1   IN THE SUPREME COURT OF THE UNITED STATES

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3   THOMAS E. PEREZ,   :

4   SECRETARY OF LABOR, ET AL.,   :

5   Petitioners   :   No. 13-1041

6   v.   :

7   MORTGAGE BANKERS   :

8   ASSOCIATION, ET AL.;   :

9   :

10   and   :

11   :

12   JEROME NICKOLS, ET AL.,   :

13   Petitioners   :   No. 13-1052

14   v.   :

15   MORTGAGE BANKERS   :

16   ASSOCIATION.   :

17   - - - - - - - - - - - - - - - - - - x

18   Washington, D.C.

19   Monday, December 1, 2014

20

21   The above-entitled matter came on for oral

22   argument before the Supreme Court of the United States

23   at 10:04 a.m.

24   APPEARANCES:

25   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

1   Department of Justice, Washington, D.C.; on

2   behalf of Petitioners.

3 ALLYSON N. HO, ESQ., Dallas, Tex.; on behalf of

4   Respondents.

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

 2                 (10:04 a.m.)

 3       CHIEF JUSTICE ROBERTS:       We'll hear argument

 4  first this morning in Case 13-1041, Perez v. the

 5  Mortgage Bankers Association and Nichols v. the Mortgage

 6  Bankers Association.

 7       Mr. Kneedler.

 8       ORAL ARGUMENT OF EDWIN KNEEDLER

 9        ON BEHALF OF THE PETITIONERS

10       MR. KNEEDLER:       Mr. Chief Justice, and may it

11  please the Court:

12       The Administrative Procedure Act expressly

13  exempts interpretative rules from the requirement for

14  notice-and-comment rulemaking, and the APA defines

15  rulemaking as an agency process for formulating, for

16  amending, or repealing a rule.  Thus, an agency's

17  amendment or repeal of an interpretative rule, just like

18  the initial issuance, is exempt from notice-and-comment

19  rulemaking.  Under the D.C. Circuit's Paralyzed Veterans

20  Doctrine however, once an agency gives a definitive

21  interpretation of a rule, it cannot significantly modify

22  that interpretation without going through

23  notice-and-comment rulemaking.

24       JUSTICE KENNEDY:       Is there some background

25  principle that should guide our decision here that in --
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1   that in a close case, an interpretive rule is preferable

2   to a regulation or vice versa? Because it seems to me

3   it would help you in your case if you said that

4   interpretative rules serve an important function and the

5   Paralyzed Veterans's decision is an incentive not to

6   adopt an interpretative interpretation.

7   MR. KNEEDLER: Right. And I think that's

8   absolutely correct. First of all, the -- the question

9   of whether this is an interpretative rule is not -- is

10   not before the Court.

11   JUSTICE KENNEDY: Correct.

12   MR. KNEEDLER: That was conceded below.

13   But -- but it is of critical importance for

14   agencies to be able to issue interpretative rules, and

15   this is reflected in the -- in the passage of the APA

16   itself. The committee reports show that -- that the not

17   imposing obstacles to agencies issuing interpretations

18   was designed to encourage them to let the public know

19   what their interpretations of the statutes and rules --

20   JUSTICE KENNEDY: And -- and if I'm an

21   agency head and you're an attorney, do you advise me

22   that interpretative rules are often preferred to

23   regulations?

24   MR. KNEEDLER: Well, I -- I -- I think it

25   depends. And, again, this is a principal purpose of --

1   of what the APA did. The APA did not prohibit an agency

2   from going through notice-and-comment rulemaking or

3   other -- or other public participation in the case of an

4   interpretative rule. It left to the agency the decision

5   whether to do that. So in some circumstances, the

6   agency might choose to have very specific regulations;

7   in other circumstances, the agency may choose to have

8   interpretations.

9   JUSTICE SCALIA: Well, things have changed

10   so much mainly because of this Court's interpretations.

11   Was it not the envision by the original APA that

12   substantive rules had to have notice and comment because

13   they would indeed be reviewed by courts on the basis of

14   abuse of discretion? I mean, you know, whether it's 25

15   centimeters or 250 centimeters for a particular

16   substantive rule there's no way for a court to say that

17   that's right or wrong.

18   Whereas, it was certainly envisioned by the

19   original APA, was it not, that interpretative rules

20   would not be given any deference by the courts, and

21   that's why there didn't have to be notice and comment,

22   because the APA says in so many words that all issues of

23   law shall be decided by the court.

24   MR. KNEEDLER: Yes. But the question of --

25   of deference when an agency -- or excuse me, when a

 1   court is deciding a question of law, that takes into

 2   account the agency's interpretation. This is -- this is

 3   demonstrated by Chevron because if --

 4   JUSTICE SCALIA: Yes, yes, yes. You can say

 5   that, but that's not what anybody thought when the APA

 6   was passed.

 7   MR. KNEEDLER: Well, as we point out in a

 8   reply brief, it was -- it was understood that there

 9   would be principles of deference to the -- to agency

10   interpretations. And beyond that, with respect to

11   interpretations of legislative regulations, Seminole

12   Rock was actually decided before the APA was passed.

13   And so the principle of -- of court's giving deference

14   to an agency's interpretation of its own regulation --

15   JUSTICE GINSBURG: What about, Mr. Kneedler,

16   this particular kind of interpretation? Is -- is this

17   an unusual situation or in classifying employees for

18   purposes of the Fair Labor Standards Act, does -- has

19   the agency changed its mind about an initial

20   classification? I mean, here we have the agency has

21   taken different views on whether loan offices qualify as

22   administrative offices. Is -- is the Fair Labor

23   Standards Act subject to this kind of review and

24   revision by the department?

25   MR. KNEEDLER: Well, there -- there haven't

1   been that many instances of -- of changes. But one of

2   the purposes of giving an agency the authority to

3   interpret a statute and its regulations is to take into

4   account evolving circumstances. The -- the -- certain

5   job descriptions, for example, may not even have existed

6   at the time or may have existed in a very different way

7   at -- at the time a regulation was adopted or a prior

8   interpretation was given.

9   But I do think it's important to recognize

10 that the -- that the Fair Labor Standards Act is a

11 situation which Congress has actually contemplated that

12 the agency would give interpretations and might change

13 them. As we point out in our brief --

14   CHIEF JUSTICE ROBERTS: What was the -- was

15 there a particular basis for the change in this case?

16   MR. KNEEDLER: Yes. The -- the agency in

17 2010 principally thought that the 2006 interpretation

18 was simply erroneous, because the -- the 2006

19 interpretation had relied on Section 203(b), which it --

20 which was part of a list of examples of applying the

21 general standards in -- in Section 200. And it -- it, I

22 think, basically overlooked it or didn't give

23 significance to the fact that that regulation itself --

24   CHIEF JUSTICE ROBERTS: Is there a change

25 in the leadership at the agency between those two

1   interpretations?

2   MR. KNEEDLER: Yes, there was. Yes,

3   there -- there was a change in -- in the leadership.

4   But the agency --

5   JUSTICE SCALIA: Change in administration?

6   MR. KNEEDLER: Yes, change in

7   administrations.

8   But the agency --

9   JUSTICE SCALIA: Isn't that a more likely

10   explanation?

11   MR. KNEEDLER: Well, the -- the agency gave

12   a very thorough explanation of the -- of the reasons for

13   the change. This, of course --

14   CHIEF JUSTICE ROBERTS: And they hadn't --

15   they hadn't done -- they hadn't addressed the same

16   issues the first time in 2006?

17   MR. KNEEDLER: They had addressed the same

18   issues, but -- but the Court -- or excuse me, the 2006

19   administrative -- or excuse me, opinion letter gave what

20   in 2010 the agency thought was an unduly narrow view of

21   what sales activities would consist of. And it's

22   instructive to look at this Court's decision in

23   Christopher. Christopher had to do with the

24   interpretation of another part of this same exemption

25   for outside salesmen. But the Court there recognized

1 that various functions are incidental to sales

2 activities and, even if they don't necessarily encompass

3 the direct face-to-face activity, preparing for that

4 meeting and doing research on that particular customer's

5 view is part of sales activity. The 2006 opinion letter

6 did not really take that view. It really just said that

7 face-to-face interaction was the part of sales.

8   JUSTICE SOTOMAYOR: Was the 2006 advice

9 contrary to prior advice?

10   MR. KNEEDLER: Yes. There had been opinion

11 letters issued in 1999 and again in 2001, which -- yes,

12 2001, which had concluded that the mortgage loan

13 officers were -- were not within -- were not within the

14 exemption and the 2006 interpretation.

15   JUSTICE SCALIA: So is it a second -- second

16 flip-flop? Maybe -- maybe we shouldn't give deference

17 to agency interpretations of its own regulations. That

18 would solve this -- the problem of this case. For me it

19 would be easy.

20   MR. KNEEDLER: Well, the question of -- the

21 question of deference, again, is another thing that is

22 not before the Court. The Respondent challenged this --

23   JUSTICE SCALIA: I understand it's not

24 before the Court, but my perception of what is before

25 the Court would be altered if I didn't think that courts

1   had to give deference to these flip-flops.

2   MR. KNEEDLER: Well, the question of how --

3   this Court's decisions have different formulations about

4   how a change of position may be factored into the

5   question of deference. We point this out in our reply

6   brief.

7   In the Thomas Jefferson Hospital case,

8   the Court suggested that change in interpretations would

9   matter, but then later, again in Christopher, the Court

10   suggested that the way a change in positions would be

11   taken into account is that it would be some indication

12   of whether the agency had given fair and considered --

13   whether it was a product of fair and considered judgment

14   today.

15   JUSTICE ALITO: In this case, didn't --

16   didn't the government say explicitly that its

17   interpretation would be entitled to controlling

18   deference?

19   MR. KNEEDLER: Well, that was -- that was an

20   invocation of the Seminole Rock standard, yes. And

21   under Seminole Rock and Auer deference --

22   JUSTICE ALITO: If it has controlling

23   deference, does it have the force of law?

24   MR. KNEEDLER: No, it doesn't. I think

25   "controlling" is just describing the -- the consequence

1   of a court going through the interpretative process.

2   Same thing under -- under Chevron. Ifthe Court has to go

3   through its analysis of deciding whether the agency has

4   interpretative authority and whether the interpretation

5   is reasonable. If all that's satisfied, then the

6   agency's interpretation controls. But it's not

7   controlling --

8   JUSTICE ALITO: It's a formal deference, but

9   as a practical matter, do you think there's much of a

10   difference?

11   MR. KNEEDLER: I -- I think there's an

12   important difference because a legislative rule which

13   has the force and effect of law itself prescribes duties

14   for the regulated party. You can be sanctioned or be

15   held liable for violating the regulation itself. That's

16   not true for an interpretative rule. An interpretative

17   rule is giving the agency's view of what some other

18   provision of law means and it's that other provision

19   be it a statute or a regulation --

20   JUSTICE SOTOMAYOR: Mr. Kneedler, that

21   was -- that's what's been troubling me. I have looked

22   at the academic debate on how to identify a legislative

23   rule from an interpretative ruling. I'm not quite

24   sure -- we don't need to get into that here. But I was

25   troubled by your answer to Justice Kennedy because you

1   were suggesting that there is no standard by which you

2   decide what becomes a legislative rule and what becomes

3   an interpretative rule.

4   MR. KNEEDLER: No.   What I -- I think what I

5   meant to say --

6   JUSTICE SOTOMAYOR: You were saying a -- if

7   you were advising on this issue that some you suggest go

8   by rule and some you -- by legislative rule and some you

9   suggest go by interpretative rule.   I don't --

10   MR. KNEEDLER: I certainly didn't mean to

11   suggest that there's no difference between the two.

12   There's a very fundamental difference.

13   JUSTICE SOTOMAYOR: There is a fundamental

14   difference.   But when --

15   MR. KNEEDLER: And the way I described it,

16   it's just that there -- there could be situations in

17   which an agency might decide to be very detailed in a

18   regulation and there are situations in which the agency

19   might not want to.   Under the --

20   JUSTICE KAGAN: Could I ask about that, Mr.

21   Kneedler, because it seems to me that part of what's

22   motivating that Respondent's position and their amici's

23   position, and I'm not sure that this maps on very well

24   to the Paralyzed Veterans doctrine, but part of what's

25   motivating it is a sense that agencies more and more are

1   using interpretative rules and are using guidance

2   documents to make law and that there is -- it's

3   essentially an end run around the notice and comment

4   provisions. Now, whether that has anything to do with

5   Paralyzed Veterans or not -- I mean, what would the

6   government say is the correction for that or the remedy

7   for that or -- I mean, because the government is sort of

8   asking for it all. It's asking for a lot of deference

9   always, it's asking for the removal of the Paralyzed

10   Veterans doctrine, it's asking for a pretty strict

11   demarcation between interpretative and legislative

12   rules.

13   So what's the solution to the problem that I

14   think the Respondents are basically identifying?

15   MR. KNEEDLER: Okay. And that -- my answer

16   to that question has a number of parts. First of all,

17   in this specific statute Congress has given a pretty

18   good answer, which is 29 U.S.C., the Portal-to-Portal

19   Act provision 259, which says that a party cannot be

20   held liable for good faith reliance on an interpretation

21   issued by the agency, and that applies whether or not

22   the statute expressly says that has been amended or

23   rescinded. So the Portal-to-Portal Act specifically

24   contemplates that there will be changes in --

25   JUSTICE KENNEDY: But I notice you make a

1   point of that on page 4 of your brief, but -- I don't

2   wish to interrupt Justice Kagan's line of questioning --

3   but it seems to me that we have to assume that there

4   will be many other cases in which there's no safe harbor

5   provision, and you have the retroactivity.

6   MR. KNEEDLER: Right. No. That -- that's

7   absolutely right, but here there is a safe harbor

8   provision. Congress addressed this in --

9   JUSTICE KENNEDY: But you -- you don't ask

10   us to confine our reasoning to that kind of case.

11   MR. KNEEDLER: Right. And so the -- with

12   respect to agency guidance and that sort of thing, the

13   APA contemplates that agencies will develop their own

14   procedures. And, in fact, agencies have done that in

15   recent years. There are agencies that seek public

16   participation when they're developing guidance

17   documents, subregulatory guidance documents. That's the

18   way the FDA proceeds. And OMB has oversight of these

19   things and can require and bring some consistency to the

20   way agencies interpret -- interpret matters.

21   With respect to the question of deference, I

22   was starting to answer this question before. This

23   Court's decisions specify some different possibilities

24   in the way deference might play into a change in

25   position, but in Kennedy v. Plan Administrator the Court

1 said that a change of position is no reason in itself to

2 disregard the agency's position. And then in Long

3 Island Care, the Court said at least where there is no

4 unfair surprise. So one way --

5   JUSTICE GINSBURG: Suppose -- suppose a

6 court had given, quote, "controlling deference" to the

7 2006 rule. Does that make any difference?

8   MR. KNEEDLER: No. I think by analogy to

9 Brand X, if the -- if the agency gives a different

10 interpretation to the regulation, that change should be

11 given effect by a reviewing court.

12   JUSTICE SOTOMAYOR: Could you go back to

13 Justice -- answering Justice Kagan? How do you address

14 the fundamental concern, which is that agencies are

15 bypassing the notice and public comment by using

16 interpretative rules when they should be using

17 legislative rules?

18   MR. KNEEDLER: Well, first of all, I mean, I

19 think some may have that impression. I -- I don't --

20 you know, I don't think that there's an empirical

21 basis --

22   JUSTICE SOTOMAYOR: Assume the impression is

23 true. That's why I asked you to define when one has to

24 be used and when the other can be used.

25   MR. KNEEDLER: Well, the -- the D.C.

 1   Circuit's decision in American Mining Congress has been

 2   given a lot of attention as dividing between what's an

 3   interpretative rule and what's a -- what's a regulation.

 4   And the -- I think the principal guide there is whether

 5   in the absence of the rule, would there be a standard to

 6   which the regulative party could be held, and here there

 7   unquestionably is. The Fair Labor Standards Act applies

 8   and the -- and the regulation itself dealing with the

 9   exemption, which Congress has expressly authorized the

10   Secretary to define, identifies who is -- who is an

11   administrative employee by -- by several factors. So

12   here there's -- this interpretative regulation is by no

13   means necessary to establish a basic rule of -- of

14   liability.

15   Now, there could be situations that -- that,

16   again, were identified in American Mining Congress and,

17   frankly, in this Court's decision in Gonzales v. Oregon.

18   If the agency issues a regulation that does nothing more

19   than just parrot the statute, then the agency hasn't

20   really accomplished anything by its -- by its regulation

21   and its -- and its interpretative rule would not get --

22   would not get deference.

23   But if the agency has actually given

24   content, even if necessarily in somewhat general terms,

25   then that is satisfactory. And under the Fair Labor

1   Standards Act, there are -- at the time the 2004

2   regulations were issued, Labor estimated there were 134

3   million people in the workforce, approximately, I think,

4   26 million covered by the -- what they call the white

5   collar exemption. It would not really be feasible for

6   the Department of Labor to issue detailed regulations

7   trying to identify every type of employment, every

8   type -- every sector in the economy. And so

9   interpretative guidance is the way that the agency has

10   done this. And, again, Congress I think in some

11   respects ratified that or at least recognized its

12   legitimacy in passing the portal-to-portal safe harbor

13   provision, which -- which deals not simply with

14   regulations, but it says good faith reliance on an

15   interpretation does not give rise to liability even if

16   that interpretation --

17   JUSTICE SCALIA: Why -- why should there be

18   a difference.

19   MR. KNEEDLER: Pardon me?

20   JUSTICE SCALIA: Why should there be a

21   difference between the two, between the treatment of

22   substantive rules and interpretative rules?

23   MR. KNEEDLER: Well, as I said, substantive

24   rules or legislative rules themselves define -- have the

25   force and effect of law. They themselves define duties

1   and obligations. Interpretative rules -- and this is in

2   the Attorney General's Manual on the APA, which this

3   Court has repeated in Chrysler, is designed to inform

4   the public of the agency's view of the statutes and

5   rules --

6   JUSTICE SCALIA: Well, nonsense. So long --

7   whether it's an interpretative rule or a substantive

8   rule, it is reviewed by a court with deference, right?

9   MR. KNEEDLER: Yes.

10   JUSTICE SCALIA: And you want us to give the

11   same deference to both.

12   MR. KNEEDLER: Yes. Yes.

13   JUSTICE SCALIA: So what the court says

14   about, in its substantive rule, is just as much or no

15   less law than what a court says in its interpretative

16   rule. If the court is within the -- the bounds of

17   ambiguity, it is the law. And a court cannot change it.

18   So why should there -- you know, I -- I just don't

19   understand the difference in treatment between the two.

20   MR. KNEEDLER: With respect, Justice Scalia,

21   I think that -- I think there's a critical difference,

22   and that is, that when the case goes to court, the court

23   is deciding whether the -- whether the agency's

24   interpretation -- whether to defer to the agency's

25   interpretation or not. But ultimately, it's the court

1   that is deciding what -- what the law is under

2   principles of deference.

3   So under -- under Chevron, if the court

4   decides that the agency's interpretation is -- is

5   appropriate, then it's the court that is construing the

6   statute. And by parallel reasoning, we think that's

7   true also for --

8   JUSTICE BREYER: I'm rather surprised --

9   sorry to wake up so late. But the -- yes, you said yes,

10   yes, you give the same degree of deference whether it's

11   a legislative rule or an interpretative rule. Where

12   it's a legislative rule, Congress has, through

13   interpretation of the statute, said to the agency, you

14   are to expand on the statute through rules. They're

15   exercising delegated congressional authority. And, of

16   course, we have systems for deciding what deference

17   we'll give and it's usually quite a lot. Or if it's an

18   interpretative rule, it's just what you said. The

19   agency's giving its interpretation. And in that kind of

20   case, the deference that a court will give to it, the

21   answer has to be, though not except -- everybody on this

22   Court might not agree with it. It depends.

23   Very often you give them that deference

24   because they know more about the statute, about what

25   went on in its enactment and what Congress meant. If

Official

1   that's the reason and they change their minds, I would

2   think the deference sinks quite a lot, something it

3   wouldn't do with a legislative rule, or after all, they

4   have the authority to decide either way.

5   So I agree with you.   We needn't go into

6   those matters in this case and I surely hope we don't.

7   But if we do, is there anything I said you disagree

8   with?

9   MR. KNEEDLER: Well, yes.

10   (Laughter.)

11   MR. KNEEDLER: I think -- I think on the

12   question of -- of deference to an agency's

13   interpretation, the Court has -- has adopted --

14   JUSTICE BREYER: It's called Skidmore very

15   often.

16   MR. KNEEDLER: Well, no. Auer deference and

17   Seminole Rock, tracing -- tracing actually throughout

18   this Court's jurisprudence, I think it's almost 50 cases

19   in which the Court has -- has recited that standard of

20   deference --

21   JUSTICE KAGAN: But, Mr. Kneedler, one of

22   the very strange things about this case is that I

23   thought that in SmithKline -- and I recognize that the

24   government probably doesn't like this aspect of

25   SmithKline -- but that SmithKline basically says when it

Alderson Reporting Company

1   comes to Auer deference, if the interpretation has been

2   unstable over time and if the interpretation has created

3   a kind of unfair surprise for private parties, that

4   those interpretations do not get Auer deference.

5   So the very kinds of interpretations that

6   we're talking about here, which is revised and amended

7   interpretations, they don't get Auer deference in the

8   first place. So this whole notion that we're supposed

9   to be so worried about this because we're going to give

10   it Auer deference, well, we don't.

11   MR. KNEEDLER: Well, I don't think

12   Christopher is -- is dispositive on that -- on that

13   point. And if I could explain. There's another way --

14   there's another way to look at this and that has to do

15   with the giving deference -- whether deference should be

16   given to the agency's new interpretation with respect to

17   transactions that -- that occurred before. That's --

18   that's a question of retroactivity, because one -- one

19   could say if the agency gives a new interpretation to an

20   existing legislative rule, that to give deference to

21   that interpretation retrospectively is, in effect, to

22   apply the regulation as so interpreted retroactively and

23   not give it effect.

24   But I don't think -- the fact that there's a

25   change of position doesn't seem to us should change the

1   deference going forward, which is really the critical

2   point. And that's we think critical because the whole

3   point of giving the agency the interpretative authority

4   is that it is the expert, Congress has delegated to it

5   the responsibility for fleshing out the regulatory

6   scheme over -- over time and new circumstances or the

7   agency may identify prior errors. So --

8   CHIEF JUSTICE ROBERTS: Or the

9   administrations might have changed.

10   MR. KNEEDLER: Or the -- but that may also

11   be an occasion to identify an error. I mean --

12   JUSTICE BREYER: We have to really get into

13   this, because I think it's fascinating and probably we

14   could each write, you know, like a new treatise on

15   administrative law in this subject. Is it possible to

16   decide this case without going into the question of

17   deference?

18   MR. KNEEDLER: Yes.

19   JUSTICE BREYER: How?

20   MR. KNEEDLER: As -- As I said before,

21   this -- this interpretation was challenged not only

22   under the Paralyzed Veterans Doctrine, but also as being

23   substantively invalid. And the district court rejected

24   that interpretation, finding that it was clear on the

25   basis of reading the regulations that the new

1   interpretation was valid, and Respondent did not appeal

2   that. So any questions about deference to the new

3   interpretation are simply not part of this case and

4   should be left for another case.

5   But going back --

6   CHIEF JUSTICE ROBERTS: But that's often the

7   case when you have a procedural challenge. I mean, the

8   idea is they're not challenging the particular

9   interpretation, but you don't doubt that the agency

10 could have come out the other way and maybe if there had

11 been notice and comment, they would have been persuaded

12 that they should -- or that they shouldn't change the

13 interpretation.

14   MR. KNEEDLER: Well, the APA itself has a

15 mechanism to take into account that as well. The APA

16 has a provision for petitioning an agency for

17 rulemaking. So if -- if the Mortgage Bankers here

18 believe that -- and this was --

19   CHIEF JUSTICE ROBERTS: How often --

20   MR. KNEEDLER: -- noted in Auer -- in Auer

21 itself, that the -- that the regulated industry - their

22 States could have petitioned the agency for a rulemaking

23 and agencies -- that is subject to judicial review. So

24 if there was arbitrary denial of the petition for

25 rulemaking, that would be -- that is another safety

1 valve. That's, again, something built into the APA

2 itself. And the -- our principal -- or the basic

3 submission here is that Paralyzed Veterans rests on a

4 real misreading of the -- of the APA and the very strong

5 values behind interpretative rules, as Justice Kennedy's

6 question suggests.

7   An agency should not be required to abide by

8 an interpretation it believes is erroneous going

9 forward. And also, the agency should be in a position

10 of telling -- of being truthful with the public as to

11 what it understands the regulation to mean.

12   I'd like to reserve the balance of my time.

13   CHIEF JUSTICE ROBERTS: Thank you, Mr.

14 Kneedler.

15   MR. KNEEDLER: Thank you.

16   CHIEF JUSTICE ROBERTS: Ms. Ho.

17   ORAL ARGUMENT OF ALLYSON N. HO

18   ON BEHALF OF RESPONDENTS

19   MS. HO: Mr. Chief Justice, and may it

20 please the Court:

21   I'd like to begin with Justice Sotomayor's

22 question about the dividing line between interpretative

23 rules and legislative rules in the context of what my

24 friend Mr. Kneedler has said about retroactivity.

25   I think when you consider -- the government

1   says, and it's recognized in the past, that the 2010 AI,

2   the agency action that is at issue here, the government

3   has said it was such a substantive change in the law

4   that it could not be applied retroactively. That is

5   fundamentally inconsistent with any notion of an

6   interpretive rule --

7   JUSTICE KAGAN: Ms. Ho, I think that this

8   entire case has been litigated with everybody accepting

9   that this was an interpretative rule. Now, maybe that

10   was wrong. Maybe you should have come in in the first

11   instance and said, really, we think this is a

12   legislative rule and so it had to go through notice and

13   comment. But you didn't do that. Everything that

14   happened in this case happened on the view that this was

15   an interpretative rule and the question is what followed

16   from that classification.

17   MS. HO: Respectfully, Justice Kagan, I

18   disagree with that -- with that description. As we

19   explain on page 46 of the red brief, what we said below

20   was that the 2010 AI was an interpretation. An

21   interpretation is not dispositive of whether it's a

22   legislative or interpretative rule. Perhaps more

23   importantly, Justice Kagan, the D.C. Circuit in its

24   decision under review gave no indication, made no

25   suggestion that what it was, in fact, doing was

1   subjecting a legislative rule -- excuse me, an

2   interpretative rule to notice and comment. It held and

3   it cited the APA that the AI 2010 was a de facto

4   amendment.

5   JUSTICE KAGAN: Yes. But to the contrary,

6   Ms. Ho, I mean, the entire Paralyzed Veterans Doctrine

7   is about when interpretative rules get notice and

8   comment, have to get notice and comment, if ever. It's

9   not about the division line between interpretative rules

10   and legislative rules. So when the D.C. Circuit starts

11   citing Paralyzed Veterans, it's on the assumption that

12   what we're talking about is an interpretative rule.

13   MS. HO: Again, Your Honor, I would

14   respectfully disagree with that. And I don't -- I don't

15   dispute that there is loose language in dicta and that

16   the D.C. Circuit has not been entirely clear about it.

17   But I think --

18   JUSTICE KAGAN: It's not just loose

19   language. If you go back to Paralyzed Veterans itself,

20   they deal with two arguments. The first argument is

21   what's become known as the Paralyzed Veterans Doctrine

22   and then they say, oh, you know, there's another

23   argument in the case, which is that this isn't an

24   interpretative rule at all.

25   MS. HO: Your Honor, I think the way that I

1   would understand both Paralyzed Veterans and the cases

2   since it, is Paralyzed Veterans it looked at one argument

3   for why what it had before it was interpretative in name

4   only. And it said the best argument here is that this

5   isn't an interpretable -- it is a de facto amendment.

6   And a de facto amendment --

7   JUSTICE GINSBURG: Why wouldn't the 2006

8   interpretation, which you say should have stuck, why if

9   this -- if it's -- if it's legislative, if it's

10   substantive, then the 2006 interpretation was equally

11   defective because there was no notice and comment for

12   the 2006. If you are trying to characterize the 2010

13   rule as not interpretative, I don't see how you can say,

14   oh, but the 2006 rule was interpretative. Especially

15   since there were the earlier rulings the other way.

16   What was it, the 2001 and -- so it seems to me that you

17   want it to be interpretative when it favors you and you

18   want it to be not interpretative -- you want the 2006 to

19   be interpretative because you didn't go through notice

20   and comment, right?

21   MS. HO: Your Honor, I think -- I think

22   what -- the status of 2006 opinion, which is not before

23   this Court, I agree with you, it's a difficult question.

24   I think the 2006 opinion has characteristics of both

25   legislative rules and it has characteristics of

1   interpretative rules. The key thing for this case is

2   the government's concession that in 2006, that opinion

3   letter was the department's authoritative definitive

4   interpretation. So regardless of the status of 2006,

5   the key thing from the D.C.'s Circuit's point of view in

6   deciding whether it was a de facto amendment, and again,

7   there's nothing in the decision under review to

8   suggest --

9   JUSTICE GINSBURG: But I don't understand

10   why we should say go back to an interpretation that

11   didn't get -- I mean, I can see you say the 2010 should

12   have had notice and comment. But why return to an

13   earlier position that didn't have notice and comment? I

14   think you could say wipe it all out, start over, but I

15   don't see how you can say the 2006 rule sticks when it

16   has the same defect on your view the 2010 did.

17   MS. HO: Well, again, Your Honor, we

18   could -- I think 2006 -- again, it's a harder question.

19   There are characteristics that make it legislative,

20   there are characteristics that make it interpretative.

21   I think the key point is focusing on 2010 and perhaps

22   one difference that would tie back to Your Honor's

23   earlier question about the specific context of this case

24   and the Fair Labor Act.

25   My friend has talked about the

1   Portal-to-Portal Act, about Section 259. One thing that

2   the 2010 AI did is it repealed, it withdrew the 2006

3   opinion letter, which under 259 gave employers an

4   opportunity to plead a good faith defense. In

5   withdrawing that, the 2010 AI effectively abridged a

6   statutory defense, and I think in that respect, the 2010

7   AI --

8   JUSTICE GINSBURG: I don't follow that

9   because it seems as far as the change, the -- an

10 employer who had relied in good faith on the 2006

11 interpretation is home free. I thought that much was clear.

12   MS. HO: Your Honor is correct. Assuming --

13 assuming that -- that an employer can -- can prove good

14 faith. But that's only for 2006 --

15   JUSTICE GINSBURG: But why wouldn't -- well,

16 how could there not be good faith? Here's a regulation,

17 I followed it. What more do I need to show good faith?

18   MS. HO: In any particular case, the

19 question would be good faith. I mean, an employer would

20 have to -- would have to show that -- that it did --

21 that, in fact, it reviewed, it looked. Often this is

22 one of the more hotly litigated aspects of the --

23   JUSTICE GINSBURG: But the employer would

24 say here's interpretative rule 2006. I followed it to

25 the letter. What more would need to be shown than

1 here's a regulation on the books, an interpretation on

2 the books, I followed that interpretation, I thought it

3 was clear that such an employer would not be liable for

4 the past? Now, for the future is something different.

5   MS. HO: Yes, Your Honor. There are several

6 elements. That would be only from 2006 to 2010. Going

7 forward, of course, and, of course, in this case in --

8   JUSTICE SCALIA: Well, even for that period.

9 I assume he'd have to prove that he relied on the

10 regulations.

11   MS. HO: Yes. Relied - relied in good faith

12   JUSTICE SCALIA: If he went ahead and did

13 this without any knowledge of the regulation, he would

14 not be in good faith reliance on a regulation, would he?

15   MS. HO: That's correct, Justice Scalia.

16   CHIEF JUSTICE ROBERTS: But I -- I didn't

17 imagine -- and maybe I misunderstood Mr. Kneedler. He

18 wasn't suggesting that they would go back and prosecute

19 people who didn't happen to read the regulation but were

20 acting in compliance with it. I guess we can ask him.

21 But, I mean, do you think that's what the government is

22 going to do?

23   MS. HO: No. No, Your Honor. I think

24 what's significant from our perspective about the

25 government's position that the 2010 AI should not apply

1   retroactively is that in an amicus brief in Henry, it's

2   in -- I apologize, it's not before the Court. It's on

3   JA-279 and 280 in the court below. In an amicus brief

4   in another case, the department took the position that

5   the AI should not apply retroactively because

6   substantive changes in the law that do not simply say

7   what the law according to the agency is and has always

8   been do not apply retroactively. So our position is

9   that -- and Justice Sotomayor, wherever the line --

10   wherever the line between interpretative --

11   JUSTICE SOTOMAYOR: What changes what is an

12   interpretative rule? What you're suggesting -- an

13   interpretative rule to me is an interpretative rule. Is

14   there a statute or a regulation that you're looking at,

15   and you're saying a statute or a regulation, I think it

16   applies this way. You don't talk about a court amending

17   a statute or a regulation when it changes its

18   interpretation.

19   So even if I agree with you that it's an

20   amendment to an interpretation, how does that make it

21   anything else but an interpretation?

22   MS. HO: I think -- the key point -- and,

23   Justice Sotomayor, you are exactly right. If -- if

24   what -- if what AI 2010 truly was was simply an

25   interpretation, simply saying here's what the regulation

1   means and has always meant, there would not be a reason

2   in the world not to apply it retroactively because you

3   would simply be saying what the law is.

4   JUSTICE SOTOMAYOR: But there is a safe

5   harbor in this particular statute and they're trying to

6   comply with the meaning of the safe harbor.

7   MS. HO: I understand that that's the

8   position that the government has taken in this case.

9   But in -- in Henry where -- where what the actual

10   argument that the government was making in that case was

11   that the 2010 AI was entitled to Auer deference, that

12   there was no unfair surprise precisely because it could

13   not apply retroactively. Our submission is that by

14   saying the 2010 AI worked a substantive change in the

15   law --

16   JUSTICE SOTOMAYOR: No, you keep calling it

17   a law. It worked a substantial change in the

18   interpretation.

19   MS. HO: I'm actually quoting from the

20   government's brief. And this is on page 280 of the JA.

21   JUSTICE KAGAN: Well --

22   MS. HO: The government says, "It is

23   important to note, however, that when the department

24   issues interpretations via administrator's

25   interpretations, amicus briefs, et cetera, that do not

1   result in a substantive change in the law, those

2   interpretations which restate what the law according to

3   the agency is both before and after" --

4   JUSTICE KAGAN: Ms. Ho, can I take you back

5   to what --

6   MS. HO: Yes, ma'am.

7   JUSTICE KAGAN: -- I thought was the

8   question in this case, which has to do with the

9   Paralyzed Veterans doctrine.

10   MS. HO: Yes.

11   JUSTICE KAGAN: And I guess what I would

12   like for you to do is simply to try to explain that

13   doctrine to me, and on the view that is a doctrine about

14   interpretative rules and what it says is that there are

15   occasions when interpretative rules must be done through

16   notice and comment and that those occasions are when the

17   interpretative rules make a significant revision to a

18   stable -- a prior stable interpretation. So could you

19   explain to me just why that is so?

20   MS. HO: Yes, Your Honor, and operating

21   under the premise that you've asked me to operate under,

22   I think it rests on the premise that where an

23   administrative agency's -- the lawmaking power and the

24   power to interpret that law rest in the same hands,

25   where the agency gives an authoritative, definitive

1   interpretation of what its own regulation means, that

2   meaning --

3   JUSTICE KAGAN: Well, why would it --

4   MS. HO: -- is for all practical purposes

5   what the regulation is such that to change that meaning

6   is to change the regulation itself.

7   JUSTICE KAGAN: I think I understand that

8   but it seems to me that that would apply as well to the

9   initial interpretation as to the revised interpretation.

10   In other words, if you really want to say an

11   interpretation somehow changes the legislative

12   regulation, then that happens at the moment the

13   interpretation takes place, doesn't it?

14   MS. HO: No, Your Honor, I don't think it

15   does. I think what -- I think what happens, and -- and

16   under the Paralyzed Veterans doctrine, this can happen

17   when the government issues an authoritative

18   interpretation. In other words, it's looking at the

19   regulation, and it's saying this is what the regulation

20   means. It's not changing that regulation, although

21   certainly some interpretative rules can include changes.

22   It is saying this is what our regulation, the law that

23   we made, this is what it means. And I think in a world

24   of Auer deference where there is no meaningful

25   distinction, and certainly not from the perspective of

1   the regulated as to the controlling force of law

2   accorded to the interpretation itself --

3   JUSTICE KAGAN: Yes, but again --

4   MS. HO: -- versus the regulation.

5   JUSTICE KAGAN: -- Auer deference actually

6   is more strong with respect to the initial determination

7   than -- initial interpretation than with respect to a

8   revised interpretation. So I don't think Auer deference

9   can save you from this little conundrum.

10   The conundrum is why it is that an

11   interpretation should be viewed as -- as changing the

12   regulation such that notice and comment is necessary

13   when it's a second interpretation but not when it's a

14   first.

15   MS. HO: Because the second -- the second --

16   the first interpretation under Paralyzed Veterans has to

17   be authoritative. It can be authoritative -- and not

18   all interpretations are authoritative. In this case the

19   government conceded it was an interpretation. In -- in

20   Alaska Hunters, 30 years of -- of uniform agency

21   practice, that was authoritative, such that to -- from

22   the perspective of the regulated, the agency isn't just

23   saying this is our authoritative interpretation. It is

24   inviting reliance upon it such that to change, to do a

25   180, to take a logically inconsistent position with it

1   at point B, that's -- that's what Paralyzed Veterans is

2   targeting.

3   JUSTICE KENNEDY: But it seems to me that

4   what you are doing is that in order to make your case,

5   you are saying that the second interpretation deserves

6   the same deference, the same Auer deference as the

7   first, and Justice Kagan's questions seem to me

8   highlight you're -- you are basically running away from

9   the Paralyzed Veterans.

10   MS. HO: No, no, Your Honor. And I

11 apologize for --

12   JUSTICE KENNEDY: And it -- it seems to me

13 odd that you would represent your client and say, well,

14 this second interpretation of its stance gets full Auer

15 deference. I would say that it does. I would think

16 that your position would be that it doesn't.

17   MS. HO: And I apologize. Our position

18 regarding deference is that in -- in a world of Auer

19 deference where the background rule, the default rule is

20 that the interpretation of a regulation and the

21 regulation itself are entitled to the same level of Auer

22 deference. To me that makes sense of the Paralyzed

23 Veterans doctrine because, again, the difference between

24 the regulation itself and the authoritative

25 interpretation of it collapses. Our position --

1   CHIEF JUSTICE ROBERTS: How -- it may not be

2 a bad idea to run away from Paralyzed Veterans. I mean,

3 how is it -- how is it at all consistent with Vermont

4 Yankee?

5   MS. HO: I think it's -- it's entirely

6 consistent with -- with Vermont Yankee in that the

7 question in a Paralyzed Veterans case is -- is whether a

8 rule -- is -- is -- is legislative or interpretative.

9 In other words, is it entitled to notice-and-comment

10 rulemaking or not? It's not imposing additional

11 requirements on -- onto -- onto the agency. It's saying

12 this is the line that the APA draws.

13   JUSTICE SCALIA: Again, unless it is adding

14 procedures if you acknowledge that this is an

15 interpretative rule.

16   MS. HO: And we do not -- we don't

17 acknowledge that and we don't think that is the fairest

18 reading of what the D.C. Circuit cases have done.

19   JUSTICE SCALIA: So it is absolutely

20 essential to your position and to Paralyzed Veterans

21 that this change has to be regarded as a substantive

22 rule, right?

23   MS. HO: Correct. Under Paralyzed Veterans,

24 that's correct.

25   JUSTICE SCALIA: And if we disagree with

1   that, you acknowledge that Paralyzed Veterans is wrong.

2   MS. HO: Yes, I -- I -- I acknowledge that.

3   I do not think that is the fairest reading of what --

4   what Paralyzed Veterans means and how the D.C. Circuits

5   applied it.

6   JUSTICE KAGAN: Well, Ms. Ho, I think that

7   you've just said that Paralyzed Veterans is wrong then,

8   because, I mean, the D.C. Circuit has two lines of

9   precedent. One line of precedent is all about how to

10   distinguish between legislative and interpretative

11   rules, and I forget what the principal case is but there

12   is a four-part test, and that's what it uses. And

13   Paralyzed Veterans it uses for a different purpose

14   altogether, which is that when it's decided that something

15   is an interpretative rule, there is still another question

16   to be asked which is whether that interpretative rule

17   revises a -- a previously stable interpretation.

18   MS. HO: Your Honor, what I would say is

19   that American Mining -- the American Mining case --

20   JUSTICE KAGAN: That's it.

21   MS. HO: -- that you are referring to, the

22   fourth -- the fourth prong of that is -- is whether the

23   rule is an amendment right --

24   JUSTICE KAGAN: No, but it's an amendment of

25   the legislative rule --

1   MS. HO: Of -- of the regulation. Yes.

2   JUSTICE KAGAN: Of the regulation.

3   MS. HO: And I -- I think the best way to

4   understand Paralyzed Veterans is it is, if you will, a

5   variation on that and saying that you can have an

6   amendment to a regulation. You can have a de facto

7   amendment to a regulation. That's what this Court

8   recognized in Guernsey and that's what this Court

9   recognized in --

10   JUSTICE KAGAN: I understand the fourth

11   prong of American Mining to be essentially the question

12   of whether the interpretation is in conflict with the

13   previous regulation.

14   MS. HO: Yes, Your Honor, and I -- I think

15   Paralyzed Veterans is best understood as recognizing a

16   variation on that. And I think that's why -- that's

17   precisely why in Paralyzed Veterans the Court went on to

18   consider whether the rule may be legislative on any

19   other -- any other number of -- of prongs.

20   JUSTICE KAGAN: But then, I mean, go back to

21   what Justice Scalia asked you, which is that if you drop

22   this kind of reinterpretation of Paralyzed Veterans and

23   you assume that what we are dealing with here is an

24   interpretative rule, then you don't think notice and

25   comment is required.

1   MS. HO: I think the APA is clear. The

2 dividing line is between interpretative rules and

3 legislative rules. The question in this case is whether

4 the 2010 AI is, in fact, an interpretative rule.

5   JUSTICE BREYER: What should we do? We have

6 a, you know -- that is, I concede, a more difficult and

7 interesting question. But the question presented, in your

8 reading of it is whether notice and opportunity for

9 comment are required where an agency issues an

10 authoritative interpretation of a regulation that

11 squarely conflicts with the same agency's prior

12 authoritative interpretation. All right? That -- that

13 is the question presented. Okay. So we can answer that

14 pretty quickly, I think.

15   Now, if I'm right about that, we can leave

16 all this for another day. And, you know, you've been

17 quoting Auer non-stop, I would quote Mead, and I would

18 say Mead suggests that, in fact, there are different

19 levels and it depends and it's much more complicated

20 than some are willing to suggest. And there we are.

21   (Laughter.)

22   JUSTICE BREYER: It did command a majority

23 of the Court, it is authoritative decision, and there

24 are obviously different views among different judges

25 about the extent to which they are the same or not.

1   So is there any reason that we have to get

2   into all that? Which I hope the answer is no, but I

3   think you have the best chance of thinking of a yes

4   answer, so --

5   MS. HO: No, Your Honor, I don't think you

6   need to -- to get into all of that. I think this --

7   this case can be resolved whether because the D.C.

8   Circuit correctly applied -- whether this Court agrees

9   with the framework the D.C. Circuit adopted or whether

10 this Court accepts one of our alternative arguments why

11 the 2010 AI is not an interpretative rule for the other

12 reasons. This Court doesn't need to wade into the

13 larger issues --

14   JUSTICE SCALIA: You're -- you're saying

15 that what the question presented boils down to is

16 whether an interpretative rule that radically modifies a

17 prior interpretative rule is a substantive rule.

18 That -- that's what you say the question presented boils

19 down to.

20   MS. HO: That is our submission and we

21 believe that is an accurate statement of what the D.C.

22 circuit has, in fact, been doing in its Paralyzed

23 Veterans Doctrine. Yes.

24   If there are no further questions, thank

25 you.

1   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

2   Mr. Kneedler, you have five minutes

3   remaining.

4   REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

5   ON BEHALF OF THE PETITIONERS

6   MR. KNEEDLER: Yes.   Thank you.

7   On the last point, I mean, I -- an

8   interpretative rule doesn't get transformed into a

9   substantive rule simply because a prior interpretative

10   rule has -- has interpreted a regulation or a statute.

11   We have two interpretative regulations -- interpretative

12   rules that have the same form and they're both intended

13   by the agency to be interpretive.

14   JUSTICE SOTOMAYOR: What do you do with the

15   quote from your brief that she revised upon?

16   MR. KNEEDLER: The brief in the Henry case?

17   I think what the agency was -- what the agency was

18   saying in that case is it was acknowledging that this

19   was a -- a significant change in the interpretation of

20   the regulation as applied to Mortgage Bankers and,

21   therefore, it should not be given -- deference

22   should not be applied retroactively to it, which we

23   think is an important safeguard that this Court could

24   look to in terms of Auer deference, not giving Auer

25   deference to the application of a regulation to prior

1   conduct.

2   I think when -- if you read the whole

3   passage, that passage in the brief was in

4   contradistinction to a situation where an interpretative

5   rule is simply clarifying or interpreting for the first

6   time something that was not clear in the regulation.

7   And in that situation, there's no problem of -- of

8   retroactivity because the agency is interpreting the

9   regulation as it always -- as it always meant.

10   CHIEF JUSTICE ROBERTS: Mr. Kneedler, you

11   are not going to go after employers who acted consistent

12   with the prior interpretation between 2006 and 2010 on

13   the ground that they didn't know about the prior

14   interpretative regulation, are you?

15   MR. KNEEDLER: No. The position we took in

16   this case below and that we took in the Henry case is

17   that the -- the new interpretation should not be given

18   Auer deference retrospectively. So anybody -- so no,

19   we're not going to invoke the 2000 --

20   CHIEF JUSTICE ROBERTS: Whether they knew

21   about the regulation or not.

22   MR. KNEEDLER: Right. Yes, that was --

23   JUSTICE SCALIA: So you're not -- you're not

24   relying on the good faith exception, right? Just on

25   your generosity in interpreting --

1   MR. KNEEDLER: Well, no, it's not -- it's

2   not -- it's not just generosity. I mean, it is -- it is

3   a principle -- retroactivity is -- is a principle

4   that -- that runs through this Court's jurisprudence in

5   a number of different respects, including --

6   JUSTICE KENNEDY: So are you -- so are you

7   saying that you would be required to avoid retroactive

8   application even if the safe harbor provision were not

9   in the statute?

10   MR. KNEEDLER: That's the position we've

11   taken because -- in this case because there is a

12   significant change. And I think that would be the case

13   whenever there may be -- there may be special

14   circumstances, but I think that would ordinarily be the

15   case. But I would urge the Court not to --

16   JUSTICE SCALIA: We're going to write this

17   down.

18   MR. KNEEDLER: Pardon me?

19   JUSTICE SCALIA: We're going to write this

20   down and quote you in future cases.

21   MR. KNEEDLER: I just -- I just wanted to

22   add a caveat to that is I don't think it would be

23   prudent for the Court to adopt a rule that runs across

24   different agencies. The -- the very existence of 259 in

25   this case shows that this agency's programs might be

1 different.

2   CHIEF JUSTICE ROBERTS: No, the point is

3 that's not right because the provision you're citing

4 requires good faith and you told me it doesn't matter

5 whether they know about it or not.

6   MR. KNEEDLER: Yes, because there was a

7 change, but that may not be the case under all programs

8 is the point that I was going to make. Under the

9 Medicare program where you have an ongoing reimbursement

10 arrangement and you have a combination of rulemaking and

11 adjudication, there are no private suits under the

12 Medicare program the way there are here and the approach

13 might be different.

14   JUSTICE ALITO: An interpretation of a

15 regulation says what the regulation has always meant.

16 So if you're saying that this can't be applied

17 retroactively, aren't you saying that the law was changed,

18 not simply that a correct interpretation has been restored?

19   MR. KNEEDLER: No, I don't -- I don't -- I

20 don't think that's -- again, on a parallel -- parallel

21 to Chevron. If an agency comes up with a -- with a new

22 interpretation of a statute in Chevron, it -- there may

23 be some theoretical question of whether that's what the

24 statute always meant, but in -- but this Court's

25 deference doctrine recognizes that an agency can change

1   that and that change may often only have prospective

2   effect. And so that it's an accommodation of competing

3   principles that the very important rule to give the

4   agency the ability to change its view going forward

5   and -- and protection of interests as they come back.

6   And the interpretative rule principle is

7   very important, which was why Congress did not impose

8   rulemaking on it, why Vermont Yankee enforced that rule

9   and the courts are not supposed to do that. It would

10   deter agencies from issuing interpretations in the first

11   place if they knew that they had to go through a

12   cumbersome process to change it. All one has to do is

13   look at the Medicare program that was discussed in

14   Guernsey Memorial Hospital where there are 640 pages of

15   regulations the Court said, aided by the provider

16   reimbursement manual, an agency could not be expected to

17   go through notice and comment to modify that.

18   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19   The case is submitted.

20   (Whereupon, at 10:57 a.m., the case in the

21   above-entitled matter was submitted.)

22

23

24

25

16:11 17:2,23
22:16 43:21 44:17
gives 4:20 16:9
22:19 34:25
giving 7:13 8:2
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