No. 14-1111

In the Supreme Court of the United States

ASSOCIATED BUILDERS AND CONTRACTORS, INC., PETITIONER

v.

PATRICIA A. SHIU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that rules promulgated by the Department of Labor governing federal contractors' obligations under the Rehabilitation Act, 29 U.S.C. 793(a), are consistent with the Act.

2. Whether the court of appeals correctly held that adoption of the challenged regulations was not arbitrary and capricious under the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 773 F.3d 257. The opinion of the district court (Pet. App. 16a-54a) is reported at 30 F. Supp. 3d 25.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2014. The petition for a writ of certiorari was filed on March 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973 (Rehabilitation Act or Act), 29 U.S.C. 701 *et seq.*, prohibits covered federal contractors from discriminating against individuals on the basis of disability. 29 U.S.C. 794(a). The Act also requires such contractors to "take af-

firmative action to employ and advance in employment qualified individuals with disabilities." 29 U.S.C. 793(a). The President's authority to implement this mandate, see *ibid.*, has been delegated to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). See Exec. Order No. 11,758, 3 C.F.R. 841 (1971-1975 Comp.); 41 C.F.R. 60-1.2.

The Act's implementing regulations have long required covered federal contractors to prepare and maintain written affirmative action programs. 41 C.F.R. 60-741.40. In December 2011, OFCCP issued a notice of proposed rulemaking to revise its affirmative action regulations. 76 Fed. Reg. 77,056 (Dec. 9, 2011). After receiving and considering more than 400 comments, OFCCP promulgated a Final Rule in September 2013. 78 Fed. Reg. 58,682, 58,685 (Sept. 24, 2013). The rule is designed to address the substantial, continuing underrepresentation among federal contractors and subcontractors of individuals with disabilities, while at the same time affording regulatory "flexib[ility] in order to reduce the compliance burden on contractors." *Id.* at 58,682.

The Final Rule modified existing regulations in three respects relevant to this case. First, the Final Rule requires federal contractors to "invite" all job applicants to self-report whether the applicant is an individual with a disability covered by the Act. 41 C.F.R. 60-741.42(a). Previously, the rule had required contractors to invite self-identification by applicants only "after making an offer of employment" to the applicant. 41 C.F.R. 60-741.42(a) (2012). As the agency explained, the revision was intended "to collect important data pertaining to the participation of indi-

viduals with disabilities in the contractor's applicant pools." 78 Fed. Reg. at 58,691. Such applicant-pool data "related to the pre-offer stage of the employment process [is] particularly helpful" in assessing a contractor's hiring practices, because it enables more-accurate evaluation of recruiting and outreach efforts. *Ibid.*

Second, the Final Rule requires the collection, maintenance, and analysis of certain information regarding job applicants and hires, including

> (1) The number of applicants who self-identified as individuals with disabilities * * * or who are otherwise known to be individuals with disabilities; (2) The total number of job openings and total number of jobs filled; (3) The total number of applicants for all jobs; (4) The number of applicants with disabilities hired; and (5) The total number of applicants hired.

41 C.F.R. 60-741.44(k). The purpose of collecting this data is "to provide more complete information with which a contractor can assess the effectiveness of its outreach and recruitment efforts over time." 78 Fed. Reg. at 58,699.

Third, the Final Rule establishes a "goal of 7 percent for employment of qualified individuals with disabilities for each job group in the contractor's workforce" (or, if the contractor has fewer than 100 employees, for the workforce as a whole). 41 C.F.R. 60-741.45(a) and (d)(2)(i). This goal "is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups." 41 C.F.R. 60-741.45; see *ibid.* ("Quotas are expressly forbidden."). Instead, the purpose is "to establish a benchmark" for measuring

progress towards an "equal employment opportunity" workplace. 41 C.F.R. 60-741.45(b); see 41 C.F.R. 60-741.45(d). A contractor that falls short of the goal "must take steps to determine whether and where impediments to equal employment opportunity exist" and must act to "correct the identified problem areas." 41 C.F.R. 60-741.45(e) and (f). The regulation also provides that "[a] contractor's determination that it has not attained the utilization goal * * * does not constitute either a finding or admission of discrimination in violation of this part." 41 C.F.R. 60-741.45(g).

2. Petitioner is a national trade association representing construction firms that contract with the federal government. Pet. App. 6a. In November 2013, petitioner filed the present action, alleging that the Final Rule is inconsistent with the Rehabilitation Act and that OFCCP acted arbitrarily and capriciously in adopting it. *Id.* at 6a, 23a, 26a, 37a. The district court granted summary judgment to respondents. *Id.* at 16a-54a. The court held that OFCCP had statutory authority to promulgate the Final Rule, *id.* at 26a-37a, and that the challenged provisions of the rule are not arbitrary or capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, Pet. App. 37a-49a.

The court of appeals affirmed. Pet. App. 1a-16a. The court first held that OFCCP acted within its statutory authority in promulgating the Final Rule. *Id.* at 7a-9a. The court rejected petitioner's argument that the Rehabilitation Act "unambiguously forecloses" a requirement to collect applicant-pool data because the Act "expressly limits affirmative action to individuals already offered jobs." *Id.* at 7a (emphasis omitted). As the court explained, this argument contradicts the

statute's "plain language." *Id.* at 8a. In requiring contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities," Congress used the term "qualified" to describe "the statute's beneficiaries," not to limit the measures that could be adopted to aid those beneficiaries. *Id.* at 7a (quoting 29 U.S.C. 793(a)). The Final Rule is consistent with that goal because it is "expressly designed to promote the 'employment and advancement in employment of *qualified* individuals.'" *Id.* at 7a-8a (citation and brackets omitted). The court also rejected petitioner's argument that OFCCP had previously disavowed its authority to adopt the rule. *Id.* at 8a.

The court of appeals further held that the challenged provisions of the Final Rule were not arbitrary or capricious. Pet. App. 9a-16a. The court determined that OFCCP had adequately explained the need to collect applicant-pool data:

> Absent such data, it is "nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any sort of objective, data-based assessments of how effective contractor outreach and recruitment efforts have been."

Id. at 12a (quoting 78 Fed. Reg. at 58,701).

The court of appeals also rejected petitioner's argument that the seven percent utilization goal was based on flawed methodology because it "does not use the same definition of disabilities as the new Rule" and "does not break down the data by industry or geography." Pet. App. 12a (internal quotation marks omitted). The court observed that the goal was drawn

from a comprehensive survey that had used a narrower definition of disability—"and, if anything, this difference would result in an *underestimate* of the size of the population with disabilities." *Ibid.* OFCCP reasonably adopted a nationwide goal, moreover, based on available data, which shows an "'almost uniform distribution' of individuals with disabilities" in the workforce. *Id.* at 13a (quoting 78 Fed. Reg. at 58,704 n.24). Finally, the court determined that OFCCP did not act arbitrarily by declining to exempt the construction industry from the challenged provisions of the Final Rule. *Id.* at 14a-16a.

ARGUMENT

The court of appeals correctly held that OFCCP's adoption of the Final Rule was consistent with the Rehabilitation Act and with administrative law requirements. The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Congress has authorized OFCCP to promulgate regulations implementing the requirement that federal contractors "take affirmative action to employ and advance in employment qualified individuals with disabilities." 29 U.S.C. 793(a). The Final Rule accordingly adopts measures "intended to provide contractors with the tools needed to evaluate their own compliance and proactively identify and correct any deficiencies in their employment practices." 78 Fed. Reg. at 58,683. The rule requires contractors to invite job applicants to self-report whether the applicant is an individual with a disability covered by the Act. 41 C.F.R. 60-741.42(a). It also requires contractors to collect and maintain applicant and hiring information. 41 C.F.R. 60-741.44(k). OFCCP acted well within its

statutory authority in adopting these requirements. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

Petitioner nevertheless contends (Pet. 12) that these requirements "read the word 'qualified' out of the Act." The court of appeals properly rejected that argument as inconsistent with "the statute's plain language." Pet. App. 8a. The statute requires measures "to employ and advance in employment qualified individuals with disabilities." 29 U.S.C. 793(a). Thus, "the word 'qualified' describes the statute's beneficiaries—'qualified individuals with disabilities.'" Pet. App. 7a. "It does not modify affirmative action," nor does it restrict the methods available for promoting the employment of qualified individuals with disabilities.[1] *Ibid.* (internal quotation marks omitted). Petitioner calls (Pet. 14) this "a distinction without a difference" but offers no plausible alternative reading of the provision—much less does petitioner carry its burden to show that "the statute *unambiguously* forecloses OFCCP's interpretation." Pet. App. 7a (citation and internal quotation marks omitted).

Petitioner also argues (Pet. 14-15) that there is "no support * * * in the Administrative Record" for the conclusion that the Final Rule will help promote the employment of qualified individuals. In fact, OFCCP explained that the rule's expansion of self-reporting to

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[1] Contrary to petitioner's suggestion (Pet. 14 n.4), the court of appeals did not "create[]" this distinction "entirely on its own." See Gov't C.A. Br. 25-26 ("The modifier 'qualified' limits only the class of individuals that should benefit from the affirmative action required by [the statute]; it does not restrict the *methods* that the Department can use to achieve that statutory purpose.").

all applicants is designed to generate "data related to the pre-offer stage of the employment process." 78 Fed. Reg. at 58,691. Such data will "enable the contractor and OFCCP to better monitor and evaluate the contractor's hiring and selection practices with respect to individuals with disabilities." *Ibid.* Similarly, the data collection and analysis requirements will help "provide meaningful data to assist the contractor in evaluating and tailoring its recruitment and outreach efforts" towards individuals with disabilities. *Id.* at 58,701. Thus, as the court of appeals observed, the requirements challenged by petitioner are "expressly designed" to promote the employment "of *qualified* individuals." Pet. App. 7a-8a (citation and brackets omitted).

Petitioner contends (Pet. 16) that the decision below conflicts with this Court's holding in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). In *Chrysler*, OFCCP had promulgated regulations requiring federal contractors to disclose certain information about their affirmative action programs and the composition of their workforces. *Id.* at 286. Chrysler Corporation objected that the requirement conflicted with 18 U.S.C. 1905, which prohibits governmental disclosure of trade secrets and confidential statistical data unless "authorized by law." 441 U.S. at 288-289. The Court held that the disclosure regulation did not satisfy the "authorized by law" standard, because the grant of rulemaking authority to OFCCP was addressed to a wholly different goal: "an end to discrimination in employment," not "any concern with the public's access to information." *Id.* at 307; see *id.* at 306 ("it is clear that * * * Congress was not concerned with

public disclosure of trade secrets or confidential business information").

Chrysler does not support petitioner's argument. That case stands for the well-accepted proposition that a "reviewing court reasonably [must] be able to conclude that the grant of authority contemplates the regulations issued." 441 U.S. at 308. Here, the court of appeals agreed: It located authority for the Final Rule within "the statute's plain language." Pet. App. 8a. The court also concluded that "the provisions of the final rule [petitioner] challenges are all expressly designed to promote" the statute's objectives. *Id.* at 7a-8a. Petitioner may disagree, but its assertion (Pet. 16) that the decision below "conflicts" with *Chrysler* simply begs the first question presented.

Nor does the decision below contravene the principle "that Congressional re-enactment of a statute without pertinent change to an agency's longstanding interpretation of it is 'persuasive evidence that the interpretation is the one intended by Congress.'" Pet. 16 (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The premise of petitioner's argument is flawed: True, Congress did reenact the Rehabilitation Act, see Pet. 17 n.6, but "OFCCP never issued a limiting 'interpretation' that Congress could have endorsed via silence," Pet. App. 8a; see *ibid.* ("Although the previous regulations included neither a pre-job-offer data-collection requirement nor a utilization goal, OFCCP never said it lacked authority to include such requirements or that it would not do so in the future."). By contrast, all of the Congressional-reenactment cases cited by petitioner (Pet. 16-17) involved definitive agency interpretations. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828

(2013) (equitable tolling not available where "[f]or nearly 40 years the Secretary ha[d] prohibited" it); *CFTC* v. *Schor*, 478 U.S. 833, 845-846 (1986) (declining to overturn the "longstanding administrative interpretation" that agency had "declared by regulation"); *Bell Aerospace*, 416 U.S. at 289 (agency could not reverse its "consistent construction of the Act for more than two decades"). Unable to point to any preexisting, definitive agency interpretation, petitioner's argument is effectively that, because OFCCP did not "make use of its full panoply of powers with the earlier regulations," it cannot invoke those powers now. Pet. App. 8a. But as the court of appeals recognized, "powers are not lost by being allowed to lie dormant." *Ibid.* (ellipsis and citation omitted). Were it otherwise, "agencies would be unable to strengthen regulations implementing statutes that Congress has amended. This is simply not how administrative law works." *Ibid.*

Finally, petitioner's reliance (Pet. 17-18) on the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. 4212, is also misplaced. As originally enacted, VEVRAA did not require contractors to report workforce data, "but OFCCP required it nonetheless." Pet. App. 9a. When OFCCP rescinded the reporting regulation due to concerns about the burden it imposed, S. Rep. No. 550, 97th Cong., 2d Sess. 82 (1982), Congress amended the statute "to restore OFCCP's prior practice." Pet. App. 9a; see 38 U.S.C. 4212(d). Thus, as the court of appeals recognized, "[t]he VEVRAA amendment * * * tells us nothing about the issue in this case." Pet. App. 9a. If anything, it warns *against* drawing the negative inference urged by petitioner: it shows that

a statute's failure to require reporting (like the original VEVRAA) does not reflect Congress's intent to prohibit it.

2. Petitioner argues (Pet. 19-24) that the seven percent utilization goal, 41 C.F.R. 60-741.45(a), "ignore[s] undeniable differences between the diverse industries covered by the new Rule" and is therefore arbitrary and capricious. Even if that were true, petitioner would be requesting only "error correction," which is "not among the 'compelling reasons' * * * that govern the grant of certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013). In any event, petitioner's various allegations of error are meritless.

Petitioner objects (Pet. 20) that the seven percent figure is based on general statistics, rather than specific evidence showing a "lack of improvement * * * among *government contractors*" or a "disparity in the employment rates of *qualified* individuals with disabilities." Petitioner also asserts (Pet. 21) that OFCCP failed to justify adopting a goal "on an all-industries, nationwide basis." Contrary to petitioner's claims, however, there is "nothing in the rulemaking that suggests OFCCP flunked th[e] highly deferential [arbitrary and capricious] standard." Pet. App. 16a.

OFCCP adopted the seven percent utilization goal "[a]fter careful consideration of the available data and consultation with the U.S. Census Bureau." 78 Fed. Reg. at 58,704. The seven percent figure reflects the percentage of individuals with disabilities in the civilian labor force, combined with data about the "discouraged worker effect," which accounts for historical discrimination and the existence of other employment barriers that have suppressed the representation of

such individuals in the workforce. *Id.* at 58,704-58,705. And OFCCP's choice of a single figure reflects the "almost uniform distribution" of individuals with disabilities nationwide. *Id.* at 58,704 & n.24. Petitioner's proposed alternative—which would require separate treatment for each distinct job within each distinct industry—is not supported by available data. See Pet. App. 12a-13a ("[D]isability data is based on sampling, and because the percentage of that sample who identify as having a disability is small, it cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender.") (brackets omitted) (quoting 78 Fed. Reg. at 58,704).

Petitioner also objects (Pet. 21) that OFCCP adopted the utilization goal based on data from a survey "that did not use the same definition of disabilities as the [Final] Rule." OFCCP considered this objection, but concluded that the seven percent goal was sufficient to serve its intended function: "enabl[ing] contractors to think critically about their employment practices, including their outreach, recruitment, and retention efforts, and help[ing] them to assess whether and where any barriers to equal employment opportunity for individuals with disabilities remain." 78 Fed. Reg. at 58,706. The goal "is not a rigid and inflexible quota which must be met," nor does it require a contractor to adjust its practices if "no impediments to equal employment opportunity exist." *Ibid.* Moreover, the narrower definition used to generate the survey data suggests that seven percent likely *underestimates* the workforce availability of individuals with disabilities. *Id.* at 58,703; see Pet. App. 12a. Thus, OFCCP did not "pluck a number out of thin air" when it chose the utilization goal. Pet. 22-23 (citation

omitted). Instead, "the agency adequately explained why the best available data did not allow it to create a tailored goal and why the uniform goal [it chose] advances its regulatory objective." Pet. App. 14a.[2]

Finally, the Final Rule is not arbitrary and capricious merely because OFCCP declined to exempt construction contractors, as petitioner would have preferred (Pet. 23-24). Petitioner claims (Pet. 24) that an exemption is necessary due to the "uniquely hazardous and physical" nature of construction. But as the agency explained, construction and transportation contractors "[t]raditionally * * * have not been exempted from" the Rehabilitation Act's affirmative action requirements. 78 Fed. Reg. at 58,701. Petitioner's demand for an exemption is "based on the flawed notion that individuals with disabilities as a group are incapable of working in these jobs." *Id.* at 58,707. Moreover, "neither [the Rehabilitation Act] nor [the Final Rule] require[s] a contractor to hire an individual who cannot perform the essential functions of the job, or who poses a direct threat to the health or safety of the individual or others." *Ibid.* In sum, "[n]one of [petitioner's] arguments demonstrates that OFCCP acted arbitrarily and capriciously by failing to

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[2] In a footnote, petitioner suggests (Pet. 20 n.10) that the data used to calculate the utilization goal, taken from a 2009 survey by the United States Census Bureau, "contradict[s] the basis for OFCCP's previous policy of not imposing any utilization goal requirement." But as the court of appeals noted, "no prior factual finding conflicts with the finding underlying the challenged Rule, i.e., that the [survey data] provides a feasible basis for calculating a utilization goal." Pet. App. 10a. The data collected in the survey—which did not previously exist—represents the best available source of nationwide disability data. See 78 Fed. Reg. at 58,703-58,704.

exempt the construction industry from the Final Rule." Pet. App. 15a.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner relies (Pet. 22) on *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), for the proposition that adopting a seven percent goal was impermissible "[a]bsent a survey of the pool of qualified applicants." *Wards Cove*, which addressed whether a particular employer could face liability for causing a disparate impact under Title VII of the Civil Rights Act of 1964, see *id.* at 650, sheds no light on whether an agency rulemaking complies with the APA.