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* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, AMERICAN HEALTH CARE ASSOCIATION, BUSINESS ROUNDTABLE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The business community has a particular interest in the interpretation and application of the rules governing the administrative process. Many businesses face an ever-growing thicket of regulations. Because the regulations themselves are often vague or ambiguous, businesses might have no choice but to rely on agencies' definitive interpretations when structuring their activities and investing for their futures. Nonetheless, the Federal and Private Petitioners contend that agencies can change these definitive interpretations at the drop of a hat, without any input from any regulated entity, even where businesses have detrimentally relied on an agency's (previously) settled view. Given the

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

breadth of its membership, the Chamber is uniquely positioned to explain the consequences of accepting that view on the Nation's business community.

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate large industrial facilities that are among the most heavily regulated in the country. AFPM members strive for 100 percent compliance with these regulations and must rely upon federal agency guidance interpreting their scope and applicability. AFPM members are impacted by changes in guidance interpreting federal regulations.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

The American Health Care Association (AHCA) is the Nation's largest association of long-term and post-acute care providers, representing the interests of nearly 12,000 nonprofit and proprietary facilities.

AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA's members operate in a heavily regulated profession, facing a host of complex, often opaque regulations. In order to continue providing quality care and services for frail, elderly, and disabled Americans, they must be able to rely on the agency guidance documents that help them navigate these regulations.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and

Washington, DC, is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

SUMMARY OF ARGUMENT

Imagine you want to start your own hunting-and-fishing guide company in Alaska, one that occasionally transports people by air to remote locations as part of the search for big game. This industry is likely regulated by a host of agencies, and so, like many business owners, you might have to scour the U.S. Code and the Code of Federal Regulations before you start your new venture. Unfortunately, the first two sources aren't much help: Congress told the agency, in essence, to go about doing good in the transportation industry, and the agency's substantive regulations largely repeat that mantra at a lower level of generality—those who transport people "for hire" must comply with all commercial aviation regulations, but without explaining who exactly transports people "for hire." Fortunately, however, the agency explained in definitive interpretive statements that those who transport in your circumstances do so only incidentally and thus need not bear the full brunt of commercial aviation regulation.

Taking the agency at its word, you move to Alaska and structure your business—and your life—around the agency's settled interpretation. Years later, without any input from you, the agency changes its mind. You get a letter advising you that your pilots must qualify as commercial aviators, you may be subject to fines or penalties, and you will at least have to comply going forward.

This scenario is hardly fanciful. *See Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999). It is also troubling because businesses must be able to rely on the interpretive rules that they frequently must consult. On the Federal and Private Petitioners' view, however, the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, stands as no barrier to the agency's interpretive whims. But the APA's notice-and-comment requirements do impose some constraints on an agency's ability to reinterpret its regulations. At a minimum, where an agency has definitively announced its interpretation of a regulation, and where private parties have relied on that interpretation, the agency must give notice and respond to comments before significantly shifting course. This position, consistent with the APA's text and compelled by its purpose, protects the legitimate reliance interests of the regulated community and promotes the APA's basic goals of increasing the effectiveness and accountability of agency decisionmaking through notice and comment.

I. The APA's notice-and-comment requirements embody Congress's efforts to promote fair, effective, and efficient agency action. By generally providing the regulated community the right to know about and participate in agency decisions that will significantly impact its interests, those requirements ensure that agencies have the information and feedback needed to regulate in a factually sound, publicly accountable manner.

II. Agencies, taking advantage of current administrative law doctrines, already attempt to avoid meaningful public participation by promulgating vague legislative rules and then

interpreting those rules to reach the potentially controversial regulatory outcomes that the agencies seek. Allowing agencies to reverse their definitive, relied-upon interpretations without notice and comment would make this situation even worse.

A. If courts had clearly demarcated the line between legislative and interpretive rules, they could strike down agency attempts to circumvent notice and comment in this fashion. But as confusion in the lower courts indicates, courts have struggled to draw—and thus to enforce—this line.

B. The problem of agencies avoiding the notice-and-comment process grows more troubling when one considers the deference that courts give to an agency's interpretation of its own ambiguous regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). Under *Auer*, agencies can thwart meaningful feedback by promulgating vague legislative regulations and then interpreting those regulations as they see fit, knowing that courts must accept those interpretations as long as they are not patently incompatible with the statutory or regulatory text.

C. As demonstrated by the line of D.C. Circuit cases establishing that agencies must engage in notice and comment before reversing their prior definitive interpretations, the statute books and the Code of Federal Regulations often leave regulated entities in the dark about some of the most basic questions surrounding the regulatory regimes that impact them. As a result, regulated entities must rely—and must be able to rely—on the interpretive rules that agencies issue to resolve these crucial questions.

D. The rule advocated by the Federal and Private Petitioners would make things worse. By allowing agencies to *switch* definitive interpretations even in the face of substantial reliance, they would further decrease the costs to the agency of promulgating vague substantive regulations and then interpreting them as they see fit, thus jeopardizing the purposes underlying the APA's notice-and-comment requirements. They would also threaten the substantial reliance interests of the regulated community. Although other legal doctrines may protect those interests against agency reversals as well, the scope of that protection is unclear and may not suffice in every case.

III. This Court need not allow these dangers to come to pass. It and the lower courts have always interpreted the APA with an eye toward the need for fairness and predictability. Under that practical approach, agencies should be required to follow the requirements of notice and comment before reversing their definitive, relied-upon interpretations because in such situations the agency has effectively amended a legislative rule.

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT GENERALLY REQUIRES AGENCIES TO SOLICIT PUBLIC FEEDBACK BEFORE MAKING CRITICAL REGULATORY DECISIONS.

Any set of procedural rules governing agency decisionmaking must address a basic tension in administrative law: On the one hand, agencies must have enough flexibility to respond to new problems, new information, and new political conditions

relatively quickly. On the other hand, those affected by agency decisions must have their fair say for agencies to regulate in an informed and well-reasoned manner.

The APA's notice-and-comment requirements embody Congress's attempt to strike a balance between fairness and flexibility. To protect the public's right to participate in essential agency decisions, Congress broadly defined a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ," 5 U.S.C. § 551(4), and generally required agencies to give notice and respond to comments when "formulating, amending, or repealing" a rule, *id.* § 551(5); *id.* § 553(a)–(b). To protect the government's (and the public's) interest in flexible, efficient proceedings, however, Congress also made certain exceptions to this default requirement. Where the need for speed is great, for example, agencies may dispense with notice and comment under the APA's good cause exemption. *See id.* § 553(b)(3)(B). The APA provides a similar exception where the need for or benefits from public input may be modest. In this vein, it exempts procedural rules (because they affect primarily the agency rather than the regulated community) as well as "interpretative rules" and "general statements of policy" (because, when used properly, they simply shed light on the agencies' current thinking). *See id.* § 553(b)(3)(A).

Although the APA thus acknowledges that sometimes an agency must be able to proceed without affording those in the regulated community

a chance to participate, Congress generally dictated that affected parties have the right to help shape the significant administrative decisions that will govern their lives. This Court, for instance, has recognized that "[i]n enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (giving *Chevron* deference to rules promulgated via notice and comment because that "relatively formal administrative procedure tend[s] to foster the fairness and deliberation that should underlie a pronouncement" with the force of law). It has also rebuffed efforts to circumvent notice-and-comment procedures—"designed to assure fairness and mature consideration of rules of general application"—for convenience's sake. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality op.).

Accordingly, this Court has emphasized the important role that notice-and-comment rulemaking plays in the modern administrative state. By generally giving regulated parties the right to participate in important agency decisions, the APA's notice-and-comment requirements "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *MCI Telecommc'ns Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (internal quotation marks omitted). And by encouraging members of the public to share their views on regulatory questions, those requirements

also "assure that the agency will have before it the facts and information relevant to a particular administrative problem" before making critical decisions. *Id.* (internal quotation marks omitted).

II. ALLOWING AGENCIES TO SWITCH INTERPRETIVE POSITIONS EVEN IN THE FACE OF SIGNIFICANT RELIANCE WOULD EXACERBATE AGENCIES' ATTEMPTS TO EVADE MEANINGFUL NOTICE-AND-COMMENT RULEMAKING.

The Federal and Private Petitioners suggest that agencies typically handle the distinction between legislative and interpretive rules appropriately, using the former to promulgate (after notice and comment) legislative rules that impose well-defined legal obligations and using the latter to clarify occasional minor questions about the agency's understanding of its own substantive regulations. Interpretive rules, they note, do not have the "force and effect of law," but "merely [reflect] the agency's present belief concerning the meaning of the statutes and legislative rules that do." Fed. Petrs.' Br. 21 (internal quotation marks omitted, alteration in original); Private Petrs.' Br. 51 (same). And those rules, they insist, do not even "fill statutory gaps," Private Petrs.' Br. 51, but rather "simply . . . inform the public about the agency's own current interpretation of its regulations," Fed. Petrs.' Br. 26.

The reality is much different. As explained below, interpretive rules are critically important in the real world. In what has come to be a typical scenario, Congress passes a broadly worded statute accompanied by an authorization for agency lawmaking. The agency then promulgates an

ambiguous legislative rule that, although preceded by notice and comment, does not address many critical issues. It uses interpretive rules, issued without public feedback, to provide the only truly clear guidance on those issues, guidance that generally binds courts unless it substantially deviates from the statute's or the rule's text.

This scenario is already problematic. Allowing agencies also to switch their definitive interpretive positions despite substantial reliance by regulated parties would exacerbate it further, undermining the APA's basic purposes and depriving the regulated community of its substantial reliance interests.

A. Leaving the Line Between Legislative and Interpretive Rules Murky Encourages Agencies To Promulgate Vague Legislative Rules

As the Federal Petitioners' brief demonstrates, agencies perceive that the notice-and-comment process takes too long and costs too much, and, therefore, they often prefer to avoid it. *See, e.g.*, Fed. Petrs.' Br. 26. Because an agency's initial interpretation need not be preceded by notice and comment, however, agencies could try to avoid much of the hassle involved in meaningful notice and comment: rather than proffer detailed regulations that prompt detailed public criticism, agencies can punt difficult questions, promulgate vague regulations, and then eventually "interpret" those regulations to reach the regulators' desired result without having to respond to dissenting views. *Cf. Caruso v. Blockbuster-Sony Music Entmt. Centre*, 193 F.3d 730, 733–37 (3d Cir. 1999).

Courts could prevent this stratagem by guarding the line between substantive and interpretive rules. This Court has not provided much guidance, however, as to how courts should police that line. For example, the Court has stated that a substantive rule "affect[s] substantial individual rights and obligations," *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), and it has provided the occasional example of a plainly substantive or plainly interpretive rule, *see, e.g.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). But there are no more precise directions for lower courts (and agencies) to apply the distinction in the mine run of cases.

The circuit courts, for their part, have designed a host of tests aimed at determining whether a given rule is legislative or interpretive. One scholar, for instance, has catalogued at least three different approaches to distinguishing between legislative and interpretive rules, including an "agency's label" test, a "substantial impact" test, and a "legal effect" test. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 286–88 (2010).

These tests—"often circular and usually somewhat Delphic," *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1264 (3d Cir. 1994)—have not helped matters much. The lower courts appear to have all but thrown up their hands by declaring the distinction "inherent[ly] vague[]," *Concourse Rehab. & Nursing Ctr. v. DeBuono*, 179 F.3d 38, 46 (2d Cir. 1999), "often illusory," *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995), and "incapable of being drawn with much analytical precision," *Dia Navigation*, 34 F.3d at

1264. In this vein, they also lament that the distinction is "fuzzy," "blurred," and "enshrouded in considerable smog." *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1142 n.14 (10th Cir. 2010) (internal quotation marks omitted).[2]

In light of this professed confusion, lower courts have struggled to guard the line between legislative and interpretive rules. This murkiness emboldens agencies to manipulate and exploit the blured boundary and avoid the costlier aspects of notice and comment by promulgating vague regulations and then making their most important regulatory decisions under the guise of interpretive rules issued without public feedback.

B. Judicial Deference to an Agency's Own Interpretation of Its Regulations Increases Agency Incentives To Evade Notice and Comment

If courts paid little attention to an agency's interpretive position in determining whether someone had complied with a substantive regulation, the troubling incentives created by the fuzzy line between legislative and interpretive rules might not be as worrisome. But, to the contrary, this Court has

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[2] *See also, e.g.*, Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705, 1705 (2007) ("To describe the legislative rule debate is to conjure doctrinal phantoms, circular analytics, and fundamental disagreement even about correct vocabulary."); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

held that an agency's interpretation of its own regulation "control[s] unless [it is] plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted); *see also, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337–38 (2013) (deferring to the agency's interpretation and emphasizing that the interpretation need not reflect the "best" reading of the regulation); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (similar). Rather than force agencies to defend their actions based on the terms of their own substantive regulations, courts thus defer to an agency's interpretation—promulgated without notice and comment—even where that interpretation falls outside the most natural reading of the regulation itself.

As a doctrinal matter, *Auer* "undoubtedly has important advantages"—for example, it imparts "certainty and predictability to the administrative process" by creating uniformity in the circuit courts in most cases. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 & n.17 (2011) (internal quotation marks and alterations omitted). But it also raises serious concerns. *See Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., joined by Alito, J., concurring) (expressing willingness to reconsider *Auer*); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (explaining that he will no longer apply *Auer*). Agencies may not have special insight into what their regulations say, and their policy expertise is arguably irrelevant to the purely interpretive task of figuring out what the law is. *See id.* at 1340 (Scalia, J., concurring in part and dissenting in part). Moreover, *Auer* deference threatens separation-of-powers principles if the same

body in charge of promulgating the law, an executive agency, gets to decide what the law means upon enforcement. *See id.* at 1341–42; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 638–54 (1996).

Whatever the merits of *Auer* on the whole, this Court has recognized that it is not an unalloyed good. As most relevant here, it has acknowledged that *Auer* deference—like the fuzzy line between legislative and interpretive rules—may encourage agencies to evade meaningful notice and comment. As the Court recently put it, *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking." *Christopher*, 132 S. Ct. at 2168 (2011) (internal quotation marks and alterations omitted).

C. Businesses Already Have To Rely On Interpretive Rules To Provide Critical Guidance Because Agencies Promulgate Ambiguous Substantive Rules

The concern that agencies will use the opportunities incidentally provided by the doctrines discussed above to circumvent meaningful notice and comment, and will instead rely on interpretive rules to make their most controversial decisions, is more than theoretical. The cases applying the *Paralyzed Veterans* doctrine at issue here demonstrate this vividly.

Consider *Paralyzed Veterans* itself. The Americans with Disabilities Act broadly states that "[n]o individual shall be discriminated against on the

basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" and that newly constructed facilities must be "readily accessible to and usable by individuals with disabilities." *Paralyzed Veterans of Am. v. D.C. Arena LP*, 117 F.3d 579, 580 (D.C. Cir. 1997) (quoting 42 U.S.C. §§ 12182(a), 12183(a)(1) (1994)).

To "flesh out" these admittedly "general principles," *id.*, the Department of Justice promulgated regulations regarding wheelchair access in public venues, but those regulations were ambiguous—perhaps intentionally so—on a critical point: whether wheelchair users must be able to see over the patrons seated in front of them even when those patrons were standing. *See id.* at 581–82; *Caruso*, 193 F.3d at 732–37. As a result, those building multi-million-dollar entertainment venues—perhaps the prototypical example of parties who need legal certainty and whose reliance interests deserve protection—were left to make decisions about design and structure based only on inconsistent agency statements and a later, conflicting interpretive rule, materials fuzzy enough to soon create a circuit split. *See United States v. AMC Entm't Inc.*, 549 F.3d 760, 764–67 (9th Cir. 2008) (tracing the difficulty courts have had interpreting the regulation at issue).

Alaska Professional Hunters Association v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), drives the point home further. There, the statutory provisions governing the FAA's conduct were sufficiently irrelevant that they did not warrant a mention in the court's opinion. *See id.* at 1030–36. And the FAA

regulations, for their part, explained that "commercial operators"—those subject to a host of regulatory requirements—included those who carried people or property "for compensation or hire," *see id.* at 1031 (quoting 14 C.F.R. §§ 1.1, 119.1(a)(1), 121.1(a), 135.1(a)), but provided little insight into whether guide flights conducted as part of other activities would count as flights "for compensation or hire" or would be considered "merely incidental" and thus exempt. As a result, Alaska's hunting and fishing industry—one on whose income "[a] large proportion of the State's population depend[ed]"—could not determine its basic legal obligations by consulting the statute books and the Code of Federal Regulations, but instead had to rely upon an interpretive rule embodied in a Civil Aeronautics Board decision and decades of statements from regional agency officials. *Id.*; *see id.* at 1031–32.

Indeed, this case itself proves the importance of interpretive rules. The Fair Labor Standards Act exempts "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman" from its mandatory overtime provisions. 29 U.S.C. § 213(a)(1). Department of Labor regulations provide some additional guidance about these broad categories. They explain, for example, that "administrative" employees must have as their "primary duty . . . the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," a duty that must "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(2)–(3).

The regulations do not, however, clearly explain how to apply these rules in the real world, where many employees perform a variety of tasks without any one taking obvious pride of place. In this regard, the regulations specify that "[e]mployees in the financial services industry generally meet the duties requirements for the administrative exception if their duties include" tasks such as "collecting and analyzing information regarding the customer's income, assets, investments or debts" or "marketing, servicing or promoting the employer's financial products," but in the same breath declare that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. § 541.203(b). In light of this ambiguity, regulated parties such as the Mortgage Bankers Association often have no choice but to seek out and rely upon definitive interpretive guidance from agency officials; the statute and the regulations simply leave too many important questions unanswered to do otherwise.

D. Allowing Agencies To Depart at Will from Their Relied-Upon Interpretive Positions Would Make These Problems Even Worse

Both as a matter of doctrine and as a matter of practice, then, agencies already face and act upon incentives to avoid meaningful public scrutiny of their conduct by promulgating vague substantive regulations and then interpreting them to address the important issues actually at stake. The Federal and Private Petitioners would make this problem worse by allowing agencies to switch interpretive positions without notice and comment, even in the face of substantial reliance by the regulated

community. This attempt, if allowed, would undermine the basic purposes of the APA and the reliance interests of regulated entities.

Consider first the distinction between legislative and interpretive rules. Because courts have struggled to articulate a clear line between interpretive and substantive rules, an agency could promulgate an ambiguous regulation in the first place and then, without having to respond to the concerns of the regulated community, merely interpret that rule to reach any of the results it desires. But even then, no matter how much anyone had relied on the agency's definitive interpretation, it could later change its mind, again without any feedback from the public. By lowering the costs of definitive interpretations, the Federal and Private Petitioners would make it easier for agencies to preserve their own flexibility while evading meaningful notice and comment.

Deferring to an agency's interpretive position where it has suddenly changed its view despite substantial reliance also brings into focus the problems associated with *Auer*. By acting in such a fashion, the agency demonstrates its lack of special insight into the regulation's meaning—it has, after all, changed its mind. Such agency flip-flopping also presents the chief danger that the Constitution's separation of lawmaking from law interpreting aims to prevent: discretion on the part of lawmakers to subject parties to "laws" that mean whatever the lawmakers later say they do, despite even their own prior interpretation. Finally, deference in such circumstances further strengthens agencies' incentive to promulgate vague regulations and then

interpret them to mean what they want—they can avoid the hassles of notice and comment while maintaining maximum flexibility to do as they please, even when what they want changes over time.[3]

To be sure, this Court has placed outer limits on an agency's ability to engage in such tactics. *See Christopher*, 132 S. Ct. at 2166–68 (refusing to defer to the agency's recently announced view because it would impose "potentially massive liability" on "decades-long" conduct that the agency consciously ignored). It is not clear, however, just how broad that protection from *Auer* is. And even if, as the Department of Labor argued below, some agency flip-flops deserve only *prospective* deference, *see* Br. for the Federal Appellees at 45, *Mortg. Bankers Ass'n v. Perez*, No. 12-5246 (D.C. Cir.),[4] that result would

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[3] Even those who criticize the *Paralyzed Veterans* doctrine acknowledge that it has considerable utility so long as courts defer to interpretive rules. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 569 (2000) (noting that *Paralyzed Veterans* might have been inspired by concerns about such deference and that "[i]t is troubling to give nearly as much force to a rule that is adopted with no procedural safeguards as to a rule that is adopted only after conducting a notice and comment rulemaking").

[4] Tellingly, the Federal Petitioners' brief fails to even mention *Auer*. Although the Private Petitioners now rely on *Christopher* in arguing that regulated parties should not fear agency flip-flops, *see* Private Petrs.' Br. at 42–44, they demanded *Auer* deference before the lower courts and suggested that such deference was inappropriate only where an agency's revised view created unfair surprise, *see* Br. for

still give cold comfort to many. What if, for example, you had moved to Alaska and set up a business in reliance on an agency's definitive interpretation, only to be told later on that—as a "prospective" matter—your business model would no longer work in light of the agency's new, binding interpretation, promulgated without your input? *See Alaska Prof'l Hunters*, 177 F.3d 1030.

The Federal and Private Petitioners' position would thus give agencies additional means to evade meaningful notice and comment by promulgating vague legislative rules and leaving everything essential up to interpretation. Allowing that result would create serious problems. For one thing, it would undermine the APA's notice-and-comment provisions by allowing agencies to change some of their most important regulatory decisions, hardened over time through definitive, consistent interpretation, without any feedback from the regulated community.

For another, it would threaten the reliance interests of those who, because of the agency's ambiguous legislative regulations, must structure their affairs around interpretive rules. Although the Due Process Clause and administrative law protections such as arbitrary and capricious review would guard against the *most* egregious threats to reliance interests, the high barriers posed by some of these doctrines might not shield reliance interests in the ordinary case where an agency changes its mind

(continued…)

Intervenors-Appellees at 36 n.13, *Mortg. Bankers Ass'n v. Perez*, No. 12-5246 (D.C. Cir.).

to the detriment of regulated parties. Indeed, as explained above, they likely would not protect against agency efforts to subject regulated parties to new interpretations going forward, even though those parties may have "had no opportunity to participate in the development" of the substantive *or* interpretive rules that will now so seriously affect their lives. *Alaska Prof'l Hunters*, 177 F.3d at 1035.

III. AT A MINIMUM, THE APA SHOULD BE CONSTRUED TO REQUIRE NOTICE AND COMMENT WHERE AN AGENCY SUBSTANTIALLY DEVIATES FROM ITS RELIED-UPON INTERPRETATION OF AN AMBIGUOUS REGULATION.

This Court should not jeopardize the legitimate and significant reliance interests of regulated entities by allowing agencies to materially change their definitive interpretive positions at will. Under the practical interpretive approach that the APA demands, where regulated entities have legitimately relied upon an agency's previous interpretation, the agency must give notice before reversing its definitive interpretation. In those circumstances, the agency has effectively amended a legislative rule, the classic example of behavior demanding notice to and an opportunity to comment by those affected by the agency's decisions.

The APA is not some narrow, technical statute governing a specific subject matter. Rather, its basic framework governs a bewildering variety of agencies and agency actions, setting the ground rules for administrative law generally. As a result, its provisions should not be interpreted mechanically, but instead must be flexibly and pragmatically

applied with a view toward the Act's basic purposes. Indeed, this Court has already recognized as much. It has, for example, emphasized that what constitutes "final agency action" for purposes of the APA's judicial review provision (5 U.S.C. § 704) must be determined in a "pragmatic way," *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (internal quotation marks omitted), sensitive to the "practical and legal consequences" that an agency's actions have on others, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004); *see also, e.g.*, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1276 (2011) (Breyer, J., dissenting on other grounds) (emphasizing that the Court has "long[] recogni[zed]" that the APA "cannot [be] interpret[ed] . . . with the linguistic literalism fit for interpretations of the tax code" but must instead be given a "practical approach").

Lower courts, too, have emphasized that the APA's provisions in general—and its notice-and-comment requirements in particular—must be interpreted in light of the essential protections they afford to the regulated community. Congress established those provisions to ensure that "the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice," in order to ensure that "the governors shall be governed and the regulators shall be regulated." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (internal quotation marks omitted). "Mindful" of these purposes, courts have been "careful to construe § 553(b)(A)'s exceptions"—including the interpretive rule

exception—"narrowly." *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).[5] They have also interpreted them functionally, asking (for example) "whether the substantive effect" of the rule in question "is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA" in determining whether a rule falls within the procedural rule exception to notice and comment. *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (internal quotation marks omitted); *see also, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (holding that a rule was substantive rather than procedural in part because it "impose[d] [so] directly and significantly upon so many members of the public").

Both this Court and the circuit courts have thus given the APA what its broad text and applicability demand: pragmatic interpretations sensitive to the impact that agency actions have on the public at large and the regulated community in particular. Under that approach, agencies must give notice of their preferred interpretation and respond to comments before reversing their prior definitive,

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[5] A host of other circuits have followed suit. *See, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (internal quotation marks omitted); *N.C. Growers Ass'n v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012); *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 201 (2d Cir. 2010); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1344 (Fed. Cir. 2005); *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 885–86 (9th Cir. 1992); *Prof'ls & Patients for Customized Care*, 56 F.3d at 595.

relied-upon interpretations because in those circumstances, the agency's action has the practical effect of overruling a prior legislative rule to the parties' detriment.

As discussed above, courts have struggled to differentiate between legislative and interpretive rules. *See supra* 11–14. Nonetheless, the factors they have considered in drawing that line demonstrate that "a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter," *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013), at least where the prior interpretation has been substantially relied upon.[6]

Consider first the main question courts ask in distinguishing between legislative and interpretive rules: does the rule itself "affect[t] individual rights and obligations" in a binding manner, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007) (internal quotation marks omitted), or does it merely "advise the public of the agency's construction of the statutes and rules which it administers"? *Guernsey Mem'l Hosp.*, 514 U.S. at 99. Where the rule "carries

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[6] The D.C. Circuit decision below, focusing on the meaning of its own prior cases, held that reliance was not a prerequisite to requiring notice and comment before an agency changes its definitive interpretation. *See Mortg. Bankers Ass'n*, 720 F.3d at 970–72. *Amici* agree with that position for the reasons explained in the Mortgage Bankers Association's brief, *see* Resp.'s Br. 36–45, but, as explained below, notice and comment is at least required where parties have substantially relied on the agency's prior position.

the force and effect of law" and does not simply "spell[] out a duty fairly encompassed within the regulation that the interpretation purports to construe," it is legislative, not interpretive, and must come from notice and comment. *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55–56 (D.C. Cir. 2002) (internal quotation marks, alteration, and emphasis omitted); *see also, e.g.*, *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009) (similar).

From the regulated party's perspective, changing definitive interpretive positions notwithstanding industry reliance feels much like changing the applicable law and imposing new obligations midstream. To be sure, the agency cannot rely entirely on either interpretive rule in any enforcement action; it must ultimately be able to support its position by reference to the underlying legislative rule. This fact, however, provides little comfort given *Auer* deference. Because of *Auer*, the agency's interpretation of a party's obligations under a (broad, ambiguous) legislative rule will be just as binding as the legislative rule itself unless the party can show that the interpretation is not just wrong, but unambiguously so, the same demanding standard parties must meet when challenging a legislative rule under *Chevron*.

As a result, it makes little sense to sharply distinguish between the legal force of a legislative rule and the force of its definitive, relied-upon interpretation; both create essentially new obligations, just at different levels of generality. And as a result, it makes plenty of sense to see reversals of definitive, relied-upon interpretations for what they practically are—amendments to a pre-existing

legislative rule, one that has naturally and predictably guided private conduct. *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) ("As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity."); *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 ("[T]he purpose of the APA would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations.").

Beyond looking at the legal force of the rule in question, courts have also stated that "the substantial impact of a rule [on the regulated community] is relevant to its classification" as legislative or interpretive. *Dia Navigation*, 34 F.3d at 1265; *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983) (similar); *see also, e.g.*, *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 (noting that the rule in question "substantially change[d] the [screening] experience of airline passengers" in concluding that it was a legislative rather than interpretive rule).[7] This

[7] Others have rejected the relevance of this factor to the inquiry, *see, e.g., Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005), but it deserves at least some weight. As a legal matter, particularly significant rules are more likely to impose new obligations on regulated parties rather than merely give details into old obligations—that is, after all, a large part of why they are important. And as a policy matter, particularly significant rules deserve notice

factor weighs strongly in favor of requiring notice and comment before an agency changes its interpretive position in the face of substantial reliance. By definition, the agency's new position in such circumstances will impact regulated entities—they have structured their affairs around the agency's settled view, and yet the agency's new position could upend years of planning and substantial investments. Like the essentially binding nature of definitive interpretations, the effect of agency reversals on the public at large indicate that those reversals may properly count as amendments of a legislative rule for purposes of the APA.

* * *

The business community needs to know that it can rely upon the interpretive rules that increasingly affect its day-to-day operations. By requiring agencies to ask for and respond to public feedback before changing definitive, relied-upon agency interpretations, this Court can protect those reliance interests and foster the APA's goals of increasing the effectiveness and legitimacy of agency decisionmaking through notice-and-comment rulemaking.

CONCLUSION

For the reasons stated above and by the Respondent, the decision below should be affirmed.

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and comment in order to increase their effectiveness and legitimacy, particularly given the hazy line between legislative and interpretive rules.

Respectfully submitted,

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