IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

THOMAS E. PEREZ, :

SECRETARY OF LABOR, ET AL., :

Petitioners : No. 13-1041

v. :

MORTGAGE BANKERS :

ASSOCIATION, ET AL.; :

:

and :

:

JEROME NICKOLS, ET AL., :

Petitioners : No. 13-1052

v. :

MORTGAGE BANKERS :

ASSOCIATION. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, December 1, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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

Department of Justice, Washington, D.C.; on behalf of Petitioners.

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

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 13-1041, Perez v. the Mortgage Bankers Association and Nichols v. the Mortgage Bankers Association.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The Administrative Procedure Act expressly exempts interpretative rules from the requirement for notice-and-comment rulemaking, and the APA defines rulemaking as an agency process for formulating, for amending, or repealing a rule. Thus, an agency's amendment or repeal of an interpretative rule, just like the initial issuance, is exempt from notice-and-comment rulemaking. Under the D.C. Circuit's Paralyzed Veterans Doctrine however, once an agency gives a definitive interpretation of a rule, it cannot significantly modify that interpretation without going through notice-and-comment rulemaking.

JUSTICE KENNEDY: Is there some background principle that should guide our decision here that in --

that in a close case, an interpretive rule is preferable to a regulation or vice versa? Because it seems to me it would help you in your case if you said that interpretative rules serve an important function and the Paralyzed Veterans's decision is an incentive not to adopt an interpretative interpretation.

MR. KNEEDLER: Right. And I think that's absolutely correct. First of all, the -- the question of whether this is an interpretative rule is not -- is not before the Court.

JUSTICE KENNEDY: Correct.

MR. KNEEDLER: That was conceded below.

But -- but it is of critical importance for agencies to be able to issue interpretative rules, and this is reflected in the -- in the passage of the APA itself. The committee reports show that -- that the not imposing obstacles to agencies issuing interpretations was designed to encourage them to let the public know what their interpretations of the statutes and rules --

JUSTICE KENNEDY: And -- and if I'm an agency head and you're an attorney, do you advise me that interpretative rules are often preferred to regulations?

MR. KNEEDLER: Well, I -- I -- I think it depends. And, again, this is a principal purpose of --

of what the APA did. The APA did not prohibit an agency from going through notice-and-comment rulemaking or other -- or other public participation in the case of an interpretative rule. It left to the agency the decision whether to do that. So in some circumstances, the agency might choose to have very specific regulations; in other circumstances, the agency may choose to have interpretations.

JUSTICE SCALIA: Well, things have changed so much mainly because of this Court's interpretations. Was it not the envision by the original APA that substantive rules had to have notice and comment because they would indeed be reviewed by courts on the basis of abuse of discretion? I mean, you know, whether it's 25 centimeters or 250 centimeters for a particular substantive rule there's no way for a court to say that that's right or wrong.

Whereas, it was certainly envisioned by the original APA, was it not, that interpretative rules would not be given any deference by the courts, and that's why there didn't have to be notice and comment, because the APA says in so many words that all issues of law shall be decided by the court.

MR. KNEEDLER: Yes. But the question of -- of deference when an agency -- or excuse me, when a

court is deciding a question of law, that takes into account the agency's interpretation. This is -- this is demonstrated by Chevron because if --

JUSTICE SCALIA: Yes, yes, yes. You can say that, but that's not what anybody thought when the APA was passed.

MR. KNEEDLER: Well, as we point out in a reply brief, it was -- it was understood that there would be principles of deference to the -- to agency interpretations. And beyond that, with respect to interpretations of legislative regulations, Seminole Rock was actually decided before the APA was passed. And so the principle of -- of court's giving deference to an agency's interpretation of its own regulation --

JUSTICE GINSBURG: What about, Mr. Kneedler, this particular kind of interpretation? Is -- is this an unusual situation or in classifying employees for purposes of the Fair Labor Standards Act, does -- has the agency changed its mind about an initial classification? I mean, here we have the agency has taken different views on whether loan offices qualify as administrative offices. Is -- is the Fair Labor Standards Act subject to this kind of review and revision by the department?

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

been that many instances of -- of changes. But one of the purposes of giving an agency the authority to interpret a statute and its regulations is to take into account evolving circumstances. The -- the -- certain job descriptions, for example, may not even have existed at the time or may have existed in a very different way at -- at the time a regulation was adopted or a prior interpretation was given.

But I do think it's important to recognize that the -- that the Fair Labor Standards Act is a situation which Congress has actually contemplated that the agency would give interpretations and might change them. As we point out in our --

CHIEF JUSTICE ROBERTS: What was the -- was there a particular basis for the change in this case?

MR. KNEEDLER: Yes. The -- the agency in 2010 principally thought that the 2006 interpretation was simply erroneous, because the -- the 2006 interpretation had relied on Section 203(b), which it -- which was part of a list of examples of applying the general standards in -- in Section 200. And it -- it, I think, basically overlooked it or didn't give significance to the fact that that regulation itself --

CHIEF JUSTICE ROBERTS: Was there a change in the leadership at the agency between those two

interpretations?

MR. KNEEDLER: Yes, there was. Yes, there -- there was a change in -- in the leadership.

But the agency --

JUSTICE SCALIA: Change in administration?

MR. KNEEDLER: Yes, change in administrations.

But the agency --

JUSTICE SCALIA: Isn't that a more likely explanation?

MR. KNEEDLER: Well, the -- the agency gave a very thorough explanation of the -- of the reasons for the change. This, of course --

CHIEF JUSTICE ROBERTS: And they hadn't -- they hadn't done -- they hadn't addressed the same issues the first time in 2006?

MR. KNEEDLER: They had addressed the same issues, but -- but the Court -- or excuse me, the 2006 administrative -- or excuse me, opinion letter gave what in 2010 the agency thought was an unduly narrow view of what sales activities would consist of. And it's instructive to look at this Court's decision in Christopher. Christopher had to do with the interpretation of another part of this same exemption for outside salesmen. But the Court there recognized

that various functions are incidental to sales activities and, even if they don't necessarily encompass the direct face-to-face activity, preparing for that meeting and doing research on that particular customer's view is part of sales activity. The 2006 opinion letter did not really take that view. It really just said that face-to-face interaction was the part of sales.

JUSTICE SOTOMAYOR: Was the 2006 advice contrary to prior advice?

MR. KNEEDLER: Yes. There had been opinion letters issued in 1999 and again in 2001, which -- yes, 2001, which had concluded that the mortgage loan officers were -- were not within -- were not within the exemption and the 2006 interpretation.

JUSTICE SCALIA: So is it a second -- second flip-flop? Maybe -- maybe we shouldn't give deference to agency interpretations of its own regulations. That would solve this -- the problem of this case. For me it would be easy.

MR. KNEEDLER: Well, the question of -- the question of deference, again, is another thing that is not before the Court. The Respondent challenged this --

JUSTICE SCALIA: I understand it's not before the Court, but my perception of what is before the Court would be altered if I didn't think that courts

had to give deference to these flip-flops.

MR. KNEEDLER: Well, the question of how -- this Court's decisions have different formulations about how a change in position may be factored into the question of deference. We point this out in our reply brief.

In the Thomas Jefferson Hospital case, the Court suggested that change in interpretations would matter, but then later, again in Christopher, the Court suggested that the way a change in positions would be taken into account is that it would be some indication of whether the agency had given fair and considered -- whether it was a product of fair and considered judgment today.

JUSTICE ALITO: In this case, didn't -- didn't the government say explicitly that its interpretation would be entitled to controlling deference?

MR. KNEEDLER: Well, that was -- that was an invocation of the Seminole Rock standard, yes. And under Seminole Rock and Auer deference --

JUSTICE ALITO: If it has controlling deference, does it have the force of law?

MR. KNEEDLER: No, it doesn't. I think "controlling" is just describing the -- the consequence

of a court going through the interpretative process. Same thing under -- under Chevron. The Court has to go through its analysis of deciding whether the agency has interpretative authority and whether the interpretation is reasonable. If all that's satisfied, then the agency's interpretation controls. But it's not controlling --

JUSTICE ALITO: It's a formal deference, but as a practical matter, do you think there's much of a difference?

MR. KNEEDLER: I -- I think there's an important difference because a legislative rule which has the force and effect of law itself prescribes duties for the regulated party. You can be sanctioned or be held liable for violating the regulation itself. That's not true for an interpretative rule. An interpretative rule is giving the agency's view of what some other provision of law means and it's that other provision is --

JUSTICE SOTOMAYOR: Mr. Kneedler, that was -- that's what's been troubling me. I have looked at the academic debate on how to identify a legislative rule from an interpretative ruling. I'm not quite sure -- we don't need to get into that here. But I was troubled by your answer to Justice Kennedy because you

were suggesting that there is no standard by which you decide what becomes a legislative rule and what becomes an interpretative rule.

MR. KNEEDLER: No. What I -- I think what I meant to say --

JUSTICE SOTOMAYOR: You were saying a -- if you were advising on this issue that some you suggest go by rule and some you -- by legislative rule and some you suggest go by interpretative rule. I don't --

MR. KNEEDLER: I certainly didn't mean to suggest that there's no difference between the two. There's a very fundamental difference.

JUSTICE SOTOMAYOR: There is a fundamental difference. But when --

MR. KNEEDLER: And the way I described it, it's just that there -- there could be situations in which an agency might decide to be very detailed in a regulation and there are situations in which the agency might not want to. Under the --

JUSTICE KAGAN: Could I ask about that, Mr. Kneedler, because it seems to me that part of what's motivating that Respondent's position and their amici's position, and I'm not sure that this maps on very well to the Paralyzed Veterans doctrine, but part of what's motivating it is a sense that agencies more and more are

using interpretative rules and are using guidance documents to make law and that there is -- it's essentially an end run around the notice and comment provisions. Now, whether that has anything to do with Paralyzed Veterans or not -- I mean, what would the government say is the correction for that or the remedy for that or -- I mean, because the government is sort of asking for it all. It's asking for a lot of deference always, it's asking for the removal of the Paralyzed Veterans doctrine, it's asking for a pretty strict demarcation between interpretative and legislative rules.

So what's the solution to the problem that I think the Respondents are basically identifying?

MR. KNEEDLER: Okay. And that -- my answer to that question has a number of parts. First of all, in this specific statute Congress has given a pretty good answer, which is 29 U.S.C., the Portal-to-Portal Act provision 259, which says that a party cannot be held liable for good faith reliance on an interpretation issued by the agency, and that applies whether or not the statute expressly says that has been amended or rescinded. So the Portal-to-Portal Act specifically contemplates that there will be --

JUSTICE KENNEDY: But I notice you make a

point of that on page 4 of your brief, but -- I don't wish to interrupt Justice Kagan's line of questioning -- but it seems to me that we have to assume that there will be many other cases in which there's no safe harbor provision, and you have the retroactivity.

MR. KNEEDLER: Right. No. That -- that's absolutely right, but here there is a safe harbor provision. Congress --

JUSTICE KENNEDY: But you -- you don't ask us to confine our reasoning to that kind of case.

MR. KNEEDLER: Right. And so the -- with respect to agency guidance and that sort of thing, the APA contemplates that agencies will develop their own procedures. And, in fact, agencies have done that in recent years. There are agencies that seek public participation when they're developing guidance documents, subregulatory guidance documents. That's the way the FDA proceeds. And OMB has oversight of these things and can require and bring some consistency to the way agencies interpret -- interpret matters.

With respect to the question of deference, I was starting to answer this question before. This Court's decisions specify some different possibilities in the way deference might play into a change in position, but in Kennedy v. Plan Administrator the Court

said that a change of position is no reason in itself to disregard the agency's position. And then in Long Island Care, the Court said at least where there is no unfair surprise. So one way --

JUSTICE GINSBURG: Suppose -- suppose a court had given, quote, "controlling deference" to the 2006 rule. Does that make any difference?

MR. KNEEDLER: No. I think by analogy to Brand X, if the -- if the agency gives a different interpretation to the regulation, that change should be given effect by a reviewing court.

JUSTICE SOTOMAYOR: Could you go back to Justice -- answering Justice Kagan? How do you address the fundamental concern, which is that agencies are bypassing the notice and public comment by using interpretative rules when they should be using legislative rules?

MR. KNEEDLER: Well, first of all, I mean, I think some may have that impression. I -- I don't -- you know, I don't think that there's an empirical basis --

JUSTICE SOTOMAYOR: Assume the impression is true. That's why I asked you to define when one has to be used and when the other can be used.

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

Circuit's decision in American Mining Congress has been given a lot of attention as dividing between what's an interpretative rule and what's a -- what's a regulation. And the -- I think the principal guide there is whether in the absence of the rule, would there be a standard to which the regulative party could be held, and here there unquestionably is. The Fair Labor Standards Act applies and the -- and the regulation itself dealing with the exemption, which Congress has expressly authorized the Secretary to define, identifies who is -- who is an administrative employee by -- by several factors. So here there's -- this interpretative regulation is by no means necessary to establish a basic rule of -- of liability.

Now, there could be situations that -- that, again, were identified in American Mining Congress and, frankly, in this Court's decision in Gonzales v. Oregon. If the agency issues a regulation that does nothing more than just parrot the statute, then the agency hasn't really accomplished anything by its -- by its regulation and its -- and its interpretative rule would not get -- would not get deference.

But if the agency has actually given content, even if necessarily in somewhat general terms, then that is satisfactory. And under the Fair Labor

Standards Act, there were -- at the time the 2004 regulations were issued, Labor estimated there were 134 million people in the workforce, approximately, I think, 26 million covered by the -- what they call the white collar exemption. It would not really be feasible for the Department of Labor to issue detailed regulations trying to identify every type of employment, every type -- every sector in the economy. And so interpretative guidance is the way that the agency has done this. And, again, Congress I think in some respects ratified that or at least recognized its legitimacy in passing the portal-to-portal safe harbor provision, which -- which deals not simply with regulations, but it says good faith reliance on an interpretation does not give rise to liability even if that interpretation --

JUSTICE SCALIA: Why -- why should there be a difference.

MR. KNEEDLER: Pardon me?

JUSTICE SCALIA: Why should there be a difference between the two, between the treatment of substantive rules and interpretative rules?

MR. KNEEDLER: Well, as I said, substantive rules or legislative rules themselves define -- have the force and effect of law. They themselves define duties

and obligations. Interpretative rules -- and this is in the Attorney General's Manual on the APA, which this Court has repeated in Chrysler, is designed to inform the public of the agency's view of the statutes and rules --

JUSTICE SCALIA: Well, nonsense. So long -- whether it's an interpretative rule or a substantive rule, it is reviewed by a court with deference, right?

MR. KNEEDLER: Yes.

JUSTICE SCALIA: And you want us to give the same deference to both.

MR. KNEEDLER: Yes. Yes.

JUSTICE SCALIA: So what the court says about, in its substantive rule, is just as much or no less law than what a court says in its interpretative rule. If the court is within the -- the bounds of ambiguity, it is the law. And a court cannot change it. So why should there -- you know, I -- I just don't understand the difference in treatment between the two.

MR. KNEEDLER: With respect, Justice Scalia, I think that -- I think there's a critical difference, and that is, that when the case goes to court, the court is deciding whether the -- whether the agency's interpretation -- whether to defer to the agency's interpretation or not. But ultimately, it's the court

that is deciding what -- what the law is under principles of deference.

So under -- under Chevron, if the court decides that the agency's interpretation is -- is appropriate, then it's the court that is construing the statute. And by parallel reasoning, we think that's true also for --

JUSTICE BREYER: I'm rather surprised -- sorry to wake up so late. But the -- yes, you said yes, yes, you give the same degree of deference whether it's a legislative rule or an interpretative rule. Where it's a legislative rule, Congress has, through interpretation of the statute, said to the agency, you are to expand on the statute through rules. They're exercising delegated congressional authority. And, of course, we have systems for deciding what deference we'll give and it's usually quite a lot. Or if it's an interpretative rule, it's just what you said. The agency's giving its interpretation. And in that kind of case, the deference that a court will give to it, the answer has to be, though not except -- everybody on this Court might not agree with it. It depends.

Very often you give them that deference because they know more about the statute, about what went on in its enactment and what Congress meant. If

that's the reason and they change their minds, I would think the deference sinks quite a lot, something it wouldn't do with a legislative rule, or after all, they have the authority to decide either way.

So I agree with you. We needn't go into those matters in this case and I surely hope we don't. But if we do, is there anything I said you disagree with?

MR. KNEEDLER: Well, yes.

(Laughter.)

MR. KNEEDLER: I think -- I think on the question of -- of deference to an agency's interpretation, the Court has -- has adopted --

JUSTICE BREYER: It's called Skidmore very often.

MR. KNEEDLER: Well, no. Auer deference and Seminole Rock, tracing -- tracing actually throughout this Court's jurisprudence, I think it's almost 50 cases in which the Court has -- has recited that standard --

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Or the administrations might have changed.

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

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

MR. KNEEDLER: Yes.

JUSTICE BREYER: How?

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

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

But going back --

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

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

CHIEF JUSTICE ROBERTS: How often --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

MR. KNEEDLER: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO

ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. HO: Yes. Relied --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Well --

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

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

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

MS. HO: Yes, ma'am.

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

MS. HO: Yes.

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

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

meaning --

JUSTICE KAGAN: Well, why --

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

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

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

accorded to the interpretation itself --

JUSTICE KAGAN: Yes, but again --

MS. HO: -- versus the regulation.

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

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

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

targeting.

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

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

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

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

CHIEF JUSTICE ROBERTS: How -- it may not be

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: That's it.

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

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

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

JUSTICE KAGAN: Of the regulation.

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

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

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

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

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

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

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

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

(Laughter.)

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

So is there any reason that we have to get

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

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

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

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

If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Kneedler, you have five minutes remaining.

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

MR. KNEEDLER: Yes. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KNEEDLER: Pardon me?

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

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