OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.

TITLE

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.,	:	
v. Petitioners	:	DOCKET NO. 82-354
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.;	:	
CONSUMER ALERT, ET AL.,	:	
v. Petitioners	:	DOCKET NO. 82-355
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.; and	:	
UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,	:	
v. Petitioners	:	DOCKET NO. 82-398
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.	:	

PLACE Washington, D. C.

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PAGES

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IN THE SUPREME COURT OF THE UNITED STATES

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v. : No. 82-354

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.;

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Washington, D.C.

Tuesday, April 26, 1983

ALDERSON REPORTING COMPANY, INC.

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Washington, D.C.; on behalf of Petitioner, the United States Department of Transportation.

LLOYD N. CUTLER, ESQ., Washington, D.C.; on behalf of Petitioners, Motor Vehicle Manufacturers Association of the United States, et al.

JAMES F. FITZPATRICK, ESQ., Washington, D.C.; on behalf Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Motor Vehicles Manufacturing Association against State Farm Mutual and the consolidated case.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,
ON BEHALF OF PETITIONER
U.S. DEPARTMENT OF TRANSPORTATION

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

The National Traffic and Motor Vehicle Safety Act of 1966 directs the Secretary of Transportation to issue appropriate federal motor vehicle safety standards which shall be practicable, shall meet the need for safety, and shall be stated in objective terms.

Over the 17 years since that statute was enacted, a succession of Transportation Secretaries have tried to find the best way to implement its broad authority. The optimum solution to the problem of occupant crash protection has been particularly elusive.

Since 1967 standard 208, which deals with the problem of occupant crash protection, has required the

installation of manual seatbelts. Passive restraints, which require no independent occupant action for their effectiveness, were first incorporated into standard 208 in a series of amendments adopted between 1970 and 1972.

One of the permitted options under those amendments was a manual belt system coupled with an ignition interlock. However, public irritation with interlock systems led Congress in 1974 to prohibit them by statute.

In 1976 Secretary Coleman attempted to deal with what he considered to be the root of the problem: widespread public resistance to mandatory passive restraints. He proposed a demonstration project involving up to 500,000 cars installed with passive restraints in order to smooth the way for their public acceptance at a later date.

Secretary Coleman did not reject mandatory passive restraints as a long-range solution. He simply concluded that they would be more effective if preceded in time by an effort to change the public's attitude about them.

His successor disagreed, as was, in our view, his prerogative. Within a manner of months, Secretary Adams dispensed with the Coleman demonstration project

and instead adopted the modified standard 208 at issue here, which made passive restraints mandatory for large cars beginning with the 1982 model year and all cars beginning with the 1984 model year.

While it permitted manufacturers to choose between two basic systems, air bags or passive belts, it was assumed at that time that about 60 percent of the cars would be equipped with air bags.

Four years after the Adams decision, Secretary Lewis rescinded the mandatory passive restraint features of standard 208. He based his decisions on three findings:

First, that because of the intervening to small cars, not one percent -- not 60 percent, but only one percent of all cars would be equipped with air bags;

Second, that in complying then with standard 208 as it then stood, the seat belts that would be installed in the overwhelming majority of new cars would be detachable, and that once detached would be the functional equivalent of manual belts;

And third, that there was substantial uncertainty about the usage rate of these detachable belts convertible to manual belts.

Under those circumstances, NHTSA could not

reliably predict whether increased use because of detachable belts would fall closer to zero percent or closer to five percent or ten percent, and for those reasons, together with the possible adverse safety effects from public reaction to what the public might perceive to be another expensive example of ineffective regulation, the agency could not conclude that the automatic restraints as then stated met the need for safety.

The Court of Appeals took no issue with the first two of these findings. It described them as reasonable. But it said that the third step turned the question on its head. The court conceded the factual issue of probable seat belt usage was one which no one could predict with certainty. Nevertheless, it held that once the agency had selected the passive restraint course of action in 1977, the presumption no longer ran in favor of the agency judgment, but rather in favor of the very regulation which the agency had concluded did not meet the statutory objectives.

The effect of this unprecedented holding is truly starting. It effectively deprives an administrative agency of its authority to regulate in conditions of uncertainty by making predictive judgments to resolve that uncertainty, judgments which in many

cases, including this one, lie at the very heart of the administrative process.

By definition, where predictive judgments must be made in uncertain conditions, as they must here, the location of the burden will usually be determinative. This case illustrates the mischief of shifting that burden once the agency proposes a regulation, and here is the reason why.

There are several views concerning which path leads to the best occupant restraint system. Over the 17 years that Secretaries of Transportation have struggled with that problem, there have been two major, enduring, and overarching issues.

The first is, how effective will the passive restraint system really be. Secretary Adams in 1977 concluded that 60 percent of all cars would be equipped with air bags under his proposal and that this would be highly effective. By 1981 the circumstances had changed dramatically. It was clear that compliance would consist of easily detachable belts, and Secretary Lewis concluded that under those new circumstance the requirements created by standard 208 as it then stood would not be effective.

There has always been a second broad issue, separate and very important. And it is: Assuming that

there is to be a passive restraint requirement at some point in time, which of two possible approaches should the agency emphasize first in time? Do you push ahead first with hardware requirements or do you emphasize first changes in public attitude?

The right answers to those two controlling questions depend on the resolution of multiple uncertainties, technological uncertainties and behavioral uncertainties. Someone has to perform the necessary task of sorting out those uncertainties, balancing the relevant considerations on all sides, and then making a judgment concerning which alternatives ought to be pursued and in what order.

It is equally clear, I submit, that that job, making predictive judgments in conditions of uncertainty, belongs to the administrative agency. Standard 208 has been in existence since 1967. It's been amended many times. After more than a decade of evolving experimental administrative efforts and continuing efforts by the Courts of Appeals for the Sixth Circuit and also for the District of Columbia, there is nothing in law and nothing in common sense that suggests that that evolution should be frozen as of the 1977 amendment.

In 1976 Secretary Coleman concluded that the

best way to implement the statute was to attempt first to change human attitudes. Was he right? Was that the best solution? Reasonable persons will differ. But what ought to be clear to everyone, I submit, is that the Coleman choice of alternative did not preclude Secretary Adams from choosing another alternative without first bearing the probably impossible burden of disproving the predictive assumptions underlying the Coleman decision.

And for the same reason, in 1981 Secretary Lewis did not rule out the possibility of active restraints as a long-range solution. All options are still available. All options are still open.

QUESTION: Mr. Lee, may I ask you one question. Is it your view that the standard to be applied in deciding whether a rescission was proper is the same as the standard to be applied in whether or not to adopt a regulation in the first instance?

MR. LEE: Mr. Answer, Justice Stevens, is yes, they're very close, but I need to modify it in this one way. The standard is arbitrariness and capriciousness, is it arbitrary and capricious. And as I read the cases that have been handed down from this Court, it requires that the agency take into account and make its predictive judgments concerning all the information it

has before it.

Now, in the course of having explored one path, there will be some information that the agency has to take into account, and it must take that into account. But at the end of the day, two things: Number one, it's still the arbitrary and capricious standard. It's a question of whether they've acted irrationally, and the presumption still runs in favor of the propriety of agency action.

And second, in the great majority of instances, and certainly I would say in this one, the standard will be about the same for not adopting a regulation in the first place or rescinding one.

QUESTION: About the same?

MR. LEE: Well, it's always governed by the arbitrary and capricious standard.

QUESTION: I understand that. Really what I'm asking you is, do you think the Secretary has the same latitude in rescinding, just the same broad -- in rescinding this regulation, as he would have had in deciding whether or not to put it into effect in the first place?

MR. LEE: Yes, except that if in the process of enacting -- of considering the regulation in the first place he has information that has come before him,

he does have the obligation to take that information into account. Now, if it had been presented to him in another kind of context, he would still, of course, have that obligation to take that into account.

QUESTION: Wouldn't he in promulgating a regulation have an obligation to take into account --

MR. LEE: Anything that comes before him, of course.

QUESTION: Then you really are saying it's the same standard, I think.

MR. LEE: I think in the overwhelming majority and maybe always, it will be the same standard, yes.

QUESTION: Do you think he had to make any findings at all?

MR. LEE: Excuse me?

QUESTION: Do you think he had to make any findings at all? What if he'd done what he did in February. Would that have been lawful?

MR. LEE: I would certainly still have defended what he did.

QUESTION: Well, I understand that, but --

(Laughter.)

MR. LEE: Though not under all circumstances will I defend what he did.

But it would have made my case perhaps more

difficult, but I think you would still look to see whether an objective Secretary of Transportation, acting under all of the facts and circumstances that were then before him, acted arbitrary and capriciously. And I would say, yes, that while we would have a less adequate explanation as to why, it would still be not arbitrary or capricious.

QUESTION: On that same point, is the agency required to articulate facts which will rationally support a decision?

MR. LEE: I would have to say that if the Court of Appeals for the District of Columbia in an earlier phase of this very litigation is correct, the answer to that question is no. In the Pacific Legal Foundation case, the question was did Secretary Adams in his 1977 decision have to take into account probable public reaction. The court said yes, that the Secretary did have to take it into account. The Secretary had said it was not important to take it into account. The court nevertheless held that it was reasonable.

So my answer to that is no, there is no obligation to set forth --

QUESTION: To articulate facts that rationally support the decision?

MR. LEE: I think that there is no obligation

under the Administrative Procedure Act. Needless to say, it is a good procedure and it helps a reviewing court and facilitates, maximizes, the likelihood that it would be upheld as proper. I do not think that it is a requirement, that it is a per se requirement in every instance under the arbitrary and capricious standard.

QUESTION: Was it necessary in this instance for the Secretary to consider not only whether the detachable belt option was ineffective, but also whether it would be appropriate to require non-detachable belts or whether it would be appropriate to require the air bag approach, the other options?

MR. LEE: The answer is no. The answer is no, and the reason is this. The Court of Appeals holding to the contrary that there was the obligation to consider these other alternatives -- and incidentally, the details of those alternatives will be discussed more thoroughly by Mr. Cutler -- rests on the Court of Appeals' assumption that passive restraints are required by the statute, So that if detachable belts wouldn't do, then the court has -- then the agency has an obligation to go on and consider some other form of passive restraint.

In fact, it is clear that the statute has never required passive restraints. The only source in

law which ever provided for passive restraints is an agency regulation, and the agency has statutory authority to revoke its own regulations.

The only Congressional mandate is to enact regulations which are practical, meet the need for safety, and are stated in objective terms. And that leaves a very broad leeway to the administrative agency as to the kinds of standards to adopt in implementation of that broad standard, and that includes the time order according to which either one alternative will be considered, and none has been foreclosed by what Secretary Lewis has done.

Now let me make one final point, and it bears, Justice O'Connor, on this emphasis on alternatives. The one thing that that emphasis on alternatives that is made both by the Court of Appeals and also the Respondents bears out is that it really underscores and confirms the fact that the situation as it stood in 1981 was not satisfactory, and that the Secretary was quite right not to let it simply drift.

The telling fact is that by 1981 it was clear that the 1977 assumption was wrong, standard 208 as then written was not going to do the job, and under those circumstances it was not irrational for the Secretary to rescind, and that is all that he did.

The real criticism that has been leveled against him is that he didn't then go on to pursue alternatives X, Y and Z. In fact, no alternative has been foreclosed, but that is a separate issue from the only issue before the Court, which is the rescission of a particular form of passive restraint when passive restraints are not mandated by the statute.

The Court of Appeals itself conceded that the Secretary could suspend the regulation, though he could not rescind. That I submit is a labeling distinction without a substantive difference. Regardless of the label, the Secretary had the authority, once he concluded we were on the wrong path, not to continue down that path.

I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Cutler.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF PETITIONERS,

MOTOR VEHICLE MANUFACTURERS ASSOCIATION ET AL.

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

I will cover the second ground of the Court of Appeals decision to set aside the agency's action. Before doing so, I'd like to supplement the Solicitor

General's response to Justice Stevens and Justice O'Connor by saying that if there was any obligation on the agency to explain its conduct, its decision, it was an obligation to give reasons.

Those reasons did not have to be facts. They could just as well be statements of uncertainties about facts, particularly facts that went to the agency's own predictive judgment. They didn't have to find facts; they had merely to conclude that they faced uncertainties about their predictive judgments, in order to rescind the standard.

As to the issue of alternatives, a majority of the court ruled that the passive restraint requirement was not justified -- a majority of the court ruled that even if the passive restraint requirement was not justified as written, the agency should have considered other alternative versions before rescinding this one. And the majority discussed three such alternatives:

One was requiring that if passive belts were used to comply they be continuous rather than detachable;

Second, requiring compliance by air bags only;

And third, reviving Secretary Coleman's voluntary demonstration program.

None of these three alternatives was listed in the agency's April 1981 notice of proposed rulemaking that ended with the rescission. That notice did request comments on a number of alternative actions, but those did not include the ones advanced by the Court of Appeals.

And under those circumstances, we submit it would have been improper for the agency to adopt any of the different proposals later advanced by the Court of Appeals before issuing a further notice and providing opportunity for comment. And we submit further that the court should not have reordered the agency's own priorities so as to require it to consider other alternatives before rescinding this prospective regulation rather than after doing so, as the agency has said it would do.

And even if it would be appropriate for a court to remand in some circumstances because an agency had failed to consider other alternatives, we would submit that those circumstances do not exist here.

The Court of Appeals relied primarily on the alternative of the non-detachable passive belt, sometimes called in these statements in briefs the continuous passive belt. This alternative, though, is one that the agency did consider fully in the decision

under review, and its reasons for rejecting it were rational, convincing and plainly within its expert discretion in applying the statutory criteria.

These reasons were the safety need for easy emergency egress, the public fear of entrapment by attached belts in a crash, and public and Congressional resistance to use-compelling features in passive restraint systems.

And both the Respondents and, we submit, the Court of Appeals were wrong to suggest that the non-detachable belt, so-called, was an obvious alternative that had already been proven acceptable to the public in practice and had clearly increased belt usage.

Until 1978 this very standard required that if a passive belt system were used the belt must be readily detachable by the passenger to permit escape in an emergency, for example a crash in which the door anchoring the belt mechanism could not be opened, or a turnover.

In '78 GM obtained agency approval to experiment with continuous spool-release passive shoulder belts and they equipped the 1980 Chevette with a three-point spool-release belt as a customer option. But it proved unpopular with the public, despite a

million dollar advertising campaign. Only 13,000 were sold out of over 400,000 Chevettes -- that is about three percent -- even though the option was offered for most of the time without charge and salesmen were offered a $25 bonus if they could persuade a customer to take one.

Moreover, that 1980 Chevette belt was in fact detachable to simplify emergency egress, and if you look at the drawing of the belt, which is at -- it's GM's drawing at page 2A of the appendix to the NAII brief -- it's the red brief, Justice Stevens -- you will see that where the lap portion attaches to the lower door there is a detachable pushbutton buckle, and when it's detached the entire three-point belt goes slack. The shoulder portion stays in place and annoys the occupant, but the system as a whole is inoperable, either as a shoulder belt or a three-point belt, until it's reattached.

The record has data on the public acceptability and usage of only three passive belt systems. There's this 1980 Chevette I just mentioned, there's the '78 and '79 Chevettes, and the VW Rabbits, which had a shoulder belt system only, protected by an ignition interlock, and as the Solicitor General has said, public annoyance with that interlock in '78 had

driven Congress to forbid the agency from requiring -- from issuing any standard that required or permitted the use of an ignition interlock.

So that option was just not available to the agency. Even though ignition interlocks did substantially increase belt usage even for active belts in the '74-'75 period and for passive belts, it's just not an option that Congress has permitted the agency to use.

In addition, it's important to note, as the agency did, that there is an important self-selection factor that explains the high usage rates of these passive belt systems guarded by interlocks or otherwise, and that is these customers voluntarily chose cars with passive belt systems when they had a choice. Even so, a substantial number of those customers found ways to disarm the belt system afterward, and in the case of the Chevette 1980 more than half of the customers, according to a telephone survey cited by NAII, said they would not buy that same system again.

Let me turn briefly to the alternative of requiring compliance by air bags only. The agency has repeatedly found that a substantial part of the driving public still feels uneasy about air bags. That concern was reflected in the 1974 amendments, where Congress set

up a warning flag by requiring that any standard requiring the use of an air bag had to be subjected to a Congressional veto procedure. It was reflected in Secretary Coleman's '77 plan. It was the very public resistance to the air bag that led him to defer any mandatory passive restraint regulation until after a large-scale voluntary experiment had first been made.

And finally I come to the Coleman experiment. the essence of that plan was voluntariness. It expressly provided that the plan would be cancelled if the agency either proposed or issued a passive restraint standard. So that the first step, if anyone was even to think of reviving the Coleman plan, would be to rescind this present regulation, which would have frustrated any Coleman plan and which also would have resulted in 99 percent of the cars having detachable passive belts rather than air bags.

And the agency, when it did do just that, announced that it plans to undertake new steps to promote the continued development and production of air bags.

Mr. Chief Justice, if I may I'd like to make one final point. The Respondents claim that the automobile industry has not done its part to improve occupant restraint protection and the usage of restraint

systems. We submit the record before you is to the contrary.

Most manufacturers offered active seat belts before the Safety Act was passed. The auto companies have lobbied vigorously and have succeeded in obtaining mandatory child restraint usage laws in 33 states. Ford and GM pioneered in developing the technology of the air bag. And well before the Coleman experiment, GM voluntarily committed to put 100,000 air bag-equipped cars per year on the road in the model year '74 to '76 --

CHIEF JUSTICE BURGER: Your time has --

MR. CUTLER: -- but only succeeded in selling 10,000.

CHIEF JUSTICE BURGER: Your time has expired, counsel.

MR. CUTLER: If I may, Mr. Chief Justice, the ignition interlock was also one of Ford's better ideas.

CHIEF JUSTICE BURGER: Mr. Fitzpatrick.

ORAL ARGUMENT OF JAMES F. FITZPATRICK, ESQ.

ON BEHALF OF RESPONDENTS

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

On behalf of the Respondents and the many amici here, we urge that the action of DOT in rescinding

the passive restraint standard was arbitrary and capricious and was properly set aside. The rule we're talking about here today has been described as the most important safety regulation on the books. Certainly, it is the most significant effort of DOT to respond to the killing and maiming on our nation's highways.

QUESTION: Who is the author of that description? Where does --

MR. FITZPATRICK: The description came from William Nordhaus, who was a witness in the proceeding below, and I think it was also quoted in the Court of Appeals' decision.

Notwithstanding the profound impact on highway safety of the regulation at issue here, at bottom the case itself is very simple. It's a conventional case of APA judicial review of informal rulemaking under the traditional standards of Overton Park.

It turns on the Auto Safety Act, which directs DOT to promulgate standards to protect the motoring public against unreasonable risk of death or injury, and DOT did promulgate such a regulation to require the installation of passive restraints to provide protection against death and injury.

Now, in anticipation of this rule two types of passive restraints have been developed and installed,

and it's undisputed on this record -- there's no uncertainty here -- DOT agrees that these two technologies work.

First is an automatic seat belt which has been installed in hundreds of thousands of cars since 1975, and those belts are effective. Now, this is not Buck Rogers space age technology. It is very simple. You attach the seat belt to the door, you open the door, you slide in, you close the door and the belt's in place. That's all that it is. It has been used in hundreds of thousands of cars and it works.

Now, NHTSA's own studies reflect that these automatic belts in use have increased usage by over 40 percentage points, and the Solicitor General's reply on pages 14 and 15 underscores the high usage rate of these automatic belts that have been in place. And taking account of any demographic differences -- selection, small cars, particular users -- taking account of any demographic differences, the agency's own data show that installation of those seat belts would save almost 6,000 lives a year and avoid over 100,000 injuries each year. So you have that --

QUESTION: Excuse me, Mr. Fitzpatrick. Was there any comparative study made of the diminution of such accidents by the 55 mile an hour speed limit and a

comparison made with the seat belts?

MR. FITZPATRICK: No, I don't think DOT has done that. DOT has had no question, as far as we can tell, ever that these automatic seat belts will have a very high usage rate and will avoid significant numbers of deaths and injuries.

QUESTION: Well, my question goes to whether the same result could be accomplished or a similar result by a 55 mile an hour speed limit enforced.

MR. FITZPATRICK: Clearly not. I don't think there's any suggestion on this record --

QUESTION: When you say "clearly not," what study?

MR. FITZPATRICK: I don't believe that there is a study that has suggested that. But there has never been any argument made by the agency itself in the consideration of its rulemaking that would suggest that an alternative of a 55 mile an hour speed limit, as useful as it might be, would be a response to the problems of head-on crashes.

A head-on crash at 54 miles an hour is a dreadful event, and one would want to avoid through the use of passive restraints the death and injury that comes from crashes at 20, 30, 40 and 50 miles an hour.

QUESTION: Mr. Fitzpatrick.

MR. FITZPATRICK: Yes.

QUESTION: How does the safety and utility of the passive belts that you were describing a moment ago bear on the Secretary's decision to resind the order about air bags?

MR. FITZPATRICK: Well, the Secretary decided to rescind the passive restraint standard which permitted compliance by two technologies: either the automatic belt, which has been found to have high usage rates; or an air bag, which the agency itself has concluded is sound and effective.

So what the Secretary is doing is rejecting technology, both air bags and automatic seat belts, that work.

QUESTION: Well, but that's really just arguing with the facts.

MR. FITZPATRICK: No, I don't believe it is. I think that goes to the very heard of what was at issue here. You had two technologies that work and at the last moment the industry advanced a third type of technology which it said wasn't going to work. It was a belt that had a release right at one's waist and there were slits in the car door. You could easily unbuckle the belt, stow it permanently.

And it's on that basis of the technology that

didn't work that the Secretary rescinded the regulation.

QUESTION: Well, we're certainly not going to decide in this Court which of three various systems of passive restraints would or wouldn't work. That's up to the Secretary.

MR. FITZPATRICK: Well, that's up in the first instance to the Secretary, with the Court of Appeals in the first instance looking to see whether there was appropriate review. But it's quite true, you don't have to decide which works.

You take the agency with the facts as they found them. They found that automatic belts do work, and they found that this new GM belt, this fully detachable belt, doesn't work. You are not, of course, sitting as a tryer or a weigher of facts.

You are taking, we would respectfully suggest, the findings as the agency has made them and those findings lead you to the conclusion that the Secretary has rejected this standard in the face of two technologies that have been proven effective, simply on the grounds that the industry has come forward with a technology that has been designed not to work in terms of its safety obligations.

QUESTION: Mr. Fitzpatrick, you said that they

found that the new belt would not work. I don't think that's right. They found if it's detached it would not work.

MR. FITZPATRICK: That's correct.

QUESTION: They really didn't make a finding on how often it would be detached.

MR. FITZPATRICK: That is quite correct. The finding of the Court of Appeals -- and one should be precise about this -- the second finding of the Court of Appeals was that once detached the belt is functionally identical to the old buckle-up belt.

But they also said, once attached or kept attached, it has the same characteristics of an automatic belt, and it is somewhat shading to say that the Court of Appeals said that the new detachable belt was functionally identical.

They said that there's nothing in the record here that indicates what the usage rates are going to be, even with this new GM belt. But our point is at this juncture in the argument that even if the agency was right that this GM belt was in fact a lemon as far as safety is concerned, then it was arbitrary and capricious under this statute to rescind the regulation rather than to rule out a belt that doesn't work.

That, Your Honor, we believe is the only

course consistent with the Safety Act, which has said that the actions of DOT have to have as their overriding goal the promotion of safety. And you have beyond that the clear decision of the Congress that in 1966 the control over the pace of safety progress was going to be in the hands of DOT and not the industry.

Here, by permitting the industry to advance a technology that doesn't work you are shifting back to the industry the authority to control the pace of safety development. We would suggest that nothing could be more arbitrary in terms of the goals and obligations of the Safety Act than to permit the industry itself to meter the pace of safety progress.

QUESTION: Well, who established the criteria in the first place in your view? Where does the criteria come from, Congress or the agency or some third area?

MR. FITZPATRICK: Well, Congress clearly stated an obligation that DOT was to promulgate regulations which would lessen the unreasonable risk of health and safety to American motorists. So there was an overarching Congressional obligation. The agency then promulgated a statute -- it promulgated a regulation --

QUESTION: While you're on that, on the first

step that you've just mentioned, is that any more than saying to the agency, do something? Did Congress say to the agency any more than, do something about this problem?

MR. FITZPATRICK: Congress imposed -- Congress did not -- and we want to make this clear -- we have not argued that Congress said to the agency, promulgate this passive restraint regulation. What Congress did was to say, promulgate regulations that will foster the safety of the motorists on the highway.

And the DOT did that, and our point is that once one revokes, once one faces a revocation situation, then there has to be support in the record for that revocation decision. From our point of view --

QUESTION: You mean they have to prove they have made a mistake?

MR. FITZPATRICK: They don't have to prove that they have to make a mistake. However, a decision to revoke and a decision to promulgate are both based upon the same standard under the APA, and there has to be some support for their decision to promulgate, there has to be some support for their decision to revoke. And the state of uncertainty is not an a priori state. It is a condition that is based upon certain factors or certain determinations of certain pieces of evidence

that lead up to the decision, the conclusion of uncertainty.

Well, Mr. Fitzpatrick --

MR. FITZPATRICK: Yes, sir.

QUESTION: -- you say there has to be support for a decision to promulgate in the first instance. Now, supposing this agency, which is charged with doing something about auto safety, simply promulgates some regulations saying you're going to use passive seat belts. Do you think the burden is on the agency to justify the promulgation of those regulations?

MR. FITZPATRICK: Indeed, they had to justify it twice, in two Courts of Appeals.

QUESTION: I'm asking you. Do you think the burden is on the agency to justify those regulations?

MR. FITZPATRICK: No. The burden of proof -- let's be clear. The burden of proof to challenge an agency action is on the side of the party that is making the challenge. But under Overton Park, under Overton Park, clearly the action of promulgation and likewise the action of revocation is action that cannot be without any record support. And in that sense, when you get to the Court of Appeals there has to be some basis, as the cases in this Court have made absolutely clear, there has to be some basis for the agency action and

there has to be some relationship between what the agency found and what the agency did.

So clearly, in that sense the agency has to be held to some account to explain or justify their actions. That's what, as I understood, the agency is all about.

QUESTION: Mr. Fitzpatrick.

MR. FITZPATRICK: Yes, sir.

QUESTION: But didn't the Solicitor General say they don't need facts, they can use reasons? Do you agree with that?

MR. FITZPATRICK: There is -- I agree --

QUESTION: I should think so.

MR. FITZPATRICK: -- in this sense. This is not a fact-finding proceeding on the record. However, their reasons have to stand up to scrutiny. There has to be some basis in the record or in logical argument that supports the reasons. And here there wasn't any uncertainty at all about the automatic belts.

And as we explained in our brief, there wasn't any support for their conclusion that there wouldn't be that minimal increase in even this GM belt to meet the standard of the statute to foster safety.

QUESTION: Are you saying that if an agency concludes that something that it has tried out and finds

that it doesn't work, it can't simply say, this hasn't worked and we're going to write it off and try something else? Do they have to give reasons?

MR. FITZPATRICK: Yes.

QUESTION: Any more reason than that?

MR. FITZPATRICK: Yes, they do indeed. I think the case --

QUESTION: Where do you find that?

MR. FITZPATRICK: Among other places, you find it in the Atchison, Topeka proceedings in this Court, the decisions in this Court. I think it's quite clear as a matter of administrative law that if an agency takes you down this road and says this road is justified under this statute, and then they reverse course and take you down this road, the cases have held quite clearly that there is some burden of explaining why this course is consistent with their statutory mandate.

Now, that does not mean that an agency cannot reverse course. Of course, indeed, if an agency is uncertain and there is support for that uncertainty in the record, of course they can reverse course. But they simply cannot conclusively say, we are uncertain, and scrap a regulation.

That action of revocation, like any other action under the APA, requires some record support --

QUESTION: You say some support in the record. What if the rescission is promulgated by notice and comment, so that there isn't necessarily any factual record at all?

MR. FITZPATRICK: We're not suggesting there has to be a trial type record. We are looking at the record as we found it here.

QUESTION: Well, what record do you mean?

MR. FITZPATRICK: Well, the record of the informal rulemaking. There were comments that were filed with the parties and there were analyses by the agency and there was an opinion written by the agency.

And in all -- in the opinion of the agency, there was not a question about the efficacy of the automatic seat belt and the air bag. So those are the facts that one is dealing with in making a judgment as to whether this recission is justified or whether it is arbitrary and capricious under the APA.

What if the Administrator had simply done it on the basis of notice and comment, said I'm thinking about rescinding this because I'm uncertain, uncertainties have developed in the last four years. He receives notice and comments, writes an opinion saying, I have reviewed the notice and comments and I still think there's a good deal more uncertainty now than

there was in 1977, period.

Is that challengeable under the arbitrary and capricious standard?

MR. FITZPATRICK: Well, it all depends on what he wrote in his opinion. If he set forth --

QUESTION: I've just given you his opinion.

MR. FITZPATRICK: That is his opinion. I would think that that would be challengeable. He has not set forth any basis, any rational basis for changing course, and that is all that's required here and that's what the Court of Appeals concluded that the agency had not done. They had not set forth any defensible basis for on one day saying X and on the next day saying non-X.

Let me say that there are some points on which we are --

QUESTION: Well, what if the only difference is between the X and the non-X is that there is a different man making a judgment of the facts?

MR. FITZPATRICK: But it's the same statute and it's the same APA.

QUESTION: Same facts, but different views of the facts. Is that -- can an agency act by saying, we just changed our mind about what the facts are and the reason we've changed our mind is they are different

minds?

MR. FITZPATRICK: No, you can't do that. If there is -- if the second man comes in and looks at the facts and can rationally set forth a basis, then that is defensible. But it is not -- this is not a political decision that one is dealing with here. This is not a matter of change of Administrations. This is a question of whether on this record there is any justification for scrapping the regulation instead of barring a belt that doesn't work.

QUESTION: You mean Mr. Adams has to prove why Mr. Coleman was wrong before he can change the program?

MR. FITZPATRICK: In the Pacific Legal Foundation case, it went to the Court of Appeals and the Court of Appeals looked at his reasons and said they were defensible reasons for changing course. That same issue of a different tactic, a different direction, arose there and the court looked at the decision and said it was rational and defensible.

The Court of Appeals here searched this record, searched for any basis for the agency to reject a regulation, to rescind a regulation, when you had technology that it admitted worked and saved lives. And it found -- and we would suggest they were absolutely right -- that that is arbitrary and capricious action

under this statute, which was to be technology-forcing.

Here the agency didn't even force technology. They didn't even pick the best technology. They had their decision turn on the worst technology. What the agency has done is put the industry back in the driver's seat as far as the pace of safety, and that is directly contrary to the decision of the Congress that said that this is not going to be the industry's ball game as far as deciding when and how safety progress will be made. This is the responsibility of the agency.

Now, I would say that there are some points on which we had no disagreement with the Government. I think the Government tried to pick a fight on what were essentially phantom issues in their opening brief.

They first said that if this case stands an agency will be frozen in its tracks, uncertainty will never be enough. Well, we have said that an agency that can document or support a finding of uncertainty, of course it can change course.

Second, they said that there was a formal burden of proof that this case had imposed on the agency. We did not read it that way at all. Clearly, the burden of proof -- the burden of proof is on a party challenging an agency action, and the court's assertion below that the burden, that the burden, there was a

burden of explaining, is not much different again than what this court had said in Atchison, Topeka, that there is a presumption that the first decision of the agency is consistent with the statutory mandate, and if the agency reverses course there is a duty to explain.

We had no difference with the Government. There was no burden of proof. The Court of Appeals found, under any standard of judicial -- under any standard of rational decisionmaking, the decision below falls.

Finally, we asserted that the post-enactment legislative history doesn't ratchet up the standard of review. Once again, we did not see that that was how the Court of Appeals was using that legislative history, but if there were any question about that we were not relying upon post-enactment legislative history. We were relying and do rely on the standards of Overton Park, which we believe, when you march up the hill or down the hill, you have to pass muster under the standards of that case.

Parenthetically, we do, in connection with the colloquy with Justice Stevens, it's clear that the cases that speak about failure to act at all are a different genus than the revocation cases. The cases have consistently given agencies more elbow-room in failure

to act than in rescission, or revocation cases. Consistently the cases, which we've cited in our brief involving revocation, have held the agency to an arbitrary and capricious standard.

Now, let me make a couple more comments if I could in connection with the Solicitor's argument. First, as far as the questions of safety, the key fact is that at no point has the agency ever found that non-detachable belts pose any safety problem at all. In fact, all the evidence is just to the contrary. We have spelled this out in our briefs.

In 1978 the agency concluded that these non-detachable spool-release belts will not cause serious occupant egress problems. In 1978 GM, that had proposed that particular kind of belt, said that those belts would provide for rapid egress without use of buckle release mechanisms. And in this very proceeding, the GM safety director said that spool release is viable from a safety egress point of view.

So there has been no question on this record at all of support for a problem of egress with a non-detachable or spool-release belt.

In terms of the suggestion that the agency continues to be committed to a Coleman plan or the promotion of passive restraints, that as well is totally

belied by the record. First, there is the suggestion that there be an educational effort to convince people. Paul Newman will step out of his sports car, look you in the eye, and say, "Buckle up."

Well, that program had met with such disfavor in the Congress that they have denied additional funds to an educational program until -- that kind of educational program, until the agency can demonstrate that it's effective.

Second, they said that they've asked for more money. The Solicitor General notes that the agency has asked for $7.5 million of funding for a crashworthiness program. There is no indication what part, if any substantial part, is to go to a passive restraint program.

Third, they've suggested that they're going to have a demonstration program in the Government to put air bags in the cars. Now, today the only manufacturer that is going to produce air bags is Mercedes and they're going to make 5,000 cars, which leads to the interesting possibility of Government employees running their errands in $25,000 and $30,000 Mercedes automobiles.

There is no other U.S. manufacturer that is making any kind of passive -- there is no U.S.

manufacturer at all that is making any kind of passive restraint today. Within 24 hours of this decision, as the Court of Appeals had noted, within 24 hours of this agency decision, every manufacturer shut down its passive restraint program. Today you can't get any kind of passive restraint on any American car and you could only get it as an option on a VW Rabbit, on a VW Jetta, or a Toyota Cressida.

So the lure that there is something right around the corner in terms of safety and protection for our citizens, as suggested by the Solicitor, simply is belied by the record. Indeed, it's rejected.

QUESTION: Is that by the record or by what's happened since the decision?

MR. FITZPATRICK: Well, I think that -- I think that those facts are all either stated in the Solicitor General's brief or are matters of the record.

QUESTION: What's happened since the rescission? I thought that's what you were describing.

MR. FITZPATRICK: Well, the fact in terms of the agency shutting down the passive program clearly was described in the Court of Appeals' decision. The fact -- the Solicitor's brief speaks of the Mercedes program.

I do not know that my statement about the fact

that in 1982 that the only cars that have as an option a passive belt is contained in the record. I don't think there's any dispute about that, but I don't think it's contained in the record.

Now, in conclusion let me address one final point. The Government has in its reply brief attempted to cast this difference as a rather squalid disagreement between the automobile industry and the insurance industry. The Solicitor said: "From the broader perspectives of the nation as a whole, the decision is sound and responsible."

That approach we think is dead wrong. But if it were proper to look at this case from the broader perspectives of the nation as a whole, then I ask the Court to lay aside our brief and lay aside Mr. Cutler's brief, and look to the brief of the Epilepsy Foundation of America and the National Society to Prevent Blindness or the brief of the Mothers Against Drunk Driving or the Brief of the American College of Preventative Medicine or the American Academy of Pediatrics, to see where, in the Solicitor's terms, from the broader perspective of the nation as a whole, the responsible action lies.

Mr. Chief Justice, we believe that, for the reasons we have advanced today and in our briefs, the decision of the agency rescinding this important and

significant regulation to protect the lives of our citizens, that rescission was arbitrary and capricious and was properly set aside. We'd urge that the judgment of the Court of Appeals be affirmed and promptly so.

We thank the Court.

CHIEF JUSTICE BURGER: Mr. Solicitor General, you have four minutes remaining.

REBUTTAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF PETITIONER

U.S. DEPARTMENT OF TRANSPORTATION

MR. LEE: I think if there's anything that ought to be clear after Mr. Fitzpatrick's argument, it is that we are dealing in an area of uncertainty, an area that ought to be left to the particular abilities and expertise of the administrative agency.

Indeed, I am now uncertain, not only as to what is the best long-range solution, over which 17 years' worth of Transportation Secretaries have struggled; I am also uncertain even as to what Mr. Fitzpatrick's position is.

I heard on the one hand that the agency whom I represent had found that automatic belts do work, because of the fact that hundreds of thousands -- there have been hundreds of thousands of automobiles that had effective passive belts, and that it had increased usage

by 40 percent.

What he neglected to tell you was that the overwhelming majority of those automobiles had their detachable belts guarded by ignition interlocks. The surprising thing about those data is that the figure was not much higher than 40 percent, because unless the devices have been tampered with you can't even start your automobile unless those seat belts are buckled.

We were then told that what the agency should have done was to rule out a belt that doesn't work, then conceding that in fact this was a belt that didn't work. But that in fact is exactly what Secretary Lewis did, and that's all he did, was to rule out a belt that didn't work.

The standard that we urge in this case that should be adopted is whether the Secretary could rationally conclude that there was sufficient uncertainty to justify his not going forward with the procedure that wouldn't work.

QUESTION: Mr. Solicitor General, let me interrupt you about the belt that didn't work. Isn't that on the assumption that the belt will be detached just as often as an active belt will not be hooked up in the first instance?

MR. LEE: That is correct.

QUESTION: And did the agency even consider the extent to which the belt would be detached as compared with the extent to which people will hook up the belt in the first place?

MR. LEE: It considered --

QUESTION: I didn't find it in their report.

MR. LEE: It considered it to this extent, Justice Stevens. It came up to the point that it found that there were no reliable data that indicated one way or the other, so that it was left with the circumstance exactly as Secretary Coleman had, that you have to make your best judgment.

QUESTION: Just as a matter of common sense, isn't it perfectly clear that there will be greater seat belt usage if the belt is automatically attached and you have to do something affirmative to detach it, as opposed to the active belt? Isn't that perfectly obvious?

MR. LEE: There are two things that are perfectly obvious. One is --

QUESTION: Well, is that one of them?

(Laughter.)

MR. LEE: That is one of them, that there will be some increase.

But the second thing is --

QUESTION: And if you just get one percent increase, you save over 100 lives a year.

MR. LEE: If you get one percent increase, you may or may not save, you may or may not save lives a year, because you also have to take into account the additional cost and the impact on public reaction that results from the public perception of ineffective regulation which leads to a more expensive example of federal requirements.

This matter of the defeat rate, the problem of the individual regarding the device that is in his automobile as an enemy and finding some way to defeat it, to cut it out, as obviously happened with these VW belts and as obviously happened with the ignition interlocks, is a very real problem, must be taken into account.

And that, once again, is part of this uncertainty with which the agency has to deal. It did give its reasons. It did explain. This is not an Atchison, Topeka and Santa Fe Railroad case, in which there were no reasons that were given.

Now, Justice White asked the question, isn't this just a matter -- what if you had the same facts but a different reviewer of facts? That's exactly what you had with Secretary Coleman and Secretary Adams.

We submit this judgment should be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-354 - MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL, Petitioners v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL:

#82-355 - CONSUMER ALERT, ET AL., Petitioners v. STATE FARM MUTUAL INSURANCE COMPANY, ET AL.; and

#82-398 - UNITED STATES DEPARTMENT OF TRANSPORATION, ET AL., Petitioners, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.

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