

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X

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

v. : No. 99-1257

AMERICAN TRUCKING ASSOCIATIONS, :  
INC., ET AL. :

- - - - - X

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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF GENERAL SETH P. WAXMAN, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF EDWARD W. WARREN, ESQ. On behalf of the Respondents	20
ORAL ARGUMENT OF JUDITH L. FRENCH On behalf of the Respondents	36
REBUTTAL ARGUMENT OF GENERAL SETH P. WAXMAN, ESQ. On behalf of the Petitioners	45

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

2 (10:14 a.m.)

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

6 General Waxman.

7 ORAL ARGUMENT OF GENERAL SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

25 For 30 years, successive administrators have

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

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

9 QUESTION: Did those effects have to be  
10 medically significant?

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

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

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

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

5           QUESTION: Good. Okay.

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

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

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

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

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

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

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

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

19 QUESTION: Okay.

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

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

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

7 MR. WAXMAN: Well --

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

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

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

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

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

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

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



1 revealed.

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

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

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

16 QUESTION: Okay.

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

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

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

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

17           MR. WAXMAN: Yes, since --

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

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

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

4 Now, your point about CASAC, I think is very  
5 important to understand. The CASAC was created in the  
6 1977 amendments, and it was directed to do two things, and  
7 it's reflected at pages 112-A and 113-A of the appendix to  
8 our petition. First, in 109(d)(2)(b) it is told to review  
9 both the criteria, which I was just discussing, and the  
10 national ambient air quality standard that EPA proposes in  
11 light of its scientific knowledge and what the criteria  
12 document reveals, and that is part of the NAAQS  
13 standard-setting process, and in this case the CASAC  
14 issued what they called closure letters, both with respect  
15 to the criteria documents on PM and ozone and with respect  
16 to the staff papers on particulate matter and ozone.

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

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

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

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

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

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

11 QUESTION: I -- were you finished?

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

14 QUESTION: The -- the -- I'm not, don't -- I'm  
15 accepting this for the sake of argument only. Don't  
16 assume it's my position. But the -- if I look at their  
17 argument on the delegation part, the nondelegation part in  
18 light of what you have just said, it seems to me that they  
19 are saying that when we look at it, specifically the  
20 health part, what we are talking about with ozone is  
21 coughing outdoor children. And if we look at coughing  
22 outdoor children we see with .09 in the air, approximately  
23 .9 of 1 percent of all the coughing outdoor children will  
24 cough and it will hurt. And if we go to .08, we get .6 of  
25 1 percent and if we go to .07, we get .3 of 1 percent.

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

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

9           MR. WAXMAN: I do believe it is their main  
10 point, and it is -- it fundamentally misconceives both  
11 what the Act requires and what every administrator since  
12 1970 has done. As I was saying before, when the  
13 administrator gets the decision, it gets a staff report  
14 validated by CASAC that shows the upper bound and lower  
15 bound of where a standard should be set based on the  
16 application to the latest scientific knowledge of the  
17 standard requisite to protect public health, and in this  
18 case, you gave the ozone standard, the standard was at the  
19 upper level .09 parts per million over an eight-hour  
20 period and at the lower level, .07.

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

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

6 .07 was, and this is reflected in the Federal  
7 Register notice promulgating the rule at pages 38863 to  
8 38868. .08 was chosen over .07 because one, there were no  
9 demonstrated adverse health effects below .08. Two, the  
10 average responses, even at .08 were typically small or  
11 mild. Three, the most certain effects at or below .08 were  
12 transient and reversible. Four, .07 is at or slightly  
13 above peak background levels in some locations. And five,  
14 not one single member of CASAC recommended .07 and in the  
15 legal challenges in the Court of Appeals to the standard,  
16 no party has challenged the administrator's decision not  
17 to go to .07.

18 .07 was viewed by CASAC and the EPA staff as  
19 within the lower range because with respect to two of the  
20 six testable health effects or end points or lung  
21 function, that is, the ability to exhale, the volume you  
22 exhale in one second and symptoms, it was possible to  
23 extrapolate from studies done at and above .08 to levels  
24 all the way down to zero just by using an arithmetic  
25 extrapolation.

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

6                   MR. WAXMAN: There may be certain --

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

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

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

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



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

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

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

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

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

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

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

9 QUESTION: So coughs don't count?

10 MR. WAXMAN: Coughs may count.

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

14 MR. WAXMAN: The criterion --

15 QUESTION: Is there anything that doesn't count?

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

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

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

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

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

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

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

23 MR. WAXMAN: Justice --

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

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

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

10 QUESTION: Is that an issue before us?

11 MR. WAXMAN: No, it's not.

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

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

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

22 ORAL ARGUMENT OF EDWARD W. WARREN

23 ON BEHALF OF THE RESPONDENTS

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

1           From what you have already heard this morning,  
2     it simply cannot be true that Congress intended for the  
3     administrator to make decisions which would cost nearly  
4     \$50 billion annually by 2010, when the administrator  
5     herself frankly admits, and I'm quoting, that she followed  
6     no generalized paradigm in making these decisions. Nor  
7     could Congress have intended for the administrator to  
8     regulate ozone and particulate matter by controlling  
9     combustion emissions from every automobile, factory, and  
10    commercial activity nationwide when again using her words,  
11    she never determined what risk is acceptable through  
12    quantification or any other metric, any other metric.

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

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

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

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

15                   MR> WARREN: Let meke one thing absolutely clear  
16 from the outset -- it should be clear from our briefs.  
17 And that is that we are not saying that this statute does  
18 not provide an intelligible principle, what we are saying  
19 --

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

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

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

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

10 MR. WARREN: Justice --

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

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

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

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

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

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

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



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

7 MR. WARREN: Let me start with the latter part  
8 of your question and then kind of trip back to some of the  
9 things you said previously. First of all, this is -- the  
10 Congress has taken no action with respect to Section  
11 109(b). We all know that. There is not going to be any  
12 change by inaction by the Congress. I think surely that's  
13 common ground for everybody.

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

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

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

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

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

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

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

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

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

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

1 to, I guess, in the next case.

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. WARREN: Right.

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

17 MR. WARREN: And --

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

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

1 effects on public health, they were not excluding effects  
2 on the economy. Those terms are obviously set up in such  
3 a way that the advice -- they are not mutually exclusive -  
4 -

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

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

18 Does that help you? Is that a clear standard?

19 MR. WARREN: Yes.

20 QUESTION: Is \$1,000 too much for a cough, or  
21 2,000, 3,000? Why does it give you a standard simply to  
22 add, add economic effects to the thing. It still seems to  
23 me quite as --

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

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

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

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

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

18 MR. WARREN: Yes.

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

21 MR. WARREN: Yes.

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



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

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

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

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

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

25 (Laughter.)

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

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

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

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

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

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

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

19 QUESTION: Can I ask a clarifying question?

20 MR. WARREN: Yes.

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

1 it doesn't cost too much?

2 MR. WARREN: No --

3 (Laughter.)

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

6 (Laughter.)

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

8 Is that what you're --

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

12 QUESTION: Includes --

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

15 MR. WARREN: Yes.

16 QUESTION: Thank you, Mr. Warren.

17 Ms. French, we'll hear from you.

18 ORAL ARGUMENT OF JUDITH L. FRENCH

19 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

25                   QUESTION: Where do we find the section you're

1 referring to?

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

5 QUESTION: Thank you.

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

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

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

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

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

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

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

1 air quality standards anywhere in the country?

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

3 QUESTION: For ozone.

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

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

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

18 QUESTION: Then Congress --

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

21 MS. FRENCH: Exactly right, Your Honor.

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

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

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

1 MS. FRENCH: No --

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

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

7 QUESTION: It covers welfare as well as health?

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

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

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

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

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

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

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



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

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

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

25                  Congress did so and it made sense to do so

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

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

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

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

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

25 QUESTION: So that's it for ozone.

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

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

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

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

1 acts to change the specific standard.

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

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

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

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

6           QUESTION: Well, never mind --

7           QUESTION: Thank you, Ms. French.

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

10          General Waxman, you have 3 minutes remaining.

11                   REBUTTAL ARGUMENT OF SETH P. WAXMAN

12                           ON BEHALF OF THE PETITIONER

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

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

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

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

3           What is before the Court is the question of  
4 whether, having resolved the legal question before it,  
5 which is the challenge to EPA's authority to revise and  
6 provide a new standard, the Court of Appeals acted  
7 properly in going beyond that and opining, based on some  
8 preamble language, to the new rule that EPA promulgated,  
9 that EPA could either not implement the new primary  
10 standard, or implement it only in conformity with subpart  
11 (2), which are the specific implementation provisions that  
12 Congress enacted in 1990 for the  
13 1-hour ozone standard.

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

20           Second of all, the question is, because it  
21 hasn't engaged in the notice and comment rulemaking about  
22 how to implement the  
23 8-hour standard, the EPA has not -- the Court of Appeals  
24 decision is perforce phrased in terms of such a high level  
25 of abstraction that not even any of the respondents can

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

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

14           Thank you.

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

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

19

20

21

22

23

24

25