No. 13-1041

In the Supreme Court of the United States

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

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Congress has expressly and unqualifiedly exempted the amendment and repeal of "interpretative rules" from the rulemaking requirements of the Administrative Procedure Act (APA). 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). The D.C. Circuit nonetheless holds, in conflict with other courts of appeals, that APA notice-and-comment rulemaking is required to amend an interpretive rule that interprets a substantive regulation whenever the interpretive change significantly alters the agency's previously definitive reading of the regulation. Pet. App. 2a, 5a (following *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998)); see Pet. 16-19. The D.C. Circuit has extended its *Paralyzed Veterans* doctrine to agency adjudicative interpretations, Pet. 15, and even to suits in which no one is shown to have relied on the agency's previous con-

struction. Pet. 8, 10. Review is warranted to correct the D.C. Circuit's fundamentally mistaken approach to this important and recurring question of administrative law.

The D.C. Circuit's holding cannot be squared with the APA's unambiguous text and this Court's precedents. Pet. 11-15. Indeed, respondent Mortgage Bankers Association (MBA) makes no attempt to grapple with that text. Br. in Opp. (Br.) 21-25. MBA instead seeks to avoid review by identifying (Br. 12-13) purported mootness "concerns"; asserting (Br. 13-19) the relevant division of authority to be "largely illusory"; and arguing (Br. 19-21) that the question of administrative law presented here is of "limited" practical importance. None of those contentions withstands scrutiny or warrants a denial of review.

1. MBA's avoidance of the statutory text is telling. See Br. 21-25; cf. Pet. 2-3, 10-14. Rather than attempt to explain whether the D.C. Circuit's position can be reconciled with the APA's text, MBA simply reiterates (Br. 22-23) the D.C. Circuit's view that an agency amendment of an existing interpretive rule that significantly changes the agency's interpretation of a substantive regulation should be "regarded" as amending the substantive regulation. But agency interpretations no more "amend" substantive regulations than judicial interpretations "amend" the statutes being interpreted. And here, Congress has expressly exempted such agency "interpretative rules" from notice-and-comment rulemaking.

MBA argues (Br. 25) that the *Paralyzed Veterans* doctrine "simply prevent[s] capricious agency flip-flopping on established positions." But this suit disproves that contention. MBA has not challenged the

district court's holdings that (a) the government's (fully explained) interpretive change was neither arbitrary nor capricious, and that (b) the underlying substantive regulations make it "clear" that the agency's revised interpretation corrected an error in its earlier reading. Pet. 7-8. MBA's brief in opposition likewise fails to dispute those substantive holdings. Accordingly, as this case comes to this Court, it cleanly presents the important question whether an agency interpretative change that is itself substantively valid and reasonable is nonetheless *procedurally* defective because it was issued without notice-and-comment rulemaking. See Sup. Ct. R. 15.2.

2. MBA's multiple non-merits-based reasons for opposing review are without merit.

a. MBA first asserts (Br. 12-13) that, if this Court grants review, it would "likely" be prevented from resolving the question presented because future agency rulemaking could raise mootness concerns. That speculative assertion is unavailing.

After the government filed its certiorari petition, the President noted that some regulations addressing exemptions from the overtime provisions of the Fair Labor Standards Act (FLSA) had become "outdated." Presidential Memorandum, *Updating and Modernizing Overtime Regulations*, 79 Fed. Reg. 15,211 (Mar. 13, 2014). The President further directed the Secretary of Labor to propose revisions to "modernize and streamline" such regulations. *Ibid.* The White House Press Office noted that although the FLSA "appl[ies] broadly to private-sector workers," workers who perform certain duties are exempt from the Act's overtime protections if they earn more than a salary "threshold" set by regulation. Office of the Press Sec-

retary, White House, *Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr. That threshold, the Press Office explained, has "failed to keep up with inflation" and has thus rendered many workers exempt from the Act's protections. *Ibid.*

Petitioner cites (Br. 12) a newspaper article suggesting that regulatory revisions might require overtime pay for many types of workers, including "loan officers." But if the Secretary were to update and increase the salary threshold in 29 C.F.R. 541.600(a), workers who earn less than the increased threshold would be placed in the category of non-exempt employees protected by the FLSA's overtime requirements, even if their job duties would otherwise render them exempt. See *ibid.* Such a regulatory change would have no effect on this case.

The Department of Labor (Department) has informed this Office that there has been no determination at this early stage of the rulemaking process that the Department will propose a regulatory revision that might reinstate the agency's specific mortgage-loan-officer interpretation that the D.C. Circuit has vacated in this case. But even if future regulations would address that specific mortgage-loan-officer issue, MBA provides no basis for concluding that this Court would be frustrated in its ability to resolve the important APA question that the certiorari petition presents. Because the Department is still identifying potential regulatory changes, it has yet to issue a notice of proposed rulemaking (NPRM) in response to the President's directive. And once such notice is

given, the time necessary to produce a final rule is normally quite long. The last significant proposed revision to the FLSA's overtime regulations prompted over 75,000 comments and led to a final rule that took more than a year after the NPRM to publish. See 69 Fed. Reg. 22,122 (Apr. 20, 2004). MBA identifies no basis to conclude that a final rule revising the FLSA's overtime regulations will likely be completed by July 2015, by which time the Court presumably will have rendered its decisions for the October 2014 Term.

Even if the Secretary of Labor were to adopt specific mortgage-loan-officer regulations before this Court could resolve this case, such regulations would not moot MBA's challenge to the Department's 2010 interpretation of the present overtime regulations. "[M]any of MBA's members" have been sued by mortgage-loan officers seeking overtime compensation under the FLSA. Compl. ¶ 34. Such members have been able to invoke the Portal-to-Portal Act's defense against FLSA liability (29 U.S.C. 259(a)) in light of an earlier 2006 interpretation (Pet. App. 70a-84a) in which the Department concluded that the regulations exempt typical mortgage-loan officers from the Act's overtime requirements. See, *e.g.*, *Swigart* v. *Fifth Third Bank*, 870 F. Supp. 2d 500, 509-512 (S.D. Ohio 2012) (jury trial not yet scheduled). The 2010 interpretation, however, both rejected as flawed and "withdr[ew]" the 2006 interpretation, Pet. App. 67a-69a, thus effectively eliminating the Portal-to-Portal Act defense for compensation earned after that 2010 withdrawal. As a result, the 2010 interpretation will remain important to claims for overtime earned between the date of that interpretation and the effective date of any future regulation governing overtime pay

for mortgage-loan officers. MBA thus would appear to retain a sufficient continuing interest, on behalf of its members, in vacating the 2010 interpretation to sustain an ongoing case or controversy. Accordingly, MBA's mootness concerns are misplaced.

b. MBA argues (Br. 13-19) that this Court's review is unwarranted because the 2-2 division of authority identified by the government is "largely illusory," Br. 15. MBA bases that view on its assertion (*ibid.*) that the courts of appeals whose decisions conflict with the D.C. Circuit's *Paralyzed Veterans* doctrine rendered their decisions in cases that themselves "would have come out the same way had they been decided by the D.C. Circuit," *ibid.* Those contentions are fundamentally mistaken for at least two reasons.

First, *this* case is the vehicle in which the government is seeking review by this Court. The relevant question is whether this case would have been decided the same way by the courts of appeals on the other side of the circuit split. The answer is no because the First and Ninth Circuits have issued decisions with holdings that squarely reject the analysis espoused by the D.C. Circuit. See Pet. 17-18. MBA does not suggest otherwise.

MBA instead focuses (Br. 16, 18) on the alternative grounds for upholding the particular interpretive rules in *Miller* v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), cert. denied, 555 U.S. 1208 (2009), and *Warder* v. *Shalala*, 149 F.3d 73 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999). As MBA notes (Br. 16, 18), the *Miller* and *Warder* courts both indicated that the interpretive rules before them had not altered prior agency interpretations of agency regulations. Even in the D.C. Circuit, such interpretive rules can

be issued without notice-and-comment rulemaking. But as the government's petition explains (Pet. 17-18), both *Miller* and *Warder* further held that, even if the defendant agencies had changed their prior reading of their regulations as the *Miller* and *Warder* plaintiffs had argued, the APA entitled the agencies to change their interpretive rules without notice-and-comment rulemaking. See *Miller*, 536 F.3d at 1033; *Warder*, 149 F.3d at 79, 81.

The fact that *Miller* and *Warder* rest on alternative holdings does not diminish their conflict with the D.C. Circuit's jurisprudence. It is settled that, "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Each independent holding in *Miller* and *Warder* thus "is the judgment of the court, and of equal validity with the other." *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 485 (1924) (citation omitted). Accordingly, the First Circuit's and Ninth Circuit's decisions are in conflict with the D.C. Circuit's *Paralyzed Veterans* doctrine because they hold that the APA entitles an agency to alter its own interpretive rule to change its interpretation of a substantive agency regulation without using notice-and-comment rulemaking.

Second, even if the division in the courts of appeals were not significant in itself, this Court's review would be warranted because the D.C. Circuit has erroneously construed the APA in its *Paralyzed Veterans* doctrine. As the petition explains (Pet. 20), venue lies in the District of Columbia over APA actions brought against most federal agencies. For that reason, plaintiffs like MBA are entitled to bring suit in the District of Columbia, where the *Paralyzed Veterans* doctrine

is binding precedent. Those factors render the D.C. Circuit's precedent particularly significant in this context and, correspondingly, can be expected to impede the development of the issue in other courts of appeals. Review therefore is warranted for this Court to correct the D.C. Circuit's atextual narrowing of the APA and the Act's express statutory exemption for "interpretative rules." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978) (explaining that the Court granted certiorari to review the D.C. Circuit's judgments "because of our concern that [the D.C. Circuit] had seriously misread or misapplied [the APA's] statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

c. Finally, MBA contends (Br. 19-21) that the basic question of administrative law presented here does not warrant review because it is of "limited" practical importance. MBA bases (Br. 19) that view on its contention that the D.C. Circuit has itself invalidated agency interpretive rules under its *Paralyzed Veterans* doctrine only occasionally. Those contentions are incorrect. The certiorari petition presents a fundamental question of administrative law concerning the proper scope of agencies' notice-and-comment obligations in light of Congress's decision to exempt "interpretative rules" from the APA's notice-and-comment requirements. The *Paralyzed Veterans* doctrine has a significant practical adverse impact on federal agencies, and it has been repeatedly applied as binding D.C. Circuit precedent to invalidate agency interpretative rules issued without notice and comment.

The D.C. Circuit's *Paralyzed Veterans* doctrine imposes a formidable *in terrorem* effect on agencies

desiring to inform the public about the agencies' current views that update and correct prior interpretations of agency regulations. Pet. 20-21. The doctrine also creates a significant disincentive to providing authoritative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking to make future revisions. Such deterrence and incentives flow directly from the D.C. Circuit's governing precedents and contravene Congress's intent in enacting the APA's express exemption from notice-and-comment rulemaking for interpretive rules. See Pet. 12-14. Although MBA opines (Br. 20) that it "hardly [is] cause for concern" to provide "an incentive to agencies to engage in notice and comment" before altering interpretive rules, the APA's exemption for interpretative rules itself shows that this, in fact, was a particular cause for concern for Congress. That exemption reflects a seasoned understanding of the very practical burdens on agency resources that notice-and-comment rulemaking can impose (Pet. 21) and Congress's judgment that limited agency time and resources should not be expended on notice-and-comment procedures simply to inform the public of the agency's own current interpretation of its regulations.

The D.C. Circuit's *Paralyzed Veterans* doctrine, moreover, has been regularly applied by courts to hold agency interpretive rules invalid for want of notice-and-comment rulemaking. See, *e.g.*, *Montefiore Med. Ctr.* v. *Leavitt*, 578 F. Supp. 2d 129, 133-134 (D.D.C. 2008); *Cresote Council* v. *Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008); *Ball Mem'l Hosp.* v. *Leavitt*, Civ. No. 04-2254, 2006 WL 2714920, at *11-

*12 (D.D.C. 2006); *Iyengar* v. *Barnhart*, 233 F. Supp. 2d 5, 14-15 (D.D.C. 2002); *Torch Operating Co.* v. *Babbitt*, 172 F. Supp. 2d 113, 124-128 (D.D.C. 2001). And in this case, in addition to again invalidating an interpretive rule under its *Paralyzed Veterans* doctrine, the D.C. Circuit has further expanded that doctrine by holding that the doctrine demands notice-and-comment rulemaking even if no one has ever relied on the agency's previous interpretation. Pet. 8, 10. The D.C. Circuit's imposition of its "own notions of proper [rulemaking] procedures upon agencies" and its erroneous departure from the APA's unambiguous text on this fundamental and recurring issue of administrative law warrants review by the Court. See *Vermont Yankee*, 435 U.S. at 525.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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