

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AIR COURIER CONFERENCE OF AMERICA,
Petitioner, v. AMERICAN POSTAL WORKERS
UNION, AFL-CIO, ET AL.

CASE NO: 89-1416

PLACE: Washington, D.C.

DATE: November 28, 1990

PAGES: 1 - 48

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IN THE SUPREME COURT OF THE UNITED STATES

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AIR COURIER CONFERENCE OF, :

AMERICA, :

Petitioner :

v. : No. 89-1416

AMERICAN POSTAL WORKERS UNION, :

AFL-CIO, ET AL. :

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Washington, D.C.
Wednesday, November 28, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:56 a.m.

- APPEARANCES:
- L. PETER FARKAS, ESQ., Washington, D.C.; on behalf of the
Petitioner.
- PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the Federal Respondent supporting the
Petitioner.
- KEITH E. SECULAR, ESQ., New York, New York; on behalf of
the Private Respondents.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	L. PETER FARKAS, ESQ.	
4	On behalf of the Petitioner	3
5	PAUL J. LARKIN, JR., ESQ.	
6	On behalf of Federal Respondent,	
7	supporting the Petitioner	10
8	KEITH E. SECULAR, ESQ.	
9	On behalf of the Private	
10	Respondents	24
11	<u>REBUTTAL ARGUMENT OF</u>	
12	L. PETER FARKAS, ESQ.	
13	On behalf of the Petitioner	47
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

P R O C E E D I N G S

(10:56 a.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on No. 89-1416, Air Courier Conference of America v.
5 American Postal Workers Union.

6 Mr. Farkas, you may proceed whenever you're
7 ready. ORAL ARGUMENT OF L. PETER FARKAS

8 . ON BEHALF OF THE PETITIONER

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

11 This case concerns in the first instance
12 international remail. I thought I might open up by saying
13 a little more about remail than we said in our briefs. I
14 think it might be helpful to decide both the issues
15 presented. I will then discuss the standing issue, and
16 Mr. Larkin will go with the merits of the administrative
17 procedure.

18 International remail involves the shipment in
19 bulk of large volumes of business documents, publications,
20 and business correspondence to post offices abroad for
21 mailing to the ultimate addressee. For example, American
22 banks that have overseas depositors, credit card companies
23 that have overseas cardholders have to send the monthly
24 statements. Rather than go to the post office, affixing
25 U.S. Postal Service's international air rate, and sending

1 them off to -- for delivery abroad, under international
2 remail the courier will pick up those monthly statements
3 in bulk, will -- they would be unstamped. They would be
4 put on an air plane that evening, and they would be
5 delivered to a foreign post office the following morning,
6 where they would be mailed at -- usually at negotiated
7 rates for ultimate delivery by that post office or by
8 another foreign post office in some other country.

9 The international remail involves a savings of
10 time. Some shipments are delivered in half the time it
11 would take the United States Postal Service to deliver, to
12 deliver the same correspondence. It involves a savings in
13 money. Some of -- the record shows that savings of up to
14 50 percent exist in certain market for delivery by
15 international remail.

16 These savings of time and money save American
17 jobs. The record shows that if remail were unavailable
18 that certain publishers would move their printing
19 operations abroad. Under the example I noted before, if
20 remail were unavailable, that is, if low cost, reliable
21 and quick service for delivery of statements were
22 unavailable, the banks or credit card companies may think
23 -- start thinking about moving their computer billing
24 operations abroad.

25 So in short, this saves, saves American jobs.

1 It promotes exports, and it does so without necessarily
2 cutting into the business of the Postal Service because
3 international trade is not a zero sum game.

4 Now let me turn to the standing issue. The --
5 in 1979 the United States Postal Service suspended the
6 operation of the restrictions on private carriage of
7 letters --

8 QUESTION: Could you speak up a little bit, Mr.
9 Farkas. I'm having a little trouble hearing. Perhaps if
10 you raised the lectern a little.

11 MR. FARKAS: In 1979 -- can you hear me now?
12 Thank you, Your Honor.

13 In 1979, the United States Postal Service
14 suspended the restrictions on private carriage of letters
15 by -- and that -- those laws -- the restrictions on
16 private carriage of letters are referred to the postal
17 monopoly laws, also referred to in the briefs as the
18 private express statutes.

19 The 1979 suspension related to both domestic
20 urgent letters and international urgent letters. Soon
21 after the suspension, the practice -- the international
22 side of the urgent letter rule was used both to deliver
23 urgent letters to -- individually to foreign addressees
24 and also to deliver international letters, urgent letters
25 in bulk, to foreign post offices.

1 In 1985 the United States Postal Service took
2 exception to the delivery of letters, urgent letters, to
3 foreign post offices and initiated a rule making to
4 prohibit that practice. The users of remail, the
5 remailers themselves with the help of the administration
6 and members of Congress, participated in that rule making
7 and the -- eventually the Postal Service turned around and
8 issued a rule that said remail was okay. It was lawful.

9 The American Postal Workers Union and the
10 National Association of Letter Carriers then sued the
11 Postal Service, saying that the suspension was improper
12 and therefore violated the postal monopoly laws. They
13 alleged as their injury the possibility of losses of jobs,
14 postal employment jobs, and the district court found that
15 to meet the Article III injuring fact test but dismissed
16 the case on the grounds that the postal employees were not
17 in the zone of interest of the postal monopoly laws. The
18 court of appeals reversed, and we're here on petition for
19 certiorari.

20 QUESTION: Did you raise below the
21 jurisdictional question at all, whether it was
22 appropriately brought under the Administrative Procedure
23 Act?

24 MR. FARKAS: No, we did not and we disagree with
25 the Government that that issue was either properly raised

1 here and we also disagree with their position on the
2 merits of that issue.

3 In order to -- under the zone of interest test,
4 in order to look at whether -- one looks to the statute
5 and its legislative history to determine whether a party
6 asserting a violation of an act was the party who's
7 rightfully entitled to pursue that suit. The private
8 express statutes were originated in the late 19 -- late
9 1700's as a general tax provisions and as a means of
10 paying for post roads.

11 The only time that Congress ever debated the
12 postal monopoly laws were in 1845. And at that time,
13 there were two -- two reasons advanced for the postal
14 monopolies. The first one was to help bind and build the
15 frontier and connect it to the rest of the country. The
16 second reason was to control the flow of information. At
17 the time it was believed unfair that some individuals
18 might take advantage of commercially useful information
19 that travelled faster than the mails could carry them.

20 Never in the history of any consideration of, of
21 a postal monopoly laws were the interests of postal
22 employees ever considered. Therefore, we contend that the
23 postal employees are not within the zone of interest of
24 the postal monopoly laws and the case was properly
25 dismissed by the district court.

1 The unions here have not seriously challenged --
2 in fact they appear to have abandoned the contention that
3 the private express statutes give them standing. They now
4 turn to the Postal Reorganization Act of 1970 as the
5 appropriate statute to look to for standing purposes for
6 zone of interest purposes.

7 We believe that the Postal Reorganization Act
8 does not confer standing because it was no more a postal
9 employment act -- it no more promoted postal employment --
10 Congress no more considered postal employment -- that is,
11 in numbers -- in promulgating that act --

12 QUESTION: Is this, is this really an argument
13 or is it part of an argument that the statute doesn't
14 provide the private cause of action to anybody?

15 MR. FARKAS: No, this is not a private cause of
16 action case. This is a judicial review case. And I think
17 the judicial -- if that's made clear, that also reflects
18 on the -- on the reviewability on the Administrative
19 Procedures Act issue raised by the Government by the
20 Postal Service.

21 QUESTION: At the time of the debate on the
22 Postal Reorganization Act of 1970, was any of that debate
23 addressed to the merits of the private express statute?

24 MR. FARKAS: No, it wasn't. Congress
25 specifically declined to change the private express

1 statutes at that time, and the legislative history says
2 so.

3 In short, the Postal Reorganization Act was
4 intended to make the Post Office into a more businesslike
5 -- Government-owned corporation. The unions opposed the
6 Postal Reorganization Act because they ended Civil Service
7 protection for employees, and it was predicted to reduce
8 postal employment in the long run because it was predicted
9 to, to help the Post Office automate and help the Post
10 Office get the Congress off its back to keep it from
11 automating. And, therefore, the purposes of the act, of
12 the 1970 act, do not bring the postal employees within the
13 zone of interest of the private express statutes.

14 QUESTION: Well, that's parallel with their
15 contention here, isn't it? They're saying it's just a,
16 a continuation of that, and we object. They're not being
17 inconsistent.

18 MR. FARKAS: Well, they are being inconsistent
19 in the sense that, Justice Kennedy, that they were opposed
20 to the Postal Reorganization Act because they thought it
21 would cost them jobs. If that's so --

22 QUESTION: Well, they're still saying that.

23 MR. FARKAS: Well, but they're --

24 QUESTION: And then it shows they have a
25 continuing interest in the enforcement and the operation

1 of this statute. They say now that you've done it, just
2 don't carry it too far. Isn't that -- isn't that their
3 claim?

4 MR. FARKAS: Well, but Congress has spoken by
5 passing -- by passing the Postal Reorganization Act over
6 their objections, and Congress --

7 QUESTION: Well, the question is whether the --

8 MR. FARKAS: That's not their intention to save
9 postal jobs.

10 QUESTION: Well, it was -- it was to keep jobs
11 in some stat, in -- at some level.

12 MR. FARKAS: In any event, the purposes of the
13 private express statutes are not clarified or helped by
14 the Postal Reorganization Act. They were passed for
15 different purposes and therefore, the Postal
16 Reorganization Act is irrelevant to bringing the postal
17 employees within the zone of interest of the postal
18 monopoly laws.

19 I'd like to -- with the Court's permission, I'd
20 like to save the -- my remaining time for rebuttal.

21 QUESTION: Very well, Mr. Farkas.

22 Mr. Larkin, we'll hear now from you.

23 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

24 ON BEHALF OF THE FEDERAL RESPONDENT,

25 SUPPORTING THE PETITIONER

1 MR. LARKIN: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 We agree with the petitioners that the unions
4 cannot bring this law suit under the APA. As we explained
5 in our opening and reply briefs, we believe that the
6 unions did not and cannot satisfy the zone of interest
7 tests that this Court has set out in its decisions. But
8 we and in this case, we alone, also believe that there is
9 an additional reason why the unions cannot invoke the APA
10 in this case, and that is that Congress has exempted the
11 Postal Service from the APA by passing section 410(a) of
12 the postal code.

13 QUESTION: Well, Mr. Larkin the Government did
14 not petition for review in this case.

15 MR. LARKIN: Correct.

16 QUESTION: And it's simply here is a respondent,
17 right?

18 MR. LARKIN: Correct.

19 QUESTION: Is it permitted to raise a separate
20 question from that raised by the petitioners?

21 MR. LARKIN: Normally, no. There is only one
22 small category of cases where we think that could be done.
23 We think this case fits into that category.

24 QUESTION: What's the authority for that
25 exception?

1 MR. LARKIN: The exception would be where the
2 matter is jurisdictional, and we think that the way this
3 Court discussed this type of issue in the case of Block v.
4 Community Nutrition Institute that it treated these types
5 of issues as being -- as the Court said in Block -- in
6 effect jurisdictional.

7 The last footnote in the Block case, footnote 4,
8 was the footnote in which the Court said that it declined
9 in that case to resolve the Article III question that was
10 before the Court. The question in that case under Article
11 III was whether the plaintiff's net lawsuit had standing.
12 There was an additional question in that case of whether
13 or not review was precluded under the APA. The Court
14 resolved the case by looking to the preclusion issue and
15 not resolving the standing issue. So we think that both
16 what the Court said in the Block case and what the Court
17 did in the Block case indicates that the Court believes an
18 issue like this is one that can be raised in this sort of
19 matter.

20 QUESTION: Even though -- even though not
21 jurisdictional in any strict sense of the word at all.

22 MR. LARKIN: Well, the term "jurisdictional,"
23 Your Honor, is one, I readily admit, has been used to
24 cover a variety of different types of claims. For
25 example, sometimes the word jurisdictional is used when

1 really the word authority is an issue. Sometimes the word
2 jurisdictional is used to discuss threshold issues which
3 would normally not be jurisdictional in the Article III
4 sense. They would be threshold issues such as whether or
5 not someone has exhausted remedies in the administrative
6 process.

7 But the peculiar factual scenario in the Block
8 case tends to indicate, I think, that the Court meant that
9 in the stronger jurisdictional sense because there was in
10 fact an Article III question that was presented by the
11 Government in that case. We brought a challenge on that
12 type of ground to the decision below. It was one of the
13 questions that we briefed in the case, and the Court,
14 rather than resolve the Article III issue, resolved this
15 other issue.

16 So that is why, Your Honor, even though I
17 readily confess that we did not raise the issue below, we
18 raised it for the first time in our brief in opposition,
19 and that normally a respondent, of course, cannot
20 interject a new issue into the case. We think nonetheless
21 this fits into that category.

22 And there is another and a smaller reason, I
23 might like to add at this point, why you -- Court may wish
24 to consider it.

25 QUESTION: A narrow one.

1 MR. LARKIN: A narrow one. The narrow one is
2 this. As the Court pointed out in the opinion by Justice
3 White in the Clarke case, the zone of interest tests is
4 principally a gloss on section 702 of the APA. If,
5 therefore, we are right in this case and the APA is
6 inapplicable to the Postal Service, then that is the type
7 of issue you would want to consider in deciding whether or
8 not the zone of interest test is the proper way of looking
9 at this case. We think the zone of interest test has not
10 been satisfied by the unions.

11 QUESTION: That surely is not a jurisdictional
12 argument.

13 MR. LARKIN: True. That -- that's not a
14 jurisdictional one, I agree. That's more a prudential
15 one. And I bring it to your attention because we thought,
16 since this is one of the issues that a court looking at
17 this sort of problem would have to consider. that is one
18 the Court would probably want to keep in mind.

19 QUESTION: Mr. Larkin, in addition to the APA
20 problem I guess there's also the question whether the
21 postal express statutes create a private cause of action,
22 and of course you say, you say they don't. Is that a
23 jurisdictional issue also in your view?

24 MR. LARKIN: Well, there is indication of that
25 in the case that is cited in footnote 4 in the Block

1 opinion, which is the Amtrak case, where in that case the
2 Court resolved a cause of action issue without, to the
3 best of my recollection, resolving a different type of
4 standing issue.

5 So if that case -- that case would therefore
6 tend to indicate that a private right of action case,
7 perhaps only where you're dealing with the Government
8 rather than a private party, would at least be seen on
9 that sort of parallel. But I would also admit the Amtrak
10 case did not use the word "forfeit." It didn't say that
11 this was the type of issue that could not be forfeited.

12 Normally, a private right of action issue is not
13 one that you would think of as a jurisdictional issue.
14 That I agree.

15 QUESTION: Mr. Larkin, you didn't raise this
16 below?

17 MR. LARKIN: Correct, we made a mistake.

18 QUESTION: Well, do you know of any other
19 instance where we take up a point that wasn't raised
20 below?

21 MR. LARKIN: Well, generally the Court doesn't
22 resolve questions that weren't raised below, but for
23 example, if the Court believes it's necessary properly to
24 resolve the case -- yesterday's opinion is some indication
25 that the Court will resolve the case at least on a basis

1 that wasn't --

2 QUESTION: Do you know --

3 MR. LARKIN: -- argued by the parties.

4 QUESTION: Do you know of any instance, other
5 than the one you gave, where this has been done?

6 MR. LARKIN: Not off the top of my head, no.

7 QUESTION: Off of any other part?

8 (Laughter.)

9 MR. LARKIN: You've got -- the rest of me can't
10 come up with an answer either. And we think for the
11 reasons I have said now and tried to summarize in our
12 brief that it's an issue that the Court would want to
13 consider and proper --

14 QUESTION: Well, what is different from that and
15 an amicus curiae?

16 MR. LARKIN: Well, we, as a respondent, I don't
17 think, Your Honor, don't have any greater right to --

18 QUESTION: The trouble is you can't be a
19 respondent and an amicus curiae.

20 MR. LARKIN: Correct.

21 QUESTION: But aren't you doing just that?

22 MR. LARKIN: I don't think so. I'm not trying
23 to. I don't want to try to force something on the Court,
24 but --

25 QUESTION: Well, you won't. You won't.

1 (Laughter.)

2 MR. LARKIN: But it is -- it is the way we
3 looked at the case, and we think that it's one that the
4 Court could decide. And under it's precedents, as I
5 pointed out, there would be reasons to believe that the
6 Court should decide it.

7 Now the issue --

8 QUESTION: Mr. Larkin, in the case that we
9 decided yesterday -- I assume you're referring to Arcadia?

10 MR. LARKIN: Yes, sir.

11 QUESTION: There, it was difficult to decide
12 correctly the issue that was initially presented, namely
13 whether you needed a conflict or there was field
14 preemption, without first deciding -- it bore upon that
15 question whether the 'field you're talking about was the
16 entirety of FURC jurisdiction.

17 Now, is that same situation here that we
18 couldn't resolve the other issue intelligently without
19 first reaching the APA coverage issue?

20 MR. LARKIN: I think that bears on my answer to
21 what I gave to Justice White.

22 QUESTION: Which I didn't understand, I guess.

23 MR. LARKIN: Well, what the Court in the Clarke
24 case said, that the zone of interest inquiry is best
25 looked at -- best looked upon as analysis of section 702

1 of the APA. It's a gloss, if you will, on the test of
2 section 702 of the APA. And its zone of interest inquiry,
3 the Court said in Clarke, is also far more generous than
4 the type of analysis someone -- a court would have to
5 employ under a Cort v. Ash.

6 So whether or not the APA applies, therefore,
7 determines to some extent the type of analysis you have to
8 follow.

9 QUESTION: Well, we'd still decide the zone of
10 interest thing the same way. I mean, we wouldn't -- it
11 wouldn't affect how we came out on this zone of interest
12 issue.

13 MR. LARKIN: Well, I --

14 QUESTION: All you're saying is that the zone of
15 interest test maybe shouldn't be applied, but we could --
16 we would still apply it correctly even though it might be
17 unnecessary.

18 MR. LARKIN: Well, you -- the zone of interest
19 test wouldn't be applied differently, but as you say, you
20 may or may not want to apply it. Now, in our view they
21 haven't satisfied the zone of interest test. The private
22 express statutes are the relevant statutes to look to in
23 this sort of context, and the unions cannot make out a
24 satisfactory showing that they are within the zone of
25 interest of the private express statutes. For that reason

1 I believe the unions have in part also tried to raise what
2 they call a common law, non-statutory type of claim.

3 Now, this Court has in some limited
4 circumstances allowed that type of showing to be
5 sufficient, basically in two types of circumstances. One
6 is where someone can satisfy the prerequisites for
7 obtaining mandamus. That the unions cannot do here. In
8 fact, they've made no real effort to try to satisfy the
9 strict requirements for mandamus.

10 And the other is best illustrated by the Court's
11 discussion in the case of Stark v. Wickard -- is a
12 situation in which Congress has implicitly granted someone
13 the right to bring a suit. That also is not the type of
14 showing that we think the unions can make out. That is
15 essentially the type of showing a union would have to make
16 out to satisfy the Cort v. Ash test, and we don't think
17 they can satisfy that very strict showing.

18 So if you look at it as a matter of the zone of
19 interests analysis, we don't the unions can satisfy that.
20 They can't show that they are within the zone of interest.
21 And to be perfectly candid, I think no one is within the
22 zone of interest except the Postal Service. The purpose
23 of the private express statutes was to protect the Postal
24 Service's ability to obtain sufficient revenue so that it
25 could serve the Nation at a uniform rate. It wasn't

1 designed to protect the unions or postal employees, which
2 -- and the concept of postal employees unions would have
3 been unheard of in 1845, when the statutes essentially
4 took their current shape -- and the statutes weren't
5 designed to protect anyone else. It was designed
6 basically to protect the union -- excuse me, the Postal
7 Service and, therefore, the public as a whole.

8 So therefore, it's really the Postal Service
9 that fits within the -- the zone of interest of the
10 private express statutes.

11 And as we've explained in our brief and I've
12 tried to summarize here, the unions also cannot satisfy
13 the necessary prerequisites for making out an implied
14 right of action.

15 If I can, then, I'd like to say a few words
16 about the merits of the case in the remaining time. And
17 that is this. We think that this record here is an
18 excellent example of precisely how Congress intended the
19 rule-making process to operate. The Postal Service
20 started out with a rule, a proposed rule, in which it
21 believe that the international remailing practice was
22 unlawful. After hearing from considerable commentary by
23 both members of the public and -- as well as other
24 Government officials, the Postal Service changed its mind
25 in reliance on those comments and ultimately adopted the

1 international remailing rule.

2 The unions have, I think, essentially two
3 arguments that they've made to try to criticize the Postal
4 Service in this case. The first is that the rule is not
5 likely to benefit the public as a whole and is likely to
6 benefit those businesses that engage in international
7 business. I think that's a misdirected inquiry.

8 The question is not whether the entire public
9 can make use of a suspension, but is whether the
10 suspension will benefit the public. In this case, the
11 Postal Service concluded that it would for a variety of
12 reasons benefit the public, and that was based upon
13 information from parties not only in the private sector,
14 as I said, but also from Secretary of Commerce, the
15 Chairman of the President's Council of Economic Advisors,
16 the Director of the Office of Management and Budget, and
17 the Attorney General of the United States. Those comments
18 indicated that this will help American businesses sell
19 goods overseas, which is in the public interest.

20 The second challenge that the unions have raised
21 is that the postal service did not adequately consider the
22 potential revenue effect of the suspension on its ability
23 to serve the public as a whole. And we think that
24 criticism is unfair.

25 The Postal Service admitted. both at the out --

1 QUESTION: Well, maybe it's right?

2 MR. LARKIN: No, it's not. It's worse than not
3 right. It's unfair.

4 The Postal Service at the outset and at the
5 conclusion of the process admitted that it did not have
6 the hard data that it would have liked. It asked the
7 public for that data, but it wasn't forthcoming.

8 The Postal Service therefore faced a decision,
9 because making no decision -- that is, not adopting a
10 suspension or deferring a suspension would be as much of a
11 decision as allowing suspension to go into effect.

12 What the Postal Service did was use a worst-
13 case scenario. It took a very high over-estimate of the
14 potential loss that it would suffer, and using that over-
15 estimate of its potential loss, nonetheless came to the
16 conclusion that the potential benefits out weighed the
17 potential loss.

18 And that's not an irrational result. Under a
19 public interest standard, an agency is entitled to make
20 that sort of assessment, particularly since the agency has
21 the ability over time to monitor the situation. If in
22 fact it were to prove that this would be too financially
23 debilitating, the Postal Service would have the ability to
24 modify the suspension or repeal it entire -- in its
25 entirety.

1 But what the respondents would have us do in
2 this case is, in the absence of complete and perfect data,
3 take no action at all, basically to stymie the agency
4 until it had the type of data that, I'm told by the Postal
5 Service, it really can't ever get. In those
6 circumstances, that would simply be forcing upon the
7 Postal Service a rule that's inconsistent with this
8 Court's decisions in cases such as Listeners Guild.

9 For these sorts of reasons and the ones laid out
10 in our brief, we ask the Court to uphold the Postal
11 Service's decision in this case on the ground that it was
12 eminently reasonable and satisfied all of the requirements
13 of the APA.

14 QUESTION: But you don't have to give reasons
15 not to adopt a rule, do you? You have to give reasons to
16 adopt one, and that's, I guess, if you have no data, you
17 don't adopt.

18 MR. LARKIN: Well, you had a request in this
19 case and you had a difference of opinion between some
20 officials in the Executive Branch and the Postal Service
21 over whether or not for example this was a practice that
22 could be conducted under the regulations that existed
23 beginning in 1979. The Postal Service included its most
24 forthright way of resolving this problem was to go ahead
25 and adopt a regulation setting forth its considered view

1 of the matter. And in that circumstance, we believe that
2 what they did was eminently reasonable.

3 Now, maybe they could have done nothing, but it
4 would have left this cloud, as Chairman McKean said. They
5 thought that the most responsible thing for the agency to
6 do was to dissipate that cloud.

7 Thank you.

8 QUESTION: Thank you, Mr. Larkin.

9 Mr. Secular?

10 ORAL ARGUMENT OF KEITH E. SECULAR

11 ON BEHALF OF THE PRIVATE RESPONDENTS

12 MR. SECULAR: Mr. Chief Justice, and may it
13 please the Court:

14 I'd like to begin by just following up on
15 Justice Scalia's last question and the response. This
16 case is not, and I really want to emphasize this. This
17 case is not about the legality or the illegality of
18 international remailing. Mr. Farkas' clients were in
19 business before the suspension, and regardless of what
20 happens here, they're going to continue to be in business.

21

22 This case really has to be understood in the
23 context of the 1979 urgent letter suspension. That's the
24 suspension under which the international remail practice
25 grew up. That suspension prescribed two tests, certain

1 delivery deadlines which had to be satisfied and it
2 prescribed an alternative cost test. The private courier
3 had to charge a certain minimum amount. And if that
4 minimum amount was charge then there was presumably a
5 reason why the mailer wanted to use a private courier
6 rather than the Postal Service.

7 That was the balance the Postal Service struck
8 to meet the needs of mailers who needed to go outside the
9 Postal Service while at the same time safe guarding the
10 monopoly.

11 What the regulation here did, and this is the
12 point that petitioners' arguments are missing, is to
13 release the international remailers and their customers
14 from those requirements. To simplify it, there's a
15 minimum requirement of a charge of twice the applicable
16 postage or \$3 -- let's just say \$3 -- for a given mailing.
17 Under the international remail suspension, that charge is
18 no longer in effect for this one group.

19 And it was that that we -- that we attacked. It
20 was the -- what we saw as an arbitrary and capricious
21 release of this one group from the same requirements that
22 are applicable to all other mailers who wish to use
23 private carriage rather than the Postal Service, and it's
24 that aspect of the case that we contended was unjustified
25 by anything in the record.

1 QUESTION: Did you present testimony or present
2 your views to the hearing?

3 MR. SECULAR: We presented comments.

4 QUESTION: Comments.

5 MR. SECULAR: Yes.

6 Now as -- just to follow up on the merits for
7 the moment and I'll move on to the reviewability and
8 standing issues.

9 The issue with respect to revenue loss, which
10 was the primary concern of the court of appeals. It's not
11 simply whether or not the Postal Service forecasted or
12 attempted to forecast how much revenue would be lost. The
13 question is the failure of the Postal Service to examine
14 the economic tradeoffs that are involved.

15 For example, international mail, just like any
16 other class of mail, is expected to make a contribution to
17 the maintenance of the Postal Service's institutional
18 infrastructure. The Court has examined the rate-making
19 procedures set forth in the Postal Reorganization Act in
20 the National Greeting Card case. And essentially there
21 are two types of costs which arise in the Postal Service
22 rate-making scheme. One are attributable costs, those
23 costs which can be attributed to a specific class of mail,
24 and other cost, which is simply assigned on an equitable
25 basis, based on statutory criteria, to all the classes of

1 mail in order to preserve the Postal Service's
2 institutional infrastructure.

3 Now, while international mail is outside the
4 scheme of the Postal Rate Commission, it has historically
5 -- and the evidence we submitted in the record makes that
6 clear -- it has historically made a contribution to the,
7 to the Postal Service's institutional costs.

8 QUESTION: Mr. Secular, it strikes me --

9 MR. SECULAR: Yes.

10 QUESTION: -- now these are your arguments on
11 the merits, you say.

12 MR. SECULAR: That's right.

13 QUESTION: It strikes me there as something that
14 could be made by any person from the general public, so to
15 speak. Do they have any connection with the special
16 standing you claim as being Postal Service employees?

17 MR. SECULAR: Well, under the case law, as I
18 understand it, standing is a separate inquiry and --

19 QUESTION: You say, in effect, that if you can
20 show standing, then you can come in and make arguments
21 that have nothing to do with the reason for your standing?

22 MR. SECULAR: Yes, we can assert the public
23 interest once standing is established. I think the cases
24 do -- like the Sierra Club establishes that and some of
25 the --

1 QUESTION: Does that seem at all odd to you?

2 MR. SECULAR: Well, it's a -- it's a bifurcated
3 inquiry. I think it's consistent with the function of the
4 zone of interest tests. The zone of interest test, as
5 most recently articulated in Clarke, is a guide to the
6 Court to determine who is an appropriate plaintiff, who
7 should the Court hear from. It's, in effect, to screen
8 out inappropriate plaintiffs, those plaintiffs whose
9 interests are so marginal or inconsistent with the statute
10 that presumption is fair that that particular plaintiff
11 would not be a reasonable plaintiff for the Court to hear.
12

13 But once someone has satisfied the zone of
14 interest test and comes before the Court as a reasonable
15 plaintiff, I think the cases then allow that plaintiff to
16 challenge the legality under the statute without regard to
17 the specifics of his interests.

18 Just to finish up the point on costs. The
19 question that the Postal Service did not examine was what
20 effect would the loss of revenue that it forecasted have
21 on the remaining users of the mail.

22 This is very, very simplistic for anyone who is
23 familiar with the rate-making process, but the Postal
24 Service calculated the cost under its worst-case scenario
25 as a little bit over 3 percent of its total revenue.

1 That's an enormous amount of money. 3 percent, if it were
2 distributed evenly over the rest of the rate structure,
3 could mean, for example, close to a penny increase on the
4 first class stamp.

5 The question is what is the rationale for making
6 the remaining users of the mail pay ultimately more for
7 their postage so that the customers of the international
8 remailers could have, in essence, free access to the
9 remailers. Maybe there is a public interest rationale.
10 The Postal Service never articulated it. That's what
11 troubled the court of appeals and that's why the court of
12 appeals remanded the case back to the Postal Service to
13 articulate that kind of rationale.

14 QUESTION: May I interrupt with a question, and
15 I don't know if the record comments on this at all, but
16 we're talking about a net loss -- I mean, a loss of gross
17 revenues. And presumably -- and this is why you're
18 objecting -- there are also some jobs that are going to be
19 lost as a result of this, which means that there are some
20 costs that are going to be saved. That's inherent in your
21 position, isn't it?

22 MR. SECULAR: That's -- what you're driving at
23 is whether or not the net -- whether there would be a loss
24 of net revenue.

25 QUESTION: Yes.

1 MR. SECULAR: Whether the costs incurred by a
2 Postal Service in furnishing international mail service
3 are greater than the loss of revenue.

4 QUESTION: Is there anything in the record that
5 --

6 MR. SECULAR: Yes, we submitted a declaration by
7 an economist which was not rebutted which tended to show
8 -- and the court of appeals cited to that, although
9 without referencing the declaration -- that there was a
10 net loss, and that in fact --

11 QUESTION: Is there anything to indicate the
12 magnitude of the net loss?

13 MR. SECULAR: There are documents, and I don't
14 have the number off the top of my head, but there are
15 documents in the record from the Postal Service's
16 comprehensive annual statement of operations which show a
17 declining international mail volumes and textually a
18 comment by the Postal Service that attributes at least a
19 significant portion of that loss to the growing practice
20 of remailing. So there is something in the record --

21 QUESTION: I'm not sure that responds to my
22 question. Is -- and -- and maybe it doesn't make any
23 difference, but there's a little bit of a -- sort of a
24 little bit of a tension between --

25 MR. SECULAR: I don't -- yeah -- I understand.

1 I don't --

2 QUESTION: -- your standing argument that you're
3 hurt by this and your relying entirely on the loss of
4 gross revenues, it seems to me.

5 MR. SECULAR: Well, it was the Postal Service
6 that cited the loss of gross revenue. There is no
7 specific estimation of the loss of net revenue. And in
8 fact, and I may regret saying this if the case proceeds
9 any further, if the case goes back to the Postal Service
10 and the Postal Service establishes that there is no
11 significant loss of net revenue, it may be that we're not
12 going to prevail ultimately in the court of appeals.

13 That -- having addressed the --

14 QUESTION: Let me ask one other question. This
15 gets a little closer to standing. Is there anything in
16 the record to indicate the impact on loss of jobs? How
17 many jobs are affected by --

18 MR. SECULAR: No, what we cited to was the
19 threat of job loss, which I think is sufficient to confer
20 injury and fact standing under the cases.

21 QUESTION: Was there anything to show the impact
22 on jobs of the 1979 regulation?

23 MR. SECULAR: No, there's no evidence of that.

24 QUESTION: Because there would have been some
25 history to work with there I suppose?

1 MR. SECULAR: Well, one of the interesting
2 issues that is raised by -- and I may be wasting my time
3 by elaborating on this. I think there are a couple of
4 questions that are raised by the urgent letter exception,
5 and one is whether or not there was any diversion. The
6 philosophical assumption of the urgent letter exemption
7 was that there was a type of service that the public
8 needed the Postal Service couldn't provide. So, in theory
9 at least, the mail volume that was generated by the urgent
10 letter exemption is not volume that the Postal Service was
11 already processing.

12 QUESTION: Yes, I see.

13 MR. SECULAR: It's also -- now I'm really just
14 speculating but I think it's fair -- one could theorize
15 that the marketing activities of the express mail industry
16 have increased the overall market, and possibly increased
17 the Postal Service's express mail business. So it would
18 be difficult to forecast the loss in revenue or job impact
19 from the urgent letter exemption.

20 As to -- briefly on the question of judicial
21 review and whether or not the -- this case can probably
22 brought under the Administrative Procedure Act. The only
23 justification that's been offered for raising that issue
24 for the first time is the notion that this is in essence a
25 jurisdictional claim, and the authority for that

1 proposition is Block v. Community Nutrition Institute.

2 I would point out that what Block was focusing
3 on is whether the substantive statute precluded review in
4 its entirety, not simply a question of whether the APA was
5 applicable. And it was on that basis that the Court
6 characterized the preclusion -- the issue as
7 jurisdictional. There's no basis in the case law for
8 treating the availability of the APA as jurisdictional.
9 In fact, Califano v. Sanders settled that the APA was not
10 a jurisdictional statute.

11 This -- the jurisdictional statutes involved
12 here were the Federal question statute and section 409 of
13 the Postal Reorganization Act. That's what creates
14 jurisdiction in the district courts for bringing this
15 lawsuit and seeking the relief that we sought.

16 At that point, I would point out, it's the
17 Government that focused and defined the issues in terms of
18 the APA zone of interest test. So I think there's no
19 basis for that issue being raised here for the first time.

20 QUESTION: Let me go back to Block for a second.
21 That wasn't really a fact that there was no review. There
22 was no review for the particular class of litigant that
23 was before the Court.

24 MR. SECULAR: That's correct. That's correct.

25 As I indicated in earlier responses, the

1 standing question as the case now -- as the case now
2 appears before the Court is defined solely in terms of the
3 zone of interest test. The zone of interest test focuses
4 on whether the plaintiff is arguably within the zone of
5 interest to be protected or regulated by the statute in
6 question.

7 Now, the argument advanced by petitioner in this
8 case focuses primarily on the notion that the private
9 express statutes are different from the Postal
10 Reorganization Act, which is the organic statute involved.
11 And we're claiming a violation of the postal -- of the
12 private express statutes, which date back to the seven --
13 1700's, when there were no postal unions, and therefore we
14 couldn't be within the zone of interest. I'd like to
15 address that argument.

16 First of all, let's start with what it is we're
17 contending, because I think that's the beginning of a
18 standing inquiry. Our contention on the merits is that
19 the Postal Service acted in excess of its authority, that
20 it abused its discretion. It acted arbitrarily in -- and
21 capriciously. The source of the authority to act that we
22 claim the Postal Service exceeded, or the source of
23 discretion which we say it abused, is 39 U.S.C. 601(b).
24 That is the one provision which the Postal Service claims
25 is the source of its authority to suspend the private

1 express statutes.

2 The argument that is being made is that 601
3 should not be considered part of the Postal Reorganization
4 Act. It should be considered some sort of 19th century
5 enactment. And let me digress and just address the
6 history here, which is summarized in our brief.

7 QUESTION: Well, where is -- is that particular
8 statutory section set out in your brief?

9 MR. SECULAR: 601 is in the statutory appendix.

10 QUESTION: Whereabouts? Well, don't worry --
11 don't take time from your argument to --

12 MR. SECULAR: Just to paraphrase it, it provides
13 that the Postal Service may suspend the foregoing section
14 or any part thereof where the public interest requires the
15 suspension. It's referring to section 601(a), which sets
16 forth certain conditions under which mail that would
17 otherwise be covered by the private express statutes can
18 be carried outside the mail. In essence, if an individual
19 puts appropriate postage on a letter, seals it, and marks
20 it appropriately, the letter can be carried outside the
21 mail.

22 That privilege of carrying letters outside the
23 mail was enacted in 1852. In 1852 the Postal Service --
24 Congress enacted a statute which gave the Postal Service
25 the authority to manufacture embossed envelopes with

1 postal on the envelopes and permitted the Post Office --
2 and further provided that those -- letters sealed in those
3 envelopes could be carried outside the mail.

4 In 1864, Congress passed another statute which
5 authorized the Postmaster General to suspend the 1852 law.
6 In other words, to revoke the privilege of carrying
7 letters outside the mail. That original 1864 enactment
8 never authorized the Post Office Department to suspend the
9 monopoly, and that was clear as the statute developed in
10 1872, in 1938. And it wasn't until 1960 when the -- when
11 Title 39 was revised, that the present structure came into
12 effect.

13 QUESTION: The present structure authorizing the
14 suspension of the PES?

15 MR. SECULAR: Yes, the present structure which
16 can be read as authorizing suspension of the private
17 express statute. And I would point out that was enacted
18 without any debate.

19 Be that as it may, there is no historical
20 practice of suspending the private express statutes, which
21 dates back to the 19th century. It's a modern
22 development.

23 QUESTION: Well, was there any debate or
24 discussion or was the statute that was finally formed in
25 1960, was that changed in any way in the Postal

1 Reorganization Act of 1970?

2 MR. SECULAR: Only in the sense that Post Office
3 was changed -- postmaster -- the reference to Postmaster
4 General was changed to Postal Service.

5 QUESTION: Well, no substantive change?

6 MR. SECULAR: No substantive change.

7 QUESTION: So, no part of the debate over the
8 Postal Reorganization Act in 1970 involved this statute,
9 which you say is the crux of the Government's power to
10 move here -- the Post Office's power to move.

11 MR. SECULAR: That's correct. But I would point
12 out that there really wasn't any reason for Congress to be
13 thinking in terms of suspensions of the private express
14 statutes when it debated the Postal Reorganization Act.

15 QUESTION: No, that wasn't what they were
16 thinking about.

17 MR. SECULAR: That's right.

18 QUESTION: And it seems to me that greatly
19 weakens your case for standing. The court of appeals
20 relied on the Postal Reorganization Act, saying that there
21 had been considerable discussion of the role of postal
22 workers and the concern for them. But in -- that may well
23 have been. But it seems to me that what you're talking
24 about is something quite different from that.

25 MR. SECULAR: Well, I -- let me make two

1 responses to that -- to that point, Mr. Chief Justice.
2 One is that I don't think that the 1960 statute could have
3 been fairly interpreted, at least in terms of
4 congressional intent, as authorizing suspensions of the
5 monopoly.

6 The Postal Service really began to view 601(b)
7 as a source of authority to suspend the monopoly for
8 reasons of policy with respect to certain specific classes
9 of mail, after the Postal Reorganization Act was enacted.
10 That's an historical response.

11 QUESTION: But did -- but did that have any --
12 but did its viewing when it did at the 1960 statute in
13 such a way have anything to do with the Postal
14 Reorganization Act?

15 MR. SECULAR: The governor's report in 1973
16 didn't address the issue as -- in any thorough way. But
17 let me move onto another response.

18 QUESTION: Well, what is your answer to that
19 question, the question I just asked you? Did the position
20 taken by the Post Office after the Postal Reorganization
21 Act about the authority in the -- have anything to do with
22 the postal reorganization?

23 MR. SECULAR: No.

24 QUESTION: Before you move on, can I ask another
25 question about the same section?

1 MR. SECULAR: Yes.

2 QUESTION: Why is that the crucial section? It
3 seems to me what you are doing is claiming the benefit of
4 the monopoly, and this is a section authorizing the Postal
5 Service to eliminate the monopoly as to certain portions.
6 But the statute that you claim gives you the protection is
7 the basic conferral of the monopoly upon the Postal
8 Service.

9 MR. SECULAR: Well, this --

10 QUESTION: Not the later provision, whenever it
11 was adopted, allowing an exception from it.

12 MR. SECULAR: Well, I'm not sure, claiming the
13 protection of the monopoly is precisely the right
14 characterization.

15 QUESTION: Well, you're claiming it was --
16 you're within the zone of interests for which the monopoly
17 was designed. It seems to me that that's your claim. I
18 don't see how the exception statute does anything except
19 affect the scope of the monopoly.

20 MR. SECULAR: Well, our argument on standing,
21 our basic argument on standing, treats the Postal
22 Reorganization Act and the private express statutes as
23 functionally a -- an integrated statutory scheme. And
24 that's because essentially the purposes of the Postal
25 Reorganization Act and the postal monopoly laws are

1 crucial interdependent. The policies of the Postal
2 Reorganization Act cannot be achieved without the
3 monopolies.

4 Similarly, the purposes of the monopoly, viewed
5 post-1970, are to effectuate and guarantee the conditions
6 under which the policies of the Postal Organization Act
7 can be realized. The court of appeals, I think fairly,
8 characterized the private express statutes as a linchpin
9 of the entire statutory scheme.

10 Let me also point out, and I think this is an
11 important --

12 QUESTION: But they were -- they were the
13 linchpin before the Postal Reorganization Act and
14 afterwards, weren't they?

15 MR. SECULAR: That's correct. That's correct.

16 QUESTION: The Postal Reorganization Act didn't
17 change them.

18 MR. SECULAR: That's correct. But a related
19 point, which I haven't articulated quite yet, is that it
20 shouldn't matter whether private express statutes and the
21 Postal Reorganization Act are considered one statute or
22 two statutes or however many statutes, because if that
23 were true then there would be -- the holdings of the
24 banking law cases from Data Processors on through Clarke
25 would have been different.

1 In Data Processors, for example, the claim, the
2 only claim on the merits that was made, was that the
3 allowance of national banks to perform data processing
4 services was a violation of the National Bank Act. When
5 it came to standing, the court looked not the national --
6 the policies of the National Bank Act but to the policies
7 of the National Bank Service Corporation Act of 1962, a
8 much later enactment. And it developed a zone of interest
9 tests on the basis of the interests that were protected by
10 that statute.

11 Similarly, in the Investment Corporation case
12 that followed just a couple of years later, the claim on
13 the merits that was advanced by the plaintiffs was that
14 the regulation allowing -- you know, the ruling allowing
15 national banks to provide investment services was in
16 violation of the Glass-Steigal Act. Well, there was no
17 finding at any time by the court that the Glass-Steigal
18 Act was designed to protect the interests of businesses in
19 the stock brokerage business. It was designed to protect
20 and safeguard the interest of the national banks.

21 Nonetheless, the court, citing Data Processors,
22 found that the policies recognized in Data Processors were
23 sufficient to confirm standing. That also true in Clarke.
24 In Clarke the statute that formed the basis for the claim
25 on the merits were the anti-branching provisions of title

1 XII. Instead of focusing narrowing on the anti-branching
2 policies, the court looked to the overall policies of the
3 National Bank Act. So, I think --

4 QUESTION: Does this -- again I'll ask you the
5 question I asked. Does this seem logical or sensible to
6 you?

7 MR. SECULAR: Well, I think it depends, Mr.
8 Chief Justice, on the case. We use the term, and I think
9 this is the one bit of terminology we attempted to add the
10 case law. The inquiry must be statute specific. In a
11 given case, it may very well be appropriate that -- to
12 hear from a plaintiff who is claiming an interest from an
13 enactment which is, which is different, although related
14 to, the enactment which is -- which will control the
15 merits. And I think this is clearly one of those cases.

16 I think we've got a much stronger case here,
17 because the relationship between the statutes at issue is
18 so intimate. The policies involved are critically
19 interrelated. They don't make sense without one or the
20 other.

21 And for that reason, I think it's fair to
22 characterize the zone of interest as the zone of interest
23 that would flow from the Postal Reorganization Act and the
24 private express statutes viewed as an integrated,
25 functional whole. And I certainly think that there's

1 enough legislative history to indicate that that's how
2 Congress thought of the relationship between --

3 QUESTION: Mr. Secular, I'm not quite clear on
4 why it is essential to the Postal Reorganization Act and
5 the various things it accomplished that there also be a
6 monopoly.

7 MR. SECULAR: The basic rationale for that was
8 articulated in the 1973 Governor's Report. Briefly, what
9 -- the focus is on the requirement of the Postal
10 Reorganization Act that the Postal Service provide
11 universal service at uniform rates. Those -- both those
12 concepts are important. The Postal Service cannot provide
13 uniform service at a uniform rate to thinly populated
14 rural areas if it's going -- if at the same time private
15 companies can skim off profitable mail service in highly
16 populated urban areas.

17 That's essentially the underlying rationale of
18 the private express statutes to -- as found by the
19 Governor's 1973 report. It's to prevent cream skimming.
20 Cream skimming must be prevented in order to allow the
21 Postal Service not only to provide universal service but
22 to charge the same rate for transporting a letter from
23 Washington, say, to Alaska.

24 QUESTION: I don't see how that follows. It
25 just depends on how the rate is. You, you can provide

1 universal service at uniform rates so long as the rate is
2 high enough. MR. SECULAR: Well, the
3 statute also --

4 QUESTION: Even if other people are scream --
5 cream skimming, the people left will pay the freight.

6 MR. SECULAR: We can get into an economic debate
7 on that, Justice Scalia. The result of that would be that
8 the rates charged by the Postal Service would skyrocket
9 above and beyond the rate of inflation, which would have a
10 devastating impact on volume. I think that it's fair to
11 say the system --

12 QUESTION: Already -- they've already
13 skyrocketed far beyond the rate of inflation.

14 MR. SECULAR: Well, the Postmaster General has
15 made that a fact, and I think that points up our argument
16 on the merits. 3 percent loss of revenue, if that's all
17 that the Postal Service is talking about, could very well
18 be the difference between whether or not rates go up more
19 than or less than the rate of inflation. It's that
20 tradeoff which the Postal Service never examined.

21 QUESTION: Maybe competition might determine it,
22 too.

23 MR. SECULAR: I'm not sure I understand the
24 thrust of the question, Justice Scalia.

25 QUESTION: Determine how fast rates go up, as it

1 does in other segments of the economy. We're talking
2 economics here.

3 MR. SECULAR: Well, the problem with that is
4 that the Postal Service has to maintain a fixed,
5 nationwide infrastructure, which prevents it, I think,
6 from responding to competition out on the fringes in those
7 particular areas where rates -- where rates -- where a
8 lower rate could be charged by a private business while
9 competing with the Postal Service.

10 That's essentially the rationale that was
11 articulated in the 1973 Governor's Report. It's the
12 rationale that underscores the conditions which the Postal
13 Service imposed when it suspended the private express
14 statutes for urgent letters, and it's that basic rationale
15 that the Postal Service ignored.

16 There's one other point I want to make, just to
17 follow up on Justice Scalia's question. One of the --
18 another one of the policies of the Postal Reorganization
19 Act which I may have neglected to mention is the
20 requirement that the Postal Service break even, that it -
21 - it's -- it cannot run at a loss. It cannot make a
22 profit. Over time the Postal Service is to break even.
23 And the basic thrust of that, in terms of the 1970
24 reorganization, was to ensure that the Postal Service
25 would no longer ultimately have to depend on subsidies

1 from the taxpayer. That's another aspect of the Postal
2 Reorganization Act which is dependent on the maintenance
3 of the private express statutes.

4 QUESTION: But the employees of the Postal
5 Service are within the zone of interest that that
6 actively, as you say, intended to protect?

7 MR. SECULAR: Oh, there's no question of that.

8 QUESTION: The purpose of this legislation, of
9 establishing the Post Office is --

10 MR. SECULAR: A substantial --

11 QUESTION: -- is to ensure employment to people?

12 MR. SECULAR: A substantial purpose of the 1970
13 reorganization was to address the legitimate grievances --
14 that the phrase that's found on the House report -- of the
15 employees. The statute was literally a response to a
16 nationwide work stoppage. It was literally collectively
17 bargained by the unions and representatives of the
18 administration in the White House.

19 After the strike was settled, the unions and the
20 administration met, settled on the broad outlines of the
21 statute, and presented it to Congress. That PRA is unique
22 in that aspect. But I think it clearly demonstrates that
23 the employees are within the zone of interest in that act.

24 QUESTION: Thank you, Mr. Secular.

25 Mr. Farkas, do you have rebuttal?

1 REBUTTAL ARGUMENT OF L. PETER FARKAS

2 ON BEHALF OF THE PETITIONER

3 MR. FARKAS: Yes, Mr. Chief Justice.

4 Mr. Secular mentioned that the Postal Service
5 had failed to consider the economic tradeoffs. At Joint
6 Appendix, page 72 to 73, the Postal Service did state --
7 give notice of the estimates of \$25 million to \$250
8 million in gross revenue losses and net losses of \$3
9 million. The postal unions failed to present any
10 evidence, contrary evidence, of tradeoffs. There's no
11 reason for the Postal Service to have considered evidence
12 or arguments that weren't raised.

13 As to the APA argument, it's really not an APA
14 argument. It's a reviewability argument, and
15 independently of the APA, there's a presumption of
16 reviewability. And there's nothing in the private express
17 statutes that precludes reviewability. In fact, the
18 court, as early as 1921 in the Burleson case, recognized
19 the right to review Postal Service -- at that time,
20 Postmaster General's -- administrative determinations.

21 When the APA was passed, there was -- it
22 intended to broaden, not limit, reviewability. The APA
23 did not include the postal -- the Post Office in either
24 section 551 or 701 under the list of exempt agencies. In
25 1970, when the Postal Reorganization Act was passed, the

1 Congress did not amend 551 or 701. Therefore, 410,
2 section 410 of the PRA, has to be limited to the purposes
3 of the PRA and do not overcome the presumption of
4 reviewability of administrative actions under the private
5 express statutes.

6 Thank you, Your Honor.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farkas.

8 The case is submitted.

9 (Whereupon, at 10:49 a.m., the case in the above
10 entitled matter was submitted.)
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CERTIFICATION

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American Postal Workers Union, AFL-CIO, et al

*and that these attached pages constitutes the original transcript
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BY *Robert H. Hester*
(REPORTER)

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