Nos. 13-1041 and 13-1052

In the

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, *et al.*,
PETITIONERS,
v.
MORTGAGE BANKERS ASSOCIATION, *et al.*,
RESPONDENTS,

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

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Under the Administrative Procedure Act, can an agency use an "interpretive rule" to change long-standing legal obligations of the regulated community?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence[1] is a project of the Claremont Institute, a nonprofit organization whose mission is to restore and uphold the principles of the American Founding, including the structure of government defining a vital separation of powers principle set out in the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance touching on administrative law, including *Department of Transportation v. Association of American Railroads*, No. 13-1080 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012); and *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies – that oversight requires active judicial review of the interpretation and application of ambiguous regulations.

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[1] Pursuant to this Court's Rule 37.3, the petitioners in *Nickols* and the respondents in both cases have filed blanket consent for amicus. The Solicitor General has granted consent for this brief and that letter has been lodged with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court in this case confronts a problem that has its roots in the deference granted to administrative agencies in *Bowels v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Although the Court has increasingly limited this deference, *see e.g. SmithKline*, 132 S.Ct. at 2166-2167, the doctrine continues to allow administrative agencies to exercise power that properly belongs to the judiciary. As Justice Scalia recently pointed out, it is contrary to the basic principles of our government to allow the same person who promulgates the law also to interpret it. *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254, 2266 (2011) (Scalia, J., concurring). The deference shown under *Seminole Rock* and *Auer* encourages agencies to use interpretive rules and pronouncements rather than notice-and-comment rulemaking to change the substantive rights and obligations of the regulated community. Because neither the Constitution nor the Administrative Procedures Act permits agencies to alter settled legal expectations of the regulated community through interpretive rules, this Court should deny the petitioners' request and require that the Department of Labor use notice-and-comment rulemaking to change the legal obligations of the regulated community.

ARGUMENT

I. The Problem Presented by this Case Is Rooted in the Court's Decisions Granting Deference to an Agency's Interpretations of Its Own Rules.

A. The current predicament is rooted in the deference created by *Seminole Rock* and *Auer*.

The difficulty presented in the present case is not altogether unique but rather represents an extension of the precedent set forth in *Seminole Rock* and *Auer*. In the former case, this Court determined that an agency's interpretation of its own regulations would be given "controlling weight." *Seminole Rock*, 325 U.S. at 414. Unless the agency's interpretation was plainly erroneous or inconsistent with the regulation, the Court instructed the judiciary to defer to the agency's construction of its own regulation. *Id.* Reiterated more recently in the latter case, this doctrine has since become known as *Auer* deference. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

As evident in this action, however, this deference creates the problem of allowing an agency to redefine substantive legal obligations via informal "interpretations." Where interpretive rules are designed to allow agencies to give notice to their understanding of a regulation, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995), under *Auer* deference they become far more than that as courts must look to them as the last word in determining the meaning of a regulation. *Seminole Rock*, 325 U.S. at 414 (describing the agency's interpretations as the "ultimate criterion").

Relying on the deference granted in *Seminole Rock* and *Auer*, agencies can issue interpretive rules that change long-standing substantive legal obligations, knowing that courts will not disturb those decisions. Agencies are thus encouraged to simply "reinterpret" a regulation rather than use the more exacting procedures of notice-and-comment rulemaking, where their final decisions are subject to judicial review. As a result, *Auer* deference begets the very problem that arises in the present case: namely, an agency using "interpretive" rules to accomplish substantive regulatory changes that otherwise would require notice-and-comment rulemaking.

Here, the Department of Labor promulgated a rule pursuant to the Fair Labor Standards Act outlining the basic contours of the definition of "administrative" employees who are not subject to the Act's overtime requirements. In 2006, the Department issued an opinion letter to the Mortgage Bankers Association indicating that mortgage loan officers—whose work duties conformed to certain typical responsibilities—were "administrative" employees under the Act and the Department's regulation. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 968 (D.C. Cir., 2013).

In 2010, the agency reversed its position, withdrew its previous opinion letter, and determined that these same mortgage loan officers were no longer "administrative" employees under the regulation and the Act. *Id.* Where the employees were not previously subject to overtime pay rules, now they would be. This reversal substantially altered the substantive rights and obligations of employers under the Act and regulations. The Department accomplished this change in

legal obligations without any change in the law or the regulation.

Because *Seminole Rock* and *Auer* require courts to defer to these interpretations, the Department of Labor escapes the obligation of seeking a change in the law by Congress, or even by its own notice-and-comment rulemaking. The irony is that final rules adopted pursuant to notice-and-comment rulemaking are subject to judicial review but the "interpretation" by the agency is not. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 639 (1996).

Auer deference encourages agencies to promulgate broad ambiguous regulations that are susceptible to multiple—even conflicting—interpretations. *Talk America, Inc.*, 131 S.Ct. at 2266 (Scalia, J., concurring); Manning, *supra* at 683. Interpretive rules and changes in interpretation are much easier than changing regulations through the notice-and-comment process. An agency can switch its view of the legal requirements of its regulations without the need to explain the basis for that change. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Since courts must generally defer to the interpretation, the agency escapes judicial review of its actions.

Although the Court has indicated that it will not defer to interpretation of those regulations that merely parrot statutory language, *Gonzalez v. Oregon*, 546 U.S. 243, 257-58 (2006), *Auer* deference encourages the promulgation of regulations that do little

more than restate the statute. Manning, *supra* at 683. These broad and ambiguous regulations, in turn, allow agencies to escape notice-and-comment rulemaking and judicial review of substantive changes in legal rules.

In this way, the problem here posed is the offspring of the far-reaching deference shown under *Seminole Rock* and *Auer*.

B. This deference violates the constitutional separation of powers.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, ,Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-

JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id*. Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id*.; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S.

at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law. *United States v. Nixon*. 418 U.S. 683, 704 (1974) ("[T]he judicial power. . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The deference shown under *Seminole Rock* and *Auer*, however, does just that by ceding judicial power to the executive. This allows the concentration of power feared by the founding generation. *See* Man-

ning at 674-75. As Professor Manning notes, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield out-sized influence on the agency. *Id.* at 675.

Congress may be able to delegate part of its lawmaking function to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15.

The power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the executive.

In the present case, the Department of Labor is using an interpretive rule to alter long-standing substantive legal rights and obligations. Had the agency done this by notice-and-comment rulemaking, it would have been obligated to explain the basis for the change and the courts would examine that change under the Administrative Procedure Act. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15. By announcing the change in an interpretive rule, however, the agency seeks to escape that initial judicial review. Instead, the regulated community must assume the courts will simply defer to the Department's decision that the words of the regulation mean something different today than they meant yesterday. This is not how Congress intended the Administrative Procedure Act to operate. When an agency changes its position on legal obligations it imposes on the regulated community, the agency is supposed to proceed by notice-and-comment rulemaking. In that process, the radical change in policy can be adequately scrutinized for the kind of arbitrary and capricious behavior that the Administrative Procedure Act tasks this Court to protect against. 5 U.S.C. § 706; *State Farm*, 463 U.S. at 41.

C. This violation places a substantial burden on the regulated community to risk the loss of litigation in a dispute over interpretation.

The petitioner in *Nickols* argues that in some instances courts may choose not to defer to agency interpretations of their own regulations, citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Good*

Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 272-273 (1981); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976). This Court in *SmithKline* acknowledged several circumstances in which *Auer* deference may be inappropriate: when the agency's interpretation does not reflect a fair and considered judgment, conflicts with a previous interpretation, is merely a convenient litigation position, or is nothing more than a post hoc rationalization. *SmithKline*, 132 S.Ct. at 2166. Yet the possibility that the lower courts may, in some instances, choose to depart from the rule of controlling deference is cold comfort to members of the regulated community confronted with a fresh command imposed via "interpretation."

Even though there are exceptions, the breadth of the deference shown under *Auer* and *Seminole Rock* still imposes a heavy burden on the regulated community. On the one hand, as indicated previously, it encourages agencies to promulgate broad ambiguous regulations. Manning, *supra* at 683. As Justice Scalia has pointed out, this ambiguity in turn "frustrates the notice and predictability purposes of rulemaking." *Talk America, Inc.*, 131 S.Ct. at 2266 (Scalia, J., concurring); *see also Thomas Jefferson U. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

The lack of notice and predictability increases costs and burdens on the regulated community as the parties subject to the regulation expend resources to acquaint themselves with the complex nature of the law as well as to come into compliance with its often changing requirements. Manning, *supra* at 655.

When agencies can authoritatively interpret the meaning of their own regulations, an agency has little incentive to promulgate clear rules, and the community bears the cost of the resulting ambiguity. *Id.* at 668-69. Because the agency should be incentivized to promulgate clear rules, it should also bear the associated cost of promulgating ambiguous rules—rather than being rewarded with greater power to interpret those rules at a later time.

Additionally, the deference shown under *Auer* places a heavy litigation burden on the regulated community. When an agency suddenly reverses or substantially alters it interpretive posture, then the affected parties face a serious dilemma; they must either expend the resources necessary to comply with the new interpretation or else assume the costs and risks of litigation. The controlling deference shown to these interpretive decisions under *Auer*, however, substantially increases the likelihood of loss in the lower courts and therefore the cost of litigating. As a consequence, many parties within the regulated community will not be able to afford the risk and will easily be coerced into compliance with illegal commands. Agencies can thus accomplish their goals of forcing compliance with a new regulation that may not be consistent with the law

Despite recognized exceptions to *Auer* deference, the breadth of deference that is shown still compels lower courts to defer to agencies' interpretations, even those that bring about substantive changes in the regulation. It therefore continues to place a substantial burden on the regulated community to comply or risk litigation.

II. An Interpretive Ruling Cannot Change Substantive Legal Obligations.

Under the Administrative Procedure Act, agencies must generally promulgate substantive rules pursuant to the notice-and-comment rulemaking process. 5 U.S.C. § 553(a)-(b). Section 553(b)(3)(A), however, exempts "interpretative rules" from this requirement. Although the Department of Labor labeled its 2010 decision as an "Administrator's Interpretation," *Harris*, 720 F.3d at 968, it cannot qualify as an interpretive rule under the Administrative Procedure Act. Because the Department of Labor's new position alters substantive rights under the law and reverses longstanding legal norms, the agency's action cannot be qualified as a mere interpretive rule under § 553(b)(3)(A) and should be subject to the general requirement of notice-and-comment rulemaking procedures.

The purpose of an interpretive rule is to inform the public of the agency's understanding of its own regulations—not to create or alter substantive rights and duties under the laws. The Court has previously explained that interpretive rules are used by agencies to advise the community of the agencies' understanding of statutes and regulations. *Guernsey Mem'l Hosp.*, 514 U.S. at 99. They are not used, however, to alter the substantive legal obligations under the law. That role is reserved to substantive rules. *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 172-73 (2007); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

Thus, where interpretive rules are used only to inform, advise, clarify, or give notice, substantive rules are used to actually change rights and obligations. Rules in the former category are exempted from the notice-and-comment procedure under § 553(b)(3)(A), but rules falling in the latter category must be subject to that process under § 553(a)-(b).

In the present case, the intent of the Department of Labor was to alter legal rights and obligations. In 2006, the Department issued an opinion letter finding that mortgage loan officers qualified for the administrative employee exception to the overtime pay requirements of the Fair Labor Standard Act. *Harris*, 720 F.3d at 968. The purpose of the so-called "interpretative" rule here under review is to reverse that position. *Id.* Without any change to the regulation, the substantive legal rights of employees and obligations of employers have been altered dramatically. The Department has proclaimed that a regulation that meant one thing in 2006 now means precisely the opposite.

The change in the agency's position did not merely advise or inform the public of its interpretation of the administrative exception to the overtime pay requirements. Rather, the agency altered long-standing legal rights and obligations of individuals and businesses who are subject to the Fair Labor Standards Act. This change can only be accomplished by a legislative rule promulgated pursuant to the notice-and-comment procedures mandated by the Administrative Procedure Act.

Though the agency's initial interpretation could arguably qualify as an interpretive rule, the subsequent reversal of that position cannot. The initial 2006 interpretation could be said to clarify rights and obligations that already existed by virtue of the criteria listed in the regulation. Thus, under *Guernsey*, it could potentially qualify as an interpretive rule. Changing the interpretation of those criteria, however, altered individual rights and obligations under the law. Under *Chrysler Corp.*, rules that affect rights and obligations qualify as legislative rules and are subject to notice-and-comment procedures. *Chrysler Corp.*, 441 U.S., at 302.

There is no doubt that an agency is entitled to change its position on the meaning of a statute. Experience should guide the agency to alter its regulations where necessary to implement Congressional policy. Congress has established a process for an agency to do just that. The process is notice-and-comment rulemaking – it is a process that is subject to judicial review and also political accountability in a way that alterations in interpretative rules are not.

CONCLUSION

The Court should require the Department of Labor to use notice-and-comment rulemaking to effectuate the change it seeks. The decision of the court below should be affirmed.

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Respectfully submitted,

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