

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. :

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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 --

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 --

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: Was 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 in 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. The 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 is --

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 --

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 --

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 were -- 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

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 --

20 JUSTICE KAGAN: But, Mr. Kneedler, one of
21 the very strange things about this case is that I
22 thought that in SmithKline -- and I recognize that the
23 government probably doesn't like this aspect of
24 SmithKline -- but that SmithKline basically says when it
25 comes to Auer deference, if the interpretation has been

1 unstable over time and if the interpretation has created
2 a kind of unfair surprise for private parties, that
3 those interpretations do not get Auer deference.

4 So the very kinds of interpretations that
5 we're talking about here, which is revised and amended
6 interpretations, they don't get Auer deference in the
7 first place. So this whole notion that we're supposed
8 to be so worried about this because we're going to give
9 it Auer deference, well, we don't.

10 MR. KNEEDLER: Well, I don't think
11 Christopher is -- is dispositive on that -- on that
12 point. And if I could explain. There's another way --
13 there's another way to look at this and that has to do
14 with the giving deference -- whether deference should be
15 given to the agency's new interpretation with respect to
16 transactions that -- that occurred before. That's --
17 that's a question of retroactivity, because one -- one
18 could say if the agency gives a new interpretation to an
19 existing legislative rule, that to give deference to
20 that interpretation retrospectively is, in effect, to
21 apply the regulation as so interpreted retroactively and
22 not give it effect.

23 But I don't think -- the fact that there's a
24 change of position doesn't seem to us should change the
25 deference going forward, which is really the critical

1 point. And that's we think critical because the whole
2 point of giving the agency the interpretative authority
3 is that it is the expert, Congress has delegated to it
4 the responsibility for fleshing out the regulatory
5 scheme over -- over time and new circumstances or the
6 agency may identify prior errors. So --

7 CHIEF JUSTICE ROBERTS: Or the
8 administrations might have changed.

9 MR. KNEEDLER: Or the -- but that may also
10 be an occasion to identify an error. I mean --

11 JUSTICE BREYER: We have to really get into
12 this, because I think it's fascinating and probably we
13 could each write, you know, like a new treatise on
14 administrative law in this subject. Is it possible to
15 decide this case without going into the question of
16 deference?

17 MR. KNEEDLER: Yes.

18 JUSTICE BREYER: How?

19 MR. KNEEDLER: As -- As I said before,
20 this -- this interpretation was challenged not only
21 under the Paralyzed Veterans Doctrine, but also as being
22 substantively invalid. And the district court rejected
23 that interpretation, finding that it was clear on the
24 basis of reading the regulations that the new
25 interpretation is valid, and Respondent did not appeal

1 that. So any questions about deference to the new
2 interpretation are simply not part of this case and
3 should be left for another case.

4 But going back --

5 CHIEF JUSTICE ROBERTS: But that's often the
6 case when you have a procedural challenge. I mean, the
7 idea is they're not challenging the particular
8 interpretation, but you don't doubt that the agency
9 could have come out the other way and maybe if there had
10 been notice and comment, they would have been persuaded
11 that they should -- or that they shouldn't change the
12 interpretation.

13 MR. KNEEDLER: Well, the APA itself has a
14 mechanism to take into account that as well. The APA
15 has a provision for petitioning an agency for
16 rulemaking. So if -- if the Mortgage Bankers here
17 believe that -- and this was --

18 CHIEF JUSTICE ROBERTS: How often --

19 MR. KNEEDLER: -- noted in Auer -- in Auer
20 itself, that the -- that the regulated industry --
21 States could have petitioned the agency for a rulemaking
22 and agencies -- that is subject to judicial review. So
23 if there was arbitrary denial of the petition for
24 rulemaking, that would be -- that is another safety
25 valve. That's, again, something built into the APA

1 itself. And the -- our principal -- or the basic
2 submission here is that Paralyzed Veterans rests on a
3 real misreading of the -- of the APA and the very strong
4 values behind interpretative rules, as Justice Kennedy's
5 question suggests.

6 An agency should not be required to abide by
7 an interpretation it believes is erroneous going
8 forward. And also, the agency should be in a position
9 of telling -- of being truthful with the public as to
10 what it understands the regulation to mean.

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

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Kneedler.

14 MR. KNEEDLER: Thank you.

15 CHIEF JUSTICE ROBERTS: Ms. Ho.

16 ORAL ARGUMENT OF ALLYSON N. HO

17 ON BEHALF OF RESPONDENTS

18 MS. HO: Mr. Chief Justice, and may it
19 please the Court:

20 I'd like to begin with Justice Sotomayor's
21 question about the dividing line between interpretative
22 rules and legislative rules in the context of what my
23 friend Mr. Kneedler has said about retroactivity.

24 I think when you consider -- the government
25 says, and it's recognized in the past, that the 2010 AI,

1 the agency action that is at issue here, the government
2 has said it was such a substantive change in the law
3 that it could not be applied retroactively. That is
4 fundamentally inconsistent with any notion of an
5 interpretive rule --

6 JUSTICE KAGAN: Ms. Ho, I think that this
7 entire case has been litigated with everybody accepting
8 that this was an interpretative rule. Now, maybe that
9 was wrong. Maybe you should have come in in the first
10 instance and said, really, we think this is a
11 legislative rule and so it had to go through notice and
12 comment. But you didn't do that. Everything that
13 happened in this case happened on the view that this was
14 an interpretative rule and the question is what followed
15 from that classification.

16 MS. HO: Respectfully, Justice Kagan, I
17 disagree with that -- with that description. As we
18 explain on page 46 of the red brief, what we said below
19 was that the 2010 AI was an interpretation. An
20 interpretation is not dispositive of whether it's a
21 legislative or interpretative rule. Perhaps more
22 importantly, Justice Kagan, the D.C. Circuit in its
23 decision under review gave no indication, made no
24 suggestion that what it was, in fact, doing was
25 subjecting a legislative rule -- excuse me, an

1 interpretative rule to notice and comment. It held and
2 it cited the APA that the AI 2010 was a de facto
3 amendment.

4 JUSTICE KAGAN: Yes. But to the contrary,
5 Ms. Ho, I mean, the entire Paralyzed Veterans Doctrine
6 is about when interpretative rules get notice and
7 comment, have to get notice and comment, if ever. It's
8 not about the division line between interpretative rules
9 and legislative rules. So when the D.C. Circuit starts
10 citing Paralyzed Veterans, it's on the assumption that
11 what we're talking about is an interpretative rule.

12 MS. HO: Again, Your Honor, I would
13 respectfully disagree with that. And I don't -- I don't
14 dispute that there is loose language in dicta and that
15 the D.C. Circuit has not been entirely clear about it.
16 But I think --

17 JUSTICE KAGAN: It's not just loose
18 language. If you go back to Paralyzed Veterans itself,
19 they deal with two arguments. The first argument is
20 what's become known as the Paralyzed Veterans Doctrine
21 and then they say, oh, you know, there's another
22 argument in the case, which is that this isn't an
23 interpretative rule at all.

24 MS. HO: Your Honor, I think the way that I
25 would understand both Paralyzed Veterans and the cases

1 since it, is Paralyzed Veterans looked at one argument
2 for why what it had before it was interpretative in name
3 only. And it said the best argument here is that this
4 isn't an interpretable -- it is a de facto amendment.
5 And a de facto amendment --

6 JUSTICE GINSBURG: Why wouldn't the 2006
7 interpretation, which you say should have stuck, why if
8 this -- if it's -- if it's legislative, if it's
9 substantive, then the 2006 interpretation was equally
10 defective because there was no notice and comment for
11 the 2006. If you are trying to characterize the 2010
12 rule as not interpretative, I don't see how you can say,
13 oh, but the 2006 rule was interpretative. Especially
14 since there were the earlier rulings the other way.
15 What was it, the 2001 and -- so it seems to me that you
16 want it to be interpretative when it favors you and you
17 want it to be not interpretative -- you want the 2006 to
18 be interpretative because you didn't go through notice
19 and comment, right?

20 MS. HO: Your Honor, I think -- I think
21 what -- the status of 2006 opinion, which is not before
22 this Court, I agree with you, it's a difficult question.
23 I think the 2006 opinion has characteristics of both
24 legislative rules and it has characteristics of
25 interpretative rules. The key thing for this case is

1 the government's concession that in 2006, that opinion
2 letter was the department's authoritative definitive
3 interpretation. So regardless of the status of 2006,
4 the key thing from the D.C.'s Circuit's point of view in
5 deciding whether it was a de facto amendment, and again,
6 there's nothing in the decision under review to
7 suggest --

8 JUSTICE GINSBURG: But I don't understand
9 why we should say go back to an interpretation that
10 didn't get -- I mean, I can see you say the 2010 should
11 have had notice and comment. But why return to an
12 earlier position that didn't have notice and comment? I
13 think you could say wipe it all out, start over, but I
14 don't see how you can say the 2006 rule sticks when it
15 has the same defect on your view the 2010 did.

16 MS. HO: Well, again, Your Honor, we
17 could -- I think 2006 -- again, it's a harder question.
18 There are characteristics that make it legislative,
19 there are characteristics that make it interpretative.
20 I think the key point is focusing on 2010 and perhaps
21 one difference that would tie back to Your Honor's
22 earlier question about the specific context of this case
23 and the Fair Labor Act.

24 My friend has talked about the
25 Portal-to-Portal Act, about Section 259. One thing that

1 the 2010 AI did is it repealed, it withdrew the 2006
2 opinion letter, which under 259 gave employers an
3 opportunity to plead a good faith defense. In
4 withdrawing that, the 2010 AI effectively abridged a
5 statutory defense, and I think in that respect, the 2010
6 AI --

7 JUSTICE GINSBURG: I don't follow that
8 because it seems as far as the change, the -- an
9 employer who had relied in good faith on the 2006
10 interpretation is home free. That much was clear.

11 MS. HO: Your Honor is correct. Assuming --
12 assuming that -- that an employer can -- can prove good
13 faith. But that's only for 2006 --

14 JUSTICE GINSBURG: But why wouldn't -- well,
15 how could there not be good faith? Here's a regulation,
16 I followed it. What more do I need to show good faith?

17 MS. HO: In any particular case, the
18 question would be good faith. I mean, an employer would
19 have to -- would have to show that -- that it did --
20 that, in fact, it reviewed, it looked. Often this is
21 one of the more hotly litigated aspects of the --

22 JUSTICE GINSBURG: But the employer would
23 say here's interpretative rule 2006. I followed it to
24 the letter. What more would need to be shown than
25 here's a regulation on the books, an interpretation on

1 the books, I followed that interpretation, I thought it
2 was clear that such an employer would not be liable for
3 the past? Now, for the future is something different.

4 MS. HO: Yes, Your Honor. There are several
5 elements. That would be only from 2006 to 2010. Going
6 forward, of course, and, of course, in this case in --

7 JUSTICE SCALIA: Well, even for that period.
8 I assume he'd have to prove that he relied on the
9 regulations.

10 MS. HO: Yes. Relied --

11 JUSTICE SCALIA: If he went ahead and did
12 this without any knowledge of the regulation, he would
13 not be in good faith reliance on a regulation, would he?

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

15 CHIEF JUSTICE ROBERTS: But I -- I didn't
16 imagine -- and maybe I misunderstood Mr. Kneedler. He
17 wasn't suggesting that they would go back and prosecute
18 people who didn't happen to read the regulation but were
19 acting in compliance with it. I guess we can ask him.
20 But, I mean, do you think that's what the government is
21 going to do?

22 MS. HO: No. No, Your Honor. I think
23 what's significant from our perspective about the
24 government's position that the 2010 AI should not apply
25 retroactively is that in an amicus brief in Henry, it's

1 in -- I apologize, it's not before the Court. It's on
2 JA-279 and 280 in the court below. In an amicus brief
3 in another case, the department took the position that
4 the AI should not apply retroactively because
5 substantive changes in the law that do not simply say
6 what the law according to the agency is and has always
7 been do not apply retroactively. So our position is
8 that -- and Justice Sotomayor, wherever the line --
9 wherever the line between --

10 JUSTICE SOTOMAYOR: What changes what is an
11 interpretative rule? What you're suggesting -- an
12 interpretative rule to me is an interpretative rule. Is
13 there a statute or a regulation that you're looking at,
14 and you're saying a statute or a regulation, I think it
15 applies this way. You don't talk about a court amending
16 a statute or a regulation when it changes its
17 interpretation.

18 So even if I agree with you that it's an
19 amendment to an interpretation, how does that make it
20 anything else but an interpretation?

21 MS. HO: I think -- the key point -- and,
22 Justice Sotomayor, you are exactly right. If -- if
23 what -- if what AI 2010 truly was was simply an
24 interpretation, simply saying here's what the regulation
25 means and has always meant, there would not be a reason

1 in the world not to apply it retroactively because you
2 would simply be saying what the law is.

3 JUSTICE SOTOMAYOR: But there is a safe
4 harbor in this particular statute and they're trying to
5 comply with the meaning of the safe harbor.

6 MS. HO: I understand that that's the
7 position that the government has taken in this case.
8 But in -- in Henry where -- where what the actual
9 argument that the government was making in that case was
10 that the 2010 AI was entitled to Auer deference, that
11 there was no unfair surprise precisely because it could
12 not apply retroactively. Our submission is that by
13 saying the 2010 AI worked a substantive change in the
14 law --

15 JUSTICE SOTOMAYOR: No, you keep calling it
16 a law. It worked a substantial change in the
17 interpretation.

18 MS. HO: I'm actually quoting from the
19 government's brief. And this is on page 280 of the JA.

20 JUSTICE KAGAN: Well --

21 MS. HO: The government says, "It is
22 important to note, however, that when the department
23 issues interpretations via administrator's
24 interpretations, amicus briefs, et cetera, that do not
25 result in a substantive change in the law, those

1 interpretations which restate what the law according to
2 the agency is both before and after" --

3 JUSTICE KAGAN: Ms. Ho, can I take you back
4 to what --

5 MS. HO: Yes, ma'am.

6 JUSTICE KAGAN: -- I thought was the
7 question in this case, which has to do with the
8 Paralyzed Veterans doctrine.

9 MS. HO: Yes.

10 JUSTICE KAGAN: And I guess what I would
11 like for you to do is simply to try to explain that
12 doctrine to me, and on the view that is a doctrine about
13 interpretative rules and what it says is that there are
14 occasions when interpretative rules must be done through
15 notice and comment and that those occasions are when the
16 interpretative rules make a significant revision to a
17 stable -- a prior stable interpretation. So could you
18 explain to me just why that is so?

19 MS. HO: Yes, Your Honor, and operating
20 under the premise that you've asked me to operate under,
21 I think it rests on the premise that where an
22 administrative agency's -- the lawmaking power and the
23 power to interpret that law rest in the same hands,
24 where the agency gives an authoritative, definitive
25 interpretation of what its own regulation means, that

1 meaning --

2 JUSTICE KAGAN: Well, why --

3 MS. HO: -- is for all practical purposes
4 what the regulation is such that to change that meaning
5 is to change the regulation itself.

6 JUSTICE KAGAN: I think I understand that
7 but it seems to me that that would apply as well to the
8 initial interpretation as to the revised interpretation.
9 In other words, if you really want to say an
10 interpretation somehow changes the legislative
11 regulation, then that happens at the moment the
12 interpretation takes place, doesn't it?

13 MS. HO: No, Your Honor, I don't think it
14 does. I think what -- I think what happens, and -- and
15 under the Paralyzed Veterans doctrine, this can happen
16 when the government issues an authoritative
17 interpretation. In other words, it's looking at the
18 regulation, and it's saying this is what the regulation
19 means. It's not changing that regulation, although
20 certainly some interpretative rules can include changes.
21 It is saying this is what our regulation, the law that
22 we made, this is what it means. And I think in a world
23 of Auer deference where there is no meaningful
24 distinction, and certainly not from the perspective of
25 the regulated as to the controlling force of law

1 accorded to the interpretation itself --

2 JUSTICE KAGAN: Yes, but again --

3 MS. HO: -- versus the regulation.

4 JUSTICE KAGAN: -- Auer deference actually
5 is more strong with respect to the initial determination
6 than -- initial interpretation than with respect to a
7 revised interpretation. So I don't think Auer deference
8 can save you from this little conundrum.

9 The conundrum is why it is that an
10 interpretation should be viewed as -- as changing the
11 regulation such that notice and comment is necessary
12 when it's a second interpretation but not when it's a
13 first.

14 MS. HO: Because the second -- the second --
15 the first interpretation under Paralyzed Veterans has to
16 be authoritative. It can be authoritative -- and not
17 all interpretations are authoritative. In this case the
18 government conceded it was an interpretation. In -- in
19 Alaska Hunters, 30 years of -- of uniform agency
20 practice, that was authoritative, such that to -- from
21 the perspective of the regulated, the agency isn't just
22 saying this is our authoritative interpretation. It is
23 inviting reliance upon it such that to change, to do a
24 180, to take a logically inconsistent position with it
25 at point B, that's -- that's what Paralyzed Veterans is

1 targeting.

2 JUSTICE KENNEDY: But it seems to me that
3 what you are doing is that in order to make your case,
4 you are saying that the second interpretation deserves
5 the same deference, the same Auer deference as the
6 first, and Justice Kagan's questions seem to me
7 highlight you're -- you are basically running away from
8 the Paralyzed Veterans.

9 MS. HO: No, no, Your Honor. And I
10 apologize for --

11 JUSTICE KENNEDY: And it -- it seems to me
12 odd that you would represent your client and say, well,
13 this second interpretation of its stance gets full Auer
14 deference. I would say that it does. I would think
15 that your position would be that it doesn't.

16 MS. HO: And I apologize. Our position
17 regarding deference is that in -- in a world of Auer
18 deference where the background rule, the default rule is
19 that the interpretation of a regulation and the
20 regulation itself are entitled to the same level of Auer
21 deference. To me that makes sense of the Paralyzed
22 Veterans doctrine because, again, the difference between
23 the regulation itself and the authoritative
24 interpretation of it collapses. Our position --

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

1 a bad idea to run away from Paralyzed Veterans. I mean,
2 how is it -- how is it at all consistent with Vermont
3 Yankee?

4 MS. HO: I think it's -- it's entirely
5 consistent with -- with Vermont Yankee in that the
6 question in a Paralyzed Veterans is -- is whether a
7 rule -- is -- is -- is legislative or interpretative.
8 In other words, is it entitled to notice-and-comment
9 rulemaking or not? It's not imposing additional
10 requirements on -- onto -- onto the agency. It's saying
11 this is the line that the APA draws.

12 JUSTICE SCALIA: Again, unless it is adding
13 procedures if you acknowledge that this is an
14 interpretative rule.

15 MS. HO: And we do not -- we don't
16 acknowledge that and we don't think that is the fairest
17 reading of what the D.C. Circuit cases have done.

18 JUSTICE SCALIA: So it is absolutely
19 essential to your position and to Paralyzed Veterans
20 that this change has to be regarded as a substantive
21 rule, right?

22 MS. HO: Correct. Under Paralyzed Veterans,
23 that's correct.

24 JUSTICE SCALIA: And if we disagree with
25 that, you acknowledge that Paralyzed Veterans is wrong.

1 MS. HO: Yes, I -- I -- I acknowledge that.
2 I do not think that is the fairest reading of what --
3 what Paralyzed Veterans means and how the D.C. Circuits
4 applied it.

5 JUSTICE KAGAN: Well, Ms. Ho, I think that
6 you've just said that Paralyzed Veterans is wrong then,
7 because, I mean, the D.C. Circuit has two lines of
8 precedent. One line of precedent is all about how to
9 distinguish between legislative and interpretative
10 rules, and I forget what the principal case is but there
11 is a four-part test, and that's what it uses. And
12 Paralyzed Veterans it uses for a different purpose
13 altogether, which is when it's decided that something is
14 an interpretative rule, there is still another question
15 to be asked which is whether that interpretative rule
16 revises a -- a previously stable interpretation.

17 MS. HO: Your Honor, what I would say is
18 that American Mining -- the American Mining case --

19 JUSTICE KAGAN: That's it.

20 MS. HO: -- that you are referring to, the
21 fourth -- the fourth prong of that is -- is whether the
22 rule is an amendment right --

23 JUSTICE KAGAN: No, but it's an amendment of
24 the legislative rule --

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

1 JUSTICE KAGAN: Of the regulation.

2 MS. HO: And I -- I think the best way to
3 understand Paralyzed Veterans is it is, if you will, a
4 variation on that and saying that you can have an
5 amendment to a regulation. You can have a de facto
6 amendment to regulation. That's what this Court
7 recognized in Guernsey and that's what this Court
8 recognized in --

9 JUSTICE KAGAN: I understand the fourth
10 prong of American Mining to be essentially the question
11 of whether the interpretation is in conflict with the
12 previous regulation.

13 MS. HO: Yes, Your Honor, and I -- I think
14 Paralyzed Veterans is best understood as recognizing a
15 variation on that. And I think that's why -- that's
16 precisely why in Paralyzed Veterans the Court went on to
17 consider whether the rule may be legislative on any
18 other -- any other number of -- of prongs.

19 JUSTICE KAGAN: But then, I mean, go back to
20 what Justice Scalia asked you, which is that if you drop
21 this kind of reinterpretation of Paralyzed Veterans and
22 you assume that what we are dealing with here is an
23 interpretative rule, then you don't think notice and
24 comment is required.

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

1 dividing line is between interpretative rules and
2 legislative rules. The question in this case is whether
3 the 2010 AI is, in fact, an interpretative rule.

4 JUSTICE BREYER: What should we do? We have
5 a, you know -- that is, I concede, a more difficult and
6 interesting question. But the question presented, your
7 reading of it is whether notice and opportunity for
8 comment are required where an agency issues an
9 authoritative interpretation of a regulation that
10 squarely conflicts with the same agency's prior
11 authoritative interpretation. All right? That -- that
12 is the question presented. Okay. So we can answer that
13 pretty quickly, I think.

14 Now, if I'm right about that, we can leave
15 all this for another day. And, you know, you've been
16 quoting Auer non-stop, I would quote Mead, and I would
17 say Mead suggests that, in fact, there are different
18 levels and it depends and it's much more complicated
19 than some are willing to suggest. And there we are.

20 (Laughter.)

21 JUSTICE BREYER: It did command a majority
22 of the Court, it is authoritative decision, and there
23 are obviously different views among different judges
24 about the extent to which they are the same or not.

25 So is there any reason that we have to get

1 into all that? Which I hope the answer is no, but I
2 think you have the best chance of thinking of a yes
3 answer, so --

4 MS. HO: No, Your Honor, I don't think you
5 need to -- to get into all of that. I think this --
6 this case can be resolved whether because the D.C.
7 Circuit correctly applied -- whether this Court agrees
8 with the framework the D.C. Circuit adopted or whether
9 this Court accepts one of our alternative arguments why
10 the 2010 AI is not an interpretative rule for the other
11 reasons. This Court doesn't need to wade into the
12 larger issues --

13 JUSTICE SCALIA: You're -- you're saying
14 that what the question presented boils down to is
15 whether an interpretative rule that radically modifies a
16 prior interpretative rule is a substantive rule.
17 That -- that's what you say the question presented boils
18 down to.

19 MS. HO: That is our submission and we
20 believe that is an accurate statement of what the D.C.
21 circuit has, in fact, been doing in its Paralyzed
22 Veterans Doctrine. Yes.

23 If there are no further questions, thank
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Mr. Kneedler, you have five minutes
2 remaining.

3 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER
4 ON BEHALF OF THE PETITIONERS

5 MR. KNEEDLER: Yes. Thank you.

6 On the last point, I mean, I -- an
7 interpretative rule doesn't get transformed into a
8 substantive rule simply because a prior interpretative
9 rule has -- has interpreted a regulation or a statute.
10 We have two interpretative regulations -- interpretative
11 rules that have the same form and they're both intended
12 by the agency to be interpretive.

13 JUSTICE SOTOMAYOR: What do you do with the
14 quote from your brief that she revised?

15 MR. KNEEDLER: The brief in the Henry case?
16 I think what the agency was -- what the agency was
17 saying in that case is it was acknowledging that this
18 was a -- a significant change in the interpretation of
19 the regulation as applied to Mortgage Bankers and,
20 therefore, it should not be given -- that deference
21 should not be applied retroactively to it, which we
22 think is an important safeguard that this Court could
23 look to in terms of Auer deference, not giving Auer
24 deference to the application of a regulation to prior
25 conduct.

1 I think when -- if you read the whole
2 passage, that passage in the brief was in
3 contradistinction to a situation where an interpretative
4 rule is simply clarifying or interpreting for the first
5 time something that was not clear in the regulation.
6 And in that situation, there's no problem of -- of
7 retroactivity because the agency is interpreting the
8 regulation as it always -- as it always meant.

9 CHIEF JUSTICE ROBERTS: Mr. Kneedler, you
10 are not going to go after employers who acted consistent
11 with the prior interpretation between 2006 and 2010 on
12 the ground that they didn't know about the prior
13 interpretative regulation, are you?

14 MR. KNEEDLER: No. The position we took in
15 this case below and that we took in the Henry case is
16 that the -- the new interpretation should not be given
17 Auer deference retrospectively. So anybody -- so no,
18 we're not going to invoke the 2000 --

19 CHIEF JUSTICE ROBERTS: Whether they knew
20 about the regulation or not.

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

22 JUSTICE SCALIA: So you're not -- you're not
23 relying on the good faith exception, right? Just on
24 your generosity in interpreting --

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

1 not -- it's not just generosity. I mean, it is -- it is
2 a principle -- retroactivity is -- is a principle
3 that -- that runs through this Court's jurisprudence in
4 a number of different respects, including --

5 JUSTICE KENNEDY: So are you -- so are you
6 saying that you would be required to avoid retroactive
7 application even if the safe harbor provision were not
8 in the statute?

9 MR. KNEEDLER: That's the position we've
10 taken because -- in this case because there is a
11 significant change. And I think that would be the case
12 whenever there may be -- there may be special
13 circumstances, but I think that would ordinarily be the
14 case. But I would urge the Court not to --

15 JUSTICE SCALIA: We're going to write this
16 down.

17 MR. KNEEDLER: Pardon me?

18 JUSTICE SCALIA: We're going to write this
19 down and quote you in future cases.

20 MR. KNEEDLER: I just -- I just wanted to
21 add a caveat to that is I don't think it would be
22 prudent for the Court to adopt a rule that runs across
23 different agencies. The -- the very existence of 259 in
24 this case shows that this agency's programs might be
25 different.

1 CHIEF JUSTICE ROBERTS: No, the point is
2 that's not right because the provision you're citing
3 requires good faith and you told me it doesn't matter
4 whether they know about it or not.

5 MR. KNEEDLER: Yes, because there was a
6 change, but that may not be the case under all programs
7 is the point that I was going to make. Under the
8 Medicare program where you have an ongoing reimbursement
9 arrangement and you have a combination of rulemaking and
10 adjudication, there are no private suits under the
11 Medicare program the way there are here and the approach
12 might be different.

13 JUSTICE ALITO: An interpretation of a
14 regulation says what the regulation has always meant.
15 So if you're saying this can't be applied retroactively,
16 aren't you saying that the law was changed, not simply
17 that a correct interpretation has been restored?

18 MR. KNEEDLER: No, I don't -- I don't -- I
19 don't think that's -- again, on a parallel -- parallel
20 to Chevron. If an agency comes up with a -- with a new
21 interpretation of a statute in Chevron, it -- there may
22 be some theoretical question of whether that's what the
23 statute always meant, but in -- but this Court's
24 deference doctrine recognizes that an agency can change
25 that and that change may often only have prospective

1 effect. And so that it's an accommodation of competing
2 principles that the very important rule to give the
3 agency the ability to change its view going forward
4 and -- and protection of interests as they come back.

5 And the interpretative rule principle is
6 very important, which was why Congress did not impose
7 rulemaking on it, why Vermont Yankee enforced that rule
8 and the courts are not supposed to do that. It would
9 deter agencies from issuing interpretations in the first
10 place if they knew that they had to go through a
11 cumbersome process to change it. All one has to do is
12 look at the Medicare program that was discussed in
13 Guernsey Memorial Hospital where there are 640 pages of
14 regulations the Court said, aided by the provider
15 reimbursement manual, an agency could not be expected to
16 go through notice and comment to modify that.

17 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

18 The case is submitted.

19 (Whereupon, at 10:57 a.m., the case in the
20 above-entitled matter was submitted.)

21

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