Nos. 13-1041, 13-1052

IN THE

Supreme Court of the United States

THOMAS E. PEREZ, Secretary of Labor, *et al.*,
Petitioners,
v.
MORTGAGE BANKERS ASSOCIATION, *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 WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: October 16, 2014

QUESTION PRESENTED

In 2010, the U.S. Department of Labor issued an Administrator's Interpretation that reversed the department's previous position and held that mortgage loan officers are not "administrative" employees exempt from the overtime-pay requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The court of appeals vacated the 2010 Administrator's Interpretation, concluding that it was subject to, and had not been issued in accordance with, the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. The question presented is:

Whether the 2010 Administrator's Interpretation was an "interpretive" rule within the meaning of § 553(b) and thus exempt from § 553's notice-and-comment requirements.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. PETITIONERS MISCHARACTERIZE *PARALYZED VETERANS*; IT DOES NOT SEEK TO IMPOSE DUTIES ON AGENCIES THAT ARE NOT SET FORTH IN THE APA 10

II. AI 2010 WAS NOT AN "INTERPRETIVE RULE"; THUS, DOL ERRED IN FAILING TO COMPLY WITH § 553's NOTICE-AND-COMMENT REQUIREMENTS 15

A. A Rule Is "Interpretive" Only If It Does Not Have the Force and Effect of Law 15

B. AI 2010 Is a Substantive Rule Because It Has the Force and Effect of Law; Among Other Things, It Eliminates a Safe-Harbor Protection Previously Available to Employers 17

Page

C. AI 2010 Is a Substantive Rule Because, Under *Paralyzed Veterans*, It in Effect Has Amended DOL Regulations 22

III. THE *PARALYZED VETERANS* RULE DOES NOT INTERFERE WITH THE EFFICIENT OPERATION OF REGULATORY AGENCIES 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Alaska Professional Hunters Ass'n v. FAA,
177 F.3d 1030, 1034 (D.C. Cir. 1999) 5, 12, 13

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 12

Auer v. Robbins,
519 U.S. 452 (1997) 22

Carley v. United States,
556 U.S. 303 (2009) 21

Christensen v. Harris County,
529 U.S. 576 (2000) 14

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 8, 15, 16

Hudson v. FAA,
192 F.3d 1031 (D.C. Cir. 1999) 13, 27

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 16, 19, 22

MetWest Inc. v. Secretary of Labor,
560 F.3d 506 (D.C. Cir. 2009) 13, 27

Paralyzed Veterans of America v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) .... *passim*

Page(s)

Shalala v. Guernsey Memorial Hospital,
514 U.S. 87 (1995) 14, 24, 28

Syncor Int'l Corp. v. Shalala,
127 F.3d 90 (D.C. Cir. 1997) 17

Vermont Yankee Nuclear Power Corp v. NRDC,
435 U.S. 519 (1978) 11

Statutes and Regulations:

Administrative Procedure Act (APA) . . . . *passim*
5 U.S.C. § 551(5) 24
5 U.S.C. § 553 . . . . *passim*
5 U.S.C. § 553(b) 4, 6
5 U.S.C. § 553(b)(A) 12
5 U.S.C. § 553(c) 4
5 U.S.C. § 706(2)(A) 6, 8
5 U.S.C. § 706(2)(D) 4

Fair Labor Standards Act (FLSA),
29 U.S.C. § 201, *et seq*. . . . . *passim*
29 U.S.C. § 207 3
29 U.S.C. § 213 19
29 U.S.C. § 213(a)(1) 3, 20

Page(s)

Portal-to-Portal Act of 1947,
29 U.S.C. § 251 *et seq* 7, 18, 19
29 U.S.C. § 251 19
29 U.S.C. § 259 . . . . 18, 19
29 U.S.C. § 259(a) 7, 8, 18, 19
29 U.S.C. § 259(b)(1) 19

29 C.F.R. § 541.200 . . . . 20, 21

29 C.F.R. § 541.203 20

29 C.F.R. § 541.203(b) 21

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947) 15, 28

Food and Drug Administration, *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (2009) 27

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

In particular, WLF has regularly appeared in this and other federal courts in support of its belief that those outside the Executive Branch ought to have a meaningful opportunity to participate in the development of government policy by federal administrative agencies. *See, e.g., Shinseki v. Sanders,* 556 U.S. 396 (2009); *Am. Farm Bur. Fed'n v. EPA*, No. 13-4079 (3d Cir., dec. pending). In particular, WLF on a number of occasions has sought invalidation of federal rules because the promulgating agency failed to comply with the notice-and-comment requirements of the Administrative Procedure Act (APA). *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Prevor v. FDA*, ___ F. Supp. 3d ___, 2014 WL 4459174 (D.D.C., Sept. 9, 2014).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

as *amicus curiae* in this and other federal and state courts on a number of occasions.

Amici readily acknowledge the right of federal administrative agencies to revise their existing rules governing how they will carry out their statutory mandate, so long as the revised rules do not conflict with that mandate. But *amici* strongly support the public's right to participate in the revision process, participation that not only is consistent with our tradition of open government but also ensures that all potential revisions are well-considered. *Amici* view the D.C. Circuit's *Paralyzed Veterans* rule as an effective tool for distinguishing those rule revisions that are purely interpretative and do not have the force of law (and are thus exempt from the APA's notice-and-comment requirements) from substantive rule revisions that are subject to those requirements. The *Paralyzed Veterans* rule has been in effect for nearly 20 years, and *amici* believe that its effects on administrative rulemaking have been universally positive.

It is settled law that an agency seeking to amend a substantive rule must comply with the notice-and-comment rulemaking procedures set forth in 5 U.S.C. § 553. *Amici* are concerned that if the Court overturns the *Paralyzed Veterans* rule, some federal agencies will seek to evade that procedural requirement by adopting *de facto* amendments to substantive rules under the guise of merely "re-interpreting" those rules.

STATEMENT OF THE CASE

The facts of this case are set out in detail in

Respondents' brief. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

Section 7 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, grants employees the right to overtime pay, subject to certain exemptions. At issue here is § 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), which exempts from the overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to [applicable provisions of the APA]. . .)."

In 2004, the Department of Labor (DOL) revised its regulations regarding exemptions from the FLSA overtime requirements, including the regulations covering the exemptions for administrative employees. In 2006, in response to an inquiry from Respondent Mortgage Bankers Association (MBA), DOL issued a detailed Opinion Letter concluding that § 213(a)(1) and implementing regulations exempt mortgage loan officers from the overtime requirements. Pet. App. 70a-84a.[2] DOL published the Opinion Letter on its website and touted it as DOL's definitive interpretation of the 2004 regulations as applied to mortgage loan officers.

As described in Intervenors' brief, DOL's decision was heavily criticized by labor leaders and

---

[2] Citations to the Petition Appendix refer to the petition appendix submitted in No. 13-1041.

others who favored broad application of the FLSA's overtime provisions. Soon after President Obama took office, DOL reversed course and declared *sua sponte* that mortgage loan officers were *not* exempt from the overtime provisions. That decision, set forth in an Administrator's Interpretation issued in 2010 ("AI 2010"), *id.* at 49a-69a, was based on the same facts—and on an interpretation of the same 2004 DOL regulations—as the 2006 Opinion Letter. The decision concluded that the Bush Administration officials responsible for issuing the 2006 letter had misinterpreted the regulations that they had issued just two years earlier. *Id.* at 68a. Because of what the decision described as the letter's "misleading assumption [regarding the meaning of the 2004 regulations] and selective and narrow analysis," AI 2010 stated that the Opinion Letter was being withdrawn. *Id.* at 68a-69a.

MBA thereafter filed suit against DOL, asserting *inter alia* that DOL's decision to reverse course regarding the overtime exemption was invalid because AI 2010 was issued "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). In particular, MBA asserted that DOL violated 5 U.S.C. § 553 by issuing its 2010 decision without first publishing "general notice of proposed rule making" and then giving "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b) & (c). The district court rejected that claim and dismissed the suit, concluding that notice-and-comment rulemaking was not required. Pet. App. 13a-48a. In particular, the court held that the D.C. Circuit's *Paralyzed Veterans* rule—named for the

appeals court's decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)—was inapplicable (and thus did not require notice-and-comment rulemaking), because the MBA could not demonstrate that its members had relied to their detriment on the 2006 Opinion Letter. *Id.* at 42a-44a.

The D.C. Circuit reversed and remanded with instructions to vacate AI 2010. *Id.* 1a-12a. The appeals court held that the district court erred when it incorporated a reliance requirement into the *Paralyzed Veterans* rule. *Id.* at 11a-12a. The court explained that rule as follows:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.

Id. at 2a (parenthetical in original) (quoting *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)). After determining both that the 2006 Opinion Letter was a "definitive interpretation" of the 2004 regulations and that AI 2010 "significantly revised" the legal analysis of the Opinion Letter without asserting any change of circumstances in the intervening years, the appeals court concluded that DOL had "effectively amended" the 2004 regulations and thus had violated the APA requirement that it engage in notice-and-comment rulemaking before amending its regulations. *Id.* at 3a.

Although the district court had also ruled that AI 2010 was a plausible interpretation of the 2004 regulations and thus was neither "arbitrary" nor "capricious," 5 U.S.C. § 706(2)(A), the D.C. Circuit's reversal nullified that ruling. The D.C. Circuit had no occasion to address the arbitrary-or-capricious issue, because the MBA did not raise it on appeal.

SUMMARY OF ARGUMENT

The only issue before the Court is whether the D.C. Circuit correctly determined that DOL violated the APA when it issued AI 2010 without first engaging in notice-and-comment rulemaking. The Questions Presented as framed by the two sets of Petitioners, by presenting a distorted version of the D.C. Circuit's *Paralyzed Veterans* rule, do not accurately reflect the issue decided below. Moreover, this case does not require the Court to address the *Paralyzed Veterans* rule in all its applications over the past two decades; rather, the Court need only decide whether the APA required notice-and-comment rulemaking in *this* case. The only plausible answer is that AI 2010 does *not* fit within the "interpretive rule" exception to § 553's notice-and-comment requirements and thus that DOL violated the APA when it issued AI 2010 without complying with those requirements.

Petitioners' "Questions Presented" fail to capture two limiting features of the *Paralyzed Veterans* rule. First, the rule does not apply unless the agency's initial statement is "definitive" or "authoritative." On numerous occasions, the D.C. Circuit has declined to apply *Paralyzed Veterans* because it concluded that the statement was not sufficiently definitive to be deemed

official agency policy. Second, the D.C. Circuit does not apply the rule unless the agency's later revision of its policy squarely conflicts with the policy articulated by the previous statement; *e.g.*, the revision can be explained only by a decision to repudiate a prior legal analysis and not by changed circumstances that caused agency officials to re-evaluate the wisdom of their prior position. Only when those two conditions are met does the D.C. Circuit conclude that "the agency has in effect amended" its regulations and therefore that the agency has issued a substantive rule to which § 553's notice-and-comment requirements apply. Pet. App. 2a.

In any event, the Court need not address whether the *Paralyzed Veterans* rule is a proper interpretation of the APA, because AI 2010 qualifies as a substantive rule for reasons unrelated to *Paralyzed Veterans*: it has the force and effect of law. Section 10(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a), creates a safe harbor for employers who decline to pay overtime compensation in reliance on any ruling or interpretation of DOL, even if the ruling or interpretation is later rescinded or determined by a court to be invalid. As the United States concedes, the 2006 Opinion Letter protected employers from liability for failure to pay overtime to mortgage loan officers, but that safe harbor ended "for compensation earned after [the] 2010 withdrawal" of the Opinion Letter. U.S. Certiorari Reply Br. at 5. Accordingly, DOL's issuance of AI 2010 had the force and effect of law: before its issuance, the § 259(a) safe harbor protected employers from liability for failing to pay overtime to their mortgage loan officers, but issuance of AI 2010 ended that legal protection. The Court has long recognized that rules having "the force and effect of

law" are substantive rules and thus are not exempt from notice-and-comment rulemaking. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 302 & n.31 (1979).

Moreover, the D.C. Circuit is correct that AI 2010 has the force and effect of law because it in essence amends the 2004 regulations. Particularly where, as here, an agency issues a "definitive" interpretation of a regulation soon after issuing the regulation itself, the general public has good cause to conclude that the interpretation reflects the agency's actual thinking at the time that it adopted the regulation. Accordingly, when the agency later issues a new rule that directly contradicts the prior interpretation without asserting any basis for the change other than disagreement with the interpretation's analysis, the new rule can legitimately be deemed substantive in nature. It may well be that the new rule is a plausible interpretation of the actual language of the underlying regulation—and thus is not subject to an arbitrary-and-capricious challenge. 5 U.S.C. § 706(2)(A). Moreover, an agency is entitled to alter its interpretation of the authorizing statute and its implementing regulations. But when, as here, its re-interpretation of existing regulations meets the criteria set forth in the *Paralyzed Veterans* rule, the substantive nature of any such re-interpretation implicates § 553's notice-and-comment requirements.

Finally, there is little evidence to suggest that the parade of horribles imagined by Petitioners will come to pass if the judgment below is affirmed. For one thing, *Paralyzed Veterans* has been the law for nearly 20 years within the circuit that handles the

lion's share of federal administrative law cases, yet Petitioners have produced no evidence that the rule has adversely affected the rulemaking process within federal agencies.

Moreover, *Paralyzed Veterans* does not dissuade agencies from providing the regulated community with helpful guidance regarding the meaning of the agencies' implementing statutes and regulations. An agency that is unsure regarding how a statute or regulation should be interpreted in a likely-to-occur factual situation is free to say just that; *e.g.*, "we hereby reserve the right to change our minds when the following factual situation arises, but our current thinking is that we will interpret those facts as not constituting a regulatory violation by a regulated entity."

Indeed, many federal agencies issue "guidance" documents that proceed in precisely that fashion. While regulated entities would probably prefer that such guidances provide binding safe harbors, they undoubtedly prefer receiving some caveated guidance to receiving no guidance whatsoever. And such guidances provide agencies with all the flexibility that Petitioners seek because a guidance document's equivocating language signals that the rule being adopted is not definitive, an agency need not worry that it will be forced to go through the lengthy notice-and-comment rulemaking process if it later determines that it wishes to alter its interpretation of the statute or regulation.

Finally, DOL needs to recognize that providing federal agencies with maximum flexibility is not the

sole objective of the FLSA and the APA. The public also has interests in participating in and enforcing the administrative process, and those interests—including an interest in the continuity of legal rules and in having a say in proposed rule changes—often run directly counter to an agency's desire for maximum flexibility. Congress has made clear that it expects the interests of both groups to be respected. *Amici* recognize that when a new Administration takes office, it is entitled to implement policies that differ substantially from its predecessor's, so long as the policies are consistent with the broad outline provided by Congress in enabling legislation. But requiring agencies to go through notice-and-comment rulemaking before reversing policies embodied in a rule that definitively explains the meaning of a regulation is not just fully consistent with § 553. Notice is an important rule-of-law value that enables affected entities to come into compliance in a reasonable time, rather than instantly. The opportunity to comment ensures that the interests of the general public are fully considered before a rule is reversed.

ARGUMENT

I. PETITIONERS MISCHARACTERIZE *PARALYZED VETERANS*; IT DOES NOT SEEK TO IMPOSE DUTIES ON AGENCIES THAT ARE NOT SET FORTH IN THE APA

Both sets of Petitioners characterize *Paralyzed Veterans* as an effort by the D.C. Circuit to impose procedural requirements on federal agencies conducting rulemaking that have no basis in the text of the APA. According to the United States, "The D.C.

Circuit's extra-textual requirement of notice-and-comment rulemaking for interpretive rules constitutes a 'serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" U.S. Br. at 12 (quoting *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 544 (1978)). *See also* Intervenor Petitioners Br. at 39 ("Whatever courts may think of the wisdom of agencies revising their informal interpretations, courts may not impose upon agencies additional procedural hurdles beyond those established by Congress."). Petitioners have mischaracterized the *Paralyzed Veterans* rule; the D.C. Circuit has repeatedly explained that the rule is based on its understanding of the APA's notice-and-comment requirements, set forth in 5 U.S.C. § 553. Nor has the appeals court ever stated that a rule can be subjected to notice-and-comment rulemaking requirements even though it qualifies as an "interpretive rule."

The decision below explained that *Paralyzed Veterans* established a narrow rule that the D.C. Circuit has only rarely invoked to invalidate agency action for failure to engage in notice-and-comment rulemaking. It described the "straightforward" rule as follows:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.

Id. at 2a (parenthetical in original) (quoting *Alaska*

Professional Hunters, 177 F.3d at 1034). By thus explaining that the *Paralyzed Veterans* rule was designed to implement notice-and-comment requirements imposed by "the APA," the court made plain that the rule is not "extra-textual" but rather is the D.C. Circuit's effort to apply § 553's notice-and-comment requirements[3] in one very specific context.[4]

In those instances in which the appeals court has invoked *Paralyzed Veterans* to invalidate a rule for failure to comply with notice-and-comment requirements, it has never suggested that those requirements could be imposed with respect to a rule that is an "interpretive rule" as defined by § 553. *See, e.g., Paralyzed Veterans*, 117 F.3d at 586; *Alaska*

---

[3] 5 U.S.C. § 553 establishes as a general rule that notice of proposed rules be published in the Federal Register and that "interested persons" be afforded "an opportunity to participate in the rulemaking." The statute creates an exception: the notice-and-comment requirements do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b)(A).

[4] *Amici* find it ironic that Petitioners criticize *Paralyzed Veterans* for its imposition of an allegedly extra-textual procedural requirement, when they are urging the Court to adopt a different extra-textual rule that is more to their liking. Both the Intervenor-Petitioners, Br. at 10, and DOL, Pet. App. 51a-52a, assert that all of the FLSA's exemptions from coverage should be "narrowly construed" against the employer. That assertion finds zero support in the text of the FLSA. The Supreme Court case cited by Petitioners in support of their assertion, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960), is inapposite. That case focused exclusively on two provisions (subsequently repealed) that exempted employees of small, intrastate retail stores from FLSA coverage; it has no relevance to the administrative-capacity exclusion at issue here.

Professional Hunters, 177 F.3d at 1033-34 (expressly rejecting FAA's claim that the challenged rule "was merely an interpretive rule, exempt from the notice and comment requirements of APA § 553."). Indeed, virtually all of the D.C. Circuit cases cited by the United States in support of its claim that the appeals court has applied *Paralyzed Veterans* extra-textually, *see* U.S. Br. at 13-14, made no more than passing reference to *Paralyzed Veterans* and were decided on totally unrelated grounds.

Moreover, two limiting features imposed on the *Paralyzed Veterans* rule by the D.C. Circuit ensures that the rule will be applied narrowly. First, the rule does not apply if the agency has not issued a "definitive" or "authoritative" interpretation of its regulation. Thus, for example, in *Paralyzed Veterans* itself, the appeals court rejected the plaintiffs' § 553 claim because the statement on which the plaintiffs relied—a speech by a mid-level official of the agency—was not a "definitive" statement by the agency. 117 F.3d at 587. *See also MetWest Inc. v. Secretary of Labor*, 560 F.3d 506, 509-10 (D.C. Cir. 2009) (OSHA statement that using reusable blood tube holders "may" be permissible is not a "definitive statement.").

Second, *Hudson v. FAA*, 192 F.3d 1031 (D.C. Cir. 1999), makes clear that a revised interpretation of a regulation does not constitute the "significant revision" envisioned by *Paralyzed Veterans* if it merely re-interprets the regulation in light of changed circumstances. In *Hudson*, the Court rejected a *Paralyzed Veterans* challenge to a revised FAA

statement regarding aircraft safety, finding that the revisions merely reflected increased FAA access to safety data. 192 F.3d at 1035-36. In other words, *Paralyzed Veterans* applies only if the agency's later revision of its interpretation squarely conflicts with the policy articulated by the previous interpretation of the regulation. Only when those two conditions are met does the D.C. Circuit conclude that "the agency has in effect amended" its regulation and therefore that the agency has issued a substantive rule to which § 553's notice-and-comment requirements apply. Pet. App. 2a.

Petitioners do not contest that if an agency actually amends one of its formal regulations, it has adopted a "substantive" rule and thus must comply with notice-and-comment rulemaking. Moreover, this Court has repeatedly held that a rule can amount to the *de facto* amendment of a formal regulation even if an agency does not acknowledge that it has adopted an amendment. *See, e.g., Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (stating that "APA rulemaking would still be required if [the challenged rule] adopted a new position inconsistent with any of the Secretary's existing regulations."); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (declining to defer to an agency's interpretation of its own regulations that was not consistent with the regulatory language, because "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). In sum, *Paralyzed Veterans* is not an extra-statutory procedural requirement imposed on federal agencies but rather is based on the D.C. Circuit's conclusion that, under limited circumstances, a rule substantially revising a prior regulatory

interpretation should be deemed a substantive rule and thus subject to notice-and-comment rulemaking requirements.

II. AI 2010 WAS NOT AN "INTERPRETIVE RULE"; THUS, DOL ERRED IN FAILING TO COMPLY WITH § 553's NOTICE-AND-COMMENT REQUIREMENTS

A. A Rule Is "Interpretive" Only If It Does Not Have the Force and Effect of Law

Amici recognize that Courts have great difficulty distinguishing between substantive rules and interpretive rules; the APA itself provides definitions for neither term. Case law nonetheless identifies several characteristics that a rule must possess in order to qualify as interpretive and thus exempt from § 553's notice-and-comment requirements.

First, an agency regulation is not interpretive if it has "the force and effect of law" or is one "affecting individual rights and obligations." *Chrysler Corp.*, 441 U.S. at 302. The Court has cited with approval the distinction drawn between administrative and interpretive rules in the Attorney General's Manual on the Administrative Procedure Act (1947), drafted immediately after adoption of the APA:

> The Manual refers to substantive rules as rules that "implement" the statute. "Such rules have the force and effect of law." Manual, *supra*, at 30 n.3. In contrast, it suggests that "interpretive rules" and "general statements of

> policy" do not have the force and effect of law. Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Ibid.*

Chrysler Corp., 441 U.S. at 302 n. 31. *See also id.* at 295 (stating that "it has been established in a variety of contexts that properly promulgated, substantive agency regulations have 'the force and effect of law.'").

More recently, the Court has described an interpretive rule as one that "may be used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007). When an agency issues a rule that is within the "gap-filling authority" issued to it by Congress, the rule is deemed substantive and is entitled to deference from courts. *Id.* at 173. In contrast, interpretive rules are not entitled to deference. *Ibid.* The Court explained that one important factor in determining whether a rule is substantive and thus entitled to deference is whether it "sets forth important individual rights and duties." *Ibid.* Of course, since an interpretive rule is not entitled to deference from the courts, the fact that an agency has a record of urging courts to defer to one of its rules suggests that the agency itself considers the rule to be substantive.

The preceding discussion illustrates that the definition of "interpretive rule" for purposes of the § 553 exception is far narrower than the word "interpretive" might suggest. In one sense, *every* rule or regulation issued by an agency is "interpretive" in

that they all attempt to translate the mandate granted to the agency by Congress into a workable set of operational standards. But Congress did not use "interpretive" in that broad sense when it created the interpretive rule exception to § 553's notice-and-comment requirements; a mere assertion that a rule was adopted for the purpose of providing an agency's interpretation of a statute or regulation is insufficient to classify it as an interpretive rule under § 553. To the contrary, a rule is interpretive only if it does *not* have the force and effect of law, does *not* set down "important rights and duties," and is *not* one for which the agency demands deference from the courts. Morever, a rule does not qualify as interpretive merely because an agency labels it as such. *Ibid.* (holding that an agency rule was substantive even though its heading read, "Interpretations."); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997).

B. AI 2010 Is a Substantive Rule Because It Has the Force and Effect of Law; Among Other Things, It Eliminates a Safe-Harbor Protection Previously Available to Employers

When examined under the above criteria, AI 2010 is properly classified as a substantive rule and thus is subject to § 553's notice-and-comment requirements. AI 2010 has the force and effect of law. Moreover, DOL issued AI 2010 in the exercise of its gap-filling functions under the FLSA; the rule "sets forth important individual rights and duties" of employees and employers in the financial services industry. Accordingly, the Court should affirm the decision below, without regard to its views on whether

the *Paralyzed Veterans* rule is a proper interpretation of the APA.

That AI 2010 has the force and effect of law is best illustrated by its effect on an FLSA safe harbor created for employers by the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.* Section 10 of the Act, 29 U.S.C. § 259, states that no employer sued for alleged FLSA violations "shall be subject to any liability" for failing to "pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith conformance with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of" the Administrator of DOL's Wage and Hour Division. 29 U.S. C. § 259(a) and (b)(1).[5] Section 259(a) states that the safe harbor bars liability even if, after such act or omission, the agency guidance is "modified or rescinded" or is "determined by judicial authority to be invalid or of no legal effect."

Section 259 is plainly implicated by the Administrator's issuance of the Opinion Letter in 2006 and his precipitous 2010 withdrawal of that letter in connection with AI 2010. As the United States concedes, the Opinion Letter provides employers with a safe harbor from liability for any failure to provide

---

[5] The Portal-to-Portal Act was adopted based on congressional findings that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers." 29 U.S.C. § 251.

overtime pay to mortgage loan officers during the four years that it was in effect. U.S. Certiorari Reply Br. at 5. The United States further concedes that the safe harbor ended the moment AI 2010 was issued; those employers were no longer immune from liability for failure to pay overtime "for compensation earned after [the] 2010 withdrawal" of the Opinion Letter by AI 2010. *Ibid.*

Based on the foregoing, one must conclude that DOL's issuance of AI 2010 had the force and effect of law: before its issuance, the § 259(a) safe harbor protected employers from liability for failing to pay overtime to their mortgage loan officers, but issuance of AI 2010 ended that legal protection. Accordingly, AI 2010 is a substantive rule subject to § 553's notice-and-comment requirements. That conclusion is not altered by Intervenors-Petitioners' assertion that the 2006 Opinion Letter is itself a substantive rule and is thus invalid because it too was issued without notice-and-comment rulemaking. Intervenors Br. at 54-55. Section 259(a) provides that the Portal-to-Portal Act provides a safe harbor without regard to whether the document the employer has relied upon in failing to pay overtime is later "determined by judicial authority to be invalid or of no legal effect." In other words, AI 2010 has the force and effect of law—and is thus a substantive rule— without regard to whether the 2006 Opinion Letter was validly issued.

AI 2010 is a substantive rule for the additional reason that it is an exercise of DOL's gap-filling function and "sets forth important individual rights and duties" of employees and employers in the financial services industry. *Long Island Care*, 551 U.S.

at 173. That AI 2010 serves a gap-filling function is best illustrated by examining the statute and regulations describing the administrative-functions exception to the FLSA's overtime pay requirement. The relevant statute, 29 U.S.C. § 213(a)(1), provides no guidance regarding the proper scope of the exemption for "any employee employed in a bona fide executive, administrative, or professional capacity." Indeed, it explicitly directs DOL to fill the gaps, explaining that the terms "bona fide executive, administrative, or professional capacity" are to be "defined and delimited from time to time by regulations of the Secretary" of DOL, subject to the provisions of the APA. *Id.*

The regulations that are principally relevant to this case, 29 C.F.R. §§ 541.200 & 541.203, fill in some of the gaps. But they do not explicitly answer the legal question of greatest interest to the MBA's members: are mortgage loan officers subject to the FLSA's overtime pay requirements? That is the question that AI 2010 answers, and it does so in a manner that "sets forth important individual rights and duties" of employees and employers in the financial services industry. Accordingly, AI 2010 is a substantive rule.

The United States no doubt would respond that AI 2010 is an interpretive rule because its principal purpose is to interpret the manner in which the administrative exemption regulations apply to mortgage loan officers. But that argument is belied by the language of AI 2010 and events leading up to its adoption. Much of AI 2010 focuses not on the actual language of DOL regulations but on DOL's understanding of the pre-2004 history of FLSA

enforcement in this area, thereby undercutting any claim that AI 2010 merely interprets the words used in the regulations. Indeed, in order to arrive at its "no exemption" conclusion, AI 2010 was required to ignore language in the regulations suggesting that mortgage loan officers qualified as administrative employees and instead base its decision on an atextual discussion of what constitutes sales activities.[6] In doing so, DOL plainly was exercising its prerogative to fill in the gaps left by the FLSA and implementing regulations, and to "set forth important individual rights and duties" of employees and employers—not merely interpreting words appearing in its regulations.

Finally, as Respondents point out, Resp. Br. at 47, the United States has filed *amicus* briefs in recent FLSA litigation in support of its new position that mortgage loan officers are not administratively exempt from the FLSA's overtime provisions. In those briefs,

---

[6] While both the 2006 Opinion Letter and AI 2010 may be sufficiently plausible to survive arbitrary-and-capricious review, *amici* view the 2006 Opinion Letter as a much more plausible interpretation of the 2004 regulations. AI 2010 arrived at its "no exemption" conclusion by focusing on 29 C.F.R. § 541.200 (which sets forth the "general rule for administrative employees") and by largely ignoring 29 C.F.R. § 541.203(b) (which provides examples of the administrative exemption as applied to "employees in the financial services industry"). Pet. App. 68a. Those examples strongly suggest that mortgage loan officers are administratively exempt from the FLSA's overtime provisions. AI 2010 justified its decision to ignore § 541.203(b) because, it asserted, the regulation's "guidance cannot result in it 'swallowing' the requirements of 29 C.F.R. § 541.200." *Id.* But canons of statutory and regulatory construction usually operate in the opposite direction. *See, e.g., Carley v. United States*, 556 U.S. 303, 305 (2009) ("a more specific statute [is] given precedence over a more general one.").

the United States has argued that AI 2010 is entitle to deference from the courts under *Auer v. Robbins*, 519 U.S. 452 (1997). As noted above, this Court has made clear that interpretive rules are not entitled to *Auer* deference. *Long Island Care*, 551 U.S. at 173. Accordingly, the United States's assertion that AI 2010 is entitled to *Auer* deference is a strong indication that the United States deems AI 2010 a substantive rule, not an interpretive rule.

C. AI 2010 Is a Substantive Rule Because, Under *Paralyzed Veterans*, It in Effect Has Amended DOL Regulations

The decision below should also be affirmed on its own terms: the D.C. Circuit correctly concluded that AI 2010 effectively amended the 2004 regulations, and thus that AI 2010 is a substantive rule subject to § 553's notice-and-comment requirements.

Amici note initially that there is no dispute that the 2006 Opinion Letter was a "definitive" interpretation of the 2004 regulations governing the administrative employee exemption as applied to mortgage loan officers. The Opinion Letter concluded unequivocally that workers performing the typical duties described in the MBA's inquiry letter were "exempt administrative employees" under the FLSA and implementing regulations. Pet. App. 70a. Given that the Opinion Letter was issued so soon after issuance of the 2004 regulations and was drafted by the same Administration responsible for drafting the regulations, there is every reason to conclude that the Opinion Letter accurately conveyed the views

expressed by DOL in its regulations.

A change in administrations took place in 2009, and—in light of the broad discretion granted by Congress to DOL to administer the FLSA—the new administration was entitled to adopt new FLSA enforcement policies. But there can be no serious dispute that the new enforcement policy embodied in AI 2010 was a 180-degree pivot from the policy articulated in the Opinion Letter. AI 2010 did not assert that its conclusion—that mortgage loan employees are *not* administratively exempt from the overtime pay requirement—was based on any change in circumstances or on the gathering of new data regarding the how mortgage loan officers spend the majority of their work days. Rather, AI 2010 simply disagreed with the Opinion Letter's conclusion that the sorts of work performed by typical mortgage loan officers indicate that "they have a primary duty other than sales." Pet. App. 78a. Based on the same evidence, AI 2010 concluded that "mortgage loan officers typically have the primary duty of making sales on behalf of their employer." *Id.* at 68a.

Under those circumstances, the D.C. Circuit correctly concluded that AI 2010 did not simply reverse the interpretation set forth in the Opinion Letter, but also amended the regulations with which the Opinion Letter was so closely identified. As the appeals court explained in *Paralyzed Veterans*:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "*repeals*" or "*amendments*." *See* 5 U.S.C. § 551(5). To allow

> an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulations."

Paralyzed Veterans, 117 F.3d at 586 (quoting *Guernsey Memorial*, 514 U.S. at 100).

The United States challenges the assertion that agency action falling within the narrow confines of *Paralyzed Veterans* constitutes the *de facto* amendment of a regulation. It asserts, "An agency interpretation no more 'amends' a legislative regulation than a judicial interpretation 'amends' the source of the law it interprets." U.S. Br. at 30. The analogy to judicial review is not well taken. When construing a statute, courts are not authorized to make substantive law; rather, they are tasked with attempting to discern congressional intent on the basis of the statutory language. Administrative agencies, on the other hand, have been delegated responsibility to use their expertise for the purpose of making substantive law where needed to plug gaps in the congressional mandate. The principal embodiment of the substantive law created by an agency are its formal regulations. Over time, those regulations acquire commonly understood meanings. Agencies are, of course, free to amend their own regulations. But when they amend that substantive law, the APA requires that they abide by § 553's notice-and-comment requirements. And the reversal of a long-held, definitive interpretation of

existing regulations "amends" the substantive law just as assuredly as does a formal amendment of the regulatory language.

III. THE *PARALYZED VETERANS* RULE DOES NOT INTERFERE WITH THE EFFICIENT OPERATION OF REGULATORY AGENCIES

Petitioners complain that affirming the decision below will create a strong incentive for agencies to avoid providing the public with guidance regarding how their regulations are to be interpreted. According to the United States:

> The *Paralyzed Veterans* doctrine inherently creates a significant disincentive to providing administrative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking for any future revisions. That disincentive flows directly from the D.C. Circuit's governing precedents and contravenes Congress's goal of affirmatively *encouraging* agencies to issue interpretive rules that inform the public of the agencies' understanding of the programs they administer.

U.S. Br. at 25. Those concerns are overblown. Moreover, they overlook the many advantages the public derives from a robust notice-and-comment rulemaking regime.

We note initially that *Paralyzed Veterans* has been the law for nearly 20 years within the D.C.

Circuit, the federal circuit that handles the lion's share of federal administrative law cases. Yet Petitioners have produced no evidence that the rule has adversely affected the rulemaking process within federal agencies. One can reasonably assume that if *Paralyzed Veterans* really were having the adverse effects that Petitioners posit, evidence of those effects would have come to light by now.

Petitioners' fear is premised on the inaccurate notion that virtually *any* guidance provided by an agency could end up restricting the agency's future flexibility if *Paralyzed Veterans* is invoked to require that amendments to the guidance be effected only through cumbersome notice-and-comment rulemaking. But as noted above, *Paralyzed Veterans* is not nearly so broadly applicable. It has no conceivable application unless the initial guidance is a "definitive" interpretation of the regulation. Even then, notice-and-comment rulemaking is not required for any revised interpretations if the revision merely reinterprets the regulation in light of changed circumstances. *Hudson*, 192 F.3d at 1035-36. Indeed, significant policy reversals of the sort likely to implicate *Paralyzed Veterans* are most likely to arise when, as here, control of the Executive Branch has switched from one political party to another. Senior agency personnel are unlikely to avoid issuing interpretive documents based on a belief that doing so might make it more difficult for officials in the next Administration to revise those interpretations. To the contrary, such a belief might prompt senior agency personnel to issue more guidance documents precisely because they may wish to make it more difficult for those in the opposing political party to revise

incumbent policies.

Moreover, the D.C. Circuit has expressly held that interpretations are insufficiently "definitive" to implicate *Paralyzed Veterans* if they include conditional or qualified language. *MetWest*, 560 F.3d at 509-10 (stating, "We have held that conditional or qualified statements, including statements that something 'may' be permitted, do not establish definitive and authoritative interpretation."). Accordingly, any agency that has some doubts about its proposed interpretation and fears getting locked into that interpretation can alleviate those concerns by including conditional language in its guidance.

Indeed, many agencies routinely issue guidance documents that state up front that while the document contains the agency's current thinking on the subject, it makes no promises that it will adhere to those views in future enforcement actions. *See, e.g.,* Food and Drug Administration, *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (2009). The very first paragraph of this FDA guidance document includes conditional and qualifying language, like that found in numerous FDA documents:

> This guidance document represents the Food and Drug Administration's current thinking on this topic. It does not create or confer any rights for or on any person, and does not operate to bind FDA or the public.

While regulated entities would probably prefer that such guidances provide binding safe harbors, they undoubtedly prefer receiving some caveated guidance to receiving no guidance whatsoever. And such guidances provide agencies with all the flexibility that Petitioners seek.

Finally, DOL needs to recognize that providing federal agencies with maximum flexibility is not the sole objective of the FLSA and the APA. The public also has interests in the administrative process, and those interests—including an interest in the continuity of legal rules and in having a say in proposed rule changes—often run directly counter to an agency's desire for maximum flexibility. In adopting the APA, Congress made clear that it expects the interests of both groups to be respected. *See, e.g.*, Attorney General's Manual at 9 (establishing procedural fairness in agency matters is "the overriding goal" of the APA). DOL may complain about the burdensomeness of engaging in notice-and-comment rulemaking, but Congress made plain its belief that DOL was up to the task when it ordered DOL to write detailed regulations implementing the FLSA. *See Guernsey Memorial*, 514 U.S. at 109-110 (O'Connor, J., dissenting).

CONCLUSION

Amici curiae request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: October 16, 2014