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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: ELIZABETH DOLE, SECRETARY OF LABOR, ET AL., Petitioners V.
UNITED STEELWORKERS OF AMERICA, ET AL.

CASE NO: 88-1434

PLACE: WASHINGTON, D.C.

DATE: November 6, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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ELIZABETH DOLE, SECRETARY OF :
LABOR, ET AL., :
Petitioners :

v. : No. 88-1434

UNITED STEELWORKERS OF AMERICA, :
ET AL. :

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Washington, D.C.
Monday, November 6, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:56 p.m.

APPEARANCES:

JEFFREY P. MINEAR, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioners.

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the
Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

JEFFREY P. MINEAR, ESQ.

On behalf of the Petitioners

3

LAURENCE GOLD, ESQ.

On behalf of the Respondent

23

REBUTTAL ARGUMENT OF

JEFFREY P. MINEAR, ESQ.

On behalf of the Petitioners

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P R O C E E D I N G S

(1:56 p.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 88-1434, Elizabeth Dole v. United
5 Steelworkers of America. You may proceed whenever you are
6 ready, Mr. Minear.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR

8 ON BEHALF OF THE PETITIONERS

9 MR. MINEAR: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The Paperwork Reduction Act requires OMB to review
12 agency information collection requests to determine
13 whether they are necessary for the proper performance of
14 the agency's functions. The question in this case is
15 whether that review process applies to the Secretary of
16 Labor's hazard communication standard, which requires
17 employers to compile and maintain chemical hazard
18 information for disclosure to their employees.

19 I would like to begin by explaining how this issue
20 has arisen. I will then explain why the government
21 believes that the hazard communication standard is subject
22 to paperwork review.

23 The Secretary first published a hazard
24 communication standard in 1983. That standard, which
25 applied only to the manufacturing sector of the economy,

1 directed covered employers to develop written hazard
2 communication programs, to compile and maintain material
3 safety data sheets, to ensure that chemical containers are
4 properly labeled and to provide their employers with
5 training concerning workplace chemical hazards.

6 OMB conducted a paperwork review of that standard
7 and approved it in full. The court of appeals for the
8 Third Circuit rejected a number of judicial challenges to
9 the 1983 standard in the decision known as Steelworkers I.
10 The court took the additional step of ordering the
11 Secretary to consider extension of the standard to the
12 entire economy. The Secretary commenced a new rule making
13 to consider that matter. Respondents then initiated a
14 contempt action, arguing that the Secretary was obligated
15 to make that decision on the existing record. The Third
16 Circuit agreed in the decision known as Steelworkers II,
17 and the court threatened the Secretary with contempt
18 sanctions unless she issued a final decision within 60
19 days.

20 The Secretary complied with that order, and on
21 August 24, 1987 issued a revised hazard communication
22 standard covering both the manufacturing and non-
23 manufacturing sectors of the economy. He also transmitted
24 the revised standard to OMB for paperwork review. OMB
25 solicited comments and conducted a public hearing on the

1 revised standard. Based on that record OMB disapproved
2 the paperwork requirements associated with three
3 provisions of the standard.

4 Respondents then initiated a new contempt action,
5 arguing that the Secretary's submission of the standard to
6 OMB violated the court's previous orders, because OMB
7 lacked authority to review the pertinent provisions. The
8 court agreed and invalidated OMB's disapproval. The court
9 acknowledged that OMB is required to review information
10 collection requests, but it concluded that the provisions
11 at issue are insulated from OMB authority because they
12 embody policy -- substantive policy decision making, and
13 because they do not require the collection of information.
14 The government seeks reversal of that decision.

15 As I stated at the outset, the Paperwork Reduction
16 Act requires OMB to review information collection
17 requests. We submit that the court of appeals erred in
18 concluding that the disapproved provisions of the hazard
19 communication standard do not contain such requests.

20 We start with the language of the statute. The
21 Paperwork Reduction Act defines an information collection
22 request as, among other things, a reporting or
23 recordkeeping requirement, collection of information
24 requirement, or other similar method calling for the
25 collection of information. The disapproved provisions,

1 which required employers to compile, maintain and disclose
2 chemical hazard information, clearly fall within that
3 definition. For example, the three disapproved provisions
4 which specify an employer's obligations with respect to
5 multi-employer worksites, FDA approved drugs and consumer
6 products, all require employers to compile and maintain
7 material safety data sheets in various circumstances.
8 Thus, the disapproved provisions plainly impose
9 recordkeeping requirements.

10 QUESTION: What were the specific items that were
11 disapproved?

12 MR. MINEAR: There are three disapproved
13 provisions. The first provide -- applied to multi-
14 employer worksites, and it required that the material
15 safety data sheets be either collected at the worksite at
16 a centralized location, or that each employer at the
17 worksite transfer his material safety data sheets to other
18 employers.

19 QUESTION: How about the other two?

20 MR. MINEAR: The other -- the next disapproved
21 provision was FDA-approved drugs. This would require, for
22 instance, it requires that a -- for instance a hospital
23 pharmacy, comply with the hazard communications standard.
24 So that, for instance, a hospital pharmacist, in addition
25 to having to package inserts that he would normally use in

1 evaluating the drugs, would also have to compile and
2 maintain a material safety data sheet for each of those
3 drugs, with the exception of pills or tablets.

4 The third provision --

5 QUESTION: Didn't something have to do with labels?

6 MR. MINEAR: There are no -- all of -- two of these
7 provisions are involved here. The FDA-approved drug
8 provision and the consumer products are general exemptions
9 from the -- limited exemptions from the general
10 requirements of the hazard communication --

11 QUESTION: How does granting an exemption require
12 anything to be collected?

13 MR. MINEAR: It specifies what the particular
14 employer's obligations might be. For instance, this
15 exemption --

16 QUESTION: Well, I know, but if you exempt it then
17 he doesn't have any obligations.

18 MR. MINEAR: But it was not a complete exemption,
19 it was only a partial exemption dealing with these
20 provisions.

21 QUESTION: Well, I know, but nevertheless --
22 nevertheless, the exemption didn't require the collection
23 or reporting of any information.

24 MR. MINEAR: OMB --

25 QUESTION: It said sorry, Fred, you don't have to

1 do any of that collecting --

2 MR. MINEAR: OMB's objection was that this
3 exemption did not go far enough, and by not going far
4 enough, imposed paperwork requirements on various
5 regulated employers. So in that sense it certainly does
6 impose the hazard communication --QUESTION: It did what?

7 MR. MINEAR: It -- OMB's position was that the
8 limited nature of the exemption subjected employers to
9 paperwork burdens. In this case -- let's take the example
10 of the hospital pharmacist. Under this exemption --

11 QUESTION: Well, to the extent it wasn't exempt, I
12 am sure it imposed paperwork requirements. But to the
13 extent it was exempt, it lessened the requirement.

14 MR. MINEAR: And OMB's position was that the
15 exemption did not go far enough. And that is why it
16 disapproved that provision.

17 QUESTION: Mr. Minear, you went through the
18 statutory language a little fast for me, to tell you the
19 truth, on the collection of information. Are you relying
20 on the statutory provision that is quoted at page 3 of
21 your brief when you say collection of information?
22 Because you left out a good deal of text, and I have a
23 little trouble --

24 MR. MINEAR: That is the definition for collection
25 of information. What I quoted to you was the definition

1 for an information collection request. The reason that --
2 it might be most helpful to turn to the addendum, which
3 has all of these materials collected. OMB's basic
4 responsibility is set forth in Section 3504 --

5 QUESTION: What page is that?

6 MR. MINEAR: This is at page 3(a) of the statutory
7 addendum in our brief.

8 QUESTION: Yes.

9 MR. MINEAR: Okay. Section -- subsection (c) of
10 3504 says the information collection request clearance and
11 other paperwork control functions of the director shall
12 include --

13 QUESTION: Is this the statute or is this -- this
14 is the statute?

15 MR. MINEAR: This is the statute.

16 QUESTION: Yeah.

17 MR. MINEAR: Reviewing and improving -- and
18 approving information collection requests proposed by
19 agencies. We then turn to the definition of an
20 information collection request, which is -- appears on
21 page 2 in the middle of the page. The term information
22 collection request means a written report form,
23 application form, schedule, questionnaire, reporting or
24 recordkeeping requirement, collection of information
25 requirement or other similar method. It is that latter

1 portion that I quoted.

2 QUESTION: It says calling for the collection of
3 information, is what it ends with.

4 MR. MINEAR: Calling for the collection of
5 information.

6 QUESTION: And then that is defined with the -- in
7 the statutory provision on page 3 of your brief, isn't it?

8 MR. MINEAR: That is right.

9 QUESTION: And that is defined as collection of
10 information, the obtaining or soliciting of facts or
11 opinions by an agency.

12 MR. MINEAR: Yes. Through the use of written
13 report --

14 QUESTION: And how is this by an agency?

15 MR. MINEAR: Because the agency is the party that
16 is making the request that the information be collected.

17 QUESTION: No, no. How is the collecting by an
18 agency, because your -- the information collection request
19 refers to -- to collection of information. And as I
20 understand the definition of collection of information, it
21 refers to collection of information by agencies.

22 MR. MINEAR: But in referring to that, the
23 collection of information doesn't specify who the
24 information is sent to. It only specifies who is making
25 the request here for obtaining or soliciting facts and

1 opinions. And you note, for instance --

2 QUESTION: No, that isn't right. The obtaining of
3 facts, soliciting facts or information is by an agency.

4 MR. MINEAR: Yes. And what the Secretary -- and if
5 you continue reading on, I think my point is clear.

6 QUESTION: Through the use of written report forms.

7 MR. MINEAR: Through the use of written report
8 forms, application forms, schedules, questionnaires,
9 reporting or recordkeeping requirements.

10 QUESTION: That is right.

11 MR. MINEAR: And what there, we submit, is being
12 imposed here is --

13 QUESTION: It's a record -- requirement of keeping
14 records so that the agency will be able to get the
15 information it wants.

16 MR. MINEAR: Or that it will be disclosed to the
17 public. If the -- this provision --

18 QUESTION: That's not what it says.

19 MR. MINEAR: -- does not specify who ultimately
20 obtains the -- information or where it would be kept. And
21 in terms of recordkeeping that also is defined, if we turn
22 to the next page, to 2(a), section 17, the term
23 recordkeeping requirement means a requirement imposed by
24 an agency on persons to maintain specified records.

25 QUESTION: Where are you now, Mr. Minear?

1 MR. MINEAR: This is on page 2(a), about two-thirds
2 of the way down, definition number 17. And again, there
3 term recordkeeping --

4 QUESTION: I can't follow you.

5 QUESTION: Well, Mr. Minear, certainly the language
6 though does seem to speak in terms of things furnished to
7 an agency or collection by an agency.

8 MR. MINEAR: It's -- well, I think there is a
9 couple of responses to that. First of all it obviously
10 includes recordkeeping requirements. Nothing is
11 transmitted to an agency in the course of a recordkeeping
12 requirement. Rather, a party must compile the records and
13 maintain them. And that in fact is emphasized by the
14 definition number 17 of recordkeeping requirements.

15 QUESTION: What if all the agency required was
16 telling the employer to post certain notices, some safety
17 notices or equal employment opportunity notices?

18 MR. MINEAR: The question would be whether the
19 party -- now, there are certain exemptions --

20 QUESTION: No written report required?

21 MR. MINEAR: Yes. But the question would be does
22 the employer have to gather or maintain information. Now,
23 in the case -- suppose for instance it was an NLRB
24 publication, a notice to employers.

25 QUESTION: Uh huh.

1 MR. MINEAR: The employer in that situation doesn't
2 have to gather any information; he simply has to post it.
3 So that most likely, under the OMB regulations, would not
4 be covered. In any case, most litigation matters are not
5 covered. There are separate exceptions that deal --
6 exemptions that deal with litigation matters.

7 But our basic point and the way that OMB applies
8 this statute is to look to whether the party who is
9 subject to a requirement has to gather, obtain or maintain
10 information. That is the gist of the requirement for an
11 information collection request. And if there is an
12 information collection request, and under 3504(c), the
13 information collection request is subject to OMB review.

14 QUESTION: I take it that a control number is
15 required for every information request?

16 MR. MINEAR: Yes. And so, for instance, a --
17 control number would have been required and was obtained
18 for the regulation, hazard communication standard. It
19 does contain a control number.

20 QUESTION: So that if the regulations here had been
21 approved, the control number would simply be on the
22 information request?

23 MR. MINEAR: It would be on -- in this case it is
24 on the regulation. On the other hand, if it's a form or a
25 questionnaire, for instance, it would be on those forms or

1 questionnaires. The notion of the control number --

2 QUESTION: Well, I take it all of the documents --
3 that the employers had to assemble pursuant to this
4 regulation, they would not have had to have a control
5 number even if they had been approved?

6 MR. MINEAR: No. A control number is applied to
7 the instrument that requires the collection of
8 information; in this case it is the regulation. And that
9 is -- the purpose of the control number is to allow a
10 person -- among other things, to allow a person to
11 determine whether OMB has reviewed the information
12 collection request. And so a party would look to the --
13 the regulation itself, identify the control number, and
14 that would verify that OMB had in fact reviewed it.

15 Now, OMB's implementing regulations, which the
16 Third Circuit did not even acknowledge, compels the same
17 result that I have described here. They state that an
18 information collection request includes any requirement or
19 request for persons to obtain, maintain, retain, report or
20 publicly disclose information. Thus, OMB's regulations
21 clearly contemplate the provisions at issue here would be
22 subject to OMB review.

23 Respondents argue that the paper --

24 QUESTION: Mr. Minear, before you go further, I
25 share Justice White's confusion as to -- as to how this

1 exception can be possibly held to be imposing any
2 requirement. Is there any way that this case can be
3 viewed as involving the regulation to which the exception
4 is an exception?

5 MR. MINEAR: I am afraid I don't follow that
6 question. Could you repeat that?

7 QUESTION: Well, it seems to me it is the
8 regulation requiring the -- the maintaining of these
9 records and the giving of this information, that is -- is
10 the gravamen of the government activity that -- that the
11 parties are complaining about, not the exception to that.
12 Is there any way that we can regard this case as involving
13 the principle regulation, rather than merely the scope of
14 the exception from the regulation?

15 MR. MINEAR: Well, I think, to clarify this, the
16 regulation, in terms of identifying what is an information
17 collection request, one could look at the hazard
18 communication itself as being a general information
19 collection request. Its general purpose is, as stated in
20 its very first paragraph, is to require parties to compile
21 and maintain and disclose information.

22 QUESTION: Right. Why isn't that so?

23 MR. MINEAR: So, I think that that is -- that is
24 appropriate, to view that the hazard communication
25 standard itself, as an information collection request.

1 But it also can be viewed as consisting of a number of
2 different discrete information collection requests itself.
3 Now, OMB will only try to carve out objections to those
4 paperwork requirements that it finds objectionable. And
5 for that reason it disapproved these exemptions on the
6 basis that they weren't broad enough. It's, another way
7 of looking at this problem --

8 QUESTION: It didn't disapprove the exemption, it
9 disapproved the substantive portion of the rule to which
10 the exemption applied.

11 MR. MINEAR: Or more specifically, it disapproved
12 the paperwork requirements of that substantive
13 requirement.

14 QUESTION: And the procedural status of the case
15 permits us to view it that way?

16 MR. MINEAR: Yes.

17 QUESTION: Okay.

18 MR. MINEAR: As I was saying before, the
19 Respondents principal argument here is that the Paperwork
20 Reduction Act should apply only to information collection
21 requests that require submission of information directly
22 to the government. But as I have pointed out, that would
23 exclude recordkeeping requirements, which is one of the
24 main sources of coverage of the Paperwork Reduction Act,
25 and which was, in fact, a major impetus for the passage of

1 this act. One of the principal concerns of the sponsors
2 was to clarify that the predecessor act, the Federal
3 Reports Act, did in fact cover recordkeeping requirements,
4 and those would be subject to OMB review.

5 QUESTION: Mr. Minear, their point is, I think,
6 that it covers recordkeeping requirements that, when the
7 records are kept for inspection by the government to carry
8 out its law enforcement responsibilities, like OPA used to
9 require business to keep all sorts of records. That's the
10 kind of thing they wanted to be sure -- it wasn't to keep,
11 to have records for investigation or inspection by third
12 parties, was it?

13 MR. MINEAR: Well, first we disagree with that,
14 because I think that the Act has no express provision,
15 nothing in the text suggests concretely that regular
16 recordkeeping requirements that have, would not be viewed
17 by the government, would be covered. The definition of
18 recordkeeping requirement describes any recordkeeping
19 requirement -- any requirement that a person maintains
20 specified records. OMB has clarified that in its
21 regulations to indicate that in fact it does include
22 records that are simply maintained for -- by an
23 individual, and are not reviewed by the government.

24 In any event, the records that are maintained here
25 are reviewed by OSHA. For instance, the multi-employer

1 worksite provision requires that the parties -- prepare a
2 written hazard communication program describing how the
3 hazard communication program would apply in multi-employer
4 worksites. That written form must be on the site when an
5 OSHA inspector comes to visit and inspect. And that's one
6 of the ways in which he insures compliance, by the fact
7 that there is a written report, the written hazard
8 communication program, that describes his obligations and
9 how he is fulfilling them.

10 So, in fact, the only difference between the OSHA
11 situation and the SEC situation is that, in OSHA -- in the
12 OSHA case the OSHA inspector goes to the plant, while in
13 the case of the SEC inspection, the materials are mailed
14 to the SEC office in Washington.

15 QUESTION: Well, say the labor board entered an
16 order saying there was unfair labor practice and required
17 that notices be posted to the employees telling them that
18 steps had been taken to comply. Is that subject to OMB
19 review?

20 MR. MINEAR: No, that would not be, for two
21 reasons. The first reason is, under OMB's regulations,
22 disclosures of that nature, that do not require the
23 compilation of information by the individual, regulated
24 individual, are not subject to OMB review. The
25 regulations state that. Also, I think that it might be

1 exempt under one of the litigation exemptions that are
2 contained in 3502.

3 QUESTION: What about -- the SEC, I notice in the
4 legislative, had a lot of interest in it -- I take it
5 registration statements would be subject to this
6 requirement. What about prospectuses that are sent out to
7 potential purchasers of securities and the like?

8 MR. MINEAR: I believe that SEC believes that there
9 is coverage across the board. And in fact there is a
10 recent, the SEC recently issued a regulation and requested
11 paperwork review and submitted it for paperwork review.
12 This involved municipal securities, and in the case of
13 municipal securities nothing is filed with the SEC. These
14 -- and official information is provided to a broker, and
15 the SEC required that the information be disseminated more
16 broadly. It did seek review, paperwork review of that,
17 and its view is that that is substantive paperwork review.
18 That --

19 QUESTION: Did the OMB, in terms of carrying out
20 its function of reviewing and improving information
21 collection requests, say by the way, you haven't requested
22 enough information?

23 MR. MINEAR: I question whether it could do that,
24 because its primary purpose is to determine whether the
25 information that is requested is necessary for the proper

1 performance of the functions of its -- of the agency.

2 QUESTION: And --

3 MR. MINEAR: And so in the context --

4 QUESTION: Including whether the information will
5 have practical utility for the agency.

6 MR. MINEAR: That is right.

7 QUESTION: Now, and yet this information is given
8 to other people.

9 MR. MINEAR: That's right, but nevertheless,
10 practical utility can -- the government -- the question of
11 practical utility turns on whether the agency is able to
12 use the information effectively. The agency in this case,
13 OSHA, is using this information by disseminating it to its
14 -- to the public, and thereby fulfilling one of its
15 requirements --

16 QUESTION: Having it disseminated.

17 MR. MINEAR: Or having it disseminated. And what
18 Respondents have really asked for is a distinction here
19 between the situation where an employer is required to
20 send the information to government and the government
21 disseminates it, or the situation where the government, or
22 the government simply requires the individual to bear the
23 more onerous burden of disseminating the information
24 directly to the public. And we submit there is no basis
25 for any distinction.

1 QUESTION: Or to its employees.

2 MR. MINEAR: Or to its employees, yes.

3 QUESTION: How did the agency measure -- OMB
4 measure the burden in this case? Did it measure the
5 burden imposed by making all of these records, or is there
6 no burden because the agency doesn't receive anything
7 back?

8 MR. MINEAR: The burden -- the number of burden
9 hours are calculated based on the burden that is borne by
10 the individual who is regulated under the -- under the
11 hazard communication standard.

12 QUESTION: Even though the statute says the burden
13 means the time and effort -- that's 3502(3): the term
14 burden means the time, effort and financial resources
15 expended by persons to provide information to a federal
16 agency.

17 MR. MINEAR: Yes, but I don't --

18 QUESTION: So I take it this is your same argument,
19 that this is all information being provided to the agency?

20 MR. MINEAR: If that was applied literally it would
21 simply mean the cost of actually mailing these documents
22 to the agency, and that certainly can't be what it means.
23 OMB has issued a clarifying regulation on this as well and
24 indicates that it is also the burden -- the burdens
25 associated with public disclosure. And those can be very

1 substantial burdens. I think our petition points out that
2 they can be up to 250 million burden hours per year in the
3 way that OMB calculates these matters.

4 In any event, those calculations are conducted by
5 the agency, which is given a prescription by OMB --

6 QUESTION: But is it your position that the burden
7 in this case is measured by all of the hours taken to
8 compile the documents by the employers, and that that is
9 all information provided to a federal agency? •

10 MR. MINEAR: I, in terms of -- my position is that
11 the OMB regulation properly interprets burden. But
12 regardless of the interpretation of burden, the question
13 here is whether this is an information collection request.
14 And we submit that it certainly is. Now, the definition
15 of burden, the OMB regulation specifies a broader calculus
16 for making that calculation beyond what was stated simply
17 in the definition of burden, and I think it bears that --
18 that interpretation.

19 We submit that the court also erred in this case in
20 holding that the Paperwork Reduction Act does not give OMB
21 authority to overrule an agency's determination of the
22 kinds of disclosure needed to accomplish its substantive
23 policies. The Act expressly grants OMB exactly that
24 authority. Section 3504(c) states that OMB information
25 request clearance functions shall include determining

1 whether the collection of information by an agency is
2 necessary for the proper performance of the functions of
3 the agency, including whether the information will have
4 practical utility.

5 Section 3508 uses the same language to describe the
6 standard that OMB must employ in reviewing information
7 collection requests. Thus, the Act plainly authorizes,
8 and indeed requires, that OMB to determine whether an
9 agency's proposed collection of information requirements
10 are necessary to accomplish the agency's functions.

11 I believe I would like to reserve the remainder of
12 my time for rebuttal.

13 QUESTION: Thank you, Mr. Minear.

14 Mr. Gold.

15 ORAL ARGUMENT OF LAURENCE GOLD

16 ON BEHALF OF THE RESPONDENT

17 MR. GOLD: Chief Justice, and may it please the
18 Court:

19 As Mr. Minear indicated at the end, but only at the
20 end of his argument, we believe there are two questions
21 here and that the ruling below rests on two grounds. The
22 first question is whether the hazard communication
23 standard, and in particular the aspects of the standard
24 disproved by OMB, are information collection requests.

25 The second is whether OMB acted properly, taking

1 into account the entirety of the Paperwork Reduction Act,
2 and most particularly the portions of the Act that we
3 reproduce on page 39 of our brief, which state that the
4 authority of OMB shall be exercised consistent with
5 applicable law and that nothing in this chapter shall be
6 interpreted as increasing or decreasing the authority of
7 OMB with respect to the substantive policies and programs
8 of departments, agencies and offices, acted properly in
9 disapproving these provisions.

10 Our basic position, which has been foreshadowed by
11 the discussion thus far, is that when Congress talked
12 about information collection requests, as the language of
13 the statute persuasively indicates, Congress was talking
14 about the collection of information by the government and
15 for the government use. The indications are numerous in
16 this regard and we lay out the basic points at pages 24
17 and 25 of our brief.

18 First of all, as has been pointed out, this statute
19 has to do with alleviating certain burdens on private
20 parties, and the burdens are defined as the time, effort
21 or financial resources expended by persons to provide
22 information to a federal agency.

23 QUESTION: Mr. Gold, do you agree that OMB is
24 entitled to a certain amount of deference in its
25 construction of the provisions of the act that are

1 critical here?

2 MR. GOLD: We -- we think that they are entitled to
3 a certain amount of deference, but you get into the
4 question which is one which is -- we well understand a
5 difficult one, whether OMB is moving into an area that was
6 never intended by Congress to be regulated. This is an
7 issue that has proved perplexing to the court. The
8 proposition that an agency of limited jurisdiction, which
9 is given a limited function, can expand that function --

10 QUESTION: That is true of all agencies. There
11 isn't a single agency that doesn't have limited
12 jurisdiction and not have a limited function.

13 MR. GOLD: And there are line -- there are these
14 line-drawing questions which we think are inherent in the
15 point you've just articulated, and that there is a
16 threshold question every time an agency asks for
17 deference. Is the agency attempting to move into an area
18 which Congress didn't permit the agency to enter at all.
19 I mean, this is a problem, and we quote the cases which
20 have been particularly acute in the National Labor
21 Relations Act. And in cases like Insurance Agents, the
22 court said that the issue of whether the agency could
23 regulate the economic weapons of parties when they were
24 engaged in collective bargaining was, I think I have the
25 quote right, simply not a question that was given to the

1 agency to ask and answer. And noted quickly that where
2 the question is one that was given to ask, then deference
3 is appropriate. So --

4 QUESTION: Those are old cases, Mr. Gold. I really
5 don't know that in any modern cases we have really tried
6 to draw that old line that agencies are entitled to no
7 deference when they are deciding their own jurisdiction.
8 Those are oldies and baddies. I don't really think we've
9 -- we have used --

10 MR. GOLD: We think they are oldies and goodies.

11 QUESTION: Every time, as the Chief Justice
12 suggested, every question that comes up is a question of
13 the agency's authority. Does the agency have authority to
14 do this? It is always deciding its jurisdiction. So, you
15 know, to say that you can't, you can't give it deference
16 when it is deciding its jurisdiction is to say that you
17 can't give it deference, period. It has no jurisdiction
18 to act unlawfully.

19 MR. GOLD: Well, plainly it has no jurisdiction to
20 act unlawfully. And I do think that there is a problem in
21 speaking in metaphors of this kind, but that doesn't mean
22 that there isn't a basic kernel of truth. There is, it
23 seems to us, quite a paradox in saying that if the agency
24 wants to aggrandize its authority and Congress has
25 provided for judicial review, the judiciary is to accept

1 that aggrandizing step if it is reasonable. There are
2 other areas where there -- where it's quite plain that the
3 question arises in the interstices of the statute within
4 an area that is the agency's where that problem just
5 doesn't arise.

6 But, for the purpose of this discussion, it seems
7 to me that we have two alternatives. We grasp at both of
8 them. First is that this isn't the kind of issue, when
9 you look at the entire statute, in which OMB is entitled
10 to deference. Secondly, there is a limit in deference,
11 and OMB, giving it deference, deserves to lose this case.

12 It does seem, to us, for the reasons I was starting
13 to develop and that have been noted by various members of
14 the Court, that there isn't a word in this statute which
15 pushes towards the conclusion that Congress intended to
16 cover as an information collection requirement materials
17 which, as a substantive matter A has to provide to B for
18 B's protection, as opposed to materials which, as the
19 statute says again and again are provided to the
20 government for its use either in policy making or law
21 making or in law enforcement.

22 The definition of burden, the use of the term
23 collection by an agency in the critical definition,
24 collection of information requirement, and the entire
25 point of the exercise, which is to determine whether the

1 information has practical utility, which is defined to
2 mean the ability of an agent -- of an agency to use
3 information it collects, particularly the capability to
4 process such information in a timely and useful fashion.

5 Every part of the statute most fairly read speaks
6 to the question which, not surprisingly the legislative
7 history shows was the only question posed to Congress,
8 namely, should there be a system of rationalizing and
9 assuring that the bureaucracy's appetite for information
10 for its own use, particularly in the planning stage,
11 should be reviewed and should be subject to efficiency and
12 other rationality controls. Efficiency and rationality
13 controls by an agency, namely OMB, which has an overall
14 management function for the government, and which has no
15 particular parochial interest in the information at hand.

16 And we have no doubt that the Paperwork Reduction
17 Act, in those terms, in its efficiency terms in assuring
18 that agencies only ask for what they can use and
19 demonstrate that what they are asking for can be, as the
20 statute so strongly indicates, can be processed and
21 assimilated in a rational way.

22 Not surprisingly, OMB's spokesman at the hearings,
23 and this on page 26 of our brief, said no one questions
24 the basic need of the for information to plan, make policy
25 decisions, operate and evaluate programs, and perform

1 necessary research. The question is rather, how much
2 information is essential. So this was supposed to be a
3 planning, programmatic type of effort. There is not a
4 word, despite the fact that there are a myriad of labeling
5 requirements and myriad of other regulatory requirements
6 concerning the provision of information to third parties
7 in the legislative history concerning these very different
8 types of regulations.

9 And it seems to us that the kind of materials you
10 have here, and the issue you have here, is different from
11 the kind of issue that was discussed at great length in
12 the legislative history and that is adverted to in the
13 little, literal language of the statute in three different
14 respects. If an agency wishes to seek information for its
15 own use, the inquiry, when the matter is reviewed by OMB,
16 as I have indicated, is is more information better. Can
17 you use this information? What are you going to do with
18 it? How will you process it? How -- what are your people
19 doing now? How is this going to work?

20 In contrast, in the situation that we have here,
21 the hazard communication standard, the agency, under a
22 particular statute, the Occupational Safety and Health
23 Act, and in particular its Section 6(b)(5) and 6(b)(7),
24 face the question of how do you reduce the risks in
25 operating circumstances of handling hazardous chemicals.

1 And the result was a determination that we are not going
2 to ban the use of these chemicals, we're not going to
3 regulate how they are used, what processes they are used
4 by. But rather, we are going to take what seems to us on
5 any account to be a far more passive form of regulation.
6 We are going to require that if you act to circulate these
7 potentially hazardous chemicals in interstate commerce,
8 you have to advise people what the chemicals are, what
9 effects they may have, how they can adversely effect
10 individuals, and how they can be safely used.

11 And in those terms the comparison here is entirely
12 different from the kind of comparison you do between more
13 information and less information in a normal collection of
14 information, or in collection of information covered by
15 this statute. Because the comparison is the burden on
16 chemical manufacturers, the economy, downstream employers,
17 of having -- commanding control regulation or process
18 regulation, versus the kind of burden imposed here. There
19 is nothing in this statute which instructs OMB how to do
20 that kind of job, or which indicates that Congress thought
21 that that kind of job was the kind of job that OMB should
22 be doing.

23 QUESTION: I take it, OMB here on the exemption
24 said they disapprove the exemptions because the exemptions
25 didn't go far enough.

1 MR. GOLD: Correct.

2 QUESTION: That you shouldn't have required all
3 these labels in certain areas, even if you thought they
4 should.

5 MR. GOLD: Correct. It was really invalidating the
6 underlying substantive requirement that was left when OSHA
7 was finished. In other words, to talk about the substance
8 of these exemptions, OSHA said that, with regard to drugs,
9 if the drug was in its final form you didn't have to
10 provide additional information, training and so on. But
11 if it wasn't, given the fact that particularly in
12 hospitals the people who were handling the materials were
13 faced with quite different hazards, then the ultimate
14 consumer would be -- that you did have to provide these
15 hazard warnings.

16 OMB said if it is covered by FDA we don't care, at
17 least outside the manufacturing sector. The rationality
18 of what OMB did here wouldn't survive, so far as at least
19 we can understand it, any form of review. But they said
20 in the manufacturing sector, it's all right to protect
21 people in the way that OSHA did. But outside the
22 manufacturing sector, and hospitals are outside the
23 manufacturing sector, it is not all right to protect
24 people with these added warnings. The reason, the reason
25 is known to OMB but can't be found in its documents.

1 Then, with regard to consumer products, OMB said
2 that there was no need to provide the particular
3 information that OSHA had required because the products
4 were subject to review by the Consumer Product Safety
5 Commission.

6 QUESTION: That's not really before us, though,
7 that issue, is it? I mean, do we have to decide whether,
8 assuming OMB has the authority to review these things, its
9 review was arbitrary or capricious? That is not here, is
10 it?

11 MR. GOLD: It seems to us that it is here. The
12 government is the master of its own petition, but as I
13 indicated when we began, the two -- in the court below
14 they gave two grounds. Ground number one was that this
15 kind of requirement is not an information collection
16 request, because it is for the use of third parties.

17 Ground number two is that, in light of the
18 substantive provisions of the product -- the Paperwork
19 Reduction Act, which I have noted in 3504(a) and 3518(e) -

20 QUESTION: Mr. Gold, the government's petition
21 phrases the question, the last four lines, as whether the
22 Paperwork Reduction Act's review process applies to agency
23 regulations developed as a part of the agency's statutory
24 mission that require regulated entities to collect
25 information for disclosure of third parties.

1 MR. GOLD: Well, the only thing I can't figure out
2 of that, Chief Justice, is that on that view, this
3 petition ought to be dismissed and we ought to win.
4 Because, as I said, the court below gave two grounds. And
5 the second ground --

6 QUESTION: But that, that question suggests that
7 the actual arbitrary and capricious review of particular
8 standards isn't before us now, don't you think?

9 MR. GOLD: If -- I -- I don't understand what the
10 government is about in this, and they've saved time for
11 rebuttal, I leave it to them. We pointed out in the brief
12 in opposition that -- and this is not an arbitrary and
13 capricious standard that the lower court used, but we
14 pointed out in the brief in opposition, we point it out
15 again in our brief, that the court below invalidated what
16 OMB did on two grounds. If only one of those grounds is
17 here, unless there is some theory that once the court
18 below has told that ground one is unsound, even though the
19 two grounds were in the alternative, something will
20 change, that there ought to be a remand, we don't
21 understand what -- what is going on here. But we believe
22 that the court below is right on both its independent
23 grounds, and that's --

24 QUESTION: But supposing we -- we were to reject
25 both of what you call its independent grounds, that we

1 would say that the PRA as construed by OMB does cover
2 furnishing of information of third parties, and that it
3 can have something to do with the substantive affairs of
4 the agency.

5 MR. GOLD: Right.

6 QUESTION: That still would not mean that we were
7 holding OMB's agency, regulations on these particular
8 cases, that we were upholding them, would it?

9 MR. GOLD: Well, I presume, to deal with the second
10 of these two questions, you would have to confront our
11 arguments that OMB disregarded the substantive policies
12 and programs of the statute, and therefore acted
13 improperly in this case.

14 QUESTION: It would just be contrary to law.

15 MR. GOLD: Yes. That is part of construing what
16 the Paperwork Reduction Act is about. I mean, the
17 government says on this part of the case, that the
18 Paperwork Reduction Act says that the OMB director can
19 review paperwork collection requests to determine whether
20 they are necessary for the proper performance of the
21 functions of the agency. That is the statutory language.

22 A question that was confronted by the court below,
23 that we raised that was confronted by the court below, and
24 that as we read the opinion in the petition Appendix at
25 8a, decided in our favor, is that in determining what is

1 necessary for the performance of the functions of the
2 agency, OMB has to take account of and conform to the
3 substantive requirements in this instance of the
4 Occupational Safety and Health Act. And that OMB did not
5 do so in this case. And that that is demonstrable.

6 Not only, as I have indicated, is it hard to find a
7 scintilla of reason in what OMB did in terms of the lines
8 it drew, but much more to the point, as I started to note,
9 the Occupational Safety and Health Act sets out a highly
10 protective standard with regard to the balance between
11 employer financial interests and employee safety and
12 health interests.

13 This Court has put it, in *American Textile*
14 *Manufacturers*, which is at 452 U.S., that Section 6(b)(5)
15 of OSHA directs the Secretary to issue the standard that
16 most adequately assures that no employee will suffer
17 material impairment of health, limited only by the extent
18 to which this is capable of being done.

19 QUESTION: Mr. Gold, you did -- you did make this
20 argument in your brief in opposition to the petition too,
21 so we couldn't get rid of it on some procedural nicety, I
22 suppose?

23 MR. GOLD: We tried to --

24 QUESTION: Yeah.

25 MR. GOLD: -- prevent that.

1 And we make the argument starting at page 39
2 through to the conclusion of our brief on the merits. And
3 our basic point on this is that if indeed this is a
4 collection of information request, that at least where the
5 statute is as plain and clear as this statute is, OMB
6 cannot, in the guise of determining whether something is
7 necessary for the performance of the function of the
8 agency, rewrite the balance in a way which is entirely
9 different from the underlying substantive statute. That
10 just reads out of the Paperwork Reduction Act itself the
11 provision that in carrying out its functions it has to
12 respect the substantive policies and programs. And here
13 it is absolutely manifest, for the reasons that we
14 develop, that OMB applied a completely different standard
15 in determining what ought to be promulgated to employees
16 than the OSH Act mandates.

17 The conclusion with regard to this multi-employer
18 worksite issue at OMB was that OSHA is wrong that
19 employees need or will use this information. Employers
20 will have difficulty coordinating the provision of the
21 information. They may have to have multiple file
22 cabinets, and therefore OSHA should go do it again. Well,
23 that is fine if you don't have an act that says that the
24 Secretary of Labor is supposed to set a standard that
25 "most adequately" assures that no employee will suffer

1 impairment of health, and in which, as this Court said,
2 Congress itself defined the basic relationship between
3 cost and benefits by placing the benefit of worker health
4 above all other considerations.

5 With regard to the --

6 QUESTION: "Most adequately" is a -- is a strange
7 phrase, isn't it. I mean, you could say --

8 MR. GOLD: It's a statutory phrase.

9 QUESTION: I know, but what does it mean? "Most
10 certainly" would make your case easily, but "most
11 adequately" you might say --

12 MR. GOLD: Well, there's a feasibility --

13 QUESTION: -- you know, it is the best-balanced
14 provision around, and that would justify what OMB did.

15 MR. GOLD: I doubt that it would, even if this
16 Court hadn't already construed the language, because the
17 Secretary of Labor had raised, had come to the opposite
18 conclusion on what "most adequately" assures. And if we
19 are going to have deference, the deference there goes to
20 the Secretary of Labor, unless you are going to read out
21 the provision that these -- that the Paperwork Reduction
22 Act doesn't increase OMB's authority and is not to be used
23 to trench on the substantive policies and programs. Now,
24 obviously there are some limits here, and we note them.

25 But when you are talking about an express provision

1 of the underlying statute, and OMB says we strike the
2 calculus differently than you do, this isn't a question of
3 whether you can use the information as an efficiency, but
4 rather it is our determination about what the underlying
5 act requires, what these employees really need.

6 QUESTION: Well, isn't that about all that was in
7 this redo ordered by the court?

8 MR. GOLD: I apologize, Justice.

9 QUESTION: When you say these regulations were
10 simply policy judgments by the agency.

11 MR. GOLD: That's right.

12 QUESTION: And the OMB shouldn't have disagreed
13 with them. Why was it -- why was it -- how did it ever
14 get over to the OMB?

15 MR. GOLD: Well, it got over to OMB because these
16 agencies, out of --

17 QUESTION: Are scared to death? They just --

18 MR. GOLD: Yes. Out of a concern for their
19 budgets. This is the Office of Management and Budget.

20 QUESTION: Well, I know, but if you are right they
21 shouldn't have sent them over at all.

22 MR. GOLD: Well, we believe that they shouldn't
23 have sent them over at all, but as --

24 QUESTION: Was there anything in there that the OMB
25 had any business passing on or not?

1 MR. GOLD: We believe not. We believe not. We
2 believe that the Third Circuit was right on both its first
3 ground and its second ground. But even if we are wrong on
4 the first and it should have gone over to OMB --

5 QUESTION: Yes.

6 MR. GOLD: Then OMB went beyond its limited
7 chartered, because it got into the question of what this
8 statute, what the underlying substantive statute, the
9 Occupational Safety and Health Act, requires employers to
10 provide employees. And let me make one other point about
11 that if I could. OMB got into the question not of what
12 information should be collected, or even what information
13 should be retained, but what information should be
14 disseminated by an employer to a third party. There's
15 absolutely nothing in this statute about that.

16 QUESTION: Thank you, Mr. Gold. Mr. Minear, do you
17 have rebuttal? You have eight minutes remaining.

18 REBUTTAL ARGUMENT OF JEFFREY P. MINEAR
19 ON BEHALF OF THE PETITIONERS

20 MR. MINEAR: Yes, Your Honor.

21 QUESTION: Looking at the definitions here, and the
22 one that jumps out at me is the definition of burden. It
23 is central to the whole operation of this OMB process that
24 they have to determine whether the burden is excessive in
25 relation to the benefits that the government is going to

1 get out of this thing. Right?

2 MR. MINEAR: Well, no, Your Honor, I disagree.

3 QUESTION: That's not essential?

4 MR. MINEAR: No. The standard for review is set
5 forth in 3504(c). The information collection request
6 clearance and other paperwork control functions of the
7 director shall include reviewing and approving information
8 collection requests proposed by agencies. Conducting that
9 review, the standard is then set forth in 3508.

10 QUESTION: Yeah.

11 MR. MINEAR: Before approving a proposed
12 information collection request, the director shall
13 determine whether the collection of information by an
14 agency is necessary for the proper performance of the
15 functions of the agency, including whether the information
16 will have practical utility. That is the standard that is
17 applied.

18 3504(c) sets forth the requirement that agencies
19 submit information collection requests to OMB. OMB then
20 reviews it under that standard. Now, the term burden is
21 used elsewhere in the statute, but it is not used in the
22 operative provisions that are at issue here.

23 The question here -- I'd like to remind the Court,
24 is the authority of OMB to review the hazard communication
25 standard. That is the issue that is presented. And these

1 are the provisions that determine that authority.

2 QUESTION: You say the word burden is not -- why
3 was the definition of burden printed in your Addendum if
4 it has nothing to do with the provisions at issue in the
5 case before us?

6 MR. MINEAR: In part because the parties raised in
7 their --

8 QUESTION: Just to confuse me.

9 MR. MINEAR: No, because the party had raised this
10 in their brief in opposition, and we wanted to have all of
11 the relevant provisions at the Court's fingertips. But it
12 doesn't enter into the question that's presented here.
13 Respondents put great reliance on all of this inferential
14 support for their position, but the question here is
15 whether this is an information collection request. That
16 is the standard for determining whether the matter is
17 subject to OMB review. And in conducting the review,
18 again the question is whether it is necessary for the
19 proper performance of the functions of the agency.

20 QUESTION: But, all right. At least it requires
21 this, that the agency has to submit to the director an
22 estimate of the burden that will result from the
23 information collection request, right?

24 MR. MINEAR: That is right.

25 QUESTION: Now, why would the government require

1 the agency to sub -- if, if an information request
2 includes what you say it does, a request that you give
3 information to somebody else --

4 MR. MINEAR: Or just a recordkeeping requirement.

5 QUESTION: Or just a recordkeeping requirement.

6 Why would they limit the burden that the agency has to
7 tell OMB about to the following: the term burden means
8 the time, effort or financial resources expended by
9 persons to provide information to a federal agency.

10 MR. MINEAR: I frankly do not know. I think that
11 might be an oversight. That might be an oversight. But
12 then again --

13 QUESTION: It's either an oversight or it's support
14 for Mr. Gold's interpretation. It could be either one.

15 MR. MINEAR: But it is only indirect support, Your
16 Honor. Again, the question here -- is there any doubt in
17 the Court's mind that there are recordkeeping requirements
18 that are being imposed here? That a pharmacist who has to
19 collect 10,000 material safety data sheets and maintain
20 them on the premises is keeping a record? And the
21 question here is whether the information collection
22 request is subject to review. The information collection
23 request here is the recordkeeping requirement, among a
24 number of other things.

25 I think, again I would like to focus the Court's

1 attention that the question here is on OMB's authority to
2 review the hazard communication standard.

3 Now, there has been some confusion that has been
4 created about the ultimate decision here. This is not an
5 APA action to review OMB's decision in this case. This
6 came up as a contempt action, and in fact I don't believe
7 that the court of appeals even had the record that OMB had
8 compiled in making its decision. So, really the only
9 issue that is presented here is the question of the
10 authority of the agency.

11 QUESTION: But you do agree that both grounds for
12 the court of appeal decision are before us, don't you?

13 MR. MINEAR: Well, the other ground here that the
14 party has raised is this question, Section 3518(e), which
15 states that nothing in this chapter shall be interpreted
16 as increasing or decreasing OMB's authority with respect
17 to an agency's substantive policies and programs. There
18 are some key things that a court must focus on in this.

19 QUESTION: I understand, but do you agree that
20 issue is before us?

21 MR. MINEAR: That this issue, about whether --

22 QUESTION: Yes. The 3518(e).

23 MR. MINEAR: Yes. I do agree that that is before
24 it. In fact we briefed it extensively.

25 QUESTION: Yeah.

1 MR. MINEAR: And our point with respect to that is
2 that the information -- again this is a qualification on
3 the Court's -- on OMB's authority. But what it states is
4 that nothing shall be interpreted as increasing or
5 decreasing OMB's authority. Now, if you refer to the
6 Federal Reports Act and it's, the Paperwork Reduction
7 Act's predecessor, Section 3506, it employed the very same
8 standard for reviewing whether an information -- whether
9 an information collection request should go forward,
10 whether it is necessary for the proper performance of the
11 function of the agency.

12 What I think 3518(e) indicates is there has simply
13 been no change in the standard of review that OMB subjects
14 these information collection requests to. Now, the
15 expansion, or the scope of an information collection
16 request has been clarified to include recordkeeping
17 requirements. That was one of the chief purposes of the
18 Act, to clarify that recordkeeping requirements would be
19 subject to OMB review.

20 But all 3518(e) does is indicate that as an
21 interpretive matter nothing except express -- OMB has the
22 powers that are expressly given here. And that includes
23 the express power to determine whether a matter is
24 necessary for the proper functioning of the agency.

25 QUESTION: Tell me about the labels. Where does

1 that, where do those fit in this?

2 MR. MINEAR: The only --

3 QUESTION: Are they recordkeeping, or what?

4 MR. MINEAR: They are, primarily the concerns here
5 are recordkeeping, although there is also disclosure. The
6 court's ruling was that none of this would be subject to
7 OMB review. We indicated that OMB in fact reviews labels
8 as well as other matters, insofar as they require a party
9 to compile and maintain information. For instance, if you
10 have to prepare a nutrition label in the FDA context --

11 QUESTION: So they -- OSHA determines that this
12 kind of a label is necessary to safeguard an employee.
13 OMB can say: not required at all.

14 MR. MINEAR: What OMB applies is the standard --

15 QUESTION: Isn't that right? That is what it said.
16 It said it doesn't go far, it doesn't go far -- you should
17 have exempted some other labeling requirements.

18 MR. MINEAR: Well, that is in part right, Your
19 Honor. But remember, OMB employs this -- looks at the
20 standard that the agency employs in making its
21 determinations. It looks to what the agency's mission is,
22 as set forth in the statutes. And then it takes a look at
23 whether the agency has in fact met that requirement. This
24 is simply a matter of interagency review, to review -- to
25 prevent duplication of efforts, to make sure that, for

1 instance, FDA is not doing something that conflicts with
2 what OSHA is doing.

3 And it makes perfect sense that a centralized
4 agency in the government should be able to review these
5 matters before they come to the court for the court's
6 review.

7 QUESTION: It doesn't go to the scope of the
8 reviewing authority anyway. I mean, that same problem
9 arises if you say that all that OMB can review is requests
10 for information to be provided to the agency. You still
11 get into the same kind of a problem, don't you, of OMB
12 second guessing the agency as to what is necessary?

13 MR. MINEAR: Well, we think that OMB does have that
14 authority to review other agencies actions here with
15 respect to whether they are collecting information that is
16 necessary for the performance of their function.

17 I see my time has expired.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

19 The case is submitted.

20 (Thereupon, at 2:56 p.m., the case in the above-
21 entitled matter was submitted.)

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CERTIFICATION

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No. 88-1434 - ELIZABETH DOLE, SECRETARY OF LABOR, ET AL., Petitioners V. UNITED

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