IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440 and consolidated cases
and
No. 97-1441 and consolidated cases

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review of Final Rules of the
United States Environmental Protection Agency

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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June 28, 1999

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
Agency	United States Environmental Protection Agency
APA	Administrative Procedure Act
CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
$\mu g/m^3$	Micrograms per cubic meter
NAAQS	National Ambient Air Quality Standards
PM	Particulate matter
$PM_{2.5}$	Particulate matter with a diameter of approximately 2.5 micrometers or less
PM_{10}	Particulate matter with a diameter of approximately 10 micrometers or less
ppm	Parts per million
PSD	Prevention of Significant Deterioration Program, 42 U.S.C. §§ 7470-7479
SIPs	State Implementation Plans
Subpart 1	Subpart 1 of Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7501-7509a
Subpart 2	Subpart 2 of Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7511-7511f
UVB	Ultraviolet-B

CONCISE STATEMENT OF ISSUES AND THEIR IMPORTANCE

On May 14, 1999, a divided Panel (Judges Williams and Ginsburg, Judge Tatel dissenting) found that section 109 of the Clean Air Act ("CAA"), 42 U.S.C. § 7409, as interpreted by the Environmental Protection Agency ("EPA"), effected an unconstitutional delegation of legislative authority. Slip op. (Attachment A). The majority remanded two rules revising National Ambient Air Quality Standards ("NAAQS" or "standards") for particulate matter ("PM") and ozone. 62 Fed. Reg. 38,652 (July 18, 1997) (PM); 62 Fed. Reg. 38,856 (July 18, 1997) (ozone). The majority found that Congress and EPA did not identify an "intelligible principle" for determining the degree of residual risk to public health permissible under both standards. In the ozone case, the Panel found that certain 1990 amendments to the Act effectively preclude EPA from implementing the revised ozone standard. Finally, the Panel held that EPA must consider alleged benefits of ozone pollution in ameliorating health risks caused by a natural phenomenon, ultraviolet-B ("UVB") radiation, in setting the ozone NAAQS.

The issues presented by this petition for rehearing and rehearing en banc are:

1. Whether the Panel erred in holding that section 109 of the Act, and EPA's interpretation of it in setting the PM and ozone NAAQS, represents an unconstitutional delegation of legislative authority;

2. Whether the Panel erred in concluding that EPA lacks authority to implement the revised, more stringent ozone NAAQS;

3. Whether the Panel erred in holding that EPA must consider alleged benefits of ozone pollution to address health risks posed by the sun's natural rays when setting an ozone NAAQS to protect the public from air pollution.

A. The Panel Majority's Nondelegation Holding Conflicts with Supreme Court Decisions and Is Inconsistent with Decisions of this Court Upholding EPA's Interpretation of the CAA.[1] The majority's decision departs abruptly from more than sixty years of Supreme Court nondelegation cases. See Mistretta v. United States, 488 U.S. 361, 371-74 (1989); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219 (1989), and cases cited therein. The Supreme Court has never held that the Constitution requires Congress to establish "determinate criteria" that preclude the exercise of discretion in choosing between numerical levels, as the majority did here. Where the statute provides clear principles, as here, courts examine whether the agency has properly applied them under the rubric of the arbitrary and capricious doctrine, as this Court has done in every previous NAAQS case. American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. June 1, 1999) (No. 98-1929); NRDC v. EPA, 902 F.2d 962 (D.C. Cir. 1990), vacated in Part IV only, 921 F.2d 326 (D.C. Cir. 1991); API v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Lead Indus. Ass'n v. EPA ("Lead Indus."), 647 F.2d 1130 (D.C. Cir. 1980).

B. The Issues Are Of Exceptional Importance. The National Ambient Air Quality Standards are the cornerstone of the Clean Air Act's program for protecting the public from the harmful effects of nationwide air pollution. The records for the revised PM and ozone NAAQS demonstrate overwhelmingly that millions of Americans, particularly children and the elderly, experience ill effects from these pollutants at levels not addressed by the previous standards -- including, in the case of PM, premature death. The majority's extraordinary departure from

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[1/] The standard for rehearing and rehearing en banc is the existence of a conflict between the Panel decision and decisions of the Supreme Court and this Court, or the presence of an issue of exceptional importance. Fed. R. App. P. 35(b).

Supreme Court nondelegation doctrine requires the full Court's review because it significantly restricts EPA's ability to provide the public with the health protection Congress intended.

The implementation issue warrants review because the Panel's conclusion attributes an irrational intent to Congress, renders large parts of the CAA inoperative, and effectively precludes EPA from implementing the revised ozone standards, even in areas where the pre-existing standards have been met. Tens of millions of people live in such areas, including millions of children and asthmatics, and need the additional health protection provided by the revised standard. See Attachment B. Nothing in the Panel's opinion questions this need. Rather, the Panel reached out to decide the implementation issue on a ground that was not properly before it or squarely briefed by the parties. The Panel lacked jurisdiction to resolve this issue because EPA did not take final action on it in the rulemaking.

The UVB issue warrants en banc review because the Panel's opinion would fundamentally alter the way that EPA -- with the Court's approval -- has set NAAQS over the past thirty years, potentially diluting the CAA's required health protection. The Panel's opinion would require EPA, in effect, to use NAAQS to consider alleged ozone pollution benefits in providing protection from even a natural phenomenon (the sun's radiation) wholly unrelated to pollution. This carries EPA's inquiry far afield from Congress' intent.[2]

STATEMENT

1. Section 109 of the CAA, 42 U.S.C. § 7409, requires EPA to establish primary NAAQS "which in the judgment of the [EPA] Administrator, . . . and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Under

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[2] Because the issues are complex and the Panel's rationale in critical respects was not anticipated by the parties in their briefs, EPA respectfully submits that additional briefing on rehearing is necessary.

section 108, NAAQS must be based on "air quality criteria" that "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 [a] pollutant in the ambient air." Id. § 7408(a)(2). In developing the criteria, EPA must consider the advice of the statutorily-created Clean Air Scientific Advisory Committee ("CASAC") and explain any important departure from CASAC's recommendations. Id. §§ 7409(d)(2)(B), 7607(d)(3). EPA must review the criteria and standards every five years, and revise them as "appropriate" under sections 108 and 109. Id. § 7409(d)(1).

2. a. In the PM rule, EPA found that the 1987 PM NAAQS, which employed the indicator PM_{10} to regulate all inhalable particles, was not adequate to protect public health based on more than 60 epidemiological studies showing serious adverse health effects at PM levels below the1987 NAAQS. These health effects included premature death, increased hospital admissions and respiratory illnesses, particularly among the elderly, people with respiratory and cardiovascular diseases, asthmatics and children. EPA found that health effects observed at levels below the1987 NAAQS were likely associated with "fine" particles ($PM_{2.5}$) and therefore revised the 1987 PM NAAQS to establish new $PM_{2.5}$ standards. EPA also revised the PM_{10} standards to address other health effects from larger (coarse) particles.

b. In the ozone rule, EPA found that the 1979 ozone NAAQS (set at 0.12 parts per million ("ppm") averaged over one hour (the "one-hour standard")), was not adequate to protect public health based on extensive evidence linking prolonged ozone exposures (six to eight hours) to numerous adverse health effects, including decreases in lung function, coughs and chest pain, aggravation of asthma, lung inflammation, increased susceptibility to respiratory infection, increased doctor and emergency room visits, and hospitalizations, and possible long-term lung

damage. Children and asthmatics are particularly at risk. EPA therefore promulgated a more stringent standard of 0.08 ppm, averaged over an eight-hour period (the "eight-hour standard").

3. a. The Panel rejected a number of procedural and substantive challenges to the NAAQS rules. Slip op. at 18-28, 45-48. However, on an issue petitioners raised in a few pages in the ozone case and a few sentences in the PM case, the majority (Judges Williams and Ginsburg) found that EPA's interpretation of section 109 of the Act "effects an unconstitutional delegation of legislative power." Id. at 6. The majority reasoned that because for ozone, and "likely" PM, there is no scientifically determinable "threshold" below which adverse health effects can be ruled out, EPA must provide a "determinate criterion for drawing lines" for any "non-zero" standard. Id. at 7-8. According to the majority, EPA's interpretation of the Act leaves it "free to pick any point between zero and a hair below . . . London's Killer Fog." Id. at 13-14.[3]

b. Judge Tatel, dissenting, emphasized that the majority "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence" upholding numerous delegations containing fewer guiding principles than section 109. Dissent at 1. In this case, Judge Tatel found restraining principles in section 109's "requisite to protect public health" language, id. at 1-2, and the statutorily-prescribed factors EPA must consider. Id. at 3-4. He concluded that EPA had adhered to a "disciplined decisionmaking process," constrained by these principles, in setting the revised PM and ozone standards. Id. at 4-8.

[3/] During a four-day period in London in December, 1952, death rates increased by 350 percent and about 4000 excess fatalities were attributed to air pollution. PM levels during this period exceeded 4500 $\mu g/m^3$ -- almost 70 times higher than the daily $PM_{2.5}$ standard at issue here. EPA, Air Quality Criteria for Particulate Matter and Sulfur Oxides, at pp.14-12 (Dec. 1982).

c. In the ozone case, petitioners contended that Congress intended to preclude revision of the primary one-hour ozone standard by codifying that standard in Subpart 2 of Part D, Title 1 of the Act. In support, petitioners relied on the classification and attainment date schedule in section 181(a) of Subpart 2. 42 U.S.C. § 7511(a). The Panel resolved that issue by finding EPA had authority to revise the primary standard, slip op. at 30-32, but then went on to address EPA's ability to implement a revised standard. It concluded that under Step 1 of Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842 (1984), Subpart 2 precludes such implementation. Slip op. at 34.[4]

d. Finally, the Panel held that EPA must consider not only ozone's adverse health effects in establishing the NAAQS, but also the alleged beneficial health effects claimed by petitioners. Slip op. at 38-41. In effect, the Panel required EPA to consider ozone pollution as a control strategy to shield the public from the sun's naturally occurring UVB radiation. The Panel rejected EPA's arguments that this is not the type of effect Congress intended EPA to consider.

ARGUMENT

I. SECTION 109 OF THE CLEAN AIR ACT DOES NOT REPRESENT AN UNCONSTITUTIONAL DELEGATION

A. The Act As Interpreted By EPA And This Court Supplies "Intelligible Principles" That Constrain EPA's Discretion.

The majority's holding strays far from the path of the Supreme Court's nondelegation doctrine articulated over more than sixty years. That doctrine is "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta, 488 U.S. at 372. Congress does not violate the Constitution

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[4] The Panel appeared unsure of the effect of its conclusion, suggesting both that "EPA must enforce any revised primary ozone NAAQS under Subpart 2," slip op. at 37, and that the new ozone standards "cannot be enforced by virtue of [CAA] § 181(a) [of Subpart 2]." Id. at 48.

"merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." Touby v. United States, 500 U.S. 160, 165 (1991); see Yakus v. United States, 321 U.S. 414, 425 (1944) (no objection that delegation "call[s] for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed framework").

Delegations thus provide the necessary "intelligible principle" if "'Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" Mistretta, 488 U.S. at 372-73 (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)); Skinner, 490 U.S. at 218-19. "'Only if we could say that there is an absence of standards for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.'" Mistretta, 488 U.S. at 379 (quoting Yakus, 321 U.S. at 425-26).[5]

Because the nondelegation doctrine is a limit on Congress, the starting point for nondelegation analysis is the statute's language, purpose, history, and context. American Power & Light Co, 329 U.S. at 104.[6] Here, the majority brushed aside the CAA's terms in two

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[5] The Supreme Court has adhered to this broad view of permissible delegations in recent cases. E.g., Loving v. United States, 517 U.S. 748, 771 (1996) ("[W]e have since upheld, without exception, delegations under standards phrased in sweeping terms"); Touby, 500 U.S. at 165 ("In light of these precedents, one cannot plausibly argue that [the] 'imminent hazard to the public safety' standard is not an intelligible principle."). See Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (sustaining delegation based on finding of "compelling public interest"); Humphrey v. Baker, 848 F.2d 211, 217 (D.C. Cir. 1988) ("Only the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional.").

[6] The threshold question in previous Supreme Court nondelegation cases, including A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), has been whether Congress has excessively delegated legislative power. Id. at 530 ("[W]e look to the statute to see whether Congress has overstepped these limitations . . . [or] has itself established the standards of legal obligation, thus performing its essential legislative function.").

conclusory sentences. Slip op. at 7, 14. It thus overlooked the "intelligible principle" in section 109: primary NAAQS must be set at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1); see id. § 7409(b)(2) (secondary standards are those "requisite to protect the public welfare"). The levels must be necessary for public health protection: neither more nor less stringent than necessary, but "requisite."

As Judge Tatel summarized, section 109's delegation of authority is thus "narrower and more principled than delegations the Supreme Court and this court have upheld since Schechter Poultry." Dissent at 1.[7] It is at least as constraining as the interpretation this Court ultimately sustained in International Union, UAW v. OSHA, 37 F.3d 665, 669 (D.C. Cir. 1994) ("Lockout/Tagout II") (requiring "a high degree of worker protection"). Dissent at 4. The CAA's directive that EPA set standards "requisite to protect the public health," with an "adequate margin of safety," plainly requires a high degree of protection. Thus, the majority's assertion that EPA could allow pollution "a hair below" the infamous London fog, slip op. at 14, which killed four thousand people in less than a week, is flatly inconsistent with the Act's directive. EPA has never claimed such discretion under the Act, nor could it.[8]

The Act's legislative history, which the majority also ignored, provides further content to the "public health" principle. The health effects protected against must be "adverse." Lead

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[7] Skinner (490 U.S. at 218-19) cites pertinent examples: Lichter v. United States, 334 U.S. 742, 778-86 (1948) (recovery of "excessive profits" on military contracts); American Power & Light Co., 329 U.S. at 104 (prevention of "unfair[] or inequitable[]" distribution of security holder voting power); Yakus, 321 U.S. at 420 (setting of "fair and equitable" commodities prices); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600-601 (1944) (determination of "just and reasonable rate"); NBC v. United States, 319 U.S. 190, 225-26 (1943) (regulation of broadcast licensing in "the public interest").

[8] As explained infra, EPA believes that the scientific record in the present rulemaking effectively bounded its discretion to PM daily peak levels almost 70 times lower than those experienced in London.

Indus., 647 F.2d at 1152 (citing S. Rep. No. 91-1196, at 10 (1970)). EPA therefore cannot base standards on detectable but medically insignificant effects. To provide an "adequate margin of safety," standards must be "preventative or precautionary," reflecting an emphasis on the "predominant value of protection of public health." Id. (quoting H.R. Rep. No. 95-294, at 49 (1977)); id. at 1155 (EPA must "err on the side of caution"). EPA cannot consider economic or technological feasibility. Id. at 1148-51. Finally, public health is distinct from individual health. The standards must protect "sensitive populations," such as asthmatics, id. at 1152, but not the most sensitive individuals within those populations. See S. Rep. No. 91-1196, at 10 (1970) (EPA must consider "a representative sample of persons comprising the sensitive group rather than a single person in such group."), in 1 A Legislative History of the Clean Air Act Amendments of 1970, 93d Cong., 2d Sess. (Comm. Print 1974) at 410.

The majority also failed to recognize the significant additional constraints the Act places on EPA's discretion to apply public health principles in setting a NAAQS. A pollutant must "reasonably be anticipated to endanger public health and welfare" and be emitted from "numerous or diverse . . . sources." 42 U.S.C. § 7408(a)(1)(A)-(B). NAAQS must be based on "air quality criteria" that reflect "the latest scientific knowledge," id. § 7408(a)(2), including information on "variable factors" that "may alter the effects on public health," as well as interactions with other pollutants "to produce an adverse effect on public health or welfare." Id. § 7408(a)(2)(A)-(B).[9] Further, the Act establishes, and prescribes the composition of, CASAC, and requires EPA to develop the "criteria" with extensive CASAC review. Id. § 7409(d)(2).

[9] Congress' recognition of the central role of evolving science is reflected in its requirement, added in 1977, that EPA conduct a review of the standards every five years. 42 U.S.C. § 7409(d)(1).

In addition, EPA has articulated "decisional criteria" to guide its application of the statutory principles. These criteria entail a balancing of several factors relevant to "public health": the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk. This Court has approved these factors, Lead Indus., 647 F.2d at 1161, and the majority found them reasonable. Slip op. at 8-9.

Finally, in section 307(d), Congress imposed a rulemaking process that ensures extensive public participation in standard-setting and heightens the strictures of arbitrary and capricious review for EPA's NAAQS decisions. 42 U.S.C. § 7607(d). EPA must discuss the data, methodology and major legal and policy interpretations underlying a proposed NAAQS and explain any significant departure from CASAC's advice, id. § 7607(d)(3);[10] respond to significant comments, id. § 7607(d)(6); and provide a reasoned explanation adequate to survive judicial review. Id. § 7607(d)(9). The availability of such review weighs strongly in favor of the constitutionality of the CAA delegation. See American Power & Light Co., 329 U.S. at 105 ("[p]rivate rights are protected by access to the courts to test the application of the policy in the light of the[] legislative declarations"); Touby, 500 U.S. at 170 (Marshall, J., concurring); Milk Indus., 132 F.3d at 1475 (arguments on APA claim "convincingly demonstrate" that statutory standard is "discernible and demanding"); United States v. Garfinkel, 29 F.3d 451, 458 (8th Cir. 1994) (APA review supports validity of delegation); see also Schechter Poultry, 295 U.S. at 532-33 (distinguishing cases upholding broad delegations because, e.g., statutes provided notice and hearing procedures).

[10/] Although the majority discounted the role of CASAC, slip op. at 10, the requirement in section 307(d)(3) makes clear that Congress intended CASAC's advice to serve as a significant constraint on EPA's decisionmaking.

For all these reasons, the CAA delegation is well within constitutional bounds. In essence, the majority confused the constitutional question with arbitrary and capricious review. As Judge Tatel emphasized, the issues raised by the majority "relate to whether the NAAQS are arbitrary and capricious," and "ha[ve] nothing to do with our inquiry under the nondelegation doctrine." Dissent at 8. Certainly no nondelegation case requires Congress to supply an "intelligible principle" that would produce the precision the majority demanded here: prescribing, e.g., "how much uncertainty is too much" in the PM rule. Slip op. at 9, 11. Rather, the constitutional requirement is for agencies to apply congressionally prescribed "intelligible principles" to the facts in a reasoned manner. Once that duty is fulfilled, judicial review of the choice of a specific numerical level is quintessentially an inquiry under the arbitrary and capricious standard -- as previous NAAQS cases well illustrate. See infra.[11]

B. The Majority's Decision Precludes On Constitutional Grounds An Interpretation Of The Act That This Court Has Repeatedly Sustained.

The majority summarily dismissed this Court's prior NAAQS decisions because they did not directly address a nondelegation challenge. Slip op. at 13.[12] However, the majority failed to address the import of those cases. This Court has considered EPA's interpretation of the Act many times and found it consistent with Congressional intent. And those panels could not have

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[11/] The majority's extraordinary policy suggestion that EPA could create a quantitative "generic unit of harm," based on Oregon's approach to Medicare, would not solve the constitutional problem it perceived. Slip op. at 16-17. Even assuming such a quantitative approach were possible, the line-drawing question would remain. To paraphrase the majority's hypothetical (id. at 7), the question becomes "how tall? how heavy? how many generic units of harm?"

[12/] Petitioners in those cases did, however, argue that EPA's discretion was not sufficiently bounded. In API, for example, petitioners argued that "nothing in the Act or the Constitution suggests that the Court should assume Congress delegated boundless discretion to EPA," citing Schechter Poultry. See Joint Reply Brief for Industry and State and Local Government Petitioners at 45 (Jan. 18, 1990).

effectively reviewed EPA's NAAQS decisions under section 307(d) if they had thought that the Act provided no "intelligible principles" by which to test the reasonableness of EPA's actions.

In Lead Industries, the Court specifically approved EPA's understanding of the degree of scientific and policy "judgment" necessary to establish NAAQS for non-threshold pollutants. It found that Congress recognized in 1977 that NAAQS pollutants may have no thresholds and that significant uncertainties are inherent in setting health-based standards. Lead Indus., 647 F.2d at 1153 n.43 ("'the amount of health damage varies with the upward and downward variations in the concentration of the pollutant, with no sharp lower limit'") (quoting H.R. Rep. No. 95-294, at 110 (1977)). Thus, far from being something new, EPA's approach to line-drawing in the PM and ozone rules has been recognized by Congress and this Court for almost twenty years.

In NRDC, industry petitioners raised the precise issue of concern to the majority: the allegedly unbounded discretion available to EPA in drawing lines in standard-setting. They argued that EPA's methodology for setting the 1987 PM NAAQS was so unbounded that it could "'justify' virtually any number on the same basis.'" 902 F.2d at 969. But this Court rejected that characterization, finding EPA's choice reasonable and acknowledging that EPA "needed to select a level along a continuum of responses." Id. [13]

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[13] EPA's approach to line-drawing here is consistent with the principle that the appropriate test for judicial review of numerical standards is "whether the agency's numbers are within a 'zone of reasonableness,' not whether its numbers are precisely right." Hercules, Inc. v. EPA, 598 F.2d 91, 106-07 (D.C. Cir. 1978). See Federal Power Comm'n v. Conway Corp., 426 U.S. 271, 278 (1976) ("'Statutory reasonableness is . . . represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high'") (citation omitted); EDF v. EPA, 636 F.2d 1267, 1284 n.47 (D.C. Cir. 1980) (remanding a numerical standard because EPA did not justify it as "within the zone of reasonableness," not because it had not "justif[ied] that particular level instead of a slightly lower level.").

C. The Majority Failed To Recognize How The CAA's Intelligible Principles Limited EPA's Discretion In The Rules At Issue Here.

The majority not only failed to examine the statutory text, it also did not examine whether EPA had arrived at NAAQS levels in a non-arbitrary manner. Had it done so, it would have found the Act and EPA's interpretation entirely sufficient to pass constitutional muster. Only by avoiding review of the records of the PM and ozone rules could the majority conclude that EPA's interpretation left it free to "pick any point between zero and a hair below . . . London's Killer Fog." Slip op. at 12, 14. Those records demonstrate that "intelligible principles" prescribed by Congress, as applied by EPA through the section 307(d) rulemaking procedures, confined EPA's discretion far more than the majority acknowledged.

First, the Act's directive to base the standards on "air quality criteria" reflecting the latest science concerning the adverse "public health" effects of the two pollutants limited the alternatives EPA could even consider.[14] In both cases, EPA found that the prior standards were inadequate to protect public health, which effectively dictated that the upper bound for consideration had to be at least as protective as the prior standards. See, e.g., 62 Fed. Reg. at 38,656-67 (PM); 61 Fed. Reg. 65,716, 65,719-21 (Dec. 13, 1996) (ozone). Then, recognizing that standards must be no more stringent than "requisite" to protect "public health," EPA set the lower bound of the range at the most protective levels the scientific evidence reasonably supported. For PM, this was the

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[14/] The majority mistakenly treated both ozone and PM as "non-threshold" pollutants (see infra note15 regarding PM) and assumed this meant there was no lower bound to EPA's discretion. It is one thing, however, to say that there may be no discernible effects threshold for a pollutant; it is quite another to conclude that effects of medical significance are actually known or thought to occur at very low levels. There may be little or no evidence for that possibility. See, e.g., 62 Fed. Reg. at 38,676. Equally important, the lack of a discernible threshold for individual effects is distinct from "public health," which concerns sensitive populations, not the most sensitive individuals within that population. For public health purposes, it can be possible to conclude, through tools such as risk and exposure assessments, that threats to public health likely become insignificant below certain levels. See infra 14.

lowest point for a possible threshold derived from long-term epidemiological data. JA 2145.[15] For ozone, it was the level below which controlled clinical studies demonstrated effects and at which EPA's exposure assessment showed that exposures of public health concern for the more serious effects were "essentially zero for most areas evaluated." 61 Fed. Reg. at 65,728, 65,730.[16] CASAC concurred that EPA's assessments were supported by sound science.

EPA therefore could not have set a $PM_{2.5}$ standard at "any point between zero and a hair below . . . London's Killer Fog," slip op. at 13-14, without being arbitrary and capricious. On the record before it, the "zone of reasonableness" (note 13, supra) confining EPA in the PM rule was far more limited than the majority assumed: 12.5 to 20 $\mu g/m^3$ for the annual $PM_{2.5}$ standard (and 20 to 65 $\mu g/m^3$ for the daily $PM_{2.5}$ standard), compared with a range of zero to a "hair below" 2,500 $\mu g/m^3$ (the level the majority assumed for the "Killer Fog," slip op. at 12).[17] Similarly, on the record before it, EPA could not rationally have set the ozone standard above 0.09 or below 0.07 ppm. Thus, section 307(d)'s arbitrary and capricious standard confines EPA's discretion within constitutional bounds, and only by ignoring this could the majority conclude otherwise.

Second, although EPA may exercise discretion in selecting a standard within the zone of reasonableness, here too EPA was constrained by its obligation to weigh relevant factors, apply them to relevant facts, respond to criticisms, and adequately explain its rationale. In this task, the decisional criteria EPA long ago developed to ensure consistency in its NAAQS decisions (see

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[15/] Thus, the majority erred in concluding that uncertainty as to whether PM is a non-threshold pollutant did not affect EPA's analysis. Slip op. at 8. The possibility that there may be an effects threshold for PM at lower levels was a critical factor, not only in setting the lower bound of the range for the annual $PM_{2.5}$ standard, but also in selecting a level within that range. See infra 15.

[16/] EPA defined "exposures of concern" for ozone as those at or above 0.08 ppm. 62 Fed. Reg. at 38,860 n.5.

[17/] Indeed, this range was much tighter than the150-250 $\mu g/m^3$ range from which EPA drew the PM_{10} standard upheld in NRDC. 902 F.2d at 969.

supra 10) came prominently into play. As the dissent recognized, the records show that EPA did not arbitrarily pick points on the line within the identified range, but instead "adhered to a disciplined decisionmaking process" constrained by statutory directives. Dissent at 4.

PM. In setting the $PM_{2.5}$ standards, the most influential of EPA's longstanding decisional criteria were the "types of health evidence" and the "kind and degree of uncertainties." The primary evidence on the health effects of fine particles was a large set of epidemiological studies, which examined patterns of disease in real-world populations. This evidence reflects conclusions drawn from statistical relationships among possibly unconnected variables, and thus involves more uncertainty than, for example, the controlled human experiments available for ozone. Within the narrow ranges under consideration, EPA found the epidemiological evidence sufficiently certain to justify the fine particle standards it selected, but concluded that uncertainties arising from such factors as the possibility of an effects threshold at lower levels were too great to justify a lower standard. 62 Fed. Reg. at 38,675-76. The majority dismissed what it called EPA's "increasing uncertainty" argument, finding it "helpful only if some principle reveals how much uncertainty is too much." Slip op. at 11.

What the majority disregarded is that the nature of the PM evidence provided EPA with just such a principle. EPA relied on the accepted practice of demanding statistical significance to the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation. As the dissent recognized (at 6-8), for example, EPA set the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$, just below the range of annual mean $PM_{2.5}$ levels --16 to 21$\mu g/m^3$ -- in locations where studies showed statistically significant positive associations between $PM_{2.5}$ and adverse health effects. There is no evidence of a statistically significant association between adverse health effects and fine particles at any annual $PM_{2.5}$ level below 15

$\mu g/m^3$. Thus, when EPA stated that "highly uncertain" evidence of effects at lower annual concentrations existed but did not warrant establishing a lower annual standard, it was referring to epidemiological evidence that did not meet the 95 percent confidence level criterion for statistical significance. See 62 Fed. Reg. at 38,676.

Ozone. In the ozone rule, EPA drew the line based primarily on judgments concerning "the nature and severity of the health effects," "the size of the sensitive population at risk," and, again, the "types of health evidence." That evidence showed that adverse health effects were occurring at eight-hour ozone exposures of 0.08 ppm, and were sufficiently significant that EPA reasonably concluded a 0.09 ppm standard would not adequately protect public health. 62 Fed. Reg. at 38,863-64, 38,867-68; 61 Fed. Reg. at 65,719-21. However, no controlled human studies demonstrated effects below 0.08 ppm. Although EPA, with CASAC's concurrence, found it reasonable to assume that certain more common health effects may occur below 0.08 ppm for purposes of a risk assessment,[18] these effects (e.g., lung function decreases and coughs) are less serious because they are "transient and reversible," according to medical judgments EPA developed with CASAC using accepted guidelines. 62 Fed. Reg. at 38,868; see 61 Fed. Reg. at 65,722-23. While such effects could still be adverse for some particularly sensitive individuals, they present a public health problem primarily if experienced repeatedly from exposures beyond those allowed by the 0.08 ppm standard. 62 Fed. Reg. at 38,864, 61 Fed. Reg. at 65,723. For more serious health effects, EPA had too little information to extrapolate below 0.08 ppm. Thus,

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[18/] The majority focused exclusively on the results of EPA's quantitative risk assessment. Slip op. at 9. EPA also relied on a much broader qualitative body of peer-reviewed scientific studies, medical judgments concerning the point at which health effects associated with ozone become a public health concern, and CASAC's expert advice.

the character of the scientific evidence differed for levels above and below 0.08 ppm, and supported the selection of the 0.08 ppm level as "requisite" to protect public health.

In sum, the CAA provides intelligible principles that "clearly delineate[] the general policy . . . and the boundaries of this delegated authority," Mistretta, 488 U.S. at 372-73, and EPA applied those principles in these two rules consistent with Congress' intent.

II. THE PANEL ERRED IN CONCLUDING THAT EPA LACKS AUTHORITY TO IMPLEMENT THE REVISED OZONE STANDARDS

In the ozone case, the Panel concluded that Congress intended EPA to revise the one-hour ozone NAAQS as necessary to protect public health, but then prohibited EPA from providing the public that necessary health protection. This conclusion is illogical on its face and is squarely inconsistent with the Act. Since first enacted in 1970, the Act has required, in section 110, that every State, after "the promulgation of a [NAAQS] (or any revision thereof)," develop plans ("State Implementation Plans" or "SIPs") to implement it. 42 U.S.C. § 7410(a)(1) (emphasis added). Congress has since amended the Act several times, adding provisions that supplement and refine that basic provision and specifically address areas with the most difficult pollution problems ("nonattainment" areas).[19] But throughout this evolution, the Act's fundamental premise has never changed or been questioned: every NAAQS -- including "any revision thereof" -- is to be implemented and enforced, everywhere in the country.

The Panel's opinion now eviscerates the Act's structure and most basic goal by attributing to Congress an intent to create a gap in statutory and public health protection. That gap is enormous. Tens of millions of people reside in areas that already meet the one-hour standard, but

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[19] Part A, subchapter 1 applies to all areas, see 42 U.S.C. § 7407; Part D, Subpart 1 (added in 1977 and 1990) applies to all nonattainment areas, id. §§ 7501-7509a; and Part D, Subparts 2-5 (added in 1990) establish additional provisions addressing nonattainment of certain standards for six specific pollutants, including ozone. Id. §§ 7511-7514a.

not the more protective eight-hour standard. See Attachment B (areas attaining the one-hour standard); 62 Fed. Reg. at 38,868/2. The Panel's reasoning precludes EPA from protecting this large portion of the public against significant adverse health effects that remain after the one-hour standard has been attained.[20] Moreover, the Panel reached this conclusion even though the only issue before it was EPA's authority to revise the one-hour standard, and the briefing on implementation was limited to those provisions that had specific bearing on that issue. Rehearing en banc is therefore warranted.

A. The Panel Lacked Jurisdiction To Decide Whether EPA Could Implement The Revised Ozone Standards.

EPA took no final action implementing the revised NAAQS in this rulemaking. Although EPA briefly discussed implementation in the rulemaking preamble, this was primarily to rebut petitioners' arguments that EPA lacked authority to revise the ozone standards. 62 Fed. Reg. at 38,884-85.[21] This Court's jurisdiction is limited to review of "nationally applicable regulations promulgated, or final agency action taken, by the Administrator." 42 U.S.C. § 7607(b). The Panel, therefore, lacked jurisdiction to reach the implementation issue.

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[20] Also, the Panel's conclusion that EPA may implement the revised secondary standard in an area once it attains the one-hour standard, slip op. at 37-38, but not the primary standard, leads to the irrational result that EPA may implement the eight-hour standard in those areas to protect, for example, crops, 42 U.S.C. § 7602(h), but not to protect public health.

[21] In this rulemaking, EPA did issue a regulation establishing criteria for when the one-hour standard no longer applies in an area. 62 Fed. Reg. at 38,894 (codified in 40 C.F.R. § 50.9(b)). EPA noted in the related preamble that Subpart 1 would apply to the implementation of the new eight-hour ozone standard. 62 Fed. Reg. at 38,873. EPA's regulation, however, did not implement the eight-hour standard, and no petitioner in this case challenged that regulation.

Moreover, a specific CAA provision -- section 172(a)(1)(B) -- defers challenges to EPA's implementation decisions classifying areas for setting attainment dates until EPA takes final action on a SIP pursuant to 42 U.S.C. § 7410(k)-(l),[22] or triggers sanctions under 42 U.S.C. § 7509, if, e.g., a State fails to submit a SIP. See also 42 U.S.C. § 7511(a)(3) (similar deferral under Subpart 2). The Panel's decision conflicts with this provision by deciding prematurely that EPA lacks authority to classify areas for the eight-hour standard under Subpart 1. Likewise, EPA's preamble statements are neither final action nor ripe for review.[23] Rehearing is warranted because the Panel's resolution of the implementation issue was not anticipated by the parties, and the Panel did not consider the jurisdictional issue.

B. The Panel Erred In Concluding That The Act Precludes EPA From Implementing The Revised Ozone Standards.

The Panel fundamentally erred by concluding that Subpart 2 ousts EPA's Subpart 1 implementation authority for ozone. Compounding this error, the Panel then concluded that the revised standards cannot be enforced, even under Subpart 2. Slip op. at 48; id. at 35. The Supreme Court has admonished that potentially conflicting provisions in a statute "'should be interpreted so as not to render one part inoperative.'" Dep't of Revenue of Oregon v. ACF Indus., 510 U.S. 332, 340-41 (1994) (citation omitted); Webster v. Reproductive Health Services,

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[22] SIPs contain and make enforceable control measures and other requirements necessary to attain the NAAQS. Train v. NRDC, 421 U.S. 60, 78-79 (1975).

[23] Preamble statements are subject to review only in limited circumstances where they independently satisfy standards for finality and ripeness. Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996). The preamble statements here are not final because no legal consequences flow from them and any legal impacts on petitioners await further proceedings, where objections concerning EPA's implementation authority could be raised. The preamble statements are also not ripe for review. Given the complexity of the numerous related provisions, judicial review of the legal issues would benefit by waiting until EPA interprets and applies the relevant provisions in a concrete setting that would inform the Court's review. ACLU v. FCC, 823 F.2d 1554, 1577-78 (D.C. Cir. 1987).

492 U.S. 490, 515 (1989) ("'the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, [and] unreasonable results'") (citation omitted). Because the Panel focused only on certain provisions in isolation, it failed to address the Act as a whole, as it must. Moreover, the Panel's construction leads to impossible and contradictory results, demonstrating that its decision under Step 1 of Chevron is plainly improper. By contrast, EPA's interpretation -- that the eight-hour standard is implemented through Subpart 1 and other applicable provisions, and the one-hour standard is implemented through Subpart 2 as well as the planning requirements in Subpart 1 and other applicable provisions -- harmonizes numerous sections of the Act, avoids the statutory conflicts and irrational results of the Panel's decision, and thereby complies with Congress' clearly expressed intent that all NAAQS be implemented.

As an initial matter, the Panel misunderstood the Act's basic structure, erroneously assuming that Congress replaced Subpart 1 with Subpart 2 in 1990. Slip op. at 29-30 and 34-35. Subpart 1 does not consist of pre-1990 provisions rejected by Congress, as the Panel apparently thought. Rather, in 1990, Congress significantly modified section 172 of Subpart 1, at the same time it added Subparts 2-5. As discussed below, in revised section 172, Congress added explicit authority for EPA to implement revised standards, 42 U.S.C. § 7502(a)(1), (a)(2), and modified other provisions that apply to all nonattainment areas for all standards.[24] Subparts 2-5 were added because many areas had not at that time attained the existing primary NAAQS, and Subpart 2 addresses continued nonattainment for the primary one-hour ozone standard. Id.

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[24] E.g., H. R. Rep. No. 101-490, pt.1 at 223-24 ("revised section 172(c) [of Subpart 1] establishes requirements for all nonattainment area plans, including those for ozone . . . nonattainment areas," and describing nine such requirements) (emphasis added), in, 2 Legislative History of the Clean Air Act Amendments of 1990, 103d Cong., 1st Sess. (Comm. Print 1993) 3025, at 3248-44 ("Leg. Hist."); id. at 222 (Subpart 1 requirements apply "for all nonattainment areas") (emphasis added), in 2 Leg. Hist. at 3247.

§ 7511-7511f. As evidenced by the title, "Additional Provisions for Ozone Nonattainment Areas," id., and the legislative history,[25] Subpart 2 applies in addition to -- not in lieu of -- Subpart 1.[26] As this Court has recognized, Subpart 1 provisions apply to all nonattainment areas for all standards.[27] Thus, the Panel's conclusion that Subpart 2 bars application of Subpart 1 for ozone is clearly erroneous and is inconsistent with these prior cases.

A key to the statutory analysis is section 172(a)(1)(A) of Subpart 1, which grants EPA authority to classify, based on the severity of their air quality problems, all areas of the country designated "nonattainment . . . pursuant to section [107(d)]." 42 U.S.C. § 7502(a)(1)(A). This section expressly grants EPA authority to classify (and set attainment dates for) nonattainment areas for "any revised standard, including a revision of any standard in effect on November 15, 1990 . . . ." 42 U.S.C. §§ 7502(a)(1)(A) (emphasis added) (& 7502(a)(2)). EPA interprets these provisions to apply to areas designated nonattainment for the eight-hour standard.

In concluding that Subpart 2 unambiguously displaces EPA's Subpart 1 authority, the Panel erred by focusing primarily on two subsections of Subpart 1 (sections 172(a)(1)(C) and 172(a)(2)(D)) and a fragment of a sentence in section 181(a)(1), while ignoring their context and

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[25] E.g., H. R. Rep. No. 101-490, pt.1 at 229 (Subpart 2 establishes "[a]dditional provisions"), in 2 Leg. Hist. at 3253.

[26] Direct references in Subpart 2 confirm that Subpart 1 generally applies to all nonattainment areas, including those for the one-hour standard. See, e.g., 42 U.S.C. § 7511a(a) (4)(last sentence) (expressly exempting in Subpart 2 application of specific portions of Subpart 1 to certain nonattainment areas); 42 U.S.C. § 7511(b)(1) (areas redesignated to nonattainment must meet all the same requirements for areas initially designated nonattainment in 1990, including "subpart 1" requirements).

[27] For example, this Court has reviewed the conformity requirement and EPA's sanction authority contained in Subpart 1, 42 U.S.C. §§ 7506, 7509, which Congress significantly bolstered in 1990. EDF v. EPA, 167 F.3d 641 (D.C. Cir. 1999) (conformity); Sierra Club v. EPA, 129 F.3d 137 (D.C. Cir. 1997) (conformity); NRDC v. Browner, 57 F.3d 1122 (D.C. Cir. 1995) (sanctions). See also Sierra Club v. EPA, 99 F.3d 1551 (10th Cir. 1996) (contingency measures, 42 U.S.C. § 7502(c)(9)).

other relevant statutory provisions. Subsections 172(a)(1)(C) and (a)(2)(D) state that EPA's classification/attainment-date setting authority under section 172(a) shall not apply to "nonattainment areas for which classifications [or "attainment dates"] are specifically provided under other provisions of this part." 42 U.S.C. §§ 7502(a)(1)(C), (a)(2)(D). The Panel reasoned (slip op. at 33-37) that Subpart 2 "specifically provide[s]" for attainment dates for all primary ozone standards, based primarily on section 181(a)(1)'s statement that "[e]ach area designated nonattainment for ozone pursuant to section [107(d)]" shall be classified at the time of such designation "by operation of law" under the scheme set out in "table 1." 42 U.S.C. § 7511(a)(1) (table reproduced in slip op. at 29 n.7).

The Panel's conclusion is flawed in at least two fundamental respects. First, section 181(a)(1) cannot reasonably be construed to "specifically provide[]" attainment dates and classifications for the revised standard. Section 181(a)(1)'s Table 1 bases attainment dates and classifications on an area's "design value," which is a measure of an area's air quality. However, the particular design value "methodology" that section 181(a)(1) codifies applies exclusively to the one-hour standard, 42 U.S.C. § 7511(a)(1); it makes no sense to apply it to the eight-hour standard.[28] Further, section 181(a)(1) cannot be reasonably construed to apply to areas designated nonattainment for the revised eight-hour standard of 0.08 ppm, because Table 1 establishes classifications and attainment dates only for nonattainment areas with ozone levels in excess of 0.120 ppm. Thus it establishes no attainment dates or classifications for nonattainment

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[28] A design value of 0.12 ppm approximates attainment of the one-hour standard. The legislative history confirms that the design value scheme referred to in section 181(a)(1) was intended to apply only for the one-hour standard. "The primary ozone standard, established to protect human health, is a daily maximum hourly concentration of 0.12 parts per million (ppm). Compliance with the ozone standard is evaluated on the basis of a 'design value,' which is the fourth highest one-hour ozone reading over three years." H. R. Rep. No. 101-490, pt.1, at 197 (1990), in 2 Leg. Hist. at 3221. See slip op. at 29 & n.6.

areas with "design values" lower than 0.121 ppm. Yet, the vast majority of areas violating the eight-hour standard have ozone levels less than 0.121 ppm. Moreover, when EPA designates areas for that standard by July 2000,[29] the attainment dates for most areas specified in Table 1 will have passed. Clearly, section 181(a)(1) does not "specifically provide[]" classifications and attainment dates for the eight-hour standard.[30]

EPA's more logical reading is that Congress intended section 181(a)(1) to apply only to areas designated nonattainment for the one-hour standard that existed in 1990 (for which calculating attainment dates from the enactment date of the 1990 Amendments would make sense).[31] That reading also is supported by section 181(a)'s title, "Classification and attainment dates for 1989 nonattainment areas" and the legislative history.[32] Particularly in light of the irrational and contradictory consequences of the Panel's reading, the title reasonably resolves any ambiguity concerning Congress' intent. See INS v. National Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991). The Panel thus erred in dismissing the title, see slip op. at 37, and

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[29] Pub. L. No. 105-178 §§ 6103(a), (b), 112 Stat. 107, 465 (1998); see 42 U.S.C. § 7407(d)(1)(B)(i); slip op. at 32.

[30] Consistent with this interpretation, EPA has long recognized that section 181(a)(1) does not even apply to all nonattainment areas for the primary one-hour ozone standard, and thus relied upon Subpart 1 to classify those areas. See 57 Fed. Reg. 13,498, 13,525 (April 16, 1992) (e.g., sub-marginal areas). The Panel recognized this (slip op. at 32), but failed to grasp its import in connection with the rest of its decision.

[31] As further proof, under section 181(b), 42 U.S.C. § 7511(b)(1), EPA's authority to apply adjusted attainment dates in Table 1 only applies to areas redesignated to nonattainment after having been initially designated shortly after 1990 for the one-hour standard under section 107(d)(4), 42 U.S.C. § 7407(d)(1), and not to areas designated for revised standards, which occurs under section 107(d)(1)(B). Id. § 7407(d)(1)(B). See slip op. at 32.

[32] Discussing section 181(a), the House Committee Report states that "[d]esignated ozone nonattainment areas are classified by operation of law . . . based on the design values for the area under the existing ozone NAAQS." H. R. Rep. No. 101-490, pt.1, at 229 (emphasis added), in 2 Leg. Hist. at 3252.

ignoring the legislative history. At the least, these incongruities preclude the Panel's conclusion under Chevron Step 1 that Subpart 2 "specifically provide[s]" for classifications and attainment dates for the revised ozone standard, not just the one-hour standard. Id. at 37.

Second, the Panel reasoned that because section 107(d)(1), 42 U.S.C. § 7407(d)(1), establishes the designation process for any revised standard, the reference to "section 107(d)" in section 181(a)(1) means that Subpart 2 specifically provides classifications and attainment dates for all primary ozone NAAQS. Slip op. at 33-35, 37. Relying upon a fragment of legislative history (a change of the reference from "section 107(d)(4)" in prior bills to "section 107(d)"), the Panel concluded that if Congress had intended a narrower reading, it would have referred only to "areas designated nonattainment under [section 107(d)(4)]" – a provision added in 1990 specifically to address areas that were nonattainment for the one-hour standard in 1990. Id. at 34.

An examination of the statutory text and structure as a whole supports a more reasoned interpretation. Section 107(d) contains two subsections -- sections 107(d)(1)(C) and 107(d)(4) -- that were added in 1990 to address areas designated nonattainment solely for the one-hour standard in 1990. 42 U.S.C. §§ 7407(d)(1)(C), 7407(d)(4).[33] The most logical reading of the reference in section 181(a) (to areas designated nonattainment under "section 107(d)") is that Congress intended to refer to these two subsections, and not to section 107(d) in its entirety. The

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[33] Immediately upon enactment of the 1990 Amendments, section 107(d)(1)(C) established "by operation of law" that areas designated nonattainment prior to the 1990 Amendments (i.e., 1989 nonattainment areas) retain that designation after the 1990 Amendments. 42 U.S.C. § 7407(d)(1)(C). For ozone, this necessarily designated such areas only under the existing one-hour ozone standard. EPA could make only certain modifications 240 days later (such as changes to boundaries) when it promulgated those designations under section 107(d)(4). See 42 U.S.C. § 7407(d)(4)(A)(iv)-(v). However, the "operation of law" nonattainment designations under section 107(d)(1)(C) controlled, as section 107(d)(4)(A)(iii) prohibited EPA from using section107(d)(4) to redesignate nonattainment areas to attainment. 42 U.S.C. § 7407(d)(4)(A)(iii). See 56 Fed. Reg. 56,694, 56,696-7 & 56,700-03 (Nov. 6, 1991).

legislative history relied upon by the Panel can most reasonably be read as recognizing that designations for the one-hour standard were addressed in both subsections, and not only in subsection 107(d)(4), as the Panel assumed.[34] Together with the structure of the Act and its legislative history (supra at 20-21 & nn.24 & 26), this supports EPA's interpretation that Subpart 1 applies to all nonattainment areas, and Subpart 2 (including the classification and attainment dates in Table 1) applies only for the one-hour standard.[35]

The Panel also raised concerns that applying Subpart 1 attainment dates for the eight-hour standard would require Los Angeles to attain that standard no later than the year it must comply with the one-hour standard. Slip op. at 35. Even assuming, arguendo, EPA establishes such an attainment date when it acts on Los Angeles' SIP for the revised standard, this is the only area of the nation in which this is arguably the situation.[36] Most important, under accepted rules of statutory construction this result would not support the Panel's broad conclusion under Step 1 of Chevron, that Congress meant to deprive EPA of authority to implement the primary eight-hour

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[34] Moreover, use of this general section 107(d) reference is consistent with Congress' practice of beginning each of the classification provisions in the different subparts, including section 172(a)(1) of Subpart 1, 42 U.S.C. § 7502(a)(1), with a general reference to section107(d). See, e.g., 42 U.S.C. § 7512(a)(1) (Subpart 3), 7513 (Subpart 4).

[35] The Panel also incorrectly concluded that Subpart 2 precludes EPA from implementing the revised secondary standard to protect public welfare in areas not attaining the one-hour standard. Slip op. at 37-38. Subpart 2 (including section 181(a)(1)) does not apply to secondary standards, as the Panel recognized. Slip op. at 37. Under accepted rules of statutory construction, the Panel therefore could not impose the Subpart 2 dates to restrict EPA's Subpart 1 authority to implement a secondary standard. Moreover, the Subpart 2 attainment dates are explicitly outside dates, 42 U.S.C. § 7511(a)(1), and not as the Panel concluded a codification of Congress' view of what attainment dates are "as expeditious[] as practicable" for the revised secondary standard under section 172(a)(2)(B), 42 U.S.C. § 7502(a)(2)(B). See H. R. Rep. No. 101-490, pt. 1, 229, in 2 Leg. Hist. at 3253; S. Rep. No.101-228, at 37, in 5 Leg. Hist. at 8377.

[36] Moreover, it is incorrect to presume that the same attainment date for both standards is per se unreasonable. As explained infra n.35, contrary to the Panel's assumption, section 181(a)(1) expressly requires attainment "as expeditiously as practicable," and the Table 1 dates are latest possible dates. 42 U.S.C. § 7511(a)(1).

standard nationwide. See supra at 19-20. To the contrary, assuming this would pose a conflict, it is precisely the sort of situation courts have found EPA has the authority to harmonize. See, e.g., Citizen to Save Spencer County v. EPA, 600 F.2d 844, 870-73 (D.C. Cir. 1979) (EPA may harmonize inconsistent statutory provisions to give "maximum possible effect to both").

Finally, in broadly concluding that a more stringent ozone standard cannot be implemented, slip op. at 35 & 48, the Panel failed to consider key implementation provisions, including those outside both Subparts 1 and 2. Most notably, as stated above, the opinion failed to consider the fundamental provisions of section 110(a) that require each State to submit a SIP implementing all NAAQS, including "any revision" of a NAAQS. 42 U.S.C. § 7410(a)(1). The opinion also did not address section 172(b) in Subpart 1, which provides for application of section 172(c) requirements to all areas designated nonattainment under section 107(d). See 42 U.S.C. § 7502(b). See supra at 20 n.24. In light of the Panel's failure to address these provisions, it is not clear what impact the Panel's broad conclusion has on these basic authorities. In view of the inconsistencies in the Panel's reasoning, and its conflict with the structure and fundamental premise of the Act that all NAAQS should be implemented, the Panel's conclusion cannot be upheld under Chevron Step 1. EPA's interpretation reconciles the relevant provisions, and should therefore be upheld as reasonable.

III. CONGRESS DID NOT INTEND EPA TO CONSIDER ALLEGED HEALTH BENEFITS OF GROUND-LEVEL OZONE IN SHIELDING THE PUBLIC FROM UVB RADIATION CAUSED BY THE SUN

In setting the ozone NAAQS, EPA reasonably interpreted the Act to preclude consideration of alleged beneficial effects of ground-level or tropospheric ozone in shielding the public from potentially harmful UVB radiation that reaches the earth, including the increase over naturally occurring levels that stems from depletion of stratospheric ozone. As the Panel

recognized, Congress addressed stratospheric ozone depletion, and therefore excess or unnatural levels of UVB radiation, in Title VI of the Act, 42 U.S.C. §§ 7671-7671q. Slip. op. at 40.[37] Further, there is no indication that Congress intended EPA to re-engineer nature by using ground-level ozone pollution as a tool to offset risks posed by naturally occurring levels of UVB radiation from sunlight.

The Panel concluded that the term "all identifiable effects" in section 108[38] includes "beneficent" as well as adverse effects, slip op. at 41, and that EPA's contrary conclusion was unreasonable. Id. at 40. The relationship between ozone and UVB-caused harms differs significantly, however, from both the Panel's hypothetical (a chemical that "impedes and enhances breathing") and from its characterization of ozone as a pollutant that "impedes breathing but provides defense against various cancers." Slip. op. at 40-41. The risks posed by the sun's UVB radiation would exist absent any pollution at all. Thus, this is not a situation where ozone directly causes both adverse and beneficial effects. Indeed, EPA has never encountered a NAAQS pollutant that directly causes both beneficial and adverse effects. Therefore, the Panel erred by misconstruing the issue before it.[39]

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[37] Petitioners explicitly argued that EPA should consider ozone's potential to reduce the risks caused by both excess UVB levels (due to stratospheric ozone depletion) and natural UVB levels. EPA thus understands that when the Panel stated that nothing in Title VI "purports to address tropospheric ozone," slip op. at 40, it was implicitly ruling EPA had to consider using ground-level ozone to shield the public from natural UVB levels.

[38] Under section 108, NAAQS are based on criteria that "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare . . . from the presence of such pollutant in the ambient air." 42 U.S.C. § 7408(a)(2).

[39] The Court en banc need not reach the issue of whether EPA must consider beneficial effects in the event that a NAAQS pollutant ever directly cause both adverse and beneficial effects.

The CAA does not define "effects" for primary NAAQS.[40] As explained below, EPA reasonably concluded that construing the term "all identifiable effects" to include the indirect beneficial effects at issue here (alleged potential to minimize the risks of sun exposure) would be in conflict with the Act and inconsistent with Congressional intent. Instead, EPA reasonably construed the term to refer only to the characteristics of ground-level ozone that make it a pollutant, i.e., its direct adverse health effects, not its potential to indirectly minimize health risks posed by exposure to the sun. EPA's interpretation is consistent with this Court's ruling that EPA did not have to consider claims that indirect health effects would flow from unemployment attendant on making a NAAQS more stringent. NRDC, 902 F.2d at 972-73.

Using ozone pollution to re-engineer nature to address a risk posed by a natural phenomenon, as the Panel's ruling would require, is inconsistent with the CAA's goals and structure. The Title I NAAQS program focuses on reducing levels of NAAQS pollutants in dirty areas that do not attain the NAAQS. In areas cleaner than the NAAQS, Title I's Prevention of Significant Deterioration ("PSD") Program, 42 U.S.C. §§ 7470-7479, restricts increases in pollution above existing levels. Alabama Power Co. v. Costle, 636 F.2d 323, 361 (D.C. Cir. 1979). Thus, the entire thrust of Title I is to control and prevent pollution: Congress intended EPA to set NAAQS at the highest level necessary to protect public health, to make dirty areas reduce pollution to meet the NAAQS, and to constrain pollution increases in clean areas.

This approach makes sense because Congress viewed "pollutants" as harms to be prevented or reduced to protect and enhance the quality of the Nation's air. See 42 U.S.C. § 7401(a)(3), (b)(1), (c). Further, Congress directed EPA to issue NAAQS only for air pollutants that "may reasonably be anticipated to endanger public health." Id. § 7408(a)(1)(A). The Title I

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[40] Cf. 42 U.S.C. § 7602(h) (defining "effects on welfare," focusing on what "welfare" means).

scheme cannot logically be reconciled with the Panel's interpretation, which would require EPA to set NAAQS at optimal levels, balancing a pollutant's adverse effects against its potential to reduce naturally occurring risks. If that were Congress' intent, States would have to devise plans to increase ozone pollution to NAAQS levels in cleaner areas to ensure a uniform national level of optimal health protection, a result at odds with the PSD program and the Act's basic structure.

The Panel's reliance on section 108(a)(2)(A) was misplaced.[41] The Panel reasoned that "the presence of ultraviolet radiation at various levels 'alter[s] the effects [of ozone] on public health or welfare' by making them on the whole less malign -- perhaps even beneficial." Slip op. at 39-40. But this statement mischaracterizes the relationship between UVB and ozone, and the effects of concern under section 108(a)(2)(A). The issue petitioners raised is not whether a variable factor -- UVB – changes ozone's effects on public health, but whether ozone changes the effects of UVB on public health. Section 108(a)(2)(A) was intended to cover variable factors that may impact the NAAQS pollutant's direct adverse effects on public health, and not indirect, allegedly beneficial effects. See, e.g., JA 1497-98.

Accordingly, the Court should grant en banc review, and uphold EPA's reasonable interpretation that it need not consider, in setting the ozone NAAQS, ozone's alleged ability to shield against natural levels of UVB radiation from the sun.

[41/] That provision requires air quality "criteria" to include information on "those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant . . . ." 42 U.S.C. § 7408(a)(2)(A).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and rehearing en banc.

Respectfully submitted,

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June 28, 1999