No. 99-1426

IN THE SUPREME COURT OF THE UNITED STATES

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

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

BRIEF OF STATES OF OHIO, MICHIGAN, AND WEST VIRGINIA IN SUPPORT OF CROSS-PETITIONERS

Filed July 21, 2000

QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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MISCELLANEOUS

INTRODUCTION

The States of Ohio, Michigan and West Virginia ("Supporting States"), along with a number of other parties, challenged the 1997 revisions to the national ambient air quality standards for ozone and particulate matter issued under section 109 of the Clean Air Act by the Environmental Protection Agency ("EPA"). The District of Columbia Circuit agreed with the challengers that EPA had not articulated an "intelligible principle" for its revisions, and remanded the case to the agency to do so. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999). However, the lower court, based on flawed precedent in the Circuit, also held that the Administrator of EPA is unable to consider any factor other than direct public health effects when setting or revising a standard under section 109. *Id.* at 1040-41. The Supporting States opposed EPA's petition for certiorari (No. 99-1257)[1], and supported the conditional cross-petition for certiorari of the American Trucking Associations (No. 99-1426), both of which were granted. The Supporting States submit this brief in support of cross-petitioners American Trucking Associations in Case No. 99-1426.

The regulation of public health and the environment is of manifest importance to the Supporting States. Long before federal legislation for air pollution controls, the Court acknowledged the States' responsibility to use their police powers to combat air pollution. "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960).

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[1] Ohio did not oppose certiorari on the first question presented in EPA's petition.

The Supporting States not only acknowledge, but embrace their responsibility to ensure public health and a safe environment. The Supporting States support efforts to promote a healthy environment and control air pollution, and therefore support the general goals and policies embodied in the Clean Air Act. The Supporting States also support the policy that consideration of public health is the primary consideration in setting and implementing air standards.

Congress's passage of the Clean Air Act, 42 U.S.C. 7401 *et seq.* ("CAA" or "the Act"), established a federal-state partnership for controlling air pollution, but confirmed that the States maintain primary responsibility for ensuring that clean air is achieved. Specifically, while EPA is responsible for setting and periodically revising air quality standards under sections 108 and 109, the States are responsible for adopting and enforcing an implementation plan that will assure that the standards are met under sections 107 and 110. CAA §§107, 108, 109, 110; 42 U.S.C. 7407, 7408, 7409, 7410.

EPA's decisions in this case, as well as the lower court's interpretation of section 109 of the Clean Air Act, upset this federal-state partnership. The District of Columbia Circuit, following a line of cases starting with *Lead Industries Ass'n v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that EPA is bereft of discretion to consider the social, economic and environmental costs of a national ambient air quality standard under section 109; EPA can consider only the direct public health consequences of the particular pollutant. This interpretation can and does result in EPA setting unrealistic standards without considering numerous other factors, including the cost of implementation, direct and indirect effects on the economy such as higher costs for energy, and even the adverse health effects of a lower amount of the pollutant. In addition, under EPA's

interpretation, it can set a standard without a specific explanation of the standard's health benefits.

The States are then left to enforce an unjustified standard that may be impossible to implement. Such an unreasonable interpretation, when applied to a non-threshold pollutant, would effect an unconstitutional delegation of legislative power. *See* 175 F.3d at 1033.

The Supporting States therefore submit this brief to respectfully request that the Court affirmatively resolve the statutory issue by holding that EPA can and should consider costs as well as benefits when setting or revising a national ambient air quality standard under section 109. Not only will this interpretation avoid a potential constitutional issue, it also is a reasonable interpretation of both the language and the legislative history of the Clean Air Act. In addition, the EPA can only make sound regulatory decisions, which the States are expected to implement, when all factors regarding a proposed standard are taken into account.

SUMMARY OF ARGUMENT

Industry parties have devoted approximately 100 pages of detailed analysis of the issues in this case. The Supporting States do not reiterate all of that analysis here, but submit this brief to present arguments most relevant to the States. In addition, rather than repeat the factual account and background adequately covered elsewhere, the Supporting States hereby adopt the Statement of the Case of the American Trucking Associations' brief in this case.

The Supporting States submit this brief to make two main points. First, EPA's and the lower court's interpretation of section 109 creates significant problems for the States. EPA's failure to consider factors other than direct public health effects in setting an air quality standard may

require States to meet an unjustified standard that is impossible to implement using "enforceable" control measures.

Second, the language and legislative history of the Clean Air Act, as well as sound administrative judgment, indicate that an interpretation of section 109 of the Act that allows EPA to consider factors other than direct public health effects of a non-threshold pollutant is reasonable. EPA's interpretation is unreasonable because it prevents the consideration of non-public health factors, but allows EPA unfettered discretion to set the standard without an intelligible basis.

ARGUMENT

A. The Court Should Avoid Consideration of the Nondelegation Issue by Interpreting Section 109 to Allow EPA to Consider Factors Other Than Direct Public Health Effects When Setting A National Ambient Air Quality Standard.

This Court has made clear on numerous occasions that it is "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). In this case, a correct interpretation of section 109 will avoid altogether the need to reach the nondelegation issue raised by the lower court. The Supporting States therefore respectfully request that this Court affirmatively avoid the constitutional issue, affirm the lower court's finding that EPA has failed to articulate intelligible principles for selecting standards for

ozone and particulate matter, and allow EPA on remand to consider costs and other non-health factors in adopting those intelligible principles.

The District of Columbia Circuit Court of Appeals correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone and fine particulates. 175 F.3d at 1034. It therefore correctly remanded the revised standard to EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. However, in so doing, the court acted as if constrained by *Lead Industries* and its progeny to deny EPA the one tool that would most help in selecting an air pollution standard: the consideration of costs and other non-health factors.

Ozone and fine particulates are "non-threshold" pollutants; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no health effects are known. As the lower court stated, "EPA regards ozone definitely, and [particulate matter] likely, as non-threshold pollutants, *i.e.* ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034, citing Ozone Final Rule, 62 Fed. Reg. at 38863/3 (1997). *See also Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1148 (D.C. Cir. 1987) ("*Vinyl Chloride*") (a "non-threshold" pollutant is one that "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the standard for lead). The court below also noted that "the only concentration[] for ozone . . . that is

utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034.[2]

In the absence of a health threshold for a pollutant such as ozone, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant is assumed to present some threat to health. Without the ability to consider some other factor, only one logical result is possible if section 109 is read to protect against any threat to health: EPA must set the standard for a non-threshold pollutant at zero.

However, rather than setting the standard at zero, EPA chooses to interpret section 109 to allow the Administrator essentially unbounded discretion to select any level of protection for a non-threshold pollutant, without articulating a principled reason for doing so. Although EPA states reasons for which it claims to have chosen the ozone standard, they consist of vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35, citing Ozone Final Rule, 62 Fed. Reg. at 38,883/2 (1997). These factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health," nor to determine "safety," so that an "adequate margin of safety" can be established. *Vinyl Chloride*, 824 F.2d at 1163-65.

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[2] Threshold pollutants are not directly at issue in this case; however the same arguments presented here with regard to non-threshold pollutants may be made to some extent for threshold pollutants. Although there may be a health-based threshold above which these pollutants pose a risk, and that threshold should be the primary factor in setting the standard, it is still a question whether the cost of abating a certain percentage of the pollutant is worth the risk reduction. *See* Breyer, *Breaking the Vicious Circle* 11-21 (Harvard University Press 1993).

The dilemma produced by *Lead Industries* and its progeny, and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine, for if EPA does indeed have such boundless discretion, then Congress has delegated too much legislative authority to an executive agency. However, this Court is not bound by the *Lead Industries* line of cases. The correct interpretation of section 109 will permit EPA to establish principled reasons for the standards set for non-threshold pollutants, thus setting boundaries for EPA's discretion, and eliminating the nondelegation problem. Rather than considering the constitutional nondelegation doctrine, the Supporting States respectfully request that the Court reject the rationale of the *Lead Industries* line of cases, thereby permitting EPA to consider factors other than direct public health effects when setting or revising a standard for an air pollutant.

EPA's standardless assertion of authority creates serious problems between the federal government and the States. Despite EPA's alleged inability to consider factors other than direct public health effects, it is required to gather and issue to the States information on just such factors when setting the criteria on which the standards are based. The States are issued "information on air pollution control techniques," including "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." CAA §108(b); 42 U.S.C. 7408(b). In addition, the information must include data on "available technology and alternative methods of prevention and control of air pollution," as well as "alternative fuels, processes, and operating methods." CAA §108(b); 42 U.S.C. 7408(b).

After EPA has set the standard, each State is required to develop a state implementation plan, or SIP for that

pollutant. CAA §110; 42 U.S.C. 7410. Specifically, section 110 requires the States to adopt and submit to EPA a plan to implement, maintain and enforce air quality standards. CAA §110(a)(1); 42 U.S.C. 7410(a)(1). According to the Act, the plan is to "include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter." CAA §110 (a)(2)(A); 42 U.S.C. 7410(a)(2)(A).

In practical terms, States implement federal standards by limiting emissions from "sources," *e.g.*, manufacturing plants, electric utilities, automobiles. A manufacturing plant, for example, may be forced to reduce emissions to meet State requirements by purchasing advanced technology pollution control equipment or reducing its hours of operation. An electric utility, for example, may be forced to reduce emissions by changing its fuel source to cleaner burning coal imported from outside the region. State officials may reduce automobile emissions by imposing emissions testing on car owners and forcing equipment upgrades for older models.

The emission reductions resulting from the combination of these individual control measures—imposed through permit requirements for plants or license requirements for car owners—create a State's overall strategy for implementing the federal standard. In creating this strategy and making the difficult policy choices among possible control measures, a State is presumably required to consider and use the information provided for it under section 108(b) on control techniques, costs of installation and operation, energy requirements, emission reduction benefits, and environmental impacts of the emission control technology. CAA §108(b) 42 U.S.C. 7408(b). In addition, this information is provided to the States early in the process,

presumably to allow them to participate in the federal rule-making process.

Under the federal government's interpretation, EPA could adopt a standard without considering any factor other than direct public health effects, and without requiring EPA to intelligibly explain the standard. At the same time, however, the States must create the overall scheme for meeting the standard by using "enforceable" control measures and taking technological feasibility, cost and all the other factors mentioned in section 108(b) into account.

If EPA's interpretation is correct, it is free to knowingly set a standard for a pollutant that is economically impossible for the States to implement, and yet is unsupported by an intelligible explanation of why EPA drew the line where it did. The States are left in an impossible position—required to attain the standard by a specific deadline, using "enforceable emission limitations and other control measures," and taking cost and technological feasibility into account, but without adequate public health justifications.

If and when EPA provides adequate public health justification and properly takes costs, technological feasibility and other factors into account when setting a national standard for a pollutant, the federal government can then articulate an intelligible principle by which the standard is set, and will be, in effect, taking responsibility for its own decisions. The effects of technological feasibility, cost and other factors, as well as the specific public health benefits of an air quality standard can be debated openly with EPA. And the standards, and the rationale behind them, will be properly reviewable under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

This Court is not bound by *Lead Industries*. The Supporting States respectfully request that the Court resolve this case without reaching the nondelegation doctrine by correctly interpreting section 109 to allow and require EPA to consider costs and other factors besides direct public health effects in setting a standard for ozone and other non-threshold pollutants.

B. The Language and the Legislative History of Section 109, as well as Principles of Administrative Policy, Support the Consideration of Costs and Other Factors Besides Direct Public Health Effects in Setting a National Ambient Air Quality Standard.

When a court reviews a statutory interpretation asserted by an executive agency, the court must answer two questions. The first is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, . . ." *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous, the court must determine whether the construction given it by the administrative agency is "based on a permissible construction of the statute." *Id.* at 843. *Lead Industries* was wrongly decided because the most reasonable interpretation of the language of section 109 and related sections is that EPA has the authority to consider factors other than health when setting an air standard. And in addition to the language of the statute, the legislative history and general principles of administrative policy support the consideration of costs as well as benefits when setting an air quality standard.

1. Under section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." CAA §109 (b)(1); 42 U.S.C. 7409(b)(1). The language of section 109, and particularly its use of the terms "criteria" and "margin of safety," indicates that EPA may consider factors other than public health in setting a standard under section 109.[3]

EPA is to set or revise a standard under section 109 based on "criteria" issued under section 108. EPA issues the "criteria" in the form of a document summarizing studies and other scientific information on the direct public health effects of a particular pollutant. Under section 108, the criteria "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 addition, the criteria are to incorporate information on a non-exclusive list of factors, including other factors that might alter the effects of the pollutant on public health and the effect of other pollutants that might interact to cause adverse health effects. CAA §108(a)(2)(A)-(B); 42 U.S.C. 7408(a)(2)(A)-(B). The fact that the list in section 108(a)(2) is non-exclusive at least suggests that factors other than "effects on public health or welfare" may be considered when issuing "criteria" upon which to set or revise a standard.

But even more telling is the very next subsection, 108(b). Simultaneously with issuance of the criteria, EPA collects and issues to the States "information on air pollution control techniques." CAA §108(b)(1); 42 U.S.C. 7408(b)(1). EPA gathers the information in consultation with advisory committees and federal departments and agencies. CAA

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[3] For more extensive discussions of the language of section 109 and related sections, *see* Brief of American Trucking Associations Argument, part II A & B; *see also* Brief of Appalachian Power Company Argument, part II A & B.

§108(b)(1); 42 U.S.C. 7408(b)(1). The information includes data on a wide range of factors, including cost of installation and operation, energy requirements, emission reduction benefits, environmental impacts of the emission control technology, alternative fuel processes, and operating methods that will result in elimination or reduction of emissions. CAA §108(b)(1); 42 U.S.C. 7408(b)(1). Section 108(b)(2) also provides for the establishment of a standing consulting committee for each pollutant, to develop the information in section 108(b)(1). CAA §108(b)(2); 42 U.S.C. 7408(b)(2). It is unlikely that Congress intended for EPA to gather and issue information on factors other than direct public health effects to aid the States in implementing a standard, if they did not also intend for EPA itself to consider the information in setting the standard.

The use of the term "public health" suggests that factors other than medical effects are to be considered in setting a standard. *See* American Trucking Associations Brief, section II A. In addition, the use of the language "margin of safety" in section 109 strongly suggests that factors other than health are to be considered in setting a standard. The word "margin" implies that there is a line from which that margin is measured. When EPA sets a standard for a threshold pollutant, as it did in *Lead Industries*, that line may be supplied by the threshold itself. (Lead is, or was at the time of *Lead Industries*, considered a threshold pollutant.) But where a non-threshold pollutant such as ozone is under scrutiny, there is no principled way, using only direct public health effects, to determine such a line. A "margin" must be measured from something, and if health factors alone do not supply the line, then other factors must.

This point is explored in *Vinyl Chloride*. In *Vinyl Chloride*, the D.C. Circuit held that section 112, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the

public health, did not preclude a consideration of costs. *Vinyl Chloride*, 824 F.2d at 1163. *Vinyl Chloride* suggests that EPA must make an initial determination of what is "safe" based solely on "the risk to health." *Id.* at 1165 although this determination "does not require a finding that 'safe' means 'risk free,'" or free from uncertainty. *Id.* EPA is to determine what inferences can be drawn from available scientific data, and decide what risks are "acceptable." However, the court goes on to state that "by its nature the finding of risk is uncertain" and "at this point of the regulatory process . . . the Administrator may set the emission standard at the lowest level that is technologically feasible." *Id.* In other words, once "safe" is determined using direct public health effects, EPA may use technological feasibility (and presumably other factors) to provide the "margin of safety."

In addition to *Vinyl Chloride*, other cases hold that an agency can consider costs if not expressly precluded from doing so by statutory language. *See George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998)(nothing in text precludes EPA's consideration of effects of proposed rule on the price and supply of gasoline); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998)(FAA may consider costs, though not mentioned in the statute, in plan for "substantial restoration of the natural quiet"); *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991)(EPA may use cost-benefit analysis in determining whether fugitive dust from coal mines is a "major" contributor to "significant deterioration" under sections 160 *et seq.*). As the D.C. Circuit observed recently, "These cases are unexceptional in their general view that *preclusion* of cost consideration requires a rather express congressional direction." *Michigan Dep't of Environmental Quality v.*

EPA, 2000 U.S. App. LEXIS 3209 at *36-40 (D.C. Cir. March 3, 2000) (*"NOx SIP call"*)(emphasis supplied).[4]

Lead Industries directly contradicts this point. *Lead Industries* held that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency may not consider them. 647 F.2d at 1148. *See also National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990)(EPA precluded from considering the health consequences of unemployment in setting particulate standard); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981)(EPA cannot consider attainability and cost justifications for ozone standards); *Vinyl Chloride*, 824 F.2d at 1158-59 (*dicta* that section 109 does "not allow consideration of technological or economic feasibility").

To be sure, the courts have correctly held that where statutory language exclusively articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. *See, e.g., Union Elec. Co. v. U.S. EPA*, 427 U.S. 246 (1976)(provision enumerating eight criteria for consideration did not authorize consideration of other criteria); *American Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (goal of ethanol market protection may not be considered in promulgating regulations under section 211 because it could "possibly make air quality worse"); *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995)(denial of waiver based on health considerations (rather than the statutorily-required criterion) found impermissible).

[4] The Supporting States were among those who challenged EPA's *NOx SIP call* rule. EPA's position in that case is wholly inconsistent with its position here; there, EPA inappropriately overemphasized costs almost to the exclusion of the impact on air quality in the determination of "significant contribution."

See also NOx SIP call, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

But where, as here, there is no language articulating an exclusive list of relevant factors, and no language precluding the consideration of factors other than direct public health effects, the *Lead Industries* rationale makes little sense. The mandate in section 109(b), "an adequate margin of safety," is similar to "ample margin of safety," the language analyzed in *Vinyl Chloride*. The "adequate margin of safety" language permits EPA less scientific uncertainty than "ample margin of safety." *Environmental Defense Fund v. EPA*, 598 F.2d 62, 81 (D.C. Cir. 1978). Other than that, there is no principled reason to distinguish the "margin of safety" language in section 109(b) and in section 112.

Finally, section 109(d), under which EPA is to review and revise criteria and standards every five years, requires the establishment of an independent scientific review committee to review and recommend changes to the criteria and standards. CAA §109(d)(2)(A); 42 U.S.C. 7409(d)(2)(A). In addition to advising the Administrator of areas in which additional knowledge and research on public health effects is needed, the committee is to advise the Administrator of a large number of other factors. These factors include "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." CAA §109(d)(2)(C)(iv); 42 U.S.C. 7409(d)(2)(C)(iv). In other words, the committee is to investigate and report to the Administrator about public health and non-public health factors regarding the national air standards. Again, it is unlikely that Congress intended the independent review committee and the Administrator to investigate these factors, and yet not consider them when revising an air standard.

In short, there is no "express congressional direction" in the Clean Air Act as a whole, or in section 109 that precludes EPA from considering cost or other factors when setting or revising an air quality standard. On the contrary, a reasonable interpretation of the language of the Act as a whole, and section 109 itself, is that EPA is to gather and consider such information when revising an air quality standard. The Court should therefore hold that, properly analyzed under *Chevron* and other cases, section 109(b) allows EPA to consider costs as well as benefits in setting or revising a standard.

2. The legislative history of the Clean Air Act also includes indications that, while "criteria" deal exhaustively with the scientific information available on the direct public health effects of a particular pollutant, a "standard" should also take other, non-health factors into account. The general tenor of the debates certainly indicates a get-tough attitude towards air pollution, and clearly demonstrates that the Act was intended to be technology forcing. However, the history also suggests that economic and technological factors were not to be entirely ignored.

An exchange on this issue took place during 1970 Senate Public Works Subcommittee Hearings on Air Pollution. At one point in the discussion, Senator Muskie was discussing criteria and standards with Undersecretary of the Department of Health Education and Welfare Veneman:

> Muskie: The standard is something different from the criteria, isn't it?
>
> Veneman: The criteria are the basis upon which you establish the standard.

> * * *
>
> Muskie: How does that differ from a criterion? What else is there of a standard? . . .
>
> Veneman: . . .As well as the health aspect, there are esthetic, economic and other aspects. You may want to take other things into consideration in your standards.

Senate Public Works Subcommittee on Air Pollution, 91st Cong. 160 (1970).

The history of the 1977 amendments also contains a pertinent comment in the Report by the Committee on Interstate and Foreign Commerce. The Committee listed a number of shortcomings in the existing standards, and then stated:

> The foregoing deficiencies in the [standards] are pervasive and not easily cured. Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. *Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.*

Committee on Interstate and Foreign Commerce, *Report*, 127 (May 12, 1977)(emphasis supplied).

Moreover, Congress has provided more than mere suggestions, at least with regard to ozone. Congress has

already recognized that attainment of the 1-hour ozone standard was impossible or nearly so in some regions. In enacting Title I, Part D, Subpart 2, Congress has set up an alternative regime for managing ozone pollution, clearly recognizing that attainment of the standard originally set by EPA was not feasible given current technology. Comments of Senator Durenberger with regard to the 1990 amendments to the Act demonstrate this point:

> [T]he whole purpose of this bill is, wherever possible, to substitute, for artificial unascertainable standards of health or safety, technology standards that suit the economic progress of an industrial society.

Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, U.S. Senate, *A Legislative History of the Clean Air Act Amendments of 1990*, 5683 (1993). As Congress clearly took cost, technological feasibility and other factors into account when it passed Subpart 2 of the Clean Air Act, it is unreasonable to assume that Congress intends for EPA to ignore these factors when revising a standard for the same pollutant.[5]

3. Finally, sound administrative policy indicates that cost in its broadest sense is always a factor in making a decision about the environment and public health. "[C]an an agency sensibly decide whether a risk is significant without also examining the cost of eliminating it?" Stephen G. Breyer, Richard B. Steward, Cass R. Sunstein & Matthew L. Sitzer, *Administrative Law & Regulatory Policy* 65 (4th ed.

[5] As will be argued at more length in the Supporting States' second brief, given the existence of Subpart 2, EPA cannot revise the ozone standard at all.

1999). As discussed above, the consideration of non-health factors is the only sensible way to establish an air quality standard for a non-threshold pollutant. A cost-benefit analysis means "only a systematic weighing of the pros and cons" of a particular standard. *International Union v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991). Public health factors are not ignored, and indeed should be the primary factor in determining a standard.

Some commentators have taken the view that environmental agencies, while claiming to make decisions based on science, are in reality largely cost and policy-driven. Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (Nov. 1995). Wagner espouses the view that environmental agencies have perpetuated a "science charade" in which they exaggerate the role of science in setting standards in order to avoid accountability for the underlying policy decisions.

Where, as here, the scientific support for a more stringent standard is thin, cost and other non-health factors are even more important in making a sound administrative decision. EPA's action in revising the ozone standard is unsupported by any reliable scientific evidence sufficiently demonstrating health benefits for the new standard. Instead, EPA admits that the new ozone standard is largely the result of a policy judgment. Reasons for the revised standard "were largely judgmental in nature . . . and may not be amenable to quantification in terms of what risk is 'acceptable,' or any other metric." 62 Fed. Reg. 38652, 38688 (1997).

EPA has not shown that the proposed ozone standard is "requisite to protect the public health" with "an adequate margin of safety." The Court has construed "safety" under the Clean Air Act as "a significant risk of harm." *Vinyl Chloride*, 824 F.2d at 1153 (quoting *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642

(1980)). *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995) (EPA's departure from "significant risk of harm" to "reasonable basis for concern" standard criticized).

As mentioned above, the statutory mandate to provide an "adequate" margin of safety permits EPA to take into account somewhat less scientific uncertainty than under an "ample" margin of safety. *EDF*, 598 F.2d at 81. However, the margin of safety inquiry supposes a significant public health risk, and EPA has not demonstrated that the revised ozone standard is needed to avoid significant health risks.

EPA admits that the science supporting the change in the standard is uncertain. *See, e.g.*, 62 Fed. Reg. 38856, 38867 (1997) ("the Administrator and CASAC have recognized . . . that there are many uncertainties inherent in [risk] assessments and that the resulting ranges of quantitative risk estimates do not reflect all of the uncertainties associated with the numerous assumptions inherent in such analyses"). The dubious science relied on by EPA was criticized by many, including the State of Ohio. "It is not possible to make an informed change in the standard since there is no statistical basis upon which to distinguish the range of proposals." Ohio's Comments, Record No. IV-D-9934.

Without hard scientific facts showing a significant risk of harm, EPA must have revised the standard based on other factors as well. EPA admits that it selected the ozone standard based on "public health policy judgments in addition to determinations of a strictly scientific nature." 62 Fed. Reg. 38856, 38867 (1997). These vague "judgments" make it impossible to determine whether the standard provides an "adequate margin of safety."

With such uncertain health benefits for the new standard, the prudent course is to balance them against costs

and other factors. To be useful, however, estimates of costs and other impacts must be comprehensive and accurate. The Regulatory Impact Analysis ("RIA") that EPA prepared (but presumably did not consider in setting the ozone standard) grossly underestimates the cost of the standard. For instance, Ohio estimated that partial compliance with the standard *for the state* would cost $760 million, while the RIA estimated that partial compliance *for the entire nation* would cost $600 million. Ohio's Comments, Record No. IV-D-9934.[6]

In short, prudent administrative policy and plain common sense demand that EPA consider costs and other relevant factors when setting a new national ambient air quality standard, while keeping the public health as its primary goal. The Court should interpret section 109 to allow and require that consideration.

The language of the Clean Air Act, as well as the legislative history, point to the reasonable conclusion that the EPA is to consider factors other than direct public health effects when setting and revising a national ambient air quality standard. Under the first part of *Chevron*, therefore, a reviewing court must put the Congressional intent into effect. But even if the intent is unclear, sound administrative policy and plain logic render EPA's rationale for revision of the ozone and particulate standards "unintelligible." Under the second part of *Chevron*, a reviewing court must hold that EPA's rationale reflects an "impermissible construction of the statute."

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[6] For a more extensive discussion of the costs of the revised ozone standard, *see* Brief of Appalachian Power Company, *et al.*, Introduction, part II and Brief of American Trucking Associations, *et al.*, Introduction, part B 1.

CONCLUSION

For the foregoing reasons, the States of Ohio, Michigan and West Virginia respectfully request that the Court avoid the potential constitutional issue by reversing the decision of the court of appeals to the extent that it precludes EPA from considering factors other than direct public health effects of a pollutant when it sets or revises a national ambient air quality standard. In addition, the Supporting States respectfully request that the Court order the lower court to vacate the ozone and particulate matter standards, and remand this case to EPA for reconsideration of those standards.

Respectfully submitted,

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