No. 99-1426

In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, et al.,

Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

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QUESTION PRESENTED

Whether section 109 of the Clean Air Act requires that the Environmental Protection Agency must, in setting national ambient air quality standards, ignore all factors other than health effects relating to pollutants in the air.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Cross-Petitioners American Trucking Associations, Inc., *et al.*[1] Counsel for American Trucking Associations and the government have granted consent for the filing of this brief. Original letters of consent will be lodged with this Court. However, not all parties have responded, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest organization with thousands of supporters nationwide. Since its establishment in 1973, PLF has researched and litigated a broad spectrum of public interest issues. PLF advocates a balanced approach to agency rulemaking and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved.

PLF devotes substantial resources to litigation involving environmental issues and becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF's Board has approved amicus participation in this case.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for any party in this case authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in *Steel Company v. Citizens for a Better Environment*, United States Supreme Court No. 96-643 (pending); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

The California Chamber of Commerce (Chamber) is the largest and most broadly based employer representative in California with a membership base of more than 11,000 businesses. These businesses represent every sector of industry--small, medium, and large--and employ roughly 1.9 million people.

The California Chamber of Commerce recognizes the importance of clean air to protect human health and the environment; however, the Chamber has serious concerns about the economic impacts the Environmental Protection Agency's (EPA) revised National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone will have on California business. These rules have been promulgated despite the fact that California's air is significantly cleaner than it was 25 years ago and is getting better all the time. In addition, California is already operating under the most stringent air quality rules in the nation which places a competitive disadvantage on California businesses. These rules will only exacerbate this problem.

It will be more expensive for California to implement these rules than other states because of the incremental costs in making further emission reductions. Also, pollution controls like best available control technology, onerous permitting fees and stringent enforcement practices will make operations more costly and complicated for businesses that are currently in compliance (or "attainment") areas, but will fall into noncompliance (or "nonattanment") areas because of the stricter rules.

Many of the new "nonattainment areas" have no experience in dealing with such stringent regulations, thus many businesses will move to "cleaner" districts or relocate to other states. In California alone, at least three areas will be added as "nonattainment areas" for particulate matter and ten others for ozone. These areas will have to develop plans by a specific date demonstrating how they will meet the new standards. If these areas do not comply, California could lose valuable highway funds. This will translate into job losses and reduced economic opportunities. Higher costs incurred by industries, including aerospace, electronics, energy, and pharmaceuticals, will only discourage new businesses and the expansion of existing facilities. One study predicts that California could lose over 10,000 jobs. Moreover, according to the Reason Public Policy Institute, the new standards could cost California $9.1 billion to implement.

The Pacific Legal Foundation and the California Chamber of Commerce are particularly concerned about the unwillingness of EPA to consider impacts on small business and the lower court's determination that EPA must not consider costs and technological feasibility in setting air quality standards. This is particularly troubling because of concerns that the rules are not based on sound science.

According to the National Center for Policy Analysis (NCPA), *Brief Analysis*, No. 236, July 17, 1997, even members of EPA's own Clean Air Scientific Advisory Committee

(CASAC) disagree on the need for stricter standards. Although the EPA Administrator claims the science supporting the new rules is indisputable, CASAC was split on what standards to set, if any. "Eight committee members thought no standards are justified because there is no clear evidence that setting a standard would yield tangible health benefits." *Id.* at 2. The remaining 13 members of the committee could not agree on whether current standards are too strict or not strict enough. *Id.*

Also, NCPA reports that the public never had an opportunity to review the relevant scientific data because the primary studies used to justify the ozone standards have never been released by the Harvard researchers--not even to the EPA. *Id.* Moreover, there is evidence that the new standards may have an adverse effect on public health and welfare.

Initially, the EPA estimated the new standard for particulate matter alone would save annually more than 40,000 people from premature death. *Id.* But later, the EPA "revealed that this figure is the total number of lives estimated to be saved by *all* clean air regulations." *Id.* (emphasis in original). Then the EPA claimed that 20,000 lives would be saved per year by the new particulate matter standard--50% less than its original estimate. *Id.* Three months after proposing the standard, "the EPA once again reduced its estimate after an outside researcher found a simple mathematical error in one of [EPA's] key studies." *Id.* "This time the EPA reduced the estimated lives saved by another 25 percent, to 15,000." *Id.* "The discovery of this error has led some analysts to question the EPA's entire statistical analysis." *Id.* It was Dr. Kay Jones, former senior advisor on air quality at the President's Council on Environmental Quality during the Carter administration, who discovered the error. Dr. Jones completely reanalyzed the EPA's estimates and concluded the number is closer to 840 lives. *Id.*

Moreover, ground-level ozone has health benefits EPA ignored. Ozone screens out potentially deadly ultraviolet

radiation. *Id.* According to the Department of Energy, the required ozone reduction would: (1) "Increase malignant cancers, causing 25 to 50 new deaths a year;" (2) "Cause as many as 260 new cases of cutaneous melanoma and 11,000 new cases of nonmelanoma skin cancer;" and (3) "Cause between 13,000 and 28,000 new incidences of cataracts each year." *Id.*

This is the type of balanced analysis the EPA should do, but has not done, to ensure its environmental regulations are reasonable and beneficial. Clearly, this case will set a precedent affecting numerous statutory schemes and literally millions of lives. Regulations that impose bureaucratically defined concepts for safety, environmental protection, or economic relationships must take into account the economic and social costs of those regulations.

For the foregoing reasons, Pacific Legal Foundation and the California Chamber of Commerce move to file a brief amicus curiae in this case.

DATED: July, 2000.

Respectfully submitted,

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STATEMENT OF THE CASE

The Clean Air Act sets up a scheme to regulate air pollutants the "emissions of which, in [the Administrator's] judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The Administrator must publish "air quality criteria" for these pollutants and establish national ambient air quality standards ("NAAQS") based on these criteria. *See id.* at §§ 7408-09. The standards are of two types--"primary" and "secondary." A "primary" standard indicates a concentration level "requisite to protect the public health" with an "adequate margin of safety." Whereas a "secondary" standard indicates a concentration level "requisite to protect the public welfare." *Id.* § 7409(b).

On July 18, 1997, the Environmental Protection Agency adopted new, stricter national ambient air quality standards for ground-level ozone (smog) and particulate matter (soot). Public outcry over the severity of these standards resulted in congressional oversight hearings and scores of suits from industry, states and other parties challenging the legality of the standards. Among others, the grounds for suit included an argument that the EPA construed Sections 108 and 109 of the Clean Air Act "so loosely as to render them unconstitutional." *American Trucking Associations v. Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*ATA*). The Court of Appeals agreed:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM [particulate matter] are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S.Ct. 348

> (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

ATA, 175 F.3d at 1034.

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, or pollutants that have some possibility of adverse health effects at any level above zero. Thus, the court found EPA's explanations for choosing one standard over another amounted to nothing more than assertions that stricter standards mean less pollution and less harm while less strict standards mean more pollution and more harm. According to the court:

> Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

Id. at 1035.

Another ground for suit was the claim that the EPA must consider costs, technological feasibility, and other nonhealth factors in setting the ozone and PM standards. However, the court rejected this claim. Specifically, with respect to costs, the court held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d [1130,] 1148 (DC Cir. 1980)." *Id.* at 1040.

The court also rejected the argument that EPA erred in failing to consider detrimental health effects that are traceable to the cost of complying with the revised national ambient air quality standards. Citing a previous decision in the D.C. Circuit, the court held "it is only health effects relating to pollutants in the air that EPA may consider." *Id.* at 1041.

Nevertheless, the court did hold that EPA must consider not only the maleficent effects of a pollutant but also the beneficent effects. The court observed that the presence of ground-level ozone causes respiratory problems in some people but it also shields people from the deleterious effects of ultraviolet radiation that can cause certain forms of cancer. *Id.* at 1052.

Ultimately, the court determined that the standards not only violated the nondelegation principle but that the ozone standard could not be enforced due to restrictions in other provisions of the Clean Air Act. The court also invalidated the PM standard as arbitrary and remanded to the agency to select a new standard.

Both sides filed petitions for writ of certiorari in this Court. The EPA sought review of the nondelegation determination, among other things, while the opposing parties sought review of the scope of section 109. Review was granted in both instances and separate briefing is required in each case. This case deals with the authority of the EPA to consider costs, technological feasibility, and other nonhealth factors under section 109 in setting ambient air quality standards.

SUMMARY OF THE ARGUMENT

Section 109 of the Clean Air Act requires the EPA to set ambient air quality standards to protect public health and welfare, but with "an adequate margin of safety." That term implies discretion and requires the EPA to consider nonhealth factors. In interpreting a similar term under section 112, that requires the EPA to set standards for hazardous pollutants with

"an ample margin of safety," the D.C. Circuit Court of Appeals determined that term does not preclude the EPA from considering costs, technological feasibility or other nonhealth factors. Rather, the court determined the text of the statute granted considerable discretion to the EPA to set emission standards and that such discretion is necessary because of the scientific uncertainty associated with determining a safe level of exposure for substances for which there may be no "risk-free" limit. The court held that a determination of what is "safe" must be made only with a consideration of health-related factors, but that the EPA had wide latitude in what it could consider to set the appropriate margin of safety.

That case is instructive in interpreting section 109. The language of section 109 is almost identical to the language of section 112. Therefore, the term "adequate margin of safety" should be understood to mean, as with section 112, that EPA can consider nonhealth factors in setting NAAQS. In fact, since ozone and particulate matter are considered "nonthreshold" substances--substances that may affect health at any exposure level above zero--it would be hard to credit how the EPA could set an "adequate margin of safety," except at zero emissions, without a consideration of nonhealth factors.

Additionally, the determination of the court below, in this case, that the EPA must consider the beneficial health effects of ozone, is at odds with the court's determination that the EPA cannot consider other factors, including health impacts induced by the EPA's own air quality standards. Below, the court held it would "seem bizarre" if the agency could only consider half of the health impacts of a substance regulated under a statute designed to protect public health and welfare. Likewise, it would seem bizarre if the EPA could not consider the net health impacts of an air quality standard it imposed on the public. It is a fact of life that increased regulatory costs contribute to unemployment and poverty that in turn increase health risks and even death. If the requirement of an "adequate margin of

safety" is to mean anything, it must mean that EPA has considered all related health effects and made a balanced judgment that the air quality standards will provide a net benefit to public health and welfare.

This Court cannot ignore or countenance EPA's disregard for public safety by a crabbed reading of the Clean Air Act. For these reasons, this Court should rule that EPA not only may, but must, consider all health and nonhealth factors that bear on the margin of safety.

ARGUMENT

I

THE TERM "ADEQUATE MARGIN OF SAFETY" IN SECTION 109 OF THE CLEAN AIR ACT, AND THE INHERENT SCIENTIFIC UNCERTAINTY ASSOCIATED WITH SETTING HEALTH-RELATED STANDARDS, INDICATES CONGRESS' INTENT THAT THE EPA EXERCISE ITS DISCRETION IN DETERMINING THE FACTORS TO CONSIDER IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS

The question as presented in this case is whether EPA may consider costs or other nonhealth effects in setting the NAAQS. Under the Clean Air Act, EPA must set air quality standards "requisite to protect the public health" and "welfare" with an "adequate margin of safety." Section 109(b) of the Clean Air Act, 42 U.S.C. § 7409(b). The answer given this question by the court below was, "no." Relying on its own precedent, the Court of Appeals held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d at 1148." *ATA*, 175 F.3d at 1040. However, subsequent to the court's decision

in *Lead Industries Association v. Environmental Protection Agency*, 647 F.2d 1130 (D.C. Cir. 1980), another panel of the same court decided *Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*). Although the court in the latter case did not overrule the former, and another section of the Act was at issue, the case offers an instructive analysis for interpreting section 109 of the Clean Air Act.

In *Vinyl Chloride*, the petitioner argued that the EPA must regulate carcinogenic air pollutants under section 112 of the Clean Air Act without regard for nonhealth factors and, therefore, the uncertainty about the health effects of carcinogenic substances requires the EPA to prohibit all emissions. Section 112 of the Act provides a means for regulating hazardous air pollutants for which no ambient air quality standards apply and that may result in increased mortality or irreversible illness. See 42 U.S.C. § 7412(a)(1). Similarly to section 109, the Act directs the EPA to designate an emission limit under section 112 "at the level which in [the Administrator's judgment] provides an ample margin of safety to protect public health." *See id.* at § 7412(b)(1)(B).

The case involved vinyl chloride that the EPA designated "an apparent nonthreshold pollutant," meaning there is no safe level of human exposure. *Vinyl Chloride*, 824 F.2d at 1148. Consequently, the EPA considered two alternative interpretations of its duty under section 112 of the Clean Air Act. Under the first alternative, EPA would have to ban all emissions because "a zero emission limitation would be the only emission standard which would offer absolute safety from ambient exposure." 40 Fed. Reg. 59,532, 59,534 (1975). But, the EPA decided against this interpretation because "complete prohibition of all emissions could require closure of an entire industry." *Id.* This cost was too high, in the mind of the EPA, given that the health risk was of unknown dimension. *See id.*

Under the second alternative, EPA would have to set emission standards for nonthreshold pollutants that require emission reductions to the lowest level possible by use of the best available control technology. EPA adopted this interpretation arguing it would "produce the most stringent regulation of hazardous air pollutants short of requiring a complete prohibition in all cases." *Id.* When the EPA finally adopted vinyl chloride emission standards based on this interpretation, the agency was sued for relying on cost and technology considerations rather than exclusively on health factors.

In an opinion authored by Judge Bork, the court framed the question for review--not unlike the question in this case--as whether the Clean Air Act adopts an exclusive focus on health such that "the Administrator must set a zero level of emissions when he cannot determine that there is a level below which no harm will occur." *Vinyl Chloride*, 824 F.2d at 1152. The court adopted the *Chevron* standard of review; whether "Congress has directly spoken to the precise question at issue." *Id.* (citing *Chevron, USA, Inc, v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)). And, "if so, 'that intention is the law and must be given effect.'" *Id.* "'If the statute is silent or ambiguous with respect to the specific issue,' then we accept an agency interpretation if it is reasonable in light of the language, legislative history, and underlying policies of the statute." *Id.*

Turning first to the language of the Act, the court noted that section 112 requires EPA to set an emission standard for hazardous air pollutants that in the Administrator's judgment would provide "an ample margin of safety." This directive is reflective of section 109 (under consideration in the case at bar) that requires "an adequate margin of safety" for national ambient air quality standards. The court found this language inconsistent with NRDC's argument that the EPA has no discretion in setting emission standards for pollutants with uncertain risks. The statute did not define "ample margin of

safety." However, Judge Bork observed that the Senate Report discussed a similar requirement in the context of setting NAAQS under section 109. The report explained the purpose of the "margin of safety" is to provide "a reasonable degree of protection . . . against hazards which research has not yet identified." S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970). According to the court, this definition comported with the "historical use of the term in engineering as 'a safety factor . . . meant to compensate for uncertainties and variabilities.'" *Vinyl Chloride*, 824 F.2d at 1152.

The court concluded:

> Congress' use of the word "safety," moreover, is significant evidence that it did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants. As the Supreme Court has recently held, "safe" does not mean "risk free." *Industrial Union Dep't AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980). Instead, something is "unsafe" only when it threatens humans with "a significant risk of harm."

Id. at 1153.

Thus, the court determined the NRDC's view would eliminate any discretion and render the term "ample margin of safety" meaningless.

> Had Congress intended that result, it could very easily have said so by writing a statute that states no level of emissions shall be allowed as to which there is any uncertainty. But Congress chose instead to deal with the pervasive nature of scientific uncertainty and the inherent limitations of scientific knowledge by vesting in the Administrator the discretion to deal with uncertainty in each case.

Vinyl Chloride, 824 F.2d at 1153.

With respect to the legislative history, the court found no support for NRDC's position. If anything, the court concluded, the history cuts the other way.

> To accept the petitioner's contention that section 112 *requires* the Administrator to prohibit all emissions of non-threshold pollutants, we would have to conclude that, without even discussing the matter, Congress mandated massive economic and social dislocations by shutting down entire industries. That is not a reasonable way to read the legislative history.

Id. at 1154.

At most, the court found, "The Legislative history is simply ambiguous with respect to the question of whether the Administrator may permissibly consider cost and technological feasibility under section 112." *Id.* at 1157. So it is in the present case. Parties on both sides of the issue cite to the legislative history for support.

Since NRDC argued, much like the EPA argues in the present case, that the EPA is never permitted to consider cost and technological feasibility under section 112, but is limited to health factors alone, the court had to determine whether EPA could consider cost and technological feasibility at all. This parallels the question presented in this case.

The court determined that section 112, on its face did not suggest Congress intended to prohibit the consideration of any particular factor. *Id.* Rather, the court believed that although the term "to protect the public health" shows an intent to make health the primary consideration, the language does not specify

the factors the EPA may consider in the "judgment" of the Administrator to ensure "an ample margin of safety." *Id.*

> Instead, the language used, and the absence of any specific limitation, gives the clear impression that the Administrator has some discretion in determining what, if any, additional factors he will consider in setting an emission standard.

Id. at 1155.

But the petitioner argued that the structure of the Clean Air Act, the Supreme Court's interpretation of section 110 in *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246 (1976), and the D.C. Circuit Court's interpretation of section 109 in *Lead Industries* precludes a consideration of costs and technological feasibility. The court responded, however, that in those other cases the courts "rejected an argument that the EPA must consider cost and technological feasibility as equal factors in importance to health" and "[w]e reject the same argument here." *Id.*, 647 F.2d at 1157. Nevertheless, the court held, "these decisions do not provide precedential support for the petitioner's position that, as a matter of statutory interpretation, cost and technological feasibility may never be considered under the Clean Air Act unless Congress expressly so provides." *Id.*

In *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, this Court concluded that "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Id.* at 257 n.5. However, in *Vinyl Chloride*, Judge Bork stated:

> We simply do not, as the NRDC does, read these statements as announcing the broad rule that an agency may never consider cost and technological feasibility, under any delegation of authority, and for any purpose, unless Congress specifically provides

> that the agency is authorized to consider these factors. At most, we believe that these statements stand for the proposition that when Congress has specifically directed an agency to consider certain factors, the agency may not consider unspecified factors. Because Congress chose not to limit specifically the factors the Administrator may consider in section 112, this discussion in *Union Electric* is not in point here.

824 F.2d at 1158.

Likewise, *Union Electric* is not on point in the case at bar either. Congress has not dictated all the factors the Administrator may consider under section 109 in setting national ambient air quality standards. Although section 108 sets forth specific air quality criteria on which the NAAQS are based, Congress did not specifically limit the scope of the Administrator's "judgment" to set standards with an "adequate margin of safety" under section 109.

Lead Industries Association v. Environmental Protection Agency, 647 F.2d 1130, is a different matter. In that case, the D.C. Circuit Court of Appeals held that section 109 prohibits the consideration of all nonhealth factors in setting air quality standards. Although the language of section 109, calling for an "adequate margin of safety," is almost identical to the language of section 112, calling for an "ample margin of safety," the court in *Vinyl Chloride* distinguished section 109 from section 112 arguing the court found in *Lead Industries* that the "structure" of the Act dictated a different result in interpreting section 109. But notwithstanding the court's nod to its own circuit precedent, the conclusion that two nearly identical statutory provisions should be read differently is inconsistent with the court's ultimate holding in *Vinyl Chloride* that the language of the Act is determinative.

Ultimately, the court held:

> Since we cannot discern clear congressional intent to preclude consideration of cost and technological feasibility in setting emission standards under section 112, we necessarily find that the Administrator may consider these factors.

Vinyl Chloride, 824 F.2d at 1163.

Nevertheless, the court found that in *Vinyl Chloride* the EPA had drifted into "a zone of impermissible action." *Id.* The court's objection with the standard set by EPA was that the EPA had not determined an acceptable level of risk for vinyl chloride but had "simply substituted technological feasibility for health as the primary consideration." *Id.*

The court found in *Vinyl Chloride* that Congress was primarily concerned with health but, as in the present case, EPA had not determined the effect of the level of emissions on health. Nor had EPA determined a level at which the proscribed emission would be "safe" or provide an "ample margin of safety." *Id.* at 1163.

> We find that the congressional mandate to provide "an ample margin of safety" "to protect the public health" requires the Administrator to make an initial determination of what is "safe." This determination must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level . . . . The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis. The latter factors have no relevance to the preliminary determination of what is safe.

Id. at 1164-65.

But, the court found another stage of the analysis, apropos to the case at bar, that would allow, or even require, other considerations.

> Congress, however, recognized in section 112 that the determination of what is "safe" will always be marked by scientific uncertainty and thus exhorted the Administrator to set emission standards that will provide an "ample margin" of safety. This language permits the Administrator to take into account scientific uncertainty and to use expert discretion to determine what action should be taken in light of that uncertainty. . . . It is only at this point of the regulatory process that the Administrator may set the emission standard at the lowest level that is technologically feasible. Because consideration of these factors at this stage is clearly intended "to protect the public health," it is fully consistent with the Administrator's mandate under section 112.

Id. at 1165.

The Administrator's mandate is not meaningfully different under section 109 where the Administrator is required to set NAAQS based first on the objective air quality criteria defined in section 108 and then to designate an emission level "requisite to protect the public health" and "welfare" with an "adequate margin of safety." 42 U.S.C. § 7409(b).

This approach to setting national ambient air quality standards satisfies the clear intent of Congress to establish health-based standards while at the same time recognizing the express directive of the Act for the Administrator to use his "judgment" in setting an "adequate margin of safety." Just like vinyl chloride, EPA regards ozone definitely, and PM likely, as nonthreshold pollutants. As such, an emission standard based solely on health impacts would dictate a complete ban. But, the consideration of other factors, including cost and technological

feasibility, would allow a margin of safety that does not mean "risk-free."

> And while Congress used the modifier "ample" [or "adequate"] to exhort the Administrator not to allow "the public [or] the environment . . . to be exposed to anything resembling the maximum risk" and, therefore, to set a margin "greater than 'normal' or 'adequate,'" Congress still left the EPA "great latitude in meeting its responsibility."
>
> Congress' use of the word "safety," moreover, is significant evidence that it did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants. As the Supreme Court has recently held, "safe" does not mean "risk-free." *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980). Instead, something is "unsafe" only when it threatens humans with a "significant risk of harm." *Id.*

Vinyl Chloride, 824 F.2d at 1153.

As a general proposition, it is hard to imagine how the Administrator could ever determine an "adequate margin of safety" for nonthreshold pollutants, like ozone and particulate matter, without considering nonhealth factors. In fact, a strictly health-based determination of safe levels of emissions would require virtually no discretion on the part of the Administrator. Risk alone would dictate a zero emissions standard for ozone and PM. However, as expressed in the statutory purpose, Congress intended a more reasoned approach to air pollution regulation--an approach that was protective of public health and welfare but also one that enhanced "the productive capacity" of the nation. *See* 42 U.S.C. § 7401. This balancing of "health and welfare" with "productive capacity" requires a consideration of nonhealth factors and an exercise of the "great

latitude" the court in *Vinyl Chloride* determined Congress had left the EPA to accomplish its responsibility. *Vinyl Chloride*, 824 F.2d at 1153. Therefore, this Court should conclude that EPA not only may, but must, consider cost, technological feasibility, and other nonhealth factors in setting ambient air quality standards under section 109 of the Clean Air Act.

II

ANY MEANINGFUL APPLICATION OF THE "ADEQUATE MARGIN OF SAFETY" REQUIREMENT MUST TAKE INTO ACCOUNT THE INDIRECT HEALTH EFFECTS RESULTING FROM THE NATIONAL AMBIENT AIR QUALITY STANDARDS THEMSELVES

According to the court below, EPA must consider the beneficial as well as the adverse health effects of ozone. *See ATA*, 175 F.3d at 1052. In support of this position, the court offered a well-reasoned, commonsense rationale. *Id.* However, the court ignored this rationale when it determined that EPA may not consider the health effects that result from EPA's own standards. The court's reasoning is inconsistent.

The beneficial effects of ground-level, or tropospheric, ozone are documented. Ozone acts as a shield against the effects of the sun's harmful ultraviolet rays helping to prevent cataracts and skin cancer. *See id.* at 1051. However, the EPA "explicitly disregarded" these benefits when it estimated the effects of ozone concentration in establishing its ambient air quality standard. *Id.* To justify itself, the EPA claimed to rely on its statutory mandate to base ambient air quality standards on published criteria that are to "reflect the latest scientific knowledge useful in 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." 42 U.S.C. § 7408(a)(2). As the court noted, the term "all identifiable effects" would seem on its face to include beneficial effects. *ATA*, 175 F.3d at 1051.

To avoid this plain reading of the Act, EPA seized on the term "such pollutant" and argued it must consider only those factors that make the substance a "pollutant." However, the Court of Appeals countered that the phrase "pollutant" is "simply a label used to identify a substance to be listed and controlled by the statute." *Id.* And while a substance with no adverse effects whatsoever would not qualify as a "pollutant," the court argued this "fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of 'identifiable effects.'" *Id.*

Moreover, the court found the legislative history shed no light on the subject and, in any event, that EPA's interpretation of the Clean Air Act failed the reasonableness standard of *Chevron*:

> [I]t seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance. At oral argument even EPA counsel seemed reluctant to claim that the statute justified disregard of the beneficent effects of a pollutant bearing directly on the health symptoms that accounted for its being thought a pollutant at all (suppose, for example, a chemical that both impedes and enhances breathing, depending on the person or circumstances); he also seemed unable to distinguish that case from the one here--where the chemical evidently impedes breathing but provides defense against various cancers.
>
> Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109.

ATA, 175 F.3d at 1052.

This analysis makes good sense. It does seem bizarre that a statute designed to protect health and welfare would not allow a consideration of the net health effect of a regulated substance. It seems equally bizarre, therefore, that the court determined that EPA must disregard the adverse health and welfare effects of its own standards.

State Petitioners in the court below argued that the EPA must "consider the environmental consequences resulting from the financial impact of the [revised ozone and PM standards] on the federal Abandoned Mine Reclamation Fund Act." *ATA*, 175 F.3d at 1041. However, the court determined this argument was precluded by earlier precedent. In *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990), the appellate court decided EPA could not consider the health effects of unemployment caused by the EPA's national ambient air quality standards and held EPA may only consider the "health effects relating to pollutants in the air." *See* 42 U.S.C. § 7408(a)(2) ("Air 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 which may be expected from the presence of such pollutant in the ambient air, in varying quantities.").

> Unlike the positive health benefits of ozone that we hold the EPA must consider, any detrimental health effects resulting from the financial impact upon the mine fund, like the health consequences of unemployment, are traceable to the cost of complying with the revised $PM_{[2.5]}$ and ozone NAAQS and not to the presence of those pollutants in the air.

ATA, 175 F.3d at 1041.

But this determination is flawed. Section 108 governs the setting of air quality criteria for impacts expected from the presence of "pollutants in the air." However, the establishment of air quality standards requisite to protect the public health and welfare with an "adequate margin of safety" is governed by Section 109. And, as argued above, costs can and should be considered in determining "an adequate margin of safety" because the terms "adequate" and "safety" connote some balancing and judgment on the part of the Administrator. Therefore, even if the establishment of the air quality criteria, upon which the air quality standard is based, must exclude costs, the setting of an "adequate margin of safety" is not so constrained.

But even if a consideration of costs was categorically prohibited by Section 109, which it isn't, the factors Petitioners argued must be addressed in this case were not direct costs but indirect health effects resulting from implementation of the NAAQS. In this case, State Petitioners argued the EPA must consider adverse environmental effects that derive from financial impacts on the mining fund. In *NRDC*, parties argued that implementation of the air quality standard for particulate matter would result in adverse health effects from increased unemployment. It is a well-established, if unfortunate fact of modern life, that as poverty increases health declines.

Some analysts estimate that the revised ozone and PM rules "will eliminate 220,000 jobs and cost the average household about $1,200 per year in discretionary spending." *Brief Analysis*, No. 236, Page 2, National Center for Policy Analysis, July 17, 1997. According to the American Thoracic Society, poverty is the number one risk factor for asthma, therefore, the new rules "will worsen health by increasing unemployment and lowering household income." *Id.* This is the conclusion of Dr. Wendy Gramm, former administrator of the Office of Regulatory Affairs in the United States Office of Management and Budget (OMB), and Susan Dudley, vice

president and director of environmental analysis at Economists, Inc. *Id.* Based on OMB estimates " that for every $9 million to $12 million decline in aggregate personal income one life is lost and EPA cost estimates for the rules, Gramm and Dudley found that the new ozone standard alone could result in 7,000 deaths a year." *Id.*

Surely, any safety margin would be inadequate if it did not account for actual harm to the public resulting from implementation of air quality standards that are supposed to protect public health and welfare. As the Court of Appeals would have it, the EPA could impose air quality standards that caused an actual net health risk to the public, such as 7,000 deaths a year from the rules in this case. This is patently unreasonable. Congress could not have intended such a blind application of the law. Nor does the law countenance absurdities.

If the requirement that the EPA set an "adequate margin of safety" for NAAQS is to mean anything, it must mean that EPA has considered all related health effects and made a balanced judgment that the air quality standards will do more good than harm with respect to public health and welfare. The lower court cannot ignore or countenance EPA's disregard for public safety by a crabbed reading of the Clean Air Act. For these reasons, this Court should rule that the setting of NAAQS does not preclude, indeed requires, a consideration of all related health effects that derive from the regulated substance and the regulation of that substance.

CONCLUSION

EPA must set air quality standards that are protective of public health and welfare. However, Congress gave EPA discretion in determining "an adequate margin of safety" for those standards. The setting of an "adequate" margin of safety

implies that EPA may set a limit above the "zero-risk" level, even for those substances, like ozone and particulate matter, that are nonthreshold pollutants. Thus, by any reasonable interpretation of the term "adequate," EPA must consider nonhealth factors. This Court should so hold.

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Respectfully submitted,

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