NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-5195

In the United States Court of Appeals for the District of Columbia Circuit

SCENIC AMERICA, INC.,
APPELLANT

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
APPELLEES

AND

OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.,
INTERVENOR-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 13-93) (THE HONORABLE JAMES E. BOASBERG, J.)

BRIEF OF INTERVENOR-APPELLEE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for intervenor-appellee Outdoor Advertising Association of America, Inc., makes the following certification:

(A) Parties, Intervenors, and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the brief of appellant. The American Planning Association; Garden Club of America; Sierra Club, Inc.; and International Dark-Sky Association, Inc., have appeared as amici in this Court.

(B) Ruling Under Review. The ruling at issue in this appeal is the June 20, 2014, order and judgment and memorandum opinion issued by the Honorable James E. Boasberg of the United States District Court for the District of Columbia in Civil No. 13-93. That ruling is available at *Scenic America, Inc.* v. *United States Department of Transportation*, ___ F. Supp. 2d ___, 2014 WL 2803084 (D.D.C. June 20, 2014), and is included in the joint appendix at pages 80 to 109.

(C) Related Cases. This case has not previously been before this Court or any other court for appellate review. Intervenor-appellee is unaware of any related case involving substantially the same parties and the same or similar issues.

S/KANNON K. SHANMUGAM
KANNON K. SHANMUGAM

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, intervenor-appellee Outdoor Advertising Association of America, Inc., states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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GLOSSARY OF ABBREVIATIONS

APA ..... Administrative Procedure Act

A.R. ..... Administrative Record

FHWA ..... Federal Highway Administration

HBA ..... Highway Beautification Act

J.A. ..... Joint Appendix

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the Federal Highway Administration's 2007 guidance memorandum is an interpretive rule that is exempt from the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

2. Whether the district court correctly held that the 2007 guidance memorandum interprets existing lighting standards, rather than creating new lighting standards inconsistent with "customary use" as that phrase is used in the Highway Beautification Act, 23 U.S.C. § 131(d).

STATUTES INVOLVED

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 553, and the Highway Beautification Act, 23 U.S.C. § 131, are set forth in an addendum to this brief.

STATEMENT OF THE CASE

In 2007, the Federal Highway Administration (FHWA), a component of the Department of Transportation, issued a guidance memorandum (2007 Guidance) to its local Division Offices concerning the application of lighting terms contained in various federal-state agreements to the technology of digital billboards. *See* J.A. 535-538. The 2007 Guidance confirmed the interpretation, already adopted by at least 31 States, that prohibitions in federal-state agreements on "flashing, intermittent, or moving" lights do not cate-

gorically prohibit all digital billboards. *See* J.A. 531-532. The 2007 Guidance also compiled criteria for digital billboard operation that had previously been approved by various Division Offices. *See* J.A. 535, 537-538.

Almost six years later, appellant Scenic America, Inc., filed suit against FHWA, the Federal Highway Administrator, the Department of Transportation, and the Secretary of Transportation, challenging the 2007 Guidance. As is relevant here, appellant alleged that FHWA violated the Administrative Procedure Act (APA), 5 U.S.C. § 553, by issuing the 2007 Guidance without engaging in notice-and-comment rulemaking; appellant further alleged that the 2007 Guidance conflicted with the Highway Beautification Act (HBA), 23 U.S.C. § 131, because digital billboards are not "consistent with customary use." Appellee Outdoor Advertising Association of America, Inc., intervened in the case, and all parties moved for summary judgment. The district court granted summary judgment to appellees, concluding that the 2007 Guidance constituted an interpretation of, rather than a substantive change to, the relevant lighting standards. *See* J.A. 80-109.

A. Digital Billboards

Digital billboards in use along the federal highway system today resemble non-digital billboards in most respects. These signs differ principally in their method of displaying messages: non-digital billboards display a painted or printed message, whereas digital signs use light-emitting diodes

to display their messages. This technology allows digital signs to display a series of different static advertisements on the same advertising space, with the advertisements rotating periodically. J.A. 83, 473, 536. In contrast with non-digital billboards, for which advertisers must manually change the billboard messages, digital billboards "offer a digital way to display static billboard advertisements and make changing them much easier, since the diodes can be reprogrammed remotely to cycle through multiple ads in a single day." J.A. 83.

At last count, some 44 States and over 400 localities have permitted digital billboards. J.A. 22. Billboards erected under the laws of those States and localities typically allow static messages that rotate every six to eight seconds, with the change from one message to another occurring instantaneously. J.A. 436; *see also*, *e.g.*, Or. Rev. Stat. §§ 377.710(6), 377.720(3)(d); Mich. Comp. Laws § 252.318(h). They do not feature jumbotron-style video displays or animation, as are found on signs such as those outside the Verizon Center here in Washington, nor do they otherwise create the appearance of movement. J.A. 471, 538.[2] Instead, using advanced technology, digital billboards eliminate the appearance of movement by immediately transitioning between static images; *a fortiori*, they eliminate the actual movement re-

[2] Typically, displays such as those at the Verizon Center are specifically authorized as part of a special-use district created by municipal law. *See* D.C. Mun. Regs. tit. 12A, § 3107.18.

quired for earlier mechanized changeable message billboards, known as "tri-vision" signs, which changed advertising copy through the mechanical rotation of slats. *See* J.A. 83, 221, 244, 473. In addition, digital billboards are capable of adjusting to their environment, and many jurisdictions have enacted regulations restricting light intensity as it corresponds to the time of day or the amount of natural light. *See*, *e.g.*, Del. Code Ann. Tit. 17 § 1110(b)(3)(e); Ark. Admin. Code § 001.01.2-7; 700 Mass. Code Regs. 3.17; *see also* Ariz. Rev. Stat. § 28-7902(E)(4) (requiring digital billboards to be turned off during nighttime hours).

Studies have shown that digital billboards of the type used along the federal highway system are "safety-neutral" and that "driving performance measures in the presence of digital billboards are on a par with those associated with everyday driving." J.A. 326, 330; *see also* J.A. 473. In particular, a 2012 report by FHWA corroborated the results of earlier studies concerning digital billboards' lack of impact on driver safety. *See* FHWA, *Driver Visual Behavior in the Presence of Commercial Electronic Variable Message Signs (CEVMS)* (Sept. 2012; released Dec. 30, 2013) <tinyurl.com/cevmsreport>. The FHWA report studied distraction under normal driving conditions and found that even "[t]he longest fixation" of a driver's eyes on a digital billboard was well below the "current widely accepted threshold for durations of glances away from the road ahead that result in higher crash risk." *Id.* at 2.

The report concluded that "the presence of [a digital billboard] did not appear to be related to a decrease in looking toward the road ahead." *Id.* Those findings confirmed the results of an earlier study finding "no statistical relationship between digital billboards and traffic accidents." J.A. 436, 473.

Digital billboards also facilitate communication of more speech with fewer physical signs; make outdoor advertising more relevant and timely; and provide opportunities for real-time law-enforcement and public-service messages. *See*, *e.g.*, 700 Mass. Code Regs. 3.17(10), (12). Several government agencies—including the Federal Bureau of Investigation, the National Center for Missing and Exploited Children, the U.S. Marshals Service, and the Federal Emergency Management Agency—routinely use commercial digital billboards, by agreement with the owners, to issue emergency messages to the public. *See*, *e.g.*, J.A. 471. Those agencies can instantly direct a digital billboard to display emergency information, vastly increasing the size of the audience and the timeliness of emergency warnings and alerts. *See id.*

B. Regulatory Framework

The federal and state governments cooperate in regulating outdoor advertising. That cooperation began with the federal Bonus Act of 1958, which amended the Federal-Aid Highway Act of 1956 to provide a 0.5% bonus in federal highway aid to States that voluntarily controlled outdoor advertising

along interstate highways. *See* Pub. L. No. 85-381, § 122, 72 Stat. 89, 95. Regulations promulgated under the Bonus Act prohibited, *inter alia*, "any flashing, intermittent, or moving light or lights." Bureau of Public Roads, *National Standards for Regulation by States of Outdoor Advertising Signs, Displays and Devices Adjacent to the National System of Interstate and Defense Highways*, 23 Fed. Reg. 8793, 8795 (Nov. 13, 1958).

In 1965, Congress enacted the Highway Beautification Act, 23 U.S.C. § 131, which establishes a grant-in-aid condition with which States must comply in order to receive full federal highway funding. Under the HBA, the "size, lighting and spacing" of billboards along federal highways are governed by agreements negotiated between the individual States and the Secretary of Transportation. 23 U.S.C. § 131(d). The HBA requires States to maintain "effective control" of outdoor advertising along federal highways, which includes ensuring that signs comply with the requirements of the applicable federal-state agreement. 23 U.S.C. § 131(b); 23 C.F.R. § 750.704(b). All 50 States entered into federal-state agreements pursuant to the HBA in the 1960s and 1970s. J.A. 83.

States also must submit proposed regulations and enforcement procedures to FHWA. FHWA's local offices, known as "Division Offices," then assess whether the proposals comply with the applicable federal-state agreement and FHWA's own regulations implementing the HBA. *See* 23 C.F.R.

§ 750.705(j). If a State fails to exercise "effective control" of its outdoor advertising, the Department of Transportation may reduce the State's federal highway funding by 10%. 23 U.S.C. § 131(b). The HBA specifies the process that the Department must follow before "making a final determination to withhold funds from a State" and allows a State to obtain judicial review of an adverse determination. 23 U.S.C. § 131(*l*).

With respect to "effective control," the HBA distinguishes between on-premise and off-premise signs. J.A. 281; *see also* J.A. 470. On-premise signs, such as signs at restaurants, hotels, or gas stations, advertise "activities conducted on the property on which they are located." 23 U.S.C. § 131(c)(3). Those signs, including ones "which may be changed at reasonable intervals by electronic process or by remote control," are consistent with "effective control" and are therefore permitted by the HBA without restriction. *Id.*; *see* Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, 2701 (amending the HBA to add the quoted language).

Off-premise signs, on the other hand, are consistent with "effective control" when (1) they are located in commercial or industrial areas, whether zoned or unzoned, and (2) their "size, lighting and spacing" accords with the terms of the applicable federal-state agreement. 23 U.S.C. § 131(d); *see* 23 C.F.R. § 750.704(a)(4), (5), (b). States retain "full authority under their own zoning laws to zone areas for commercial or industrial purposes," and their

determinations "will be accepted." 23 U.S.C. § 131(d). In addition, whenever a State or a local zoning authority has determined that the size, lighting, and spacing of signs in commercial or industrial areas is "consistent with customary use," the Secretary must defer to that determination "in lieu of controls by [the applicable federal-state] agreement." *Id.*; *see also* J.A. 176-177. That determination of "customary use" thus "rest[s] entirely in the hands of the States or the appropriate local jurisdiction." Conf. Rep. No. 1799, 90th Cong., 2d Sess. 26 (1968).

The majority of federal-state agreements contain a prohibition on the use of "flashing, intermittent, or moving" lights. As noted above, that phrase originated in regulations relating to the Bonus Act; it also appears in regulations concerning certain directional signs. *See* J.A. 448; 23 C.F.R. §§ 750.106(b)(7), 750.108(c), 750.154(c)(1). "However, since the [federal-state] agreements were executed independently with each State," FHWA interprets the "applicable State law and State/Federal agreement . . . on an individual basis," taking into account, *inter alia*, past practice in the State and "State certification of local controls in lieu of those in the agreement." J.A. 176.

C. FHWA Guidance

1. As changeable message technology has evolved over the years, FHWA has issued guidance memoranda to its Division Offices to assist them

in applying the HBA, regulations, and federal-state agreements to new technologies. In 1990, FHWA issued a memorandum to its division administrators in response to inquiries about signs with "lights, glow cubes, rotating slats, [and] moving reflective disks," stating that "FHWA has interpreted the Federal law as implemented under individual State/Federal agreements to prohibit off-premise variable message signs, irrespective of the method used to display the changing message." J.A. 163. Almost immediately, however, FHWA clarified its position with respect to the prohibition on "flashing, intermittent, or moving" lights, stating in a 1991 response to a request for an opinion on tri-vision signs that "[a]ny attempt to ban [changeable electronic variable message signs] that do not have the effect of flashing lights would have no legal foundation unless it is reasonable to assume that, regardless of the actual rate of change, signs having merely the capacity to create a flashing light effect would have to be banned as a practical matter because policing every sign's rate of change would be too onerous." J.A. 167.

In a 1993 white paper, FHWA declared that it was "reexamining [its] position on these types of signs" because of "th[e] restrictive policy clarification [in the 1990 memorandum] and the increased interest as well as use in some areas." J.A. 172. Reviewing applicable law at the time, FHWA concluded that "Federal Law and regulations are silent on specific prohibition of off-property variable message signs and those with moving parts, except the

regulations on Class 3 and 4 signs in Bonus States and on directional signs." *Id.*[3]

2. In 1996, FHWA issued a guidance memorandum (1996 Guidance) to its regional administrators to "restate [its] position concerning" changeable message signs. J.A. 182. The 1996 Guidance was issued in response to a "number of States . . . taking the position that certain off-premise changeable message signs are consistent with State law and do not violate the lighting provisions of their State/Federal agreement." *Id.* FHWA emphasized that "changes in technology require the State and FHWA to interpret the agreements with those changes in mind." *Id.*

In the 1996 Guidance, FHWA concluded that "[c]hangeable message signs are acceptable for off-premise signs, regardless of the type of technology used, if the interpretation of the State/Federal agreement allows such signs." J.A. 182. FHWA stated that it "will concur with a State that can reasonably interpret the State/Federal agreement to allow changeable message signs if such interpretation is consistent with State law" and that the "frequency of message change and limitation in spacing for these signs should be determined by the State." *Id.* At the same time, FHWA reiterated that

[3] As a practical matter, the HBA effectively superseded the Bonus Act because it imposed mandatory requirements on all 50 States. The Bonus Act remains in force, however, and States that participated before 1965 and still enforce the Bonus Act controls remain eligible for a bonus.

"these signs may still not contain flashing, intermittent, or moving lights." *Id.*[4]

3. After the 1996 Guidance, many States interpreted their federal-state agreements to permit digital billboards. Some States sought and received approval of their regulations from their FHWA Division Offices, and others interpreted the 1996 Guidance as conveying the agency's approval of digital billboards. J.A. 84, 501. A few Division Offices, however, denied approval of digital billboard proposals. J.A. 84. By September 2007, at least 22 FHWA Division Offices had approved States' digital billboard proposals as consistent with their federal-state agreements, and other States had permitted digital billboards without seeking express FHWA approval. *Id.*; J.A. 531-532.

Despite the growing national consensus, some States and interest groups sought further clarification regarding the permissibility of digital billboards under applicable federal-state agreements. *See*, *e.g.*, J.A. 85, 282, 448. Appellant itself pushed FHWA for "an urgent response to the issue of digital signs." J.A. 444. In an email entitled "[t]he need for urgency," appellant requested "clear and unambiguous guidance from FHWA about what is

[4] In a 1998 memorandum, FHWA affirmed that "animated or scrolling displays" that are dependent "on use of flashing, intermittent, or moving lights" did not conform with the corresponding prohibitions in the federal-state agreements. J.A. 183.

or is not allowed under the law" and urged FWHA to issue guidance on digital signs "*as soon as possible*." J.A. 444-445.

In response to the requests for further clarification, FHWA conducted a comprehensive survey of its Division Offices, asking whether each State within the office's region had previously decided to permit digital billboards; what justification the State had offered for its decision; whether the Division Office had concurred with that justification; and whether the State had implemented regulations governing details such as the length of time each message is displayed or the transition time between the display of different messages. *See, e.g.*, J.A. 412-414, 417-418. In formulating the memorandum at issue here, FHWA also considered a broad range of other input, including not only the results of its survey of Division Offices but also numerous studies, reports, news articles, and positions presented by outside groups, including appellant. J.A. 85 (citing J.A. 184-259, 265-409, 426-436, 442-447, 465-498, 502-517, 519-522, 524-526, 528-532, 535; A.R. 287-289, 458-464).

After reviewing all of those data, on September 25, 2007, FHWA issued the 2007 Guidance, entitled "Guidance on Off-Premise Changeable Message Signs," to its Division Offices. *See* J.A. 535-538. The purpose of the 2007 Guidance was to "clarif[y] the application of the . . . 1996 memorandum" and thereby to "provide guidance to Division [O]ffices concerning off-premises changeable message signs." J.A. 535. In the memorandum,

FHWA reaffirmed that the analysis of the 1996 Guidance applied with equal force to digital billboards, stating that "[c]hangeable message signs, including Digital/LED Display [changeable electronic variable message signs], are acceptable for conforming off-premise signs, if found to be consistent with the [applicable federal-state agreement] and with acceptable and approved State regulations, policies and procedures." J.A. 536.

In particular, FHWA noted that the 1996 Guidance had determined that "changeable messages that were fixed for a reasonable time period do not constitute a moving sign." J.A. 536. Applying that general principle in the specific context of digital billboards, FHWA reasoned that "[e]lectronic signs that have stationary messages for a reasonably fixed time merit the same considerations." *Id.* FHWA concluded that "[p]roposed laws, regulations, and procedures that would allow permitting [digital billboards] subject to acceptable criteria (as described below) do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various [federal-state agreements]." J.A. 535.

In the 2007 Guidance, FHWA also compiled a list of state standards for digital billboards that Division Offices had previously approved, noting that they may "be useful in reviewing State proposals on this topic." J.A. 537. The list included various state laws and regulations for digital billboards regarding duration of message, transition time, brightness, spacing, and loca-

tion, among other topics. J.A. 537-538. At the same time, FHWA emphasized that the memorandum was intended to "provide information to assist the Divisions in evaluating [state] proposals" and not to "amend applicable legal requirements." J.A. 538. The memorandum did not direct the approval or rejection of any billboard. FHWA indicated that it "may provide further guidance in the future as a result of additional information received through safety research, stakeholder input, and other sources." J.A. 535.

D. Proceedings Below

1. On January 23, 2013—almost six years after the promulgation of the 2007 Guidance and just a few months shy of the expiration of the limitations period on such a claim—appellant, an advocacy organization, brought suit challenging the 2007 Guidance. J.A. 8-19.

Appellant raised three claims, two of which are relevant on appeal. *First*, appellant claimed that the 2007 Guidance is a "legislative and substantive rule" that, under the APA, should have undergone notice-and-comment rulemaking. J.A. 17. *Second*, appellant claimed that 2007 Guidance created a "new lighting standard" for every federal-state agreement and thus conflicted with the HBA because digital billboards are inconsistent with "customary use" as that phrase is used in the statute. J.A. 18-19. Outdoor Advertising Association of America, Inc., a trade association representing the outdoor-advertising industry, moved to intervene as a defendant, and the district

court granted the motion. J.A. 3. The parties cross-moved for summary judgment.[5]

2. On June 20, 2014, the district court issued a lengthy opinion granting summary judgment to appellees on all counts. *See* J.A. 80-109.

On the APA count, the district court concluded that the 2007 Guidance is an interpretive rule that is not subject to the APA's notice-and-comment requirements under 5 U.S.C. § 553(b)(A). J.A. 90. The district court analyzed the 2007 Guidance using the four-factor inquiry set forth by this Court in *American Mining Congress* v. *Mine Safety & Health Administration*, 995 F.2d 1106 (1993), for distinguishing between interpretive rules, on the one hand, and legislative or substantive rules, on the other. After considering the case law and the parties' arguments, the court concluded that "all four factors of the *American Mining Congress* [analysis] indicate that the 2007 Guidance is an interpretive rule, not a substantive one." J.A. 102. The court noted that appellant had not directly challenged FHWA's interpretation as arbitrary and capricious under the APA, but it nevertheless addressed what it described as appellant's "backdoor attack on the accuracy of the interpretation contained in the Guidance" and concluded that the interpretation was a

[5] Appellees previously moved to dismiss the complaint on the grounds that appellant lacked standing to pursue its claims and that the 2007 Guidance was not final agency action subject to judicial review. The district court denied those motions. *See* J.A. 56-79.

permissible one of the relevant provisions of the federal-state agreements. J.A. 92-94.

The district court also rejected appellant's argument that, even if the 2007 Guidance were interpretative, it nevertheless should have undergone notice-and-comment rulemaking under the doctrine established in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998), for modifications of interpretations in previous interpretive rules. J.A. 102-106. "[E]ven assuming the applicability and the validity of [that] doctrine," the court concluded that the 2007 Guidance did not "significantly revise FHWA's prior interpretation of the [federal-state agreement] lighting provisions" but instead was entirely consistent with the agency's previous interpretation articulated in the 1996 Guidance. J.A. 103, 106.

On the HBA count, the district court observed that all parties agreed that the lighting provisions in the federal-state agreements were established "consistent with customary use" as that phrase is used in the HBA. J.A. 108. In light of its determination that the 2007 Guidance "merely interprets those provisions" rather than contradicting them, the court found it "inescapable that the [Guidance] is similarly consistent with customary use." J.A. 107-108.[6] This appeal follows.

[6] The district court also granted summary judgment to appellees on a third claim, holding that the 2007 Guidance did not create new lighting

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to appellees on the ground that the 2007 Guidance does nothing more than interpret the existing lighting terms of various federal-state agreements. Its well-reasoned decision should be affirmed.

I. The 2007 Guidance is an interpretive rule—and, as such, it is not subject to the notice-and-comment requirements of the APA. As the district court correctly determined, all four factors of the familiar *American Mining* standard used by this Court for distinguishing between legislative and interpretive rules indicate that the 2007 Guidance is interpretive. Appellant does not even contest the district court's analysis of two of those factors. As to the other two, the district court correctly concluded that (1) an adequate basis for agency enforcement existed apart from the Guidance and (2) the Guidance did not effectively amend a prior legislative rule. FHWA determined that digital billboards are not categorically forbidden by the prohibition on "flashing, intermittent, or moving" lights, and that determination certainly constituted a colorable interpretation of the relevant language in the federal-state agreements. Because appellant's contrary interpretation is not the only possible one, all of its arguments necessarily fail.

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standards in violation of the procedures required by the HBA. *See* J.A. 107. Appellant has not challenged that holding on appeal.

Perhaps recognizing that it cannot succeed under the *American Mining* standard, appellant urges the Court to attach dispositive weight to other factors instead. But neither of its proposed additional factors—whether the rule contains numerical standards and whether it restricts agency discretion—can be reconciled with this Court's precedent. And neither of those factors suggests that the 2007 Guidance is anything other than an interpretive rule.

Finally, appellant argues that, even if the 2007 Guidance is interpretive, FHWA was required to undertake notice-and-comment rulemaking because the Guidance significantly revises a definitive prior agency interpretation. But as the district court correctly determined, to the extent that any prior agency interpretation can be discerned, it was entirely consistent with the 2007 Guidance. The Guidance therefore does not fall within the narrow *Paralyzed Veterans* doctrine—even assuming that the doctrine survives the Supreme Court's review in a currently pending case.

II. The 2007 Guidance also did not conflict with the provision of the HBA concerning "customary use," because it simply interprets the relevant provisions of the federal-state agreements, whose terms, as appellant admits, are consistent with "customary use." Appellant's argument on this score, much like its APA argument, hinges on the premise that the Guidance some-

how amended the federal-state agreements. Because that premise is invalid, appellant's HBA argument necessarily fails.

In addition, appellant's construction of "customary use" would have the perverse and ambitious effect of freezing sign technology at the time the HBA was enacted. The statutory text, purpose, and history all indicate that Congress added the "customary use" provision to the statute to give States flexibility to permit additional types of signs, not to limit outdoor advertising to technologies that were in use in 1965. In the end, appellant simply disagrees with FHWA's interpretation of the federal-state agreement, but that is no ground for relief, because the agency's interpretation is entitled to substantial judicial deference.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo and may affirm the entry of summary judgment on any ground properly raised and supported by the record. *See, e.g.*, *Ark Initiative* v. *Tidwell*, 749 F.3d 1071, 1074 (D.C. Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE 2007 GUIDANCE IS AN INTERPRETIVE RULE THAT IS NOT SUBJECT TO THE NOTICE-AND-COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

The APA exempts from notice-and-comment rulemaking "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). An interpretive rule is a "rule[] or statement[] issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *American Mining*, 995 F.2d at 1109 (quoting *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). Interpretive rules are contrasted with "legislative" (or "substantive") rules, which are subject to the APA's notice-and-comment requirements. Legislative rules are rules "issued by an agency pursuant to statutory authority and which implement the statute." *Id.* (quoting *Attorney General's Manual* 30 n.3).

In the pathmarking *American Mining* decision, this Court reconciled its various relevant precedents into a four-factor inquiry for ascertaining whether a rule is interpretive or legislative. *See* 995 F.2d at 1112. That analysis has consistently guided decisions in this circuit for over 20 years since it was announced. The district court in this case correctly recognized that the *American Mining* factors govern the inquiry here and that all four factors

point to the conclusion that the 2007 Guidance is an interpretive rule. Appellant, by contrast, largely ignores the *American Mining* factors and instead presses arguments that directly contradict the principles announced in that decision. Appellant's effort to shoehorn the 2007 Guidance into the narrow parameters of the *Paralyzed Veterans* doctrine is similarly unavailing. The district court's straightforward application of well-established law should be affirmed.

A. The *American Mining* Factors Support The Conclusion That The 2007 Guidance Is An Interpretive Rule

The four factors this Court has identified for determining whether agency action is an interpretive or legislative rule are "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *American Mining*, 995 F.2d at 1112. Appellant concedes that the district court correctly assessed the second and third factors: FHWA did not publish the 2007 Guidance in the Code of Federal Regulations and did not invoke its general legislative authority in issuing the Guidance. *See* Br. 16. It is therefore undisputed that those two factors, which are among the "hallmarks of legislative rulemaking," weigh in favor of the con-

clusion that the 2007 Guidance is an interpretive, not legislative, rule. *Conference Group, LLC* v. *FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). As the district court correctly determined, the remaining two factors also support that conclusion. Because the 2007 Guidance did nothing more than interpret terms in federal-state agreements, it is an interpretive rule.

1. In The Absence Of The 2007 Guidance, There Would Be An Adequate Basis For Agency Enforcement

a. The "clearest case" of a legislative rule is one in which, "in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate." *American Mining*, 995 F.2d at 1109. The paradigmatic example is a case in which the relevant statute or regulation itself forbids nothing except acts to be spelled out by future agency rules or regulations. For example, Section 14(b) of the Securities Exchange Act of 1934 forbids certain persons from giving or withholding a proxy "in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. § 78n(b)(1). The statute does not itself forbid anything: by definition, the SEC must exercise its congressionally conferred authority to promulgate rules and regulations before it can enforce the statutory proscription. The ensuing rules and regulations are therefore legislative rules. *See American Mining*, 995 F.2d at 1109.

By contrast, in *American Mining*, this Court held that an agency letter that was intended to coordinate policy and to define ambiguous terms in

existing regulations was not a legislative rule because, *inter alia*, there was no "legislative gap" that required the letter as a predicate to enforcement action. 995 F.2d at 1112. Under existing regulations, mine operators were already required to report "diagnosed" occupational illnesses. In response to confusion among mine operators as to whether certain x-ray results qualified as diagnoses, the Mine Safety and Health Administration issued three letters, adopting varying interpretations of the term "diagnosis." *Id.* at 1107-1108. The Court reasoned that, because the "regulations themselves require the reporting of diagnoses of the specified diseases," the agency already had a predicate for enforcement, rendering the letters merely interpretative and not legislative. *Id.* at 1112.

As the district court in this case recognized, "[u]nder this rubric, the 2007 Guidance is clearly an interpretative rule" because the regulatory scheme already "empowers the agency to either accept or reject [s]tate proposals to permit digital billboards, with or without the 2007 Guidance." J.A. 92. The HBA authorizes FHWA to reduce federal highway funding to any State that "has not made provision for effective control of the erection and maintenance" of outdoor advertising. 23 U.S.C. § 131(b). The HBA further provides that, consistent with the requirement of "effective control," States may permit signs to be erected in commercial and industrial areas whose "size, lighting and spacing" are "determined by agreement between the sev-

eral States and the Secretary." 23 U.S.C. § 131(d). The various federal-state agreements include provisions on the subject of lighting, and many of those agreements prohibit signs illuminated by "flashing, intermittent, or moving" lights.

The federal-state agreements therefore already supply an adequate basis for enforcement. As in *American Mining*, the 2007 Guidance merely interprets the meaning of an existing duty; it does not *create* a duty, because the relevant provisions of the federal-state agreements already impose a duty not to use "flashing, intermittent, or moving" lights. In other words, "the legal base upon which the rule rests" is the existing language of the federal-state agreements, not FHWA's "power to exercise its judgment as to how best to implement a general statutory mandate." *Fertilizer Institute* v. *EPA*, 935 F.2d 1303, 1308-1309 (D.C. Cir. 1991) (internal quotation marks omitted).

Indeed, this case presents the quintessential type of interpretive rule, because it involves an agency's expression about what it *interprets* the terms of an existing document to mean. *See*, *e.g.*, *Syncor International Corp.* v. *Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Gibson Wine Co.* v. *Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952). For example, in the rule at issue in *Fertilizer Institute*, the Environmental Protection Agency "attempt[ed] to clarify the meaning of the term 'release' as defined by" the Comprehensive Environmental Response, Compensation, and Liability Act. 935 F.2d at 1308. This

Court concluded that the agency's action "fit comfortably within the category of an interpretative rule." *Id.* The Court rejected the argument that the rule was legislative because it would have had the effect of creating new rights or duties. *Id.* Instead, the Court explained, "regardless of the consequences of a rulemaking, a rule will be considered interpretative if it represents an agency's explanation of a statutory provision." *Id.*

Here, the 2007 Guidance expressly stated that FHWA was interpreting the terms "flashing, intermittent, or moving" "as those terms are used in the various [federal-state agreements]." J.A. 535. The agency interpreted those terms to permit digital billboards subject to certain criteria to be established in the future on a case-by-case basis. *See* J.A. 537-538. Through the 2007 Guidance, FHWA made the public aware of its interpretation of the federal-state agreements and confirmed what types of signs it would generally permit under the terms of those agreements—a classic interpretive task. *Cf. Firearms Import/Export Roundtable Trade Group* v. *Jones*, 854 F. Supp. 2d 1, 13 (D.D.C. 2012) (determining that a rule was interpretive when "it announced the agency's new interpretation of what it may approve under the strictures" of the relevant statute), *aff'd*, 498 Fed. Appx. 50 (D.C. Cir. 2013).[7]

[7] The fact that the 2007 Guidance interprets a phrase contained in many federal-state agreements, as opposed to a statute or agency regulation of general applicability, further illustrates just how far removed the Guidance is from a legislative rule. The federal-state agreements themselves are not contained within a statute or regulation. Rather, the 2007 Guidance repre-

The interpretative nature of the 2007 Guidance is confirmed by the fact that 22 FHWA Division Offices, and at least 31 States, had interpreted the applicable federal-state agreements to permit digital billboards even before the Guidance's issuance. J.A. 92; *see* J.A. 531-532. That fact amply illustrates not only that the Guidance was unnecessary to provide a legislative basis for enforcing lighting standards, but also that it was unnecessary even to provide a basis for reaching the very interpretation of those standards expressed in the Guidance itself. Thus, "[e]ven if the regulatory guidance did not exist, [FHWA] could rely upon prior authority" to apply the policy embodied in the 2007 Guidance. *Truckers United for Safety* v. *FHWA*, 139 F.3d 934, 939 (D.C. Cir. 1998). The fact that two Division Offices had denied approval for digital billboard proposals before the 2007 Guidance does not alter the analysis, because the Division Offices understood themselves to have "an adequate legislative basis for . . . agency action to . . . ensure the performance of duties" without the 2007 Guidance, even though they reached different results in interpreting the federal-state agreements. *American Mining*, 995 F.2d at 1112.

b. Appellant's only contrary argument concerning the first *American Mining* factor is that the lighting provisions in the federal-state agree-

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sents the opinion of FHWA officials as to a reasonable interpretation of ambiguous contractual terms in agreements negotiated with individual States.

ments categorically prohibit digital billboards—and that, as a result, the 2007 Guidance "runs 180 degrees counter to the plain meaning" of those provisions, leaving FHWA with no legislative basis for issuing the Guidance. Br. 25 (internal quotation marks omitted). The district court correctly rejected that argument for the simple reason that the 2007 Guidance "does not stand in complete contradiction" to the lighting provisions of the federal-state agreements. J.A. 101; *see* J.A. 93-94.[8]

In making its argument, appellant exclusively relies on *National Family Planning and Reproductive Health Association* v. *Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). *See* Br. 26-27. In that case, regulations published in the Code of Federal Regulations stated that projects receiving funding under Title X of the Public Health Service Act "may not" provide counseling about abortion. *National Family Planning*, 979 F.2d at 234. The Department of Health and Human Services subsequently issued a directive providing that, under those regulations, Title X physicians *may* provide counseling about abortion. *Id.* at 234-235. The Court explained that, "[w]hile an agency's construction of the statute need not always be correct for its rules to be considered interpretative, the fact that its subsequent interpretation runs 180 de-

[8] Appellant claims that the district court "erroneously gave heightened 'deference'" to FHWA's interpretation, Br. 26 n.8, but that so-called "deference" is built into appellant's own argument: *viz.*, that the interpretation is "180 degrees counter" to the text it is interpreting. *See* J.A. 93.

grees counter to the plain meaning of the regulation gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation." *Id.* at 235 (citation omitted).

As the district court correctly determined, this case is nothing like *National Family Planning*. *See* J.A. 101. The federal-state agreements "do not expressly forbid digital billboards," nor "do they prohibit *all* lights." J.A. 93-94. The 2007 Guidance does not provide that States no longer have to abide by the lighting terms of their federal-state agreements, nor does it authorize approval of "flashing, intermittent, or moving" lights in any circumstances. Instead, it simply interprets the lighting standards of the federal-state agreements as applied to the technology of digital billboards.

Appellant's attempt to define "flashing, intermittent, or moving" in a manner that renders the 2007 Guidance 180 degrees counter to those terms similarly falls flat. *See* Br. 27-29. As the district court correctly held, "[t]he billboards approved by the Guidance . . . could be understood neither to 'flash,' since [their] brightness is limited and they must remain stationary for at least four seconds at a time, nor 'move,' since the images are static," in contrast to scrolling or animated displays. J.A. 94.

The light from digital billboards is also not "intermittent," nor does it create the appearance of intermittency. *See, e.g.*, J.A. 439, 462, 474 (defining "intermittent" in the billboard context); *cf. Webster's New Collegiate Dic-*

tionary 603 (1976) (defining "intermittent" as "occurring or appearing in interrupted sequence"). When a digital billboard is in operation, its light is constant and continuous, not interrupted. To take one definition of "intermittent," if the light were "stopping or ceasing for a time" or "alternately ceasing and beginning again," the sign would display nothing for the period during which the light "stop[ped]" or "ceas[ed]." *Random House College Dictionary Revised Edition* 696 (1975). It was thus entirely reasonable for FHWA to conclude, based on the evidence before it and the HBA's purpose of promoting aesthetics and traffic safety, that imperceptible fluctuations of individual diodes are irrelevant. At the very least, because the lights on a digital billboard "are required to remain steady for several seconds at a time," "the reading contained in the Guidance does not contradict the plain language of the [federal-state agreements]." J.A. 94. Appellant's confused argument about what occurs during the transition between the display of different messages does not undermine that conclusion. *See* Br. 28-29.[9]

FHWA's interpretation may not be appellant's preferred reading of the lighting provisions of the federal-state agreements, but it is far from "180 degrees counter" to the general terms used in those provisions. And as the

[9] Faced with unhelpful definitions of the relevant terms, appellant simply invents its own. For example, appellant relies on a declaration from one of its members for the proposition that, in the member's opinion, a digital billboard "flash[es]." Br. 27.

district court correctly observed, this Court "has affirmed, time and again, that '[a] statement which is interpretative does not become substantive simply because it *arguably* contradicts the statute it interprets.'" J.A. 93 (emphasis added) (quoting *Cabais* v. *Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982)). Because there was a sufficient legislative basis for FHWA enforcement regarding digital billboards even in the absence of the 2007 Guidance, the Guidance is an interpretive rule.

2. The 2007 Guidance Did Not Effectively Amend A Prior Legislative Rule

As for the fourth *American Mining* factor, the district court correctly determined that the 2007 Guidance does not "effectively amend[] a prior legislative rule" because it neither "repudiates [n]or is irreconcilable with" the federal-state agreements. *American Mining*, 995 F.2d at 1112, 1113; *see* J.A. 100-102.[10] Appellant does not challenge the district court's reasoning on this factor.

[10] Appellant does not identify on appeal what legislative rule it claims the 2007 Guidance has amended, but presumably appellant is arguing that the Guidance amends the lighting terms of the various federal-state agreements. *See* Br. 29-31. It is questionable, however, whether the federal-state agreements could themselves be considered legislative rules. They were not themselves subject to the requirements of APA notice-and-comment rulemaking. For that reason, it would make little sense to say that *interpretations* of the agreements are subject to the APA's requirements.

Instead, appellant now advances a new theory on this factor—one that it did not raise before the district court. There, appellant argued that the 2007 Guidance was an effective amendment because it changed the lighting terms of many federal-state agreements by creating a supposed "exemption" for digital billboards. *See* D. Ct. Pltf.'s Mot. for S.J. 33. On appeal, however, appellant now argues that the 2007 Guidance was an effective amendment because it "grant[ed] substantive rights to digital billboard operators who are now immune from agency regulation." Br. 29-30. As a preliminary matter, by failing to present this argument before the district court, appellant has forfeited it. *See Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014); *Potter* v. *District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009); *NRM Corp.* v. *Hercules, Inc.*, 758 F.2d 676, 680 (D.C. Cir. 1985).

Should the Court consider appellant's argument, however, it should reject it because it is simply wrong, as a legal and factual matter. The law could not be clearer that "the impact of a rule has no bearing on whether it is legislative or interpretative." *American Postal Workers Union, AFL-CIO* v. *United States Postal Service*, 707 F.2d 548, 559-560 (D.C. Cir. 1983). As this Court has explained, "[t]here was a time when this court used a 'substantial effects' or 'substantial impact' test to help draw a line between legislative rules and general statements of policy[,] . . . [b]ut we rejected such a test for determining whether an agency pronouncement was a legislative rule or

an interpretive rule." *Central Texas Telephone Co-op., Inc.* v. *FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005). Because "[i]nterpretative and substantive rules may both vitally affect private interests, . . . the substantial impact test has no utility in distinguishing between the two." *Cabais*, 690 F.2d at 237-238. Instead, "the proper focus in determining whether an agency's act is legislative is the source of the agency's action, not the implications of that action." *Fertilizer Institute*, 935 F.2d at 1308. As a result, the fact that a rule "may affect how parties act does not make the rule legislative—regardless of the consequences of a rulemaking, a rule will be considered interpretative if it represents an agency's explanation of a statutory provision." *Id.*

What is more, the 2007 Guidance did not "grant[] new rights to digital billboard operators," as appellant erroneously contends. Br. 30. FHWA cannot grant rights to billboard owners; it can only approve or reject States' regulatory proposals. It is the State, not FHWA standing alone, that possesses the power to authorize or ban digital billboards within its jurisdiction. The Guidance does not even direct FHWA Division Offices to approve digital billboard proposals or guarantee States that their proposals will be approved. Appellant asserts that advertisers in Texas and New York may now display digital messages in a manner that they could not before the 2007 Guidance. Br. 30-31. But any "rights" that advertisers have gained in Texas and New York are the proximate result of policies and regulations enacted

by the States' own transportation departments, which had the option of withholding those rights. *See* N.Y. Dep't of Transportation, *Criteria for Regulating Off-Premises Commercial Electronic Variable Message Signs (CEVMS) in New York State* (Jan. 5, 2015) <tinyurl.com/nycevmspolicy>; 43 Tex. Admin. Code §§ 21.252-21.260 (2011). Not only were those rights not "grant[ed]" by FHWA, but the practical impact of the 2007 Guidance "has no bearing on whether it is legislative or interpretative." *American Postal Workers*, 707 F.2d at 559-560.

B. Appellant's Proposed Additional Factors Do Not Support The Conclusion That The 2007 Guidance Is A Legislative Rule

Having failed to demonstrate that the 2007 Guidance is a legislative rule under the four-factor analysis established by this Court to govern that inquiry, appellant now argues that the Court should consider as dispositive two additional factors, neither of which can be reconciled with governing precedent. *See* Br. 16-25. Appellant's effort to inject new factors into the analysis is unavailing.

1. The 2007 Guidance Permissibly Included A Summary of Existing Numerical Standards

Appellant argues that the 2007 Guidance is a legislative rule because it "provides arbitrary numeric standards in a four-page conclusory document without record support." Br. 21. That argument is both forfeited and meritless.

a. Appellant's lead argument in this Court is that the district court "overlooked . . . precedent outside of the four-factor test" of *American Mining*, including precedent that "arbitrary numerical regulatory standards" are legislative rules. Br. 16-17. But appellant did not advance that argument before the district court. The closest appellant came was in one sentence of its reply brief in support of summary judgment, where it asserted, as *part* of the four-factor *American Mining* analysis, that the 2007 Guidance "introduces a detailed set of numerical parameters to govern the operation of digital billboards, completely untethered to any language in the statute or [federal-state agreements]." D. Ct. Reply in Support of S.J. 11. Appellant did not cite, much less discuss, either *Catholic Health Initiatives* v. *Sebelius*, 617 F.3d 490 (D.C. Cir. 2010), or *Hoctor* v. *United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), the cases it now emphasizes on appeal. Nor did appellant challenge the Guidance on the grounds of arbitrariness. *See* J.A. 92-93 (noting that appellant did not challenge the Guidance as "arbitrary and capricious").

Appellant has forfeited this argument by failing to articulate, much less present meaningful discussion of, this novel theory in the district court. *See*, *e.g.*, *Armenian Assembly of America, Inc.* v. *Cafesjian*, 758 F.3d 265, 285 (D.C. Cir. 2014); *Gerlich* v. *DOJ*, 711 F.3d 161, 168 (D.C. Cir. 2013). Although the district court easily rejected the argument that the numerical pa-

rameters in the 2007 Guidance were "untethered" from the language of the federal-state agreements, *see* J.A. 97-98, it had no opportunity to pass upon the argument that appellant now advances as the centerpiece of its appeal: namely, that the Guidance constituted a legislative rule because it set "arbitrary numerical regulatory standards." This Court should decline to consider appellant's forfeited argument.

b. In any event, appellant's argument lacks merit. To begin with, appellant's theory depends on the erroneous premise that the 2007 Guidance "imposed . . . numeric standards" for which it provided no explanation. Br. 21. Quite the contrary. Far from imposing mandatory numerical standards, the Guidance clearly states that FHWA surveyed its Division Offices and presented in the Guidance "ranges of acceptability that have been adopted in those States that do allow [digital billboards] that will be useful in reviewing State proposals on this topic." J.A. 537. The Guidance then set out a list of ranges and recommendations that "have been approved by Divisions to date." *Id.* The Guidance further clarified that it "does not prohibit States from adopting more restrictive requirements for permitting [digital billboards]" and that Division Offices "are not required to concur with State proposed regulations, policies, and procedures if the Division review determines . . . [that they] are not consistent with the [applicable federal-state agreement] or do not include adequate standards to address the safety of the

motoring public." *Id.* Summarizing what individual offices have done is simply not equivalent to dictating what they *must* do.[11]

Nor do appellant's authorities support its argument. In *Catholic Health Initiatives*, this Court held that a rule governing the holdings of offshore captive insurers, promulgated by Secretary of Health and Human Services, was not an interpretive rule because "there is no way an interpretation of [the statutory phase] 'reasonable costs' can produce the sort of detailed—and rigid—investment code set forth in the [rule]." 617 F.3d at 496. Among other things, the rule capped offshore captive insurers' investments in equity securities at 10% of their assets. *Id.* at 492. The Court reasoned it was "impossible to give a reasoned distinction" between acceptable and unacceptable percentages based on the purportedly interpreted text. *Id.* at 496 (internal quotation marks omitted).

Similarly, in *Hoctor*, the Seventh Circuit held that the Department of Agriculture was not interpreting a regulation about the "structural strength" of animal housing units when it imposed a requirement that perimeter fences

[11] Of course, the primary function of the 2007 Guidance is to inform Division Offices and the public that FHWA interprets "flashing, intermittent, or moving" lights in the federal-state agreements not to categorically prohibit digital billboards. If the Court were to conclude that the numerical examples in the Guidance are impermissible "standards," the appropriate remedy would be to vacate only those standards, leaving intact the Guidance's central conclusion that digital billboards do not necessarily violate the lighting standards of the federal-state agreements.

at facilities for exotic animals must be eight feet tall. 82 F.3d at 167-168. The court found that the height restriction was based on an "arbitrary choice[]," not an interpretation of the existing regulation. *Id.* at 170.

In both cases, the courts made clear that their reasoning did not mean that "an interpretive rule can never have a numerical component." *Catholic Health Initiatives*, 617 F.3d at 495 (internal quotation marks omitted); *Hoctor*, 82 F.3d at 171. "[A] rule that translates a general norm into a number may be justifiable as interpretation," as would "the use of a number as a rule of thumb" or a numerical presumption that is related to the animating standard. *Hoctor*, 82 F.3d at 171. What is not permitted is a numerical rule that is "self-contained, unbending, [and] arbitrary." *Id.* That distinction is consistent with the broader principle that a rule does not become legislative merely because "it supplies crisper and more detailed lines than the authority being interpreted"; bright-line rules may be interpretive. *American Mining*, 995 F.2d at 1112 (citing cases).

Appellant faults the district court for recognizing that this Court "has been amenable to interpretive rules that derive highly specific, numerical interpretations from seemingly vague source material," Br. 17 (quoting J.A. 97), but it is appellant who errs. As the district court explained, *American Mining* itself is a striking example of this Court holding that a highly specific numerical standard, derived from one general word, is an interpretive rule.

See J.A. 97-98. Nor is that decision an outlier. *See*, *e.g.*, *American Postal Workers Union*, 707 F.2d at 558-559 (holding that a rule establishing a new formula for the computation of retirement annuities for postal workers was interpretive).

The compilation in the 2007 Guidance of ranges of times previously approved by Division Offices for the display of each message, or the transition between the display of different messages, does not establish "self-contained [and] unbending" standards. *Hoctor*, 82 F.3d at 171. The Guidance itself states that those examples are provided because they may "be useful in reviewing State proposals." J.A. 537. And, as the district court correctly determined, the specifications in the Guidance "are tied to the language in the [federal-state agreements] because the limits on timing and brightness serve to ensure that the lights on the digital billboards do not 'flash,' 'move,' or shine 'intermittently.'" J.A. 98. This case is nothing like the cases on which appellant relies, and it certainly does not provide an occasion for the Court to deviate from the well-established *American Mining* analysis.

2. It Is Irrelevant That The 2007 Guidance Restricts Agency Discretion

Appellant also argues that the 2007 Guidance is a legislative rule simply because it restricts agency discretion. *See* Br. 22-25. In so arguing, appellant goes further than it did in the district court, asking this Court to rewrite *American Mining* by making dispositive a factor that the Court explicitly re-

jected in that case. Appellant also mischaracterizes the Guidance, which restricted only the Division Offices' ability to categorically prohibit digital billboards.

In *American Mining*, this Court directly addressed the fact that some of its prior cases had emphasized whether the disputed rule restricted agency discretion. 995 F.2d at 1111. The Court rejected that factor as a basis for distinguishing between interpretive and legislative rules, reasoning that the cases discussing that factor arose in the "quite different context" of distinguishing policy statements from legislative rules. *Id.*; *see*, *e.g.*, *Community Nutrition Institute* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam); *id.* at 950 (Starr, J., concurring in part and dissenting in part). As the Court explained in *American Mining*, "while a good rule of thumb is that a norm is less likely to be a general policy statement when it purports (or even better, has proven) to restrict agency discretion, restricting discretion tells one little about whether a rule is interpretive." 995 F.2d at 1111 (citations omitted); *see also Syncor*, 127 F.3d at 96 (same). All of the cases from the Court on which appellant now relies were decided before *American Mining*, *see* Br. 22-24, and thus do not call into question the Court's rejection of this factor or the district court's rejection of appellant's argument, J.A. 96; *see* Br. 24 (chastising the district court for "parroting" *American Mining*).

In any event, appellant simply misreads the 2007 Guidance when it argues that "it would be daunting indeed" for Division Offices to withhold approval of state digital billboard proposals "that fit within the 'acceptable criteria' of the 2007 Guidance." Br. 23-24. The Guidance itself makes clear that "Divisions are not required to concur with State proposed regulations, policies and procedures if the Division review determines, based upon all relevant information, that the proposed regulations, policies and procedures are not consistent with the [federal-state agreement] or do not include adequate standards to address the safety of the motoring public." J.A. 537. As the district court correctly concluded, the only restriction on discretion imposed by the 2007 Guidance was "its removal of Division Offices' discretion to categorically reject States' digital-billboard proposals" on the ground that all digital billboards necessarily violate the federal-state agreements. J.A. 96. The Division Offices, however, retain significant discretion to determine whether a particular state proposal is acceptable, including whether it runs afoul of any applicable prohibition on "flashing, intermittent, or moving" lights or is deficient in any other respect. Even if the cases on which appellant relies retain vitality, therefore, this case bears little resemblance to them.

C. The *Paralyzed Veterans* Doctrine Does Not Apply Here Because The 2007 Guidance Does Not Significantly Revise A Prior Agency Interpretation

In this circuit, an agency's interpretation of a regulation may nevertheless require notice-and-comment rulemaking if the agency "has given its regulation a definitive interpretation, and later significantly revises that interpretation," thereby "effect[ively] amend[ing] its rule." *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). As appellant emphasizes, this doctrine—known as the *Paralyzed Veterans* doctrine, after the case in which it was first established—is quite "narrow." Br. 34. In fact, it is so narrow that this Court has applied the doctrine only twice, and the validity of the doctrine is currently before the Supreme Court. *See Perez* v. *Mortgage Bankers Ass'n*, No. 13-1041 (argued Dec. 1, 2014). Assuming the continued vitality of the *Paralyzed Veterans* doctrine, it is inapplicable here.

Of the two cases in which this Court has applied the *Paralyzed Veterans* doctrine, only one involved a dispute over the applicability of the doctrine's requirements. In *Alaska Hunters*, the Federal Aviation Administration (FAA) had an unbroken 30-year practice of advising Alaskan guides that they need not comply with the agency's commercial-pilot regulations. 177 F.3d at 1035. That position was reflected in official agency adjudications and was uncontradicted over the entire 30-year period. *See id.*; *Mortgage Bankers Ass'n* v. *Harris*, 720 F.3d 966, 970 (D.C. Cir. 2013), *cert. granted*, 134

S. Ct. 2820 (2014). Indeed, the Court found that it had become "authoritative departmental interpretation, an administrative common law." *Alaska Hunters*, 177 F.3d at 1035. After thirty years, however, the FAA issued a notice "abruptly revers[ing]" that "previously settled practice," thereby disrupting the reliance interests of an entire industry that had been built on the previous interpretation. *Association of American Railroads* v. *Department of Transportation*, 198 F.3d 944, 947 (D.C. Cir. 1999); *see Alaska Hunters*, 177 F.3d at 1035-1036. The Court held that, if the FAA wanted to apply its commercial-pilot regulations to the Alaskan guides, it must first give them an opportunity to comment through the notice-and-comment rulemaking process. *See Alaska Hunters*, 177 F.3d at 1035-1036.

This case is far removed from *Alaska Hunters*, which illustrates the definiteness of the interpretation, and the significance of the change, necessary to invoke the narrow *Paralyzed Veterans* doctrine. To begin with, FHWA had not adopted a "definitive interpretation" of the federal-state agreements with respect to digital billboards before it issued the 2007 Guidance. The agency had never announced an official position regarding digital billboards, and its prior interpretations of the lighting standards in the agreements were too general to establish a definitive agency interpretation.[12]

[12] Before the 2007 Guidance, the only agency interpretations specifically pertaining to digital billboards were the decisions of the various Division Of-

The best evidence that FHWA's preexisting interpretation of the lighting standards with respect to digital billboards was not considered "express, direct, and uniform" consists of the outcry from States, Division Offices, and appellant itself for a more definitive interpretation from FHWA in the years leading up to the 2007 Guidance. *Association of American Railroads*, 198 F.3d at 949; *see* J.A. 281, 444-445, 448; *see also* J.A. 519 (letter from appellant accusing FHWA of taking a "passive stance" on the issue of digital billboards).

Second, even if one could "discern from this meager record a position on signs displaying static messages through variable lighting," the district court correctly concluded that the relevant prior agency interpretation was stated in the 1996 Guidance, which is entirely consistent with the 2007 Guidance. J.A. 105-106. Appellant argues that FHWA's 1990 memorandum set forth the relevant prior interpretation and that the 1996 Guidance concerned only tri-vision signs. Br. 32-33. But the district court correctly rejected that argument. J.A. 106. It is true that the 1990 memorandum interpreted the federal-state agreements to "prohibit off-premise variable message signs irrespective of the method used to display the changing message." J.A. 163. But the 1996 Guidance reversed that policy, stating that "[c]hangeable mes-

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fices, 22 of which had interpreted the relevant federal-state agreements to permit digital billboards. *See* J.A. 530-532.

sage signs are *acceptable* for off-premise signs, *regardless of the type of technology used*." J.A. 182 (emphases added). That policy "necessarily supersedes" the contrary one articulated in 1990, and the 1996 Guidance is not subject to review here. J.A. 106.

As the district court explained, "[i]t is clear" that the 2007 Guidance did not "significantly revise[]" the interpretation articulated in the 1996 Guidance. J.A. 106 (quoting *Alaska Hunters*, 177 F.3d at 1034). The 1996 Guidance permits changeable message signs "regardless of the type of technology used," as long as they are consistent with the provisions of the applicable federal-state agreement, including any provision banning "flashing, intermittent, or moving" lights. J.A. 182. The 2007 Guidance, "in harmony with that framework," approved "[c]hangeable message signs, including [digital billboards], . . . if found to be consistent with the [federal-state agreement]," and it explained that digital billboards subject to acceptable criteria do not constitute "flashing, intermittent, or moving lights." J.A. 106, 535-536. Because that "new guidance document 'can reasonably be interpreted' as consistent with prior documents, it does not significantly revise a previous authoritative interpretation." *MetWest, Inc.* v. *Secretary of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009) (quoting *Air Transportation Ass'n of America* v. *FAA*, 291 F.3d 49, 57-58 (D.C. Cir. 2002)). Even assuming the *Paralyzed Veterans* doctrine survives the Supreme Court's review, therefore, that doc-

trine does not apply here, and FHWA need not have promulgated the 2007 Guidance via notice-and-comment rulemaking.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE 2007 GUIDANCE DOES NOT CONFLICT WITH THE HIGHWAY BEAUTIFICATION ACT

Appellant's argument concerning the Highway Beautification Act fails for the simple reason that the 2007 Guidance interpreted the lighting standards of various federal-state agreements, instead of amending them as appellant asserts. The district court correctly rejected appellant's argument that the Guidance somehow contravenes a freestanding "customary use" requirement in the HBA.

A. The HBA provides that the "size, lighting, and spacing" of signs in specified commercial and industrial areas, "consistent with customary use is to be determined by agreement between the several States and the Secretary." 23 U.S.C. § 131(d). As appellant concedes, the phrase "customary use" in this provision refers to the content of the federal-state agreements, including their lighting standards. *See* Br. 36. The prohibition on "flashing, intermittent, or moving" lights is therefore consistent with "customary use."

As the district court explained, because the 2007 Guidance "merely interprets those provisions" of the federal-state agreements, "it is inescapable that the [Guidance] is similarly consistent with customary use." J.A. 108. Appellant's argument here, like its argument before the district court, de-

pends on the premise that the Guidance "amends" or "changes" the federal-state agreements, rather than simply interpreting them. Br. 35, 36. But because the 2007 Guidance merely interpreted, and did not alter, the terms of the federal-state agreements, which are concededly consistent with "customary use," the Guidance is consistent with "customary use" as well.

B. Appellant seemingly suggests that, by interpreting the language of the federal-state agreements to permit at least some digital billboards, FHWA somehow contravened a freestanding "customary use" requirement, on the ground that digital billboards did not exist at the time those agreements were drafted. *See* Br. 36, 39; Amicus Br. 3. But whatever the precise meaning of the phrase "consistent with customary use" in Section 131(d), it certainly does not require that sign technology be frozen as it was at the time the HBA was enacted.

Congress added the "customary use" language at issue here in response to concerns from the billboard industry about giving the federal government unilateral authority to impose restrictions on the size, lighting, and spacing of billboards. *See* 111 Cong. Rec. 26,296 (1965) (statement of Rep. Wright that the amendment "might give some relief to the great concern . . . expressed here today that the Secretary of Commerce is getting broad, unrestrained, discretionary authority to determine sizing, spacing and lighting in an entirely new area of law"). The "customary use" language thus

was intended to limit the Secretary's authority, vis-à-vis the States, to force the adoption of national standards in contravention of prevailing state standards.

The "customary use" language is therefore the antithesis of a "strict limitation" imposed by Congress, as appellant contends. *See* Br. 40. To the contrary, Congress added it to the statute to give the States more flexibility to allow billboards. Other provisions of the HBA support that understanding: while the HBA expressly authorizes the Secretary to establish national standards for States participating in the Bonus Act and for "directional and official" signs, 23 U.S.C. § 131(c), it conspicuously does not do so for signs of the type at issue here, which are covered by Section 131(d).

A subsequent amendment to Section 131(d) further demonstrates that Congress intended the "customary use" language not to freeze sign technology in its existing state, but rather to protect the primacy of state authority to *permit* particular uses. In 1968, Congress amended Section 131(d) to add language providing that, "[w]henever a bona fide State, county, or local zoning authority has made a determination of *customary use*, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority." Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(a), 82 Stat. 815, 817 (emphasis added). That amendment required deference to state and local de-

terminations that particular practices are "consistent with customary use." *See* Conf. Rep. No. 1799, 90th Cong., 2d Sess. 26 (1968); S. Rep. No. 833, 95th Cong., 2d Sess. 14 (1978). As then-Secretary of Transportation Boyd explained, "[w]hat is determined in good faith by a bona fide local or State zoning authority as 'customary use' will be an acceptable basis for standards as to size, spacing, and lighting in the commercial and industrial areas within the geographical jurisdiction of that State or local authority." Conf. Rep. No. 1799, *supra*, at 26.

The better view, therefore, is that neither the "customary use" language nor any other language in the HBA limits outdoor advertising to technologies that were in use at the time the HBA was enacted. Such an interpretation would prohibit not only digital billboards, but also tri-vision signs and much of the technology of modern billboards more generally. Notably, a 1965 letter from then-Secretary of Commerce Connor to the House Subcommittee on Roads makes clear that the HBA was not intended to embody a static understanding of "customary use":

> The criteria to be followed in setting the standards for billboards . . . would be designed to assist the advertising industry to achieve an orderly development of this important and legitimate business enterprise. . . . The standards for outdoor advertising would be aimed at assuring a pattern of reasonable development as the advertising industry reaches new dimensions. . . . *It is not possible to spell out in detail exactly what kind of reasonable regulation this will be, since we will continue to have new and ingenious types of signs and devices brought forth in the future which may or may not present a haz-*

> *ard*. . . . [I]t would be expected that the refinement of these standards would be a continuing process for the benefit of both the traveling public and private business concerns serving the motorists.

H.R. Rep. No. 1084, 89th Cong., 1st Sess. 5 (1965) (emphasis added). Instead, the HBA delegates broad authority to the States and the Secretary to establish appropriate standards for sign technology—as States and the Secretary have done by prohibiting "flashing, intermittent, or moving" lights. The fact that the States and the Secretary chose to establish general lighting standards in the federal-state agreements, rather than a specific list of approved technologies, does not render the phrase "customary use" meaningless—nor would this suit be an appropriate means of challenging that choice.

Similarly, appellant's argument that the 2007 Guidance renders exemptions for public service information surplusage is nothing more than a disagreement with the substance of FHWA's interpretation. *See* Br. 40-41. Many federal-state agreements exempt public service information such as time, date, and temperature from the prohibition on "flashing, intermittent, or moving" lights. After the Guidance, as before, only those particular types of public service information may be presented by flashing, intermittent, or moving lights, whereas other information, including that on digital billboards, cannot. Appellant simply disagrees with FHWA's interpretation of those terms.[13]

[13] Importantly, as the district court noted, appellant has not directly challenged FHWA's interpretation as arbitrary and capricious under the familiar

C. Finally, to the extent appellant contends that FHWA's interpretation violates a freestanding "customary use" requirement because digital billboards are necessarily signs with "flashing, intermittent, or moving" lights, that contention lacks merit. As explained above, the district court correctly rejected this argument because the 2007 Guidance "does not stand in complete contradiction" to the lighting provisions of the federal-state agreements. J.A. 101; *see* pp. 28-29, *supra*.

Even if appellant had directly challenged FHWA's interpretation of those provisions—and it did not, *see* J.A. 92-94—the agency's interpretation would be entitled to deference. It is black-letter law that an agency's interpretation of its own regulations is "controlling." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). And an agency "is entitled to just as much benefit of the doubt in interpreting . . . an agreement as it would in interpreting its own orders, its regulations, or its authorizing statute." *Cajun Electric Power Corp.* v. *FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991) (citations omitted).

The federal-state agreements here do not implicate either of the "central concerns" appellant raises about traditional deference to agency interpretations. Br. 42. Those agreements were the product of extensive negotia-

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standard of 5 U.S.C. § 706(2)(A). *See* J.A. 87, 92-93. To the extent that appellant now seeks a declaration from this Court that "the FHWA's 2007 Guidance [is] arbitrary [and] capricious," Br. 48, that request comes much too late.

tion between the individual States and the Secretary, and concerns about agencies enacting "vague rules which give [them] the power" or "permit[ting] the person who promulgates law to interpret it" are therefore inapposite. Br. 42-43.

Appellant's additional attempts to strip the agency of deference also fall flat. *See* Br. 44-48. The terms "flashing," "intermittent," and "moving" are terms whose meaning is inherently context-dependent. In the context of digital billboards, FHWA has determined that lights that display a "stationary message[] for a reasonably fixed time" do not categorically qualify as "flashing, intermittent, or moving" lights, whereas lights that display "animation, flashing, scrolling, intermittent or full-motion video" do. J.A. 536, 538. That interpretation—which is based on the agency's experience and expertise with digital billboards, *see* J.A. 537—is eminently reasonable. As previously explained, the administrative record is replete with evidence of FHWA's deliberation and its consideration of input from various sources, including from appellant itself. After reviewing all of the data, FHWA adopted a nuanced approach that accords with its prior interpretations. In this context, even more than in the traditional *Chevron* context, the Court should defer to the agency's expertise in making that reasonable interpretation and may not "substitute its judgment for that of the agency." *Americans for Safe*

Access v. *Drug Enforcement Administration*, 706 F.3d 438, 440 (D.C. Cir.) (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 267 (2013).[14]

[14] This case is therefore unlike the 2011 Arizona state-court decision on which appellant's amici rely in their brief, which was prepared by appellant's longtime outside counsel. *See* Amicus Br. 20-24, 26-27. In that decision, the court analyzed the meaning of the statutory language at issue de novo without affording any deference to the state agency, which until recently had interpreted the statute to prohibit digital billboards. *See Scenic Arizona* v. *City of Phoenix Board of Adjustment*, 268 P.3d 370, 426, 430-431 (Ariz. Ct. App. 2011). Here, by contrast, FHWA has articulated in the 2007 Guidance its interpretation of the lighting standards in federal-state agreements in the context of digital billboards, and its interpretation of that contractual language is entitled to deference. *See Cajun Electric Power*, 924 F.2d at 1135.

In any event, the arguments of appellant's amici are severely undercut by the fact that amici themselves use digital billboards to communicate their messages. *See*, *e.g.*, Wave 3 News, *Billboard Campaign Targets Kemper Co. Power Plant* (Oct. 31, 2013) <tinyurl.com/sierraclubbillboards> (describing Sierra Club's "new digital billboard message"); Associated Press, *Kemper County Power Project Cost Approaches $5 Billion With Latest Rise* (Oct. 29, 2013) <tinyurl.com/sierraclubthree> (noting that Sierra Club planned "to unveil three electronic billboards"); Sierra Club, *MS Sierra Club Launches Billboards Showing True $5 Billion Price of Kemper Boondoggle* (Oct. 30, 2013) <tinyurl.com/sierraclubannouncement> (announcing billboards on Sierra Club website).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

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5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on

the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

23 U.S.C. § 131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this sec-

tion, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall ap-

ply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State transportation departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State transportation department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State transportation department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided*, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(*l*) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned com-

mercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967. Subject to approval by the Secretary in ac-

cordance with the program of projects approval process of section 105, a State may use any funds apportioned to it under section 104 of this title for removal of any sign, display, or device lawfully erected which does not conform to this section.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment. Funds apportioned to a State under section 104 of this title shall not be treated for purposes of the preceding sentence as being available to the State for making such a payment except to the extent that the State, in its discretion, expends such funds for such a payment.

(*o*) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surround-

ings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

(r) REMOVAL OF ILLEGAL SIGNS.—

(1) BY OWNERS.—Any sign, display, or device along the Interstate System or the Federal-aid primary system which was not lawfully erected, shall be removed by the owner of such sign, display, or device not later than the 90th day following the effective date of this subsection.

(2) BY STATES.—If any owner does not remove a sign, display, or device in accordance with paragraph (1), the State within the borders of which the sign, display, or device is located shall remove the sign, display, or device. The owner of the removed sign, display, or device shall be liable to the State for the costs of such removal. Effective control under this section includes compliance with the first sentence of this paragraph.

(s) SCENIC BYWAY PROHIBITION.—If a State has a scenic byway program, the State may not allow the erection along any highway on the Interstate System or Federal-aid primary system which before, on, or after the effective date of this subsection, is designated as a scenic byway under such program of any sign, display, or device which is not in conformance with subsection (c) of this section. Control of any sign, display, or device on such a highway shall be in accordance with this section. In designating a scenic byway for purposes of this section and section 1047 of the Intermodal Surface Transportation Efficiency Act of 1991, a State may exclude from such designation any segment of a highway that is inconsistent with the State's criteria for designating State scenic byways. Nothing in the preceding sentence shall preclude a State from signing any such excluded segment, including such segment on a map, or carrying out similar activities, solely for purposes of system continuity.

(t) PRIMARY SYSTEM DEFINED.—For purposes of this section, the terms "primary system" and "Federal-aid primary system" mean the Federal-aid primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System.

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for intervenor-appellee and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Brief of Intervenor-Appellee Outdoor Advertising Association of America, Inc., is proportionately spaced, has a typeface of 14 points or more, and contains 11,832 words.

S/KANNON K. SHANMUGAM
KANNON K. SHANMUGAM

FEBRUARY 20, 2015

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for intervenor-appellee, certify that, on February 20, 2015, a copy of the attached Brief of Intervenor-Appellee Outdoor Advertising Association of America, Inc., was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

s/KANNON K. SHANMUGAM
KANNON K. SHANMUGAM