No. 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, ET AL.,
Respondent.

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

BRIEF OF STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMICI CURIAE

NATIONAL LEAGUE OF CITIES

UNITED STATES CONFERENCE OF MAYORS

NATIONAL ASSOCIATION OF COUNTIES

INTERNATIONALCITY/COUNTY MANAGEMENT ASSOCIATION

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

GOVERNMENT FINANCE OFFICERS ASSOCIATION

NATIONAL SCHOOL BOARDS ASSOCIATION

NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[*]

Amici respectfully submit this *amici curiae* brief in support of Respondent. *Amici* seek to offer additional reasons that this Court should affirm the District of Columbia Circuit's holding that significant changes to definitive interpretive rules are subject to notice and comment requirements.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[*]Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici curiae* brief.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 17,500 members are dedicated to the sound management of government financial resources.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4

million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high-quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is reversed. As *amici* argue herein, the D.C. Circuit's opinion has ample support in the text and structure of the Administrative Procedure Act (APA), and reversing it would be detrimental to state and local governments that regulate in the same space as the federal government. If the D.C. Circuit's decision is not affirmed, state and local governments would find themselves buffeted by the changing winds at federal agencies with little opportunity to participate in the formulation of binding rules that have a substantial effect on state and local government policy and regulation.

SUMMARY OF ARGUMENT

I. Since the enactment of the APA in 1946, this Court has afforded different levels of deference and binding legal effect to agency statements depending primarily on two attributes: whether the agency statement in question clarified a statute or a regulation, and whether the agency invited some kind of public or private participation prior to issuing the statement. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Two decisions, however, have introduced additional complexity to that traditional scheme by stating that deference need not go hand in hand with procedural formality. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

This decoupling of deference and procedural formality tends to maximize agency discretion and flexibility at the expense of the reliance and expectancy interests of regulated parties. Requiring a notice and comment process for significant changes to agency statements interpreting regulations would help to restore the balance between agency discretion and the reliance interests that the APA was designed to protect. Moreover, it would guard against the latent threat to the separation of powers presented by an agency's dual status as both author and interpreter of its regulations.

II. *Amici* state and local governments have a significant interest in, and would benefit from, requiring a notice and comment period before federal agencies may make significant changes to their interpretations of regulations. State and local governments often regulate in the same space as federal authorities, and often incorporate federal guidance into their own statutory and regulatory schemes. Significant unannounced changes to those underlying federal standards may be highly disruptive to those schemes, necessitating either new legislation or state agency action, even if such changes

are not in the best interest of the State or locality. Federal agencies can preserve the flexibility to amend the rules and standards that they issue, and achieve better results and minimal disruption to state and local governments, if those agencies are required to allow comment on those rules before they are issued. Such a comment period would be a far more efficient method of allowing state and local governments to raise concerns, at a fraction of the cost of expensive litigation. Furthermore, allowing greater state and local participation in the process would avoid, or at least limit, the risk to federalism posed by ever-expanding federal agency authority.

Given the doctrinal reasons to require federal agencies to use a notice and comment process prior to making significant changes to their interpretations, as well as the strong reliance interests at stake, *amici* respectfully ask this Court to affirm the D.C. Circuit's decision.

ARGUMENT

I. NOTICE AND COMMENT PROCEDURES ARE NECESSARY BEFORE MAKING SIGNIFICANT CHANGES TO DEFINITIVE AGENCY INTERPRETATIONS OF REGULATIONS IN ORDER TO PRESERVE THE APA'S CAREFULLY CONSIDERED STATUTORY SCHEME AND THE SEPARATION OF POWERS.

1. Administrative agencies construe two very different species of legal authority: statutes enacted by Congress (to the extent they have been authorized to do so, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984)), and regulations duly promulgated by the agency through an administrative adjudication or through notice and comment rulemaking, *see Auer v. Robbins*, 519 U.S. 452, 461 (1997).

When interpretations are "issued pursuant to statutory authority," "affect individual rights and obligations," and are intended to bind the public, they are often referred to as "substantive" or "legislative-type rule[s]." *Chrysler Corp. v. Brown*, 441 U.S. 281, 300–03 (1979). Because these rules may bind third parties, they "must conform with any procedural requirements imposed by Congress," including, as relevant here, a notice and comment process. *Id.* at 303 (citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).[1]

Agency statements may also be classified as "interpretive rules." Due to their procedural informality and (typically) non-binding effect on third parties, interpretive rules receive "some weight," but do not receive the "same deference as norms that derive from the exercise of * * * delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *see* 5 U.S.C. § 553(b)(3)(A) (exempting "interpretive rules" from notice and comment procedures); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (stating that an interpretation in an opinion letter that was not arrived at through "a formal adjudication or notice-and-comment rulemaking" "[did] not warrant *Chevron*-style deference").

Neither "interpretive rule" nor "legislative rule" is defined in the APA. But the APA clearly contemplates a correlation between the amount of process an agency utilizes in issuing a statement and the amount of deference—and thus,

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[1] Respondent Mortgage Bankers Association has offered a number of persuasive reasons, with which *amici* agree, as to why the Department of Labor's (Department) 2010 opinion letter interpreting 29 C.F.R. § 541.200(a)(2) properly should be analyzed as a legislative rule, and should conform with the APA's procedural requirements as a result. *See* Resp. Br. at 37, 43–44, 48. This brief, however, explains why the same result is proper even if both the 2010 and 2006 opinion letters are treated as "interpretive rules."

binding legal effect—that statement will receive. Procedural formality, in other words, has long been a proxy for whether an agency statement has the "force of law" and whether it merits deference. This Court has explained that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (deferring to challenged interpretation in part because it was promulgated and amended pursuant to a notice and comment procedure which created no "unfair surprise" to the public).

This approach helps to "maintain[] the balance" wrought by the APA by "ensuring that agencies comply with the outline of minimum essential rights and procedures." *Brown*, 441 U.S. at 313 (quotations omitted); *see also Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523–2 (1978) (describing the APA as a compromise that settled "long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces ha[d] come to rest").

2. Until recently, the APA's basic compromise between procedural formality and deference remained relatively unchanged. But a series of decisions, including *United States v. Mead* and *Barnhart v. Walton*, have carved out an exception to that traditional framework by affording informal interpretive rules controlling force—even if they were not initially intended to have such effect—if they meet certain specified criteria.

In *Mead*, the Court considered a series of rulings letters issued by the United States Customs Service. The Court ultimately concluded that these letters, which were issued pursuant to the Harmonized Tariff Schedule of the United States,

19 U.S.C. § 1202, were "best treated like interpretations contained in policy statements," and were not entitled to *Chevron* deference because, among other reasons, they were issued by the thousands every year and binding only on individual parties. *See* 533 U.S. at 233–34 (quotations omitted). However, the Court did not rule out the possibility that the letters could have received controlling effect had the facts been different, noting that there were sometimes "reasons for *Chevron* deference even when [no notice and comment rulemaking] was required and none was afforded." *Id.* at 231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995) (affording *Chevron* deference to statements of the Comptroller of the Currency because he was "charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws")).

The Court picked up this theme again in *Barnhart v. Walton*, 535 U.S. 212 (2002), where it elaborated a non-exhaustive list of factors to determine whether an interpretive rule derived from a regulation warranted deference. In particular, the Court analyzed (1) whether the legal question being interpreted by the agency was "interstitial" or necessary to resolve some ambiguity in the regulation; (2) whether the agency had "related expertise" suited to the question at hand; (3) whether the question was of importance to the "administration of the statute"; (4) whether the administration of the statute was "complex"; and (5) whether it appeared the agency had given the question "careful consideration" "over a long period of time." *Id.* at 222. Analyzing those factors together, the Court concluded that an interpretive rule defining the term "inability" in a regulation promulgated under the Social Security Act merited deference and could be afforded

controlling effect notwithstanding the fact that it had not been promulgated through any kind of formal process. *Id.*[2]

The possibility that interpretive rules might receive *Chevron*-like deference, however, was not contemplated by the drafters of the APA. To the contrary, contemporaneous legislative history reflects an understanding that interpretative rules were exempt from pre-adoption notice and comment because "interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review," and implicitly would *not* receive any *Chevron*-style deference. *See* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 313 (1946) (statement of Sen. McCarren).

As agencies continue to increase their volume of interpretive rulings—by one estimate, federal agencies issued more than 24,000 "Public Notices," including "guidance documents," in 2013 alone, compared with only 3,500 or so rules—the creation of this new category of rules is likely to assume greater significance. *See* Clyde W. Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, at 25 (Jan. 2014), *available at* http://cei.org/sites/default/files/Wayne%20Crews%20%20Ten%20Thousand%20Commandments%202014.pdf. Therefore, to maintain the "hard fought" balance the APA achieved in light of the potential complications posed by *Mead* and *Barnhart*, significant changes to interpretive statements that would otherwise be entitled to *Chevron* deference under the reasoning in those cases (sometimes de-

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[2] Controlling deference has been afforded to interpretive rules in other situations as well. *See, e.g.*, *Davis v. EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003) (affording *Chevron* deference to an EPA interpretation of the Clean Air Act); *Mylan Labs. Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (affording *Chevron* deference to FDA opinion letters).

scribed as "definitive" interpretations, *see* Resp. Br. at 16, 20) should be made using a notice and comment process.

3. This approach validates the D.C. Circuit's decision in this case. Here, the Department of Labor's 2006 interpretation of 29 C.F.R. § 541.200(a)(2), which found that mortgage loan officers were exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, is entitled to deference because it meets most if not all of the *Mead* / *Barnhart* factors:[3]

First, the 2006 interpretation is a valid exercise of the Secretary of Labor's authority to resolve "interstitial" questions: Section 541.200 was promulgated pursuant to the Secretary of Labor's authority to interpret the FLSA, *see* 29 U.S.C. § 213(a)(1),[4] and the interpretation at issue—a 2006 Administrator Opinion Letter sent to the Mortgage Bankers Association—was signed by the Administrator of the Department's Wage and Hour Division. *Second*, the Wage and Hour Administrator, as the head of that division of the Department, clearly has the "related expertise" to decide which types of employees are exempt from the FLSA's overtime requirements based on the duties they perform. *Third*, the question of which employees are exempt from the overtime requirements is, of course, critical to the interpretation of the

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[3] 29 C.F.R. § 541.200(a)(2) states, in full: "(a) The term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act shall mean any employee: (2) Whose primary duty is 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."

[4] 29 U.S.C. § 213(a)(1) states, in relevant part that "any employee employed * * * in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [5 U.S.C. §§ 551–59] * * *)" is exempt from the FLSA's overtime requirements.

wage and hour provisions of the FLSA. *Fourth*, that question is a "complex" one because it requires a nuanced assessment of not only what the employee's "primary" duties are, but also whether those duties are "related to the management or general business operations of the employer," and if so, whether they are "directly" related. None of these questions has an obvious answer, and indeed, the Department has reversed its position at least twice on this issue. *See* Resp. Br. at 2–7. *Fifth*, the Administrator's 2006 interpretation included a detailed analysis of the relevant regulations and applicable case law, and was not only communicated directly to MBA, but also published on the Department's website as general guidance available to, and regularly consulted by, members of the public seeking to understand the Department's position on various labor and employment issues.

The rulings letters in *Mead*, by contrast, satisfied few if any of these factors. There, it was not at all obvious that "Congress meant to delegate authority to Customs to issue clarification rulings with the force of law" as part of its statutory grant of authority. *Mead*, 533 U.S. at 232–33. And, while the Customs Service undoubtedly had "related expertise" to issue rulings letters, readers of the rulings letters were explicitly cautioned that they were not definitive interpretations and should not be relied upon by third parties. *See id.* That in turn suggested that the letters were merely intended to respond to the particular parties to a dispute, rather than to provide guidance regarding the administration of any statute or regulation. In addition, the letters were issued by the thousands every year by forty-six different customs offices, suggesting that they were crafted with the goal of expediency in mind, rather than "careful consideration." *Id.*; *see also Univ. of Texas S.W. Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (declining to afford the EEOC guidance manual even *Skidmore* deference because the manual's reasoning was circular and was not sufficiently grounded in the provisions of the statutory scheme).

Here, as discussed above, the Secretary and his deputies are expressly authorized to promulgate and interpret regulations under the FLSA, and the detailed, carefully reasoned 2006 interpretation was widely publicized without any caveats about relying on its guidance. Given the authoritative source of the interpretation and its broad public dissemination in a format said to constitute a "final agency action" under longstanding D.C. Circuit precedent, *see Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701–02 (D.C. Cir. 1971) (involving a published opinion letter signed by the administrator of an agency), the 2006 interpretation can be said to have affected the "individual rights and obligations" of third parties, *Brown*, 441 U.S. at 303, and would be entitled to *Chevron*-style deference under this Court's precedents. *See Barnhart*, 535 U.S. at 222; *NationsBank*, 513 U.S. at 256–57.

If the Department of Labor's 2006 interpretive rule is to receive *Chevron*-style deference, however, it is sufficiently definitive and likely to induce reliance that it should not have been significantly altered without the same notice and comment process that is required to amend other binding legal rules. As a result, the 2010 interpretation, which was also declared to be "substantive" and "controlling," Resp. Br. at 8, was correctly found to be procedurally invalid. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (alluding to the possibility that a more robust explanation for a change in policy may be required "when [an agency's] prior policy has engendered serious reliance interests"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("Sudden and unexplained change * * * or change that does not take account of legitimate reliance on prior interpretation * * * may be 'arbitrary, capricious [or] an abuse of discretion.'" (citing 5 U.S.C. § 706(2)(A))); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding if it would impose "new liability * * * on individuals for past

actions which were taken in good-faith reliance on [agency] pronouncements"). Were it otherwise, an agency could disrupt settled expectations and make arbitrary changes to its interpretations with impunity, and still be entitled to deference. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) ("APA rulemaking would * * * be required if [the agency's interpretive rule] adopted a new position inconsistent with any of the [agency's] existing regulations.").

4. Requiring a notice and comment process for significant changes to interpretive rules would also advance another important goal: preserving the separation of powers.

The typical practice of affording *Chevron* deference to reasonable agency constructions of ambiguous statutes poses no separation of powers problem because Congress, as the author of the statute that will be ceding interpretive authority to another entity, has an incentive to "speak as clearly as possible on matters it regards as important." *Decker v. Nw. Envt'l Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013). If Congress wants to make a wholesale delegation of authority to an agency to interpret a statute, it can clearly say so by "explicitly [leaving] a gap for the agency to fill." *Chevron*, 467 U.S. at 843. If it wants to take a more limited approach, it may do that as well. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where delegation of authority did not include the power to "promulgate rules or regulations") (quotations omitted).

But, the practice of affording *Chevron*-style deference to some agency interpretations of their own regulations, whether set forth in interpretive rules or other statements, as courts now do pursuant to *Auer*, 519 U.S. at 461, poses grave separation of powers concerns. As Justice Scalia argued in *Decker*, "'[w]hen the legislative and executive powers are united in the same person * * * there can be no liberty; because apprehensions may arise, lest the same monarch or senate

should enact tyrannical laws, to execute them in a tyrannical manner.'" 133 S. Ct. at 1341 (Scalia, J., dissenting) (quoting Montesquieu, SPIRIT OF THE LAWS bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)). Specifically, permitting an agency to both author and interpret its own regulations encourages agencies to "issue vague regulations" in order to "maximize agency power." *Id.* at 1341 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)). Not only does this structure create a risk of "arbitrary government," *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring), it also creates considerable uncertainty and thus "frustrat[es] the notice and predictability purposes of rulemaking." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

There are good arguments to abandon *Auer* deference entirely. *See Decker*, 133 S. Ct. at 1339–40 (Scalia, J., dissenting). But even without overruling *Auer*, this Court can reduce the separation of powers concern it creates, and the accompanying risk of arbitrary governance, by requiring a notice and comment process for significant changes to interpretations of regulations. Such a process would accomplish these ends by limiting an agency's ability to make drastic changes to its own regulations through "interpretive" revisions that fail to incorporate private or public feedback or input.[5]

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[5] One recent example, discussed more fully *infra* Part II, demonstrates that judicial review may not be a sufficient protection for regulated parties where an agency is determined to implement its agenda without notice and comment. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), for example, the Eighth Circuit invalidated the EPA's effort to modify certain regulations implementing the Clean Water Act's wastewater treatment provisions through "guidance letters" and without a formal rulemaking process. *See id.* at 874. Despite the Eighth Circuit's ruling, the EPA decided it would continue with that effort in all States

In short, affirming the D.C. Circuit's ruling requiring a notice and comment process prior to making a significant change to an agency interpretation is firmly supported by the structure of the APA and would accomplish two important ends: It would restore the balance between agency discretion and reliance interests that is fundamental to the APA's statutory scheme, and would avoid, or at least mitigate, the separation of powers problem posed by undue deference to agency interpretations of their own regulations.

II. A NOTICE AND COMMENT PROCEDURE IS NECESSARY TO SAFEGUARD STATE AND LOCAL RELIANCE INTERESTS AND TO PRESERVE THE APPROPRIATE BALANCE BETWEEN STATE AND FEDERAL POWER.

In addition to the sound legal reasons to require agencies to use a notice and comment process prior to making significant changes to interpretations of regulations, such a requirement would safeguard state and local reliance interests, improve federal policymaking, and protect against gradual shifts in the balance of state and federal power. These federalism interests are of considerable importance to *amici*.

1. All regulated parties have reliance interests that are affected when a federal agency makes a significant change to an interpretive rule without notifying the public and offering an opportunity for participation. But the reliance interests of the state and local government entities represented by *amici*

[Footnote continued from previous page]

outside of the Eighth Circuit's jurisdiction, which has created tremendous confusion, not to mention anger over the agency's lack of transparency. *See* Letter from Senators Chuck Grassley and David Vitter to the Acting Administrator of the EPA (June 18, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=5cbc9d40-f565-22ef-2882-9f8c0dc929ed.

are particularly significant because these entities often regulate in the same space as the federal government and routinely incorporate pertinent statutes and regulations into their own policies, laws, and regulations. *See, e.g.*, *S. Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48, 64 (1984) (acknowledging critical role that state agencies play in enacting federal policy at the state level).

This type of incorporation occurs in a variety of fields, including:

- environmental regulation, *see Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (requiring States to incorporate federal air quality standards into state-issued pollution permits); *United States v. Iverson*, 162 F.3d 1015, 1020 (9th Cir. 1998) (state codes incorporate federal pollution discharge standards);
- employment and labor regulation, *see See's Candy Shops, Inc. v. Super. Ct.*, 148 Cal. Rptr. 3d 690, 699–700 (Cal. Ct. App. 2012) (California statutes incorporate federal statutes, regulations, and interpretations regarding timekeeping policies); *Huntington Mem'l Hosp. v. Super. Ct.*, 32 Cal. Rptr. 3d 373, 376–78 (Cal. Ct. App. 2005) (California statutes incorporate federal statutes and regulations regarding the "regular rate" of pay);
- consumer protection, *Dyson v. Miles Labs., Inc.*, 394 N.Y.S.2d 86, 87 (N.Y. App. Div. 1977) (New York statute incorporated FDCA branding regulations);
- transportation, *Va. Highlands Airport Auth. v. Singleton Auto Parts, Inc.*, 670 S.E.2d 734, 738 (Va. 2009) (Virginia local ordinance regulating obstructions of airspace incorporated specific FAA regulations);
- banking and finance, *LaSalle Bank, N.A., II v. Shearon*, 881 N.Y.S.2d 599, 605 (N.Y. Sup. Ct. 2009)

(New York Banking Law incorporates various federal banking regulations);

- special education, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (noting that the Individuals with Disabilities Education Act gives States "primary responsibility for developing and executing educational programs for handicapped children," subject to "cooperation and reporting between state and federal educational authorities") (citations omitted);
- taxation, *see, e.g.*, MD. CODE ANN., TAX-GEN. § 10-203 (defining "adjusted gross income" as the individual's "federal adjusted gross income for the taxable year");
- social services, *Hinderer v. Dep't of Soc. Servs.*, 291 N.W.2d 672, 675 (Mich. Ct. App. 1980) (Michigan statute incorporated federal regulations regarding income requirements for welfare eligibility); and
- zoning and property law, *see Putnam Family P'ship v. City of Yucaipa*, 673 F.3d 920, 930 n.6 (9th Cir. 2012) (state or local laws may incorporate federal accessibility standards for housing).

In addition to the foregoing, federal agencies issue almost 600 regulations per year that directly affect state and local governments; in some years, there have been well over 1,200. *See* Crews, *Ten Thousand Commandments* at 45. As a result, whenever a federal agency makes a significant change to its interpretation of one of the statutes or regulations incorporated into state laws or regulations, or a regulation that affects a State directly, the entire legislative and regulatory apparatus must be adjusted to accommodate the change. While such shifts might still be necessary even with a notice and comment process, such a process could ameliorate the disruption by alerting the federal agency to the costs and burdens associated with the change, and perhaps encour-

aging States and localities to work with the federal agency to find a more mutually convenient solution.

2. A second issue that arises where federal agencies are permitted to make significant changes to interpretations of regulations without notice and comment is that States and localities are deprived of an opportunity to offer their input and expertise prior to the formal change in policy. Such input is often necessary because federal agencies, by virtue of their focus on issues of national concern, are generally ill-equipped to address or understand the particular challenges or concerns facing States and localities. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) (noting that federal employees enforcing federal regulations "have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible" and are "hardly as accessible and responsive as those who occupy analogous positions in state and local governments").

This type of "information gap" between federal authorities and local regulated parties was readily apparent in *Alaska Hunters*. There, the federal government decided to change its interpretation of a longstanding rule to require Alaskan private pilots operating hunting or fishing expeditions to comply with the same stringent standards applied to commercial pilots on the theory that the piloting was not incidental to the activity of hunting, but was rather transportation "for hire." *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1032 (D.C. Cir. 1999). This change in interpretation had serious consequences for the many individuals who had set up their own lodges and businesses in reliance on the original interpretation. A far better result could have been reached by seeking local input: As the D.C. Circuit stated, "[h]ad guides and lodge operators been able to comment on the resulting amendments and modifications to [the regulation at issue], they could have suggested changes or excep-

tions that would have accommodated the unique circumstances of Alaskan air carriage." *Id.* at 1035–36.

Such input is particularly important given the budgetary shortfalls faced by many States and localities. In one recent example, the Department of Labor altered its interpretation of a longstanding rule concerning the payment of a stipend, or a "nominal fee," to school staff members who volunteered to coach student athletic teams. In its 1999 interpretation, the Department concluded that such stipends did not trigger any federal or state overtime requirements so long as the stipend, divided across the hours the employee spent coaching, was less than the minimum wage. DOL Op. Ltr., Wage & Hour Div., 1999 WL 1002401 (May 17, 1999). In 2005, however, the Department withdrew that interpretation and concluded that the amount of the stipend could not exceed 20% of the salary the school would pay to a full-time coach in order to avoid having to pay overtime under the FLSA. DOL Op. Ltr., Wage & Hour Div., FLSA2005-51 (Nov. 10, 2005). But many local schools did not have any such full-time coaches, did not participate in any sort of market for coaches, and had no clear way of gauging whether their stipend would comply with the FLSA. *See, e.g.*, Br. of Appellee Fairfax Cnty. Sch. Bd. at 50–58, Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408), 2010 WL 2661193.

While the schools could have avoided any issue with FLSA compliance by paying overtime, many schools were already strapped for cash and simply did not have the budget to support such an additional expense. *See* Br. of Nat'l Sch. Bd. Ass'n et al. as *Amicus Curiae* at 14–18, Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408). Not wanting to find themselves at the center of a lawsuit over a regulation of uncertain interpretation, and unable to marshal the funds to pay overtime, many schools simply eliminated the stipends altogether, to the detriment of the

volunteer coaches, or eliminated the sports program, to the detriment of participating students. *See id*. at 18–19. Had there been a notice and comment process prior to the reversal of the agency's interpretation, the affected schools could have alerted the Department to the practical problems with its proposed standard and arrived at a solution that could be actually implemented without harming the coaching staff or the students in the affected programs.

Another example of state and local reliance interests being affected by changes in federal agency interpretations involved a series of opinion letters issued by the Department of Labor pertaining to municipal firefighters. In 1993, a few years after this Court concluded that the FLSA minimum wage and overtime provisions applied to state and local governments, *see Garcia*, 469 U.S. at 555–56, the Department issued a series of opinion letters concluding that career firefighters who volunteered their services to private organizations had to be paid overtime by whatever public entity employed them. *See* DOL Op. Ltrs., Wage & Hour Div., 1993 WL 901159, 1993 WL 901160, 1993 WL 901155, 1993 WL 901152. This was a departure from its previous policy stating that such volunteer services need not be separately compensated. *See* DOL Op. Ltr., Wage & Hour Div., FLSA2001-19 at 1 (Nov. 27, 2001) (discussing shifting agency policy on this issue). That departure required local governments to expend additional resources paying overtime, training additional volunteers, or hiring and training additional paid firefighters to meet their fire prevention needs. Other governments experienced an opposite, but equally problematic effect: In places where local labor agencies interpreted the 1993 opinion letter as extending to volunteer services by individuals in other professions (such as state police volunteering as firefighters), volunteer firefighters who were also city employees were released to avoid having to pay additional overtime. *See* U.S. Fire Administration, *Retention & Recruitment for the Volunteer Emergency Services*

at 19 (2004) *available at* http://www.in.gov /dhs/files/retainrecruit.pdf.

In 2001, however, the Department reversed course again and concluded that no additional remuneration was necessary, provided that the firefighters volunteered at an independent, private, non-profit fire or rescue department that "exercises day-to-day control over what positions they hold as a volunteer, what they do and when they do it." FLSA2001-19 at 4. While this new interpretation may have relieved some pressure on local government budgets and understaffed local fire departments, it, like the Department opinion letter governing volunteer coaches, created confusion regarding its application. That confusion might have been avoided if local input had been sought before the interpretation was changed. *See Retention & Recruitment* at 22.

3. In addition, *ex post* challenges to agency interpretations are not a particularly viable means of limiting agency discretion. Not only do published interpretations receive deference under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), if not under *Chevron*, but they may also be prohibitively expensive or impractical to challenge. In the coaching example cited above, for instance, it was far more cost effective for the schools to get rid of the stipend and move coaches to a pure volunteer basis than to challenge the interpretation or risk being sued for non-payment of overtime. That mirrors the choice regulated parties have to make whenever a regulation is altered: Cease all activity (so as to avoid violating the new interpretation) and either challenge the interpretation or comply. Most entities, strapped for cash and burdened with other pressing priorities, will likely choose to comply, thus removing any effective post-adoption check on agency reversals and increasing the risk of arbitrary governance that has concerned members of this Court. *See Talk Am. Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring) (exces-

sive agency discretion "promotes arbitrary government"); *Christopher*, 132 S. Ct. at 2168 (same).

Anecdotal evidence seems to bear this out. For example, between 1995 and 2010, the EPA alone issued 1,176 regulations affecting state governments, and 789 regulations affecting local governments, but only 297 cases were brought by States, territories, municipalities, and regional government entities challenging EPA agency actions over that same period.[6] *See* Crews, *Ten Thousand Commandments* at 78–79; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 17 (2011). Each of those actions cost approximately $68,600 in attorney's fees alone, and fees can often be substantially higher: A 2010 case filed by New York and New Jersey against the EPA resulted in attorney's fees of almost $500,000—quite a substantial sum compared to the virtually costless process of submitting a comment through Regulations.gov. *See* GAO-11-650 at 23, 40; *see also* http://www.regulations.gov/#!home.[7] As a result, the most meaningful opportunity for state and local governments to challenge or provide input regarding such reversals is *before* the agency changes its interpretation.

4. Notice and comment procedures not only guard against the risk of arbitrary governance generally, they may

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[6] Much of this litigation tended to track changes in presidential administrations, GAO-11-650 at 17, which often triggers changes in agency interpretations as well, *see, e.g.*, *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012) (noting repeated switches in position by Department of Labor on donning/doffing issues depending on the presidential administration).

[7] These fee estimates are taken from cases where the state or local entity actually succeeded in recovering fees. These cases are fairly rare; the data is used only as an estimate of what the fee costs would be without a fee award.

also alert state and local governments of threats to federalism. As the foregoing examples illustrate, state and local governments are often regulated by federal agencies and often regulate the same subject matter as those agencies. Allowing those agencies to alter definitive interpretations whenever they see fit without soliciting input from state and local entities would quickly encroach upon authority of state and local governments to regulate their own affairs.

Iowa League of Cities v. E.P.A., 711 F.3d 844 (8th Cir. 2013), a case involving wastewater discharge regulations under the Clean Water Act (CWA), illustrates the very real risk to federalism that unchecked agency discretion can create. Under the CWA, state and federal governments must work in tandem to regulate, among other things, wastewater discharges in order to preserve water quality standards. States and municipalities have a significant degree of discretion in setting up their own programs, though that discretion is "exercised against a backdrop of significant EPA authority over state-run * * * programs." *Id*. at 856. Under longstanding EPA policy, "[S]tates should exercise their 'discretion'—as set forth in 40 C.F.R. § 131.13—to adopt a 'definitive statement' in their water quality standards" regarding the use of "mixing zones," which are generally defined as areas where a wastewater plant may allow concentrations of various effluents to exceed federal standards. *Id*. at 873–74; 857. While these "zones" were subject to certain federal restrictions, States had the ability to determine whether to use them or not. However, in a 2011 "guidance" letter, the EPA categorically stated that such mixing zones "should not be permitted," thus "eviscerat[ing] state discretion to incorporate mixing zones into their water quality standards." *Id*. at 874.

The Eighth Circuit concluded that this "guidance" was not merely an interpretation but rather a "new legal norm"

that should have been promulgated through notice and comment. *Id*.[8] The court also referenced the fact that EPA's efforts to make substantive changes to its regulations through "guidance" could prove to be very costly for municipalities who "must either immediately alter their behavior [based on the new 'guidance'] or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the letters but will be rejected when the letters are applied as written." *Id*. at 868.

Iowa League of Cities, like this case, supports the principle that courts must be active in ensuring that the "formerly flexible strata" of interpretive rules do not "ossify into rule-like rigidity" by evading notice and comment or judicial review. *Id*. at 873. And when that ossification occurs in a space where the States and the federal government regulate concurrently, or collaboratively, it may not be long before the "tyranny of small decisions" produces a sizeable and irreversible shift in the balance of state and federal power. *Id*.

In sum, requiring a notice and comment period for significant changes to interpretive rules would have at least three salutary effects for state and local governments: It would avoid undue disruption to state and local regulatory

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[8] A similar analysis was applied to another regulation involving "blending," which is a type of treatment process which various municipalities had hoped to use in their wastewater treatment plants. *See id*. at 858. Whereas previous regulations had posed no absolute bar to using those types of treatments, another FDA "guidance" letter categorically stated that such treatments could only be used if there were "no feasible alternatives." *Id*. at 875. As with the mixing zones, the Eighth Circuit concluded that this "guidance" was really a new legal norm that had no basis in any existing regulations and was invalid because it was not promulgated through a notice and comment procedure. *Id*. at 876.

apparatuses that incorporate federal regulations and standards; improve federal policymaking by allowing regulated entities to participate in the regulatory process; and prevent a slow and creeping realignment of state and federal power.

CONCLUSION

For all of these reasons, the Court should affirm the judgment below.

Respectfully submitted.

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