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1 Washington, D.C.

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4 The above-entitled matter came on for oral
5 argument before the Supreme Court of the United States
6 at 10:14 a.m.

7 APPEARANCES:

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9 Mich.; on behalf of State Petitioners.

10 F. WILLIAM BROWNELL, ESQ., Washington, D.C.; on behalf
11 of industry Petitioners and Respondents in support.

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13 Department of Justice, Washington, D.C.; on behalf of
14 Federal Respondents.

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16 industry Respondents.

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1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 14-46, Michigan v. The
5 Environmental Protection Agency and the consolidated
6 cases.

7 Mr. Lindstrom.

8 ORAL ARGUMENT OF AARON D. LINDSTROM

9 ON BEHALF OF STATE PETITIONERS

10 MR. LINDSTROM: Mr. Chief Justice, and may
11 it please the Court:

12 EPA's view that it can decide whether to
13 regulate electric utilities without considering costs is
14 contrary to the text and structure of Section 7412.

15 The text sets out two distinct terms and
16 thus directs EPA to consider whether it is appropriate
17 to regulate and whether it is necessary to regulate.
18 EPA found that it's necessary to regulate because of the
19 existence of public health harms, and it found it's
20 appropriate to regulate for the exact same reason, the
21 existence of public health harms.

22 So its interpretation --

23 JUSTICE KAGAN: General, I'm not sure that
24 that's quite what EPA said. My understanding of what
25 EPA said is that it's necessary because of public health

1 harms and that it's appropriate because there are
2 technologies that can redress or remedy those public
3 health harms. So on the one hand, it said that -- it
4 said that the phrase "appropriate" went to the nature of
5 the harms. The phrase -- the phrase "necessary" went to
6 the nature of the harms. The phrase "appropriate" went
7 to the existence of technologies.

8 MR. LINDSTROM: Justice Kagan, when they
9 relied on the availability of controls, they did that
10 only after having already said that we must find it's
11 appropriate if a health hazard exists. So they've
12 already determined that the health hazard is a necessary
13 and sufficient condition so the existence of controls is
14 something that's not --

15 JUSTICE SCALIA: Where is that? Can you
16 give us a citation to their opinion? I mean, the
17 language speaks for itself, I assume. What are you
18 referring to?

19 MR. LINDSTROM: For example, if you look --
20 this is in our reply brief, but if you're looking at --

21 JUSTICE SCALIA: In the reply brief?

22 MR. LINDSTROM: Yes, Your Honor.

23 I think the -- that points you to the actual
24 final rule. That's volume 1 of the UR petition
25 appendix. So the language -- let me find it in the

1 reply brief. I have the UR -- I have the volume.

2 JUSTICE SOTOMAYOR: I'm sorry, what was the
3 page?

4 MR. LINDSTROM: Sure. If you turn to the
5 UR Petition Appendix volume 1.

6 JUSTICE SCALIA: Good Lord.

7 MR. LINDSTROM: Page 196. This is the text
8 of the final rule. Page 206A. I misspoke the first
9 time. 206 says, "We must find" -- at the top of the
10 page -- "We must find it appropriate to regulate EGUs
11 under Clean Air Act Section 112 if we determine that a
12 single HAP emitted from EGUs poses a hazard to public
13 health or environment."

14 They said we must regulate. And the phrase
15 "must regulate" means that when you get back to the
16 availability of controls, then there's nothing left to
17 be done. You've already said that we have to do it so
18 the availability of controls isn't doing any additional
19 work.

20 The over --

21 JUSTICE KENNEDY: Is the government going to
22 say that if the predicate for regulation exists, i.e.,
23 there are emissions, then it's appropriate to regulate?
24 That's what the government will say. I mean, that's --
25 "appropriate" is a capacious term.

1 MR. LINDSTROM: It absolutely is.

2 JUSTICE KENNEDY: And it would seem to me
3 that the government will say, well, it's appropriate to
4 regulate if there's an emission, so --

5 MR. LINDSTROM: It is a capacious term, but
6 it, in fact, cuts against the government because one of
7 the things that's encompassed within the term
8 "appropriate" is that it looks at all of the
9 circumstances in the context of determining whether or
10 not you're going to regulate costs is a relevant
11 circumstance. So the very fact that it's capacious cuts
12 against them.

13 But the fact that they're -- they've said we
14 must find it's appropriate to regulate means that this
15 other control --

16 JUSTICE SOTOMAYOR: Well, I thought --

17 JUSTICE KAGAN: Are you saying that they
18 didn't -- that they didn't look at the availability of
19 technologies? Is that what you're saying? That they
20 thought that the availability of technologies was itself
21 irrelevant to the determination? Is that your argument?

22 MR. LINDSTROM: We're not saying they
23 thought it was irrelevant. They thought -- well, I
24 guess logically irrelevant. They thought that it's
25 something they did look at. It's something that when

1 they did the utility study, they examined the
2 availability of controls, but then they said regardless
3 of whether or not controls are available, if a health
4 hazard exists, we have to regulate. So if I can give an
5 example --

6 JUSTICE SOTOMAYOR: I -- I'm sorry. I
7 thought they said only if it was necessary. Congress
8 was motivated in not listing these sources because it
9 didn't know whether the technology that was going to be
10 put in place to control acid rain would reduce the HAPs
11 sufficiently so that regulation wasn't necessary or a
12 listing wasn't necessary.

13 I had a different understanding of
14 appropriate and necessary. Appropriate if there were
15 HAPs, but necessary only if those HAPs were not
16 sufficiently controlled by the other technology.

17 MR. LINDSTROM: The necessary -- both of
18 them looked at whether or not there was going to be an
19 ongoing harm because both necessary and appropriate
20 turned on the utility study. The utility study was
21 something that examined what health hazards would remain
22 after all the other regulations --

23 JUSTICE SOTOMAYOR: The health hazard could
24 have been low enough so that no -- no standards were
25 necessary.

1 MR. LINDSTROM: Well, they determined how
2 severe -- the severity to the health hazard. The
3 severity went into determining whether or not a public
4 health hazard existed at all. So they looked at the --
5 the effects, and the only place they looked at severity
6 in the final rule was determining whether or not a
7 public hazard existed. Once there were enough health
8 effects that there was a public health hazard, then they
9 said we must regulate. And the fact that they said we
10 must regulate, it's necessary to regulate, is exactly
11 the same as what they said with appropriate, that we
12 must regulate.

13 JUSTICE KAGAN: Can -- can I step back for a
14 minute, General Lindstrom? Because it seems to me that
15 this quest for very particular meanings attached to each
16 one of these adjectives; "appropriate" means X and
17 "necessary" means Y. If we step back a little bit, I
18 mean, that kind of language is used all over the U.S.
19 Code and, indeed, that kind of language is used in our
20 Constitution, the Necessary and Proper Clause.

21 And as I understand what courts have done
22 with that kind of language, that they haven't insisted
23 that there be separate, defined meanings for each of
24 those words. When John Marshall was doing this in
25 McCulloch, in fact, he starts off with the word

1 "necessary" and then he says, no, this is a phrase and
2 we have to understand what the phrase as a whole means.
3 And why shouldn't we similarly say this idea that, you
4 know, you can catch them in a redundancy or a superfluity,
5 it's just not right because it's a complete
6 phrase.

7 MR. LINDSTROM: I think there's two
8 responses to that. First of all, under the Necessary
9 and Proper Clause, if you look at what this Court did in
10 Printz v. The United States, it recognized something
11 might be necessary and not necessarily proper. The
12 commandeering of State legislature might be necessary
13 to couch what you're trying to do --

14 JUSTICE SCALIA: Exactly. We -- we have
15 separated out the two words and -- and said something
16 could be necessary and not proper. And what Marshall
17 said was that necessary doesn't mean absolutely
18 indispensable. It just means useful. That's quite
19 different from saying that proper has no -- has no role
20 to play. It can be necessary; that is, useful to the
21 Federal government, and yet not proper. So I --

22 JUSTICE SOTOMAYOR: So why do you get to
23 pick what it means? I mean, I thought in -- in our
24 agency law we repeatedly say if a term is ambiguous,
25 and there is no legal definition of appropriate, it's

1 contextual, yes. But, by definition, if you're saying a
2 word that's not self-defined, you have to look at in
3 context, then it's ambiguous.

4 MR. LINDSTROM: I don't think it's ambiguous
5 in context. You can use the word "appropriate" in such
6 a way that everyone understands what you're meaning. If
7 I said we're going to take a group of people and we're
8 going to go someplace and I want you to behave in an
9 appropriate manner, and then I told you we're going to
10 the library, everyone would know that that means be
11 quiet.

12 JUSTICE SOTOMAYOR: Yes. But I look at this
13 statute and I see them doing the first part, the part
14 at issue, and the very next provision says in 4 years
15 instead of 3, do a mercury study that includes costs.
16 I'm looking at it. I can very safely say one study
17 doesn't use the word "costs." The other does. The
18 first one doesn't necessarily intend the costs to be
19 looked at. What is irrational or not plausible about
20 that reading?

21 MR. LINDSTROM: Well --

22 JUSTICE SOTOMAYOR: Because we don't -- all
23 we have to find is a plausible reading to -- to uphold
24 the EPA's interpretation.

25 MR. LINDSTROM: It's irrational because

1 they're taking the key statutory word and treating it as
2 surplusage. The language I should have pointed you to
3 earlier is on page 4 of our reply brief. So the -- by
4 treating them as doing the exactly the same work,
5 they're reading a word out of the statute. And Chevron
6 deference doesn't extend so far as to say we can violate
7 an ordinary rule of statutory construction, which is
8 that independent words have --

9 JUSTICE GINSBURG: But the word -- the word
10 "appropriate," often it's a signal that discretion
11 is what's fitting and you have an expert agency. So the
12 word "appropriate," I think, is commonly used to
13 indicate that the expert agency will do what it finds
14 fit based on its expertise. So, how you -- well, you
15 are saying that appropriate necessarily embodies a cost
16 calculation and yet this is a statute that uses cost,
17 directs EPA to consider costs multiple, multiple times.

18 Is there any case in all -- all of our
19 decisions where we have said even though there was no
20 instruction to consider costs, EPA is required to
21 consider costs? Is there any such decision?

22 MR. LINDSTROM: I don't think this -- no, I
23 don't think this issue has arisen the same way where
24 Congress has given broad discretion to an agency, told
25 them to look at all of the circumstances, and the agency

1 has said, we're going to ignore what is an important
2 part of the problem. And that's why, in the way that
3 Judge Kavanaugh looked at it, this is a problem under
4 Chevron Step 1, 2 or under the State Farm doctrine,
5 because agencies are supposed to not ignore an essential
6 part of the problem as they engage in reasoned
7 decision-making.

8 JUSTICE KAGAN: But I think what Justice
9 Ginsburg is getting at, General Lindstrom, is, you know,
10 sometimes what we've done is we've looked at silence and
11 we've said given that silence, cost considerations are
12 precluded, right? So that's the example in Whitman.
13 Sometimes we've said silence still allows agency
14 discretion. They can do what they want with it. But
15 it's so far from our most closely analogous case, which
16 is Whitman, to say not only is -- is cost
17 considerations, you know, not precluded, it's -- it's
18 required when there's silence as to that subject.

19 Now, if Congress wanted to require
20 something, and clearly, Congress required this in other
21 places, Congress knows how to require consideration of
22 costs, to get from silence to this notion of a
23 requirement seems to be a pretty big jump.

24 MR. LINDSTROM: And Justice Kagan, I don't
25 think it is silent when it tells the agency to look at

1 all of the circumstances. And the material circumstance
2 in the context of the question that the agency has to
3 answer is should we regulate under this section, costs
4 are part of the relevant materials --

5 JUSTICE SCALIA: I'm not even sure I agree
6 with the premise that when -- when Congress says nothing
7 about cost, the agency is entitled to disregard cost. I
8 would think it's classic arbitrary and capricious agency
9 action for an agency to command something that is
10 outrageously expensive and -- and in which the expense
11 vastly exceeds whatever public benefit can be -- can be
12 achieved. I would think that's -- that's a violation of
13 the Administrative Procedure Act.

14 MR. LINDSTROM: And I think that's where --

15 JUSTICE SCALIA: Even without the word
16 "appropriate."

17 MR. LINDSTROM: And I think that's where
18 there's overlap between what the State --

19 JUSTICE SOTOMAYOR: I'm sorry. The study at
20 issue that Congress commanded was simply a study. "The
21 administrator shall perform a study of the hazards to
22 public health, reasonably anticipated to occur as a
23 result of emissions by electric utility steam-generating
24 units." So the study that was directed to be made was
25 only of public health hazards. And then it says, "The

1 administrator shall regulate these entities after" --
2 under this section -- "if it finds regulation is
3 appropriate and necessary after considering the results
4 of the study."

5 So if the study is directed only at public
6 health hazards, doesn't talk about -- it doesn't talk at
7 all about cost, just public health hazards, why in the
8 world would one assume that Congress was thinking about
9 cost? Why didn't it do as it did with mercury? Make
10 sure the study tells us how much control is going to
11 cost. But it didn't do that. It just said tell us if
12 they're a public health hazard.

13 MR. LINDSTROM: And, Your Honor, it didn't
14 limit the considerations that EPA was supposed to look
15 at only the study. It says to consider the study --

16 JUSTICE SOTOMAYOR: But it says only the
17 study.

18 MR. LINDSTROM: It doesn't say only the
19 study.

20 JUSTICE SOTOMAYOR: After it says -- it
21 says, "The administrator shall regulate if the
22 administrator finds such regulation is appropriate and
23 necessary after considering the results of the study.
24 After considering the results of the study." The only
25 thing that the study requires is a -- an evaluation of

1 hazards to public health.

2 MR. LINDSTROM: Well, first of all --

3 JUSTICE SOTOMAYOR: I'm not sure how you get
4 to -- to -- to them having to do another step, when the
5 only step that's a prerequisite to registration is
6 studying public health hazards.

7 MR. LINDSTROM: Well, first of all, even EPA
8 doesn't think it's limited solely to the things that
9 were studied in that utility study. They rely on
10 environmental harms to justify --

11 JUSTICE SOTOMAYOR: But that doesn't --

12 JUSTICE SCALIA: Does it say after
13 considering only the results of the study?

14 MR. LINDSTROM: No, Your Honor. That's --

15 JUSTICE SCALIA: It doesn't say that, does
16 it?

17 MR. LINDSTROM: No, Your Honor. That's
18 correct, it doesn't --

19 JUSTICE SCALIA: Sure. And they have to
20 consider the results of the study. It doesn't say they
21 can't consider everything else. And the word
22 "appropriate" seems to suggest that they may consider
23 other stuff.

24 MR. LINDSTROM: Correct. So there's a study
25 they're supposed to look at, but that's not the end of

1 the analysis. They're supposed to do something else.
2 That second step is to figure out whether it's also
3 appropriate and necessary to regulate. So it didn't
4 stop at just the study. And again, EPA agrees they can
5 look beyond the results of the study. They look at
6 environmental harms, which is not particularly mentioned
7 here and is mentioned in (n)(1)(b).

8 JUSTICE ALITO: It -- it seems to me that a
9 very salient feature of the statutes that we have to
10 interpret, maybe the most salient feature is that
11 Congress chose to treat power plants differently from
12 other sources. It could have treated them the same way
13 and if it hadn't done that, then the -- the listing
14 decision would not have taken into account costs, it
15 would have been based on emissions, right?

16 Or if it was an area source, it would have
17 been based on effect of health alone. So what, if
18 anything, can we infer from that, from the fact that
19 Congress pointedly decided to treat power plants
20 differently?

21 MR. LINDSTROM: I think we can tell that
22 they're trying to create a different regime. They're
23 trying to do something different here than they did
24 elsewhere. And That includes --

25 JUSTICE KAGAN: But they were trying to

1 create a different regime, but the reason is pretty
2 clear on its face. They were trying to create a
3 different regime because they thought that the Acid Rain
4 Program might have a real impact on what these electric
5 utilities were doing. So they said, wait and see and
6 let's see how the Acid Rain Program works, and let's see
7 if we still have a problem to solve. And that's the
8 reason why they put the electric utilities in a
9 different category, isn't it?

10 MR. LINDSTROM: And that highlights why
11 costs are significant. The Acid Rain Program, in
12 particular, was an economically-based approach that was
13 determined to regulate in a cost-effective manner.

14 JUSTICE KAGAN: But the point is that the
15 Acid Rain Program didn't do what they -- Congress
16 thought it might have done, and it was still left with
17 this issue of continuing harm from the electric,
18 utilities. And then once that happened, it seems to me
19 that it's natural to take a look at the rest of the
20 statute and to say, let's regulate in a similar way to
21 the way all other industries are being regulated.

22 MR. LINDSTROM: But if they had wanted to do
23 it in the same way, there would have been no need to use
24 the phrase, "necessary and appropriate." They could
25 have just simply gone to the ten-ton threshold emissions

1 that apply to major sources and to the risk-based
2 analysis that goes to area sources. So the fact that
3 they used different criteria here in (n)(1) as opposed
4 to criteria that's listed in 7412(c) --

5 JUSTICE KAGAN: Well, they could have, but
6 they might have thought, you know, let's take a look at
7 the Acid Rain Program. Let's take a look at the problem
8 that still remains, if any, and let's give the
9 discretion to the agency at that point, because it will
10 be years down the road in a different set of
11 circumstances.

12 MR. LINDSTROM: But the discretion includes
13 looking at the entire problem. I mean, again, the
14 language in the circumstances requires looking at the
15 material circumstances, and this ties into the State
16 Farm test. You have to look at all of the relevant
17 circumstances if you're engaged in reasoned decision
18 making. You can't ignore an important part of the
19 problem. But I would like --

20 JUSTICE ALITO: If the -- if the reason for
21 the separate treatment was the belief that the Acid Rain
22 Program would be sufficient at some point in time to
23 bring emissions from power plants below the level that
24 would result in their being listed if they were other
25 sources, why would it be necessary to enact this

1 separate provision asking whether it's necessary and
2 appropriate to regulate them?

3 MR. LINDSTROM: It could have just --

4 JUSTICE ALITO: I don't see how that can be
5 the explanation.

6 MR. LINDSTROM: Yes, Your Honor. They could
7 have just had a three-year delay if that's all they were
8 trying to do, as opposed to -- and then go through the
9 ordinary system.

10 JUSTICE KAGAN: No, because they didn't
11 know. They thought it might; they thought it might not.
12 They were going to wait and see. It depended on how the
13 industry responded to the regulatory requirements of the
14 Acid Rain Program.

15 MR. LINDSTROM: That still doesn't explain,
16 Your Honor, why they chose to use different criteria as
17 opposed to just reiterating the criteria that are under
18 7412(c) under the ordinary thing that applies to every
19 other source. They're still trying to treat electric
20 utilities differently.

21 And I would like to return to one point
22 about the Acid Rain Program, which is that, again, if
23 you're addressing emissions from electric utilities in a
24 program that's specifically targeting electric utilities
25 as they did in the Acid Rain Program and that was

1 entirely based on cost effectiveness, it makes little
2 sense to look at what's remaining after you've already
3 done that and then to say in this area of diminishing
4 marginal utility, we're going to say costs are
5 irrelevant. That's backwards. Costs would be
6 especially relevant when you're in the area of what's
7 left over.

8 JUSTICE KENNEDY: When the statute refers to
9 the emissions standards for the 12 percent of the best
10 performing plants, will the government say that
11 implicitly is a cost consideration?

12 MR. LINDSTROM: I expect --

13 JUSTICE KENNEDY: I mean, is that their
14 position and if so, how do you answer?

15 MR. LINDSTROM: Right. I expect they will.
16 The way I would answer that is to say that that looks at
17 plants across the range of how old they are. So plants
18 that were built in 2005, for example, might have been
19 built in such a way that they have technology where it
20 was cost effective to include certain control measures.
21 But if you're looking at a plant that was built in 1960,
22 imposing those same control measures on an older plant
23 is something that would be a lot more expensive.
24 It's the difference between renovating your house and
25 building it certainly in the first place.

1 JUSTICE SOTOMAYOR: But that's true of
2 all --

3 JUSTICE KENNEDY: Mandated -- if that's a
4 mandated base from which the government must operate
5 and --

6 MR. LINDSTROM: It is.

7 JUSTICE KENNEDY: -- and it's -- and I -- it
8 seems to me like there's an implicit cost consideration
9 there. You still say that's insufficient because?

10 MR. LINDSTROM: Yes, Your Honor. That's
11 insufficient because it's not -- I'm explaining why it
12 doesn't necessarily take costs into effect. The fact
13 that -- into consideration. The fact that some
14 utilities were able to impose things doesn't mean it
15 would be cost effective for other ones to do it.

16 JUSTICE BREYER: Yes. But why isn't that
17 taken care of by -- you see, you have to take into
18 account cost somewhere. And so they -- they -- the
19 other side says, well, there's room for that. But
20 suppose that 25 percent of all electricity generators
21 are near waterfalls. This is easy for them, okay? But
22 75 percent, it's impossible and they'll all go out of
23 business and we'll have no electricity. Imagine that
24 were so.

25 Could the EPA, under their current theory,

1 take account of that? Well, I guess the answer you want
2 to say is no, but they say yes, they can. What about
3 this 12 percent rule? You know, how does that -- well,
4 a little bit earlier in the statute, it says, "The
5 administrator may distinguish among classes, types and
6 sizes of sources." So if you really had this situation,
7 you could say, look 75 percent of the generators in the
8 United States have this really old technology and
9 they'll all go out of business. And EPA could say fine.
10 That's a different class. Okay. I mean, if that were
11 really true. So -- so don't they have, through that
12 provision and the 12 percent and the next one, the
13 ability to take into account at least serious cost
14 problems?

15 MR. LINDSTROM: Well, assuming they have the
16 ability to take into account.

17 JUSTICE BREYER: Do they? Yes or no? Do
18 they yes or no?

19 MR. LINDSTROM: No. I think --

20 JUSTICE BREYER: No, they don't. Why not?

21 MR. LINDSTROM: The reason that costs are
22 not directly relevant to the first one is what I was
23 explaining about the 12 percent. So in other words, as
24 you -- the example you gave shows that some might be
25 able to have the lower cost-effective approach just

1 because they're near a waterfall. So relying on the
2 fact that 12 percent were able to meet this --

3 JUSTICE BREYER: Fine. My point was -- I --
4 I want an answer to this. My point was, if in the
5 imaginary situation that I've imagined, 20 percent of
6 the generators, for whatever reason, can meet this
7 pretty easily; the next 80 percent will require the
8 entire gross national product to meet. Suppose that
9 were the situation. You, I guess, could go to EPA and
10 say, create, of that second group, a separate class, a
11 separate type, for that's the reason it's so expensive.
12 And, therefore, the 12 percent doesn't apply to them
13 because they're in a separate class.

14 Now, my question is: Can you legally make
15 that argument? And they will take it into account. And
16 that's what I want a yes or no answer to.

17 MR. LINDSTROM: And I think the answer might
18 be yes in the future, but now we can't do it because --

19 JUSTICE BREYER: Did you make the argument
20 here now?

21 MR. LINDSTROM: My point is that --

22 JUSTICE BREYER: If you're saying yes in the
23 future, let's now go to this case and say, did you make
24 this argument?

25 MR. LINDSTROM: I don't believe either side

1 has made that argument.

2 JUSTICE BREYER: Fine. I'll -- I'll --

3 JUSTICE SCALIA: Has -- has the argue -- has
4 the agency made this obvious argument?

5 MR. LINDSTROM: The agency has not --

6 JUSTICE SCALIA: Has the agency said, we're
7 going to take costs into account; we're going to use
8 this -- this provision that Justice Breyer discovered,
9 and -- and that's what we're going to do? Is -- is that
10 how the agency issued its rule?

11 MR. LINDSTROM: They did not. The only
12 distinction --

13 JUSTICE SCALIA: I don't think so. I never
14 heard of this argument.

15 MR. LINDSTROM: It --

16 JUSTICE BREYER: Now, wait, because I still
17 want to know a fact. I want to -- the fact that I want
18 to know -- and you're familiar with this record -- is
19 did anyone on your side of the issue ask the agency to
20 take costs into account brutally, roughly, crudely, or
21 did they all say we want a cost benefit analysis?

22 I would like your characterization of the
23 record on that point, because reading what they've said,
24 it's about cost-benefit analysis, that paragraph. So
25 that gave me the idea that maybe everyone interested in

1 cost asked for a cost-benefit analysis.

2 MR. LINDSTROM: And I think the answer is
3 that we asked them to consider costs. We thought a
4 cost-benefit analysis is the ordinary way that a
5 reasoned agency decision-making happens, not through
6 some vague sense of what the costs are, but by doing an
7 analysis. And they have said -- their entire position
8 here is that we don't need to do that because costs are
9 irrelevant. That's not something we have to consider
10 under the statute.

11 JUSTICE SOTOMAYOR: As I understand --

12 JUSTICE KAGAN: General --

13 JUSTICE SOTOMAYOR: As I understand what
14 happens, listing and standards are the only things that
15 you can generally appeal from. It's only a final agency
16 action when the -- when the standards are issued. And I
17 thought it was at the issuance of the standards that the
18 government sometimes breaks up the sources and the
19 amount of emissions that each type of source that
20 Justice Breyer is talking about can have.

21 So I think the listing is just of a broad
22 category, because we've had plenty of cases in -- in
23 this Court where we've looked at the agency saying this
24 type of source meets these standards, that type of
25 source meets another standard. Isn't that the way it

1 works?

2 MR. LINDSTROM: Well, that highlights why
3 they're not treating this as separate listing versus
4 regulatory decision. They did both at the exact same
5 time here. Same time they made the necessary and
6 appropriate finding, they also promulgated the emission
7 standards. And that shows this isn't simply a typical
8 listing standard.

9 JUSTICE SCALIA: Once -- once they're
10 listed, they are subject to minimum standards, aren't
11 they?

12 MR. LINDSTROM: That's absolutely correct,
13 and must be --

14 JUSTICE SCALIA: And it's not up to the
15 agency to calibrate standards. Once they're listed,
16 minimum standards apply, right?

17 MR. LINDSTROM: Absolutely.

18 JUSTICE SCALIA: And the agency could have
19 discretion as to whether to lift the standards further,
20 but the minimums apply, right?

21 MR. LINDSTROM: That's EPA's position.
22 You --

23 JUSTICE SCALIA: That's theirs.

24 MR. LINDSTROM: -- must regulate as soon
25 as -- has been made.

1 If I could reserve my time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Lindstrom.

4 Mr. Brownell.

5 ORAL ARGUMENT OF F. WILLIAM BROWNELL
6 ON BEHALF OF INDUSTRY PETITIONERS
7 AND RESPONDENTS IN SUPPORT

8 MR. BROWNELL: Mr. Chief Justice, and may it
9 please the Court:

10 I would like to make three points to
11 supplement my colleague's argument: First, regarding
12 the nature of power plant regulation under the Clean Air
13 Act; second, the language of Subsection (n)(1)(A); and,
14 third, the broader Clean Air Act context.

15 To begin, power plants are the most
16 regulated source category under the Clean Air Act both
17 before 1990 and after the 1990 Amendments. The Court
18 has talked about some of the programs. It's not only
19 Title IV Acid Deposition Program, but a visibility,
20 best available retrofit technology, pollution transport
21 programs targeted at power plants, and a variety of
22 other control programs, both control and air quality.

23 JUSTICE KAGAN: Mr. Brownell, I -- I would
24 think that cuts the other way, that every other
25 significant industry in the United States is subject to

1 this program except for electric power plants.

2 MR. BROWNELL: Your Honor, what it shows is
3 that for the other industries, EPA estimated in 2010
4 that for all other industries, this Air Toxics Program
5 would impose compliance costs of about \$840 million.
6 All of these other programs for power plants would
7 impose compliance costs, EPA estimated in 2011, about
8 10.4 billion.

9 This single regulation now on air toxics
10 imposes annual costs of 9.6 billion. And what does one
11 get for it? There are three standards at issue here,
12 and I think that this is important to understand some of
13 the questions that have been asked. There's a regulation
14 for mercury, there's a regulation for nonmercury metals,
15 and there's a regulation for acid gases.

16 Most of the costs here -- the majority,
17 about 5 billion annually -- are associated with the acid
18 gas regulation which the agency has concluded presents
19 no public health risk, no public health concern. The
20 agency said that our modeling has consistently showed
21 that power-plant-related exposures are at least an order
22 of magnitude below the conservatively determined safe
23 level.

24 Now, in the Title IV program, Congress
25 addressed pollution with acidification potential and

1 required reductions of 9 million tons a year at about a
2 cost of 1 to 1.4 billion. The Acid Gas Program is
3 projected to result in reductions of acid gases about
4 40- to 50,000 tons per year at a cost of \$5 billion.

5 What that background shows, Your Honor, is
6 that when -- why Congress treated power plants
7 differently. It asked whether it is appropriate to
8 impose further regulation of a specific type, whether
9 it's appropriate to propose regulation under this
10 section on the most aggressively regulated industry
11 under the Clean Air Act.

12 Now, what the statutory --

13 JUSTICE KAGAN: Mr. Brownell, can I take you
14 back to Justice Breyer's first question? And the first
15 question was about the way these categories work and how
16 the categories enable the EPA to mitigate certain
17 dramatic or onerous costs on certain segments of the
18 industry, because that's not an unknown provision of any
19 kind. And, indeed, it seems to me that the provision
20 very much cuts against your argument, because EPA, in
21 some ways, can't even figure out the costs until it
22 makes those categorization decisions. But the aggregate
23 costs, not just within each category, but the aggregate
24 costs obviously depend on how EPA categorizes and
25 subcategorizes.

1 So you would have the EPA make the cost
2 calculation before it really can, given the structure of
3 the statute.

4 MR. BROWNELL: Your -- Your Honor, the cost
5 does factor into a variety of determinations that are
6 made as part of the regulatory process. When EPA issued
7 its Notice of Regulatory Finding in December of 2010, it
8 said this is nonfinal. EPA confirmed again -- and this
9 is at page 555a of the UAR Petitioner's Appendix -- that
10 the -- there is no final (n)(1)(A) determination or
11 listing, and we are going to take comment on that as
12 part of the rulemaking to examine Section 7412(d)
13 emission standards.

14 So as part of that, the agency addresses
15 issues related to level of control, subcategorization,
16 and at the end of the rulemaking comes out with a
17 regulation that has certain characteristics and
18 consequences. And here this regulation -- what
19 (n)(1)(A) says is, in light of the study, address
20 whether such regulation under the section is appropriate
21 and necessary for power plants.

22 Now, it may be necessary to regulate
23 something like mercury if there's a public health risk,
24 and that's the only hazardous air pollutant for which
25 EPA has calculated a quantifiable public health risk,

1 but that may not be the appropriate regulatory regime
2 if, as EPA has explained here, their view of the statute
3 is not to focus on whether such regulation is
4 appropriate, but whether listing of power plants under
5 subsection C is appropriate just like every other
6 source category.

7 JUSTICE SCALIA: Can -- can I say -- can I
8 ask whether that listing is -- and -- and the minimum
9 standards that that imposes are subject to the
10 categorization device that Justice Breyer was asking
11 about? Could -- could the agency say, well, you know,
12 we're going to divide these into categories, and since
13 it's too expensive for certain -- 80 percent of power
14 plants that -- that don't have waterfalls nearby, we're
15 going to exempt them from these minimum standards?
16 Can -- can it do that?

17 MR. BROWNELL: No, Your Honor, not at the
18 listing stage. But once the source category is listed
19 at the standard-setting stage, they could consider
20 subcategorization --

21 JUSTICE SCALIA: Reduce it below --

22 MR. LINDSTROM: -- in order to --

23 JUSTICE SCALIA: -- below the -- the
24 minimums?

25 MR. BROWNELL: Not below the minimums. Your

1 Honor is perfectly right --

2 JUSTICE KAGAN : No. But the minimums
3 depend --

4 JUSTICE SCALIA: That's -- that's what I
5 thought.

6 JUSTICE KAGAN : The minimums depend on
7 the categories and the subcategories. You can
8 categorize in such a way that the minimums will be up
9 here, or you can categorize in such a way the minimums
10 will be down there.

11 MR. BROWNELL: And during the rulemaking,
12 Your Honor, arguments made about subcategorization, and
13 EPA ultimately subcategorized the -- the power industry
14 with respect to one limited set of sources, lignite
15 sources with respect to the mercury standard. But,
16 otherwise, EPA's position is once listed, it triggers an
17 obligation to issue emission standards under the -

18 JUSTICE SOTOMAYOR: So your answer --

19 JUSTICE KAGAN : It triggers an
20 obligation as to some standard, but, again, the minimum
21 standard can vary dramatically depending upon how the
22 categories and subcategories are set up. And because
23 the minimum standard can vary dramatic, so, too, will
24 costs vary dramatically. So you're having the EPA
25 consider costs before the EPA can know what the costs

1 are.

2 MR. BROWNELL: Your -- Your Honor, if I can
3 respond to -- to that before the other question at the
4 other end of the bench.

5 EPA does know what the costs are through the
6 rulemaking process in which it undertakes notice and
7 comment with respect to both the (n)(1)(a) determination
8 and the emission standard. Section 7607(d)(1)(c) of the
9 Clean Air Act lists subsection N as one of the
10 provisions that requires notice and comment rulemaking
11 under the special Clean Air Act procedures. And this is
12 why the agency explained that there's no final (n)(1)(a)
13 until the end of the process, until notice and comment
14 and we've taken and determined what the costs are.

15 JUSTICE SOTOMAYOR: So
16 interestingly -- and -- and this is then confirming what
17 Justice Breyer said -- the point that you had an
18 opportunity and apparently took advantage of it to tell
19 the EPA that it should subcategorize this source, and it
20 decided to subcategorize just one piece of it.

21 So what you're really saying to us is it's
22 not the listing. It's the way they've set up their
23 emissions standards that I disagree with because they
24 could have decided that there were subcategories that
25 didn't require a standard at all. I'm presuming that

1 they could have said anybody by the water doesn't have
2 to do more because they're already 12 -- they're part of
3 the 12 percent. We're going to do cost by everybody
4 else that's not by the water.

5 MR. BROWNELL: Conceptually, Your Honor, I
6 imagine they could have subcategorized away the entire
7 industry, but that's not what they did in this
8 rulemaking. And with respect to certain of the
9 regulations --

10 JUSTICE SOTOMAYOR: No, they didn't do it.
11 But -- but you're asking us -- you're -- this is
12 almost a -- this is a challenge to a regulation that's
13 only piecemeal because you're -- you're arguing that
14 they should have considered costs, but they obviously
15 did before they issued the standards. You can't look at
16 the standards and the emission in a case, and -- and
17 the listing in a case like this in isolation.

18 MR. BROWNELL: Justice Sotomayor, if I could
19 try the answer to the question once again.

20 The subsection N(1)(a) question is whether
21 after considering the results of the study -- and I note
22 that the study also looks at alternative control
23 strategies for any emissions that may warrant
24 regulation -- the agency determines such regulation is
25 appropriate and necessary. So the focus of the

1 determination is not on -- on listing and whatever may
2 flow from that, but the regulation that the agency
3 decides to apply to address the remaining public health
4 hazard that is identified from this source category.

5 JUSTICE ALITO: Mr. Brownell, when -- did
6 EPA say we are not going to take costs into account at
7 the listing stage because we will take costs into
8 account through this sub-categorization possibility
9 that's being discussed?

10 MR. BROWNELL: No, they did not, Your Honor.
11 As I recall the record of the proceeding, this
12 discussion of sub-categorization has come up in the
13 briefing afterwards.

14 JUSTICE BREYER: Why -- why didn't they
15 write -- you see what's -- try -- these questions are
16 difficult because they're so hypothetical. It isn't
17 true that 50 percent of the industry will use up
18 50 -- all the domestic product, et cetera. But they
19 wrote this thing in a way that sounds as if even if that
20 had been true, they wouldn't have taken it into account.
21 So -- so what they say is the EPA does not believe it is
22 appropriate to consider costs when determining whether
23 EGU is -- okay. You see the problem? So for me -- but
24 the SG is telling us, don't worry. Maybe they should
25 have written, knowing what we know and what is

1 undisputed so far, we don't think that the cost problem
2 is big enough for us to warrant a cost-benefit analysis
3 or other consideration. Okay? Then they've taken it
4 into account. So there's no problem if it's within,
5 it's reasonable.

6 Now, they didn't write that. So that's why
7 I'm looking to see is the -- it's really the SG, but I
8 mean, is -- is there really a different way that they
9 could eliminate this horrible scenario if it existed,
10 which it didn't. You understand what I'm driving at?
11 I'm trying to get your best answer on that.

12 MR. BROWNELL: And -- and I want to
13 emphasize that this is not an argument about whether or
14 not to regulate mercury where there's been an identified
15 public health risk. It's whether the regulatory regime
16 that has been defined here under Section 7412, which the
17 government says is the listing that applies to all other
18 source categories, and the (d)(3) minimum controls
19 technology standards that apply to all other source
20 categories is the right way to do it. Regardless of how
21 you subcategorize, it's going to have tremendous impacts
22 as a result of acid gas regulation and for a pollutant
23 that presents no public health risk. There are other
24 ways --

25 CHIEF JUSTICE ROBERTS: I -- I suppose we

1 can't -- we can't uphold an agency rule on a ground that
2 they didn't adopt below, right?

3 MR. BROWNELL: That's correct.

4 CHIEF JUSTICE ROBERTS: Under Chenery?

5 MR. BROWNELL: That's correct.

6 CHIEF JUSTICE ROBERTS: So is your
7 understanding correct that this is not an argument -- a
8 basis for decision that they adopted below?

9 MR. BROWNELL: That's correct, Your Honor.
10 My understanding of the basis for the decision below is
11 that costs are irrelevant in our determination under
12 (n) (1) (a) whether or not -- whether to regulate the
13 source category under the typical Subsection 7412 regime
14 that applies to other source categories.

15 JUSTICE KAGAN: But that's exactly right,
16 Mr. Brownell. I mean, the -- the agency, at that point
17 in time, was only answering the very first question, the
18 very threshold issue. And at that point, the agency
19 said costs were irrelevant. But costs become relevant
20 later in the analysis and in a variety of ways: Through
21 the 12 and a half percent, through the 12 percent,
22 through the categorization and sub-categorization,
23 through the determination whether to raise standards
24 even higher. So costs costs costs later, but as to this
25 particular thing, the agency said, yes, here we don't

1 consider costs. We could, but we don't want to because
2 there's all this potential for costs to come in
3 afterwards.

4 MR. BROWNELL: And, Your Honor, it's costs
5 costs costs under the statutory criteria that Congress
6 provided for setting (d)(3) control technology standards
7 and then having defined those standards at the end of
8 the process, the agency finalizes its (n)(1)(a)
9 determination in light of the costs and impacts and
10 other factors that are mentioned in the --

11 JUSTICE KENNEDY: Do you think -- do you
12 think that whenever the term "appropriate" is used in a
13 regulatory context in the Clean Air Act, that it demands
14 a cost-benefit analysis?

15 MR. BROWNELL: Your Honor, when you say in
16 any context, that's so broad I don't think that I can
17 say that it would require cost-benefit in any context.
18 But in a specific context here where the focus is on
19 whether such regulation is appropriate and necessary,
20 that regulation has certain characteristics and
21 consequences that we have talked about this morning,
22 including the fact that it imposes on a pollutant that
23 presents no public health risk, \$5 billion a year.

24 JUSTICE GINSBURG: But, Mr. Brownell, before
25 you finish, because your time is out, can you clarify

1 for me why this is -- is at this stage something that we
2 should be concerned about because there is this
3 regulatory impact assessment and that -- that has said
4 that the benefits vastly exceed the costs, and
5 that's -- that's an impact analysis and has gone through
6 the OR process and OR concluded that EPA appropriately
7 calculated the costs.

8 MR. BROWNELL: Yes, Your Honor, Mr. Chief
9 Justice. The co-benefits -- all of those benefits are
10 co-benefits. Only 4 to 6 million dollars are associated
11 with hazardous air pollutants. Those co-benefits that
12 are in the regulatory impact analysis were not
13 considered as part of the regulatory determination for
14 good reason, because they're important questions
15 regarding their legal importance and relevance under the
16 proper standard. And what I mean, Your Honor, is that
17 PM 2.5 is the pollutant, fine particles that is
18 associated with these co-benefits. That is extensively
19 regulated under the National Ambient Air Quality
20 Standard program. In fact, those are quality standards
21 were only recently revised to be tightened, and in the
22 context of that proceeding, the agency found that the
23 low levels of exposure for these co-benefits did not
24 produce effects or risks that were of regulatory
25 significance because they're too uncertain. So there

1 are serious questions about legal relevance and
2 importance.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. BROWNELL: Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: General Verrilli.

6 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

7 ON BEHALF OF FEDERAL RESPONDENTS

8 GENERAL VERRILLI: Mr. Chief Justice, and
9 may it please the Court:

10 EPA's interpretation of Section
11 7412(n)(1)(A) should be affirmed for three basic
12 reasons. First, it is the most natural and certainly a
13 permissible reading of the statutory text which directs
14 EPA to focus on health concerns and doesn't mention
15 costs.

16 Second, it harmonizes the provision with
17 Section 7412's structure and design, because it applies
18 the same regulatory logic to power plants that Congress
19 directed EPA to apply to regulate hazardous air
20 pollution from every other type of source, and that is
21 decide whether to list for regulation based on health
22 and environmental hazards alone, and consider costs in
23 setting the emission standards.

24 And third, as a matter of common sense and
25 sound government practice, it was certainly appropriate

1 for EPA to list power plants for regulation based solely
2 on health and environmental hazards, because that
3 reflects the approach Congress chose not only in 7412,
4 in this regulatory program, but in all of the major
5 regulatory programs under the Clean Air Act.

6 CHIEF JUSTICE ROBERTS: Could I go to
7 your -- you're now three out -- your first -- first
8 point. You concede, don't you, that EPA could have
9 interpreted the statutory language to allow them to
10 consider costs?

11 GENERAL VERRILLI: I think EPA read it as --
12 read the best interpretation of the statute was it
13 didn't provide for the consideration of costs at the
14 listing stage --

15 CHIEF JUSTICE ROBERTS: But under Chevron,
16 if you adopted a regulation that said appropriate and
17 necessary allows us to consider cost, you think that
18 would be appropriate?

19 GENERAL VERRILLI: I think the phrase
20 appropriate and necessary doesn't, by its terms,
21 preclude the EPA from considering cost. But under
22 Chevron, what the EPA has got to do is explain the
23 justification for its reading of the statute, and that's
24 what it did.

25 CHIEF JUSTICE ROBERTS: Right. But since

1 you're dealing with the term, I think this says as
2 capacious as appropriate, and since you could have
3 issued a regulation allowing the consideration of costs
4 as appropriate, you're saying that the agency
5 deliberately tied its hands and said we're not going to
6 consider something. We're going to issue a rule saying
7 we can't consider something that we could consider
8 otherwise.

9 GENERAL VERRILLI: No, I think the best way
10 to think about this, Mr. Chief Justice, is what the
11 agency did was decide that it was appropriate to
12 approach the question of whether to regulate power
13 plants in the same manner that Congress found it was not
14 only appropriate, but mandated to address the question.

15 CHIEF JUSTICE ROBERTS: They could have --
16 I'm not -- I understand your argument that they could
17 have done that, but I think it's unusual for an agency
18 to say, when they want to do something, that that's the
19 only thing we could do. Agencies usually like to
20 maintain for themselves as much discretion as they can.
21 And it strikes me as unusual, maybe the agency could go
22 ahead and consider -- and not consider costs, but to say
23 that we're prohibited from considering costs under the
24 phrase appropriate, it strikes me as very unusual.

25 GENERAL VERRILLI: Well, it said -- I don't

1 think so, Mr. Chief Justice. It said -- it didn't say,
2 we're prohibited from considering costs. It said, we
3 are not going to consider costs at the listing stage in
4 making the decision about whether power plants should be
5 listed for regulation under Section 7412.

6 CHIEF JUSTICE ROBERTS: I thought -- I
7 thought the rule was that the phrase appropriate and
8 necessary did not allow them to consider costs.

9 GENERAL VERRILLI: And appropriate and
10 necessary goes to the question of whether power plants
11 should be listed for regulation under Section 7412,
12 which would then kick in the regulatory mechanism by
13 which standards were set and costs are considered at the
14 standard-setting --

15 JUSTICE KENNEDY: I have the same question
16 as the Chief Justice. Let me ask one more time. Could
17 this agency reasonably have considered costs at stage
18 one?

19 GENERAL VERRILLI: I don't think the
20 statutory text unambiguously forbids them from
21 considering costs. But they determined that the best
22 reading of the statutory text is that power plants,
23 because after the study was conducted that Congress
24 required, EPA determined that power plants are no
25 differently situated than any other source of hazardous

1 air pollutants regulated under Section 7412.

2 And if I may Mr. Chief Justice?

3 CHIEF JUSTICE ROBERTS: Sure.

4 GENERAL VERRILLI: For every other source of
5 hazardous air pollutants, what Congress mandated as
6 appropriate was that you do not consider costs when you
7 decide whether to regulate. You only consider health
8 and environmental effects, and then you do consider
9 costs under Section 7412(d) when you set the emissions
10 standards.

11 JUSTICE ALITO: How is that -- how is that
12 consistent with this statutory scheme? If your argument
13 is that EPA's only reason for doing this is that it
14 wants to treat power plants the same as other sources,
15 we know that that's what Congress didn't want or it
16 would have -- it would not have enacted the separate
17 provision for power plants.

18 GENERAL VERRILLI: I agree, Justice Alito,
19 that Congress proposed different treatment for power
20 plants, but that doesn't answer the question. That just
21 asks the question. The question is what different
22 treatment did Congress prescribe. Now, what Petitioners
23 are arguing is that what Congress prescribed and mandated
24 was a cost-benefit analysis that does not apply to any
25 other source of hazardous pollutants.

1 But that is not what the text of the statute
2 says, and it's not what the history reflects. What the
3 text of the statute says in (n)(1)(A) is that even
4 though for every other source, regulation would proceed
5 immediately; for power plants, there was uncertainty
6 about whether power plants emitted hazardous pollutants
7 at a level that would cause a problem, whether the acid
8 rain regulations would solve the problem, and whether
9 there were alternative control strategies available.

10 And so -- if I may. I'm sorry.

11 EPA -- what Congress told EPA to do was to
12 study those three things. Those go to health
13 considerations. And then once EPA was -- made a
14 judgment about that, it was to decide whether to list
15 power plants for regulation as -- whether it was
16 appropriate and necessary to list them for regulation.

17 JUSTICE ALITO: This is what I don't
18 understand about your position. Congress's decision to
19 treat power plants differently, it seems to me, reflects
20 the fact that Congress wanted at least to hold open the
21 possibility that power plants would not be listed even
22 if their emissions exceeded the levels that would result
23 in listing for other sources. I don't see another
24 reason why they would treat them differently.

25 GENERAL VERRILLI: Well, I think --

1 JUSTICE ALITO: If I can just continue.

2 GENERAL VERRILLI: I'm sorry.

3 JUSTICE ALITO: Perhaps you may disagree
4 with that, but it seems to me that -- that that's a
5 necessary inference from this statutory scheme.

6 If that is the case, what factor might
7 Congress have thought would justify allowing power
8 plants to emit more than would be permitted if they were
9 other sources?

10 Now, Petitioners have an explanation which
11 is costs, and they say that power plants have to bear a
12 lot of costs that other sources don't have to bear, in
13 particular the Title IV program. Their emissions might
14 exceed the otherwise permissible limit because they have
15 participated in the cap and trade program, so they have
16 contributed to the reduction in emissions in that way,
17 in a way that wouldn't be reflected in their -- in their
18 own emissions.

19 So what -- that is an explanation. Cost is
20 what's missing. I don't know what your explanation is.

21 GENERAL VERRILLI: So I know Your Honor
22 asked me to accept the premise, but I can't accept the
23 premise because both the text of (n) (1) (A) and the
24 legislative history tell you what considerations
25 Congress left open, and they were all related to the

1 possibility of health hazards. No one -- the argument
2 that Your Honor just posed is not in the legislative
3 history, and it's not in the text. And if Congress
4 really thought that, then what they would have said to
5 EPA is, take the -- push the pause button, take the
6 three years and study -- don't subject them to the same
7 schedule as everybody else -- and study the cost
8 problem. They would have expressly told EPA to study
9 costs. And they did not do that.

10 JUSTICE ALITO: If all they were concerned
11 about was health, why wouldn't they impose on power
12 plants the same standard that's imposed on area sources?
13 Just ask EPA to determine whether there is -- I forget
14 the exact term -- but is there an effect on public
15 health, a significant effect on public health, whatever.
16 If so, list.

17 GENERAL VERRILLI: I think they came very
18 close to that, because what they said -- first of all,
19 they -- they told EPA to make its judgment after
20 considering the results of the study, and they told EPA
21 to study things that went to health hazards. And so that
22 comes very close, it seems to me, and the reason, I
23 think, it used the appropriate and necessary language,
24 rather than the language Your Honor suggests, is because
25 I think Congress, when it was legislating here in 1990,

1 understood that there might well be uncertainty at the
2 end of this -- of the analysis that Congress directed
3 the EPA to undertake. There might be uncertainty about
4 the projected effects of the acid rain regulations,
5 because I do -- I do think it's important to clear up --

6 JUSTICE SOTOMAYOR: I don't -- I think
7 that's what the legislative history said.

8 GENERAL VERRILLI: Right. And I do want to
9 clear up a misconception about that, I think, which is
10 that -- that the way these acid rain regulations
11 unfolded, they were put in place in 1990 at the same
12 time as 7412, but they were to unfold over a 10-year
13 period; 5 years until the first stage, and then 5 more
14 years until second stage. So EPA was going to have to
15 make a long-term projection here about which there could
16 be some uncertainty.

17 And so I think what Congress was saying to
18 EPA was you may need to exercise your judgment here, and
19 in fact, EPA did exercise its judgment because it
20 concluded --

21 JUSTICE BREYER: There are two parts to this
22 argument. One is what were they thinking of the word
23 appropriate if it wasn't costs? All right, I see your
24 answer to that. I'll think about that.

25 But the second, which I think your argument

1 very much depends on, in my mind anyway, is, well, don't
2 worry, because there is a way to take into account
3 costs. So, if, in fact -- I mean, you know, it's a lot
4 of money, \$9 billion, and if you divide it by the
5 population, you have \$30 a person for a family of four
6 of \$120. That's a lot of money for people, for some
7 people. And to say, gee, you couldn't take it into
8 account ever, suppose it would have been 500? You know,
9 it begins to look a little irrational to say, I'm not
10 taking it into account at all. But you say, never fear,
11 because they will take it into account when they set
12 standards. And at that point I read the thing about the
13 12 percent. I've got the word "similar source," which
14 then can refer me back to the categorization of two
15 things earlier, as they say maybe, and then I have,
16 aside from that, hey, here's what you do. When you're
17 regulating you look at the top 12 generators and that's
18 the minimum standard. So they might want to say, hey,
19 that's not right. I mean, it's right, it says it. But
20 if you go to the bottom 50 generators, you're going to
21 see it's not going to cost \$120 per family, it's going
22 to cost \$1,000 a family. And we have the EPA saying, we
23 won't even look at that.

24 At that point I begin to say, oh, my
25 goodness. Why? Why won't you even look at it? You

1 could say it isn't true, but why wouldn't you even look
2 at it.

3 And -- and now the answers seems to me to be
4 in that word "similar source," and the classes and the
5 subclasses. Because were there such an argument, maybe
6 the EPA could say, don't worry. If there is such an
7 argument, which there isn't, we have the power here
8 under the statute to take it into account.

9 Now, you know where that argument came from?
10 From discussion and thought in my chambers. Now, maybe
11 it came out of the briefs, too. But is what I say
12 right? Can the EPA take that into account, or do they
13 have to just blindly say, if it's the top 12, that's for
14 everybody no matter what the cost? In which case they
15 can't take it into account ever except for the word
16 "appropriate." Now, that's the argument I'm putting --
17 you got it in my argument because that's important.

18 GENERAL VERRILLI: I -- I've got it. I'm
19 going to make three points in response to it.

20 JUSTICE BREYER: Yes.

21 GENERAL VERRILLI: The first one goes to the
22 empirical situation in this case, but then I'm going to
23 get to the theoretical question you asked.

24 JUSTICE BREYER: Yes.

25 GENERAL VERRILLI: The first is this: Nine

1 billion is a big number. This is an industry with \$360
2 billion a year in annual revenues, so you're talking
3 about two to two-and-a half annual revenues -- of annual
4 revenues. And what Congress and what EPA concluded when
5 it --

6 JUSTICE SOTOMAYOR: Revenues doesn't talk
7 about profit, though.

8 GENERAL VERRILLI: Right. But it's -- well,
9 this is a cost, and the cost is about two and-a-half
10 percent of revenues. And then what EPA concluded was
11 that this -- that about 2 percent of electrical
12 generating capacity could go offline as a result of it
13 being uneconomic. So it's not a 50 percent or a 78, 88
14 percent.

15 JUSTICE BREYER: Right . And as soon as
16 you've said that, you've taken costs into account, which
17 is what they say they wouldn't do.

18 GENERAL VERRILLI: And then -- but then --
19 now, let me talk about the way EPA under this regime
20 does take costs into account. The first point I would
21 make is that the situation that Your Honor described in
22 the hypothetical is a quite unusual one. In the normal
23 case, the 12 percent rule, it's a technology-forcing
24 rule, the kind that Your Honor discussed in -- in your
25 concurring opinions in Whitman and in Entergy. It's

1 that kind of a rule. And for -- and in the normal case,
2 it's not going to have that effect. It means that
3 this -- this percentage of the industry has been able to
4 meet this without an operator in an economic matter and
5 Congress is trying to force the rest of the industry to
6 catch up. And as we know from multiple experiences, as
7 Your Honor identified with respect to catalytic
8 converters and motor vehicles and with respect to acid
9 rain, it turned out that the cost was vastly lower on
10 industry than EPA anticipated it would be; that there's
11 a very great tendency to overestimate costs in that
12 situation.

13 But then the third point is Your Honor's
14 point about subcategories. And Section 7412(c)(1),
15 which is the provision that governs the listing of
16 categories, it mentions the availability of
17 subcategories and, in fact, the last sentence of it says
18 nothing in this --

19 JUSTICE KENNEDY: Do you have that page?

20 GENERAL VERRILLI: I'm sorry, I'm sorry,
21 Justice Kennedy. It's 35A of the appendix to our brief.

22 JUSTICE KENNEDY: Thank you.

23 GENERAL VERRILLI: And this is (c)(1) and
24 it's the last sentence. And it -- and it talks about
25 the EPA's authority and says, "Nothing in the preceding

1 sentence limits the administrator's authority to
2 establish subcategories under this section as
3 appropriate." And in fact, that is what --

4 JUSTICE SCALIA: Can -- can those
5 subcategories apply to the minimum standards?

6 GENERAL VERRILLI: Yes. That's how it would
7 work, because you -- you identified the category and
8 then you generate the standard based on who's in the
9 category.

10 JUSTICE SCALIA: No, but I thought the
11 standards are automatic. There's certain minimums.
12 Once they find on the basis of -- of the study that
13 these things should be listed, I thought there -- there
14 is an automatic requirement imposed on -- on -- which is
15 the reason they're complaining.

16 GENERAL VERRILLI: Well, the -- the
17 requirement -- it depends on how you categorize. And so
18 if -- if there were a situation -- let me just switch --
19 if there were a situation in which one segment of the
20 industry was so vastly different from another segment of
21 the industry in terms of its economics, in terms of its
22 technology, then EPA would have the authority to break
23 those into two separate subcategories and then you don't
24 calculate the best performing 12 percent, which is what
25 the standard is, until you know if it's the best

1 performing 12 percent of the people you've put in the
2 category.

3 JUSTICE BREYER: The language that does
4 that -- the language that does that is the first
5 sentence of three, which says, "The maximum degree that
6 is deemed achievable, not less stringent than the
7 emission control," that is achieved in practice by the
8 best-controlled similar source as determined by the
9 administrator." That's what allows him to break it into
10 categories and apply the minimums to the -- to similar
11 source.

12 GENERAL VERRILLI: Right. And --

13 JUSTICE BREYER: Am I right or not?

14 GENERAL VERRILLI: That's correct. And EPA
15 did that in this case. It broke out power plants that
16 generate power burning natural gas, and it said that's a
17 separate subcategory.

18 CHIEF JUSTICE ROBERTS: Where in the
19 record -- where can you point me into the record where
20 this argument was made or considered by the agency? As
21 opposed to Justice Breyer's chambers. Because it's a
22 very important principle of administrative law that we
23 will only uphold a rule based on the arguments that were
24 considered and addressed by the agency. So -- and I --
25 I -- as I said, it's not something I recall from the

1 briefs.

2 GENERAL VERRILLI: It's, of course, true,
3 Mr. Chief Justice. But -- and you're -- you're exactly
4 right in stating that principle. But our argument in
5 this case is that this question here is -- under --
6 under (n)(1)(a), (n)(1)(a) says, "EPA shall regulate
7 under this section if it determines that such regulation
8 is appropriate and necessary," and therefore, that when
9 EPA makes a judgment to regulate under this section,
10 because it is appropriate and necessary, EPA is -- is
11 triggering all of the requirements --

12 JUSTICE SCALIA: Well, you're just saying --
13 you're just saying that the argument is right, not that
14 the -- not that the agency made it, right?

15 GENERAL VERRILLI: Well, it's -- I guess
16 what I would say about it, Your Honor, is --

17 JUSTICE SCALIA: It's not enough that the
18 argument be right. The -- the agency must have rested
19 its decision on the point.

20 GENERAL VERRILLI: The -- I think that the
21 agency in the order on being challenged here did use the
22 approach. But beyond that, whether or not -- it would
23 be one thing if this were a case in which you had a
24 situation in which EPA -- or EPA faced a situation in
25 which 50 percent or 75 percent were going to face vastly

1 uneconomic consequences. But this case didn't present
2 that situation. EPA made a judgment about --

3 JUSTICE SOTOMAYOR: General, can I simplify
4 your answer for you?

5 (Laughter.)

6 GENERAL VERRILLI: Yes. I'd be delighted if
7 you did that, Justice Sotomayor.

8 JUSTICE SOTOMAYOR: All right. Basically,
9 you have consistently in your brief, and so has the
10 other Respondents, basically said at the listing stage
11 we don't consider costs, we consider it later. And
12 everybody gave a few examples. Whether this example was
13 given or not is irrelevant. The issue here was, do you
14 have to do it at listing? It's only some of my
15 colleagues here who are concerned that when you issue
16 standards, you never consider cost.

17 GENERAL VERRILLI: And that's exactly right.
18 The question here is whether EPA's got to conduct a
19 cost-benefit analysis when it does the listing, and the
20 logic of the statute of 7412 doesn't -- it doesn't
21 operate --

22 JUSTICE KENNEDY: But at that point the game
23 is over.

24 GENERAL VERRILLI: No, I don't think it is,
25 Justice Kennedy, for -- for several reasons. First,

1 the -- the standard under Section 7412(d) for setting
2 emissions -- emissions standards once you've decided to
3 list, that is Your Honor's question to -- to my friend
4 General Lindstrom pointed out, that does take costs into
5 account in the sense that a segment of the industry can
6 operate economically. Secondly --

7 JUSTICE SCALIA: Excuse me. I don't -- I
8 didn't understand that. I thought that there were
9 automatic requirements imposed once -- once the -- the
10 plants are listed.

11 GENERAL VERRILLI: Once EPA lists --

12 JUSTICE SCALIA: Yes.

13 GENERAL VERRILLI: -- and defines the
14 category for listing, then the automatic requirement
15 that is applied is that everyone in the category has to
16 match the performance of the best 12 percent.

17 JUSTICE SCALIA: Where did this categories
18 comes from? I -- I really don't like the fact that
19 your -- your friend on the other side was -- was not
20 permitted to mount an argument in opposition to this
21 categorization theory that Justice Breyer's chambers
22 devised. Usually -- usually we have arguments on both
23 sides. This is an argument I never heard of and I'm not
24 sure it's right. But -- but I certainly didn't --
25 didn't know the agency to say, oh, we're just listing,

1 but we're -- you know, we're going to categorize the
2 listing. They didn't say that.

3 GENERAL VERRILLI: I understand your point
4 about the focus or non-focus on subcategories. But the
5 point that we're just listing, we say that over and over
6 again in our brief. And in fact, the Petitioners
7 concede, and this is at page 5 and 6 of the UARG reply
8 brief, that if this is just about listing, then, of
9 course, costs are irrelevant. But it is just about
10 listing. That is the way the statute works.

11 CHIEF JUSTICE ROBERTS: You had responded to
12 the fairly dramatic disparity your friends on the other
13 say, the 6 million benefits, 9.6 million cost. You
14 respond with a different calculation that looks to -- I
15 call them collateral --

16 GENERAL VERRILLI: Co-benefits.

17 CHIEF JUSTICE ROBERTS: -- the ancillary --
18 co-benefits. And then the -- the argument is raised
19 that that's -- that's not quite proper because you're
20 using your -- your -- the HAP regulation to get at the
21 criteria pollutants that you otherwise would have to go
22 through a much more difficult process to regulate.

23 In other words, you can't regulate the
24 criteria pollutants through the HAP program, so you get,
25 okay, here we've got this tiny bit of mercury, and so

1 we're going to regulate, and that's how we're going to
2 get additional regulation of the criteria pollutants.
3 And so it's sort of an end run around the restrictions
4 that would otherwise make -- give you less control over
5 the regulation.

6 What -- what's your response to that?

7 GENERAL VERRILLI: Let me address that.

8 It's -- there's several points, and I actually need to
9 make all of them, I think, to -- to make this clear.

10 The first point is that that's not an
11 argument that any party has raised. One amicus brief
12 raised it, one -- and it was averted to a bit more oral
13 argument --

14 CHIEF JUSTICE ROBERTS: Well, my
15 chambers found it, but --

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: Yes.

18 GENERAL VERRILLI: And -- and here's the
19 problem with the argument: The problem with the
20 argument is that -- it -- it has two problems. One is
21 that once EPA concludes that a source emits a hazardous
22 pollutant, and here EPA has concluded that these sources
23 emit mercury at levels that are unsafe. I don't think
24 Petitioners dispute that. And by the unambiguous terms
25 of Section 7412(d), EPA is under an obligation to

1 regulate all hazardous pollutants that the source emits,
2 and -- and that's -- the D.C. Circuit in a case called
3 National Lime 15 years ago --

4 CHIEF JUSTICE ROBERTS: Well, no, no, no. I
5 understand --

6 GENERAL VERRILLI: -- interpreted it that
7 way --

8 CHIEF JUSTICE ROBERTS: -- I understand how
9 the end run works.

10 GENERAL VERRILLI: Well, it's not --

11 CHIEF JUSTICE ROBERTS: I'm -- I'm just
12 questioning --

13 GENERAL VERRILLI: It's not a --

14 CHIEF JUSTICE ROBERTS: No, I'm just
15 questioning the legitimacy of it --

16 GENERAL VERRILLI: Yes.

17 CHIEF JUSTICE ROBERTS: -- because what they
18 would say, okay, you found, you know, a -- a HAP that --
19 that you want to list, but you ought to consider only
20 the benefits of regulating that. You shouldn't consider
21 the -- the bootstrapped --

22 GENERAL VERRILLI: Well, I guess the --

23 CHIEF JUSTICE ROBERTS: -- benefits -- that
24 should be addressed through the other --

25 GENERAL VERRILLI: I guess the next point I

1 would make, Mr. Chief Justice, is that it's not an end
2 run, and it's not a bootstrap. This is a well --
3 regulating the surrogates, regulating the surrogates, is
4 a well-recognized methodology that goes back decades,
5 that EPA has used for decades, that the D.C. Circuit has
6 upheld for decades, that that is a perfectly appropriate
7 way to -- to deal with getting at metals and -- and
8 other pollutants that would be hard to get at directly.
9 And, in fact, the very argument that Your Honor is
10 positing here as a -- as an end run is one that was made
11 in this same National Lime case to the D.C. Circuit
12 15 years ago and the D.C. Circuit rejected.

13 So what EPA is doing here -- basically what
14 the D.C. Circuit said, that Section 7412(d) required
15 them to do with respect to regulating every hazardous
16 pollutant that the -- that the sources emit, and what
17 the EPA has said, and what the D.C. Circuit has said for
18 decades, EPA --

19 CHIEF JUSTICE ROBERTS: Well, right. But, I
20 mean, the --

21 GENERAL VERRILLI: -- is permitted to do,
22 and that it isn't an end run at all. It's just a normal
23 way in which you regulate --

24 CHIEF JUSTICE ROBERTS: Well, but the issue
25 that I think raises the red flag, at least, is that

1 there's such a tiny proportion of benefit from the HAP
2 program and such a disproportionate amount of benefit
3 that would normally be addressed under the criteria --

4 GENERAL VERRILLI: So --

5 CHIEF JUSTICE ROBERTS: -- program. So --
6 so it's not just that, yes, where you're regulating one,
7 if -- it's a good thing if it also has benefits with
8 respect to other pollutants. But if your basis for
9 regulating what -- what is the benefit from the
10 co-pollutants that you get?

11 GENERAL VERRILLI: The -- oh, it's many,
12 many billions of dollars.

13 CHIEF JUSTICE ROBERTS: Do you remember how
14 much it is? It's sort of 30 --

15 GENERAL VERRILLI: 30 to \$90 billion.

16 CHIEF JUSTICE ROBERTS: 30 to 90 billion.
17 The benefit from the mercury is, what, 4 million?

18 GENERAL VERRILLI: Well --

19 CHIEF JUSTICE ROBERTS: So you say, we get
20 to regulate this. We get to regulate it because there's
21 a \$4 million impact on mercury. But when we do that, we
22 get to regulate 35 billion -- in a way that gives us
23 \$35 billion in cost on the other side.

24 GENERAL VERRILLI: So --

25 CHIEF JUSTICE ROBERTS: So I understand the

1 idea that you can have -- you know, it's a good thing if
2 your regulation also benefits in other ways. But when
3 it's such a disproportion, you begin to wonder whether
4 it's an illegitimate way of avoiding the different --
5 quite different limitations on EPA that apply in the
6 criteria program.

7 GENERAL VERRILLI: So I don't -- I -- I
8 really don't think that. I understand that Petitioners
9 have put the case that way, Mr. Chief Justice. I don't
10 think that's a fair way to put it.

11 What EPA did with respect to mercury was
12 quantify one of the public health benefits. It did not
13 quantify many of the other public health benefits. If
14 you'll look in the Joint Appendix -- and I think this is
15 about page 910 to about page 940, there's page after
16 page of charts in which EPA has listed the other
17 benefits that come from regulating mercury and the
18 hazardous substances that it didn't try to quantify.

19 Part of the reason it didn't try to quantify
20 is because quantifying those kinds of benefits can be
21 very difficult and challenging. And, frankly, that is
22 one of the key reasons that Congress adopted not only in
23 7412, but under the NAAQS Program and the Motor Vehicle
24 Program and the New Source Performance Standard Program,
25 the approach it did of not taking costs into

1 consideration at the listing stage, but only at the
2 regulatory stage --

3 JUSTICE SOTOMAYOR: Could you tell me
4 about --

5 GENERAL VERRILLI: -- because --

6 JUSTICE SOTOMAYOR: -- the natural gas? You
7 were cut off earlier.

8 GENERAL VERRILLI: Sure. EPA reached the
9 conclusion that they ought to have -- that natural gas
10 power plants ought to be a separate category and -- and
11 because they didn't generate public health problems at
12 the level that would make them comparable to the --
13 the -- the coal and --

14 JUSTICE SOTOMAYOR: So they were --

15 JUSTICE ALITO: Now, on this issue of --

16 JUSTICE SOTOMAYOR: -- part of the listing,
17 but not --

18 JUSTICE ALITO: I'll wait.

19 GENERAL VERRILLI: Correct.

20 JUSTICE SOTOMAYOR: They were part of the
21 listing, but they were not regulated, because you just
22 sort of turn it off.

23 GENERAL VERRILLI: Yes, Your Honor.

24 JUSTICE ALITO: Can I ask you another
25 question about these subcategories?

1 Your -- your argument is that under the last
2 sentence of 7412(c)(1), the EPA can create subcategories
3 based, in whole or in part, on costs; is that right?

4 GENERAL VERRILLI: I -- I think -- I think
5 it's more subtle than that. I think that if -- I
6 think -- and it's not just that provision. It's --
7 there are numerous provisions within 7412 that allow for
8 subcategorization. But I think that if there is such a
9 vast difference in the tech -- in the -- in the
10 technologies that the -- that the group of entities is
11 using, that there would be that vast a difference in
12 cost, that there might well be a basis to treat them as
13 a different subcategory.

14 JUSTICE SCALIA: Well, why didn't the EPA
15 say that? I thought the EPA said, we are not going to
16 take into account costs with regard to the listing.
17 Now, they could have said, we're going to take into
18 account costs as to whether some categories should be
19 listed and other categories shouldn't be listed. That's
20 not what they said. They said, we will not take into
21 account costs with regard to listing. We list all --

22 GENERAL VERRILLI: Here -- here's what --

23 JUSTICE SCALIA: -- of -- of these --

24 GENERAL VERRILLI: -- here's what they
25 said --

1 JUSTICE SCALIA: -- utilities.

2 GENERAL VERRILLI: -- Justice Scalia, and
3 I -- and here's why they said it, and I think this is
4 critical.

5 What they said was that we think it is
6 appropriate, with respect to power plants, not to
7 consider costs at listing and to consider costs --

8 JUSTICE SCALIA: Right.

9 GENERAL VERRILLI: -- at emission standard
10 setting. And the reason we think it is appropriate is
11 because that is the standard, that is the regulatory
12 logic that Congress deemed not only appropriate, but
13 mandatory for every other source category. And so one
14 would have to conclude, then, that what Congress said
15 was mandatory, and therefore necessarily appropriate for
16 every other category, was inappropriate, and even
17 additionally goes so far as to say --

18 JUSTICE SCALIA: That -- that -- that's how
19 I understood their argument --

20 JUSTICE KAGAN: But --

21 JUSTICE SCALIA: -- entirely. And I did not
22 understand it to say, we -- you know, we -- we can -- we
23 can exempt some people from these minimum standards
24 because we categorize them differently. It -- it
25 definitely was not allowing --

1 GENERAL VERRILLI: That -- that is their
2 main argument, but I do think the point -- what the
3 point of -- the point of the logic of EPA's position
4 here is that you make the listing decision, and then you
5 regulate, as (n) (1) (A) says, under Section 7412, and
6 these are provisions in Section 7412 that give EPA the
7 authority to --

8 JUSTICE KAGAN: And, General, as --

9 JUSTICE ALITO: Are their regulations
10 that --

11 JUSTICE KAGAN: -- as I understood it --
12 please.

13 CHIEF JUSTICE ROBERTS: Alito.

14 JUSTICE ALITO: Are there regulations that
15 set out the criteria for creating these subcategories?

16 GENERAL VERRILLI: I'm -- I'm not aware that
17 there are. I'm not -- I just don't know the answer to
18 that, Your Honor.

19 JUSTICE ALITO: So, well, without them, we
20 really don't know to what extent, if any, costs are
21 taken into account in creating subcategories, do we?

22 GENERAL VERRILLI: Well, I -- I think
23 that -- I -- no, I do think that if -- it's -- it's
24 going to be based on differences in technology and
25 operation, I think, from which you might be able to

1 infer costs.

2 But that's hypothetical in this case because
3 this is not a case in which EPA needed to confront that
4 question, except with respect to natural-gas-fired power
5 plants, which they did find to be so different that
6 they -- they warranted different treatment, because it
7 didn't have the kind of problem that Justice Breyer's
8 hypothetical raised. You -- you didn't have that kind
9 of problem. You didn't need to face this issue in these
10 cases, so the EPA didn't.

11 And if I could just make this point, because
12 I think it's quite -- I think it's quite critical.
13 Given that 7412's regulatory logic provides for listing
14 based on health, emissions standard-setting based on --
15 on costs, including consideration of costs, and based on
16 the -- and -- and given that that's exactly the same
17 logic under the NAAQS Program, it's exactly the same
18 logic under the Motor Vehicle Program, it's exactly the
19 same logic under the New Source Performance Standards
20 Program, that if Congress intended to mandate that EPA
21 cut so deeply against the grain and make such a
22 radically different approach with respect to this one
23 category of sources, you would expect to see very clear
24 legislative language to that effect. You would expect
25 to see a -- a direction to EPA in 7412 to study costs

1 before making this judgment.

2 JUSTICE SCALIA: General Verrilli, let me --
3 let me ask a question about costs. There -- there are
4 economic costs. There are other costs. Is it -- is it
5 the Agency's position that no cost can be taken into
6 account? For example, it -- it may find that -- that a
7 particular material has an effect on health, but it may
8 find that eliminating it will have other effects that
9 are even more deleterious to health. Could that cost be
10 taken into account?

11 GENERAL VERRILLI: If I may answer,
12 Mr. Chief Justice. I think that cost would be taken
13 into account in the OIRA regulatory impact analysis.

14 JUSTICE SCALIA: But not for the listing.

15 GENERAL VERRILLI: But -- but not for the
16 listing.

17 JUSTICE SCALIA: Not for the listing.
18 That's right.

19 GENERAL VERRILLI: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, General.
21 Mr. Smith.

22 ORAL ARGUMENT OF PAUL M. SMITH
23 ON BEHALF OF INDUSTRY RESPONDENTS

24 MR. SMITH: Mr. Chief Justice, and may it
25 please the Court:

1 We agree with the government that the EPA
2 was not required to engage in a cost-benefit analysis
3 before making the initial listing decision to regulate
4 hazardous pollutants emitted by power plants from
5 power -- applying the appropriate and necessary
6 standard. And I -- I certainly want to acknowledge at
7 the beginning, clearly, Congress did think that power
8 plants needed to be treated differently, but what did
9 they give them? They gave them a 3-year pause in which
10 the EPA was instructed to take account of the health
11 effects of the particular pollutants emitted by power
12 plants, and it did this under an appropriate and
13 necessary standard.

14 And if I could address the issue of what
15 those two words mean in the reading of the EPA, I would
16 refer the Court to pages 226 and 227 of the National
17 Mining Association cert-petition appendix. I don't think
18 it's necessary to read from it, but what the EPA said
19 consistently throughout this record is we looked at two
20 things. There was a claim made in the legislative
21 history that these chemicals are simply not harmful
22 enough to require any further regulation, that their
23 effects are negligible, and they looked at that issue
24 under the appropriateness rubric. And they said these
25 are harmful chemicals, particularly mercury.

1 In addition, under the appropriateness
2 rubric, they looked at the question of whether or not
3 there were technologies available to regulate them. The
4 necessary rubric was used to look at the post-Clean Air
5 Act post-acid rain health effects that would persist.
6 So they said, A, these are harmful chemicals -- harmful
7 pollutants; and B, under necessary, they will continue
8 to be harmful after the Acid Rain Program has kicked in.
9 And that's how the Court -- the EPA saw the two
10 different words, and it's a perfectly logical way for
11 them to proceed.

12 JUSTICE SCALIA: Who -- who would have
13 guessed? I mean, that seems such an artificial division
14 of -- of necessary and appropriate. Why -- describe it
15 again. I really didn't -- didn't quite understand it.
16 Necessary means what?

17 MR. SMITH: The claim -- everybody concedes
18 that necessary means that there will still be health
19 problems after the Acid Rain Program kicks in.

20 JUSTICE SCALIA: All right. And appropriate
21 means?

22 MR. SMITH: The appropriate was intended to
23 meet the claim made by the -- the industry that these
24 chemicals already are sufficiently harm-free that we
25 don't need to regulate here regardless of the effects.

1 JUSTICE SCALIA: Why isn't that part of the
2 first one? I mean --

3 MR. SMITH: Well, it could have been done
4 that way. They read them separately --

5 JUSTICE SCALIA: I see.

6 MR. SMITH: -- Your Honor.

7 JUSTICE SCALIA: Okay.

8 MR. SMITH: That's the way the government
9 read them.

10 JUSTICE SCALIA: It's a silly way to read
11 them, I think.

12 MR. SMITH: Perhaps so, Your Honor. But the
13 key thing is, the issues that they were directed to
14 study, the issues that were then supposed to control the
15 listing decision were the health effects of the
16 pollutants that come out of these power plants. And
17 they then deferred the issue of considering a cost to
18 the second stage just as occurs with every single other
19 source of the same 189 hazardous pollutants that they
20 were dealing with.

21 And if I could pause here and just clarify
22 one thing about what happened at that listing stage.
23 Natural gas-fired plants were not turned into a
24 category. They looked at the health effects of natural
25 gas-fired plants and said we are exempting them entirely

1 from regulation under this section, under the
2 appropriate and necessary standard because they simply
3 don't emit these chemicals in more than trace amounts,
4 and there's simply nothing for us to regulate. So
5 natural gas plants get taken out at the listing stage.

6 We then have coal-fired and oil-fired plants
7 as to which they begin to apply the subsection (d)
8 standards, standards which were designed by Congress to
9 limit the emission regulation to reasonable amounts,
10 designed because the floors are, in fact, limited to
11 what has already been achieved by comparable plants in
12 the same category.

13 Now, there was some question raised about
14 whether or not this categorization was something that
15 EPA recognized it could use to effect the emissions
16 standards and make them reasonable. In fact, as
17 Mr. Brownell acknowledged, they did use -- create a
18 category -- a separate category of coal-burning plants
19 that burned Lignite, because it turns out that none of
20 the Lignite plants could meet the -- the standards that
21 would otherwise have -- have applied with respect to
22 mercury if they were in the category with the other
23 coal-fired plants.

24 They then through this whole process looked
25 at the issue of categorization. They started out with

1 two coal-fired categories. They ended up with -- and as
2 far as that, with one oil-fired category. In the final
3 rule, there are four separate categories of oil-fired
4 plants, depending on what they burn and how they
5 operate. So this whole process of separating out these
6 categories to produce emissions standards that make
7 sense and are practicable was built into that process
8 under subsection (d) --

9 JUSTICE KAGAN: Mr. Smith, could -- could
10 you just clarify for me that the -- the categorization
11 happens after the listing; is that correct?

12 MR. SMITH: Yes, Your Honor. What they
13 listed was all coal-fired plants and all oil-fired
14 plants, but no natural gas plants. They then go to the
15 question of what emissions standards should occur. And
16 with respect to other sources, that's sometimes years
17 after the listing decision is made. But they then have
18 a process of saying, what are our categories going to
19 be? We have to put out -- we have to get information at
20 that point. What of the top 12 percent of the category
21 would, in fact, are there emissions? You have to --
22 they have to report in. They make a calculation about
23 that.

24 JUSTICE SCALIA: Aren't -- aren't these just
25 requirements above the minimums that automatically

1 apply?

2 MR. SMITH: No, Your Honor. The -- the
3 minimums are established by what the top 12 percent in
4 the category that the EPA has --

5 JUSTICE SCALIA: Yes. But I'm -- I'm saying
6 the categorization that allows you to -- you know, to
7 reduce some people and -- and not to reduce others, that
8 applies to requirements above the minimums. No?

9 MR. SMITH: Your Honor, the -- the minimums
10 are the things that are set by mathematical calculation
11 from the categories. Everything else above the minimums
12 is done taking cost into account under (d)(2) expressly.

13 JUSTICE SCALIA: Yes.

14 MR. SMITH: So the only thing that is done
15 using not express consideration of cost, but
16 consideration of cost indirectly basing the regulations
17 on what the top 12 percent are doing is the minimums.
18 And the minimums are then altered, depending on what
19 categories you establish. That is the way that the
20 regulation has worked for all of the sources that they
21 regulated. That is the -- the practical mechanism --

22 JUSTICE KAGAN: So just to clarify that just
23 for -- for my own purpose, Mr. Smith. It's just you
24 categorize one way, the minimums are down here. You
25 categorize another way, the minimums are up there.

1 MR. SMITH: That's correct, Your Honor.

2 JUSTICE KAGAN: It can make a huge
3 difference in terms of what the minimums are.

4 MR. SMITH: Right. And there's a notice and
5 comment process. They put out proposed categories.
6 They tell them what we -- empirically what we found
7 about what the top 10 -- 12 percent are doing. They
8 then get comments in and they -- as they happened
9 here -- they make different categories in the final rule
10 adjusting.

11 JUSTICE ALITO: How can we -- how can we
12 tell the degree to which costs are taken into account,
13 if they are at all, without knowing what the criteria
14 are for creating these subcategories?

15 MR. SMITH: Well, Your Honor, it's in the
16 statute that they create the categories in applying this
17 12 percent. I don't --

18 JUSTICE ALITO: No, no. The 12 percent -- I
19 thought the 12 percent came into play after you've
20 created the category -- the subcategory.

21 MR. SMITH: Right, as part of the process.
22 It's part of the process.

23 JUSTICE ALITO: But how do I know how they
24 create the subcategories?

25 MR. SMITH: Well, it's -- you can see it in

1 the notice of proposed rulemaking. They say here are
2 our proposed categories: Two coal categories, one oil
3 category. Then they get comment about how -- we are
4 not -- what happens, then, is the people that comment
5 say we're so different from that category. We have
6 these special problems. We need our own separate
7 category.

8 JUSTICE KAGAN: And it's a rulemaking after
9 the rulemaking that applies to the listing; is that
10 right?

11 MR. SMITH: It's totally after that, Your
12 Honor. It's a second phase. It -- it happened here
13 that they announced it all at the same time, but only
14 because there had been an 11-year delay.

15 JUSTICE BREYER: You -- you confirm it was
16 not made up in my chambers.

17 (Laughter.)

18 JUSTICE BREYER: The fact -- the fact is --

19 MR. SMITH: Although they did a wonderful
20 job figuring it out again, Your Honor.

21 (Laughter.)

22 JUSTICE BREYER: You're right. The -- the
23 brief said Congress -- the SG's brief -- unambiguously
24 required EPA to consider costs at the second stage of
25 the regulatory process. That's what it said. A few

1 pages later, they have the statute. So not
2 surprisingly, I read the statute. And -- and reading
3 the statute leads me to think it works along the lines
4 you just said.

5 MR. SMITH: That's correct your honor.

6 JUSTICE BREYER: But if you did have the
7 most expensive set of generators in the world, you would
8 ask EPA to create a separate category for them in which
9 case the top 12 percent would no longer be in your
10 category and you wouldn't have to do it.

11 MR. SMITH: And that's what happened with --

12 JUSTICE BREYER: Now, what I'm asking is if
13 that you think it's the system, that's what I read in
14 the statute. The SG thinks that's the system, but is
15 there a treatise? Is there a -- an explanation that EPA
16 has put out so that it is clear that it was not made up,
17 that it's clear that this is the system that they
18 follow? Would you refer me to a source?

19 MR. SMITH: Your Honor, the only source that
20 I can refer you to -- and perhaps the government can
21 supply something after -- is -- is the notice of
22 proposed rulemaking in the final rule in which all of
23 this categorization process is laid out in -- in
24 exquisite detail. And -- and you can see the comments
25 that come in and say the categories don't work, we need

1 different categories, and they then produce different
2 categories.

3 JUSTICE SOTOMAYOR: I think that Justice
4 Alito --

5 CHIEF JUSTICE ROBERTS: Is there something
6 in the -- excuse me. Is there something in the
7 administrative record where EPA adopts that? When
8 somebody says you're not considering cost. It's a bad
9 thing. We're going to go to the Supreme Court if you
10 don't consider cost, and EPA says, oh, no we're going to
11 consider cost. We're going to consider cost when we
12 categorize the power plants. Is there a reference to
13 the administrative record where there's something like
14 that?

15 MR. SMITH: Well, they certainly said, Your
16 Honor, in the notice of proposed rulemaking, that we
17 interpret the listing decision as being something that
18 is based solely on health and not on cost.

19 CHIEF JUSTICE ROBERTS: The listing decision
20 is not based on cost.

21 MR. SMITH: Right.

22 CHIEF JUSTICE ROBERTS: I want to know if
23 there's anything there that says, but don't worry
24 because we're going to consider cost through the
25 categorization process.

1 MR. SMITH: I don't know whether they said
2 that explicitly. That was so implicit in the whole
3 system. This is a system that's been in operation for
4 other sources for -- since 1990.

5 CHIEF JUSTICE ROBERTS: Well, implicit
6 usually doesn't work when you're talking about an
7 administrative record.

8 MR. SMITH: Your Honor, they gave everybody
9 the opportunity to attack the categories that they, in
10 fact, proposed, based on the argument that they were
11 impractical for them.

12 JUSTICE KENNEDY: But I thought your
13 position was that you didn't need to consider costs at
14 the first step, and that that would include your initial
15 category.

16 MR. SMITH: No, Your Honor, the categories
17 are at the second step. The categories have -- the only
18 thing that they did at the first step is say --

19 JUSTICE KENNEDY: But you didn't take that
20 second step.

21 MR. SMITH: They did, Your Honor. They
22 categorized oil-fired plants into four categories. They
23 categorized coal-fired plants into various categories.
24 And that was all done through a notice and comment
25 process which led, then, to different emission

1 standards.

2 JUSTICE KENNEDY: And are you saying that
3 was done based on cost?

4 MR. SMITH: Yes, Your Honor, it was done --
5 what -- what was feasible for these different
6 technologies.

7 JUSTICE SCALIA: I see. How much money did
8 that save? I mean, do we know how much of the \$9.6
9 billion cost would be reduced by this categorization?

10 MR. SMITH: Well, Your Honor --

11 JUSTICE SCALIA: I mean, that's the problem
12 here, isn't it?

13 MR. SMITH: I don't have that calculus, but
14 I would point out that it's important to recognize that
15 something like 90 percent of that 9.6 billion -- 90
16 percent of the capital cost, which is most of that 9.6
17 billion, has now already been spent. And the industry
18 has not experienced the kinds of upheavals that are
19 being described. The rule takes effect in the middle of
20 April, and so the idea that the result here was somehow
21 ludicrous or outlandishly expensive is belied by the
22 fact that the industry is bringing itself into full
23 compliance.

24 JUSTICE SCALIA: Instead of going to jail?
25 Is that it?

1 MR. SMITH: Complying with Federal law --

2 JUSTICE SCALIA: I mean, it might still be
3 ludicrous, but it had to be done.

4 MR. SMITH: Well, the other thing I would
5 say is the idea that the \$4.6 million benefit is the
6 proper comparator is wrong on so many different levels.
7 First of all, that was a single -- one single health
8 benefit related to mercury. They didn't think --

9 JUSTICE KENNEDY: Is the \$9 billion a year
10 recurring annually, or are you saying that most of this
11 is capital investment one time?

12 MR. SMITH: Most of it is amortization of
13 the capital expenditures that have already been made.
14 That's in all the briefs from the Petitioners. There
15 will be something like 40 percent will be operating
16 costs and 60 percent is amortized capital costs, Your
17 Honor.

18 The industry has been able to do this, and
19 the situation now is we're ready to finally have
20 national standards, which means it's not -- the States
21 that have been regulating in this area very strenuously
22 won't continue to have mercury flowing across state
23 lines as they have. And we have this national, highly
24 competitive electricity market, where some companies
25 have marginal costs that reflect that they're in

1 compliance, and some don't. And that is a problem that
2 really needs to be solved.

3 JUSTICE SOTOMAYOR: Mr. Smith, I just want
4 you to finish your thought. The four million -- the
5 four billion that they are referring to is only mercury.
6 The agency did not quantify all of the other costs for
7 the other HAPs, correct?

8 MR. SMITH: Actually, it didn't quantify
9 many, if not most, of the costs for mercury, because
10 mercury causes developmental delays, attention deficit
11 disorder --

12 JUSTICE SOTOMAYOR: Well, let's put that
13 aside.

14 MR. SMITH: -- all these other things that
15 are not quantified in the rule. It causes
16 cardiovascular problems that are not -- a lot of things
17 mercury does, it's an extremely poisonous neurotoxin.

18 The other thing about the 30 billion to 90
19 billion, that is particulate reduction, and some of the
20 particulate that is reduced is, in fact, HAPs. It is
21 nonmercury metals that go out in the form of particles.
22 It is mercury that sometimes goes out in the form of
23 particles. It is the acid gases, which when they get
24 out into the atmosphere turn into particles because they
25 become aerosolized, they go into your lungs as tiny

1 droplets.

2 So all of those are, in fact, being taken
3 care of in the controls of particulate. It is true that
4 in controlling those HAPs, you use the same technology
5 and you end up controlling a lot of other kinds of
6 particulate, primarily sulfur dioxide, which causes
7 premature deaths. And so when they did the calculation,
8 they said we put these particulate controls in to
9 control HAPs. It happens to also save a lot of lives,
10 because of sulfur dioxide that's not otherwise being
11 controlled. And so we'll tell you all the lives we're
12 saving, not just some of those lives.

13 JUSTICE ALITO: Was this the basis for the
14 EPA's decision? I thought the EPA -- I thought the
15 EPA's position was, it doesn't matter how much the
16 benefit -- how much the costs exceed the benefits, we
17 just will not take costs into account at the listing
18 stage.

19 MR. SMITH: That is correct, Your Honor.
20 They did not consider the cost-benefit analysis at the
21 listing stage. That's based on their reasonable --
22 quite reasonable, I think, interpretation of the
23 statute. The statute, which with respect to every other
24 source, it's conceded you don't do the cost-benefit
25 analysis upfront. This statute came out of a period of

1 regulatory paralysis of 20 years, where the EPA just
2 wasn't regulating effectively.

3 And Congress came in and said we're going to
4 force regulation of these chemicals that are being
5 spewed into the environment and causing all these health
6 effects. It gave one benefit to the power plant
7 industry and said you have three years. You can prove
8 that there wasn't -- there aren't really health effects
9 that are serious. But it didn't give them the benefit
10 of having a cost-benefit analysis done upfront, or
11 create all the discretion in the world on the part of
12 EPA simply to say, we don't think you should regulate
13 this particular category.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Smith.

16 Mr. Lindstrom, you have four minutes
17 remaining.

18 REBUTTAL ARGUMENT OF AARON D. LINDSTROM

19 ON BEHALF OF STATE PETITIONERS

20 MR. LINDSTROM: Thank you, Mr. Chief
21 Justice.

22 Any subcategorization that was going to
23 happen has already occurred, because we're talking about
24 the rule that's been promulgated, and despite any
25 subcategorization that happened, there's still \$9.6

1 billion in costs that are being imposed on an annual
2 basis --

3 JUSTICE SOTOMAYOR: You're asking us -- it
4 wasn't the question presented. Is the question
5 presented that -- not that you have to take that into
6 account at listing, but that somehow that ratio makes
7 any emissions standards wrong --

8 MR. LINDSTROM: The question is whether --

9 JUSTICE SOTOMAYOR: -- even if, for some
10 people, it's really not back-breaking to do it?

11 MR. LINDSTROM: The question is whether
12 costs have to be considered under (n)(1) when you're
13 regulating electric utilities. And there's one thing
14 I'd like to --

15 JUSTICE SOTOMAYOR: They do say it does when
16 you're regulating at the emission standard.

17 MR. LINDSTROM: They say that it's being
18 done -- I guess if you think about this, what happens
19 under 7412(c) is you've got a listing decision, first
20 stage. Then you've got a floor standard. And then
21 you've got an above-the-floor standard.

22 JUSTICE SOTOMAYOR: That's not what --

23 MR. LINDSTROM: In their approach --

24 JUSTICE SOTOMAYOR: You're taking out the
25 categorization. They don't establish the floor until

1 they categorize, correct?

2 MR. LINDSTROM: So categorization could
3 happen here, but my point is, what happens under (n) (1)
4 is these first two steps are merged. You're making the
5 necessary and appropriate determination, when you're
6 looking not to list, but whether such regulation is
7 appropriate and necessary. That's the language in the
8 statute. It says, is such regulation appropriate and
9 necessary.

10 So it's not just whether it's going to be
11 listed. It's looking at what's actually going to
12 happen, so that's why it's -- that's why they did both
13 at the same time. Why they made the appropriate and
14 necessary finding at the same time they published the
15 emissions standards. They were looking at the costs
16 ahead because they didn't know what the costs were going
17 to be to figure out if such regulation --

18 JUSTICE SCALIA: Are you saying that they
19 purported to make the categorization decision without
20 taking into account costs?

21 MR. LINDSTROM: Yes, any categorization
22 they've done has already been done, and they didn't
23 consider costs.

24 JUSTICE SCALIA: And didn't consider cost.

25 MR. LINDSTROM: That's correct. And again,

1 I'd like to return to one of the big picture principles,
2 which is, this is an administrative law case, so it does
3 -- this turns or falls on what the agency actually did
4 below. So they've already actually made determinations.
5 They've said costs are not relevant. They've ignored an
6 important part of the regulatory problem, and adopted --

7 JUSTICE SOTOMAYOR: I'm sorry. They
8 proposed categories, and everybody had the opportunity
9 to say it's the wrong category, correct?

10 MR. LINDSTROM: Yes, Your Honor.

11 JUSTICE SOTOMAYOR: And argue why it's the
12 wrong category.

13 MR. LINDSTROM: And the categories have been
14 adopted

15 JUSTICE SOTOMAYOR: And some people
16 submitted complaints about costs relative to their
17 technology and their kinds of plants, correct?

18 MR. LINDSTROM: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: So, it's not true that
20 -- they proposed them, but everybody gets a chance to
21 tell them, these are -- this technology is different
22 from the others, or this kind of plant is different from
23 the others, and it imposes a cost much greater than you
24 are anticipating.

25 MR. LINDSTROM: I'm saying we're already

1 past that phase. They've already -- any categorization
2 they were going to do has already been done.

3 JUSTICE SOTOMAYOR: No, what you're saying,
4 it's already past. It's past because that's been -- the
5 final rule has been issued.

6 MR. LINDSTROM: Correct.

7 JUSTICE SOTOMAYOR: I'm talking during the
8 rulemaking process. The rulemaking process does permit
9 the agency to consider the cost of technology in setting
10 up categorizations.

11 MR. LINDSTROM: They've adopted the exact
12 opposite position, which is that costs do not matter.

13 JUSTICE BREYER: Well, I thought we just
14 heard -- I thought we just heard that say the Lignite
15 people, I can't remember if that's the right name, but
16 they said, look, we have special ways of producing
17 this -- our stuff, and they are much more expensive, so
18 please don't put us in the same category as you put the
19 other people in. Okay? For the purposes of figuring
20 the best 12 percent, and the agency said, right, okay,
21 separate. Now, did that happen?

22 MR. LINDSTROM: Yes.

23 JUSTICE BREYER: All right. Then how would
24 you do that without considering cost? Because their
25 basis was the Lignite people were saying our costs are

1 more expensive?

2 MR. LINDSTROM: We don't know how they -- I
3 don't know how they did it, but they've said throughout
4 that we're not considering costs.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:46 a.m., the case in the
9 above-entitled matter was submitted.)

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