No. 99-1257

# In the Supreme Court of the United States

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

*v.*

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

**PARTIES TO THE PROCEEDING**

1. Petitioners are the respondents in the court of appeals: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency (EPA).

The following parties intervened in support of EPA in the court of appeals: the American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey.

The following States appeared as amici curiae in support of EPA in the court of appeals: New York, Connecticut, New Hampshire and Vermont.

2. Respondents are the petitioners in the court of appeals:

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest and Paper Association
American Iron and Steel Institute
American Petroleum Association
American Portland Cement Alliance
American Public Power Association
American Trucking Associations, Inc.
Appalachian Power Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power & Light Company

Chamber of Commerce of the United States of America
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
The Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company

Madison Gas and Electric Company
David Matusow
Brian McCarthy
Meridian Gold Company
The State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
National Association of Manufacturers
National Association of Home Builders
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Stone Association
National Small Business United
Nevada Mining Association
Newmont Gold Company
Non-Ferrous Founders Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
The State of Ohio
Ohio Edison Company
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
PacifiCorp
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
The Potomac Edison Company
Potomac Electric Power Company

PP&L Resources
Public Service Company of New Mexico
Richard Romero
Salt River Project Agricultural Improvement & Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Tampa Electric Company
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
Virginia Power
Western Fuels Association
West Penn Power Company
The State of West Virginia
West Virginia Chamber of Commerce
Wisconsin Electric Power Company

The following parties intervened in support of petitioners American Trucking Ass'ns, et al., in the court of appeals:

American Road and Transportation Builders Association
Atlantic City Electric Company
Texas Gas Transmission Corporation

The following persons appeared as amici curiae in support of petitioners American Trucking Ass'ns, *et al.*, in the court of appeals:

Representative Tom Bliley
Senator Orrin G. Hatch

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Carol M. Browner, Administrator of the Environmental Protection Agency, *et al.* (EPA), respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these two sets of identically-captioned consolidated cases.

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 175 F.3d 1027. The opinion on petitions for rehearing and dissenting statements on denial of rehearing en banc (Pet. App. 70a-102a) are reported at 195 F.3d 4.

### JURISDICTION

The decision of the court of appeals was entered on May 14, 1999. Petitions for rehearing were granted in part and denied in part on October 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 1 of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth in the Appendix at Pet. App. 105a-126a.

The EPA rules at issue in this case are set forth in the Appendix at Pet. App. 102a-104a.

## STATEMENT

Respondents American Trucking Associations, Inc., *et al.* (ATA), petitioned under Section 307(b) of the Clean Air Act (CAA), 42 U.S.C. 7607(b), for review of two final EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone under Section 109 of the CAA, 42 U.S.C. 7409. On May 14, 1999, the court of appeals issued a single opinion for the two sets of consolidated cases. No. 97-1440 (particulate matter); No. 97-1441 (ozone). A divided panel found that Section 109 of the CAA, 42 U.S.C. 7409, as interpreted by EPA in setting the ozone and particulate matter NAAQS, effected an unconstitutional delegation of legislative authority. The court remanded both rules with instructions that EPA should articulate an "intelligible principle" for determining the degree of residual risk to public health permissible in setting revised NAAQS. Although EPA had taken no final agency action to implement the revised ozone NAAQS, the court also issued an opinion, later modified, on the scope of EPA's implementation authority.

1. The CAA directs EPA to promulgate NAAQS, which establish the maximum permissible levels, in the outside air, of a limited number of pervasive pollutants that have adverse effects on public health and welfare. CAA § 109, 42 U.S.C. 7409. Section 109 directs EPA to promulgate "primary" NAAQS to protect human health and "secondary" NAAQS to protect "public welfare." See CAA § 109(b), 42 U.S.C. 7409(b). See also CAA § 302(h), 42 U.S.C. 7602(h) (defining welfare interests). EPA has promulgated NAAQS for six pollutants: sulfur dioxide, carbon monoxide, nitrogen oxide, lead, ozone, and particulate matter (PM).[1]

The CAA directs EPA to establish NAAQS at specific levels. Primary NAAQS must be set at levels that, "in the judgment of the [EPA] Administrator, * * * 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). Secondary NAAQS must be set at levels that, "in the judgment of the Administrator," are "requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). In making those judgments, EPA must develop and rely 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." CAA § 108(a)(2), 42 U.S.C. 7408(a)(2). EPA must review the air quality criteria and NAAQS every

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[1] PM embraces airborne particles of varying size and composition. See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,653 (1997). $PM_{10}$ denotes inhalable particulate matter up to approximately 10 micrometers in diameter, while $PM_{2.5}$ denotes PM up to approximately 2.5 micrometers in diameter. See 62 Fed. Reg. at 38,654 n.1, 38,666-38,667.

five years and revise them as "appropriate" in accordance with Sections 108 and 109. 42 U.S.C. 7409(d)(1).

The CAA sets out an implementation process, resting on principles of federal-state cooperation, to ensure that the air throughout the Nation "attains" the NAAQS. Within three years of promulgating a new or revised NAAQS, EPA must "designate" prescribed areas of the country as either attainment areas or nonattainment areas for each NAAQS pollutant depending on whether the NAAQS has been met. CAA § 107(d)(1), 42 U.S.C. 7407(d)(1). Once EPA designates an area as nonattainment for a NAAQS, EPA must establish the date by which the nonattainment area must attain the NAAQS in question (the attainment date). See generally CAA § 172(a), 42 U.S.C. 7502(a). The States are generally responsible for determining what measures are necessary within their borders to achieve and maintain the NAAQS. The CAA allows each State to develop, for approval by EPA, a State Implementation Plan (SIP) that sets forth pollution control measures necessary, among other things, for nonattainment areas within the State to attain all NAAQS by the applicable attainment dates. See CAA §§ 110, 172(c), 42 U.S.C. 7410, 7502(c).

Congress has amended the CAA on several occasions, including an extensive revision in 1990. See Pub. L. No. 101-549, 104 Stat. 2399 (the 1990 Amendments). The 1990 Amendments recognized, among other things, that many areas of the country had failed to attain the existing NAAQS, including the primary ozone NAAQS, set in 1979, of 0.12 parts per million (ppm) averaged over one hour (the one-hour standard). The 1990 Amendments revised the CAA's implementation process in certain respects, creating a new procedure for classifying nonattainment areas based upon pertinent factors (such as the severity of the nonattainment problem) and revising the method for setting attainment

dates. See generally CAA § 172, 42 U.S.C. 7502. The 1990 Amendments also imposed specific implementation measures for areas designated nonattainment for various pollutants. See CAA §§ 181-192, 42 U.S.C. 7511-7514a In the case of ozone, the 1990 Amendments established mandatory classifications and attainment dates for the primary one-hour ozone standard. See CAA § 181(a)(1), 42 U.S.C. 7511(a)(1).

2. In July 1997, after extensive rulemaking proceedings, EPA issued revised NAAQS for particulate matter and ozone in light of new scientific knowledge about the adverse health effects of those pollutants. See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652 (1997); NAAQS for Ozone, 62 Fed. Reg. at 38,856.[2]

a. EPA found that the 1987 NAAQS for particulate matter, which employed the indicator $PM_{10}$ to regulate all inhalable particles (see note 1, *supra*), were inadequate to protect public health. EPA based its finding on more than 60 epidemiological studies showing serious adverse health effects at particulate matter concentrations below the 1987 NAAQS. Those 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 the health effects observed at concentrations below the 1987 NAAQS were likely associated with "fine" particles ($PM_{2.5}$) and therefore revised the 1987 NAAQS to establish new $PM_{2.5}$ standards. EPA also revised the $PM_{10}$ standards to continue to address other health effects from larger (coarse) particles. See 62 Fed. Reg. at 38-579-38,655.

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[2] Copies of those Federal Register notices have been lodged with the Clerk of the Court.

b. Similarly, EPA found that the 1979 one-hour ozone NAAQS was inadequate to protect public health based on clinical studies and other evidence linking prolonged ozone exposures (from six to eight hours) to numerous adverse health effects, including decreases in lung function, coughs and chest pain, potential aggravation of asthma, lung inflammation, increased susceptibility to respiratory infection, increased doctor and emergency room visits and hospitalizations, and possible permanent lung damage from repeated exposures. Children and asthmatics are particularly at risk. EPA therefore promulgated a more stringent ozone NAAQS of 0.08 ppm, averaged over an eight-hour period (the eight-hour standard). See 62 Fed. Reg. at 38,859-38,878.

3. Numerous industry groups, a public interest group, and several States and individuals challenged the revised particulate matter and ozone NAAQS. The court of appeals rejected many of the challenges, but nevertheless remanded the revised NAAQS to EPA and instructed the agency to "develop a constitutional construction of the act." Pet. App. 4a, 5a. Relying on a theory that was not extensively briefed by the parties, the court found that EPA's interpretation of Section 109 of the CAA "effects an unconstitutional delegation of legislative power." *Id.* at 4a. The majority reasoned that, because there is no scientifically determinable "threshold" below which adverse health effects from ozone can be ruled out, and because there "likely" is no similar threshold for PM, EPA must provide a "determinate criterion for drawing lines" for any "non-zero" standard. *Id.* at 5a-6a. According to the majority, EPA's interpretation of the CAA leaves it "free to pick any point between zero and a hair below * * * London's Killer Fog," a notorious 1952 incident in which approximately 4000 deaths over four days were attrib-

uted to air pollution. *Id.* at 13a. Judge Tatel dissented from that portion of the opinion, emphasizing that the majority "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence" upholding numerous congressional enactments containing fewer guiding principles than Section 109. *Id.* at 59a.

In the ozone case, the court of appeals rejected the industry petitioners' argument that Congress's 1990 Amendments to the CAA, which established mandatory classifications and attainment dates for the primary one-hour ozone standard then in effect, see CAA § 181, 42 U.S.C. 7511, precluded EPA from revising the ozone NAAQS. Pet. App. 34a-37a. That ruling resolved the issue before the court. The court of appeals nevertheless went on to direct what EPA may and may not do when it proceeds—in the future—to implement the ozone NAAQS. The court ruled that EPA cannot set nonattainment classifications and attainment dates for the revised ozone NAAQS through Section 172 (42 U.S.C. 7502), but must instead employ the classifications and attainment dates set out in Section 181(a) (42 U.S.C. 7511(a)), and this precluded EPA from impleenting a more protective ozone NAAQS. Pet. App. 34a, 37a-44a.[3]

4. EPA and other parties filed petitions for rehearing and suggestions for rehearing en banc. The panel denied EPA's petition for rehearing on the nondelegation issue. Pet App. 72a. It expressly rejected EPA's view that the relevant provisions of the CAA,

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[3] The court of appeals resolved some, but not all, of the other challenges to EPA's rules. See Pet. App. 4a-5a. The court concluded that "[t]he remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act (and, if appropriate, modify the disputed NAAQS in accordance with that construction)." *Id.* at 5a.

including Section 109(b)(1)'s direction that NAAQS must be based on air quality criteria and "set at levels requisite to protect the public health," 42 U.S.C. 7409(b)(1), set out intelligible principles that limit the agency's discretion. Pet. App. 72a-89a. Judge Tatel dissented. *Id.* at 89a.

In the ozone case, the panel granted rehearing in part, to modify its opinion regarding EPA's authority to implement the revised NAAQS. Pet. App. 71a-72a, 76a-82a. The panel rejected EPA's argument that, because EPA had yet to take final action implementing the revised NAAQS, the court lacked jurisdiction to consider which provision of the CAA would govern EPA's implementation, including the specification of classifications and attainment dates. *Id.* at 77a-79a. The court found that EPA's statements on that issue in the regulatory preamble accompanying the revised ozone NAAQS, made in response to industry comments challenging EPA's authority to *promulgate* that standard, see 62 Fed. Reg. at 38,884-38,885, constituted final agency action on the question of implementation that was ripe for judicial review. Pet. App. 77a-79a. On the merits, the panel modified its opinion to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with [Section 181]." *Id.* at 81a. Judge Tatel wrote separately because he disagreed with the panel's reasoning. *Id.* at 83a-89a. He found the statute ambiguous and would have deferred to EPA's interpretation. *Id.* at 84a. Judge Tatel nevertheless concurred in the judgment because, in his view, the modified decision allows EPA to implement the revised ozone NAAQS in a nonattainment area once the area has attained the one-hour standard in accordance with Section 181. *Id.* at 89a.

The court also denied EPA's suggestion for rehearing en banc, with five of the court's eleven active judges

(Chief Judge Edwards, and Judges Silberman, Rogers, Tatel, and Garland) voting in favor of rehearing en banc, and four (Judges Williams, Ginsburg, Sentelle, and Randolph) voting against it. Pet. App. 90a-92a. Judge Silberman and Judge Tatel each wrote a statement dissenting from the denial of rehearing en banc on the nondelegation issue. *Id.* at 92a-96a (Silberman, J., dissenting); *id.* at 97a-99a (Tatel, J., dissenting). Chief Judge Edwards and Judge Garland joined in Judge Tatel's statement. *Id.* at 97a.

**REASONS FOR GRANTING THE PETITION**

The court of appeals has rejected EPA's revision of the particulate matter and ozone NAAQS, ruling that Section 109 of the CAA as interpreted by EPA effects an unconstitutional delegation of legislative power. The court's decision presents an issue of immense practical importance to the health of the American public. In addition, the court's ruling raises issues of extraordinary governmental concern. First, the court's decision represents a radical departure from settled law respecting the nondelegation doctrine. The court's ruling conflicts with this Court's decisions upholding congressional enactments containing far broader grants of authority than that contained in Section 109 and, as a consequence, raises questions respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments. Second, the court's approach would unjustifiably expand the role of the courts in reviewing agency action. In this instance, the court has directed EPA to revisit and artificially narrow the discretion that EPA has

previously been entitled to exercise under Section 109 of the CAA.[4]

The court's decision respecting EPA's authority to implement a revised ozone NAAQS also warrants review. The court's ruling is not only important from a public health perspective, but also raises a core jurisdictional question of far-reaching significance. The court adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals. Furthermore, by asserting jurisdiction before the agency action is ripe for review, the court of appeals has deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS.

The court's premature review of EPA's implementation authority has also resulted in an erroneous resolution of the merits, which additionally warrants this Court's review. The court's mistaken interpretation would inappropriately force EPA to delay protecting the public from the very health consequences

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[4] As Judge Tatel observed, "[t]he Act has been parsed by [the District of Columbia Circuit] no fewer than ten times in published opinions delineating EPA authority in the NAAQS-setting process." Pet. App. 59a. See, *e.g.*, *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389, 392 (D.C. Cir. 1998) (sulfur dioxide), cert. denied, 120 S. Ct. 58 (1999); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 969 (1990) (particulate matter), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (ozone), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1161 (D.C. Cir.) (lead), cert. denied, 449 U.S. 1042 (1980). The majority acknowledged that those decisions recognized EPA's broad discretion to make policy judgments in setting NAAQS, but summarily discounted their relevance on the ground that "none of those panels addressed the claim of undue delegation that we face here." Pet. App. 12a.

that warrant a NAAQS revision in the first place, until areas attain an air quality standard that EPA has concluded is inadequate to protect public health.

1. The court of appeals' rejection of EPA's revised NAAQS for particulate matter and ozone presents an important federal question with profound implications for the health of the American public and the effectiveness of the CAA. Because the NAAQS are the foundation of key CAA programs, the current uncertainty regarding the validity of the revised $PM_{2.5}$ and ozone NAAQS will disrupt federal and state programs to achieve and maintain air quality. Based on the latest scientific knowledge, EPA has determined that the preexisting PM and ozone standards are inadequate to protect public health. The Clean Air Scientific Advisory Committee (CASAC)—a body created by Congress to render independent scientific advice on NAAQS decisions, 42 U.S.C. 7409(d)(2)(B)—has concurred in EPA's scientific findings in that regard. The court of appeals' decision frustrates EPA's efforts to revise the PM and ozone NAAQS and thus unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels. See, *e.g.*, Pet. App. 56a (finding that evidence in the rulemaking record "amply justifies establishment of new fine particle standards").

a. The court of appeals' decision is a striking departure from this Court's nondelegation jurisprudence. Section 109's grant of authority is "far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." Pet. App. 97a (Tatel, J., dissenting from denial of rehearing en banc); see also *id.* at 93a (Silberman, J., dissenting from denial of rehearing en banc) (Section

109 does not "raise a serious constitutional problem").[5] The court has overlooked this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context. *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946).[6] The majority brushed aside the CAA's terms in two conclusory sentences, holding that the statute, as interpreted by EPA, is unconstitutional because it does not provide a "determinate criterion for drawing lines." Pet. App. 6a.[7]

This Court has repeatedly held that Congress does not violate the Constitution "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, *e.g.*, *Yakus*, 321

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[5] *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218-219 (1989), cites pertinent examples: *Lichter* v. *United States*, 334 U.S. 742, 778-786 (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* v. *United States*, 321 U.S. 414, 420 (1944) (setting of "fair and equitable" commodities prices); *FPC* 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, 225-226 (1943) (regulation of broadcast licensing in "the public interest").

[6] The threshold question in the Court's previous nondelegation cases, including *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), has been whether Congress has authorized the agency to exercise nondelegable legislative functions. *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.").

[7] See Pet. App. 5a ("EPA appears to have articulated no 'intelligible principle' to channel its application of [public health factors]; nor is one apparent from the statute."); *id.* at 14a ("Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power * * *.").

U.S. at 425 (Congress may authorize agencies to engage in activities that "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework"). It is "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.*, 329 U.S. at 105); *Skinner*, 490 U.S. at 218-219.

Had the court fully considered the terms of the statute, its history, purpose, and context, the court would have found that Section 109 amply satisfies that test. Section 109(b)(1) of the Act requires that primary NAAQS be set at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. 7409(b)(1). To warrant the setting of a NAAQS, a pollutant must "reasonably be anticipated to endanger public health or welfare" and be emitted from "numerous or diverse * * * sources." CAA § 108(a)(1)(A)-(B), 42 U.S.C. 7408(a)(1)(A)-(B). Each NAAQS must be based on "air quality criteria" that reflect "the latest scientific knowledge," 42 U.S.C. 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." 42 U.S.C. 7408(a)(2)(A)-(B). Further, the CAA establishes and prescribes the composition of CASAC and requires EPA to develop the "criteria" with extensive CASAC review. CAA § 109(d)(2), 42 U.S.C. 7409(d)(2).[8]

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[8] The CAA's directives plainly require a high degree of protection and cannot reasonably be construed, as the court claimed, to allow EPA such broad discretion as to authorize pollutant levels ranging from zero to "a hair below" the infamous London Killer

Moreover, Congress has prescribed rulemaking procedures through Section 307(d) of the CAA that ensure extensive public participation and the availability of arbitrary-and-capricious review for EPA's NAAQS decisions. See 42 U.S.C. 7607(d). EPA must discuss the data, methodology, and major legal and policy interpretations underlying proposed NAAQS and explain any significant departure from CASAC's advice, 42 U.S.C. 7607(d)(3); respond to significant comments, 42 U.S.C. 7607(d)(6)(b); and provide a reasoned explanation adequate to withstand judicial review. 42 U.S.C. 7607(d)(9). The availability of such review weighs strongly in favor of the constitutionality of Section 109's grant of agency authority. 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); see also *Schechter Poultry*, 295 U.S. at 532-533 (distinguishing cases upholding broad legislative authorizations because, *e.g.*, statutes provided notice and hearing procedures).

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Fog episode. Pet. App. 11a. For example, EPA found, based on new evidence in the 1997 rulemaking, that the 1987 NAAQS for particulate matter were inadequate to protect public health. That finding effectively dictated that the upper bound for the Administrator's consideration for revised standards had to be at least as protective as the 1987 NAAQS, which were set far below "Killer Fog" levels. See, *e.g.*, 62 Fed. Reg. at 38,656-38,666, 38,674-38,675. EPA made a similar finding regarding the inadequacy of the existing ozone NAAQS. 61 Fed. Reg. 65,716, 65,719-65,721 (1996). In each instance, EPA established the lower limit based on an extensive examination of the best available scientific evidence of adverse health effects, see 62 Fed. Reg. at 38,674-38,677; 61 Fed. Reg. at 65,727-65,728, and the range of alternatives considered was far narrower than the range suggested by the court. See also Pet. App. 66a (Tatel, J., dissenting).

The CAA's legislative history, which the majority also failed to consider, provides further guidance to the agency. That history indicates that the health effects justifying a NAAQS must be "adverse," *Lead Indus. Ass'n*, 647 F.2d at 1152 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970)), and therefore must be medically significant and not merely detectable. 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." *Ibid.* (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 49 (1977)); *id.* at 1155 (EPA must "err on the side of caution"). EPA cannot consider the economic or technological feasibility of attaining NAAQS. *Id.* at 1148-1151. Finally, public health is distinct from individual health; NAAQS must protect "sensitive" populations, such as asthmatics, *id.* at 1152, but not the most sensitive individuals within those populations. See S. Rep. No. 1196, *supra*, at 10 (EPA must consider effects by reference to "a representative sample of persons comprising the sensitive group rather than to a single person in such a group."), *reprinted in* 1 Staff of the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 410 (Comm. Print 1974).[9]

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[9] Drawing on the legislative guidance, EPA has developed "decisional criteria" that it considers in the course of developing NAAQS. The public health factors considered include 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. The District of Columbia Circuit first approved EPA's use of those factors almost 20 years ago, *Lead Indus.*, 647 F.2d at 1161; EPA has since employed them in numerous NAAQS rulemakings; and even the panel majority found them reasonable. Pet. App. 5a-7a.

This Court's decisions on the nondelegation doctrine reflect "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. The court of appeals lost sight of that crucial practical understanding and, in doing so, opened to potential constitutional attack not only Section 109 of the CAA, but also numerous other federal statutes containing similarly broad grants of authority to administrative agencies.

b. The court of appeals' decision departs from established law by transforming the nondelegation doctrine from a means for preserving the separation of powers by ensuring that Congress has not abdicated, by delegating to another Branch or to private parties, its power to "make * * * Laws," U.S. Const. Art. I, § 8, Cl. 18, into a basis for otherwise unwarranted judicial supervision of the exercise of administrative discretion. See Pet. App. 14a. The court directed EPA to "develop[] determinate, binding standards for itself" to reduce the likelihood that EPA would "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *Ibid.* Neither *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), nor any other decision of this Court, justifies that novel utilization of the nondelegation doctrine. See Pet. App. 92a (Silberman, J., dissenting from the denial of rehearing en banc) ("I do not think that [the nondelegation] doctrine can be employed to force an agency to narrow a broad legislative delegation from Congress.").

As a practical matter, the court of appeals' decision would initiate a fundamental change in the nature of

judicial review of agency standard-setting. The court concluded that the nondelegation doctrine requires Congress, or agencies interpreting the intent of Congress, to delineate a "determinate criterion for drawing lines" or, by implication, a quantitative rule for deciding the precise degree of protection required for a given health or safety standard. See Pet. App. 6a. In effect, the panel demanded that either the CAA or EPA supply a principle that would allow a reviewing court to conclude that EPA reached what is, in the court's view, exactly the "right" result. That approach would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard. As Judge Silberman recognized, it would "implicitly assert[] a greater role for a reviewing court than is justified." *Id.* at 96a. See also note 4 , *supra.*

The court's direction to EPA to develop "determinate, binding standards" to govern the agency's NAAQS decisions (Pet. App. 14a) is inconsistent with this Court's instruction in *American Power & Light Co.*, 329 U.S. at 106:

> Nor is there any constitutional requirement that the legislative standards be translated by [an agency] into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

Cf. *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-545 (1978). The court's rationale for its approach—to make arbitrary agency action less likely and to enhance meaningful judicial review (Pet. App. 14a)—is adequately addressed through the arbitrary and capricious standard for judicial review of agency action, including review to determine whether the agency has ade-

quately explained any departures from past practices or decisions. See *id.* at 68a (Tatel, J., dissenting) (those issues "relate to whether the NAAQS are arbitrary and capricious" and "ha[ve] nothing to do with our inquiry under the nondelegation doctrine").[10]

Neither the Constitution, the CAA, nor any prior judicial decision requires EPA to supply the "determinate criterion for drawing lines," Pet. App. 6a, that would produce the precision the majority demanded here. See also *id.* at 10a (standard prescribing "how much uncertainty is too much"). Instead, EPA must consider the factors that the CAA prescribes and provide a reasoned explanation, based on scientific evidence, for its decision. As this Court explained in reviewing rates set by the Federal Power Commission under a statute requiring rates to be "just and reasonable":

> [T]here is no single cost-recovering rate, but a zone of reasonableness: "Statutory reasonableness is an abstract quality 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."

*FPC* v. *Conway Corp.*, 426 U.S. 271, 278 (1976) (quoting *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv.*

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[10] The court's extraordinary, policy-based suggestion that EPA could employ a quantitative "generic unit of harm" based on Oregon's approach to Medicaid (Pet. App. 16a-17a & n.5) would not solve the constitutional problem the court perceived; EPA would still have to draw lines. Even if we assume that such a quantitative approach were possible, the policy judgments necessary to establish a "generic unit of harm" and to determine how many such units are permissible under the CAA would be similar to those EPA has traditionally made in its NAAQS proceedings; these judgments would merely be made under a different framework that would likely be more confusing and difficult for the public and a reviewing court to evaluate.

*Co.*, 341 U.S. 246, 251 (1951)). That is also the approach the District of Columbia Circuit has followed in reviewing prior decisions under Section 109, such as the 1987 particulate matter standard. See *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 972 (D.C. Cir. 1990) (CAA does not require EPA to identify "the clear and sole appropriate standard," but rather a standard that is reasonable in light of the record evidence).

The court of appeals' decision marks a profound change in the ground rules that shape not only EPA's air quality and other programs, but also those of other federal agencies. Many, if not most, of the rules and decisions under those programs are reviewed in the District of Columbia Circuit. This Court should review the court of appeals' decision and determine, before EPA and other agencies refocus the analyses that they have traditionally employed under the arbitrary and capricious standard, whether those new ground rules are appropriate.[11]

2. The court of appeals also significantly erred in assuming jurisdiction to decide the scope of EPA's

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[11] The court of appeals' decision cannot give rise to a square conflict among the courts of appeals, because Section 307(b) of the CAA vests the District of Columbia Circuit with exclusive jurisdiction to review EPA's decisions to promulgate and revise the NAAQS. See 42 U.S.C. 7607(b). Nevertheless, as Judge Tatel noted, the majority's decision is inconsistent with the reasoning of a First Circuit decision that addressed a nondelegation challenge in the course of reviewing a CAA implementation issue (a transportation plan aimed at achieving a NAAQS). See Pet. App. 60a-61a. See also pp. 19-20, *infra* (describing the CAA provisions that direct implementation challenges to the regional courts of appeals). The First Circuit stated, in that context, that Section 109's "requisite to protect the public health" standard is not an unconstitutional and excessive delegation of legislative authority. *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677 (1974).

authority to implement and enforce the revised ozone NAAQS. Pet. App. 37a-44a. Section 307(b)(1) of the CAA authorizes the District of Columbia Circuit to review "action of the Administrator in promulgating any [NAAQS]" and other "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. 7607(b)(1). Section 307(b)(1) further states, however, that the regional courts of appeals shall have authority to review "the Administrator's action in approving or promulgating any implementation plan under [Section 110 of the Act]." 42 U.S.C. 7607(b)(1). The CAA makes clear, by expressly deferring challenges to EPA's classification decisions until EPA takes final action on a State's submission (or failure to submit) a SIP, that the question of how to classify areas for purposes of setting attainment dates for the revised ozone NAAQS is reviewable only as part of the post-NAAQS-promulgation process of implementation planning. See CAA §§ 172(a)(1)(B), 181(a)(3), 42 U.S.C. 7502(a)(1)(B), 7511(a)(3).

Consistent with the procedural steps set out in the CAA, EPA did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS. EPA has not, for example, designated areas as attainment or nonattainment for the eight-hour standard under Section 107(d), and it has neither classified any nonattainment areas nor established attainment dates under either Section 172(a) or Section 181(a)(1). See 42 U.S.C. 7502(a), 7511(a)(1). The issue of implementation arose solely because ATA argued that Congress, by establishing a scheme in Section 181(a)(1) for implementing the then-current one-hour ozone standard, implicitly prohibited EPA from ever promulgating any revised ozone NAAQS. EPA responded to that argument in the rulemaking preamble (and later in its court of appeals brief) by explaining, in

the course of showing why the Section 181(a) scheme does not prevent EPA from promulgating a revised NAAQS, how it would implement such a standard. See 62 Fed. Reg. at 38,884-38,885. The only issue before the court of appeals, therefore, was whether the statutory provisions at issue precluded EPA from promulgating the revised standard. Once the court answered this question in the negative, Pet. App. 34a-37a, its task was done. It should not have gone on to consider prematurely whether and how EPA could implement the revised NAAQS.

The court of appeals' decision to address prematurely the question of NAAQS implementation has important consequences that warrant this Court's review. The court of appeals has departed from the requirement that the reviewing court restrict its inquiry to the agency's final actions, and it has adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals. The court has also violated similarly well-established ripeness principles and deprived the agency charged with implementing a complex statute of the opportunity fully to develop its interpretation and resolve any tensions within the statutory scheme.

a. The panel erroneously concluded that the views that EPA had expressed in the rulemaking preamble regarding its implementation authority constitute final action. Pet. App. 77a-78a. In *Bennett* v. *Spear*, 520 U.S. 154 (1997), this Court explained that

> two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process * * *—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been

> determined," or from which "legal consequences will flow" * * *.

*Id.* at 177-178 (citations omitted). In this case, the court of appeals determined, notwithstanding *Bennett*, that preamble statements that merely express EPA's future intentions are final agency actions. The court effectively reconfigured each prong of this Court's test in a way that would significantly broaden the domain of final agency actions.

The court of appeals ruled that EPA's statements respecting NAAQS implementation satisfied the "consummation" prong because the court concluded that EPA's description of how it would implement the rule would likely not change. See Pet. App. 77a-78a. Under *Bennett*, however, the proper inquiry is not merely whether the agency has any present intention to alter its position. Rather, the question is whether the agency has completed its decisionmaking process under the governing statute for the specific agency action at issue. Here, EPA has not designated nonattainment areas, classified those areas, or set attainment dates in accordance with the CAA's statutorily prescribed decisionmaking process. See, *e.g.*, CAA §§ 107(d), 172(a), 42 U.S.C. 7407(d), 7502(a). The court of appeals' approach of focusing on the certainty of EPA's preamble statements, without considering whether the statements consummate the statutory decisionmaking process for implementing the ozone NAAQS, distorts the *Bennett* test and conflicts with the finality jurisprudence of other courts of appeals.[12]

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[12] For example, in *Dow Chemical Co.* v. *EPA*, 832 F.2d 319 (5th Cir. 1987), the court explained that "EPA's construction of [the regulatory provision] is 'final' only in the sense that no one at the agency currently plans to revise it. The same could be said of countless other instances of legal 'interpretation.'" *Id.* at 323-324.

The court of appeals' decision also distorts the second *Bennett* factor. The court concluded that EPA's preamble statements respecting the agency's future implementation plans constitute final agency action even though no legal consequences flow from EPA's expression of its views regarding the statutory provisions that govern implementation of a revised ozone NAAQS. See Pet. App. 78a. ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates. ATA will be able to obtain judicial review of EPA's judgments on those issues—through the statutorily prescribed mechanism (see pp. 19-20, *supra*)—once EPA takes such final binding action on those specific matters. The court of appeals erred in overlooking these decisive considerations and treating the legal effects of NAAQS

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Instead, to satisfy the definitiveness requirement, the relevant administrative decisional process must be complete. *American Airlines, Inc.* v. *Herman*, 176 F.3d 283, 291-292 (5th Cir. 1999). Other courts of appeals have taken varying approaches to whether certainty alone, or an evaluation within the broader statutory context, is necessary to determine whether the first factor under *Bennett* has been satisfied. Compare, *e.g.*, *Hindes* v. *FDIC*, 137 F.3d 148, 162 (3d Cir. 1998) (because notification issued by FDIC was the first step of a multi-step process, it did not constitute FDIC's definitive statement and thus was not final), and *Mobil Exploration & Producing U.S., Inc.* v. *Department of the Interior*, 180 F.3d 1192, 1198-1199 (10th Cir. 1999) (although agency letter may have concluded that an audit should begin under the statute, that did not consummate the decisionmaking process within the overall statutory scheme that would satisfy the first prong for finality), with *Western Ill. Home Health Care, Inc.* v. *Herman*, 150 F.3d 659, 663 (7th Cir. 1998) (agency letter characterizing situation as a joint employee relationship, establishing the agency's "enforcement position," satisfies the first prong of finality because it is "not at all tentative").

promulgation as if they were a consequence of EPA's preamble statements respecting implementation.[13]

b. Even if it is assumed that EPA's preamble statements respecting implementation constitute final agency action, that action would not be ripe for judicial review. The court of appeals' concern over how to reconcile Sections 172 and 181 is not yet fit for review because the matter is too abstract and general: EPA has neither fully developed its interpretation nor attempted to exercise its implementation authority. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-738 (1998); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967).[14]

The interplay among Section 107(d), Section 172, Section 181, and other relevant provisions of the CAA is complex. Judicial exploration of these issues would be on much surer footing if the reviewing court had the benefit of EPA's full thinking and explanation of how and why it has implemented a NAAQS in a particular way, in a particular context, after the completion of the relevant decisional process (including public notice and comment) that actually implements the standard. Fur-

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[13] The court suggested that EPA's statements were final action because by "promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states * * * [and] those areas that do not comply will ultimately be required to do so." Pet. App. 78a. But the triggered events are solely a consequence of promulgation of the revised NAAQS and have nothing to do with EPA's preamble statements respecting implementation.

[14] Indeed, it is doubtful whether the dispute over implementation is sufficiently concrete to constitute a case or controversy within the meaning of Article III. See *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (the ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

thermore, deferring review would allow EPA the opportunity to work through the various implementation provisions, reconcile any conflicts, and make any policy judgments and apply its expertise as necessary to resolve ambiguities in the statute. See *Ohio Forestry Ass'n*, 523 U.S. at 733-734; *Chevron*, 467 U.S. at 842-845. The importance of such a concrete setting for judicial review is underscored by the court's own confusion regarding EPA's interpretation, compare Pet. App. 43a, 44a, with *id.* at 80a-81a, and the extreme breadth and generality of the court's conclusion that "EPA can enforce a revised primary ozone NAAQS only in conformity with [Section 181]." *Id.* at 81a.[15]

3. In our view, the jurisdictional preconditions of final agency action and ripeness should have prevented the court of appeals from reaching the merits of any NAAQS implementation dispute. But even if the court of appeals could have overcome those obstacles, its decision on the merits is wrong. Congress "has not directly addressed the precise question" of the relationship between Section 172 and Section 181 (see *Chevron*, 467 U.S. at 843); instead, it has left a gap for the agency to fill (*id.* at 843-844); and the question is whether EPA's conclusion that Section 172 and Section 181 can be applied simultaneously "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (*id.* at 845). We first describe the origins of the relevant provisions, including the terminology of "Subpart 1" and "Subpart

[15] The court, on rehearing, erroneously concluded that this issue "would not benefit from a more concrete setting," apparently because the issue is legal in nature. See Pet. App. 80a. The presence of a legal issue does not, by itself, render review appropriate before the issue arises in a concrete case or controversy. See, *e.g.*, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994).

2." We then explain the difference between EPA's and the court's understanding of those provisions. Finally, we briefly summarize why, if the issue must be decided at this juncture, the court of appeals' understanding is flawed.

a. When Congress first enacted the CAA in 1970, and authorized EPA to promulgate and revise NAAQS, it expected that the various regions of the country would meet the NAAQS in a relatively short period of time. Attainment proved more difficult than expected, and when Congress enacted the 1990 CAA Amendments, it specifically addressed certain aspects of the nonattainment problem. First, Congress preserved (with some modifications) EPA's general authority to revise NAAQS at five-year intervals and to designate nonattainment areas. See CAA §§ 107(d), 109(d), 42 U.S.C. 7407(d), 7409(d). Next, Congress enacted a new Subpart 1, Part D, Title I of the CAA, which granted EPA additional authority, set out in Section 172(a), to classify nonattainment areas and to set attainment dates under all new or revised NAAQS. 42 U.S.C. 7502(a). Section 172(a) makes clear that this authority applies unless "classifications [or attainment dates] are specifically provided under other provisions" of the Act. 42 U.S.C. 7502(a)(1)(C) and (2)(D). In addition, Congress enacted a series of other new Subparts, encompassing Sections 181 to 191 of the CAA, to address the problems raised by nonattainment of particular NAAQS. Subpart 2 addresses the ozone NAAQS. Section 181(a)(1) therein sets out a schedule establishing "classification and attainment dates for 1989 nonattainment areas." 42 U.S.C. 7511(a). That schedule establishes those classifications and attainment dates based on the one-hour ozone standard then in effect and sets attainment dates that run from the enactment of the 1990 Amendments.

b. In response to public comments, EPA described the relationship between Section 107, Subpart 1, and Subpart 2. It stated in the ozone rulemaking that, once EPA completes promulgation of a revised ozone NAAQS, those provisions collectively require that EPA: (1) designate nonattainment areas in accordance with Section 107(d), and establish classifications and attainment dates and take other implementing actions for the revised ozone NAAQS under Subpart 1; and (2) simultaneously continue to implement the provisions of Subpart 2 for areas that have not yet attained under the prior one-hour ozone standard. See 62 Fed. Reg. at 38,884-38,885. The court of appeals properly rejected ATA's argument that EPA lacked *any* authority to revise the ozone NAAQS in light of the Subpart 2 classifications and attainment dates. Pet. App. 34a-37a. But the court went on to conclude (prematurely, in our view, see pp. 21-25, *supra*) that Subpart 2 precluded implementation of a more protective ozone NAAQS. See *id.* at 37a-44a. When EPA explained on rehearing that the court's construction would lead to irrational results, the court revised its decision to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," *id.* at 82a, which apparently means that EPA can enforce its revised ozone NAAQS under Subpart 1 once an area attains the one-hour standard under Subpart 2, *id.* at 89a (Tatel, J., concurring). See p. 8, *supra*.

c. The court of appeals' reasoning, even as modified on rehearing and interpreted by Judge Tatel, is flawed. Contrary to the court's suggestions, Pet. App. 37a, the CAA does not precisely address how to reconcile Subpart 1—which authorizes EPA to set new classifications and attainment dates for revised NAAQS—with Subpart 2—which establishes a specific timetable for compliance with the one-hour ozone standard in effect in

1989. The CAA surely does not dictate the result the court of appeals has required.[16]

Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the

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[16] The court believed that the CAA specifies how those provisions should be reconciled because Subpart 1 provisions do not apply if "classifications [or attainment dates] are specifically provided under other provisions" of the CAA, see CAA § 172(a)(1)(C) and (2)(D), 42 U.S.C. 7502(a)(1)(C) and (2)(D). Pet. App. 37a. In the court's view, Subpart 2 provides classifications and attainment dates for *any* ozone standard, including any revised ozone NAAQS. That view, which is based on a highly technical argument, is wrong. The court reasoned that, because Section 181(a) of Subpart 2 states that an "area designated non-attainment for ozone pursuant to [Section 107(d)] * * * shall be classified at the time of such designation" in accordance with the table in Section 181(a); and because Section 107(d) addresses designations under both the one-hour ozone standard in effect in 1989 and future NAAQS revisions; then Subpart 2 must govern the implementation of any ozone NAAQS. See *id.* at 38a-41a. That reasoning is flawed because Section 181(a)'s reference to Section 107(d) is cabined by the context of Subpart 2. It is clear from the statutory context that Section 181(a) refers only to Section 107(d) designations of nonattainment areas under the one-hour ozone standard that was in effect in 1989. For example: (1) Section 181(a)'s caption denotes that the Section addresses "Classification and attainment dates *for 1989 nonattainment areas*" (emphasis added); (2) Section 181(a) bases attainment dates and classification on an area's "design value," specifically codifying the methodology of the one-hour ozone standard then in existence; (3) Section 181(a) provides classification and attainment dates only for nonattainment areas with ozone levels in excess of .012 ppm – the "design value" in effect in 1989-1990 under the one-hour standard; and (4) Section 181(a) bases attainment dates by reference to 1990 and imposes attainment deadlines that, for most areas, have already passed. See 42 U.S.C. 7511(a)(1). Hence, the text and context of Section 181(a) indicate that Congress intended to provide classifications and attainment dates only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard. See 42 U.S.C. 7407(d)(1)(C) and (4)(A).

court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. EPA has reasonably concluded that Congress intended that EPA would implement a revised ozone NAAQS under Subpart 1 for all members of the American public, including those members that reside in nonattainment areas governed by Subpart 2, "as expeditiously as practicable." See CAA § 172(a)(2), 42 U.S.C. 7502(a)(2); CAA § 181(a)(1), 42 U.S.C. 7511(a)(1). There is no warrant for imposing a categorical requirement that EPA must ensure compliance with the inadequately protective one-hour ozone standard before it can require efforts to attain the more protective revised ozone NAAQS.[17] To the extent that there is a conflict between Subpart 1 and Subpart 2, it is up to EPA to harmonize the applicable provisions, and the courts must defer to EPA's reasonable judgment on the matter. *Chevron*, 467 U.S. at 845.[18]

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[17] For example, it may be "practicable"—and preferable from an implementing State's perspective—to achieve both the one-hour ozone standard and the revised ozone NAAQS at the same time. There is no reason to believe that Congress intended to preclude that approach.

[18] The court of appeals expressed concern that a practical conflict could conceivably arise for the Los Angeles nonattainment area between Subpart 1's attainment date for the revised ozone NAAQS and Subpart 2's attainment date for the one-hour ozone standard. In the court's view, Congress would not have intended that Los Angeles comply with the revised ozone NAAQS before Subpart 2's statutory deadline for compliance with the one-hour standard. See Pet. App. 41a. That concern, however, is overstated. The time deadlines set out in Section 181(a)(1) establish the outer time limits for attaining the one-hour standard, see 42 U.S.C. 7511(a)(1). Los Angeles would be required to attain the revised NAAQS under Subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard. Compare CAA § 172(a)(2), 42 U.S.C. 7502(a)(2), with

In our view, EPA's preliminary statements respecting implementation do not constitute final agency action and are not ripe for judicial review. But if the Court concludes otherwise, then it should proceed to address the merits of this important issue. On the merits, the court of appeals erred in ruling that the CAA categorically precludes the EPA from implementing the revised ozone NAAQS under Subpart 1 until the nonattainment areas described in Subpart 2 have attained Subpart 2's one-hour ozone standard.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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CAA § 181(a)(1) and (5), 42 U.S.C. 7511(a)(1) and (5). In any event, the question of how EPA should reconcile any competing compliance deadlines is clearly the type of issue that should first be addressed by EPA through the implementation process, including public notice and comment, and subject to judicial review in the appropriate regional court of appeals. See CAA § 307(b), 42 U.S.C. 7607(b).