Nos. 13-1041, 13-1052

In the
Supreme Court of the United States

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

v.

MORTGAGE BANKERS ASSOCIATION, RESPONDENT.

JEROME NICKOLS, ET AL., PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF OF THE CATO INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

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The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice in America through defending the Constitution as

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[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP educates through various outlets, including print, broadcast, and Internet media.

The Cato Institute, CEI, and JEP are interested in the courts' enforcement of the Administrative Procedure Act's procedural protections, which Congress enacted to ensure that regulatory agencies would respect the rule of law, limited government, and the public's right to participate meaningfully in the promulgation of substantive regulations.

SUMMARY OF ARGUMENT

Under *Vermont Yankee*, courts must not burden agencies with procedural requirements above and beyond those already imposed by the Administrative Procedure Act (APA). *Vermont Yankee Nuclear Power Corp*. v. *NRDC*, 435 U.S. 519, 545-49 (1978). But to honor this rule, the courts must first ascertain which APA requirements apply at all. *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006).

In this case, the courts must determine whether the challenged Labor Department action is an "interpretative rule" or a "legislative rule." The Government does not answer this question—it begs it, simply asserting that the rule is interpretative. Gov't Br. 6-7. Thus, it argues, the D.C. Circuit's decision requiring notice-and-comment proceedings for the rule violates *Vermont Yankee*. *Id.* at 14-15.

The Government's argument is rooted in an oversimplified characterization of the APA's history, purpose, and text. *Amici* submit this brief to provide the Court with a more complete account of the APA, rebutting four sweeping generalizations proffered by the Government:

First, the Government asserts that the APA draws an "unambiguous" line between legislative and interpretative rules. But in fact, the APA's framers recognized that the boundary between "interpretative" and "legislative" rules is blurred, and must be governed in light of a rule's function, not merely its form.

Second, the Government asserts that there must be no distinction drawn between an agency's initial

interpretation and its subsequent re-interpretations. But as this Court and scholars have recognized, interests engendered by an agency's initial interpretation are relevant to the agency's subsequent "re-interpretations."

Third, the Government criticizes the D.C. Circuit for independently analyzing whether the agency's rule is "interpretative" or "legislative." But the APA's framers stressed that it must be the duty of courts—not agencies—to police the boundary between legislative and interpretative rulemaking.

Finally, the Government self-servingly asserts that Congress enacted this notice-and-comment exemption for the sole purpose of alleviating burdens on agencies. But in fact, Congress enacted that exemption because it expected interpretative rules to face more thorough judicial review than legislative rules would face. Today, however, interpretative rules receive utmost deference from the courts, which makes rigorous enforcement of notice-and-comment requirements all the more indispensable.

Ultimately, the Government paints the APA as a tool of regulator convenience. But the APA's sponsor saw it quite differently: "Except in a few respects," Sen. McCarran explained, "this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations." *See infra* at 22. The APA was enacted to restrain agencies, not empower them. To that end, the courts must not allow the "interpretative rule" exception to swallow the notice-and-comment rule. The D.C. Circuit rightly asked not what the agency's rule did in form, but what it did in effect.

ARGUMENT

The APA draws a basic distinction between "legislative" rules and "interpretative" rules, but it does not define either of those terms. *Guardian Fed. Sav. & Loan Ass'n* v. *Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978) (Leventhal, J.).[2] The "essential meaning" of that distinction—that legislative rules are promulgated with "the force of law" but interpretative rules are not—may be simple to state in theory, *id.*, but it proves difficult to apply in practice. Courts "have characterized the distinction as 'fuzzy,' 'tenuous,' 'blurred,' 'baffling,' and 'enshrouded in considerable smog.'" Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.4, p. 448 (5th ed. 2010) (quoting cases). Scholars are no less blunt: "Distinguishing between 'interpretation' and 'lawmaking' can have the qualities of a shell game." Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1478 n.44 (1992).

These lines become even more difficult to draw when what the agency "interprets" are not statutes passed by Congress, but "legislative" rules promulgated and previously interpreted by the very same agency now purporting to "re-interpret" them. *See*, *e.g.*, *Am. Mining Cong.* v. *MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (recognizing that a nominal

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[2] While the APA speaks of "interpretative" rules, over time they have come to be called "interpretive" rules. *See Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007). Because this brief focuses on the original framing of the APA, it employs the original term, "interpretative."

"interpretation" could be "a de facto amendment of prior legislative rules").

The federal courts have grappled with this by inquiring into rules' actual function instead of their mere form, devising rough criteria to separate "interpretative" from "legislative" rules. The D.C. Circuit offered one such approach in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997); *see also* Pierce, 1 *Administrative Law Treatise* § 6.4, pp. 454-66 (describing various approaches). By the *Paralyzed Veterans* test, the court attempts to determine whether "the interpretation itself carries 'the force and effect of law,'" thus making it a legislative rule. 117 F.3d at 588.

Decades of experience have illuminated the challenge of distinguishing between "interpretative" and "legislative" rules, but the APA's framers and that era's scholars saw the challenge, too. They recognized that "interpretative" and "legislative" rules must be distinguished by their function, not mere form—and that the obligation to do so would fall upon the courts.

I. The APA's Framers Recognized That "Interpretative" and "Legislative" Rules Must Be Distinguished by Their Function, Not Their Form

1. The Government asserts that the Labor Department's rule is an "interpretive rule," but it never explains why this is so. Gov't Br. 6-7; *see also* Resp. Br. 13-14 ("Petitioners simply assert that AI 2010-1 is an 'interpretive rule' exempt from APA

notice and comment: Q.E.D."). Nor has Respondent conceded that the rule is an interpretative rule.[3]

The mere presence of an "interpretation" in the rule does not make it an "interpretative rule," because many "legislative" rules contain interpretations. *See* Pierce, 1 *Administrative Law Treatise* § 6.4, pp. 433-34; Arthur E. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 Admin. L. Rev. 101, 109 (1971) ("It should be noted . . . that a legislative rule may sometimes interpret other law.").

The Government notes that "interpretive" rules "do not have the force of law," Gov't Br. 19, but it makes no effort to explain why the Labor Department action at issue lacks such "force." While the Government now asserts that the department's decision is nonbinding, in the lower courts the Government took a much less humble view, arguing that the courts must treat the department's interpretation as "controlling."[4] Moreover, the department's rule categorically concludes, "[b]ased upon a thorough analysis of the relevant factors," that "mortgage loan officers who perform the typical

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[3] The Government inaccurately claims that Respondent "acknowledged" that the rule was an "interpretative rule." Gov't Br. 6-7. In fact, Respondent acknowledged only that the rule contained an "interpretation." *See* Resp. Br. 46 n.8.

[4] Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mortgage Bankers Ass'n* v. *Solis*, No. 11-73, Doc. 20, at 9 (D.D.C. May 17, 2011).

duties" described in the decision "*do not qualify* as bona fide employees exempt under" the Fair Labor Standards Act. Pet. App. 69a. (emphasis added). The Government does not explain how this "controlling" decision lacks the "force of law."

By contrast, the D.C. Circuit's approach in the decision below focuses on function over form. It asks whether the government action, whatever its form or purported intent, "has *in effect* amended its rule, something it may not accomplish under the APA without notice and comment." Pet. App. 2a (quoting *Alaska Prof. Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)) (brackets omitted, emphasis added). Thus, an agency's "stated intent to treat a major substantive legal addition as an 'interpretative' rule will not by itself suffice to escape the notice and comment requirements of section 553" of the APA. *Paralyzed Veterans*, 117 F.3d at 588 (citing *Am. Mining Cong.*, 995 F.2d at 1109-10). Rather, the court determined whether the agency rule "carries 'the force and effect of law,'" by applying the *Paralyzed Veterans* test. *Id.*

2. The court's realistic approach would not have been foreign to the APA's framers. Rather, the debates in Congress and that era's scholarship recognized that to determine whether a given rule truly is "interpretative" or "legislative" requires judgment. And the APA's framers expected the courts to exercise such judgment based not on a rule's nominal form or the agency's subjective intent, but on the rule's actual, substantive function as to regulated entities. While the Government asserts that the APA's "interpretative rule" exemption is "unambiguous," Gov't Cert. Pet. 9, the APA's framers

saw considerable ambiguity in the legislative-interpretative distinction, and they enacted a statute that accommodates the courts' practical judgment.

Indeed, this ambiguity was recognized and analyzed in the debates giving rise to the APA. In its 1941 report, the Attorney General's Committee on Administrative Procedure stressed that the theoretical distinction between legislative and interpretative rules—namely, whether they have "statutory force upon going into effect"—is often "blurred" by the fact that even nominally "interpretative" regulations can have great practical impact. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 77-8, 1st Sess. (1941), at 100. But the Government ignores these warnings, even while citing other parts of the Committee's report.[5]

The Committee's appreciation of the difficulty in distinguishing legislative and interpretative rules reflected the state of scholarship in the years leading up to the APA's enactment. In an early book on American administrative law, John Preston Comer outlined the familiar theoretical distinction between legislative (or, in his words, "administrative") rules and interpretative rules, but then proceeded to explain why "it is almost impossible to separate the

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[5] The Government quotes the Committee's initial comment that interpretative rules "indicat[e] merely the agency's present belief concerning the meaning of applicable statutory language," *id.* at 27, but ignores the Committee's recognition that the theoretical line between interpretative and legislative rules is in fact "blurred." *See* Gov't Br. 21, Gov't Cert. Pet. 13.

two classes of regulations." John Preston Comer, *Legislative Functions of National Administrative Authorities* 29 & 137-38 (1927). And Comer cited various examples of regulators and congressmen recognizing the difficulty of separating interpretative rules from legislative ones. *Id.* at 141-44.

Yale's Abraham Feller, too, urged that a "word of caution is needed on the question of legislative versus interpretative regulations." A.H. Feller, *Addendum to the Regulations Problem*, 54 Harv. L. Rev. 1311, 1320 (1941). While there "can be no doubt of the validity of the basic distinction" between interpretative and legislative rules "in *principle*," this "distinction becomes blurred and may be difficult to administer" in *practice*: "What looks like an interpretative regulation may on close inspection be seen to be legislative, and vice versa." *Id.* at 1320-21 (footnote omitted, emphasis added).

3. Congress heeded these scholarly warnings. The APA does not expressly, specifically define "interpretative" or "legislative" rules. The legislative history reflects Congress's nuanced approach.

At the House Judiciary Committee's hearing, committee chairman Hatton Sumners pressed Carl McFarland, chairman of the American Bar Association (ABA) Committee on Administrative Procedure, on the practical distinction between interpretative and legislative (or "substantive") rules. McFarland's opinion was significant: as the Government notes, he was "a central figure in the APA's development," having served on the committee that produced the Attorney General's 1941 report, and eventually was a drafter of the APA legislation. Gov't Br. 21-22 & n.6. And while McFarland urged

the committee not to impose notice-and-comment requirements on interpretative regulations or statements of policy, he conceded to the chairman that there was no bright line distinguishing "interpretative" rules from "substantive" ones:

> THE CHAIRMAN. Mr. McFarland, let me interrupt you. *The interpretative regulations of substantive regulations become very definitely substantive.*
>
> MR. MCFARLAND. The interpretative?
>
> THE CHAIRMAN. The interpretative regulations of substantive regulations, because the interpretation is what affects these people.
>
> MR. MCFARLAND. That is right.

Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. 30 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 76 (1946) (emphasis added) (hereinafter "APA LEGISLATIVE HISTORY").[6]

The legislative history contains other references to "interpretative" rules. Senator Pat McCarran,

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6 The Government quotes this exchange to support its point that "interpretative" rules are exempt from notice-and-comment, but it omits the Chairman's recognition that "interpretative regulations of substantive regulations become very definitely substantive." Gov't Br. 21-22.

sponsor of the APA bill,[7] stated that interpretative rules are "merely adaptations of interpretations of statutes." APA LEGISLATIVE HISTORY at 313 (statement of Sen. McCarran) (Mar. 12, 1946). That was the interpretation suggested in the Senate Judiciary Committee's print of S. 7, a forerunner to the APA. *See* S. 7, 79th Cong. 1st Sess. 6 (1945), *in* APA LEGISLATIVE HISTORY at 18 (contrasting "interpretative" rules with "substantive rules," and noting that "interpretative rules" were "merely interpretations of statutory provisions").

Such comments, in turn, were the basis for the "working definition" offered by the Attorney General's 1947 manual on the APA, to distinguish "interpretative" and "substantive rules." The manual repeated the theoretical distinction: a "substantive rule" has "the force and effect of law," while an "interpretative rule" is intended to "advise the public of the agency's construction of the statutes and rules which it administers." *See* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947). But it offered no explanation of how to discern whether a particular rule does, in fact, have "the force and effect of law."

Two years after the APA's enactment, Kenneth Culp Davis wrote that while the distinction between "legislative" and "interpretative" rules may prove difficult to apply in practice, the statute was intended to reflect the theory. *See* Kenneth Culp

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7 *Shaughnessey* v. *Pedreiro*, 349 U.S. 48, 52 (1955) (noting that Senator McCarran was the APA's sponsor in the Senate).

Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 928-29. (1948). The APA's procedural exemption for "interpretative rules" was intended to reflect the fundamental force-of-law concept: "The meaning of the [APA's] term must be found in case law, in practices of agencies, and in usage," *id.* at 928, which maintained that legislative rules have "the same force and effect as valid statutes," while interpretative rules are those that "merely interpret previous law" but have no independent force of their own, *id.* at 929. Davis reiterated this interpretation of the APA's statutory meaning in his first book on administrative law. *See* Kenneth Culp Davis, *Administrative Law* 194-95 (1951). Davis was, to be sure, a critic of the notion that bright lines separate "legislative rules" from "interpretative rules" in practice, *see id.* at 198-200, but he acknowledged the APA's intended distinction between rules that "create new law" and those that do not, *id.* at 194.

Others shared Davis's view that the APA's exemption for "interpretative rules" embodied the basic notion of "force of law," but that the statute offered little direct guidance as to how to apply that theory in specific cases. At a 1947 symposium convened by Arthur T. Vanderbilt (a veteran of the Attorney General's 1941 committee) to analyze the newly enacted APA, Assistant Solicitor General David Reich presented a paper on "Rule Making Under the Administrative Procedure Act." Pressed by a questioner to "give us a little clarification as to what interpretative rule means in [Section 4 of the APA]," Reich conceded the fundamental difficulty of distinguishing between the two general categories of rules in any given case:

> The courts have looked differently at interpretative rules than at substantive rules. A substantive rule, as you know, has the full force and effect of law. But an interpretative rule does not have the effect of law. The Supreme Court often had difficulty in determining whether a particular rule is interpretative or substantive. In a broad sense, I think we can make the distinction I tried to make [*i.e.*, that legislative rules have the force of law but interpretative rules do not]. In a narrow situation, I am sure it is going to be more difficult, just like anything else.

David Reich, *Rule Making Under the Administrative Procedure Act*, in *The Federal Administrative Procedure Act and the Administrative Agencies: Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947*, at 492, 516 (George Warren ed., 1947).

In the decades that followed the APA's enactment, scholars have continued to criticize the notion that the APA draws a bright, easily administered line between "interpretative" and "legislative" rules.[8] And courts have approached such

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[8] *See, e.g.*, Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 Geo. L.J. 1047, 1052 (1976) (criticizing the distinctions drawn by the Attorney General's Manual as not "very meaningful"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 547 (2000) ("For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are

questions functionally, not formalistically. *See, e.g.*, *Paralyzed Veterans*, 117 F.3d at 586-88; *Am. Mining Cong.*, 995 F.2d at 1108-12; *see also* Pierce, *Distinguishing Legislative Rules From Interpretative Rules*, *supra* note 8, at 554-66.

In sum, the Government errs when it suggests that the APA draws an "unambiguous" line between interpretative and legislative rules. The APA established a framework in which courts must look to a rule's function, not its form, to determine whether it truly is an "interpretative rule," or whether instead it has the force of law.

II. This Court and Scholars Have Recognized That Interests "Engendered" by an Initial Interpretative Rule Justify Heightened Scrutiny of Subsequent Re-Interpretations

The Government asserts that there must be "symmetry" between the law's treatment of an agency's initial interpretation and its subsequent reinterpretations. Gov't Br. 31. But early scholars recognized that an initial interpretation can take on substantive force over time, particularly in light of

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appropriate to distinguish between legislative rules and interpretative rules"); *cf.* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 523-26, 540-42 (2002) (arguing that the APA implicitly adopted a convention that agencies cannot promulgate rules with the force of law unless "Congress attached sanctions in the statute to compel observance of the regulations," but that neither pre-APA nor post-APA cases mentioned the convention, due to lawyers failing to invoke it).

the interests engendered by that interpretation. And as modern scholars note, such considerations are heightened when the agency's inconsistent "interpretations" pertain not to a statute passed by Congress, but to a legislative rule promulgated by the same agency.

1. Erwin Griswold and Kenneth Culp Davis both rejected the notion that initial reinterpretations and subsequent reinterpretations are "symmetrical." Gov't Br. 31. Erwin Griswold distinguished in 1941 between an agency's initial interpretation of a statute and its subsequent reinterpretations. While "the practicalities of administration" call for agency "freedom in working out the proper construction of a statute in the early days after its enactment," the passage of time can reduce an agency's flexibility: "after a while, an interpretative regulation becomes seasoned. It becomes something upon which people justifiably rely." Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 413 (1941). This should preclude agencies from making "retroactive" changes to their interpretations, Griswold argued, *id.*, and it also raises "most difficult question[s]" about the agency's discretion in changing a "seasoned interpretation" prospectively, too, *id.* at 415-16. Subsequent interpretations "can hardly have much foundation in any actual understanding of the legislature at the time the statute was passed," he reasoned, and "the factors of certainty and predictability" weigh against allowing the law "to change by mere administrative fiat." *Id.*; *see also* Note, *Judicial Review of Reversals of Policy by Administrative Agencies*, 68 Harv. L. Rev. 1251, 1253 (1955) ("Newly formulated administrative policy which represents a change in the agency's

view is most vulnerable to attack when it disturbs those who have relied.").

Kenneth Culp Davis did not embrace Griswold's view wholeheartedly, but neither did he reject it altogether. In his 1951 book, Davis wrote that it would be "overstate[ment]" to suggest that "regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes," should *always* be "deemed to . . . have the effect of law." Davis, *Administrative Law* 205. Instead, Davis proposed a slightly more nuanced approach, in the context of reinterpretations with retroactive effect: "long-followed regulations or practices are often given extra authoritative weight but do not *necessarily* have the effect of law." *Id.* (emphasis added).

Davis was more direct a few years later, in the first edition of his treatise. Distinguishing legislative from interpretative rules, he explained that "[a]n interpretative rule may or may not have the force of law, depending upon such factors as . . . *whether the rule is one of long standing*." Kenneth Culp Davis, 1 *Administrative Law Treatise* § 5.03, p. 300 (1st ed. 1958) (emphasis added).[9]

2. The Government's call for "symmetry" also lacks support in the modern caselaw that it cites. The Government quotes repeatedly this Court's

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9 *Cf. id.* at § 5.06, p. 330 ("the Court has sometimes given greater weight to contemporaneous and long-standing construction, where the question is scope of power to issue legislative rules").

statement that the APA's judicial-review provision "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), *quoted in* Gov't Br. 12, 17, 30. But the Government neglects to quote *Fox*'s crucial caveat that this general rule is subject to significant exceptions—most importantly, that courts must scrutinize an agency's revision of a prior rulemaking more closely when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered *serious reliance interests* that must be taken into account." *Id.* (emphasis added) (citing *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).[10]

By specifically acknowledging that agency revisions of prior policies may implicate substantial "reliance interests," and that courts may need to take action to prevent undue injury to such interests, the Court was acknowledging the substantial due process and rule-of-law concerns that Griswold and Davis had voiced.

3. Such concerns are heightened when what the agency is interpreting and re-interpreting are not

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[10] The Government's use of *Fox* also suffers from a second flaw: each time the Government quotes *Fox* for the proposition that the APA "makes no distinction" between initial and subsequent agency action, it neglects to acknowledge that the Court limited this characterization to the APA's judicial review provision, 5 U.S.C. § 706, and not to 5 U.S.C. § 553's rulemaking procedures or the APA as a whole. *See id.*

Congress's statutes but the agency's own regulations. And they are exacerbated still further when the agency benefits from extensive judicial deference—the combination gives agencies an incentive to promulgate ambiguous regulations initially, and then "interpret" them with the protection of extreme judicial deference.

As Prof. John Manning explains, "[i]f *Seminole Rock* permits agencies to adopt imprecise or indeterminate regulations, and to bind the courts and public to improbable or hard-to-predict constructions of its regulations, then the notice-giving function is disserved." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 669 (1996) (footnote omitted) (discussing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). And, Prof. Manning continues, if an agency faces only *de minimis* procedural restraints in interpreting and re-interpreting the regulations that the agency itself prescribed, then "regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation has been *definitively interpreted* by the agency." *Id.* at 671 (emphasis added) (citing Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 20 (1962) ("A second reason for definite standards of administrative adjudication is the social value in encouraging the security of transactions.")).

Building on Manning's analysis, Matthew Stephenson and Miri Pogoriler note that one benefit of reducing judicial deference to subsequent agency re-interpretations would be to "mitigate an agency's

incentive to leave key issues permanently undecided," and thus would promote "the further desirable effect of making agency rules, and their application, more predictable." Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1478 (2011).

The interests identified by Griswold and Davis at the time of the APA's enactment, and by Manning and others in more recent debates, are similar to the interests that animated the D.C. Circuit's analysis in *Paralyzed Veterans* and *Alaska Hunters*. If an agency can cloak effective rule amendments in the form of "interpretation," then the public cannot "know the rules by which the game will be played." *Alaska Hunters*, 177 F.3d at 1035 (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. Q. Rev. 412, 414 (1909)). The Government's categorical assertion that there must be "symmetry" in the courts' treatment of initial interpretative rules and subsequent re-interpretations simply shrugs off these fundamental, long-recognized concerns.

III. The APA's Framers Obligated Courts To Police the Boundary Between "Legislative" and "Interpretative" Rules

The Government criticizes the D.C. Circuit for inquiring into whether the agency action was merely "interpretative" (as the Government asserts), or whether it was in fact legislative and thus not within the APA's exemption from notice-and-comment. *See*, *e.g.*, Gov't Br. 34-35. By attacking as *ultra vires* the D.C. Circuit's unremarkable exercise of the judicial authority to decide whether the Labor Department's action was in fact "interpretative," the Government

contradicts another point that the APA's framers and founding-era scholars emphasized: that courts must police the boundary between "interpretative" and "legislative" rules, in order to prevent agencies from evading the requirements that the APA's framers placed upon them.

1. Throughout the debates giving rise to the APA, Congress stressed that the Act was intended to restrain agencies, and that responsibility for ensuring compliance with the APA's restraints would fall not to the agencies themselves, but to the courts:

> These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, *is a function which is clearly conferred upon the courts in the final analysis*.[11]

Accordingly, "[i]t will thus be the *duty* of reviewing courts *to prevent avoidance of the requirements of the bill by any manner or form of indirection*, and to determine the meaning of the words and phrases used." APA LEGISLATIVE HISTORY 217 (Senate Report) (emphasis added); *id.* at 277-78 (House Report); *see also id.* at 326 (statement of Sen. McCarran) (similar).

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[11] This instruction appeared in identical form, in both the Senate and House Reports. S. Rep. No. 79-752 (1945), *reprinted in* APA LEGISLATIVE HISTORY 217; H.R. Rep. No. 79-1980 (1946), *reprinted in* APA LEGISLATIVE HISTORY 278 (emphasis added).

Thus, with respect to the APA's distinction between interpretative and legislative rules, "the problem of categorizing administrative rules" is "deposited squarely into the laps of the courts[.]" Paul R. Dean, *Rule Making: Some Definitions Under the Federal Administrative Procedure Act*, 35 Geo. L.J. 491, 497 (1947).

Congress entrusted this duty to the courts, not the agencies, because the APA was intended to restrain the agencies, not empower them. "Except in a few respects," Senator McCarran explained, "this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations." APA LEGISLATIVE HISTORY 326 (Statement of Sen. McCarran); *see id.* at 298 (describing the APA as "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government").

Thus, as Prof. Pierce observes, when the agency says "that it is issuing only an interpretative rule," it "is not appropriate for a court simply to accept the agency's characterization":

> In such a situation, the agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure. Thus, a court must attempt to determine whether a putative interpretative rule is actually a procedurally invalid legislative rule by determining whether the rule, if valid, actually has "the force of law."

Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, *supra* note 8, at 555 (citing *Am. Mining*, 995 F.2d at 1112); *see also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 390 ("a court cannot always rely on labels to distinguish between legislative and nonlegislative rules," because an agency "may try to disguise the issue by failing to describe its product clearly.").

Thus, when the Government criticizes the D.C. Circuit for simply attempting to carry out its obligations under the APA, the Government flips the APA on its head. The court did not "disregard the limits on judicial intervention contained in Section 4 of the APA[.]" Gov't Br. 28. To the contrary, the court fulfilled the obligation placed upon it by the APA: to determine whether the Labor Department's rule truly is a mere interpretative rule, lest the department promulgate a legislative rule without the requisite notice-and-comment proceedings.

IV. The APA's Framers Relaxed Notice-and-Comment Requirements for Interpretative Rules Because They Expected the Courts To Conduct Robust, "Plenary" Judicial Review of Those Rules

Throughout its brief, the Government asserts that the APA exempts interpretative rules from notice-and-comment for one and only one reason—to make it easier for agencies to promulgate such rules:

> The reason for exempting interpretive rules from notice-and-comment rulemaking is plain . . . Congress presumably determined that it would be an unwarranted encroach-

> ment 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.

Gov't Br. 20-21. But this rationalization, and the clips of legislative history selectively quoted by the Government in support of it, tells only half the story.

Bureaucratic efficiency was indeed *one* of Congress's reasons for exempting interpretative rules from notice-and-comment procedures. But there was *another* reason, which the Government neglects to mention: the APA's framers expected the courts to conduct robust, "plenary" judicial review of "interpretative rules." Such judicial review would provide an *ex post* restraint on agencies sufficient to offset the absence of *ex ante* procedural protections. *See*, *e.g.*, Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *excerpted in* APA LEGISLATIVE HISTORY 18.[12]

This point was stressed in the Senate by the APA's sponsor. "The pending bill exempts from its procedural requirements all interpretative . . . rules," Sen. McCarran explained, "because under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review [than legislative

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[12] Legislative rules, by contrast, would receive relaxed judicial review, and therefore justified the additional *ex ante* procedural protections. *Id.*

rules are]." APA LEGISLATIVE HISTORY 313 (statement of Sen. McCarran).

The Attorney General's 1941 committee report also alluded to this consideration. *Final Report of the Attorney General's Committee on Administrative Procedure* at 27. Perhaps the committee did so at the behest of member Ralph Fuchs, who had raised this point in a recent article. "If the regulation is subject to challenge in all of its respects after its promulgation," he wrote in 1938, "the need for advance formalities is reduced or eliminated"; but when regulated parties are left "with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it." Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 271, 272 (1938).[13]

This is not to say that the APA's framers harbored the illusion that courts would accord *no* weight to any agency's interpretations. As Prof.

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[13] Perhaps its mention owed also to the committee's director, Walter Gellhorn. In a book published the same year as the committee's report, Gellhorn wrote:

> Both the court and the administrative agency are vital instruments of democratic policies and defenders of democratic gains. Each has special values to contribute. In some areas one may conclude, purely pragmatically, that the organization and procedure of the one are better adapted than those of the other to furthering the nation's aspirations.

Walter Gellhorn, *Federal Administrative Proceedings* 73 (1941).

Davis noted in 1951, "although courts are free to substitute their judgment as to content of interpretative rules they often refrain in varying degrees from doing so." Davis, *Administrative Law* at 201.[14] Nevertheless, the APA's framers intended for courts to enjoy the authority to review agency interpretations *de novo*, and they saw the availability of this *ex post* protection as the necessary corollary to the APA's elimination of notice-and-comment protections *ex ante*.

2. Seven decades later, however, judicial review of agencies' interpretative rules is much less exacting. By extending *Seminole Rock* deference to agencies' interpretative rules, the courts have brought about precisely the situation that the APA's framers sought to avoid: agency rules promulgated without notice and comment, yet facing no meaningful judicial scrutiny, and thus "creat[ing] a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (brackets omitted) (quoting *Talk America, Inc.*

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[14] *See also* Davis, 1 *Administrative Law Treatise* § 5.03, p. 298 ("The distinction [between interpretative and legislative rules] is important because courts often substitute judgment as to the content of an interpretative rule but almost always (theoretically always) as to the content of a legislative rule."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (noting that the promise of plenary judicial review "was not *categorically* true in 1945" (emphasis added)).

v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

The present case exemplifies the cause for such concerns. The Government maintains that the Labor Department's action is exempt from notice-and-comment requirements because the rule is not "binding" with the "force of law." Gov't Br. 21. Yet the Government has argued in the same case that the department's action must be given "controlling deference" by the courts. Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mortgage Bankers Ass'n* v. *Solis*, No. 11-73, Doc. 15, at 26 n.17 (D.D.C. Mar. 10, 2011).

As it happens, Prof. Davis anticipated in 1951 the dangers of mixing the APA's notice-and-comment exemption with judicial deference. Citing the "recent case" of *Seminole Rock*, Davis noted that to extend such deference to interpretative rules would produce "absurd" results: "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." Davis, *Administrative Law* 202 n.72. Recognizing that he was writing at a moment when "the science of interpretation of administrative rules . . . is still in its infancy," Davis noted his expectation that the Supreme Court would intervene and prevent agencies from receiving *Seminole Rock* deference for such rules. *Id.* But history proved otherwise. *See* Manning, 96 Colum. L. Rev. at 654-96; Stephenson & Pogoriler, 79 Geo. Wash. L. Rev. at 1459-66.

While the propriety of extending *Seminole Rock* deference to interpretative rules is not an issue

before the Court in this case, these considerations cast substantial doubt upon the Government's claim that subjecting the Labor Department's rule to notice and comment unfairly restricts the agency's "free[dom] to fashion [its] own rules of procedure." Gov't Br. 27 (quoting *Vermont Yankee*, 435 U.S. at 544-45). Such complaints ignore the costs borne by the public when, contrary to the APA's framers' intentions, rules are subjected to neither *ex ante* nor *ex post* protections. There is, to be sure, "an obvious need to conduct our government efficiently, expeditiously, effectively, and inexpensively," but "the interest in involving affected parties in rulemaking is not so slight that it should be set aside solely on the basis of minor inconvenience or expense to government." Bonfield, *supra* page 7, at 106.

Indeed, as Prof. Manning notes, "[e]ven if rejection of *Seminole Rock* marginally increased agency reluctance to rely on rulemaking . . . that result would be attributable to the fact that agencies would finally be internalizing the cost of adopting unobvious or vague regulations." Manning, 96 Colum. L. Rev. at 694. When agencies are required to choose between either *ex ante* notice-and-comment or *ex post* judicial review, they face what scholars have called the "pay me now or pay me later" principle, a "doctrinal compromise" intended to prevent agencies from "escaping both procedural constraints and meaningful judicial scrutiny." Stephenson & Pogoriler, 79 Geo. Wash. L. Rev. at 1464 (quoting E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1491-92 (1992)). So long as agencies know that *Seminole Rock* saves them from having to "pay later," full judicial enforcement of the APA's *procedural* requirements is the means by which

courts can ensure that agencies at least "pay now." *Am. Mining Cong.*, 995 F.2d at 1111 (quoting Elliott, *Reinventing Rulemaking*, 41 Duke L.J. at 1491 ("As in the television commercial in which the automobile repairman intones ominously 'pay me now, or pay me later,' the agency has a choice")).

To that end, the D.C. Circuit's decisions in *Paralyzed Veterans*, *Alaska Hunters*, and the decision under review, attempt to ensure that the APA's procedural requirements are obeyed not just in form, but in function—by prohibiting an agency from "in effect amend[ing]" its previously promulgated legislative rule, "something it may not accomplish without notice and comment." *Alaska Hunters*, 177 F.3d at 1034. They "look to whether the interpretation itself carries 'the force and effect of law,'" and if it does, they enforce the APA's notice-and-comment requirement. *Paralyzed Veterans*, 117 F.3d at 588; *see also Am. Mining Cong.*, 995 F.2d at 1109 ("Our own decisions have often . . . inquir[ed] whether the disputed rule has 'the force of law'.").

The APA's framers, like the D.C. Circuit, understood that "it is quite difficult to draw a line between substantive and interpretative rules." *Paralyzed Veterans*, 117 F.3d at 587. But they obligated the courts to draw those difficult lines nonetheless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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