Nos. 13-1041 and 13-1052

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

JEROME NICKOLS, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, generally provides that "notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. 553(b), and, if such notice is required, the rulemaking agency must give interested persons an opportunity to submit written comments, 5 U.S.C. 553(c). The APA further provides that its notice-and-comment requirement "does not apply * * * to interpretative rules," unless notice is otherwise required by statute. 5 U.S.C. 553(b)(A). No other statute requires notice in this case. The question presented is:

Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

PARTIES TO THE PROCEEDING

Petitioners in No. 13-1041 are Thomas E. Perez, Secretary of Labor; the Department of Labor; and David Weil, Administrator, Wage and Hour Division, Department of Labor.*

Respondent Mortgage Bankers Association was plaintiff-appellant below.

Respondents Beverly Buck, Ryan Henry, and Jerome Nickols are petitioners in No. 13-1052 and were intervenors-appellees below.

* David Weil was automatically substituted as a party after he became the Administrator of the Wage and Hour Division in May 2014. See Sup. Ct. R. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 720 F.3d 966.[1] The opinion of the district court (Pet. App. 13a-48a) is reported at 864 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied

[1] "Pet. App." refers to the petition appendix in No. 13-1041.

on October 2, 2013 (Pet. App. 85a-86a). On December 19 and 20, 2013, the Chief Justice extended the time within which to file petitions for writs of certiorari to and including January 30, 2014. On January 21, 2014, the Chief Justice further extended the time to February 28, 2014, and the petitions were filed on that date. The petitions for writs of certiorari were granted on June 16, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition in No. 13-1041. Pet. App. 87a-99a.

STATEMENT

1. a. This case concerns whether the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, requires a federal agency to follow notice-and-comment rulemaking procedures before it may alter an "interpretive" rule that articulates an interpretation of an agency regulation.

The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). The Act defines "rule" to encompass a broad range of agency "statement[s]" serving various functions, including statements that are "designed to * * * interpret * * * law" as well as statements that are designed "to implement * * * or prescribe law." 5 U.S.C. 551(4). More specifically, the Act defines "rule" to "mean[] the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Ibid.*

Section 4 of the APA, 5 U.S.C. 553, governs the process of agency rulemaking. Section 4(b) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. 553(b). Section 4(c), in turn, provides that, if "notice [is] required by this section," the agency, after giving such notice, "shall give interested persons an opportunity to participate in the rule making through submission of written [comments]" and consider those comments before promulgating the rule. 5 U.S.C. 553(c).

Section 4 further provides, however, that its notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

b. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its minimum-wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [5 U.S.C. 551-559])." 29 U.S.C. 213(a)(1).

Congress contemplated that, in the course of its administration of the FLSA, the Department of Labor (Department) would from time to time modify or re-

scind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1).

The Department has promulgated regulations through notice-and-comment rulemaking that define and delimit the categories of FLSA-exempt employees. See, *e.g.*, 29 C.F.R. Pt. 541 (1998); 3 Fed. Reg. 2518 (Oct. 20, 1938) (original Part 541 regulations). In 2004, the Department revised those regulations through notice-and-comment rulemaking. 29 C.F.R. Pt. 541. The current regulations provide, in pertinent part, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. 541.203(b) (administrative exemption examples).

2. This case involves the Department's interpretation of its FLSA regulations governing the "administrative" exemption from the FSLA's overtime and minimum-wage requirements in the context of mortgage-loan officers. In 1999 and 2001, the Wage and Hour Division issued Opinion Letters in which it interpreted the then-existing regulations and concluded that mortgage-loan officers are not FLSA-exempt

administrative employees, *i.e.*, that the FLSA's minimum-wage and overtime requirements apply to those employees.[2]

After the Department revised its FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA or Association), a national trade association representing real-estate finance companies, requested an opinion from the Wage and Hour Division on whether mortgage-loan officers are FLSA exempt. Pet. App. 3a, 20a n.3. In 2006, the Division's Administrator issued a letter opining that mortgage-loan officers are exempt administrative employees under those regulations. *Id.* at 70a-84a.

In 2010, the Wage and Hour Division revisited the issue and revised its interpretation of the governing regulations in an Administrator's Interpretation. Pet. App. 49a-69a. That Interpretation reanalyzed provisions of the 2004 regulations and considered judicial decisions addressing the administrative exemption. *Id.* at 50a-69a. The Department concluded that "employees who perform the typical job duties of a mortgage loan officer, as described" in the Interpretation, "have a primary duty of making sales for their employers and, therefore, do not qualify" for the exemption for "administrative" employees under the FLSA's implementing regulations. *Id.* at 49a-50a, 52a, 69a. The Department accordingly withdrew its 2006 Opinion Letter, explaining that the letter had adopted an erroneous reading of 29 C.F.R. 541.203(b) and related

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[2] See Wage & Hour Div., Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8351 (Dep't of Labor Feb. 16, 2001), available at 2001 WL 1558764; Wage & Hour Div., Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8249 (Dep't of Labor May 17, 1999), available at 1999 WL 1002401.

provisions that was inconsistent with, *inter alia*, a regulation addressing work performed incidental to, and in conjunction with, an employee's own sales or solicitations (29 C.F.R. 541.500(b)). Pet. App. 59a & n.3, 67a-68a. The Department did not utilize notice-and-comment rulemaking to issue its 1999, 2001, and 2006 Opinion Letters or its 2010 Administrator's Interpretation.

3. a. Respondent MBA filed this APA action in district court to vacate and set aside the 2010 Administrator's Interpretation. Pet. App. 13a-14a, 28a. Petitioners Buck, Henry, and Nickols (former mortgage-loan officers) intervened. 2/13/2012 Order 1-2 (Doc. 25).

MBA challenged the 2010 Administrator's Interpretation on two grounds. First, the Association argued that the interpretation was procedurally invalid because the agency must use APA notice-and-comment rulemaking to revise its reading of a regulation in an interpretive rule. Pet. App. 28a. Second, the Association argued that the interpretation was substantively invalid because it was inconsistent with the regulations it interprets and, thus, was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Ibid.* (citation omitted).

The government responded that, as relevant here, the Administrator's Interpretation was an "interpretive" rule and that the APA exempts such "interpretive rules" from notice-and-comment rulemaking. Gov't Cross Mot. to Dismiss 14-15 (Doc. 15) (citing 5 U.S.C. 553(b)(A)); see *id.* at 15 n.8 ("There is no dispute between the parties that the 2010 [Administrator's Interpetation] is an interpretive rule."). MBA acknowledged that the government was "correct" that

the 2010 Administrator's Interpretation was an interpretative rule, but argued that its status as an interpretative rule was "of no moment" because an "'interpretative rule[] * * * still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans* [*of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998),] and its progeny." MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17) (quoting *Tripoli Rocketry Ass'n* v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 12 (D.D.C. 2004), remanded, 437 F.3d 75 (D.C. Cir. 2006)). Under its *Paralyzed Veterans* doctrine, the D.C. Circuit holds that if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation," the resulting "modification of [the agency's earlier] interpretive rule construing [the] agency's substantive regulation" requires notice-and-comment rulemaking. *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).[3]

b. The district court granted summary judgment to the government. Pet. App. 13a-48a. The court agreed with the parties that the "2010 [Administrator's Interpretation] is an interpretive rule," and the court's analysis addressed whether it was valid as such a rule. *Id.* at 31a n.7.

First, the district court concluded that the Department did not have to use notice-and-comment-rulemaking procedures to revise its prior interpretation of its regulations. Pet. App. 32a-44a. The district court explained that the D.C. Circuit's *Paralyzed*

[3] Although *Paralyzed Veterans* articulated its notice-and-comment requirement in dictum, the D.C. Circuit later elevated that requirement to a holding in *Alaska Professional Hunters*.

Veterans precedents controlled, *id.* at 32a-37a, but concluded that they would require notice-and-comment rulemaking only if the affected party had "substantial[ly] and justifiabl[y] reli[ed] on a [prior] well-established agency interpretation," *id.* at 40a (emphasis omitted) (quoting *MetWest Inc.* v. *Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009)). See *id.* at 37a-41a. The court found that the Association had failed to establish such reliance. *Id.* at 41a-44a. The court stated, *inter alia*, that the Portal-to-Portal Act's defense for good-faith reliance on a prior agency interpretation undermined the Association's argument that notice-and-comment rulemaking was required to protect the reliance interests of its members. *Id.* at 43a-44a.

Second, the district court upheld the Administrator's Interpretation as substantively valid. Pet. App. 44a-47a. The court concluded that the Department's interpretation of its FLSA regulations was "persuasive," finding it "clear" on the face of the regulations that the Association's contrary position was based on a misreading of 29 C.F.R. 541.203(b). Pet. App. 44a, 46a. The court accordingly held that the 2010 interpretation was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 47a.

4. a. On appeal, MBA abandoned its substantive contention that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. See MBA C.A. Br. 1-56; MBA C.A. Reply Br. 1-29. The Association argued only that the 2010 Administrator's Interpretation was procedurally invalid under *Paralyzed Veterans*. MBA C.A. Br. 2, 20-21.

b. The D.C. Circuit reversed and remanded with instructions to vacate the 2010 Administrator's Interpretation. Pet. App. 1a-12a.

The court of appeals explained that, under its *Paralyzed Veterans* decisions, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." Pet. App. 2a (quoting *Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1034) (brackets in original). That conclusion, the court explained, rests on the "operative assumption" that "a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Id.* at 5a n.3.

The court of appeals further concluded that the relevant analysis under *Paralyzed Veterans* "contains just two elements: definitive interpretations ('definitiveness') and a significant change ('significant revision')." Pet. App. 5a. The court of appeals thus rejected the government's argument that the rule of *Paralyzed Veterans* incorporates an element of reliance. *Id.* at 6a-12a. The court held that although reliance can in some contexts be relevant to whether a prior agency interpretation was sufficiently definitive, reliance is not itself a distinct requirement under *Paralyzed Veterans*. *Id.* at 9a.

The court of appeals observed that the government in this case "conceded the existence of two definitive—and conflicting—agency interpretations." Pet. App. 3a. The court accordingly held that, under its *Paralyzed Veterans* jurisprudence, the 2010 Administrator's Interpretation, which significantly revised the

interpretation in the 2006 Opinion Letter, must be vacated. *Ibid.* The court emphasized that it took "no position on the merits of [the 2010] interpretation" and stated that the Department was entitled to "readopt" that interpretation in the future but must first "conduct the required notice and comment rulemaking." *Ibid.*

SUMMARY OF ARGUMENT

The D.C. Circuit's *Paralyzed Veterans* doctrine requires that agencies utilize notice-and-comment rulemaking in order to make a significant "modification [to] an interpretive rule construing an agency's substantive regulation." *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). That judge-made procedural requirement is inconsistent with the text of the APA, the policies embodied in that Act, and this Court's precedents.

A. The APA expressly exempts interpretive rules from the Act's notice-and-comment-rulemaking requirement. Section 4 of the Act generally requires agencies to give notice of, and to afford the public an opportunity to provide written comments on, proposed "rule making." 5 U.S.C. 553(b) and (c). Section 4, however, expressly exempts "interpretative rules" from those requirements, unless another statute requires otherwise. 5 U.S.C. 553(b)(A). And because the APA defines "rule making" to mean the agency process for "formulating, amending, or repealing a rule," 5 U.S.C. 551(5), Congress unambiguously expressed its intent that the formulation, amendment, and repeal of interpretive rules are categorically exempt from the Act's notice-and-comment requirement. That unambiguous command has been long understood by both the Executive Branch and this Court to

mean exactly what it says: agency interpretive rules do not require notice-and-comment rulemaking. See, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (*Guernsey*) ("Interpretive rules do not require notice and comment.").

B. Congress's purpose for exempting interpretive rules from notice-and-comment rulemaking is plain. An "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law," 5 U.S.C. 551(4), "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*, 514 U.S. at 99 (citation omitted). Such interpretive statements reflect an agency's *own* views and, unlike binding legislative rules, they do not have the force and effect of law. Congress thus recognized that it would be an unwarranted encroachment to force federal agencies to dedicate limited time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.

Indeed, Congress designed the APA's interpretive-rule exemption to encourage the promulgation of such rules by giving agencies discretion to decide whether and to what extent public participation is warranted in particular contexts. Congress's purpose of encouraging agencies to inform the public of their understanding of the regulatory programs they administer carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision is, in fact, erroneous. Agencies should be encouraged to announce their changed views promptly and publicly, rather than allow the public to be misled

by an earlier interpretive rule that is contrary to the agency's best understanding of the regulatory scheme.

C. The D.C. Circuit extra-textual requirement of notice-and-comment rulemaking for interpretive rules constitutes a "serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). Indeed, this Court has long made clear that Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking." 435 U.S. at 524. Because Section 4 expressly exempts interpretive rules from the Act's notice-and-comment-rulemaking requirement, the court of appeals "stray[ed] beyond the judicial province" (*id.* at 549) by imposing its own views of appropriate rulemaking procedures on federal agencies.

D. MBA's attempted defense of the *Paralyzed Veterans* doctrine lacks merit. MBA contends, for instance, that an agency's modification of a prior interpretive rule requires notice-and-comment rulemaking because it is effectively an "amendment" of the underlying legislative regulation being construed. But an agency interpretation no more "amends" a legislative regulation than a judicial interpretation "amends" the source of law it interprets. Moreover, the APA "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Section 4's "rule making" provisions apply equally to the pro-

cess of "formulating, amending, [and] repealing" a rule, 5 U.S.C. 551(5), and Section 4's interpretive-rule exemption makes clear that none of those actions with respect to interpretive rules require notice-and-comment rulemaking. The *Paralyzed Veterans* doctrine disregards that rulemaking symmetry by permitting an agency's initial formulation of an interpretive rule to be effectuated without notice-and-comment procedures while requiring notice-and-comment rulemaking to amend or repeal the same interpretive rule.

In short, the court of appeals' *Paralyzed Veterans* doctrine finds no support in the APA's text, that statute's purposes, or this Court's precedents. This Court should therefore reject that doctrine and confirm that Congress meant what it said in the APA: Interpretive rules do not require notice-and-comment rulemaking.

ARGUMENT

AN AGENCY MAY ADOPT AN INTERPRETIVE RULE ALTERING ITS PRIOR INTERPRETATION OF AN AGENCY REGULATION WITHOUT NOTICE-AND-COMMENT RULEMAKING

This case concerns an important question of administrative law: Whether a federal agency is required to conduct notice-and-comment rulemaking before it may correct or significantly revise an interpretive rule that construes a legislative regulation. Under the D.C. Circuit's *Paralyzed Veterans* doctrine, an agency's "interpretative rule construing a legislative rule cannot be modified [significantly] without the notice and comment procedure that would be required to change the underlying regulation." *Molycorp, Inc.* v. *EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999) (citing *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586

(D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998)); see Pet. App. 2a. As a result, the "modification of an interpretive rule construing an agency's substantive regulation will * * * 'likely require a notice and comment procedure,'" *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (citation omitted), because the D.C. Circuit "hold[s] that an agency cannot significantly change its position, * * * even between two interpretive rules, without prior notice and comment [rulemaking]." *Transportation Workers Union* v. *TSA*, 492 F.3d 471, 475 (D.C. Cir. 2007); see also, *e.g.*, *Monmouth Med. Ctr.* v. *Thompson*, 257 F.3d 807, 813-814 (D.C. Cir. 2001) ("[U]nder the law of this circuit altering an interpretive rule (interpreting an agency regulation)" normally "requires notice and opportunity for comment.").

Moreover, in this case, the D.C. Circuit eliminated any need for plaintiffs even to show reliance on the prior regulatory interpretation that an agency seeks to revise. Pet. App. 2a. The *Paralyzed Veterans* doctrine thus now requires an agency to undertake notice-and-comment rulemaking simply to explain to the public that the agency has corrected or revised its previous legal interpretation of a regulation in some significant way—even if no one has ever relied on the prior interpretation.

The court of appeals' *Paralyzed Veterans* doctrine cannot be squared with the unambiguous text of the APA, the policies embodied in that Act, or this Court's governing decisions. The APA's unqualified exemption of "interpretative rules" from the requirement of notice-and-comment rulemaking (unless another statute requires otherwise), 5 U.S.C. 553(b)(A), admits no limitation of the sort imposed by the *Paralyzed Veter-*

ans doctrine. Indeed, Congress exempted interpretive rules from notice-and-comment rulemaking precisely because it wanted to encourage, not discourage, agencies to issue and revise such rules. The D.C. Circuit's creation of an extra-statutory procedural hurdle for interpretive rules not only undermines the flexibility Congress intended the exemption to afford federal agencies; it directly contravenes this Court's admonishment that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 545-549 (1978) (*Vermont Yankee*)). The *Paralyzed Veterans* doctrine has long been criticized by legal scholars as an unjustified departure from the APA that disregards fundamental principles of administrative law. This Court should now lay that misguided doctrine to rest.

A. The APA Categorically Exempts Interpretive Rules From The APA's Notice-And-Comment Requirement

The APA expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). That statutory exemption for interpretive rules forecloses the D.C. Circuit's requirement of notice-and-comment rulemaking when an agency seeks to amend an "interpretative rule construing a legislative rule." *Molycorp, Inc.*, 197 F.3d at 546.

1. Section 4 of the APA generally directs that a "notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. 553(b). If such notice is required, the agency must also give interested per-

sons "an opportunity to participate in the rule making through submission of written [comments]." 5 U.S.C. 553(c). Section 4, however, contains an express exemption for interpretive rules. It specifies that, unless "notice or hearing is required by statute," Section 4's notice-and-comment requirement "does *not* apply * * * to interpretative rules." 5 U.S.C. 553(b)(A) (emphasis added).[4]

The APA's definition of "rule making" demonstrates that this exemption from the Act's notice-and-comment-rulemaking requirement applies not only when an agency formulates an interpretive rule in the first instance, but also when it issues a subsequent interpretive rule that amends or supersedes the first. Because the Act defines "rule making" to be an "agency process for formulating, *amending*, or *repealing* a rule," 5 U.S.C. 551(5) (emphasis added), the statutory provisions in Section 4 that govern "rule making"—including the exemption from notice-and-comment procedures for "interpretive rules"—necessarily apply to any agency process for "formulating, amending, or repealing" (*ibid.*) any "agency statement of general or particular applicability and future effect designed to * * * interpret * * * law," 5 U.S.C. 551(4) (defining "rule"). In other words, the general APA

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[4] No other statute requires notice and comment in this case. The FLSA vests the Secretary of Labor with authority to "define[] and delimit[]" the scope of the minimum-wage and overtime exemption in 29 U.S.C. 213(a)(1) by issuing "regulations * * * subject to the provisions of subchapter II of chapter 5 of title 5," *ibid.*, *i.e.*, subject to the APA's administrative-procedure provisions at 5 U.S.C. 551-559. Congress has thus vested the Secretary of Labor with authority to promulgate legislative rules in this area but has not required notice-and-comment rulemaking for any associated interpretive rules.

requirement of notice-and-comment rulemaking does not apply to any agency process for either (a) "formulating" an interpretive rule or (b) subsequently "amending" or "repealing" such a rule. That express exemption reflects the APA's general approach of "mak[ing] no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515.

2. Since the APA's enactment, the government and the decisions of this Court have understood the unambiguous import of the statute's unqualified exemption for interpretive rules. The D.C. Circuit's imposition of an extra-textual notice-and-comment requirement is inconsistent with both this Court's teachings and the APA's broader design.

In the wake of Congress's passage of the APA, Attorney General Clark issued a manual on the APA to provide guidance to agencies in conforming their procedures to the Act's requirements. That guidance drew on the Department of Justice's expertise obtained from the significant role that it played "in the development of the [APA]." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 5-6 (1947) (*APA Manual*). The Attorney General concluded that the statutory exemption in 5 U.S.C. 553(b)(A) "restricts the application" of the Act's notice-and-comment-rulemaking requirement to legislative rules "issued pursuant to statutory authority," "which implement [a] statute" and "have the force and effect of law." *APA Manual* 30 & n.3. In contrast, the Attorney General concluded, the exemption for "interpretative rules" authorizes an agency to issue "rules or statements * * * to advise the

public of the agency's construction of the statutes and rules which it administers" without recourse to notice-and-comment rulemaking. *Ibid.*[5]

This Court has since repeatedly made clear that "interpretive rule[s]," which inform the public of the "'agency's construction of the statutes and rules which it administers,'" "do not require notice and comment" rulemaking. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979), which in turn quotes the Attorney General's *APA Manual* 30 n.3); see also, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply * * * only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

The *Paralyzed Veterans* doctrine cannot be squared with those teachings. The D.C. Circuit has disregarded not only the APA's unqualified textual exemption for interpretive rules, but also this Court's repeated explanation that interpretive rulemaking does not require notice-and-comment procedures. Indeed, the D.C. Circuit has never attempted to ex-

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[5] This Court has repeatedly found the Attorney General's manual interpreting the APA to be a persuasive construction of the APA. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases); see also, *e.g.*, *Vermont Yankee*, 435 U.S. at 546 (explaining that this Court has given deference to the Attorney General's "contemporaneous interpretation" of the APA in the *APA Manual* "because of the role played by the Department of Justice in drafting the legislation").

plain how its jurisprudence can be reconciled with the APA's interpretive-rule exemption or this Court's decisions.

The D.C. Circuit has likewise ignored the Court's teaching that agencies are free to amend interpretive rules that construe legislative regulations. In *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504 (1994), for instance, the Court held that, when an agency has concluded that its prior "interpretation of its regulation" should be modified, "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Id.* at 517 (brackets omitted) (quoting *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993)). Yet by forcing an agency to undertake the type of notice-and-comment rulemaking needed to amend legislative regulations simply to change the agency's prior reading of such a regulation, the court of appeals has effectively required the agency to promulgate a *new* legislative regulation that incorporates the agency's current interpretation. Cf. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 571 (2000) (Pierce) ("[S]ince an interpretative rule does not have the force of law, an agency does not have to issue a rule that has the force of law in order to amend a prior interpretative rule.").

The conflict between the APA and the D.C. Circuit's *Paralyzed Veterans* doctrine is further reflected in the court of appeals' extension of its doctrine to agency adjudication. The D.C. Circuit has held that if an agency adopts an interpretation of one of its regulations in an agency adjudication (rather than in an interpretive rule), the agency cannot later alter that interpretation by interpretive rule without notice-and-

comment rulemaking. See *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 994-995, 997-998 (2005) (holding that EPA orders in licensing proceedings were "definitive interpretation[s]" of legislative regulations that could not be modified by a later interpretive rule absent notice-and-comment rulemaking). Yet the agency would be able to modify the same interpretation in a subsequent adjudication, to which the APA's rulemaking provisions would not apply. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292, 294 (1974) (finding it "plain" that an agency may "announc[e] new principles in an adjudicative proceeding"; rejecting the view that "rulemaking was required because * * * [the agency's interpretation] would be contrary to its prior decisions"); see also 5 U.S.C. 551(6) and (7) (agency "adjudication" involves matters "other than rule making"). That anomalous result underscores the artificial and extra-statutory character of the *Paralyzed Veterans* doctrine.

B. Congress Designed The APA's Exemption For Interpretive Rules To Encourage, Not Obstruct, The Public's Access To Agency Interpretations

Congress adopted the APA's interpretive-rule exemption from the Act's notice-and-comment requirement to encourage agencies to promulgate interpretive rules to inform the public of agency interpretations of statutes and legislative rules. The *Paralyzed Veterans* doctrine significantly undermines that statutory purpose.

1. The reason for exempting interpretive rules from notice-and-comment rulemaking is plain. An "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law." 5 U.S.C. 551(4). Interpretive rules are "'issued by an

agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*, 514 U.S. at 99 (quoting *Chrysler Corp.*, 441 U.S. at 302 n.31, which quotes *APA Manual* 30 n.3). Such agency statements, unlike legislative rules, "do not have the force and effect of law." *Ibid.* They "merely [reflect] the agency's present belief concerning the meaning" of the statutes and legislative rules that do. *Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941), reprinted as *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (*Final Report*); see *APA Manual* 30 n.3 (citing *Final Report* for definition of interpretive rules). And because those interpretive statements reflect the agencies' *own* views, not binding legislative rules that have the force of law, Congress presumably determined that it would be an unwarranted encroachment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.

The APA's legislative history confirms as much. In hearings before the House Judiciary Committee, Carl McFarland, the chairman of the American Bar Association (ABA) Committee on Administrative Procedure and a central figure in the APA's development, testified that APA legislation should require agencies to conduct a notice-and-comment proceeding before issuing substantive regulations, but that "no [such] proceeding ought to be required with respect to * * * interpretative regulations." *Administrative Procedure: Hearings on the Subject of Federal Ad-*

ministrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. 30 (1945) (*House Hearings*).[6] The exception for "interpretative rules," he explained, reflects the judgment that an "agency should be as free as it can be" when issuing "interpretative rules" "for the simple reason that those types of regulations are the kind that agencies should be encouraged to make." *Ibid.*

When the Judiciary Committee's Chairman asked whether "[t]he *interpretive regulations of substantive regulations*" should be "publicized" by agencies "because the interpretation is what affects these people," McFarland agreed that such interpretative rules construing substantive regulations "should be publicized." *House Hearings* 30 (emphasis added); see *id.* at 28 (discussing need for public access to agency interpretations). But McFarland made clear at the same time that the proposed statutory notice-and-comment procedure for "the issuance of regulations * * * *should be limited* to substantive regulations." *Id.* at 30 (emphasis added). Cf. *id.* at 29 (ex-

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[6] McFarland served on the Attorney General's Committee on Administrative Procedure that issued an influential 1941 report on administrative procedure (see p. 21, *supra*); later served as chairman of the ABA's Committee on Administrative Law; and has been credited as being a drafter of the legislation that Congress enacted as the APA. See Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, 16 Va. J. Int'l L. 12, 14-17 (1975); see also *House Hearings* 3-4. Under McFarland's leadership, the ABA played a significant role in developing the provisions of S. 7, 79th Cong., 1st Sess. (1945), which Congress revised and later enacted as the APA. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 15-16 (1946); *APA Manual* 6; see also *House Hearing* 20 ("S. 7 * * * represent[s] the latest recommendations of the [ABA] for legislation").

plaining that the Department of Labor's "Wages and Hours Division" issued publicly available pamphlets containing its interpretations that were "helpful to the businessman who wants to comply with [such] interpretations that are laid down with respect to the Wages and Hours Act").

Congress expressed its agreement by enacting 5 U.S.C. 553(b)(A)'s unqualified exemption for interpretive rules from the APA's notice-and-comment requirement. The House and Senate Judiciary Committees explained the APA exemption for rules governing certain proprietary functions in terms relevant here. The Committees explained that such rules often involve interpretations and deemed it "wise to encourage and facilitate the issuance of rules" announcing "interpretations" by "dispensing with all mandatory procedural requirements"; "confer[ring] a discretion upon agencies to decide what, if any, public rulemaking procedures shall be utilized in a given situation"; and ultimately permitting the public to use the APA's "petition procedures" (see 5 U.S.C. 553(e)) if they wish to seek changes. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946) (*House Report*); see S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945) (*Senate Report*). Both Committees likewise explained more generally that the APA's interpretive-rule exemption would confer upon agencies "discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules" in order to allow each agency to determine what interpretive-rulemaking process would be warranted in any particular context. *House Report* 24; see *Senate Report* 14. That explanation "leaves little doubt that Congress intended the discretion of the *agencies* and not that of

the courts be exercised in determining when extra procedural devices should be employed." *Vermont Yankee*, 435 U.S. at 546 (discussing these House and Senate committee reports).

The notice-and-comment exemption for interpretive rules also reflects the understanding that it is "no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities," *Hoctor* v. *United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.). Precluding an agency from publicly announcing an interpretive rule does not alter the agency's expert understanding of its legislative regulations. And requiring an agency to give notice of and seek public comment on an interpretation of a regulation before the agency can announce its own interpretation would impose an unwarranted procedural hurdle and hinder public access to the agency's current understanding of its legislative regulations. Such a requirement therefore would significantly undermine the policy of encouraging agencies to issue interpretive rules to "advise the public of the agency's construction of the statutes and rules which it administers,'" *Guernsey*, 514 U.S. at 99 (citation omitted).

Congress's purpose to encourage agencies to provide the public with interpretive rules carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision was, in fact, erroneous. Agencies should be encouraged to announce their changed views promptly and publicly, rather than allow the public to be misled by an earlier interpretive rule that is contrary to the

agency's best understanding of the regulatory scheme.

2. The D.C. Circuit's *Paralyzed Veterans* doctrine both creates a powerful incentive for an agency to avoid announcing interpretations of its regulations and threatens to significantly delay an agency's correction of such interpretations that the agency concludes are erroneous.

The *Paralyzed Veterans* doctrine inherently creates a significant disincentive to providing administrative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking for any future revisions. That disincentive flows directly from the D.C. Circuit's governing precedents and contravenes Congress's goal of affirmatively *encouraging* agencies to issue interpretive rules that inform the public of the agencies' understanding of the programs they administer.

Moreover, the *Paralyzed Veterans* doctrine can present a formidable barrier for agencies seeking to correct their prior interpretations of regulations. Many complex government programs are heavily dependent upon interpretive rules to inform the public about the agency's understanding of the details of the regulatory regime. The Medicare program, for instance, has "thousands of pages of interpretative rules that address myriad details that are not explicitly resolved by the legislative" regulations. Pierce, 52 Admin. L. Rev. at 553; see, *e.g.*, *Guernsey*, 514 U.S. at 97-99, 101-102. Under the provisions of the APA that Congress enacted, the agency should be free to revisit its interpretations expeditiously through new interpretive rules.

Although MBA has asserted (Br. in Opp. 20) that it "hardly [is] cause for concern" to provide "an incentive to agencies to engage in notice and comment" before altering interpretive rules, the APA's exemption for interpretive rules itself shows that this, in fact, was a particular cause for concern for Congress. Congress enacted that exception specifically to vest agencies with "discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules," and thereby allow each federal agency to decide for itself what, if any, public process it should adopt in any particular context. *House Report* 24; see *Senate Report* 14.

The APA's interpretive-rule exemption ultimately reflects a seasoned understanding of the substantial practical burdens that notice-and-comment rulemaking can impose. Notice-and-comment rulemaking is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, 52 Admin. L. Rev. at 550-551; see U.S. Gov't Accountability Office, *GAO-09-205*, *Federal Rulemaking* 5, 19 (Apr. 2009) (case study finding average of over four years to complete notice-and-comment rulemaking and that some "rules that were not major took nearly as long or longer to be published"). By exempting agency interpretive rules from such notice-and-comment rulemaking, Congress expressed its judgment that limited agency time and resources should not be expended on notice-and-comment procedures simply to inform the public of the agency's own current interpretation of its regulations.

C. The APA Specifies The Maximum Procedural Requirements That Courts May Enforce For Agency Rulemaking

This Court has "continually repeated" the "very basic tenet of administrative law" that "agencies should be free to fashion their own rules of procedure," and it has squarely rejected the contention that courts may require more than the APA's "minimum" procedural requirements for rulemaking in 5 U.S.C. 553. *Vermont Yankee*, 435 U.S. at 544-545. The Court has thus emphasized that a federal court conducting APA review of an agency rule should review the rule's substantive validity and may enforce the APA's "statutory *minima*" for rulemaking procedure, but should "not stray beyond the judicial province * * * to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 548-549. The *Paralyzed Veterans* doctrine runs afoul of those principles by ignoring Congress's unambiguous command that the APA's notice-and-comment requirements do not apply to interpretive rules. Indeed, this Court has recently reiterated that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *Fox Television Stations, Inc.*, 556 U.S. at 513.

Section 4 of the APA (5 U.S.C. 553) in particular specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking." *Vermont Yankee*, 435 U.S. at 524. That provision "settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang*

Sung v. *McGrath*, 339 U.S. 33, 40 (1950)). For that reason, Section 4's unqualified exemption for interpretive rules, which renders the APA's only notice-and-comment provisions wholly inapplicable to interpretive rulemaking, 5 U.S.C. 553(b)(A), is dispositive.[7]

Legal scholars have long recognized the D.C. Circuit's error in disregarding the limits on judicial intervention contained in Section 4 of the APA and reinforced by the Court's decision in *Vermont Yankee*. The "[a]cademic commentary on [the *Paralyzed Veterans* doctrine] has been scathing." Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006) (Murphy) (citing illustrative critiques). The numerous amici Administrative Law Scholars in this case have stated they "are not aware of a single scholar who agrees with the doctrine." See Amicus Br. 1, 4, 7-9. That highly unusual consistency amongst scholars on such a fundamental

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[7] The Court in *Vermont Yankee* observed that, "if [any circumstances] exist" under which a court might properly impose procedures on an agencies beyond those specified in the APA, "such circumstances" would be "extremely rare." 435 U.S. at 524. The Court suggested that in "some circumstances" in which an agency makes a "'quasi-judicial' determination" that "'exceptionally affect[s]'" a "very small number of persons" and the agency bases its determination "'in each case on individual grounds,'" due process "may" require "additional procedures" for the aggrieved persons. *Id.* at 542 (citation omitted). The Court also suggested that "a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction." *Ibid.* But neither the D.C. Circuit nor MBA has ever attempted to justify the *Paralyzed Veterans* doctrine on such theories, which are inapplicable to the interpretive rulemaking contexts to which *Paralyzed Veterans* applies.

issue of administrative law confirms the fundamental error of the D.C. Circuit's jurisprudence.[8]

D. MBA's Defense Of The *Paralyzed Veterans* Doctrine Is Without Merit

MBA has offered three arguments in defense of the *Paralyzed Veterans* doctrine. See Br. in Opp. 21-25. First, MBA contends (*id.* at 22-23) that an interpretive rule effectively "amends" a legislative regulation when the interpretation alters the agency's prior interpretation of the regulation. Second, MBA contends (*id.* at 24-25) that the doctrine is justified because it prevents capricious changes in agency interpretation. And finally, MBA contends (*id.* at 22) that a single statement in this Court's decision in *Guernsey*, which MBA admits was dictum, supports the D.C.

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[8] MBA confirms the striking uniformity of legal scholars on the question presented by stating (Br. in Opp. 24 n.12) that not "all" scholars are hostile to the doctrine, but citing only a law student's note and an essay that does not support MBA's position. Professor Murphy authored the essay as an "assigned project" for an academic forum that "require[d] the [author] to play the contrarian" because his assignment was to attempt to "rehabilitate" an "underrated administrative law opinion," *i.e.*, the D.C. Circuit's application of *Paralyzed Veterans* in *Alaska Professional Hunters*. See Murphy, 58 Admin. L. Rev. at 917-918 & n.1. Even in his role as assigned contrarian, Professor Murphy conceded that the "functional and doctrinal critiques" of the D.C. Circuit's doctrine "have undeniable power," *id.* at 926, and concluded that, *inter alia*, the D.C. Circuit's analysis is "internally incoherent," *id.* at 920, "ignores the express exemption of interpretative rules from notice and comment requirement in the APA itself," *id.* at 923, relies "on a strained reading of the APA's rulemaking provisions," *id.* at 938, and "is vulnerable to a strong objection under *Vermont Yankee*" because it "impos[es] procedural requirements beyond those adopted by Congress," *id.* at 927 & n.55.

Circuit's doctrine. None of those contentions has merit.

1. As MBA appears to recognize, the "operative assumption" behind the D.C. Circuit's *Paralyzed Veterans* doctrine is "the belief that a definitive [agency] interpretation is so closely intertwined with the [legislative] regulation [being interpreted] that a significant change to the [interpretation] constitutes a repeal or amendment of the [regulation]" itself. Pet. App. 5a n.3 (emphasis omitted); see also *id.* at 2a (the changed interpretation "in effect amend[s]" the underlying regulation) (citation omitted). That assumption is incorrect.

An agency interpretation no more "amends" a legislative regulation than a judicial interpretation "amends" the source of law it interprets. When an agency issues an interpretive rule, it issues a "statement * * * designed to * * * *interpret* * * * law," 5 U.S.C. 551(4) (emphasis added), not change or amend the law itself. This Court has thus determined that an "interpretive rule" simply reflects "the agency's construction of the statutes and rules which it administers" and, unlike the legislative provisions being interpreted, "do[es] not have the force and effect of law." *Guernsey*, 514 U.S. at 99 (citation omitted); see *Chrysler Corp.*, 441 U.S. at 295-296, 302 n.31 ("substantive rules * * * 'have the force and effect of law'" but "'interpretive rules' * * * do not") (quoting *APA Manual* 30 n.3).

Moreover, the APA "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515. Congress accordingly defined "rule making" to mean an agency pro-

cess for "formulating, amending, or repealing" a rule. 5 U.S.C. 551(5). It follows that the APA's provisions governing "rule making" procedures in 5 U.S.C. 553 apply equally to the process of formulating, amending, or repealing a particular rule, whether interpretive or otherwise. The D.C. Circuit's *Paralyzed Veterans* doctrine disregards that rulemaking symmetry by adhering to the APA's authorization for an agency's initial formulation of an interpretive rule to occur without notice-and-comment rulemaking, while holding that notice-and-comment rulemaking is necessary to amend or repeal the same interpretive rule. Both phases of the interpretive rulemaking process must be governed by the same minimum APA procedure, and the APA's interpretive-rule exemption makes clear that neither requires notice-and-comment rulemaking.

2. MBA argues (Br. 25) that the *Paralyzed Veterans* doctrine "simply prevent[s] capricious agency flip-flopping on established positions." MBA may thereby suggest that the doctrine could be justified under a reviewing court's authority to set aside agency action that is "arbitrary" or "capricious," 5 U.S.C. 706(2)(A). But the D.C. Circuit has never attempted to frame *Paralyzed Veterans*' (procedural) notice-and-comment requirement as a (substantive) limitation on arbitrary and capricious agency action. In all events, this very suit disproves MBA's contention.

MBA never challenged on appeal the district court's holdings that (a) the government's (fully explained) interpretive change was neither arbitrary nor capricious, and (b) the underlying substantive regulations make it "clear" that the agency's revised interpretation corrected an error in its earlier reading. See p. 8, *supra*. MBA's brief in opposition likewise

failed to dispute those substantive holdings. Moreover, any such argument would have been inconsistent with the decision of the court of appeals, which made clear that the government was "free to" "readopt [its] later-in-time interpretation" so long as it "conduct[s] the required notice and comment rulemaking." Pet. App. 3a. In other words, the court of appeals had no occasion to question the district court's unchallenged holding that the 2010 Administrator's Interpretation was itself a sound interpretation of the underlying legislative rule. See *ibid.* ("We take no position on the merits of the[] interpretation."). The court of appeals simply held that interpretive rule to be *procedurally* defective because it was issued without notice-and-comment rulemaking. Cf. *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 377 (1998) ("Substantive review of an agency's interpretation of its regulations is governed only by that general provision of the [APA] which requires courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. 706(2)(A)). Indeed, only in cases such as this, in which an agency's revised interpretation is *not* substantively arbitrary or capricious, does the *Paralyzed Veterans* doctrine invalidate an interpretive rule that would not have been set aside on other grounds.

3. Finally, MBA points (Br. in Opp. 22) to a sentence in *Guernsey* in which this Court "noted (in dicta)" that APA notice-and-comment rulemaking could be required if an agency "'adopt[s] a new position inconsistent with . . . existing regulations,'" *Paralyzed Veterans*, 117 F.3d at 586 (brackets in original) (quoting *Guernsey*, 514 U.S. at 100). That passage does not support the *Paralyzed Veterans* analysis.

In *Guernsey*, this Court addressed the authority of the Secretary of Health and Human Services "to resolve certain [Medicare] reimbursement issues by * * * interpretive rules, rather than by regulations." 514 U.S. at 89-90. The Court ultimately concluded that the relevant Medicare "regulations" did not require reimbursement by generally accepted accounting principles and that the Secretary's relevant Medicare guideline in her Provider Reimbursement Manual (PRM) was "a valid interpretive rule." *Id.* at 90. Throughout its opinion, the Court "distinguished between 'regulations'—[the Court's] shorthand synonym for legislative rules—and 'interpretative rules.'" Pierce, 52 Admin. L. Rev. at 568. More specifically, the Court referred to the relevant legislative rules codified in the Code of Federal Regulations as "regulations," *e.g.*, 514 U.S. at 92-95 (discussing 42 C.F.R. 413.20(a), 413.24 (1994)), and referred to a guideline provision in the PRM, which "d[id] not purport to be a regulation," as a "prototypical example of an interpretive rule" construing a "regulatory requirement," *id.* at 90, 99 (discussing PRM § 233).

After the Court explained that interpretive rules "do not require notice and comment" and "do not have the force and effect of law," *Guernsey*, 514 U.S. at 99, the Court stated (in dictum) that "[w]e can agree that APA rulemaking would still be required if PRM § 233 adopted a new position inconsistent with any of the Secretary's existing [legislative] regulations." *Id.* at 100. That observation reflects that an interpretive rule cannot properly interpret legislative regulations if it is itself "inconsistent" with the legislative regulations being construed. Because such an interpretive rule is a substantively invalid interpretation, the only

way for an agency to adopt a new position that would be inconsistent with its pre-existing legislative regulations is for the agency to conduct, as *Guernsey's* dictum suggests, notice-and-comment rulemaking to amend the existing regulations to reflect the agency's new position. See Pierce, 52 Admin. L. Rev. at 568 (explaining that *Guernsey*'s dictum reflects "the noncontroversial proposition that an agency can only amend a legislative rule by issuing another legislative rule"). Nothing in that observation suggests that notice-and-comment rulemaking would be required to amend an interpretive rule when the agency's revised construction is itself a legally valid interpretation of the underlying provisions. Indeed, such an understanding would be inconsistent with the Court's recognition in *Guernsey* itself that "[i]nterpretive rules do not require notice and comment." *Guernsey*, 514 U.S. at 99.

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In short, the *Paralyzed Veterans* doctrine cannot be squared with two fundamental rules of administrative law. First, the APA expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). Second, the APA itself "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *Fox Television Stations, Inc.*, 556 U.S. at 513, such that 5 U.S.C. 553 defines the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking," *Vermont Yankee*, 435 U.S. at 524. This Court should reject the D.C. Circuit's imposition of extra-textual procedural re-

quirements for interpretive rules under *Paralyzed Veterans* and confirm that Congress meant what it said in the APA: The formulation, amendment, and repeal of agency interpretive rules do not require notice-and-comment rulemaking.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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