

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KATHLEEN SEBELIUS, SECRETARY OF :

4 HEALTH AND HUMAN SERVICES, :

5 Petitioner : No. 11-1231

6 v. :

7 AUBURN REGIONAL MEDICAL :

8 CENTER, ET AL. :

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10 Washington, D.C.

11 Tuesday, December 4, 2012

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:08 a.m.

16 APPEARANCES:

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 Petitioner.

20 JOHN F. MANNING, ESQ., Cambridge, Massachusetts;
21 Court-Appointed amicus curiae.

22 ROBERT L. ROTH, ESQ., Washington, D.C.; on behalf of
23 Respondents.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOHN F. MANNING, ESQ.	
7	Court-Appointed amicus curiae	16
8	ORAL ARGUMENT OF	
9	ROBERT L. ROTH, ESQ.	
10	On behalf of the Respondents	26
11	REBUTTAL ARGUMENT OF	
12	EDWIN S. KNEEDLER, ESQ.	
13	On behalf of the Petitioner	53
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

P R O C E E D I N G S

(10:08 a.m.)

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3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-1231, Sebelius v. Auburn
5 Regional Medical Center.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONER

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

11 Under Part A of the Medicare program, the
12 Federal government pays out more than \$230 billion
13 annually to more than 30,000 institutional providers,
14 including more than 6,000 hospitals. The total amount
15 to which each of these providers is entitled is
16 determined by a fiscal intermediary on the basis of a
17 cost report.

18 The statute provides that a provider may
19 obtain a hearing before the Provider Reimbursement
20 Review Board, only if he appeals the intermediary's
21 determination with -- within 180 days.

22 For the almost 40 years of the existence of
23 the Provider Reimbursement Review Board, the Secretary,
24 pursuant to her broad rulemaking authority, has
25 prohibited the board from extending that period, and

1 instead required dismissal of the appeal, except as
2 specifically provided in the Secretary's own
3 regulations.

4 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
5 there's a little bit of at least facial incongruity in
6 your position.

7 Congress sets in place the 180-day limit.
8 Then you say, oh, well, that, we can go beyond that.
9 The Secretary puts in the 3-year limit, and you say
10 that's it -- you know, that's the dead drop-off. I
11 would have thought what Congress says is entitled to
12 greater weight than what the Secretary says.

13 MR. KNEEDLER: Well, the 180-day limitation
14 here is not a limitation applied to suits filed in
15 court, in which the court is the relevant tribunal, and
16 the court has -- has itself construed the statute's
17 regulating access to the courts or the appellate courts
18 as a matter -- a matter of internal judicial
19 administration.

20 This deadline governs an appeal within the
21 Department of Health and Human Services, and that is
22 something that Congress has delegated the responsibility
23 to the Secretary to construe the relevant statutes and
24 to adopt the relevant regulations pursuant to her broad
25 rulemaking authority.

1 So in -- in this setting, it is the board
2 that is the relevant tribunal, and the rules governing
3 the board's jurisdiction are established --

4 JUSTICE SOTOMAYOR: Excuse me.

5 MR. KNEEDLER: Excuse me.

6 JUSTICE SOTOMAYOR: You don't mention Union
7 Pacific in your brief. How can you be calling what
8 you're doing setting your jurisdictional limits? Didn't
9 we say, in Union Pacific, that agencies can't do that?
10 You can't define your own jurisdiction.

11 MR. KNEEDLER: Well, I --

12 JUSTICE SOTOMAYOR: Now, you may or may not
13 be able to establish claim processing rules. That, I
14 think, is a totally different question. But why do you
15 continue to use it as jurisdictional language?

16 MR. KNEEDLER: Well, I was responding to --
17 first of all, the -- the Secretary's regulations have,
18 from the outset, referred to these limitations as
19 limitations on the board's jurisdiction. This is --
20 this is set forth in the -- in the regulations
21 promulgated --

22 JUSTICE SOTOMAYOR: Well, in that respect, I
23 think the amici is right. You can't -- if they're
24 jurisdictional, we've clearly said that equitable
25 tolling doesn't apply under any circumstances.

1 MR. KNEEDLER: Right. And we -- and we
2 clearly believe that equitable tolling does not apply.
3 That would be fundamentally inconsistent.

4 JUSTICE SOTOMAYOR: So what is good cause,
5 if not some form of equitable tolling?

6 MR. KNEEDLER: There is nothing incompatible
7 between a good cause -- a limited good cause extension
8 and a jurisdictional rule.

9 For example, in -- in the several cases that
10 this Court has considered finding provisions to be
11 jurisdictional, the time for taking an appeal and the
12 time for petitioning for certiorari are both
13 jurisdictional, but both allow extensions for good
14 cause. In fact, this Court's decision in *Bowles*
15 involved the extension for good cause.

16 So the question here for the Secretary --
17 and, again, this is just a narrow question of good
18 cause. It in no way suggests that equitable tolling
19 would be -- would be permitted.

20 The narrow question is whether the Secretary
21 permissibly construed the statute to allow a comparable
22 good cause exception, where -- where something akin to
23 an act of God would prevent the provider from actually
24 appealing within the requisite period of time, just like
25 the district court can extend the appeal period.

1 JUSTICE GINSBURG: The -- the Court's
2 decision in Henderson against Shinseki, that also
3 involved an intra-agency appeal, and yet, we said that
4 equitable tolling was permissible.

5 MR. KNEEDLER: Well, I mean, there are a
6 number of differences there. I think, technically, it
7 was not intra-agency. It was an appeal from
8 the Board of Veterans Appeals to the Court of Veterans
9 Appeals, which is a separate body. It is not something
10 under the jurisdiction of the VA.

11 The VA was not given rulemaking authority
12 over that, unlike here, where the board is under the
13 Secretary's jurisdiction, and, in fact, she has adopted
14 regulations that have been in place for 40 years, which
15 have expressly barred any extensions and treated that
16 limitation as jurisdictional.

17 Also, very much unlike Henderson, this
18 statute is not one comparable to a statute regulating
19 benefits for veterans, to which there has always been a
20 solicitude by Congress and the courts --

21 JUSTICE KAGAN: But, Mr. Kneedler, do you
22 think you could do the same thing in the veterans'
23 benefits context? Because in Henderson, of course, we
24 dropped a footnote saying that we weren't deciding
25 whether equitable tolling was available. All we were

1 saying was that this was a claims processing rule and
2 not a jurisdictional rule.

3 Could the Secretary of Veterans Affairs then
4 go on and say, okay, it's a claims processing rule, but
5 still, we get to decide how much equitable tolling we
6 want, and we're going to adopt a regulation, much like
7 the one in this case, saying you can't come in after 3
8 years? Could you do that in Henderson?

9 MR. KNEEDLER: Well, I think, in Henderson,
10 there would have been the problem that the rule, as I
11 understand it, was a rule to -- for appealing to the
12 Court, which was outside the -- the Secretary's
13 rulemaking authority; whereas, here, this is a body
14 within HHS over which the Secretary has rulemaking
15 authority.

16 But, yes, we -- we think that the Secretary
17 clearly had -- and she has very broad legislative
18 rulemaking authority under this statute -- has the
19 authority to adopt strict limitations, as she has done
20 on that --

21 JUSTICE GINSBURG: Could she -- could she
22 have adopted equitable tolling?

23 MR. KNEEDLER: I -- we don't think that she
24 could have. We think that, as we say in our brief,
25 quite aside from the Secretary's regulation, we believe

1 the sort of open-ended equitable tolling that the court
2 of appeals has imposed on this program for the first
3 time in 40 years is fundamentally inconsistent with a
4 need for repose, especially given the sophisticated
5 nature of these providers, as this Court noted in the
6 Your Home nursing home case --

7 JUSTICE KAGAN: I guess the question I was
8 trying to ask, Mr. Kneedler, was do you think it's a
9 general principle of administrative law that, when there
10 is a claims processing rule that -- that relates only to
11 internal agency process, that the agency gets to decide
12 how much, if any, equitable tolling to allow?

13 MR. KNEEDLER: Yes. We -- we certainly do
14 believe that.

15 For -- for -- in the first place, most
16 agency time limits are established by the agency itself,
17 pursuant to regulation. So if there had been no
18 statutory 180-day limitation period here and the
19 Secretary had adopted a regulation imposing that, then
20 whether -- and the extent to which that provision would
21 be open to extensions for good cause, for some degree of
22 equitable tolling, whatever the factors, would be up to
23 the Secretary in construing her own regulation --

24 JUSTICE ALITO: Now, you refer to these --
25 to the providers as sophisticated, and that certainly is

1 true. But are they really in a position to double-check
2 the calculation when -- if it were true -- and I know
3 you don't agree with this -- if it were true that
4 information needed to make the calculation was
5 intentionally withheld, concealed?

6 MR. KNEEDLER: Well, as you say, we do
7 not -- we do not agree with that. And the findings by
8 the district court in this case, which was the same
9 district judge who sat in the Baystate case, disagreed
10 with that -- with that conclusion.

11 JUSTICE ALITO: Well, I understand that.
12 But if that were the case, would their sophistication
13 allow them to double-check this? Or is this just
14 something that is dependent on data that they cannot
15 access?

16 MR. KNEEDLER: Well, it -- it may be more
17 difficult. This was a situation which required the
18 matching of data between CMS and the Social Security
19 administrative -- massive data files of 11 million
20 Medicare claims, I think 6 million SSI claims.

21 And when you have two agencies matching
22 something, there will be errors. And the -- the
23 providers did not know --

24 JUSTICE SOTOMAYOR: Assume for the sake of
25 your answer that the error was intentional. Don't try

1 to go to the facts, but assume the error was
2 intentional. Now, answer Justice Alito's question.

3 MR. KNEEDLER: There -- it --

4 JUSTICE SOTOMAYOR: There -- that might be a
5 contradiction in terms.

6 MR. KNEEDLER: There may be -- there may be
7 situations in which the provider would not know that,
8 but the need -- but the need for finality under this
9 program, we think, requires an across-the-board rule.
10 Otherwise, a provider could come in -- as this Court
11 suggested in the Your Home case, circumstances --

12 JUSTICE SOTOMAYOR: If this is a claim
13 processing rule, under what theory could you shield
14 yourself against fraudulent conduct -- fraudulent
15 concealment? Under what theory of law would an agency's
16 rule be fair and -- and non-arbitrary --

17 MR. KNEEDLER: Well --

18 JUSTICE SOTOMAYOR: -- that shielded it from
19 fraudulent acts.

20 MR. KNEEDLER: First of all, we do not
21 believe this is an ordinary claims processing rule. We
22 believe that this is a jurisdictional limitation imposed
23 by the -- by Congress, interpreted by the Court to allow
24 this narrow exception. So we do not believe that --

25 JUSTICE SOTOMAYOR: Why do you keep fighting

1 the -- the question?

2 MR. KNEEDLER: But with -- yes, we do
3 believe that the Secretary, in the interest of -- of
4 finality, can impose that sort of limitation. There's a
5 presumption of regularity in the -- in the operation
6 of -- administration of Federal programs. There are
7 criminal sanctions.

8 JUSTICE SOTOMAYOR: You keep fighting the
9 hypotheticals. There is an intent to save money and an
10 intent not to use the figures that are specified by
11 statute, and that is concealed. In that set of
12 circumstances, if this were a claim processing rule,
13 would you be authorized to treat -- not to -- not to
14 permit the action?

15 MR. KNEEDLER: Yes. We -- we believe the
16 Secretary would be -- would be required to, and we think
17 may well be compelled to. But let me point out, if
18 there was that sort of extraordinary circumstance, then
19 either Congress or the Secretary could provide a special
20 remedy in that situation.

21 If there was an inspector general's report
22 that showed widespread fraud in something, I think
23 Congress or the Secretary could be expected to respond
24 to that in an appropriate way. The question is whether
25 the hard and fast rules that have been adopted should

1 be -- should be open to general equitable tolling
2 principles.

3 JUSTICE SCALIA: Mr. Kneedler, you -- what I
4 find incompatible in your argument is you -- you assert
5 that this is a jurisdictional limitation.

6 MR. KNEEDLER: Insofar as the board is
7 concerned. The board has said and the Secretary has
8 said that the board -- this is jurisdictional, and the
9 board has no equitable powers to --

10 JUSTICE SCALIA: Can you think of any other
11 instance in which we have found something to be a
12 jurisdictional limitation and allowed the person or
13 agency, subject to that limitation, to extend it? I --
14 I had always thought that once you say it's
15 jurisdictional, it means you have to abide by it.

16 MR. KNEEDLER: As I said, in -- in Bowles,
17 the Court was dealing with the jurisdictional time limit
18 for an appeal, but there was a comparable -- there is a
19 comparable statutory provision for the Court to extend
20 that period for good cause. It remains jurisdictional.
21 That was the point in Bowles. It was -- there was a
22 question of whether the --

23 JUSTICE SCALIA: Well, if there is another
24 statutory provision, then that -- then that statutory
25 extension is part of the jurisdictional limitation.

1 That's fine.

2 But when you just have a jurisdictional 180
3 days, without any statutory provision for extension, if
4 it's jurisdictional, I thought that's the end of the
5 game.

6 MR. KNEEDLER: Right. And -- and the -- the
7 question is -- some time limitations have been
8 understood to contain explicit -- excuse me, explicit or
9 implicit authorizations for the tribunal concerned. And
10 this --

11 JUSTICE SCALIA: Undoubtedly. But have any
12 jurisdictional time limitations?

13 JUSTICE KAGAN: I mean, you don't need that
14 label, do you, Mr. Kneedler? You could do just as well
15 with a claims processing label. Maybe you could do
16 better, as Justice Scalia is suggesting, with a claims
17 processing label, as long as, with that label, comes the
18 general rule that the agency gets to determine the
19 extent of discretion as to late filings.

20 MR. KNEEDLER: Right. This is a
21 mandatory -- this is a mandatory -- even if
22 nonjurisdictional, it is a mandatory limitation. And
23 the question is whether the statute contains an implicit
24 authorization, whether the Secretary could permissibly
25 construe it to allow for this narrow good cause

1 exception comparable to the one for extending the
2 time --

3 JUSTICE SCALIA: The problem with taking
4 that approach, of course -- and I assume why you assert
5 that it's jurisdictional, is that there is a long
6 history of both the board and the Secretary regarding
7 this as jurisdictional.

8 MR. KNEEDLER: Yes, that is --

9 JUSTICE SCALIA: They have said it.

10 MR. KNEEDLER: -- that is -- that is
11 correct. But we -- but I think it's also important to
12 recognize that the -- that this statute was enacted, the
13 regulations were adopted before this Court's recent
14 jurisprudence identifying some things as jurisdictional,
15 some things as claim processing, primarily focusing on
16 the judicial situation.

17 Here, we have a statute governing procedures
18 in an administrative agency and regulations adopted at a
19 time before that -- that bifurcated way of looking at
20 things arose.

21 JUSTICE BREYER: All right. But that --
22 that's why I wonder what the basic underlying principle
23 is. I mean, I would have thought -- but I'm not sure
24 what you think, that -- that the way to look at these
25 cases is, using ordinary principles of statutory

1 interpretation, would a reasonable legislator, having
2 enacted these words, intend to give the agency a degree
3 of leeway in interpreting the statute?

4 Now, if that's the basic question, it helps,
5 but isn't determinative whether you classify this as a
6 claims processing rule or a jurisdictional rule. Those
7 are conclusions. But, really, it's the question of
8 leeway that the Congress intended to -- to delegate to
9 the agency that is determinative.

10 If the answer to that question is yes, your
11 rule stands, regardless of label, and if the answer to
12 the question is no, it fails regardless of label.

13 MR. KNEEDLER: That's --- that's correct.
14 And I want to make clear that under, whatever the answer
15 to that precise question, the Respondents in this case
16 lose because whether -- if it's an absolute rule to
17 which there can be no exception or the Secretary's
18 regulation allowing a limited exception is valid, in no
19 case would the sort of open-ended tolling regime that
20 the court of appeals imposed be permissible.

21 If I may, I'd like to reserve the balance of
22 my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Manning.

25 ORAL ARGUMENT OF JOHN F. MANNING,

1 COURT-APPOINTED AMICUS CURIAE

2 MR. MANNING: Mr. Chief Justice, and may it
3 please the Court:

4 Congress in two ways signaled its intention
5 to treat the time limitation prescribed by Subsection
6 (a)(3) as absolute; that is, as not subject to waiver
7 and not subject to equitable tolling.

8 First, Congress chose to locate that
9 provision in the very part of the statute that defines
10 the board's jurisdiction, that is to say, in the part
11 that determines the class --

12 JUSTICE SOTOMAYOR: It didn't talk about the
13 board. It talks about what a party can do, not what the
14 board can or cannot do.

15 MR. MANNING: You're entirely -- entirely
16 right, Justice Sotomayor. It talks about the -- the
17 right of the provider to get a hearing in the provision
18 of the statute that -- that determines the class of
19 cases that the provider may hear.

20 JUSTICE SOTOMAYOR: That's not the
21 prototypical limitation that -- that Congress uses when
22 it intends a jurisdictional limit on a court.

23 MR. MANNING: No, it's not, Your Honor. But
24 in several cases, this Court has held that similar
25 statutes that are framed in terms of the party's right

1 to invoke the power of the tribunal, that those are
2 jurisdictional statutes. The Court has never addressed
3 the question whether they can be -- they must be framed
4 in terms of the power of the board or in terms of the
5 right of the party to invoke the power of the board.

6 JUSTICE SOTOMAYOR: We have talked about
7 what the -- the fact that there almost is a presumption
8 of a claims processing rule, rather than jurisdictional,
9 unless Congress is clear about that.

10 What policy supports an argument that we
11 should be reading limitations of this kind as
12 jurisdictional, particularly when, on the same day the
13 statute was passed, the agency, invoking its regulatory
14 powers, treated it like a claim processing? Whatever
15 your colleague argues, a good cause exception, the
16 3-year exception, everything else is -- is really
17 treating it like a claim processing rule, not as
18 jurisdictional.

19 MR. MANNING: Justice Sotomayor, you're
20 entirely right, that the test that this Court has
21 prescribed in this area of law is focused on
22 congressional intent. In *Arbaugh*, this Court said that
23 the touchstone is congressional intent, that -- that the
24 design of this Court's rules is to put the ball in
25 Congress' court.

1 This Court has put a thumb on the scale
2 against jurisdiction because of the hard consequences
3 that follow from deeming a procedure jurisdictional. In
4 this case, the agency's regulation, no matter how old it
5 is, is invalid because Congress signaled a clear
6 intention to treat this as jurisdictional in two ways:
7 One, by putting it in the -- in the provision of the
8 statute that defines the board's jurisdiction. But,
9 secondly, Congress, in this statute, created two
10 different kinds of deadlines, one for providers and one
11 for beneficiaries.

12 Both set almost identical deadlines for
13 administrative appeals. It's 6 months for
14 beneficiaries, 180 days for providers. But there is a
15 fundamental difference in the way Congress treated these
16 two sets of deadlines, and the fundamental difference is
17 that Congress explicitly gave the Secretary authority --
18 discretion, to extend the deadline for beneficiaries.
19 It gave no such discretion to extend the -- the deadline
20 for providers.

21 And the same story plays out in the 60-day
22 limits that govern judicial review. Discretion --

23 JUSTICE GINSBURG: This -- this agency not
24 more than 3 years extension, that was adopted after
25 notice and comment, and Congress amended this statute

1 several times thereafter, but it left this -- this
2 3-year outside limit intact. So if Congress really
3 wanted there to be no leeway at all, then it should have
4 done something about that regulation.

5 MR. MANNING: Justice Ginsburg, you're
6 entirely right. Congress has amended the statute, in
7 fact, eight times since the Secretary promulgated her
8 regulation establishing a good cause requirement. But
9 this Court has, in recent years, been more careful about
10 finding acquiescence than it did at one time.

11 In the Solid Waste Authority of Northern
12 Cook County, what this Court said is that before it will
13 find that Congress has acquiesced, there must be
14 evidence that Congress was aware of the regulation and a
15 clear signal that Congress meant to embrace or put in
16 place this regulation.

17 And this is a sound policy because Congress
18 leaves regulations in place for all sorts of reasons
19 because somebody is using a parliamentary tactic,
20 because Congress doesn't have one opinion or the other
21 about whether the -- the regulation is right, because
22 Congress didn't think of the problem.

23 So, in recent years, this Court has insisted
24 upon a high degree of proof before it will find
25 acquiescence, and that degree is not present here.

1 There is no evidence that Congress was aware of this
2 regulation, much less that it approved of it.

3 JUSTICE BREYER: Well, but you have three --
4 the point that you make is right, that -- that you have
5 specific language in the beneficiary part and not here;
6 but you have the other way, the point that Justice
7 Ginsburg made, the fact that the language here is --
8 is -- doesn't say file within 180 days. It says, you
9 may have a hearing if you file within 180 days. It
10 doesn't say what happens if you don't. It's open, the
11 language.

12 And the -- the subject matter is not a
13 court. The subject matter is a rather technical agency
14 review board. And normally, I would think, you would
15 think, and members of Congress would think that the
16 agency knows best as to how to run its own operation
17 and -- and don't interfere too much in details, and this
18 is a sort of detail.

19 So those are the things against you, it
20 seems to me, though the thing you cite is certainly for
21 you.

22 MR. MANNING: Quite -- quite right, Your
23 Honor. And -- and typically, an agency has discretion
24 to set its own procedures, as the government argues.
25 And -- and the government is quite right to cite Vermont

1 Yankee. And I would add Chevron, that -- that the
2 government promulgated its regulation in a
3 Chevron-eligible format. But Chevron only applies if
4 the statute is not clear, and here, we say that Congress
5 addressed the precise question in issue.

6 It's very difficult when one reads the
7 beneficiary provisions and provider provisions, which
8 are quite different. One provides discretion, and one
9 doesn't. And what Respondents would have --

10 JUSTICE BREYER: One was passed long, long
11 ago and was part of the Social Security Act or
12 something, the one you're talking about, and was passed
13 many years before the second one was passed.

14 And when they're sitting in Congress
15 writing -- you know, they don't know everything that was
16 passed in history.

17 MR. MANNING: You're exactly right, Justice
18 Breyer. But Congress, in Section 2990 of the 1972 Act,
19 that enacted -- that created the PRRB, amended and
20 reenacted the provision from the 1965 legislation that
21 prescribed the -- the beneficiary review provisions. It
22 incorporated, by reference, provisions that gave the
23 Secretary express discretion to extend those deadlines.

24 And so, in the same statute, what Congress
25 did was it set up two systems, one for beneficiaries and

1 one for providers. One prescribed discretion, one
2 didn't.

3 What the Respondents are asking this Court
4 to do is to read these two sets of provisions, which are
5 worded very differently, to mean the same thing, to mean
6 that the Secretary has discretion whether Congress gives
7 it or doesn't.

8 And I submit that that's a good reason to
9 treat this as a step one case. The Secretary does not
10 merit deference in this case because the statute is
11 clear. And to return to Justice Sotomayor's question
12 about the phrase -- and your question about the
13 phraseology of Subsection (a), this Court held in *Bowles*
14 *v. Russell* that Section 2107 is jurisdiction
15 notwithstanding that it --

16 JUSTICE SOTOMAYOR: That was, in part, the
17 point I raised earlier, which is we look at what the
18 history is to help inform our use of labels. The
19 history here -- you can't ignore it -- is that, from its
20 inception, whether it's trying to disclaim it now or
21 not, the agency has not treated it as jurisdictional.

22 It's used the word --

23 MR. MANNING: Well --

24 JUSTICE SOTOMAYOR: -- but it's treated it
25 as a claim processing rule by creating these exceptions.

1 MR. MANNING: Well, you're right,
2 Justice Sotomayor. But my question -- the question that
3 that raises is this: From the very beginning, this
4 agency has -- all three of the agencies -- the
5 Secretary, CMS, and the board -- have all described this
6 provision as jurisdictional and non-waivable. At the
7 same time, they have tried to create this exception.

8 In the -- in the 2008 regulations that
9 narrowed the good cause exception, the Secretary
10 acknowledged that there was a question about whether the
11 good cause exception was consistent with the
12 characterization of the time limitation as
13 jurisdictional, acknowledged that there was a split of
14 authority on that, and suggested that the courts would
15 have to resolve it. This is not --

16 JUSTICE SOTOMAYOR: There is -- there is a
17 lot of discussion and confusion between jurisdiction,
18 mandatory claim processing rules, nonmandatory claim
19 processing rules. I could go on and on about the
20 labels.

21 But let's go back to the point Justice Kagan
22 made earlier, which is, assuming we were to treat this
23 as a mandatory claim processing rule, where does that
24 get you?

25 Now, the agency says that means no equitable

1 tolling. Assuming I'm willing to accept that, is
2 equitable tolling the same as fraudulent concealment,
3 which has been treated in the law, not as a -- as a
4 necessary part of equitable tolling, which has to do
5 with what the plaintiff could have done or not done, but
6 with what a defendant has done or not done?

7 MR. MANNING: Justice Sotomayor, this Court
8 has said that, if a time limitation is jurisdictional,
9 that limitation is absolute. That includes no equitable
10 tolling.

11 In Irwin, this Court included among the
12 grounds for equitable tolling the intentional
13 concealment of information that was necessary to --

14 CHIEF JUSTICE ROBERTS: Why don't you -- why
15 don't you take another minute to finish your answer?

16 MR. MANNING: Certainly.

17 So if it's jurisdictional,
18 Justice Sotomayor, then even if the -- even if the CMS
19 intentionally withheld this information, the time limit
20 would be absolute and would not be extendable.

21 On the other hand, I believe that if the --
22 the statute is not jurisdictional, it's subject to
23 equitable tolling; under Irwin, the presumption of
24 equitable tolling applies. And, it's very difficult to
25 see how the Secretary is warranted in narrowing

1 equitable tolling beyond the traditional grounds on
2 which equitable tolling would be available.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. MANNING: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Roth.

6 ORAL ARGUMENT OF ROBERT L. ROTH

7 ON BEHALF OF THE RESPONDENTS

8 MR. ROTH: Mr. Chief Justice, and may it
9 please the Court.

10 JUSTICE SOTOMAYOR: Do you agree with that
11 last statement?

12 MR. ROTH: Well, I --

13 JUSTICE SOTOMAYOR: Do you think an agency
14 is not permitted to have mandatory claim processing
15 rules?

16 MR. ROTH: Excuse me, Your Honor?

17 JUSTICE SOTOMAYOR: Do you believe an agency
18 is not capable of having mandatory claim processing
19 rules, that it limits the application of equitable
20 principles?

21 MR. ROTH: The -- the agency could have
22 mandatory claims processing rules to the extent -- with
23 the leeway that was provided by Congress.

24 Here, the leeway ends when you have -- when
25 you have issues, like Your Honor was talking about, with

1 intentional concealment, when you have actions by the
2 Secretary, misconduct by the Secretary, that caused the
3 statute of limitations time to be missed.

4 One would have to assume that the -- that
5 the Congress has -- has delegated to the fox to
6 determine who is in charge of the henhouse. So there is
7 a limitation, Your Honor, on how far the agency can go,
8 and it cannot go as far as to shield itself from
9 judicial review of its own misconduct.

10 JUSTICE SOTOMAYOR: Would our review be an
11 APA review, whether the -- the rule is arbitrary or
12 capricious?

13 MR. ROTH: Well, I think that -- that the
14 APA review would start under -- under step one. And we
15 believe that the statute is clear on this point, that
16 under step one of Chevron, that this has not been
17 delegated to the agency to determine what the judicial
18 review should be available in the context of agency
19 misconduct, Your Honor.

20 And, in fact, Your Honor, there is -- 139500
21 provides no support for the government's proposition
22 that Congress intends undetectable and undisclosed
23 agency misconduct to deprive hospitals of the payments
24 Congress promised --

25 JUSTICE SCALIA: Of course, nobody -- nobody

1 intends that when they -- when they adopt an absolute
2 rule. I mean, you -- you can create a horrible with
3 respect to any absolute jurisdictional rule. That's
4 easy to do. So the mere fact that -- that a horrible
5 could occur does -- does not at all persuade me that --
6 that a rule is not absolute.

7 MR. ROTH: Well, the horrible that we're
8 talking about here, Your Honor, is agency misconduct.
9 And it's been a longstanding principle of law that
10 defendants should not benefit from their own misconduct.

11 JUSTICE GINSBURG: And why -- why do you say
12 that? I mean, the record that we have says that the CMS
13 failed to use the best available data. It doesn't say
14 anything about deliberate concealment.

15 MR. ROTH: Your Honor, the -- this case
16 arises on -- comes to this Court after a motion to
17 dismiss was granted, and so that the -- that the -- the
18 Court would have to take as true the allegations in the
19 complaint.

20 And the allegations in our complaint in
21 paragraph -- in paragraph 30 -- 38, Your Honor, raise
22 this question. And that can be found -- let's see -- do
23 you have -- in the Joint Appendix --

24 JUSTICE GINSBURG: Well, in -- in any event,
25 the Baystate case, which is what revealed all of this,

1 in -- in that case, the district judge there didn't
2 say -- he said they didn't use the best available data.
3 He didn't find any deliberate concealment.

4 MR. ROTH: That's correct, Your Honor, and
5 because the -- that issue was not before the court and
6 it was not necessary for the court to make that finding
7 for purposes of addressing that case.

8 I'm at the Joint Appendix at 2829, which is
9 paragraph 38 of our complaint. And paragraph 38 in our
10 complaint presented one aspect of this concealment,
11 which was a misleading aspect of the agency's actions
12 here, where the agency said that matching on the basis
13 of Social Security numbers was the best way to deal with
14 this -- this matching of the data that my colleague from
15 the government was -- was discussing.

16 And it ends up that the -- that it turns out
17 years later that, in fact, the Secretary didn't match on
18 the basis of Social Security numbers. And that made an
19 enormous difference with respect to how that -- how the
20 disproportionate share hospital benefit would be
21 calculated.

22 So -- so the reason the district court in
23 the Baystate case didn't have to make findings about
24 fraud or similar fault or delve that much into the
25 agency action was because that case came to the court

1 through the traditional appeals process without
2 having -- and so a finding as to the actions of the
3 Secretary and -- and characterizing those actions, as
4 whether they're misconduct or not was, not necessary to
5 addressing the case as it was before the district court
6 in that -- at that time.

7 The -- but -- but we are talking -- while we
8 are talking about the disproportionate share hospital
9 payment, Your Honor, let me simply -- let me simply
10 mention that what we are talking about here are safety
11 net hospitals. We are talking about those hospitals
12 that provide services to -- to a high percentage of poor
13 people, and -- and Congress had found that those
14 patients are more expensive to treat.

15 JUSTICE KAGAN: But, Mr. Roth, on -- on the
16 legal question here, I think Justice Breyer is right,
17 that this all comes down to congressional intent, how we
18 read this statute. If you -- one response to reading
19 the briefs in this case is that you and Mr. Manning
20 present opposite views of the statute, and -- and both
21 of you say the statute is clear as to your opposite
22 view.

23 In other words, Mr. Manning says the statute
24 clearly prohibits equitable tolling, and you say the
25 statute clearly requires equitable tolling. And both of

1 you have kind of decent arguments.

2 And one response to that might be to say,
3 Mr. Kneedler is right, that the statute is just
4 ambiguous and that it can be read a bunch of different
5 ways, and both of you have presented good arguments, but
6 in the end, it really all goes to show that there is a
7 lack of clarity here, and then it's up to the agency to
8 decide.

9 MR. ROTH: Well, of course, Your Honor,
10 the -- the statute is clear and equitable tolling is
11 permitted.

12 JUSTICE SCALIA: Of course -- of course, one
13 can always make an argument on the other side, and the
14 mere fact that an argument is made on the other side
15 does not prove that it's not clear. That's what lawyers
16 do. They make arguments on the other side.

17 MR. ROTH: But here, Your Honor, the -- when
18 you look at the factors that underpin the government's
19 position here that somehow the government can decide
20 that it can preclude this Court from reviewing agency
21 misconduct -- you heard the government talk about the
22 need for finality. Well, the need for finality is not
23 something that's articulated in the -- in the Medicare
24 Act except to the extent in a statute that's protective
25 of providers. There is not a --

1 JUSTICE BREYER: Are there examples? I
2 mean, it seems to me that, even if you lose this -- I
3 mean, I mentioned the three arguments against you, the
4 other -- the ambiguity of the language and so forth. So
5 if it ends up, even though it's not just a lawyer's
6 argument, it isn't really that clear, and they do have
7 some authority, you then have the second string, which
8 is you say their rule is unreasonable because it has an
9 absolute 3-year cutoff, instead of a little flexibility
10 there for fraudulent concealment.

11 So -- so do you have statutes, are there
12 statutes that say 3 -- or are there cases that say 3
13 years is not enough, that -- that you have to have more
14 than 3 years? I thought 3 years is a pretty long time.
15 I mean, I guess they can't go back to fraudulent
16 concealment pre-Civil War -- you know, I mean, there's
17 some period that must be reasonable to cut everything
18 off, and what is that period? What do the cases say?
19 If it isn't 3 years, what is it?

20 MR. ROTH: Well, Your Honor, the Secretary
21 has addressed this question in the context of -- of
22 fraud or similar fault by providers, and they said there
23 should be no time limit at all.

24 JUSTICE BREYER: That's their view there,
25 and their view here, which is a different kind of thing,

1 is that 3 years is enough. The question is, is that
2 reasonable? And do you have any authority that says
3 it's unreasonable?

4 JUSTICE SCALIA: I thought the 3 years
5 provision applied only to the Secretary, that she gives
6 herself 3 years to go back and sort things out, but only
7 gives you 180 days; is that right?

8 MR. ROTH: The Secretary -- well, depends
9 what sort -- if the "sort it out" means recovering
10 overpayments, the Secretary has an unlimited amount of
11 time to recover overpayments that are the fault or
12 similar -- fraud or similar fault on a provider.

13 If it is not fraud or similar fault on a
14 provider, the reason the Secretary can't go back more
15 than 3-plus years is because the statute permits it. 42
16 U.S. Code 1395gg, which is not cited in the government's
17 brief, that says that, at the end of the third year
18 after payment, that the payment becomes final, as long
19 as the provider and the beneficiary was without fault
20 with respect to the payment.

21 So that 3-year limitation that the
22 government touts in 1885 was not a subject of an
23 administrative determination that they made. That was
24 simply they were -- they were following a statute. And
25 when you look in the Medicare Act for evidence of a

1 statute that -- that should limit -- impose finality in
2 some way, that statute is the only one, and it's
3 protective of providers.

4 And what the Secretary has done here is it
5 enacted -- it promulgated a regulation, and the
6 regulation provides for an unlimited time period to
7 recover in the face of --

8 JUSTICE GINSBURG: But Justice Scalia was
9 not correct in what he just said. The 3 years is for
10 the provider. The 3 -- under the Secretary's
11 regulations, the provider gets an additional 3 years,
12 but no more; isn't that right?

13 MR. ROTH: Well, the 3-year is both -- it --
14 it goes both ways, Your Honor, that -- that, under the
15 reopening rule, that providers have up to 3 years to
16 come in to ask for relief.

17 JUSTICE GINSBURG: Yes. But it's not 180
18 days for them. It's 180 days, plus an extension up to 3
19 years.

20 MR. ROTH: It's -- well, but after the --
21 after the 180-day period there is no right to judicial
22 review. With the reopening -- if there would be a
23 denial of the reopening request, that denial of the
24 reopening request, as this Court said in *Your Home*,
25 would not be subject to judicial review.

1 So the extension of time there, Your Honor,
2 it would -- would be available, but would not have
3 recourse; and without recourse to judicial review, when
4 you have an issue here like secretarial misconduct, that
5 means there will be no review at all, because --

6 JUSTICE GINSBURG: But are you challenging -- I
7 mean, there is a rule that says that -- there is a
8 regulation that, for fraud, it's -- the time is
9 unlimited. But that -- that regulation, the government
10 says, applies only to the provider, not to the -- the
11 government.

12 Are you challenging the agency's reading of
13 the word "party" in that regulation?

14 MR. ROTH: Well, we -- again, this came to
15 the Court on a motion to dismiss, but we think that
16 the -- the Secretary's interpretation of that ruling has
17 changed from when it was -- when it was promulgated in
18 1974, when during the rulemaking process, they
19 specifically changed that rule to get -- to eliminate
20 the reference only to a provider, and it's to any party.

21 And so that rule ought to be applied in a
22 way that provides equilibrium, that it would apply both
23 against secretarial misconduct --

24 JUSTICE GINSBURG: Did you -- did you make
25 that argument in this case? I wasn't aware that you had

1 challenged the interpretation of -- of the fraud
2 regulation.

3 MR. ROTH: We -- we speak at some length in
4 the brief, under this -- under this rubric of the
5 one-way ratchet. This is the one-way ratchet that we
6 were talking about, Your Honor, in that, with respect to
7 the reopening rule, the -- the Secretary has provided an
8 unlimited amount of time. So finality is not an issue
9 with respect to correcting -- correcting these payments
10 that arise from the fraud -- fraud or similar fault of
11 the provider.

12 CHIEF JUSTICE ROBERTS: Counsel, I'm about 5
13 minutes behind. The gg provision that you said the
14 government didn't cite -- you mentioned a provision that
15 ended, anyway, with gg.

16 MR. ROTH: Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: Is that in your
18 brief?

19 MR. ROTH: No. No. That is --

20 CHIEF JUSTICE ROBERTS: Is that in the
21 amici's brief?

22 MR. ROTH: It is not cited in any of the
23 briefs, Your Honor.

24 CHIEF JUSTICE ROBERTS: Is it anywhere that
25 I can find, other than -- I mean, is it in the appendix

1 to any brief?

2 MR. ROTH: No. Sorry, Your Honor. We do
3 not have -- this is not before the Court.

4 CHIEF JUSTICE ROBERTS: It's a little bit
5 much to chide the Solicitor General for not citing it
6 when nobody cited it.

7 MR. ROTH: That is true, Your Honor, and
8 that -- that is correct. But in citing 405.1885 and the
9 reason that we're bringing it up, Your Honor, for the
10 first time on rebuttal is that in the -- in the
11 government's reply brief, they went out of their way to
12 try to characterize the reasonableness of the Secretary,
13 you can trust the Secretary here because the Secretary
14 has said, look, after 3 years, we consider there to be
15 finality, and we don't go back after the -- after the --
16 after the providers -- you know, except for fraud or
17 similar fault, as if this had been a gift, an
18 interpretation from the Secretary.

19 It wasn't, Your Honor. That's why we are
20 raising it here, Your Honor, because, under the 1395gg
21 provision, they can't go back, and that's why they have
22 their reopening regulation and that reopening regulation
23 is an order from Congress.

24 And what we have here, Your Honor, is that
25 you have this concept at least arising from Congress;

1 when you look at the 1395gg, you look at the appeals
2 statute in 1395oo, is that you have an expectation from
3 Congress that the providers within their 180 days will
4 be able to know exactly what happened and why they were
5 underpaid. And here, of course, that underpayment was
6 concealed.

7 JUSTICE SCALIA: Is that reopening -- is
8 that reopening provision, the mysterious gg, is -- is
9 that subject to equitable tolling, too?

10 MR. ROTH: The -- well, the --

11 JUSTICE SCALIA: And if not, why not?

12 MR. ROTH: Well, 1395gg simply says that
13 a -- that a -- that a provider and a beneficiary will
14 not be subject to overpayment recoveries, if they were
15 without fault.

16 And what we -- and whether it would be
17 susceptible for equitable tolling is not before the
18 Court at this point, but that rule at least is applied
19 equally on both sides.

20 In other words, if -- if the -- if a
21 provider was underpaid because of its own fault, this
22 case isn't about any -- any relaxation of that rule.
23 Providers are on the hook for that.

24 On the other hand, where a provider is
25 underpaid because of the secretive conduct, the

1 undisclosed and undetectable conduct of the Secretary,
2 that is the -- that's an area where we would find that
3 the very concept of equitable tolling is inherent in
4 139500.

5 Remember, the trigger point in 139500 is
6 notice. That is -- and, again, that goes against this
7 concept that it is jurisdictional. It's a claims
8 processing statute. And here, Your Honor, the notice
9 was defective. When they issued --

10 JUSTICE KAGAN: Mr. Roth, I'm not certain
11 about the extent of your argument, so let me -- let me
12 try something.

13 Now, are you saying that any time Congress
14 passes a statute saying -- you know, there is 30 days to
15 do this, there is 60 days to do this, in the agency
16 context now, as to administrative process, that Congress
17 necessarily means that equitable tolling applies and
18 that the agency cannot limit that equitable tolling?

19 MR. ROTH: Yes, Your Honor, that, if the
20 issue is the -- is the agency's own misconduct, that
21 Congress would -- to -- to read that Congress intended
22 in a situation under the -- like this under the Medicare
23 Act, where we're talking about a procedural right to
24 that -- to enforce a substantive right.

25 In other words, we have here providers who

1 have provided services. And under their agreement with
2 the Secretary, they provide services, and they get paid
3 for those services.

4 If there were an attempt to limit that
5 payment, to cut off that payment because of agency
6 misconduct, because of the expiration of a -- of a
7 statute of limitations, we don't believe Congress ever
8 intended that its payments would be cut off because of
9 agency misconduct that caused a provider to miss -- to
10 miss a deadline that caused the expiration of a statute
11 of limitations.

12 JUSTICE KENNEDY: I'm not sure how we can
13 limit this to agency misconduct. Suppose there is a
14 computer glitch in a program, completely good faith, and
15 the computer just spits out the -- the wrong
16 information, and nobody knows about it. That's not
17 misconduct.

18 MR. ROTH: That's not misconduct.

19 JUSTICE KENNEDY: And -- but --

20 MR. ROTH: We would agree, Your Honor.

21 JUSTICE KENNEDY: But you would say no
22 equitable tolling in that case?

23 MR. ROTH: Well, that's not -- that -- this
24 case -- that -- that is a mistake. That's an error.

25 JUSTICE KENNEDY: I mean, that would be good

1 cause. It seems to me that would be good cause under
2 the -- under the Secretary's rules.

3 MR. ROTH: That has never been good cause
4 under Secretary's ruling, but -- potentially. But that
5 is not what -- that would be the level -- that would not
6 be misconduct. That would not trigger equitable
7 tolling, as opposed to the facts of this case.

8 JUSTICE KENNEDY: Well, I don't know -- I
9 don't know why it wouldn't.

10 MR. ROTH: What's that?

11 JUSTICE KENNEDY: You mean to say that if
12 that happened, under the Secretary's rule, the Secretary
13 would abuse its discretion in extending the time for 3
14 years?

15 MR. ROTH: For -- excuse me? For
16 recovering -- for the --

17 JUSTICE KENNEDY: Yes.

18 MR. ROTH: -- for a provider to make an
19 appeal?

20 JUSTICE KENNEDY: Yes.

21 MR. ROTH: Well, they don't have to extend
22 the time, Your Honor. They can simply provide by
23 administrative payment to -- to fix the problem. They
24 don't have to circle it through -- through an appeals
25 process, if the government found out. And, in fact,

1 Your Honor, there is another regulation. It's
2 unfortunately --

3 JUSTICE KENNEDY: Well, I just find it
4 hard -- hard to see why this is -- you're saying that
5 the equitable tolling rule -- the agency does have the
6 3-year rule.

7 MR. ROTH: Right.

8 JUSTICE KENNEDY: It is limited to
9 misconduct?

10 MR. ROTH: Yes, Your Honor. But the facts
11 that you're talking about --

12 JUSTICE KENNEDY: So you're arguing for --
13 in a way, for a narrower rule than what the
14 government --

15 MR. ROTH: Well, Your Honor, let me say that
16 the facts that you're talking about are addressed
17 explicitly in 42 CFR 405.980. And what the government
18 has said in that regulation is that, when there has been
19 clerical error, claims can be reopened indefinitely.
20 That's another indefinite time period.

21 JUSTICE GINSBURG: Well, suppose it's just
22 what the Baystate court said it is. It isn't deliberate
23 concealment, but it is failure to use the best available
24 data.

25 And I take it the argument you just presented

1 is equitable tolling is tied to misconduct. So just
2 failure to use the best available data, not deliberate
3 concealment, wouldn't make it.

4 MR. ROTH: Well, in this case, Your Honor --
5 well, simply, if it was knowing use of bad data, in
6 other words, if the government, as in this case, was
7 aware that there was better data to be had, that would
8 rise to the level of the kind of conduct that could be
9 subject to equitable tolling; whereas, simple mistakes
10 are already addressed for the Secretary's
11 regulations --

12 JUSTICE GINSBURG: So what -- what
13 circumstances trigger equitable tolling, in your view?

14 MR. ROTH: Well, equitable tolling is
15 certainly triggered under the circumstances of this
16 case, Your Honor, because --

17 JUSTICE GINSBURG: Yes, but suppose that the
18 fact-finding turns out that the -- that there is no
19 deliberate concealment, but there is merely a failure to
20 use the best available data.

21 MR. ROTH: Well, if we don't -- if we don't
22 have that extra level of -- of that -- of that level of
23 concealment, Your Honor, I don't think that we would
24 have the misconduct that this Court has cited in the --
25 in the Bowen case, and before that, in -- in Irwin and

1 footnote 4 in the -- in the Gluss case that would rise
2 to the level of which -- at which equitable tolling
3 would apply.

4 JUSTICE GINSBURG: So you would have to
5 prove that before we know whether there is equitable
6 tolling.

7 MR. ROTH: We -- we -- well, we've made that
8 allegation in our complaint, Your Honor. And we believe
9 that -- that assuming those allegations to be true for
10 purposes of this hearing, which --

11 JUSTICE GINSBURG: Yes, but I'm asking you,
12 if you get past that hurdle, then we never -- we won't
13 know that there is equitable tolling until we have tried
14 out the question of the character of --

15 MR. ROTH: Absolutely, Your Honor. If we --
16 if we get past this -- this -- this -- and there would
17 be a remand, it would -- the burden then would be on the
18 hospitals at that time to, in fact, show that equitable
19 tolling could apply.

20 The issue in this Court is whether it should
21 foreclose permanently the availability of equitable
22 tolling, even in the face of allegations of agency
23 misconduct -- excuse me --

24 JUSTICE KAGAN: I guess I'm not sure I
25 understand this, Mr. Roth. Are you saying that, in all

1 of our cases about the presumption in favor of equitable
2 tolling, when we talk about equitable tolling, we are
3 only talking about misconduct or fraud cases -- you
4 know, as opposed to the case where it's just a person
5 cannot possibly know the -- the information that would
6 back up a claim and that we regard that as a good
7 excuse?

8 MR. ROTH: No, Your Honor. Whether it was
9 Henderson or -- or other cases, those cases recognize --
10 those cases have focused on what happened to the
11 claimant, and the claimant missed a deadline. Holland,
12 it was a deadline that was missed. There wasn't
13 misconduct on the other side.

14 JUSTICE KAGAN: Right.

15 MR. ROTH: And those were subject to
16 equitable tolling.

17 JUSTICE KAGAN: Well because I thought that
18 most of your argument was built on the presumption in
19 favor of equitable tolling that we've recognized in
20 those cases --

21 MR. ROTH: Correct.

22 JUSTICE KAGAN: -- and whether it applied to
23 the agency context. But now, you're saying that in the
24 agency context, it's -- it's a different kind of
25 equitable tolling that we are talking about, a more

1 limited kind?

2 MR. ROTH: Well, the -- what -- the
3 equitable tolling rule that the Court has found in those
4 other cases would certainly come into play. This case
5 goes farther. This case even goes farther than Bowen v.
6 City of New York because it has affirmative misconduct
7 by the Secretary.

8 JUSTICE BREYER: So what about -- then let's
9 get back to the question I really meant to ask before --
10 you know, assuming they have some authority here to
11 write a rule, you want to say a 3-year absolute rule is
12 not reasonable in this situation. So what is?

13 MR. ROTH: Well --

14 JUSTICE BREYER: I mean, you want to go back
15 to the Civil War? I mean, let's imagine you really have
16 the strongest possible case. All the records burned up,
17 and it took 5 years for scientists to reproduce the
18 records by putting charred pieces of paper together.
19 Okay? So you couldn't possibly bring your claim until
20 they finished. That's a pretty equitable claim. 5
21 years okay? 10? What is the -- 100? I mean, what?

22 MR. ROTH: Well, Your Honor, in this
23 instance, the -- the question of how to limit a
24 circumstance where a provider is not getting paid --
25 gotten paid the amount promised by Congress, one way

1 to -- to limit that is by time.

2 But recall here, Your Honor, that the
3 Secretary could eliminate this issue entirely by simply
4 being more transparent. This issue arises --

5 JUSTICE BREYER: But what I hear you saying
6 is go back to the Revolutionary War. If it took 100
7 years to put the papers together, you're saying no time
8 limit at all is -- is the only reasonable solution
9 because there are too many weird cases or unusual cases
10 or misconduct cases. You've got to have some exception
11 in there forever.

12 MR. ROTH: Well, if --

13 JUSTICE BREYER: Is that right? If that is
14 your position, I just want to know.

15 MR. ROTH: That is -- that is the position
16 because, in order to -- to prevail in equitable tolling,
17 we would have to show that the providers here were
18 diligent, and that's a self-limiting factor.

19 JUSTICE BREYER: Okay. And by the way, do
20 we -- are you supposed to, in such circumstances, give
21 the agency's own determination some weight?

22 MR. ROTH: The agency's own determination?

23 JUSTICE BREYER: Yes. They'll come in and
24 say, I don't care what the cause is, there isn't cause
25 here because we weren't that awful. And now, does the

1 judge give them some weight?

2 MR. ROTH: If the Secretary here decided to
3 attack head-on this concept of equitable tolling and
4 deal with this question of finality straight up and
5 say -- you know, here -- here is how we think that --
6 that finality should be -- should be handled, even in
7 the -- even in the context of secretarial misconduct,
8 by, for example, saying within the 3-year period any
9 provider who feels that we've misrepresented data, come
10 in, you can come in and look at our data, but after 3
11 years, the time limit is over, I think that's a rule
12 that could exist, Your Honor.

13 CHIEF JUSTICE ROBERTS: Well, subject to
14 arbitrary and capricious review under Chevron?

15 MR. ROTH: It -- subject, of course, to
16 arbitrary and capricious review on that. But the
17 point --

18 JUSTICE GINSBURG: Why in your case, even
19 assuming that there might be equitable tolling, here, is
20 it -- is it 10 years later? And there was this Baystate
21 case going on. You -- you didn't file immediately after
22 that litigation was instituted. You waited until those
23 plaintiffs won their case.

24 You waited till there was a decision of the
25 lower court. So it seems to me you -- you said there's

1 a requirement of diligence. Why -- why didn't you have
2 to file when you were first on notice, which you would
3 have been from the complaint filed in the Baystate case?

4 MR. ROTH: Well, the complaint was filed,
5 Your Honor, in Baystate after we brought our
6 administrative appeal. We brought our administrative
7 appeal soon after the board -- the administrative board
8 rendered its decision. That was the first public
9 pronouncement that there were flaws with the data.

10 There were some providers who had an inkling
11 that some days might have been missed here or there, but
12 there was no sense in the provider community that that
13 arose from a systematic effort by the government to
14 miscount and then fail to disclose that it, in fact,
15 miscounted and had misrepresented how it had counted the
16 days.

17 So, Your Honor, diligence, of course, will
18 be an issue if we -- on remand if we get -- if we get
19 that opportunity. But this -- but the -- but the case
20 here arose after the board issued its decision in the
21 Baystate -- in the Baystate case.

22 And there was a -- and there was a
23 discussion earlier about whether the board has viewed
24 its own jurisdiction as limited in some way. And the --
25 the fact of the matter is that -- that the board here --

1 and I focus on the Bradford case in particular. In the
2 Bradford case, the board itself made a determination
3 that equitable tolling should apply in another time
4 limit within the -- within the Medicare Act.

5 That case then goes up to appeal in the
6 Western District of Pennsylvania, and the -- and the
7 court says, you know what, we think equitable tolling
8 should apply, reversing the Secretary, who had reversed
9 the board's finding that equitable tolling should apply.
10 And in that case, the -- the Secretary didn't leave it
11 there.

12 They petitioned for -- for the court to
13 revisit its determination, which the court did and
14 affirmed its decision with respect to the application of
15 equitable tolling.

16 At that point, the Secretary abandoned -- it
17 didn't seek an appeal. It allowed the case to go back
18 to the board, and it -- and it -- and it allowed the
19 case to go forward, with that deadline having been
20 equitable tolled. So when the government portrays this
21 as somehow some kind of consistent view, it's not.

22 This board has engaged in equitable
23 determinations going back for those 37 years that the
24 good cause regulation has been in place because it is
25 that good cause regulation that -- that forced the --

1 the board to have to deal with these equitable questions
2 about whether -- whether or not the -- whether or not
3 the -- the claim should be considered timely, even
4 though the deadline had to be -- had to be extended.

5 The -- the facts that we have here, Your
6 Honor, is that this is really an unprecedented case.
7 This is an unprecedented case in Medicare, that we have
8 the agency that says it was doing one thing in a Federal
9 Register document and actually did something different,
10 that then spent years trying to avoid, as was laid out
11 in the Southwest Consulting amicus brief, avoid having
12 those facts come to -- come to -- come to the attention
13 of the providers.

14 There will not be floodgates that result
15 from this, either at the board or at the Federal court
16 level, because there are -- there will always be, in
17 Medicare, a lead case. This is what we saw in the Cape
18 Cod case. There, you had a case that resulted in what
19 looked to be billions of dollars of payments to every
20 single hospital in the country as a result of one
21 district court decision and one court of appeals
22 decision.

23 So allowing equitable tolling to address the
24 misconduct of the Secretary in this kind of case will
25 not -- will not -- will not flood the judiciary or the

1 agency, and it will not -- it will not require an
2 expenditure of money --

3 JUSTICE GINSBURG: How many -- how many
4 cases are there like this pending, either at the agency
5 level or in court now?

6 MR. ROTH: Well, I think that, when the
7 government says there are 80 cases that are pending
8 involving 4,000 cost years and 450 hospitals, those
9 probably mostly, if not entirely, or for the most part
10 relate to -- to this case. And depending on how this
11 case unfolds, those cases will all presumably fall into
12 line, just as in the Cape Cod case.

13 JUSTICE SOTOMAYOR: Excuse me. Is the
14 miscalculation still going on? I mean, this involved --

15 MR. ROTH: Well, there was a change --

16 JUSTICE SOTOMAYOR: -- claims 12 years ago.

17 MR. ROTH: Right.

18 JUSTICE SOTOMAYOR: But did they continue
19 from that time forward to the present?

20 MR. ROTH: Well, there was a change in the
21 law in 2004 that now give providers access to the data,
22 so they can look at the underlying access to the data
23 instead of -- instead of the government presenting --
24 preventing them from being able to get access.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Kneedler, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

4 ON BEHALF OF THE PETITIONER

5 MR. KNEEDLER: Thank you, Mr. --

6 JUSTICE SOTOMAYOR: Mr. Kneedler, just for
7 point of clarification, the 3-year good cause extension
8 that's permitted under the government's regulations,
9 would that include -- would good cause -- or could a
10 claim be raised that fraud by the agency is the good
11 cause?

12 MR. KNEEDLER: I -- I think that's unclear
13 under the current regulation. The current regulation is
14 written in terms of good cause for something that
15 prevents the actual filing of the appeal, like a fire or
16 destruction of records or something.

17 JUSTICE SOTOMAYOR: That's what I thought. So
18 it's not as if the government is saying --

19 MR. KNEEDLER: No, no. But that hasn't been
20 tested as to whether it could. But that's not the only
21 avenue. In fact, the predominant avenue for raising
22 claims of -- of new and material evidence, which at
23 bottom this is, evidence that -- that there was not the
24 best evidence used in this match, is the reopening
25 regulation, and that's the regulation that was addressed

1 by this Court in the Your Home case. There, the Court
2 made clear that it was a matter of grace, not statutory
3 compulsion, that the Secretary allowed for any reopening
4 at all of past cost reports.

5 This sort of claim of new evidence, for
6 whatever reason it wasn't available, could be raised
7 under that. But this Court held in -- in Your Home,
8 that a denial of a reopening was not even appealable to
9 the board at all or subject to judicial review for
10 reasons of finality and certainty, that, at some point,
11 the cost years have to be closed.

12 And the Court specifically pointed out that
13 to allow administrative and judicial review of a denial
14 of reopening would circumvent the very 180-day
15 limitation that we have at issue here.

16 What Respondents are trying to do is to come
17 up with another way of circumventing that 180-day
18 limitation by superimposing, for the first time in 40
19 years, an open-ended equitable tolling regime in this
20 situation. The Respondents here are seeking to
21 recalculate payment years back to 1987. The only reason
22 it goes back no further is that's when the DSH payments
23 began.

24 DSH payments, by the way, go to 80 percent
25 of hospitals. It's not some limited category. And what

1 is being claimed here is -- is a mismatch of a
2 legislative type. It's not some concealment from an
3 individual provider.

4 With respect to the allegations in the
5 complaint, I'm not in a position to spend time refuting
6 them here. We have a footnote in our reply brief that
7 refers to the government's summary judgment motion in
8 which the allegations of misconduct are -- are
9 addressed.

10 I would like to say that -- that whatever
11 label one attaches, jurisdiction, claims processing,
12 mandating, it's absolutely clear that, from the outset
13 of this program, the Secretary understood and
14 implemented the 180-day time limit as limiting the
15 board's authority. It says an appeal shall be dismissed
16 if it's not filed within 180 days. No extension shall
17 be granted if requested after -- after 3 years.

18 That 3 years -- Respondent has conceded a
19 regulation that provides for coming in within 3 years to
20 address matters of fraud or anything else would be
21 valid. That's what this regulation does. And we think
22 there is no plausible argument at this late date in the
23 Medicare program to suggest that a 3-year limitation
24 on -- on revisiting of closed cost reports is arbitrary
25 and capricious under -- under this Court's decisions.

1 And if we're wrong, as I said, about the
2 validity of the Secretary's narrow good cause
3 regulation, which simply parallels what's in
4 jurisdictional provisions -- for example, notices of
5 appeal -- if the Secretary has no authority to do even
6 that, then the result is the same, there is no broad
7 equitable tolling.

8 Just one side comment on this Bradford
9 opinion, that did not involve the 180-day limitation.
10 That involved a regulatory provision. The Secretary's
11 consistent position has been, as we cite in the brief,
12 that the 180-day limitation is not subject to any
13 equitable extensions at all because the board is not an
14 equitable body. And the Medicare program, like the tax
15 program in Brockamp, is not one in which equities are
16 taken into account. You need absolute rules.

17 Allegations of fraud or concealment are easy
18 to make, but they can -- they can lead to widespread
19 delayed litigation, as the Baystate litigation shows,
20 requiring calling of witnesses -- in this case, 20 years
21 ago -- what happened 15 or 20 years ago. You would have
22 a hospital-by-hospital determination of when did the
23 hospital know or have reason to know what happened.

24 And we think that that's -- could be chaotic
25 in a program like this.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Mr. Manning, you argued and briefed this
3 case as an amicus curiae at the invitation of the Court,
4 and you have ably discharged your responsibility, for
5 which the Court is grateful.

6 The case is submitted.

7 (Whereupon, at 11:09 a.m., the case in the
8 above-entitled matter was submitted.)

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17
18
19
20
21
22
23
24
25

A				
abandoned 50:16	addressing 29:7 30:5	AL 1:8	38:1 41:24 51:21	aside 8:25
abide 13:15	administration 4:19 12:6	ALITO 9:24 10:11	APPEARAN... 1:16	asking 23:3 44:11
able 5:13 38:4 52:24	administrative 9:9 10:19 15:18 19:13 33:23 39:16 41:23 49:6,6,7 54:13	Alito's 11:2	appellate 4:17	aspect 29:10,11
ably 57:4	adopt 4:24 8:6 8:19 28:1	allegation 44:8	appendix 28:23 29:8 36:25	assert 13:4 15:4
above-entitled 1:13 57:8	adopted 7:13 8:22 9:19 12:25 15:13,18 19:24	allegations 28:18,20 44:9 44:22 55:4,8 56:17	application 26:19 50:14	assume 10:24 11:1 15:4 27:4
absolute 16:16 17:6 25:9,20 28:1,3,6 32:9 46:11 56:16	Affairs 8:3	allow 6:13,21 9:12 10:13 11:23 14:25 54:13	applied 4:14 33:5 35:21 38:18 45:22	assuming 24:22 25:1 44:9 46:10 48:19
absolutely 44:15 55:12	affirmative 46:6	allowed 13:12 50:17,18 54:3	applies 22:3 25:24 35:10 39:17	attaches 55:11
abuse 41:13	affirmed 50:14	allowing 16:18 51:23	apply 5:25 6:2 35:22 44:3,19 50:3,8,9	attack 48:3
accept 25:1	agencies 5:9 10:21 24:4	ambiguity 32:4	approach 15:4	attempt 40:4
access 4:17 10:15 52:21,22 52:24	agency 9:11,11 9:16,16 13:13 14:18 15:18 16:2,9 18:13 19:23 21:13,16 21:23 23:21 24:4,25 26:13 26:17,21 27:7 27:17,18,23 28:8 29:12,25 31:7,20 39:15 39:18 40:5,9 40:13 42:5 44:22 45:23,24 51:8 52:1,4 53:10	ambiguous 31:4	appropriate 12:24	attention 51:12
account 56:16	agency's 11:15 19:4 29:11 35:12 39:20 47:21,22	amended 19:25 20:6 22:19	approved 21:2	Auburn 1:7 3:4
acknowledged 24:10,13	ago 22:11 52:16 56:21,21	amicus 5:23	Arbaugh 18:22	authority 3:24 4:25 7:11 8:13 8:15,18,19 19:17 20:11 24:14 32:7 33:2 46:10 55:15 56:5
acquiesced 20:13	agree 10:3,7 26:10 40:20	amicus's 36:21	arbitrary 27:11 48:14,16 55:24	authorization 14:24
acquiescence 20:10,25	agreement 40:1	amicus 1:21 2:7 17:1 51:11 57:3	area 18:21 39:2	authorizations 14:9
across-the-bo... 11:9	akin 6:22	amount 3:14 33:10 36:8 46:25	argued 57:2	authorized 12:13
act 6:23 22:11 22:18 31:24 33:25 39:23 50:4		annually 3:13	argues 18:15 21:24	availability 44:21
action 12:14 29:25		answer 10:25 11:2 16:10,11 16:14 25:15	arguing 42:12	available 7:25 26:2 27:18 28:13 29:2 35:2 42:23 43:2,20 54:6
actions 27:1 29:11 30:2,3		anyway 36:15	argument 1:14 2:2,5,8,11 3:3 3:7 13:4 16:25 18:10 26:6 31:13,14 32:6 35:25 39:11 42:25 45:18 53:3 55:22	authorized 12:13
acts 11:19		APA 27:11,14	arises 28:16 47:4	authorizations 14:9
actual 53:15		appeal 4:1,20 6:11,25 7:3,7 13:18 41:19 49:6,7 50:5,17 53:15 55:15 56:5	arguments 31:1 31:5,16 32:3	available 7:25 26:2 27:18 28:13 29:2 35:2 42:23 43:2,20 54:6
add 22:1		appealable 54:8	arises 28:16 47:4	avenue 53:21,21
additional 34:11		appealing 6:24 8:11	arising 37:25	avoid 51:10,11
address 51:23 55:20		appeals 3:20 7:8 7:9 9:2 16:20 19:13 30:1	arose 15:20 49:13,20	aware 20:14 21:1 35:25 43:7
addressed 18:2 22:5 32:21 42:16 43:10 53:25 55:9			articulated 31:23	awful 47:25
				a.m 1:15 3:2 57:7
				B
				back 24:21 32:15 33:6,14

<p>37:15,21 45:6 46:9,14 47:6 50:17,23 54:21 54:22 bad 43:5 balance 16:21 ball 18:24 barred 7:15 basic 15:22 16:4 basis 3:16 29:12 29:18 Baystate 10:9 28:25 29:23 42:22 48:20 49:3,5,21,21 56:19 began 54:23 beginning 24:3 behalf 1:18,22 2:4,10,13 3:8 26:7 53:4 believe 6:2 8:25 9:14 11:21,22 11:24 12:3,15 25:21 26:17 27:15 40:7 44:8 beneficiaries 19:11,14,18 22:25 beneficiary 21:5 22:7,21 33:19 38:13 benefit 28:10 29:20 benefits 7:19,23 best 21:16 28:13 29:2,13 42:23 43:2,20 53:24 better 14:16 43:7 beyond 4:8 26:1 bifurcated 15:19 billion 3:12 billions 51:19 bit 4:5 37:4</p>	<p>board 3:20,23 3:25 5:1 7:8,12 13:6,7,8,9 15:6 17:13,14 18:4 18:5 21:14 24:5 49:7,7,20 49:23,25 50:2 50:18,22 51:1 51:15 54:9 56:13 board's 5:3,19 17:10 19:8 50:9 55:15 body 7:9 8:13 56:14 bottom 53:23 Bowen 43:25 46:5 Bowles 6:14 13:16,21 23:13 Bradford 50:1,2 56:8 Breyer 15:21 21:3 22:10,18 30:16 32:1,24 46:8,14 47:5 47:13,19,23 brief 5:7 8:24 33:17 36:4,18 36:21 37:1,11 51:11 55:6 56:11 briefed 57:2 briefs 30:19 36:23 bring 46:19 bringing 37:9 broad 3:24 4:24 8:17 56:6 Brockamp 56:15 brought 49:5,6 built 45:18 bunch 31:4 burden 44:17 burned 46:16</p>	<p style="text-align: center;">C</p> <p>C 2:1 3:1 calculated 29:21 calculation 10:2 10:4 calling 5:7 56:20 Cambridge 1:20 capable 26:18 Cape 51:17 52:12 capricious 27:12 48:14,16 55:25 care 47:24 careful 20:9 case 3:4 8:7 9:6 10:8,9,12 11:11 16:15,19 19:4 23:9,10 28:15,25 29:1 29:7,23,25 30:5,19 35:25 38:22 40:22,24 41:7 43:4,6,16 43:25 44:1 45:4 46:4,5,16 48:18,21,23 49:3,19,21 50:1,2,5,10,17 50:19 51:6,7 51:17,18,18,24 52:10,11,12 54:1 56:20 57:3,6,7 cases 6:9 15:25 17:19,24 32:12 32:18 45:1,3,9 45:9,10,20 46:4 47:9,9,10 52:4,7,11 category 54:25 cause 6:4,7,7,14 6:15,18,22 9:21 13:20 14:25 18:15 20:8 24:9,11 41:1,1,3 47:24 47:24 50:24,25</p>	<p>53:7,9,11,14 56:2 caused 27:2 40:9 40:10 Center 1:8 3:5 certain 39:10 certainly 9:13 9:25 21:20 25:16 43:15 46:4 certainty 54:10 certiorari 6:12 CFR 42:17 challenged 36:1 challenging 35:6 35:12 change 52:15,20 changed 35:17 35:19 chaotic 56:24 character 44:14 characterizati... 24:12 characterize 37:12 characterizing 30:3 charge 27:6 charred 46:18 Chevron 22:1,3 27:16 48:14 Chevron-eli... 22:3 chide 37:5 Chief 3:3,9 4:4 16:23 17:2 25:14 26:3,5,8 36:12,17,20,24 37:4 48:13 53:1 57:1 chose 17:8 circle 41:24 circumstance 12:18 46:24 circumstances 5:25 11:11 12:12 43:13,15</p>	<p>47:20 circumvent 54:14 circumventing 54:17 cite 21:20,25 36:14 56:11 cited 33:16 36:22 37:6 43:24 citing 37:5,8 City 46:6 Civil 46:15 claim 5:13 11:12 12:12 15:15 18:14,17 23:25 24:18,18,23 26:14,18 45:6 46:19,20 51:3 53:10 54:5 claimant 45:11 45:11 claimed 55:1 claims 8:1,4 9:10 10:20,20 11:21 14:15,16 16:6 18:8 26:22 39:7 42:19 52:16 53:22 55:11 clarification 53:7 clarity 31:7 class 17:11,18 classify 16:5 clear 16:14 18:9 19:5 20:15 22:4 23:11 27:15 30:21 31:10,15 32:6 54:2 55:12 clearly 5:24 6:2 8:17 30:24,25 clerical 42:19 closed 54:11 55:24 CMS 10:18 24:5</p>
---	---	--	--	---

<p>25:18 28:12 Cod 51:18 52:12 Code 33:16 colleague 18:15 29:14 come 8:7 11:10 34:16 46:4 47:23 48:9,10 51:12,12,12 54:16 comes 14:17 28:16 30:17 coming 55:19 comment 19:25 56:8 community 49:12 comparable 6:21 7:18 13:18,19 15:1 compelled 12:17 complaint 28:19 28:20 29:9,10 44:8 49:3,4 55:5 completely 40:14 compulsion 54:3 computer 40:14 40:15 concealed 10:5 12:11 38:6 concealment 11:15 25:2,13 27:1 28:14 29:3,10 32:10 32:16 42:23 43:3,19,23 55:2 56:17 conceded 55:18 concept 37:25 39:3,7 48:3 concerned 13:7 14:9 conclusion 10:10 conclusions 16:7</p>	<p>conduct 11:14 38:25 39:1 43:8 confusion 24:17 Congress 4:7,11 4:22 7:20 11:23 12:19,23 16:8 17:4,8,21 18:9,25 19:5,9 19:15,17,25 20:2,6,13,14 20:15,17,20,22 21:1,15 22:4 22:14,18,24 23:6 26:23 27:5,22,24 30:13 37:23,25 38:3 39:13,16 39:21,21 40:7 46:25 congressional 18:22,23 30:17 consequences 19:2 consider 37:14 considered 6:10 51:3 consistent 24:11 50:21 56:11 construe 4:23 14:25 construed 4:16 6:21 construing 9:23 Consulting 51:11 contain 14:8 contains 14:23 context 7:23 27:18 32:21 39:16 45:23,24 48:7 continue 5:15 52:18 contradiction 11:5 Cook 20:12</p>	<p>correct 15:11 16:13 29:4 34:9 37:8 45:21 correcting 36:9 36:9 cost 3:17 52:8 54:4,11 55:24 counsel 16:23 26:3 36:12 53:1 57:1 counted 49:15 country 51:20 County 20:12 course 7:23 15:4 27:25 31:9,12 31:12 38:5 48:15 49:17 court 1:1,14 3:10 4:15,15 4:16 6:10,25 7:8 8:12 9:1,5 10:8 11:10,23 13:17,19 16:20 17:3,22,24 18:2,20,22,25 19:1 20:9,12 20:23 21:13 23:3,13 25:7 25:11 26:9 28:16,18 29:5 29:6,22,25 30:5 31:20 34:24 35:15 37:3 38:18 42:22 43:24 44:20 46:3 48:25 50:7,12 50:13 51:15,21 51:21 52:5 54:1,1,7,12 57:3,5 courts 4:17,17 7:20 24:14 Court's 6:14 7:1 15:13 18:24 55:25</p>	<p>Court-Appoin... 1:21 2:7 17:1 create 24:7 28:2 created 19:9 22:19 creating 23:25 criminal 12:7 curiae 1:21 2:7 17:1 57:3 current 53:13 53:13 cut 32:17 40:5,8 cutoff 32:9</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 data 10:14,18,19 28:13 29:2,14 42:24 43:2,5,7 43:20 48:9,10 49:9 52:21,22 date 55:22 day 18:12 days 3:21 14:3 19:14 21:8,9 33:7 34:18,18 38:3 39:14,15 49:11,16 55:16 dead 4:10 deadline 4:20 19:18,19 40:10 45:11,12 50:19 51:4 deadlines 19:10 19:12,16 22:23 deal 29:13 48:4 51:1 dealing 13:17 December 1:11 decent 31:1 decide 8:5 9:11 31:8,19 decided 48:2 deciding 7:24 decision 6:14 7:2 48:24 49:8 49:20 50:14</p>	<p>51:21,22 decisions 55:25 deeming 19:3 defective 39:9 defendant 25:6 defendants 28:10 deference 23:10 define 5:10 defines 17:9 19:8 degree 9:21 16:2 20:24,25 delayed 56:19 delegate 16:8 delegated 4:22 27:5,17 deliberate 28:14 29:3 42:22 43:2,19 delve 29:24 denial 34:23,23 54:8,13 Department 1:18 4:21 dependent 10:14 depending 52:10 depends 33:8 deprive 27:23 Deputy 1:17 described 24:5 design 18:24 destruction 53:16 detail 21:18 details 21:17 determination 3:21 33:23 47:21,22 50:2 50:13 56:22 determinations 50:23 determinative 16:5,9 determine 14:18</p>
--	---	---	--	--

<p>27:6,17 determined 3:16 determines 17:11,18 difference 19:15 19:16 29:19 differences 7:6 different 5:14 19:10 22:8 31:4 32:25 45:24 51:9 differently 23:5 difficult 10:17 22:6 25:24 diligence 49:1 49:17 diligent 47:18 disagreed 10:9 discharged 57:4 disclaim 23:20 disclose 49:14 discretion 14:19 19:18,19,22 21:23 22:8,23 23:1,6 41:13 discussing 29:15 discussion 24:17 49:23 dismiss 28:17 35:15 dismissal 4:1 dismissed 55:15 disproportion... 29:20 30:8 district 6:25 10:8,9 29:1,22 30:5 50:6 51:21 document 51:9 doing 5:8 51:8 dollars 51:19 double-check 10:1,13 dropped 7:24 drop-off 4:10 DSH 54:22,24 D.C 1:10,18,22</p>	<p>E</p>	<p>47:16 48:3,19 50:3,7,9,15,20 50:22 51:1,23 54:19 56:7,13 56:14 equities 56:15 error 10:25 11:1 40:24 42:19 errors 10:22 especially 9:4 ESQ 1:17,20,22 2:3,6,9,12 establish 5:13 established 5:3 9:16 establishing 20:8 ET 1:8 event 28:24 evidence 20:14 21:1 33:25 53:22,23,24 54:5 exactly 22:17 38:4 example 6:9 48:8 56:4 examples 32:1 exception 6:22 11:24 15:1 16:17,18 18:15 18:16 24:7,9 24:11 47:10 exceptions 23:25 excuse 5:4,5 14:8 26:16 41:15 44:23 45:7 52:13 exist 48:12 existence 3:22 expectation 38:2 expected 12:23 expenditure 52:2 expensive 30:14 expiration 40:6</p>	<p>40:10 explicit 14:8,8 explicitly 19:17 42:17 express 22:23 expressly 7:15 extend 6:25 13:13,19 19:18 19:19 22:23 41:21 extendable 25:20 extended 51:4 extending 3:25 15:1 41:13 extension 6:7,15 13:25 14:3 19:24 34:18 35:1 53:7 55:16 extensions 6:13 7:15 9:21 56:13 extent 9:20 14:19 26:22 31:24 39:11 extra 43:22 extraordinary 12:18</p>	<p>F</p>	<p>43:18 fail 49:14 failed 28:13 fails 16:12 failure 42:23 43:2,19 fair 11:16 faith 40:14 fall 52:11 far 27:7,8 farther 46:5,5 fast 12:25 fault 29:24 32:22 33:11,12 33:13,19 36:10 37:17 38:15,21 favor 45:1,19 Federal 3:12 12:6 51:8,15 feels 48:9 fighting 11:25 12:8 figures 12:10 file 21:8,9 48:21 49:2 filed 4:14 49:3,4 55:16 files 10:19 filing 53:15 filings 14:19 final 33:18 finality 11:8 12:4 31:22,22 34:1 36:8 37:15 48:4,6 54:10 find 13:4 20:13 20:24 29:3 36:25 39:2 42:3 finding 6:10 20:10 29:6 30:2 50:9 findings 10:7 29:23 fine 14:1 finish 25:15</p>
---	-----------------	--	---	-----------------	--

finished 46:20	6:3 9:3	41:3 45:6	hearing 3:19	56:22
fire 53:15	further 54:22	50:24,25 53:7	17:17 21:9	Human 1:4 4:21
first 3:4 5:17 9:2		53:9,10,14	44:10	hurdle 44:12
9:15 11:20	G	56:2	held 17:24 23:13	hypotheticals
17:8 37:10	G 3:1	gotten 46:25	54:7	12:9
49:2,8 54:18	game 14:5	govern 19:22	help 23:18	
fiscal 3:16	general 1:17 9:9	governing 5:2	helps 16:4	I
fix 41:23	13:1 14:18	15:17	Henderson 7:2	identical 19:12
flaws 49:9	37:5	government	7:17,23 8:8,9	identifying
flexibility 32:9	general's 12:21	3:12 21:24,25	45:9	15:14
flood 51:25	getting 46:24	22:2 29:15	henhouse 27:6	ignore 23:19
floodgates 51:14	gg 36:13,15 38:8	31:19,21 33:22	HHS 8:14	imagine 46:15
focus 50:1	gift 37:17	35:9,11 36:14	high 20:24 30:12	immediately
focused 18:21	Ginsburg 7:1	41:25 42:14,17	history 15:6	48:21
45:10	8:21 19:23	43:6 49:13	22:16 23:18,19	implemented
focusing 15:15	20:5 21:7	50:20 52:7,23	Holland 45:11	55:14
follow 19:3	28:11,24 34:8	53:18	home 9:6,6	implicit 14:9,23
following 33:24	34:17 35:6,24	government's	11:11 34:24	important 15:11
footnote 7:24	42:21 43:12,17	27:21 31:18	54:1,7	impose 12:4
44:1 55:6	44:4,11 48:18	33:16 37:11	Honor 17:23	34:1
forced 50:25	52:3	53:8 55:7	21:23 26:16,25	imposed 9:2
foreclose 44:21	give 16:2 47:20	governs 4:20	27:7,19,20	11:22 16:20
forever 47:11	48:1 52:21	grace 54:2	28:8,15,21	imposing 9:19
form 6:5	given 7:11 9:4	granted 28:17	29:4 30:9 31:9	inception 23:20
format 22:3	gives 23:6 33:5,7	55:17	31:17 32:20	include 53:9
forth 5:20 32:4	glitch 40:14	grateful 57:5	34:14 35:1	included 25:11
forward 50:19	Gluss 44:1	greater 4:12	36:6,16,23	includes 25:9
52:19	go 4:8 8:4 11:1	grounds 25:12	37:2,7,9,19,20	including 3:14
found 13:11	24:19,21 27:7	26:1	37:24 39:8,19	incompatible
28:22 30:13	27:8 32:15	guess 9:7 32:15	40:20 41:22	6:6 13:4
41:25 46:3	33:6,14 37:15	44:24	42:1,10,15	incongruity 4:5
fox 27:5	37:21 46:14	H	43:4,16,23	inconsistent 6:3
framed 17:25	47:6 50:17,19	hand 25:21	44:8,15 45:8	9:3
18:3	54:24	38:24	46:22 47:2	incorporated
fraud 12:22	God 6:23	handled 48:6	48:12 49:5,17	22:22
29:24 32:22	goes 31:6 34:14	happened 38:4	51:6 52:25	indefinite 42:20
33:12,13 35:8	39:6 46:5,5	41:12 45:10	hook 38:23	indefinitely
36:1,10,10	50:5 54:22	56:21,23	horrible 28:2,4	42:19
37:16 45:3	going 8:6 48:21	happens 21:10	28:7	individual 55:3
53:10 55:20	50:23 52:14	hard 12:25 19:2	hospital 29:20	inform 23:18
56:17	good 6:4,7,7,13	42:4,4	30:8 51:20	information
fraudulent	6:15,17,22	head-on 48:3	56:23	10:4 25:13,19
11:14,14,19	9:21 13:20	Health 1:4 4:21	hospitals 3:14	40:16 45:5
25:2 32:10,15	14:25 18:15	hear 3:3 17:19	27:23 30:11,11	inherent 39:3
fundamental	20:8 23:8 24:9	47:5	44:18 52:8	inkling 49:10
19:15,16	24:11 31:5	heard 31:21	54:25	insisted 20:23
fundamentally	40:14,25 41:1		hospital-by-h...	Insofar 13:6

<p>inspector 12:21 instance 13:11 46:23 instituted 48:22 institutional 3:13 intact 20:2 intend 16:2 intended 16:8 39:21 40:8 intends 17:22 27:22 28:1 intent 12:9,10 18:22,23 30:17 intention 17:4 19:6 intentional 10:25 11:2 25:12 27:1 intentionally 10:5 25:19 interest 12:3 interfere 21:17 intermediary 3:16 intermediary's 3:20 internal 4:18 9:11 interpretation 16:1 35:16 36:1 37:18 interpreted 11:23 interpreting 16:3 intra-agency 7:3 7:7 invalid 19:5 invitation 57:3 invoke 18:1,5 invoking 18:13 involve 56:9 involved 6:15 7:3 52:14 56:10 involving 52:8</p>	<p>Irwin 25:11,23 43:25 issue 22:5 29:5 35:4 36:8 39:20 44:20 47:3,4 49:18 54:15 issued 39:9 49:20 issues 26:25</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JOHN 1:20 2:6 16:25 Joint 28:23 29:8 judge 10:9 29:1 48:1 judgment 55:7 judicial 4:18 15:16 19:22 27:9,17 34:21 34:25 35:3 54:9,13 judiciary 51:25 jurisdiction 5:3 5:10,19 7:10 7:13 17:10 19:2,8 23:14 24:17 49:24 55:11 jurisdictional 5:8,15,24 6:8 6:11,13 7:16 8:2 11:22 13:5 13:8,12,15,17 13:20,25 14:2 14:4,12 15:5,7 15:14 16:6 17:22 18:2,8 18:12,18 19:3 19:6 23:21 24:6,13 25:8 25:17,22 28:3 39:7 56:4 jurisprudence 15:14 Justice 1:18 3:3</p>	<p>3:9 4:4 5:4,6 5:12,22 6:4 7:1 7:21 8:21 9:7 9:24 10:11,24 11:2,4,12,18 11:25 12:8 13:3,10,23 14:11,13,16 15:3,9,21 16:23 17:2,12 17:16,20 18:6 18:19 19:23 20:5 21:3,6 22:10,17 23:11 23:16,24 24:2 24:16,21 25:7 25:14,18 26:3 26:5,8,10,13 26:17 27:10,25 28:11,24 30:15 30:16 31:12 32:1,24 33:4 34:8,8,17 35:6 35:24 36:12,17 36:20,24 37:4 38:7,11 39:10 40:12,19,21,25 41:8,11,17,20 42:3,8,12,21 43:12,17 44:4 44:11,24 45:14 45:17,22 46:8 46:14 47:5,13 47:19,23 48:13 48:18 52:3,13 52:16,18 53:1 53:6,17 57:1</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 7:21 9:7 14:13 24:21 30:15 39:10 44:24 45:14,17 45:22 KATHLEEN 1:3 keep 11:25 12:8</p>	<p>KENNEDY 40:12,19,21,25 41:8,11,17,20 42:3,8,12 kind 18:11 31:1 32:25 43:8 45:24 46:1 50:21 51:24 kinds 19:10 Kneedler 1:17 2:3,12 3:6,7,9 4:4,13 5:5,11 5:16 6:1,6 7:5 7:21 8:9,23 9:8 9:13 10:6,16 11:3,6,17,20 12:2,15 13:3,6 13:16 14:6,14 14:20 15:8,10 16:13 31:3 53:2,3,5,6,12 53:19 know 4:10 10:2 10:23 11:7 22:15,15 32:16 37:16 38:4 39:14 41:8,9 44:5,13 45:4,5 46:10 47:14 48:5 50:7 56:23,23 knowing 43:5 knows 21:16 40:16</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>L 1:22 2:9 26:6 label 14:14,15 14:17,17 16:11 16:12 55:11 labels 23:18 24:20 lack 31:7 laid 51:10 language 5:15 21:5,7,11 32:4 late 14:19 55:22</p>	<p>law 9:9 11:15 18:21 25:3 28:9 52:21 lawyers 31:15 lawyer's 32:5 lead 51:17 56:18 leave 50:10 leaves 20:18 leeway 16:3,8 20:3 26:23,24 left 20:1 legal 30:16 legislation 22:20 legislative 8:17 55:2 legislator 16:1 length 36:3 let's 24:21 28:22 46:8,15 level 41:5 43:8 43:22,22 44:2 51:16 52:5 limit 4:7,9 13:17 17:22 20:2 25:19 32:23 34:1 39:18 40:4,13 46:23 47:1,8 48:11 50:4 55:14 limitation 4:13 4:14 7:16 9:18 11:22 12:4 13:5,12,13,25 14:22 17:5,21 24:12 25:8,9 27:7 33:21 54:15,18 55:23 56:9,12 limitations 5:18 5:19 8:19 14:7 14:12 18:11 27:3 40:7,11 limited 6:7 16:18 42:8 46:1 49:24 54:25 limiting 55:14</p>
---	---	---	---	--

<p>limits 5:8 9:16 19:22 26:19 line 52:12 litigation 48:22 56:19,19 little 4:5 32:9 37:4 locate 17:8 long 14:17 15:5 22:10,10 32:14 33:18 longstanding 28:9 look 15:24 23:17 31:18 33:25 37:14 38:1,1 48:10 52:22 looked 51:19 looking 15:19 lose 16:16 32:2 lot 24:17 lower 48:25</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>mandating 55:12 mandatory 14:21,21,22 24:18,23 26:14 26:18,22 Manning 1:20 2:6 16:24,25 17:2,15,23 18:19 20:5 21:22 22:17 23:23 24:1 25:7,16 26:4 30:19,23 57:2 Massachusetts 1:20 massive 10:19 match 29:17 53:24 matching 10:18 10:21 29:12,14 material 53:22 matter 1:13 4:18</p>	<p>4:18 19:4 21:12,13 49:25 54:2 57:8 matters 55:20 mean 7:5 14:13 15:23 23:5,5 28:2,12 32:2,3 32:15,16 35:7 36:25 40:25 41:11 46:14,15 46:21 52:14 means 13:15 24:25 33:9 35:5 39:17 meant 20:15 46:9 Medical 1:7 3:5 Medicare 3:11 10:20 31:23 33:25 39:22 50:4 51:7,17 55:23 56:14 members 21:15 mention 5:6 30:10 mentioned 32:3 36:14 mere 28:4 31:14 merely 43:19 merit 23:10 million 10:19,20 minute 25:15 minutes 36:13 53:2 miscalculation 52:14 misconduct 27:2 27:9,19,23 28:8,10 30:4 31:21 35:4,23 39:20 40:6,9 40:13,17,18 41:6 42:9 43:1 43:24 44:23 45:3,13 46:6 47:10 48:7 51:24 55:8</p>	<p>miscount 49:14 miscounted 49:15 misleading 29:11 mismatch 55:1 misrepresented 48:9 49:15 missed 27:3 45:11,12 49:11 mistake 40:24 mistakes 43:9 money 12:9 52:2 months 19:13 morning 3:4 motion 28:16 35:15 55:7 mysterious 38:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrow 6:17,20 11:24 14:25 56:2 narrowed 24:9 narrower 42:13 narrowing 25:25 nature 9:5 necessarily 39:17 necessary 25:4 25:13 29:6 30:4 need 9:4 11:8,8 14:13 31:22,22 56:16 needed 10:4 net 30:11 never 18:2 41:3 44:12 new 46:6 53:22 54:5 nonjurisdiction... 14:22 nonmandatory 24:18</p>	<p>non-arbitrary 11:16 non-waivable 24:6 normally 21:14 Northern 20:11 noted 9:5 notice 19:25 39:6,8 49:2 notices 56:4 notwithstandi... 23:15 number 7:6 numbers 29:13 29:18 nursing 9:6</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obtain 3:19 occur 28:5 oh 4:8 okay 8:4 46:19 46:21 47:19 old 19:4 once 13:14 one-way 36:5,5 open 9:21 13:1 21:10 open-ended 9:1 16:19 54:19 operation 12:5 21:16 opinion 20:20 56:9 opportunity 49:19 opposed 41:7 45:4 opposite 30:20 30:21 oral 1:13 2:2,5,8 3:7 16:25 26:6 order 37:23 47:16 ordinary 11:21 15:25</p>	<p>ought 35:21 outset 5:18 55:12 outside 8:12 20:2 overpayment 38:14 overpayments 33:10,11</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 Pacific 5:7,9 PAGE 2:2 paid 40:2 46:24 46:25 paper 46:18 papers 47:7 paragraph 28:21,21 29:9 29:9 parallels 56:3 parliamentary 20:19 part 3:11 13:25 17:9,10 21:5 22:11 23:16 25:4 52:9 particular 50:1 particularly 18:12 party 17:13 18:5 35:13,20 party's 17:25 passed 18:13 22:10,12,13,16 passes 39:14 patients 30:14 payment 30:9 33:18,18,20 40:5,5 41:23 54:21 payments 27:23 36:9 40:8 51:19 54:22,24 pays 3:12 pending 52:4,7</p>
--	---	--	---	---

Pennsylvania 50:6	23:17 24:21 27:15 38:18	primarily 15:15	prove 31:15 44:5	4:24 9:17
people 30:13	39:5 48:17	principle 9:9 15:22 28:9	provide 12:19 30:12 40:2	put 18:24 19:1 20:15 47:7
percent 54:24	50:16 53:7	principles 13:2 15:25 26:20	41:22	puts 4:9
percentage 30:12	pointed 54:12	probably 52:9	provided 4:2 26:23 36:7	putting 19:7 46:18
period 3:25 6:24 6:25 9:18	policy 18:10 20:17	problem 8:10 15:3 20:22	40:1	<hr/> Q <hr/>
13:20 32:17,18	poor 30:12	41:23	provider 3:18 3:19,23 6:23	question 5:14 6:16,17,20 9:7
34:6,21 42:20	portrays 50:20	procedural 39:23	11:7,10 17:17	11:2 12:1,24
48:8	position 4:6 10:1 31:19 47:14,15	procedure 19:3	17:19 22:7	13:22 14:7,23
permanently 44:21	55:5 56:11	procedures 15:17 21:24	33:12,14,19	16:4,7,10,12
permissible 7:4 16:20	possible 46:16	process 9:11 30:1 35:18	34:10,11 35:10	16:15 18:3
permissibly 6:21 14:24	possibly 45:5 46:19	39:16 41:25	35:20 36:11	22:5 23:11,12
permit 12:14	potentially 41:4	processing 5:13 8:1,4 9:10	38:13,21,24	24:2,2,10
permits 33:15	power 18:1,4,5	11:13,21 12:12	40:9 41:18	28:22 30:16
permitted 6:19 26:14 31:11	powers 13:9 18:14	14:15,17 15:15	46:24 48:9	32:21 33:1
53:8	precise 16:15 22:5	16:6 18:8,14	49:12 55:3	44:14 46:9,23
person 13:12 45:4	preclude 31:20	18:17 23:25	providers 3:13 3:15 9:5,25	48:4
persuade 28:5	predominant 53:21	24:18,19,23	10:23 19:10,14	questions 51:1
petitioned 50:12	prescribed 17:5 18:21 22:21	26:14,18,22	19:20 23:1	quite 8:25 21:22 21:22,25 22:8
Petitioner 1:5 1:19 2:4,13 3:8	23:1	39:8 55:11	31:25 32:22	<hr/> R <hr/>
53:4	present 20:25 30:20 52:19	program 3:11 9:2 11:9 40:14	34:3,15 37:16	R 3:1
petitioning 6:12	presented 29:10 31:5 42:25	55:13,23 56:14	38:3,23 39:25	raise 28:21
phrase 23:12	presenting 52:23	56:15,25	47:17 49:10	raised 23:17 53:10 54:6
phraseology 23:13	presumably 52:11	programs 12:6	51:13 52:21	raises 24:3
pieces 46:18	presumption 12:5 18:7	prohibited 3:25	provides 3:18 22:8 27:21	raising 37:20 53:21
place 4:7 7:14 9:15 20:16,18	25:23 45:1,18	prohibits 30:24	34:6 35:22	ratchet 36:5,5
50:24	pretty 32:14 46:20	promised 27:24 46:25	55:19	read 23:4 30:18 31:4 39:21
plaintiff 25:5	prevail 47:16	promulgated 5:21 20:7 22:2	provision 9:20 13:19,24 14:3	reading 18:11 30:18 35:12
plaintiffs 48:23	prevent 6:23	34:5 35:17	17:9,17 19:7	reads 22:6
plausible 55:22	preventing 52:24	pronouncement 49:9	22:20 24:6	really 10:1 16:7 18:16 20:2
play 46:4	prevents 53:15	proof 20:24	33:5 36:13,14	31:6 32:6 46:9
plays 19:21	pre-Civil 32:16	proposition 27:21	37:21 38:8	46:15 51:6
please 3:10 17:3 26:9		protective 31:24 34:3	56:10	reason 23:8 29:22 33:14
plus 34:18		prototypical 17:21	provisions 6:10 22:7,7,21,22	37:9 54:6,21
point 12:17 13:21 21:4,6			23:4 56:4	56:23
			PRRB 22:19	reasonable 16:1
			public 49:8	
			purposes 29:7 44:10	
			pursuant 3:24	

32:17 33:2 46:12 47:8 reasonableness 37:12 reasons 20:18 54:10 rebuttal 2:11 37:10 53:3 recalculate 54:21 recall 47:2 recognize 15:12 45:9 recognized 45:19 record 28:12 records 46:16 46:18 53:16 recourse 35:3,3 recover 33:11 34:7 recoveries 38:14 recovering 33:9 41:16 reenacted 22:20 refer 9:24 reference 22:22 35:20 referred 5:18 refers 55:7 refuting 55:5 regard 45:6 regarding 15:6 regardless 16:11 16:12 regime 16:19 54:19 Regional 1:7 3:5 Register 51:9 regularity 12:5 regulating 4:17 7:18 regulation 8:6 8:25 9:17,19 9:23 16:18 19:4 20:4,8,14 20:16,21 21:2	22:2 34:5,6 35:8,9,13 36:2 37:22,22 42:1 42:18 50:24,25 53:13,13,25,25 55:19,21 56:3 regulations 4:3 4:24 5:17,20 7:14 15:13,18 20:18 24:8 34:11 43:11 53:8 regulatory 18:13 56:10 Reimbursement 3:19,23 relate 52:10 relates 9:10 relaxation 38:22 relevant 4:15,23 4:24 5:2 relief 34:16 remaining 53:2 remains 13:20 remand 44:17 49:18 remedy 12:20 Remember 39:5 rendered 49:8 reopened 42:19 reopening 34:15 34:22,23,24 36:7 37:22,22 38:7,8 53:24 54:3,8,14 reply 37:11 55:6 report 3:17 12:21 reports 54:4 55:24 repose 9:4 reproduce 46:17 request 34:23,24 requested 55:17 require 52:1 required 4:1 10:17 12:16	requirement 20:8 49:1 requires 11:9 30:25 requiring 56:20 requisite 6:24 reserve 16:21 resolve 24:15 respect 5:22 28:3 29:19 33:20 36:6,9 50:14 55:4 respond 12:23 Respondent 55:18 Respondents 1:23 2:10 16:15 22:9 23:3 26:7 54:16,20 responding 5:16 response 30:18 31:2 responsibility 4:22 57:4 result 51:14,20 56:6 resulted 51:18 return 23:11 revealed 28:25 reversed 50:8 reversing 50:8 review 3:20,23 19:22 21:14 22:21 27:9,10 27:11,14,18 34:22,25 35:3 35:5 48:14,16 54:9,13 reviewing 31:20 revisit 50:13 revisiting 55:24 Revolutionary 47:6 right 5:23 6:1 14:6,20 15:21 17:16,17,25	18:5,20 20:6 20:21 21:4,22 21:25 22:17 24:1 30:16 31:3 33:7 34:12,21 39:23 39:24 42:7 45:14 47:13 52:17 rise 43:8 44:1 ROBERT 1:22 2:9 26:6 ROBERTS 3:3 4:4 16:23 25:14 26:3,5 36:12,17,20,24 37:4 48:13 53:1 57:1 Roth 1:22 2:9 26:5,6,8,12,16 26:21 27:13 28:7,15 29:4 30:15 31:9,17 32:20 33:8 34:13,20 35:14 36:3,16,19,22 37:2,7 38:10 38:12 39:10,19 40:18,20,23 41:3,10,15,18 41:21 42:7,10 42:15 43:4,14 43:21 44:7,15 44:25 45:8,15 45:21 46:2,13 46:22 47:12,15 47:22 48:2,15 49:4 52:6,15 52:17,20 rubric 36:4 rule 6:8 8:1,2,4 8:10,11 9:10 11:9,13,16,21 12:12 14:18 16:6,6,11,16 18:8,17 23:25 24:23 27:11	28:2,3,6 32:8 34:15 35:7,19 35:21 36:7 38:18,22 41:12 42:5,6,13 46:3 46:11,11 48:11 rulemaking 3:24 4:25 7:11 8:13,14,18 35:18 rules 5:2,13 12:25 18:24 24:18,19 26:15 26:19,22 41:2 56:16 ruling 35:16 41:4 run 21:16 Russell 23:14 <hr/> S S 1:17 2:1,3,12 3:1,7 53:3 safety 30:10 sake 10:24 sanctions 12:7 sat 10:9 save 12:9 saw 51:17 saying 7:24 8:1 8:7 39:13,14 42:4 44:25 45:23 47:5,7 48:8 53:18 says 4:11,12 21:8 24:25 28:12 30:23 33:2,17 35:7 35:10 38:12 50:7 51:8 52:7 55:15 scale 19:1 Scalia 13:3,10 13:23 14:11,16 15:3,9 27:25 31:12 33:4 34:8 38:7,11
--	--	--	--	---

scientists 46:17	30:12 40:1,2,3	sophisticated	30:18,20,21,23	suppose 40:13
Sebelius 1:3 3:4	set 5:20 12:11	9:4,25	30:25 31:3,10	42:21 43:17
second 22:13	19:12 21:24	sophistication	31:24 33:15,24	supposed 47:20
32:7	22:25	10:12	34:1,2 38:2	Supreme 1:1,14
secondly 19:9	sets 4:7 19:16	Sorry 37:2	39:8,14 40:7	sure 15:23 40:12
secretarial 35:4	23:4	sort 9:1 12:4,18	40:10	44:24
35:23 48:7	setting 5:1,8	16:19 21:18	statutes 4:23	susceptible
Secretary 1:3	share 29:20 30:8	33:6,9,9 54:5	17:25 18:2	38:17
3:23 4:9,12,23	shield 11:13	sorts 20:18	32:11,12	systematic
6:16,20 8:3,14	27:8	Sotomayor 5:4,6	statute's 4:16	49:13
8:16 9:19,23	shielded 11:18	5:12,22 6:4	statutory 9:18	systems 22:25
12:3,16,19,23	Shinseki 7:2	10:24 11:4,12	13:19,24,24	
13:7 14:24	show 31:6 44:18	11:18,25 12:8	14:3 15:25	T
15:6 19:17	47:17	17:12,16,20	54:2	T 2:1,1
20:7 22:23	showed 12:22	18:6,19 23:16	step 23:9 27:14	tactic 20:19
23:6,9 24:5,9	shows 56:19	23:24 24:2,16	27:16	take 25:15 28:18
25:25 27:2,2	side 31:13,14,16	25:7,18 26:10	story 19:21	42:25
29:17 30:3	45:13 56:8	26:13,17 27:10	straight 48:4	taken 56:16
32:20 33:5,8	sides 38:19	52:13,16,18	strict 8:19	talk 17:12 31:21
33:10,14 34:4	signal 20:15	53:6,17	string 32:7	45:2
36:7 37:12,13	signaled 17:4	Sotomayor's	strongest 46:16	talked 18:6
37:13,18 39:1	19:5	23:11	subject 13:13	talking 22:12
40:2 41:12	similar 17:24	sound 20:17	17:6,7 21:12	26:25 28:8
46:7 47:3 48:2	29:24 32:22	Southwest 51:11	21:13 25:22	30:7,8,10,11
50:8,10,16	33:12,12,13	speak 36:3	33:22 34:25	36:6 39:23
51:24 54:3	36:10 37:17	special 12:19	38:9,14 43:9	42:11,16 45:3
55:13 56:5	simple 43:9	specific 21:5	45:15 48:13,15	45:25
Secretary's 4:2	simply 30:9,9	specifically 4:2	54:9 56:12	talks 17:13,16
5:17 7:13 8:12	33:24 38:12	35:19 54:12	submit 23:8	tax 56:14
8:25 16:17	41:22 43:5	specified 12:10	submitted 57:6	technical 21:13
34:10 35:16	47:3 56:3	spend 55:5	57:8	technically 7:6
41:2,4,12	single 51:20	spent 51:10	Subsection 17:5	terms 11:5
43:10 56:2,10	sitting 22:14	spits 40:15	23:13	17:25 18:4,4
secretive 38:25	situation 10:17	split 24:13	substantive	53:14
Section 22:18	12:20 15:16	SSI 10:20	39:24	test 18:20
23:14	39:22 46:12	stands 16:11	suggest 55:23	tested 53:20
Security 10:18	54:20	start 27:14	suggested 11:11	Thank 16:23
22:11 29:13,18	situations 11:7	statement 26:11	24:14	26:3,4 52:25
see 25:25 28:22	Social 10:18	States 1:1,14	suggesting	53:1,5 57:1
42:4	22:11 29:13,18	statute 3:18 6:21	14:16	That's 53:17
seek 50:17	Solicitor 1:17	7:18,18 8:18	suggests 6:18	theory 11:13,15
seeking 54:20	37:5	12:11 14:23	suits 4:14	thing 7:22 21:20
self-limiting	solicitude 7:20	15:12,17 16:3	summary 55:7	23:5 32:25
47:18	Solid 20:11	17:9,18 18:13	superimposing	51:8
sense 49:12	solution 47:8	19:8,9,25 20:6	54:18	things 15:14,15
separate 7:9	somebody 20:19	22:4,24 23:10	support 27:21	15:20 21:19
services 1:4 4:21	soon 49:7	25:22 27:3,15	supports 18:10	33:6

<p>think 5:14,23 7:6,22 8:9,16 8:23,24 9:8 10:20 11:9 12:16,22 13:10 15:11,24 20:22 21:14,15,15 26:13 27:13 30:16 35:15 43:23 48:5,11 50:7 52:6 53:12 55:21 56:24 third 33:17 thought 4:11 13:14 14:4 15:23 32:14 33:4 45:17 53:17 three 21:3 24:4 32:3 thumb 19:1 tied 43:1 till 48:24 time 6:11,12,24 9:3,16 13:17 14:7,12 15:2 15:19 16:22 17:5 20:10 24:7,12 25:8 25:19 27:3 30:6 32:14,23 33:11 34:6 35:1,8 36:8 37:10 39:13 41:13,22 42:20 44:18 47:1,7 48:11 50:3 52:19 54:18 55:5,14 timely 51:3 times 20:1,7 tolled 50:20 tolling 5:25 6:2 6:5,18 7:4,25 8:5,22 9:1,12 9:22 13:1</p>	<p>16:19 17:7 25:1,2,4,10,12 25:23,24 26:1 26:2 30:24,25 31:10 38:9,17 39:3,17,18 40:22 41:7 42:5 43:1,9,13 43:14 44:2,6 44:13,19,22 45:2,2,16,19 45:25 46:3 47:16 48:3,19 50:3,7,9,15 51:23 54:19 56:7 total 3:14 totally 5:14 touchstone 18:23 touts 33:22 traditional 26:1 30:1 transparent 47:4 treat 12:13 17:5 19:6 23:9 24:22 30:14 treated 7:15 18:14 19:15 23:21,24 25:3 treating 18:17 tribunal 4:15 5:2 14:9 18:1 tried 24:7 44:13 trigger 39:5 41:6 43:13 triggered 43:15 true 10:1,2,3 28:18 37:7 44:9 trust 37:13 try 10:25 37:12 39:12 trying 9:8 23:20 51:10 54:16 Tuesday 1:11</p>	<p>turns 29:16 43:18 two 10:21 17:4 19:6,9,16 22:25 23:4 type 55:2 typically 21:23</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unclear 53:12 underlying 15:22 52:22 underpaid 38:5 38:21,25 underpayment 38:5 underpin 31:18 understand 8:11 10:11 44:25 understood 14:8 55:13 undetectable 27:22 39:1 undisclosed 27:22 39:1 Undoubtedly 14:11 unfolds 52:11 unfortunately 42:2 Union 5:6,9 United 1:1,14 unlimited 33:10 34:6 35:9 36:8 unprecedented 51:6,7 unreasonable 32:8 33:3 unusual 47:9 use 5:15 12:10 23:18 28:13 29:2 42:23 43:2,5,20 uses 17:21 U.S 33:16</p> <hr/> <p style="text-align: center;">V</p> <hr/>	<p>v 1:6 3:4 23:14 46:5 VA 7:10,11 valid 16:18 55:21 validity 56:2 Vermont 21:25 veterans 7:8,8 7:19,22 8:3 view 30:22 32:24,25 43:13 50:21 viewed 49:23 views 30:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waited 48:22,24 waiver 17:6 want 8:6 16:14 46:11,14 47:14 wanted 20:3 War 32:16 46:15 47:6 warranted 25:25 Washington 1:10,18,22 wasn't 35:25 37:19 45:12 54:6 Waste 20:11 way 6:18 12:24 15:19,24 19:15 21:6 29:13 34:2 35:22 37:11 42:13 46:25 47:19 49:24 54:17,24 ways 17:4 19:6 31:5 34:14 weight 4:12 47:21 48:1 weird 47:9 went 37:11 weren't 7:24 47:25 Western 50:6</p>	<p>We'll 3:3 we're 8:6 28:7 37:9 39:23 56:1 we've 5:24 44:7 45:19 48:9 widespread 12:22 56:18 willing 25:1 withheld 10:5 25:19 witnesses 56:20 won 48:23 wonder 15:22 word 23:22 35:13 worded 23:5 words 16:2 30:23 38:20 39:25 43:6 wouldn't 41:9 43:3 write 46:11 writing 22:15 written 53:14 wrong 40:15 56:1</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,9</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yankee 22:1 year 33:17 years 3:22 7:14 8:8 9:3 19:24 20:9,23 22:13 29:17 32:13,14 32:14,19 33:1 33:4,6,15 34:9 34:11,15,19 37:14 41:14 46:17,21 47:7 48:11,20 50:23 51:10 52:8,16 54:11,19,21 55:17,18,19</p>
---	---	---	---	---

56:20,21 York 46:6	33:1,4,6 34:9 34:10,11,15,18 37:14 41:13 48:10 55:17,18 55:19			
<hr/> \$ <hr/>				
\$230 3:12				
<hr/> 1 <hr/>	3-plus 33:15 3-year 4:9 18:16			
10 46:21 48:20	20:2 32:9			
10:08 1:15 3:2	33:21 34:13			
100 46:21 47:6	42:6 46:11			
11 10:19	48:8 53:7			
11-1231 1:5 3:4	55:23			
11:09 57:7	30 28:21 39:14			
12 52:16	30,000 3:13			
1395gg 33:16	37 50:23			
37:20 38:1,12	38 28:21 29:9,9			
1395oo 27:20	<hr/> 4 <hr/>			
38:2 39:4,5	4 1:11 44:1 53:2			
15 56:21	4,000 52:8			
16 2:7	40 3:22 7:14 9:3			
180 3:21 14:2	54:18			
19:14 21:8,9	405.1885 37:8			
33:7 34:17,18	405.980 42:17			
38:3 55:16	42 33:15 42:17			
180-day 4:7,13	450 52:8			
9:18 34:21	<hr/> 5 <hr/>			
54:14,17 55:14	5 36:12 46:17,20			
56:9,12	53 2:13			
1885 33:22	<hr/> 6 <hr/>			
1965 22:20	6 10:20 19:13			
1972 22:18	6,000 3:14			
1974 35:18	60 39:15			
1987 54:21	60-day 19:21			
<hr/> 2 <hr/>	<hr/> 8 <hr/>			
20 56:20,21	80 52:7 54:24			
2004 52:21				
2008 24:8				
2012 1:11				
2107 23:14				
26 2:10				
2829 29:8				
2990 22:18				
<hr/> 3 <hr/>				
3 2:4 8:7 17:6				
19:24 32:12,12				
32:14,14,19				