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.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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

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INTRODUCTION

The Supporting States of Ohio, Michigan and West Virginia argued at the outset that EPA's failure to consider factors other than direct public health effects in setting an air quality standard for a non-threshold pollutant may require States to meet an unjustified standard that is impossible to implement using enforceable control measures. EPA does not respond to that argument. Instead, EPA characterizes cost and factors not directly related to the physical health of individuals as matters relating to the feasibility of compliance and, therefore, as only relevant to implementation. By doing so, EPA only highlights the problem with its approach—that implementation itself is impossible if EPA does not, in the first instance, account for the "public health" in a comprehensive way, subject proposed standards to a cost/benefit analysis to determine whether they are, in fact, beneficial to the public, and then articulate an intelligible basis for its decision.

EPA cannot justify its decision-making by relying on the "technology forcing" nature of the Clean Air Act. The Supporting States agree that the Act should force technological changes and that air standards must be based first and foremost on public health considerations. The Supporting States cannot agree, however, that EPA may, in the name of public health, set standards for non-threshold pollutants without any consideration for "health" in a complete sense and without any consideration for whether these new standards will truly benefit the citizens of our States.

As the Supporting States argued in Case No. 99-1257, EPA had no authority to revise the existing ozone standard. But even assuming such authority, the Supporting States ask that the Court vacate the PM and ozone rules and remand them to EPA for further consideration because EPA cannot

show that its new air standards are "requisite" to protect "public health." Such a remand avoids the constitutional question and retains Section 109 of the Act.

ARGUMENT

I. EPA Mischaracterizes Cost and Other Non-Health Factors As Compliance Issues.

EPA argues throughout its brief that consideration of technological feasibility should occur only at implementation. The Supporting States agree that the standards at issue here ultimately implicate compliance issues because unfounded standards lead inevitably to impossible implementation. However, EPA's focus on the "feasibility" of compliance is misplaced.

Cross-Petitioners have not simply raised questions of compliance, and are not, as EPA asserts, looking to "protect[] industry from 'compliance costs.'" EPA Brief at 37. Rather, the issues before the Court go to the heart of EPA's decision-making when setting standards for non-threshold pollutants. Despite uncertain science, and in the face of enormous costs to the States, industry, and, ultimately, the public, EPA must be able to articulate a basis for its proposed standards. Anything less violates the most basic principles of agency authority.

II. The Act Supports A Finding That EPA May Consider Cost and Other Non-Health Factors When Setting An Air Quality Standard.

In its brief, EPA employs a number of arguments in support of its main point—that it is not permitted to consider cost, technological feasibility, or factors other than direct public health effects when setting a national ambient air quality standard under Section 109(b)(1) of the Clean Air

Act. 42 U.S.C. 7409(b)(1). But EPA evades the real charge in this case—articulation of a cogent principle of statutory interpretation that will allow analysis of the statutory language itself to determine when factors not expressly listed in the relevant statute are to be considered by an agency. Instead, EPA employs an interpretation heavily laden with legislative history, without first carefully analyzing the statutory language.

For all its focus on this Court's decision in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), EPA has missed the critical point of statutory construction. Where Congress presents an agency with an *exclusive* list of factors it must consider in making a determination, the agency usually cannot consider other, non-listed factors in making its decision. In *Union Electric*, the Court found that a provision exclusively enumerating eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. The logical corollary of this principle is that where such a list is *not exclusive*, the agency is permitted to consider other, relevant factors in making its determination. *See National Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). It is this corollary principle that is at issue here, and at the root of the important conflict with *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), and its progeny.

Section 109 requires EPA to set or revise a standard based on "criteria" issued under Section 108. The "criteria" documents incorporate information on a non-exclusive list of topics, including information 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 indicates that information other than "effects on public health

or welfare" may be considered when issuing "criteria" documents upon which to set or revise a standard.

EPA argues that the list in Section 108(a)(2) "are all encompassed within, and limited by, Section 108(a)(2)'s general directive that 'air quality criteria' shall provide information on the health and welfare effects posed by 'the presence of such pollutant in the ambient air.'" But EPA misses the point that the list in 108(a) is *not exclusive*; it directs that the criteria "shall include" various information, but does not use "only," "exclusive," or any other language that makes that list exclusive.

And the language of Section 108(b) reinforces that interpretation of Section 108(a). 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 § 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 the elimination or reduction of emissions. CAA § 108(b)(1); 42 U.S.C. 7408(b)(1).

EPA argues that Section 108(b) indicates only that Congress wanted to continue the program of "separately" providing States with information on emission controls so that the States can implement air quality standards. But if so, it is much more likely that Congress would have truly separated the language, by putting it in Section 110, which describes state implementation plans. Its presence in 108 suggests that the information is connected with establishing

criteria, not implementing state plans. CAA § 110; 42 U.S.C. 7410.

Also, 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). The committee is to advise the Administrator of a large number of factors, including "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).

EPA again argues that the language in Section 109 requiring committee advice on a long list of health and non-health issues is in a separate subsection from that requiring advice on reevaluating air quality standards, and therefore that the non-health factors are not to be considered when revising the standard. However, EPA does not suggest why the committee is to gather this information and report to the Administrator, if she is not to use it in revising an air quality standard. And the presence of such a requirement in Section 109, rather than elsewhere in the Act, indicates that the purpose of the information is for revising standards.

In short, EPA has not shown that the statutory language prohibits consideration of cost and non-health factors. Indeed, many provisions suggest that such factors can and should be considered.

III. The Legislative History of the Clean Air Act Does Not Unequivocally Establish That Cost and Technological Feasibility May Not Be Considered in Setting A National Air Quality Standard.

EPA relies heavily on various remarks made during congressional hearings for its proposition that costs and other non-health factors may not be considered in setting an air quality standard. The Supporting States cited to legislative statements that indicate Congress intended for costs to be considered.

For instance, EPA cites various passages, mostly comments made by Senator Muskie during the 1970 hearings. However, other members make comments that indicate otherwise. For example, Senator Baker states:

> Now, on the other side of the question of where [the standard] ought to be set is unanswerable. And it will continue to be unanswerable because we at the legislative department and the executive department through its appropriate administrative channel are going to have to monitor *the state of the art, the condition of the world, the economic impact in dislocations*, the situation as it continues from year to year and decide what we are going to do about it.

Hearings on Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works, 91st Cong., 2d Sess. Pt. 4, at 1488, 1489 (1970), *(Air Pollution Hearings) reprinted in* 2 Staff of Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970* at 1186 (Comm. Print. 1974) (hereinafter "2 1970 Leg. Hist.") (emphasis supplied); EPA Brief at 28, n.8. This passage at least implies that economic impacts will influence the revision of air quality standards.

In addition, EPA cites Senator Muskie "reemphasiz[ing] that the concept of this bill . . . is not keyed to any condition that [EPA] finds technically and economically feasible." EPA Brief at 26. This comment was made in regard to the amendment creating a standing consulting committee for each pollutant to advise EPA on technology and costs. However, the sponsor of the amendment, Senator Randolph commented:

> It is my belief that since enactment of the 1967 amendments to the Clean Air Act, it has become apparent that one of the deficiencies . . . has been the agency's lack of understanding of industrial pollution control techniques. It is, of course, easy for Government to arrive at a set figure for industry to meet *without giving due consideration to whether those requirements are obtainable on the basis of available control technology.*

1 1970 Leg. Hist. 341 (emphasis supplied). Again, this passage at least implies that available control technology should be considered in setting a standard.

These examples, together with those cited in the Supporting States' opening brief, indicate that there are numerous instances in the legislative history where members of Congress express the opinion that factors other than public health are to play a role in setting and revising an air quality standard. Thus, at the very least, the legislative history indicates a diversity of opinion on the issue and may be more accurately interpreted that Congress did not want cost and technological feasibility to stand in the way of meeting a standard. In any case, the history does not go to how EPA is to determine standards for non-threshold pollutants. EPA's heavy reliance on such a history is therefore misplaced, and

should be given less credence than the statutory language itself.

IV. Expanding the Number of Factors EPA May Consider in Setting an Air Quality Standard Narrows Choices and Allows for An "Intelligible Principle" in Setting the Standard, Thus Avoiding the Issue of Nondelegation.

Finally, despite the uncertainty surrounding the standards, EPA argues that expanding the range of factors that it may consider in setting an air quality standard would exacerbate the problem of defining a standard, as it would increase, rather than decrease its discretion under Section 109. EPA Brief at 47-49. Therefore, in EPA's view, consideration of cost and other factors does not avoid the nondelegation question. But, contrary to EPA's contention, additional factors actually narrow, rather than broaden, choices in decision-making and, therefore, resolve the issues before the Court without the need to resolve the constitutional question.

Useful analogies abound to illustrate this point. In a well-known principle of plane geometry, an infinite number of straight lines can be drawn through a single point, but two points define only one straight line. In the purchase of a car, if the only criterion for the car is its size, a huge number of choices are available. As each new criterion (*e.g.*, price, color, safety record, gas mileage, etc.) is added to the decision-making process, the choices narrow dramatically.

So it is here. In determining an air quality standard, consideration of the single factor of health effects on individuals (especially for a non-threshold pollutant) identifies a broad range of possible standards. Addition of the further factors of societal costs and benefits narrows that

range considerably and will help, rather than hinder, definition of a standard based on an "intelligible principle."

Limited considerations of costs and other factors do not involve an "open ended inquiry" into every conceivable cost, as EPA suggests. Cost-benefit analysis "is simply a weighing of all the desirable effects of a proposed action against all the undesirable effects, whether or not they are susceptible of being expressed in economic terms." A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 101 (1987). *See also International Union v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991). Therefore, the inquiry may reasonably involve only those costs directly relevant to the limitation of a particular pollutant. Of course, as EPA asserts, that inquiry will be open to debate. But such debate is the price of public comment and agency rulemaking. And the ultimate agency decision resulting from such an analysis "is particularly difficult for a court to second-guess." 24 Hous. L. Rev. at 101.

On the other hand, failing to consider any factor other than direct health effects results in the present, unreasonable result—no intelligible principle whatsoever for the ozone and particulate matter standards. EPA reasonably should consider costs and other non-health factors when setting and revising a national air quality standard.

CONCLUSION

For the foregoing reasons, the States of Ohio, Michigan and West Virginia respectfully request that the Court order the lower court to vacate the ozone and particulate matter standards, and remand the particulate matter standard to EPA for reconsideration of those standards.

Respectfully submitted,

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