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Nos. 13-1041, 13-1052

In The
Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS
OFFICIAL CAPACITY, SECRETARY OF
THE DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,

Respondents.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTION PRESENTED

Whether notice and opportunity for comment are required where an agency issues an authoritative interpretation of a regulation that squarely conflicts with the same agency's prior authoritative interpretation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Thomas E. Perez, Secretary of Labor, and Jerome Nickols, Ryan Henry, and Beverly Buck.

Respondent is the Mortgage Bankers Association, which has no parent corporation and does not issue stock.

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STATEMENT

For nearly two decades, the D.C. Circuit has held that "[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 Administrative Procedure Act] without notice and comment," as established in *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (Randolph, J.). This rule—known as the *Paralyzed Veterans* doctrine—enforces the mandate of the Administrative Procedure Act (APA) that substantive rules promulgated by agencies must go through notice-and-comment rulemaking. 5 U.S.C. § 553.

To ensure fairness and rationality in rulemaking, the *Paralyzed Veterans* doctrine prevents an agency from abruptly abandoning its prior, authoritative interpretation without at least providing the regulated community with notice and an opportunity to be heard. The doctrine also strengthens the rule of law by giving agencies the choice between interpreting their own regulations consistently, or changing those interpretations transparently. Without *Paralyzed Veterans*, an agency—such as the Department of Labor in this case—can impose liability for the very thing it previously approved and announced to the world that its rule permitted. Neither the text of the APA, nor this Court's cases, nor sound public policy

supports, much less requires, such a result. The judgment below should be affirmed.

A. Background

This administrative law case arises in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Employers covered by the FLSA must pay overtime wages to employees who work more than 40 hours per week, unless the employees are exempt. 29 U.S.C. § 207(a)(1). Section 13(a) of the FLSA exempts from those overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity[,] * * * or in the capacity of outside salesman," as those terms are "defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551-559]." 29 U.S.C. § 213(a)(1). These are the "white-collar exemptions."

In 1940, the Department of Labor promulgated regulations defining the administrative exemption as applying to employees who, among other things, perform work "directly related to management policies or general business operations." 5 Fed. Reg. 4077 (1940). In 1949, the Department revised this requirement to provide that an administratively exempt employee is one "[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his

employer's customers." 14 Fed. Reg. 7705, 7706 (1949). This definition remained unchanged for over 50 years.[1]

In 2004, after engaging in notice-and-comment rulemaking, the Department issued revised regulations addressing various FLSA exemptions, including the administrative exemption. The 2004 regulations retained the 1949 "primary duty" test without change: an administratively exempt employee is still one whose "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2).

The 2004 regulations included a new section (29 C.F.R. § 541.203) giving examples of administratively exempt employees. These examples included "employees in the financial services industry," whose "duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial

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[1] The administrative exemption also requires that the employee be paid at least $455 per week (on a salary or fee basis), and that his primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200. Those requirements are not at issue in this case.

products; and marketing, servicing or promoting the employer's financial products." 29 C.F.R. § 541.203(b).

An employee "whose *primary duty* is selling financial products does not qualify for the administrative exemption." *Ibid.* (emphasis added). But as the Department repeatedly made clear in the preamble to the 2004 regulations, the administrative exemption can still apply even if employees also do some selling to consumers. See *Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees*, 69 Fed. Reg. 22,122, 22,146 (2004).

For example, the Department noted approvingly that the Eleventh Circuit has held that insurance agents are exempt employees "even though they also sold insurance products directly to existing and new customers." *Ibid.* (citing *Hogan* v. *Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004)). The Department also cited with approval a district court decision holding that "selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—[is] not enough of a distinction to negate [an employee's] exempt status." *Ibid.* (citing *Wilshin* v. *Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1377-79 (M.D. Ga. 2002)).

The Department explained that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." *Ibid.* Specifically, the Department clarified that "servicing existing customers, promoting

the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment" such that the administrative exemption applies. *Ibid.*

In September 2006, the Department issued an administrator opinion letter in response to an inquiry by respondent Mortgage Bankers Association regarding the status of mortgage loan officers under the 2004 regulations. Pet. App. 70a-84a. The Department determined that because loan officers qualify as exempt employees under Section 13 of the FLSA, they are not owed overtime payments in addition to their salaries. *Ibid.* That opinion was signed by the Administrator of the Wage and Hour Division, published on the Department's website, and held out to employers as the Department's definitive interpretation of its regulations. *Ibid.*

Specifically, the Department determined that mortgage loan officers typically perform administratively exempt duties. *Id.* at 83a. The Department first cited the examples provided in the 2004 regulations, noting that they specifically include "'[e]mployees in the financial services industry.'" *Id.* at 76a (citing 29 C.F.R. § 541.203(b)). The Department further noted that the cases cited in the preamble to the 2004 regulations hold that "many financial services employees qualify as exempt administrative employees, even if

they are involved in some selling to customers." *Id.* at 77a (quoting 69 Fed. Reg. at 22,146). The Department explained:

> The description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Id. at 78a.

Thus, "[s]imilar to the employees" in the cases cited in the 2004 preamble—"all of whom were found to satisfy the duties requirements of the administrative exemption—the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products." *Id.* at 79a (citations omitted). The Department concluded that the "mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer." *Ibid.*[2]

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[2] The Department further concluded that the mortgage loan officers met the other requirements for the administrative exemption, including that they exercise discretion and independent

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Four years later, in March 2010, the Department abruptly announced that going forward, it would sharply limit the use of opinion letters and instead rely on *sua sponte* "administrator interpretations" as the Department's primary vehicle for interpreting the pertinent statutes and regulations. The first administrative interpretation ("AI 2010-1") dealt with mortgage loan officers. *Id.* at 49a. The Department issued AI 2010-1 with no prior notice and no opportunity for public comment.

AI 2010-1 withdrew the 2006 opinion letter—which determined that employees who perform the typical job duties of a mortgage loan officer are administratively exempt under the FLSA—and concluded just the opposite. *Id.* at 68a-69a. The typical job duties of mortgage loan officers set forth in the administrative interpretation were the same ones that the Department relied upon in its 2006 opinion letter reaching the opposite conclusion. Compare *id.* at 50a-51a, with *id.* at 72a-73a.

Although the Department previously found those same job duties to constitute work "directly related to the management or general business operations of their employer or their employer's customers," *id.* at 75a (quoting 29 C.F.R. § 541.200(a)(2)), and thus qualify for the administrative exemption, the Department now declared that those same job duties "do

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judgment with respect to matters of significance. Pet. App. 83a. Again, those requirements are not at issue in this case.

not relate to the internal management or general business operations of the company." *Id.* at 64a. The Department rejected what it called an "inappropriately narrow definition of sales" in its 2006 opinion, *id.* at 59a-60a n.3, and criticized what it now viewed as a "misleading assumption and selective and narrow analysis." *Id.* at 68a. The AI 2010-1 did not mention or discuss any of the cases in the 2004 Preamble dealing with employees who are administratively exempt yet still sell products for their employer. 69 Fed. Reg. at 22,145.

In a 2010 *amicus* brief, the Department acknowledged that its recent administrative interpretation was not "merely a clarification of a regulation." Rather:

> [AI 2010-1] unambiguously represents a *substantive* change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.

Br. of *Amicus* The Secretary of Labor at 27-28, *Henry* v. *Quicken Loans*, 698 F.3d 897 (6th Cir. 2012) (No. 2:04-cv-40346 (E.D. Mich. Dec. 9, 2010), ECF No. 609) ["DOL *Amicus* Brief"] (emphasis added). That "substantive change," argued the Department, "is entitled to controlling deference" under *Auer* v. *Robbins*, 519 U.S. 452 (1997). *Ibid.*

B. Facts and Procedural History

Respondent Mortgage Bankers Association filed a complaint in the district court alleging that the Department violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, in issuing the administrative interpretation. Pet. App. 4a.

The Association's complaint relied upon the D.C. Circuit's tandem of decisions in *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) (Randolph, J.), which together stand for the proposition that where, as here, "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 without notice and comment." *Id.* at 1034.

The parties filed cross-motions for summary judgment. After briefing closed, three former mortgage loan officers who sued their previous employer for overtime pay after the Department withdrew the 2006 interpretive opinion moved to intervene in the case. The district court granted the motion, and the private party intervenors filed their own summary judgment brief.[3]

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[3] Private party intervenor Henry's overtime claim was rejected by a jury in March 2011, and that verdict was affirmed by the Sixth Circuit in 2012. *Henry*, 698 F.3d at 902. Henry's remaining interest in this litigation—and thus his standing

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The district court granted summary judgment to petitioners, ruling (as pertinent here) that the Association could not rely upon *Paralyzed Veterans* because it could not "satisfy the reliance component of the *Paralyzed Veterans* doctrine." Pet. App. 41a-42a. In reaching that conclusion, the district court rejected the Association's argument that even assuming reliance was a freestanding requirement of the doctrine, the Association satisfied any such requirement because its members relied heavily upon the 2006 opinion letter. As the Association pointed out, shortly after the Department issued the AI 2010-1 withdrawing the 2006 opinion letter, the Association's members soon found themselves embroiled in litigation by mortgage loan officers (like the private-party intervenors in this case) claiming that, based on the AI 2010-1, they were wrongly classified as administratively exempt and were entitled to damages as a result.

The D.C. Circuit reversed. Writing for a unanimous panel (Tatel and Brown, J.J., and Sentelle, S.J.), Judge Brown began by articulating the "straightforward rule" announced by the "tandem" of *Paralyzed Veterans* and *Alaska Hunters*: "When 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 without notice and comment." Pet. App. 2a. (citing *Alaska Hunters*, 177 F.3d at

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before this Court—is suspect. See Br. in Opposition to *Certiorari* 10 n.4.

1034). Noting that the sole issue before the court—whether reliance is "a 'separate and independent requirement'" of the *Paralyzed Veterans* doctrine—was a "narrow one," the court held that reliance is "just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive." *Ibid.*

Because the government "conceded the existence of two definitive—and conflicting—agency interpretations," and "acknowledged at oral argument" that the Association would prevail if "the only reason [courts] look to reliance is to find out if there is a definitive interpretation," *id.* at 3a, the court reversed and remanded with instructions to vacate AI 2010-1. *Ibid.* The court made clear that if the Department "wishes to readopt the later-in-time interpretation, it is free to do so. We take no position on the merits of their interpretation. [The Department] must, however, conduct the required notice and comment rulemaking." *Ibid.*

The court noted that "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." *Id.* at 6a n.4 (citing government's brief "counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions"). Indeed, the court reasoned, "*Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

The private party intervenors (but not the government) unsuccessfully sought rehearing *en banc*. Pet. App. 85a. On remand, the district court issued an order vacating AI 2010-1.

The government and the private party intervenors filed petitions for *certiorari*. Shortly afterward, the President directed the Secretary of Labor to "propose revisions to modernize and streamline the existing overtime regulations." Presidential Memorandum, *Updating & Modernizing Overtime Regulations*, 79 Fed. Reg. 15,209 (Mar. 18, 2014). White House officials told reporters the new rulemaking will address the status of "loan officers."[4]

This Court granted *certiorari*.

[4] Michael D. Shear & Steven Greenhouse, *Obama Will Seek Broad Expansion of Overtime Pay*, N.Y. TIMES, Mar. 11, 2014, www.nytimes.com/2014/03/12/us/politics/obama-will-seek-broad-expansion-of-overtime-pay.html?_r=0. Because notice-and-comment rulemaking will be required regardless of the outcome of this case, the Association argued in opposing *certiorari* that the case is moot. Br. in Opposition to *Certiorari* 12-13. In its reply (at 4), the government implied that the rulemaking will not address the provisions at issue in this case. Subsequent events may confirm that the case is moot or that the petitions should be dismissed as improvidently granted.

SUMMARY OF ARGUMENT

The *Paralyzed Veterans* doctrine serves a vital role in administrative law. Its insistence on APA notice-and-comment procedures prevents agencies from unseemly flip-flopping once they have definitively interpreted their own regulations. Otherwise, an agency could exclude the regulated community entirely from its deliberations and undermine both reliance interests and the APA's mandate for procedural fairness in agency dealings. Nothing in the APA's text, this Court's cases, or sound public policy supports, much less requires, such an unfortunate result.

This case exemplifies the importance of the doctrine. Under the Department's regulations as the Department itself interpreted them in the 2006 opinion letter, employers of loan officers were not liable for overtime, and loan officers were not entitled to overtime. When the Department *sua sponte* amended that definitive interpretation, however, employers of loan officers were immediately liable for overtime (unless some other exemption applied). Before an agency can so dramatically change course as to what its own regulation means—and effect a change that imposes liability where before there was none—*Paralyzed Veterans* simply requires the agency to provide notice and an opportunity to comment.

Petitioners make no real effort to demonstrate that AI 2010-1 actually falls within the APA's exclusion of "interpretive rules" from the general requirement of notice-and-comment procedures. Petitioners

simply assert that AI 2010-1 is an "interpretive rule" exempt from APA notice and comment: Q.E.D. That is not so, however, for two primary, independent reasons: (1) The Department, in issuing AI 2010-1, substantially altered its prior definitive interpretation of the 2004 regulations, thereby effectively amending the regulation itself; and (2) The Department, in holding out AI 2010-1 as "controlling," "substantive," and entitled to *Auer* deference, has made plain that AI 2010-1 has the force of law, is legislative in effect, and is thus invalid without notice and comment.

Under either rationale, the D.C. Circuit's judgment that the Department was required to engage in notice and comment before issuing AI 2010-1 should be affirmed. Where, as here, an agency substantially alters a definitive interpretation of its own regulation—and then holds out the new interpretation as "controlling" and "substantive"—the APA's exemption for "interpretive rules" does not allow the agency to evade the APA's notice-and-comment requirements. That conclusion finds strong support in what Congress originally understood an "interpretive rule" to be when it enacted the APA and chose to exempt such rules from notice and comment. It is fully consistent with this Court's cases, which take a functional approach to the APA and look at the substance and effect of agency action—not its form or label. And it furthers critically important policies of good government all the while respecting separation of powers principles.

No one disputes that elections have consequences. Different administrations will naturally have different priorities and policy views when it comes to administrative agencies. But as Judge Wilkinson has observed, the APA "requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *N.C. Growers' Ass'n* v. *UFW*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). "Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow." *Ibid.*

Paralyzed Veterans helps ensure that substantial changes in the rules governing regulated entities are accomplished with "at least some fidelity to law and legal process" by requiring notice and comment. In doing so, *Paralyzed Veterans* does not simply protect legitimate reliance interests. It also enforces the APA's mandate of procedural fairness and protects the common-sense values of government transparency and accountability. Particularly in a world where courts afford controlling deference to agencies' own interpretations of their regulations, *Paralyzed Veterans* is critical. If an agency like the Department of Labor claims controlling deference for its interpretation on the back end, it is hardly untoward to require the Department to go through notice and comment on

the front end. The judgment of the D.C. Circuit should be affirmed.

ARGUMENT

Petitioners' primary argument is that *Paralyzed Veterans* is inconsistent with the text of the APA, which exempts "interpretive rules" from its general notice-and-comment requirements. 5 U.S.C. § 553(b). But where, as here, an agency abrogates its own definitive interpretation of a regulation, that agency action "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing novel procedural requirements not found in the APA, *Paralyzed Veterans* correctly insures that agencies comply with the APA—which, after all, seeks to establish procedural fairness in agency dealings. That purpose would be directly contravened if *Paralyzed Veterans* were abandoned. The Court should decline petitioners' invitation to do so and affirm the judgment below.

I. *PARALYZED VETERANS* PROPERLY ENFORCES THE APA'S MANDATE OF PROCEDURAL FAIRNESS

The overriding goal of the Administrative Procedure Act is to establish procedural fairness in agency dealings. See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 9 (1947)

[*Attorney General's Manual*]. Notice-and-comment rulemaking is generally required by the APA because, among other things, it "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994) (quotations omitted).

The D.C. Circuit's *Paralyzed Veterans* doctrine plays a critical role in enforcing the APA's mandate of procedural fairness by restraining agencies from abruptly changing positions without at least providing notice and an opportunity to comment on the contemplated agency action. In a world without *Paralyzed Veterans*, agencies could adopt definitive interpretations of their own regulations—interpretations that not only tend to foster reliance interests but are also intended to do so—and then, without notice or opportunity for the regulated community to comment, alter those interpretations dramatically. This Court should decline petitioners' invitation to discard that sound doctrine and remove a critical check on agency overreach.

A. A Proper Understanding Of *Paralyzed Veterans* Demonstrates Its Rightful Place In Administrative Law

The D.C. Circuit first applied the *Paralyzed Veterans* doctrine in *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999). There, fishing and hunting guides from Alaska—who necessarily

flew small planes to reach remote areas—challenged a new FAA rule, issued without notice and comment, forcing the guides to comply with regulations for commercial airline pilots. *Id.* at 1030-31. The new interpretation was contrary to decades of agency advisement that the guides were exempt from the commercial pilot restrictions. *Ibid.*

The D.C. Circuit invalidated the agency's new interpretation because it effected a wholesale change in the agency's prior interpretation—made definitive over the course of years of consistent application—that effectively amended the regulation itself, and thus required the agency to provide an opportunity for notice and comment before making the substantive change. *Id.* at 1036. Writing for the court, Judge Randolph emphasized that "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Id.* at 1035 (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)).

The rule applied by the *Alaska Hunters* court was first set out in *Paralyzed Veterans*, which involved an agency guideline for wheelchair access related to the Americans with Disabilities Act. The "most powerful argument" against the agency, Judge Silberman explained in writing for the court, was "that the Department of Justice's present interpretation of the regulation constitutes a fundamental modification of its previous interpretation" and thus should have been made only after notice and comment. *Id.* at 586.

Judge Silberman explained the rationale for such a rule:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with * * * existing regulations."

Paralyzed Veterans, 117 F.3d at 586 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).

The *Paralyzed Veterans* court ultimately held that the agency's prior interpretation—which was contained in a speech by "a mid-level official of [the] agency"—was "not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position." *Id.* at 587 (quoting *Auer*, 519 U.S. at 452). Thus the D.C. Circuit set out the doctrine and its requirements in *Paralyzed Veterans*, but did not actually apply the doctrine to invalidate agency action until *Alaska Hunters*.

For more than 15 years since then, *Paralyzed Veterans* has prevented agencies from unilaterally and substantially altering definitive interpretations of their regulations. The vital role played by the

doctrine is by no means diminished because courts have only rarely applied it to invalidate agency action. Rather, as Judge Brown noted in her opinion in this case, "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." Pet. App. 6a n.4. That is because "*Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

It is also because the criteria for invoking the doctrine are substantial. First, if the previous agency interpretation was not definitive or authoritative, *Paralyzed Veterans* will not apply. *Ass'n of Am. R.R.s* v. *Dep't of Transp.*, 198 F.3d 944, 948 (D.C. Cir. 1999). Second, if there is no "significant revision" to the rule in question, *Paralyzed Veterans* will not apply. *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 58 (D.C. Cir. 2002). Here the government has conceded that both prongs of the doctrine are satisfied. Pet. App. 3a.

Perhaps most important, the doctrine's limitations are firmly rooted in the APA itself. No one disputes that the APA requires notice and comment before an agency can amend a regulation. *Paralyzed Veterans* simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself—and the APA requires notice and comment

before an agency can do that. See, e.g., *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) ("If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.").

Paralyzed Veterans also reflects the reality that definitive interpretations take on the force of law—which is the touchstone of "legislative" or substantive rules—because they bind parties moving forward and alter individual obligations, as here, for example, where employers of loan officers now face liability to private parties on the basis of AI 2010-1 where there was none before. See, e.g., *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule,'—as one 'affecting individual rights and obligations.' This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' " (citing *Morton* v. *Ruiz*, 415 U.S. 199, 232, 236 (1974))).

To be sure, an agency is initially permitted to interpret an ambiguous regulatory provision—and entitled to deference—because the agency has the expertise needed to clarify the ambiguity. But once clarified by a definitive interpretation, such as the 2006 Administrator Opinion Letter, the regulation is no longer ambiguous—and the definitive interpretation becomes part of that regulation itself. See, e.g., *Nat'l Family Planning & Reproductive Health Ass'n,*

Inc. v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) ("'If the courts accept the agency's interpretation, it becomes a part of the statutory law without any formally legislative action on the part of the agency.' (quoting Robert A. Anthony, *'Well, You Want the Permit Don't You?' Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 38 (1992)). Courts must therefore be wary not to accord this elevated status too easily to agency missives unless it is clear that the rule is merely interpretative and therefore already implicitly part of the statute or regulation.").

Thus, when an agency tries—as the Department did here—to reverse a definitive interpretation, it is impermissibly seeking to adopt a new position wholly inconsistent with the regulation without the notice and opportunity to comment required by the APA. See, e.g., *Guernsey*, 514 U.S. at 100 ("We can agree that APA rulemaking would still be required if [Provider Reimbursement Manual] § 233 adopted a new position inconsistent with any of the Secretary's existing regulations."). That is why an initial interpretation that may fall within the exception to notice and comment in § 553(b)(A) cannot be reversed without notice and comment.

Of course, if an agency has issued various interpretations of its own regulation that are reasonably viewed as consistent, there has been no change (or amendment) to the regulation (and *Paralyzed Veterans* would not apply). But if the change is a substantial one—like the Department's admitted 180° reversal

here—the agency has effectively amended the regulation because the same agency charged with issuing, interpreting, and enforcing the same regulation has said that it now means something completely different than what the agency said it meant before. This is not to say that an agency can never change its mind. It is simply to say that under these circumstances, it cannot do so without affording notice and an opportunity to comment. Properly understood, then, *Paralyzed Veterans* performs a vital function in enforcing the APA's mandate of procedural fairness and uniformity by preventing the exception to APA notice-and-comment rulemaking for interpretive rules from swallowing the rule itself.

B. *Paralyzed Veterans* Is Faithful To This Court's Functional Approach To The APA

As set out above, the *Paralyzed Veterans*' doctrine—not petitioners' crabbed interpretation of the APA—is fully consistent with this Court's cases. In *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), for example, this Court recognized that deferring to what the agency called an "interpretation" of an unambiguous regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." The imposter "interpretation" in *Christensen* was not an interpretation at all, and thus the agency could not avoid notice-and-comment procedures by cloaking its actions

in the mantle of mere "interpretation." *Ibid.* The same thing is true here, where *Paralyzed Veterans* similarly prevents agencies from engaging in "*de facto*" amendments to regulations without notice and comment.

Similarly, in *Guernsey*, this Court "agree[d] that APA rulemaking would still be required if [the interpretive rule at issue] adopted a new position inconsistent with any of the Secretary's existing regulations." 514 U.S. at 100. Notice and comment was unnecessary in that case only because the rule in question did not effect "a substantive change in the regulations." *Ibid.* The necessary implication is that interpretations effecting substantive changes—like AI 2010-1—do require notice and comment. That is because they are the functional equivalent of amendments to regulations. The agency's characterization of its own action is, of course, not determinative of the inquiry. See, e.g., *Am. Trucking Ass'n* v. *ICC*, 659 F.2d 452, 471 (5th Cir. 1981) ("[W]hat professes to be mere guideline, * * * is instead a rule to which all must conform.").

Petitioners, however, insist that *Paralyzed Veterans* disregards this Court's teaching in cases such as *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), and *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), that the APA 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. This misses the point, though, that *Paralyzed Veterans* does not impose any extrinsic procedures of its own. It merely safeguards the procedural requirements at the heart of § 553: notice and opportunity for public comment.

In *Vermont Yankee*, this Court reviewed a D.C. Circuit decision that imposed procedures on the agency beyond the APA, such as those required in a full adjudicatory hearing. See *id.* at 547-48. This Court reversed, holding that the procedures were beyond the APA's scope, but acknowledging that circumstances could "justify a court in overturning agency action because of a failure to employ procedures beyond those required by the [APA]." *Id.* at 524. *Paralyzed Veterans* does not go so far, though. It only asks for the procedures provided in the APA itself when an agency takes the dramatic step of overturning its own definitive interpretation of a regulation.

When an agency does that, it "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing new procedural requirements not found in the APA, *Paralyzed Veterans* correctly ensures that agencies comply with the APA, thereby keeping faith with *Vermont Yankee*.[5]

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[5] This Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), is inapposite for the same reasons. In that case, the Court was concerned with whether the

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That conclusion finds further support in *Chief Probation Officers of California* v. *Shalala*, 118 F.3d 1327 (9th Cir. 1997), written by Justice White—who joined the *Vermont Yankee* opinion in full—sitting on the Ninth Circuit panel by designation. In *Chief Probation Officers*, Justice White rejected the view—advanced by petitioners here—"that every rule interpreting a statute or regulation need not provide for notice and comment." *Id.* at 1333 n.6.

Interpretive rule changes sometimes require notice and comment, Justice White reasoned, when they modify other rules "having the force of law." *Ibid.* The rules at issue, however, were merely "short-lived" interpretations of the governing statute that did not have the force of law. *Id.* at 1334. Justice White fully agreed with the *Paralyzed Veterans* doctrine—he simply concluded its prerequisites had not been satisfied in that particular case. That a member of the unanimous *Vermont Yankee* Court could later adopt the *Paralyzed Veterans* doctrine in

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explanation provided by an agency for a policy shift in the context of adjudications could survive arbitrary-and-capricious review, and held that it could. Here, the issue is whether the APA requires notice and comment as a purely procedural matter. Thus *Fox* presents a conflict only if one assumes the very thing at issue here—whether *Paralyzed Veterans* is somehow imposing procedures beyond those required by the APA. As demonstrated above, *Paralyzed Veterans* does no such thing, so the claimed conflict with *Fox* is illusory.

full only confirms that *Vermont Yankee* and *Paralyzed Veterans* are perfectly compatible.[6]

Petitioners also point to this Court's decision in *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 517 (1994), as a source of conflict with *Paralyzed Veterans*, but that is incorrect. While the Court acknowledged—in *dicta*—an agency's ability to change its mind on an interpretation, the Court was clear that unlike here, there was no "persuasive evidence that the Secretary has interpreted the * * * provision in an inconsistent manner." *Id.* at 515.

To be sure, "[a]n agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on a continuing basis * * * *" *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted). *Paralyzed Veterans* is not to the contrary.

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[6] Justice Stevens also cited *Paralyzed Veterans* with approval in his dissent in *Geier* v. *Honda*, writing that "the APA's requirement of new rulemaking [applies] when an agency substantially modifies its interpretation of a regulation." 529 U.S. 861, 912 (2001) (Stevens, J., dissenting) ("Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking—whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent—respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation." (citing *Paralyzed Veterans*)).

The interpretation at issue in *National Cable* was itself the product of notice-and-comment rulemaking. *Id.* at 977 ("[After two years], that rulemaking culminated in the *Declaratory Ruling* under review in these cases."). No one disagrees that an agency should be free to revise substantive interpretations through thoughtful analysis. There is no basis in this Court's cases, however, for excluding the regulated community from that process under the guise of engaging in "interpretive" rulemaking exempt from notice and comment.

C. *Paralyzed Veterans* Promotes Good Government

Like the APA itself, the fundamental goal of the *Paralyzed Veterans* doctrine is basic fairness. As Judge Randolph put it in *Alaska Hunters*, "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" 177 F.3d at 1035 (quoting Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)); see also Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1974) (commenting that the APA's notice-and-comment process was designed to be "a genuine interchange" with affected parties, rather than "mere bureaucratic sport"). That concern is relevant not only to protecting the legitimate reliance interests of those regulated by administrative agencies, but also to vindicating the interest of every citizen in promoting accountable, transparent

government. See, e.g., Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 954 (1997) ("The [APA] was a historic compromise. It signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints * * * *").

As this Court has recently explained, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable * * * *" *Christopher* v. *Smithkline Beecham Co.*, 132 S. Ct. 2156, 2168 (2012). *Paralyzed Veterans* has the salutary effect of protecting industry reliance interests and, at a minimum, gives regulated entities notice of impending changes to the regulations under which they must operate. That is why petitioners' arguments for discarding *Paralyzed Veterans* are so unpersuasive.

Petitioners primarily complain that *Paralyzed Veterans* interferes with needed agency "flexibility." Government Br. at 20-27; Intervenors' Br. at 49-54. But that argument proves too much. In enacting the APA, Congress selected notice and comment as the default rule. It is just as illegitimate to allow agencies to evade that rule as it is to impose process that the APA does not require. If anything, the selection of notice and comment as the default suggests that Congress was less concerned with agency flexibility than it was with procedural fairness and uniformity.

See *Attorney General's Manual* 9. In all events, petitioners' concerns are overblown—particularly when one considers that the doctrine creates no more additional "difficulty" for agencies than what Congress originally envisioned in setting notice-and-comment rulemaking as the default rule for agency action in the first place.

Further, as demonstrated above, concerns that the *Paralyzed Veterans* doctrine inappropriately limits agency flexibility are misplaced given the inherent, significant limitations on the doctrine's application: It only applies to invalidate agency action when the agency—after issuing a definitive and authoritative interpretation—significantly revises that interpretation. And if an agency's subsequent interpretation "'can reasonably be interpreted' as consistent with prior [interpretations], it does not significantly revise a previous authoritative interpretation." *MetWest Inc.* v. *Sec'y of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009) (quoting *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 57-58 (D.C. Cir. 2002)).

Those limitations prevent fickle agency flip-flopping on established positions. They do not create insurmountable hurdles for run-of-the-mill course corrections. See, e.g., *Hudson* v. *FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999) (holding that FAA interpretation did not require notice-and-comment procedures because it was simply an "application of the regulation to a changed situation which calls for a different policy"). But if an issue is significant enough to warrant wholesale changes to the substance of a rule,

it is significant enough to be considered through APA procedures or resolved with the "good cause" exemption—5 U.S.C. § 553(b)(B)—for bypassing those procedures. To the extent agency flexibility is needed, the APA has already provided it.

What is more, as the D.C. Circuit recognized in its opinion, Pet. App. 6a, facts giving rise to the application of *Paralyzed Veterans* do not occur very often. While the government now speculates (at 25-26) about the potential *in terrorem* effect of the doctrine, this is a new-found concern. The government took the position in the court of appeals that under *Paralyzed Veterans*, "an agency cannot change its initial interpretation of a regulation by issuing a later interpretation without going through notice and comment unless an exception applies, *but an exception always applies*." Br. of Federal Appellees at 42, *Mortgage Bankers Ass'n* v. *Solis*, No. 12-5246 (D.C. Cir. 2013) (emphasis added). Given that representation, petitioners' late-breaking concerns that *Paralyzed Veterans* improperly interferes with agency decisionmaking are less than credible.

To the extent *Paralyzed Veterans* provides an incentive to agencies to engage in notice and comment before issuing interpretations that contradict prior definitive interpretations, that should hardly be a concern. Good government is predicated upon just such checks, and the only procedure required is that already approved by Congress in the APA.

This is why the intervenors' parade of horribles (at 50) implicates no legitimate concerns. First,

where an agency realizes an error in interpretation a month after an initial interpretive rule, it is difficult to see how the initial interpretation could have been sufficiently definitive to trigger the doctrine in the first instance (and might be a candidate for the "good cause" exemption in all events). Second, if an agency wishes to change substantive positions on an issue, it is free to do so—it simply needs to go through notice-and-comment procedures. Third, *Paralyzed Veterans* does not prevent an agency from revising lower-level opinions, as they would obviously not be definitive.

More than anything, the intervenors' parade of horribles—like petitioners' overbroad questions presented—reveals a fundamental lack of understanding about what the *Paralyzed Veterans* doctrine actually entails. See Intervenors' Pet. at i ("Whether agencies subject to the Administrative Procedure Act are *categorically prohibited from revising their interpretive rules* unless such revisions are made through notice-and-comment rulemaking." (emphasis added) (omitting requirements that prior interpretation be definitive and then subsequent revision be substantial)); Government Pet. at i ("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." (omitting requirement that the prior rule must be "authoritative" or "definitive")).

What is more, discarding *Paralyzed Veterans* would silence voices from participating in the "interpretive dialogue" that petitioners aim to foster,

Intervenors' Br. at 49—with no corresponding gain in government transparency or accountability. Without the procedural check of *Paralyzed Veterans*, an agency could promulgate a vague rule through notice and comment and then come back to "interpret" that rule with the precision desired in the first instance. The intervenors get this point exactly backwards (at 52) because they fail to acknowledge the deference afforded to agency interpretations. See *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."). And there would be no offsetting gain in the clarity of regulations, as petitioners speculate, because there would be little, if any, incentive to draft clear regulations in the first place.

Even more unpersuasive is the claim that *Paralyzed Veterans* somehow chills agencies from providing helpful guidance. See, e.g., Government Br. at 25-26. Setting aside that those fears have failed to materialize over the nearly 20 years since *Paralyzed Veterans* has been the law of the D.C. Circuit, the claim vastly overstates the breadth of the *Paralyzed Veterans* doctrine, which is not triggered by garden-variety interpretive rules that are neither definitive nor substantial modifications.

Contrary to petitioners' apparent view, notice-and-comment procedures exist primarily to protect the regulated, not to hinder the regulators. In this case, the Department cited no change in the statute or the regulations. Nor did it cite any change in the industry—or in the typical job duties at issue. Instead, the Department (under a new administration)—without any warning—*sua sponte* reconsidered the same question and reached a completely different outcome. Thankfully, such extreme agency flip-flopping is rare. But the importance of *Paralyzed Veterans* in ensuring that it remains so cannot be overstated. *N.C. Growers' Ass'n*, 702 F.3d at 772 (Wilkinson, J., concurring).

D. *Paralyzed Veterans* Respects The Separation Of Powers

Once government is enabled to control the governed, the second great difficulty lies in obliging it to control itself. THE FEDERALIST No. 51, at 347-53 (James Madison) (Clinton Rossiter ed., 1961). The greatest structural device for accomplishing this task is the separation of powers instituted by the Framers. And so, important as they are, the salutary effects of *Paralyzed Veterans* are not limited to promoting government accountability and protecting reliance interests. The doctrine also maintains separation of powers.

Administrative agencies, though situated in the Executive Branch, possess a great deal of legislative

power delegated from Congress. Filling the gaps left in statutes for the exercise of agency expertise and then enforcement of the resulting rules is the primary job of an agency. Congress has also granted agencies limited jurisdiction to adjudicate claims related to their spheres of influence. This has been held not to violate separation of powers. See, e.g., *CFTC* v. *Schor*, 478 U.S. 833, 851-52 (1986). It is imperative, however, that each of these roles be kept distinct to avoid offending the separation of powers principle:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151-152 (O. Piest ed., T. Nugent transl. 1949).

Talk Am., Inc., 131 S. Ct. at 2266 (Scalia, J., concurring). *Paralyzed Veterans* keeps administrative authority within proper bounds by refusing to allow agencies to take a short cut around the APA cornerstone of notice and comment and exceed the limits Congress set on agencies' ability to act unilaterally.

As Justice Scalia has noted, the ability of an agency to both make and interpret law runs the risk

of violating separation of powers. *Ibid.* While there must be some interpretation inherent in adjudications made by an agency, that is a fundamentally different enterprise from allowing agencies blanket authority to effectively rewrite their own regulations from time to time under the guise of "interpreting" those regulations—particularly given the deference accorded by courts to agency interpretations. And the notice component, which has long been a fixture of societies governed by the rule of law, serves as a buffer for regulated entities against political overreach disguised as interpretation. See Posner, *The Rise and Fall of Administrative Law*, 72 Chi.-Kent L. Rev. 953, 954 (1997) (noting that the APA was passed as a "reaction to the politicization of some agencies"). *Paralyzed Veterans* ensures that agency power, though possessing attributes of each branch of government, is appropriately cabined.

II. *PARALYZED VETERANS* PROPERLY CONSTRUES THE APA'S EXEMPTION FOR "INTERPRETIVE RULES"

Despite the strong evidence that the APA requires notice and comment where a substantial change is made to a definitive agency interpretation, petitioners argue that this Court should jettison *Paralyzed Veterans* because the doctrine cannot be reconciled with the APA's text—specifically, with the APA's exception to notice and comment for "interpretive rules." That argument is wrong, however, for at least two reasons.

First, as demonstrated above, where an agency substantially revises a prior, authoritative interpretation of its regulation, the agency has effectively amended its regulation—something it cannot do without notice and comment.[7]

Second, as demonstrated below, not all agency interpretations are "interpretive rules" exempt from notice and comment. See, e.g., 5 U.S.C. § 551(4) (defining "rule" as "an agency statement of general applicability and future effect designed to implement, *interpret*, or prescribe law or policy * * * *" (emphasis added)). Where an agency holds out its interpretation as "controlling" and "substantive"—and third parties can seek to impose liability on the basis of that interpretation—it is a legislative rule in interpretive clothing, and requires notice and comment for that reason, too.

[7] The government has previously argued against *Paralyzed Veterans* by noting that a literary critic's new interpretation of *Hamlet* does not create a new play—and by analogy, a new interpretation of a rule does not create a new regulation. Br. of Federal Appellees, *Mortgage Bankers Ass'n* v. *Harris* at 30. That analogy is flawed, however, because, unlike in the government's analogy, an agency is *both* critic and playwright. Viewed in that light, a new interpretation of Hamlet by Shakespeare himself in which Hamlet and Ophelia lived happily ever after would surely be more than just a new interpretation.

A. As Originally Understood, The APA's Exemption For "Interpretive Rules" Does Not Apply To The Agency Action Here

As discussed above, the APA makes notice and comment the default rule for agency action, but then provides:

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to *interpretative rules*, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b) (emphasis added). The APA does not define the term "interpretative" (or interpretive) rule. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term [in question] *at the time Congress enacted the statute* * * * *" *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (emphasis added) (citing *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975)). That analysis supports the view that the APA's exemption for "interpretive rules" did not excuse the

Department from engaging in notice and comment before adopting AI 2010-1—particularly given that the exemption should be narrowly construed in view of the important purposes served by the APA's procedural requirements. See, e.g., *Caraballo* v. *Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993); see also 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47:11 (7th ed.) (discussing general canon of construction that exceptions to statutes should be construed narrowly).

Most fundamentally, when Congress enacted the APA, "interpretive rules" were prospective interpretations of (primarily) statutes that would be accorded little, if any, weight by courts. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138 (1944) ("[Interpretive rules] provide a practical guide * * * as to how [the agency] will seek to apply [the statute]."); Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies*, Final Report, S. Doc. No. 77-8, at 27 (1st Sess. 1941) [Final Report] ("Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected * * * *"); *Administrative Procedure Act—Legislative History 1944-46*, S. Doc. No. 248, 79th Cong., 2nd Sess. (1946), at 18 (arguing for exclusion of interpretive rules from notice and comment because "interpretive rules—as merely interpretations of statutory provisions—are subject to plenary judicial review"). Yet from the beginning, it was understood that not all

agency interpretations would be "interpretive rules" exempt from notice and comment. Final Report 27 ("An agency's interpretations *may* take the form of 'interpretive rules.'") (emphasis added).

Specifically, interpretive rules were juxtaposed with "legislative" or substantive rules that filled in gaps left by Congress for agencies to bring to bear their subject-matter expertise and to which courts were therefore expected to defer. *Ibid*. ("Many statutes contain provisions which become fully operative only after exercise of an agency's rule-making function. * * * Thus these *substantive* regulations have many of the attributes of statutes themselves and are well described as subordinate legislation.") (emphasis added).

As the government points out, the Chair of the ABA's Committee on Administrative Procedure, Mr. McFarland, testified to the House of Representatives that he thought interpretive regulations should be exempt from notice-and-comment rulemaking. *Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm.*, 79th Cong., 1st Sess. 30, at 76 (1945). In the same conversation, however, the Chair of the Judiciary Committee interrupted Mr. McFarland to make clear that "[t]he interpretive regulations of substantive regulations become very definitely *substantive*." *Ibid.* (emphasis added).

The year after Congress passed the APA, the Attorney General issued a Manual on the statute that has become instructive—if not authoritative—in

construing it. In explaining that agencies might offer "interpretive rules" for both statutes and regulations, the manual provided examples of both substantive (or "legislative") and interpretive rules. *Attorney General's Manual* 30 n.3. The example provided of substantive rules was the proxy rules promulgated by the SEC pursuant to the Securities Exchange Act of 1934. *Ibid.* Those rules are what one would expect from rules designed to have the force and effect of law. Specifically, they list five types of individuals or institutions that would be exempt from the proxy rules. 1935 SEC LEXIS 378, Rule LA2.

In contrast, when explaining "interpretive rules," the Attorney General's Manual cites the 1941 Final Report, the 1945 Senate Comparative Print, and earlier Senate Judiciary Committee Hearings on the APA. *Attorney General's Manual* 30 n.3. The view expressed in each of those sources is that interpretive rules do not have the force of law and are not entitled to judicial deference.

That original understanding of interpretive rules is confirmed by this Court's decision in *Bowles* v. *Seminole Rock*, 325 U.S. 410 (1945)—issued the year before the APA was enacted. *Seminole Rock* generally serves as the basis for judicial deference to agency interpretations of their own regulations. The Court held there that an agency's interpretation in a manual should be given considerable weight in determining the meaning of the regulation for which it provided interpretive guidance. *Id.* at 414. The Court did not

address whether the interpretation at issue was an "interpretive rule" within the meaning of § 553(b)(A).

The agency interpretation in *Seminole Rock* was not just consistent with the regulation itself and the agency's previous positions, though. It was also "issued by the Administrator *concurrently* with the [regulation]." *Id.* at 414-17 (emphasis added). In that respect, the manual was much like the Preamble to the 2004 regulations here—a logically suitable place for a genuinely interpretive guideline.

Taken together, the source materials concerning what Congress thought it was exempting from notice and comment as "interpretive rules" are best read as encompassing (i) non-authoritative interpretations of statutes, or (ii) interpretations of regulations issued at the same time as the regulations themselves (much like preambles to rules today). It makes sense, then, why agencies would not be required to engage in notice and comment to promulgate "interpretive rules," properly understood. Such rules would lack the force of law, receive little if any judicial deference, and present no issue of agency flip-flopping (because, to the extent they would even involve an agency's interpretation of its own regulation, they would be issued concurrently with that regulation, as in *Seminole Rock*, and thus virtually part of the regulation itself).

The AI 2010-1, of course, is none of those things. It is neither an interpretation of a statute, nor a contemporaneous explanation of a new regulation.

Petitioners themselves have held out AI 2010-1 as (1) "controlling"—having the force and effect of law, DOL *Amicus* Brief at 14; (2) "substantive," *id.* at 27-28; and (3) "definitive," Putative Intervenors' Motion to Intervene at 25. Having done so, the Department should hardly be surprised to find itself required to engage in notice and comment to adopt a rule that, in the Department's own words, is practically indistinguishable from a legislative rule. See, e.g., *Chief Probation Officers*, 118 F.3d at 1333 n.6 ("Regulations, for example, often spell out what a statute requires. If these rules are held out as having the force of law, they are not immune from the notice and comment procedure.").

Indeed, AI 2010-1 is much more akin to the SEC proxy rules presented as the quintessential example of a legislative rule. *Attorney General's Manual* 30 n.3. Like the proxy rules, AI 2010-1 singles out a group not covered by the regulation and thereby alters substantive rights. It aligns with what a member of the Securities & Exchange Commission told Congress (when the APA was being debated) about the difference between interpretive rules and legislative rules:

> As I see an interpretive rule, it is a rule in which the Commission, in formal fashion, states its opinion as to what the statute means. That expression, of course, is not binding on the courts, because the last word as to the meaning of words in a statute rests with the court * * * * We have exemption rules letting companies out of these statutes

> or certain sections of them where it is perfectly plain they do not fall within the intention of the statute. Those exemption rules, I would say, are fair examples of legislative rules * * * *

Senate Hearings on the Administrative Procedure Act Before the Judiciary Comm. at 330-31 (1941). It would have been unthinkable to the drafters of the APA that an interpretation held out by the agency itself as "controlling" and "substantive" (and by its defenders as "definitive") concerning who does and does not qualify for the administrative exemption—and subjecting employers to liability to third parties for conduct the agency previously declared perfectly lawful—would be deemed an "interpretive rule" exempt from notice and comment. Such a rule may be an interpretation—but it has a legislative effect that removes it from the category of "interpretive rules" within the meaning of the APA.

This also aligns with the Executive Order that currently defines agency regulations. 58 Fed. Reg. 190 (1993) (defining a "[r]egulation" or "rule" that requires notice-and-comment procedures as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy"). If an agency intends an interpretation to have the force of law—whether by an agency enforcement action or by a private civil action—it makes no difference that the action is "interpreting" the law or that the agency labels it an

"interpretive rule." Here, where the Department offered a (1) definitive interpretation, (2) which it announced publicly, (3) on which reliance was intended, and argued that it was (4) controlling and (5) entitled to deference so that it would (6) have the force of law, notice and comment was required.

B. When An Agency Holds Out Its Own Rule As "Substantive" And "Controlling," Requiring Notice And Comment Does No Violence To The APA

To recap, where, as here, an agency issues a rule significantly revising the agency's own prior, authoritative interpretation of a regulation, the prior interpretation essentially "finishes the job" of creating the regulation itself—and the later-in-time interpretation is therefore functionally an amendment to the regulation and is properly subject to notice and comment. *Alaska Hunters*, 177 F.3d at 1034.

Additionally, where, as here, an agency holds out an interpretation as controlling, definitive, and substantive—as the Department has done with AI 2010-1—that interpretation has a legislative effect that takes it out of the ambit of the APA's exemption from notice and comment for "interpretive rules." See, e.g., *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements * * * by labeling a major substantive legal addition to a rule a mere interpretation.").

As detailed above, both conclusions find strong support in the original understanding of the differences between legislative and interpretive rules and both comport with the text, structure, history, and purpose of the APA.[8]

That functional approach aligns with—indeed, is virtually compelled by—the reality of a world in which courts generally afford agency interpretations of their own regulations *Auer* deference. And a functional view of what is truly an "interpretive rule" is even more important where, as here, an agency relies on private parties to spearhead enforcement of that regulation. That is precisely why the intervenors in this case have relied so heavily on *Auer*'s holding that agency interpretations of their

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[8] Contrary to the government's contentions (at 6-7), the Association did not "acknowledge" that AI 2010-1 "was an interpretative rule." The Association did acknowledge that it was an "interpretation" but noted that the label was insignificant given that, under *Paralyzed Veterans*, the name attached to agency action is not dispositive. See MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17). And given the government's concessions that both prongs of the *Paralyzed Veterans* test are satisfied in this case, the distinction was irrelevant in the D.C. Circuit, where the only issue was whether reliance is a standalone element of the doctrine. Most important, the Association has always maintained that without notice and comment, AI 2010-1 is invalid—and thus the Association had no need under the binding authority of *Paralyzed Veterans* to invoke the vexing interpretive/legislative dichotomy.

own regulations are entitled to deference. See, e.g., Putative Intervenors' Motion to Intervene at 17.[9]

Perhaps more important, the Department has explicitly sought controlling deference for the AI 2010-1 while appearing as *amicus* in litigation to assist private parties seeking to impose liability on employers. See generally DOL *Amicus* Brief. *Auer* deference thus results in a rule with the force and effect of law—and confirms that the rule here is not an "interpretive rule" for APA purposes. So long as *Auer* holds sway, a functional approach to the APA's exemptions is not just acceptable—it is a necessity. An agency should not be able to escape notice and comment on the front end by labelling a rule "interpretive" and then seek *Auer* deference on the back end by claiming that the rule is "controlling." As one commentator has put it, "[t]he administrative agency should be put to the election whether to obtain legislative effect by providing for notice and comment or to forego this effect and adopt the rule without notice and comment." Kevin W. Saunders, *Interpretive Rules With Legislative Effect: An Analysis And A Proposal For Public Participation*, 1986 DUKE L. J. 346, 382.

[9] The private party intervenors—but not the government—now attempt to retreat from that position by arguing (at 42-43) that courts will not defer to agency interpretations that are inconsistent. That argument ignores the Department's own litigation position that AI 2010-1 is entitled to controlling deference. See generally DOL *Amicus* Brief.

All of this confirms that *Paralyzed Veterans* is entirely consistent with the APA in both letter and spirit. A critical reason why the APA exempted interpretive rules from notice and comment in the first place is because such rules were not entitled to judicial deference. *Christensen*, 529 U.S. at 589 (Scalia, J., concurring in part and concurring in the judgment) (explaining that the lack of deference "accounts for that provision of the 1946 Administrative Procedure Act which exempted 'interpretive rules' (since they would not be authoritative) from the notice-and-comment requirements applicable to rulemaking, see 5 U.S.C. § 553(b)(A)." (citation omitted)).

Paralyzed Veterans faithfully enforces the APA's exemption of "interpretive rules" by properly refusing to apply that exemption to rules that, whatever their label, are functionally legislative rules—either because they effectively amend an agency regulation, or because they have legislative effect (i.e., they have the force of law and substantively alter legal rights and obligations). Either way, only those agency rules that are truly "interpretive" as that term was originally understood—i.e., lacking the force and effect of law—should be exempt from notice and comment (abiding by the text of the APA), and that analysis must take into account how the rule in question actually functions (adhering to the spirit of the APA).

Moreover, whatever the strength and rationale of *Paralyzed Veterans* in other contexts, there is an additional reason that notice-and-comment rulemaking was required here. Section 13 of the FLSA delegates

to the Department the authority to "define" and "delimit" rules according to the rulemaking process. 29 U.S.C. § 213. Thus, when it acts pursuant to Section 13, as it did in this case, the Department is exercising substantive rulemaking power delegated to it by Congress. Like the SEC with the proxy rules considered quintessentially legislative when Congress enacted the APA, the Department exercised its § 213 substantive rulemaking power to mark the boundaries for inclusion or exclusion of individuals with respect to the FLSA's white-collar exemptions. Whether AI 2010-1 is deemed the functional equivalent of an amendment to the 2004 regulations, or an interpretation with legislative effect, it does not fit within the APA's exemption for interpretive rules.

Regarding AI 2010-1, the Department described its later-in-time interpretation as "controlling" and "substantive." And it cleared the way for private parties to impose liability on employers for conduct that was previously authorized by the Department itself. Nothing in the APA requires, much less supports, overturning the D.C. Circuit's judgment that while the Department is free to issue such a rule, it must first go through notice and comment.[10]

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[10] The D.C. Circuit is hardly an outlier in that regard. In *SBC Inc.* v. *FCC*, 414 F.3d 486, 498 (3d Cir. 2005), the Third Circuit held, consistent with *Paralyzed Veterans*, that "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment

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As Professor John Manning has explained, "[t]he central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice and comment procedures, or a proper interpretive rule or general statement of policy exempt from such procedures?" John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917 (2004). *Paralyzed Veterans* can thus be understood as a sorting mechanism that, when certain prerequisites are satisfied, simplifies the notoriously difficult inquiry into when agency action is an "interpretive rule" exempt from notice and comment and when it is a legislative rule that is invalid without it. See *id.* at 893 ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'"); *Nat'l Min. Ass'n* v. *McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014)

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requirements of the APA." The Fifth Circuit has agreed that "the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well-established regulatory interpretation," *Shell Offshore*, 238 F.3d at 629, and the Sixth Circuit had noted that notice and comment will "often be required" "once an agency gives a regulation an interpretation." *Dismas Charities, Inc.* v. *U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005). And in *Erringer* v. *Thompson*, 371 F.3d 625, 632 (9th Cir. 2004), the Ninth Circuit stated approvingly that "[a]ny rule that effectively amends a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking." The only Circuit to explicitly disagree with *Paralyzed Veterans* is the Seventh, and it did so in dicta. *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536 (7th Cir. 2012) (Castillo, D.J., sitting by designation).

(Kavanaugh, J.) ("[W]e need to know how to classify an agency action as a legislative rule, interpretive rule, or general statement of policy. That inquiry turns out to be quite difficult and confused."). Jettisoning *Paralyzed Veterans* would only add to the confusion by needlessly eliminating a helpful analytical tool for classifying agency action and enforcing the APA's mandate for fair, uniform agency procedures.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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