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.

JEROME NICKOLS, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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This case concerns whether a federal agency must use notice-and-comment-rulemaking procedures to correct or significantly revise an interpretive rule that construes a legislative regulation. Unlike legislative rules, interpretive rules "do not have the force and effect of law"; they "advise the public of the agency's construction of the statutes and rules" that do. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (*Guernsey*) (citation omitted). The Administrative Procedure Act (APA) expressly and categorically

exempts the "formulat[ion]," "amend[ment]," and "repeal[]" of interpretive rules from the Act's notice-and-comment rulemaking procedures. 5 U.S.C. 551(5), 553(b)(A); see Gov't Br. 15-17.

The doctrine developed by the D.C. Circuit in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (1997), cert. denied, 523 U.S. 1003 (1998), nevertheless requires an agency to use notice-and-comment rulemaking to issue an interpretive rule that significantly amends or repeals an earlier interpretive rule. Gov't Br. 13-14. As explained in our opening brief, that doctrine is inconsistent with the APA's text (*id.* at 15-17); this Court's precedents (*id.* at 17-20); and Congress's intent to encourage, not obstruct, public access to agency interpretations (*id.* at 20-26). The *Paralyzed Veterans* doctrine also runs afoul of this Court's repeated admonition to follow the "very basic tenet of administrative law" that agencies should be left free to fashion their own procedures and that reviewing courts "stray beyond the judicial province" when they impose rulemaking procedures exceeding the APA's "statutory *minima*," even if the courts conclude that the additional procedures "are 'best' or most likely to further * * * [the] public good." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544-545, 548-549 (1978). See Gov't Br. 27-29.

Respondent attempts to side-step those basic points by asserting (Br. 14, 20-21, 37, 45) two justifications for the *Paralyzed Veterans* doctrine. First, respondent contends (Br. 20) that an agency's second interpretive rule "effectively amend[s]" not only the agency's earlier interpretive rule that it supplants, but also the underlying legislative regulation being interpreted. And because an amendment of a legislative

regulation requires notice-and-comment rulemaking, respondent reasons, so too does the revised interpretive rule. Second, respondent invokes the long-established doctrine of judicial deference to an agency's interpretation of its own legislative regulations—as reflected in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and the more recent decision on which respondent relies, *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Respondent contends (Br. 21, 37, 47) that a definitive agency interpretation of a legislative rule is itself "a legislative rule in interpretive clothing" having "the force of law," because granting "*Auer* deference [to an agency's interpretive rule] * * * results in a rule with the force and effect of law." This result, in respondent's view, requires notice-and-comment rulemaking.

Those contentions are without merit. So too are respondent's attempt (Br. 23-28) to distinguish this Court's precedents, its assertion (Br. 38-45) regarding Congress's "original understanding" of the APA exemption for interpretive rules, and its reliance (Br. 28-34) on policy arguments.

A. An Interpretive Rule Does Not "Effectively Amend" The Legislative Regulation That It Interprets

Respondent first contends (Br. 20) that the *Paralyzed Veterans* doctrine "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself." That is so, respondent insists (Br. 23), because the agency has said that the regulation now means something different than what the agency said it meant before. Respondent's brief, however, fails to articulate cogent *reasons* why those bare assertions are correct. And

they are not. An agency interpretation of regulatory text does not amend—effectively or otherwise—the legislative regulation being interpreted.

1. Respondent concedes (Br. 21-22) that when an agency first formulates an interpretive rule, it is "permitted to interpret an ambiguous regulatory provision," and that its "initial interpretation" will "fall within the [APA's] exception to notice and comment in [5 U.S.C.] 553(b)(A)." But the Act's notice-and-comment "rule making" exception makes clear that the agency's subsequent amendment or repeal of that same rule can be accomplished in the same manner.

Congress expressly exempted all "interpretative rules" from the notice-and-comment requirements for "rule making," 5 U.S.C. 553(b) and (b)(A), and defined "rule making" to mean the agency process for "formulating, amending, or repealing" a rule. 5 U.S.C. 551(5). Thus, as our opening brief explains (at 16-17, 30-31), if the agency can "formulate" an interpretive rule without notice and comment because the rule falls within the APA's "rule making" exception, the agency can later "amend" or "repeal" that same interpretive rule without notice and comment because the relevant exception extends to any "rule making" concerning that rule, not merely its initial "formulation." In fact, the APA more generally "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Respondent has offered no response to that straightforward textual analysis.

2. Respondent seeks to avoid the conclusion the APA's text compels by asserting (Br. 21) that once the agency issues an interpretive rule, the agency's "de-

finitive interpretation becomes part of the [legislative] regulation itself" and that, as a result, "the regulation is no longer ambiguous." Again, respondent offers no support for its assertion.

When an agency issues an interpretive rule construing a legislative regulation, the legislative regulation is itself unchanged—just as a statute remains unchanged when the agency charged with administering the statute issues a rule interpreting it. The agency's statement of its own understanding of a legislative regulation in an interpretive rule does not alter the regulation's text or any other aspect of the regulation. Respondent's one citation for its amendment-by-agency-interpretation theory states that "*[i]f the courts accept* the agency's interpretation, it becomes a part of the statutory law." Br. 21-22 (quoting *National Family Planning & Reprod. Health Ass'n* v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992)) (emphasis added). But that passage shows that an agency's interpretation does not effectively amend the underlying regulation. Indeed, *National Family Planning* emphasized that this Court had previously interpreted the regulation at issue and explained that "the *Supreme Court's* accepted interpretation of the clear meaning of the underlying regulation" cannot later be altered by an agency without amending the terms of the regulation itself. 979 F.3d at 234, 240 (emphasis added). Cf. *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) (explaining that once this Court "has already interpreted [a] statute," "there is no longer any different construction * * * available for adoption by the agency").

Doctrines governing judicial deference to agency interpretations likewise offer respondent no support.

If respondent were correct that an agency's interpretive rule effectively amends the legislative regulation it construes, litigants and the courts would never have to discuss the substantive validity of the agency's interpretation, because they would take as a given that the agency's interpretation had already "amended" the regulation and thus *ipso facto* properly reflects the true meaning of the regulation's text. But that is not how judicial review works. When the meaning of a legislative regulation is relevant to a claim in litigation, the court, applying principles of deference, may decide to follow the agency's interpretation of the regulation. But if it does, it is the *court* (not the agency) that ultimately has determined the regulation's meaning in the case. And like an interpretive rule, such a judicial interpretation construes—not amends—the regulation in question.

3. Respondent suggests (Br. 22) that dictum in *Guernsey* supports the proposition that when an agency attempts to revise its interpretation of a legislative regulation, "it is impermissibly seeking to adopt a new position wholly inconsistent with the regulation." But as our opening brief explains (at 32-34), *Guernsey* simply recognized that an interpretive rule (Section 233 of Medicare's Provider Reimbursement Manual (PRM)) cannot adopt a "position inconsistent with any of the [agency's] existing [legislative] regulations," 514 U.S. at 100, because such an interpretation would be *substantively* invalid. Cf. *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 882 (2011) (agency's interpretation of regulation is "inconsistent with the regulation" when it conflicts with the regulation's unambiguous text) (citation omitted). In other words, if an agency desires to adopt a position precluded by the

text of its own legislative regulation, it must amend that regulation through notice-and-comment rulemaking.

The court of appeals in *Guernsey* had identified what it believed was such a conflict between the agency's legislative regulations—which the court of appeals read as requiring the agency to follow Generally Accepted Accounting Principles (GAAP)—and an agency interpretive rule that "departed from GAAP." 514 U.S. at 91. That court thus concluded that the interpretive rule was invalid and would require a "substantive change in the regulations" through notice-and-comment rulemaking. *Ibid.* Once this Court concluded that the legislative regulations did not require the use of GAAP, *id.* at 92-95, it rejected the court of appeals' view that following the agency's interpretive rule would impermissibly effect "a substantive change in the regulations," *id.* at 100 (citation omitted). Thus, respondent is incorrect in contending (Br. 24) that *Guernsey* supports its view that notice-and-comment rulemaking was needed to issue the 2010 Administrator's Interpretation (AI) in this case because that interpretation "effect[ed] substantive changes" to the agency's earlier *interpretation* of its regulations. *Guernsey* did not involve a changed agency interpretation of regulations; it merely recognized that an agency interpretation of legislative regulations cannot contradict the regulations themselves. Gov't Br. 32-34.

B. The *Paralyzed Veterans* Doctrine Is Not Supported By Respondent's Judicial-Deference Arguments

Respondent's alternative defense of the D.C. Circuit's *Paralyzed Veterans* doctrine fares no better. In respondent's view (Br. 21, 37, 47), a definitive agency

interpretation of a legislative regulation is itself "a legislative rule in interpretive clothing" having "the force of law," because granting "*Auer* deference [to an agency's interpretive rule] * * * results in a rule with the force and effect of law." Respondent has forfeited that basis for challenging the 2010 AI, and that basis in any event lacks merit. It is also inconsistent with the doctrine that respondent purports to defend. The *Paralyzed Veterans* doctrine applies only to a changed agency interpretation. Yet the logic of respondent's deference arguments would apply equally to an agency's initial interpretive rule, which respondent *concedes* does not require notice-and-comment rulemaking.

1. As explained in our certiorari petition, respondent acknowledged in district court that the government was "correct" that the Department of Labor's (Department's) 2010 AI is an interpretive rule, but argued that, under *Paralyzed Veterans*, an "interpretive rule" can be subject to notice-and-comment-rulemaking requirements. 13-1041 Pet. 6; accord Gov't Br. 6-7. Respondent now denies (Br. 46 n.8) that it acknowledged below that the 2010 AI is an "interpretive rule," asserting instead that it merely conceded that the AI was an "interpretation." But because respondent's brief in opposition failed to dispute this point, respondent has waived it in this Court. See *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 306 & n.14 (2010) (discussing Sup. Ct. R. 15.2).

In any event, respondent did forfeit the point below. Respondent maintained in district court that the government was "correct" that the 2010 AI was an interpretive rule, but it asserted that that conclusion

was "of no moment" because, "'[e]ven if [a] pronouncement can be considered an *interpretative rule*, it still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans*." Dist. Ct. Doc. 17, at 7 n.10 (emphasis added; citation omitted; brackets in original). Given that respondent was responding directly to the government's contention that "[t]here is no dispute between the parties that the 2010 AI is an interpretive rule" and that 5 U.S.C. 553(b)(A) "expressly exempts interpretive rules from [the APA's notice-and-comment-rulemaking] requirements," Dist. Ct. Doc. 15, at 14 & n.8, respondent's position can only reasonably be understood as conceding that the 2010 AI is an "interpretive rule." The district court thus recognized that the parties' dispute turned on whether notice-and-comment rulemaking was required to issue that "interpretive rule," and the court "conduct[ed] its analysis from that perspective." 13-1041 Pet. App. 31a n.7. Indeed, this case has always been litigated on that understanding, which is why the Question Presented on which the Court granted certiorari is "[w]hether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an *interpretive rule* that articulates an interpretation of an agency regulation." 13-1041 Pet. I (emphasis added).

2. Respondent's concession reflects the underlying premise of the *Paralyzed Veterans* doctrine: That a rule's status as an "interpretive rule" does not exempt it from notice-and-comment rulemaking (despite the APA's express exception for such rules) if it significantly alters the agency's prior interpretation of a legislative regulation.

Indeed, *Paralyzed Veterans* itself recognized the difference between (1) the argument that an "interpretive rule" significantly altering a prior agency interpretation of a regulation must be issued using notice-and-comment rulemaking, and (2) the distinct argument that the agency's revised interpretation is itself a "substantive" (*i.e.*, legislative) rule that must be promulgated using notice-and-comment rulemaking. The *Paralyzed Veterans* court first articulated the doctrine at issue here, concluding that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." 117 F.3d at 586. The court found that principle inapplicable in the case before it, however, because it "conclude[d]" that the relevant agency "never authoritatively adopted a position contrary to its [current] interpretation." *Id.* at 587. The court then *separately* examined "whether the interpretation is itself a 'substantive rule' having the force of law" and made clear that that distinct issue was an "independent * * * reason" for requiring notice-and-comment rulemaking. *Ibid.* Because that second inquiry required "draw[ing] a line between substantive and interpretative rules," the D.C. Circuit repeatedly cited *American Mining Congress* v. *Mine Safety & Health Administration*, 995 F.2d 1106, 1108-1110 (D.C. Cir. 1993)—its leading decision on the APA's distinction between legislative and interpretive rules—in the course of concluding that the rule at issue was an interpretive rule. *Paralyzed Veterans*, 117 F.3d at 587-588.

Since *Paralyzed Veterans*, the D.C. Circuit has continued to distinguish between those distinct legal

arguments. See, *e.g.*, *Transportation Workers Union* v. *TSA*, 492 F.3d 471, 475 (2007) (explaining that an argument under "[the *Paralyzed Veterans*] line of cases holding that an agency cannot significantly change its position * * * , even between two interpretive rules, without prior notice and comment" is distinct from the argument that the interpretation at issue is not an "'interpretive rule'" at all but rather "a 'legislative rule' or 'substantive rule,' which would require notice and comment"). Accordingly, the D.C. Circuit has repeatedly framed its *Paralyzed Veterans* doctrine as requiring notice-and-comment rulemaking for "interpretive rules," Gov't Br. 13-14 (citing and quoting cases), and, to our knowledge, has never stated that its doctrine rests on the view that a challenged agency interpretation of a legislative regulation is actually a "legislative rule." Respondent thus is incorrect in asserting (Br. 46 n.8) that the legislative/interpretive distinction "was irrelevant" below because *Paralyzed Veterans* was "binding authority." The distinction would have been relevant because it would have been a separate basis for arguing that notice-and-comment rulemaking was required, yet respondent forfeited that argument by failing to raise it below.

3. The D.C. Circuit has never adopted respondent's deference-based justification for the *Paralyzed Veterans* doctrine, and with good reason: The justification is incorrect and inconsistent with the doctrine itself.

a. Legislative rules must be issued using notice-and-comment rulemaking, 5 U.S.C. 553(b) and (c). If properly promulgated, they "have the 'force and effect of law.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295,

302-303 (1979). Interpretive rules, by contrast, "do not require notice and comment" and "do not have the force and effect of law." *Guernsey*, 514 U.S. at 99. Respondent nevertheless argues (Br. 21, 37, 47) that a "definitive [agency] interpretation[] take[s] on the force of law" and thus constitutes a "legislative rule in interpretive clothing" because "*Auer* deference * * * results in a rule with the force and effect of law." Respondent thus apparently argues that an agency's *new* interpretation that significantly revises an earlier agency interpretation of a regulation has the "force of law" (by virtue of *Seminole Rock/Auer* deference) and for that reason qualifies as a legislative rule for which notice-and-comment rulemaking is required. That contention fundamentally misconceives the role of deference principles in judicial adjudication.

The *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), which was influential in the legislative evolution of the APA, explained that courts conducting "judicial review" will "speak the final word on interpretation" of a statute, but that they need not "substitute their own interpretations for those of the administrative agencies" because judicial review can be appropriately "limited to the inquiry whether the administrative construction is a permissible one." *Id.* at 78. The report explained that a reviewing "court may accept [the construction] of the administrative body" if the "statute is reasonably susceptible of more than one interpretation," because "the administrative opinion is to be given weight * * * as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." *Id.* at 90-91; *id.*

at 91 (noting that an agency's "expert knowledge and judgment" can be "particularly significant" in contexts involving "complex matters"). Such "agency[] interpretations," the report observed, "may take the form of 'interpretative rules'" or administrative "rulings upon particular questions" before agencies. *Id.* at 27.

Those concepts of judicial deference have long been reflected in this Court's cases. The leading decisions of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and *Seminole Rock*, 325 U.S. at 414 (1945), for instance, were both decided more than a year before the APA's enactment. *Skidmore* taught that the "rulings, interpretations and opinions" of the Department's Wage and Hour Administrator "constitute a body of experience and informed judgment to which courts" may defer when interpreting the Fair Labor Standards Act (FLSA). See 323 U.S. at 140. *Seminole Rock*, in turn, confirmed that reviewing courts should provide a greater degree of deference to "the administrative construction of [an agency's] regulation." 325 U.S. at 414. The Court therefore followed the relevant agency interpretations of an April 1942 regulation that the agency had issued after promulgating that regulation. *Id.* at 413, 417-418 & n.8 (following May 1942 bulletin and subsequent agency interpretations of the regulation).

Seminole Rock thus teaches that courts should normally provide "substantial deference to an agency's interpretation of its own regulations" and give the agency's interpretation "controlling weight" in the adjudicatory process unless the agency's reading conflicts with "the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson*

Univ. v. *Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). But a court's decision to construe a legislative regulation by deferring to the agency's proffered reading does not mean that the interpretive rule articulating the agency's reading of its regulation has the "force of law." It is the *court* that adjudicates the regulation's meaning, and the court does so by deciding whether to adopt the agency's reading as its own by deferring to the proffered agency interpretation.

In this case, respondent now challenges only the procedure used to adopt the 2010 AI, having abandoned below its challenge to the substantive validity of that interpretation. See Gov't Br. 6-8; Gov't Cert. Reply Br. 2-3. This case therefore does not provide an occasion for this Court to determine the validity of the 2010 AI applying *Seminole Rock/Auer* deference principles—or to address more generally the framework of deference when an agency has amended its earlier interpretation of a legislative regulation. The Court has indicated, but not squarely held, that when an agency's interpretation of such a regulation has significantly changed, that change can in certain circumstances be relevant to the deference that courts will give the agency's views. See, *e.g.*, *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337-1338 (2013) (concluding that agency's "consistent" interpretation with "no indication that [the agency's] current view is a change from prior practice" was "another reason" to accord *Auer* deference); *Thomas Jefferson Univ.*, 512 U.S. at 515 (stating that "an agency's interpretation of a * * * regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view") (citation and internal quotation marks omitted); see

also *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (stating that deference can be unwarranted if there is reason to suspect that agency's interpretation does not reflect its fair and considered judgment, which "might occur when the agency's interpretation conflicts with a prior interpretation") (citing *Thomas Jefferson Univ.*, 512 U.S. at 515). And in *Seminole Rock* itself, when the Court concluded that an agency's interpretation of its own regulations warranted deference, 325 U.S. at 414, it referred to "the consistent administrative interpretation" of the regulations and found no "inconsistent [agency] interpretations," *id.* at 418 & n.9.

The Court has held, however, that an agency's change in interpretation "alone presents no separate ground for disregarding the [agency's] present interpretation" of its regulations, *Kennedy* v. *Plan Adm'r*, 555 U.S. 285, 296 n.7 (2009) (citation omitted), at least when the change does not constitute "unfair surprise," *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170-171 (2007). No "unfair surprise" will result, for example, if the agency's actions give notice that it is reconsidering its interpretive views. See *id.* at 163-164, 170-171 (according *Auer* deference to Department's interpretation of regulations in an Advisory Memorandum, notwithstanding changes in Department's interpretation, where Department initiated notice-and-comment rulemaking to reconsider its regulations but did not produce a final rule). Even without such notice, a changed interpretation need not produce an unfair surprise. In this context, for instance, Congress ensured that an employer will not incur FLSA liability if the employer's actions are "in good faith in conformity with and an in reliance" on a

relevant Department interpretation, even if a subsequent Department interpretation "modifie[s] or rescind[s]" that earlier guidance. 29 U.S.C. 259(a).

An agency must also provide a reasoned explanation for its change in interpretation in order for its revised interpretive rule to survive review for arbitrary and capricious agency action. Cf. *Fox Television Stations*, 556 U.S. at 515. The foregoing principles governing agency interpretation confirm that the availability of judicial deference to agency interpretive rules does not transform such rules into legislative rules that themselves will carry the force and effect of law.

b. Respondent's contention would also prove far too much to justify *Paralyzed Veteran*'s view that only a revised interpretive rule requires notice-and-comment rulemaking. The logical consequence of respondent's theory would seem to be that *all* agency interpretive rules construing agency regulations—including initial interpretations—are "legislative" regulations having the "force of law" and requiring notice-and-comment rulemaking because courts may give them *Seminole Rock/Auer* deference. We are aware of no court ever so holding, and indeed respondent expressly concedes (Br. 21-22) that an agency's "initial interpretation" falls within the APA's interpretive-rule "exception to notice and comment [rulemaking]" even though it may be "entitled to deference." There is no reason why the result should be different with respect to a revised interpretation, even though it too may be entitled to deference.[1]

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[1] To the extent respondent suggests (Br. 21, 48) that an agency's interpretation of a legislative regulation is itself a "legislative rule" because it "bind[s]" individuals and addresses their "legal rights

c. Respondent cites (Br. 8) an amicus brief that the Department filed in district court in another case in which the Department argued that the court should give *Seminole Rock/Auer* deference to the 2010 AI that respondent challenges here. Respondent argues (Br. 14, 37, 47) that the Department's amicus brief demonstrates that the 2010 AI is "a legislative rule" because the brief argued for "controlling" deference and acknowledged that the 2010 AI is a "substantive" change from the Department's 2006 opinion letter. But just as *Seminole Rock/Auer* deference cannot justify the *Paralyzed Veterans* doctrine, neither can an agency's legal arguments for such deference.

And in any event, the question whether notice-and-comment rulemaking was required to issue the 2010

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and obligations," respondent is mistaken. Although a legislative regulation can "affect[] individual rights and obligations," *Chrysler*, 441 U.S. at 302, that characteristic does not fruitfully distinguish interpretive rules from the underlying legislative rules they interpret. See *American Postal Workers Union* v. *USPS*, 707 F.2d 548, 560 (D.C. Cir. 1983) ("the impact of a rule has no bearing on whether it is legislative or interpretative"), cert. denied, 465 U.S. 1100 (1984); see also *Metropolitan Sch. Dist.* v. *Davila*, 969 F.2d 485, 494 (7th Cir. 1992) (same), cert. denied, 507 U.S. 949 (1993); *Chief Prob. Officers* v. *Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997) (White, J., sitting by designation) (rule's "'impact' is not a basis for finding [it] not to be interpretive"). An interpretive rule that construes the scope of a legislative regulation proscribing individual rights and obligations will, of course, express the agency's understanding of the regulation's scope, but it does not itself proscribe rights and obligations because, unlike the underlying legislative regulation, it lacks the force and effect of law. This Court in *Guernsey* thus held the interpretive rule in that case to be a "prototypical" interpretive rule even though applying the interpretation significantly affected the amount of hospitals' reimbursement. See pp. 21-22, *infra*.

AI cannot properly turn on the agency's *subsequent* statements about the deference that should be given the interpretation. Otherwise, notice-and-comment rulemaking would turn on the happenstance of agency statements about an interpretation after its issuance rather than the actual character of the interpretation itself.

4. Respondent relatedly contends (Br. 34-36) that separation-of-powers principles support the *Paralyzed Veterans* doctrine, which, in respondent's view, properly constrains agency authority "by refusing to allow agencies to take a short cut around the APA cornerstone of notice and comment" (Br. 35). But separation-of-powers principles speak to the division of authority *between* different Branches of Government, not the particular procedures that a federal agency should follow in exercising its authority. Moreover, respondent's suggestion that the *Paralyzed Veterans* doctrine prevents agencies from taking a "short cut" begs the question of what rulemaking procedures the APA requires.

C. The *Paralyzed Veterans* Doctrine Is Inconsistent With This Court's Teachings

Respondent contends (Br. 23-28) that the *Paralyzed Veterans* doctrine is "fully consistent" with this Court's decisions. That is incorrect.

As explained in our opening brief (at 27-29), the Court in *Vermont Yankee* held that Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose on agencies in conducting rulemaking" and, for that reason, a reviewing court cannot require more process even if it concludes such additional "procedures are 'best' or most likely to further

* * * [the] public good." 435 U.S. at 524, 549. Respondent appears to suggest (Br. 25) that *Vermont Yankee* prohibits a court from adding "extrinsic procedures" like "full adjudicatory" procedures but not from extending the type of "procedures provided in the APA," namely, notice-and-comment rulemaking. Section 4, however, embodies Congress's judgment that the APA's notice-and-comment procedures should *not* apply to interpretive rules even though they apply to other rules, and *Vermont Yankee* thus teaches that courts cannot force agencies to adopt such procedures that extend beyond the APA's "maximum" requirements. To the extent respondent seeks (*ibid.*) to justify *Paralyzed Veterans* as a prophylactic tool that "merely safeguards" notice-and-comment rulemaking, such an *extension* of the APA's requirements conflicts with *Vermont Yankee*'s conclusion that such policy-based judgments lie beyond the province of a reviewing court.

Respondent appears (Br. 27) to recognize that *Thomas Jefferson University* understood that an agency can alter its interpretation of a regulation without engaging in the type of notice-and-comment rulemaking needed to amend the regulation itself. See Gov't Br. 19. Respondent, however, simply disregards that conclusion as dicta without attempting to reconcile it with *Paralyzed Veterans*.

Finally, respondent suggests (Br. 23-24) that *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), supports its view. But respondent relies on a passage that offers no refuge. *Christensen* explains that the Department's interpretation of a legislative regulation expressed in an opinion letter could be given *Auer* deference "only [if] the *language* of the

regulation is ambiguous" and such deference was unwarranted because the text was clear. 529 U.S. at 588 (emphasis added). The Court noted that adopting a reading inconsistent with that text would erroneously allow "the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation," *ibid.*, but that observation simply reflects that such an agency interpretation is substantively invalid. Like *Guernsey* (see pp. 6-7, *supra*), *Christensen* does not address whether a change in an agency *interpretation* of a regulation must be issued using notice-and-comment-rulemaking procedures.

D. Respondent's Attempted Reformulation Of The Term "Interpretive Rule" Does Not Justify The *Paralyzed Veterans* Doctrine

Respondent argues (Br. 38-42) that, "at the time Congress enacted the [APA]" in 1946, Congress would have understood that the Act's exemption for "interpretive rules" would cover only "(i) non-authoritative interpretations of statutes" and "(ii) interpretations of regulations issued at the same time as the regulations themselves," Br. 38, 42 (citation omitted). That narrowed category of interpretive rules, respondent concludes (Br. 42), would "receive little if any judicial deference"; would not involve changes in interpretation; and, because the APA's notice-and-comment exception would apply only to that narrowed category, would support the *Paralyzed Veterans* doctrine by excluding from the interpretive-rule exemption the rules to which the doctrine applies. Respondent's contentions are incorrect and do not provide a sound basis for departing from the understanding that an "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law,"

5 U.S.C. 551(4), "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Guernsey*, 514 U.S. at 99 (citation omitted).

The Congress that enacted the APA would have understood that courts construing agency regulations would defer to the very type of interpretive rules that the APA exempts from notice and comment rulemaking. This Court's *Seminole Rock* decision, for instance, confirmed—prior to the enactment of the APA—that such deference principles apply on judicial review. See pp. 12-14, *supra*.

Respondent notes that interpretive rules in which an agency expresses its interpretation of substantive (legislative) regulations were recognized in a congressional hearing to be "very definitely substantive," Br. 40 (citation omitted), because such interpretations will affect individuals. Gov't Br. 22. But despite recognizing as much, a central figure in the APA's development (Carl McFarland) testified that the APA's notice-and-comment-rulemaking requirement should be limited to the substantive regulations and not the interpretive rules. See *ibid.* Congress adopted McFarland's recommendation. This Court accordingly concluded in *Guernsey* that an agency interpretive rule (PRM § 233) construing Medicare reimbursement regulations was a "prototypical example of an interpretive rule" that did "not require notice and comment," 514 U.S. at 99, notwithstanding the hospital's contention that it should be deemed a legislative rule requiring notice and comment because it affected the hospital's "reimbursement rights" and had been invoked by the agency to deny Medicare payments.

See Resp. Br. at 46-48, *Guernsey*, *supra* (No. 93-1251).[2]

Congress thus would reasonably have understood that its notice-and-comment exemption for interpretive rules would cover interpretations of regulations to which courts would give *Seminole Rock* deference, even though those interpretations would reflect agencies' understanding of the scope of legislative regulations affecting individuals' rights and obligations. See also p. 16 n.1, *supra* (interpretive rules construing the scope of legislative regulations affecting individual rights and obligations are not themselves legislative). The APA's definition of "rule making," moreover, demonstrates that Congress would have understood that exemption to extend not only to initial agency interpretations but also to subsequent "amendments" or "repeals" of agency interpretations of regulations. See p. 4, *supra*. Respondent thus provides no sound basis for adopting its constrictive view of "interpretive rules" under the APA or its corresponding reconceptualization of the *Paralyzed Veterans* doctrine.

E. Respondent's Policy Contentions Lack Merit

Finally, respondent argues (Br. 28-34) that *Paralyzed Veterans*' imposition of notice-and-comment-rulemaking procedures promotes "[g]ood [g]overn-

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[2] Respondent suggests (Br. 44) that the definition of "regulation" and "rule" used by Executive Order No. 12,866, § 3(d), 3 C.F.R. 641 (1993 comp.), reprinted as amended at 5 U.S.C. 601 note, supports its position. But that definition captures only a subset of the "rule[s]" within the APA's definition of the term, namely, certain rules that "the agency *intends* to have the force and effect of law," *ibid.* (emphasis added), and that therefore could be expected to proceed through notice-and-comment rulemaking. It is these potential rules that are reviewed pursuant to the Order.

ment" by providing advance notice of interpretive changes and protecting reliance interests. Respondent further argues (Br. 29-31, 33) that the government's concerns with the doctrine (Gov't Br. 24-26) are misplaced and that Congress's selection of notice-and-comment-rulemaking as the APA's "default rule" shows that Congress favored those procedural protections over agency flexibility. Respondent is incorrect.

Congress's creation of an express and unqualified exemption from notice-and-comment rulemaking for interpretive rules reflects the balance that Congress struck between agency flexibility and mandatory procedural devices for such rulemaking. The mandatory imposition of additional procedural requirements would by definition lead to greater public involvement in the rulemaking process, but mandatory procedures across all rulemaking contexts come at a significant cost to agency time and resources and the prompt correction of erroneous interpretations. Congress thus made the judgment that the formulation, amendment, and repeal (5 U.S.C. 551(5)) of agency interpretive rules should be categorically exempt from the APA's otherwise mandatory notice-and-comment provisions in order to provide agencies greater flexibility in that specific context and facilitate the public's prompt access to current agency interpretations. See Gov't Br. 22-24. The relevant Committee Reports thus emphasize that the rulemaking exemption for interpretive rules does not reflect a judgment that agencies "should not undertake public procedures in connection with such rule making where useful to them or helpful to the public," but rather Congress's determination that "[a]gencies [be] given discretion" to decide on a case-by-case basis in which particular

contexts they should dispense with or utilize public procedures. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946); accord S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945).

This Court has therefore determined that the APA's rulemaking provision shows that "Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed." *Vermont Yankee*, 435 U.S. at 546. The D.C. Circuit's *Paralyzed Veterans* doctrine disregards that congressional judgment and erroneously "stray[s] beyond the judicial province" by imposing "its own notion of which procedures are 'best' or most likely to further * * * [the] public good," *id.* at 549.[3]

We note that Congress was not unmindful of the potential impact of agency interpretive changes in the FLSA minimum-wage and overtime context. Congress has made clear that an employer who acts "in good faith in conformity with and in reliance on any written administrative * * * interpretation" of the Administrator of the Wage and Hour Division that has been "modified or rescinded" shall *not* be liable for any resulting minimum-wage or overtime liability. 29 U.S.C. 259(a) and (b)(1); see Gov't Br. 4.

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In short, this Court should now reject the *Paralyzed Veterans* doctrine and confirm that Congress meant what it said in the APA: The formulation,

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[3] Respondent asserts (Br. 49 n.10) that four courts of appeals follow *Paralyzed Veterans* and that no circuit has held otherwise. That is incorrect. See 13-1041 Pet. 16-19 & nn.5-6 (two-to-two division of authority).

amendment, and repeal of interpretive rules do not require notice-and-comment rulemaking.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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