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.
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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS *ET AL.* AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici Curiae are the National Federation of Independent Business, the American Farm Bureau Federation, the American Petroleum Institute, the National Association of Home Builders, and the Retail Litigation Center, Inc.[1] Each of these organizations, like their

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution.

members throughout the United States, has a significant interest in the integrity of the federal regulatory process—that, in accordance with the Administrative Procedure Act, federal regulations are enacted and modified efficiently, transparently, and with appropriate input from the regulated public. The web of federal regulations continues to grow at a rapid pace, and regulated entities and individuals must invest considerable resources to understand and comply with them. Given the burdens on the public when agencies enact new rules or change their positions on old ones, procedural regularity is a modest request, made not only by *amici* and their members, but commanded by Congress.

1. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. NFIB's membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses.

2. The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. Rep-

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Letters from all parties consenting to the filing of this *amicus* brief are on file with the Clerk's office.

resenting more than 6 million member families in all 50 States and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to give voice to its members and protect their rights.

3. The American Petroleum Institute (API) is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8% of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 20 million Americans.

4. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates in litigation as a party litigant and *amicus curiae* to safeguard the rights and interests of its

members.

5. The Retail Litigation Center, Inc. (RLC) is a public-policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Each of these *amici* is deeply concerned about the likely legal and economic instability that would attend reversal of the judgment below. Regulatory agencies would increasingly label substantive modifications of binding rules as mere "interpretive rules," which would evade the express statutory requirement of allowing public participation via notice-and-comment rulemaking. In turn, regulated entities would face increasing costs, because the regime governing them would be far less stable and the investments necessary to comply with a given regulation could be largely destroyed when an agency flip-flops on its own interpretation.

SUMMARY OF ARGUMENT

The Administrative Procedure Act was designed not to maximize convenience for the federal bureaucracy, but to ensure regulatory rationality and accountability. If agencies can avoid the Act's procedural checks by labeling legislative rules as mere interpretive rules, agencies will be less informed, and their regulations will be costlier and less predictable for individuals and businesses. Yet the Government's brief openly seeks a green light for just this sort of regulatory transformation.

To preclude end-runs around the APA, and as a modest check on agencies' exercise of substantive power, the D.C. Circuit has held that when an agency "significantly revises" a "definitive interpretation" of an unchanged regulation, it effectively "amend[s]" that regulation. *Alaska Prof'l Hunters Ass'n, Inc.* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); see also *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Thus, to comply with the APA, agencies must provide an opportunity for notice and comment before changing the meaning of a regulation.

Pulling one isolated APA provision from its context, the Government contends that the *Paralyzed Veterans* doctrine violates the APA's text. This argument ignores the rest of the APA's text, which creates a framework that limits agency overreach. The spare grant of authority to enact "interpretive rules" without notice and comment must be read in light of this larger context; the Government's reading would transform a minor and innocuous power into the authority to dispense with the core of the APA in many regulatory contexts. Notice and comment must generally precede significant regulatory changes because agencies' legitimacy depends on rationality and accountability. The Government's construction would encourage agencies to define their way around a vital check that promotes those essential aspects of administrative law. This construction sets the APA at war with itself.

The Government's only practical argument is its dislike of notice-and-comment rulemaking, which it regards as a costly procedure that "can present a formidable *in terrorem* barrier for agencies seeking to" change past interpretations of regulations. Pet. 20; see U.S. Br. 25-26. But notice-and-comment rulemaking is designed to reduce the much greater "*in terrorem*" effect on the public of capricious, ill-considered regulatory swings. It

helps ensure that resulting regulations are rational, workable, and lawful, and it facilitates judicial review. If, as the Government suggests, agencies *fear* procedural regularity, then the public and the courts should be deeply concerned. The administrative process takes time, which may seem irritating to regulators who would prefer to impose changes at once and by fiat. But the benefits of procedural regularity in rulemaking greatly outweigh any perceived costs.

Conversely, as examples provided below by *amici* show and as common sense suggests, regulation by "interpretive rule" inherently injects unpredictability into the regulatory process and reduces agencies' accountability. Without the benefit of notice and comment, these regulations are often costlier and less workable than regulations adopted after more careful consideration. Moreover, while an agency can assign a regulation a new meaning at the stroke of a pen, those subject to the regulation cannot always react so quickly. Far from embracing such regulatory whiplash, the APA constrains it, and the D.C. Circuit's judgment should accordingly be affirmed.

ARGUMENT

Amici agree with the substantive legal arguments made by Respondents. Because their members are also subject to substantial federal regulation, *amici* seek to assist the Court by addressing the legal and practical consequences of this case from the perspective of the wider regulated public. The APA was designed to protect the public from opaque, irrational, and unaccountable agency action. Numerous examples demonstrate the value of the APA's procedural protections and the costs the public incurs when agencies cast these requirements aside.

I. *PARALYZED VETERANS* COMPORTS WITH THE PURPOSE AND TEXT OF THE APA

Congress enacted the Administrative Procedure Act to promote procedural regularity as an essential predicate to allowing agencies to wield vast authority over the public. Notice-and-comment rulemaking is central to this purpose, helping ensure rationality and accountability. It alerts those who are being regulated, like *amici* and their members, to proposed changes in regulations and it allows the public to educate agencies on the effects those changes might have on the ground. The APA exempts interpretive rules from this procedural requirement, but the courts—not the agencies—must determine whether a rule is legislative or interpretive. The purpose and text of the APA makes clear that when "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation," *Alaska Hunters*, 177 F.3d at 1034, the latter rule is not a mere interpretive rule, but is instead a legislative rule and accordingly is subject to the APA's notice-and-comment procedure.

A. *Paralyzed Veterans* is a modest rule that furthers the APA's goals of fair regulatory procedures and rational regulations

"The Administrative Procedure Act, enacted in 1946, was designed to promote general fairness and regularity in administrative action." *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R. Co.*, 353 U.S. 436, 442-443 (1957). Congress recognized a "need for a simple and standard plan of administrative procedure" that could "assure administrative fairness in the beginning so that litigation may become unnecessary." H.R. Rep. No. 79-1980, at 8 (1946).

To that end, the Act limits agency discretion through "procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 303 (1979) (quot-

ing *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)). These safeguards are essential because typically, when an agency acts, "important interests are in conflict." *Id.* at 316. "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Ibid.*

Not every agency decision rises to the level of a regulation governing the public, and so not every agency action is subject to notice and comment. The APA provides that "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" do not have to go through this process. 5 U.S.C. § 553(b)(A). Interpretive rules do not bind the public, but merely "advise the public of the agency's construction of the statutes and rules * * * ." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947) (APA Manual).[2]

These lines are not always clear. "Distinguishing between a 'legislative' rule * * * and an interpretive rule," therefore, "is often very difficult * * * ." *Hoctor* v. *U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996); see also *Am. Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"). The D.C. Circuit has sought to add clarity by holding that a purported interpretive rule is actually a legislative rule if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties," or "the rule effectively amends a prior legislative

[2] The APA also provides that agencies can bypass notice and comment when a rule is insignificant or, alternatively, is so significant that it must be implemented immediately. See 5 U.S.C. § 553(b)(B).

rule." *Am. Mining Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). While "considerable smog" still enshrouds the distinction between legislative and interpretive rules, *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90, 93 (D.C. Cir. 1997) (internal quotation omitted), "[i]n light of the obvious importance of [the APA's] policy goals of maximum participation and full information, [courts] have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive." *Am. Hosp. Ass'n*, 834 F.2d at 1044; see also *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (same). In other words, when it is unclear whether an agency action affecting the regulated public is legislative or interpretive, the tie should go to the regulated public.

In *Alaska Hunters*, the D.C. Circuit relied on these principles to hold that when an agency first gives a legislative rule "a definitive interpretation" and later issues a rule that "significantly revises that interpretation," the latter rule effectively "amend[s]" the agency's prior legislative rule, making that action subject to notice and comment. 177 F.3d at 1034. The court, however, has stressed the limited applicability of this doctrine. First, "conditional or qualified statements, including statements that something 'may be' permitted," do not satisfy the definitive-interpretation prong. *MetWest Inc.* v. *Sec'y of Labor*, 560 F.3d 506, 509-510 (D.C. Cir. 2009). Instead, the earlier interpretation must be "express, direct, and uniform * * *." *Ass'n of Am. R.Rs.* v. *Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999). Regarding the second prong, "so long as a new guidance document 'can reasonably be interpreted' as consistent with prior documents, it does not significantly revise a previous authoritative interpretation." *MetWest Inc.*, 560 F.3d at 510 (quoting *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 57-58 (D.C. Cir. 2002)).

Thus, the *Paralyzed Veterans* doctrine applies only in cabined circumstances, not to interpretive rules that play the limited role that would excuse notice-and-comment rulemaking. Indeed, far from the reign of terror that the Government depicts, *Paralyzed Veterans* has been applied by the D.C. Circuit only three times to require notice and comment. See Pet. App. 6a n.4. In those rare circumstances where both factors are met, *Paralyzed Veterans* protects the interests of parties who have relied on an agency's definitive interpretation of a regulation and ensures that agencies receive valuable public input before completely changing a settled course. In so doing, the doctrine advances the purposes of the APA.

B. The APA's text justifies the *Paralyzed Veterans* approach

1. *Courts determine whether an agency rule is legislative or interpretive*

The Government is correct that the APA exempts interpretive rules from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553(b)(A). But the Government elides the central question of what precisely qualifies as an interpretive rule for purposes of that provision. When agencies cloak their actions by characterizing them as interpretive rules, courts need not listlessly accept agencies' own choice of label. The history of the APA and this Court's precedent establish that an agency cannot bypass the APA's procedural requirements by simply declaring its action to be an "interpretive rule."

Congress did not intend for agencies to be able to unilaterally broaden their power by mislabeling their actions. In 1945, the Senate Judiciary Committee made clear that the Act, "[e]xcept in a few respects, * * * is not a measure conferring administrative powers but is one laying down definitions and stating limitations." S. Rep. 79-752, at 31 (1945). Courts have "the duty * * * to pre-

vent 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." *Ibid.*

Thus, the Court should "not classify a rule as interpretive just because the agency says it is. Instead, 'it is the substance of what the [agency] has purported to do and has done which is decisive.'" *Chamber of Commerce* v. *Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) (quoting *Columbia Broad. System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942)); see also *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) ("Since the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation."); *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 101-102 (1995) (analyzing whether a provision in an agency manual was a substantive or interpretive rule).

2. *If a rule significantly amends an agency's existing definitive interpretation of a regulation, it is not an interpretive rule*

The text and structure of the APA weigh against the capacious definition of "interpretive rule" offered by the Government and confirm that "Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones." *Am. Hosp. Ass'n*, 834 F.2d at 1044. Along with interpretive rules, the APA exempts "general statements of policy" and "rules of agency organization, procedure, or practice" from notice and comment. 5 U.S.C. § 553(b)(A). These additional types of rules provide the context for understanding the kind of "interpretive rule" that Congress immunized from notice and comment. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) ("words and people are known by their companions"). They suggest that the designation does not apply when a rule significantly changes a definitive interpretation of a regulation.

First, rules of agency organization, procedure, or practice concern only how an agency structures its internal affairs. These rules do not change how a regulation is construed or implicate any substantial reliance interests. Next, general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." APA Manual at 30 n.3. Again, these rules might announce an agency's regulatory priorities, but they have no effect on *whether* a regulation applies. Likewise, interpretive rules that "advise the public of the agency's construction of the statutes and rules," *ibid.*, will not implicate reliance interests when they only clarify or flesh out a regulation.

But once an agency provides its definitive interpretation, regulated parties are justified in structuring their affairs around that version of the regulation. Indeed, considering the level of deference that courts afford these interpretations, and that agencies demand, private parties ignore them at their own peril. See *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997).[3] A later rule that replaces a previous definitive interpretation with a completely contrary interpretation does not simply clarify the regulation, but instead effectively alters its meaning. See *Alaska Hunters*, 177 F.3d at 1034. As such, "notions of fairness and informed administrative decisionmaking require that [such] agency decisions be made only after

[3] Recent studies have found that when *Auer* deference has been applied, courts overwhelmingly side with agencies. See William Eskridge & Lauren Baer, The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1142 (2008) (finding that the Supreme Court ruled for agencies in 91% of *Auer* cases); Richard Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 515, 519 (2011) (finding that district and circuit courts ruled for agencies in 76% of *Auer* cases) (last visited Oct. 11, 2014).

affording interested persons notice and an opportunity to comment." *Chrysler Corp.*, 441 U.S. at 316.

The Government argues that if an agency action that clarifies a regulation is an interpretive rule, then a later action that rescinds and replaces that rule must also be deemed an interpretive rule. The Government reasons that because the APA defines "rule making" as the "agency process for formulating, amending, or repealing" a rule, 5 U.S.C. § 551(5), the APA's procedural requirements must "apply equally to the process of formulating, amending, or repealing a particular rule, whether interpretive or otherwise." U.S. Br. 31.

But fundamentally different interests are implicated when an agency changes, rather than clarifies, a regulation's meaning. Precedent from the statutory context is illuminating. If a new law merely clarifies a law that preexisted a defendant's alleged violation, courts apply the new law retroactively. *See, e.g.*, *Piamba Cortes* v. *Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that "concerns about retroactive application are not implicated when an amendment * * * is deemed to clarify relevant law rather than effect a substantive change in the law").[4] The Due Process Clause, however, "protects the interests in fair notice and repose that may be compromised by retroactive legislation" if new law substantively changes old law. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). The same principles apply here.[5] When an agency conducts an about-face on a

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[4] See also *Brown* v. *Thompson*, 374 F.3d 253, 261 n.6 (4th Cir. 2004); *ABKCO Music, Inc.* v. *LaVere*, 217 F.3d 684, 691 (9th Cir. 2000) (same); *Liquilux Gas Corp.* v. *Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (same).

[5] This reading of 5 U.S.C. § 553(b) is further supported by the Court's practice of looking with suspicion at an agency interpretation that "conflicts with a prior interpretation * * *." *Christopher* v.

definitive regulatory interpretation, it must provide for notice and comment before it forces the public to likewise change course.

II. Regulation By "Interpretive Rule" Leads To Greater Public Costs And Uncertainty

These principles have real-life consequences for those, like *amici*'s members, who are subject to the power of federal regulatory agencies. Unchecked and irrational agency actions can upend millions of people's day-to-day lives. The following examples illustrate why the *Paralyzed Veterans* doctrine is essential to preventing improper diminution of the transparency, predictability, and accountability of the regulatory process.

A. The EPA's recent interpretive rule regarding agricultural conservation practices demonstrates the need for procedural regularity

One recent example of the potential dangers of overreaching interpretive rules comes in the agricultural context. The Environmental Protection Agency and the Army Corps of Engineers recently issued what they deemed an interpretive rule regarding certain exemptions available under the Clean Water Act. The Act requires any party seeking to discharge dredged or fill material into navigable waters to first obtain a permit—a process that requires notice and an opportunity for public hearings.[6] 33 U.S.C. § 1344(a). Congress amended the

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SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994)).

[6] This is no simple process. In *Rapanos* v. *United States*, a plurality of this Court declared that the Corps "exercises the discretion of an enlightened despot" when "deciding whether to grant or deny a permit" under section 1344(a). 547 U.S. 715, 721 (2006). The plurality noted that "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Ibid.*

Act in 1977 to exempt "normal farming, silviculture, and ranching activities" from this permitting requirement. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(f)(1), 91 Stat. 1566, 1600. The EPA and Army Corps of Engineers accordingly promulgated rules listing broad categories of normal farming activities that would not require permitting. See 40 C.F.R. § 232.3; 33 C.F.R. § 323.4.

On March 25, 2014, the EPA and Army Corps of Engineers issued a self-described "interpretive rule" that purported to "identif[y] additional activities considered exempt from permitting" while leaving exemptions in place for already-exempt activities. EPA & U.S. Dep't of the Army, Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) 1 (2014).[7] The rule first provided that activities named in the statute and regulations and "other activities of essentially the same character" were already exempt under existing regulations. *Id.* at 2. It then declared that "additional" exemptions for 55 specific Natural Resources Conservation Service (NRCS) agricultural conservation practices were warranted because these practices were "of essentially the same character" as the "upland soil and water conservation practices" named in the statute and regulations.[8] *Ibid.* But there was a catch: The 55 identified

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[7] *available at* http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf (last visited Oct. 15, 2014).

[8] The same day the agencies promulgated their interpretive rule, they issued a Memorandum of Understanding that listed the 55 agricultural conservation practices covered by the interpretive rule. See U.S. Dep't of Agric., EPA, & U.S. Dep't of the Army, Memorandum of Understanding Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards (2014), *available at* http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf (last visited Oct. 15, 2014).

practices would have to be performed in accordance with detailed technical standards promulgated by NRCS.[9]

The rule provides that it "does not affect, in any manner, the scope of * * * activities currently exempt from permitting under section 404(f)(1)(A)," *id.* at 1, but this cannot be true because the rule *necessarily* puts new restrictions on exempt activities. By the agencies' own reasoning, the 55 identified practices were already exempt. Why? These "exempt" practices were "of essentially the same character" as the "upland soil and water conservation practices" named in the statute and regulations. *Id.* at 2. What has changed is that now they "must * * * be implemented in conformance with NRCS technical standards." *Id.* at 4.

The rule, unsurprisingly, has generated confusion and costs for farmers. Day-to-day tasks like building fences, digging ditches, or pruning trees have been transformed overnight from simple farming activities into "NRCS Conservation Practices" with detailed practice standards.[10] Farmers who engage in these and similar routine

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[9] The NRCS offers conservation assistance to landowners who request it, but its conservation standards have always been voluntary "best practices," not regulatory requirements. See Natural Resources Conservation Services, Conservation Planning, *available at* http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/cp/ (last visited Oct. 15, 2014).

[10] For example, NRCS standards for building fences require: (1) fencing materials, type and design to be of a high quality and durability; (2) fences shall be designed, located, and installed to meet appropriate local wildlife and land management needs and requirements; (3) when appropriate, natural barriers should be utilized instead of fencing; (4) the fence design and location should consider erosion, flooding potential, and stream crossings; (5) fences across gullies, canyons, or streams may require special bracing, design, or approaches; and (6) regular inspection of fences as part of an ongoing maintenance program, including a schedule for inspections after storms, repair or replacement of loose materials, removal of

practices without a permit now run the risk of an enforcement action and thousands of dollars in fines if they are found out of compliance with NRCS standards. Thus, any farmer who plants a simple field border near navigable waters should be sure, among other things, to "[e]stablish plant species with morphological characteristics that optimize interception and adhesion of airborne particulates" and "produce adequate above- and below-ground biomass for the site" to "increase carbon storage."[11] Future editions of the Farmer's Almanac may need a huge regulatory appendix.

The failure to engage in proper notice-and-comment rulemaking not only imposes these burdens on farmers, but has generated unjustifiable confusion that could have been avoided.[12] Months after the rule was issued, it remained unclear which agency would enforce the new standards. On June 11, 2014, Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, testified to a congressional committee that the NRCS would be responsible for ensuring compliance.[13] The next week, Robert

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trees/limbs, replacement of water gaps, repair of eroded areas, and repair or replacement of markers or other safety and control features. See NRCS Conservation Practice Standard, Fence, Code 382 (2013) *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1144464.pdf (last visited Oct. 15, 2014).

[11] NRCS Conservation Practice Standard, Field Border, Code 386 (2013) *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1241318.pdf (last visited Oct. 15, 2014).

[12] While the agencies did allow the public to comment on this "interpretive rule," they did so only *after* the rule became binding on the public.

[13] Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Hearing Before the Subcomm. on Water Resources & Environment of the H. Comm. on Transportation and Infrastructure, 113th Cong. (2014) (Sec'y Darcy responding to Rep. Hahn) *available at* http://www.regulations.gov/contentStreamer?

Bonnie, who oversees the NRCS, testified to a different congressional committee that "there is no requirement that any landowner seek NRCS's certification for any of these practices,"[14] and "no requirement that there be any inspection that takes place."[15]

In July 2014, EPA Administrator Gina McCarthy admitted that when the EPA and Corps developed their interpretive rule, they did not anticipate a regulatory role for the Agriculture Department.[16] This concerned several affected parties because NRCS, the agency that developed the new conservation standards, is part of the Agriculture Department. McCarthy acknowledged that this was a "legitimate" concern the agencies "didn't anticipate."[17] She stated that the concern was raised in comments the agencies received *after* the interpretive rule went into effect.[18]

Administrator McCarthy's statements confirm the wisdom of the APA's procedural requirements and the *Paralyzed Veterans* doctrine. Before an agency issues a substantive rule, it must give notice and an opportunity to comment. The EPA and Corps' rule would have bene-

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objectId=0900006481794814&disposition=attachment&contentType=pdf (last visited Oct. 15, 2014).

[14] A Review of the Interpretive Rule Regarding the Applicability of Clean Water Act Agricultural Exemptions: Hearing Before the Subcomm. on Conservation, Energy, and Forestry of the H. Comm. on Agric., 113th Cong. 17 (2014), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88485/pdf/CHRG-113hhrg88485.pdf (last visited Oct. 15, 2014).

[15] *Id.* at 28.

[16] Amena H. Saiyid, Bloomberg BNA, "McCarthy Says Agencies Didn't Anticipate Regulatory Role for USDA in Water Act Rule," July 9, 2014, *available at* http://www.bna.com/mccarthy-says-agencies-n17179891948/ (last visited Oct. 15, 2014).

[17] *Ibid.*

[18] *Ibid.*

fited if the agencies had given "the consideration that is the necessary and intended consequence of such procedures," and, had they done so, they "might have decided that a different accommodation was more appropriate." *Chrysler Corp.*, 441 U.S. at 316.

B. Sudden reversals by agencies create significant retroactivity concerns

The *Paralyzed Veterans* doctrine serves a limited but important role by preventing agencies from disguising wholesale changes in policy as mere "clarifications." This Court recently refused to defer to just such a late-breaking "clarification" that would have reversed decades of settled agency action and restructured an entire industry overnight. Farmers in the Ninth Circuit, however, have been less fortunate, and now face retroactive liability due to a similar agency reversal.

1. *The Department of Labor's "interpretive rule" in* Christopher *v.* SmithKline *would have unfairly upset significant reliance interests*

Opportunities for problems with interpretive rules appear to abound in labor law, the subject of this case. This Court recently rejected a Labor Department flip-flop that would have abruptly reversed decades of consistent agency practice and fundamentally altered the relationship between employers and over 90,000 employees. See *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012). The Fair Labor Standards Act (FLSA) imposes minimum wage and maximum hours requirements on employers, see 29 U.S.C. §§ 206-207, but those requirements do not apply to any employee working as an "outside salesman," § 213(a)(1). The issue in *SmithKline* was whether pharmaceutical sales representatives qualified as "outside salesm[e]n." 132 S. Ct. at 2161.

The FLSA did not define "outside salesman," but the Department of Labor defined the term in its regulation

and for decades gave the term a broad interpretation. In guidance provided in 1940 and 2004, the Department stated that the outside-salesman exemption could apply to employees who "in some sense" make sales. See Dep't of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 46 (1940); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (2004). The Department made clear that "[e]xempt status should not depend" on technicalities, such as "whether it is the sales employee or the customer who types the order into a computer system and hits the return button." 69 Fed. Reg. at 22163.

Since the 1950s, pharmaceutical companies have employed pharmaceutical representatives to provide information about their products to physicians. *SmithKline*, 132 S. Ct. at 2163-2164. The representatives encourage the physician to write more prescriptions when appropriate for the products they detail, but the representatives never transfer title to the product. *Id.* at 2163. For decades, pharmaceutical companies classified these employees as exempt outside salesmen. *Id.* at 2168.

The Department never suggested that this practice was unlawful, until 2009. Pharmaceutical representatives had brought class-action suits against their employers on the ground that plaintiffs were non-exempt employees who were owed years of unpaid overtime. *Id.* at 2164. In a 2009 Second Circuit *amicus* brief, the Department for the first time interpreted its regulation to state that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought." Br. for Sec'y of Labor as *Amicus Curiae* at 11, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010) (No. 09–0437). When the case reached this Court, the

Department took the position that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." Br. for United States as *Amicus Curiae* at 12-13, *SmithKline*, 132 S. Ct. 2156. The Department demanded *Auer* deference for its recent interpretive rule.

The Court declined to defer to the Department's interpretation because it contradicted the Department's apparent acceptance of the companies' actions. See *SmithKline*, 132 S. Ct at 2166-2167. The Court emphasized the serious reliance interests implicated by the Department's about-face, noting that "[u]ntil 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA." *Id.* at 2167. The agency's consistently broad interpretations of its regulation and years of inaction communicated the message that the companies' actions were lawful. *Id.* at 2167-2168. Were the Court to give deference to the agency's new interpretation, it would "frustrat[e] the notice and predictability purposes of rulemaking." *Id.* at 2168 (internal quotation omitted). The Court rejected the agency's unpersuasive interpretation and held that pharmaceutical representatives were outside salesmen under the FLSA. *Id.* at 2174.

Thus, like the courts that have followed the *Paralyzed Veterans* doctrine, this Court declined to give effect to a new "interpretive rule" that would have upended past agency interpretations and unfairly damaged parties who relied on those interpretations. A significant revision to a definitive interpretation may generate a unique sort of surprise when an agency offers it for the first time in litigation. But even when the regulatory U-turn occurs before litigation or an enforcement action, individuals and businesses that have invested their time and money in reliance on an agency's interpretation can still face life-

altering losses. Such surprises are still unfair and are not permitted under the APA.

2. *An agency about-face has exposed Nevada farmers to retroactive liability*

The sort of agency ambush that the Court rejected in *SmithKline* was recently blessed by the Ninth Circuit, where the *Paralyzed Veterans* doctrine does not apply. Department of Labor regulations require employers who hire temporary guest workers to reimburse those workers within the first workweek for expenses that are primarily for the benefit of the employer. See 29 C.F.R. §§ 531.3(d)(1), 531.35. For decades, the Department declined to bring enforcement actions against employers who did not reimburse temporary guest workers for the cost of traveling to the United States within the first workweek. A separate regulation instead required the employers to reimburse most of these expenses after 50% of an employee's work was completed. 20 C.F.R. § 655.122(h)(1). In 2008, the Department officially sanctioned this practice when it interpreted its regulation to clarify that such expenses were not primarily for the benefit of the employer. 73 Fed. Reg. 77,110, 77,149-50 (Dec. 18, 2008).

But three months and one election later, the agency reversed course, withdrawing its interpretation in March 2009, 74 Fed. Reg. 13,261 (Mar. 26, 2009), and issuing a contrary interpretation that August. DOL, Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* 1 (2009).[19] By 2011, Peri & Sons Farms, Inc., was a defendant in a class-action suit brought by former employees—many of whom had been hired before 2009—who alleged that Peri violated the FLSA when it failed to grant them travel reimburse-

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[19] *available at* http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm (last visited Oct. 15, 2014).

ments within their first week on the job. *Rivera* v. *Peri & Sons Farms, Inc.*, 805 F. Supp. 2d 1042, 1044 (D. Nev. 2011).

When the case reached the Ninth Circuit, the Department filed an *amicus* brief arguing that Peri was liable for failing to reimburse expenses in accordance with the agency's new interpretation, even for those expenses incurred before March 2009. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365). The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant * * * ." *Id.* at 25. The Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. Under that approach—one hardly confined to this particular legal question—such "clarifications" could become increasingly common after every presidential election, concerns about legal stability and reliance interests notwithstanding.

C. Notice-and-comment rulemaking led OSHA to pass a more rational regulation and prevented the imposition of needless costs

The benefits to all parties of adhering to procedural regularity can be seen by comparing the before and after approach taken by the Occupational Safety and Health Administration (OSHA) when it decided to require employers to pay for their employees' personal protective equipment. After OSHA was rebuffed in its attempt to change its regulation through "interpretive rule," it engaged in notice-and-comment rulemaking to pass its new regulation. That process highlighted why regulations passed in accordance with the APA's requirements are more effective and less costly than regulations that circumvent these protections.

The Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, was enacted to promote safe on-the-job conditions for workers. Under the Act, OSHA promulgated a regulation requiring that wearable "personal protective equipment * * * shall be provided, used, and maintained * * * ." 29 C.F.R. § 1910.132(a). The regulation did not specify whether employers were required to pay for this equipment.

In a 1974 agency adjudication, the Occupational Safety and Health Review Commission determined that "provide" in section 1910.132(a) did not mean "pay for." *Budd Co.*, 1 BNA OSHC 1548 (no. 74-1256, 1974), *aff'd*, 513 F.2d 201 (3d Cir. 1975). For more than a decade, OSHA never stated that the regulation required employers to pay for personal protective equipment. See *Union Tank Car Co.*, 18 BNA OSHC 1067, 1997 WL 658425, at *1-2 (No. 96-0563, 1997). In 1994, however, OSHA issued a memorandum that provided that employers were required to provide and pay for personal protective equipment, *id.* at *2, and a 1995 interpretive letter also stated that requirement, *id.* at *3.

In 1996, OSHA cited Union Tank Car Company for violating section 1910.132 because the company required its employees to purchase their safety shoes and gloves. *Id.* at *1. The company appealed the decision to the Occupational Safety and Health Review Commission, which refused to enforce the "new requirement contained" in the purported interpretive rule issued by OSHA. *Id.* at *3. "The Secretary's new interpretation comes after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*." *Ibid.*

Thus, instead of breaking with its past practice through a unilateral pronouncement, OSHA was forced to engage in notice and comment to amend its legislative rule. OSHA proposed an amended regulation that required employers to pay for all equipment except safety-

toe protective footwear and prescription safety eyewear that employees could safely use when off the job. Employer Payment For Personal Protective Equipment, 64 Fed. Reg. 15402 (proposed Mar. 31, 1999) (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918, 1926). The agency specifically requested input from regulated parties on a dozen issues. *Id.* at 15415-15416. OSHA received comments from numerous stakeholders who expressed concerns and shared insights regarding key provisions of the proposed rule.

OSHA responded to this input. For example, in its final rule, it expressly exempted certain items of clothing that it did not consider to be protective equipment, which was "particularly important because commenters to the rulemaking record identified a number of items that they thought would be subject to the rule and asked the Agency to clarify * * *." 72 Fed. Reg. 64342, 64346 (Nov. 15, 2007). OSHA clarified that while ordinary clothing like long sleeves, cotton gloves, and heavy coats could offer employees protection, such items were not protective equipment that employers had to cover under the statute or regulation. *Id.* at 64346-64347. Further, because "OSHA * * * determined that additional clarity was needed in the regulatory text regarding payment for everyday clothing and ordinary clothing used solely for protection from weather," it expressly exempted those items. *Id.* at 64349.

OSHA's proposed rule required employers to pay when personal protective equipment needed to "be replaced due to normal wear and tear or occasional loss." 64 Fed. Reg. at 15414. In response to comments, OSHA admitted that this language was "vague" and "unhelpful." 72 Fed. Reg. at 64355. It added new language that clarified this important issue. *Ibid.*

Following notice and comment, OSHA also admitted that it had included no provision to address employee-

owned personal protective equipment. *Id.* at 64358 Because commenters raised this issue, OSHA revised the final rule to "clearly set[] forth an employer's obligations with respect to employee-owned" equipment. *Ibid.*

Finally, OSHA recognized that small businesses and parties that had entered into collective bargaining agreements under the old regulation could face additional difficulties adjusting to the new rule. *Id.* at 64368. Accordingly, rather than implement the rule 90 days after finalizing it (much less overnight, as an "interpretive rule"), OSHA gave parties six months to prepare for this major change. The delay sought to "minimize the impact of the rule on existing collective bargaining agreements, and give businesses (including small businesses) needed time to implement the requirements." *Ibid.*

The process worked in the end. Because OSHA was prevented from sidestepping the APA's procedural requirements, it used notice and comment to amend its regulation. As Congress anticipated, the new regulation was better, clearer, and more effective for having gone through that process—something the agency itself acknowledged It also was more legitimate, because it created a record that would permit judicial review, and allowed the regulated public to participate in making that record. Had OSHA been allowed to short-circuit this process—as it initially wanted, and as the Government now wishes to authorize for all agencies—it would have amended its regulation through "interpretation," with the resulting uncertainty imposing significant and unjustifiable costs on employers and employees alike. Such results will be inevitable if the Court grants this power to the Government now.

* * *

Even under current law, agencies have repeatedly tried to slip past the APA's requirements by labeling ma-

jor regulatory changes as interpretive rules. If this Court were to do away with the *Paralyzed Veterans* doctrine, the incentives to regulate via "interpretive rule" would become irresistible in important regulatory fields, and likely in the areas that most justify transparency. Any number of settled regulatory regimes could be overturned instantly based on little more than the preferences of those then in power. The Court should not reopen the loophole closed by *Paralyzed Veterans*.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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