No. 99-1426

IN THE SUPREME COURT OF THE UNITED STATES

American Trucking Associations, Inc., Chamber of Commerce of the United States, 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 FOR SENATORS JAMES M. INHOFE, TIM HUTCHINSON, ROBERT F. BENNETT, AND GEORGE VOINOVICH AS *AMICI CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Senators of the United States of America. Senator James M. Inhofe represents the citizens of Oklahoma. Senator Tim Hutchinson represents the citizens of Arkansas. Senator Robert F. Bennett represents the citizens of Utah. Senator George Voinovich represents the citizens of Ohio.

Senator Inhofe is Chairman of the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Committee on Environment and Public Works of the United States Senate. Senators Bennett and Voinovich are members of the Subcommittee and Senator Hutchinson served as a member of the Subcommittee in the 105th Congress. While serving as Governor of Ohio, Senator Voinovich was Chairman of the Republican Governors Association Environmental Task Force.

Amici have an interest in ensuring that the statute in question not be construed in a manner that violates the fundamental separation-of-powers principles inherent in the United States Constitution in derogation of their legislative powers and responsibilities. In addition, a*mici* will have substantial legislative responsibility for the reauthorization of the Clean Air Act when the 107th Congress considers it and for oversight of the Administrator's implementation of the Act. Finally,

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, or counsel contributed money or services to the preparation or submission of this brief.

amici represent millions of citizens who will be affected by implementation of the Act. *Amici* are, therefore, vitally interested in the proper construction of the Clean Air Act.

SUMMARY OF ARGUMENT

The Administrator interprets the Clean Air Act to require that, in setting National Ambient Air Quality Standards ("NAAQS"), she may not consider any factor other than benefits to the public health from the standards set. In other words, the Administrator believes that the statute prohibits consideration of countervailing health risks, economic costs or technical feasibility.

This construction of the statute is at odds with the statutory language. The statutory phrase "adequate margin of safety" uses words that permit the Administrator to balance the public health benefits of a proposed NAAQS against other public policy factors. Indeed, Congress could not have intended any other interpretation. Absent consideration of any countervailing factors, the logical import of the Administrator's view is that the statute requires the complete elimination of all human-generated pollutants that have an adverse health effect -- but Congress never intended to order or permit the deindustrialization of America.

Nor can the Administrator's construction of the statute be saved by reliance on an alleged ratification of that construction when the Congress reauthorized the Clean Air Act in 1990. Reliance on subsequent Congressional inaction as ratification gives that inaction legislative character and effect. After this Court's decision in *INS v. Chadha,* 462 U.S. 919, 957 (1983), the

only permissible actions having legislative effect are those that comport with the Presentment Clauses (U.S. CONST. Art. I, § 7, cls. 2, 3) and the structural requirements of separation of powers. Moreover, *amici* can attest to the reality of the modern day legislative process; Congressional inaction has, except in the most unusual circumstances, little, if any, practical interpretive value.

ARGUMENT

The Clean Air Act stands as the signature environmental enactment of the United States Congress. Given its impact on public health and the national economy, the proper construction of the Act is of vital interest to the American people. But far more is at stake in this case than these manifestly significant concerns. In light of the Administrator's actions, the Court is obliged to confront, squarely, fundamental questions about the balance of authority between the Legislative and Executive branches of government.

In 1997, acting pursuant to Section 109(d) of the Clean Air Act, 42 U.S.C. § 7409(d), the Administrator of the Environmental Protection Agency promulgated final rules revising existing NAAQS for ozone, *see* 62 Fed. Reg. 38,855, and particulate matter, *see* 62 Fed. Reg. 38,652. The revised NAAQS were set by the Administrator to meet the statutory mandate that they "allow[] an adequate margin of safety . . . requisite to protect the public health." CAA § 109(b)(1). In setting these standards -- whose implementation will substantially affect every member of the public and all American industry -- the Administrator concluded that the statutory framework prevented consideration of

"economic costs or technical feasibility." *E.g.* 62 Fed. Reg. at 38,878.[2] This interpretation is, however, not consistent with the language and purpose of the Clean Air Act; nor was it ratified by Congressional reauthorization of the Act in 1990.

First, nothing in the language of the Act constrains the Administrator's authority to consider the significance of the risk posed by potential pollution or the costs to be incurred by virtue of the adoption of the proposed regulations. To conclude to the contrary, as the District of Columbia Circuit did in *Lead Industries*, 647 F.2d at 1148, is to presume that Congress has acted irrationally. It has not, and the Administrator has acted under the mistaken belief that the Act prohibits consideration of countervailing health risks and other economic costs.

Second, the Administrator cannot look to the reauthorization of the Clean Air Act in 1990 as a subsequent "ratification" of the statutory interpretation announced in *Lead Industries*. Subsequent legislative inaction does not qualify as an authoritative legislative pronouncement. To rely on inaction as acquiescence is deeply inconsistent with the Constitutional requirement of Presentment (Art. I, § 7, cls. 2, 3) and principles of separation of powers.[3]

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[2] In fairness to the Administrator, she believed that her determination to ignore economic and technical factors, as well as other health-related costs, was mandated by the decision of the District of Columbia Circuit in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

[3] By resolving this case on grounds of statutory construction, the Court will avoid the difficult Constitutional questions posed by the delegation doctrine issue presented in the companion case, No. 99-1257. Properly construed, the Clean Air Act permits the Administrator to interpret the Act as embodying an intelligible principle of implementation. As this Court has said: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S 366, 408 (1909)); *see also Ashwander v. TVA*, 297 U.S. 288, 348 ((1936) (Brandeis, J., concurring). To the extent the Court deems it necessary to address the delegation question at issue in No. 99-1257, *amici* concur that without a limiting principle the Administrator's present construction of the Act renders it an impermissible delegation of the legislative function.

I. The Clean Air Act Does Not Prohibit The Administrator From Considering Countervailing Health Risks, Risk Significance, And Economic Feasibility

The Act requires the Administrator to set NAAQS at a level of ambient air quality sufficient to "allow[] an adequate margin of safety . . . requisite to protect the public health." CAA § 109(b)(1). The Administrator, acting under the aegis of *Lead Industries*, believes that this language requires her to consider only the health-related benefits of a proposed regulation, without regard to countervailing health risks, other economic costs, or the significance of the risks being addressed. Yet nothing in this plain language remotely purports to limit the Administrator's discretion. Indeed, such an interpretation is irrational and contrary to the underlying statutory purpose of the Clean Air Act. Because the Administrator mistakenly believed that the

statute limited her discretion, the decision to adopt the ozone and particulate matter NAAQS was arbitrary and capricious.[4]

A. The Plain Language Of The Statute Does Not Prohibit Consideration Of Costs Or Risk Significance

"As in any case of statutory construction, [the Court's] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see also Harris Trust and Savings Bank v. Salmon Smith Barney Inc.*,

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[4] An agency's mistaken interpretation of law renders its decision arbitrary and capricious. "An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" *Sea-Land Service, Inc. v Dep't of Transp.*, 137 F.3d 640 (D.C. Cir. 1995) (quoting *Prill v. National Labor Relations Board*, 755 F.2d 941, 947 (D.C. Cir. 1985)); *see also Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."); *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1505 (10th Cir.1995) (agency action founded on mistake of law is arbitrary and capricious under Administrative Procedures Act). For essentially the same reasons, *amici* also believe that the Administrator's position is as an impermissible construction of the law under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Both modes of legal analysis build on the same factual premise -- the Administrator misunderstood the law. *Cf. Smiley v. Citibank (S.D.) N.A.*, 517 US. 735, 741-42 (1996) (*Chevron* II analysis similar to arbitrary and capricious review).

120 S.Ct. 2180, 2191 (2000) (same). Thus, if an examination of the text gives a clear and unequivocal answer to the interpretive question presented, that textual answer controls unless some "clearly expressed legislative intent to the contrary" is manifested in the legislative history of the enactment. *Reeves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

Here the text of the statutory language is clear. The Administrator is obliged to provide an "adequate margin of safety" to protect public health. This is not an absolute command that the Administrator consider *only* public health benefits -- yet the Administrator and the District of Columbia Circuit in *Lead Industries* have misconstrued it as such.

Congress could have enacted the "health only" standard of *Lead Industries* -- and had it wished to do so, it would have written with far greater clarity. Congress might have commanded, for example, that the NAAQS be set to "protect public health to the maximum extent practical without regard for economic costs or technical feasibility" -- but did not. Congress might have written that the NAAQS be set "giving exclusive consideration to the public health benefits resulting from reductions in" pollutants -- but it did not. In *amici*'s experience it would be exceedingly odd for Congress to command that "economic costs, countervailing health risks, and technical feasibility" be ignored without using those words or any reasonable cognates of them in the statute.

To the contrary, the text of CAA § 109(b)(1) speaks in terms of moderation and comparison, not in terms of absolutes. *Amici* believe that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9

(1962). Here, the ordinary words used do not support the Administrator's construction of the law.

The word "adequate," for example, connotes sufficiency, not excess. *See* Webster's Collegiate Dictionary 14 (10th ed. 1999) (defining adequate as "sufficient for a specific requirement"). And, in some contexts "adequate" carries with it the implication of minimum sufficiency. *See id.* (alternately defining adequate as "barely sufficient"). Thus, use of the word "adequate" plainly signals that the Administrator is to set NAAQS at a level that suffices to the purpose, and no more.[5]

So too, the use of the word "margin" connotes a "spare amount or measure or degree allowed or given for contingencies." Webster's Collegiate Dictionary 711 (10th ed. 1999). Thus, the statutory text commands the Administrator to strike a balance, defining an adequate margin of safety somewhere above the minimum necessary to protect public health. *Cf. NRDC v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*") (recognizing that an "ample" margin of safety is one greater than an "adequate" margin).

And finally, the word "safety" also betokens balance. "Safe" means "free from harm or risk" and "secure from threat of danger." Webster's Collegiate Dictionary 1030 (10th ed. 1999). Concepts of "risk" and

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[5] This is consistent with the legislative history in the Senate reflecting an intent that the NAAQS be set at the "*maximum* permissible ambient air level" which will protect the public health. S. Rep. No. 1196, 91st Cong. 2d Sess., at 10 (1970) (emphasis supplied). In other words, the Administrator is to do what is needed, and no more.

"threat" are relative metrics, not absolutes. "Use of the word 'safety' . . . is significant evidence that [Congress] did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants . . . . '[S]afe' does not mean 'risk-free'. . . . [S]omething is 'unsafe' only when it threatens humans with 'a significant risk of harm.'" *Vinyl Chloride*, 824 F.2d at 1153 (citation omitted).[6]

But how is the adequacy of a margin of safety to be measured? Any value beyond the scientifically minimum requisite provides a "margin." And any level of protection provides a measure of "safety" greater than that provided by a less stringent level. To measure the "adequacy" of a margin the margin must be balanced against some countervailing value. In this regard, *Lead Industries'* casual rejection of any countervailing balance to public health benefits is simply inconsistent with the plain language of CAA § 109(b)(1).

The Administrator's reading also disregards parallel textual provisions that were intended to guide the Administrator in assessing the adequacy of the protection of public safety. CAA § 108(a)(2) directs the Administrator to issue criteria -- that is, informational compilations used in NAAQS standard setting, *see* 62 Fed. Reg. at 38,654 (particulate matter criteria), 38,857 (ozone criteria) -- that include information on any "known or anticipated adverse effects on welfare." CAA § 108(a)(2)(C). Consideration of the effects on the

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[6] *Amici* agree that Congress used the phrase "public health" to refer to a well known, scientific discipline. Because the meaning of that reference is fully developed in the parties' briefs, *amici* do not repeat that analysis here.

"welfare" of the public expressly requires consideration of other factors beyond the public health effects of a particular regulation. *See* CAA § 302(h) (defining "welfare" to include, *inter alia*, "effects on economic values and on personal comfort and well-being"); *cf.* U.S. CONST. Preamble ("to . . . promote the general Welfare"). Countervailing economic costs, health risks, and technical factors are potentially "anticipated adverse effects on welfare." Thus, as a matter of textual exegesis, Congress has said that however significant and important the magnitude of any particular public health concern, there are other public policy factors that may be considered in making the requisite regulatory decision.

So that our point is clear, we make it explicit: *Amici* do not contend that the text of CAA § 109(b)(1) *requires* the consideration of economic costs; rather, we make the simpler and equally sustainable point that CAA § 109(b) does not *prohibit* such consideration.[7]

What the law does require is that the Administrator identify some factor -- some aspect of the public "welfare" -- against which to measure the adequacy of the margin of safety proposed. That factor might be the economic cost and technical feasibility of the

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[7] Were the Administrator to give these regulations such consideration she might well reevaluate and revise her decision. As the Office of Management and Budget has reported, the net present value of the costs associated with implementing the ozone final rule, in its current form, exceed the societal benefits of the rule. *See* REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS, at 72 (2000) (costs of $62 billion; benefits of $11-59 billion). Data on the particulate matter final rule are ambiguous. *Id.* at 73 (costs of $230 billion; benefits of $148-816 billion).

regulation proposed; it might be (as we suggest, *infra* § I.B.2) an assessment of the significance of the risk being addressed; it might be a comparative risk analysis attempting to determine whether the resources required to implement the regulation in question would produce greater benefits if put to another use; or it might be some combination of all of these factors. What is unsupportable is the Administrator's assertion of an effectively standardless, unconstrained authority to set NAAQS levels without any attempt to justify the adequacy of the margin of safety proposed.[8]

B. Prohibiting Consideration Of Costs Or Risk Significance Would Be Irrational And Contrary To The Statute's Purpose

Any fair reading of the Administrator's position must acknowledge the irrationality of the decision she supposes Congress to have made. No court should so lightly assume that Congress has legislated without sense. Under the Administrator's interpretation, the Agency may not consider countervailing adverse health risks, nor may it consider other economic costs, nor may

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[8] *See, e.g.* 62 Fed. Reg. at 38,688, ("The Administrator is not limited to any single approach to determining an adequate margin of safety"); *id.* at 38,883 (same). EPA has blandly asserted that its decisions need not be based on any "generalized paradigm;" "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric;" and are "largely judgmental in nature." *Id.* at 38,688, 38,883. This is not a balanced measure of the "adequacy" of a particular margin of safety -- it is an assertion that an arbitrarily set margin is "adequate" simply because the Administrator says it is. The text of CAA § 109(b)(1) demands more.

it consider whether the health risks it addresses are of any public significance. On this reading, the statute logically requires the total elimination of anthropogenic sources of ozone and particulate matter -- a manifestly absurd result that Congress never intended.

1. Prohibiting Consideration Of Costs Effectively Prohibits Consideration Of Countervailing Health Risks

The most striking aspect of the Administrator's counter-intuitive interpretation of CAA § 109 is that the Administrator believes it impermissible to consider whether the regulations proposed might have net adverse health effects. So long, in the Administrator's view, as a positive health benefit from regulation is identified, the substantial (and perhaps significantly greater) adverse health-related costs that will be incurred are of no statutory importance.

Thus, in the ozone final rule, the Administrator affirmatively chose to disregard the potential health benefits of tropospheric ozone as a shield from the harmful effects of ultraviolet radiation. *See, e.g.,* Ozone JA 255-71, 2579, 2666, 2676, 2849, 3089 (summarizing this evidence); *id.* at 210 (declining to consider it). *Amici* are not, of course, in a position to opine on the significance or validity of the scientific data presented in opposition to the ozone rule -- *but at this juncture neither is the Administrator.*

On the present state of the administrative record the Administrator is in an uncomfortable -- and incomprehensible -- position. She argues that even though the beneficent health effects of tropospheric ozone (in preventing skin cancers, for example) may actually outweigh the harmful health effects of tropospheric ozone

(in effecting breathing) the law obliges her to utterly ignore those potentially countervailing health benefits.

But the language of the statute requires no such thing -- the criteria for issuing NAAQS for any particular air pollutant are required to include information on "variable factors which may *alter* the effects on public health or welfare of such air pollutant." CAA § 108(a)(2)(A) (emphasis added). A beneficial health effect is surely one that "alters" the effect on public health. Thus, Congress has spoken directly to this question and rejected this irrational conclusion.

2. The Administrator's Construction Requires Elimination Of All Adverse Health Risks, Regardless Of Costs – An Absurd Result Not Contemplated By The Statute

Of equal significance is the logical import of the Administrator's "health benefit only" focus. For non-threshold pollutants this interpretation has only one intelligible stopping point -- elimination of all anthropogenic pollutant production.

It is a sad, but undisputed, scientific fact that ozone (certainly) and particulate matter (with a high degree of probability) are non-threshold pollutants. *See* 62 Fed. Reg. at 38,863 (ozone); 61 Fed. Reg. at 65,651 (particulate matter). In other words, they have adverse health effects at naturally occurring background atmospheric concentration levels. Thus, even the total elimination of all human ozone and particulate matter production would not suffice to eliminate all adverse public health effects, as natural ozone and particulate matter levels would continue to have adverse effects.

But if (as the Administrator has argued) public health is the only statutorily permissible consideration then there is no bright-line at which to set the requisite NAAQS level. The only logical response to non-threshold pollutants, consistent with that statutory construction, is to minimize adverse health risks to the maximum extent practical -- a standard that, in this instance, calls for the elimination of all human activity which generates either ozone or particulate matter. Such a standard would, of course, be nonsensical, as it would require the closure of every major industrial plant in America and the elimination of all automobile transportation.

The Administrator, understandably, shies away from the implications of her "health benefit only" formulation. Yet, as the court below correctly recognized, Pet.App. 7a-11a (No. 99-1257), any effort to justify an intermediate NAAQS standard above one eliminating all human pollutant production without reference to some counter-balancing factor is nothing more than arbitrary line-drawing, lacking rational basis or explanation.

Amici submit that implicit in the necessity for setting a threshold for non-threshold pollutants is the requirement that the Administrator assess the public significance of the adverse health risks to be addressed.[9] When Congress legislates it does not intend to solve all

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[9] Perhaps this is merely a reformulation of the question of costs. *See* Breyer, Stewart, Sunstein & Spitzer, ADMINISTRATIVE LAW AND REGULATORY POLICY 65 (4th ed. 1999) ("[C]an an agency sensibly decide whether a risk is 'significant' without also examining the cost of eliminating it?"). Alternatively, it may be viewed as a formulation that looks solely to the benefit side of the cost/benefit question.

the problems of air pollution no matter what the costs imposed by the solution. Similarly, it does not enact a statute of general applicability addressed to a particular class of problems (such as, air pollution) with the intent that all problems within the class be addressed no matter how trivial or insignificant. *Amici* can attest that, as this Court has already recognized, legislation of general applicability is typically intended only to address "significant risks" within the general class. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (*"Benzene"*) (construing Occupational Safety and Health Act to require a determination that risk is "significant"). Congress, in legislating, looks to resolve the larger issues of public importance; we do not generally intend to expand the sphere of federal influence to every corner of the economy.

In this instance, the Administrator's construction of the law, carried to its logical endpoint, rests on the premise that Congress intended such an expansion and contemplated the deindustrialization of America. "It is simply not possible that Congress intended such havoc in the American economy and not a single representative or senator mentioned the fact." *Vinyl Chloride*, 824 F.2d at 1155.

3. Congress Should Not Be Presumed To Have Intended To Ignore Societal Costs Imposed By Regulation

Finally, *amici* submit that the Administrator's interpretation of CAA § 109(b)(1) is contrary to the appropriate background rule of statutory construction. We have endeavored to demonstrate that the statute is clear and that its text permits consideration of economic and social costs and risk significance. But even if we are

wrong -- if the statute is not as clear as we believe -- then at a minimum, the Administrator must acknowledge that the statute does not contain an express prohibition on the consideration of such factors. We submit that the proper rule of construction is to resolve any such ambiguity in favor of permitting consideration of social costs and risk significance, absent a clearly expressed Congressional intent to the contrary.[10]

Though this Court has never clearly adopted such a rule of construction, it is a logical outgrowth of Congress's practice of delegating substantial discretion to administrative agencies. When, for example, the Federal Aviation Administration is tasked with the "substantial restoration of the natural quiet" of the Grand Canyon, there is no reason to suppose that in deciding how substantial the restoration should be the FAA cannot consider the costs that will be borne by the air tourism industry. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998); *see also Michigan v. EPA*, 213 F.3d 663, 2000 WL 180650, at *12 (D.C. Cir. 2000) (permitting consideration of cost absent clear expression of Congressional intent to preclude consideration). Thus, in *amici*'s view, Congress generally enacts statutes with the intention that they be read to authorize regulations with benefits "roughly commensurate with their costs." Sunstein, *Interpreting Statutes in a Regulatory State*, 103 HARV. L. REV. 405, 457 (1989).

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[10] As this Court said in *Benzene*, 448 U.S. at 646, such a rule of construction may be Constitutionally mandated to avoid serious delegation issues. We address here, however, only the prudential concerns, leaving the Constitutional question for resolution in the companion case, No. 99-1257.

In sum, as this Court said in an unrelated context: "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Here, the Administrator has adopted precisely such a simplistic and untenable presumption; her interpretation of § 109(b)(1) must be rejected.

II. Passage Of The Clean Air Act Amendments In 1990 Did Not Ratify The Rule In *Lead Industries*

In defense of the NAAQS final rules, the Administrator relies on the actions of a subsequent Congress which, in 1990, reauthorized the Clean Air Act without making any change in the operative language of CAA § 109(b)(1). From this reauthorization, the Administrator infers Congressional acquiescence in the *Lead Industries* interpretation of the Act. But such an inference is unwarranted. Indeed, any general theory of statutory interpretation that places significant reliance on Congressional failure to modify a statute in light of an intervening judicial decision is contrary to the provisions of the Presentment Clauses of the Constitution and the principles of separation of powers. It also ignores the realities of the legislative process.

A. Reliance On Legislative Inaction Violates The Presentment Clauses

Congress exercises its legislative power only through the process of legislative enactment specified in

the Constitution. As this Court held in *INS v. Chadha,* 462 U.S. 919, 957 (1983), that process requires compliance with "[t]he bicameral requirement, [and] the Presentment Clauses," followed by the President's approval of the legislation (or an override of his veto). These requirements are not mere empty formalities -- rather the "bicameral requirement and the Presentment Clauses serve essential constitutional functions." *Id.* at 951. They are the bedrock foundation of the Constitution, "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power." *Id.* at 957.

One necessary implication of the holding in *Chadha* is that Congressional silence or inaction may not be read by the courts as approval of a prior judicial interpretation of an existing statute. All legislative acts, after *Chadha,* require legislative enactment. Reading Congressional silence as approval of a judicial decision effectively treats Congressional silence as an exercise of the legislative power, without that exercise comporting with Constitutional requirements.

As the Court said in *Chadha,* in determining whether an act is legislative in character this Court must look to "its character and effect,'" *id.* at 952 (quoting S.Rep. No. 1335, 54th Cong. 2d Sess., 8 (1897)), not its form. Interpreting Congressional inaction as affirmative approval of a judicial interpretation (or an administrative interpretation) is indistinguishable from an affirmative Congressional enactment of the judicial (or administrative) interpretation as positive law. Indeed, the quintessential hallmark of a legislative enactment is that it constitutes "law" -- that is, that courts use it as an expression of what the statutory law is. *See* Black's Law Dictionary 884 (6th ed. 1990) (defining "law" as including statutory enactments). When legislative inaction is

treated as a substantive adoption of a judicial or administrative rule the courts imbue that inaction with both "legislative" character and effect.

This highlights the fundamental flaw in a principle of statutory interpretation that relies on an unexpressed subsequent Congressional intent as determinative. It is not consistent with *Chadha.* As the Court said: "To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." 462 U.S. at 958, n.22.

It is true that, in the past, this Court has on occasion relied upon Congressional inaction in concluding that Congress has ratified (or consented to) a prior judicial or administrative decision. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353 (1982) (relying on failure to disturb judicial decision in later revision of law); *Bob Jones University v. United States,* 461 U.S. 574 (1983) (relying on Congressional failure to repeal administrative interpretation); *Haig v. Agee,* 453 U.S. 280 (1981) (same); *Zemel v. Rusk,* 381 U.S. 1 (1965) (same); *United States v. Midwest Oil Co.,* 236 U.S. 459 (1914) (Congressional failure to limit Presidential exercise of Executive power). But each of these cases is readily distinguishable on the simple ground that it arose prior to *Chadha.*[11] While it might

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[11] Candor compels the acknowledgment that the decision in *Bob Jones University* preceded *Chadha* by only a month. Nevertheless, precede *Chadha* it did. Moreover, the Court reached its decision in *Chadha,* when squarely faced with the question of Constitutional limits on Congressional legislative powers, in the face of the dissent's direct reliance on *Bob Jones* as a counter-example. 463 U.S. at 991 (White, J., dissenting). Thus, *Chadha* can only be read as a rejection of

have been appropriate for this Court to rely on Congressional silence as equivalent to legislative approval before it adopted the construction of the Presentment Clauses embodied in *Chadha* that interpretive methodology can no longer be sustained.[12]

Nor can the implications of *Chadha* be evaded by attempting to recharacterize Congressional inaction as Congressional action. Congress's decision to reauthorize the Clear Air Act in 1990 cannot be fairly characterized as an affirmative adoption of the *Lead Industries* rule. As even the Administrator is obliged to concede, Congress did not amend CAA § 109(b)(1) in any relevant respect. *See* U.S. Opp. 14 ("Congress did not change the substantive criteria for setting and revising NAAQS" in 1977); *id.* at 15 ("Congress . . . did not change the legal standard on which NAAQS are based" in 1990). And, as *amici* can attest, legislative enactments that are carried

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the *Bob Jones* interpretive methodology. Of equal significance, as the Court acknowledged in *Bob Jones*, its reliance on Congressional inaction was one of two alternative grounds for its decision. Ultimately, the Court found that Congress had "affirmatively manifested its acquiescence in the IRS policy [at issue in *Bob Jones*] when it enacted" other provisions of the Internal Revenue Code. 461 U.S. at 601.

[12] The only post-*Chadha* case that might be read to rely on Congressional inaction as an interpretive tool is *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000). For reasons we discuss, *infra*, we do not understand *Brown & Williamson* to overrule *Chadha sub silentio*. Moreover, in our view, *Brown & Williamson* does not truly involve Congressional inaction.

forward in reauthorization without change are often given little (if any) substantive consideration.[13]

Thus, it is simply untenable to characterize this sort of non-consideration as a legislative enactment; it bears little (if any) resemblance to the paradigm of the legislative process mandated by *Chadha*. "The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority." 462 U.S. at 958, n.22.[14] Allowing legislative silence by a subsequent Congress to be used as a tool of statutory construction simply does not comport with Article I requirements.[15]

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[13] In this regard CAA § 109(b)(1) is typical. During reauthorization in 1990, no substantive reconsideration was given to the legal standards embodied in CAA § 109(b)(1). No amendments were proposed to that provision; no votes were taken in either the House or the Senate.

[14] President Bush was apparently of the view that the reauthorization of the Clean Air Act did not adopt the reasoning of *Lead Industries*. As he said upon signing the Act: "To address the serious concerns raised by the cost of this legislation, I am directing Bill Reilly, Administrator of the Environmental Protection Agency, to implement this bill in the most cost-effective manner possible. . . . These implementation strategies will help keep unnecessary costs and job losses down, while ensuring the achievement of the environmental goal of this bill in the most efficient manner possible." *See* "Statement on Signing the Bill Amending the Clean Air Act November 15, 1990" *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, Vol. I at 727-28.

[15] Thus, our view is that the method of statutory analysis adopted in *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative

B. Reliance on Legislative Inaction Violates Separation of Powers Principles

Underlying the Presentment Clauses analysis this Court utilized in *Chadha* is an equally fundamental, yet distinct dimension of the analysis. "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (*per curiam*). Sometimes, as in *Chadha*, those principles find animation in particular textual provisions of the Constitution. Often, however, application of the principles springs from the "'very structure' of the Constitution that exemplifies the concept of separation of powers." *Miller v. French*, 2000 WL 775572 at *9 (U.S. June 19, 2000) (quoting *Chadha*, 462 U.S. at 946). Those structural principles preclude giving interpretive effect to Congressional inaction.

"Separation of powers was designed to implement a fundamental insight: concentration of powers in the hand of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Thus, as Madison wrote of the principle of separation of powers: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST No. 47 (J. Cooke ed. 1961). Where "the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *Id.*

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or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"), simply cannot be squared with and does not survive this Court's decision in *Chadha*.

This Madisonian concern -- what this Court appropriately characterizes as fear of the "hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power," *Chadha*, 463 U.S. at 591 -- reflects a anxiety that one branch will, through its actions, seek to encroach on the powers of another and aggrandize to itself greater power. *Mistretta v. United States*, 488 U.S. 361, 382 (1989). For this reason, the Court has routinely struck down, on separation of powers grounds, actions that unify in a single branch power more appropriately diffused among the several branches or that undermine the authority of one coordinate branch for the benefit of another. *Id. See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (legislative enactment encroaching on judicial function); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (legislative agent exercising executive function); *Bowsher v. Synar*, 478 U.S. 714 (1986) (legislative branch exercising executive removal authority); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Article I judges exercising Article III powers).

Conversely, where a statute poses no danger of encroachment or aggrandizement, separation of powers concerns do not require invalidation. *See, e.g., Miller v. French*, 2000 WL 775572 (U.S. June 19, 2000) (approving legislative limitation on judicial procedures); *Morrison v. Olson*, 487 U.S. 654 (1988) (approving judicial appointment of inferior Executive officer). Thus, the separation of powers principle insures that one branch of government not intrude upon the legitimate sphere of

another. *See City of New York,* 524 U.S. at 450 (Kennedy, J., concurring) ("when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two").

A theory of statutory interpretation construing legislative silence as legislative assent is an assault on the fundamental separation of powers principles inherent in the structure of the Constitution. Wholly apart from the textual requirements attending the enactment of particular legislation, to read legislative inaction as approval would work a wholesale redistribution of power from the Legislative to the Executive branch. No longer would Congress be able to serve as a check on Executive power. Rather, the Executive could readily act to extend the outer bounds of its authority and if, for whatever reason, Congress did not affirmatively act to check that excess, the Judiciary would construe that inability as acquiescence.

But this stands the concept of checks and balances on it head -- separation of powers exists to establish an *ex ante* restriction on the abuse of power, not as an expression of the opportunity for the Legislative branch to act *ex post* to redress an imbalance created by Executive abuse. Indeed, given the structural ability of the Executive to frustrate a Legislative response through the use of the veto power, the doctrine of acquiescence by silence is, in practice, a license for Executive expansion of its power so long as one-third of the Members of either the House or Senate are willing to sustain a Presidential veto of corrective legislation. *Amici* greatly fear the growth in Executive power that flows from this mistaken interpretative principle.

Nor will it do to respond that this diminution of Legislative power is ameliorated by the availability of judicial review. The cannon of construction at issue -- ratification by silence -- reflects a conscious decision of the Judicial branch to refrain from invalidating certain assertions of Executive power. In effect, the courts become complicit (through their rules of statutory interpretation) in an Executive raid on the Legislative function. This is precisely the sort of encroachment and aggrandizement that the principle of separation of powers precludes; *amici* respectfully submit that, as a cannon of construction, the doctrine of ratification by acquiescence cannot be Constitutionally permissible.

The instant case presents a paradigm example. Here, the Administrator has acted in a manner that *expands* the jurisdiction of the Environmental Protection Agency. The indisputable effect of her assertion of authority to lower the NAAQS in the manner she has done is to sweep far greater number of individuals and American businesses within the regulatory ambit of the Agency.[16]

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[16] The Administrator's decision to do so came, in the case of the particulate matter NAAQS, despite her high degree of "*uncertainty* in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. at 38,655 (emphasis supplied). Whatever may be said about the respective powers of the Legislative and Executive branches, it cannot be gainsaid that the resolution of policy uncertainties is the province of the American public's elected representatives, not its unelected (and only indirectly accountable) bureaucracy. The contrary rule, inherent in the Administrator's submission, would work a sea change in the distribution of power, to the significant detriment of political accountability.

But this assertion of greater regulatory authority is precisely the sort of "hydraulic" expansion that this Court's separation of powers teachings counsel should be viewed with grave concern. It plainly does not come with any affirmative legislative enactment. Nor does it come with any assurance that a majority of Congress (as constituted in 1990) approved of that interpretation. Nonetheless, the Administrator would have this Court infer from legislative inaction Congressional approval of this expansion of Executive authority. In *amici*'s view, the quintessential legislative prerogative (in concert with an appropriate Presidential approval or veto) is to define the scope of the law and make the bedrock policy decision of to whom a law should apply. Here, the Administrator's interpretation has stripped the Legislative branch of that prerogative and aggrandized to the Executive branch that power.

Recognition of this separation of powers principle serves to distinguish this case from the Court's recent decision in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000). In *Brown & Williamson*, the Court reviewed subsequent legislative actions relating to tobacco, reading them *in pari materia* with Congressional silence concerning the scope of the FDA's direct authority over tobacco products. But one should not read *Brown & Williamson* as using Congressional silence to infer approval of a regulatory action.

In *Brown & Williamson* the alleged Congressional acquiescence accompanied an Executive abnegation of power. The FDA had, historically, *declined* to assert an expanded tobacco jurisdiction. That refusal posed no threat to the Legislative branch and did not reflect an effort to broaden the jurisdictional reach of an Executive agency at the expense of Congress's authority to speak to the fundamental legal and policy questions presented by

such an extension. Indeed, it is somewhat conceptually skewed to treat Congressional acquiescence in Executive *inaction* on the same footing as alleged acquiescence in Executive *action*. In the former case (exemplified by *Brown & Williamson*) the *status quo* in the balance between Legislative and Executive powers is maintained. In the later case (at issue here) the Executive action upsets the balance and alters the *status quo*.

In *amici*'s view, the two situations are distinct. When both Congress and the Executive branch *decline* to exercise their powers, no danger of encroachment is posed and separation of powers principles do not require that the Judicial branch ignore that joint Legislative/Executive acceptance of the *status quo*.[17] That situation poses no threat to *amici*'s role as legislators and their Constitutional responsibilities. Conversely, when the Executive seeks to expand its power and upset the *status quo*, the cannon of ratification by inaction "undermine[s] the authority and independence" of the Legislative branch by reassigning the legislative power to the Executive branch. *Mistretta*, 488 U.S. at 382.

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[17] Thus, *amici*'s experience is that Congress is unlikely to delegate a policy decision of great economic and political magnitude to an administrative agency. *Cf. Brown & Williamson*, 120 S.Ct. at 1301. Those are issues the citizens expect *amici* to address in their legislative capacity and, absent an express statement to the contrary, should be presumed reserved to Congress.

C. Legislative Inaction Is An Ambiguous Indicator Of Congressional Views

Beyond the Constitutional barriers to reliance on subsequent legislative inaction, any theory of statutory construction that gives substantial weight to inaction as indicative of Congressional intent is inconsistent with the realities of the legislative process. As *amici* can attest, and as this Court has often said, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 381 U.S. 204, 313 (1960); *see also CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (same); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963) (same).

This is especially so in the case of legislative failure to act. Given the institutional barriers to successful legislative enactment, failure to amend a statute can result from any number of causes. *See Vinyl Chloride,* 824 F.2d at 1162 & n.10. It may be the product of endorsement or ratification (as the Administrator would suggest). But sometimes it is the product of passivity, indecision, or indifference. Sometimes the Congress cannot act even though a majority disapproves of a judicial or administrative interpretation because, the procedural rules of the Senate or House permit a minority to block substantive consideration of a legislative proposal.

For these practical reasons, in amici's experience subsequent legislative inaction is of virtually no weight in determining legislative intent. *Cf., United States v. Wise*, 370 U.S. 405, 411 (1962). "Such non-action by Congress affords the most dubious foundation for drawing positive inferences." *Price*, 381 U.S. at 310-11. Congressional inaction lacks "persuasive significance"

precisely because any number of "equally tenable inferences" may be drawn from inaction. *Wise*, 370 U.S. at 411; *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 630, 650 (1990) (same); *Haynes v. United States*, 390 U.S. 85, 87-88, n.4 (1968) (same); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring).

Here, to the extent Congress spoke at all in 1990, it rejected the Administrator's view and attempted to limit and restrain regulatory expansion. Congress directly addressed the problem of ozone pollution in adopting the Clean Air Act amendments in 1990, effectively codifying the then-existing ozone NAAQS of 0.12 parts per million. *See* Title I, Part D, Subpart 2, Pub. L. No. 101-549, CAA § 181 (codified at 42 U.S.C. § 7511). Concurrently, Congress directed the EPA to conduct a comprehensive study of the impact of the Act on the "public health, economy, and environment of the United States" including, particularly, the requirement to "consider the costs, benefits and other effects associated with compliance with each [NAAQS]." CAA § 312(a). And, most significantly, in creating a scientific review committee to advise the Administrator on revisions to the NAAQS, Congress required that it report to the Administrator on any "adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." CAA § 109(d)(2)(C)(iv).

This modest subsequent history contrasts sharply with that at issue in *Brown & Williamson*. In *Brown & Williamson* the Court was not faced with a single, ambiguous statutory reauthorization. Rather, the FDA's new assertion of jurisdiction ran contrary to 35 years of Congressional enactments relating to tobacco, 120 S.Ct. at 1312, including express consideration and rejection of

bills that would have extended the FDA's authority, *id.* at 1309. As this Court noted, it did not rely on Congress' failure to act as a ground for decision; instead, the decision rested on the enactment of a comprehensive legislative scheme that made sense only if read *in pari materia* with a rejection of FDA's tobacco jurisdiction. *Id.* at 1312-13. Thus, *Brown & Williamson* is "not a case of simple inaction by Congress that purportedly represents acquiescence in an agency's position" and is not in conflict with the position *amici* espouse here. *Id.* at 1312.

In sum, in the case of the Clean Air Act, subsequent Congressional enactments (unlike those at issue in *Brown & Williamson*) cannot possibly be read as an affirmative adoption of the *Lead Industries* rule. The most that can be said is that Congress was divided and uncertain and therefore was unable or unwilling to legislate any modification of CAA § 109. This is a far and distant cry from legislative silence that betokens assent.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed on the alternate grounds presented by the cross-petition.

Respectfully submitted.

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