinois Environmental Council, The Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, Ohio Citizen Action, The Ohio Environmental Council, Physicians for Social Responsibility, Southern Environmental Law Center, Tennessee Environmental Council, and Valley Watch, are sixteen not-for-profit membership organizations working to improve public health and environmental quality throughout the United States. We seek healthier air quality on behalf of our thousands of members who live, raise families, and provide public health services in communities across the country that have air pollution concentrations in excess of the ozone and particulate matter standards under review in this case.[1]

SUMMARY OF ARGUMENT

Congress has effectively ratified the interpretation of the Environmental Protection Agency (EPA) that section 109(b) of the Clean Air Act precludes the consideration of

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

costs in setting the National Ambient Air Quality Standards (NAAQS). Throughout the nearly 30 years in which the agency has consistently applied this interpretation, both supporters and opponents have brought it repeatedly to Congress' attention. Congress considered and rejected a number of bills that would have permitted or required costs to be taken into account in setting the NAAQS. It also reenacted the Clean Air Act on two occasions in which it made sweeping changes to the statute but left section 109(b) unchanged. The cross-petitioners and their supporters are attempting to win before the Court a battle that they have lost repeatedly before Congress.[2]

Moreover, the cross-petitioners seek to have the Court depart from the long-standing and consistent judicial interpretation that section 109(b) bars the consideration of costs in setting the NAAQS, which was first adopted by the D.C. Circuit in *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148-52 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). The principle of *stare decisis* applies in this case because the D.C. Circuit has exclusive venue over challenges under section 109(b) and has consistently followed *Lead Industries*, and because *Lead Industries* itself followed the interpretive framework set forth by the Court in *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-58 (1976). The failure to apply *stare decisis* would create massive additional work for EPA and the states, and would greatly affect the settled expectations of the regulated community and the public.

The statutory arguments advanced by the cross-petitioners are convoluted, implausible, and without merit. Their supporters also urge the Court to adopt a cost-benefit canon of interpretation, which, in *Lochner*-like fashion, would attribute to all federal legislative activity a uniform normative goal. The application of such a canon to the Clean Air Act would upset the carefully crafted congressional compromise in which costs are irrelevant to the setting of the NAAQS but highly relevant to when and how the NAAQS will be attained. Finally, the cross-petitioners advance an interpretation of the term "public health" that is inconsistent with the congressional understanding of this concept.

[2] This brief does not review the congressional intent expressed in the 1970 Clean Air Act because it will be discussed at length in the briefs of other supporters of EPA's interpretation.

ARGUMENT

I. CONGRESS HAS EFFECTIVELY RATIFIED EPA'S INTERPRETATION THAT COSTS CANNOT BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

A. The Court's Recent Decision in *Brown & Williamson* Compels Upholding EPA's Interpretation

The Court should uphold EPA's long-standing interpretation that costs cannot be taken into account in setting the NAAQS. See Part I.B, *infra*. Only last Term, in *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), the Court concluded that "Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction . . . to regulate tobacco products." *Id.* at 1307. In reaching this conclusion, the Court noted that Congress had adopted various statutes regulating tobacco "against the backdrop of the FDA's consistent and repeated statements that it lacked authority" to do so. *Id.* at 1306-07. It also noted that over the years "Congress considered and rejected bills that would have granted the FDA such jurisdiction." *Id.* at 1307.

As discussed in Part I.C, *infra*, the parallels with this case are striking. Here, too, Congress adopted important

statutory provisions "against the backdrop of" a substantial and consistent agency interpretation. Indeed, the 1977 and 1990 amendments to the Clean Air Act modified the programs governing the implementation of the NAAQS rather than change the manner in which the NAAQS are set. EPA's interpretation was also "brought to Congress' attention through legislation specifically designed to supplant it," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985), including the proposals by industry groups in 1977 and 1981, the regulatory reform bills that have been introduced since 1995, and the specific bills seeking to amend the Clean Air Act introduced in 1996 and 2000.

B. EPA Has a Long-standing and Consistent Interpretation of Section 109(b)

EPA first took the position that section 109(b) bars the consideration of costs in 1971, when it adopted the first six NAAQS. See 36 Fed. Reg. 8186 (1971) ("[T]he Clean Air Act . . . does not permit any factors other than health to be taken into account in setting the primary standards."). The agency repeatedly has reaffirmed this interpretation:

> Section 109(b) of the Act specifies that [NAAQS] are to be based on scientific criteria relating to the level that should be attained to adequately protect public health and welfare. Considerations of cost of achieving those standards . . . are not germane . . . , as the words of the Act and its legislative history clearly indicate.

45 Fed. Reg. 55,067 (1980); see also 43 Fed. Reg. 26,963 (1978); *id.* at 46,247; 44 Fed. Reg. 8203 (1979). In the regulatory proceedings currently under review, EPA stated: "For more than a quarter of a century, EPA has interpreted section 109 of the Act as precluding consideration of . . . economic costs . . . " 62 Fed. Reg. 38,683 (1997); *id.* at 38,878.

C. Congress Has Legislated Against the Backdrop of EPA's Interpretation and Repeatedly Has Rejected Overturning this Interpretation

1. The 1977 Amendments

Congress amended the Clean Air Act extensively in 1977 (the amendments take up 111 pages in the Statutes at Large, see Pub. L. 95-95, 91 Stat. 685, 685-796 (1977)) but left section 109(b) unchanged even though the manner in which EPA set the NAAQS received sustained congressional attention.

Perhaps the most important decision before Congress in 1977 was how to deal with the fact that large portions of the country had failed to meet the NAAQS even though the 1970 statute had contemplated that the primary NAAQS would be achieved throughout the country by 1975. See 42 U.S.C. §§ 1857c-4, 1857c-5 (amended 1977). One approach could have been to weaken the NAAQS in areas that had trouble meeting these standards – an approach that would have required an amendment of section 109(b). See *Lead Industries*, 647 U.S. at 1150 (discussing efforts by industry representatives to urge Congress to "[r]evise section 109 . . . to include allowance for the consideration of social and economic factors in the definition of 'health' and 'welfare.' "). Congress, however, left section 109(b) unchanged and instead extended the deadlines for achieving the standards to 1982 and, in some instances, to 1987. 42 U.S.C. § 7502(a)(1)-(2) (amended 1990).

Congress also debated the merits of the NAAQS in the crafting of a program for the Prevention of Significant Deterioration (PSD) of air quality in areas meeting the NAAQS. See 42 U.S.C. §§ 7470-7492. Congress faced the

question whether areas that had better air quality than the NAAQS would be subject to standards more stringent than the NAAQS. Despite extensive congressional discussion concerning the NAAQS, the relevant committee reports do not suggest that the NAAQS were too stringent because they were set without taking costs into account. Quite to the contrary, the Report of the House Committee on Interstate and Foreign Commerce found that the NAAQS were insufficiently protective, and that it was therefore desirable to have more stringent standards in areas that were already meeting the NAAQS. See H.R. Rep. 95-294, at 103-28 (1977). In fact, the Report noted that "all indicators point to the likely necessity for tightening the ambient air quality standards to protect public health." *Id.* at 127. Thus, Congress retooled the air quality management programs both for areas failing to meet the NAAQS and for areas achieving the NAAQS, but did not modify the provisions in section 109(b) governing how EPA set the NAAQS.

2. Further Consideration in the 1980s

The 1977 amendments established the National Commission on Air Quality, which included the leaders of the congressional committees with oversight responsibilities for the Clean Air Act (Sens. Hart and Stafford, and Reps. Broyhill and Dingell). The Commission was asked to "make an independent analysis of air pollution control and alternative strategies for achieving the goals of the Act." See The National Commission on Air Quality, *To Breathe Clean Air* vii (1981). In its final report, the Commission made numerous recommendations for amendments to Congress, but its first recommendation was to retain the Act's prohibition on the consideration of costs in setting the NAAQS: "The current statutory criteria and requirements for setting air quality standards at the levels

necessary to protect public health without consideration of economic factors should remain unchanged." *Id.* at 55.

The Commission's recommendation was debated in oversight hearings held in 1981. For example, the Business Roundtable proposed that section 109(b) be amended to require the Administrator "to consider the nature and extent of the risk, attainability of the standard, economic values, and other public interests." *Clean Air Oversight: Hearings Before the Senate Comm. on Environment and Public Works*, 97th Cong., Part 3, at 505 (1981). George Eads, one of the signatories of the *amicus* brief filed by a group of economists in this case, harshly characterized the setting of NAAQS without taking costs into account as "an elaborate charade that does not serve the public well." *Id.* at 200. Senator Hart, the Commission's Chairman, strongly objected to Eads' characterization: "[W]hat you describe as an elaborate charade was the product of very extensive deliberation on the part of the Congress of 1970, received almost 3 years of deliberation on the part of the Congress that acted in 1977, was reviewed for almost 3 years by the National Commission on Air Quality and was sustained by that Commission." *Id.* at 214.

Similarly, Senator Chafee expressed misgivings about the "insertion of an added element, namely consideration of the cost-benefit test." *Id.* at 212. A number of other Senators indicated that costs could not be taken into account in setting the primary NAAQS. See, *e.g.*, *id.* at 202 (Sen. Stafford); *id.* at 209 (Sen. Gorton).

Later in 1981, in connection with possible amendments to the Clean Air Act, the Senate Committee on Environment and Public Works unanimously agreed in a straw vote not to change the manner in which the primary standards were set. See 12 *Env't Rep.* (BNA) 835 (1981). An industry group supported this outcome, noting that "primary standards should continue to be based

on health factors," though it urged that "economic factors" should be made relevant to the secondary standards. See *id.* at 766. This group included representatives of the U.S. Chamber of Commerce and the National Association of Manufacturers, which now urge the Court to hold that costs must be taken into account in setting the primary standards.

3. The 1990 Amendments

In 1990, as in 1977, Congress left section 109(b) unchanged despite statutory amendments that take up 314 pages in the Statutes at Large. See Pub. L. 101-549, 104 Stat. 2399, 2399-2712 (1990). Both the floor debates and the congressional reports, however, discussed the prohibition on considering costs in setting the primary NAAQS. See, *e.g.*, 136 Cong. Rec. H12,885 (daily ed. Oct. 26, 1990) (Rep. Swift) ("They are not cost-benefit standards. They are absolute standards."); 136 Cong. Rec. S16,896 (daily ed. Oct. 27, 1990) (Sen. Moynihan) ("The cost of meeting these standards was not to be considered."); S. Rep. 101-228, at 5 (1989) (" '[P]rimary' ambient air quality standards limit the maximum allowable concentration of each criteria pollutant . . . without regard to the economic or technical feasibility of attainment."); see also S. Rep. 100-231, at 251 (1987) (referring to disallowance of cost considerations under section 109(b)). One opponent of the proposed amendments, Representative Dannemeyer, introduced into the *Congressional Record* a study complaining that "benefits and costs" could not be taken into account in setting the NAAQS. 136 Cong. Rec. H12,916 (daily ed. Oct. 26, 1990); see *id.* at H12,912-15.

Moreover, in 1990, Congress again faced the problem of how to deal with areas that had not met the NAAQS. As in 1977, the 1990 Congress could have weakened the NAAQS in order to make attainment easier but chose to leave unchanged the method for setting the NAAQS and

instead to extend the attainment deadlines. See, *e.g.*, 42 U.S.C. § 7511(a)(1).

4. Bills to Amend Section 109(b)

In hearings held in 1995, Mary Nichols, EPA's Assistant Administrator for Air and Radiation, testified that "the Clean Air Act has always required the EPA not to take costs into consideration when setting the national ambient air quality standards." *Clean Air Act Amendments: Joint Hearing Before the Subcomms. on Oversight and Investigations, and on Health and Environment, House Comm. on Commerce,* 104th Cong., at 126 (1995). Representative Barton then introduced the Clean Air Act Amendments of 1996, which would have required that "the incremental costs" of the NAAQS must not exceed their "incremental benefits." See H.R. 3519, 104th Cong., 2d Sess. § 13 (1996). The Barton bill was never reported out of committee.

In the 106th Congress, Senator Voinovich introduced the Air Quality Standard Improvement Act of 2000, which would require EPA to consider cost-benefit analysis in setting the NAAQS. See S. 2362, 106th Cong., 2d Sess. (2000). That bill has not been reported out of committee. Thus, the specific legislative initiatives to amend the manner in which the NAAQS are established under section 109(b) have been unsuccessful.

5. Regulatory Reform Efforts Beginning in the 104th Congress

Section 109(b)'s prohibition on the consideration of costs was the subject of extensive congressional attention in the debates over regulatory reform bills that would have required cost-benefit analysis for many federal regulations. In the 104th Congress, there were two principal vehicles for these efforts: H.R. 9, 104th Cong., 1st Sess. (1995) and S. 343, 104th Cong., 1st Sess. (1995). See also S. 291, 104th Cong., 1st Sess. (1995).

During the House debates on an earlier version of H.R. 9, for example, Representative Beilenson complained:

> Particularly troubling is the fact that the bill's decision criteria for issuing rules would supercede such requirements in existing health, safety, and environmental laws. By applying these new requirements to such laws as the Clean Air . . . Act[ ], this legislation threatens to overturn the important health protections citizens have under those laws.

141 Cong. Rec. H2235 (daily ed. Feb. 27, 1995). Similarly, Representative Brown noted that "the bill overrides . . . provisions of existing law," including the Clean Air Act. *Id.* at H2241.

Representative Boehlert offered an amendment, with bipartisan support, to restrict the bill's reach: "Nothing in this Act shall be construed to modify any statutory standard or requirement . . . " *id.* at H2357 (daily ed. Feb. 28, 1995), and members noted its impact on the Clean Air Act, see *id.* at H2361 (Rep. Morella); *id.* at H2364 (Rep. Waxman). The amendment was defeated and the bill passed the House, *id.* at H2365-66, 2638-39, but was never voted on by the Senate.

In the Senate, a number of Senators on the Committee on the Judiciary complained about the impact of S. 343 on statutes such as the Clean Air Act:

> S. 343 contains what has been called a "supermandate." It creates supplementary decisional criteria for every agency action that permits the cost factors to trump safety factors in statutes in which Congress intended that safety should be the primary consideration. Without acknowledgment, the bill's supplementary decisional criteria effectively would amend the carefully considered criteria now in place in such landmark laws as . . . the Clean Air Act . . .

S. Rep. 104-90, at 135 (1995) (additional views of Senators Biden, Kennedy, Leahy, Simon, Kohl, and Feingold); see also *id.* at 130, 136. Witnesses in committee hearings raised similar complaints. See, *e.g.*, *Regulatory Reform: Hearings Before the Senate Comm. on Governmental Affairs*, 104th Cong., at 495 (1995).

In response to these concerns, the Senate amended the bill with bipartisan support to eliminate the supermandate, by providing: "Nothing in this section shall be construed to override any statutory requirement, including health, safety, and environmental requirements." 141 Cong. Rec. S9695 (daily ed. July 11, 1995). The bill as amended failed to survive a cloture vote. See *id.* at S10,399.[3]

6. Oversight Hearings in Connection with the Proposal and Promulgation of the Challenged NAAQS for Ozone and Particulate Matter

Following EPA's proposal of the NAAQS for ozone and particulate matter (PM) that are at issue in this case, Congress held a number of oversight hearings on the Clean Air Act in which EPA officials highlighted EPA's practice of not considering costs when setting the NAAQS. For example, Carol Browner, the EPA Administrator, stated in both Senate and House hearings that "[t]hroughout the 25-year history of the Clean Air Act . . . [c]osts of meeting the standards and related factors have never been considered in setting the national

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[3] A number of bills requiring cost-benefit analyses of significant federal regulations were introduced in the 105th and 106th Congresses, but none reached either the House or Senate floor for a vote. See, *e.g.*, H.R. 1704, 105th Cong., 1st Sess. (1997); H.R. 4085, 105th Cong., 2d Sess. (1998); H.R. 4162, 105th Cong., 2d Sess. (1998); H.R. 4863, 105th Cong., 2d Sess. (1998); S. 981, 105th Cong., 1st Sess. (1997).

ambient air quality standards themselves." *Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Senate Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety and the Senate Comm. on Environment and Public Works*, 105th Cong., Part 1, at 282 (1997) [*1997 Senate Environment Hearings*]; *EPA's Particulate Matter and Ozone Rulemaking: Is EPA Above the Law?: Hearings Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs, House Comm. on Government Reform and Oversight*, 105th Cong., at 380 (1997) [*1997 House Government Reform Hearings*]; see *Implementation of the Clean Air Act National Ambient Air Quality Standards (NAAQS) Revisions for Ozone and Particulate Matter: Joint Hearing Before the Subcomm. on Health and Environment and the Subcomm. on Oversight and Investigations, House Comm. on Commerce*, 105th Cong., at 21 (1997).

EPA Deputy Administrator Fred Hansen testified that "Congress directed EPA to set what are known as 'primary standards' to protect public health without consideration of cost." *EPA's Rulemakings on the National Ambient Air Quality Standards for Particulate Matter and Ozone: Hearing Before the Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary*, 105th Cong., at 22 (1997) [*1997 Senate Judiciary Hearings*].

Similarly, Mary Nichols, EPA's Assistant Administrator for Air and Radiation, testified that EPA's practice of not taking costs into account in setting the NAAQS had been followed "through six Presidential administrations and 14 Congresses." 1997 *Senate Environment Hearings*, Part 2, at 203; *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearings Before the Subcomm. on Health and the Environment and the Subcomm. on Oversight and Investigations, House Comm. on Commerce*, 105th Cong., Part 1, at 160 (1997) [*1997 House Commerce Hearings*].

Witnesses supporting and opposing the revised ozone and PM standards testified that the Clean Air Act

required the NAAQS to be set without taking costs into account. See, *e.g.*, *1997 Senate Judiciary Hearings*, at 68 ("These standards must be established by relying on health based criteria only; that is very specific in the Clean Air Act"); *1997 House Commerce Hearings*, Part 1, at 53 ("[I]t is unfortunate that the Clean Air Act prohibits the consideration of cost in setting the standard."); *1997 Senate Environment Hearings*, Part 2, at 162 ("EPA interprets the Clean Air Act to prohibit the consideration of costs in setting NAAQS."); *1997 House Government Reform Hearings* at 284 ("As required by Congress, EPA is to set . . . the ozone and PM standards at levels that are protective of the public health without basing its decision on the costs of complying with those standards.").

Moreover, members of Congress acknowledged that under the law costs could not be taken into account in setting the NAAQS. See, *e.g.*, *1997 House Commerce Hearings*, Part 2, at 260 ("The law says that EPA must set standards based solely upon human health considerations.") (Rep. Pallone). In the end, a bill that would have reinstated the previous ozone and PM standards did not reach the Senate floor for a vote. S. 1084, 105th Cong., 1st Sess. (1997).

D. The Court Should Not Be Used to End-Run the Political Process

There currently is dissension in Congress on the role that costs should play in setting the NAAQS. The variety of views are illustrated by a recent subcommittee hearing that marked the beginning of a new effort to reauthorize the Clean Air Act. See *Clean Air Act: Review and Oversight: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety, Senate Comm. on Environment and Public Works*, 106th Cong. (1999). Senator Inhofe complained that the Clean Air Act "is chasing after pennies of benefits for dollars in costs through its failure to identify

the most cost-effective risks." *Id.* at 2. Senator Voinovich announced that he would introduce a bill requiring the use of cost-benefit analysis under section 109(b). *Id.* at 3.

In contrast, Senator Baucus stated: "[D]eveloping clean air standards does not lend itself easily to cost-benefit analysis . . . I challenge anyone to put a dollars and cents value on a child's reduced IQ due to exposure to lead." *Id.* at 6. Senator Lieberman expressed "words of caution on the issue of applying cost-benefit analysis to the Clean Air Act" and spoke critically of telling "the public that we can't let them know whether the air is clean enough to breathe because the standard doesn't meet a cost-benefit test." *Id.* at 8-9.

Perhaps the proponents of cost-benefit analysis eventually will prevail before Congress as they did in 1996 with respect to the amendments of the Safe Drinking Water Act (SDWA). See 42 U.S.C. § 300g-1(b)(4)(C), (6)(A). But if advocates of cost-benefit analysis do prevail in Congress it is likely to be as part of a package in which some of the competing concerns of other interests also are addressed, as was the case under the SDWA. See *id.* § 300g-1(b)(1)(C) (requiring EPA to take account of the interests of sensitive subgroups); *id.* § 300g-3(c)(4) (requiring the provision of information to consumers).

The cross-petitioners and various *amici* are seeking to win a victory from the Court that they have not been able to achieve in Congress despite extensive efforts over two decades. See Part I.C, *supra*. They are also trying to obtain this victory in a manner that does not require any competing compromises, as invariably would occur in the give-and-take of the legislative process. So are some Senators who have so far been unsuccessful at obtaining the passage of the legislation that they favor: two of the four senators who co-sponsored the recent Senate bill that would require cost-benefit analysis in the setting of the NAAQS, see Part I.C.4, *supra*, and two of the leading advocates of the failed regulatory reform bills in the

104th Congress, see Part I.C.5, *supra*. See Am. Br. of Sen. Inhofe *et al.* 5-17; Am. Br. of Sen. Hatch and Rep. Bliley. Were they to prevail here they would be denying the public a full and fair consideration of the host of political, technical and intellectual issues that must be aired and resolved in this policy debate: an airing and resolution that only Congress can provide. The Court should not allow itself to be used for such an end-run around the political process.

II. THE PRINCIPLE OF *STARE DECISIS* CALLS FOR FOLLOWING THE LONG-STANDING JUDICIAL DETERMINATION THAT COSTS CANNOT BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

A. In a Body of Case Law Issued Over the Past Twenty Years, the D.C. Circuit Has Consistently Held that Costs Cannot Be Taken Into Account in Setting the NAAQS

EPA's interpretation that costs cannot be taken into account in setting the NAAQS was first affirmed by the D.C. Circuit in 1980. See *Lead Industries*, 647 F.2d at 1148 ("[T]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109.").

The D.C. Circuit, which has exclusive venue over the review of NAAQS, see 42 U.S.C. § 7607(b)(1), reaffirmed *Lead Industries* in cases reviewing various NAAQS. See *API* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982) ("API's argument that the Administrator erred in not considering attainability and cost justifications for the ozone standards was specifically rejected in the *Lead Industries* case."); *NRDC* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991) ("Under § 109 . . . the Administrator may not

consider cost and technological feasibility."); see also *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (NAAQS must be set "without reference to cost or technological feasibility"). The court below thus simply followed a long line of consistent precedent in holding that "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." Pet. App. 19a.

B. The Principle of *Stare Decisis* Applies in this Case

As Justice Stevens observed in a recent plurality opinion joined by Justices Ginsburg and Breyer, the principle of *stare decisis* comes into play when the Court confronts a clear body of law fashioned by the courts of appeals. See *Hubbard* v. *United States*, 514 U.S. 695, 712-13 (1995) (plurality opinion); see also *United States* v. *Ryan*, 284 U.S. 167, 174 (1931) ("[W]e should hesitate to set aside, at this late date, the uniform construction given . . . by the lower federal courts . . . "). Justice Stevens noted that following precedents of the lower courts "serves . . . one of the central purposes of *stare decisis*: promoting 'stability and certainty in the law.' " *Hubbard*, 514 U.S. at 713 n.13.

This case presents an even more compelling claim for *stare decisis* than *Hubbard* because here following the long-standing and consistent lower court approach does not require overruling a prior Supreme Court precedent. Thus, the concerns about invoking *stare decisis* expressed by the three dissenting Justices in *Hubbard* are not present here. See *id.* at 721 (Rehnquist, C.J., joined by O'Connor and Souter, JJ., dissenting).

Quite to the contrary, *Lead Industries* followed the Court's own approach to the interpretation of the Clean Air Act. In *Union Electric Co.*, 427 U.S. at 253-54, the petitioners argued that EPA was required to consider

economic and technological feasibility in deciding whether to approve State Implementation Plans (SIPs) under section 110 of the Clean Air Act. The Court held that EPA could not rely on factors other than those listed in section 110(a)(2). *Id.* at 257. Similarly, the D.C. Circuit in *Lead Industries* held that, in setting the NAAQS, EPA could not rely on factors other than those set forth in section 109(b). Moreover, the Court in *Union Electric* stated that, under the Clean Air Act, "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Id.* at 257 n.5. Relying on *Union Electric*, the D.C. Circuit used nearly identical language in *Lead Industries*. See 647 F.2d at 1148-49 & n.37. Other opinions have recognized the close links between the interpretive approaches of the two cases. See, *e.g.*, *NRDC* v. *EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (*en banc* opinion by Bork, J.) ("*Vinyl Chloride*"); *Union of Concerned Scientists* v. *NRC*, 824 F.2d 108, 114-15 (D.C. Cir. 1987).

None of the special circumstances that might justify a departure from a *stare decisis* approach are present here. In particular, no "intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). The continuing vitality of *Lead Industries* is underscored by the D.C. Circuit's reliance on this case in interpreting other statutory provisions. See *Union of Concerned Scientists*, 824 F.2d at 114 (relying on *Lead Industries* and *Union Electric* to hold that "economic costs" may not be considered under provision of the Atomic Energy Act); *Vinyl Chloride*, 824 F.2d at 1158-59 (en banc opinion by Bork, J.) (analyzing implications of *Lead Industries* and *Union Electric* for the interpretation of section 112 of the Clean Air Act). There is no merit in the cross-petitioners' suggestion that subsequent decisions of the Court "negate the premises on which *Lead Industries* is predicated," as none of the cases on which they rely deal

with the Clean Air Act, the consideration of costs under environmental statutes, the use of cost-benefit analysis, or are otherwise relevant. Cross-Pet. Br. 28, 31-32.

Moreover, this case does not raise the issue that led the Court to reject *stare decisis* in *Dickinson* v. *Zurko*, 527 U.S. 150 (1999), over the dissent of three Justices, see *id.* at 171 (Rehnquist, C.J., joined by Kennedy and Ginsburg, JJ., dissenting). The Court's concern in *Zurko* was that because the Federal Circuit's standard of review over decisions of the Patent and Trademark Office was different from the standard under the Administrative Procedure Act (APA), applying *stare decisis* would make it too easy for other agencies to depart from the requirements of the APA. See *id.* at 162. In this case, following the *Lead Industries* approach would not have a negative impact on other statutes.

C. This Case Presents Particularly Compelling Arguments in Favor of the Application of *Stare Decisis*

In *Patterson*, 491 U.S. at 172, the Court emphasized that "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction," as is the case here. Even in constitutional cases, where the possibility of congressional correction is absent, "the principles of *stare decisis* weigh heavily against overruling" precedents. *Dickerson* v. *United States*, 120 S. Ct. 2326, 2336 (2000).

The principle of *stare decisis* has particular force where abandoning precedent "would dislodge settled rights and expectations." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Departing from *Lead Industries* would do far more than simply set aside the revisions to the NAAQS for ozone and PM that were challenged below. It could also mean that all the other

NAAQS would have to be revised at the time of their five-year review, see 42 U.S.C. § 7409(d)(1), even if no new information arose concerning the adverse health effects of the respective contaminants.

In turn, such revisions of the NAAQS would give rise to the need for states to submit new SIPs and, consequently, to impose new limitations on their stationary sources. See 42 U.S.C. § 7410(a)(1)-(2). Furthermore, thirty years of settled air quality management policies in communities across the country would be called into question.

The result would be massive additional work for EPA and the states. The change in interpretation also would greatly affect the settled expectations of the regulated community and the public. Investments in pollution control equipment could be rendered worthless by changes in the standards. In sum, the factors that call for a heightened application of the principle of *stare decisis* are present here.

D. A Policy Change of this Magnitude Cannot be Made by the Judiciary Without Seriously Disrupting the Nation's Efforts to Control Air Pollution

The dislocations that would come from failing to follow *stare decisis* underscore why policy changes of the magnitude proposed by the cross-petitioners ought to be made, if at all, by Congress and not by the judiciary. If Congress were to decide that costs should be taken into account in setting the NAAQS, it could establish rules ensuring an orderly transition to a new regime. For example, Congress might decide, as it did in its 1996 amendments to the SDWA, to require cost-benefit analysis only if EPA seeks to strengthen standards. See 42 U.S.C. § 300g-1(b)(3)-(6), (9)). Thus, the transition to the use of cost-benefit analysis did not affect the existing standards.

The judiciary, unlike Congress, does not have the flexibility to fashion finely textured rules of this sort. Its only available instrument – a judicial reinterpretation of section 109(b) – is overly blunt, and would lead to considerable disarray in the implementation of the Clean Air Act.

III. THE CHALLENGES TO EPA'S INTERPRETATION OF SECTION 109(b) ARE WHOLLY UNPERSUASIVE

A. The Cross-Petitioners' Arguments Concerning Sections 108 and 109 Are Without Merit

First, the cross-petitioners note that the criteria published pursuant to section 108(a)(2) must contain information not only concerning public health, but also concerning public welfare. See 42 U.S.C. § 7408(a)(2). Then, they point out that public welfare is defined in the statute to include effects "on economic values and on personal comfort and well-being." *Id.* § 7602(h). From this, they conclude that economic values must be taken into account in setting the primary NAAQS. See Cross-Pet. Br. 37-39.

The flaw with this argument is that it is the secondary NAAQS – not the primary NAAQS – that are set to protect against adverse effects on public welfare. The definition of public welfare is irrelevant to the setting of the primary standards, which must "protect the public health." 42 U.S.C. § 7409(b)(1).

Second, the cross-petitioners argue that just because the primary NAAQS must be "based on" the air quality criteria promulgated under section 108, see 42 U.S.C. § 7409(b)(1), does not mean that they must be based *only* on the criteria. Cross-Pet. Br. 39. For the cross-petitioners to prevail, however, the statute would have to say that the NAAQS *must* be based on factors other than those

included in the criteria, and, more particularly, that they must be based on the costs of compliance. Without that, the cross-petitioners do not have an affirmative counterweight to the clear meaning of the 1970 legislation, the congressional reaffirmation of EPA's interpretation, the doctrine of *stare decisis*, or the deference owed to the long-standing administrative construction.

Third, the cross-petitioners take issue with EPA's view that the section 108 "criteria" are compilations of scientific information about a pollutant's adverse health effects. Cross-Pet. Br. 39. The dictionary definition on which cross-petitioners rely cannot override the statutory command that "[a]ir quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare." 42 U.S.C. § 7408(a)(2).

Fourth, the cross-petitioners argue that the NAAQS cannot be set solely by reference to the criteria because the agency is commanded to consider the comments submitted in the rulemaking. Cross-Pet. Br. 39-40. But there is no plausible scenario under which the requirement that the agency consider comments could modify the standards defined in the statute for the setting of the NAAQS.

Fifth, the cross-petitioners focus on section 108(b)(1), which requires the Administrator to provide states with information about air pollution control techniques, including "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." 42 U.S.C. § 7408(b)(1). The cross-petitioners argue that the statute requires the Administrator to provide this information so that states can "criticize EPA's consideration of compliance costs in NAAQS standard setting proceedings," rather than so that they can begin

preparing their strategies for attaining the NAAQS. Cross-Pet. Br. 40.

The only evidence that the cross-petitioners adduce for this bizarre proposition is that the states receive this information "at least three or four years" before "they begin planning compliance with a revised NAAQS." *Id.* The statute, however, does not contemplate such an extended time frame. Indeed, EPA must issue the information "simultaneously" with the publication of proposed NAAQS, and must promulgate final NAAQS no later than 90 days after the proposal. See 42 U.S.C. § 7409(a)(1)(B), (a)(2). The states must submit SIPs for EPA's approval within 3 years of the promulgation of the NAAQS, and before this submission they must provide "reasonable notice" and conduct "public hearings." *Id.* § 7410(a)(1). So, under the statutory time frame, states must "begin planning" for their SIPs soon after the NAAQS are promulgated.

Sixth, the cross-petitioners find support for the view that NAAQS must take into account economic considerations in section 109(d), which sets forth the role of the Clean Air Scientific Advisory Committee (CASAC). Cross-Pet. Br. 41. CASAC's principal function is to review at five-year intervals the criteria and NAAQS for the various pollutants. See 42 U.S.C. § 7409(d)(2)(B). But CASAC also is required to advise the Administrator on a number of other matters, including on "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." *Id.* § 7409(d)(2)(C)(iv). The legislative history explains the purpose of this provision: "[T]his advice may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. No. 95-294, at 183 (1977).

The cross-petitioners insist, nonetheless, that this cannot in fact be the purpose of section 109(d) because the information on compliance costs is given to the

Administrator and not to the states. The cross-petitioners overlook, however, that EPA has a statutory obligation under section 108(b)(1) to provide such information to the states. See 42 U.S.C. § 7408(b)(1).

The cross-petitioners attempt to bolster their argument by referring to section 307(d)(3), which requires EPA, when it proposes a NAAQS, to "provide a reference to any pertinent findings, recommendations, and comments" by CASAC, and to explain the reasons for important departures from these recommendations. *Id.* § 7607(d)(3). But the statute makes clear that this obligation attaches only to "pertinent" CASAC materials. The advice under section 109(d)(2)(C)(iv) is simply not "pertinent" to the setting of the NAAQS.

B. The Court Should Decline the Invitation to Adopt a Cost-Benefit Canon of Statutory Interpretation

Amicus General Electric urges the Court to adopt an interpretive canon that would attribute to all federal legislative activity a uniform normative goal: cost-benefit analysis. *Cf. College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) ("We had always thought that the distinctive feature of *Lochner*, nicely captured in Justice Holmes' dissenting remark about 'Mr. Herbert Spencer's Social Statics,' was that it sought to impose a particular economic philosophy upon the Constitution."). The Court is asked to take this course of action despite the deep divisions that cost-benefit analysis engenders in the political process. See Parts I.C.5, I.D, *supra*. Regardless of what the Court might think of such a "*Lochner* for the administrative state," this case provides a poor vehicle for considering the question.

1. Such a Canon Could Not Override the Evidence of Congressional Intent or the Deference Owed to EPA Under *Chevron*

The cost-benefit canon is irrelevant to the disposition of this case. The canon cannot override the clear meaning of the 1970 legislation, the congressional reaffirmation of EPA's interpretation, or the doctrine of *stare decisis*. Moreover, the Court's endorsement of the cost-benefit canon could have no impact on the disposition of this case because "policy oriented canons of statutory construction" cannot trump the *Chevron* deference owed to EPA's interpretation. *Ober United Travel Agency, Inc.* v. *Department of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998); see *Amex Land Co.* v. *Quarterman*, 181 F.3d 1356, 1362 (D.C. Cir. 1999) ("canons that embody a policy choice and should not be employed by a reviewing court at *Chevron* step I or II"); *Michigan Citizens for an Indep. Press* v. *Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989) (same).

2. The Court Must Respect the Manner in Which Congress Has Taken Costs into Account in the Clean Air Act

A cost-benefit canon has no role to play under the Clean Air Act, where Congress paid close attention to where and how costs should be considered and traded off against health benefits. The NAAQS are aggregate measures of the permissible concentration of pollutants in the ambient air, which do not directly constrain the activities of any polluter. Costs are directly relevant, however, to when and how the NAAQS will be met through the regulation of individual polluters. For example, the federal emission limitations are highly sensitive to the costs imposed on regulated firms. The New Source Performance Standards (NSPS), which apply to new stationary sources, must "tak[e] into account the costs of achieving

[the] reduction." 42 U.S.C. § 7411(a)(1). The Best Available Control Technology (BACT) standards, which apply to large new sources in areas meeting the NAAQS, must "tak[e] into account energy, environmental, and economic impacts and other costs." *Id.* § 7479(3). Reasonably Available Control Technology (RACT) standards, which apply to existing sources in areas out of compliance with the NAAQS, must take into account "[t]he social, environmental, and economic impact of such controls." 40 C.F.R. § 51.100(o)(2). Similarly, in determining whether to prescribe more stringent standards for mobile sources, the Administrator must consider whether further emission reductions would be "cost-effective." 42 U.S.C. § 7521(i)(3)(A)(iii). In other parts of the statute, Congress has deliberately employed cost-reducing strategies, such as the emissions allowance and trading program to address acid rain. 42 U.S.C. §§ 7651-7651o.

Furthermore, in its amendments to the Clean Air Act, Congress has shown a keen interest in avoiding excessive economic dislocations. Most importantly, while the 1970 Clean Air Act contemplated that the NAAQS for all pollutants would be met, nationwide, by around 1975, Congress extended the attainment deadlines in the 1977 and 1990 amendments. See Part I.C.1, I.C.3. For ozone, for example, the NAAQS do not need to be met in certain parts of the country until 2010. See 42 U.S.C. § 7511(a)(1). In addition, Congress has provided more targeted relief in a variety of instances. See, *e.g.*, Pub. L. 97-23, § 2, 95 Stat. 139, 139 (1981) (extending compliance deadlines for iron and steel facilities); 42 U.S.C. § 7419 (providing waiver for copper smelters in 1977).

The Clean Air Act accordingly consists of a carefully crafted congressional compromise in which costs are irrelevant to the setting of the NAAQS but highly relevant to when and how the NAAQS will be attained. The application of a cost-benefit canon would impermissibly upset this compromise.

C. The Challengers Rely on a Number of Irrelevant Generalities and Inapposite Provisions of the Clean Air Act

As indicated in the preceding section, costs do play an important role in determining how the NAAQS will be implimented. It is therefore not surprising that the challengers to EPA's interpretation can find concern in the Act's preamble, 42 U.S.C. § 7401(b)(1), for "the productive capacity of the population." See Appalachian Power Br. 29, 33, 35, 37, 45; see also *id.* at 29 (citing legislative history concerning the overall purpose of the 1977 amendments). But such generalities are irrelevant to the analysis of section 109(b).

The cross-petitioners and their supporters also rely on a number of cases that are inapposite to the interpretation of section 109(b). See Cross-Pet. Br. 45-47. For example, *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000), deals with programs designed to implement the NAAQS, not with the provisions governing the establishment of the NAAQS. The question in *Michigan* v. *EPA* was whether the emission reductions necessary to meet the NAAQS had to be made by upwind or downwind sources. The D.C. Circuit upheld EPA's approach of allocating the resulting pollution control burden in a manner that reduced the aggregate costs of compliance. See *id.* at 674-78. Other cases involve the interpretation of statutory provisions that *require* the consideration of costs. *George E. Warren Corp.* v. *EPA*, 159 F.3d 616 (1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999), involves the regulation of certain gasoline under section 211 – a provision in which costs play an integral role. See 42 U.S.C. § 7545(c)(2)(A)-(B), (k)(1). *NRDC* v. *EPA*, 937 F.2d 641 (D.C. Cir. 1991), concerns the setting of standards for major emitting facilities in areas that have attained compliance with the NAAQS. These standards are set by

reference to BACT, 42 U.S.C. § 7475(a)(4), which must take costs into account.[4]

D. The Challengers Fail in their Efforts to Introduce Economic Considerations into the Term "Public Health"

Having repeatedly failed in legislative attempts to require that economic concerns be taken into account in setting the NAAQS, see Part I.C, *supra*, the cross-petitioners and their supporters now claim that the term "public health" in section 109(b) always required the consideration of costs. Cross-Pet. Br. 33-36; Am Br. of General Electric 14-15; Am. Br. of Sen. Hatch *et al.* 6-7. In making this implausible assertion, they rely principally on a 1951 book, which they assert was the "authoritative public health definition available to the 1970 Congress," Cross-Pet Br. 34, and on a presentation at a Harvard faculty meeting. Am. Br. of Sen. Hatch *et al.* 7, n.8.

The meaning of "public health" must be determined in light of the statutory context in which it is used. Section 109(b) directs EPA to establish standards requisite to protect public health on the basis of air quality "criteria." The exclusive subject of these criteria is scientific information related to adverse health effects, not economic considerations. 42 U.S.C. § 7408(a)(2); Part III.A, *supra*. When Congress enacted the 1970 Clean Air Act, it prescribed that the NAAQS for the five pollutants for which criteria had already been prepared be proposed within 30 days of the Act's passage, *id.* § 7409(a)(1)(A), leaving no time for revising the criteria. In doing so, Congress was aware of the purely health-based content of

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[4] Cross-petitioners' reliance on *Vinyl Chloride*, 824 F.2d at 1146, is similarly misplaced, since that case did not cast any doubt on *Lead Industries'* interpretation of section 109(b). See *id.* at 1157-59; Part II.B, *supra*.

these five criteria. See Am. Br. of Clean Air Trust and Sen. Stafford 15-18.

Further, if the term "public health" encompassed economics, Congress would not have deemed it necessary in the Clean Air Act to repeatedly describe public health and economic concerns as distinct concepts. For example, the Clean Air Act authorizes EPA to issue regulations establishing emission standards for heavy-duty vehicles based on their pollution's effects "on the public health and welfare, and taking costs into account." 42 U.S.C. § 7521(a)(3)(B)(i); see *id.* § 7521(a)(3)(D) (controlling emissions resulting from rebuilding engines that may "endanger public health or welfare taking costs into account"). Likewise, the statutory provisions governing CASAC provide for advice regarding "adverse public health, welfare, social, economic, or energy effects" of pollution control strategies. *Id.* § 7409(d)(2)(C)(iv); see *id.* § 7412(f)(1)(B) (report on the "public health significance" of certain risks and the "costs of reducing such risks"); *id.* § 7612(b) (report on "the economic, public health, and environmental benefits" of compliance efforts). These statutory distinctions between public health and economic considerations would have been unnecessary had Congress believed that economics was subsumed within the meaning of "public health." See *Dunn* v. *CFTC*, 519 U.S. 465, 472 (1997) (legislative enactments should not be construed to render their provisions mere surplusage).

It appears that Congress employed the term "public health" in the Clean Air Act for the purpose of distinguishing the health of populations, which is the concern of "public health," from the health of individuals, which is the concern of clinical medicine. See Elizabeth Fee, *Disease and Discovery* 2 (1987) ("Public health is oriented toward the analysis of the determinants of health and disease on a population basis, while medicine is oriented

toward individual patients."). Indeed, the legislative history stresses that the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals. S. Rep. No. 91-1196, at 10 (1970).

Even the 1951 book upon which the cross-petitioners rely so heavily does not support their argument. Cross-Pet. Br. 34-35. It states that "[p]ublic health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency." C.E.A. Winslow, *The Cost of Sickness and the Price of Health* 28 (1951). By "efficiency," Winslow means personal fulfillment, not economic efficiency, as evidenced by his discussion of the "aim of raising the general level of vigour, efficiency, and satisfaction by a more positive physiological approach." *Id.* at 31.

Winslow distinguishes between the meaning of public health and the means to achieve its ends: "The promotion of the health of the peoples of the world is basically a moral – not an economic – issue. The means of approaching that objective are, however, practical ones, which involve financial considerations." *Id.* at 72. The Clean Air Act employs a directly analogous approach: The setting of the NAAQS does not permit economic tradeoffs but the strategies for attaining the NAAQS require such tradeoffs. See Part III.B.2, *supra*.

For more than two decades, there have been elaborate congressional deliberations about whether to amend the Clean Air Act and require economic factors to be taken into account in setting the NAAQS. Part I.C, *supra*. The cross-petitioners and their supporters implausibly suggest that none of this discussion was really necessary because tradeoffs between health and economic concerns were required by the term "public health" in section 109(b). Their strained arguments lack merit.

CONCLUSION

For the foregoing reasons the judgment of the D.C. Circuit with respect to the consideration of costs under section 109(b) of the Clean Air Act should be affirmed.

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