

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENGINE MANUFACTURERS :

4 ASSOCIATION AND WESTERN :

5 STATES PETROLEUM :

6 ASSOCIATION, :

7 Petitioners :

8 V. : No. 02-1343

9 SOUTH COAST AIR QUALITY :

10 MANAGEMENT DISTRICT, ET AL. :

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12 Washington, D. C.

13 Wednesday, January 14, 2004

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 10:12 a.m.

17 APPEARANCES:

18 CARTER G. PHILLIPS, ESQ., Washington, D. C. ; on behalf of
19 the Petitioners.

20 THEODORE B. OLSON, ESQ., Solicitor General, Department of
21 Justice, Washington, D. C. ; on behalf of the United
22 States, as amicus curiae, supporting the Petitioners.

23 SETH P. WAXMAN, ESQ., Washington, D. C. ; on behalf of the
24 Respondents.

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P R O C E E D I N G S

(10: 12 a. m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1343, Engine Manufacturers Association and Western States Petroleum Association v. the South Coast Air Quality Management District.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

In 1967, Congress enacted section 209(a) of the Clean Air Act, which is reproduced in the petitioners' brief at page 1. That statute prohibits States and their localities from adopting or attempting even to enforce, quote, any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.

In this case, a political subdivision of the State of California has adopted fleet rules that prohibit the purchase by certain fleets of various classes of -- of vehicles that are otherwise certified for purchase in the State of California and, indeed, have essentially precluded the purchase by those organizations of diesel-fueled vehicles in toto.

QUESTION: Mr. Phillips, this is a facial

1 challenge?

2 MR. PHILLIPS: Yes, Justice O'Connor, it is a
3 facial challenge.

4 QUESTION: Claiming total preemption.

5 MR. PHILLIPS: Yes, claiming total preemption.

6 QUESTION: What if we were to think that at
7 least as applied to the district's own purchases of
8 vehicles, that it could limit itself to what kinds of
9 vehicles it wanted to purchase and therefore is valid at
10 least in part?

11 MR. PHILLIPS: Well, the -- there are two
12 answers to that. One, the district doesn't need a statute
13 in order to purchase its own vehicles. There is no basis
14 for adopting a standard that controls that particular
15 situation.

16 QUESTION: Well, but let's suppose it wants to
17 establish a standard to apply now and in the future for
18 itself and for any other jurisdiction, public
19 jurisdiction, within its area?

20 MR. PHILLIPS: Well, if it goes beyond --

21 QUESTION: If it's authorized to do that.

22 MR. PHILLIPS: Well, if it goes beyond what it
23 wants to purchase itself and imposes requirements on
24 others, then it seems to me that's a standard that falls
25 within the ambit of the preemption.

1 QUESTION: What if -- what if the State -- what
2 if the State of California says that all of our officials,
3 including the Governor, shall have a low emissions
4 vehicle?

5 MR. PHILLIPS: I think that -- that there is a
6 serious question as to whether or not that would be
7 preempted. I -- I don't think it's presented, obviously,
8 by the particulars of this case. I mean, it still look --
9 sounds like a --

10 QUESTION: Well, but it seems -- it seems to me
11 that -- that it is from -- from the standpoint of -- of
12 governmentally owned and operated vehicles.

13 MR. PHILLIPS: Well, I think the answer to the
14 question at the end of the day, Justice Kennedy, would be
15 that you would require a clearer statement from Congress
16 than what you have in section 209(a) to interfere with the
17 kind of purchasing decisions that localities are -- are
18 making in contrast to this.

19 QUESTION: Right, but -- but it seems to me not
20 -- not an answer to Justice O'Connor's concern to say that
21 it goes beyond the particulars of this case because when
22 you make a facial challenge, you are going beyond the
23 particulars of this case.

24 MR. PHILLIPS: Well, I understand that, Justice
25 Scalia. Well, there are two answers to that, one that I

1 was trying to answer before which is I don't think that
2 this provision actually covers that particular situation
3 because you don't need this provision in order to have
4 authority as a local jurisdiction to make purchases on
5 your own as to what you're going to buy. That's not, I
6 don't think, a standard within the meaning of the statute.

7 But second of all, I also don't think that the
8 -- it must be unconstitutional in all respects as the
9 controlling standard of law in this particular context
10 either. It is clear that there is a significant component
11 of this -- of these fleet rules that is preempted, and
12 perhaps all of them are preempted. But we were dismissed
13 out at the earliest stages of these proceedings without an
14 opportunity to demonstrate the metes and bounds of the
15 regulations as they would particularly apply at this -- at
16 -- at this particular juncture.

17 QUESTION: No, but we may --

18 QUESTION: I'm still not sure -- sure where we
19 are. It -- it seemed to me that the regulation talks
20 about some private vehicles, trash hauling and airport
21 shuttles, but it also talks about exclusively
22 governmentally owned vehicles. And it seemed to me that
23 the State can do whatever it has -- whatever standard it
24 wants for its own vehicles.

25 MR. PHILLIPS: Well, our -- our challenge is not

1 intended, frankly, to interfere with the local
2 jurisdiction's ability to purchase their own vehicles on
3 their own behalf.

4 QUESTION: Local jurisdictions. I mean, you
5 know, what's that? Are you saying that it is a standard
6 if the City of Los Angeles has a regulation through the
7 city council that applies to the purchasing of every
8 little local area? Or suppose the State of California has
9 a general regulation respecting only governmental
10 purchases. Are you saying right now that all those -- in
11 other words, rules, regulations, standards, practices by
12 the State of California or some part thereof -- that does
13 nothing more than control purchasing by governmental units
14 of that State is fine? They can do that.

15 MR. PHILLIPS: Yes. That's what we're saying.

16 QUESTION: All right.

17 MR. PHILLIPS: We don't -- we don't have any
18 challenge to that.

19 QUESTION: In that case we're now down to the
20 possibility that we're talking about some garbage trucks,
21 I think, and some airport vehicles because I think all the
22 rest of it did just involve the State.

23 MR. PHILLIPS: Well, it's difficult to know
24 precisely what the metes and bounds of it is, but the
25 portion of this that offends us and the portion that we

1 think does not require a clearer statement, which is that
2 which goes directly to non-governmental entities. If --
3 if you're talking about regulating the purchasing choices
4 of pure governmental entities, then you expect Congress to
5 speak with a -- with a clearer voice.

6 But the purpose of these fleet rules is not
7 simply to restrict the purchases by governmental entities.
8 It is quite clear that the purpose of these fleet rules is
9 to regulate the purchasing choices that are made with
10 respect to a much broader scope of purchasing entities,
11 including private entities, and it is that portion of the
12 regulation, frankly, that we are challenging and
13 challenging on its face.

14 QUESTION: Mr. Carter, if these regulations had
15 been adopted by the State of California rather than a
16 regional district as its 246, in -- in lieu of the Federal
17 plan, would that have been permissible?

18 MR. PHILLIPS: Assuming, Justice Ginsburg, that
19 you -- that California took -- complied with all of the
20 requirements of section 246, and there are specific
21 requirements in order to get a -- in the -- in the State
22 action plan that -- State implementation plan that need to
23 be satisfied. But to be sure, the Congress clearly
24 envisioned that for States with nonattainment problems,
25 that they would be able to use fleet restrictions as a

1 mechanism for promoting their overall emissions quality.

2 QUESTION: So your objection is to this on a
3 regional basis. Statewide you say is permissible provided
4 you follow -- I guess you need EPA approval?

5 MR. PHILLIPS: Yes, providing you comply with
6 the standards of section 246.

7 QUESTION: But -- so -- but the substance of it
8 would be okay statewide. So -- so --

9 MR. PHILLIPS: Well, I don't know if the precise
10 terms of this -- of these rules would qualify under
11 section 246 or not. Nobody has actually analyzed that
12 point, but the truth is it's clear that you could have
13 certain fleet rules implemented that are consistent with
14 section 246.

15 But realize, Justice Ginsburg, that what -- by
16 saying all our concern is is that every -- every one of
17 thousands of jurisdictions can impose purchase and sale
18 requirements on vehicles --

19 QUESTION: Well, it's not sale requirements.
20 It's a purchase requirement.

21 MR. PHILLIPS: Well, under the respondents'
22 theory of this case which limits the term standards to
23 production mandates imposed on manufacturers, then it
24 seems to me that it clearly extends to all purchases and
25 sales and whether it extends to fleets, it wouldn't --

1 it's not limited to fleets at all. Under the respondents'
2 theory of this case, the field that has been preempted
3 here really is limited to the manufacturers. And to allow
4 every local jurisdiction to come in and bring forth
5 additional requirements is to make a hash out of a scheme
6 that was clearly designed to create a unitary market for
7 the manufacture, sale, purchase, and licensing of new
8 motor vehicles.

9 QUESTION: Well, if -- if one local jurisdiction
10 affects other governmental jurisdictions, but the latter
11 don't care, then it's just as if, as the hypothetical just
12 posed, the State had the -- had -- had the rule.

13 Is there sort of an ultra vires component to
14 your argument that this -- that this district here is
15 affecting what other governmental entities can do and
16 that's the problem?

17 MR. PHILLIPS: Well, this Court has long
18 recognized that you can't analyze a preemption case solely
19 on the basis of the single action by a single actor, that
20 in fact you have to consider the possibility that all 50
21 States or, in this case, every local jurisdiction could
22 follow suit.

23 And remember, it's not just follow suit with
24 respect to this kind of fleet rules under the respondents'
25 theory of this case, which is that all purchase and sale

1 restrictions --

2 QUESTION: Well, I -- I had not understood your
3 argument to be based on any conception that this
4 particular district would be treated differently than the
5 State as a whole, but I -- I -- am I wrong in that?

6 MR. PHILLIPS: Well, the State of California
7 would have certain prerogatives, obviously, under the
8 entire scheme that are different, but even if California
9 had simply done what the district did here, which is to
10 just announce a set of fleet rules, not made any effort to
11 comply with 246, not made any effort to comply with
12 section 209(b) --

13 QUESTION: Well, what -- what does -- what does
14 246 provide?

15 MR. PHILLIPS: Section 246 provides that in
16 certain nonattainment States, one of the options they have
17 available in order to eliminate the overall -- or to -- to
18 improve the overall ambient air quality is to adopt
19 certain types of fleet rules. And the provision is very
20 lengthy. It's very detailed about -- and you have to
21 include that in your State implementation plan.

22 What California did was it used the substitute
23 route and adopted its LEV rules saying that those would be
24 equally effective.

25 QUESTION: So it didn't comply in your view with

1 246.

2 MR. PHILLIPS: Oh, it clearly didn't comply. I
3 don't think there's any question that California has made
4 no effort to satisfy the Clean Air Act with respect to
5 this. But this Court --

6 QUESTION: Your -- your argument, as I
7 understand it, going back to your answer to Justice
8 Ginsburg, is that although there is an avenue for the
9 State, as it were, to get where -- where it might want to
10 go on a -- on a fleet policy under 246, the district
11 simply does not have that avenue open to it.

12 MR. PHILLIPS: Yes, that's absolutely clear.

13 QUESTION: Yes.

14 MR. PHILLIPS: And that's -- and that's part of
15 the way this entire scheme operates.

16 QUESTION: But that gets me back to my question.
17 If we disagree with you, to the extent we think some
18 application of the district's fleet rules are not
19 preempted, then how does that leave your challenge, which
20 is a facial one?

21 MR. PHILLIPS: Well, I -- I think the answer is
22 that there are various components of the fleet rules, and
23 I think unlike if you're -- if you're seeking pre-
24 enforcement of a statute, where you'd have to find every
25 application of it, the question is are there subcomponents

1 of these rules that are properly challengeable and
2 therefore properly enjoined rather than being allowed to
3 go in. I don't -- I don't understand --

4 QUESTION: That eliminates the doctrine
5 entirely, I mean, the doctrine that facial challenge has
6 to show the statute is -- is invalid in all its
7 applications. You could always say, well, we're not
8 challenging all of its applications. We're -- we're just
9 challenging this particular set of applications. I mean,
10 that -- that --

11 MR. PHILLIPS: Well, no, Justice Scalia, I think
12 it's a little more complicated than that because what
13 you're really talking about is a -- is a host of rules.
14 And if you look at the appendix to the respondents' brief
15 with all of the rules that are laid out there, there are
16 literally dozens of rules. And in order to challenge the,
17 quote, fleet rules in the sense of recognizing that there
18 are clearly areas of those rules that intrude into
19 preempted Federal activities, it doesn't seem to me that
20 you have to challenge the entirety of the rules. You
21 should be entitled to pick those rules that you're going
22 after and a complaint and go forward. And that's --

23 QUESTION: But --

24 MR. PHILLIPS: -- that's what we've done. I
25 understand if you have a simple unitary statute that

1 you're challenging, the Salerno rule may suggest that the
2 statute has to be unconstitutional in all its respects,
3 but if you adopted a rule that if part A is good and part
4 B is not good, you should be allowed to -- to challenge
5 part B facially without worrying about part A.

6 QUESTION: But I thought -- I thought this was
7 the case in -- in which part A applies both to the
8 district, as in Justice O'Connor's question, and to non-
9 governmental entities so that it's not that A applies to
10 -- to one kind of buyer and B to another. There's a --
11 there's a rule that applies to buyers. And Justice -- and
12 correct me if I'm wrong. Justice O'Connor's question in
13 effect says, if there is a substantial -- if there is an
14 application of that rule that in a substantial number of
15 cases at least would not be preempted, then isn't that the
16 end of the facial challenge?

17 MR. PHILLIPS: And my answer to you is I don't
18 think that's the proper application of Salerno and I don't
19 -- I mean, I recognize --

20 QUESTION: I'm not applying Salerno. I'm -- I'm
21 applying a substantial application rather than a one-
22 instance kind of rule. And -- and your answer to that
23 was, well, we don't have to challenge all rules. We could
24 challenge A but not B. And my response is the rule that
25 covers the governmental situation and the private

1 situation is the same rule, and if that rule has a
2 substantial number of constitutional applications or -- or
3 non-preempted applications, doesn't that, in -- in effect,
4 defeat the facial challenge?

5 MR. PHILLIPS: Well, except for the fact that if
6 -- if we don't get past the ruling of the court below at
7 this stage, which is that none of this is preempted, that
8 -- whether it's a facial challenge or a non-facial
9 challenge, we're going to have rules that are out there
10 that are being implemented at this stage and will be
11 upheld as constitutional under the Ninth Circuit's ruling
12 as the -- as the controlling rule of law, and we won't be
13 in a position even to get at any portion of those rules
14 that are clearly unconstitutional because they --

15 QUESTION: You can, can you not -- I'm just
16 trying to draw this back because it seems to me you're not
17 challenging the public part. So if you're not challenging
18 the public part, then -- I've looked at pages 7 and 8 of
19 the SG's brief where he's listed these rules.

20 MR. PHILLIPS: Right.

21 QUESTION: And I take it what you're challenging
22 is rule 1194 insofar as it applies to private operators.

23 MR. PHILLIPS: Right.

24 QUESTION: Rule 1193, the same, and rule 1186.1,
25 the same, and nothing else.

1 MR. PHILLIPS: I think that --

2 QUESTION: In each of those rules, having looked
3 at them, it does say at the beginning, these apply to
4 public and private. So I take it it's those two words,
5 and private, written in the text of those rules that
6 you're challenging.

7 MR. PHILLIPS: That -- that is our -- I mean,
8 our primary concern. The -- the problem here is --

9 QUESTION: Well, but that's what you're
10 challenging, nothing else.

11 MR. PHILLIPS: Right. Well, I mean, the
12 question is whether or not -- I mean, I'm not sure that is
13 precisely what we're challenging. It seems to me there is
14 a difference between a public entity deciding on its
15 own --

16 QUESTION: Yes.

17 MR. PHILLIPS: -- that it will make a certain
18 purchasing decision as a purchasing decision. There is a
19 fundamentally different proposition when another entity
20 demands that it must make a purchasing decision based on
21 emissions control.

22 QUESTION: What do you mean? Another public or
23 private?

24 MR. PHILLIPS: A public entity.

25 QUESTION: Oh.

1 MR. PHILLIPS: What I was saying is -- what --
2 what I meant to answer your question earlier, Justice
3 Breyer, was to say if you're asking me can public entities
4 make purchasing decisions free of the restrictions of the
5 Clean Air Act, I think the answer is yes because I don't
6 think Congress spoke to that.

7 But if what you're saying is can a -- can one
8 governmental entity demand that another governmental
9 entity make a decision for purely environmental reasons
10 and not as a -- as a contracting matter, no. That seems
11 to me is still a standard --

12 QUESTION: Well, now just let's think --

13 MR. PHILLIPS: -- that controls emissions and is
14 unconstitutional.

15 QUESTION: -- of the complexity of State and
16 central government in light of what you just said. You're
17 saying that the State of California board A couldn't say
18 all the -- I mean, I don't know where to go with this. Do
19 you see -- do you see the problem?

20 MR. PHILLIPS: No, but the -- the problem is
21 much simpler than that, Justice Breyer, because there's a
22 scheme in place where if you don't like the way the
23 regulatory arrangements are worked out, you can take the
24 issue to California and California can take it to the EPA.

25 I mean, the whole purpose of this enterprise was

1 to devise a unitary market and make it very simple. And
2 there's nothing in the -- in the suggestion that --

3 QUESTION: -- the merits. My problem is to try
4 to figure out what's being challenged.

5 MR. PHILLIPS: Well, we're challenging the
6 effort by the district to impose these kinds of
7 requirements, these standards which control emissions.

8 QUESTION: On its --

9 QUESTION: But if California --

10 MR. PHILLIPS: On everyone.

11 QUESTION: -- if California accepts that as a
12 matter of its domestic law, who are we to say otherwise?

13 MR. PHILLIPS: Well, because that's what the
14 Clean Air Act is all about. California is free to do that
15 if it complies with section 209(b) which says you can
16 obtain a waiver. You can make these the Federal
17 standards. I mean, there's no question that these fleet
18 rules could have been adopted by the State of California
19 and be approved by the EPA and be operating completely
20 tomorrow if they want to go through that process. That's
21 the specific process Congress had in mind, a process that
22 the district has abandoned. And all we're suggesting is
23 that's what they ought to do.

24 MR. PHILLIPS: Mr. Phillips, I don't want to
25 intrude into your time, but I -- I hope you have time to

1 comment on your adversary's argument that the word
2 standards just refers to numerical figures and so forth
3 and that you -- you have a -- it means the same thing when
4 the government is -- Federal Government is implementing
5 its own standards and it is in this provision. Do you --
6 do you have a response to that basic argument?

7 MR. PHILLIPS: So there -- there are two answers
8 to that. One, section 202 is not limited to production
9 mandates, those kinds of numerical standards, even -- even
10 within 202. And second, the language that -- that
11 Congress used about standards relating to the control of
12 emissions is inherently broader than 202 in any event, and
13 if you expected 209 and 202 to be read in para materia,
14 you would have expected Congress to cross reference.

15 QUESTION: Because they were enacted at
16 different times, I think, the two sections.

17 MR. PHILLIPS: They were enacted at different
18 times.

19 QUESTION: Yes.

20 QUESTION: What about the distinction between
21 standard and requirement?

22 MR. PHILLIPS: Well, the use of requirement in
23 the second sentence is simply a recognition that there
24 could be standardless requirements imposed by States
25 requiring a certification or some other kind of

1 documentation that don't have standards. So the first
2 sentence deals with standards and the second one deals
3 with standardless obstacles to implementation.

4 If I could reserve the balance of my time.

5 QUESTION: Very well, Mr. Phillips.

6 General Olson, we'll hear from you.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

12 The South Coast rules prohibit the purchase of
13 certain motor vehicles and require the purchase of others
14 based on explicit emission standards. Under respondents'
15 reasoning, every other State and local government agency
16 in the United States could adopt its own individual and
17 unique blend of prohibited and permitted motor vehicles.
18 But --

19 QUESTION: General Olson, does -- does the
20 Government take the position that petitioner has just
21 taken, that these rules are invalid even insofar as they
22 apply to governmental subdivisions in California?

23 MR. OLSON: I think the answer is -- is no, but
24 let me explain, that to the extent that agencies of
25 government, the State or subdivisions, are purchasing

1 their own vehicles, we do not contend that that is
2 unconstitutional. They can purchase --

3 QUESTION: No, no. I'm not talking about
4 whether their doing of it is unconstitutional. Whether
5 the State's -- whether the State's prescribing that they
6 do it violates the statute.

7 MR. OLSON: Our -- our position -- I don't --
8 I'm not sure I know the answer to that because I don't
9 know what authority this agency has with respect to
10 requiring different units of -- of the government of the
11 State of California to purchase or not purchase vehicles.
12 And it hasn't -- it's not a subject that was briefed, if
13 at all, extensively in the briefs.

14 But the -- the force -- the force of the
15 preemption provision here is that Congress determined that
16 there should be a uniform standard with respect to
17 controls on the emissions of motor vehicles. California
18 was given an exception provided that certain requirements
19 were met. This is in section 209(b) that these provisions
20 be submitted to the EPA and approved under a process
21 that's open and transparent and allows the national agency
22 to make sure that there are uniform standards that can be
23 met that also comply with the requirement that the
24 national economy not be disrupted, so that there would be
25 different -- by different standards in every little

1 community of the United States. That's the thrust --

2 QUESTION: Has it happened, General Olson? One
3 pier that you raise is if -- that -- if this district can
4 have these fleet rules, so can every district in the
5 country, and these -- these rules have been in operation
6 now for some years. Have other districts in other States
7 copied what this one has done?

8 MR. OLSON: Not that I know of. They've --
9 they've only been in existence since the year 2000. The
10 -- the district was given the authority to adopt these
11 rules in 1987, if I'm correct, did not adopt them until
12 the year 2000.

13 The arguments -- the principal arguments that
14 are made by respondents that standards are production
15 mandates finds no basis in the statute. The language of
16 section 202 or section 209 is not so limited. The -- what
17 -- what section 202 and 209 do, talk about emission levels
18 or emission standards.

19 And there should be no mistake about it. These
20 fleet rules are directly related to emission standards.
21 One of them, for example, rule 1194, uses the phrase,
22 emission standards, 12 times and it requires all
23 purchasers to be vehicles that meet certain emission
24 standards, adopting by reference the State of California
25 CARB rules. It picked out a subset, as the respondents

1 put it, of one in column A, two in column B, no diesel.
2 There must be some clean fuel. It's another -- it's a
3 totally different package.

4 And Palm Beach County or -- or Waco -- the City
5 of Waco could do something exactly like what the
6 respondents are contending because they say the controls
7 with respect to emissions don't apply if they're
8 purchasing requirements.

9 EPA, in fact, enforces the standards that it
10 adopts under section 202 pursuant to the provisions of 203
11 by restricting the sale or introduction into commerce of
12 motor vehicles and under section 219, under certain
13 circumstances, the purchasers of fleets, bus fleets. So
14 the implementation of the limitations that -- that -- the
15 standards that EPA adopts are through purchase
16 restrictions or purchasing restrictions. They're not
17 production mandates. It's my understanding and I'm
18 informed that the EPA has never implemented the Clean Air
19 Act with respect to production mandates. They say what
20 can be sold or what can be purchased.

21 QUESTION: But -- but, Mr. Olson, why can't a
22 local agency or community decide it's going to buy
23 vehicles and will buy no diesel vehicles? And why is that
24 the imposition of a standard?

25 MR. OLSON: Well, it is not -- we -- we are not

1 contending, Justice O'Connor -- I want to make it very
2 clear that local agencies, San Francisco or Los Angeles,
3 can put for their own vehicles anything they want. This
4 district -- I -- the -- the --

5 QUESTION: Well, does this district have the
6 authority to so provide for its own purchases?

7 MR. OLSON: For its own purchases. If it -- I
8 don't know whether it does or not. This is a quality
9 control district. I don't know how many vehicles they
10 have.

11 QUESTION: Does it have authority to -- to make
12 that requirement for cities within its jurisdiction?

13 MR. OLSON: We don't think that it has the
14 authority to require other governmental agencies based
15 upon emission standards to do something.

16 QUESTION: Well, that's a matter of State law.

17 MR. OLSON: That is a matter of State law, and
18 it's -- and -- and what we're talking about here is the
19 requirement by particular agencies to pick out different
20 types of motor vehicles that may or may not be sold.

21 QUESTION: Well, I suppose the separate States
22 could do that for its own purchases.

23 MR. OLSON: For their own -- for their own
24 purchases, Justice Kennedy.

25 QUESTION: All right.

1 QUESTION: -- they can't --

2 QUESTION: And could they also do that for all
3 their governmental subdivisions? The State of Nebraska
4 says that the State and all of its subdivisions will have
5 some very strict standards --

6 MR. OLSON: I agree with the -- with the way
7 that the Chief Justice put it, that that's their own
8 purchasing decisions, and it's a matter of State law as to
9 whether they can -- but that is not what this case is
10 about.

11 This case is about whether the South Coast
12 district can impose those standards, including Federal
13 Government vehicles, postal vehicles, FBI vehicles,
14 private vehicles that go to the airports and so forth.
15 And the justification that they say is that we can control
16 the sale of motor vehicles willy-nilly by -- by
17 controlling the purchase. By controlling the purchase,
18 you control what can be sold and thus can what be
19 manufactured. They are claiming an authority in southern
20 California that they -- that they claim the EPA doesn't
21 even have.

22 QUESTION: Maybe, but most of what it covers is
23 simply the -- the purchase by governmental units. If you
24 acknowledge that the State can require its subdivisions to
25 -- to purchase only certain kinds of vehicles, as you've

1 just acknowledged, why can't the State create a district
2 as here and allow that district to require --

3 MR. OLSON: Justice --

4 QUESTION: -- subdivisions to purchase only --

5 MR. OLSON: From the standpoint of the United
6 States Government, we're not contending that the State or
7 an individual can choose whatever vehicle he or she or it
8 wants to purchase. What we're contending is that the
9 whole scheme of the EPA and the Clean Air Act and the --
10 and the preemption provisions prevent different agencies
11 by using the -- the mechanism

12 The entire argument that respondents advanced
13 here, by using the word -- by -- by prescribing what can
14 be purchased, they can -- they can control what vehicles
15 will exist and what vehicles will be run. It isn't
16 limited. The authority that they're claiming isn't
17 limited to their own vehicles. This same authority --
18 they would make the same arguments if the South Coast
19 District said all persons or all persons that have more
20 than one vehicle or all persons that live in a certain
21 portion of southern California. The authority that they
22 claim by using the word purchase, which is not in the
23 statute, is not in the preemption provision, and is an
24 authority that the -- the EPA specifically uses to a
25 certain extent under section 219 --

1 QUESTION: General Olson, you mentioned that
2 there are Federal vehicles involved, postal vehicles, but
3 you also are stressing purchase. Suppose the Federal
4 Government buys its vehicles that it's going to operate in
5 California in Nevada. These rules wouldn't apply. So the
6 -- the United States is not inhibited in any way in its
7 purchases, is it?

8 MR. OLSON: Well, A, I think that is an
9 inhibition. B, I think the respondents will say that
10 these -- these purchasing requirements are imposed upon
11 fleet owners that -- that requires them to make purchases
12 of certain vehicles. So I think the premise of your
13 question is not correct.

14 If southern California or if the State of
15 California wishes to impose fleet requirements, there is a
16 mechanism. It's a logical, consistent, transparent, open
17 mechanism under -- that was thoughtfully put out by
18 Congress. The whole mechanism is thoughtfully calibrated
19 by Congress to allow the EPA to make judgments. Does this
20 make sense from a national standpoint? Will this make
21 sense from other States' standpoints? Is it -- will it
22 impose a dislocation on the marketplace for motor
23 vehicles?

24 The twin objectives of the Clean Air Act are,
25 one, to produce cleaner air, but two, to do it in a way

1 that does not disrupt the national economy and the
2 marketing of motor vehicles, which is an important part of
3 the economy of this Nation.

4 QUESTION: Just so I have it clear, because it
5 -- this is very important to me. It's your position that
6 the State may require municipalities only to buy certain
7 kinds of cars.

8 MR. OLSON: To the extent that -- yes. I'm --
9 because I don't know the answer to the State law question
10 that the Chief Justice alluded to. Assuming that the
11 State of California was one and the same and decided that
12 it owned or had the authority under State law to purchase
13 those vehicles, the answer would be yes.

14 QUESTION: Thank you, General Olson.

15 Mr. Waxman, we'll hear from you.

16 ORAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE RESPONDENTS

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

20 The question in this case is whether section
21 209(a) of the Clean Air Act, which is reproduced at page
22 36a of our brief, preempts very modest fleet purchase
23 rules which apply only to vehicles that are already
24 commercially available, that is, that cannot have an
25 effect on manufacture -- cannot require manufacturers to

1 produce or sell anything, and which were adopted by a
2 unique airshed in which 90 percent of all toxic air
3 pollution derives from motor vehicles.

4 And the answer to that question is no because
5 the text and the context of the Clean Air Act, title II of
6 the Clean Air Act that deals with motor vehicles, show
7 that Congress intended the word standard in section 209 to
8 be used in the same way that it is used in section 202
9 and, indeed, throughout the entirety of title II -- title
10 II. It's used 100 times, I'm told by an amicus, in
11 section 202 alone, and every single time that it is used
12 there, it is used to refer to an obligation placed on
13 manufacturers, that the vehicles they produce and sell
14 meet specified emissions characteristics. No one contends
15 that that definition, the way the word is used in section
16 202, covers the rules in this case.

17 Now, express preemption -- it requires
18 discerning Congress' intent. It's not an exercise in
19 definitional possibilities, this Court has reminded us
20 many times. Now, you can read every brief from our
21 opponents. Every different brief offers up some other
22 definition, and their briefs in related cases have done
23 the same. And we've heard no definition this morning.
24 They look to the dictionary definition of standard or
25 criteria or test, and they're reproduced in their briefs.

1 But they -- they concede that there is no dictionary
2 definition that they offer that coincides with the rule
3 that they seek because they concede that Congress did not
4 intend to cover incentive programs or tax programs even
5 though, like purchase rules, they operate through the
6 market on manufacturers and not directly on manufacturers.

7 QUESTION: Suppose that California passes a law
8 and says no one can sell a diesel bus in California.

9 MR. WAXMAN: Well --

10 QUESTION: Clearly you'd have to go get
11 permission if you want a rule like that. Right?

12 MR. WAXMAN: A -- a rule that --

13 QUESTION: The rule is exactly what I said: no
14 one can sell a diesel bus in California.

15 MR. WAXMAN: A -- one could -- I believe that a
16 good argument could be made that that rule is preempted
17 because it conflicts with the overall purposes of the
18 Clean Air Act. But --

19 QUESTION: Yes. I mean, you'd have to go to
20 EPA.

21 MR. WAXMAN: But, Justice Breyer, please let me
22 finish.

23 QUESTION: Yes.

24 MR. WAXMAN: This is a very important point.
25 The challenge here is that these rules are expressly

1 preempted -- it's in the question presented in the
2 petitioners' brief -- expressly preempted by the first
3 sentence of section 209(a), and it is expressly preempted
4 because these are standards. And our submission is --

5 QUESTION: I'm -- for purposes of my question,
6 I'm rejecting that argument. I'm trying to figure out
7 what is the correct way of dealing with the statute.

8 MR. WAXMAN: Yes, and --

9 QUESTION: And where I was going, if you want to
10 see, I'll show you because then you -- it -- it seems to
11 me clearly you'd have to ask question -- nobody can sell a
12 diesel bus in California. You have to get permission from
13 EPA.

14 Second, they change it. No one can buy a diesel
15 bus. All right? It's the same.

16 Third, they say no governmental unit can buy a
17 diesel bus, but it turns out that the only buses anyone
18 has ever bought or sold in California are diesel units.
19 And it's at that third point that's bothering me because
20 it seems to me whether it's preempted or not turns upon
21 the effects. Have you, in effect, required the
22 manufacturer to change its assembly line or not? And I
23 don't know where to go with that. That's what I'm posing.

24 MR. WAXMAN: Here is my -- here is my first
25 effort at an answer. The word standard, as it is used in

1 202 and in the other provisions of title II that deal with
2 different types of standards, the standards with respect
3 to fuel, standards with respect to buses, standards --
4 standards in section 243 that deal with the Federal clean
5 fuel purchase program, are all obligations that are placed
6 directly on manufacturers. The Congress and the EPA
7 recognized when section 246 was enacted, which is the
8 Federal fleet purchase program --

9 QUESTION: Mr. Waxman, can I interrupt you just
10 a moment? You say there are obligations that are placed
11 on the -- which is also true. But the word standard as
12 used in the statute over and over again refers to things
13 that are express in terms of so many units per mile and so
14 many -- so forth and so on. The term standard, it seems
15 to me, refers to the -- the numerical definitions rather
16 than to how they're enforced or implied.

17 MR. WAXMAN: Well --

18 QUESTION: I think it may well be they're -- and
19 -- and we don't have to worry about the enforced or
20 implied in the terms that a statute because all it has to
21 be that -- the only prohibition is against anything
22 relating to a standard.

23 MR. WAXMAN: No, it's --

24 QUESTION: And if the standard is limited to the
25 numerical term -- I don't find in the text of the -- of

1 any part of the statute here your -- your point about
2 enforcement against. That's -- that's what -- what is
3 done with the standard. It's not what the standard itself
4 is.

5 MR. WAXMAN: Justice --

6 QUESTION: I have the same problem, if I could
7 second it. It seems to me the fact that you use standard
8 99 times in discussing manufacturing standards doesn't
9 mean that when you use it a 100th time to refer to some
10 other aspect of the whole thing, it must refer to
11 manufacturing. It just doesn't follow.

12 MR. WAXMAN: I'll try -- I'll be efficient and
13 try and answer two questions at once then.

14 First of all, 209 doesn't refer --, doesn't
15 prohibit anything relating to a standard. It prohibits
16 standards relating to motor vehicle emissions just as
17 section 202 in the very first sentence authorizes the
18 Federal Government to promulgate standards applicable to
19 the emission of motor vehicles.

20 Now, standards, as the word is used in 202 and
21 throughout title II, refers to emission characteristics or
22 the obligation of manufacturers to sell and produce cars.
23 If you look at section 202(g) or 202(h) and 202(i), for
24 example, those are instances of subsections where it is
25 used not just to refer to the emissions characteristics

1 themselves, but also the obligation on manufacturers and
2 sellers.

3 And in fact, if you look at section 203 of the
4 act, which is called Prohibited Acts -- it's the
5 enforcement provisions -- it is directed at manufacturers
6 and sellers.

7 QUESTION: I agree with you completely that the
8 statute imposes these obligations on the manufacturers to
9 comply with the standards. But the word standard is -- is
10 a different concept from the obligation to comply with the
11 standard.

12 MR. WAXMAN: Well, I think the -- the word
13 standard -- I'll -- I'll say this one more time and then
14 retreat to another -- another argument. The word
15 standard, as it is used, for example, in 202(g), is used
16 both to refer to the emissions characteristics, numerical
17 or otherwise, and an obligation placed on manufacturers
18 and sellers to do something about that.

19 And the -- let me -- let me give you my second
20 line of argument here --

21 QUESTION: Excuse me. Now you say it's not just
22 manufacturers. It's manufacturers and sellers. I thought
23 it was just manufacturers.

24 MR. WAXMAN: Well, there are provisions in
25 section 203, which is the Prohibited Acts, that it -- it

1 is imposed on the people who make cars and requires them
2 or limits them in what those people can make.

3 QUESTION: I mean, it -- it's hard enough to say
4 that the word standards on its own is automatically
5 limited to manufacturers, but it's doubly hard to say it
6 is limited not to just to manufacturers, but to
7 manufacturers and sellers, but not to manufacturers,
8 sellers, and purchasers.

9 MR. WAXMAN: It -- it is -- Justice Scalia,
10 there is a provision in section 203 of the act, the
11 Prohibited Acts, that deals with the instance in which a
12 manufacturer, for example, produces cars overseas and then
13 tries to sell noncompliant cars through a distributor or
14 some other entity. Those people are covered.

15 But when Congress considered in 1990 its own
16 fleet purchase rules, we're talking here about very
17 limited fleet purchase rules that -- talking about my
18 rules -- have a commercial availability exception. They
19 do not -- they cannot be read to require manufacturers to
20 make anything they don't make or sellers to sell anything
21 they don't sell.

22 QUESTION: Yes, but as soon as there's -- as
23 soon as there's one commercial vehicle available, that's
24 going to have effect on the manufacturing.

25 MR. WAXMAN: Well, there may be -- the -- the

1 vehicle has to be -- the rules make quite clear that the
2 vehicles have to be available and able to be used by that
3 user in the locality, the fuel --

4 QUESTION: And you -- and you have to get --
5 apply for an exemption which the petitioner says is very
6 difficult to get.

7 MR. WAXMAN: There -- the petitioner does not
8 say it's very difficult to get, and that footnote 7 on
9 page 8 of their brief is truly the 13th chime of the clock
10 in their argument. The -- if we had to establish a
11 factual record in this case -- and there is none -- I am
12 told by my client that these exemptions are sought for
13 some of these rules never because the vehicles are -- are
14 readily available, for example, with respect to street
15 sweepers, and on other vehicles, they are readily given.
16 If somebody --

17 QUESTION: What's -- what's that 13th chime? I
18 lost you. I thought you said --

19 (Laughter.)

20 MR. WAXMAN: The 13th chime of the clock is --

21 QUESTION: Yes, I know. I know what it is.

22 Where is it? At page --

23 MR. WAXMAN: It's on page 8, footnote 7 of their
24 reply brief.

25 QUESTION: The reply, all right.

1 MR. WAXMAN: They say that, oh, well, about
2 commercial availability, it's just not true. The district
3 that promulgated these rules said it only applies when
4 it's commercially available. The State that enacted a
5 provision that authorized these rules has filed a brief in
6 this case saying it applies only when it's commercially
7 available. No one in this case or any other case has ever
8 argued that that commercial availability exemption doesn't
9 exist until footnote 7 of their reply brief, and it is
10 simply wrong.

11 But my point generally about the -- the meaning
12 of the word standard in the Federal act, title II, is in
13 1990 Congress enacted its own fleet purchasing rules, and
14 they are codified in --

15 QUESTION: When you say its own, you mean fleets
16 that were going to serve Congress?

17 MR. WAXMAN: No, no. Congress put into --
18 amended the Clean Air Act to require certain States that
19 have nonattainment areas to include within their State
20 implementation plans either a fleet -- a set of fleet
21 purchase rules or some alternative that they would propose
22 that would be equally efficacious in cleaning the air.

23 QUESTION: Just to be clear on your position, do
24 you think that California as a State could enact a law
25 saying that no purchaser of a motor vehicle in California

1 can purchase a gasoline-powered vehicle?

2 MR. WAXMAN: I --

3 QUESTION: Is that -- is that preempted or not?

4 MR. WAXMAN: It is not expressly preempted by
5 section 209(a). It would be subject to conflict
6 preemption principles, as this Court went through in Geier
7 v. American Honda, if it could be shown that --

8 QUESTION: Well, by any theory. Is that
9 preempted or not in your view?

10 MR. WAXMAN: I think -- I think it may well be
11 preempted by -- under conflict preemption principles, not
12 express preemption, if it could be shown that this is
13 really a sales or production -- this is really an
14 obligation that is masquerading as a purchase requirement.
15 That would be the analysis --

16 QUESTION: Nobody can buy a gasoline-powered
17 vehicle in California would require the manufacturers
18 totally to dramatically change the kinds of vehicles they
19 produce.

20 MR. WAXMAN: To be sure --

21 QUESTION: So why wouldn't it fall right within
22 the word standard relating to the control of emissions for
23 motor vehicles?

24 MR. WAXMAN: Because standards, as I said --

25 QUESTION: That isn't a standard? What it says

1 is --

2 MR. WAXMAN: Yes.

3 QUESTION: It's not a standard?

4 MR. WAXMAN: That is correct.

5 QUESTION: Because?

6 MR. WAXMAN: A standard is -- is a requirement
7 that is imposed on manufacturers and that distinction is
8 drawn throughout title II --

9 QUESTION: Well, it is a -- what -- what do you
10 do with 209(b) which says -- it -- it authorizes EPA to
11 waive application of 209(a) in the case of, quote, any
12 State which has adopted standards, other than crank case
13 emission standards, for the control of emissions from new
14 motor vehicles or new motor vehicle engines?

15 Now, most of the States do not have automobile
16 manufacturers located within the States. How could they
17 possibly impose a requirement on automobile manufacturers?
18 It is obviously referring to State standards that deal
19 with the operators of -- of cars -- you have to go in and
20 -- and have your -- your emissions checked -- or the -- or
21 the purchases of cars.

22 MR. WAXMAN: Justice Scalia, it's -- I actually
23 think that 209(b) is important proof for our premise that
24 section 209(a), the word standard, has to be read -- it
25 has to be read to be used in the same way as section 202.

1 And clearly the way that -- when I -- when we
2 talk about production mandates, I -- it's -- it's actually
3 the Congress in section 249(h) used the word production or
4 sales mandates. The EPA in its rules and in its letter
5 that was submitted under a primary jurisdiction referral
6 to the First Circuit talks about production requirements.
7 It's shorthand.

8 But I readily agree that when 209(b) or 209(a)
9 or 202 apply -- when I'm talking about production
10 mandates, I'm talking about an obligation that's placed on
11 the manufacturers about what they produce and can sell.
12 It's one and the same. There was a presumption that they
13 would try and sell what they produced and they would
14 produce the things that they want to sell.

15 The point is that in -- when Congress enacted
16 the Federal fleet purchase program, it drew a -- the same
17 distinction that is shot through title II between
18 standards, which has a very limited meaning, and
19 requirements. It's a distinction that exists in section
20 116 of the act, which is on page 3a of our appendix, that
21 preserves State authorities. And what Congress said and
22 what the EPA said and what Senator Levin, who was very
23 ably representing the interests of Detroit in 1990, said
24 is these fleet purchase rules, because they are directed
25 at purchasers may very well have a tremendous impact on

1 manufacturers. They may cause a race to the top. But
2 they are different than production standards, production
3 mandates, or requirements placed directly on
4 manufacturers.

5 QUESTION: I -- I don't understand your response
6 to my question. My question is -- you just said again,
7 that standards always refer to manufacturing standards.
8 But in 209(b), they clearly do not refer to manufacturing
9 standards. Any State which has adopted standards for the
10 control of emissions from new motor vehicles or new motor
11 vehicle engines. Those standards are -- are just not
12 applied to the manufacturer. Most States don't have
13 manufacturers that they can control.

14 MR. WAXMAN: Justice --

15 QUESTION: Those standards are imposed at the
16 purchase -- or at the operations stage.

17 MR. WAXMAN: They are imposed on the people who
18 make the cars when they sell them. That's because,
19 Justice Scalia--

20 QUESTION: Why don't you just say they are
21 imposed upon the sellers? And that's the way they get
22 imposed upon the manufacturers.

23 MR. WAXMAN: I -- I wish that I could have said
24 it that concisely, but that's the point that I'm making.

25 QUESTION: They're not imposed upon the users?

1 MR. WAXMAN: They are --

2 QUESTION: Virginia cannot impose them upon the
3 users of cars in Virginia?

4 MR. WAXMAN: My submission to the Court, Your
5 Honor, is that standards, as the term is used throughout
6 title II, refers to the supply side of motor vehicles, the
7 people who make them and the people who sell them, and
8 that when Congress wanted to make a rule that dealt with
9 purchasers, which applies only indirectly against
10 manufacturers, it used the word requirement. And that's
11 because --

12 QUESTION: So that this provision in 209(b) does
13 not authorize a State to conduct emissions tests of old
14 vehicles that have already been sold. It has nothing to
15 do with manufacturers, nothing to do with sellers at this
16 point. It has to do with whether the user is keeping the
17 emissions system in -- in proper operation. You say that
18 is not covered by 209(b) because 209(b) does -- does not
19 say requirements. It says standards.

20 QUESTION: No. It's not --

21 MR. WAXMAN: Both 209(a) --

22 QUESTION: -- covered by 209(b) because 209(b)
23 is a limitation on (a) and (a) only talks about new
24 vehicles. So you could get around this whole thing if
25 California adopted a rule that said any vehicle 6 years --

1 6 months old has to meet certain standards. The whole
2 statute wouldn't apply.

3 MR. WAXMAN: Look, section -- subsection (d) of
4 209 applies to vehicles that are not new. 209(a) and
5 209(b) apply to new vehicles. What -- 209(b) is the
6 presumptive waiver for California alone of the preemption
7 provision in 209(a).

8 I -- I don't want to be pedantic, but let's --
9 we -- we started talking about 1965 and 1967, and I think
10 it's tremendously revealing, in terms of the purposes,
11 what Congress intended by standard in 209, to understand
12 that in 1963 Congress enacted the first version of the
13 Clean Air Act. And it basically didn't authorize the
14 Federal Government to do anything other than help States
15 do their part in cleaning up the air.

16 That didn't work very well, and in 1965 Congress
17 enacted the provision that is now 202 that says we are
18 going to take from the realm of a traditional State
19 authority this much for the Federal Government. They can
20 and will set standards applicable to motor vehicle
21 emissions.

22 Now, for the intervening 2 years, the
23 manufacturers came to Congress and said this doesn't make
24 things better, it makes things worse because there are a
25 number of States that are promulgating their own mandates

1 on how we build engines and what kind of equipment we
2 have.

3 And in footnote 7 of our brief, we cite a report
4 by HEW that categorizes what each State was doing. It's a
5 1976 report. And what they were doing was not putting
6 requirements on purchasers. They were saying to
7 manufacturers, if you want to sell a car in our State,
8 it's got to have a whiz-bang or a doodad, or it has to
9 meet the following characteristics. And the manufacturers
10 said, we can only engineer and manufacture to one
11 standard.

12 So in 1967, Congress responded to that by
13 enacting what is now section 209, and it compromised. It
14 said, well, we're not going to make you manufacture and
15 engineer only to one standard. We're going to make an
16 exception for California, which was there before the
17 Federal Government was there.

18 But other than California, which is subsection
19 (b), no State can do what it is that the EPA is doing in
20 section 202. And there are a number of rules of statutory
21 interpretation, leaving aside the presumption against
22 preemption in this area of historic police -- State police
23 power, that require you to read for an express preemption
24 point, not a general, broad conflict preemption argument
25 that is not advanced here, that the word standard is to be

1 read as narrowly as reasonable to preserve as much for the
2 States as possible.

3 QUESTION: Is --

4 MR. WAXMAN: And it has to be -- it's only
5 coherent if it means that the States are precluded from
6 doing what EPA was mandated to do, which is to tell
7 manufacturers, if you've got a vehicle over 6,000 pounds,
8 it can't emit more than X, Y, and Z grams per mile.

9 What the manufacturers cared about was that they
10 not have to make what is -- was subsequently called a
11 third car. They didn't want to have to build different
12 cars and engines for different parts of the country. And
13 that's why a rule that is directed only at purchasers and
14 has built within it an exception for anything that is not
15 commercially available or can't be used for the purpose
16 that the user wants to use it for is not a standard.

17 QUESTION: All right. Maybe that's --

18 MR. WAXMAN: It's a difficult question that --

19 QUESTION: -- Justice Breyer.

20 MR. WAXMAN: I'm sorry.

21 QUESTION: I want you to finish what you're
22 doing, but I want at some point to get back to this
23 effectiveness -- the effect thing. I don't want to cut
24 you off.

25 MR. WAXMAN: Well --

1 QUESTION: Maybe I'll -- do it in the order you
2 want.

3 MR. WAXMAN: I'm here to answer questions, and I
4 apologize.

5 QUESTION: Do it in the order you want and you
6 can just that I've just been off base, and I'll put out
7 the three propositions that -- that I'm thinking. Now,
8 you'll see it in a second.

9 I'm thinking, one, this case isn't a big deal
10 because all California has to do is go ask EPA and EPA is
11 almost bound to approve whatever they want.

12 Two, that you can't do it on language, that you
13 have to figure out the purpose. The purpose is to stop
14 the manufacturers from having to make different cars, and
15 therefore, why don't you, in these circumstances, look to
16 the effect? And -- and if in fact the effect is that
17 they're going to have to make some different cars, it's no
18 good.

19 But all the examples you give in your brief, all
20 those things are fine. They don't -- they don't involve
21 this and -- and they're not commands. You have to go the
22 command and have an effect. This is a command. And I
23 don't think it does have an effect, nor do you, but they
24 think it might.

25 MR. WAXMAN: I think it's --

1 QUESTION: Well, so try it out. That -- that's
2 -- that's the kind of thing that's going through my mind.

3 MR. WAXMAN: I --

4 QUESTION: And now you've sort of said, no, no,
5 you're way off base, and I want to know why I'm way off
6 base.

7 MR. WAXMAN: Justice Breyer, you are not way off
8 base.

9 (Laughter.)

10 MR. WAXMAN: You're slightly off base, but not
11 way off.

12 (Laughter.)

13 QUESTION: There, there, Justice Breyer.

14 MR. WAXMAN: You've raised -- you've raised
15 three points, and I'll try and address them in turn.

16 They're -- the -- they're -- what they're saying
17 is, look, there's no big deal because -- because this
18 airshed, one of 33 in California, could take the concerns
19 of its citizens -- even though it's mandated by the State
20 to promulgate these rules, it could go to the bureaucracy
21 in Sacramento and try and get that bureaucracy to include
22 in its list of what it sends to the centralized command
23 and control bureaucracy in Washington permission to enact
24 rules that scientific studies show cause 9,000 premature
25 deaths in the district a year. Now, it's true, but it

1 would not avail, that is, particulate emissions from motor
2 -- toxic emissions from motor vehicles and diesel
3 vehicles.

4 Now, what about Houston? Houston -- right now
5 the South Coast is the only extreme nonattainment zone in
6 the country, but Houston has been knocking at the door for
7 several years. The -- the waiver provision that they're
8 referring to in 209(b) would not avail Houston. It
9 wouldn't avail Phoenix which has its own unique airshed
10 problems with particulate emissions.

11 And therefore, our submission is if it's a
12 standard, yes. If you say this is a standard, we will go
13 to the State of California and say please sponsor this
14 rule and please ask the EPA to give permission for us to
15 be able to impose these fleet purchasing rules.

16 QUESTION: The district could not apply directly
17 to EPA. It would have to go through Sacramento?

18 MR. WAXMAN: I believe so. There is a provision
19 in the California Health and Safety Code that says that
20 the California Air Resources Board is the relevant State
21 agency for purposes of 209(b).

22 But more generally, if the -- the point here is
23 do you determine what Congress' purpose is by the effect.
24 That's fine.

25 QUESTION: It's not determined what Congress'

1 purpose is by the effect. You have things that you're
2 talking about, standards telling the -- the manufacturers
3 what to do, and then you have close-to things, things not
4 quite that, but close to that, selling, purchasing. So
5 there, where it's a command in this slightly different
6 form, we look to see whether it really has the effect that
7 the statute is aimed at preventing. And if so, go to the
8 EPA and ask them. If not, don't.

9 MR. WAXMAN: No. If -- if it is a command to
10 manufacturers with respect to emissions characteristics of
11 the vehicles they make, it is a standard, as that term is
12 used throughout title II. If it is directed at purchasers
13 and, as Senator Levin and the EPA explained in 1990, only
14 affect manufacturers and sellers through the marketplace,
15 even though it may have a substantial effect, it is no
16 different than the many incentives and differential tax
17 programs that they say aren't covered.

18 Look, California --

19 QUESTION: Mr. Waxman, I think -- maybe I'm
20 wrong, but I think the effect that Justice Breyer is
21 thinking about is the effect of -- of being forced to
22 manufacture the third car.

23 MR. WAXMAN: Yes, indeed.

24 QUESTION: Yes.

25 MR. WAXMAN: And -- and these --

1 QUESTION: And -- and I thought your answer to
2 that was because you don't have to buy anything that is
3 not commercially available, that nixes the third car
4 effect argument, and therefore there isn't preemption.

5 MR. WAXMAN: That is absolutely correct.

6 QUESTION: No, but that's completely wrong in
7 principle for the reason that the rules don't talk about
8 commercial availability but in averages.

9 MR. WAXMAN: No.

10 QUESTION: So, in fact, if they're only supposed
11 to make three ZEV's -- see, they're only supposed to make
12 three ZEV's. ZEV is commercially available. But you
13 could have a rule say buy only ZEV's and that would be a
14 major change in the EPA rule.

15 MR. WAXMAN: With respect, Justice Breyer --

16 QUESTION: Yes.

17 MR. WAXMAN: Here you are completely off base.

18 (Laughter.)

19 MR. WAXMAN: The rules each -- I'm not talking
20 about CARB's statewide standards, but the rules challenged
21 here have an exception for anytime somebody can show that
22 the vehicle they want is either not commercially available
23 or can't be used.

24 Look at page 50a of the joint appendix. The
25 rules are all in the joint appendix. That happens to be

1 the rule that deals with the one that my book opened up
2 to. It's buses. And it says on page 50 of the joint
3 appendix that this -- an exception -- an exemption to
4 these fleet purchase rules where no alternative-fuel
5 engine and chassis configuration is available commercially
6 or could be used.

7 And so this is the situation that -- our
8 submission is that these things can't possibly have --
9 impose a mandate on manufacturers. And in fact, look --
10 we -- we discuss in our brief a little bit that California
11 has a program where it provides, I think, a 75 or 90
12 percent rebate to school districts if they buy buses that
13 are fueled by alternative-fuel vehicles. Now, is that
14 going to have an effect on the kinds of buses that school
15 districts buy? Of course. And is it going to have a big
16 effect on manufacturers? Sure.

17 And therefore, when we're talking about
18 something that is mandatory, as opposed to something that
19 is voluntary, they -- on page 7 of their reply brief, they
20 make a distinction between voluntary standards and
21 mandatory standards. From the relevant perspective, that
22 is the perspective of the manufacturer, they are the same,
23 as Senator Levin and the EPA explained. They operate on
24 the manufacturers through the market.

25 Now, to be sure, there -- you can come up and I

1 think Justice O'Connor came up with the extreme example of
2 no one in our State can buy a diesel vehicle. And what
3 I'm saying is that one could argue and one might make a
4 very good argument that if it is a mandate that's imposed
5 on manufacturers or sellers that is masquerading as a
6 purchase rule, where it really has that effect, you may
7 find that substance will prevail over form, or you may
8 find -- I think it would be more appropriate -- that this
9 simply conflicts with the fundamental objective of the
10 Clean Air Act under the Hines v. Davidovitz test.

11 But that's not the challenge that was brought
12 here, and that's --

13 QUESTION: It would be conflict preemption, not
14 express preemption.

15 MR. WAXMAN: Conflict preemption and not express
16 preemption. And that will -- that analysis and that mode
17 of analysis will allow the courts to deal with this parade
18 of horrors that has never come true and may never come
19 true if the political branches don't.

20 But if you look at the history of what was going
21 on in 1965 or 1967 -- this is Congress' purpose -- no one
22 was talking about -- no manufacturers were concerned about
23 purchase rules. They were concerned about having to
24 engineer and manufacture a third vehicle.

25 QUESTION: But if you need -- if you need

1 conflict preemption to answer such a basic hypothetical as
2 that put by Justice O'Connor, the statute doesn't mean
3 very much.

4 MR. WAXMAN: Oh, I think -- no, no, no. With --
5 with respect, this -- this statute shut down cold, Justice
6 Kennedy, precisely what was going on in 1967.

7 QUESTION: Thank you, Mr. Waxman.

8 MR. WAXMAN: Thank you, Your Honor.

9 QUESTION: Mr. Phillips, you have 2 minutes
10 remaining.

11 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

12 ON BEHALF OF THE PETITIONERS

13 MR. PHILLIPS: Thank you, Mr. Chief Justice.

14 Let me start with Justice O'Connor's
15 hypothetical. We are told in language that I think a 6-
16 year-old would have a hard time understanding that a flat
17 ban on all gasoline-fueled engines in the State of
18 California is not a standard relating to the control of
19 emissions from new motor vehicles or new motor vehicle
20 engines.

21 Justice Kennedy is absolutely right. It has
22 rendered the scope of preemption. There is no field of
23 preemption. There is not even a divot of dirt of
24 preemption that is created under that interpretation.
25 It's not consistent with the language of the word

1 standard. Standard means more than what manufacturers do.
2 It's not simply how it gets enforced. It's broader, and
3 Justice Stevens is clearly correct in that regard.

4 The one provision that seems to have gotten lost
5 in the -- in all of this, which I think is terribly
6 important, is section 177 which states that State -- and
7 this is at the -- the respondents' brief's appendix at 4a
8 -- 4a. The States are not authorized to prohibit or limit
9 directly or indirectly the manufacture or sale of a new
10 motor vehicle or motor vehicle engine that is certified in
11 California.

12 That is precisely what is being done here, is
13 that vehicles that are certified in California are
14 prohibited by a subagency. The State can't even do this,
15 which is why I submit the answer to your question, Justice
16 Scalia, is the State wouldn't have the authority to place
17 the kind of restriction on its own subentities without
18 running afoul of section 177. And the only way California
19 could get approval for that would be to go to the EPA in
20 the way that Justice Breyer has already described.

21 QUESTION: Mr. Carter, Mr. Waxman said in his
22 brief that the position he's taking is the position that
23 EPA takes, and EPA is not with us this morning.

24 MR. PHILLIPS: Oh, I believe EPA is very much
25 with us this morning because the Solicitor General speaks

1 for the United States, and EPA is clearly a part of the
2 United States Government. And -- and the EPA has made it
3 absolutely clear, Justice Ginsburg --

4 QUESTION: So you -- you say that's just wrong
5 when --

6 MR. PHILLIPS: Oh, absolutely that's just wrong.
7 There is no -- there is no way -- I have seen nothing to
8 justify departing from what the Government's brief says.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Phillips.

11 The case is submitted.

12 (Whereupon, at 11:13 a.m., the case in the
13 above-entitled matter was submitted.)

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