IN THE SUPREME COURT OF THE UNITED STATES

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CAROL M. BROWNER, ADMINISTRATOR :

OF THE ENVIRONMENTAL PROTECTION:

AGENCY, ET AL., :

Petitioners, :

v. : No. 99-1257

AMERICAN TRUCKING ASSOCIATIONS, :

INC., ET AL. :

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Washington, D.C.

Tuesday, November 7, 2000

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

APPEARANCES:

GENERAL SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

EDWARD W. WARREN, ESQ., Washington, D.C.; on behalf of the Respondents.

JUDITH L. FRENCH, ESQ., Assistant Attorney General, Columbus, Ohio; on behalf of the Respondents.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE RENQUIST: We'll hear argument now on No. 99-1257, Carol M. Browner vs. American Trucking Associations.

General Waxman.

ORAL ARGUMENT OF GENERAL SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

There are two principal issues in this first case and, with the Court's leave, I'll address each in turn. First, the Clean Air Act does not violate the nondelegation doctrine.

The Act prescribes the following: EPA must set national ambient air quality standards for a limited set of ubiquitous pollutants. The standards must be requisite to protect public health with an adequate margin of safety. They must be based on criteria that reflect the latest scientific knowledge about the identifiable effects of the pollutant in the ambient air, and the administrator must consult an independent body of scientific experts and explain any significant departure from its recommendations.

For 30 years, successive administrators have

applied the Act's terms consistently. Requisite means sufficient, but not more than necessary to protect public health with an adequate margin of safety.

Public health addresses not all biological effects, and not even all medical effects, but only those adverse health effects that threaten populations. And identifiable effects means those that are shown to exist not hypothesized. The Court of Appeals --

QUESTION: Did those effects have to be medically significant?

MR. WAXMAN: They do; that is, the legislative history -- says that they must be adverse, which the administrator and the Court of Appeals means medically significant. Now, they have to be also medically significant to a sufficient population to constitute a public health effect.

The Court of Appeals held that the Constitution requires more, specifically the articulation of what it called a determinate criterion to govern the setting of the precise standard for each pollutant. That is contrary to this Court's precedents which require that the Court articulate only an intelligible principle or, as the Court has otherwise put it, that the Court delineate the general policy, the public agency that is to accomplish it, and the boundaries of the delegated authority.

QUESTION: And in simplest terms, what is the intelligible principle here?

MR. WAXMAN: I believe I can say it in one sentence, Justice O'Connor.

QUESTION: Good. Okay.

MR. WAXMAN: For a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.

Now that, in our view, means that Congress has made the fundamental policy choices, and it is also articulated both substantive and procedural constraints on EPA's application of the specified standard. The Constitution simply does not require more.

There is a second issue in the case, if I can outline what our position is.

QUESTION: Before you get off the first issue, you say it's easy to say, but, but, but what does requisite to protect public health consist of? I mean, suppose, you know, the scientific evidence indicates that there is some risk beyond -- below a certain level of pollutant in the air, but that risk has not been -- the extent of that risk has not been scientifically

determined. Now, what is requisite to protect the public health? Everything above zero risk?

MR. WAXMAN: No. Absolutely not. And let me answer your direct question first, and if I can and if it would be helpful to the Court, quickly outline the steps, the serial steps, that the Agency must go through every time the administrator has to modify it.

QUESTION: Well, before we get to the steps, I mean, I don't think that an accumulation of procedures is going to make -- is going to create a criterion that doesn't otherwise exist. What is the criterion? How do you decide how much risk is too much risk, or is that just up to the Agency?

MR. WAXMAN: The Agency looks first based on the criteria documents at the identifiable effects. Those are effects that science has identified will happen to people not hypothesized risks about what might happen. That's number one.

QUESTION: Okay.

MR. WAXMAN: Number two, it then looks at whether those demonstrated effects rise to the level of medical significance, not whether they are -- there is some effect on the biology of a cell, but whether it rises with respect to any person to the level at which a physician applying in this case the standards of the

American Thoracic Society would determine that that person requires treatment, that that person, if you will, is ill or manifesting a significant medical symptom.

QUESTION: That's easy. You are talking about demonstrated effects, but my question went to those areas in which we don't know what the effects are.

MR. WAXMAN: Well --

QUESTION: There is a risk that there may be some effects, but we do not know what they are. What is requisite to protect the public health? Has Congress made clear what's requisite?

MR. WAXMAN: Well, requisite has been defined by the Agency, and it's supported both by the legislative history and the D.C. Circuit, to mean sufficient, but not more than necessary. That is, the Congress could not have been clearer that zero risk or background levels of a pollutant, that is levels that exist in the ambient air without man-made activity, is not what the administrator is aiming for or what the Act is designed to protect.

QUESTION: Okay. Then what is it? It's something above zero, but what is it to decide whether the risk is too much risk?

MR. WAXMAN: Well, perhaps I -- if I may, perhaps I can, to answer your question by reference to either or both of the two pollutants that are at issue

here. With respect to particulate matter, for example, there was a preexisting standard that was set in 1987. The Agency pursuant to the Act's requirements that the standards be reviewed every five years in light of the latest scientific knowledge went back and collected all of the medical and scientific study and prepared them in a criteria document, which is a multivolume set that is reviewed by CASAC, the independent advisory committee, which agreed that it was what it called the best ever compilation of the health effects of small particulate matter on public health.

The EPA then created a -- what is called a staff paper. The staff paper distills the science and organizes the data in a series of recommendations. That, too, was reviewed by CASAC, which agreed that the ranges of concentrations -- and this I think is what you're getting to -- provided the appropriate parameters for the administrator's decision.

Now, with respect to particulate matter, the staff recommended, and CASAC agreed, that it was important to separately measure particulate, fine particulate matter; that is, matter that is equal to or less than 25 micrograms per cubic meter. And if the staff with CASAC's approval set both the upper bound and the lower bound for the administrator's decision based on what the science

revealed.

QUESTION: May I ask you a question right there about the CASAC reviews, so called, the scientific committee. I thought the statute required that committee to advise the EPA of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of the national standards. I mean, the statute does require the scientific committee to look at all those things and to report it to the EPA.

Now, why would Congress want that advice on economic and energy effects if Congress didn't want the EPA to consider those in setting the standards?

MR. WAXMAN: Well, a couple of reasons, Justice O'Connor.

QUESTION: Okay.

MR. WAXMAN: First of all, as I think we'll probably address in some detail in the next hour, the EPA uses costs and feasibility standards in many, many of the things that it does, and it uses the information, this information that CASAC provides for that purpose. For example, in all -- the Act essentially creates a two-part process. The first part is the setting of these national standards that set a floor for ambient air across the whole country and do not apply of their own force to any

source of polluting, whether it's me driving my car or the utility plant that generates my power.

The second part of the Act is implementation; that is, how do you go about achieving these standards, and the states and EPA have vast authority and discretion to determine how that's done, and costs and other implementation factors, like technological constraints, are used at that point to determine what's reasonable. This Court in Union Electric in 1976 pointed out that costs and technological considerations are amply used in the implementation process, so long as they don't avoid it.

QUESTION: But in your view in looking at the standards governing EPA's setting of these national ambient air quality standards, you think that the EPA may not consider any of these economic or cost factors --

MR. WAXMAN: Yes, since --

QUESTION: -- as part of its required consideration of factors in setting?

MR. WAXMAN: The legislative history and the text of the '70 Act are absolutely clear, and the EPA and the D.C. Circuit have been unanimous for 30 years that in the first part of the Clean Air Act, that is in setting the standards, the EPA is to consider only what the criteria documents reveal as the effects on public health

and welfare of the pollutant in the air, and that costs are determined at the implementation phase by the states, by EPA, and by Congress.

Now, your point about CASAC, I think is very important to understand. The CASAC was created in the 1977 amendments, and it was directed to do two things, and it's reflected at pages 112-A and 113-A of the appendix to our petition. First, in 109(d)(2)(b) it is told to review both the criteria, which I was just discussing, and the national ambient air quality standard that EPA proposes in light of its scientific knowledge and what the criteria document reveals, and that is part of the NAAQS standard-setting process, and in this case the CASAC issued what they called closure letters, both with respect to the criteria documents on PM and ozone and with respect to the staff papers on particulate matter and ozone.

You have directed my attention to a separate section of the statute which says that such committees shall also, and then it lists a series of things that it should do. That section, the section that relates to implementation technologies, et cetera relates to the implementation process of the standards. The EP -- for example, with respect to the PM and ozone standards, the CASAC has not yet issued any of that information because the Agency has not yet either begun to implement the

eight-hour standard or the 2.5 standard, or indicated in notice and comment rulemaking how it will go about doing that.

The provision that you have questioned, Justice O'Connor, ties in perfectly with the provision in -- also in Section 7409, I can't remember which subsection it is, which requires the EP -- or maybe it's Section 7408. In any event, I'll explain to you what I have in mind.

The 1970 Act, which required EPA to set national standards for the first time under the 1967 Act, they were set by the states. In the 1967 Act, the states were told to set them by reference to two things that EPA's predecessor, HEW, would supply them. The first was the criteria document accumulating the science data on health effects, which is the same thing we have today. The second thing was a description of costs, pollution control technologies, feasibility, et cetera, and the '67 Act told the states that they were to conform their standards to both of those documents.

Now in 1970, the Congress did two very significant things. First of all, it gave, it made the requirement to set standards mandatory and upon EPA, that is, on a national basis, so we would have a national floor. Then the second thing which is really significant to your question is that it separated out the two things

that EPA was collecting and providing. And it provided that EPA was to still do the criteria documents, but that the NAAQS, the national standards, would be based on those criteria documents only, and the Act provides that at the time that the criteria documents are issued, EPA shall also provide to the states and to Congress information about costs, implementation, and available control technologies so that they can use that information in the standard-setting process that this Court reviewed in Union Electric.

QUESTION: I -- were you finished?

MR. WAXMAN: I can talk until interrupted, but I would prefer to answer questions, of course.

QUESTION: The -- the -- I'm not, don't -- I'm accepting this for the sake of argument only. Don't assume it's my position. But the -- if I look at their argument on the delegation part, the nondelegation part in light of what you have just said, it seems to me that they are saying that when we look at it, specifically the health part, what we are talking about with ozone is coughing outdoor children. And if we look at coughing outdoor children we see with .09 in the air, approximately .9 of 1 percent of all the coughing outdoor children will cough and it will hurt. And if we go to .08, we get .6 of 1 percent and if we go to .07, we get .3 of 1 percent.

See, it's a line they draw between points. 9, 6, 3. And they say there is no way to draw, nowhere to stop on that line. Absolutely not.

Once you take all costs and these other things out of it, why are you protecting the .6 and not the .3? Why the .3, not the .9? That's, I think, what I take it is their main claim on the nondelegation point and so I would like to you respond to that directly.

MR. WAXMAN: I do believe it is their main point, and it is -- it fundamentally misconceives both what the Act requires and what every administrator since 1970 has done. As I was saying before, when the administrator gets the decision, it gets a staff report validated by CASAC that shows the upper bound and lower bound of where a standard should be set based on the application to the latest scientific knowledge of the standard requisite to protect public health, and in this case, you gave the ozone standard, the standard was at the upper level .09 parts per million over an eight-hour period and at the lower level, .07.

Now, the question about why the administrator chose one number within that range is, of course, the question that the Court of Appeals under Section 307(b)(1) to which it will apply the arbitrary and capricious not in accordance with law standard that it has not yet done in

this case, but I can articulate for you why both why no one thought the range should be below .07, that is regulating down to zero risk, and why the administrator chose .07 versus .08. I'll start with the second first to make sure that I get to the salient point.

.07 was, and this is reflected in the Federal Register notice promulgating the rule at pages 38863 to 38868. .08 was chosen over .07 because one, there were no demonstrated adverse health effects below .08. Two, the average responses, even at .08 were typically small or mild. Three, the most certain effects at or below .08 were transient and reversible. Four, .07 is at or slightly above peak background levels in some locations. And five, not one single member of CASAC recommended .07 and in the legal challenges in the Court of Appeals to the standard, no party has challenged the administrator's decision not to go to .07.

.07 was viewed by CASAC and the EPA staff as within the lower range because with respect to two of the six testable health effects or end points or lung function, that is, the ability to exhale, the volume you exhale in one second and symptoms, it was possible to extrapolate from studies done at and above .08 to levels all the way down to zero just by using an arithmetic extrapolation.

QUESTION: Well, fine. I mean, I understand what you are saying, but it still leaves open the question, why aren't transient health effects health effects? I mean, so it's less coughing, and it doesn't hurt as much. Why do you say that that should be ignored?

MR. WAXMAN: There may be certain --

QUESTION: And as for CASAC and the parties not favoring going below what you finally picked, I mean, that can be explained because they, unlike, unlike EPA, may have been taking economic effects into account. You know, if it required closing down the entire, the entire steel industry, for example.

MR. WAXMAN: Justice Scalia, there is no evidence in the record and no basis for an assertion that either CASAC or the EPA or the administrator have done what they have said the law does not permit them to do. That is, to take economic or cost effects into account.

QUESTION: Then come back and tell me, tell me why transient coughing effects are -- shouldn't be considered.

MR. WAXMAN: When there is an observed symptomatic -- as I said, there are six different health effects that are measured, and these are reflected in the staff papers. They range in level from very serious to potentially not serious at all. The first two are

mortality and emergency room hospital admissions. The middle two are: is there inflammation in the lungs, and do the lungs manifest an unnatural responsiveness to pathogens or infection, and the two smaller ones which I addressed as to which there is data below .08 are, does it limit the amount of volume you can expel?

QUESTION: But all you are telling me, General, is that -- is that there are -- there are reasons why one would pick the higher levels and not pick the lower levels. It makes more sense to pick the higher levels, but you still haven't given me a criterion of where you stop. Why not go lower? What's the matter with stopping transient health of adverse health effects?

MR. WAXMAN: There may be some transient effects. Inflammation in the lungs for -- a hospital admission may reflect a transient effect, but the administrator since 1970 has viewed that as by definition adverse.

QUESTION: Is that the principle? Then one of the principles that EPA has applied and can derive from this statute is that transient health effects are not to be taken into account.

MR. WAXMAN: No, I may have misspoken. But there are -- if you are -- EPA concludes that if epidemiological studies show that you are required to go to the emergency

room, they deem that to be an adverse health effect. That is, a medically significant health effect.

What the administrator does when she gets the data within the range is to make a judgment. The statute requires her to make a judgment within that range by reference to three factors. She looks first, Justice Scalia, at the nature and severity of the health effects. A cough is not like a death, obviously. She looks at --

QUESTION: So coughs don't count?

MR. WAXMAN: Coughs may count.

QUESTION: Is that a -- I'm looking for some criterion I can glom on to and say this is the standard. Coughs don't count or transient effects don't count.

MR. WAXMAN: The criterion --

QUESTION: Is there anything that doesn't count?

MR. WAXMAN: The criterion -- nothing that -- anything that does not rise to the level of a medically significant health effect does not count.

QUESTION: That's circular. What is a medically significant health effect? Is a transient cough a medically significant health effect?

MR. WAXMAN: As I explained earlier and as the Agency has explained and the D.C. Circuit has explained, it is a health effect that rises to the level at which a medical professional would deem it to be a concern that

should be treated. In this case, with respect to pulmonary effects, the Agency has always applied the standards of the American Thoracic Society.

I understand, I do understand the question. You are asking for a determinant criterion, but this -- this Court's precedents have not and cannot require an agency with respect to an area where there are many different pollutants, many different kinds of health effects, many different kinds of health effects and many different kinds of science and scientific uncertainty to provide that criterion. She exercises her judgment and explains in the record in detail why she made the choice within the range provided her that she did, and for 20 years, the D.C. Circuit has had no problem applying arbitrary and capricious review to that.

QUESTION: She hasn't said why. She said these things are worse, and we are banning them. These things are not so bad, and we are not going to ban them.

But you could have drawn the line anywhere and said the same thing. You could have gone up from, you know, 0.8 to 1.0 and said the same thing. The things above here are very bad. The things below here are not so bad.

MR. WAXMAN: Justice --

QUESTION: I want a criterion for why she drew the line at 0.8. Now maybe, maybe you don't need it for

the constitutional point. Maybe Congress can leave it to her, you know, to pick a reasonable point. But gee, she has to say the basis on which she picked the reasonable point, at least for the arbitrary or capricious point, don't you think?

MR. WAXMAN: Of course. For the arbitrary and capricious review, she has to explain why she made the decision she made, given what the scientific data showed, what the legal factors are, what the -- and that's test --

QUESTION: Is that an issue before us?

MR. WAXMAN: No, it's not.

QUESTION: Okay. So I mean, your -- your position, as I understand it, is that -- that this determinant point is not necessary to satisfy the delegation doctrine, and the -- and as you have just said, the question of reasonableness or capriciousness is not before us because it was never reached by the court below.

MR. WAXMAN: That is correct. May I reserve? May I reserve the balance of my time?

QUESTION: Yes, you may, General Waxman. Mr. Warren, we'll hear from you.

ORAL ARGUMENT OF EDWARD W. WARREN

ON BEHALF OF THE RESPONDENTS

MR. WARREN: Mr. Chief Justice, may it please the Court:

From what you have already heard this morning, it simply cannot be true that Congress intended for the administrator to make decisions which would cost nearly $50 billion annually by 2010, when the administrator herself frankly admits, and I'm quoting, that she followed no generalized paradigm in making these decisions. Nor could Congress have intended for the administrator to regulate ozone and particulate matter by controlling combustion emissions from every automobile, factory, and commercial activity nationwide when again using her words, she never determined what risk is acceptable through quantification or any other metric, any other metric.

This Court's decisions do not lightly presume that Congress delegated questions of such great economic and political significance to an administrative agency, nor as this Court said in Benzene, in the Benzene decision, do they allow an agency like EPA to regulate broadly across the entire economy without determining what risks are acceptable or unacceptable in an everyday common sense manner.

QUESTION: Can you explain, because this goes to the heart of, I think, of our understanding of your case, why your argument relates to delegation as opposed to the arbitrary and capricious stand, the point at which we ended up with -- with your brother.

MR. WARREN: Yes, Justice Souter. Because the prerequisite, the logically antecedent question for arbitrary and capricious review is an intelligible principle. This Court has for 70 years said there must be an intelligible, substantive principle against which the rulemaking can be conducted, expert advice can be given, and judicial review can take place.

QUESTION: True, but we're living under a regime in which things like just and reasonable and public convenience and necessity pass muster, and so it's not clear to me why the delegation here, in light of those examples, is wrong, as distinct from the argument that what the administrator has done does not satisfy the arbitrary and capricious standard.

MR> WARREN: Let meke one thing absolutely clear from the outset -- it should be clear from our briefs. And that is that we are not saying that this statute does not provide an intelligible principle, what we are saying --

QUESTION: Isn't that the end of the delegation issue?

MR. WARREN: No it's really not, because the Court of Appeals was confronted with an interpretation of the statute from the Lead Industries case and the cases that followed on, which gave rise to the delegation

problem. And so it is true, I think, Justice Souter, to respond to your question, I do, just like General Waxman had to, I have to refer to the statute in talking about the intelligible principle and I will do so this morning in my discussion.

QUESTION: But your defending, Mr. Warren, are you not, a decision that said that said there is no intelligible principle in this statute. To get one, someone has to make it up, either the Court or the Agency.

MR. WARREN: Justice --

QUESTION: What is the intelligible principle in the statute. Surely it's not in the statute that there must be a cost/benefit analysis.

MR. WARREN: If I may. First, we are saying that it is the Lead Industries line of cases that created the delegation problem here. We do argue that there is an intelligible principle in this statute that derives from public health, from requisite to protect the public health. There are a number of other words in the statute which I may get time to deal with in my second argument but I want to focus right now on public health, because I think it brings clearly into focus what is missing from General Waxman's argument.

General Waxman referred to medically significant risks and talked about the American Thoracic Society.

He's talking as if the statute said we want to protect personal health. That's not what the statute says. What the statute says is we want to protect public health, and that difference is terribly significant because let me explain what happened in 1970.

The Senate bill said we want to set national standards which will protect the health of persons, a term that was interchangeable in the previous Act with health of any persons. The House had a bill that said, no, we want to protect public health. Public health was a word that had been used consistently since 1955 in the statute and connoted just what, as we say in our briefs, public health does connote, which is a comprehensive cost included evaluation in order to reduce sickness and to improve longevity of the population.

What the conference committee did is it accepted the House version, public health, which has a meaning which I'm going to be discussing further this morning. And what Mr. Waxman or what General Waxman has been doing this morning is referring to legislative history from the Senate bill from which he -- not just he, I don't want to blame Mr. Waxman -- but EPA has derived this notion of medically significant risks.

QUESTION: And you've derived the notion of cost from public health. I mean, that is as obvious or not

obvious, one or the other, and this regime has been going on -- Lead Industries was 1980, and this debate has been going on and yet when Congress made adjustments, it always made adjustments on the implementation end. It never did what could have been, what could have ended this debate very swiftly.

MR. WARREN: Let me start with the latter part of your question and then kind of trip back to some of the things you said previously. First of all, this is -- the Congress has taken no action with respect to Section 109(b). We all know that. There is not going to be any change by inaction by the Congress. I think surely that's common ground for everybody.

QUESTION: But there has been some action by Congress stretching out the time to achieve attainment.

MR. WARREN: But Congress has never, has never done anything to the central standard-setting provision, and it has never said anything which is different than what I'm saying about public health. And I think for a very good reason. Let me just kind of put those cases in context. I know that you had some role because you were in the Court of Appeals at the time.

But Lead Industries involved a not very ubiquitous pollutant. Lead in the ambient air principally resulted from gasoline emissions which had already been

regulated by EPA, and that case was tried very much as a technological feasibility case, not as a public health case such as we are talking about here. There is no doubt that the standards there protected public health in the very sense that I'm talking about in my argument this morning.

The problem with the decisions following Lead Industries, it's not that Lead Industries on those facts concerning the contentions being made in that case was wrong. It is rather that the Court of Appeals then conflated the idea of technological feasibility with the question -- separate question -- of whether cost and other kinds of countervailing considerations can be taken into account in setting the standards in the first instance.

Now, with respect -- and let me go ahead and say here we are with the two most ubiquitous pollutants, ozone and particulate matter, where the regulatory scheme requires everything I said in my first moments of argument this morning where we are in the last mile, and all of a sudden the question which has been present all along in public health is now front and center.

Now, we talk about the implementation process here. I think two things are significant about what General Waxman had to say about this -- that this morning. First of all, I think he is conceding logically that costs

must play a role or else he wouldn't be making this argument about the implementation phase. But he is misstating with all due respect what this Court's Union Electric decision said. What the Union Electric decision says is that the standards are set by EPA and they cannot be changed when EPA approves a state implementation plan. Those standards are set and whether they protect public health or not, they can't be changed in the implementation process.

QUESTION: But I think it is the case, number one, that the implementation process, may, and I presume does, consider economics when it determines the period of time in which compliance must be reached, and of course, Congress may do that. And so that I think it's wrong on anybody's premises to say that economics is excluded from the process.

Now, it may very well be that if the cost is so horrendous, that there is -- that there is no implementation period in which the cost would not be very great on an annual basis. In 20 years, it's still going to be enormously costly. I think the Solicitor General's response to that, if I understand the briefs, is that, in effect, is the decision that Congress reserved to itself by periodically taking up the question of revising implementation standards as it has, as we are going to get

to, I guess, in the next case.

MR. WARREN: Justice Souter, if I may, this Court's decisions very clearly distinguish between feasibility analysis and cost/benefit analysis. Now, I will say, recognizing you said the opposite, cost in the sense of cost/benefit analysis can never be taken into account in the implementation process at all. Those standards are set, and they can't be modified in the implementation.

QUESTION: Right. Let's assume, let's assume that is so, and I don't believe the Solicitor General will agree, but let's assume it is so. Then I think the government's answer would be Congress has set out the scheme which in effect reserves to Congress the right to revise implementation, and that's the point at which economics definitely will be given its place. But even on your kind of worst case argument, I think the government's response is that's what Congress wanted, and Congress has reserved to itself the power to interfere in the process.

MR. WARREN: First of all, I'm going to be talking about why that isn't what Congress wanted, but let me continue on the implementation part of this. What the Union Electric case says is that only the states can even look at these questions at implementation, and then they can only look at them and say who's going to bear the

burden of the standards that are already set by EPA. I call it triage, but, I mean, I think you get the idea. It's essentially who's going to bear the burden.

QUESTION: And they can say how long their time, how much time will be allowed for that burden to be borne, which has an obvious economic consequence.

MR. WARREN: But even that's not true. Those standards have to be met by the deadlines established by Congress. There is only -- this kind of consideration that you are wishing were there isn't there.

QUESTION: Then the argument is that Congress has reserved something and it shouldn't have reserved it. It should have given the power in the first instance to the administrator.

MR. WARREN: Now, but that -- first of all, I would think that it would be common ground that we don't construe statutes on the assumption that Congress will change them, and that we don't construe the words, because it seems to me when we come to the words here, we come back to what really went on.

QUESTION: But the words that you are ultimately, the word that you are depending on is the term public health as distinct from individual health. You'll say, you say that imports. That implies an economic criterion. And I have to say even as a threshold matter,

I don't know why that implies an economic criterion in some different way than a reference to or a different degree than a reference to individual health would do.

MR. WARREN: Well, I think, the distinction, Your Honor, is very much like the idea of managed care. I mean, what we are talking about is a world of limited resources, and the decision is being made on the population as a whole.

QUESTION: There are other provisions in this very statute --

MR. WARREN: Right.

QUESTION: -- that use the term public health, and then add to the term public health the impact upon the economy. For example, Section 76.12, which commissions a study to analyze the impact of this chapter on the public health, the economy and the environment.

MR. WARREN: And --

QUESTION: You're saying they didn't really have to say economy.

MR. WARREN: No. I'm saying that those three terms, public health, environment, and the economy, overlap and interrelate and so that when -- when, for example, Congress was asking for advice about the effects on the environment, they were not excluding effects on public health and so, too, when they were asking for

effects on public health, they were not excluding effects on the economy. Those terms are obviously set up in such a way that the advice -- they are not mutually exclusive --

QUESTION: There are several other places in the statute where -- where public health is added or, or, or referred to separately from economic effects.

The second problem I have, and I would like you to address that if you can is, I don't see how it helps your delegation problem to simply add the economy to the ineffable pot of things that the administrator is supposed to consider. I mean, I was pressing the Solicitor General on, you know, is, is a -- is a cough too much. I don't know if a cough is too much. I suppose, you know, it's a hard call, but does it make it easier to say, well, you know, if you are going to stop a cough, you are going to -- it's going to cost $1,000 a cough. Well, I don't know.

Does that help you? Is that a clear standard?

MR. WARREN: Yes.

QUESTION: Is $1,000 too much for a cough, or 2,000, 3,000? Why does it give you a standard simply to add, add economic effects to the thing. It still seems to me quite as --

MR. WARREN: We are not, we are not adding factors. We are adding factors that countervail. They're

on the other side of the equation. Could I --

QUESTION: But they're just as indeterminate. It seems to me it's not enough to have other factors on the other side. If you're going to bring more certainty to this statute, you need more determinative factors, not just more factors.

MR. WARREN: Justice Scalia, with all respect, I think that when you add countervailing factors, you narrow the range of outcomes. Let me illustrate by just and reasonable rates which we talk about in our brief. I think you'd have a great big constitutional problem if you didn't take investor interests and consumer interests and weigh them one against the other. That's what Hope Natural Gas says. It upholds that delegation precisely because we --

QUESTION: But I don't see how it, just and reasonable rates. The question that I asked before --

MR. WARREN: Yes.

QUESTION: -- which I think was trying to get your argument --

MR. WARREN: Yes.

QUESTION: All right. I could ask the same question with just and reasonable rates. I could ask the same question with picking out trucking routes or picking out airline routes. I mean, why is this worse than those?

You just say there are interests on both sides, so -- well, there's no way to -- there's no scale in heaven or anything else, other than judgment, that tells us what the just and reasonable rate is in terms of return to an investor, and similarly there's nothing other than judgment that would tell you here how far down the health scale you go before it's not really required by public health.

MR. WARREN: Justice Breyer, the judgment is informed by having countervailing factors. That's the point. This is different because --

QUESTION: Then what you're saying is that if you have 50 countervailing factors you may get a more informed judgment. I agree with you on that, but I now suffer from Justice Scalia's question. That is, I agree with that. I don't see how it's one wit more determinative whether you have 50 factors informing your judgment or one, or two.

MR. WARREN: Justice Breyer, I don't think law and jurisprudence requires determinative outcomes. Justice Scalia likes a world of rules. I understand that. But a lot of law is standards. A lot of law is --

QUESTION: Don't blame it on me. You're arguing for a law of rules. You're --

(Laughter.)

QUESTION: You're saying that Congress can't give this to the EPA unless it holds the rein pretty tight. I thought that's your argument.

MR. WARREN: No, I think -- when you say hold the rein tight, what I'm saying is that public health necessarily conveys and connotes the kind of countervailing factors that I'm talking about. That does not mean the agency lacks discretion. That doesn't mean, just as Justice Breyer was suggesting, that the FPC, when it sets just and reasonable rates, is pinned down to 6 cents rather than 5 cents. That's really not my argument at all. I'm not arguing that we're going to get to a solution of a differential equation. What I'm saying is that you have to have the competing factors.

QUESTION: And the Government says the competing factors, the countervailing factors are identified, among other things, by looking to norms today about the need for treatment. That's a countervailing factor. Do you have to treat it, don't you have to treat it? Is the effect transitory, is it nontransitory? Those are all compared-to-what kind of analyses, and they're saying you get those compared-to-what kind of analyses without having to get into economics at the front end when you're setting the standard, so they say your own argument is met.

MR. WARREN: But with all due respect, they are

bucking the whole regulatory process, because what they're talking about is characterizing a risk. Science helps to characterize risks, I don't doubt that. The question is, how do you manage risks? When you're managing risks you've got to take into account countervailing factors, otherwise you're in the situation that the Court of Appeals, I think, pretty aptly described.

QUESTION: Right, but they're saying that at the standard-setting stage the question is not risk management, the question is risk identification, and we identify the risks by bearing in mind these various countervailing factors. We manage the risk at stage 2, at the implementation stage.

MR. WARREN: But with all respect, Your Honor, they are managing risks when they set those standards because the standards can't be changed in the implementation process. I realize I'm just folding back on the argument I've made previously, but your --

QUESTION: Can I ask a clarifying question?

MR. WARREN: Yes.

QUESTION: Are you saying -- I want to be sure I understand your argument -- that although the terms, requisite to public -- protect the public health are too vague and too standardless, it would be all right if it said, are requisite to protect the public health provided

it doesn't cost too much?

MR. WARREN: No --

(Laughter.)

MR. WARREN: I think my red light's on, but if I can respond to this --

(Laughter.)

QUESTION: I think that's what you're saying. Is that what you're --

MR. WARREN: No, that's not what I'm saying at all. What I'm saying is that requisite to protect the public health itself, in this statutory context --

QUESTION: Includes --

QUESTION: It's not provided it doesn't cost too much --

MR. WARREN: Yes.

QUESTION: Thank you, Mr. Warren.

Ms. French, we'll hear from you.

ORAL ARGUMENT OF JUDITH L. FRENCH

ON BEHALF OF THE RESPONDENTS

MS. FRENCH: Thank you, Mr. Chief Justice, and may it please the Court:

EPA'S promulgation of a revised ozone standard was unlawful because it conflicts with Congress' specific and comprehensive plan for ozone regulation found at subpart (2) of part (d) of the Clean Air Act.

In 1990, Congress rewrote the law that applies to ozone. Congress rejected the old and failed one-size-fits-all approach to ozone attainment. Congress implemented instead a comprehensive and unique scheme that combines realistic expectations with measures of progress. EPA's position has changed repeatedly over the last few years, but there is no question the EPA intends to take us back to that failed approach. For the states, that means a return to unrealistic deadlines, inflexible requirements, and certain failure. We ask the Court to affirm the lower court's judgment that EPA may not implement a different standard.

QUESTION: May it declare one? I mean, one part of this I thought was that the Congress has instructed EPA periodically to review these national ambient air quality standards and revise them based on more current information, so it seems that the obligation on EPA to review and revise is one clear instruction that Congress has given.

MS. FRENCH: Not with respect to ozone, Your Honor. We need to look at Section 181 of the Act. The very first sentence of Section 181, which is the first section of subpart (2), states specifically that each area --

QUESTION: Where do we find the section you're

referring to?

MS. FRENCH: That would be in the brief of respondents American Trucking in Case Number 99-1257, their red brief, at page 15-A.

QUESTION: Thank you.

MS. FRENCH: The first sentence of that section reads that each area designated nonattainment for ozone shall be classified according to table 1 that's provided there, and using -- by operation of law, and using the design value for each area.

The second sentence tells us that the design value is calculated according to the methodology that EPA had in place most recently before November 15, 1990. From those two sentences in table 1, we have a specific standard in place --

QUESTION: So you mean the 1990 standard has to last forever?

MS. FRENCH: That's true, Your Honor.

QUESTION: To 2010, it's still the 1990 standard?

MS. FRENCH: Yes, Your Honor. Congress left no room for EPA to promulgate a different standard. The section, Section 181 is --

QUESTION: So you think Congress intended to prevent the EPA from enforcing new ozone national ambient

air quality standards anywhere in the country?

MS. FRENCH: For ozone, yes, Your Honor --

QUESTION: For ozone.

MS. FRENCH: -- that's exactly correct, and we make that argument based on the specific language of Section 181, in particular, table 1.

QUESTION: Does that have the effect of reading subpart (1) sort of out of existence?

MS. FRENCH: Not entirely, Your Honor. However, there are specific limitations in subpart (1). For instance, in Section 172 of the Act, that's the section that gives EPA its general authority to classify areas and to set specific attainment deadlines, Congress stated in the 1990 amendments that those paragraphs giving EPA that general authority do not apply where those classifications and attainment deadlines have been set in other parts of the Act.

QUESTION: Then Congress --

QUESTION: Well, section (1) will continue to apply for other pollutants --

MS. FRENCH: Exactly right, Your Honor.

QUESTION: -- that are not contained in table 1.

MS. FRENCH: That's exactly right, Your Honor.

QUESTION: And it would apply as to, what is it, the secondary standards --

MS. FRENCH: No --

QUESTION: -- the welfare standards, wouldn't it?

MS. FRENCH: No, Your Honor, actually. Our argument is that subpart (2) would also apply to secondary --

QUESTION: It covers welfare as well as health?

MS. FRENCH: Yes, and it would also --

QUESTION: If Congress wanted to say you can't pass any new tougher ozone standard, why didn't it just say it, instead of having a provision in there that says you should revise it every 5 years?

MS. FRENCH: Your Honor is correct that EPA -- I'm sorry, that Congress could have put it in the negative, that thou shalt not revise the standard. However, they put it in the positive.

QUESTION: They didn't say that you shall revise the ozone standard every 5 years, did they?

MS. FRENCH: No, Your Honor, they did not.

QUESTION: They said, you shall revise standards every 5 years, and that's their general provision. Then they had a more specific provision dealing with ozone which said, this is going to be the standard.

MS. FRENCH: Exactly right, Your Honor, and that more specific language came later in time.

We have the language of Section 181, which gives us a specific standard, gives specific classifications or gives specific deadlines. This is the deal that Congress brokered in 1990 with the states and with EPA. What it gives to us and gave to EPA at the time was certainty, planning certainty, after 20 years of failure. Twenty years --

QUESTION: Was there any legislative history which is where they all got up on the floor even which would be significant to me, not to everyone, where they said and now this means, this means that the EPA has no more power to revise the standards.

MS. FRENCH: There are references, Your Honor, to the number of other kinds of revisions that Congress considered. Congress considered other bills that would have given EPA authority to revise the standard within a certain period of time following the '90 amendments. There were other bills that would have given EPA, for instance, the authority to change the averaging time from say a six-hour standard to a 12-hour standard. What Congress put into place was the specific standard we find in subpart (2) which gives us the one-hour standard using the design value that was in place at the time of the '90 amendments.

Congress did so and it made sense to do so

because of the failure of the 20 years before 1990. We'd had the '70 amendments, or the '70 Act, the 1977 amendments and then leading to the '90 amendments. Attainment areas across -- there were nonattainment areas across the country and Congress got it right this time, after 20 years of failure, we've had 10 years of success. The state of Ohio is a good example of that. Ten years ago today, the state of Ohio ranked third among the 50 states for areas that were out of attainment for ozone.

QUESTION: That's third from the bottom, basically, from a health point of view.

MS. FRENCH: From meeting the standard point of view, yes, Your Honor. We had the most, we are the third highest number of areas out of attainment. Today the entire state of Ohio, as well as the states of Michigan and West Virginia, are completely in attainment and that is only after following Congress' scheme for ozone attainment, not the one-size-fits-all approach that was in effect until 1990. Again, the reason for the '90 amendments was the failure that came before the '90 amendments.

QUESTION: Do you mean now, they're home free forever. You said Ohio is now an attainment area.

MS. FRENCH: That's correct, Your Honor.

QUESTION: So that's it for ozone.

MS. FRENCH: That's it in terms of just having to meet the standard that is currently in place, but even when areas are in attainment, Your Honor, they are not without regulation. There are certainly emission requirements to be met, a permitting review that happens on a continual basis, so the states, the areas that are in attainment are not without regulation to make sure that we continue to maintain that specific standard.

QUESTION: Judge Tatel had a different view of how these two subparts worked, did he not?

MS. FRENCH: He did, Your Honor, and what he suggested was that once an area met the standard, that then EPA could change the standard for that specific area. That doesn't work with subpart (2) for three reasons.

The first is that subpart (2) is a comprehensive scheme that applies nationwide. The second is that Section 172 of the Act takes away EPA's general authority, not just general authority with the 1-hour standard, but its general authority for classifying areas and for setting deadlines. The final reason is that subpart (2) itself in Section 181 refers to areas that are currently in attainment but may fall out of attainment. There are specific provisions in place that would apply subpart (2), and specifically table 1, to those areas. There is simply no room left, whether now, in the future, until Congress

acts to change the specific standard.

We've got an extraordinary case here where Congress balanced the interests, many of the interests that we're talking about this morning with respect to ozone. Congress got it right, and we're asking the Court to simply affirm the lower court's judgment that EPA may not implement the standard, but we are offering as an alternative basis that EPA cannot implement the standard because Congress gave it no authority to revise the standard in the first instance.

Again, we need to look only specifically at Section 181, at the very first sentences, the sentence that provides that each area designated nonattainment for ozone shall be classified in accordance with table 1.

I would be remiss if I didn't state here that we won below. A majority of the D.C. Circuit agreed the EPA had no enforcement authority to enforce a different standard. We are asking the Court to go one step further on alternative grounds, and that is that EPA cannot implement a different standard because it may not revise the standard. EPA's argument is that they cannot implement the standard because it becomes unworkable. It's unworkable because Congress never anticipated that the 1-hour standard would be changed without congressional change.

Just as the states and EPA, I may remind the Court that EP -- this was EPA's bill. This was the President's bill before Congress asking for certainty, asking for a specific standard, a specific set of classifications, and specific deadlines.

QUESTION: Well, never mind --

QUESTION: Thank you, Ms. French.

MS. FRENCH: I see that my time is up. Thank you.

General Waxman, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

GENERAL WAXMAN: Mr. Chief Justice, and may it please the Court:

The state of Ohio is asking this Court to rule that the administrator may not revise national ambient air quality standards for ozone, and that even if she can revise them, that she cannot implement them either for primary or secondary standards.

The District of Columbia Circuit held, in a judgment that no one petitioned from, that the clear language of the statute requires EPA to revise and, as appropriate, promulgate new standards for ozone, and that nothing in Section 181 in any respect impairs her ability to enforce the secondary standard, which is identical, and

we think, therefore, that those questions are not properly before the Court.

What is before the Court is the question of whether, having resolved the legal question before it, which is the challenge to EPA's authority to revise and provide a new standard, the Court of Appeals acted properly in going beyond that and opining, based on some preamble language, to the new rule that EPA promulgated, that EPA could either not implement the new primary standard, or implement it only in conformity with subpart (2), which are the specific implementation provisions that Congress enacted in 1990 for the 1-hour ozone standard.

We think -- we have two submissions. First, there was -- the Court of Appeals did not properly address the issue of how EPA will implement the new standard that it said it had authority to set, because EPA has not undertaken any final agency action to do so, and the time for doing so has not yet come.

Second of all, the question is, because it hasn't engaged in the notice and comment rulemaking about how to implement the 8-hour standard, the EPA has not -- the Court of Appeals decision is perforce phrased in terms of such a high level of abstraction that not even any of the respondents can

agree what the Court of Appeals meant when it said in its third try at this that EPA may implement the 8-hour standard only in conformity with subpart (2), and therefore we think that the Court of Appeals should not have reached this issue.

The administrator will engage in notice and comment rulemaking specifying how the Act is to be implemented at the time that she promulgates the area designations that the states have provided to her and sets the schedule for what are called state implementation plans, and at that point she will have issued a rule and undertaken an action supported by an explanation that this, or the Court of Appeals could review.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Waxman. The case is submitted.

(Whereupon, at 11:14 a.m., the case in the above-entitled matter was submitted.)