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IN THE SUPREME COURT OF THE UNITED STATES

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KATHLEEN SEBELIUS, SECRETARY OF :

HEALTH AND HUMAN SERVICES, :

Petitioner : No. 11-1231

v. :

AUBURN REGIONAL MEDICAL :

CENTER, ET AL. :

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Washington, D.C.

Tuesday, December 4, 2012

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:08 a.m.)

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

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

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

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

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

For the almost 40 years of the existence of the Provider Reimbursement Review Board, the Secretary, pursuant to her broad rulemaking authority, has 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 -- 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: 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 some 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 think 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 with 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, most of your argument
18 was built on the presumption in favor of equitable
19 tolling that we've recognized in those cases --

20 MR. ROTH: Correct.

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

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

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

12 MR. ROTH: Well --

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

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

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

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

11 MR. ROTH: Well, if --

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

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

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

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

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

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

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

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

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

23 You waited till there was a decision of the
24 lower court. So it seems to me you -- you said there's
25 a requirement of diligence. Why -- why didn't you have

1 to file when you were first on notice, which you would
2 have been from the complaint filed in the Baystate case?

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

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

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

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

1 Bradford case, the board itself made a determination
2 that equitable tolling should apply in another time
3 limit within the -- within the Medicare Act.

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

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

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

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

1 about whether -- whether or not the -- whether or not
2 the -- the claim should be considered timely, even
3 though the deadline had to be -- had to be extended.

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

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

22 So allowing equitable tolling to address the
23 misconduct of the Secretary in this kind of case will
24 not -- will not -- will not flood the judiciary or the
25 agency, and it will not -- it will not require an

1 expenditure of money --

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

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

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

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

15 JUSTICE SOTOMAYOR: -- claims 12 years ago.

16 MR. ROTH: Right.

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

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

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Kneedler, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

3 ON BEHALF OF THE PETITIONER

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

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

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

16 JUSTICE SOTOMAYOR: Okay. So it's not as if
17 the government is saying --

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

1 made clear that it was a matter of grace, not statutory
2 compulsion, that the Secretary allowed for any reopening
3 at all of past cost reports.

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

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

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

23 DSH payments, by the way, go to 80 percent
24 of hospitals. It's not some limited category. And what
25 is being claimed here is -- is a mismatch of a

1 legislative type. It's not some concealment from an
2 individual provider.

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

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

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

25 And if we're wrong, as I said, about the

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

5 The case is submitted.

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

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