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 THE CLEAN AIR TRUST AND SENATOR ROBERT STAFFORD AS AMICI CURIAE IN SUPPORT OF CROSS-RESPONDENTS

Filed SEPT 11, 2000

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THE INTEREST OF AMICI CURIAE[1]

The Clean Air Trust was established in 1995 by Senators Edmund Muskie (D-ME), and Robert Stafford (R-VT) to educate the public and policymakers about the value of the Clean Air Act, to attain and maintain national ambient air quality standards, to promote effective enforcement of the Act through grassroots education, and to defend the Act. Senator Robert Stafford was a member of the Senate from 1971 to 1989, and chaired the Environment and Public Works Committee 1981-1985. The President of the Clean Air Trust, Leon Billings, was staff director of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, which Senator Muskie chaired, during the period in which the national ambient air quality standards ("NAAQS") provisions were being debated, enacted and implemented. The Clean Air Trust has access to extensive records documenting the Congress's responses to the nation's air quality problems since the early 1960s. Amici can offer helpful guidance to the Court by providing an authentic account of the development of the 1970 NAAQS provisions, based on public record sources that are highly reliable. That account shows conclusively that Congress adopted a coherent and sensible regulatory strategy in 1970, which

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amici state that the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

included primary NAAQS based exclusively on health considerations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For thirty years, the plain meaning of the Clean Air Act has always required EPA to base primary national ambient air quality standards ("NAAQS") solely on the health effects caused by air pollution. Cross-Petitioners now ask this court to ignore that meaning and to rule that the statute actually requires EPA to "balanc[e] a broad range of factors," Brief for Respondents Appalachian Power, et al., In Support of Petitioner 23 ("App.Pr.Br."), and to "consider countervailing 'non-health' factors," Brief for Cross-Petitioners 50 ("ATA Br."), in issuing the NAAQS.

This Court can and should reject Cross-Petitioners' claim based on the statutory language and structure alone. Cross-Petitioners hope to convince this Court to twist the statute in their direction by arguing that setting the primary NAAQS on the basis of health considerations alone inevitably produces irrational policy, and that their proposal is only common sense. This argument fails, though, because it is wrong on its own terms. Congress acted deliberately, rationally and sensibly in 1970, when the NAAQS provisions were introduced into the law. Congress gave EPA only limited authority in setting health-based NAAQS, and reserved to itself reconsidering the statute after its new philosophy toward air pollution control had been given a chance to work, all as part

of a coherent strategy to stimulate technological innovation to solve a pressing national health problem. While the approach taken in 1970 was itself innovative, the ability of Congress to delegate limited powers to an agency, as it did here, was and remains well-established.

The statute's meaning is amply confirmed by uncontradicted evidence of how the vocabulary used in the 1970 Act evolved during the prior decade of intense federal engagement with the problems of clean air. Overwhelming and reliable evidence confirms that the key concepts of "criteria" and "protection of the public health" were well established by the time the 1970 Act was passed, as was the desirability of an exclusively health-based minimum national standard.

ARGUMENT

I. CONGRESS HAS PRECISELY STATED THAT THE PRIMARY NAAQS ARE TO BE BASED ONLY ON THE HEALTH EFFECTS ASSOCIATED WITH THE PRESENCE OF AIR POLLUTION IN THE AIR.

Congress has spoken to the precise question Cross-Petitioners put at issue, and Cross-Respondents' briefs fully present the overwhelming textual and structural case for the statute's meaning. Here, we merely highlight three telling features of the legislation.

The Administrator of EPA must issue primary NAAQS that are in her judgment "requisite to protect the public health" "based on such criteria and allowing an adequate margin of safety." § 109(b)(1). "Such criteria"

refers to the information that EPA must issue under § 108, indicating "the kind and extent of all identifiable effects on public health or welfare which may be expected from *the presence of* such pollutant in the ambient air, in varying quantities." § 108(a)(2) (emphasis added). Criteria thus correlate levels of air pollution with the effects caused by that pollution. This is an entirely distinct inquiry from determining the effects of controlling pollution or assessing countervailing costs.

For the five pollutants for which criteria had already been issued prior to passage of the NAAQS provisions in 1970,[2] the 1970 Act required EPA to propose NAAQS within thirty days of enactment. § 109(a)(1)(A). This was far too little time for EPA to perform any additional analysis beyond what was already contained in the criteria documents themselves. As Congress well knew, those criteria documents contained absolutely no information concerning countervailing costs. Their content was exclusively focused on health or welfare effects associated with the presence of air pollution in the air, as required by the statute.

Not only did the short one month period limit EPA to relying solely on the criteria documents, the express requirement that the NAAQS be "based on such criteria" does so as well. That language stands in marked contrast to then-existing law, which required air quality standards

[2] *See* HEW, National Air Pollution Control Administration, Air Quality Criteria for Particulate Matter, Pub. No. AP-49 (1969); for Sulfur Oxides, AP-50 (1969); for Carbon Monoxide, AP-62 (1970); for Photochemical Oxidants [Ozone], AP-63 (1970); for Hydrocarbons, AP-64 (1970).

to be "consistent with the criteria and the recommended control techniques." 42 U.S.C. § 1857d(c) (1964 & Supp. III 1964-67). In a provision distinct and separate from the criteria, then-existing law required HEW to issue "recommended pollution control techniques," along with information on "available technology," "economic feasibility," and "cost-effectiveness analyses." § 1857c-2(c). If Congress had intended the NAAQS to be based on such factors as these, as Cross-Petitioners contend, it would not have deliberately eliminated the connection of this control technique information to the NAAQS when it enacted the 1970 Amendments.

II. CONGRESS'S LIMITED DELEGATION TO EPA TO CONSIDER ONLY HEALTH EFFECTS IN SETTING THE NAAQS IS SOUND AND RATIONAL POLICY.

All parties to this case must agree that our government's laws should always be expected to do more good than harm. *See* ATA Br. 43. Cross-Petitioners claim, however, that unless the Environmental Protection Agency weighs costs against benefits each time it issues a NAAQS, those standards must be "of necessity, arbitrary." *Id.* 29. This is a gross misunderstanding of the Constitution's division of labor under the principles of separated powers. Congress has the responsibility in the first instance to make policy choices that do more good than harm, and it also has the Constitutional authority to choose an approach to a problem that delegates limited responsibilities to an administrative agency. In the environmental area, as in others, Congress's choices come to this Court with a strong presumption that they have a

rational basis. *See, e.g., United States v. Nat'l Treas. Emp. U.*, 513 U.S. 454, 468 (1995). In contrast, an agency's first responsibility is to be faithful to the delegation Congress has made, so that it cannot and should not "balanc[e] a broad range of factors," App.Pr.Br. 23, unless Congress has directed or permitted it to do so. Whenever traditional tools of statutory construction demonstrate that Congress has *not* delegated an authority or responsibility to the agency, "that is the end of the matter, for the court, as well as the agency." *Chevron v. NRDC*, 467 U.S. 837, 842 (1984).

In 1970, Congress had ample reason to decide that delegating responsibility to set primary NAAQS based on health effects alone was part of a legislative approach to improving air quality that would do more good than harm. The nation's air quality was deteriorating, and pollution had become the nation's most serious problem in the minds of its citizens.[3] The inadequate existing federal policy had been predicated on exactly the course that Cross-Petitioners now urge, with air quality standards limited by technological feasibility and economic cost.[4] Congress had come to understand the problems

[3] *See* Issue of the Year: The Environment, *Time* at 21 (Jan. 4, 1971) (reporting Harris poll showing "Americans now regard pollution as 'the most serious' problem confronting their community – well ahead of crime, drugs and poor schools.")

[4] *See* Thomas Jorling, The Federal Law of Air Pollution Control, in *Federal Environmental Law* 1058, 1060 n.9 (Environmental Law Institute, Erica Dolgin & Thomas Guilbert, eds. 1974) (citing pre-1970 sources). Mr. Jorling was minority counsel on Senate Committee on Public Works as it was drafting the 1970 Act.

with such a strategy, which relied heavily on the assistance of industry to develop costly technologies when this was against their self-interest.[5] In order to change industry's incentives so as to stimulate the technological innovation crucial to solving a pressing health problem, Congress adopted health-based minimum standards with deadlines for compliance backed by sanctions. As Senator Muskie, the chief architect of the Clean Air Act Amendments of 1970, explained it to his colleagues, such an approach was

> probably the only way in which we are really going to generate the sense of urgency that is necessary to deal with this problem of air pollution effectively. We have tried other ways and they have not worked . . . The legislation on auto exhaust is an illustration of how the thing can stretch out if you leave it to administrative discretion and the technology which the industry is willing to develop.[6]

[5] As Senator Muskie said, "It is difficult to draw precise lines in these instances, because those who will be required to provide the technological know-how tend to resist, and we have to try to form independent judgments as to what may be possible. And they are not of particular assistance to us in forming those judgments." *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 114-15 (Aug. 31, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-4. The automobile industry had provided the best object lesson in how slowly technological breakthroughs by industry occur when this is the incentive structure, as there had been a federal presence in addressing the auto exhaust problem since 1955.

[6] *Executive Session of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 14-15 (July 23, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-1.

So Congress deliberately "abandon[ed] the old assumption of requiring the use of only whatever technology is already proven and of permitting pollution to continue when it is not economically feasible to control it."[7] In imposing sanctions for non-compliance by a date certain, Congress sought to achieve a health-based minimum level of air quality by giving industry self-interested reasons to "stretch[ ] the [technological] possibilities . . . to find ways to do things that we are told in many, many instances cannot be done."[8] This "deliberate decision to rule out arguments based on" some factors otherwise relevant to a full cost benefit inquiry stands at

[7] Senate Debate on S. 4358, 116 Cong. Rec. 32919 (Sept. 21, 1970) (remarks of Senator John Sherman Cooper (R-KY)) *reprinted in* Senate Comm. on Public Works, 93rd Cong. 2nd Sess. 1 *Legislative History of the Clean Air Act Amendments of 1970* 262 (Serial No. 93-18 1974) ("1970 Leg. History"). *See also*, 116 Cong. Rec. 32919 (remarks of Senator Howard Baker (R-TN) (bill represents a "basic change in the philosophy of the Government of the United States toward" air pollution)), *reprinted in* 1 *1970 Leg. History* 265. Congress had been studying the incentives problem for years. *E.g.*, Air Pollution – 1967 *Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 780 and Related Matters Pertaining to the Prevention and Control of Air Pollution*, 90th Cong. 1st Sess. at 760-61 (Feb. 8, 1967) (HEW Secretary John Gardner describing incentive problem); *id.* at 1-20 (Feb. 13, 1967) (Subcommittee discussing incentives and the need for stringent regulations with California officials).

[8] *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 114-15 (Aug. 31, 1970) (remarks of Senator Muskie), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-4.

the very heart of the 1970 Act,[9] and, like the Clean Water Act decisions Congress would make two years later, Congress acted here "based on long experience, and aware of the limits of technological knowledge and administrative flexibility."[10]

Fully cognizant that air pollution control would be costly,[11] Congress still believed that the approach of the 1970 Act was justified by the urgency of the problem. Experts from the Administration had testified that the necessary technology was close at hand even though they

[9] The limitations on tailpipe emissions from automobiles received even more attention than the NAAQS provisions, and these also precluded EPA from considering countervailing factors, this time by means of Congress enacting the standards directly into law, § 202(b), P.L. 91-604, 84 Stat. 1676, 1690, even though the auto industry said it lacked the technology to implement them.

[10] *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). In the case of clean water, Congress ruled out arguments based on potentially monetizable benefits in deciding that all firms must apply best practicable technology to abate their water effluent, regardless of the effects their pollution was having on receiving water quality. *Id.*

[11] *See, e.g.*, Senate Debate on H.R. 17255 Conference Report, 116 Cong. Rec. 42392 (Dec. 18, 1970) (remarks of Senator Randolph (D-WV) (noting that the Muskie Subcommittee and the full Public Works Committee had "talked about the economics of this legislation as well as the health standards of the legislation," and that "it will be costly.")), *reprinted in* 1 *1970 Leg. History* 145. *See also*, Philip Abelson, Progress in Abating Air Pollution, 167 *Science* 3 (No. 3925, March 20, 1970) (noting public can expect a six to ten percent increase in electricity prices from reductions in sulfur content of coal alone, but concluding that "this seems a small price to pay" "in view of the health hazards and other costs.").

would not commit to a definite date.[12] Congress knew that industry estimates of capability tended to overstate costs and understate technological ability, and for that reason industry was going to be "of no particular assistance" to Congress making the judgments Congress had to make.[13]

Just as importantly, Congress was not shirking the issue of costs when it did not delegate the authority to balance costs and benefits in setting the NAAQS.[14] As Senator Muskie declared in discussing the deadlines for meeting health-based standards, "[w]e want to give the country a clear cut goal and say this is the goal. Congress

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[12] Air Pollution – 1970 Part 4, *Hearings Before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works*, 91st Cong. 2nd Sess. 1505 (1970) ("1970 Senate Hrgs.") (Dr. John Middleton, head of NAPCA, testifying that "I think the levels we have come across in relation to adverse health effects are achievable and they are achievable in short periods of time."), *reprinted in* 2 *1970 Leg. History* 1200; *see also, e.g.*, Senate Debate on S. 4358, 116 Cong. Rec. 32919 (Sept. 21, 1970) (remarks of Senator Cooper (R-KY)) ("I do not know if the [NAAQS] . . . can be accomplished in all places by 1975. However, as emphasized by the Senator from Maine [Muskie – D(ME)] and the Senator from Delaware [Boggs – R(DE)], we have set these standards because we believe that they can be met."), *reprinted in* 1 *1970 Leg. History* 261.

[13] *See* n.5, above.

[14] Nor was Congress eliminating costs from consideration in the overall implementation of the Act. For instance, state implementation plans can select the most cost effective means of compliance, delayed compliance orders, added later to the Act, permit some consideration of costs, and Congress has revisited the statute to make adjustments when costs have proven to be imposing. *See* n.17, below.

says it is. . . . If the decision is important enough for the Congress to make in the first instance, then only the Congress ought to change it."[15] Congress could revisit the Act after its approach had been given a chance to succeed, and when industry had made good faith efforts to comply.[16] Congress could then make adjustments to

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[15] *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 349-350 (Sept. 10, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-6.

[16] *See, e.g.*, Senate Debate on S. 4358, 116 Cong. Rec. 32905 (Sept. 21, 1970) (remarks of Senator Muskie ("Congress, I assume, will be in session in 1971, 1972, 1973, 1974 and 1975 . . . The companies would be in a position to make their case. If the Congress, which would have made the policy in the first instance, is persuaded that the industry cannot do the job, Congress could change the policy . . . [T]his would be – as it is now – a policy decision of such moment to the country that it ought to be made by nobody other than the Congress, so that the decision gets the visibility, the prestige and the responsibility that are necessary to deal with this problem.")), *reprinted in* 1 *1970 Leg. History* 236; Senate Debate on H.R. 17255 Conference Report, 116 Cong. Rec. 42389 (Dec. 18, 1970) (remarks of Senator Baker (acknowledging that under the bill "the legislative department will be called upon to sit as a factfinding body to decide whether or not the automobile industry will be permitted to continue manufacturing automobiles, assuming it has not fully met this statutory deadline," even though he thought this to be "a horrible prospect.")), *reprinted in* 1 *1970 Leg. History* 142. *See also*, Roger Strelow, Reviewing the Clean Air Act, 4 *Ecol. L. Q.* 582, 588 (1975) (Critics claim the Act "unreasonably demands clean air to the detriment of conflicting social and economic considerations . . . A more pragmatic view of the Act, however, suggests that Congress simply wanted to ensure that maximum cleanup was achieved and that the consequences of an unqualified commitment to clean air were explored before the Act's limited provisions for 'balancing' clean air with other values were expanded.").

accommodate countervailing costs it believed weighty enough to warrant them.[17] Congress behaved responsibly in keeping in its own hands the question of how to balance the nation's health against the countervailing costs. When human health is involved, "[t]here is no economics that tells you the right results . . . there is no economics that tells . . . us how much we're prepared to spend . . . on the life of another person . . . [T]hat's a decision that people make through their elected representatives."[18]

By mandating health-based NAAQS, Congress was exercising its well-recognized Constitutional authority to delegate to an agency only one aspect of a problem at a time. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Congress has made similar limited delegations innumerable times, often in ways that deny an agency the authority to conduct the kind of wide ranging cost-benefit inquiry that Cross-Petitioners erroneously contend EPA must have. For example, Congress has denied the Secretary of Transportation authority "to engage in a wide-ranging balancing of competing interests," in favor

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[17] Indeed, since 1970, Congress has made a number of adjustments in the Act to accommodate difficult compliance problems, but it has never altered the NAAQS. For details, *see* the Briefs of Cross-Respondent American Lung Association, and of Environmental Defense, et al., as *Amici Curiae* in Support of Respondents.

[18] Nomination of Stephen G. Breyer to Be An Associate Justice of the Supreme Court of the United States, *Hearings Before the Senate Judiciary Committee*, 103rd Cong. 2nd Sess. 276-77 (S.Hrg. 103-715, July 13, 1994) (testimony of then-Judge Stephen Breyer).

of making "protection of parkland [of] paramount importance" in selecting routes for the interstate highway system. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-412 (1971). Similarly, Congress has required the FDA to restrict its safety inquiry to "determin[ing] that the product itself is safe as used by consumers," prohibiting it from considering other "countervailing effects" such as the effects of leaving the product on the market. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1304 (2000). Not only does the record show Congress made a rational, considered judgment, the regulatory regime it established is fully within Congress's competence. This Court must respect that judgment.

III. THE HEALTH-ONLY BASIS OF THE PRIMARY NAAQS IS OVERWHELMINGLY CONFIRMED BY THE EVOLUTION OF FEDERAL AIR POLLUTION POLICY.

The "history of evolving congressional regulation in [an] area" can properly inform the Court's understanding of legislative meaning. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 463, 475 (1997). In the case of the Clean Air Act, its evolution in the 1960s confirms conclusively that the key terms Congress used in 1970 to describe EPA's NAAQS responsibilities already had well-established meanings that excluded the consideration of costs in setting minimum standards. "Criteria" always referred to the effects on health or welfare caused by various concentrations of ambient air pollution, as ascertained by the best available science. "Protection of the public health" referred to a level of air pollution at or below the lowest level at which the criteria identified adverse

health effects. Countervailing costs played no role in either term, and non-health considerations played no role in the idea of protecting human health. The evolution of federal air pollution policy further shows a consensus that a health-based, criteria-based standard ought to be a national minimum standard. This consensus emerged even prior to passage of the 1970 Act, and was never challenged.

These conclusions are confirmed by abundant evidence in a variety of settings in which the speakers and writers had no strategic reason to dissemble regarding the issues Cross-Petitioners raise. Indeed, they had every reason to communicate as clearly as possible. This is because until very late in the drafting of the 1970 Act, countervailing costs were being amply taken into account in federal air pollution policy, both in setting the time for compliance, and in determining whether standards below a health-based minimum should be set. When the 91st Congress moved to a Clean Air Act that set fixed deadlines for complying with a national standard, it was too late to alter the meanings of the terms that defined that standard, even if anyone had tried.

A. Throughout the Evolution of Federal Air Policy, "Criteria" Always Referred Only to the Effects Caused by Air Pollution, Not to the Countervailing Economic Costs of Controlling Air Pollution.[19]

The Clean Air Act of 1963 introduced the concept of "criteria" into the federal regulatory vocabulary, describing criteria in terms that have remained essentially unchanged. It directed that the Secretary of HEW

> [w]henever he determines that there is a particular air pollution agent [in the air and harmful to health or welfare], . . . shall compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollution agent . . . in the air in varying quantities. § (3)(c)(2), P.L. 88-206, 77 Stat. 392, 395.

The Act contained no explicit provisions for standard setting. Instead, it "encouraged" municipal, State, and interstate action to abate pollution, § 5(b), *id.*, and it authorized the Secretary to "recommend . . . such criteria of air quality as in his judgment may be necessary to protect the public health and welfare." § 3(c)(3), *id.*

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[19] This part summarizes the evolution of federal air pollution policy as it relates to the terms with which the NAAQS requirements are expressed. A more detailed summary of the development of federal policy can be found in Brief of Respondents Massachusetts and New Jersey in Support of Petitioners, in *Browner v. Amer. Trucking Ass'n*, 99-1257, at 7-19.

As Congress was considering the Air Quality Act of 1967, it heard testimony about how HEW was implementing the 1963 Act. Dr. John Middleton, head of the National Air Pollution Control Administration (NAPCA) within HEW, and in charge of the federal air quality efforts, testified that

> air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of pollutants in the air and their adverse effects on man, animals, vegetation, materials, and so forth. . . . They describe the effects that can be expected to occur whenever and wherever the ambient air level of a pollutant reaches or exceeds a specific figure for a specific time period.[20]

At the time he testified, NAPCA had just issued the first criteria document, for sulfur oxides, so Congress had a precise illustration of what criteria included and what they did not include. The sulfur oxide criteria focused exclusively on scientific studies describing adverse effects on health or welfare that were or might be caused by various levels of sulfur oxide in the air. Neither it nor any other criteria issued by EPA contained any mention of the costs of removing pollution from the air.[21]

Dr. Middleton's succinct description reflected Congress's understanding of the contents of the criteria. It

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[20] Air Pollution – 1967, *Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 780 and Related Matters Pertaining to the Prevention and Control of Air Pollution*, 90th Cong. 1st Sess 1154 (1967) (Comm. Print).

[21] N.2, above, identifies the five criteria documents issued prior to 1971.

was explicitly quoted by both House and Senate Reports accompanying the 1967 Act,[22] repeated by Dr. Middleton in later testimony[23] and by the executive branch in air quality guidance documents,[24] quoted in other Congressional Reports,[25] and quoted or paraphrased in the academic journals.[26]

Statutory revisions in 1967 and 1970 changed the description of criteria cosmetically, but the core definition never changed, and there was never any indication that the Congress – or anyone else knowledgeable about the development of air pollution policy – ever thought the content of "criteria" had been changed to include economic costs.[27] Criteria continued to "define the health

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[22] S. Rep. 90-403 5 (1967); H. Rep. 90-728 16 (1967).

[23] *E.g.*, 1 *1970 Senate Hrgs.* 160, *reprinted in* 2 *1970 Leg. History* 1000.

[24] HEW, National Air Pollution Control Administration, Guidelines for the Development of Air Quality Standards and Implementation Plans 4 (1969) ("HEW Guidelines").

[25] Air Quality Criteria, *Staff Report for the Subcommittee on Air and Water Pollution, Senate Committee on Public Works*, 90th Cong. 1st Sess. 2-3 (1968) (Comm. Print).

[26] *See, e.g.*, Robert Martin and Lloyd Symington, A Guide to the Air Quality Act of 1967, 33 *Law & Contemp. Prob.* 239, 251-52 (Spring, 1968); Note, The Air Quality Act of 1967, 54 *Iowa L. Rev.* 115, 126 (1968).

[27] In 1967, the criteria were to reflect "the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollutant . . . in the ambient air, in varying quantities." § 107(b)(1), P.L. 90-148, 81 Stat., 485, 491. Both the House and Senate Reports accompanying the 1967 Air Quality Act explicitly employed Dr. Middleton's definition, *see* n.22, above, and in 1968 a staff report of Senator Muskie's subcommittee stated that the 1967 Act had "reaffirmed" the

and welfare considerations that must be taken into account in the development of standards and regulations. Economic and technical considerations have a place in the pattern of control activity but not in the development of criteria."[28]

B. Throughout the Evolution of Federal Air Policy, "Protection of the Public Health" Was Understood to Require an Exclusively Health-Based, Criteria-Based Level of Air Quality.

In 1967, Congress for the first time provided direction to the States as to what kind of air quality standards they ought to develop, providing that the Secretary of HEW was to approve state standards that were "consistent with the criteria and the recommended control techniques." § 108(c)(1), P.L. 90-148, 81 Stat. 485, 492. Subsequently, HEW issued guidelines describing what standards it would find acceptable, stating that "it is the intent of the Air Quality Act . . . to provide for the attainment throughout every air quality control region of

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1963 Act's call for criteria development. n.25, above, at 2. In 1970, the criteria also were to reflect "the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." § 108(a)(2), P.L. 91-604, 84 Stat. 1676, 1678. The 1970 Act explicitly ratified the criteria that HEW had already issued under the 1967 Act as forming the basis for national standards, § 109(a)(1)(A), *id.* at 1679, demonstrating that Congress thought it was not making any material change in the required content of the criteria.

[28] H.Rep. 90-728 16 (1967).

air quality which, at a minimum, is *adequate for the protection of the public health,*"[29] essentially the same language that Congress would later use to describe the NAAQS.[30]

As states began submitting standards and plans to HEW for approval, it became evident that HEW understood "adequate for the protection of the public health" to mean levels at or below the level identified by the criteria as the lowest at which HEW concluded adverse health effects had been shown. Dr. Middleton explained how HEW was implementing the 1967 Act:

> Let's take the example of the standards being adopted for sulfur oxides. The standard being adopted by the States which are acceptable to the Secretary are less than 0.04 parts per million (p.p.m.) as an annual average. Most states are coming up with air quality standards that are 0.03 p.p.m. or smaller . . . [31]

According to the criteria document, 0.04 p.p.m. was the point where "the health effects begin."[32]

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[29] HEW Guidelines 17 (emphasis added).

[30] The core of the definition of "criteria" in the 1967 Act contains the same phraseology as the primary and secondary NAAQS in the 1970 Act. § 107(b)(1), P.L. 90-148, 81 Stat. 485, 491 (Secretary shall issue criteria "as in his judgment may be requisite for the protection of the public health and welfare").

[31] *1970 Senate Hrgs.* 1492, *reprinted in* 2 *1970 Leg. History* 1187 (1970).

[32] *1970 Senate Hrgs.* 1500, *reprinted in* 2 *1970 Leg. History* 1195 (1970).

Costs and technological feasibility played roles in the local debates over whether to adopt standards more stringent than the required federal minimum (a number of states did indeed adopt more stringent standards) and in the determination of a "reasonable" compliance time,[33] but costs and technological feasibility played no role in setting the minimum health-protective air quality levels.

In 1970, both the Congress and the Nixon Administration concluded that further statutory reforms were needed to strengthen the federal law. The Administration initiated the idea of national ambient air quality standards, sending Congress language that would require the Secretary to "publish . . . proposed regulations establishing nationally applicable standards of air quality for any pollutant or combination of pollutants which [the Secretary] determines endanger or may endanger the public health or welfare and with respect to which criteria have

[33] The 1967 Act required whatever levels the states established to be achieved "within a reasonable time." 42 U.S.C. § 1857d(c) (1964 & Supp. III (1964-67)). "The implementation plan must assure achieving the standards of air quality within a reasonable time, as economic and technological feasibility permit." Robert Martin and Lloyd Symington, A Guide to the Air Quality Act of 1967, 33 *Law & Contemp. Prob.* 239, 256 (Spring, 1968).

been issued . . . "[34] Even this language, despite being much vaguer than the language ultimately enacted, was understood as setting health-based minimum standards, based on the criteria. Under Secretary of HEW John Veneman explained how the administration's standards would work:

> [Let me] give an example so that maybe we can make it clear. For example, in the criteria that were established for sulfur oxides, the minimum identifiable human health effect occurs at a level of 0.04 ppm. Now, in establishing a national air quality standard, it would be below that. It would not be above that. Now, what we are suggesting is that you do not set standards just at the point of minimum impact or effect on human health. They have to be below that. We are suggesting that if a state or an area within a state, even the intrastate regions, wants to reduce that even below the national standard, they would have the prerogative.[35]

This statement of the administration's position draws a simple and direct connection between criteria and the national standard. The level of 0.04 ppm in the criteria document rested exclusively on medical evidence of health effects caused by sulfur oxides at that concentration.

[34] On the Senate side, the Administration proposal was S. 3466. In the House, it was H.R. 15848. *See* § 107(a), S. 3466, *reprinted in* 2 *1970 Leg. History* 1483; H.R. 15848, *reprinted in* Air Pollution Control and Solid Wastes Recycling, *Hearings Before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce*, 91st Cong. 1st and 2nd Sess. 177 (Serial No. 91-49, 1970).

[35] *1970 Senate Hrgs. 159, reprinted in* 2 *Leg. History* 999.

Even industry spokespersons shared the conception of the national standard as directly derived from the exclusively health-based criteria. For instance, Fred E. Tucker, Manager, Pollution Control and Services for the National Steel Corp., testified in support of the Administration's call for national standards: "We simply feel that the adoption of the air quality criteria papers presented [by HEW] to date as standards would speed up the implementation of air quality control. . . . We have air quality criteria documents available today . . . [T]here is no objection on my part as an industry representative to see those criteria adopted as national standards immediately." *1970 Senate Hrgs.* 245-246.

Mr. Tucker spoke of *adopting* the criteria *as* standards. He did not advocate writing national standards only after weighing countervailing factors against the criteria's findings on adverse health effects. He simply urged the federal government to take the criteria's numerical levels for adverse health effects, and make those levels legally binding.[36]

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[36] This was entirely consistent with industry's self-interest, so they had no reason to be duplicitous about it. At the time, they were reeling from a series of regional standard-settings in which states had acceded to public demand and adopted standards even lower than the HEW recommendations. *See 1970 Senate Hrgs.* 240-41 (Tucker testifying to several states adopting standards lower than the federally acceptable levels). They hoped that national standards, together with the elimination of public hearings at the regional level (which had become a venue for citizen agitation for stringent standards) would make it more likely that states would adopt the national standards.

C. Although There Was Debate Over Fixed Deadlines for Compliance, No One Doubted That the 1970 Primary NAAQS Would Be Exclusively Health-Based.

The Administration's proposal for national health-based standards gained industry support because the Administration bill continued to provide a "reasonable time" for compliance, and this provided ample room for arguments based on technological feasibility and cost. As Senator Pete Domenici (R-NM) would note later, the 1970 Act "basically [has] two working parts, standards and deadlines."[37] So long as deadlines could be "reasonable" in light of costs, health-based standards were acceptable to industry and to the Administration.

The House passed its version of the 1970 Act on June 10, 1970, defining the Secretary's national standards obligation in terms materially identical to the Administration's proposal, and also allowing a "reasonable time" for compliance.[38] On the Senate side, though, hearings

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[37] Pete V. Domenici, The Clean Air Act Amendments: Balancing the Imponderables, *reprinted in* Senate Committee on Environment and Public Works, 6 A Legislative History of the Clean Air Act Amendments of 1977, 96th Cong. 2nd Sess. 4508 (1978).

[38] H.R. 17255 Sec. 2 and 4 (adding 107(e)(1) and 108(c)(1)(C)(i) to the Air Quality Act), reprinted in 1 *1970 Leg. History* 911, 914. The only difference between the Administration proposal and H.R. 17255 as passed by the House was that the House bill retained the requirement that criteria had to have been issued before standards could be, whereas the Administration proposal dropped that requirement. *See* S. 3466, Sec. 6, amending § 107(a) of the Air Quality Act, *reprinted in* 2 *1970 Leg. History* 1482-83.

and committee meetings progressed through the summer and fall of 1970. There, the idea of fixed deadlines developed momentum. A "standard" without a definite attainment date came to be seen as no improvement over current law.[39] Despite continuing Administration advocacy for a reasonable compliance time,[40] the Senate

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[39] *See, e.g,* Senator Eagleton's comments to Dr. Middleton, who presented the Administration position:

> This is where I get hung up on a national standard. If indeed it is national, for all 50 States, then it would seem to me that it ought to be attainable within a reasonably foreseeable period of time, applied nationwide, with no exceptions, or then in truth it is not a national standard, and we are right back where we are. . . . You [Dr. Middleton] and I disagree. You say there is a benefit to be gained by telling the public that we have a national standard which you say is really a national goal . . . I just don't see a national standard that is a national standard, unless you set specific target dates, is really helping to achieve anything, beyond what you are presently doing . . .

1970 Senate Hrgs. 1512, *reprinted in* 2 *1970 Leg. History* 1207.

[40] Appearing before the Muskie Subcommittee after Veneman, Dr. Middleton continued to advocate the reasonable time idea: "So I make the plea that you consider the things that will bring about clean air rather than setting a date when this must be achieved, because the State capability, the fuel resources available, the state of the art of control techniques, the existence of natural or synthetic gas pipeline transmission systems, the Federal Power Commission's policy on using fuels environmental improvement [sic], and other factors have a bearing on compliance dates. Taking care of these things would allow clean air to be attained in a timely and realistic manner, rather than saying that, by some specific state, you have to do it." *1970 Senate Hrgs.* 1501-02, *reprinted in* 2 *1970 Leg. History* 1196-1197.

bill required that national standards had to be met within a statutory deadline of three years.[41]

Now industry and the Administration had reason to object, not over the issuance of a health-based national standard, but over substituting a fixed compliance date for a flexible one. Newly appointed HEW Secretary Elliot Richardson urged the Conference Committee to return compliance flexibility to the Act by providing him with an open-ended authority to extend the deadlines when "adequate control technology is not available and is not likely to be available." Letter from Secretary Richardson to Senator Randolph, Nov. 17, 1970, *reprinted in* 1 *1970 Leg. History* 211, 215.[42]

The Congress's "new philosophy" prevailed. The Conference reported a bill devoid of any connection between setting the primary NAAQS and considerations of costs and technological feasibility. The Administration

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[41] S. 4358, § 111(2)(A), *reprinted in* 1 *1970 Leg. History* 544. S. 4358 also provided for the possibility that a three judge federal court, upon petition from the Governor, and upon making specific findings, could extend the period for a year. Additional one year extensions were possible, upon the filing of a new petition each time. § 111(f), *reprinted in* 1 *1970 Leg. History* 550-553. In the final legislation, this was changed to a maximum two year extension if "the necessary technology or other alternatives are not available. . . . " § 110(e)(1)(A), P.L. 91-604, 84 Stat. 1676, 1682.

[42] *See also,* Letter of J.E. Swearingen, Std. Oil of Indiana, to Senator Jennings Randolph, Aug. 27, 1970 (opposing three year compliance time), 1 *1970 Leg. History* 782-83; Letter of James D. Kittelton to Richard Grundy, Committee on Public Works Staff Member, Aug. 26, 1970, 1 *1970 Leg. History* 716 (three year limit is "unreasonably short.").

and industry were undoubtedly disappointed in this outcome, but disappointment about the fixed deadlines cannot alter the significant and universal agreement reflected in the testimony of Under Secretary Veneman, Dr. Middleton and Mr. Tucker that the national minimum standard – now codified in the primary NAAQS – would be set at a health-based, criteria-based level.[43]

Subsequent to passage of the 1970 Act, the health-based, criteria-based nature of the primary NAAQS has since been confirmed numerous times, of which we will only provide a few examples. Of course, EPA has always said that its primary NAAQS responsibilities were limited to health considerations.[44]

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[43] Confirming that the debate over compliance time had not altered the definition of the NAAQS, the description that Dr. Middleton gave of the primary NAAQS after their enactment was equivalent to the description he used prior to passage in explaining the administration's concept of national standards. *Compare*, John Middleton, Planning Against Air Pollution, 59 *American Scientist* 188, 189 (1971) ("These standards will be based on the criteria documents . . . To protect the public health, there will be national primary ambient air quality standards which will define how clean the air must be in order to be healthy to breathe.") *with 1970 Senate Hrgs.* 1512-13 (Middleton testifying that "setting a national air quality standard is a further step . . . declaring as a matter of national policy, that air quality in all places must be uniformly protective of health."), *reprinted in* 2 *1970 Leg. History* 1206-07.

[44] EPA's first administrator, William Ruckelshaus, summarized the law when he issued the first NAAQS, less than 4 months after the 1970 Amendments were enacted: "the Clean Air Act does not permit any factors other than health to be taken into account" in setting the NAAQS. 36 Fed. Reg. 8186 (1971).

Later in the 1970s, the provisions of the Act came under heavy pressure because they were indeed proving hard to comply with fully, and also because the country was suffering through recession and energy shortages. Congress extensively debated changes in the law and eventually made a number of mid-course corrections. During the thorough review that proceded the 1977 Amendments,

> the major challenge directed at the Act during the . . . oversight hearings [was] one dealing with the fundamental purpose of the law: to protect public health and welfare. At issue [was] whether the effects on public health of air pollutants should continue to represent the sole criterion for standard setting, . . . or whether, in view of events that occurred in the past 3 years, other elements that greatly affect national life and well being should now be included as valid criteria when standards are set and implemented.[45]

In explaining the legislative changes proposed by the Senate Environmental and Public Works Committee that had emerged from this review, Senator Domenici emphasized "one area of the law that the Committee refused to

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[45] Congressional Research Service, A Summary of Clean Air Act Oversight Hearings, March 19, 20, April 20-24, 29-30, May 1, 13, 15, 20-21, 1975 at 5 (June 13, 1975), *reprinted in* Implementation of the Clean Air Act – 1975, Part I, *Hearings of the Subcommittee on Environmental Pollution of the Senate Committee on Public Works*, 94th Cong. 1st Sess. 5 (Serial No. 94-H10 1975).

alter. This was the national primary and secondary ambient air quality standards. These standards and the protection they offer to the public health and welfare are the linchpin of the Act."[46] Looking back on the 1970 Act in 1981, Senator Robert Stafford (R-VT), chairman of the Senate Environment and Public Works Committee, opened an oversight hearing by referring to the primary NAAQS as "health standards" that should continue in force as initially intended in 1970.[47] Overall, the primary NAAQS policy has been reviewed many times, always with the same results.

Also in 1981, a blue ribbon commission created by Congress in 1977 to undertake a thorough review of federal air policy returned its report to the Congress. It first conclusion was that "[t]he current statutory criteria and requirements for setting air quality standards at the levels necessary to protect public health without

[46] Pete V. Domenici, n.37, above, at 4507. He went on to note that "this left the deadlines as the major variable around which to structure [the Environment and Public Works Committee's] compromises." *Id.*

[47] Clean Air Act Oversight – Part 3, *Hearings Before the Senate Committee on Environment and Public Works*, 97th Cong. 1st Sess. 191 (Serial No. 97-H12, 1981) (remarks of Senator Stafford).

consideration of economic factors should remain unchanged."[48] And so they have.[49]

CONCLUSION

The decision of the Court of Appeals that EPA may only consider health effects when issuing the primary NAAQS should be affirmed.

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[48] National Commission on Air Quality, *To Breathe Clean Air* 55 (1981). Even Edwin Dodd, chairman of Owens Illinois and the industry representative on the Commission, agreed that the primary NAAQS were health-based and that this was a sound premise for the Act. *Id.*, at 320 (Supplemental Statement of Edwin Dodd) ("The Clean Air Act is built on a basis of NAAQS. The primary standards are set on the basis of protection of public health without consideration of economic factors. I can agree with this premise if it is clearly understood that in developing the various clean air programs necessary to meet these health standards, other goals of our society and economic practicality are considered in the implementation process.")).

[49] The briefs of Cross-Respondent American Lung Association and of *amici curiae* Environmental Defense, et al. provide additional post-enactment confirmation that the primary NAAQS are exclusively health- and criteria-based.