Nos. 13-1041 and 13-1052

In The Supreme Court of the United States

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

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondents.

JEROME NICKOLS, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,
Respondent.

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

BRIEF OF *AMICI CURIAE* UTILITY AIR REGULATORY GROUP AND AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The Utility Air Regulatory Group (UARG) is an *ad hoc* unincorporated association of individual electric generating companies and industry groups.[1] The members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. These facilities are extensively regulated under legislative rules promulgated by the U.S. Environmental Protection Agency under the Clean Air Act (CAA). UARG's purpose is to participate on behalf of its members collectively in CAA proceedings, including rulemakings, that affect the interests of electric generators, and in litigation relating to those proceedings.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative – Better Practices, Better Planet 2020. The forest products industry accounts

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

for approximately four percent of the total U.S. manufacturing Gross Domestic Product, manufactures approximately $210 billion in products annually, and employs nearly 900,000 men and women.

The members of UARG and the AF&PA rely on compliance with the regulatory requirements adopted by federal agencies to ensure that their actions and operations do not subject them to liability. The principles of administrative law governing the promulgation of agency rules and their interpretation that were at issue in *Paralyzed Veterans of America* v. *D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied *sub nom., Pollin* v. *Paralyzed Veterans of America*, 523 U.S. 1003 (1998), principles which petitioners would have this Court repudiate, are important to the interests of the members of UARG and the AF&PA.

All parties have consented to the filing of this brief.

INTRODUCTION

The federal petitioners describe the sole issue before this Court as whether, under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (APA or the Act), 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." Brief for the Federal Petitioners (Fed. Br.) at I. The private petitioners are in accord, asking whether agencies subject to the APA are "categorically prohibited from revising their interpretative rules unless such revisions are made

through notice-and-comment rulemaking." Brief for Petitioners (Pet'rs Br.) at i.

The answer to these questions (which petitioners presume must be "no") is beside the point. At issue in this case is (1) whether every agency statement that purports to "interpret" an agency's own legislative rule is an "interpretative rule" within the meaning of 5 U.S.C. § 553 – it is not – and (2) whether an agency statement that would fundamentally change the meaning of a legislative rule to which the agency has given a definitive interpretation is an amendment to the rule subject to notice-and-comment requirements – it is.

Petitioners' questions are predicated on their misreading of the *Paralyzed Veterans* decision and on a misunderstanding of what the APA provides. *Paralyzed Veterans* reflects the straightforward application of basic APA principles, as some members of this Court have previously recognized. See *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 912 (2000) (Stevens, J., dissenting on other grounds) (citing *Paralyzed Veterans* for the proposition that the APA "require[s] ... new rulemaking when an agency substantially modifies its interpretation of a regulation").[2]

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[2] In his separate opinion, which Justices Souter, Thomas, and Ginsburg joined, Justice Stevens also cited for this proposition *National Family Planning & Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992), a decision on which *Paralyzed Veterans* had itself relied. In *National Family Planning*, the D.C. Circuit observed that the APA's "notice and comment guarantees would not be meaningful if an agency

This Court should reject petitioners' invitation to repudiate *Paralyzed Veterans*, which is neither inconsistent with the APA nor a "'departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" Fed. Br. at 12, quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). The Court should instead attest to the correctness of *Paralyzed Veterans* and affirm the judgment of the court of appeals below.

BACKGROUND

The APA defines "rule," in relevant part, to mean "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy …." 5 U.S.C. § 551(4). Under this definition, legislative rules are those rules that "implement … or prescribe law."[3]

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could effectively, constructively amend regulations by means of nonobvious readings without giving the affected parties an opportunity … to affect the content of the regulations at issue …." *Id.* at 240 (internal quotation marks and citation omitted).

[3] The APA uses the term "substantive rule" rather than "legislative rule." The term "substantive rule" has been found to be equivalent to "legislative rule." See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-03 (1979) (equating "substantive" and "legislative-type" rules). This brief uses the term "legislative rule," except where quoting or referencing the APA's usage. Further, while the APA uses the term "interpretative rule," this brief (following the recent practice of this Court) employs the spelling "interpretive," except where quoting or referencing the APA.

Because legislative rules have the force of law, the public is afforded the right to participate in an agency's development of such rules through the notice-and-comment "rule making" procedures of 5 U.S.C. § 553(a)-(c).[4] By contrast, "interpretative rules," which do not "implement ... or prescribe law," are exempt from this notice-and-comment requirement. See *id.* § 553(b) ("Except when notice or hearing is required by [other] statute, this subsection does not apply – ... to interpretative rules ....").

In the determining the meaning of "substantive rule" and "interpretative rule," as those terms are used under the APA, courts have sought guidance from the U.S. Department of Justice's "Attorney General's Manual on the Administrative Procedure Act" (1947) (APA Manual), a document which was issued shortly after the APA was enacted and "whose reasoning [this Court has] ... often found persuasive." See *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004).[5] In a footnote, the APA Man-

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[4] The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

[5] But cf. K.M. Lewis, Note, *Text(Plus-Other-Stuff)ualism: Textualists' Perplexing Use of the Attorney General's Manual on the Administrative Procedure Act*, 1 MICH. J. ENVTL. & ADMIN. L. 287, 295 (2012) (Lewis, *Text(Plus-Other-Stuff)ualism*) (suggesting that the APA Manual may be "neither an authoritative nor accurate guide to the meaning of contested provisions of the APA," insofar as it was "written to advance the interests of the Executive Branch," and is "arguably unreliable when it advances a pro-executive point of view." (internal quotation marks and footnote omitted)).

ual offered what it called "working definitions" of "substantive rules" and "interpretative rules." APA Manual at 30 n.3. The former were described, in relevant part, as "rules ... issued by an agency pursuant to statutory authority and which implement the statute ...." *Id.* "Such rules," the APA Manual added, "have the force and effect of law." *Id.* As for "interpretative rules," the APA Manual described these as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.*

SUMMARY OF ARGUMENT

The D.C. Circuit's *Paralyzed Veterans* decision is not in any way inconsistent with the APA. Fundamental to Congress's purpose in enacting the APA is that the public be given the opportunity (through the notice-and-comment process) to participate in the development of agency pronouncements having the force and effect of law. *Paralyzed Veterans* vindicates this fundamental principle.

Petitioners condemn *Paralyzed Veterans* on the flawed assumption that each and every agency statement that purports to "interpret" a legislative rule necessarily constitutes an "interpretative rule" within the meaning of 5 U.S.C. § 553. On account of this flaw, petitioners devote the entirety of their briefing arguing a proposition – *i.e.*, that the APA does not require that an agency engage in notice-and-comment rulemaking in order to make or revise an "interpretative rule" – that is not in dispute and, ultimately, is not relevant to this case.

As the term has been uniformly construed by courts over the years, an "interpretative rule" under the APA serves merely to "clarify" or "explain" *existing* law. In *Paralyzed Veterans*, the D.C. Circuit recognized that, where an agency has given a definitive interpretation to one of its own legislative rules, a subsequent statement by the agency that would give a new and different meaning to that rule is not an interpretive rule. This subsequent statement would neither clarify nor explain existing law but would *change* existing law. Because such a statement would amend the legislative rule itself, the APA's notice-and-comment requirements apply. The application of *Paralyzed Veterans* in the case below was correct, and this Court should affirm the judgment of the court.

At the same time, this case serves as a reminder to the Court that, as some members have already suggested, the time has come for the Court to consider whether the limitations imposed on judicial review of agency interpretations of legislative rules by *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and its progeny should now be abandoned. *Paralyzed Veterans* is an attempt on the D.C. Circuit's part (and one consistent with basic APA principles) to redress some of the harm that *Seminole Rock* has been inflicting over the course of nearly 70 years. So long as *Seminole Rock* remains the law, then *Paralyzed Veterans* should itself remain the law. If this Court is not inclined to affirm *Paralyzed Veterans*, then it should overrule *Seminole Rock*.

Finally, the Court can affirm the judgment of the court below on the alternative grounds that *no* agency statement that purports to interpret a legislative rule constitutes an "interpretative rule" within the meaning of 5 U.S.C. § 553. Contrary to what courts (including this Court) have long supposed, there is no indication whatsoever that Congress intended "interpretative rule," as that term is employed by the APA, to include anything other than an agency's interpretation of a statutory provision. Against the backdrop of this Court's decision in *Seminole Rock*, the rationale Congress gave for exempting statutory interpretations from the APA's notice-and-comment requirements does not justify an agency's interpretation of a legislative rule being similarly exempt.

ARGUMENT

For decades, courts have twisted themselves into knots trying to come to grips with the distinction the APA draws between legislative rules and interpretive rules. See, *e.g.*, *Cmty. Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (*per curiam*) (noting that the "distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' *Chisholm* v. *FCC,* 538 F.2d 349, 393 (D.C. Cir. [1976]), ... 'fuzzy,' *Pac. Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), ... and, perhaps most picturesquely, 'enshrouded in considerable smog.' *Noel* v. *Chapman*, 508 F.2d 1023, 1030 (2d Cir. [1975])"). Fortunately, the Court is not obliged

to trod across this particular patch of smoggy terrain in order to resolve the case at hand.

Instead, presented here is a distinctly different question, one that has rarely (if ever) been asked: does *every* agency statement that purports to "interpret" a legislative rule constitute an "interpretative rule" within the meaning of 5 U.S.C. § 553? For its part, the D.C. Circuit in *Paralyzed Veterans* identified a discrete category of agency statements that are not interpretive rules but, rather, represent an attempt by the agency to amend a legislative rule without satisfying its notice-and-comment obligations. As is explained in section I below, *Paralyzed Veterans* is consistent with basic APA principles, and the Court should decline the petitioners' invitation to repudiate that decision.

Section II argues that, as an alternative to upholding *Paralyzed Veterans*, the Court should overrule *Seminole Rock*. Some on the Court have recently suggested that the time has come to set aside the *Seminole Rock* doctrine. See *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring), 1339 (Scalia, J., concurring in part and dissenting in part).

Finally, section III explains that this Court can also affirm the decision of the court of appeals below on the alternative grounds that the exemption from notice-and-comment requirements that the APA provides for "interpretative rules" applies only to agency interpretations of *statutory* provisions. An interpretation which an agency may offer of one of its own

legislative rule is not properly understood to be an "interpretative rule" within the meaning of 5 U.S.C. § 553 at all.

I. *Paralyzed Veterans* Is Consistent with the APA.

Key to this case – and dispositive of the petitioners' attempt to have this Court set aside *Paralyzed Veterans* – is that courts have consistently construed "interpretative rules" under the APA to be agency statements which "merely clarify or explain *existing* law or regulations." See, *e.g.*, *Powderly* v. *Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983) (emphasis added); accord *Mendoza* v. *Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (interpretive rules "remind parties of *existing* statutory or regulatory duties, or merely track[] *preexisting* requirements and explain something the statute or regulation *already required*" (internal quotation marks omitted) (emphases added)); *AD Transp. Express, Inc.* v. *United States*, 290 F.3d 761, 768 (6th Cir. 2002) (a "rule is interpretative if it merely explains what the more general terms of the Act and regulations *already provide*" (internal quotation marks omitted) (emphasis added)); cf. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 111 (1995) ("interpretive rules are exempt from the notice and comment provisions" of the APA, but "they *must explain existing law* and *not contradict* what the regulations require." (emphases added)) (O'Connor, J., dissenting).

In other words, an agency statement regarding the meaning of one of its own legislative rules is an

"interpretative rule" within the meaning of the APA – and thus exempt from the notice-and-comment requirements of 5 U.S.C. § 553 – if that statement does no more than set forth the agency's view as to the rule's existing meaning. *Paralyzed Veterans* addressed an altogether different sort of agency statement, one in which the agency sought to make a "fundamental change" to its prior definitive interpretation of the rule at issue. See *Paralyzed Veterans*, 117 F.3d at 586. While the agency was free to change its interpretation of the rule, the D.C. Circuit explained, it could do so "only … as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* "Under the APA," the D.C. Circuit pointed out, "agencies are obliged to engage in notice and comment before formulating regulations," and this requirement "applies as well to 'repeals' or 'amendments.'" *Id.*, quoting 5 U.S.C. § 551(5) (emphases omitted). To "allow an agency" to forego "notice and comment" in this specific circumstance, the D.C. Circuit reasoned, "would undermine those APA requirements." *Id.*

Petitioners' complaint that *Paralyzed Veterans* runs afoul of the APA makes sense only if one assumes that the agency statement the D.C. Circuit was addressing constituted an "interpretative rule" within the meaning of 5 U.S.C. § 553. No such assumption is possible. An agency statement that would work a "fundamental change" to the agency's own prior understanding of the meaning of its legislative rule is not clarifying or explaining the "existing law." The key point is, in such circumstances,

the "existing law" is the legislative rule as previously (and definitively) interpreted by the agency. Any subsequent agency statement that would give the legislative rule a new (and different) meaning is not a clarification or an explanation but, rather, is a change to existing law. This sort of agency statement cannot be considered an "interpretative rule" and, thus, the exemption that 5 U.S.C. § 553 provides for such rules does not apply.

The case at hand provides a stark illustration of this principle. In 2006, the U.S. Department of Labor's Wage and Hour Division issued a formal "Opinion Letter," in which the Division set forth an interpretation of a legislative rule (codified at 29 C.F.R. Part 541) that the Department had adopted to implement the Fair Labor Standards Act's provisions governing exemptions for overtime pay requirements. As relevant here, the effect of the 2006 Opinion Letter was that mortgage loan officers were classified as "exempt" employees. See *Mortgage Bankers Ass'n* v. *Harris*, 720 F.3d 966, 968 (D.C. Cir. 2013). In 2010, the Division issued an "Administrator's Interpretation" (2010 AI) which "explicitly withdrew" the 2006 Opinion Letter and provided a *new* interpretation of 29 C.F.R. Part 541, under which mortgage loan officers would *not* be classified as exempt. *Id.*

A rule cannot have two diametrically opposed meanings at the same time. The 2010 AI was not an "interpretative rule" within the meaning of 5 U.S.C. § 553. It did not serve to "clarify" or "explain" exist-

ing law. At the time the 2010 AI was issued, the "existing law" – *i.e.*, the provisions of 29 C.F.R. Part 541, as interpreted by the 2006 Opinion Letter – was that mortgage loan officers were deemed to be "exempt" employees. Under the 2010 AI, the provisions of 29 C.F.R. Part 541 were construed so that those very same mortgage loan officers were deemed *not* to be "exempt." This was a change to the existing law, not a clarification or explanation of it. Surely, at a minimum, had the 2010 AI been a true clarification or explanation, exempt employees would have remained exempt. Cf. *Nat'l Family Planning*, 979 F.2d at 237 (a "rule which 'effect[s] a change in existing law or policy' is legislative") (citation omitted).

The D.C. Circuit noted that, if the Department of Labor wished to adopt the "later-in-time interpretation, it [was] free to." *Mortgage Bankers Ass'n*, 720 F.3d at 968. Invoking *Paralyzed Veterans*, the court specified, however, that the Department "must ... conduct the required notice and comment rulemaking" in order to accomplish this change. *Id.* In so deciding, the D.C. Circuit imposed no new "judge-made procedural requirement," Fed. Br. at 10, but only pointed out what the APA itself demands. See *Nat'l Family Planning*, 979 F.2d at 235 ("It is a maxim of administrative law that: 'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.' Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396.").

The petitioners perceive an anomaly in *Paralyzed Veterans*, insofar as the decision allows "for an agency's initial formulation of an interpretive rule to occur without notice-and-comment rulemaking," while "holding that notice-and-comment rulemaking is necessary to amend or repeal the same interpretive rule." Fed. Br. at 31. Petitioners contend that, in this regard, *Paralyzed Veterans* "disregards" the APA's "rulemaking symmetry." *Id.*

There is no anomaly, and the APA's "symmetry" is preserved. The *first* time an agency issues a statement giving a definitive interpretation to one of its legislative rules, the agency is engaged in true "interpretive" rulemaking. In such a setting, the agency statement presumably clarifies or explains existing law – *i.e.*, the "existing law" being the legislative rule with ambiguous or indeterminate language for which no interpretation has yet been issued by the agency. Notice-and-comment is not required because this initial interpretation is not changing the meaning of the rule. Thereafter, the "existing law" is comprised of the legislative rule as it has been definitively interpreted. If some subsequent agency statement sets forth a different interpretation, notice-and-comment procedures will be required, as that subsequent statement is not clarifying or explaining what current law provides but, rather, seeks to change the law.

In sum, *Paralyzed Veterans* is consistent with and, indeed, vindicates basic APA principles. The

Court should affirm the correctness of the D.C. Circuit's reasoning.

II. As an Alternative to Upholding *Paralyzed Veterans*, the Court Should Overturn *Seminole Rock*.

In enacting the APA, Congress intended that the public be given notice of, and be provided the opportunity to participate in, the development of agency pronouncements that would have the force and effect of law. *Seminole Rock*, however, operates to give the force of law to agency interpretations that evade the notice-and-comment process that Congress had envisioned. See *Seminole Rock*, 325 U.S. at 414 (in "choosing between various constructions" of a rule's language, the "ultimate criterion is the administrative interpretation, which become of *controlling weight* unless it is plainly erroneous or inconsistent with the regulation.") (emphasis added). Accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

Paralyzed Veterans can thus be viewed as a modest effort on the part of the D.C. Circuit to address this problem in one narrow context, involving as it does only the (rarefied) situation where an agency is found to have given a definitive interpretation to one of its legislative rules, and thereafter seeks to give a wholly different meaning to the rule without undergoing notice-and-comment. An alternative to upholding *Paralyzed Veterans* is for the Court to overturn *Seminole Rock* and hold that if an agency interprets its rules outside the notice-and-comment process, that interpretation is entitled to no more weight than

is due to an agency statutory interpretation made outside the notice-and-comment process or in some other context where Congress did not "contemplate[] administrative action with the effect of law." See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). Such interpretations are entitled only to that "respect" which is "proportional to its 'power to persuade.'" *Id.* at 235, quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

That is, consistent with their constitutional responsibility to "'say what the law is,'" see *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), courts would in the first instance determine what a legislative rule means. In a given case, the agency's interpretation (whether it be the first, second, or even the seventeenth) would not be given "controlling weight," but would, at most, be given only such weight as the "thoroughness evident in [the agency's] consideration," the "validity of its reasoning," its "consistency with earlier and later pronouncements," and "all those factors which give it power to persuade, if lacking power to control," the interpretation might be found to command. See *Skidmore*, 323 U.S. at 140. No longer would agency "interpretive" statements, made without notice-and-comment, be given the force and effect of law, an attribute which Congress only ever intended that "substantive rules" should possess.

In short, underpinning *Paralyzed Veterans* is the understanding that the "purpose of interpretation" is

not to "make the regulatory program work in a fashion that the current leadership of the agency deems effective," but, rather, to "determine the fair meaning of the rule" – *i.e.*, not to "make policy, but to determine what policy *has been made* and promulgated by the agency, to which the public owes obedience." See *Decker*, 133 S. Ct. at 1340 (emphasis added) (Scalia, J., concurring in part and dissenting in part).

At a minimum, the D.C. Circuit's reasoning in *Paralyzed Veterans* should be affirmed by this Court. In the alternative, the Court should overrule *Seminole Rock*. An agency's action in interpreting (and reinterpreting) its own rules cannot be exempt from the APA's notice-and-comment requirements, on the grounds that an "interpretative rule" is without binding effect, while at the same time that interpretation is given "controlling weight." "Enough is enough." *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part).

III. An Agency's Interpretation of Its Own Legislative Rule Is Not An Interpretative Rule Within the Meaning of the APA.

Alternatively, this Court can affirm the judgment below on the grounds that the exemption from the notice-and-comment requirements of 5 U.S.C. § 553 that the APA provides for "interpretative rules" does not apply to an agency statement that purports to interpret the agency's own legislative rule. There is no reason to suppose that Congress, in enacting the APA, intended that "interpretative rules" should in-

clude such agency statements. There are good reasons to conclude that Congress did not so intend.

As was previously noted, while the APA employs the term "interpretative rule," Congress did not include a definition of the term. Courts have for decades, therefore, resorted to the "working definition" of the term set forth in the APA Manual. For its part, the APA Manual cited three specific items of APA legislative history in support of its post-enactment definition.[6] Notably, *none* of the items on which the APA Manual relied for its assertion that "interpretative rules" include statements intended to "advise the public of the agency's construction of the ... rules" which the agency "administers" mentioned agency "rules" at all. Instead, those cited portions of legislative history described "interpretative rules" solely as those agency statements that interpret or construe *statutory* provisions.

For example, the Final Report explained that "[m]ost agencies find it useful from time to time to

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[6] Those three items were (1) page 27 of the FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) (Final Report); (2) page 6 of the *Senate Judiciary Committee Print, June 1945, reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79TH CONG., 1944-1946 (APA LEG. HISTORY) at 18 (1946) (Senate Comparative Print); and (3) page 330 of the *Hearings Before a Subcommittee of the Committee of the Judiciary, United States Senate, Seventy-Seventh Congress First Session on S. 674, S. 675 and S. 918, Part 1, April 2 to 29, 1941, reprinted in* 2 ADMINISTRATIVE PROCEDURE ACT 1935-1946 at 300 (Senate Hearings). See APA Manual at 30 n.3.

issue interpretations of the *statutes under which they operate*," and that "[t]hese interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of *applicable statutory language*." Final Report at 27 (emphases added).[7]

Similarly, the Senate Comparative Print explained that the reason why the proposed legislation excluded "interpretative rules" from the notice-and-comment requirement was that "'interpretative' rules" were *merely interpretations of statutory provisions*" and thus were "subject to plenary judicial review." Senate Comparative Print at 18 (emphasis added).

As for the third item cited by the APA Manual – *i.e.*, a portion of the hearings held before a subcommittee of the Senate Judiciary Committee in 1941 – page 330 of the record of those hearings included the following testimony given by Robert Healy, the then-General Counsel of the Federal Trade Commission:

> We have two classes of rules outside of the merely procedural rules .... They may be roughly divided as interpretive rules and what may be called legislative rules.

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[7] Federal petitioners (selectively) quote this same language from page 27 of the Final Report, placing quotation marks after the word "meaning," omitting the words "of applicable statutory language," and then adding their own words "... of the statutes and legislative rules ...." See Fed. Br. at 21. The private petitioners do something similar. See Pet'rs Br. at 8.

> As I see an *interpretive rule*, it is a rule in which the Commission, in formal fashion, states its opinion as to what the *statute* means.

Senate Hearings at 330 (emphases added). Mr. Healy went on to explain that "[t]hat expression, of course, is not binding on the courts, because the last word as to the meaning of words *in a statute* rests with the court, but it is a guide and a help to those who do business with us …." *Id.* at 331 (emphasis added). Mr. Healy appears to have said nothing about agency interpretations of their own legislative rules as also being a type of "interpretive rule."

In short, if there is anything in the legislative history of the APA to support the APA Manual's position that Congress intended the term "interpretative rule" to include an agency's interpretation of its *own rules*, the APA Manual does not identify it. At the same time, there are further examples from the APA's legislative history that indicate that, by "interpretative rules," Congress had in mind only *statutory* interpretations made by agencies. See, *e.g.*, Proceedings from Congressional Record of March 12, 1946, Administrative Procedure, *reprinted* APA LEG. HISTORY at 313 (1946) (statement of Sen. Pat McCarran, Chairman, S. Judiciary Comm.) (McCarran Statement) (the "pending bill exempts from its procedural requirements all interpretative … rules, because under present law interpretative rules, *being merely adaptations of interpretations of statutes*, are

subject to a more ample degree of judicial review ...." (emphasis added)).

On its face, the plain language of the APA does not itself communicate an intent on Congress's part that an "interpretative rule" should be understood to include an agency's interpretation of its own legislative rules. As was noted, the APA defines "rule," in relevant part, to mean "an agency statement ... designed to ... interpret ... law or policy." 5 U.S.C. § 551(4). While this language undoubtedly embraces an agency's interpretation of a congressionally-enacted statutory provision, it is less obvious that Congress in 1946 intended that the words "to ... interpret ... *law*" were also to include an agency's interpretation of its own legislative rules – *i.e.*, agency-promulgated provisions that may at best be described as having the "force and effect of law." Cf. APA Manual at 30 n.3; see also *United States* v. *Mersky*, 361 U.S. 431, 437 (1960) ("An administrative regulation, of course, is not a 'statute,'" and "[w]hile in practical effect regulations may be called 'little laws,' they are at most but offspring of statutes." (footnote omitted)).

In any event, regardless whether the Attorney General in 1947 had any solid basis for construing "interpretative rule," as that term in used in 5 U.S.C. § 553, to include "rules or statements issued by agency to advise the public of the agency's construction of the ... rules which it administers," APA Manual at 30 n.3, it would appear that courts – including this

Court[8] – have presumed such to be the case. See, *e.g.*, *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980); *Warder* v. *Shalala*, 149 F.3d 73, 79 (1st Cir. 1998); *White* v. *Shalala*, 7 F.3d 296, 303 (2d Cir. 1993); *Bailey* v. *Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989); *Allen* v. *Bergland*, 661 F.2d 1001, 1007 (4th Cir. 1981); *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 700 (5th Cir. 1979); *Dismas Charities, Inc.* v. *U.S. Dep't of Justice*, 401 F.3d 666, 679 (6th Cir. 2005); *Ala. Tissue Ctr. of the Univ. of Ala. Health Serv. Found., P.C.* v. *Sullivan*, 975 F.2d 373, 377 (7th Cir. 1992); *McKenzie* v. *Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986); *Gunderson* v. *Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001); *Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999); *Warshauer* v. *Solis*, 577 F.3d 1330, 1338 (11th Cir. 2009). The petitioners presume so as well. It may not be a sound presumption.

The reasons Congress gave for allowing agencies to forego notice-and-comment procedures in the making of "interpretative rules" pertained only to an agency interpretation of a *statutory* provision. The 1941 Final Report, for instance, explained that "interpretative rules" that set forth agency "interpretations of the statutes under which they operate" were "ordinarily of an advisory character" only and were

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[8] In *Guernsey Memorial Hosp.*, 514 U.S. at 99, this Court cited without discussion its earlier decision in *Chrysler Corp.*, 441 U.S. at 302 n.31, in which the Court had quoted (again, without discussion) the APA Manual's "working definition" of "interpretative rules."

"*not binding* upon those affected." Final Report at 27 (emphasis added). This was so because "if there is disagreement with the agency's view, the question may be presented for determination by a court." *Id.* While the "agency's interpretations … customarily … are accepted as determinative by the public at large," the Final Report added, "if they are challenged in judicial proceedings," the reviewing court "will be influenced though not concluded by the administrative opinion." *Id.*

The 1945 Senate Comparative Print made a similar observation. Public participation (through notice-and-comment) in the making of agency interpretive rules was deemed "unnecessary," insofar as such rules, being "merely interpretations of statutory provisions," would be "subject to *plenary judicial review*." Senate Comparative Print at 18 (emphasis added).

In proceedings before the Senate in March 1946, one of the sponsors of the legislation that became the APA explained that, under the pending bill, notice-and-comment was not required for "interpretative rules," in that such agency statements, "being merely adaptations of interpretations of statutes," were "subject to a *more ample degree of judicial review*." McCarran Statement at 313 (emphasis added). This conforms to the testimony given before a subcommittee of the Senate Judiciary Committee some years earlier, in which the witness explained that, when his agency "in formal fashion, states its opinion as to what the statute means," that opinion "of course, is

not binding on the courts, because the last word as to the meaning of words in a statute *rests with the court*." Senate Hearings at 330-31 (emphasis added).[9]

In the case of an agency's interpretation of one of its own legislative rules, Congress's rationale for why "interpretative rules" should be exempt from notice-and-comment under 5 U.S.C. § 553 does not apply. This Court's decision in *Seminole Rock* operates to ensure that an agency's interpretation of one of its own legislative rules is *not* "subject to plenary judi-

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[9] Developments in this Court since enactment of the APA have not unsettled congressional expectations in this regard. In *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984), the Court held that statutory ambiguity represented an implicit delegation by Congress to the agency of authority to "elucidate a specific provision of the statute by regulation." In such a circumstance, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation" made by the agency. *Id.* at 844. Thereafter, in *Mead Corp.*, 533 U.S. at 226-27, the Court clarified that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference" only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and that the "agency interpretation claiming deference was promulgated in the exercise of that authority." The "overwhelming number of our cases applying *Chevron* deference," the Court observed, "have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230. A statutory interpretation that is not the product of the agency's exercise of such delegated authority, the Court held, is entitled only to so-called "*Skidmore* deference." *Id.* at 234-38. See *Skidmore* 323 U.S. at 140 (the "power to persuade" but not the "power to control").

cial review" and *is*, for all practical purposes, "binding on the courts." *Seminole Rock*, 325 U.S. at 414 (the "administrative interpretation … becomes of *controlling weight* unless it is plainly erroneous or inconsistent with the regulation.") (emphasis added).

Under *Seminole Rock*, a court *must* give "controlling weight" to an agency's interpretation of its own legislative rule except in the rarest of circumstances.[10] Under the *Seminole Rock* regime, there is little if any meaningful distinction between a legislative rule and an agency's interpretation of the rule: as to what the rule means, how it applies to regulated en-

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[10] Such circumstances involve situations where the interpretation itself is found to be categorically unlawful. This includes (1) where "an alternative reading is *compelled* by the regulation's plain language," see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (emphasis added; internal quotation marks omitted); and (2) the agency's interpretation, while not inconsistent with the regulatory language, would (if applied) have the effect of rendering the rule inconsistent with the statute pursuant to which the rule was promulgated. See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (an agency interpretation "must be given controlling weight" per *Seminole Rock* "provided ... [the] interpretation … does not violate the Constitution or a federal statute") (internal quotation marks omitted). More recently, this Court has indicated that an agency interpretation may not be given "controlling weight" where "potentially massive liability" would result on account of applying the agency's interpretation to conduct that occurred prior to the interpretation having been announced, resulting in "'unfair surprise'" and raising Due Process concerns. See *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

tities, and how a reviewing court should read the rule, what the agency says, goes.

That being the case, if the APA requires that notice-and-comment procedures be followed in the development of the rule, there would seem be no good reason why the agency's formulation of an "interpretation" of the rule should be excused from those same procedures. As was noted above, there is nothing on the face of the APA or its legislative history to indicate that, in exempting "interpretative rules" from the notice-and-comment requirement of 5 U.S.C. § 553, Congress had anything in mind other than agency interpretations of statutory provisions, interpretations which present no equivalent concerns.[11]

Regarding this, federal petitioners cite portions of an exchange between Carl McFarland, the then-chairman of the American Bar Association's Committee on Administrative Procedure, and Chairman of the House Judiciary Committee during a hearing on the APA, in which Mr. McFarland "made clear" his view that the "proposed statutory notice-and-comment procedure for 'the issuance of regulations ... should be limited to substantive regulations.'" Fed. Br. at 21-22, quoting *Administrative Procedure:*

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[11] See *supra* note 9 (discussing *Chevron* and *Mead*). Cf. Final Report at 27 (in the case of an interpretative rule setting forth an agency's interpretation of a statutory provision – which the agency could adopt without notice-and-comment – and that interpretative rule is "challenged in judicial proceedings," the reviewing court "will be influenced though not concluded by the administrative opinion").

Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. at 30 (1945) *reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT 1935-1946 LEGISLATIVE HISTORY at 30 (1946) (House Hearings). What federal petitioners leave out this exchange provides more insight than the portions they include:

> MR. MCFARLAND. * * * * Incidentally, no proceeding ought to be required with respect to ... interpretative regulations ....
>
> THE CHAIRMAN. Mr. McFarland, let me interrupt you. *The interpretative regulations of substantive regulations become very definitely substantive.*
>
> MR. MCFARLAND. The interpretative?
>
> THE CHAIRMAN. The interpretative regulations of substantive regulations, *because the interpretation is what affects these people.*
>
> MR. MCFARLAND. That is right.

House Hearings at 30 (emphases added). Just so. With regard to agency interpretations of legislative rules, where subsequent judicial review is governed by *Seminole Rock*, the distinction between the "interpretation" and the "rule" essentially evaporates. The Committee Chairman was remarkably prescient: *Seminole Rock* had been handed down just two weeks before.

This Court "presume[s] that the power authoritatively to interpret its own regulations is a component

of [an] agency's delegated lawmaking powers." See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). If, in exercising its "delegated lawmaking powers" in formulating and promulgating a legislative rule, an agency must adhere to the APA's notice-and-comment requirements, why should the agency, where it seeks to "authoritatively … interpret" that rule, be excused from meeting those same requirements?

This case provides the Court an opportunity to answer that question. It should instruct that, so long as *Seminole Rock* remains in place and, as a consequence, an agency's interpretation of its own rules is to be afforded "controlling weight," the making of such interpretations, like the making of legislative rules themselves, is subject to the notice-and-comment requirements of 5 U.S.C. § 553. Contrary to what (post-APA enactment) the APA Manual asserted,[12] and contrary to what has long been supposed, an "interpretative rule," as the APA employs the term, does not include an agency's interpretation of its own legislative rules. The Court can affirm the judgment below on this alternative basis.

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[12] Cf. Lewis, *Text(Plus-Other-Stuff)ualism* at 296 (questioning whether the APA Manual might be seen as a "post hoc attempt by the Executive Branch to interpret the APA in a manner beneficial to its interests").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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