

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES L. KISOR, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 18-15  
 )  
 ) ROBERT WILKIE, SECRETARY OF )  
 )  
 ) VETERANS AFFAIRS, )  
 )  
 ) Respondent. )  
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Pages: 1 through 73

Place: Washington, D.C.

Date: March 27, 2019

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8 VETERANS AFFAIRS, )

9 Respondent. )

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11

12 Washington, D.C.

13 Wednesday, March 27, 2019

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

18

19 APPEARANCES:

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21 on behalf of the Petitioner.

22 GEN. NOEL J. FRANCISCO, Solicitor General,

23 Department of Justice, Washington, D.C.;

24 on behalf of the Respondent.

25

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

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.

15           JUSTICE GINSBURG: But the government  
16 tells us it's really beside the point because  
17 not only -- well, either the regulation is  
18 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.

22           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 --  
15 they seem to concede that Auer is wrong but  
16 want us to retain some -- some reduced or  
17 revised version of it? Why shouldn't we do  
18 that?

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

1 superior to what currently exists.

2 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.

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

13 JUSTICE SOTOMAYOR: I'm sorry, but  
14 that -- that's not quite true. It -- I don't  
15 think that here it was an issue of them trying  
16 to avoid notice and comment. New legal issues  
17 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  
22 itself in a case, and they reasoned an answer,  
23 and they gave an answer.

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

1 about the need to give notice and comment time.

2 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  
10 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  
13 the agency's, the VA's, own conduct here  
14 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  
23 that the regulation is, indeed, ambiguous and  
24 that the agency interpretation is a reasonable  
25 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,  
17 including the Vietnam Veterans of America, the  
18 Paralyzed Veterans of America, the National  
19 Organization of Veterans' Advocates, and  
20 others. Then, in January, when the VA released  
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  
24 regulations in response to the public comments.

25           Those 45 changes mattered quite a

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  
13 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  
24 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  
5    mean, I want to parody it, but, I mean, this  
6    sounds like the greatest judicial power grab  
7    since Marbury versus Madison, which I would say  
8    was correctly decided.

9           (Laughter.)

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

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

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  
24    rules, they didn't think about it, rules that  
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  
15 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 on -- or three years or two years  
21 on each of the million interpretive rules? By  
22 the way, they'll just go to adjudications,  
23 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 decisions.

7 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  
16 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  
19 words, somebody who decides they can't consult  
20 ex parte with -- with prosecutors in the  
21 agency.

22 MR. HUGHES: Well --

23 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  
3 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  
13 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 rate-making?

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

1 different specific rules in specific  
2 circumstances.

3           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.

13           JUSTICE GORSUCH: If it was --

14           JUSTICE ALITO: If Auer were  
15 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  
20 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



1 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 brought its scientific  
9 consensus to bear.

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

15 MR. HUGHES: Well, I think --

16 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  
2           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  
16          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?

20          MR. HUGHES:  A few answers, Your  
21          Honor, but, to begin with, I don't think  
22          there's distance with the government on that  
23          point because, under the government's test,  
24          Auer deference, in the case of Auer, the Court  
25          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  
11 think stare decisis has substantially less  
12 effect in circumstances where, first, it was an  
13 underlying judge-made rule and not something  
14 that was a statutory, constitutional  
15 interpretation of its origin.

16 And, second --

17 JUSTICE KAGAN: I -- I don't  
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  
13 mean, we used to -- and we need a good reason  
14 for it.

15 So what's your good reason?

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

22 JUSTICE KAGAN: Well, reliance is a  
23 kind of plus factor, and we can talk about  
24 reliance either way, but, I mean, usually we  
25 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  
19 of agency policy than agency decision-makers  
20 are.

21 MR. HUGHES: Your Honor, I think it's  
22 just impossible to reconcile Auer deference  
23 with the judgment that's reflected in the APA,  
24 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  
12 there's just one thing missing, one thing  
13 missing, and that is it doesn't say how you do  
14 it.

15 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.

20 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 and there's no --

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,  
11 by the way, Seminole Rock is not there.

12           And so we have both the language which  
13 doesn't say -- it says shall determine, but it  
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  
24 that manual at Footnote 31 --

25           JUSTICE BREYER: Yeah, that's right.

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.

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

13           MR. HUGHES:  And --

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

17           MR. HUGHES:  And I want to be clear.  
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  
13 throughout the 1800s where the courts were  
14 basically talking about you take the  
15 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

1 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  
14 me, which is regulated parties should know  
15 where to start, and the best people who can  
16 tell them is the agency who's responsible to  
17 the public for having sound interpretations or  
18 reasonable interpretations.

19 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  
23 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.

3 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  
11 innovations of the APA that imposed on past  
12 practice as a matter of congressional  
13 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  
18 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  
24 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.

15 But I will say Auer is still used in a  
16 way that injects inconsistencies and  
17 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  
24 consider the range of reasonableness and, you  
25 know, the confidence that a court has that the

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  
10 when they're subject to judicial review within  
11 a particular range and it's really quite  
12 imprecise what the range is.

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

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

16 MR. HUGHES: Your Honor, I do think  
17 that imprecision is quite the problem, but as  
18 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  
13 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  
17 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 --

22           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

1 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  
14 just referenced underscored, those cases lack  
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  
21 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  
24 Auer, and Auer is not good law?

25 MR. HUGHES: I think parties could

1 potentially advance arguments along those  
2 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  
12 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 --

16 MR. HUGHES: Well, prospectively, what  
17 our argument would -- would lead to is an area  
18 where there is far more prospective stability  
19 because once the -- a court decides the meaning  
20 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  
14 issue of notice-and-comment overreach, not to  
15 allow agencies to circumvent it.

16 If I may reserve my time.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 General Francisco.

20 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

21 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,  
11 and political accountability because, if a rule  
12 is subject to multiple reasonable  
13 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  
17 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.

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

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

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

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

23           JUSTICE GORSUCH: Well, people fight  
24 over whether there's ambiguity and what  
25 ambiguity means. They fight over what

1       reasonableness means.

2                   GENERAL FRANCISCO:   Right.

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

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

14                   GENERAL FRANCISCO:   Well --

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

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

20                   GENERAL FRANCISCO:   No.

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

1 upon itself?

2 GENERAL FRANCISCO: Sure. Well, Your  
3 Honor --

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

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

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

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

23 One of the virtues of Seminole Rock is  
24 that when you're facing multiple reasonable  
25 interpretations, you vest the decision-making

1 authority -- excuse me -- in a single party  
2 rather than multiple courts. And that's  
3 actually of a benefit to regulated parties  
4 because they don't actually have to litigate  
5 that thing in multiple courts across the  
6 country.

7 JUSTICE GORSUCH: Well, on that --

8 JUSTICE KAVANAUGH: The government --

9 GENERAL FRANCISCO: They can rely on  
10 the agency.

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

19 And every private party before us says  
20 their interests in stability would be better  
21 served by -- by eliminating this rule  
22 altogether. And it's not just the Chamber of  
23 Commerce. It's -- it's the Farm Bureau. It's  
24 the national lawyers engaged with the  
25 immigration system every day and are faced with

1 claims of Auer deference for single-member  
2 decisions from the BIA that are unreasoned.

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

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

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

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

24 There are a couple of ways to go. You  
25 could do notice-and-comment rule-making. That

1 takes a very long period of time. In the  
2 meantime, there are two things to do.

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

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

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

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



1 comment?

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

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

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

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

22 As to notice and comment, look, we --  
23 we take the law as it is, as it's handed down  
24 to us by this Court and other courts. And as  
25 it's handed down, notice-and-comment

1 rule-making is a cumbersome procedure. That  
2 doesn't mean it doesn't have benefits. It has  
3 extraordinary benefits.

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: I haven't seen a

1 large decrease in notice and proposed rules --

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

4 JUSTICE SOTOMAYOR: -- in the Federal  
5 Register.

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Counsel, one  
25 of -- as a practical matter, one of two things

1 happens: The judge gets deeply into the  
2 question before him or her and does the work  
3 and comes up with something that looks like the  
4 right answer. And once you've done that,  
5 everything else looks pretty unreasonable. Or  
6 the judge just starts looking at it and  
7 flipping through it and says, boy, there's a  
8 wide range here, could be this, could be that,  
9 and you defer to the agency.

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

13 GENERAL FRANCISCO: Your Honor, I  
14 think you ought to adopt ours, because we --  
15 (Laughter.)

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

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

20 (Laughter.)

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

1           We do think that courts should do --

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

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

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

25           GENERAL FRANCISCO: No, Your Honor,

1 because, again, I don't think that is quite the  
2 nature of the inquiry. I think that there are  
3 lots of statutes --

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

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

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

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

16 JUSTICE KAVANAUGH: -- on big cases.

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

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

24 Secondly, I think it is often the case  
25 that there is -- it is not clear what, in fact,

1 the best reading is when you are facing  
2 multiple reasonable constructions.

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

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

1           GENERAL FRANCISCO: I think it's far  
2 less of a concern under our rule because --  
3 under -- under the United States' rule,  
4 because, under my friend on the other side's  
5 position, every single regulation that's  
6 currently on the books whose interpretation has  
7 been established under Seminole Rock now has to  
8 be relitigated anew. So I think --

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

16           GENERAL FRANCISCO: Uh-huh.

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

24           So, at the end of the day, I -- I  
25 didn't see anything in the briefs other than



1 rank speculation on this point.

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

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

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

25 So I think our position would be

1 significantly less disruptive than my friend's  
2 on the other side.

3 JUSTICE BREYER: Well, when you say --

4 JUSTICE KAGAN: General, a similar --

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

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

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

24 Now you're just supposed to say yes.

25 (Laughter.)

1           GENERAL FRANCISCO: Certainly, I would  
2 say yes -- certainly, I would say yes in the  
3 context of Seminole Rock itself because that  
4 really does underscore our key point. Seminole  
5 Rock only applies when a rule is genuinely  
6 ambiguous and that after applying --

7           JUSTICE KAVANAUGH: Do you --

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

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

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

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

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

1                   GENERAL FRANCISCO: Reasonableness.

2           Yes, Your Honor.

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

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

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

25                   JUSTICE KAVANAUGH: You agree -- you

1 agree, I think, with taking Footnote 9 of  
2 Chevron, using all the tools of statutory  
3 construction, and -- before you conclude that  
4 the ambiguity remains in this context? I think  
5 you've said that a few times.

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

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

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

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

1 JUSTICE GORSUCH: Well, that's --

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

9 So does it?

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

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

22 And that's why we think that you ought  
23 to reinforce the requirement of genuine  
24 ambiguity, you ought to reinforce the -- the  
25 requirement that you wouldn't apply it to

1 inconsistent interpretations, and we don't  
2 think the agency should get Seminole Rock  
3 deference for secret, private interpretations.  
4 It ought to give public notice of its  
5 interpretation, as it did in Seminole Rock  
6 itself.

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

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

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

23           GENERAL FRANCISCO: Yes.

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

1           GENERAL FRANCISCO: Your Honor, and I  
2 think that's exactly their position. The  
3 seminal feature --

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

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

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

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

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

25           GENERAL FRANCISCO: Yes.



1 JUSTICE GORSUCH: -- and not be  
2 sideswiped later by a bureaucracy. You can  
3 call it democratically accountable if you wish.

4 GENERAL FRANCISCO: Right.

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

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

22 That seems to me a significant  
23 promise, especially to the least and most  
24 vulnerable among us, like the immigrant, like  
25 the veteran, who may not be the most popular or

1 able to capture an agency the way many  
2 regulated entities can today.

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

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

15 GENERAL FRANCISCO: I --

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

18 GENERAL FRANCISCO: No.

19 JUSTICE GORSUCH: It was an amicus  
20 brief.

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

1 JUSTICE GORSUCH: That's good enough?

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

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

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

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

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

24 And, here, it was the VA itself that  
25 identified the potential reconsideration

1 pathway that would have provided the -- the  
2 veteran with the benefit of retroactive  
3 benefits and the VA itself that also explained  
4 why it didn't apply to the veteran.

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

13           JUSTICE ALITO: If we were --

14           GENERAL FRANCISCO: And if --

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

20           GENERAL FRANCISCO: I think the best  
21 conceptual basis is what this Court gave it in  
22 the Martin case, and that's where it said that  
23 Seminole Rock rests on a presumption of  
24 legislative intent, that Congress presumed that  
25 courts would defer to an agency's reasonable

1 interpretation of its otherwise ambiguous rules  
2 as part of its delegated rule-making authority.

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

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

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

21 And it also reflects the fact -- and  
22 this was the second portion of the point I was  
23 going to be making on the separation of powers  
24 issue -- is that when an agency acts pursuant  
25 to a lawful delegation from Congress -- and we

1 can fight over what that means -- but, as long  
2 as you've got a lawful delegation from  
3 Congress, at the end of the day, it doesn't  
4 really matter if what the agency is doing looks  
5 adjudicative, looks executive, or looks  
6 legislative because, in every one of those  
7 instances, the agency is effectuating executive  
8 power.

9           It has to be effectuating executive  
10 power, as --

11           JUSTICE SOTOMAYOR: General --

12           GENERAL FRANCISCO: -- Justice Scalia

13 --

14           JUSTICE SOTOMAYOR: -- you may not --

15           GENERAL FRANCISCO: -- has made clear.

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

25           GENERAL FRANCISCO: Uh-huh.

1 JUSTICE SOTOMAYOR: How would you  
2 advise us to advise judges to approach the Auer  
3 question?

4 GENERAL FRANCISCO: Sure.

5 JUSTICE SOTOMAYOR: Write my opinion  
6 for me on that.

7 (Laughter.)

8 GENERAL FRANCISCO: Right. So --

9 JUSTICE SOTOMAYOR: Okay?

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

17 JUSTICE SOTOMAYOR: By the way --

18 GENERAL FRANCISCO: But the -- the  
19 graver issue here --

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

25 GENERAL FRANCISCO: Uh-huh.

1 JUSTICE SOTOMAYOR: So deal with all  
2 of that.

3 GENERAL FRANCISCO: Sure. Sure. So  
4 we do care about how the specific case comes  
5 out. But, in terms of how it would apply to  
6 this case, at the end of the day, I actually  
7 don't think the Federal Circuit should have  
8 applied Seminole Rock deference to the VA  
9 Board's decision in this case for two reasons.

10 First -- and this is one you might  
11 well disagree with us on -- we think we had the  
12 better interpretation of the regulation, and so  
13 we don't think you ever get to Seminole Rock.  
14 But, if you disagreed with us on that, one of  
15 the key questions and under Seminole Rock and  
16 under Chevron --

17 JUSTICE SOTOMAYOR: Do you think their  
18 reading is unreasonable or not?

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

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



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

4           Assuming you've got some ambiguity and  
5   it would otherwise trigger Seminole Rock, under  
6   Seminole Rock and Chevron, you only defer if  
7   the determination reflects the considered  
8   judgment of the agency as a whole.

9           And given the way the VA Board is  
10  structured, there are something like 98 members  
11  of the VA Board.  They issue, I think, over  
12  80,000 decisions a year.  Their proceedings are  
13  ex parte.  They're all individual member  
14  decisions.  They're not made in panels.  And I  
15  think -- and none of them have any precedential  
16  value.

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

21           JUSTICE GORSUCH:  Wow.

22           GENERAL FRANCISCO:  -- as a --

23           JUSTICE GORSUCH:  So you would have  
24  this Court and -- and -- and courts across the  
25  country judge agency decisions as to how

1 considered they are?

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

4 JUSTICE GORSUCH: Isn't that a --  
5 isn't that a bit -- asking a -- a bit of  
6 inter-branch disrespect?

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

12 JUSTICE GORSUCH: No, in Mead --

13 GENERAL FRANCISCO: It's actually --

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

19 GENERAL FRANCISCO: But I think both  
20 --

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

23 GENERAL FRANCISCO: Yeah.

24 JUSTICE GORSUCH: -- the agency  
25 decision is.

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

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

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

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

24           And, here, we think that our  
25 interpretation, even if you don't think it is

1 the theoretically best one, we think that it is  
2 more plausible than Petitioner's and,  
3 therefore, you wouldn't get to the application  
4 of the veteran's canon.

5 But, again, our principal concern on  
6 behalf of both the VA and the other agencies  
7 throughout the United States is in preserving  
8 Seminole Rock in its core applications because  
9 that is an issue that transcends the facts of  
10 this case.

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

16 GENERAL FRANCISCO: No, not --

17 JUSTICE SOTOMAYOR: Unless the agency  
18 heads --

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

21 JUSTICE SOTOMAYOR: Tell me when they  
22 count --

23 GENERAL FRANCISCO: Sure.

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

1           GENERAL FRANCISCO: Not at all  
2 necessarily, Your Honor. But I think what this  
3 Court's decisions have been clear about across  
4 the board is that whoever is -- whoever issues  
5 the decision on which we are seeking deference  
6 has to be able to speak for the agency as a  
7 whole. And different agencies have different  
8 ways of doing that.

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

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 General.

18           Three minutes, Mr. Hughes.

19           REBUTTAL ARGUMENT OF PAUL W. HUGHES

20           ON BEHALF OF THE PETITIONER

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

23           And I'd like to begin, and we thank  
24 the General for the clear recognition here that  
25 deference does not apply in this case or other

1 cases like it. We certainly agree with that  
2 conclusion.

3 But we still believe that the  
4 appropriate resolution of this case is to  
5 overturn Seminole Rock and Auer in their whole  
6 because it's critical to restore the importance  
7 of notice-and-comment rule-making that Congress  
8 thought was a critical check to bring  
9 democratic accountability to the agencies.

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

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

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

1           In this context, as we've explained,  
2           the particular manner that the agency  
3           identified was through rule-making that  
4           provides the public that ability to  
5           participate. And that's the fundamental  
6           problem.

7           My -- my second --

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

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

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

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

5           But, to turn additionally to the  
6 practical problems that exist in Auer  
7 deference, as the Chief Justice was explaining,  
8 I think you get a non-satisfactory result  
9 regardless of how courts apply it.

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

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

25           JUSTICE SOTOMAYOR: By the way, your



1 -- the General said, if we adopt your  
2 interpretation and rescind Auer deference in  
3 total, that every case that relied on Auer  
4 deference would be subject to new litigation.

5 MR. HUGHES: Well, Your Honor, I  
6 think, as I explained with the Marsh example  
7 earlier, all of those cases are already  
8 fundamentally --

9 JUSTICE SOTOMAYOR: No --

10 MR. HUGHES: -- unstable --

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

19 MR. HUGHES: If I may, Your Honor?

20 CHIEF JUSTICE ROBERTS: Yes.

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

25 However, if prospectively Auer does

1 not apply, that is what ultimately leads to  
2 stability, because interpretations of  
3 regulations would just be like interpretations  
4 of statutes that would have binding effect  
5 absent the agency or Congress going through the  
6 process that's constitutionally and statutorily  
7 prescribed for amending the underlying text.

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

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

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## Official - Subject to Final Review

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