SUPREME COURT OF THE UNITED STATES

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JAMES L. KISO	₹,)			
	Petition	er,)			
v	•) No	o. 1	18-15	
ROBERT WILKIE	, SECRETA	RY OF)			
VETERANS AFFA	IRS,)			
	Responde	nt.)			
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Pages: 1 through 73

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1	IN THE SUPREME COURT OF THE UNITED STATES	
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4	JAMES L. KISOR,)	
5	Petitioner,)	
6	v.) No. 18-3	15
7	ROBERT WILKIE, SECRETARY OF)	
8	VETERANS AFFAIRS,)	
9	Respondent.)	
10		
11		
12	Washington, D.C.	
13	Wednesday, March 27, 2019	
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15	The above-entitled matter came or	n for
16	oral argument before the Supreme Court of the	9
17	United States at 10:09 a.m.	
18		
19	APPEARANCES:	
20	PAUL W. HUGHES, ESQ., Washington, D.C.;	
21	on behalf of the Petitioner.	
22	GEN. NOEL G. FRANCISCO, Solicitor General,	
23	Department of Justice, Washington, D.C.;	
24	on behalf of the Respondent.	
25		

1	CONTENTS	
2	ORAL ARGUMENT OF:	PAGE:
3	PAUL W. HUGHES, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	GEN. NOEL G. FRANCISCO, ESQ.	
7	On behalf of the Respondent	32
8	REBUTTAL ARGUMENT OF:	
9	PAUL W. HUGHES, ESQ.	
LO	On behalf of the Petitioner	68
11		
L2		
L3		
L4		
15		
L6		
L7		
18		
L9		
20		
21		
22		
23		
24		

1	PROCEEDINGS
2	(10:09 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument this morning in Case 18-15, Kisor
5	versus Wilkie, the Secretary of Veterans
6	Affairs.
7	Mr. Hughes.
8	ORAL ARGUMENT OF PAUL W. HUGHES
9	ON BEHALF OF THE PETITIONER
10	MR. HUGHES: Thank you, Mr. Chief
11	Justice, and may it please the Court:
12	The government now appears to agree
13	with our principal contention, deference does
14	not apply in this case. The Court should
15	arrive at that result by overturning the
16	doctrine of Seminole Rock and Auer deference in
17	its entirety. Agencies may issue a wide array
18	of rules, interpretations, and
19	JUSTICE SOTOMAYOR: Even if the best
20	reading of the statute is the SG's in this
21	case?
22	MR. HUGHES: Well, Your Honor, we
23	JUSTICE SOTOMAYOR: Making making
24	that assumption, why do we need to reach that
25	broader issue?

- 1 MR. HUGHES: Well, Your Honor, we
- 2 think we have the best reading of the
- 3 regulation. Of course --
- 4 JUSTICE SOTOMAYOR: I know you think
- 5 that, but this was a hypothetical.
- 6 MR. HUGHES: Well, Your Honor, the
- 7 Federal Circuit below rested its decision on
- 8 complete reliance on Auer deference, so we
- 9 think that that is the principal question that
- 10 was presented by the Federal Circuit.
- 11 So we think the first order of
- 12 business is to determine whether or not the
- 13 Federal Circuit was correct in deciding that
- 14 Auer deference resolved this case.
- JUSTICE GINSBURG: But the government
- tells us it's really beside the point because
- 17 not only -- well, either the regulation is
- unambiguous or, if there's any ambiguity, the
- 19 Federal Circuit's reading, the -- the Veterans
- 20 Administration's reading is by far the better
- 21 reading.
- MR. HUGHES: Your Honor, the Federal
- 23 Circuit, though, relied on Auer deference
- 24 because the government asked the Federal
- 25 Circuit to do so. The government expressly

- 1 argued to the Federal Circuit that Auer 2 deference applies in this case, and the Federal 3 Circuit took the government's invitation to 4 rest its decision on Auer deference. 5 So I think this case does squarely 6 present that question because of the 7 government's own argument before the Federal 8 Circuit, which the Federal Circuit adopted. 9 And that is, I believe, both the premise of the 10 petition and the question on which the Court 11 granted was to resolve whether or not Auer 12 deference --13 JUSTICE GORSUCH: So could you turn to 14 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
- 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

argument is better than the status quo, and we

21

25 the Veterans Court, so we certainly think it's

- 1 superior to what currently exists.
- We don't think, though, it's the --
- 3 ultimately the right answer for a few reasons.
- 4 The first is the most important practical and
- 5 legal problem with Auer deference is it is a
- 6 circumvention of the notice-and-comment
- 7 requirements that Congress has imposed
- 8 generally in the APA, as well as in particular
- 9 statutory schemes, including this one.
- The government's rule still allows
- 11 agencies to put a thumb on the scale without
- 12 providing --
- JUSTICE SOTOMAYOR: I'm sorry, but
- 14 that -- that's not quite true. It -- I don't
- think that here it was an issue of them trying
- 16 to avoid notice and comment. New legal issues
- arise normally in adjudications, and that's
- 18 what happened here.
- 19 It's not like they should have
- 20 anticipated that they needed to be more
- 21 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
- 25 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
- 3 with all of that, which is to say the agency
- 4 can do these things, it can be precedential
- 5 with respect to the agency, it can bind future
- 6 agency adjudicators.
- 7 The only question is for that agency
- 8 activity to also subsequently have legal
- 9 binding effect in court, what did Congress
- intend the procedures for the agency to
- 11 undertake for the agency's action to have
- 12 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
- 15 of law, it acts through --
- 16 JUSTICE GINSBURG: But does it --
- 17 MR. HUGHES: -- notice-and-comment
- 18 rule-making.
- 19 JUSTICE GINSBURG: -- does it really
- 20 have the force of law? Because we made it
- 21 plain that Auer does not call for blind
- 22 deference. The court must, first of all, agree
- that the regulation is, indeed, ambiguous and
- that the agency interpretation is a reasonable
- one.

1	MR. HUGHES: Your Honor, there's
2	certainly limitations on when Auer deference
3	applies, but the maintenance of Auer deference
4	means that there are a range of cases in which
5	the agency's views that did not go through
6	notice and comment, did not provide the public
7	safeguards, still will have binding effect on
8	the courts.
9	And it's that range of cases that this
10	is one of which we think is is the ultimate
11	problem with Auer deference and why the Court
12	should depart from that doctrine.
13	CHIEF JUSTICE ROBERTS: Well, only
14	only with some degree, and it's a matter of
15	debate how much of a degree, but only with some
16	degree of sanction by by the court, right?
17	At least the court has to determine that the
18	agency's interpretation is a reasonable one.
19	MR. HUGHES: That's true, Your Honor,
20	but what happens in cases like this is the
21	regulated public is not able to participate in
22	the underlying law-making process that leads to
23	the ultimate rules. And that is not just some
24	speed bump along the administrative process.
25	This matters as a practical matter a great

- 1 degree. 2 And I think one example that I can 3 offer is at Footnote 4 of the government's 4 brief, the government recognizes that just two 5 months ago, the VA made substantial changes to 6 this regulatory scheme via notice-and-comment 7 rule-making. We went back and looked to see 8 what happened in that scheme, and what we found 9 was the VA issued a notice of proposed --10 proposed rule-making in August of 2018. 11 The VA said here's the existing 12 regulation, here are the several changes that 13 we think we should make to it, here is the text 14 of what those changes will look like. 15 Regulated public, what do you think about this? 16 They got comments from all over, including the Vietnam Veterans of America, the 17 Paralyzed Veterans of America, the National 18 19 Organization of Veterans' Advocates, and 20 Then, in January, when the VA released others. 21 its final rule, we went and counted, it made 45 22 material changes from what it initially 23 proposed to do to what it ultimately did in the
- 25 Those 45 changes mattered quite a

24

regulations in response to the public comments.

- 1 great deal because the regulated public was
- 2 able to participate.
- 3 CHIEF JUSTICE ROBERTS: Of course,
- 4 they didn't --
- 5 JUSTICE ALITO: If we searched
- 6 through --
- 7 JUSTICE BREYER: But, as a practical
- 8 matter, you've read the SG's brief, I mean,
- 9 there are hundreds of thousands, possibly
- 10 millions of interpretive regulations. I mean,
- 11 they give an example, one of them, where the
- 12 Court deferred to the understanding of the FDA
- that a particular compound should be treated as
- 14 a single new active moiety, which consists of a
- 15 previously approved moiety, joined by a
- 16 non-ester covalent bond to a lysine group. Do
- 17 you know how much I know about that?
- 18 (Laughter.)
- 19 JUSTICE BREYER: Right, exactly. And
- 20 -- and that's all over the place, so they're
- 21 not all like that. Do you know how long it
- 22 took the FTC to make its first rule under
- 23 rule-making? I think the answer was seven
- years, okay? And I think a lot of them were
- 25 made more quickly.

1 But what you're doing is saying, 2 instead of paying attention to people who know 3 about that, but rejecting it if it's 4 unreasonable, the judges should decide. I mean, I want to parody it, but, I mean, this 5 6 sounds like the greatest judicial power grab 7 since Marbury versus Madison, which I would say 8 was correctly decided. 9 (Laughter.) MR. HUGHES: Well, a -- a few 10 responses to that, Your Honor. 11 12 To begin with, we think that Auer deference forces the agency to ask the wrong 13 14 question because, under Martin and Pauley, what 15 it allows the agency at that interpretive stage to do is to determine what it thinks the best 16 policy is, rather than what the best reading --17 18 JUSTICE BREYER: You read -- also 19 read, everybody cited them here, all these 20 studies that show what you say is a problem can 21 be sometimes a problem, but rarely, and that 22 the judges have a lot of power to reject 23 unreasonable rules, inappropriately considered rules, they didn't think about it, rules that 24 25 change position, rules that are not clear, all

- 1 these interpretations, you don't have to take
- 2 Auer literally, and later cases have not.
- 3 And so do you -- what is your real
- 4 objection to taking those later cases and
- 5 saying, of course, judges are in control; of
- 6 course, they reject what is unreasonable; of
- 7 course, they reject what is inadequately
- 8 considered; of course, they reject things that
- 9 are just changed without explanation, but, in
- 10 general, recognize that the FDA knows more
- 11 about moieties than you do, Judge, and there
- 12 are 800 judges, and they all think moiety means
- 13 something different.
- 14 MR. HUGHES: Your Honor, the critical
- shortcoming of that is the lack of notice and
- 16 comment because I am sure the FDA knows quite a
- 17 bit about active moieties, but the regulated
- 18 public may have a --
- 19 JUSTICE BREYER: So you want to take
- 20 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.
- 24 MR. HUGHES: Well, Your Honor, I think
- 25 what the APA reflects is the balance this Court

- 1 recognized in Perez that agencies have a
- 2 choice. Agencies can engage in interpretive
- 3 rules, and interpretive rules have that
- 4 flexibility and expediency, they're faster to
- 5 implement, and they bring uniformity to agency
- 6 actions and consistency to agency --
- JUSTICE ALITO: Yeah, Mr. Hughes, do
- 8 you -- do you think the FCC knows a lot more
- 9 about the meaning of the word "relevant" than
- 10 federal district judges?
- 11 MR. HUGHES: No, Your Honor. I think
- 12 that's a -- a -- a straightforward question of
- 13 legal interpretation that federal district
- 14 judges are --
- 15 JUSTICE BREYER: Do you know why 56d
- or 554d, which is the separation of functions
- 17 provision of the APA, it has an exception for
- 18 rate-making, which is the FDA's job. In other
- words, somebody who decides they can't consult
- 20 the ex parte with -- with prosecutors in the
- agency.
- MR. HUGHES: Well --
- JUSTICE BREYER: But there's an
- 24 exception. There's an exception for
- 25 rate-making. And look it up and you will

- 1 discover why. Do you know why? Because nobody
- 2 in the FCC really knew how to do rate-making
- and they had to talk to their staff. Okay?
- 4 So you think the FDA and the judges
- 5 know about the same amount about that?
- 6 MR. HUGHES: Well, Your Honor, I think
- 7 that the exception for rate-making is precisely
- 8 our point, which is to say, when Congress has
- 9 provided agencies authorities to act in a
- 10 particular manner and has given agencies that
- 11 delegated authorization, we agree that that's
- 12 an area in which agencies can exercise their
- delegated authority if it's been provided by
- 14 Congress.
- 15 JUSTICE BREYER: But the individual
- 16 rates, I mean, and changes in the rates and
- 17 changes in the conditions of the railroad cars
- 18 and -- and acting under -- there are millions.
- 19 We know there are millions.
- 20 So how do you propose to deal with
- 21 those millions? Every one of them goes through
- 22 notice and comment and rate-making?
- MR. HUGHES: Your Honor, I think --
- 24 well, again, in the rate-making context, as
- Your Honor points out, Congress can establish

- 1 different specific rules in specific
- 2 circumstances.
- What we're discussing are the default
- 4 rules that generally apply. And that default
- 5 rule, as I'm saying, is a balance between
- 6 interpretive rules, that are easier for
- 7 agencies to promulgate, that have real effect
- 8 with inside the agency.
- 9 On the other hand, notice-and-comment
- 10 rule-making, it does require more for the
- 11 agencies, but it provides important safeguards
- 12 for the regulated public.
- JUSTICE GORSUCH: If it was --
- 14 JUSTICE ALITO: If Auer were
- overruled, would an agency's interpretation,
- 16 particularly in areas requiring a great deal of
- 17 scientific or technical knowledge, be entitled
- 18 to no deference by a court?
- 19 MR. HUGHES: No, Your Honor, I think
- if Auer were overturned, Skidmore would apply.
- 21 And Skidmore, as this Court has articulated,
- 22 has exceptional importance, particularly in
- 23 areas where an agency --
- 24 JUSTICE KAVANAUGH: Well, Skidmore --
- 25 Skidmore deference is -- is really no deference

- because it -- it applies only when it's
- 2 persuasive, which is true of any argument.
- 3 MR. HUGHES: Well, in the context of a
- 4 highly technical or reticulated statutory
- 5 scheme where it's not the ordinary business of
- 6 judging like the meaning of relevant, but
- 7 something like active moiety, and the FDA can
- 8 explain that it's broad, it's scientific
- 9 consensus to bear.
- 10 JUSTICE KAVANAUGH: That sounds like
- 11 State Farm. But Skid -- Skidmore is really not
- 12 any -- you rely on that to say don't worry, but
- 13 Skidmore deference, as I've seen it applied
- over many years, is -- is not much.
- MR. HUGHES: Well, I think --
- JUSTICE KAVANAUGH: If anything.
- 17 MR. HUGHES: -- Your Honor, it's to
- 18 say in one of those technical contexts, if a
- 19 court is going to arrive at a different result
- 20 from the agency, the court needs to have a
- 21 pretty serious reason as to why it's doing so.
- 22 It has to articulate real rational reasons on
- 23 the record as to why it is rejecting the
- 24 agency's admitted authority over particular
- 25 scientific and technical areas.

- 1 So Skidmore does show the respect
- that's due a coordinate branch of government.
- 3 We think that's the appropriate alternative
- 4 solution.
- 5 JUSTICE KAGAN: Mister -- Mr. Hughes,
- 6 may I ask you about stare decisis, because
- 7 you're asking us to overrule two decisions,
- 8 Auer and Seminole Rock, and -- and really 10 or
- 9 12 more over the past half century where the
- 10 Court has talked about Auer deference or
- 11 Seminole Rock deference.
- 12 And -- and -- and what is the basis
- 13 for that? Congress could have done this at any
- 14 time. Congress knows that this goes on.
- 15 Congress has repeatedly acted in this sphere
- and shown no interest whatsoever in reversing
- 17 the rule that the Court has long established.
- 18 So why is it that overruling is the
- 19 appropriate course here?
- MR. HUGHES: A few answers, Your
- 21 Honor, but, to begin with, I don't think
- there's distance with the government on that
- point because, under the government's test,
- 24 Auer deference, in the case of Auer, the Court
- should not have applied deference.

1 Under the government's view, there 2 needs to be a principle of fair notice. 3 JUSTICE KAGAN: Well, you know, there 4 might be a problem of a lack of adversarialness 5 here, but I'm asking you -- I can also ask the 6 government -- but I'm asking you. 7 MR. HUGHES: So setting aside the 8 government's position would require overturning 9 a dozen cases on its own. 10 To -- to -- to move to the point, I think stare decisis has substantially less 11 12 effect in circumstances where, first, it was an underlying judge-made rule and not something 13 14 that was a statutory, constitutional 15 interpretation of its origin. 16 And, second --JUSTICE KAGAN: I -- I don't 17 18 understand that. You know, what -- what we 19 look to is could Congress have changed this. 20 If Congress couldn't have changed that, that's 21 a reason for us to change it. But, if Congress 22 could have changed it, which Congress could 23 have done any time within these past however 24 many decades, that's a reason for us to say, 25 you know, we don't think that we should step in

- 1 where Congress has not.
- 2 MR. HUGHES: Well, Your Honor, I think
- 3 that was true in -- in -- in both Pearson and
- 4 Wayfair and other cases the Court's decided
- 5 where the Court recognized that Congress could
- 6 step in and change the rule, but the Court has
- 7 repeatedly said in those cases that when the
- 8 underlying issue stems from a -- a decision of
- 9 this Court --
- 10 JUSTICE KAGAN: Well, there aren't
- 11 very many of those cases. And we take it
- 12 super-seriously when we do and we need a -- I
- mean, we used to -- and we need a good reason
- 14 for it.
- So what's your good reason?
- MR. HUGHES: So -- so good reason,
- 17 Your Honor, is two-fold. First, stare decisis
- applies with substantially less force because
- 19 this is not a doctrine under which the public
- 20 can rely, in fact, and injects considerable
- 21 instability into the legal system.
- JUSTICE KAGAN: Well, reliance is a
- 23 kind of plus factor, and we can talk about
- reliance either way, but, I mean, usually we
- look to something terrible that's happening:

- 1 This is unworkable. This is an anomaly in the
- 2 doctrine. It no longer has any support in the
- 3 surrounding legal landscape, something like
- 4 that. This is so grievously wrong that we
- 5 can't stand to live with it anymore.
- 6 Do you think Auer rises to that level?
- 7 MR. HUGHES: I do, Your Honor. And --
- 8 and to begin with, Auer did not have any
- 9 underpinning when it was first announced. It's
- 10 never been reconciled with the APA.
- 11 And the practical problems --
- 12 JUSTICE KAGAN: It didn't have any
- 13 underpinning? Its underpinning is obvious.
- 14 Its underpinning is everything that Justice
- 15 Breyer talked about. Its underpinning is
- 16 agency expertise. Its underpinning is -- is --
- 17 is -- is -- is an idea that judges are far less
- 18 suited to make these kind of minute decisions
- of agency policy than agency decision-makers
- 20 are.
- MR. HUGHES: Your Honor, I think it's
- just impossible to reconcile Auer deference
- 23 with the judgment that's reflected in the APA,
- that when an agency is going to put on its
- 25 policy-making hat, which undoubtedly the agency

- 1 can do, there's an ability for the public to be
- 2 able to participate in that process and provide
- 3 their views.
- 4 JUSTICE BREYER: You're right, you're
- 5 right that it says in the APA, it says, you're
- 6 absolutely right, that when a judge decides a
- 7 case, and it has to do with the meaning of the
- 8 regulation, it says the judge, the reviewing
- 9 court shall determine the meaning or
- 10 applicability of the terms of an agency action.
- 11 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
- 14 it.
- And, by the way, that isn't just made
- 16 up out of thin air. They -- the -- it's not
- 17 Auer. It's Seminole Rock, Auer repeats
- 18 Seminole Rock, decided in 1944, an important
- 19 case.
- The APA is written two or three years
- 21 later. I can't remember exactly when it was
- 22 adopted. But wouldn't somebody have said
- 23 something about it if, in fact, those words
- 24 were meant to change what was pretty well
- 25 established law at the time?

- 1 MR. HUGHES: Well, Your Honor, I don't 2 think that there's any evidence that the APA 3 somehow silently adopted the -- the doctrine of 4 Seminole Rock. There's no evidence in the 5 history of --6 JUSTICE BREYER: Well, the evidence 7 would be that if the Attorney General's manual 8 that discusses the APA goes through prior cases 9 that they intend to change, I'm not saying 10 perfectly, but to a considerable degree, and, by the way, Seminole Rock is not there. 11 12 And so we have both the language which doesn't say -- it says shall determine, but it 13 14 doesn't say how to determine. And, in 15 addition, you have the report, which I agree 16 with you says nothing, but I'm not sure that 17 that cuts in your favor. 18 MR. HUGHES: But, Your Honor, if we 19 look to the Attorney General's manual of 1947, 20 as you allude, that actually, I think, cuts 21 strongly in our favor because that explains 22 that interpretive rules do not have the 23 prospective force of law. The Court relied on
- JUSTICE BREYER: Yeah, that's right.

that manual at Footnote 31 --

1 MR. HUGHES: -- of its Chrysler Corp 2 decision, which is carried forward to Perez. 3 JUSTICE BREYER: No, I agree with you, 4 you're right about that, but I don't see this 5 being interpreted. This isn't enforceable. 6 We're trying to figure out what the -- what the 7 regulation means. And you read the AG's brief. He has a 8 9 lot of conditions around the judge's authority; 10 that is to say, the judge has a lot of authority to say this reg is no good, but he 11 12 doesn't have to ignore what the agency says. 13 MR. HUGHES: And --14 JUSTICE BREYER: After all, the agency knows about old Lysol, whatever it is, and we 15 don't. 16 MR. HUGHES: And I want to be clear. 17 18 We do not believe that the court needs to 19 ignore what the agency says either. We think 20 it warrants respectful consideration for 21 reasons of interbranch comity and the 22 recognition that agencies do have technical 23 expertise. We don't dispute any of that. 24 The only question --

25

JUSTICE SOTOMAYOR: I -- you know,

- 1 everybody's talking about this being the rule
- 2 since Seminole Rock and Auer, but I go back to
- 3 cases in the early 1800s, and -- and one -- I
- 4 just pick one of 1850, where the Court said the
- 5 foregoing construction, being the one adopted
- 6 by the Department of Public Lands soon after
- 7 the Act of 1832 went into operation, we should
- 8 feel ourselves restrained, unless the error of
- 9 construction was plainly manifest, from
- 10 disturbing the practice prescribed by the
- 11 Commission of the grand Land Office.
- 12 And I have a series of other cases
- throughout the 1800s where the courts were
- 14 basically talking about you take the
- interpretation of the agencies unless some
- 16 manifest error was present.
- 17 So Sturgeon and Auer are not more
- 18 recent manifestations. They're based on fairly
- 19 understandable principles. Number one,
- 20 agencies have expertise. My colleagues have
- 21 talked about that. Two, they are also part of
- 22 an administration and often have a better
- 23 understanding of what the needs are under that
- 24 regulation. And, three, in some ways,
- 25 regulated parties need to have a starting point

- of understanding how their conduct will be
- 2 viewed.
- 3 And if you tell the world agencies are
- 4 going to receive this generalized Skidmore
- 5 deference that Justice Kavanaugh spoke about as
- 6 no deference, essentially, persuasiveness
- 7 really isn't, then they don't really have a
- 8 starting point to understand how to conform
- 9 their conduct because they have to wait until
- 10 13 circuit courts rule on an interpretation of
- 11 a statute before really understanding what they
- 12 have to do.
- 13 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
- 17 the public for having sound interpretations or
- 18 reasonable interpretations.
- MR. HUGHES: Thank you, Your Honor.
- 20 I'd like to respond both to the point about the
- 21 history as well as the stability point.
- 22 To begin with -- with Your Honor's
- initial point about the underlying history, I
- 24 agree if we look prior to the APA, there are
- 25 cases that suggest in the statutory context

- 1 that a department or agency's interpretation of
- 2 the statute deserves binding deference.
- But, in the APA, Congress decided that
- 4 there needed to be procedural protections to
- 5 safeguard the interests of the public through
- 6 notice-and-comment rule-making to provide the
- 7 public the ability to participate in that
- 8 law-making function that happens within the
- 9 agency.
- 10 That was one of the critical
- innovations of the APA that imposed on past
- 12 practice as a matter of congressional
- direction, and we think that's what's lacking
- 14 here. But --
- 15 CHIEF JUSTICE ROBERTS: Counsel, to
- 16 get back to the -- a little bit to the stare
- 17 decisis question, I -- I think the issue
- depends at least in part about how much of a
- 19 change you're making.
- 20 And one of the things I have trouble
- 21 getting my -- my arms around is, if you start
- 22 with Auer and recognizing the limitations on
- 23 Auer that -- you know, that have accumulated
- over the years and you're changing from that to
- 25 Skidmore deference, which I find hard to get my

- 1 hands around too -- I think I know more what a
- 2 moiety is than I know what Skidmore deference
- 3 is.
- 4 (Laughter.)
- 5 CHIEF JUSTICE ROBERTS: And I -- I
- 6 just wonder exactly how much of a change at the
- 7 end of the day you're talking about.
- 8 MR. HUGHES: Well, once we take into
- 9 account SmithKline Beecham and Gonzales and the
- 10 Court's consistent narrowing of Auer, I -- I
- 11 think Your Honor is right that Auer has been
- 12 narrowed to the point where it does have
- 13 substantially less practical effects today than
- 14 it does previously.
- But I will say Auer is still used in a
- 16 way that injects inconsistencies and
- instability into the legal system that I -- I
- 18 believe also responds to Justice Sotomayor's --
- 19 CHIEF JUSTICE ROBERTS: Well, I
- 20 suppose it depends -- I mean, it depends on the
- 21 agency. It depends on the rule. It depends on
- 22 the -- the -- the court. I mean, at some
- 23 point, you're applying Auer -- you -- you
- consider the range of reasonableness and, you
- 25 know, the confidence that a court has that the

2.8

- 1 agency is, you know, not found itself within
- 2 those bounds is going to vary greatly from case
- 3 to case.
- 4 The courts are going to take a more
- 5 careful look in some cases than they are in
- 6 others. And maybe that's -- that's part of the
- 7 problem, but I -- I guess I'm not quite sure
- 8 that I understand what you're saying when the
- 9 -- the rules have the force and effect of law
- when they're subject to judicial review within
- 11 a particular range and it's really quite
- 12 imprecise what the range is.
- MR. HUGHES: Well, I -- I think --
- 14 CHIEF JUSTICE ROBERTS: And as I say,
- maybe that's the problem, but --
- 16 MR. HUGHES: Your Honor, I do think
- 17 that imprecision is quite the problem, but as
- long as Auer and Seminole Rock remain, that
- 19 suggests that there will be a range of rules, I
- 20 think a narrowed set of rules, but some rules
- 21 that, if they make it through the gauntlet of
- 22 Auer and Seminole Rock, do have the prospective
- 23 force of law without going through the
- 24 procedures that Congress identified that need
- 25 -- that the agencies should undertake to have

- 1 that force and effect of law.
- 2 And I think this case is an example.
- 3 I'd point the Court to another case recently
- 4 that -- that highlights the instability. It's
- 5 a decision -- an en banc decision of the Ninth
- 6 Circuit, the Marsh case, that was decided in
- 7 September of 2018 about the Fair Labor
- 8 Standards Act and how the tip credit works for
- 9 employees that sometimes work under a tips job
- 10 and sometimes don't.
- 11 Well, the -- the en banc Ninth Circuit
- 12 decided that case on the basis of Auer
- deference in reliance on the then-binding
- 14 Department of Labor interpretation. It was not
- 15 six weeks or seven weeks later that the
- 16 Department of Labor rescinded the
- interpretation that the Ninth Circuit en banc
- 18 rested on, and now the lower courts are having
- 19 to figure out is the Ninth Circuit's en banc
- 20 decision still binding interpretation of that
- 21 regulation when --
- JUSTICE GINSBURG: And what about --
- 23 JUSTICE ALITO: On the question --
- 24 JUSTICE GINSBURG: -- what about the
- 25 lower courts? Let's -- let's say your argument

- is accepted and Auer is overruled. There may
- 2 have been a dozen or so cases, Auer cases in
- 3 this Court, but there are probably hundreds in
- 4 the lower courts.
- 5 So do all of those cases -- what
- 6 happens to all of those cases where there was
- 7 reliance on Auer in the lower courts?
- 8 MR. HUGHES: So I think from this
- 9 Court's cases, we still have stare decisis, but
- 10 to Your Honor's question about the lower
- 11 courts, I -- I think the courts would have to
- 12 wrestle to see if -- whether or not Auer was
- 13 the rule of decision. But, as the Marsh case I
- just referenced underscored, those cases lacked
- 15 the kind of stability that interpretations of
- 16 statutes and regulations hold because they are
- 17 constantly subject to revision overnight by any
- 18 --
- 19 JUSTICE GINSBURG: But are you saying
- 20 that there would be wholesale cases before the
- lower courts, lower courts that had relied on
- 22 Auer, and the losing party then says, Court,
- 23 vacate that decision because you premised it on
- Auer, and Auer is not good law?
- MR. HUGHES: I think parties could

- 1 potentially advance arguments along those
- lines, Your Honor, but I don't think that
- 3 increases instability any more than exists in
- 4 the status quo, when those decisions are
- 5 already subject to revision by the agency. I
- 6 don't think --
- 7 JUSTICE KAVANAUGH: Your -- your
- 8 argument is that notice and comment solves
- 9 everything, right? I mean --
- 10 MR. HUGHES: Well, I think notice and
- 11 comment is the scheme that Congress implemented
- into the APA as the one --
- 13 JUSTICE KAVANAUGH: In other words,
- 14 this issue would go away if the agency did
- 15 notice and comment for the guidance that --
- MR. HUGHES: Well, prospectively, what
- 17 our argument would -- would lead to is an area
- where there is far more prospective stability
- 19 because once the -- a court decides the meaning
- of a regulation, that has durability, unless
- 21 the agency changes the reliability --
- 22 JUSTICE KAVANAUGH: Can I get your
- 23 reaction to the -- the thought that the lower
- 24 courts have made notice-and-comment rule-making
- 25 too difficult through various requirements,

- 1 requiring detailed explanations, making it hard
- 2 to change regulations that have gone through
- 3 notice and comment? Do you have a reaction to
- 4 that? Because that may be one of the reasons
- 5 that has pushed them into the more guidance
- 6 rather than notice and comment in the first
- 7 place.
- 8 MR. HUGHES: Well, Your Honor, I think
- 9 notice and comment is what Congress required,
- 10 and that's what the Court should adopt. If the
- 11 Court is of the view that notice and comment
- 12 has become more onerous than Congress intended,
- 13 I think the solution would be to address that
- issue of notice-and-comment overreach, not to
- 15 allow agencies to circumvent it.
- If I may reserve my time.
- 17 CHIEF JUSTICE ROBERTS: Thank you,
- 18 counsel.
- 19 General Francisco.
- 20 ORAL ARGUMENT OF GEN. NOEL G. FRANCISCO
- ON BEHALF OF THE RESPONDENT
- 22 GENERAL FRANCISCO: Mr. Chief Justice,
- 23 and may it please the Court:
- 24 Seminole Rock deference raises some
- 25 problems in some applications, but it's been on

- 1 the books for decades, it has significant
- 2 practical benefits, its practical problems can
- 3 be addressed by reinforcing reasonable
- 4 limitations on the doctrine.
- 5 I'd therefore like to address two key
- 6 points. First, in its core applications, like
- 7 Seminole Rock itself, where the agency provided
- 8 public notice of its consistent interpretation,
- 9 it has significant practical benefits. It
- 10 promotes national uniformity, predictability,
- and political accountability because, if a rule
- is subject to multiple reasonable
- interpretations, the choice of which one to
- 14 adopt is made by a single more politically
- 15 accountable agency, rather than in dozens and
- 16 perhaps hundreds of district -- different
- district courts across the country.
- 18 JUSTICE GORSUCH: Mr. Francisco, as I
- 19 understand it, nobody left before us alive is
- 20 willing to take Auer literally and it's just a
- 21 matter of how -- how much revision to it we've
- 22 already made. Is it enough? How much further
- 23 should we go? Or should we just give up on it
- 24 altogether?
- 25 And -- and you're asking us to keep on

- 1 going. And, as I understand it, there are six
- 2 elements of your test. We have to decide
- 3 whether the -- the regulation is ambiguous,
- 4 whether the interpretation is reasonable,
- 5 whether it's consistent, whether it was made by
- 6 someone at a high level, whether there was fair
- 7 notice, and whether it was made by somebody
- 8 with expertise.
- 9 Is that a -- a recipe for stability
- and predictability in the law, or is that a
- 11 recipe for the opposite?
- 12 GENERAL FRANCISCO: No, I absolutely
- 13 think it is and it's a workable standard, Your
- 14 Honor. I think our principal limitations are
- 15 -- are consistent with existing law, though
- 16 perhaps not -- not identical to it.
- 17 The requirement of genuine ambiguity
- 18 is really what we think this Court's cases have
- 19 always required, although there is language
- 20 that we think ought to be replaced with the
- 21 genuine ambiguity language.
- JUSTICE GORSUCH: Well, people fight
- over whether there is ambiguity and what
- 24 ambiguity means. They fight over what
- 25 reasonableness means.

1 GENERAL FRANCISCO: Right. 2 JUSTICE GORSUCH: They fight over how 3 consistent is consistent. And for the life of 4 me, I don't know how high a level a person has 5 to be before we're going to defer to him, or 6 how much notice is fair, or how much expertise 7 counts. 8 I'm -- I'm with Justice Breyer on 9 moieties, but the people I think have the most expertise on what relevant evidence is, is 10 probably John Kane, a federal district judge of 11 12 about 40 years --13 GENERAL FRANCISCO: Well --14 JUSTICE GORSUCH: -- not -- not -- not 15 an agency. 16 And under the rule you propose, every agency could define relevant evidence 17 18 differently. 19 GENERAL FRANCISCO: No. 20 JUSTICE GORSUCH: What is -- what is 21 -- well, if they have enough expertise, we're 22 going to -- we're going to go down that road. 23 And I -- I -- I guess I'm just wondering, at 24 what point does this whole edifice just fall 25 upon itself?

1	GENERAL FRANCISCO: Sure. Well, Your
2	Honor
3	JUSTICE GORSUCH: And lawyers will
4	will enrich themselves and do well with this
5	kind of test. But how are regulated people
6	supposed to behave?
7	GENERAL FRANCISCO: Sure. And, Your
8	Honor, there's a lot built into that question.
9	But what I'd like to bring the focus on in
LO	in answering it is our strong interest in
11	preserving Seminole Rock in its core
L2	applications where we actually think it has a
13	significant amount of benefit to regulated
L4	parties.
15	Because you are right, there is a lot
L6	of disagreement amongst judges as to what a
L7	reasonable interpretation is.
18	As the Court said earlier this term,
L9	reasonable jurists can look at the language
20	and, acting in good faith, come to different
21	interpretations.
22	One of the virtues of Seminole Rock is
23	that when you're facing multiple reasonable
24	interpretations, you vest the decision-making
25	authority evalue me in a single party

- 1 rather than multiple courts. And that's
- 2 actually of a benefit to regulated parties
- 3 because they don't actually have to litigate
- 4 that thing in multiple courts across the
- 5 country.
- 6 JUSTICE GORSUCH: Well, on that --
- 7 JUSTICE KAVANAUGH: The government --
- 8 GENERAL FRANCISCO: They can rely on
- 9 the agency.
- JUSTICE GORSUCH: -- on that -- on
- 11 that, and I'm sorry, but, you know, you say --
- 12 you keep saying how much of a benefit it is for
- 13 regulated parties and their reliance interests,
- 14 private reliance interests. And I must say I
- 15 cast a skeptical eye when the government is --
- 16 is -- is worried about private reliance
- 17 interests.
- 18 And every private party before us says
- 19 their interests in stability would be better
- 20 served by -- by eliminating this rule
- 21 altogether. And it's not just the Chamber of
- 22 Commerce. It's -- it's the Farm Bureau. It's
- 23 the national lawyers engaged with the
- immigration system every day and are faced with
- 25 claims of Auer deference for single member

- decisions from the BIA that are unreasoned.
- 2 And it's the veterans before us, the
- 3 American Legion, the lawyers who represent
- 4 veterans every day before the veterans' courts
- 5 who are outraged by Auer and who say it doesn't
- 6 serve their reliance interests and it provides
- 7 highly unstable rules that they have to guess
- 8 at all the time.
- 9 Why should I credit the government's
- 10 protestations that it is serving private
- 11 reliance interests?
- 12 GENERAL FRANCISCO: Well, Your Honor,
- 13 I think that it benefits both those private
- 14 reliance interests, and there are a lot of
- 15 private reliance interests that aren't
- 16 represented here before the Court, as well as
- interests in stability and political
- 18 accountability.
- But, if I could sort of use an example
- 20 to illustrate the point, suppose you got a rule
- 21 that is genuinely ambiguous. It's subject to
- 22 multiple reasonable interpretations.
- There are a couple of ways to go. You
- 24 could do notice-and-comment rule-making. That
- 25 takes a very long period of time. In the

- 1 meantime, there are two things to do.
- 2 You can litigate the case in dozens of
- 3 district courts across the country and hope
- 4 that you can convince all the courts to reach
- 5 the same conclusion, or you can defer to the
- 6 agency's reasonable choice amongst what is, by
- 7 definition, reasonable alternative definitions.
- 8 And we think that is the benefit to
- 9 Seminole Rock. In the face of those multiple
- 10 reasonable interpretations, you're vesting
- 11 decision-making authority in a single, more
- 12 politically-accountable party.
- 13 JUSTICE KAVANAUGH: Judges -- judges
- 14 disagree all the time, though, on the threshold
- question of whether something's ambiguous to
- begin with. And that creates a whole sideshow
- 17 here.
- 18 And -- and one of my broader questions
- 19 is why can't the government just do notice and
- 20 comment? You said it takes a long time, and
- 21 that may be a problem with some lower court
- 22 impediments to notice and comment, I -- I share
- that concern, but if notice and comment were
- 24 more efficient, why not just do notice and
- 25 comment?

1 GENERAL FRANCISCO: So there are two 2 parts to that question. First, on the 3 reasonableness and degree, I completely take 4 your point, that judges can come to a different 5 conclusion as to what is ambiguous and what is 6 not ambiguous. 7 JUSTICE KAVANAUGH: It happens all the 8 time, all the time. 9 GENERAL FRANCISCO: And that's not a 10 problem that Seminole Rock creates or a problem that Seminole Rock can solve. It's something 11 that's just endemic to this process. 12 13 But what Seminole Rock does do, is 14 there's going to be a lot more agreement on 15 whether something is subject to a range of 16 reasonable readings than there is on 17 pinpointing the precise, accurate, 18 theoretically correct reasoning. So Seminole 19 Rock reduces a large amount of uncertainty in 20 that respect. 21 As to notice and comment, look, we --22 we take the law as it is, as it's handed down to us by this Court and other courts. 23 24 it's handed down, notice-and-comment 25 rule-making is a cumbersome procedure. That

- 1 doesn't mean it doesn't have benefits. It has
- 2 extraordinary benefits.
- 3 That being said, when you're looking
- 4 at a -- a rule that is by definition subject to
- 5 multiple reasonable readings --
- 6 JUSTICE KAVANAUGH: Do you agree from
- 7 your study of this issue that the impediments
- 8 to efficient notice-and-comment rule-making
- 9 have pushed the government into doing more
- 10 things in this manner?
- 11 GENERAL FRANCISCO: Your Honor, I'm
- 12 not prepared to -- to -- to say I agree or
- 13 disagree with that. I certainly understand
- 14 Your Honor's point.
- But I guess the simpler point that I'm
- 16 trying to make is that, given that it is what
- 17 it is --
- 18 JUSTICE KAGAN: Do you happen to know
- 19 what the average notice-and-comment rule-making
- is, how long it takes?
- 21 GENERAL FRANCISCO: Your Honor, I
- 22 don't know the answer to that question. I
- 23 apologize. But I --
- 24 JUSTICE SOTOMAYOR: I haven't seen a
- 25 large decrease in notice and proposed rules --

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1
               GENERAL FRANCISCO: No, Your Honor, I
 2
     haven't.
 3
               JUSTICE SOTOMAYOR: -- in the Federal
 4
     Register.
 5
               GENERAL FRANCISCO: I -- I haven't.
 6
      And -- and -- and, again, though, the --
 7
               JUSTICE SOTOMAYOR: Your -- your --
 8
     your opposite -- your colleague on the other
9
      side talked about one notice and comment that
      received 45 changes. So the rule is still
10
     being used. Notice and comment is still being
11
12
     used.
13
               GENERAL FRANCISCO: Oh, it's
14
     definitely still being used, Your Honor. And
      -- and it -- it is a very important process,
15
     but it doesn't undermine the benefits of
16
      Seminole Rock because, while you're going
17
18
      through that period, you're -- you're facing a
19
      rule that, by definition, is ambiguous. And
20
      you've got to figure out what to do with it.
21
               JUSTICE SOTOMAYOR: I -- I -- I do
22
      think that --
23
               CHIEF JUSTICE ROBERTS: Counsel, one
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of -- as a practical matter, one of two things

happens: The judge gets deeply into the

24

- 1 question before him or her and does the work
- 2 and comes up with something that looks like the
- 3 right answer. And once you've done that,
- 4 everything else looks pretty unreasonable. Or
- 5 the judge just starts looking at it and
- flipping through it and says, boy, there's a
- 7 wide range here, could be this, could be that,
- 8 and you defer to the agency.
- 9 Now, if I think that that's what
- 10 happens as a practical matter, which rule
- 11 should I adopt?
- 12 GENERAL FRANCISCO: Your Honor, I
- 13 think you ought to adopt ours, because we --
- 14 (Laughter.)
- 15 GENERAL FRANCISCO: -- because we
- 16 actually place an --
- 17 CHIEF JUSTICE ROBERTS: Ours, you mean
- 18 yours, or Auer the case?
- 19 (Laughter.)
- 20 GENERAL FRANCISCO: The -- the
- 21 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
- 24 ambiguity.
- 25 We do think that courts should do --

CHIEF JUSTICE ROBERTS: So you think

2	what the judge ought to do is do all
3	extensive amount of work and come up what looks
4	to him or her as the right answer?
5	GENERAL FRANCISCO: I think what the
6	judge needs to do is an extensive amount of
7	work at the front end to determine if there is,
8	in fact, genuine ambiguity within the language
9	of the rule itself, much as like it's required
10	to do under Chevron. You look at the
11	JUSTICE KAVANAUGH: But the problem is
12	the problem is that the judge, judges, could
13	come up with an interpretation that says the
14	agency's interpretation of the regulation is
15	wrong, and this is a really important
16	interpretation, has real effects on many
17	people, and it's wrong, but, nonetheless, rule
18	for the agency under your theory because and
19	under the Chief Justice's question because
20	there's some ambiguity in it and, therefore,
21	defer to the agency, even though the judges
22	might unanimously think it's wrong. And
23	doesn't that trouble you?
24	GENERAL FRANCISCO: No, Your Honor,
25	because, again, I don't think that is quite the

- 1 nature of the inquiry. I think that there are
- 2 lots of statutes --
- JUSTICE KAVANAUGH: I think that -- I
- 4 think that I disagree. I think that's what
- 5 happens in judicial conference rooms.
- 6 GENERAL FRANCISCO: Okay. And I'm not
- 7 going to obviously question you on that.
- 8 JUSTICE KAVANAUGH: Which is the point
- 9 I don't think this is the -- I don't think the
- 10 government's reading is the best reading, but
- it's sufficiently ambiguous that I'll rule for
- 12 the government. That happens --
- GENERAL FRANCISCO: Yeah. So -- so I
- 14 quess I --
- 15 JUSTICE KAVANAUGH: -- on big cases.
- 16 GENERAL FRANCISCO: So I guess I have
- 17 a couple of responses to that.
- 18 First of all, in our search for what
- 19 the best reading is, I think that often the
- agency's interpretation is highly relevant to
- 21 understanding what the best reading is of a
- 22 complicated regulatory regime.
- 23 Secondly, I think it is often the case
- 24 that there is -- it is not clear what, in fact,
- 25 the best reading is when you are facing

1 multiple reasonable constructions. 2 And that, again, is the virtue of 3 Seminole Rock in those core cases when you're 4 facing multiple reasonable constructions, and 5 you have the benefit of the views of an agency 6 that's administering a complicated regulatory 7 scheme, you vest the choice on which one to pick in a more politically-accountable agency, 8 9 rather than having to fight it out in different 10 courts across the country, because different judges are going to come to different 11 12 conclusions as to what the most reasonable or theoretically best understanding of a 13 14 particular rule or regulation is. 15 JUSTICE ALITO: Should we be concerned about the effect that either overruling Auer 16 and Seminole Rock or taking your position will 17 18 have on cases in which courts have interpreted 19 regulations based on those principles and now, 20 whichever course we take, those will be thrown 21 into doubt? And if that's a real concern, is 22 it more of a concern -- is it much less of a 23 concern if we take your proposed route than if 2.4 we overrule Auer and Seminole Rock completely? 25 GENERAL FRANCISCO: I think it's far

- 1 less of a concern under our rule because --
- 2 under -- under the United States' rule, because
- 3 under my friend on the other side's position,
- 4 every single regulation that's currently on the
- 5 books whose interpretation has been established
- 6 under Seminole Rock now has to be relitigated
- 7 anew. So I think --
- JUSTICE GORSUCH: Well, I guess I
- 9 don't -- I don't understand that response,
- 10 because it seems to me you've made the point
- 11 that there are going to be a great many
- 12 regulations where the outcome would be the same
- 13 with or without Auer. You make that argument
- 14 in this case.
- 15 GENERAL FRANCISCO: Uh-huh.
- 16 JUSTICE GORSUCH: So we'd have to know
- 17 how many of those there are. We'd have to know
- 18 how many would be problematic even under your
- 19 -- your modified test, and we don't know that.
- 20 A lot of these regulations get supplanted and
- 21 statutes disappear and get modified, and those
- 22 would have to be accounted for too.
- So, at the end of the day, I -- I
- 24 didn't see anything in the briefs other than
- 25 rank speculation on this point.

1 GENERAL FRANCISCO: Well, I think that 2 one thing that doesn't require speculation is 3 to know that their position would be more 4 disruptive than ours, because theirs would require everything to be revisited. Even under 5 6 the most aggressive interpretation of our view, 7 it wouldn't require everything to be 8 interpreted. 9 But, if you look at this Court's 10 cases, and -- and I'm not representing them as a random sample, but, if you look at them as a 11 12 sample, I don't think our rule would be particularly disruptive of -- at all, if you 13 14 focus on our requirement of inconsistency. 15 We've identified three of this Court's cases 16 that arguably applied Seminole Rock in the face of inconsistent interpretations. 17 18 In each three of those cases, the 19 application of Seminole Rock appeared to be 20 makeweight; in other words, the Court first 21 explained why the agency's interpretation was 22 likely the best one but then applied Seminole 23 Rock in order to confirm that decision. 2.4 So I think our position would be 25 significantly less disruptive than my friend's

1 on the other side. 2 JUSTICE BREYER: Well, when you say --JUSTICE KAGAN: General, a similar --3 4 JUSTICE BREYER: I mean, "best" has come up about 50 times, and I'm a little 5 6 curious about that. Jerome P. Frank thought 7 there are no cases like Justice Kavanaugh 8 described, and I believe Justice Kavanaugh was 9 closer to it, and so I think he's probably 10 right. But which is the best? 11 I mean, we know one thing: We know 12 that democratically speaking, agencies aren't 13 very democratic, but there is some 14 responsibility and there are one group of 15 people who are still less democratic, and 16 they're called judges. 17 So if, in fact, you believe that the 18 best solution -- where there's real ambiguity, 19 and you just don't know, the best solution is, 20 in our country, a democratic solution, well, 21 maybe the agency is the institution that's 22 closer to it. 23 Now you're just supposed to say yes. 24 (Laughter.) 25 GENERAL FRANCISCO: Certainly, I would

- 1 say yes -- certainly, I would say yes in the
- 2 context of Seminole Rock itself because that
- 3 really does underscore our key point. Seminole
- 4 Rock only applies when a rule is genuinely
- 5 ambiguous and that after applying --
- 6 JUSTICE KAVANAUGH: Do you --
- 7 GENERAL FRANCISCO: -- all of the
- 8 ordinary -- after applying all of the ordinary
- 9 tools of construction, it's subject to multiple
- 10 reasonable readings.
- 11 And in that context, we do think it
- 12 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
- 16 word "bad" interpretation, because bad
- interpretation sounds to me like an
- 18 unreasonable interpretation. It can only be
- 19 bad if it's unreasonable. And that already is
- 20 taken care of by the Auer standard.
- 21 GENERAL FRANCISCO: By the requirement
- 22 that it be genuinely ambiguous, like --
- JUSTICE SOTOMAYOR: A, genuinely
- ambiguous and, B, reasonable.
- 25 GENERAL FRANCISCO: Reasonableness.

- 1 Yes.
- JUSTICE SOTOMAYOR: Reasonableness
- 3 can't, I don't think, mean a bad interpretation
- 4 that's not consistent with the statute or -- or
- 5 not consistent with either the text, the
- 6 context, et cetera.
- 7 So, if it's reasonable, then there has
- 8 to be a basis for the interpretation in the
- 9 statute.
- 10 GENERAL FRANCISCO: I -- I think I
- 11 generally agree with that, Your Honor. And to
- 12 that I would add two points. I think that when
- 13 you're talking about interpreting complicated
- regulatory regimes, the agency's understanding
- of it often is going to be highly relevant to
- 16 determining what the -- and I'm going to put it
- in quotes -- "best" interpretation is, and as
- 18 I've already said, if you poll 50 judges on a
- 19 complicated regulatory regime, you're often
- 20 going to come up with multiple different best
- 21 interpretations. And that, again, underscores
- 22 the benefit of Seminole Rock in those core
- 23 applications.
- 24 JUSTICE KAVANAUGH: You agree -- you
- 25 agree, I think, with taking Footnote 9 of

- 1 Chevron, using all the tools of statutory
- 2 construction, and -- before you conclude that
- 3 the ambiguity remains in this context? I think
- 4 you've said that a few times.
- 5 GENERAL FRANCISCO: I -- I absolutely
- 6 think that is part of the -- the genuine --
- 7 determining genuine ambiguity.
- 8 JUSTICE KAVANAUGH: And when you do
- 9 that, you usually eliminate or greatly reduce
- 10 the number of cases where there remains an
- 11 ambiguity. Do you agree with that?
- 12 GENERAL FRANCISCO: And not only that,
- but you also reduce the range of ambiguity,
- 14 because a reasonable interpretation has to fall
- within the zone of ambiguity that remains in
- 16 the rule after you apply those ordinary tools
- 17 of construction.
- And so that's why -- and I know my
- 19 friend on the other side didn't really get into
- 20 the separation of powers issue, but that's why
- 21 we don't think that there's any substantial
- 22 separation of powers question here, because the
- agencies are, in fact, subject to substantial
- 24 control by both Congress and by the courts.
- JUSTICE GORSUCH: Well, that's --

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1
               JUSTICE KAGAN: General, can I ask
 2
      about a slightly broader version of Justice
 3
      Alito's question? He asked about reliance, but
 4
      thinking about all the stare decisis factors,
      when I started asking Mr. Hughes about them, he
 5
 6
      immediately said: Well, the government has
 7
      just as big a problem on those factors.
 8
               So does it?
 9
               GENERAL FRANCISCO: Absolutely not,
10
      Your Honor, because what we're arguing for is
      that Seminole Rock be retained in its core
11
12
      applications, which, frankly, we think are the
      areas where it is the -- the most important,
13
14
      both to regulated parties and to agencies.
15
               And it is always more faithful to --
16
      to stare decisis principles to retain a
      doctrine at its core, while perhaps imposing
17
18
      limitations on the edge that simply recognize
19
      that, in the course of practical application,
20
      practical issues have been identified.
21
               And that's why we think that you ought
22
      to reinforce the requirement of genuine
23
      ambiguity, you ought to reinforce the -- the
      requirement that you wouldn't apply it to
24
25
      inconsistent interpretations, and we don't
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- 1 think the agency should get Seminole Rock
- deference for secret, private interpretations.
- 3 It ought to give public notice of its
- 4 interpretation, as it did in Seminole Rock
- 5 itself.
- But we think that when you have those
- 7 principal limitations, you've largely addressed
- 8 the practical problems of Seminole Rock, and
- 9 what you're left with, in our view, are the
- 10 practical benefits of Seminole Rock.
- 11 So even if you think it was wrongly
- decided as an original matter, it's got
- 13 significant practical benefits, its practical
- 14 problems are manageable, it's been on the books
- 15 for decades, and this is something that
- 16 Congress could fix if it believed that this
- 17 Court has misgauged legislative intent in
- 18 adopting the Seminole Rock doctrine.
- 19 JUSTICE KAVANAUGH: You -- you said
- 20 give public notice. That's one of the
- 21 requirements, right?
- 22 GENERAL FRANCISCO: Yes.
- JUSTICE KAVANAUGH: I think the other
- 24 side would say just add "and comment."
- 25 GENERAL FRANCISCO: Your Honor, and I

- 1 think that's exactly their position. 2 seminal feature --3 JUSTICE KAVANAUGH: And what's -- and 4 what's wrong with that? 5 GENERAL FRANCISCO: The seminal 6 feature of Seminole Rock is, of course, that 7 you don't require notice and comment. And I 8 think that your -- your question gets back to 9 the colloguy that we had before. 10 While you're going through that notice-and-comment process, you're simply left 11 12 with an enormous amount of uncertainty because you're left with a rule that everyone has 13 14 already concluded is on its face subject to 15 multiple reasonable interpretations. And to say that the alternative is to 16 17 have multiple courts across the country 18 struggle with that is --19 JUSTICE GORSUCH: Well, Mr. Francisco, 20 you keep telling us about the benefits of that, but the benefits of notice and comment are, 21
- 24 GENERAL FRANCISCO: Yes.

22

23

JUSTICE GORSUCH: -- and not be

among other things, people will know

prospectively what rules govern them --

- 1 sideswiped later by a bureaucracy. You can
- 2 call it democratically accountable if you wish.
- 3 GENERAL FRANCISCO: Right.
- 4 JUSTICE GORSUCH: I don't know, people
- 5 might disagree. At any rate, a bureaucracy
- 6 coming up with an amicus brief or a
- 7 single-member opinion in a BIA decision
- 8 involving an immigrant or, in this case, a
- 9 veteran seeking benefits, who in the middle of
- 10 a case is confronted with a new interpretation
- 11 never seen before, all right, those -- that's
- 12 the reality.
- 13 And I'm not sure how that serves
- 14 democratic processes or the separation of
- powers, as opposed to having an independent
- 16 judge. The one thing you're going to know is
- 17 you're going to have an independent judge
- 18 decide what the law is in your case, consistent
- 19 with the statute that says an independent judge
- 20 shall decide all questions of law.
- 21 That seems to me a significant
- 22 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

- 1 regulated entities can today.
- 2 GENERAL FRANCISCO: Well, Your Honor,
- 3 there's a -- there's a -- there are a few
- 4 things built into that. Let me start by saying
- 5 that I think that our public notice requirement
- 6 ensures that regulated parties -- that the
- 7 agency can't rely on secret interpretation. So
- 8 it makes sure that its interpretation is out
- 9 there in the public and members of regulated
- 10 parties --
- 11 JUSTICE GORSUCH: So Auer is gone
- 12 then. You've -- you are asking us to overrule
- 13 Auer itself.
- 14 GENERAL FRANCISCO: I --
- JUSTICE GORSUCH: Because that's what
- 16 happened in Auer.
- 17 GENERAL FRANCISCO: No.
- 18 JUSTICE GORSUCH: It was an amicus
- 19 brief.
- 20 GENERAL FRANCISCO: No, Your Honor. I
- 21 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
- 24 this Court --
- JUSTICE GORSUCH: That's good enough?

GENERAL FRANCISCO: -- satisfies the 1 2 public notice requirement, because it puts the 3 world on notice that this is, in fact, the 4 agency's position. 5 But to go to your larger point, I 6 think as this Court held in the Martin case, 7 Seminole Rock deference reflects --8 JUSTICE GORSUCH: A person who 9 litigates against the government for years, for 10 his disability benefits as a veteran of the United States, is on public notice when the 11 case arrives here and you file an amicus brief? 12 13 GENERAL FRANCISCO: Well, Your Honor, 14 we are much less concerned with the outcome of 15 this particular case than we are with 16 preserving Seminole Rock in its core 17 applications. 18 But to go to this particular case, 19 remember, the VA has a system where the VA 20 itself is charged with assisting veterans 21 through what can sometimes be a complex 22 process. 23 And here it was the VA itself that identified the potential reconsideration 24 25 pathway that would have provided the -- the

- 1 veteran with the benefit of retroactive
- 2 benefits and the VA itself that also explained
- 3 why it didn't apply to the veteran.
- 4 So I think in this particular context
- of this case, this -- this was a very fair
- 6 process. That being said, we aren't
- 7 particularly concerned with this specific case
- 8 as we are with preserving Seminole Rock
- 9 deference in its core applications where we do
- 10 think it has the most significant amount of
- 11 benefits.
- 12 JUSTICE ALITO: If we were --
- 13 GENERAL FRANCISCO: And if --
- JUSTICE ALITO: If we were writing on
- 15 a clean slate, what would you say is the basis
- 16 for any version of Auer or Seminole Rock? Is
- it based on some kind of delegation theory or
- 18 what is its -- what is its conceptual basis?
- 19 GENERAL FRANCISCO: I think the best
- 20 conceptual basis is what this Court gave it in
- 21 the Martin case, and that's where it said that
- 22 Seminole Rock rests on a presumption of
- 23 legislative intent, that Congress presumed that
- courts would defer to an agency's reasonable
- 25 interpretation of its otherwise ambiguous rules

- 1 as part of its delegated rule-making authority.
- Now, I think that members of this
- 3 Court may debate whether that was or wasn't an
- 4 accurate understanding of legislative intent,
- 5 but this late in the day, I don't think that's
- 6 any longer the relevant question because it's
- 7 been on the books for decades.
- 8 JUSTICE KAGAN: And -- and usually
- 9 those kinds of presumed legislative intent are
- 10 based on other views, right? They're based on
- 11 a view -- of course, Congress is presumed to
- 12 want the agencies to do this because -- fill in
- 13 the blanks. Is it expertise? Is it political
- 14 accountability? Is it uniformity? Is it a
- 15 combination of those things?
- 16 GENERAL FRANCISCO: I think that's
- 17 fair. I think all -- all -- all of the above
- 18 are -- are fair considerations of what those
- 19 types of presumptions are often based on.
- 20 And it also reflects the fact, and
- 21 this was the second portion of the point I was
- 22 going to be making on the separation of powers
- issue, is that when an agency acts pursuant to
- 24 a lawful delegation from Congress -- and we can
- 25 fight over what that means -- but as long as

- 1 you've got a lawful delegation from Congress,
- 2 at the end of the day it doesn't really matter
- 3 if what the agency is doing looks adjudicative,
- 4 looks executive, or looks legislative because
- 5 in every one of those instances the agency is
- 6 effectuating executive power.
- 7 It has to be effectuating executive
- 8 power, as --
- 9 JUSTICE SOTOMAYOR: General --
- 10 GENERAL FRANCISCO: -- Justice Scalia
- 11 --
- JUSTICE SOTOMAYOR: -- you may not --
- 13 GENERAL FRANCISCO: -- has made clear.
- JUSTICE SOTOMAYOR: -- you may not
- care about the outcome of this case but we're
- 16 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
- 19 accept your approach, what did the district
- 20 court -- what did the court below, not the
- 21 district court -- what did the court below do
- 22 wrong? How would you correct it? How would
- 23 you advise us to advise judges to approach the
- 24 Auer question?
- 25 GENERAL FRANCISCO: Sure.

1 JUSTICE SOTOMAYOR: Write my opinion 2 for me on that. 3 (Laughter.) 4 JUSTICE SOTOMAYOR: Okay? 5 GENERAL FRANCISCO: Right, so, a 6 couple of points, Your Honor. And if I could 7 first say I didn't mean to say that we don't 8 care about the outcome of this case, because we 9 deeply care about the rights of our veterans 10 and we do care about the outcome of -- of all 11 of these types of cases. 12 JUSTICE SOTOMAYOR: By the way --13 GENERAL FRANCISCO: But the graver 14 issue here --15 JUSTICE SOTOMAYOR: -- the biggest 16 argument that your adversary has is that the 17 agency didn't take into account the -- the 18 assumption that interpretations should favor 19 veterans. 20 GENERAL FRANCISCO: Uh-huh. 21 JUSTICE SOTOMAYOR: So deal with all 22 of that. 23 GENERAL FRANCISCO: Sure. Sure. 24 we do care about how the specific case comes

out. But in terms of how it would apply to

- 1 this case, at the end of the day I actually
- 2 don't think the Federal Circuit should have
- 3 applied Seminole Rock deference to the VA
- 4 Board's decision in this case for two reasons.
- 5 First, and this is one you might well
- 6 disagree with us on, we think we had the better
- 7 interpretation of the regulation, and so we
- 8 don't think you ever get to Seminole Rock, but
- 9 if you disagreed with us on that, one of the
- 10 key questions and under Seminole Rock and under
- 11 Chevron --
- 12 JUSTICE SOTOMAYOR: Do you think their
- 13 reading is unreasonable?
- GENERAL FRANCISCO: We do. And -- and
- 15 -- and, secondly, as under Seminole Rock --
- 16 JUSTICE GORSUCH: Let's say we
- disagree with you on that because it is the
- 18 usual interpretation of relevant evidence found
- in the Federal Rules of Evidence, so it's not
- 20 crazy.
- 21 GENERAL FRANCISCO: So -- so I'm going
- 22 to my -- that would -- my second point would
- 23 be -- help address that.
- Assuming you've got some ambiguity and
- 25 it would otherwise trigger Seminole Rock, under

- 1 Seminole Rock and Chevron you only defer if the
- 2 determination reflects the considered judgment
- 3 of the agency as a whole.
- 4 And given the way the VA Board is
- 5 structured, there are something like 98 members
- of the VA Board. They issue, I think, over
- 7 80,000 decisions a year. Their proceedings are
- 8 ex parte. They're all individual member
- 9 decisions. They're not made in panels. And I
- 10 think -- and none of them have any precedential
- 11 value.
- 12 Given that suite of factors, we don't
- 13 think that any individual Board decision by the
- 14 VA Board reflects the considered judgment of
- 15 the agency as a whole --
- JUSTICE GORSUCH: Wow.
- 17 GENERAL FRANCISCO: -- as a --
- JUSTICE GORSUCH: So you would have
- 19 this Court and -- and courts across the country
- 20 judge agency decisions as to how considered
- 21 they are?
- 22 GENERAL FRANCISCO: No, Your Honor.
- 23 That's --
- 24 JUSTICE GORSUCH: Isn't that a --
- isn't that a bit -- asking a -- a bit of

- inter-branch disrespect?
- 2 GENERAL FRANCISCO: I don't think so
- 3 at all, Your Honor. It's exactly what this
- 4 Court said that the rule was in the Mead case
- 5 when you're -- when you're undertaking Chevron
- 6 deference.
- JUSTICE GORSUCH: No, in Mead --
- 8 GENERAL FRANCISCO: It's actually --
- 9 JUSTICE GORSUCH: No, in Mead we said
- 10 that if -- if Congress didn't delegate it in
- 11 those cases. Here we're -- we're pay past
- 12 that. We're on factor four or five of your
- 13 six-part test.
- GENERAL FRANCISCO: But I think, both
- 15 --
- 16 JUSTICE GORSUCH: And -- and a
- judge has to decide how considered --
- 18 GENERAL FRANCISCO: Yeah.
- 19 JUSTICE GORSUCH: -- the agency
- 20 decision is.
- 21 GENERAL FRANCISCO: Right. But I
- think in Mead, both the majority and the
- 23 dissent agreed that you wouldn't get to Chevron
- 24 deference unless the decision reflect the
- considered views of the agency as a whole.

1 They just disagreed over whether or 2 not the particular decision issued in that 3 case, the customs letter, reflected that 4 considered judgment. 5 So I don't think that's an innovation 6 that we're asking for. That's simply an 7 elemental aspect of it. 8 But to go to your -- the other parts 9 of your question, Your Honor, when you get down 10 to the application of the veterans canon, the Court, of course, didn't grant certiorari on 11 12 the application of the veterans canon, but assuming that it applies in the context of 13 14 regulations, we don't think that it would apply 15 in Petitioner's favor here because we believe 16 that that is a tie-breaking canon that only applies when two interpretations are equally 17 18 plausible. 19 And here we think that our 20 interpretation, even if you don't think it is 21 the theoretically best one, we think that it is 22 more plausible than Petitioner's and, therefore, you wouldn't get to the application 23 2.4 of the veteran's canon. But, again, our principal concern on 25

- 1 behalf of both the VA and the other agencies
- 2 throughout the United States is in preserving
- 3 Seminole Rock in its core applications because
- 4 that is an issue that transcends the facts of
- 5 this case.
- 6 JUSTICE SOTOMAYOR: So if I'm
- 7 understanding your views, in answer to Justice
- 8 Gorsuch, you're basically saying a decision by,
- 9 let's assume, a BIA court is not enough, unless
- 10 a BIA what?
- 11 GENERAL FRANCISCO: No, not --
- 12 JUSTICE SOTOMAYOR: Unless that the
- 13 agency has --
- GENERAL FRANCISCO: No -- yeah, not --
- 15 not at all.
- JUSTICE SOTOMAYOR: Tell me when they
- 17 count --
- 18 GENERAL FRANCISCO: Sure.
- 19 JUSTICE SOTOMAYOR: -- and when they
- don't.
- 21 GENERAL FRANCISCO: Not at all
- 22 necessarily, Your Honor. But I think what this
- 23 Court's decisions have been clear about across
- 24 the board is that whoever is -- whoever issues
- 25 the decision on which we are seeking deference

- 1 has to be able to speak for the agency as a
- 2 whole. And different agencies have different
- 3 ways of doing that.
- We don't think that, given the suite
- of factors at issue specifically with respect
- 6 to the VA Board, meets that standard because
- 7 there are so many different indicia suggesting
- 8 that an individual Board decision doesn't
- 9 reflect the considered views of the VA as a
- 10 whole, as to the meaning of its regulations.
- 11 CHIEF JUSTICE ROBERTS: Thank you,
- 12 General.
- Three minutes, Mr. Hughes.
- 14 REBUTTAL ARGUMENT OF PAUL W. HUGHES
- ON BEHALF OF THE PETITIONER
- 16 MR. HUGHES: Thank you, Mr. Chief
- 17 Justice.
- And I'd like to begin, and we thank
- 19 the General for the clear recognition here that
- 20 deference does not apply in this case or other
- 21 cases like it. We certainly agree with that
- 22 conclusion.
- But we still believe that the
- 24 appropriate resolution of this case is to
- 25 overturn Seminole Rock and Auer in their whole

- 1 because it's critical to restore the importance
- of notice and comment rule-making that Congress
- 3 thought was a critical check to bring
- 4 democratic accountability to the agencies.
- 5 We certainly agree that agencies have
- 6 a very substantial role to play in
- 7 policy-making, but Congress made the judgment
- 8 that the way that that is done in a democratic
- 9 way accountable to the population is through
- 10 notice and comment rule-making, such that the
- 11 regulated public can provide their views.
- 12 And that also accounts with the
- 13 theoretical underpinnings of how this Court has
- 14 explained that deference can be appropriate to
- 15 agencies.
- There are two things that are
- 17 required: First, a delegation of the subject
- 18 matter but, second, that the agency acts in the
- 19 particular manner that Congress has delegated
- 20 the agency to -- to act within.
- In this context, as we have explained,
- 22 the particular manner that the agency
- 23 identified was through rule-making that
- 24 provides the public that ability to
- 25 participate. And that's the fundamental

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1
     problem.
 2
               My -- my second --
 3
               JUSTICE GINSBURG: What -- what is
 4
      your answer to the delay? And -- and what do
 5
      we do in the interim, one year, two years,
 6
      three years?
 7
               MR. HUGHES: Well, a few things about
      the delay, Your Honor. That's part of the
 8
 9
     balance the APA struck. If the agency wants to
10
      move faster, it can use interpretive rules that
     bring consistency to the agency but don't have
11
12
     binding effect in law -- in courts. They would
13
     have the -- the -- the effect of Skidmore.
14
               In the event that there is some sort
15
      of emergency situation, the APA contemplates
16
      that for allowing for regulations pursuant to
      the good cause exception, if the agency can
17
18
      show that there is something that is akin to an
19
      emergency that would warrant something like a
20
      preliminary injunction in court.
21
               So Congress has provided for those
22
      sorts of emergency situations when the delay in
23
      -- in the regulatory process would actually
     pose some kind of practical problem.
24
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But to turn additionally to the

- 1 practical problems that exist in Auer
- deference, as the Chief Justice was explaining,
- 3 I think you get a non-satisfactory result
- 4 regardless of how courts apply it.
- 5 If courts apply it as they did in this
- 6 case to say we don't have to -- to really do
- 7 much statutory or -- or textual construction to
- 8 determine if both sides have an argument that
- 9 looks plausible on the page, that we -- then we
- defer, that is not a particularly satisfactory
- 11 answer.
- 12 By contrast, if courts go far down the
- road of step one and do the interpretation, but
- 14 then ultimately decide, as many courts have had
- 15 to do, that although we think the -- the agency
- 16 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
- 19 not a satisfactory answer.
- JUSTICE SOTOMAYOR: By the way, your
- 21 -- the General said if we adopt your
- 22 interpretation and rescind Auer deference in
- 23 total, that every case that relied on Auer
- deference would be subject to new litigation.
- 25 MR. HUGHES: Well, Your Honor, I think

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1
      as I explained with the Marsh example earlier,
 2
      all of those cases are already fundamentally --
 3
               JUSTICE SOTOMAYOR: No --
 4
               MR. HUGHES: -- unstable --
 5
               JUSTICE SOTOMAYOR: -- but they're
 6
      still going to come to court for courts to
 7
      decide if that's true or not. Every losing
 8
     party under prior Auer deference litigation is
 9
      going to come to court to argue that it --
10
      under its reading it has the better reading.
11
      It could be shot down but it's going to still
12
      arque it.
13
               MR. HUGHES: If I may, Your Honor?
               CHIEF JUSTICE ROBERTS: Yes.
14
15
               MR. HUGHES: I don't think that
16
      increases any instability in the aggregate
      because the existing circumstance is completely
17
18
     unstable.
19
               However, if prospectively Auer does
20
     not apply, that is what ultimately leads to
21
      stability because interpretations of
22
      regulations would just be like interpretations
23
      of statutes that would have binding effect
24
      absent the agency or Congress going through the
```

process that's constitutionally and statutorily

1	proscribe	ed for amending the underlying text.
2		CHIEF JUSTICE ROBERTS: Thank you,
3	counsel,	General. The case is submitted.
4		(Whereupon, at 11:10 a.m., the case
5	was subm	itted.)
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22		
23		
24		
25		

		-II	7 4 4 0 4 4 0 0 4
1	act [4] 14:9 24:7 29:8 69:20	allow [1] 32:15	7,14,21 16 :2 2
10 [1] 17: 8	acted [1] 17:15	allowing [1] 70 :16	47: 13 62: 16 6
10:09 [2] 1: 17 3: 2	acting [2] 14:18 36:20	allows [2] 6 :10 11 :15	arguments [1
11:10 [1] 73:4	action [2] 7:11 21:10	allude [1] 22:20	arise [1] 6: 17
12 [1] 17 :9	actions [1] 13:6	already [6] 31:5 33:22 50:19 51:18	arms [1] 26 :21
	active 3 10:14 12:17 16:7	55 :14 72 :2	around [3] 23:
13 [1] 25 :10	activity [1] 7:8	alternative (3) 17:3 39:7 55:16	array [1] 3:17
18-15 [1] 3:4	acts [3] 7:15 60:23 69:18	although [2] 34: 19 71: 15	arrive [2] 3:15
1800s [2] 24:3,13	actually [8] 22:20 36:12 37:2,3 43:	altogether [2] 33:24 37:21	arrives [1] 58:
1832 [1] 24:7	16 63 :1 65 :8 70 :23	ambiguity [16] 4:18 34:17,21,23,	articulate 🕮
1850 [1] 24 :4	add [2] 51:12 54:24	24 43 :24 44 :8,20 49 :18 52 :3,7,11,	articulated [1
1944 [1] 21 :18	addition [1] 22:15	13,15 53: 23 63: 24	aside [1] 18:7
1947 [1] 22: 19	additionally [1] 70:25	ambiguous [12] 7:23 34:3 38:21	aspect [1] 66:
2	address [3] 32:13 33:5 63:23	39: 15 40: 5,6 42: 19 45: 11 50: 5,22,	assisting [1] {
2018 [2] 9 :10 29 :7	addressed [2] 33:3 54:7	24 59 :25	assume [2] 61
2019 [1] 1: 13	adjudications [2] 6:17 12:22	amending [1] 73:1	Assuming [2]
27 [1] 1 :13	adjudicative [1] 61:3	America [2] 9:17,18	assumption
	adjudicators [1] 7:6	American [1] 38:3	attention [1] 1
3	administering [1] 46:6	amicus [4] 56:6 57:18,22 58:12	Attorney [2] 2
3 [1] 2:4	administration [1] 24:22	among [2] 55 :22 56 :23	Auer [65] 3:16
31 [1] 22 :24	Administration's [1] 4:20	amongst [2] 36:16 39:6	15 6: 5,25 7: 2
32 [1] 2 :7	administrative [1] 8:24	amount [7] 14:5 36:13 40:19 44:3,	2 15 :14,20 17
	admitted [1] 16:24	6 55 :12 59 :10	22 21: 17,17 2
4	adopt [5] 32:10 33:14 43:11,13 71:	anew [1] 47:7	10,11,15,23 2
4 [1] 9: 3	21	announced [1] 20:9	7,12,22,24,24
40 [1] 35 :12	adopted [4] 5:8 21:22 22:3 24:5	anomaly [1] 20:1	43 :18 46 :16,2
45 [3] 9 :21,25 42 :10	adopting [1] 54:18	another [1] 29:3	13,16 59 :16 6
5	advance [1] 31:1	answer [11] 6:3,22,23 10:23 41:22	22,23 72 :8,19
	adversarialness [1] 18:4	43 :3 44 :4 67 :7 70 :4 71 :11,19	August [1] 9:1
50 [2] 49 :5 51 :18	adversary [1] 62:16	answering [1] 36:10	authorities [
554d [1] 13 :16	advise [2] 61:23,23	answers [1] 17:20	authority [7] 1
56d [1] 13: 15	Advocates [1] 9:19	anticipated [1] 6:20	36: 25 39: 11 6
6	AFFAIRS 2 1:8 3:6	APA [15] 6:8 12:25 13:17 20:10,23	authorizatio
	AG's [1] 23:8	21 :5,20 22 :2,8 25 :24 26 :3,11 31 :	average [1] 4
68 [1] 2:1 0	Agencies [24] 3:17 6:11 13:1,2 14:		average 1:14
8	9,10,12 15 :7,11 23 :22 24 :15,20	apologize [1] 41:23	
80,000 [1] 64:7	25 :3 28 :25 32 :15 49 :12 52 :23 53 :	APPEARANCES [1] 1:19	away [1] 31:14
800 [1] 12: 12	14 60 :12 67 :1 68 :2 69 :4,5,15	appeared [1] 48:19	
		appears [1] 3:12	back [5] 9:7 24
9	agency [65] 7:3,5,6,7,10,24 11:13,	applicability [1] 21:10	bad [4] 50:16,1
9 [1] 51 :25	15 13 :5,6,21 15 :8,23 16 :20 20 :16,	application [5] 48:19 53:19 66:10,	balance [3] 12
98 [1] 64: 5	19,19,24,25 21 :10 23 :12,14,19 25 :		banc [4] 29:5,
A	16 26 :9 27 :21 28 :1 31 :5,14,21 33 :	12,23	based [6] 24:1
A	7,15 35 :15,17 37 :9 43 :8 44 :18,21	applications 8 32:25 33:6 36:12	10,19
a.m [3] 1:17 3:2 73:4	46 :5,8 49 :21 50 :13 54 :1 56 :25 57 :	51 :23 53 :12 58 :17 59 :9 67 :3	basically [2] 2
ability [3] 21:1 26:7 69:24	7 60 :23 61 :3,5 62 :17 64 :3,15,20	applied 5 16:13 17:25 48:16,22	basis [6] 17:12
able [5] 8:21 10:2 21:2 56:25 68:1	65 :19,25 67 :13 68 :1 69 :18,20,22	63 :3	18,20
above [1] 60 :17	70 :9,11,17 71 :15,18 72 :24	applies [7] 5:2 8:3 16:1 19:18 50:4	bear [1] 16: 9
above-entitled [1] 1:15	agency's [14] 7:11,13 8:5,18 15:	66: 13,17	become [1] 32
absent [1] 72:24	15 16 :24 26 :1 39 :6 44 :14 45 :20	apply [13] 3:14 5:23 15:4,20 52:16	Beecham [1]
absolutely [4] 21:6 34:12 52:5 53:	48 :21 51 :14 58 :4 59 :24	53 :24 59 :3 62 :25 66 :14 68 :20 71 :	
9	aggregate [1] 72:16	4,5 72 :20	begin [7] 5:19
accept [1] 61:19	aggressive [1] 48:6	applying ១ 27 :23 50 :5,8	22 39 :16 68 :1
accepted [1] 30:1	ago [1] 9:5	approach [2] 61:19,23	behalf [9] 1:21
account [2] 27:9 62:17	agree [15] 3:12 7:2,22 14:11 22:15	appropriate [4] 17:3,19 68:24 69:	21 67:1 68:15
accountability 5 33:11 38:18 50:	23 :3 25 :24 41 :6,12 51 :11,24,25	14	behave [1] 36
12 60 :14 69 :4	52 :11 68 :21 69 :5	approved [1] 10:15	believe [7] 5:9
accountable [4] 33:15 50:13 56:2	agreed [1] 65:23	area [2] 14:12 31:17	17 66 :15 68 :2
69: 9	agreement [1] 40:14	areas [4] 15:16,23 16:25 53:13	believed [1] 5
accounted [1] 47:22	air [1] 21:16	aren't [4] 19:10 38:15 49:12 59:6	below [3] 4:7
accounts [1] 69:12	akin [1] 70:18	arguably [1] 48:16	benefit [7] 36:
accumulated [1] 26:23	ALITO [7] 10:5 13:7 15:14 29:23	argue [3] 57:21 72:9,12	5 51 :22 59 :1
accurate [2] 40:17 60:4	46 :15 59 :12,14	argued [1] 5:1	benefits [14] 3
across [7] 33:17 37:4 39:3 46:10	Alito's [1] 53:3	arguing [1] 53:10	42 :16 54 :10,1
55:17 64:10 67:23	alive [1] 33:19	argument [18] 1:16 2:2,5,8 3:4,8 5:	10 59: 2,11

7.14.21 **16:**2 **29:**25 **31:**8,17 **32:**20 **68**:14 **71**:8 [1] 31:1 3:9 26:21 27:1 5 **16**:19 3:12 16:22 [1] 15:21 3:7 **58:**20 **1**:18 **67**:9 ^[2] **63**:24 **66**:13 n [2] 3:24 62:18 11:2 **22:**7,19 6 **4:**8,14,23 **5:**1,4,11, 21 **8:**2,3,11 **11:**12 **12: 7:**8,10,24,24 **20:**6,8, **24**:2,17 **26**:22,23 **27**: 28:18,22 29:12 30:1,2, 4 **33**:20 **37**:25 **38**:5 ,24 **47**:13 **50**:20 **57**:11, **61**:17,24 **68**:25 **71**:1, 9 10 [1] **14:**9 **14:**13 **16:**24 **23:**9,11 60:1 on [1] **14:**11 **:1:**19

В 24:2 26:16 55:8 61:17 .16.19 **51:**3 2:25 15:5 70:9 .11.17.19 18 **46:**19 **59:**17 **60:**10, **24**:14 **67**:8 12 **29**:12 **51**:8 **59**:15, **32:**12 **27**:9 9 11:12 17:21 20:8 25: 21,24 2:4,7,10 3:9 32: **6**:6 :9 **23**:18 **27**:18 **49**:8, :23 **54**:16 **61:**20,21 5:13 **37**:2,12 **39**:8 **46**: 33:2,9 38:13 41:1,2 13 55:20,21 56:9 58: 10 59:2,11

argument [18] 1:16 2:2,5,8 3:4,8 5:

55:17 **64:**19 **67:**23

conclude [1] 52:2

beside [1] 4:16 best [19] 3:19 4:2 11:16,17 25:15 **45**:10,19,21,25 **46**:13 **48**:22 **49**:4, 10,18,19 51:17,20 59:19 66:21 better [6] 4:20 5:21 24:22 37:19 63:6 72:10 between [1] 15:5 BIA [4] 38:1 56:7 67:9.10 big [2] 45:15 53:7 biggest [1] 62:15 bind [1] 7:5 binding [6] 7:9 8:7 26:2 29:20 70: 12 72:23 bit [4] 12:17 26:16 64:25.25 blanks [1] 60:13 blind [1] 7:21 Board [7] 64:4,6,13,14 67:24 68:6, Board's [1] 63:4 bond [1] 10:16 books [4] 33:1 47:5 54:14 60:7 both [11] 5:9 19:3 22:12 25:20 38: 13 **52**:24 **53**:14 **65**:14.22 **67**:1 **71**: bounds [1] 28:2 boy [1] 43:6 branch [1] 17:2 BREYER [16] 10:7,19 11:18 12:19 13:15,23 14:15 20:15 21:4 22:6, 25 23:3,14 35:8 49:2,4 brief [7] 9:4 10:8 23:8 56:6 57:19, 22 58:12 briefs [1] 47:24 bring [4] 13:5 36:9 69:3 70:11 broad [1] 16:8 broader [3] 3:25 39:18 53:2 built [2] 36:8 57:4 bump [1] 8:24 Bureau [1] 37:22 **bureaucracy** [2] **56:**1,5

С

business [2] 4:12 16:5

call [2] 7:21 56:2

called [1] 49:16 came [1] 1:15 canon [4] 66:10,12,16,24 capture [1] 56:25 care [6] 50:20 61:15 62:8,9,10,24 careful [1] 28:5 carried [1] 23:2 cars [1] 14:17 Case [46] 3:4.14.21 4:14 5:2.5.24 6: 22 **17**:24 **21**:7.19 **28**:2.3 **29**:2.3.6. 12 30:13 39:2 43:18 45:23 47:14 **56**:8,10,18 **58**:6,12,15,18 **59**:5,7, 21 61:15 62:8,24 63:1,4 65:4 66:3 67:5 68:20,24 71:6,23 73:3,4 cases [36] 5:24 6:25 8:4,9,20 12:2, 4 **18**:9 **19**:4,7,11 **22**:8 **24**:3,12 **25**: 25 28:5 30:2,2,5,6,9,14,20 34:18 45:15 46:3,18 48:10,15,18 49:7 **52**:10 **62**:11 **65**:11 **68**:21 **72**:2 cast [1] 37:15

cause [1] 70:17 century [1] 17:9 certainly [8] 5:20,25 8:2 41:13 49: 25 50:1 68:21 69:5 certiorari [1] 66:11 cetera [1] 51:6 Chamber [1] 37:21 change 8 11:25 18:21 19:6 21:24 **22**:9 **26**:19 **27**:6 **32**:2 changed [4] 12:9 18:19,20,22 changes [9] 9:5,12,14,22,25 14:16, 17 31:21 42:10 changing [1] 26:24 charged [1] 58:20 check [1] 69:3 Chevron [6] 44:10 52:1 63:11 64: 1 **65**:5.23 CHIEF [19] 3:3,10 8:13 10:3 26:15 **27**:5,19 **28**:14 **32**:17,22 **42**:23 **43**: 17 **44**:1,19 **68**:11,16 **71**:2 **72**:14 choice [4] 13:2 33:13 39:6 46:7 Chrysler [1] 23:1 Circuit [14] 4:7,10,13,23,25 5:1,3,8, 8 25:10 29:6.11.17 63:2 Circuit's [2] 4:19 29:19 circumstance [1] 72:17 circumstances [2] 15:2 18:12 circumvent [1] 32:15 circumvention [1] 6:6 cited [1] 11:19 claims [1] 37:25 clean [1] 59:15 clear [6] 11:25 23:17 45:24 61:13 67:23 68:19 close [1] 71:18 closer [2] 49:9.22 colleague [1] 42:8 colleagues [1] 24:20 colloguy [1] 55:9 combination [1] 60:15 come [9] 36:20 40:4 44:3,13 46:11 **49:**5 **51:**20 **72:**6,9 comes [2] 43:2 62:24 coming [2] 5:24 56:6 comity [1] 23:21 comment [24] 6:16 7:1 8:6 12:16 **14**:22 **31**:8.11.15 **32**:3.6.9.11 **39**: 20.22.23.25 40:21 42:9.11 54:24 55:7.21 69:2.10 comments [2] 9:16,24 Commerce [1] 37:22 **Commission** [1] **24**:11 complete [1] 4:8 completely [3] 40:3 46:24 72:17 complex [1] 58:21 complicated [4] 45:22 46:6 51:13, compound [1] 10:13 concede [1] 5:15 conceptual [2] 59:18.20

concern [6] 39:23 46:21.22.23 47:

concerned [3] 46:15 58:14 59:7

concluded [1] 55:14 conclusion [3] 39:5 40:5 68:22 conclusions [1] 46:12 conditions [2] 14:17 23:9 conduct [3] 7:13 25:1.9 conference [1] 45:5 confidence [1] 27:25 confirm [1] 48:23 conform [1] 25:8 confronted [1] 56:10 Congress [31] 6:7 7:9 14:8,14,25 17:13,14,15 18:19,20,21,22 19:1,5 **26**:3 **28**:24 **31**:11 **32**:9.12 **52**:24 **54**:16 **59**:23 **60**:11,24 **61**:1 **65**:10 69:2,7,19 70:21 72:24 congressional [1] 26:12 consensus [1] 16:9 consider [1] 27:24 considerable [2] 19:20 22:10 consideration [1] 23:20 considerations [1] 60:18 considered [9] 11:23 12:8 64:2. 14.20 65:17.25 66:4 68:9 consistency [2] 13:6 70:11 consistent [9] 27:10 33:8 34:5,15 **35**:3,3 **51**:4,5 **56**:18 consists [1] 10:14 constantly [1] 30:17 constitutional [1] 18:14 constitutionally [1] 72:25 construction [6] 24:5,9 50:9 52:2, 17 **71**·7 constructions [2] 46:1 4 consult [1] 13:19 contemplates [1] 70:15 contention [1] 3:13 context [10] 14:24 16:3 25:25 50:2. 11 **51**:6 **52**:3 **59**:4 **66**:13 **69**:21 contexts [1] 16:18 contrast [1] 71:12 control [3] 12:5,23 52:24 convince [1] 39:4 coordinate [1] 17:2 core [9] 33:6 36:11 46:3 51:22 53: 11.17 58:16 59:9 67:3 Corp [1] 23:1 correct [3] 4:13 40:18 61:22 correctly [1] 11:8 couldn't [1] 18:20 Counsel [4] 26:15 32:18 42:23 73: count [1] 67:17 counted [1] 9:21 country [7] 33:17 37:5 39:3 46:10 49:20 55:17 64:19 counts [1] 35:7 couple [3] 38:23 45:17 62:6 course [12] 4:3 10:3 12:5.6.7.8 17: 19 **46**:20 **53**:19 **55**:6 **60**:11 **66**:11 COURT [59] 1:1.16 3:11.14 5:10. 25 7:9.22 8:11.16.17 10:12 12:25 15:18.21 16:19.20 17:10.17.24 19: 5,6,9 21:9 22:23 23:18 24:4 27:22

25 29:3 30:3,22 31:19 32:10,11, 23 36:18 38:16 39:21 40:23 48:20 **54**:17 **57**:22,24 **58**:6 **59**:20 **60**:3 **61**:20,20,21,21 **64**:19 **65**:4 **66**:11 67:9 69:13 70:20 72:6,9 Court's [7] 19:4 27:10 30:9 34:18 48:9.15 67:23 courts [33] 8:8 24:13 25:10 28:4 **29**:18.25 **30**:4.7.11.11.21.21 **31**:24 33:17 37:1.4 38:4 39:3.4 40:23 43: 25 46:10.18 52:24 55:17 59:24 64: 19 70:12 71:4.5.12.14 72:6 covalent [1] 10:16 crazy [1] 63:20 creates [2] 39:16 40:10 credit [2] 29:8 38:9 critical [4] 12:14 26:10 69:1,3 cumbersome [1] 40:25 curious [1] 49:6 currently [2] 6:1 47:4 customs [1] 66:3 cuts [2] 22:17 20

D

D.C [3] 1:12.20.23 day [7] 27:7 37:24 38:4 47:23 60:5 61:2 63:1 deal [4] 10:1 14:20 15:16 62:21 debate [2] 8:15 60:3 decades [4] 18:24 33:1 54:15 60:7 decide [7] 11:4 34:2 56:18,20 65: 17 **71:**14 **72:**7 decided [7] 11:8 19:4 21:18 26:3 **29**:6,12 **54**:12 decides [3] 13:19 21:6 31:19 deciding [1] 4:13 decision [19] 4:7 5:4 19:8 23:2 29: 5.5.20 **30**:13.23 **48**:23 **56**:7 **63**:4 **64**:13 **65**:20.24 **66**:2 **67**:8.25 **68**:8 decision-makers [1] 20:19 decision-making [2] 36:24 39:11 decisions [8] 17:7 20:18 31:4 38: 1 64:7,9,20 67:23 decisis [7] 17:6 18:11 19:17 26:17 30:9 53:4,16 decrease [1] 41:25 deeply [2] 42:25 62:9 default [2] 15:3,4 defer [8] 35:5 39:5 43:8 44:21 59: 24 64:1 71:10.17 deference [47] 3:13,16 4:8,14,23 **5**:2,4,12,22,23 **6**:5,25 **7**:22 **8**:2,3, 11 **11:**13 **15:**18.25.25 **16:**13 **17:**10. 11.24.25 **20**:22 **25**:5.6 **26**:2.25 **27**: 2 29:13 32:24 37:25 54:2 58:7 59: 9 63:3 65:6,24 67:25 68:20 69:14 71:2,22,24 72:8 deferred [1] 10:12 define [1] 35:17 definitely [1] 42:14 definition [3] 39:7 41:4 42:19 definitions [1] 39:7 degree [6] 8:14,15,16 9:1 22:10

delay [3] 70:4,8,22 delegate [1] 65:10 delegated [4] 14:11,13 60:1 69:19 delegation [4] 59:17 60:24 61:1 69:17 democratic [7] 49:13,15,20 50:12 56:14 69:4.8 democratically [2] 49:12 56:2 depart [1] 8:12 Department [5] 1:23 24:6 26:1 29: depends [5] 26:18 27:20.20.21.21 described [1] 49:8 deserves [1] 26:2 detailed [1] 32:1 determination [1] 64:2 determine [8] 4:12 8:17 11:16 21: 9 22:13,14 44:7 71:8 determining [2] 51:16 52:7 different [13] 12:13 15:1 16:19 33: 16 **36:**20 **40:**4 **46:**9.10.11 **51:**20 68:227 differently [1] 35:18 difficult [1] 31:25 direction [1] 26:13 disability [1] 58:10 disagree [6] 39:14 41:13 45:4 56: 5 63:6.17 disagreed [2] 63:9 66:1 disagreement [1] 36:16 disappear [1] 47:21 discover [1] 14:1 discusses [1] 22:8 discussing [1] 15:3 dispute [1] 23:23 disrespect [1] 65:1 disruptive [3] 48:4.13.25 dissent [1] 65:23 distance [1] 17:22 district [8] 13:10,13 33:16,17 35: 11 39:3 61:19,21 disturbing [1] 24:10 doctrine [8] 3:16 8:12 19:19 20:2 **22**:3 **33**:4 **53**:17 **54**:18 doing 5 11:1 16:21 41:9 61:3 68: done [4] 17:13 18:23 43:3 69:8 doubt [1] 46:21 down [6] 35:22 40:22.24 66:9 71: 12 **72**:11 dozen [2] 18:9 30:2 dozens [2] 33:15 39:2 due [1] 17:2 durability [1] 31:20 Е

each [2] 12:20 48:18 earlier [2] 36:18 72:1 early [1] 24:3 easier [1] 15:6 edge [1] 53:18 edifice [1] 35:24 effect [10] 7:9 8:7 15:7 18:12 28:9 **29:1 46:**16 **70:**12.13 **72:**23

effects [2] 27:13 44:16 effectuating [2] 61:6,7 efficient [2] 39:24 41:8 either [5] 4:17 19:24 23:19 46:16 **51:**5 elemental [1] 66:7 elements [1] 34:2 eliminate [1] 52:9 eliminating [1] 37:20 emergency [3] 70:15,19,22 emphasis [1] 43:23 emplovees [1] 29:9 en [4] 29:5.11.17.19 end [5] 27:7 44:7 47:23 61:2 63:1 endemic [1] 40:12 enforceable [1] 23:5 engage [1] 13:2 engaged [1] 37:23 enormous [1] 55:12 enough [5] 33:22 35:21 57:25 67: 9 71:18 enrich [1] 36:4 ensures [1] 57:6 entirety [1] 3:17 entities [1] 57:1 entitled [1] 15:17 equally [1] 66:17 error [2] 24:8,16 especially [1] 56:22 ESQ [4] 1:20 2:3,6,9 essentially [1] 25:6 establish [1] 14:25 established [3] 17:17 21:25 47:5 et [1] 51:6 Even [7] 3:19 12:23 44:21 47:18 48:5 54:11 66:20 event [1] 70:14 everybody [1] 11:19 everybody's [1] 24:1 everyone [1] 55:13 everything [5] 20:14 31:9 43:4 48: evidence [7] 22:2,4,6 35:10,17 63: 18.19 ex [2] 13:20 64:8 exactly [5] 10:19 21:21 27:6 55:1 example [5] 9:2 10:11 29:2 38:19

72:1 exception [5] 13:17,24,24 14:7 70: exceptional [1] 15:22

excuse [1] 36:25 executive [3] 61:4,6,7 exercise [1] 14:12 exist [1] 71:1 existing [3] 9:11 34:15 72:17 exists [2] 6:1 31:3 expediency [1] 13:4 expertise [8] 20:16 23:23 24:20 **34:**8 **35:**6.10.21 **60:**13 explain [1] 16:8 explained [5] 48:21 59:2 69:14,21

72:1

explaining [1] 71:2 explains [1] 22:21 explanation [1] 12:9 explanations [1] 32:1 expressly [1] 4:25 extensive [2] 44:3,6 extraordinary [1] 41:2 eye [1] **37:**15

face 3 39:9 48:16 55:14 faced [1] 37:24 facing [4] 36:23 42:18 45:25 46:4 fact [8] 19:20 21:23 44:8 45:24 49: 17 **52**:23 **58**:3 **60**:20 factor [2] 19:23 65:12 factors [4] 53:4.7 64:12 68:5 facts [1] 67:4 fair [7] 18:2 29:7 34:6 35:6 59:5 60: 17,18 fairly [1] 24:18 faith [1] 36:20 faithful [1] 53:15 fall [2] 35:24 52:14 far [5] 4:20 20:17 31:18 46:25 71: Farm [2] 16:11 37:22 faster [2] 13:4 70:10 favor [4] 22:17.21 62:18 66:15 FCC [2] 13:8 14:2 FDA [5] 10:12 12:10,16 14:4 16:7 FDA's [1] 13:18 feature [2] 55:2,6 Federal [16] 4:7,10,13,19,22,24 5: 1,2,7,8 13:10,13 35:11 42:3 63:2, feel [1] 24:8 few [6] 6:3 11:10 17:20 52:4 57:3 fight [5] 34:22.24 35:2 46:9 60:25 figure [3] 23:6 29:19 42:20 file [1] 58:12 filed [1] 57:22 fill [1] 60:12 final [1] 9:21 find [1] 26:25 first [16] 4:11 6:4 7:22 10:22 18:12 19:17 20:9 32:6 33:6 40:2 43:23 45:18 48:20 62:7 63:5 69:17 five [1] 65:12 fix [1] 54:16 flexibility [1] 13:4 flippina [1] 43:6 focus [2] 36:9 48:14 Footnote 3 9:3 22:24 51:25 force [8] 7:12,14,20 19:18 22:23 28:9,23 29:1 forces [1] 11:13 foregoing [1] 24:5 forward [1] 23:2

1,7 37:8 38:12 40:1,9 41:11,21 42: 1,5,13 43:12,15,20 44:5,24 45:6, 13,16 46:25 47:15 48:1 49:25 50: 7,21,25 **51**:10 **52**:5,12 **53**:9 **54**:22, 25 55:5,19,24 56:3 57:2,14,17,20 **58**:1,13 **59**:13,19 **60**:16 **61**:10,13, 25 **62**:5,13,20,23 **63**:14,21 **64**:17, 22 **65**:2,8,14,18,21 **67**:11,14,18,21 Frank [1] 49:6 frankly [1] 53:12 friend [2] 47:3 52:19 friend's [1] 48:25 front [1] 44:7 FTC [1] 10:22 function [1] 26:8 functions [1] 13:16 fundamental [1] 69:25 fundamentally [1] 72:2 further [1] 33:22 future [1] 7:5

G

gauntlet [1] 28:21 gave [2] 6:23 59:20 GEN [3] 1:22 2:6 32:20 General [79] 1:22 12:10 32:19.22 34:12 35:1.13.19 36:1.7 37:8 38: 12 **40**:1.9 **41**:11.21 **42**:1.5.13 **43**: 12.15.20 44:5.24 45:6.13.16 46:25 47:15 48:1 49:3.25 50:7.21.25 51: 10 **52**:5,12 **53**:1,9 **54**:22,25 **55**:5, 24 56:3 57:2,14,17,20 58:1,13 59: 13,19 60:16 61:9,10,13,25 62:5,13, 20,23 63:14,21 64:17,22 65:2,8,14, 18,21 **67**:11,14,18,21 **68**:12,19 **71**: 21 73:3 General's [2] 22:7.19 generalized [1] 25:4

generally [3] 6:8 15:4 51:11

52:6.7 **53**:22

1 63:24

genuine [7] 34:17,21 43:23 44:8

genuinely [4] 38:21 50:4,22,23

gets [2] 42:25 55:8 getting [1] 26:21 GINSBURG [7] 4:15 7:16,19 29: 22,24 30:19 70:3 qive [5] 7:1 10:11 33:23 54:3,20 given [6] 14:10 41:16 57:23 64:4, 12 68:4 Gonzales [1] 27:9 GORSUCH [30] 5:13 15:13 33:18 **34**:22 **35**:2.14.20 **36**:3 **37**:6.10 **47**: 8.16 **52**:25 **55**:19.25 **56**:4 **57**:11. 15.18.25 58:8 63:16 64:16.18.24 **65**:7,9,16,19 **67**:8 qot [6] 9:16 38:20 42:20 54:12 61:

govern [1] 55:23 government [15] 3:12 4:15,24,25 9:4 17:2,22 18:6 37:7,15 39:19 41: 9 45:12 53:6 58:9

government's [11] 5:3,7,14,20 6: 10 9:3 17:23 18:1,8 38:9 45:10 grab [1] 11:6

found [3] 9:8 28:1 63:18

FRANCISCO [75] 1:22 2:6 32:19.

20.22 33:18 34:12 35:1.13.19 36:

four [1] 65:12

grand [1] 24:11 grant [1] 66:11 granted [1] 5:11 graver [1] 62:13 great [4] 8:25 10:1 15:16 47:11 greatest [1] 11:6 greatly [2] 28:2 52:9 grievously [1] 20:4 group [2] 10:16 49:14 guess [9] 28:7 35:23 38:7 41:15 **45**:14,16 **47**:8 **57**:21,21 guidance [2] 31:15 32:5

half [1] 17:9

hand [1] 15:9

handed [2] 40:22.24 hands [1] 27:1 happen [1] 41:18 happened [3] 6:18 9:8 57:16 happening [1] 19:25 happens [8] 8:20 26:8 30:6 40:7 42:25 43:10 45:5,12 hard [2] 26:25 32:1 hat [1] 20:25 hear [1] 3:3 held [1] 58:6 help [1] 63:23 hiah [2] 34:6 35:4 high-profile [1] 57:23 highlights [1] 29:4 highly [4] 16:4 38:7 45:20 51:15 history [3] 22:5 25:21,23 hold [1] 30:16 Honor [54] 3:22 4:1,6,22 5:20 7:2 8:1,19 11:11 12:14,24 13:11 14:6, 23,25 15:19 16:17 17:21 19:2,17 20:7.21 22:1.18 25:19 27:11 28: 16 **31**:2 **32**:8 **34**:14 **36**:2.8 **38**:12 41:11.21 42:1.14 43:12.21 44:24 51:11 53:10 54:25 57:2,20 58:13 62:6 64:22 65:3 66:9 67:22 70:8 71:25 72:13 Honor's [3] 25:22 30:10 41:14 hope [1] 39:3 however [2] 18:23 72:19 HUGHES [57] 1:20 2:3,9 3:7,8,10,

hypothetical [1] 4:5

71:25 72:4.13.15

idea [1] 20:17 identical [1] 34:16 identified [5] 28:24 48:15 53:20 58:24 69:23 ignore [2] 23:12,19 illustrate [1] 38:20

22 **4**:1,6,22 **5**:19 **7**:2,17 **8**:1,19 **11**:

15:19 **16**:3,15,17 **17**:5,20 **18**:7 **19**:

10 **12**:14,24 **13**:7,11,22 **14**:6,23

2,16 20:7,21 22:1,18 23:1,13,17

25:19 **27**:8 **28**:13,16 **30**:8,25 **31**:

10.16 32:8 53:5 68:13.14.16 70:7

hundreds 3 10:9 30:3 33:16

immediately [1] 53:6 immigrant [2] 56:8,23 immigration [1] 37:24 impediments [2] 39:22 41:7 implement [1] 13:5 implemented [1] 31:11 importance [2] 15:22 69:1 important [6] 6:4 15:11 21:18 42: 15 **44**:15 **53**:13 imposed [2] 6:7 26:11 imposina [1] **53:**17 impossible [1] 20:22 imprecise [1] 28:12 imprecision [1] 28:17 inadequately [1] 12:7 inappropriately [1] 11:23 including [2] 6:9 9:17 inconsistencies [1] 27:16 inconsistency [1] 48:14 inconsistent [2] 48:17 53:25 increases [2] 31:3 72:16 indeed [1] 7:23 independent [3] 56:15.17.19 indicates [1] 7:14 indicia [1] 68:7 individual [4] 14:15 64:8,13 68:8 initial [1] 25:23 initially [1] 9:22 injects [2] 19:20 27:16 injunction [1] 70:20 innovation [1] 66:5 innovations [1] 26:11 inquiry [1] 45:1 inside [1] 15:8 instability 5 19:21 27:17 29:4 31: 3 72:16 instances [1] 61:5 instead [1] 11:2 institution [1] 49:21 intend [2] 7:10 22:9 intended [1] 32:12 intent [4] 54:17 59:23 60:4,9 inter-branch [1] 65:1 interbranch [1] 23:21 interest [2] 17:16 36:10 interests [10] 26:5 37:13,14,17,19 38:6.11.14.15.17 interim [1] 70:5

interpretation [39] 7:24 8:18 13: 13 **15**:15 **18**:15 **24**:15 **25**:10 **26**:1 29:14,17,20 33:8 34:4 36:17 44: 13,14,16 **45**:20 **47**:5 **48**:6,21 **50**:

16,17,18 **51:**3,8,17 **52:**14 **54:**4 **56:** 10 **57**:7,8 **59**:25 **63**:7,18 **66**:20 **71**: 13,17,22

interpretations [19] 3:18 12:1 25: 17,18 30:15 33:13 36:21,24 38:22 **39**:10 **48**:17 **51**:21 **53**:25 **54**:2 **55**: 15 **62**:18 **66**:17 **72**:21,22

interpreted [3] 23:5 46:18 48:8 interpreting [1] 51:13

interpretive [8] 10:10 11:15 12:21 13:2.3 15:6 22:22 70:10 invitation [1] 5:3

involving [1] 56:8 isn't [5] 21:15 23:5 25:7 64:24,25 issue [15] 3:17,25 6:15,21 19:8 26: 17 31:14 32:14 41:7 52:20 60:23

62:14 64:6 67:4 68:5 issued [2] 9:9 66:2

issues [3] 6:16 53:20 67:24

itself [11] 6:22 28:1 33:7 35:25 44: 9 **50**:2 **54**:5 **57**:13 **58**:20,23 **59**:2

JAMES [1] 1:4 January [1] 9:20 Jerome [1] 49:6 job [2] 13:18 29:9 John [1] 35:11 ioined [1] 10:15 Judge [15] 12:11 21:6,8 23:10 35: 11 **42**:25 **43**:5 **44**:2,6,12 **56**:16,17, 19 64:20 65:17 iudge's [1] 23:9 judge-made [1] 18:13 judges [18] 11:4,22 12:5,12 13:10, 14 **14**:4 **20**:17 **36**:16 **39**:13,13 **40**: 4 44:12.21 46:11 49:16 51:18 61: judging [1] 16:6

judgment [5] 20:23 64:2,14 66:4

judicial 3 11:6 28:10 45:5 jurists [1] 36:19

Justice [144] 1:23 3:3,11,19,23 4:4 15 **5**:13 **6**:13 **7**:16,19 **8**:13 **10**:3,5, 7,19 **11**:18 **12**:19 **13**:7,15,23 **14**: 15 **15**:13,14,24 **16**:10,16 **17**:5 **18**: 3,17 19:10,22 20:12,14 21:4 22:6, 25 23:3.14.25 25:5 26:15 27:5.18. 19 28:14 29:22.23.24 30:19 31:7. 13.22 **32**:17.22 **33**:18 **34**:22 **35**:2. 8,14,20 **36**:3 **37**:6,7,10 **39**:13 **40**:7 41:6.18.24 42:3.7.21.23 43:17 44: 1.11 45:3.8.15 46:15 47:8.16 49:2. 3,4,7,8 **50**:6,14,15,23 **51**:2,24 **52**:8 25 53:1,2 54:19,23 55:3,19,25 56:

:8 **61**:9,10,12,14 **62**:1,4,12,15, 21 63:12,16 64:16,18,24 65:7,9,16 **67**:6,7,12,16,19 **68**:11,17 **70**:3 :2,20 **72**:3,5,14 **73**:2

4 **57**:11,15,18,25 **58**:8 **59**:12,14

Justice's [1] 44:19

KAGAN [10] 17:5 18:3,17 19:10,22 20:12 41:18 49:3 53:1 60:8 Kane [1] 35:11

KAVANAUGH [23] 15:24 16:10.16 25:5 31:7.13.22 37:7 39:13 40:7 **41**:6 **44**:11 **45**:3,8,15 **49**:7,8 **50**:6 **51**:24 **52**:8 **54**:19,23 **55**:3

Kavanaugh's [1] 50:15 keep [3] 33:25 37:12 55:20

key [3] 33:5 50:3 63:10 kick [1] 61:17

kind [6] 19:23 20:18 30:15 36:5 59:

17 **70**:24 kinds [1] 60:9 KISOR [2] 1:4 3:4 knowledge [1] 15:17 knows [5] 12:10,16 13:8 17:14 23:

L

Labor [3] 29:7,14,16 lack [2] 12:15 18:4 lacked [1] 30:14 lacking [1] 26:13 Land [1] 24:11 Lands [1] 24:6

landscape [1] 20:3 language [5] 22:12 34:19,21 36:

19 44:8 large [2] 40:19 41:25 largely [1] 54:7 larger [1] 58:5

last [1] 25:13 late [1] 60:5

later [5] 12:2,4 21:21 29:15 56:1 Laughter [7] 10:18 11:9 27:4 43: 14.19 49:24 62:3

law [15] 7:12.15.20 21:25 22:23 28: 9.23 29:1 30:24 34:10.15 40:22

56:18.20 **70**:12

law-making [2] 8:22 26:8

lawful [2] 60:24 61:1

lawyers [3] 36:3 37:23 38:3 lead [1] 31:17

leads [2] 8:22 72:20 least [3] 8:17 26:18 56:22 left [4] 33:19 54:9 55:11,13

legal [7] 6:5,16 7:8 13:13 19:21 20: 3 27:17

Legion [1] 38:3

legislative [5] 54:17 59:23 60:4.9

less [10] 12:23 18:11 19:18 20:17 27:13 46:22 47:1 48:25 49:15 58:

letter [1] 66:3 level [3] 20:6 34:6 35:4 life [1] 35:3

likely [1] 48:22

limitations [6] 8:2 26:22 33:4 34: 14 **53**:18 **54**:7

lines [1] 31:2 literally [2] 12:2 33:20

litigate [2] 37:3 39:2 litigates [1] 58:9

litigation [3] 57:23 71:24 72:8 little [2] 26:16 49:5

live [1] 20:5

long [7] 10:21 17:17 28:18 38:25 **39**:20 **41**:20 **60**:25

longer [2] 20:2 60:6

look [12] 9:14 13:25 18:19 19:25 **22**:19 **25**:24 **28**:5 **36**:19 **40**:21 **44**: 10 48:9.11

looked [1] 9:7 looking [2] 41:3 43:5

people 9 11:2 25:15 34:22 35:9

Official - Subject to Final Review

opinion [2] 56:7 62:1

looks [7] 43:2,4 44:3 61:3,4,4 71:9 losing [2] 30:22 72:7 lot [11] 10:24 11:22 13:8 23:9,10 **36**:8,15 **38**:14 **40**:14 **43**:22 **47**:20 lots [1] 45:2 lower [9] 29:18,25 30:4,7,10,21,21 31:23 39:21 Ivsine [1] 10:16 Lysol [1] 23:15

М

made [14] 7:20 9:5.21 10:25 21:15 **31**:24 **33**:14.22 **34**:5.7 **47**:10 **61**: 13 64:9 69:7 Madison [1] 11:7 maintenance [1] 8:3 maiority [2] 5:24 65:22 makeweight [1] 48:20 manageable [1] 54:14 manifest [2] 24:9,16 manifestations [1] 24:18 manner [4] 14:10 41:10 69:19,22 manual [3] 22:7,19,24 many [10] 16:14 18:24 19:11 44:16 47:11,17,18 56:25 68:7 71:14 Marbury [1] 11:7 March [1] 1:13 Marsh [3] 29:6 30:13 72:1 Martin [3] 11:14 58:6 59:21 material [1] 9:22 matter [12] 1:15 8:14,25 10:8 26: 12 33:21 42:24 43:10 54:12 61:2 69:18 71:16 mattered [1] 9:25 matters [1] 8:25 Mead [4] 65:4,7,9,22 mean [16] 10:8.10 11:5.5 14:16 19: 13.24 27:20.22 31:9 41:1 43:17 49:4.11 51:3 62:7 meaning [6] 13:9 16:6 21:7,9 31: 19 68:10 means [6] 8:4 12:12 23:7 34:24.25 60:25 meant [1] 21:24 meantime [1] 39:1 meets [1] 68:6 member [2] 37:25 64:8 members [3] 57:9 60:2 64:5 middle [1] 56:9 might [4] 18:4 44:22 56:5 63:5 million [1] 12:21 millions [4] 10:10 14:18.19.21 minute [1] 20:18 minutes [1] 68:13 misgauged [1] 54:17 missing [2] 21:12,13 Mister [1] 17:5 modified [2] 47:19,21 moieties [3] 12:11,17 35:9 moiety [5] 10:14,15 12:12 16:7 27: months [1] 9:5

56:22.24 59:10 move [2] 18:10 70:10 much [14] 8:15 10:17 16:14 26:18 **27**:6 **33**:21,22 **35**:6,6 **37**:12 **44**:9 46:22 58:14 71:7 multiple [13] 33:12 36:23 37:1,4 38:22 39:9 41:5 46:1,4 50:9 51:20 **55**:15 17 must [2] 7:22 37:14

Ν

narrowed [2] 27:12 28:20 narrowing [1] 27:10 National [3] 9:18 33:10 37:23 nature [2] 45:1 57:23 necessarily [1] 67:22 need [6] 3:24 7:1 19:12.13 24:25 28:24 needed [2] 6:20 26:4 needs [5] 16:20 18:2 23:18 24:23 never [2] 20:10 56:11 New [4] 6:16 10:14 56:10 71:24 Ninth [4] 29:5,11,17,19 nobody [2] 14:1 33:19 NOEL [3] 1:22 2:6 32:20 non-ester [1] 10:16 non-satisfactory [1] 71:3 none [1] 64:10 nonetheless [1] 44:17 normally [1] 6:17 nothing [1] 22:16 notice [35] 6:16 7:1 8:6 9:9 12:15 14:22 18:2 31:8,10,15 32:3,6,9,11 33:8 34:7 35:6 39:19,22,23,24 40: 21 41:25 42:9,11 54:3,20 55:7,21 **57:**5 **58:**2,3,11 **69:**2,10 notice-and-comment [12] 6:6 7: 17 9:6 15:9 26:6 31:24 32:14 38: 24 40:24 41:8.19 55:11 Number [2] 24:19 52:10

objection [1] 12:4 obvious [1] 20:13 obviously [1] 45:7 offer [1] 9:3 Office [1] 24:11 often [6] 24:22 45:19,23 51:15,19 **60:**19 okay [5] 10:24 14:3 45:6 61:17 62: old [1] 23:15 once [3] 27:8 31:19 43:3 one [39] 6:9,24 7:25 8:10,18 9:2 10: 11 **14:**21 **16:**18 **21:**12,12 **24:**3,4,5, 19 **25**:13 **26**:10,20 **31**:12 **32**:4 **33**: 13 **36:**22 **39:**18 **42:**9.23.24 **46:**7 **48**:2,22 **49**:11,14 **54**:20 **56**:16 **61**: 5 **63**:5,9 **66**:21 **70**:5 **71**:13 onerous [1] 32:12 only [12] 4:17 7:7 8:13,14,15 16:1 23:24 50:4,18 52:12 64:1 66:16 operation [1] 24:7

opposed [1] 56:15 opposite [2] 34:11 42:8 oral [5] 1:16 2:2,5 3:8 32:20 order [2] 4:11 48:23 ordinary [4] 16:5 50:8,8 52:16 Organization [1] 9:19 origin [1] 18:15 original [1] 54:12 other [18] 13:18 15:9 19:4 24:12 **31**:13 **40**:23 **42**:8 **47**:3.24 **48**:20 **49**:1 **52**:19 **54**:23 **55**:22 **60**:10 **66**: 8 67:1 68:20 others [2] 9:20 28:6 otherwise [2] 59:25 63:25 ought [6] 34:20 43:13 44:2 53:21, 23 54:3 ourselves [1] 24:8 out [8] 14:25 21:16 23:6 29:19 42: 20 46:9 57:8 62:25 outcome [5] 47:12 58:14 61:15 62: 8 10 outraged [1] 38:5 over [12] 9:16 10:20 16:14.24 17:9 26:24 34:23,24 35:2 60:25 64:6 66:1 overnight [1] 30:17 overreach [1] 32:14 overrule [4] 17:7 46:24 57:12 61: overruled [2] 15:15 30:1 overruling [2] 17:18 46:16 overturn [1] 68:25 overturned [1] 15:20 overturnina [2] 3:15 18:8 own [3] 5:7 7:13 18:9

PAGE [2] 2:2 71:9 panels [1] 64:9 Paralyzed [1] 9:18 parody [1] 11:5 part [6] 24:21 26:18 28:6 52:6 60:1 parte [2] 13:20 64:8 participate [5] 8:21 10:2 21:2 26: particular [12] 6:8 10:13 14:10 16: 24 28:11 46:14 58:15,18 59:4 66: 2 69:19.22 particularly [5] 15:16,22 48:13 59: 7 71:10 parties [9] 24:25 25:14 30:25 36: 14 37:2.13 53:14 57:6.10 parts [2] 40:2 66:8 party [5] 30:22 36:25 37:18 39:12 past [4] 17:9 18:23 26:11 65:11 pathway [1] 58:25 PAUL [5] 1:20 2:3,9 3:8 68:14 Pauley [1] 11:14 pay [1] 65:11

36:5 44:17 49:15 55:22 56:4 Perez [2] 13:1 23:2 perfectly [1] 22:10 perhaps [3] 33:16 34:16 53:17 period [2] 38:25 42:18 person [2] 35:4 58:8 persuasive [1] 16:2 persuasiveness [1] 25:6 petition [1] 5:10 Petitioner [6] 1:5,21 2:4,10 3:9 68: Petitioner's [2] 66:15,22 pick [2] 24:4 46:8 pinpointing [1] 40:17 place [3] 10:20 32:7 43:16 plain [1] 7:21 plainly [1] 24:9 plausible [3] 66:18,22 71:9 play [1] 69:6 please [2] 3:11 32:23 plus [1] 19:23 point [26] 4:16 14:8 17:23 18:10 **24:**25 **25:**8.13.20.21.23 **27:**12.23 **29**:3 **35**:24 **38**:20 **40**:4 **41**:14.15 **45**:8 **47**:10.25 **50**:3 **58**:5 **60**:21 **61**: 16 **63**:22 points [4] 14:25 33:6 51:12 62:6 policy [2] 11:17 20:19 policy-making [2] 20:25 69:7 political [3] 33:11 38:17 60:13 politically [2] 33:14 50:13 politically-accountable [2] 39: 12 46:8 poll [1] 51:18 popular [1] 56:24 population [1] 69:9 portion [1] 60:21 pose [1] 70:24 position [9] 11:25 18:8 43:21 46: 17 **47**:3 **48**:3,24 **55**:1 **58**:4 possibly [1] 10:9 potential [1] 58:24 potentially [1] 31:1 power [4] 11:6,22 61:6,8 powers [4] **52**:20,22 **56**:15 **60**:22 practical [18] 6:4 8:25 10:7 20:11 27:13 33:2.2.9 42:24 43:10 53:19. 20 54:8.10.13.13 70:24 71:1 practice [2] 24:10 26:12 precedential [2] 7:4 64:10 precise [1] 40:17 precisely [1] 14:7 predictability [2] 33:10 34:10 preliminary [1] 70:20 premise [1] 5:9 premised [1] 30:23 prepared [1] 41:12 prescribed [1] 24:10 present [2] 5:6 24:16 presented [2] 4:10 6:21 preserving [4] 36:11 58:16 59:8 presumed [3] 59:23 60:9,11

paving [1] 11:2

Pearson [1] 19:3

morning [1] 3:4

most [8] 6:4 35:9 46:12 48:6 53:13

response [2] 9:24 47:9

responsibility [1] 49:14

responsible [1] 25:16

rest [1] 5:4

responses [2] 11:11 45:17

Official - Subject to Final Review

presumption [1] 59:22 presumptions [1] 60:19 pretty [3] 16:21 21:24 43:4 previously [2] 10:15 27:14 principal [5] 3:13 4:9 34:14 54:7 66:25 principle [1] 18:2 principles [3] 24:19 46:19 53:16 prior [3] 22:8 25:24 72:8 private [7] 37:14,16,18 38:10,13, 15 **54:**2 probably [4] 30:3 35:11 49:9 57: problem [17] 6:5 8:11 11:20.21 18: 4 **28**:7,15,17 **39**:21 **40**:10,10 **44**: 11,12 50:15 53:7 70:1,24 problematic [1] 47:18 problems [6] 20:11 32:25 33:2 54: 8.14 **71:**1 procedural [1] 26:4 procedure [1] 40:25 procedures [2] 7:10 28:24 proceedings [1] 64:7 process [10] 8:22,24 21:2 40:12 **42**:15 **55**:11 **58**:22 **59**:6 **70**:23 **72**: processes [1] 56:14 promise [1] 56:22 promotes [2] 33:10 50:12 promulgate [1] 15:7 propose [2] 14:20 35:16 proposed [5] 9:9,10,23 41:25 46: proscribed [1] 73:1 prosecutors [1] 13:20 prospective [4] 7:12 22:23 28:22 **31:**18 prospectively [3] 31:16 55:23 72: protections [1] 26:4 protestations [1] 38:10 provide [4] 8:6 21:2 26:6 69:11 provided [5] 14:9,13 33:7 58:25 70:21 provides [3] 15:11 38:6 69:24 providing [1] 6:12 provision [1] 13:17 public [22] 8:6,21 9:15,24 10:1 12: 18 **15**:12 **19**:19 **21**:1 **24**:6 **25**:17 **26**:5,7 **33**:8 **54**:3,20 **57**:5,9 **58**:2, 11 69:11.24 pursuant [2] 60:23 70:16 pushed [2] 32:5 41:9 put [4] 6:11 20:24 43:22 51:16 puts [1] 58:2

Q

question [24] 4:9 5:6,10 6:24 7:7 11:14 13:12 23:24 26:17 29:23 30: 10 36:8 39:15 40:2 41:22 43:1 44: 19 **45**:7 **52**:22 **53**:3 **55**:8 **60**:6 **61**: 24 66:9 questions [3] 39:18 56:20 63:10

quite [7] 6:14 9:25 12:16 28:7,11, 17 44:25 quo [2] 5:21 31:4 quotes [1] 51:17 railroad [1] 14:17 raises [1] 32:24 random [1] 48:11 range [9] 8:4,9 27:24 28:11,12,19 **40**:15 **43**:7 **52**:13 rank [1] 47:25 rarely [1] 11:21 rate [1] 56:5 rate-making [6] 13:18,25 14:2,7, rates [2] 14:16.16 rather [5] 11:17 32:6 33:15 37:1 rational [1] 16:22 reach [2] 3:24 39:4 reaction [2] 31:23 32:3 read [4] 10:8 11:18,19 23:8 reading [14] 3:20 4:2,19,20,21 11: 17 **45**:10,10,19,21,25 **63**:13 **72**:10, readings [3] 40:16 41:5 50:10 real [6] 12:3 15:7 16:22 44:16 46: 21 49:18 reality [1] 56:12 really [18] 4:16 6:24 7:19 14:2 15: 25 16:11 17:8 25:7,7,11 28:11 34: 18 **43**:22 **44**:15 **50**:3 **52**:19 **61**:2 reason [6] 16:21 18:21,24 19:13, 15,16 reasonable [24] 7:24 8:18 25:18 **33:**3.12 **34:**4 **36:**17.19.23 **38:**22 39:6.7.10 40:16 41:5 46:1.4.12 50: 10.24 51:7 52:14 55:15 59:24 reasonableness [5] 27:24 34:25 **40**:3 **50**:25 **51**:2 reasoned [1] 6:22 reasons [5] 6:3 16:22 23:21 32:4

reasoning [1] 40:18 **REBUTTAL** [2] 2:8 68:14 receive [1] 25:4 received [1] 42:10 recent [1] 24:18 recently [1] 29:3 recipe [2] 34:9.11 recognition [2] 23:22 68:19 recognize [2] 12:10 53:18 recognized [2] 13:1 19:5 recognizes [1] 9:4 recognizing [1] 26:22 reconcile [1] 20:22 reconciled [1] 20:10 reconsideration [1] 58:24 record [1] 16:23 reduce [2] 52:9.13 reduced [1] 5:16

reduces [1] 40:19

referenced [1] 30:14 reflect [2] 65:24 68:9 reflected [2] 20:23 66:3 reflects [5] 12:25 58:7 60:20 64:2. req [1] 23:11 regardless [1] 71:4 regime [2] 45:22 51:19 regimes [1] 51:14 Register [1] 42:4 regulated [16] 8:21 9:15 10:1 12: 17 **15**:12 **24**:25 **25**:14 **36**:5.13 **37**: 2,13 53:14 57:1,6,9 69:11 regulation [14] 4:3,17 7:23 9:12 **21**:8 **23**:7 **24**:24 **29**:21 **31**:20 **34**:3 44:14 46:14 47:4 63:7 regulations [11] 9:24 10:10 30:16 **32**:2 **46**:19 **47**:12,20 **66**:14 **68**:10 70:16 72:22 regulatory [6] 9:6 45:22 46:6 51: 14 19 70:23 reinforce [2] 53:22.23 reinforcina [1] 33:3 reject [4] 11:22 12:6,7,8 rejecting [2] 11:3 16:23 released [1] 9:20 relevant [8] 13:9 16:6 35:10,17 45: 20 51:15 60:6 63:18 reliability [1] 31:21 reliance [13] 4:8 19:22,24 29:13 **30**:7 **37**:13,14,16 **38**:6,11,14,15 **53**:3 relied [4] 4:23 22:23 30:21 71:23 relitigated [1] 47:6 rely [4] 16:12 19:20 37:8 57:7 relvina [1] 21:11 remain [1] 28:18 remains [3] 52:3.10.15 remember [2] 21:21 58:19 repeatedly [2] 17:15 19:7 repeats [1] 21:17 replaced [1] 34:20 report [1] 22:15 represent [1] 38:3 represented [1] 38:16 representing [1] 48:10

require [6] 15:10 18:8 48:2,5,7 55:

required [4] 32:9 34:19 44:9 69:17

requirement [8] 34:17 43:23 48:

requirements [3] 6:7 31:25 54:21

14 **50**:21 **53**:22,24 **57**:5 **58**:2

respect [4] 7:5 17:1 40:20 68:5

Respondent [4] 1:9,24 2:7 32:21

requiring [2] 15:16 32:1

rescind [1] 71:22

reserve [1] 32:16

resolve [1] 5:11

resolved [1] 4:14

rescinded [1] 29:16

resolution [1] 68:24

respectful [1] 23:20

respond [1] 25:20

responds [1] 27:18

rested [2] 4:7 29:18 restore [1] 69:1 restrained [1] 24:8 rests [1] 59:22 result [3] 3:15 16:19 71:3 retain [2] 5:16 53:16 retained [1] 53:11 reticulated [1] 16:4 retroactive [1] 59:1 reversing [1] 17:16 review [1] 28:10 reviewing [1] 21:8 revised [1] 5:17 revision [3] 30:17 31:5 33:21 revisited [1] 48:5 riahts [1] 62:9 rises [1] 20:6 road [2] 35:22 71:13 **ROBERT** [1] 1:7 ROBERTS [14] 3:3 8:13 10:3 26: 15 **27**:5.19 **28**:14 **32**:17 **42**:23 **43**: 17 **44:**1 **68:**11 **72:**14 **73:**2 Rock [50] 3:16 17:8,11 21:17,18 22:4,11 24:2 28:18,22 32:24 33:7 **36**:11,22 **39**:9 **40**:10,11,13,19 **42**: 17 **46**:3,17,24 **47**:6 **48**:16,19,23 **50**:2,4 **51**:22 **53**:11 **54**:1,4,8,10,18 **55**:6 **58**:7,16 **59**:8,16,22 **63**:3,8,10, 15 25 **64**:1 **67**:3 **68**:25 role [1] 69:6 rooms [1] 45:5 route [1] 46:23 rule [30] 6:10 9:21 10:22 15:5 17: 17 18:13 19:6 24:1 25:10 27:21 30:13 33:11 35:16 37:20 38:20 41: 4 **42**:10,19 **43**:10 **44**:9,17 **45**:11 **46**:14 **47**:1,2 **48**:12 **50**:4 **52**:16 **55**: 13 **65**:4 rule-making [15] 7:18 9:7,10 10: 23 15:10 26:6 31:24 38:24 40:25 41:8 19 60:1 69:2 10 23 rules [23] 3:18 8:23 11:23.24.24.25 12:21 13:3.3 15:1.4.6 22:22 28:9. 19.20.20 **38**:7 **41**:25 **55**:23 **59**:25 63:19 70:10

safeguard [1] 26:5 safeguards [2] 8:7 15:11 same [3] 14:5 39:5 47:12 sample [2] 48:11,12 sanction [1] 8:16 satisfactory [2] 71:10,19 satisfies [1] 58:1 saying [9] 11:1 12:5 15:5 22:9 28: 8 30:19 37:12 57:4 67:8 says [12] 21:5,5,8 22:13,16 23:12, 19 30:22 37:18 43:6 44:13 56:19 scale [1] 6:11

quickly [1] 10:25

Scalia [1] 61:10 scheme [5] 9:6,8 16:5 31:11 46:7 schemes [1] 6:9 scientific [3] 15:17 16:8,25 search [1] 45:18 searched [1] 10:5 second [5] 18:16 60:21 63:22 69: 18 70.2 Secondly [2] 45:23 63:15 secret [2] 54:2 57:7 **SECRETARY** [2] 1:7 3:5 see [4] 9:7 23:4 30:12 47:24 seeking [2] 56:9 67:25 seem [1] 5:15 seems [2] 47:10 56:21 seen [3] 16:13 41:24 56:11 seminal [2] 55:2.5 Seminole [50] 3:16 17:8.11 21:17. 18 **22**:4,11 **24**:2 **28**:18,22 **32**:24 **33**:7 **36**:11,22 **39**:9 **40**:10,11,13, 18 **42**:17 **46**:3,17,24 **47**:6 **48**:16, 19.22 **50:**2.3 **51:**22 **53:**11 **54:**1.4.8. 10.18 55:6 58:7.16 59:8.16.22 63: 3.8.10.15.25 64:1 67:3 68:25 separation [5] 13:16 52:20,22 56: 14 60:22 **September** [1] 29:7 series [1] 24:12 serious [1] 16:21 serve [1] 38:6 served [1] 37:20 serves [1] 56:13 serving [1] 38:10 set [1] 28:20 settina [1] 18:7 seven [3] 10:23 12:20 29:15 several [1] 9:12 SG's [2] 3:20 10:8 shall [3] 21:9 22:13 56:20 share [1] 39:22 shortcoming [1] 12:15 shot [1] 72:11 shouldn't [1] 5:17 show [3] 11:20 17:1 70:18 shown [1] 17:16 side [4] 42:9 49:1 52:19 54:24 side's [1] 47:3 sides [1] 71:8 sideshow [1] 39:16 sideswiped [1] 56:1 significant [6] 33:1,9 36:13 54:13 **56**:21 **59**:10 significantly [1] 48:25 silently [1] 22:3 similar [1] 49:3 simpler [1] 41:15 simply [3] 53:18 55:11 66:6 since [2] 11:7 24:2 single [6] 10:14 33:14 36:25 37:25 39:11 47:4 single-member [1] 56:7 situation [1] 70:15 **situations** [1] **70:**22 six [2] 29:15 34:1

six-part [1] 65:13 **skeptical** [1] **37:**15 Skid [1] 16:11 Skidmore [11] 15:20,21,24,25 16: 11,13 **17**:1 **25**:4 **26**:25 **27**:2 **70**:13 slate [1] 59:15 slightly [1] 53:2 SmithKline [1] 27:9 **Solicitor** [1] **1**:22 solution [5] 17:4 32:13 49:18.19. solve [1] 40:11 solves [1] 31:8 somebody [3] 13:19 21:22 34:7 somehow [1] 22:3 someone [1] 34:6 something's [1] 39:15 sometimes [4] 11:21 29:9,10 58: soon [1] 24:6 sorry [2] 6:13 37:11 sort [2] 38:19 70:14 sorts [1] 70:22 **SOTOMAYOR** [28] **3**:19.23 **4**:4 **6**: 13 **23**:25 **41**:24 **42**:3.7.21 **50**:14. 23 51:2 61:9,12,14 62:1,4,12,15, 21 63:12 67:6,12,16,19 71:20 72: 3,5 Sotomayor's [1] 27:18 sound [1] 25:17 sounds [3] 11:6 16:10 50:17 speaking [1] 49:12 specific [5] 6:21 15:1,1 59:7 62:24 specifically [1] 68:5 speculation [2] 47:25 48:2 speed [1] 8:24 sphere [1] 17:15 spoke [1] 25:5 **squarely** [1] **5**:5 stability [7] 25:21 30:15 31:18 34: 9 37:19 38:17 72:21 staff [1] 14:3 stage [1] 11:15 stand [1] 20:5 standard [3] 34:13 50:20 68:6 Standards [1] 29:8 stare [7] 17:6 18:11 19:17 26:16 30:9 53:4 16 start [3] 25:15 26:21 57:4 started [1] 53:5 starting [2] 24:25 25:8 starts [1] 43:5 State [1] 16:11 STATES [5] 1:1,17 43:21 58:11 67: States' [1] 47:2 status [2] 5:21 31:4 statute [6] 3:20 25:11 26:2 51:4.9 **56:**19 statutes [4] 30:16 45:2 47:21 72:

statutorily [1] 72:25

52:1 71:7

statutory [6] 6:9 16:4 18:14 25:25

stems [1] 19:8 step [3] 18:25 19:6 71:13 still [13] 6:10 8:7 27:15 29:20 30:9 42:10,11,14 49:15 68:23 71:17 72: straightforward [1] 13:12 strong [1] 36:10 strongly [1] 22:21 struck [1] 70:9 structured [1] 64:5 struaale [1] 55:18 studies [1] 11:20 study [1] 41:7 Sturgeon [1] 24:17 subject [12] 28:10 30:17 31:5 33: 12 38:21 40:15 41:4 50:9 52:23 **55**:14 **69**:17 **71**:24 submitted [2] 73:3,5 subsequently [1] 7:8 substantial [4] 9:5 52:21,23 69:6 substantially [3] 18:11 19:18 27: sufficiently [1] 45:11 suggest [1] 25:25 suggesting [1] 68:7 suggests [1] 28:19 suite [2] 64:12 68:4 suited [1] 20:18 super-seriously [1] 19:12 superior [1] 6:1 supplanted [1] 47:20 support [1] 20:2 suppose [2] 27:20 38:20 supposed [2] 36:6 49:23 **SUPREME** [2] 1:1.16 surrounding [1] 20:3 system [4] 19:21 27:17 37:24 58: 19 talked [4] 17:10 20:15 24:21 42:9

technical [5] 15:17 16:4,18,25 23: 22
tells [1] 4:16
term [1] 36:18
terms [2] 21:10 62:25
terrible [1] 19:25
test [5] 17:23 34:2 36:5 47:19 65: 13
text [3] 9:13 51:5 73:1
textual [1] 71:7
theirs [1] 48:4
themselves [1] 36:4
then-binding [1] 29:13
theoretical [1] 69:13
theoretically [3] 40:18 46:13 66: 21
theory [2] 44:18 59:17
there's [17] 4:18 8:1 13:23,24 17:

theory [2] 44:18 59:17 there's [17] 4:18 8:1 13:23,24 17: 22 21:1,12 22:2,4 36:8 40:14 43:6 44:20 49:18 52:21 57:3,3 therefore [3] 33:5 44:20 66:23 they'll [1] 12:22

thinking [1] 53:4 thinks [1] 11:16 though [6] 4:23 6:2 34:15 39:14 **42**:6 **44**:21 thousands [1] 10:9 three [7] 12:20 21:20 24:24 48:15, 18 68:13 70:6 threshold [1] 39:14 throughout [2] 24:13 67:2 thrown [1] 46:20 thumb [1] 6:11 tie-breaking [1] 66:16 tip [1] 29:8 tips [1] 29:9 today [2] 27:13 57:1 took [2] 5:3 10:22 tools [3] 50:9 52:1,16 total [1] 71:23 transcends [1] 67:4 treated [1] 10:13 triager [1] 63:25 trouble [2] 26:20 44:23 troubles [1] 25:13 true [5] 6:14 8:19 16:2 19:3 72:7 trying [3] 6:15 23:6 41:16 turn [2] 5:13 70:25 two [14] 9:4 12:20 17:7 21:20 24: 21 33:5 39:1 40:1 42:24 51:12 63: 4 66:17 69:16 70:5 two-fold [1] 19:17 types [2] 60:19 62:11

U ultimate [2] 8:10,23 ultimately [4] 6:3 9:23 71:14 72: unambiguous [1] 4:18 unanimously [1] 44:22 uncertainty [2] 40:19 55:12 under [26] 5:23 10:22 11:14 14:18 17:23 18:1 19:19 24:23 29:9 35: 16 44:10.18.19 47:1.2.2.3.6.18 48: 5 63:10,10,15,25 72:8,10 underlying [5] 8:22 18:13 19:8 25: 23 73:1 undermine [1] 42:16 underpinning [6] 20:9,13,13,14, 15,16 underpinnings [1] 69:13 underscore [1] 50:3 underscored [1] 30:14 underscores [1] 51:21 understand [8] 5:22 18:18 25:8 28:8 33:19 34:1 41:13 47:9 understandable [1] 24:19 understanding [9] 10:12 24:23 25:1,11 45:21 46:13 51:14 60:4 undertake [2] 7:11 28:25 undertaking [1] 65:5 undoubtedly [1] 20:25 uniformity 3 13:5 33:10 60:14 UNITED [6] 1:1,17 43:21 47:2 58: 11 67:2

thin [1] 21:16

unless [6] 24:8,15 31:20 65:24 67: 9,12 unreasonable [7] 11:4,23 12:6 43: 4 50:18,19 63:13 unreasoned [1] 38:1 unstable [3] 38:7 72:4,18 until [2] 6:21 25:9 unworkable [1] 20:1 up [9] 13:25 21:16 33:23 43:2 44:3, 13 **49**:5 **51**:20 **56**:6 using [1] 52:1 usual [1] 63:18

VA [15] 9:5.9.11.20 58:19.19.23 59: 2 63:3 64:4.6.14 67:1 68:6.9 VA's [1] 7:13 vacate [1] 30:23 value [1] 64:11 various [1] 31:25 vary [1] 28:2 vast [1] 5:24 version [4] 5:17,22 53:2 59:16 versus [2] 3:5 11:7 vest [2] 36:24 46:7 vesting [2] 39:10 50:12

veteran's [1] 66:24 VETERANS [13] 1:8 3:5 4:19 5:25 9:17,18 38:2,4 58:20 62:9,19 66:

veteran [5] 56:9.24 58:10 59:1.3

10,12

Veterans' [2] 9:19 38:4 via [1] 9:6

Vietnam [1] 9:17 view [5] 18:1 32:11 48:6 54:9 60:

viewed [1] 25:2

views [8] 8:5 21:3 46:5 60:10 65:

25 67:7 68:9 69:11 virtue [1] 46:2 virtues [1] 36:22 vulnerable [1] 56:23

wait [1] 25:9 wants [1] 70:9 warrant [1] **70**:19 warrants [1] 23:20 **Washington** [3] 1:12,20,23 way [11] 12:21 19:24 21:15 22:11 **27**:16 **56**:25 **62**:12 **64**:4 **69**:8,9 **71**: Wayfair [1] 19:4 ways [3] 24:24 38:23 68:3 **Wednesday** [1] 1:13 weeks [2] 29:15,15 whatever [1] 23:15

Whereupon [1] 73:4 whether [14] 4:12 5:11 30:12 34:3, 4,5,5,6,7,23 39:15 40:15 60:3 66:

whichever [1] 46:20 who's [1] 25:16

whatsoever [1] 17:16

whoever [2] 67:24,24 whole [8] 35:24 39:16 64:3,15 65: 25 68:2,10,25 wholesale [1] 30:20 wide [2] 3:17 43:7 WILKIE [2] 1:7 3:5 will [11] 8:7 9:14 13:25 25:1 27:15 **28**:19 **36**:3,4 **46**:17,20 **55**:22 willing [1] 33:20 wish [1] 56:2 wishes [1] 7:14 within [7] 18:23 26:8 28:1,10 44:8 **52**:15 **69**:20 without [4] 6:11 12:9 28:23 47:13 wonder [1] 27:6

words [4] 13:19 21:23 31:13 48:20 work [4] 29:9 43:1 44:3,7 workable [1] 34:13 works [1] 29:8 world [2] 25:3 58:3 worried [1] 37:16 worry [1] 16:12 Wow [1] 64:16 wrestle [1] 30:12 Write [1] 62:1 writing [1] 59:14 written [1] 21:20 wrongly [1] 54:11

wondering [1] 35:23

word [2] 13:9 50:16

year [2] 64:7 70:5 years [11] 10:24 12:20,20,20 16:14 **21**:20 **26**:24 **35**:12 **58**:9 **70**:5,6

Ζ

zone [1] 52:15