SUPREME COURT
OF THE UNITED STATES

            IN THE SUPREME COURT OF THE UNITED STATES

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ALEX M. AZAR, II, SECRETARY   )

OF HEALTH AND HUMAN SERVICES,   )

            Petitioner,   )

                v.   ) No. 17-1484

ALLINA HEALTH SERVICES, ET AL.,   )

            Respondents.   )

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Pages: 1 through 64

Place: Washington, D.C.

Date: January 15, 2019

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3     ALEX M. AZAR, II, SECRETARY          )
4     OF HEALTH AND HUMAN SERVICES,        )
5                 Petitioner,              )
6             v.                           ) No. 17-1484
7     ALLINA HEALTH SERVICES, ET AL.,      )
8                 Respondents.             )
9     - - - - - - - - - - - - - - - - - - - -
10                  Washington, D.C.
11               Tuesday, January 15, 2019
12
13          The above-entitled matter came on for
14    oral argument before the Supreme Court of the
15    United States at 11:12 a.m.
16
17    APPEARANCES:
18    EDWIN S. KNEEDLER, Deputy Solicitor General,
19        Department of Justice, Washington, D.C.;
20        on behalf of the Petitioner.
21    PRATIK A. SHAH, ESQ., Washington, D.C.;
22        on behalf of the Respondents.
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1   C O N T E N T S

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

2                              (11:12 a.m.)

3             CHIEF JUSTICE ROBERTS:  We'll hear

4    argument next in Case 17-1484, Azar versus

5    Allina Health Services.

6             Mr. Kneedler.

7              ORAL ARGUMENT OF EDWIN S. KNEEDLER

8                ON BEHALF OF THE PETITIONER

9             MR. KNEEDLER:  Mr. Chief Justice, and

10   may it please the Court:

11            Section 1395hh did not require CMS to

12   go through notice-and-comment rulemaking before

13   it could furnish its calculation of one

14   component of a hospital's reimbursement to the

15   contractors that perform the initial

16   determination of reimbursement for the agency.

17            That calculation was not binding on

18   the agency, the courts, or Respondents, and it

19   could be challenged on administrative appeal,

20   as, in fact, Respondents did here.

21            JUSTICE SOTOMAYOR:  I have a -- a sort

22   of problem with this.  And I know you say that,

23   but I don't know how you take this outside of

24   being a policy, meaning it's applying to every

25   single provider uniformly.  I don't know the
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1   basis that you could have a individual

2   adjudication. And what would happen? The

3   board would look at it and say we're not going

4   to listen, even though we're required to

5   listen, to the agency's position; we're going

6   to tell them they're wrong?

7   If one case tells you the agency is

8   wrong, does that case then become the new

9   policy? Or -- or are you -- I'm a little lost

10   as to how this is not a agency policy.

11   MR. KNEEDLER: So several points.

12   JUSTICE SOTOMAYOR: A statement of

13   policy.

14   MR. KNEEDLER: Several points, Justice

15   Sotomayor. And the -- the first is that we are

16   relying on the operative language in 1395hh,

17   whether it's called a -- whether the issuance

18   is called a policy or a requirement or whatever

19   the agency calls it. It is only -- it only

20   triggers notice-and-comment rulemaking if it

21   establishes or changes a substantive legal

22   standard. And that is the --

23   JUSTICE SOTOMAYOR: Well, that's what

24   I'm -- that's what I'm having a problem with.

25   It's every single provider is going to be given

1   a fraction that incorporates your policy, and

2   that binds what they're going to get.

3   MR. KNEEDLER: No, it -- it --

4   JUSTICE SOTOMAYOR: Because they have

5   to use that fraction in the claims they made

6   against you.

7   MR. KNEEDLER: It -- it only governs

8   what the contractor does. The contractor is

9   just like an agency employee, making

10   determinations on behalf of the agency at the

11   first step.

12   When -- when the --

13   JUSTICE SOTOMAYOR: From you -- from

14   the contractor, from the agency, they're only

15   going to get the fraction as you told the

16   contractor to calculate it.

17   MR. KNEEDLER: Only if they don't

18   appeal. And -- and as -- as we point out --

19   JUSTICE SOTOMAYOR: I -- I just don't

20   understand what difference it means -- it means

21   -- I mean, even a regulation or a rule may have

22   legal meaning only until it's accepted, but

23   even a rule can be challenged later on appeal.

24   The grounds for that challenge might

25   be different, but I can go into court and say

1   it's ultra vires. I can go into court and say

2   it's not supported by the statute. It's not

3   binding in -- in any meaningful way, other than

4   that's what the agency's going to do.

5   MR. KNEEDLER: Well, if I -- if I may,

6   in our view, 1395hh codifies for the Medicare

7   program what this Court referred to in Chrysler

8   Corporation as the central distinction in the

9   APA between substantive and interpretive rules.

10   And this Court in Guernsey --

11   JUSTICE SOTOMAYOR: Well, the problem

12   I have is that the provision adds something.

13   It's not just rule or regulation; it's

14   statement of policy. And it seems to suggest

15   to me that there's some interpretive rules that

16   are encompassed by that. Now which ones is the

17   open question.

18   But it does seem to suggest that it's

19   broader than the APA ever was, because the APA

20   only talks about rules.

21   MR. KNEEDLER: Well, again, several

22   points -- several points about that. This

23   Court's decision in Guernsey Memorial Hospital,

24   which described the general APA standards,

25   distinguished between substantive rules and

1   interpretive rules.

2   And the interpretive rule there was

3   something in the provider reimbursement manual

4   which, just as here, bound the contractor but

5   could be changed -- or could be challenged --

6   JUSTICE SOTOMAYOR: Mr. Kneedler, why

7   didn't --

8   MR. KNEEDLER: -- and set aside on

9   appeal.

10   JUSTICE SOTOMAYOR: -- why didn't

11   Congress just say this is like the APA? Why

12   does it change the language at all?

13   MR. KNEEDLER: Well --

14   JUSTICE SOTOMAYOR: I have to give

15   some meaning different than the APA to

16   Congress's express choice of a different

17   articulation of the standard.

18   MR. KNEEDLER: Well, first of all,

19   when -- when Congress first enacted the

20   provisions or amended the provisions in the

21   rulemaking in 1986, it said certain regulations

22   -- regulations have to go through notice and

23   comment. It didn't define regulation at that

24   point.

25   But the conference report said this

1   does not require notice-and-comment rulemaking

2   for interpretive rules or other things that are

3   not now subject to that requirement.

4   Then, in 1987, Congress revisited the

5   -- the provision. And if you look at page 34

6   of our brief, we -- we set out the House

7   version, the version that was passed by the

8   House, and then -- and contrast that to the

9   version that was finally enacted.

10   The House -- the House version said no

11   rule requirement or other statement of policy

12   that has or may have a significant effect on

13   the payment for services can go into effect

14   unless promulgated through notice-and-comment

15   rulemaking. That was changed in conference.

16   And the enacted language kept

17   everything but substituted for that italicized

18   language the phrase "that has" -- that --

19   excuse me, "that establishes or changes a

20   substantive legal standard."

21   JUSTICE BREYER: Is -- is this right?

22   I mean, I -- it's very complicated, what you're

23   saying. I thought it was quite simple, that

24   for a long time in Medicare they didn't have to

25   follow the APA. All right?

1   Then Congress passes a statute and

2   says, in this area, you do. So the reason it

3   says no rule, requirement, or other statement

4   of policy is they have certain policy

5   statements in mind, certain requirements in

6   mind, and certain rules in mind, namely, those

7   that establish or change a substantive legal

8   standard.

9   MR. KNEEDLER: And that --

10   JUSTICE BREYER: And, basically, what

11   they're doing is saying to the agency, don't

12   run around this. We're not going to permit a

13   run-around, where what you do is you change the

14   legal standard and you call what you're doing a

15   statement of policy. So don't run around us,

16   my friend. You follow the APA.

17   Now that is what I took out of your

18   brief, but have I got that right?

19   MR. KNEEDLER: That -- that is exactly

20   -- that is exactly our position. And the --

21   JUSTICE BREYER: So why didn't you say

22   that was the answer to what Justice Sotomayor

23   said?

24   (Laughter.)

25   JUSTICE SOTOMAYOR: Well, the problem

1   I have with that --

2   MR. KNEEDLER: I -- I -- I tried to

3   start down that path --

4   JUSTICE SOTOMAYOR: -- counsel --

5   MR. KNEEDLER: -- but I -- but that --

6   JUSTICE SOTOMAYOR: -- but -- but let

7   me -- let me stop you. If that's what Congress

8   intended, it could have stopped in 1986

9   because, in 1986, it had done what you said.

10   But something -- and you read the House

11   report --

12   MR. KNEEDLER: The House bill.

13   JUSTICE SOTOMAYOR: -- the House

14   bill -- was leading them to believe that a

15   different standard was necessary because they

16   changed it. They had the APA standard in 1986.

17   They chose intentionally to alter it by

18   altering it in '87.

19   And you look at the rejection of the

20   House bill as something that helps you, but I'm

21   not sure how.

22   MR. KNEEDLER: It -- it --

23   JUSTICE SOTOMAYOR: Because it tells

24   me they are significantly concerned about

25   things that make major changes, substantive

1   changes in how people are being paid.

2   MR. KNEEDLER: And -- and here's --

3   here's what matters there, as -- as I pointed

4   out. Congress substituted has or may have a

5   significant effect. Maybe that would sweep in

6   ordinary statements of policy or interpretive

7   rules. But the -- the Conference Committee and

8   Congress enacted something that -- that refers

9   only to substantive legal standards.

10   And the committee report said this

11   language reflects recent court rulings. The

12   recent court rulings could only be APA rulings

13   because there was nothing else that would have

14   governed Medicare.

15   And, in fact, as we point out in our

16   brief, there was an American Hospital

17   Association case decided, I think, just a

18   matter of several weeks before the Conference

19   Committee that was very similar to this, and it

20   involved instructions affecting peer review

21   organizations, which are contractors that

22   operate on behalf of HHS under the Medicare

23   program.

24   And the court there drew a sharp

25   distinction between substantive rules on the

       1   one hand and interpretive and procedural rules

       2   on the other hand.

       3   JUSTICE BREYER: So the answer is that

       4   it didn't do what it's trying to do in 1986.

       5   What it talked about was any regulation, which

       6   could have included interpretive regulations.

       7   I would have found out, because I read

       8   the House reports. But those who think they're

       9   irrelevant might not have understood the

      10   statute.

      11   And, moreover, there was an argument

      12   going on in the D.C. Circuit about what is a

      13   legislative rule. Is it just important versus

      14   unimportant, or is it legally binding versus

      15   non-legally binding no matter how unimportant?

      16   All right. That's what they're

      17   thinking about. And it's confused. And the

      18   1987 statute clarifies it.

      19   MR. KNEEDLER: Yes. We --

      20   JUSTICE BREYER: Am I right or not

      21   right?

      22   MR. KNEEDLER: Yes, we agree. But --

      23   but all -- but 1986, we think, makes that clear

      24   too. Not only the conference report, which

      25   specifically says interpretive rules are not

 1   covered, in fact, nothing's covered that wasn't

 2   already covered by the APA, but the -- the --

 3   the term "regulation" as used itself connotes a

 4   -- a substantive rule, a -- a legislative type

 5   rule.

 6   People may talk about interpretive

 7   rules. You don't usually talk about

 8   interpretive regulations.

 9   JUSTICE GORSUCH: Mr. Kneedler, this

10   is where I get stuck. And I'm -- I'm -- I'm

11   focusing more on the language of the statute, I

12   confess, than -- than the history, which I've

13   read but I -- I find confused, as Justice

14   Breyer suggests.

15   So (a)(2) says that any rule,

16   requirement, or other statement of policy that

17   establishes a substantive legal change has to

18   go through informal rulemaking, not even formal

19   rulemaking. And so, really, the question all

20   boils down to what does "substantive" mean, I

21   think, as -- as -- as I understand it.

22   And the import of that in the

23   government's view is that it's binding, as

24   opposed to an interpretive rule, borrowing

25   language from the APA. And your friend on the

1   other side reads substantive, as it's often

2   read elsewhere in the law, as material or

3   affecting private rights, as opposed to

4   procedural.

5   And both seem to me pretty plausible

6   interpretations of that word. And -- and the

7   strikes against you, as I see it from the text

8   of the statute, are a few.

9   First, the statute speaks of

10   statements of policy as being substantive.

11   But, of course, in APA language, statements of

12   policy are interpretive. They're not

13   substantive. They don't bind the agency in any

14   reasonable sense.

15   It speaks of substantive changes in an

16   interpretive rule in (e). And, of course,

17   that's like a -- a complete incoherent

18   statement in APA language, but entirely

19   coherent in the language of the law if

20   "substantive" means material.

21   And then, of course, the statute also

22   adopts the APA good faith -- the good clause

23   exception to -- to -- to rulemaking verbatim.

24   And it clearly doesn't adopt the substantive

25   interpretive language verbatim, which is right

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 1    next door in -- in the APA.  I mean, it's the

 2    next section.

 3             And you're asking us to think that

 4    Congress recreated that section in this statute

 5    through this rather oblique mechanism.

 6             So, there, I've put my cards on the

 7    table.  Tell me where I've gone wrong.

 8             MR. KNEEDLER:  Okay.  Starting with

 9    the good cause exception, as -- as we say, in

10    our view, the statute only applies to

11    substantive or legislative rules.  And the good

12    cause exception under the APA applies to things

13    that have to go through notice-and-comment

14    rulemaking, which are substantive rules, so it

15    was necessary to incorporate that.

16             But, in -- in our view, the text of

17    the provision, which refers only to substantive

18    legal standards, does not include interpretive

19    rules to begin with or procedural rules for

20    that matter, so there's no need to have an

21    express exception because the operative text

22    excludes it.

23             With respect to the substantive change

24    in regulations under (e)(1), it does not say

25    substantive legal standard, which is the
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 1   operative language in -- in (a)(2). It says a

 2   substantive change.

 3   And we think "substantive" means in

 4   substance, as opposed to perhaps form or

 5   wording or something like that.

 6   JUSTICE KAGAN: But then you would be

 7   using the word "substantive" in two different

 8   ways in two very nearby provisions, wouldn't

 9   you?

10   MR. KNEEDLER: Well, but we -- but we

11   think that they -- that they have a different

12   effect. But even -- but even -- even if you

13   said an interpretive rule can address something

14   of substance, it's -- for example, if it's

15   interpreting a statute or a regulation, it may

16   have some effect as a substantive matter, but

17   it is not binding.

18   And what this Court has said in -- in

19   Chrysler Corporation, said it in Guernsey

20   Memorial Hospital, which deals with this very

21   program, a substantive rule is one that has the

22   force and effect of law. An interpretive rule

23   does not. It simply explains the agency's

24   construction of the statutes and rules that it

25   implements. So --

1   JUSTICE GORSUCH: Mr. Kneedler,

2   there's a lot of words there, but I'm not sure

3   there's an answer to Justice Kagan's question.

4   So I'm -- I'm going to give you an opportunity

5   to try again, because it's very important to me

6   as well.

7   Aren't you using the word

8   "substantive" in two different senses, first in

9   the APA's -- what I call the APA sense in (a),

10   and then what I'll call the other traditional

11   legal sense in (e)? So you're conceding to

12   your colleague on the other side that it is

13   used in that sense at least in (e), I believe.

14   MR. KNEEDLER: Well, it -- it doesn't

15   say substantive rule or substantive standard,

16   which would be the --

17   JUSTICE GORSUCH: Substantive -- it

18   says substantive change to an interpretive

19   rule.

20   MR. KNEEDLER: Right.

21   JUSTICE GORSUCH: Which is a nonsense

22   under your view, I believe.

23   MR. KNEEDLER: But -- but substantive

24   there, we -- we think in substance is

25   whatever -- no, I'm -- I'm -- I'm serious, is

 1   what it refers to. It's not in form. It's

 2   meaningful.

 3   But beyond that, the -- the subsequent

 4   words used in the section refer to regulations,

 5   manual instructions, interpretive rules,

 6   statements of policy. It is distinguishing

 7   regulations, which are the things that have to

 8   go through notice-and-comment under (a), from

 9   the subsequent things, manual instructions,

10   interpretive rules, which do not.

11   JUSTICE GORSUCH: Again, a lot of

12   words, but I think at the end of the day you

13   are agreeing that Congress is using that word

14   in two different senses, right?

15   MR. KNEEDLER: We -- we -- we think

16   the phrase "substantive change" here is

17   different from substantive legal standard,

18   which is -- we think is the same as substantive

19   -- as substantive rule.

20   And, I'm sorry, I -- I forgot the

21   third point you asked me.

22   JUSTICE KAGAN: Statement of policy,

23   because that's hanging me up too.

24   MR. KNEEDLER: Okay. State --

25   statement of policy, again, frankly, I think

1   that is an artifact of the House version of the

2   -- of the bill. If you go back to page 34, it

3   read off no rule, requirement, or other

4   statement of policy that has or may have a

5   significant effect.

6   It's possible that a statement of

7   policy, or an interpretive rule, could have a

8   significant effect on -- on --

9   JUSTICE SOTOMAYOR: This one does.

10   MR. KNEEDLER: -- interpretation, but

11   it doesn't have the force of law.

12   JUSTICE KAGAN: So you're -- you're

13   agreeing it's incoherent as written. It's just

14   that when the language was different it was not

15   incoherent?

16   MR. KNEEDLER: Well --

17   JUSTICE KAGAN: As written, it's

18   incoherent because a statement of policy is, by

19   definition, not a substantive rule?

20   MR. KNEEDLER: Yes, but I think it --

21   I think it serves the purpose that Justice

22   Breyer was identifying, basically saying we

23   don't care what you call it, whether you call

24   it a rule, whether you call it a requirement,

25   whether you call it a statement of policy.

1   A rule, after all, includes

2   interpretive rules. So no matter what you call

3   it, a rule, a requirement, or a statement of

4   policy, it -- it covers -- it's only covered if

5   it would have established or changed a

6   substantive legal standard.

7   And, in fact, the conference report on

8   the 1987 amendment specifically stresses --

9   JUSTICE GORSUCH: What would be the --

10   MR. KNEEDLER: -- that it only covers

11   --

12   JUSTICE GORSUCH: What would be the

13   point --

14   MR. KNEEDLER: -- substantive legal

15   standards.

16   JUSTICE GORSUCH: What would be the

17   point of that, though, if a statement of policy

18   couldn't have operative legal effect on anyone

19   anyway?

20   MR. KNEEDLER: Well, again, if -- if

21   -- if that was the --

22   JUSTICE GORSUCH: I mean, a party

23   would simply say that's just a statement of

24   policy. Have a nice day.

25   MR. KNEEDLER: Well, but if -- but if

1   it -- if it purports to, as the language the

2   Court used in Chrysler, to establish a

3   substantive legal standard, it's not just a

4   statement of policy. It's called a statement

5   of policy. Then it actually describes --

6   JUSTICE GORSUCH: Well, then it's not

7   a statement -- then the argument would be it's

8   not a statement of policy, right?

9   MR. KNEEDLER: Right, that -- that --

10   that is true, but that -- but that --

11   JUSTICE GORSUCH: Okay.

12   MR. KNEEDLER: -- that doesn't mean

13   that -- that doesn't mean it's not -- it's not

14   a statement of policy within the precise

15   meaning of the APA.

16   JUSTICE BREYER: Well, they don't want

17   a run-around.

18   MR. KNEEDLER: Right.

19   JUSTICE BREYER: But, (e), they don't

20   run around it by calling it a statement of

21   policy when you're --

22   MR. KNEEDLER: Right.

23   JUSTICE BREYER: -- changing the

24   substantive --

25   JUSTICE KAGAN: Yes, but it's at least

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 1      --
 2              JUSTICE BREYER:  And -- and I have a
 3      different question, which is (e), which is
 4      because they are using the word "substantive
 5      change" there possibly in a different sense.
 6              So -- so -- so I -- I agree with that,
 7      and I -- but I thought that (e) has something
 8      to do that's not involved here.  (e) is a kind
 9      of codification of a different common law rule
10      of administrative law that, when you do
11      something retroactively that's important, Mr.
12      Agency, you better have a reason.  You better
13      look at why you've changed it.
14              MR. KNEEDLER:  Right.
15              JUSTICE BREYER:  If you're changing
16      policy, go look at it and explain it to us.
17              MR. KNEEDLER:  Right.
18              JUSTICE BREYER:  Something this Court
19      has said many, many times.
20              MR. KNEEDLER:  Right.
21              JUSTICE BREYER:  And I thought that's
22      what (e) is about.
23              MR. KNEEDLER:  Yes.
24              JUSTICE BREYER:  It's a different
25      subject.
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1   MR. KNEEDLER: That -- that is --

2   that's correct in our view. And it talks about

3   a substantive change in regulations, again,

4   which are the things that have to go through

5   notice-and-comment rule -- rulemaking under

6   subsection (a). And then goes on to say manual

7   instructions, interpretive rules, statements of

8   policy or guidelines, which do not have the

9   force and effect of law, they are not

10   substantive rules or, in the language here,

11   they do not establish or change substantive

12   legal standards.

13   JUSTICE KAGAN: May -- may --

14   MR. KNEEDLER: And so it distinguishes

15   right -- right in there the reg -- the sort of

16   regulations that (a) is talking about and these

17   -- these non-binding sorts of things that --

18   that either way they should be made

19   retroactive. If they're interpretive, the

20   interpretation shouldn't be made retroactive

21   unless it -- it goes through -- unless the

22   agency makes it specified.

23   JUSTICE KAGAN: May -- may I take you

24   back, Mr. Kneedler, to one of Justice

25   Sotomayor's original questions, which is just

        1   what, on your theory, this provision ends up

        2   actually accomplishing?

        3   Because, as I understand the 19 -- the

        4   1986, the -- the prior year's provision,

        5   Congress essentially already said, for Medicare

        6   substantive rules, you have to go through

        7   notice and comment. And I understand how this

        8   would have been different if it was the

        9   original version of the thing, the "has or may

        10   have a significant effect."

        11   But, as written, on your theory, it

        12   seems to just repeat the 1986 command, doesn't

        13   it?

        14   MR. KNEEDLER: Well, again, the House

        15   would have done something broader in 1987. And

        16   I -- and I think that the -- I think the Court

        17   should realize that --

        18   JUSTICE KAGAN: But are you saying --

        19   I want to make sure I understand this. Are you

        20   saying that the compromise was essentially to

        21   just repeat the 1986 provision?

        22   MR. KNEEDLER: Yes. I mean, I think

        23   -- I think that is -- it was carried forward.

        24   And the -- and, again, the conference committee

        25   report stresses that only things that establish

      1   or change a substantive legal standard.

      2   And that -- the word "substantive" in

      3   the rulemaking context has a -- has a long

      4   history in administrative law under the APA.

      5   It also -- the distinction -- that very

      6   distinction is drawn in Black's Law Dictionary,

      7   as we explain in our -- in our brief.

      8   JUSTICE KAGAN: I mean, it is a little

      9   bit odd, don't you agree, Mr. Kneedler,

     10   because, if the compromise was not to do

     11   anything beyond 1986, then you would think that

     12   people would just say, okay, let's not do it.

     13   Not put in a new -- a new -- a new statute

     14   saying precisely the same thing.

     15   MR. KNEEDLER: Well, the -- the bill

     16   was in conference -- in conference at that

     17   point, and there were several other things that

     18   were in the bill at that point. This is --

     19   this change was not the only one.

     20   The bill was in conference, and they

     21   -- the conference committee decided that

     22   something should be enacted, rather than

     23   nothing done at all. But, as to this

     24   provision, we think that it -- that --

     25   JUSTICE GORSUCH: It's entirely

1   superfluous?

2   MR. KNEEDLER: I -- I -- I don't think

3   it's --

4   JUSTICE GORSUCH: It does nothing?

5   MR. KNEEDLER: No, I don't think it's

6   superfluous.

7   JUSTICE GORSUCH: It does nothing new?

8   MR. KNEEDLER: Well, it -- it -- it

9   substitutes -- it -- it elaborates -- it

10   elaborates on --

11   JUSTICE GORSUCH: But substantively --

12   sorry -- it does nothing new?

13   MR. KNEEDLER: No, it -- it -- it

14   reiterates through the use of such --

15   JUSTICE GORSUCH: It reiterates, okay.

16   It reiterates what's already the law --

17   MR. KNEEDLER: Well, it was not -- it

18   was not in the --

19   JUSTICE GORSUCH: -- which is to say

20   it is superfluous.

21   MR. KNEEDLER: It was not in the

22   statute in 1986.

23   JUSTICE GORSUCH: Can I -- can I take

24   you --

25   MR. KNEEDLER: The statute referred to

 1   regulation --

 2   JUSTICE GORSUCH: Can I take you back

 3   just to one other problem I have? You want us

 4   to -- to -- to view this statute as very

 5   carefully using APA terminology when it comes

 6   to substantive. But, when it comes to

 7   statements of policy, you want us to ignore the

 8   fact that what -- what the APA -- how it treats

 9   them and say even faux statements of policy

10   that are really rules and requirements and

11   regulations, that's what it's aiming at. Isn't

12   that a problem for you too?

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

14   think so because the -- the statement of policy

15   is in the opening clause, which refers to

16   rules, which could include interpretive rules,

17   requirement, or statement of policy.

18   Those are descriptions of the kind of

19   agency issues --

20   JUSTICE SOTOMAYOR: But when is ever a

21   statement of policy binding?

22   MR. KNEEDLER: Pardon me?

23   JUSTICE SOTOMAYOR: Meaning, when is a

24   statement -- if it's not a rule or regulation,

25   if it's just a statement of policy, when is it

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 1      ever binding as you've defined "binding"?
 2                MR. KNEEDLER:  I --
 3                JUSTICE SOTOMAYOR:  Isn't policy
 4      something that can be challenged?
 5                MR. KNEEDLER:  It -- it -- it is, but
 6      I think it's important for the Court to focus
 7      on the -- on the operative language, which is
 8      whether it changes -- establishes or changes a
 9      substantive legal standard.  That's what
10      Congress enacted.
11                I'd also like to point out what the
12      consequences of this for the Medicare program
13      are.  As -- as this Court has pointed out in
14      Guernsey Memorial Hospital and other cases, the
15      Medicare program has, you know, hundreds of
16      pages of statutes, probably thousands of pages
17      of regulations, but the Court has recognized
18      that that can't answer all questions that come
19      up.
20                And -- and the Court in Guernsey
21      recognized the importance of interpretive
22      materials like, in that case, a provision in
23      the provider reimbursement manual.  There are
24      similar manuals governing the program integrity
25      for hospitals and doctors and -- and -- and
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1   whatnot. There are still reimbursement issues

2   that are -- that are fleshed out in the manual.

3   JUSTICE SOTOMAYOR: But I look at the

4   subsequent history of this in -- in the D.C.

5   Circuit, and I look at Clarian Health West, and

6   your fears there are overstated. A fairly

7   significant change was held not to be

8   encompassed by this provision because it really

9   was just following the statute.

10   This is filling a gap in the statute.

11 I don't know what else is clearly more a policy

12 than that when you're filling in a gap as

13 opposed to interpreting a statute. And that

14 seems to be the distinction the D.C. -- D.C.

15 Circuit is applying.

16   MR. KNEEDLER: Well, Clarian did not

17 go to the substantive provisions for

18 reimbursement. It had to do with a procedure

19 for various screening.

20   JUSTICE SOTOMAYOR: That's my point.

21 That's my point.

22   MR. KNEEDLER: Yes, but it --

23   JUSTICE SOTOMAYOR: Which is not

24 everything is going to come under this.

25   MR. KNEEDLER: It's not everything,

1   but it -- but it -- but it certainly would

2   subject to notice-and-comment rule --

3   rulemaking a broad swath of what has never been

4   done. This is --

5   JUSTICE GORSUCH: Well, on that -- on

6   that --

7   MR. KNEEDLER: -- this is 30 years

8   later in HHS --

9   JUSTICE GORSUCH: -- on that -- on

10   that, though, I don't doubt it's more

11   convenient for the government to proceed

12   through adjudication of an individual case and

13   announce a new rule that applies to the whole

14   of society without inviting comment and

15   providing notice to everyone affected. Surely,

16   I -- I get that that's easier and preferable,

17   certainly more efficient.

18   But couldn't Congress make rationally

19   an alternative decision that informal

20   rulemaking, not even formal rulemaking, that's

21   gone by the boards, but just informal notice

22   and comment to affected parties in something as

23   significant as changing the formula for

24   Medicare for all Medicare providers nationwide,

25   that maybe they should have 60 days to at least

1   throw in their comments.

2   MR. KNEEDLER: Well, first of all, the

3   agency has tried to go through

4   notice-and-comment rulemaking twice on this.

5   It did -- it did it in 2004, when the issue was

6   brought to its attention. It did it in 2013.

7   It recognizes that.

8   But what it did here was -- was not --

9   not establish a binding provision that has the

10   force and effect of law but simply furnish

11   fractions to the contractors who were

12   performing calculations at the very first stage

13   of the -- of the process.

14   JUSTICE KAGAN: Could I very quickly

15   ask you, given Clarian Health, what

16   consequences are you afraid of?

17   MR. KNEEDLER: Afraid of, again, the

18   broad swath of -- of manual provisions that --

19   I mean, that -- that really just dealt with

20   procedures. I mean, I -- in -- in one respect,

21   you could look at it as -- as recognizing the

22   procedures. Procedural rules are not covered

23   by notice and comment under the APA. A

24   procedure about how contractors are supposed to

25   evaluate certain situations without changing

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 1    substantive standards isn't -- isn't covered.

 2            And that's our -- you know, when it

 3    comes to interpretive rules, that's our

 4    position, because they -- they explain the

 5    agency's own interpretation, but it's the

 6    statute that governs, not -- and this is not a

 7    regulation that establishes a substantive legal

 8    standard on its own terms.

 9            If I may reserve the balance of my

10    time.

11            CHIEF JUSTICE ROBERTS:  Thank you,

12    Mr. Kneedler.

13            Mr. Shah.

14            ORAL ARGUMENT OF PRATIK A. SHAH

15            ON BEHALF OF THE RESPONDENTS

16            MR. SHAH:  Mr. Chief Justice, and may

17    it please the Court:

18            By making the legal determination to

19    count Part C days as Part A entitled days in

20    the Medicare fraction, the agency's 2014

21    issuance reduced the payment right of hospitals

22    nationwide by -- and this is according to the

23    agency's own estimate -- billions of dollars.

24    That is --

25            CHIEF JUSTICE ROBERTS:  But it's not
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1   -- it's not binding at all.

2   MR. SHAH: Well, Your Honor --

3   CHIEF JUSTICE ROBERTS: Interim

4   calculation.

5   MR. SHAH: I -- I think it's binding

6   in every normal sense of the word. Let me give

7   you two responses. First, let me address your

8   concern on binding as a factual matter and then

9   tell you why it's legally irrelevant.

10   First, as a factual matter, they call

11   it just an internal instruction. The fact is

12   the contractors are the ones who make the final

13   payment determination. How this regime works

14   is the hospitals submit a cost report form that

15   has all the data on it. The contractors then

16   use the fractions from the agency, and they

17   then compute the final adjustment that the

18   hospital is owed.

19   That is then a final binding payment

20   determination. That's it. That's how much the

21   hospital is owed, unless the hospitals could do

22   an administrative appeal or they can sue in

23   court.

24   If you don't do the administrative

25   appeal or sue in court, there's no doubt about

1   it, it's in the reg, that is your final

2   determination of your legal right to payment.

3   Now, here --

4   CHIEF JUSTICE ROBERTS: But doesn't it

5   make sense if you've got -- I don't know

6   exactly -- I mean, how many of these interim

7   calculations do they have?

8   MR. SHAH: Well, when you're talking

9   about interim calculations for the DSH

10   adjustment, there's only two calculations.

11   There's the Medicaid -- Medicare fraction and

12   the Medicaid fraction. That is it.

13   And -- and they compute that, and then

14   they give you a number for that adjustment.

15   JUSTICE BREYER: I think in --

16   CHIEF JUSTICE ROBERTS: Well, but, I

17   mean, how many every year or whatever the

18   payment schedule is? My -- my understanding is

19   they were using this to tell you how to

20   calculate what you owe, but not until the, I

21   don't know, the final bill comes in.

22   MR. SHAH: Oh, okay. So, just to

23   clarify here, so this is in the context of a

24   final payment determination.

25   CHIEF JUSTICE ROBERTS: Right.

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 1                    MR. SHAH:  So this happens once a
 2       year.  At the end of the year, the hospital
 3       will, after the year is closed, they'll file a
 4       cost report form, and the agency will then use
 5       that data, along with the Medicare fraction
 6       that the agency has given them, and give them a
 7       final total for that year.
 8                    So it's used to -- as a payment total
 9       for the end of the year.  And then that
10       Medicare fraction is used, just the Medicare
11       fraction, is then used to compute the interim
12       payments for the next year until the next
13       fractions are issued.
14                    So all of that is binding, however
15       that word is used.  Obviously, it's not in the
16       statute.  But the hospitals are stuck with
17       that.  That's their payment determination.
18                    Their only recourse, of course, is to
19       file an administrative appeal or sue in court.
20       They did that here.  And here is what the
21       agency's own board said.  We are bound by the
22       agency's action.  That is, we lack the legal
23       authority to look behind the policy and
24       adjudicate this.
25                    The agency's own board says they can't
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 1    do that.  So for -- for the government --
 2              JUSTICE BREYER:  Well, then they're
 3    wrong, because the SG is telling us that they
 4    do have that power.
 5              MR. SHAH:  Well, okay.
 6              JUSTICE BREYER:  And so, therefore,
 7    your complaint is to go to a court and say they
 8    didn't do what they admit they were supposed to
 9    do --
10              MR. SHAH:  Well, Justice Breyer--
11              JUSTICE BREYER:  -- which is that they
12    treat the substantive matter --
13              MR. SHAH:  Justice Breyer, the
14    government made that exact argument to the
15    district court, and the district court found
16    that the board was right.  They made that --
17              JUSTICE BREYER:  That's what both of
18    these things seem to me to be somewhat side
19    issues.  I understand why they give color to
20    the problem.
21              MR. SHAH:  Right.
22              JUSTICE BREYER:  And I accept that.
23    But the basic problem to me is whether or not
24    this statute, in using words like policy and so
25    forth, is saying:  Agency, when you have a
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1   legislative rule, which is defined as a rule

2   that establishes or changes a legal --

3   substantive legal standard, when you have that

4   kind of rule and don't hide it under a

5   statement of policy or some other way, when

6   it's doing that, use notice-and-comment.

7   Now, if you aren't doing that, you can

8   use notice-and-comment. You're more free to do

9   what you want.

10   Now that's basically their argument.

11   MR. SHAH: Right.

12   JUSTICE BREYER: That has considerable

13   importance even beyond this area. And so I'd

14   like you at some -- you know, to get to your

15   view on that.

16   MR. SHAH: Sure. Okay. So, Your

17   Honor, that -- that argument makes no sense

18   because it goes -- it doesn't go any further

19   than the 1986 enactment that we've already

20   discussed.

21   And even under the APA, if you call a

22   legislative rule a ham sandwich, that doesn't

23   get you out of the notice-and-comment

24   requirement. If you called an interpretive

25   rule or a statement of policy, there is an

 1   exception for those, but if it's actually a

 2   legislative rule, you have to go through

 3   notice-and-comment. So the government's --

 4   JUSTICE BREYER: Well, yes, you know

 5   that --

 6   MR. SHAH: Yeah.

 7   JUSTICE BREYER: -- and I know that.

 8   But there are many, many people perhaps in the

 9   United States, and including many who work in

10   agencies --

11   MR. SHAH: Well, Your Honor, the --

12   JUSTICE BREYER: -- who don't know

13   that. And so where it said in 1986 the word

14   "regulation," and then you read the House

15   report --

16   MR. SHAH: Yes.

17   JUSTICE BREYER: -- then we arrive at

18   the same conclusion that it already said it.

19   But many people don't read House

20   reports. And that word "regulation" might not

21   explain itself. And, therefore, they reenact

22   1987's law in order to put the House report, in

23   essence, in the law.

24   MR. SHAH: Well --

25   JUSTICE BREYER: And they show exactly

1   what they mean, okay?

2   MR. SHAH: Well, a --

3   JUSTICE BREYER: That's the argument

4   on the other side.

5   MR. SHAH: Well, a couple responses.

6   If you want to ignore the text and look at the

7   House report, I would suggest we look at the

8   1987 House report, which is the one that led to

9   Section (a)(2). And what it says there is we

10   tried this in 1986.

11   It turns out that the agency, and this

12   is a quote, "with growing frequency is enacting

13   significant" -- unquote -- is enacting

14   significant policies without going through not

15   -- notice-and-comment, notwithstanding our 1986

16   enactment. And, in fact, it -- the next

17   sentence says, in fact, it's doing these things

18   through things like manual instructions.

19   And so what we are going to do is

20   enact a further requirement that even if it is

21   a rule, whatever type, interpretive or

22   legislative, a requirement or a statement of

23   policy, as long as it's actually affecting a

24   standard changing effect on Medicare providers

25   or beneficiaries, their legal rights, then they

1   have to go through notice-and-comment.

2   And -- and let me point out, let's get

3   back to the fatal flaw, which the government

4   has still not addressed in its statutory

5   construction, other than saying that Congress's

6   use of the word "statement of policy" is an

7   artifact, that essentially Congress made a

8   mistake when they enacted the statute because

9   it didn't change -- it didn't strike everything

10   out except legislative rule.

11   The statute here says any rule,

12   requirement, or statement of policy. Now it's

13   not an artifact. A statement of policy -- this

14   is the government's construction -- only things

15   that have the force of law can have a standard

16   -- can affect a substantive legal standard.

17   Well, categorically, as the government

18   says on page 16 its reply brief, a statement of

19   policy under decades of APA law categorically

20   lacks the force of law.

21   So Congress has now enacted a statute

22   that says any rule, requirement, or statement

23   of policy can trigger notice-and-comment,

24   except you could never have a statement of

25   policy that triggers a notice of comment. Both

 1   sides agree on that.

 2   You are now reading significant words

 3   out of a statute. That is not how statutory

 4   construction works.

 5   Now the government says: Oh, you

 6   should just read this provision as simply

 7   codifying the preexisting distinction between

 8   substantive and interpretive rules in the APA,

 9   the APA's interpretive rule exception.

10   Well, first of all, the term

11   "substantive legal standard" that they use in

12   (a)(2) appears nowhere in the APA or in any APA

13   cases. So it would be an exceedingly,

14   extraordinarily round-about way for Congress to

15   try to adopt the interpretive rule exception

16   which is sitting on the books, instead to

17   introduce new language which has never been

18   used in the APA to duplicate the interpretive

19   rule and section.

20   Instead of introducing that novel

21   concept, if all that's what the -- what

22   Congress wanted to do in (a)(2), it could have

23   simply cross-referenced the interpretive rule

24   exception in the APA, just like it

25   cross-referenced the neighboring good cause

1   exception, or it could have simply said any

2   substantive rule requires notice-and-comment.

3   That would have been a lot simpler.

4   And yet, obviously, Congress didn't do that.

5   It did almost the opposite. It -- it took --

6   it expressly includes any rule, requirement, or

7   statement of policy, which, if you compare it

8   to the interpretive rule exception in the APA,

9   that expressly carves out any interpretive rule

10   or statement of policy.

11   JUSTICE SOTOMAYOR: Could you give

12   meaning to legal, substantive legal?

13   MR. SHAH: Sure. So --

14   JUSTICE SOTOMAYOR: Because that --

15   that's where the strongest argument, I think

16   your adversary makes, which is generally we

17   think of legal as binding.

18   So, if you can deal with that, I think

19   --

20   MR. SHAH: Sure.

21   JUSTICE SOTOMAYOR: -- everything else

22   you're saying falls into place.

23   MR. SHAH: Sure. So substantive legal

24   standard, how we -- how we would view it is a

25   legal standard is, obviously, a term that's

 1   used in law all the time. It's this legal

 2   test, right?

 3   And so, here, the legal standard in

 4   their issuance is whether Part A entitled days

 5   cover Part C days, whether they cover days that

 6   are not covered under paid or covered under

 7   Part A. So that's -- in substantive legal

 8   standard, the legal standard is the test.

 9   Here, we obviously have a test, that's

10   what the whole 2014 issuance is doing, defining

11   when Part C days are covered. So that's your

12   legal standard.

13   Now the question is, what work is

14   substantive doing? Well, then the work

15   substantive doing it, it's doing it in

16   contravention to procedural. And there is no

17   doubt here, everyone on both sides agree that

18   in that sense, substantive versus procedural,

19   what the agency did here has a substantive

20   effect. It's an effect towards billions of

21   dollars, it reduces the right of recovery or

22   reimbursement for these hospitals.

23   Now what the government says, they

24   point to this D.C. Circuit case called AHA v.

25   Bowen, and they say Congress made this change

1   in the statutory language and added the phrase

2   "substantive legal standard" to reflect that

3   ruling.

4   Well, first of all, when Congress made

5   that change, it said we are clarifying the

6   statute. It did not say we are doing a

7   wholesale change in the statute, which is what

8   the government's position is today at oral

9   argument. It said it's clarifying the statute.

10   Second point: That AHA v. Bowen case,

11   actually, substantive versus procedural is also

12   a distinction in the APA. There are

13   substantive rules, there are interpretive

14   rules, and there are procedural rules.

15   And what AHA v. Bowen says is

16   procedural rules, as opposed to substantive and

17   interpretive rules, also lack

18   notice-and-comment.

19   And it draws the distinction between

20   substantive and procedural. This is on pages

21   1045 to 1047 of AHA v. Bowen.

22   So even if we assume that Congress had

23   AHA v. Bowen in mind -- Congress is silent

24   about that in the House report -- but I'm

25   willing to take the government at face

1   value that --

2   JUSTICE KAGAN: Do you have any other

3   case that that might be when the conference

4   report says we're reflecting recent cases? Is

5   there anything else other than Bowen that you

6   think it might be referring to?

7   MR. SHAH: That -- that's the -- I

8   mean, we've looked. There really isn't

9   anything that's on point of the ones that we

10   could find in that time frame. Bowen is

11   obviously the one that the government focuses

12   on.

13   And we're happy to focus on that

14   because the core of Bowen is distinguishing a

15   procedural rule, things like enforcement

16   policies, auditing requirements on contractors,

17   how often you need -- the contractor has to go

18   and check the books of the hospital, those sort

19   of things.

20   It's distinguishing them from

21   substantive and interpretive rules. And so in

22   -- in -- if that's what Congress was trying to

23   do, that makes perfect sense. We agree that

24   (a)(2) excludes procedural rules from its

25   ambit.

1   It says any rule, requirement, or

2   statement of policy that alters a substantive

3   legal standard, so what's off the table are

4   like the rules in Clarion; things that have to

5   do with enforcement policies, enforcement

6   priorities, anything that's procedural in

7   nature is off the table.

8   So it's completely consistent.

9   Congress used words that make sense. They

10   departed from the APA. And it's completely

11   consistent with the legislative history.

12   Now, if I could --

13   JUSTICE BREYER: What about the

14   practical --

15   MR. SHAH: Yes.

16   JUSTICE BREYER: -- the practical?

17   And the reason is practical is relevant is you

18   make a very coherent argument for one view

19   that, at one time, the D.C. Circuit waffled

20   between that a legislative rule was an

21   important rule.

22   And the other side of it is, no, it

23   might or might not be. It is a legally binding

24   rule. That was Davis. And the D.C. Circuit

25   tried your approach but then went back.

1   And the reason was practical, that

2   once you start to say, as you're reading this

3   statute, that what they're talking about are

4   important rules, you see, and that's why they

5   put in not just rules but statements of policy,

6   et cetera. Once you do, you open the door to

7   agency after agency, and at least here with

8   this statute, saying what in heaven's name is

9   that?

10   You get into arguments about

11 everything, every word of a manual. And if

12 they avoid that by applying this statute, to

13 everything arguably important in every manual,

14 they will be here 'til Christmas come.

15   And -- and, moreover, they will have

16 to make decisions in advance that they really

17 don't understand until later.

18   And your client, so they might be

19 happy with this case, may not be so happy with

20 a few of the others that take 19 years to go

21 through -- I'm exaggerating --

22   MR. SHAH: Right.

23   MR. BREYER: -- but you see the

24 practical problem.

25   MR. SHAH: No. Yes.

             1   JUSTICE BREYER: You don't see it or

             2   you --

             3   MR. SHAH: I do see your --

             4   JUSTICE BREYER: That's why I want to

             5   know the answer.

             6   MR. SHAH: I see your concern.

             7   JUSTICE BREYER: Yeah.

             8   MR. SHAH: But here is why your

             9   concern is misplaced here. And let me give you

            10   three clear reasons why, and these -- these are

            11   important.

            12   First, we've already talked about the

            13   Clarian decision. There's one D.C. Circuit

            14   decision that actually applies the decision

            15   here that they say is going to cause serious

            16   problems for the administration of Medicare

            17   Act.

            18   The D.C. Circuit made clear they are

            19   laying down a line, and that line is we're

            20   going to take everything that has any anything

            21   to do with enforcement priorities, auditing,

            22   anything like that, so a large swath of

            23   manual-type instructions, that was a manual

            24   instruction in Clarian, off the table.

            25   The second point, in its brief, the

1   government focuses on the provider

2   reimbursement manual. They say: Oh, virtually

3   all of this is going to require notice and

4   comment and -- and -- and raised some of the

5   concerns.

6   Well, the government still has not

7   provided a single example from that provider

8   reimbursement manual, so we took a look at that

9   provider reimbursement manual. It's about

10   6,000 pages long.

11   The last 5,000 pages of it are

12   procedural instructions on how to fill out the

13   cost reimbursement form. It's instructions to

14   providers. That's kind of like an exceedingly

15   complicated tax return.

16   And so the last 5,000 -- and, by the

17   way, of those last 5,000 pages, a lot of those

18   are obsolete because they don't pull out the

19   old instructions. It tells you to add line 20

20   to 21 to get to line 22. That means --

21   JUSTICE BREYER: But does the statute

22   apply only to provider manuals or does it

23   provide, say, let's say, to 320 or 240 million

24   Americans or 120 million Americans who get all

25   kinds of things from Medicare?

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 1              MR. SHAH:  Well, Your Honor --
 2              JUSTICE BREYER:  And perhaps thousands
 3    of hospitals and thousands of services.  How
 4    does -- if the statute's on just provider, you
 5    have a good point, but is it?
 6              MR. SHAH:  Well, the problem that the
 7    government points to are these manuals.  And
 8    what I'm telling you is the manuals --
 9              JUSTICE BREYER:  No, and I'm pointing
10    to a different problem.
11              MR. SHAH:  Okay.
12              JUSTICE BREYER:  I'm pointing to a
13    question --
14              MR. SHAH:  So here --
15              JUSTICE BREYER:  -- of whether this is
16    limited to provider manuals.
17              MR. SHAH:  So here's -- here's --
18    well, it's limited to the terms of the statute.
19    It has to be a rule, requirement, or statement
20    of policy that changes or alters a substantive
21    legal standard affecting one of the three
22    categories of things.  Right?
23              JUSTICE ALITO:  Well, you explained
24    away the --
25              MR. SHAH:  A right to payment --
```

1   JUSTICE ALITO: You -- you explained

2   away the last 5,000 pages of the manual.

3   MR. SHAH: Yes.

4   JUSTICE ALITO: But what about the

5   first thousand?

6   (Laughter.)

7   MR. SHAH: Okay. So the first -- the

8   first -- the remaining 980 pages, of that,

9   40 percent are from before 1987. (a)(2)'s

10   effective date applies to any manual --

11   anything promulgated after 1987. So that --

12   that's off the table. That leaves you your

13   roughly 400 pages, Justice Alito.

14   Of those, we went page by page through

15   those 400 pages. All of about 30 -- except for

16   about 35 of those pages, apply to the prior

17   cost reimbursement regime. That was the regime

18   of how Medicare used to do those things. And

19   those required detailed instructions.

20   Now, however, the vast, vast majority

21   of providers are governed by the prospective

22   payment system. Only about 35 pages apply to

23   those.

24   Now, even if 35 pages worth of stuff

25   needed to be done through notice-and-comment,

1   although I'm quite sure the government can come

2   up with all sorts of arguments why those 35

3   pages don't fall under (a)(2), but even if you

4   did -- and here, Justice Breyer, this should

5   address your concern better than anything I've

6   said so far.

7   There is an annual prospective payment

8   system rulemaking that the statute requires

9   when it made this change from reasonable cost

10   reimbursement to this new regime, to which

11   there are only 35 pages applicable.

12   That annual prospective payment

13   rulemaking is hundreds of pages long. And the

14   agency already puts everything governing

15   prospective payment systems that has a

16   substantive effect into that rulemaking.

17   In fact, 16 times before this case, it

18   adjusted the treatment of certain categories of

19   days through the prospective payment system

20   rulemaking.

21   JUSTICE BREYER: That's a prospective

22   payment manual, but read this.

23   MR. SHAH: This is not a manual.

24   JUSTICE BREYER: It says it governs

25   the scope of benefits.

```
1              MR. SHAH:  Yes.  And so --
2              JUSTICE BREYER:  Not just -- and the
3    eligibility --
4              MR. SHAH:  Right.
5              JUSTICE BREYER:  -- of individuals to
6    furnish or receive services or benefits.
7              MR. SHAH:  Right.
8              JUSTICE BREYER:  So suddenly reading
9    that, I think it governs medicine and
10   healthcare provided 80 million people or 100
11   million people.
12             MR. SHAH:  Sure.  Well, Your Honor, a
13   couple responses.
14             JUSTICE BREYER:  Am I right or wrong?
15             MR. SHAH:  First of all -- first, it
16   would cover it if it falls under the terms of
17   the statute, but here is why that doesn't
18   create a workability problem.  And not even the
19   government has argued that.
20             And here's why.  First of all, all --
21   a lot of that stuff is already done through
22   rulemaking, just like the prospective payment
23   system rulemaking.  That's one of many, many
24   annual rulemakings that the agency does,
25   hundreds of pages long, includes all of the
```

1   stuff that we have in here. There's no burden

2   to that.

3   And, by the way, those rulemakings

4   don't take 19 years, Justice Breyer. We went

5   through and averaged them. It's in the

6   appendix to our cert opposition brief. They

7   take on average 102 days to put through an

8   agency rulemaking on all of this stuff.

9   Now, to -- to address your other

10   question, a lot of that stuff is done through

11   regulation. A lot of that stuff, the stuff

12   that you're talking about, is this -- is this

13   drug or treatment covered to the thousands of

14   people who might submit a Medicare claim,

15   that's all done through national coverage

16   determinations, local determinations. And then

17   those are all adjudications.

18   There are thousands of those that are

19   done every day where the agency, a contractor

20   gets a Medicare claim. And that is just a

21   mine-run -- there is a reg -- there is a rule

22   on it. I apply the rule. Is this drug

23   covered? Yes or no.

24   JUSTICE SOTOMAYOR: Do you have any

25   idea --

1   MR. SHAH: That doesn't implicate

2   (a)(2).

3   JUSTICE SOTOMAYOR: Do you have any

4   idea why this change wasn't put through the

5   ordinary rulemaking notice and --

6   MR. SHAH: Yes, Your Honor, because

7   they tried. They did. In 2004, they did this

8   through notice-and-comment rulemaking or tried

9   to do it through notice --

10   JUSTICE SOTOMAYOR: I've now

11   forgotten. Why was that rebuffed?

12   MR. SHAH: Right. So --

13   JUSTICE SOTOMAYOR: I remember the

14   2013.

15   MR. SHAH: Yes.

16   JUSTICE SOTOMAYOR: But I don't

17   remember the --

18   MR. SHAH: Yes. So what happened is

19   they did the proposed rulemaking in 2003, which

20   said, look, we want to codify our long-standing

21   policy and practice of excluding Part C days

22   from the Medicare fraction. That's our

23   position as to how you should do this.

24   Then, in 2004, they did a 180-degree

25   turn but did not do any further

```
 1    notice-and-comment, and they issued it as a
 2    final rule to include the Part C days.
 3              The D.C. Circuit in the precursor to
 4    this case, what we call Allina I in the briefs,
 5    said that's a logical outgrowth failure because
 6    you've now flipped your long-standing policy
 7    without any notice and comment.
 8              So they tried to do it through
 9    notice-and-comment, but because they got
10    rejected because of their defect in that
11    process, they then came to these -- they then
12    -- then they did the 2013 rulemaking, Justice
13    Sotomayor, that you're talking about, but, of
14    course, that's only going to apply
15    prospectively.
16              So then they were stuck while that
17    Allina I litigation was going on.  Between 2005
18    to 2013, they had those years that were not
19    covered by their new rule, because that had
20    been invalidated for the logical outgrowth
21    failure, and was not covered by the 2013 rule,
22    which only operated prospectively.
23              So, rather than doing a proper
24    rulemaking, they simply announced these on a
25    website.  They posted them on their website and
```

 1   said: Now we are doing exactly the same thing

 2   we were told that we tried to do in the 2004

 3   final rule but was vacated by the D.C. Circuit.

 4   So that's the answer.

 5   CHIEF JUSTICE ROBERTS: Well, I guess

 6   the way the government puts it is they decided

 7   not to proceed through rulemaking but to

 8   proceed through adjudication.

 9   MR. SHAH: Well, Your Honor, as the

10   D.C. Circuit said, this looks nothing like an

11   adjudication. This policy that they introduced

12   on their website of including Part C days in

13   the Medicare fraction, that applies to every

14   hospital nationwide without exception. It has

15   prospective effect --

16   CHIEF JUSTICE ROBERTS: It's a big

17   adjudication.

18   MR. SHAH: Well -- well, I think what

19   distinguishes the adjudication from the

20   rulemaking is, does it have general

21   applicability? That's the definition in the

22   APA.

23   And this, as the D.C. Circuit said in

24   its opinion, and the fact is the government's

25   counsel in the D.C. Circuit oral argument

1   conceded, when asked at oral argument, doesn't

2   this policy have effect to every single

3   hospital in the nation -- nationwide, and the

4   answer is yes, it does.

5   And not only that, it's prospective

6   because these fractions are used, again, for

7   every hospital nationwide to calculate their

8   interim payments for the intervening year until

9   the new fractions come out.

10   CHIEF JUSTICE ROBERTS: Well, but --

11   MR. SHAH: So this looks nothing like

12   an adjudication.

13   CHIEF JUSTICE ROBERTS: -- if it is --

14   well, I guess, again, I mean, we can hear on

15   rebuttal, but, I mean, it's an adjudication

16   where they're doing what you'd like to see

17   people do in adjudication, which is apply the

18   same rules to similarly situated parties.

19   MR. SHAH: Well --

20   CHIEF JUSTICE ROBERTS: There just

21   happens to be a lot of them.

22   MR. SHAH: Right. Well -- well, that

23   -- that would be fine. But you can't issue a

24   -- a -- a policy that changes how you were

25   treating it and -- and have it have prospective

1   effect for every hospital nationwide without

2   complying with the terms of (a)(2), which says,

3   if you do any rule, requirement, or statement

4   of policy, you can't just give it a label that

5   says we're doing adjudication.

6   This has every effect of a rule,

7   requirement, or statement of policy in that

8   that treatment of Part C days, that is going to

9   decide the Medicare reimbursement amount, their

10   legal entitlement to reimbursement, for every

11   hospital nationwide.

12   CHIEF JUSTICE ROBERTS: So are --

13   you're saying this is not something that could

14   have been done through adjudication?

15   MR. SHAH: Well, Your Honor, not in

16   the way --

17   CHIEF JUSTICE ROBERTS: The -- the

18   agency could not choose adjudication as a means

19   of establishing this policy?

20   MR. SHAH: Not as a means of

21   establishing it nationwide for every hospital

22   nationwide. And the government has said that

23   when they would do these things, they apply the

24   same rule to each hospital.

25   So, no, if you're going to do

1   something like this, then -- you could call it

2   an adjudication. That's fine. But you have to

3   go through notice and comment when you're going

4   to be changing a substantive legal standard

5   that applies to them. And so they can't --

6   they can't now label this as adjudication.

7   Now, again, this is somewhat of a -- a

8   -- a -- of a theoretical question in this case,

9   because as the D.C. Circuit -- even the

10   district court, which ruled in front of the

11   government -- in favor of the government,

12   rejected their claim that this was an

13   adjudication and said this bears all the

14   hallmarks of a rule.

15   If there are no further questions, I'm

16   happy to sit down.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   Four minutes, Mr. Kneedler.

20   REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

21   ON BEHALF OF THE PETITIONER

22   MR. KNEEDLER: Several things,

23   Mr. Chief Justice.

24   Subsection (e), by the way, was

25   enacted at a later time, and so its text

        1   doesn't necessarily shed light on what Congress

        2   did in 1987.

        3   The term "rule" in the lead-in to

        4   subsection (a)(2) includes statements of

        5   policy. So there's some redundancy or some --

        6   it's superfluous there anyway, no matter -- no

        7   matter how you read it. So it is -- it is

        8   imprecise.

        9   The conference committee report in

       10   1987, I want -- I want to stress this, again

       11   says recent court rulings. Those could only

       12   have been APA rulings.

       13   And, in fact, I -- I take my friend to

       14   acknowledge that the American Hospital

       15   Association case was the leading case, and that

       16   case discussed the distinction between

       17   substantive rules and both interpretive rules

       18   and procedural rules, not just the one.

       19   And as we point out on page 11 of our

       20   reply brief, it did it in terms that are echoed

       21   in the text of -- of hh itself. It says the

       22   APA's notice-and-comment requirement applies

       23   only to substantive rules that create law --

       24   which goes to Justice Sotomayor's point about

       25   what does "legal standard" mean -- creates law

         1   and a -- "establish a standard of conduct"

         2   which has the force of law. Those -- that

         3   language is very close to what -- what is in

         4   the statute as enacted.

         5   This is really the last program in

         6   which one would expect Congress to have created

         7   such a transformation of administrative law as

         8   Respondents are proposing here, that

         9   interpretive rules, such as manuals -- and the

        10   provider reimbursement manual is not the only

        11   manual.

        12   JUSTICE GORSUCH: But why -- why is

        13   that? In Chenery II, this Court did allow the

        14   government to engage in retroactive

        15   adjudications that affect substantive rights,

        16   but expected that it would be a rare thing that

        17   that would happen and that most of these kinds

        18   of actions would happen through rulemaking.

        19   This, of course, is the Court's -- the

        20   government's claiming the power to affect every

        21   Medicare provider in the country retroactively

        22   through these seriatim adjudications. Why is

        23   -- why is this extraordinary?

        24   MR. KNEEDLER: The Court addressed

        25   that very situation in Guernsey Memorial

           1   Hospital, in which it said some things can be

           2   done by regulation, some things can be done by

           3   manuals, and some things are done by

           4   adjudication.

           5   And the agency -- and this is the

           6   teaching of Vermont Yankee, the agency has to

           7   have the flexibility to choose. And this does

           8   have the character of a -- of an adjudication,

           9   going to the Chief Justice's question.

          10   Yes, they sent it out to every

          11   contractor performing on behalf of every

          12   individual hospital, but that contractor's

          13   determination for that -- for each of those

          14   hospitals is an individual adjudication.

          15   And the -- the application of this

          16   fraction in that individual adjudication is not

          17   binding. It -- it can be reversed on appeal to

          18   the board or in court.

          19   JUSTICE SOTOMAYOR: Can you point to

          20   anything in the history of the '86 bill or '87

          21   bill that leads substance to your claim that

          22   Congress was not, in fact, concerned about

          23   substantive changes in formulas like this one

          24   being done through rulemaking as opposed to

          25   adjudication?

1   MR. KNEEDLER: Well --

2   JUSTICE SOTOMAYOR: I thought in all

3   the history I read that was motivating them is

4   the agency's change of policy of doing less

5   than a rulemaking. They wanted more or the

6   same but not less.

7   CHIEF JUSTICE ROBERTS: You may.

8   MR. KNEEDLER: What Congress was

9   driving at -- and this comes from the word

10   "substantive," which has an established meaning

11   in administrative law and the APA -- was things

12   that have the force and effect of law, not

13   things that are simply interpretive. That's

14   the very distinction this Court drew in

15   Mortgage Bankers and in Guernsey Memorial

16   Hospital arising under this -- under this same

17   program.

18   CHIEF JUSTICE ROBERTS: Thank you,

19   counsel. The case is submitted.

20   (Whereupon, at 12:07 p.m., the case

21   was submitted.)

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