No. 13-1052

In The
Supreme Court of the United States

Jerome Nickols, Ryan Henry, Beverly Buck,
Petitioners,

v.

Mortgage Bankers Association,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent Mortgage Bankers Association's ("MBA") objections to review in this case do not withstand scrutiny.

Contrary to MBA's suggestion, this case is not moot. Mootness cannot be demonstrated by a newspaper article, citing an anonymous source, suggesting possible regulatory reform years in the future. Even proceeding under the assumption that such reform could occur, any rulemaking would happen, if at all, years from now—long after this Court's 2014 term—and would not affect the claims of thousands of employees, like Petitioners, who have pending claims for overtime compensation.

MBA's remaining arguments are equally meritless. The circuit split in this case is genuine, as courts, scholars, and even the panel below universally recognize. The Question Presented is important, recurring, and squarely presented in this case. MBA's arguments ignore all evidence to the contrary, including numerous district court opinions invoking *Paralyzed Veterans*, as well as evidence of the doctrine's serious chilling effect on agency decision making.

Petitioners join the United States Solicitor General and seventy-two administrative law scholars—unanimous in their criticism of the D.C. Circuit's decision—in urging this Court to grant review in this important case.

I. THIS CASE PRESENTS NO MOOTNESS CONCERNS.

President Obama recently directed the Secretary of Labor to propose revisions to the Fair Labor Standards Act's ("FLSA") minimum wage

and overtime regulations. *See* Presidential Memorandum Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 15,211 (Mar. 13, 2014). But the President's directive does not—indeed cannot—render this case moot, for three principal reasons.

First, the President's recent announcement omits any mention of loan officers. *See id.* The White House even issued a "Fact Sheet," which describes in greater detail the kinds of reforms the President intends to pursue. *See* Press Release, Office of the Press Sec'y, the White House, *FACT SHEET: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr. This fact sheet similarly does not say a word about whether any future reform would cover loan officers. *Id.* Some media reports, citing unnamed and anonymous sources, have suggested the reform will address loan officers, but such off-the-record whispers fall far short of the kind of definitive evidence necessary to demonstrate mootness. *See United States v. Grose*, 687 F.2d 1298, 1300 (10th Cir. 1982) (en banc) (rejecting mootness argument where the "possibility of mootness is only speculative").

Second, even assuming that future regulatory reform could address loan officers, any such reform would occur, if at all, years in the future, long after this Court resolves this case. Although the President has directed the Secretary to propose reforms, there is no timetable for publishing proposed rules or conducting notice and comment. The last time the Department of Labor

("DOL") amended the FLSA regulations, the process took over two years from beginning to end.[1] This Court, on the other hand, would likely hear argument in this case in November 2014, and resolve the matter by February to June 2015—one or more years before any new regulations would take effect.

Given these two timelines, there is no inconsistency whatsoever in the government challenging the D.C. Circuit's decision while (by hypothesis) simultaneously laying the groundwork for notice and comment. If the government prevails in this case, it will no longer be required to spend years and millions of dollars simply to codify an interpretation that nearly everyone recognizes as the correct interpretation of existing regulations. If MBA prevails, the government will not have wasted a year sitting on its hands. And conceptually, MBA's mootness argument is perverse: the DOL is under court order to conduct notice-and-comment rulemaking or abandon its interpretation. The mere suggestion that the government will comply with the D.C. Circuit's

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[1] The Secretary first announced in August 2002 that she would propose new FLSA regulations. Inst. of Mgmt. & Admin., *DOL Secy Chou Vows to Demystify Regs for HR Managers*, Hum. Res. Dep't Mgmt. Rep., Aug. 2002, at 1, *available at* 2002 WLRN 322252. The DOL published proposed rules on March 31, 2003; the final rules went into effect on August 23, 2004. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541); Defining and Delimiting the Exemptions, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

directive if it loses this case hardly moots the case itself.

Third, as MBA concedes, any future reforms would not bear on the claims of many employees, such as Petitioners, who have already asserted claims for overtime compensation. Petitioners stand in the shoes of thousands of similarly-situated employees asserting claims dating back to 2004. These claims will be resolved by reference to existing regulations. They cannot—now or in the future—become moot by future agency action.

II. THE CIRCUIT SPLIT IS GENUINE.

The circuit split over the *Paralyzed Veterans* doctrine is genuine and is not, as MBA claims, "illusory." Although reasonable minds can debate the precise contours of the split, the existence of the split has been recognized by numerous authorities, including the panel below, several other circuit courts, seventy-two leading administrative law scholars, and Solicitors General serving under Presidents of both major political parties. MBA alone fails to acknowledge the persistent split of authority.

Moreover, the circuit split is not just "theoretical." The fact that many appellate decisions addressing the doctrine could have been made on other grounds does not, as MBA suggests, make the split any less real. It is well established that "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1924) (citing *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)); *Fla. Cent. R. Co. v. Schutte*, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one

point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter."). Even if some of the debate over the doctrine has occurred in dicta, that dicta is entitled to respect by lower courts and is routinely followed. In fact, the *Paralyzed Veterans* opinion itself established the doctrine in dicta, yet the D.C. Circuit later applied the doctrine without question. *See Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The *Paralyzed Veterans* decision has sent ripples through both courts and the administrative agencies subject to the doctrine. MBA seeks to diminish the doctrine's importance; but MBA relies on the mistaken premise that a simple tallying of published court of appeals opinions applying *Paralyzed Veterans* suffices to measure the doctrine's impact on agencies and regulated communities. This premise is wrong. MBA fails to take account of the numerous district court decisions invoking the doctrine to strike down agency interpretations and the profound chilling effect the doctrine places on the process of interpretive rulemaking.

First, the contention that *Paralyzed Veterans* has only served to invalidate two interpretive rules is simply incorrect. Courts have invoked the doctrine to invalidate agency interpretations numerous times. *See, e.g.*, *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001); *Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 124–

25 (D.D.C. 2001) (invoking *Paralyzed Veterans* to strike down a Department of Interior interpretation related to calculating royalties on crude oil transportation costs); *Neb. Dep't of Health & Human Servs. v. U.S. Dep't of Health & Human Servs.*, 340 F. Supp. 2d 1, 20–21 (D.D.C. 2004) (applying *Paralyzed Veterans* to strike down a Health and Human Services interpretive rule regarding training costs); *Tripoli Rocketry Ass'n, Inc. v. U.S. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 9–13 (D.D.C. 2004) (relying on *Paralyzed Veterans* to strike down a Bureau of Alcohol, Tobacco, Firearms and Explosives interpretation removing an exemption from a previously exempt sport model rocket); *Mercy Med. Skilled Nursing Facility v. Thompson*, No. C.A.99-2765 TPJ, C.A.01-2014 TPJ, C.A.02-2252 TPJ, 2004 WL 3541332, at *2–3 (D.D.C. May 14, 2004) (finding that the Health and Human Services Secretary's "long established practice of granting atypical cost exceptions" amounted to a definitive interpretation of a regulation and required notice and comment prior to modification); *Montefiore Medical Ctr. v. Leavitt*, 578 F. Supp. 2d 129, 133–34 (D.D.C. 2008) (concluding that a longstanding, established approach to Medicare reimbursements to hospitals constituted a definitive interpretation requiring notice and comment to change); *Ball Mem'l Hosp. v. Leavitt*, Civil Action No. 04-2254(RMC), 2006 WL 2714920, at *8–11 (D.D.C. Sept. 22, 2006) (holding that an agency's previously applied reimbursement rate was a definitive interpretation, and must be subject to notice and comment prior to change); *Cresote Council v. Johnson*, 555 F. Supp. 2d 36, 38 (D.D.C. 2008) (invalidating the Environmental Protection Agency's revised interpretation addressing when

chemical releases must be reported); *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 564–65 (M.D. La. 2003) (invalidating a change in a Bureau of Prisons interpretation of the Bureau's policy of placing certain classes of convicts directly into community confinement centers); *Barron v. Berkebile*, No. 3:08-CV-0668-K, 2008 WL 4792532, at *3 (N.D. Tex. Oct. 30, 2008) (invalidating the Bureau of Prisons' change in interpretation addressing whether the early release of qualifying inmates is permissible).

Second, MBA ignores *Paralyzed Veterans*' pervasive chilling effect on agency decision making. The doctrine arises frequently in agency adjudications, demonstrating agencies' hesitance to use their interpretive authority in light of the doctrine. *See, e.g.*, *W&T Offshore, Inc.*, 184 Interior Dec. 272, 287–90 (IBLA 2014) (going to great lengths to explain why a longstanding agency action was not a definitive interpretation subject to *Paralyzed Veterans*); *Williams Prod. Co.*, MMS-02-0007-O&G, 2004 WL 6032917 (Dep't of Interior Oct. 22, 2004) (final determination) (holding that the agency had only expressed its view through nonbinding agency authority to avoid *Paralyzed Veterans*' sweep); *Alameda Hosp. v. BlueCross BlueShield Ass'n/First Coast Serv. Options, Inc.*, No. 98-0460, 2012 WL 983161 (PRRB Feb. 10, 2012) (invalidating an agency interpretation regarding hospital occupancy in order to avoid a *Paralyzed Veterans* challenge); *In re Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 15 F.C.C. 1760 (1999) (dissenting board member would apply the *Paralyzed Veterans* doctrine to invalidate an interpretive rule); *Rag Shoshone Coal Corp.*, 26 FMSHRC 75 (2004) (disallowing agency action in

light of the *Paralyzed Veterans* doctrine); *Mill Site Location & Patenting Under the 1872 Mining Law*, M-37010, 2003 WL 26613333, at *32 (IBLA Oct. 7, 2003) (same); *Hosp.-Based Peer Grp. Mean*, 2010 WL 4214214 (PRRB June 10, 2010) (same); *Glenwood Reg'l Med. Ctr.*, No. 97-2439, 2004 WL 2066678, at *6 (PRRB June 7, 2004) (same).

Even this evidence of the doctrine's impact fails to tell the entire story. There is simply no way to fully account for the cumulative impact of the doctrine on agency decision making, or the extent to which the doctrine stifles informal communications between agencies and their regulated communities. Until this Court intervenes, the specter of *Paralyzed Veterans* will continue to haunt agencies and regulated communities alike.

IV. THIS CASE IS THE IDEAL VEHICLE TO REVIEW THE QUESTION PRESENTED.

As the D.C. Circuit held below, the *Paralyzed Veterans* doctrine "contains just two elements[:]" (1) a definitive interpretation, and (2) a significant change. App. 5a; *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013). Given that there is no dispute over the presence of these simple factual predicates here, MBA's characterization of this case as "factbound" is puzzling.

MBA's vehicle objections (most of which are inaccurate, although that is beside the point) actually demonstrate that this case is the perfect vehicle to consider the Question Presented. For example, MBA faults the Secretary for failing to invoke the Administrative Procedure Act's ("APA") good cause exception to notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b)(3)(B). Of course,

had the Secretary successfully done so, this case would be an awful vehicle to examine the *Paralyzed Veterans* doctrine—the Question Presented might not have been presented at all. MBA argues the DOL did an inadequate job of explaining why it rescinded the 2006 opinion letter, but the point is irrelevant. The *Paralyzed Veterans* doctrine invalidates well-reasoned and poorly-reasoned interpretive changes alike—without regard to the substance of the change. MBA's inability to hypothesize a better case for review shows there is no better case.

MBA suggests that another case will come along soon, but there are sound reasons for the Court to act now. The D.C. Circuit's decision below puts agencies on notice that the *Paralyzed Veterans* doctrine will be vigorously enforced. No agency in its right mind will willingly sacrifice the substance of its regulatory agenda to set up a test case on the meaning of the APA, knowing the agency is sure to lose in both the district court and court of appeals. Because agencies may well decide to comply with the D.C. Circuit's mistaken rule rather than engage in costly and protracted litigation, it is difficult to predict when another case presenting the same issue will reach the Court. The time to confront the Question Presented is now.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the D.C. Circuit.

Respectfully submitted.

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