SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

JAMES L. KISOR,)

Petitioner,)

v.) No. 18-15

ROBERT WILKIE, SECRETARY OF)

VETERANS AFFAIRS,)

Respondent.)

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 73

Place: Washington, D.C.

Date: March 27, 2019

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

JAMES L. KISOR,)
Petitioner,)
v.) No. 18-15
ROBERT WILKIE, SECRETARY OF)
VETERANS AFFAIRS,)
Respondent.)

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Wednesday, March 27, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

PAUL W. HUGHES, ESQ., Washington, D.C.;
on behalf of the Petitioner.

GEN. NOEL G. FRANCISCO, Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 18-15, Kisor versus Wilkie, the Secretary of Veterans Affairs.

Mr. Hughes.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE PETITIONER

MR. HUGHES: Thank you, Mr. Chief Justice, and may it please the Court:

The government now appears to agree with our principal contention, deference does not apply in this case. The Court should arrive at that result by overturning the doctrine of Seminole Rock and Auer deference in its entirety. Agencies may issue a wide array of rules, interpretations, and --

JUSTICE SOTOMAYOR: Even if the best reading of the statute is the SG's in this case?

MR. HUGHES: Well, Your Honor, we --

JUSTICE SOTOMAYOR: Making -- making that assumption, why do we need to reach that broader issue?

MR. HUGHES: Well, Your Honor, we think we have the best reading of the regulation. Of course --

JUSTICE SOTOMAYOR: I know you think that, but this was a hypothetical.

MR. HUGHES: Well, Your Honor, the Federal Circuit below rested its decision on complete reliance on Auer deference, so we think that that is the principal question that was presented by the Federal Circuit.

So we think the first order of business is to determine whether or not the Federal Circuit was correct in deciding that Auer deference resolved this case.

JUSTICE GINSBURG: But the government tells us it's really beside the point because not only -- well, either the regulation is unambiguous or, if there's any ambiguity, the Federal Circuit's reading, the -- the Veterans Administration's reading is by far the better reading.

MR. HUGHES: Your Honor, the Federal Circuit, though, relied on Auer deference because the government asked the Federal Circuit to do so. The government expressly

argued to the Federal Circuit that Auer deference applies in this case, and the Federal Circuit took the government's invitation to rest its decision on Auer deference.

So I think this case does squarely present that question because of the government's own argument before the Federal Circuit, which the Federal Circuit adopted. And that is, I believe, both the premise of the petition and the question on which the Court granted was to resolve whether or not Auer deference --

JUSTICE GORSUCH: So could you turn to the government's argument where they -- they -- they seem to concede that Auer is wrong but want us to retain some -- some reduced or revised version of it? Why shouldn't we do that?

MR. HUGHES: So, to begin with, Your Honor, we certainly think the government's argument is better than the status quo, and we understand it to be a version of deference under which deference would not apply in this case, in the vast majority of cases coming from the Veterans Court, so we certainly think it's

superior to what currently exists.

We don't think, though, it's the -- ultimately the right answer for a few reasons. The first is the most important practical and legal problem with Auer deference is it is a circumvention of the notice-and-comment requirements that Congress has imposed generally in the APA, as well as in particular statutory schemes, including this one.

The government's rule still allows agencies to put a thumb on the scale without providing --

JUSTICE SOTOMAYOR: I'm sorry, but that -- that's not quite true. It -- I don't think that here it was an issue of them trying to avoid notice and comment. New legal issues arise normally in adjudications, and that's what happened here.

It's not like they should have anticipated that they needed to be more specific about this until the issue presented itself in a case, and they reasoned an answer, and they gave an answer.

So the question really is not one of that in all Auer deference cases are we talking

about the need to give notice and comment time.

MR. HUGHES: Well, Your Honor, I agree with all of that, which is to say the agency can do these things, it can be precedential with respect to the agency, it can bind future agency adjudicators.

The only question is for that agency activity to also subsequently have legal binding effect in court, what did Congress intend the procedures for the agency to undertake for the agency's action to have prospective force of law? And, again, I think the agency's, the VA's, own conduct here indicates that when it wishes to have the force of law, it acts through --

JUSTICE GINSBURG: But does it --

MR. HUGHES: -- notice-and-comment rule-making.

JUSTICE GINSBURG: -- does it really have the force of law? Because we made it plain that Auer does not call for blind deference. The court must, first of all, agree that the regulation is, indeed, ambiguous and that the agency interpretation is a reasonable one.

MR. HUGHES: Your Honor, there's certainly limitations on when Auer deference applies, but the maintenance of Auer deference means that there are a range of cases in which the agency's views that did not go through notice and comment, did not provide the public safeguards, still will have binding effect on the courts.

And it's that range of cases that this is one of which we think is -- is the ultimate problem with Auer deference and why the Court should depart from that doctrine.

CHIEF JUSTICE ROBERTS: Well, only -- only with some degree, and it's a matter of debate how much of a degree, but only with some degree of sanction by -- by the court, right? At least the court has to determine that the agency's interpretation is a reasonable one.

MR. HUGHES: That's true, Your Honor, but what happens in cases like this is the regulated public is not able to participate in the underlying law-making process that leads to the ultimate rules. And that is not just some speed bump along the administrative process. This matters as a practical matter a great

degree.

And I think one example that I can offer is at Footnote 4 of the government's brief, the government recognizes that just two months ago, the VA made substantial changes to this regulatory scheme via notice-and-comment rule-making. We went back and looked to see what happened in that scheme, and what we found was the VA issued a notice of proposed -- proposed rule-making in August of 2018.

The VA said here's the existing regulation, here are the several changes that we think we should make to it, here is the text of what those changes will look like. Regulated public, what do you think about this?

They got comments from all over, including the Vietnam Veterans of America, the Paralyzed Veterans of America, the National Organization of Veterans' Advocates, and others. Then, in January, when the VA released its final rule, we went and counted, it made 45 material changes from what it initially proposed to do to what it ultimately did in the regulations in response to the public comments.

Those 45 changes mattered quite a

great deal because the regulated public was able to participate.

CHIEF JUSTICE ROBERTS: Of course, they didn't --

JUSTICE ALITO: If we searched through --

JUSTICE BREYER: But, as a practical matter, you've read the SG's brief, I mean, there are hundreds of thousands, possibly millions of interpretive regulations. I mean, they give an example, one of them, where the Court deferred to the understanding of the FDA that a particular compound should be treated as a single new active moiety, which consists of a previously approved moiety, joined by a non-ester covalent bond to a lysine group. Do you know how much I know about that?

(Laughter.)

JUSTICE BREYER: Right, exactly. And -- and that's all over the place, so they're not all like that. Do you know how long it took the FTC to make its first rule under rule-making? I think the answer was seven years, okay? And I think a lot of them were made more quickly.

But what you're doing is saying, instead of paying attention to people who know about that, but rejecting it if it's unreasonable, the judges should decide. I mean, I want to parody it, but, I mean, this sounds like the greatest judicial power grab since Marbury versus Madison, which I would say was correctly decided.

(Laughter.)

MR. HUGHES: Well, a -- a few responses to that, Your Honor.

To begin with, we think that Auer deference forces the agency to ask the wrong question because, under Martin and Pauley, what it allows the agency at that interpretive stage to do is to determine what it thinks the best policy is, rather than what the best reading --

JUSTICE BREYER: You read -- also read, everybody cited them here, all these studies that show what you say is a problem can be sometimes a problem, but rarely, and that the judges have a lot of power to reject unreasonable rules, inappropriately considered rules, they didn't think about it, rules that change position, rules that are not clear, all

these interpretations, you don't have to take Auer literally, and later cases have not.

And so do you -- what is your real objection to taking those later cases and saying, of course, judges are in control; of course, they reject what is unreasonable; of course, they reject what is inadequately considered; of course, they reject things that are just changed without explanation, but, in general, recognize that the FDA knows more about moieties than you do, Judge, and there are 800 judges, and they all think moiety means something different.

MR. HUGHES: Your Honor, the critical shortcoming of that is the lack of notice and comment because I am sure the FDA knows quite a bit about active moieties, but the regulated public may have a --

JUSTICE BREYER: So you want to take seven years or three years or two years on each of the million interpretive rules? By the way, they'll just go to adjudications, where we have even less control.

MR. HUGHES: Well, Your Honor, I think what the APA reflects is the balance this Court

recognized in Perez that agencies have a choice. Agencies can engage in interpretive rules, and interpretive rules have that flexibility and expediency, they're faster to implement, and they bring uniformity to agency actions and consistency to agency --

JUSTICE ALITO: Yeah, Mr. Hughes, do you -- do you think the FCC knows a lot more about the meaning of the word "relevant" than federal district judges?

MR. HUGHES: No, Your Honor. I think that's a -- a -- a straightforward question of legal interpretation that federal district judges are --

JUSTICE BREYER: Do you know why 56d or 554d, which is the separation of functions provision of the APA, it has an exception for rate-making, which is the FDA's job. In other words, somebody who decides they can't consult the ex parte with -- with prosecutors in the agency.

MR. HUGHES: Well --

JUSTICE BREYER: But there's an exception. There's an exception for rate-making. And look it up and you will

discover why. Do you know why? Because nobody in the FCC really knew how to do rate-making and they had to talk to their staff. Okay?

So you think the FDA and the judges know about the same amount about that?

MR. HUGHES: Well, Your Honor, I think that the exception for rate-making is precisely our point, which is to say, when Congress has provided agencies authorities to act in a particular manner and has given agencies that delegated authorization, we agree that that's an area in which agencies can exercise their delegated authority if it's been provided by Congress.

JUSTICE BREYER: But the individual rates, I mean, and changes in the rates and changes in the conditions of the railroad cars and -- and acting under -- there are millions. We know there are millions.

So how do you propose to deal with those millions? Every one of them goes through notice and comment and rate-making?

MR. HUGHES: Your Honor, I think -- well, again, in the rate-making context, as Your Honor points out, Congress can establish

different specific rules in specific circumstances.

What we're discussing are the default rules that generally apply. And that default rule, as I'm saying, is a balance between interpretive rules, that are easier for agencies to promulgate, that have real effect with inside the agency.

On the other hand, notice-and-comment rule-making, it does require more for the agencies, but it provides important safeguards for the regulated public.

JUSTICE GORSUCH: If it was --

JUSTICE ALITO: If Auer were overruled, would an agency's interpretation, particularly in areas requiring a great deal of scientific or technical knowledge, be entitled to no deference by a court?

MR. HUGHES: No, Your Honor, I think if Auer were overturned, Skidmore would apply. And Skidmore, as this Court has articulated, has exceptional importance, particularly in areas where an agency --

JUSTICE KAVANAUGH: Well, Skidmore -- Skidmore deference is -- is really no deference

because it -- it applies only when it's persuasive, which is true of any argument.

MR. HUGHES: Well, in the context of a highly technical or reticulated statutory scheme where it's not the ordinary business of judging like the meaning of relevant, but something like active moiety, and the FDA can explain that it's broad, it's scientific consensus to bear.

JUSTICE KAVANAUGH: That sounds like State Farm. But Skid -- Skidmore is really not any -- you rely on that to say don't worry, but Skidmore deference, as I've seen it applied over many years, is -- is not much.

MR. HUGHES: Well, I think --

JUSTICE KAVANAUGH: If anything.

MR. HUGHES: -- Your Honor, it's to say in one of those technical contexts, if a court is going to arrive at a different result from the agency, the court needs to have a pretty serious reason as to why it's doing so. It has to articulate real rational reasons on the record as to why it is rejecting the agency's admitted authority over particular scientific and technical areas.

So Skidmore does show the respect that's due a coordinate branch of government. We think that's the appropriate alternative solution.

JUSTICE KAGAN: Mister -- Mr. Hughes, may I ask you about stare decisis, because you're asking us to overrule two decisions, Auer and Seminole Rock, and -- and really 10 or 12 more over the past half century where the Court has talked about Auer deference or Seminole Rock deference.

And -- and -- and what is the basis for that? Congress could have done this at any time. Congress knows that this goes on. Congress has repeatedly acted in this sphere and shown no interest whatsoever in reversing the rule that the Court has long established.

So why is it that overruling is the appropriate course here?

MR. HUGHES: A few answers, Your Honor, but, to begin with, I don't think there's distance with the government on that point because, under the government's test, Auer deference, in the case of Auer, the Court should not have applied deference.

Under the government's view, there needs to be a principle of fair notice.

JUSTICE KAGAN: Well, you know, there might be a problem of a lack of adversarialness here, but I'm asking you -- I can also ask the government -- but I'm asking you.

MR. HUGHES: So setting aside the government's position would require overturning a dozen cases on its own.

To -- to -- to move to the point, I think stare decisis has substantially less effect in circumstances where, first, it was an underlying judge-made rule and not something that was a statutory, constitutional interpretation of its origin.

And, second --

JUSTICE KAGAN: I -- I don't understand that. You know, what -- what we look to is could Congress have changed this. If Congress couldn't have changed that, that's a reason for us to change it. But, if Congress could have changed it, which Congress could have done any time within these past however many decades, that's a reason for us to say, you know, we don't think that we should step in

where Congress has not.

MR. HUGHES: Well, Your Honor, I think that was true in -- in -- in both Pearson and Wayfair and other cases the Court's decided where the Court recognized that Congress could step in and change the rule, but the Court has repeatedly said in those cases that when the underlying issue stems from a -- a decision of this Court --

JUSTICE KAGAN: Well, there aren't very many of those cases. And we take it super-seriously when we do and we need a -- I mean, we used to -- and we need a good reason for it.

So what's your good reason?

MR. HUGHES: So -- so good reason, Your Honor, is two-fold. First, stare decisis applies with substantially less force because this is not a doctrine under which the public can rely, in fact, and injects considerable instability into the legal system.

JUSTICE KAGAN: Well, reliance is a kind of plus factor, and we can talk about reliance either way, but, I mean, usually we look to something terrible that's happening:

This is unworkable. This is an anomaly in the doctrine. It no longer has any support in the surrounding legal landscape, something like that. This is so grievously wrong that we can't stand to live with it anymore.

Do you think Auer rises to that level?

MR. HUGHES: I do, Your Honor. And -- and to begin with, Auer did not have any underpinning when it was first announced. It's never been reconciled with the APA.

And the practical problems --

JUSTICE KAGAN: It didn't have any underpinning? Its underpinning is obvious. Its underpinning is everything that Justice Breyer talked about. Its underpinning is agency expertise. Its underpinning is -- is -- is -- is -- is an idea that judges are far less suited to make these kind of minute decisions of agency policy than agency decision-makers are.

MR. HUGHES: Your Honor, I think it's just impossible to reconcile Auer deference with the judgment that's reflected in the APA, that when an agency is going to put on its policy-making hat, which undoubtedly the agency

can do, there's an ability for the public to be able to participate in that process and provide their views.

JUSTICE BREYER: You're right, you're right that it says in the APA, it says, you're absolutely right, that when a judge decides a case, and it has to do with the meaning of the regulation, it says the judge, the reviewing court shall determine the meaning or applicability of the terms of an agency action.

That's what you're relying on. And there's just one thing missing, one thing missing, and that is it doesn't say how you do it.

And, by the way, that isn't just made up out of thin air. They -- the -- it's not Auer. It's Seminole Rock, Auer repeats Seminole Rock, decided in 1944, an important case.

The APA is written two or three years later. I can't remember exactly when it was adopted. But wouldn't somebody have said something about it if, in fact, those words were meant to change what was pretty well established law at the time?

MR. HUGHES: Well, Your Honor, I don't think that there's any evidence that the APA somehow silently adopted the -- the doctrine of Seminole Rock. There's no evidence in the history of --

JUSTICE BREYER: Well, the evidence would be that if the Attorney General's manual that discusses the APA goes through prior cases that they intend to change, I'm not saying perfectly, but to a considerable degree, and, by the way, Seminole Rock is not there.

And so we have both the language which doesn't say -- it says shall determine, but it doesn't say how to determine. And, in addition, you have the report, which I agree with you says nothing, but I'm not sure that that cuts in your favor.

MR. HUGHES: But, Your Honor, if we look to the Attorney General's manual of 1947, as you allude, that actually, I think, cuts strongly in our favor because that explains that interpretive rules do not have the prospective force of law. The Court relied on that manual at Footnote 31 --

JUSTICE BREYER: Yeah, that's right.

MR. HUGHES: -- of its Chrysler Corp decision, which is carried forward to Perez.

JUSTICE BREYER: No, I agree with you, you're right about that, but I don't see this being interpreted. This isn't enforceable. We're trying to figure out what the -- what the regulation means.

And you read the AG's brief. He has a lot of conditions around the judge's authority; that is to say, the judge has a lot of authority to say this reg is no good, but he doesn't have to ignore what the agency says.

MR. HUGHES: And --

JUSTICE BREYER: After all, the agency knows about old Lysol, whatever it is, and we don't.

MR. HUGHES: And I want to be clear. We do not believe that the court needs to ignore what the agency says either. We think it warrants respectful consideration for reasons of interbranch comity and the recognition that agencies do have technical expertise. We don't dispute any of that.

The only question --

JUSTICE SOTOMAYOR: I -- you know,

everybody's talking about this being the rule since Seminole Rock and Auer, but I go back to cases in the early 1800s, and -- and one -- I just pick one of 1850, where the Court said the foregoing construction, being the one adopted by the Department of Public Lands soon after the Act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commission of the grand Land Office.

And I have a series of other cases throughout the 1800s where the courts were basically talking about you take the interpretation of the agencies unless some manifest error was present.

So Sturgeon and Auer are not more recent manifestations. They're based on fairly understandable principles. Number one, agencies have expertise. My colleagues have talked about that. Two, they are also part of an administration and often have a better understanding of what the needs are under that regulation. And, three, in some ways, regulated parties need to have a starting point

of understanding how their conduct will be viewed.

And if you tell the world agencies are going to receive this generalized Skidmore deference that Justice Kavanaugh spoke about as no deference, essentially, persuasiveness really isn't, then they don't really have a starting point to understand how to conform their conduct because they have to wait until 13 circuit courts rule on an interpretation of a statute before really understanding what they have to do.

That last point is one that troubles me, which is regulated parties should know where to start, and the best people who can tell them is the agency who's responsible to the public for having sound interpretations or reasonable interpretations.

MR. HUGHES: Thank you, Your Honor. I'd like to respond both to the point about the history as well as the stability point.

To begin with -- with Your Honor's initial point about the underlying history, I agree if we look prior to the APA, there are cases that suggest in the statutory context

that a department or agency's interpretation of the statute deserves binding deference.

But, in the APA, Congress decided that there needed to be procedural protections to safeguard the interests of the public through notice-and-comment rule-making to provide the public the ability to participate in that law-making function that happens within the agency.

That was one of the critical innovations of the APA that imposed on past practice as a matter of congressional direction, and we think that's what's lacking here. But --

CHIEF JUSTICE ROBERTS: Counsel, to get back to the -- a little bit to the stare decisis question, I -- I think the issue depends at least in part about how much of a change you're making.

And one of the things I have trouble getting my -- my arms around is, if you start with Auer and recognizing the limitations on Auer that -- you know, that have accumulated over the years and you're changing from that to Skidmore deference, which I find hard to get my

hands around too -- I think I know more what a moiety is than I know what Skidmore deference is.

(Laughter.)

CHIEF JUSTICE ROBERTS: And I -- I just wonder exactly how much of a change at the end of the day you're talking about.

MR. HUGHES: Well, once we take into account SmithKline Beecham and Gonzales and the Court's consistent narrowing of Auer, I -- I think Your Honor is right that Auer has been narrowed to the point where it does have substantially less practical effects today than it does previously.

But I will say Auer is still used in a way that injects inconsistencies and instability into the legal system that I -- I believe also responds to Justice Sotomayor's --

CHIEF JUSTICE ROBERTS: Well, I suppose it depends -- I mean, it depends on the agency. It depends on the rule. It depends on the -- the -- the court. I mean, at some point, you're applying Auer -- you -- you consider the range of reasonableness and, you know, the confidence that a court has that the

agency is, you know, not found itself within those bounds is going to vary greatly from case to case.

The courts are going to take a more careful look in some cases than they are in others. And maybe that's -- that's part of the problem, but I -- I guess I'm not quite sure that I understand what you're saying when the -- the rules have the force and effect of law when they're subject to judicial review within a particular range and it's really quite imprecise what the range is.

MR. HUGHES: Well, I -- I think --

CHIEF JUSTICE ROBERTS: And as I say, maybe that's the problem, but --

MR. HUGHES: Your Honor, I do think that imprecision is quite the problem, but as long as Auer and Seminole Rock remain, that suggests that there will be a range of rules, I think a narrowed set of rules, but some rules that, if they make it through the gauntlet of Auer and Seminole Rock, do have the prospective force of law without going through the procedures that Congress identified that need -- that the agencies should undertake to have

that force and effect of law.

And I think this case is an example. I'd point the Court to another case recently that -- that highlights the instability. It's a decision -- an en banc decision of the Ninth Circuit, the Marsh case, that was decided in September of 2018 about the Fair Labor Standards Act and how the tip credit works for employees that sometimes work under a tips job and sometimes don't.

Well, the -- the en banc Ninth Circuit decided that case on the basis of Auer deference in reliance on the then-binding Department of Labor interpretation. It was not six weeks or seven weeks later that the Department of Labor rescinded the interpretation that the Ninth Circuit en banc rested on, and now the lower courts are having to figure out is the Ninth Circuit's en banc decision still binding interpretation of that regulation when --

JUSTICE GINSBURG: And what about --

JUSTICE ALITO: On the question --

JUSTICE GINSBURG: -- what about the lower courts? Let's -- let's say your argument

is accepted and Auer is overruled. There may have been a dozen or so cases, Auer cases in this Court, but there are probably hundreds in the lower courts.

So do all of those cases -- what happens to all of those cases where there was reliance on Auer in the lower courts?

MR. HUGHES: So I think from this Court's cases, we still have stare decisis, but to Your Honor's question about the lower courts, I -- I think the courts would have to wrestle to see if -- whether or not Auer was the rule of decision. But, as the Marsh case I just referenced underscored, those cases lacked the kind of stability that interpretations of statutes and regulations hold because they are constantly subject to revision overnight by any --

JUSTICE GINSBURG: But are you saying that there would be wholesale cases before the lower courts, lower courts that had relied on Auer, and the losing party then says, Court, vacate that decision because you premised it on Auer, and Auer is not good law?

MR. HUGHES: I think parties could

potentially advance arguments along those lines, Your Honor, but I don't think that increases instability any more than exists in the status quo, when those decisions are already subject to revision by the agency. I don't think --

JUSTICE KAVANAUGH: Your -- your argument is that notice and comment solves everything, right? I mean --

MR. HUGHES: Well, I think notice and comment is the scheme that Congress implemented into the APA as the one --

JUSTICE KAVANAUGH: In other words, this issue would go away if the agency did notice and comment for the guidance that --

MR. HUGHES: Well, prospectively, what our argument would -- would lead to is an area where there is far more prospective stability because once the -- a court decides the meaning of a regulation, that has durability, unless the agency changes the reliability --

JUSTICE KAVANAUGH: Can I get your reaction to the -- the thought that the lower courts have made notice-and-comment rule-making too difficult through various requirements,

requiring detailed explanations, making it hard to change regulations that have gone through notice and comment? Do you have a reaction to that? Because that may be one of the reasons that has pushed them into the more guidance rather than notice and comment in the first place.

MR. HUGHES: Well, Your Honor, I think notice and comment is what Congress required, and that's what the Court should adopt. If the Court is of the view that notice and comment has become more onerous than Congress intended, I think the solution would be to address that issue of notice-and-comment overreach, not to allow agencies to circumvent it.

If I may reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Francisco.

ORAL ARGUMENT OF GEN. NOEL G. FRANCISCO
ON BEHALF OF THE RESPONDENT

GENERAL FRANCISCO: Mr. Chief Justice, and may it please the Court:

Seminole Rock deference raises some problems in some applications, but it's been on

the books for decades, it has significant practical benefits, its practical problems can be addressed by reinforcing reasonable limitations on the doctrine.

I'd therefore like to address two key points. First, in its core applications, like Seminole Rock itself, where the agency provided public notice of its consistent interpretation, it has significant practical benefits. It promotes national uniformity, predictability, and political accountability because, if a rule is subject to multiple reasonable interpretations, the choice of which one to adopt is made by a single more politically accountable agency, rather than in dozens and perhaps hundreds of district -- different district courts across the country.

JUSTICE GORSUCH: Mr. Francisco, as I understand it, nobody left before us alive is willing to take Auer literally and it's just a matter of how -- how much revision to it we've already made. Is it enough? How much further should we go? Or should we just give up on it altogether?

And -- and you're asking us to keep on

going. And, as I understand it, there are six elements of your test. We have to decide whether the -- the regulation is ambiguous, whether the interpretation is reasonable, whether it's consistent, whether it was made by someone at a high level, whether there was fair notice, and whether it was made by somebody with expertise.

Is that a -- a recipe for stability and predictability in the law, or is that a recipe for the opposite?

GENERAL FRANCISCO: No, I absolutely think it is and it's a workable standard, Your Honor. I think our principal limitations are -- are consistent with existing law, though perhaps not -- not identical to it.

The requirement of genuine ambiguity is really what we think this Court's cases have always required, although there is language that we think ought to be replaced with the genuine ambiguity language.

JUSTICE GORSUCH: Well, people fight over whether there is ambiguity and what ambiguity means. They fight over what reasonableness means.

GENERAL FRANCISCO: Right.

JUSTICE GORSUCH: They fight over how consistent is consistent. And for the life of me, I don't know how high a level a person has to be before we're going to defer to him, or how much notice is fair, or how much expertise counts.

I'm -- I'm with Justice Breyer on moieties, but the people I think have the most expertise on what relevant evidence is, is probably John Kane, a federal district judge of about 40 years --

GENERAL FRANCISCO: Well --

JUSTICE GORSUCH: -- not -- not -- not an agency.

And under the rule you propose, every agency could define relevant evidence differently.

GENERAL FRANCISCO: No.

JUSTICE GORSUCH: What is -- what is -- well, if they have enough expertise, we're going to -- we're going to go down that road. And I -- I -- I guess I'm just wondering, at what point does this whole edifice just fall upon itself?

GENERAL FRANCISCO: Sure. Well, Your Honor --

JUSTICE GORSUCH: And lawyers will -- will enrich themselves and do well with this kind of test. But how are regulated people supposed to behave?

GENERAL FRANCISCO: Sure. And, Your Honor, there's a lot built into that question. But what I'd like to bring the focus on in -- in answering it is our strong interest in preserving Seminole Rock in its core applications where we actually think it has a significant amount of benefit to regulated parties.

Because you are right, there is a lot of disagreement amongst judges as to what a reasonable interpretation is.

As the Court said earlier this term, reasonable jurists can look at the language and, acting in good faith, come to different interpretations.

One of the virtues of Seminole Rock is that when you're facing multiple reasonable interpretations, you vest the decision-making authority -- excuse me -- in a single party

rather than multiple courts. And that's actually of a benefit to regulated parties because they don't actually have to litigate that thing in multiple courts across the country.

JUSTICE GORSUCH: Well, on that --

JUSTICE KAVANAUGH: The government --

GENERAL FRANCISCO: They can rely on the agency.

JUSTICE GORSUCH: -- on that -- on that, and I'm sorry, but, you know, you say -- you keep saying how much of a benefit it is for regulated parties and their reliance interests, private reliance interests. And I must say I cast a skeptical eye when the government is -- is -- is worried about private reliance interests.

And every private party before us says their interests in stability would be better served by -- by eliminating this rule altogether. And it's not just the Chamber of Commerce. It's -- it's the Farm Bureau. It's the national lawyers engaged with the immigration system every day and are faced with claims of Auer deference for single member

decisions from the BIA that are unreasoned.

And it's the veterans before us, the American Legion, the lawyers who represent veterans every day before the veterans' courts who are outraged by Auer and who say it doesn't serve their reliance interests and it provides highly unstable rules that they have to guess at all the time.

Why should I credit the government's protestations that it is serving private reliance interests?

GENERAL FRANCISCO: Well, Your Honor, I think that it benefits both those private reliance interests, and there are a lot of private reliance interests that aren't represented here before the Court, as well as interests in stability and political accountability.

But, if I could sort of use an example to illustrate the point, suppose you got a rule that is genuinely ambiguous. It's subject to multiple reasonable interpretations.

There are a couple of ways to go. You could do notice-and-comment rule-making. That takes a very long period of time. In the

meantime, there are two things to do.

You can litigate the case in dozens of district courts across the country and hope that you can convince all the courts to reach the same conclusion, or you can defer to the agency's reasonable choice amongst what is, by definition, reasonable alternative definitions.

And we think that is the benefit to Seminole Rock. In the face of those multiple reasonable interpretations, you're vesting decision-making authority in a single, more politically-accountable party.

JUSTICE KAVANAUGH: Judges -- judges disagree all the time, though, on the threshold question of whether something's ambiguous to begin with. And that creates a whole sideshow here.

And -- and one of my broader questions is why can't the government just do notice and comment? You said it takes a long time, and that may be a problem with some lower court impediments to notice and comment, I -- I share that concern, but if notice and comment were more efficient, why not just do notice and comment?

GENERAL FRANCISCO: So there are two parts to that question. First, on the reasonableness and degree, I completely take your point, that judges can come to a different conclusion as to what is ambiguous and what is not ambiguous.

JUSTICE KAVANAUGH: It happens all the time, all the time.

GENERAL FRANCISCO: And that's not a problem that Seminole Rock creates or a problem that Seminole Rock can solve. It's something that's just endemic to this process.

But what Seminole Rock does do, is there's going to be a lot more agreement on whether something is subject to a range of reasonable readings than there is on pinpointing the precise, accurate, theoretically correct reasoning. So Seminole Rock reduces a large amount of uncertainty in that respect.

As to notice and comment, look, we -- we take the law as it is, as it's handed down to us by this Court and other courts. And as it's handed down, notice-and-comment rule-making is a cumbersome procedure. That

doesn't mean it doesn't have benefits. It has extraordinary benefits.

That being said, when you're looking at a -- a rule that is by definition subject to multiple reasonable readings --

JUSTICE KAVANAUGH: Do you agree from your study of this issue that the impediments to efficient notice-and-comment rule-making have pushed the government into doing more things in this manner?

GENERAL FRANCISCO: Your Honor, I'm not prepared to -- to -- to say I agree or disagree with that. I certainly understand Your Honor's point.

But I guess the simpler point that I'm trying to make is that, given that it is what it is --

JUSTICE KAGAN: Do you happen to know what the average notice-and-comment rule-making is, how long it takes?

GENERAL FRANCISCO: Your Honor, I don't know the answer to that question. I apologize. But I --

JUSTICE SOTOMAYOR: I haven't seen a large decrease in notice and proposed rules --

GENERAL FRANCISCO: No, Your Honor, I haven't.

JUSTICE SOTOMAYOR: -- in the Federal Register.

GENERAL FRANCISCO: I -- I haven't. And -- and -- and, again, though, the --

JUSTICE SOTOMAYOR: Your -- your -- your opposite -- your colleague on the other side talked about one notice and comment that received 45 changes. So the rule is still being used. Notice and comment is still being used.

GENERAL FRANCISCO: Oh, it's definitely still being used, Your Honor. And -- and it -- it is a very important process, but it doesn't undermine the benefits of Seminole Rock because, while you're going through that period, you're -- you're facing a rule that, by definition, is ambiguous. And you've got to figure out what to do with it.

JUSTICE SOTOMAYOR: I -- I -- I do think that --

CHIEF JUSTICE ROBERTS: Counsel, one of -- as a practical matter, one of two things happens: The judge gets deeply into the

question before him or her and does the work and comes up with something that looks like the right answer. And once you've done that, everything else looks pretty unreasonable. Or the judge just starts looking at it and flipping through it and says, boy, there's a wide range here, could be this, could be that, and you defer to the agency.

Now, if I think that that's what happens as a practical matter, which rule should I adopt?

GENERAL FRANCISCO: Your Honor, I think you ought to adopt ours, because we --

(Laughter.)

GENERAL FRANCISCO: -- because we actually place an --

CHIEF JUSTICE ROBERTS: Ours, you mean yours, or Auer the case?

(Laughter.)

GENERAL FRANCISCO: The -- the position of the United States, Your Honor. And that's because we really do put a lot of emphasis on that first requirement of genuine ambiguity.

We do think that courts should do --

CHIEF JUSTICE ROBERTS: So you think what the judge ought to do is do all -- extensive amount of work and come up what looks to him or her as the right answer?

GENERAL FRANCISCO: I think what the judge needs to do is an extensive amount of work at the front end to determine if there is, in fact, genuine ambiguity within the language of the rule itself, much as like it's required to do under Chevron. You look at the --

JUSTICE KAVANAUGH: But the problem is -- the problem is that the judge, judges, could come up with an interpretation that says the agency's interpretation of the regulation is wrong, and this is a really important interpretation, has real effects on many people, and it's wrong, but, nonetheless, rule for the agency under your theory because -- and under the Chief Justice's question -- because there's some ambiguity in it and, therefore, defer to the agency, even though the judges might unanimously think it's wrong. And doesn't that trouble you?

GENERAL FRANCISCO: No, Your Honor, because, again, I don't think that is quite the

nature of the inquiry. I think that there are lots of statutes --

JUSTICE KAVANAUGH: I think that -- I think that I disagree. I think that's what happens in judicial conference rooms.

GENERAL FRANCISCO: Okay. And I'm not going to obviously question you on that.

JUSTICE KAVANAUGH: Which is the point I don't think this is the -- I don't think the government's reading is the best reading, but it's sufficiently ambiguous that I'll rule for the government. That happens --

GENERAL FRANCISCO: Yeah. So -- so I guess I --

JUSTICE KAVANAUGH: -- on big cases.

GENERAL FRANCISCO: So I guess I have a couple of responses to that.

First of all, in our search for what the best reading is, I think that often the agency's interpretation is highly relevant to understanding what the best reading is of a complicated regulatory regime.

Secondly, I think it is often the case that there is -- it is not clear what, in fact, the best reading is when you are facing

multiple reasonable constructions.

And that, again, is the virtue of Seminole Rock in those core cases when you're facing multiple reasonable constructions, and you have the benefit of the views of an agency that's administering a complicated regulatory scheme, you vest the choice on which one to pick in a more politically-accountable agency, rather than having to fight it out in different courts across the country, because different judges are going to come to different conclusions as to what the most reasonable or theoretically best understanding of a particular rule or regulation is.

JUSTICE ALITO: Should we be concerned about the effect that either overruling Auer and Seminole Rock or taking your position will have on cases in which courts have interpreted regulations based on those principles and now, whichever course we take, those will be thrown into doubt? And if that's a real concern, is it more of a concern -- is it much less of a concern if we take your proposed route than if we overrule Auer and Seminole Rock completely?

GENERAL FRANCISCO: I think it's far

less of a concern under our rule because -- under -- under the United States' rule, because under my friend on the other side's position, every single regulation that's currently on the books whose interpretation has been established under Seminole Rock now has to be relitigated anew. So I think --

JUSTICE GORSUCH: Well, I guess I don't -- I don't understand that response, because it seems to me you've made the point that there are going to be a great many regulations where the outcome would be the same with or without Auer. You make that argument in this case.

GENERAL FRANCISCO: Uh-huh.

JUSTICE GORSUCH: So we'd have to know how many of those there are. We'd have to know how many would be problematic even under your -- your modified test, and we don't know that. A lot of these regulations get supplanted and statutes disappear and get modified, and those would have to be accounted for too.

So, at the end of the day, I -- I didn't see anything in the briefs other than rank speculation on this point.

GENERAL FRANCISCO: Well, I think that one thing that doesn't require speculation is to know that their position would be more disruptive than ours, because theirs would require everything to be revisited. Even under the most aggressive interpretation of our view, it wouldn't require everything to be interpreted.

But, if you look at this Court's cases, and -- and I'm not representing them as a random sample, but, if you look at them as a sample, I don't think our rule would be particularly disruptive of -- at all, if you focus on our requirement of inconsistency. We've identified three of this Court's cases that arguably applied Seminole Rock in the face of inconsistent interpretations.

In each three of those cases, the application of Seminole Rock appeared to be makeweight; in other words, the Court first explained why the agency's interpretation was likely the best one but then applied Seminole Rock in order to confirm that decision.

So I think our position would be significantly less disruptive than my friend's

on the other side.

JUSTICE BREYER: Well, when you say --

JUSTICE KAGAN: General, a similar --

JUSTICE BREYER: I mean, "best" has come up about 50 times, and I'm a little curious about that. Jerome P. Frank thought there are no cases like Justice Kavanaugh described, and I believe Justice Kavanaugh was closer to it, and so I think he's probably right. But which is the best?

I mean, we know one thing: We know that democratically speaking, agencies aren't very democratic, but there is some responsibility and there are one group of people who are still less democratic, and they're called judges.

So if, in fact, you believe that the best solution -- where there's real ambiguity, and you just don't know, the best solution is, in our country, a democratic solution, well, maybe the agency is the institution that's closer to it.

Now you're just supposed to say yes.

(Laughter.)

GENERAL FRANCISCO: Certainly, I would

say yes -- certainly, I would say yes in the context of Seminole Rock itself because that really does underscore our key point. Seminole Rock only applies when a rule is genuinely ambiguous and that after applying --

JUSTICE KAVANAUGH: Do you --

GENERAL FRANCISCO: -- all of the ordinary -- after applying all of the ordinary tools of construction, it's subject to multiple reasonable readings.

And in that context, we do think it promotes democratic accountability by vesting it in a more politically accountable agency.

JUSTICE SOTOMAYOR: That's why I have a problem with Justice Kavanaugh's use of the word "bad" interpretation, because bad interpretation sounds to me like an unreasonable interpretation. It can only be bad if it's unreasonable. And that already is taken care of by the Auer standard.

GENERAL FRANCISCO: By the requirement that it be genuinely ambiguous, like --

JUSTICE SOTOMAYOR: A, genuinely ambiguous and, B, reasonable.

GENERAL FRANCISCO: Reasonableness.

Yes.

JUSTICE SOTOMAYOR: Reasonableness can't, I don't think, mean a bad interpretation that's not consistent with the statute or -- or not consistent with either the text, the context, et cetera.

So, if it's reasonable, then there has to be a basis for the interpretation in the statute.

GENERAL FRANCISCO: I -- I think I generally agree with that, Your Honor. And to that I would add two points. I think that when you're talking about interpreting complicated regulatory regimes, the agency's understanding of it often is going to be highly relevant to determining what the -- and I'm going to put it in quotes -- "best" interpretation is, and as I've already said, if you poll 50 judges on a complicated regulatory regime, you're often going to come up with multiple different best interpretations. And that, again, underscores the benefit of Seminole Rock in those core applications.

JUSTICE KAVANAUGH: You agree -- you agree, I think, with taking Footnote 9 of

Chevron, using all the tools of statutory construction, and -- before you conclude that the ambiguity remains in this context? I think you've said that a few times.

GENERAL FRANCISCO: I -- I absolutely think that is part of the -- the genuine -- determining genuine ambiguity.

JUSTICE KAVANAUGH: And when you do that, you usually eliminate or greatly reduce the number of cases where there remains an ambiguity. Do you agree with that?

GENERAL FRANCISCO: And not only that, but you also reduce the range of ambiguity, because a reasonable interpretation has to fall within the zone of ambiguity that remains in the rule after you apply those ordinary tools of construction.

And so that's why -- and I know my friend on the other side didn't really get into the separation of powers issue, but that's why we don't think that there's any substantial separation of powers question here, because the agencies are, in fact, subject to substantial control by both Congress and by the courts.

JUSTICE GORSUCH: Well, that's --

JUSTICE KAGAN: General, can I ask about a slightly broader version of Justice Alito's question? He asked about reliance, but thinking about all the stare decisis factors, when I started asking Mr. Hughes about them, he immediately said: Well, the government has just as big a problem on those factors.

So does it?

GENERAL FRANCISCO: Absolutely not, Your Honor, because what we're arguing for is that Seminole Rock be retained in its core applications, which, frankly, we think are the areas where it is the -- the most important, both to regulated parties and to agencies.

And it is always more faithful to -- to stare decisis principles to retain a doctrine at its core, while perhaps imposing limitations on the edge that simply recognize that, in the course of practical application, practical issues have been identified.

And that's why we think that you ought to reinforce the requirement of genuine ambiguity, you ought to reinforce the -- the requirement that you wouldn't apply it to inconsistent interpretations, and we don't

think the agency should get Seminole Rock deference for secret, private interpretations. It ought to give public notice of its interpretation, as it did in Seminole Rock itself.

But we think that when you have those principal limitations, you've largely addressed the practical problems of Seminole Rock, and what you're left with, in our view, are the practical benefits of Seminole Rock.

So even if you think it was wrongly decided as an original matter, it's got significant practical benefits, its practical problems are manageable, it's been on the books for decades, and this is something that Congress could fix if it believed that this Court has misgauged legislative intent in adopting the Seminole Rock doctrine.

JUSTICE KAVANAUGH: You -- you said give public notice. That's one of the requirements, right?

GENERAL FRANCISCO: Yes.

JUSTICE KAVANAUGH: I think the other side would say just add "and comment."

GENERAL FRANCISCO: Your Honor, and I

think that's exactly their position. The seminal feature --

JUSTICE KAVANAUGH: And what's -- and what's wrong with that?

GENERAL FRANCISCO: The seminal feature of Seminole Rock is, of course, that you don't require notice and comment. And I think that your -- your question gets back to the colloquy that we had before.

While you're going through that notice-and-comment process, you're simply left with an enormous amount of uncertainty because you're left with a rule that everyone has already concluded is on its face subject to multiple reasonable interpretations.

And to say that the alternative is to have multiple courts across the country struggle with that is --

JUSTICE GORSUCH: Well, Mr. Francisco, you keep telling us about the benefits of that, but the benefits of notice and comment are, among other things, people will know prospectively what rules govern them --

GENERAL FRANCISCO: Yes.

JUSTICE GORSUCH: -- and not be

sideswiped later by a bureaucracy. You can call it democratically accountable if you wish.

GENERAL FRANCISCO: Right.

JUSTICE GORSUCH: I don't know, people might disagree. At any rate, a bureaucracy coming up with an amicus brief or a single-member opinion in a BIA decision involving an immigrant or, in this case, a veteran seeking benefits, who in the middle of a case is confronted with a new interpretation never seen before, all right, those -- that's the reality.

And I'm not sure how that serves democratic processes or the separation of powers, as opposed to having an independent judge. The one thing you're going to know is you're going to have an independent judge decide what the law is in your case, consistent with the statute that says an independent judge shall decide all questions of law.

That seems to me a significant promise, especially to the least and most vulnerable among us, like the immigrant, like the veteran, who may not be the most popular or able to capture an agency the way many

regulated entities can today.

GENERAL FRANCISCO: Well, Your Honor, there's a -- there's a -- there are a few things built into that. Let me start by saying that I think that our public notice requirement ensures that regulated parties -- that the agency can't rely on secret interpretation. So it makes sure that its interpretation is out there in the public and members of regulated parties --

JUSTICE GORSUCH: So Auer is gone then. You've -- you are asking us to overrule Auer itself.

GENERAL FRANCISCO: I --

JUSTICE GORSUCH: Because that's what happened in Auer.

GENERAL FRANCISCO: No.

JUSTICE GORSUCH: It was an amicus brief.

GENERAL FRANCISCO: No, Your Honor. I guess -- I guess I would probably argue that I think an amicus brief filed in this Court, given the high-profile nature of litigation in this Court --

JUSTICE GORSUCH: That's good enough?

GENERAL FRANCISCO: -- satisfies the public notice requirement, because it puts the world on notice that this is, in fact, the agency's position.

But to go to your larger point, I think as this Court held in the Martin case, Seminole Rock deference reflects --

JUSTICE GORSUCH: A person who litigates against the government for years, for his disability benefits as a veteran of the United States, is on public notice when the case arrives here and you file an amicus brief?

GENERAL FRANCISCO: Well, Your Honor, we are much less concerned with the outcome of this particular case than we are with preserving Seminole Rock in its core applications.

But to go to this particular case, remember, the VA has a system where the VA itself is charged with assisting veterans through what can sometimes be a complex process.

And here it was the VA itself that identified the potential reconsideration pathway that would have provided the -- the

veteran with the benefit of retroactive benefits and the VA itself that also explained why it didn't apply to the veteran.

So I think in this particular context of this case, this -- this was a very fair process. That being said, we aren't particularly concerned with this specific case as we are with preserving Seminole Rock deference in its core applications where we do think it has the most significant amount of benefits.

JUSTICE ALITO: If we were --

GENERAL FRANCISCO: And if --

JUSTICE ALITO: If we were writing on a clean slate, what would you say is the basis for any version of Auer or Seminole Rock? Is it based on some kind of delegation theory or what is its -- what is its conceptual basis?

GENERAL FRANCISCO: I think the best conceptual basis is what this Court gave it in the Martin case, and that's where it said that Seminole Rock rests on a presumption of legislative intent, that Congress presumed that courts would defer to an agency's reasonable interpretation of its otherwise ambiguous rules

as part of its delegated rule-making authority.

Now, I think that members of this Court may debate whether that was or wasn't an accurate understanding of legislative intent, but this late in the day, I don't think that's any longer the relevant question because it's been on the books for decades.

JUSTICE KAGAN: And -- and usually those kinds of presumed legislative intent are based on other views, right? They're based on a view -- of course, Congress is presumed to want the agencies to do this because -- fill in the blanks. Is it expertise? Is it political accountability? Is it uniformity? Is it a combination of those things?

GENERAL FRANCISCO: I think that's fair. I think all -- all -- all of the above are -- are fair considerations of what those types of presumptions are often based on.

And it also reflects the fact, and this was the second portion of the point I was going to be making on the separation of powers issue, is that when an agency acts pursuant to a lawful delegation from Congress -- and we can fight over what that means -- but as long as

you've got a lawful delegation from Congress, at the end of the day it doesn't really matter if what the agency is doing looks adjudicative, looks executive, or looks legislative because in every one of those instances the agency is effectuating executive power.

It has to be effectuating executive power, as --

JUSTICE SOTOMAYOR: General --

GENERAL FRANCISCO: -- Justice Scalia --

JUSTICE SOTOMAYOR: -- you may not --

GENERAL FRANCISCO: -- has made clear.

JUSTICE SOTOMAYOR: -- you may not care about the outcome of this case but we're going to have to at some point. And if we overrule Auer, we can just kick it back, okay, but, if we don't, let's assume we were to accept your approach, what did the district court -- what did the court below, not the district court -- what did the court below do wrong? How would you correct it? How would you advise us to advise judges to approach the Auer question?

GENERAL FRANCISCO: Sure.

JUSTICE SOTOMAYOR: Write my opinion for me on that.

(Laughter.)

JUSTICE SOTOMAYOR: Okay?

GENERAL FRANCISCO: Right, so, a couple of points, Your Honor. And if I could first say I didn't mean to say that we don't care about the outcome of this case, because we deeply care about the rights of our veterans and we do care about the outcome of -- of all of these types of cases.

JUSTICE SOTOMAYOR: By the way --

GENERAL FRANCISCO: But the graver issue here --

JUSTICE SOTOMAYOR: -- the biggest argument that your adversary has is that the agency didn't take into account the -- the assumption that interpretations should favor veterans.

GENERAL FRANCISCO: Uh-huh.

JUSTICE SOTOMAYOR: So deal with all of that.

GENERAL FRANCISCO: Sure. Sure. So we do care about how the specific case comes out. But in terms of how it would apply to

this case, at the end of the day I actually don't think the Federal Circuit should have applied Seminole Rock deference to the VA Board's decision in this case for two reasons.

First, and this is one you might well disagree with us on, we think we had the better interpretation of the regulation, and so we don't think you ever get to Seminole Rock, but if you disagreed with us on that, one of the key questions and under Seminole Rock and under Chevron --

JUSTICE SOTOMAYOR: Do you think their reading is unreasonable?

GENERAL FRANCISCO: We do. And -- and -- and, secondly, as under Seminole Rock --

JUSTICE GORSUCH: Let's say we disagree with you on that because it is the usual interpretation of relevant evidence found in the Federal Rules of Evidence, so it's not crazy.

GENERAL FRANCISCO: So -- so I'm going to my -- that would -- my second point would be -- help address that.

Assuming you've got some ambiguity and it would otherwise trigger Seminole Rock, under

Seminole Rock and Chevron you only defer if the determination reflects the considered judgment of the agency as a whole.

And given the way the VA Board is structured, there are something like 98 members of the VA Board. They issue, I think, over 80,000 decisions a year. Their proceedings are ex parte. They're all individual member decisions. They're not made in panels. And I think -- and none of them have any precedential value.

Given that suite of factors, we don't think that any individual Board decision by the VA Board reflects the considered judgment of the agency as a whole --

JUSTICE GORSUCH: Wow.

GENERAL FRANCISCO: -- as a --

JUSTICE GORSUCH: So you would have this Court and -- and courts across the country judge agency decisions as to how considered they are?

GENERAL FRANCISCO: No, Your Honor. That's --

JUSTICE GORSUCH: Isn't that a -- isn't that a bit -- asking a -- a bit of

inter-branch disrespect?

GENERAL FRANCISCO: I don't think so at all, Your Honor. It's exactly what this Court said that the rule was in the Mead case when you're -- when you're undertaking Chevron deference.

JUSTICE GORSUCH: No, in Mead --

GENERAL FRANCISCO: It's actually --

JUSTICE GORSUCH: No, in Mead we said that if -- if Congress didn't delegate it in those cases. Here we're -- we're pay past that. We're on factor four or five of your six-part test.

GENERAL FRANCISCO: But I think, both --

JUSTICE GORSUCH: And -- and -- and a judge has to decide how considered --

GENERAL FRANCISCO: Yeah.

JUSTICE GORSUCH: -- the agency decision is.

GENERAL FRANCISCO: Right. But I think in Mead, both the majority and the dissent agreed that you wouldn't get to Chevron deference unless the decision reflect the considered views of the agency as a whole.

They just disagreed over whether or not the particular decision issued in that case, the customs letter, reflected that considered judgment.

So I don't think that's an innovation that we're asking for. That's simply an elemental aspect of it.

But to go to your -- the other parts of your question, Your Honor, when you get down to the application of the veterans canon, the Court, of course, didn't grant certiorari on the application of the veterans canon, but assuming that it applies in the context of regulations, we don't think that it would apply in Petitioner's favor here because we believe that that is a tie-breaking canon that only applies when two interpretations are equally plausible.

And here we think that our interpretation, even if you don't think it is the theoretically best one, we think that it is more plausible than Petitioner's and, therefore, you wouldn't get to the application of the veteran's canon.

But, again, our principal concern on

behalf of both the VA and the other agencies throughout the United States is in preserving Seminole Rock in its core applications because that is an issue that transcends the facts of this case.

JUSTICE SOTOMAYOR: So if I'm understanding your views, in answer to Justice Gorsuch, you're basically saying a decision by, let's assume, a BIA court is not enough, unless a BIA what?

GENERAL FRANCISCO: No, not --

JUSTICE SOTOMAYOR: Unless that the agency has --

GENERAL FRANCISCO: No -- yeah, not -- not at all.

JUSTICE SOTOMAYOR: Tell me when they count --

GENERAL FRANCISCO: Sure.

JUSTICE SOTOMAYOR: -- and when they don't.

GENERAL FRANCISCO: Not at all necessarily, Your Honor. But I think what this Court's decisions have been clear about across the board is that whoever is -- whoever issues the decision on which we are seeking deference

has to be able to speak for the agency as a whole. And different agencies have different ways of doing that.

We don't think that, given the suite of factors at issue specifically with respect to the VA Board, meets that standard because there are so many different indicia suggesting that an individual Board decision doesn't reflect the considered views of the VA as a whole, as to the meaning of its regulations.

CHIEF JUSTICE ROBERTS: Thank you, General.

Three minutes, Mr. Hughes.

REBUTTAL ARGUMENT OF PAUL W. HUGHES
ON BEHALF OF THE PETITIONER

MR. HUGHES: Thank you, Mr. Chief Justice.

And I'd like to begin, and we thank the General for the clear recognition here that deference does not apply in this case or other cases like it. We certainly agree with that conclusion.

But we still believe that the appropriate resolution of this case is to overturn Seminole Rock and Auer in their whole

because it's critical to restore the importance of notice and comment rule-making that Congress thought was a critical check to bring democratic accountability to the agencies.

We certainly agree that agencies have a very substantial role to play in policy-making, but Congress made the judgment that the way that that is done in a democratic way accountable to the population is through notice and comment rule-making, such that the regulated public can provide their views.

And that also accounts with the theoretical underpinnings of how this Court has explained that deference can be appropriate to agencies.

There are two things that are required: First, a delegation of the subject matter but, second, that the agency acts in the particular manner that Congress has delegated the agency to -- to act within.

In this context, as we have explained, the particular manner that the agency identified was through rule-making that provides the public that ability to participate. And that's the fundamental

problem.

My -- my second --

JUSTICE GINSBURG: What -- what is your answer to the delay? And -- and what do we do in the interim, one year, two years, three years?

MR. HUGHES: Well, a few things about the delay, Your Honor. That's part of the balance the APA struck. If the agency wants to move faster, it can use interpretive rules that bring consistency to the agency but don't have binding effect in law -- in courts. They would have the -- the -- the effect of Skidmore.

In the event that there is some sort of emergency situation, the APA contemplates that for allowing for regulations pursuant to the good cause exception, if the agency can show that there is something that is akin to an emergency that would warrant something like a preliminary injunction in court.

So Congress has provided for those sorts of emergency situations when the delay in -- in the regulatory process would actually pose some kind of practical problem.

But to turn additionally to the

practical problems that exist in Auer deference, as the Chief Justice was explaining, I think you get a non-satisfactory result regardless of how courts apply it.

If courts apply it as they did in this case to say we don't have to -- to really do much statutory or -- or textual construction to determine if both sides have an argument that looks plausible on the page, that we -- then we defer, that is not a particularly satisfactory answer.

By contrast, if courts go far down the road of step one and do the interpretation, but then ultimately decide, as many courts have had to do, that although we think the -- the agency has it wrong, as a matter of -- of interpretation, we still have to defer to the agency because it's close enough, that's also not a satisfactory answer.

JUSTICE SOTOMAYOR: By the way, your -- the General said if we adopt your interpretation and rescind Auer deference in total, that every case that relied on Auer deference would be subject to new litigation.

MR. HUGHES: Well, Your Honor, I think

as I explained with the Marsh example earlier, all of those cases are already fundamentally --

JUSTICE SOTOMAYOR: No --

MR. HUGHES: -- unstable --

JUSTICE SOTOMAYOR: -- but they're still going to come to court for courts to decide if that's true or not. Every losing party under prior Auer deference litigation is going to come to court to argue that it -- under its reading it has the better reading. It could be shot down but it's going to still argue it.

MR. HUGHES: If I may, Your Honor?

CHIEF JUSTICE ROBERTS: Yes.

MR. HUGHES: I don't think that increases any instability in the aggregate because the existing circumstance is completely unstable.

However, if prospectively Auer does not apply, that is what ultimately leads to stability because interpretations of regulations would just be like interpretations of statutes that would have binding effect absent the agency or Congress going through the process that's constitutionally and statutorily

proscribed for amending the underlying text.

CHIEF JUSTICE ROBERTS: Thank you, counsel, General. The case is submitted.

(Whereupon, at 11:10 a.m., the case was submitted.)