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

BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The National Mining Association ("NMA")[1] is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state and local taxes each year.[2] A core mission of NMA is to work with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. NMA also participates in litigation raising issues of concern to the mining community.

The issue raised in this case—whether an agency can significantly modify its definitive interpretation of a rule without going through notice and comment rulemaking—has important implications for the mining industry. Mining is heavily regulated in numerous ways by a host of federal agencies, which prescribe rules governing issues from where mining may occur; to how mining facilities must be designed, operated and constructed; to how such facilities must be closed and reclaimed at the end of their operating life. Despite their complexity, these rules are

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[1] The National Mining Association states that (i) no counsel for a party authored this brief in whole or in part, and (ii) neither the parties, nor their counsel, nor anyone except the National Mining Association, its members, and its counsel financially contributed to preparing this brief. All parties have consented to the filing of this brief.

[2] National Mining Association, *The Economic Contributions of U.S. Mining (2012)*, at E-1 (2014), *available at* www.nma.org/pdf/economic_contributions.pdf.

frequently beset with vagueness and ambiguity—yet the penalties for less-than-perfect compliance can be substantial. And in disputes over the meaning of an agency regulation, the agency will assert that its own interpretation prevails, and the failure to accede to the agency's interpretation will be offered as evidence of willful violation carrying more severe penalties.

Mining companies therefore are effectively forced to comply with agency interpretations in order to carry out their operations, and they make highly consequential investment, business, and engineering decisions—such as whether and how to expand their operations—based on the rules as the agency has interpreted them. These interpretations can take many forms, including agency statements in preambles discussing the scope of a new rule; guidance documents fleshing out an agency's interpretation of a rule; and letters from authoritative agency personnel addressing the scope of the rule. In any form, these interpretations create significant investment-backed expectations on the part of mining companies and other regulated parties.

When an agency considers changing a settled interpretation through notice and comment, NMA regularly avails itself of the comment process to communicate the effect on its members' investment-backed expectations. But if petitioners prevail in this case, NMA's members will be triply damaged. First, the government will be free to change from one interpretation to another, and even to claim that the new interpretation is just as binding as the old one, despite the significant impact on the reasonable,

investment-backed expectations of regulated parties. Second, the voices of NMA and its members will not even be heard beforehand. Third, by labeling its revisions as changes in "interpretation," the agency may be able to insulate its new "interpretation" from timely judicial review.

For these reasons, NMA, its predecessors, and its members have regularly participated in litigation over agency interpretations—including many of the leading cases cited in the parties' briefs. *See, e.g.*, *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000); *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (intervenor); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993). The question presented here squarely implicates the interests of NMA and its member companies.

SUMMARY OF ARGUMENT

The Labor Department here, like federal agencies more broadly, wants to have it both ways. It wants the power to change what a rule means, without the notice and comment that the APA requires for "amending . . . a rule." 5 U.S.C. § 551(5).

In many cases involving "deference," the agency demands that the Judiciary respect the agency's broad substantive power to make federal law through interpretation: even when the federal courts would interpret an ambiguous federal regulation in one way, the agency asserts, the courts *must* adopt a different interpretation solely *because the agency prefers the latter interpretation*. Regulated parties, who often must comply with the law on pain of massive sanctions, cannot overcome that agency

interpretation: so long as the agency stays within certain fuzzily defined boundaries, the agency's view prevails. Moreover, such views are often insulated from judicial review until the agency pursues the regulated entity for a violation.

Now in this case, the government seeks to shrug off one of the few procedural constraints on its substantive authority to issue reinterpretations. The government seeks to make substantive changes without the modest requirement of notice and comment—even when regulated entities have relied on the previous interpretation in making business decisions and a reversal of that interpretation will upset settled, investment-backed expectations. The agency recognizes that there can be no such notice and comment exemption for substantive rules, so it comes to this Court claiming that its interpretations are not substantive at all—that they are just "interpretative," even though the agency has invoked and will continue to invoke them as effectively binding on the courts and regulated entities.

The issue in this case cannot be resolved simply by looking at what label the agency applies. An agency action is not exempted from notice and comment if it is, in substance, a change in the rule. Petitioners' contrary view, if adopted by this Court, could allow agencies to wreak havoc in a sector as heavily regulated as mining, in which decisions concerning what projects to undertake, and how to develop and operate them, are made based in part on long-standing agency regulatory interpretations.

ARGUMENT

I. Courts must be able to distinguish true interpretive rules from those that are only labeled "interpretive" but are in fact legislative.

One of the bedrock procedural protections of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., is that agencies may not engage in "rule making" without notice and comment. *Id*. § 553(b)–(e). "[R]ule making" includes "amending . . . a rule," and the APA's broad definition of a "rule" includes *any* "agency statement" with "future effect" that is "designed to implement, interpret, or prescribe law or policy." *Id*. § 551(4), (5).

The only pertinent exception to the rulemaking requirement is the exception for purely "interpretative rules." *Id*. § 553(b)(A). That exemption creates an all-too-tempting pathway that agencies often seek to follow: rather than going through the time and expense of legislative rulemaking, agencies are more frequently expressing substantive policy though guidance documents.[3] Courts have readily recognized that some such interpretations are "interpretative" in name only.[4]

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[3] *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 167 (2000).

[4] *See, e.g*. *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 47-49 (D.C. Cir. 2000) (recognizing that EPA's decision to use a guidance document, rather than notice-and-comment rulemaking, to announce that it would no longer apply EPCRA's de minimus exception to waste rock did not prevent it from creating "legal consequences" and "the prospect of hardship" to mining companies); *Envtl. Integrity Project v. EPA*,

The pathway bypassing notice and comment leads to a serious problem. The APA's *procedural constraints* on legislative rulemaking are designed to provide the public—especially the people being regulated—with fair warning of changes to the law, a chance to have input into those changes, and the opportunity to challenge those changes in court if they are arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 704 (legislative rules are subject to judicial review). The requirement to invite and consider public comment is "designed to assure due deliberation," *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), which in turn is essential to "informed administrative decisionmaking." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Public comment helps ensure that agencies have access to a range of viewpoints and expertise before making interpretations that significantly impact industries. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like —Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373 (1992) ("The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis.").

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425 F.3d 992, 997 (D.C. Cir. 2005) (holding that EPA's "flip-flop" interpretation of umbrella monitoring rules under the Clean Air Act "complies with the APA only if preceded by adequate notice and opportunity for public comment"); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (holding that EPA directive that created "dramatic change in the agency's established regulatory regime" required notice and comment).

Notice also often provides regulated entities with time—years, in some cases—to plan for compliance with the final rule. Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 124, 134-37 (1992) (reviewing data showing that major EPA rules took, on average, three years from the time the rule entered the agency's regulatory-development management system and the date the final rule was issued). This delay between notice and agency action "provides strong protection of reliance interests on current interpretations and policies." Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 337 (2011).

Finally, and most fundamentally, public participation through notice and comment can "instill[] a sense of legitimacy" and make the policy changes instituted by interpretive documents more democratic. Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702-03 (2007).

Using guidance documents to change the reach of regulations not only shuts out the public from having input into a change of course contemplated by an agency, it may also permit agencies to skirt centralized review by the Office of Management and Budget and its Office of Information and Regulatory Affairs ("OIRA"). *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (requiring that OIRA review proposed regulations). That review process plays a vital role in rulemaking by ensuring that each significant rule has undergone an independent analysis, "do[es] not conflict with the policies or actions of another agency," and has complied with

the requirements of a careful cost-benefit assessment. *See id.* §§ 6(a)(3)(B)-(C), 6(b), 7, 58 Fed. Reg. at 51741-42; James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues,* 51 DUKE L.J. 851, 878-79 (2001). Moreover, public access to the analyses prepared during this review process, Exec. Order No. 12,866*,* § 6(b)(4)(D), 58 Fed. Reg. at 51743, also increases agency accountability and transparency. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2286–87 (2001). By contrast, the extent to which OIRA reviews guidance documents is "unclear" at best, and even in the relatively rare instances where that review does occur, there is a "significant question . . . whether the use of guidance documents might allow agencies to avoid [the] disciplining requirements," such as cost-benefit analysis, "that would otherwise have applied through the regulatory review process." Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 487, 489 (2014); *see id.* at 485-89.

Labeling a decision as interpretative in order to avoid notice and comment thus leads to agency policymaking that is less informed, less fair, and less democratically legitimate than Congress required in the APA. Given these serious ramifications, courts have correctly recognized that agencies may not insulate a legislative rule change from review by merely labeling it as an interpretative document. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive

legal addition to a rule a mere interpretation."); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986) (holding that an agency cannot escape judicial review under the APA by merely labeling its action as an "informal" guideline). What matters is the substance, not the label.

II. When agencies use interpretive documents to make policy, they must comply with the same rulemaking requirements that apply to legislative rules.

"[A]mending . . . a rule" is itself rulemaking. 5 U.S.C. § 551(5). If a rule contains an express exemption provision, for instance, there can be no doubt that deleting that exemption amounts to rulemaking, and requires notice and comment. Yet agencies regularly seek to bring out exactly the same effect using guidance instead of notice and comment. Under this Court's cases—enthusiastically embraced by the federal government—agency guidance can have real legal effects on the scope and meaning of a regulation, even if the guidance is not formally published in the *Code of Federal Regulations*. And for exactly that reason, regulated parties often have no choice but to rely on the agency's expressed view. Indeed, multimillion-dollar investments may be made in reliance on the agency's expressed view of what the law is.

If the interpretation announced in the guidance document has essentially become part of the rule—through deference by courts, reliance by regulated parties, or both—then it follows that *amending* the guidance document must follow the same procedure as amending the rule. *See Am. Mining Cong.*, 995

F.2d at 1112. But if the Court accepts petitioners' submission, federal agencies will be free to withdraw guidance at will—and then demand that the courts defer to the new interpretation just as they would have deferred to the old—without even a moment's advance notice to the affected parties. If this Court holds that the APA permits that course of action, the inevitable result will be more flip-flops. And because of deep reliance on agency guidance, many such reversals will be even more damaging to the regulated community than the reversal at issue here.

A. Agencies use guidance to shape policy, and under current law, the courts are generally obliged to defer to the agencies' policy judgments.

The government regularly employs guidance documents as "regulations lite": same great legal weight, no cumbersome notice and comment. By treating regulatory interpretations as binding sources of federal law, the government has defeated its own premise in this case—that adopting a different construction of a rule is not an amendment to that rule. Today, to win this case, the government asserts that interpretive rules are not binding. *See* Gov't Br. 30. But the government regularly sings a different tune, demanding that the courts defer to those supposedly non-binding interpretive rules. It has even done so in this very case.

The government has argued, and this Court has substantially agreed, that the issuance of agency guidance interpreting a federal regulation fundamentally transforms the task of a court interpreting that same regulation. Under those cases, once the agency has spoken, the court may no

longer seek the best reading of the regulation, under the ordinary rules of construction. Instead, this Court has held, "the agency's interpretation must be given '*controlling weight* unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (emphasis added); *accord, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("controlling"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Martin v. OSHRC*, 499 U.S. 144, 151 (1991) ("authoritative[]"). In short, the same federal government that today tells the Court that agency interpretations are harmlessly non-binding will tomorrow demand that the courts treat such interpretations *as binding*. And under current doctrine, the courts will generally agree, as long as the agency stays within the "considerable legal leeway" that *Auer* deference extends. *Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *see also, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328, 1330 (D.C. Cir. 1995) (court was required to defer to an agency interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations themselves] could not have fairly informed [regulated parties] of the agency's perspective").

The government has already done as much in this case. Respondent's original challenge included the contention that the Labor Department's 2010 interpretation was substantively invalid under the APA. The government successfully invoked *Auer* deference and urged the district court to dismiss that challenge: "Given that DOL's interpretation of its own regulations is entitled to 'controlling' deference,

this Court should reject [respondent's] argument to the contrary." Gov't Cross-Mot. to Dismiss or for Summ. J., 1:11-cv-73 ECF No. 15, at 36 (D.D.C. filed Mar. 10, 2011); *see also* Resp. Br. 8 (describing government amicus brief demanding "controlling deference" to the Labor Department's "substantive change").

Agency interpretation—and re-interpretation—is an exercise in policymaking. Indeed, that is a substantial part of this Court's rationale for deferring to agency interpretations: that it is the agency's "policymaking prerogative" to decide how its own regulation should apply. *Martin*, 499 U.S. at 151; *see id.* at 153 (agency's "policymaking expertise" justifies deference); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (deferring to the agency because its interpretation "entail[ed] the exercise of judgment grounded in policy concerns"). Recognizing the policy component is appropriate: agencies change their interpretations far too frequently to conceal their policymaking motivations.[5] That is especially true shortly before and after Inauguration Day, when revision of interpretative rules is considered a high priority.[6]

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[5] *See, e.g.*, Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1250 (2013) (regulated industries often experience "wild flip-flops" in an agency's position "during a short period of time").

[6] *See* Seidenfeld, *supra*, at 337 (noting that a change in administration can "prompt a change in the significance placed on costs of compliance or the benefits of a regulatory scheme" which encourages the agency to change interpretations); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889,

When a new administration replaces its predecessor's interpretation with a new, diametrically opposite one—as it did here, *see* Gov't Br. 4-6; Resp. Br. 6-8; Pet. App. 49a-84a—it cannot credibly claim to just be divining what the regulation has *always* meant. That would be revisionism just shy of "Oceania has always been at war with Eastasia."[7]

Given that *courts* must treat the agency interpretations as controlling, it follows that *regulated parties* must do the same. Indeed, failure to comply with federal regulations is often a criminal offense, subject to severe civil penalties, or both. *E.g.,* 33 U.S.C. § 1319(c)-(d) (Clean Water Act); 42 U.S.C. § 6928(d), (g) (Resource Conservation and Recovery Act); *id.* § 7413(b)-(c) (Clean Air Act); *id.* §§ 9603(b), 9609(c) (Comprehensive Environmental Response, Compensation, and Liability Act). The government often asserts that its interpretation provides the regulated community with fair notice of the meaning of a regulation, and failure to comply subjects the entity to enhanced penalties.

Interpretive guidance has a proper function—whether it is carried out in a preamble, agency guidance document, or a letter from an authoritative agency official—when it gives content to an ambiguous regulation, and purports to be the sort of authoritative statement of agency position that can

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953-54 (2008) (noting that agencies engage in much more regulatory activity in the last quarter of a president's term).

[7] *See* George Orwell, NINETEEN EIGHTY-FOUR 30 (Plume 1983) (1949).

receive deference.[8] That type of interpretation should properly be deemed part of the regulation for purposes of assessing compliance with the APA. This is not to say that promulgating the original interpretation necessarily requires notice and comment rulemaking. But once the interpretation has authoritatively fleshed out how the underlying rule shall apply in a particular context, a *change* in that prescribed application is a change in the rule. And a change in a rule requires notice and comment.

B. Detrimental reliance on agency guidance is a persuasive indication that the guidance's interpretation has become part of a legislative rule.

The court of appeals correctly recognized that substantial and justified reliance on an agency interpretation is one way (but not the only way) to show that the agency interpretation is the sort of definitive pronouncement that has, in substance, become part of the rule. *See* Pet. App. 6a, 9a. Regulated businesses do not rely upon—and invest substantial sums of money complying with—mere suggestions. *Id.* at 9a (observing that regulated entities are unlikely to "rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation"). Rather, they act in response to agency pronouncements that have the force of law. Indeed, agency pronouncements may *invite* reliance: an agency may issue guidance specifically to let regulated entities know how they

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[8] Some agency actions—for example, opinions of subordinate officials subject to internal agency review—plainly do not deserve deference and so can properly remain in the "interpretative" category. *See* Resp. Br. 19-20, 32.

should design, construct, and manage their operations.[9]

For that reason, courts applying the same principle as the decision below—that an interpretation may reflect substantive rulemaking, and thus need to be amended through notice and comment—have already recognized that reliance is an important factor for determining whether an interpretation is substantive. *See, e.g.*, *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035–36 (D.C. Cir. 1999) (holding that a well-established interpretation upon which the affected parties had substantial and justifiable reliance required notice and comment before it could be changed); *Ass'n of Am. R.R. v. Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999) (noting likelihood that an interpretation is substantive rather than interpretive when the company "altered their business practices in any significant manner" or "made large capital expenditures based on [the agency's] interpretation").

Using interpretive documents to change the rule of decision applied in court (based on deference), and thus to deprive regulated entities of their justifiable, investment-backed expectations, amounts to the same type of "unfair surprise" this Court has found invalid. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012); *see also Long Island Care at Home, Ltd. v. Coke*, 551

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[9] *See, e.g.,* Letter from Elizabeth Cotsworth, Acting Director, EPA Office of Solid Waste, to Steven Barringer and Michael Giannotto (Dec. 2, 1998), *available at* http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/3aa2ed713ebbab8d852569c900623ed3!OpenDocument.

U.S. 158, 170 (2007) (deferring to the Secretary of Labor's changed position in part because the Secretary had gone through notice and comment, which mitigated any "unfair surprise"). In *Christopher*, this Court recognized the "potential for unfair surprise" when the Labor Department's "announcement of its interpretation [wa]s preceded by a very lengthy period of conspicuous inaction" and "there was no [notice or] opportunity for public comment." *Christopher*, 132 S. Ct. at 2168-69. Expressing concern that the agency's new policy would suddenly expose companies to "potentially massive liability . . . for conduct that occurred well before that interpretation was announced," this Court declined to defer to the agency's interpretation because it "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Id.* at 2167 (internal quotation omitted).

This Court in *Christopher* concluded that serious measures were warranted—denial of deference and rejection of an agency interpretation—when the Secretary of Labor sought to switch from a position of silence to a position of substance. The Court recognized that a regulated party can justifiably rely on agency *in*action. Here the remedy the regulated party seeks is much more modest: the D.C. Circuit recognized that the agency was "free to" adopt its preferred new interpretation, so long as it goes through notice and comment first. Pet. App. 3a. And the government's reversal of position is even more significant from the perspective of regulated parties: the public surely is even more justified in relying on actual agency *guidance* than on mere agency *silence,* as in *Christopher*. The risk of "unfair surprise"

identified in *Christopher* is correspondingly greater where, as here, an agency uses an interpretive document to change a prior legislative rule.

Indeed, this Court has already recognized that justifiable reliance may limit an agency's ability to change interpretations without notice and comment. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court balanced an agency's interest in changing a long-standing interpretation in an adjudicative proceeding against the adverse consequences to reliance interests before ultimately concluding that "the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding." *Id.* at 294-95.

The D.C. Circuit's *Paralyzed Veterans* rule rightly applies the exact same reliance-based logic to the situation currently before the Court. As the court recognized, "significant reliance functions as a rough proxy" for definitive interpretations while "[a]gency pronouncements effectively ignored by regulated entities are unlikely to bear the marks of an authoritative decision." Pet. App. 9a (explaining *Paralyzed Veterans* doctrine). In sum, reliance frequently will serve as the best evidence that an agency's interpretation is a definitive one.

III. Allowing agencies to substantively change definitive interpretations without notice and comment will have significant adverse impacts on mining (and other highly-regulated industries), which rely on an open and fair process in agency decision-making.

A. The mining industry is forced to rely heavily on interpretive documents due to broad and vague statutes, regulations, and rules.

Mining and other regulated industries are often forced to rely on so-called "interpretive" documents. Courts have recognized this predicament:

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Appalachian Power Co., 208 F.3d at 1020.

The Environmental Protection Agency (EPA) regularly issues guidance documents, regulatory preambles, and correspondence construing how the

Resource Conservation and Recovery Act ("RCRA"),[10] the Clean Water Act ("CWA"),[11] and the Emergency Planning and Community Right-to-Know Act ("EPCRA")[12] apply to the mining industry. While ostensibly "interpretive," in practice mining companies must often treat them as more than mere suggestions.

To cite one example, EPA by regulation exempts from RCRA's hazardous-waste provisions all wastes "uniquely associated" with mineral "beneficiation" and 20 specific (but not all) mineral "processing" wastes. 40 C.F.R. § 261.4(b)(7). In designing, constructing and operating their facilities, mining companies need to know whether particular waste streams will, in fact, be categorized as "uniquely associated" with "beneficiation" by EPA (and therefore categorically exempt from RCRA

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[10] *E.g.*, EPA, Office of Solid Waste, *Final Technical Background Document: Identification and Description of Mineral Processing Sectors and Waste Streams* (Apr. 1998) ("1998 Technical Background Document"), *available at* http://www.epa.gov/epawaste/nonhaz/industrial/special/mineral/pdfs/techdocs.htm.

[11] *E.g.*, EPA, Office of Water, *Development Document for Effluent Limitations Guidelines and Standards for the Nonferrous Metals Manufacturing Point Source Category Volume I General Description* (1989), *available at* http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyPDF.cgi/00001D1C.PDF?Dockey=00001D1C.pdf; EPA, Office of Water, *Development Document for Effluent Limitations Guidelines and Standards for the Ore Mining and Dressing Point Source Category* (1982), *available at* http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyPDF.cgi/00003BTW.PDF?Dockey=00003BTW.pdf.

[12] *E.g.*, EPA, Office of Pollution Prevention and Toxics, *EPCRA Section 313 Industry Guidance: Metal Mining Facilities* (Jan. 1999), *available at* http://www2.epa.gov/toxics-release-inventory-tri-program/guidance-metal-mining-facilities.

regulation) or instead as "mineral processing" (and therefore subject to regulation unless specifically listed as one of 20 exempt mineral processing wastes). While EPA's regulations contain a definition for the term "beneficiation," *see id.* § 261.4(b)(7)(i), they do not define "mineral processing," and in fact EPA has recognized that the exact parameters of "beneficiation," and the precise line between "beneficiation" and "mineral processing" are often unclear. *See Methods and Data Sources*, 1998 Technical Background Document, *supra* note 10, at 23 ("Defining which operations are beneficiation and which (if any) are processing [at a particular facility] can be a complex undertaking"); *id.* at 24 ("[Some] mineral industry activities are more difficult to classify unambiguously as beneficiation operations [because] [c]ertain beneficiation activities may bear a close resemblance to certain mineral processing operations.").

To clarify the reach of its regulations, the EPA has over the past three decades provided guidance on these issues to States and regulated entities in the form of statements in preambles, guidance letters, and guidance documents. For instance, in 1998, after notice and comment, the EPA issued a massive 900-page "Technical Background Document" that painstakingly discusses each hardrock mineral industry sector and sets forth the Agency's views on which waste streams in those sectors are "uniquely associated" with "beneficiation" (and therefore exempt from RCRA) and which are "mineral processing" wastes or wastes that are not "uniquely associated" with beneficiation (and therefore not exempt). 1998 Technical Background Document,

supra note 10. Regulated entities have relied on this document's characterization of certain wastes as exempt "beneficiation" wastes when designing and constructing hundred-million-dollar facilities, and in operating those facilities.

Any significant change to the portions of this Technical Background Document on which mining companies have relied, particularly any change under which a waste long deemed an exempt "beneficiation" waste would now suddenly be transformed into a non-exempt "mineral processing" waste, could have significant adverse impacts on the mining industry. Multi-million-dollar facilities might need to be shut down and extensively retrofitted and new facilities built to manage previously exempt wastes as "hazardous waste." Such a change in the status of a regulated waste, and in all of the prior preambles, letters, and guidance documents on which that status is based, would in substance be changing the regulations. That constitutes a rulemaking requiring notice and comment. If the agency proceeded with the amendment following notice and comment, mining companies would then have had an opportunity to express their opinions on any change, including the great reliance interests that they have in the existing system, and the opportunity to obtain judicial review of the changes before they are threatened with penalties for violating them.

This is but one example of the many agency opinions and guidance documents that govern the manner in which mining facilities are planned and exist. Changes would not merely affect how mining

companies could operate going forward. They also could potentially result in mining companies' having to retrofit or even mothball existing facilities that were designed and constructed in reliance on the prior agency guidance and interpretive rules.

B. Because of its heavy reliance on agency guidance, the mining industry would be left especially vulnerable if agencies were allowed to change definitive interpretations without notice and comment.

The mining industry is understandably concerned about the sort of multi-million-dollar agency flip-flop discussed above, especially since retrofitting a single mine to comply with new regulations can cost $150 million. *See, e.g.*, MINING AND THE ENVIRONMENT: INTERNATIONAL PERSPECTIVES ON PUBLIC POLICY 154 (Roderick Eggert ed., 2011) (citing Bureau of Mines, Annual Report 28 (1990)). The industry's experience has made clear just how necessary it is to restrain agencies from surprise reversals.

After making significant investments in reliance on definitive guidance documents, the mining industry has been repeatedly subjected to sudden changes in agency interpretation, with significant consequences. A prime example is the EPA's revision of its interpretation of the Clean Air Act's ("CAA") "routine maintenance, repair, and replacement" ("RMRR") exemption without notice or the opportunity to comment. The Prevention of Significant Deterioration ("PSD") provisions of the CAA require operators of regulated sources in attainment areas to obtain a permit before modifying

a facility. 42 U.S.C. §§ 7475(a)(1), 7479(2)(C). EPA regulations provide that RMRR is not a "modification" and therefore does not require a PSD permit. 40 C.F.R. § 51.166(b)(2)(i), (iii). Consistent with statements in a 1992 preamble, the EPA interpreted this RMRR exemption as applying to activities that were "routine" *according to industry practice*. 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (noting that "the determination of whether the repair or replacement of a particular item of equipment is 'routine' . . . must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category"). This standard was the unquestioned law.[13]

But suddenly the EPA changed its interpretation. In a series of enforcement actions, the EPA argued for—and sought deference to—a conflicting interpretation that the RMRR exemption was based on whether an activity was routinely performed at a *particular facility*. *E.g., Duke Energy,* 278 F. Supp. 2d at 630, 635 (observing that the EPA's interpretation that "the RMRR exemption requires 'a case-by-case determination of whether the activity is routinely performed at an individual unit'" conflicted with previous guidance) (quoting an EPA

[13] *See United States v. Duke Energy Corp*., 278 F. Supp. 2d 619, 637 (M.D.N.C. 2003) ("*Duke Energy*") ("Through the EPA's statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades the EPA . . . established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry.").

pleading).[14] Through a self-serving litigation position, the EPA purported to change the law without notice or opportunity to comment while seeking to penalize those not clairvoyant enough to foresee its reversal.[15] As a result, companies that had undertaken what they thought was routine maintenance in reliance on the prior interpretation faced the prospect that they had accidentally run afoul of the PSD provisions and risked substantial fines and legal costs.

The EPA is not the only agency whose abrupt changes in legal interpretation have threatened the mining industry with the loss of multi-million-dollar investments. Under the General Mining Law of 1872, the holder of a mining claim has a right to locate and utilize "millsites" on public land for ancillary activity related to mining so long as "no [millsite land] * * * shall exceed five acres." 30 U.S.C. § 42(a). For 125 years, this requirement had consistently been interpreted as not imposing any limits on the number of millsites per mining claim. *E.g.*, BLM Manual, Rel. 3-270, 3864-Mill Site Claim Patent Applications (July 9, 1991); *see generally* Patrick Garver & Mark Squillace, *Mining Law*

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[14] *See also United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1290 (N.D. Ala. 2005) (noting that the EPA changed its interpretation of the RMRR); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 844–45 (S.D. Ohio 2003) (granting deference to the EPA's interpretation that "routine" must be judged in reference to the unit and not the industrial category); *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1007–10 (S.D. Ind. 2003) (same).

[15] *See United States v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1311 (N.D. Ala. 2008) (observing that applying the EPA's new interpretation to a modification that occurred while the previous one was in effect "strikes the court as a 'gotcha' test.").

Reform—Administrative Style, 45 ROCKY MTN. L. INST. §§ 14.01-14.07 (1999). Mining companies relied on this interpretation in determining whether to invest hundreds of millions of dollars into planning and designing mining facilities and seeking the Interior Department's approval to operate those facilities.

Despite the deep reliance on the longstanding interpretation, in 1997, the Solicitor of the Interior, John Leshy, sought to reverse it. He issued an opinion declaring that "only one millsite of no more than five acres" may be located with each mining claim. Solicitor's Opinion M-36988, Limitations on Patenting Millsites Under the Mining Law of 1872, at 2 (Nov. 7, 1997). This abrupt change in policy threatened to wipe out substantial investment in existing and prospective hard rock mining operations on the public lands. According to the opinion, many mining companies were now illegally operating on federal land. Unsurprisingly, stock in the mining industry plummeted. *Crown Jewel Mine Decision*: *Hearing Before the S. Subcomm. on Forests & Pub. Land Mgmt. of the Comm. on Energy and Natural Res.,* 106th Cong. 60 (1999) (statement of Danny E. Robertson, Operations Manager, Crown Jewel Mine, Battle Mountain Gold Co.). Most significantly, Solicitor Leshy used his Opinion as the basis for declining final approval of a proposed gold mine – after the mining company had already spent $80 million in development investments in reliance on the prior long-standing interpretation. *Id.* at 4 (statement of Sen. Harry Reid); Marc Humphries, Congressional Research Service Report for Congress, *The Mining Law Millsite Debate* (Sept. 14, 1999).

Fortunately, Congressional action[16] and a change in administration[17] prevented most of these harms from coming to fruition.

NMA's experience has been harsh, but it has not been unique. The foregoing examples highlight the need for courts to be able to scrutinize agency action to prevent regulating authorities from smuggling substantive change under the guise of guidance to the detriment of industries that reasonably relied on prior interpretations.

IV. An agency that wants to reverse itself and dispense with notice and comment must also abandon any claim to deference, justify its departure from the prior interpretation, and refrain from applying the new interpretation retroactively.

At the very least, if a federal agency wants the freedom from notice and comment requirements that applies to interpretative rules, it must treat its new action as truly "interpretative." To reverse the interpretation of guidance that is effectively binding under *Auer*, without notice and comment, it must abjure reliance on *Auer* in defending the new guidance. It must also be required to explain the

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[16] Interior and Related Agencies Appropriations Act for FY2000, Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (barring enforcement of Solicitor Leshy's millsite opinion).

[17] Deputy Solicitor's Opinion M-37010, Mill Site Location and Patenting under the 1872 Mining Law, at 2 (Oct. 7, 2003) (retracting Solicitor Leshy's opinion while noting that it had "represented a departure from the Department's long-standing administrative practice and interpretation that the mill site provision does not limit mill sites to one per mining claim").

change in circumstances that justifies its new interpretation of an unchanged regulation. And it must rigorously refrain from applying the new interpretation to upset settled expectations. In short, the agency must take the bitter with the sweet. Adopting such a construction of "interpretative rule" would at least ensure that, when an interpretation is reversed without notice and comment, the new interpretation is one that the courts and the agency can agree is the best interpretation, not just a permissible one, and that regulated entities are not punished for relying on the old interpretation.

This Court has already laid the groundwork for such a rule. In a number of cases, the Court has suggested that agencies may not claim deference to an interpretation that is contrary to the agency's own "intent at the time of the regulation's promulgation," *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted), shown through objective "indications" such as a regulation's preamble. *See, e.g.*, *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 631-33 (9th Cir. 2005). And more generally, the Court has stated that "considerably less deference" is due "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation." *Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation omitted); *see Christopher*, 132 S. Ct. at 2166-67. In cases of agency reversal through guidance, given the lack of procedural protections, there should be no deference: the new interpretation should stand on its own merits, to the extent it has the power to persuade. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 233, 234-35 (2001) (agency interpretations not undertaken pursuant to notice and comment receive

only *Skidmore* respect, rather than *Chevron* deference).

Furthermore, the new interpretation must truly be an interpretation, not policymaking in disguise. The agency therefore must explain the change as based on something more than new decision-makers. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 37-38, 57 (1983) (holding that an agency failed to present an adequate basis and explanation for rescinding a regulation after a change in administration).

An agency's new interpretation must also comply with due process limits. Courts of appeals have relied on due process to preclude a federal agency from imposing penalties for failure to comply with a regulatory interpretation *announced after the supposed offense*, unless the regulated community had constitutionally adequate notice of what the regulations meant. *See, e.g.*, *Gen. Elec. Co.,* 53 F.3d at 1329-31; *see also Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C. Cir. 1993) (noting that "it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule"). Those cases involved interpretation, not *re*-interpretation. It follows *a fortiori* that a regulated party cannot be subject to penalties for failure to predict an agency's flip-flop: reliance on the agency's own binding, authoritative interpretation *at a minimum* excuses any culpability. No one can constitutionally be punished for failing to read the regulation to mean X when the responsible federal agency maintained at the time that it meant Y.

The new interpretation also should not be allowed to be applied so as to require retrofitting of existing facilities designed and constructed in reliance on the old interpretation. *United States v. AMC Entm't, Inc.,* 549 F.3d 760, 762 (9th Cir. 2008) (reversing injunction requiring "modifications to multiplexes that were designed or built before the government gave fair notice of its [new] interpretation of" regulation imposing line-of-sight requirement). Even if agencies have the power to reinterpret their regulations, they certainly lack the Orwellian power to reinterpret them *retroactively*.

The government cannot both take interpretive power away from the courts *and* take the protections of notice and comment away from the regulated community. If a government seeks to change a binding interpretation that has become part of a rule, it must follow the procedures to amend the rule—or else abandon any claim that its new interpretation will be binding on the courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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