No. 13-1052

In The Supreme Court of the United States

JEROME NICKOLS, RYAN HENRY, and BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking.

PARTIES TO THE PROCEEDINGS

Petitioners Jerome Nickols, Ryan Henry, and Beverly Buck are former mortgage loan officers seeking overtime compensation in lawsuits filed in federal district court under the Fair Labor Standards Act, 29 U.S.C. § 216(b). Petitioners intervened before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and participated as Defendants before the district court and Appellees before the court of appeals. Respondent Mortgage Bankers Association, a financial services industry trade group, was the Plaintiff in the district court and Appellant in the court of appeals. The United States Department of Labor, Secretary of Labor, and Department of Labor Deputy Wage and Hour Administrator were Defendants in the district court, were Appellees in the court of appeals, and are Petitioners in *Perez v. Mortgage Bankers Ass'n*, No. 13-1041.

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BRIEF FOR PETITIONERS

INTRODUCTION

The D.C. Circuit's doctrine prohibiting agencies from modifying interpretations of agency regulations without notice and comment contradicts the Administrative Procedure Act and upsets the careful balance struck by Congress.

The Administrative Procedure Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). Section 553 of the Act generally requires agencies to engage in notice-and-comment rulemaking, but categorically exempts "interpretative rules" from the notice-and-comment requirement. 5 U.S.C. § 553(b).

The D.C. Circuit has added a judicial gloss to the statute. It holds that although an agency may issue an *initial* interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

The D.C. Circuit's *Paralyzed Veterans* doctrine – which controlled the outcome in this case – is incorrect.

The doctrine is unfaithful to the text of the Administrative Procedure Act, which states unambiguously that all interpretative rules are exempt from notice and comment.

By straying from the text of the statute, the *Paralyzed Veterans* doctrine undermines the thoughtful scheme created by Congress, upsetting a carefully-struck balance between process and predictability on the one hand and agency flexibility on the other. In so doing, the doctrine ignores numerous firmly grounded checks – arbitrary and capricious review, statutory safe harbors, and due process, among others – protecting regulated communities from unexplained and arbitrary shifts in agency interpretation. By the same token, the D.C. Circuit's one-bite-at-the-interpretive-apple rule creates a host of negative consequences Congress sought to avoid: preventing agencies from correcting obvious mistakes, chilling the informal dialogue between government and regulated groups, and increasing the administrative burden on agencies, businesses, and citizens alike.

The *Paralyzed Veterans* doctrine cannot withstand scrutiny, and the D.C. Circuit's decision in this case must be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is available

at *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at Appendix 1a.[1] The district court's opinion is available at *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012), *rev'd sub nom. Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at Appendix 15a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its Opinion and Final Judgment on July 2, 2013. App. 13a. The D.C. Circuit denied Petitioners' timely-filed petition for rehearing en banc on October 2, 2013. App. 54a. Chief Justice Roberts twice granted Petitioners' applications for an extension of time within which to file a petition for a writ of certiorari, extending the deadline to and including February 28, 2014. The petition was filed on that date and granted on June 16, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] All citations to the appendix refer to the appendix accompanying Petitioners' Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act are reproduced at Appendix 71a.

STATEMENT

Congress authorized the Department of Labor ("DOL") to issue regulations defining various statutory exemptions contained in the Fair Labor Standards Act ("FLSA"). In addition to promulgating formal regulations, the DOL – like many other federal agencies – has traditionally issued informal interpretations addressing how the regulations apply to various factual scenarios.

Over the years, the DOL had issued a series of opinion letters concluding that mortgage loan officers – bank employees who sell mortgage products to customers – do not qualify for the FLSA's administrative exemption. In 2006, however, the DOL changed its interpretation, concluding that such employees *do* qualify for the exemption. In 2010, the DOL restored its original and long-standing interpretation, concluding once again that mortgage loan officers do not qualify for the exemption.

The DOL's inconsistency in this case is not happenstance. Rather, the DOL's flip flopping was the result of a concerted lobbying campaign by Mortgage Bankers Association, the Respondent in this case, to change the DOL's interpretation to benefit

the financial services industry in ongoing litigation. Although Mortgage Bankers' lobbying efforts briefly succeeded, the DOL's short-lived 2006 interpretation was widely condemned as both substantively incorrect and the product of regulatory capture.

When the DOL acted in 2010 to restore its original interpretation, Respondent Mortgage Bankers sued the Secretary of Labor. Mortgage Bankers, having successfully convinced a federal agency to change its interpretation without input from anyone else, now argued that the DOL broke the law when the agency changed its interpretation back without first seeking input from affected parties through notice-and-comment rulemaking.

The district court dismissed Mortgage Bankers' case, upholding the DOL's 2010 interpretation as both substantively correct and procedurally sound. But Mortgage Bankers found a sympathetic audience at the D.C. Circuit. Applying the controversial *Paralyzed Veterans* doctrine, the D.C. Circuit vacated the DOL's 2010 interpretation. The *Paralyzed Veterans* doctrine holds that although an agency may issue an *initial* interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586.

A brief description of the background and procedural history of this case follows. Section One addresses relevant provisions of the Administrative Procedure Act. Section Two examines the FLSA, as well as the regulations and interpretations issued by the DOL addressing loan officers' exemption status under the Act. Section Three summarizes the procedural history of this case and the decisions below.

1. The Administrative Procedure Act. Congress enacted the Administrative Procedure Act ("APA"), 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500, *et seq.*), as a "basic and comprehensive regulation of procedures in many agencies." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950).

a. Section 551 of the APA defines the terms "rule" and "rule making" broadly. A "rule" "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4). "Rule making," in turn, "means the agency process for formulating, amending, or repealing a rule . . . ." § 551(5).

Section 553 of the Act sets forth the procedural requirements for agency rulemaking. Section 553(b) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . . . " § 553(b). Section 553(c) further provides that, "[a]fter notice required by this section, the agency shall give

interested persons an opportunity to participate in the rule making through submission of written [comments]." § 553(c). Together, these provisions describe what is commonly referred to as notice-and-comment rulemaking.

Section 553(b), however, contains a number of exceptions to the notice-and-comment rulemaking requirement. Relevant here, section 553(b)(A) provides that the APA's notice-and-comment requirement "does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b)(A).

b. Courts and scholars refer to rules that are subject to the APA's formal rulemaking procedures as "legislative rules," "substantive rules," or simply "regulations." *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 61 (2007); Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 233-34 (3d ed. 1994). Legislative rules "bind[ ] members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority." Davis & Pierce, *supra*, at 233. "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979) (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure*

Act 30 n.3 (1947)). "'Such rules have the force and effect of law.'" *Id.*

Interpretative rules (often referred to as interpretive rules),[2] by contrast, are rules "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* at 302, n.31; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Interpretive rules "do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Guernsey*, 514 U.S. at 99. Interpretive rules "merely [reflect] the agency's present belief concerning the meaning" of the statutes and regulations administered by the agency. Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies,* S. Doc. No. 77-8, at 27 (1st Sess. 1941).

c. Section 706(2)(D) of the APA governs judicial review of agency action. That section authorizes courts to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or

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[2] *See* Bryan A. Garner, *Modern American Usage* 476 (3d ed. 2009) ("[*I*]*nterpretive* has gained ground in the last 50 years – so much so that it's about five times as common in print as *interpretative*. . . . Refight an old fight, if you like, and stick to *interpretative*. But *interpretive* has already taken hold." (emphasis in original)). The two terms are used interchangeably in this brief.

"without observance of procedure required by law." § 706(2)(D).

2. The Fair Labor Standards Act. The FLSA generally requires employers to pay employees both minimum wage and overtime compensation. 29 U.S.C. §§ 206-207. There are certain statutory exemptions, however, to the FLSA's minimum wage and overtime requirements. Relevant here, Congress exempted any employee "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." The FLSA, however, grants the Secretary of Labor authority to "defin[e] and delimi[t]" the scope of these exemptions. 29 U.S.C. § 213(a)(1). Because of Congress' broad delegation of rulemaking authority, the regulations issued by the DOL have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The DOL has promulgated detailed regulations defining these so-called white collar exemptions, *see* 29 C.F.R. § 541, and "[t]he major substantive provisions of the [white collar] regulations have remained virtually unchanged for 50 years." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541). In order to further the broad remedial purpose of the Act, FLSA

"exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

a. This case touches on two of the white collar exemptions: the outside sales exemption and the administrative exemption, both of which require brief examination.

i. The current outside sales regulations exempt "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [the Act]" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a)(1)-(2).

ii. The administrative exemption, as defined by the Secretary's regulations, covers any employee (1) "[c]ompensated on a salary or fee basis at a rate of not less than $455 per week," (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. § 541.201(a). "To meet this requirement, an employee must perform

work directly related to assisting with the running or servicing of the business," as distinguished, for example, from "production" or "selling a product." *Id.*

Courts typically employ the "administrative/ productive work dichotomy" described in the DOL's regulations. *See Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 901 (3d Cir. 1991) (citing 29 C.F.R. § 541.205(a) (1991)). Under that analysis, the administrative duties of "running the business" – for example, accounting, budgeting, quality control, research, safety and health, human resources, or regulatory compliance, *see* 29 C.F.R. § 541.201(b) – are juxtaposed with "production" activities, such as manufacturing and sales, that involve "the day-to-day carrying out of the business' affairs." *Bratt v. Cnty. of L.A.*, 912 F.2d 1066, 1070 (9th Cir. 1990).

The exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). The term applies to the kinds of "decisions normally made by persons who formulate policy within their spheres of responsibility or who participate in this process or who exercise authority to commit the employer in a substantial respect, financial or otherwise." *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997) (citing 29 C.F.R. § 541.207(d)(2) (1997)).

b. Mortgage loan officers are workers employed by banks and mortgage companies who sell loan

products to individual consumers. Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation, No. 2010-1, 2010 WL 1822423, at *1 (Mar. 24, 2010) [hereinafter "2010 Interpretation"], App. 108a-109a (citing cases). Loan officers contact potential customers and collect required financial information, such as income, employment history, assets, investments, and debts, from each customer. *Id.* Loan officers enter the information into a computer program, and the computer identifies which loan products may be offered based on the lending guidelines of the company (and in some cases, the guidelines of the government, for example in the case of an FHA loan). *Id.* Loan officers then assess the loan products identified and discuss the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. *Id.*

Loan officers earn commissions tied directly to sales volume. 2010 Interpretation, 2010 WL 1822423, at *5-6, App. 118a-122a (citing cases). They are subject to strict sales quotas and work long hours to hit their sales targets. *Id.* Loan officers typically receive sales training where they learn proven sales techniques, such as how to close a sale when a prospective customer wants to talk to her spouse or shop around. *Id.* Sales managers frequently encourage and motivate loan officers to close sales, for example, by offering prizes in a sales contest or showing clips from classic sales films like *Boiler Room* or *Glengarry Glen Ross*. *Id.* Loan officers are also promoted, evaluated,

disciplined, and terminated based on their sales production. *Id.*

According to the Bureau of Labor Statistics, nearly 300,000 people – approximately 1 in every 500 workers in the United States – work as loan officers. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Loan Officers (15th ed. 2014), http://www.bls.gov/ooh/Business-and-Financial/Loan-officers.htm.

c. The DOL has, on six occasions, publicly issued interpretive guidance addressing mortgage loan officers' exemption status under the FLSA. Because this case turns on the legal authority of an agency to modify its interpretations, the DOL's six relevant interpretations are necessarily described in some detail here.

i. In a series of four opinion letters published between 1971 and 2006, the agency's position was clear and consistently held: although loan officers qualify for the FLSA's outside sales exemption if the employees perform their job duties outside the office, loan officers do not qualify for the Act's administrative exemption.[3]

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[3] *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971), App. 72a (concluding that mortgage loan officers who customarily and regularly perform work outside the office meet the requirements of the FLSA's outside sales exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999), App.

(Continued on following page)

ii. Traditionally, loan officers were nearly uniformly classified as exempt outside salespersons. *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971), App. 72a. But beginning in the late-1990s, the rise of the Internet and sophisticated marketing campaigns made it possible for loan officers to perform their work without ever leaving the office. No longer able to rely on the outside sales exemption, employers in the financial services industry faced a dilemma: either begin paying overtime, or else classify 300,000 loan officers as administrative employees – a move that would contravene clear guidance from the DOL concluding that loan officers do not qualify for the administrative exemption. *See supra* note 3.

iii. Many employers saw the writing on the wall and began paying overtime, but a handful decided to test their position in the courts.

Consistent with the DOL's interpretations, federal courts uniformly held that mortgage loan officers do not qualify for the FLSA's administrative exemption. In the leading case, *see Casas v. Conseco Fin.*

75a (holding that mortgage loan officers do not meet the requirements of the FLSA's administrative exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001), App. 79a (reaffirming that loan officers do not qualify for the administrative exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-11, 2006 WL 1094597 (Mar. 31, 2006), App. 82a (reaffirming that loan officers who work outside the office qualify for the outside sales exemption).

Corp., No. Civ.00-1512, 2002 WL 507059, at *6-10 (D. Minn. Mar. 31, 2002), the court recognized that as loan officers "making direct contact with customers, it is [their] primary duty to sell [the company's] lending products on a day-to-day basis." *Id.* at *9. The court observed that loan officers "are responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer's financial needs." *Id.* "[T]hese duties establish that [loan officers] are primarily involved with 'the day-to-day carrying out of the business' rather than 'the running of [the] business [itself]' or determining its overall course or policies." *Id.* (citations omitted); *see also Wong v. HSBC Mortg. Corp.*, No. C-07-2446 MMC, 2008 WL 753889, at *6-7 (N.D. Cal. Mar. 19, 2008) (holding that loan officers do not qualify for the administrative exemption).

Although courts rejected the argument that the nation's nearly 300,000 loan officers were now administering banks, federal courts continued to be receptive to employers wishing to invoke the outside sales exemption – provided, of course, that the loan officers customarily and regularly worked outside the office. *See, e.g.*, *Olivo v. GMAC Mortg. Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004). But as courts recognized, the financial services industry could not have its cake and eat it too. By their very terms, the administrative and outside sales exemptions are mutually exclusive: "a [loan officer] cannot be simultaneously exempt under the outside sales exemption and the administrative exemption because the former requires the

employee to have a primary job duty of sales, whereas that same primary job duty disqualifies an employee from coverage under the latter." *See, e.g.*, *Swigart v. Fifth Third Bank*, 870 F. Supp. 2d 500, 511 (S.D. Ohio 2012) (citations omitted).

iv. Between 2003 and 2006, employers facing litigation, and losing in the courts, began lobbying the DOL to reverse its employee-friendly loan officer interpretations. Respondent Mortgage Bankers hired Robert Davis, a former Solicitor of the DOL, as the group's chief lobbyist. R., Intervenors' Mem. Opp'n Summ. J., Exs. 3 & 4, ECF Nos. 30-3, -4. During the same time period, Mr. Davis served as chief litigation counsel to Quicken Loans, Inc., which was engaged in overtime litigation against hundreds of its former loan officer employees. *Id.*

Mortgage Bankers saw its first opportunity to change the law in 2003. On March 31, 2003, the DOL announced plans to update and modernize the FLSA's overtime regulations, and invited public comment. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560 (Mar. 31, 2003). Mortgage Bankers, through Mr. Davis, submitted detailed comments arguing that the white collar exemptions should be broadened so that mortgage loan officers would fall under the coverage of the administrative exemption. R., Intervenors' Mem. Opp'n Summ. J., Ex. 4 at 7-10, ECF No. 30-4.

Mortgage Bankers' comments were not adopted. The DOL's amendments to the white collar regulations went into effect on August 23, 2004. *See generally* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122. But despite Mr. Davis' lobbying, the regulations were not broadened. On the contrary, the new regulations did not alter the substance of the administrative exemption.[4] The DOL did, however, add a new regulatory provision discussing the application of the administrative exemption to employees in the financial services industry. This new section confirmed that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *See* 29 C.F.R. § 541.203(b). And if there was any doubt about who the DOL was referring to when it described "an employee whose primary duty is selling financial products," the commentary accompanying the new provision cited *Casas*, 2002 WL

[4] The DOL did raise the salary threshold required for invoking the administrative exemption from $155 per week to $455 per week. The exemption's duties requirements, however, did not undergo any substantive change. *See Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892 n.6 (D.C. Cir. 2010) (citing Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22,126 & 22,139) (recognizing that the most recent administrative exemption regulations were merely meant to "consolidate and streamline" and ultimately be "consistent with" the old regulations). *Compare* 29 C.F.R. §§ 541.200-.207 (2003), *with* 29 C.F.R. §§ 541.200-.203.

507059, as the prime example, which, as previously discussed, held that loan officers do not qualify for the administrative exemption because their primary duty is sales. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22,145.

Mortgage Bankers had failed to change the law. But Mr. Davis was undaunted. In 2005, Mr. Davis began seeking an informal interpretation from the DOL stating that mortgage loan officers qualified for the administrative exemption.

From around July 2005 to September 2006, Mr. Davis contacted some of the personal connections he had developed at the DOL during his tenure at the agency and lobbied for an opinion letter reversing the agency's prior loan officer interpretations. *See* R., Intervenors' Mem. Opp'n Summ. J., Ex. 3, Davis Decl. ¶ A, ECF No. 30-3; *see also id.* Ex. 7, ECF No. 30-7 (email to DOL personnel); *id.* Ex. 6, ECF No. 30-6 (privilege log showing correspondence between Mr. Davis and Quicken's counsel regarding the requested opinion letter).

But Mr. Davis did not simply request the DOL's impartial application of the FLSA to a hypothetical set of facts. Instead, correspondence obtained through Freedom of Information Act requests shows that Mr. Davis and DOL attorneys worked hand-in-hand on the interpretation, behind closed doors, extensively

negotiating both the factual assumptions and legal analysis on which the DOL's opinion would be based.[5]

Despite Mr. Davis' representation of Quicken Loans in litigation involving the classification of the company's loan officers, he explicitly represented to the DOL that the opinion letter was "not sought by a party to pending private litigation concerning the issue addressed herein." Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *6 (Sept. 8, 2006), App. 106a.

v. On September 8, 2006, in a sharp break from its long-settled position, the DOL issued an opinion letter concluding that mortgage loan officers are exempt administrative employees. *See id.*, App. 91a.[6]

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[5] For example, on July 28, 2005, following a preliminary meeting with agency personnel, Mr. Davis submitted a memorandum to DOL attorneys containing a draft opinion letter request. R., Intervenors' Mem. Opp'n Summ. J., Ex. 9, ECF No. 30-9. The draft contained proposals for the facts that would be assumed as well as the legal analysis to be used by the DOL in reaching the requested conclusion. *Id.* at 5-7. Following another meeting between Mr. Davis and DOL attorneys, Mr. Davis sent a follow-up email addressing factual distinctions that he believed would be "appropriate" for the DOL to make in its opinion letter, as well as supplemental legal analysis to be used in the letter. *Id.*, Ex. 7, ECF No. 30-7.

[6] Recognizing that the 2004 revisions to the FLSA overtime regulations did not alter the substance of the administrative exemption, the 2006 opinion letter asserted that its conclusion applied in equal force under both the current and prior versions of the regulations. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *2 (Sept. 8, 2006), App. 96a.

Although the 2006 opinion letter broke with over a generation's worth of DOL guidance and federal case law, the 2006 letter did not cite – let alone discuss – the mountain of prior authority concluding that mortgage loan officers do not qualify for the administrative exemption. Rather, the letter simply declared, for the first time, that loan officers met the exemption's requirements.[7]

In the candid words of one federal judge, "[t]he fact of the matter is, an extremely powerful trade association cause[d] a shift in federal law . . . effectively manipulat[ing] an agency to issue a letter that governs the outcome of federal litigation without anybody being able to address it," creating a result that is "highly unfair, highly disruptive to employees, plaintiffs and courts who have to deal with [it]." R.

[7] The 2006 interpretation concluded that only employees who spend more than 50 percent of their total working time "encouraging . . . individual potential customer[s] to do business with [their] employer's . . . company rather than a competitor," qualify as non-exempt salesmen. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *2, *6 (Sept. 8, 2006), App. 94a-95a, 105a. Of course, no employee in America, including the most dedicated used car salesman, meets that standard. And the conclusion flatly contravenes long-standing FLSA regulations, which teach that an employee's "primary duty" "must be based on . . . the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). As one federal magistrate examining the 2006 interpretation wryly put it, "[h]ad Willy Loman's work day been sliced up i[n] such detail, even Arthur Miller might not have recognized him as a salesman." *See Henry v. Quicken Loans, Inc.*, No. 04-CV-40346, 2009 WL 3270768, at *16 n.23 (E.D. Mich. July 16, 2009).

Intervenors' Mem. Opp'n Summ. J., Ex. 10 at 5, 7-8, ECF No. 30-10.

vi. The DOL's 2006 interpretation did not survive long. Three-and-a-half years later, on March 24, 2010, the DOL issued its 2010 Interpretation, restoring the agency's original and long-held position that mortgage loan officers do not qualify for the administrative exemption. 2010 Interpretation, 2010 WL 1822423, at *1, App. 107a. The 2010 interpretation forcefully withdrew the contrary 2006 opinion letter, analyzing the 2006 letter's numerous analytical flaws in detail, citing the letter's inconsistency with the governing regulations and case law, and criticizing the 2006 letter's "misleading assumption and selective and narrow analysis." *Id.* at *4-9, App. 114a-128a.

3. Procedural History. a. On January 12, 2011, Respondent Mortgage Bankers filed suit in federal district court seeking an order vacating and enjoining the implementation of the 2010 Interpretation. Mortgage Bankers contended that the DOL violated the APA by issuing the 2010 Interpretation without notice and comment, and argued alternatively that the 2010 Interpretation should be set aside as arbitrary, capricious, and contrary to law. *Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 195, App. 15a.

b. Petitioners are former mortgage loan officers engaged in litigation against Quicken Loans, alleging that Quicken improperly misclassified them as

exempt under the FLSA.[8] Petitioners intervened as defendants before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and participated as parties before the district court and court of appeals.

c. On June 6, 2012, the district court granted Petitioners' and the DOL's motions for summary judgment. *Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 208-10, App. 15a. On the procedural argument, the district court held itself bound by the *Paralyzed Veterans* doctrine, but concluded that Mortgage Bankers could not invoke the doctrine because Respondent failed to show "substantial and justifiable reliance on a well-established agency interpretation." *Id.* at 208, App. 43a. On the substantive point, the district court had little trouble affirming the DOL's conclusion that mortgage loan officers do not qualify for the administrative exemption. In the words of the district court, "the DOL is . . . tasked with determining whether specific employees' 'primary duty is selling financial products,'" in which case, the employee "does not qualify for the administrative exemption." *Id.* at 209, App. 47a.

d. Mortgage Bankers appealed, but abandoned the argument that the 2010 Interpretation was

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[8] Petitioner Ryan Henry is a plaintiff in *Henry v. Quicken Loans, Inc.*, No. 04-CV-40346 (E.D. Mich.). Petitioner Beverly Buck is a plaintiff in *Mathis v. Quicken Loans, Inc.*, No. 07-CV-10981 (E.D. Mich.), and Petitioner Jerome Nickols is a plaintiff in *Chasteen v. Rock Financial, Inc.*, No. 07-CV-10558 (E.D. Mich.).

arbitrary, capricious, and inconsistent with the underlying regulations. *See generally* R., D.C. Cir. Br. for Appellant Mortg. Bankers Ass'n.

The D.C. Circuit reversed. The court began by reaffirming the *Paralyzed Veterans* doctrine, declining Petitioners' invitation to overrule the doctrine as inconsistent with the APA. *Mortg. Bankers Ass'n*, 720 F.3d at 967 n.1, App. 2a. Applying the doctrine, the court concluded that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Id.* at 967, App. 2a (citing *Paralyzed Veterans*, 117 F.3d at 586, and *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)). Addressing the district court's reasoning, the D.C. Circuit held that a party challenging an agency's changed interpretation need not prove that anyone relied on the prior interpretation. *Id.* at 967-68, 970, App. 2a-3a, 9a (citing *Paralyzed Veterans*, 117 F.3d at 586, and *Alaska Hunters*, 177 F.3d 1030). Rather, according to the D.C. Circuit, agencies must employ notice-and-comment rulemaking in every case so long as there is (1) a definitive interpretation, and (2) a significant change. *Id.* at 969, App. 5a.[9]

[9] Petitioners argued, both at the district court and the court of appeals, that if *Paralyzed Veterans* remained good law, the 2006 interpretation would itself be procedurally invalid. R., Intervenors'

SUMMARY OF ARGUMENT

I. The *Paralyzed Veterans* doctrine conflicts with the APA.

A. The doctrine contradicts the plain language of the Act, which exempts "interpretative rules" from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553.

B. The doctrine violates other rules of statutory interpretation, and would render superfluous other statutory provisions requiring notice and comment in limited circumstances.

C. The *Paralyzed Veterans* opinion itself grounded its rule on a misreading of the APA and this Court's precedents. The opinion improperly expanded on the accepted principle that an agency must engage in notice and comment before revising its *regulations*, and wrongly held that an agency must also go through notice and comment before changing its *interpretations*.

D. The panel below called the doctrine's "operative assumption" "the belief that a *definitive* interpretation is so closely intertwined with the regulation

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Mem. Opp'n Summ. J. 34-36, ECF No. 30; R., D.C. Cir. Br. for Intervenors-Appellees at 39-41. After all, the 2006 interpretation reversed a prior agency interpretation without notice and comment. The district court did not confront the issue because it upheld the 2010 Interpretation on other grounds. *See generally Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 208, App. 44a. The D.C. Circuit, for reasons that are unclear, simply ignored the argument.

that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3, App. 5a (emphasis in original). That assumption is wrong. The assumption defies logic and disrespects the distinction drawn in the APA between legislative and interpretive rules.

E. The *Paralyzed Veterans* doctrine exceeds the authority of courts to impose procedural requirements on agencies. The doctrine contravenes the principle that the APA "establishe[s] the maximum procedural requirements which Congress was willing to have the courts impose upon agencies[,]" *Vt. Yankee*, 435 U.S. at 524, and "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

II. The *Paralyzed Veterans* doctrine undermines the careful balance struck by Congress.

A. The doctrine ignores numerous safeguards protecting regulated communities from unfair and unforeseen shifts in agency interpretation. These safeguards adequately protect regulated parties and demonstrate that Congress understood the consequences of exempting interpretive rules from notice and comment.

1. Congress incorporated arbitrary and capricious review into the APA as the primary vehicle to address shifting agency interpretations. When an agency revises its interpretation, the agency "must show that there are good reasons for the new policy,"

Fox Television, 556 U.S. at 515, "must explain why 'it now reject[s] the considerations that led it to adopt that initial policy,'" *id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment), and must address any reliance interests upset by the interpretive shift, *id.* at 515 (majority opinion).

2. Under this Court's judicial deference doctrines, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

3. An agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations. *See* 5 U.S.C. § 706(2)(A). Agencies may not, "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

4. Numerous statutory safe harbors shield regulated parties from liability when they rely in good faith on agency interpretations. Relevant here, the Portal-to-Portal Act of 1947 absolves employers from liability under the FLSA when they act in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation." 29 U.S.C. § 259(a). These statutory safe harbors protect regulated entities from the

shifting winds of agency interpretations, and demonstrate Congress' understanding that changes in interpretation will happen from time to time.

5. Due process guarantees "that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). The government may not, consistent with due process, extract penalties from private parties for conduct that occurred before they received fair notice of their potential liability. *Id.* at 2320.

B. The *Paralyzed Veterans* doctrine creates serious negative consequences Congress sought to avoid.

The doctrine deprives agencies of a crucial source of flexibility and prevents agencies from correcting obvious mistakes. By collapsing the distinction between legislative and interpretive rules, the doctrine chills the informal dialogue between government and regulated groups. At the same time, the doctrine creates perverse incentives for agencies to issue vague regulations, and increases the costs and administrative burden on agencies, businesses, and citizens.

III. Assuming the *Paralyzed Veterans* doctrine exists, it must be applied fairly. The doctrine must not be invoked selectively to invalidate only the most recent interpretive change.

ARGUMENT

I. THE D.C. CIRCUIT'S *PARALYZED VETERANS* DOCTRINE CONFLICTS WITH THE APA

The *Paralyzed Veterans* doctrine cannot be reconciled with the text of the APA, which unambiguously exempts all interpretive rules from notice and comment. Moreover, the D.C. Circuit's doctrine contravenes the important principle that courts may not impose additional procedural requirements on agencies beyond those specifically required by Congress.

A. The *Paralyzed Veterans* Doctrine Is Inconsistent with the Plain Language of the APA

This case begins and ends with the text of the APA. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Section 553 of the APA sets forth the procedural requirements for rulemaking, including notice, comment, and publication of rules. 5 U.S.C. § 553. Section 553(b), however, exempts from the notice-and-comment requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b).

This Court has long recognized that, under the plain language of the APA, "[i]nterpretive rules do not require notice and comment." *Guernsey*, 514 U.S. at 99; *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply . . . only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

The statute could not be more clear on its face: interpretive rules are exempt from notice and comment. The APA admits no exception here, and certainly draws no distinction between initial interpretations and subsequent interpretations. So long as both rules are interpretive, notice-and-comment is not required. In the absence of any contrary congressional command, *Paralyzed Veterans*' one-bite rule cannot be reconciled with the plain text of the APA. *See Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (concluding that the *Paralyzed Veterans* doctrine is "not persuasive" because it "conflicts with the APA's rulemaking provisions, which exempt *all* interpretive rules from notice and comment" (emphasis added)); *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("[N]o notice-and-comment rulemaking is required to amend a previous *interpretive* rule." (emphasis in original)).

B. The *Paralyzed Veterans* Doctrine Renders Other Statutory Provisions Superfluous

Although the text of the APA is clear and unambiguous, the *Paralyzed Veterans* doctrine fares no better examined through the lens of other relevant canons of statutory construction.

The in pari materia canon "is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (quoting *United States v. Stewart*, 311 U.S. 60, 64 (1940)). "Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of (an) earlier act . . . .'" *Id.*

Numerous statutory provisions illustrate that Congress knew how to write the *Paralyzed Veterans* doctrine into law, and chose not to do so when it enacted the APA. For example, under the Tariff Act of 1930, the Secretary of the Treasury may not issue an interpretive ruling modifying or revoking a previous interpretive ruling without first engaging in notice and comment. 19 U.S.C. § 1625(c). As a second example, the FDA Modernization Act explicitly requires opportunity for public comment before the Secretary makes "changes in interpretation" of a relevant "statute or regulation." 21 U.S.C. § 371(h)(1)(C)(i).

These statutes show that Congress is capable of writing the *Paralyzed Veterans* doctrine into law in

circumstances where it sees fit. But the D.C. Circuit mistakenly requires similar procedures across the board, despite Congress' decision to exempt interpretive rules from such a categorical requirement under the APA. Indeed, the *Paralyzed Veterans* doctrine effectively makes these narrowly-targeted notice-and-comment provisions superfluous. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (recognizing the familiar "canon against interpreting any statutory provision in a manner that would render another provision superfluous[,]" a principle of statutory interpretation which "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

C. The *Paralyzed Veterans* Opinion Grounded Its Rule on Faulty Reasoning

The *Paralyzed Veterans* opinion itself, taken on its own terms, similarly fails to persuade. The opinion – remarkable for its atextual character – makes almost no effort to square its sweeping rule with the APA. Without citation to any statute, case, or other authority, *Paralyzed Veterans* simply declares that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586.

In a later passage, *Paralyzed Veterans* cites section 551(5) of the APA and this Court's opinion in

Guernsey, 514 U.S. 87, but neither authority supports the court's sweeping new rule.

Citing section 551(5), the court stated that "[u]nder the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.'" *Paralyzed Veterans*, 117 F.3d at 586 (emphasis in original). But section 551(5) merely supplies the APA's definition of "rule making," stating that the term "means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Section 553 sets forth the actual procedures required for rulemaking, and exempts interpretive rules from notice and comment. *See* § 553(b)(A). Reading the two sections together, it is readily apparent that when an agency "formulat[es]," "amend[s]," or "repeal[s]" a *legislative* rule – that is, a formal regulation – notice and comment is required. But at the same time, an agency remains free to issue an *interpretive* rule, whether by formulation, amendment, or repeal, without notice and comment. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 567 (2000) ("When an agency issues, amends, or repeals a legislative rule, it must use the notice and comment procedure. When it issues, amends, or repeals an interpretative rule, it is not required to use the notice and comment procedure.").

Paralyzed Veterans cites *Guernsey* for the proposition that "APA rulemaking is required where an interpretation 'adopt[s] a new position inconsistent with . . . existing regulations.'" *Paralyzed Veterans*,

117 F.3d at 586 (citing *Guernsey*, 514 U.S. at 100). But *Guernsey* won't bear the weight of *Paralyzed Veterans*. Nothing in *Guernsey* suggests that an agency must engage in notice-and-comment rulemaking where an agency's interpretation is consistent with the regulations but conflicts with a prior interpretation.

At issue in *Guernsey* was the validity of a provision found in the Medicare Provider Reimbursement Manual. *Guernsey*, 514 U.S. at 90. The manual, which was issued without notice and comment, interpreted various Medicare legislative rules (referred to in the opinion simply as "regulations") to mean that certain reimbursable losses must be amortized over a period of years rather than reimbursed in the year of the loss. *Id.* After assuring itself that the manual was consistent with the regulations, *id.* at 92-95, this Court held that it was "proper for the Secretary to issue a guideline or interpretive rule," calling the manual "a prototypical example of an interpretive rule issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," *id.* at 97, 99 (citations and internal quotation marks omitted). The Court noted that "APA rulemaking would still be required if [the manual] adopted a new position inconsistent with any of the Secretary's existing regulations." *Id.* at 100.

Put in context, this Court's observation in *Guernsey* stands for the unremarkable proposition that an interpretive rule that conflicts with the governing *legislative rules* is invalid. *Paralyzed Veterans*

impermissibly expands this principle to hold that an interpretive rule that is *consistent* with the relevant legislative rules but *inconsistent* with a prior interpretive rule is procedurally invalid. Nothing in the APA or *Guernsey* supports such a result.

D. The D.C. Circuit's Novel Textual Justification for the Doctrine Is Unpersuasive

The D.C. Circuit's opinion below does not contain a single citation to the APA, the statute which the court claimed to interpret. Rather, the court offered a novel textual defense of the *Paralyzed Veterans* doctrine, calling the doctrine's "operative assumption" "the belief that a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3, App. 5a (emphasis in original).

This "operative assumption" is flat wrong. A new interpretation leaves the formal regulations unchanged, sitting comfortably in the Code of Federal Regulations in identical form before and after the interpretive shift. Indeed, the D.C. Circuit's assumption defies both logic and common sense. When this Court handed down *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court plainly *changed its interpretation* of the Constitution as applied to racial segregation in schools. No rational observer would say the Court, by overruling *Plessy*, improperly amended the Constitution without following the procedural

requirements outlined in Article V – while simultaneously acknowledging that, absent *Plessy*, *Brown* could stand as a valid interpretation of the Constitution. But it is precisely this curious logic that the D.C. Circuit now believes tethers the *Paralyzed Veterans* doctrine to the text of the APA.

To the extent the D.C. Circuit now believes that any interpretation "closely intertwined" with the underlying regulations becomes a binding legislative rule, the assertion finds no support in the APA or any other authority construing the nearly seventy-year-old Act.

E. The *Paralyzed Veterans* Doctrine Exceeds the Scope of Judicial Review Contemplated by the APA

Although this case can be resolved by reference to the text of the APA and nothing more, the *Paralyzed Veterans* doctrine cannot stand for the additional reason that the doctrine fundamentally conflicts with this Court's precedent addressing the limited scope of judicial authority under the APA.

In a line of cases beginning with *Vermont Yankee*, this Court has held that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." 435 U.S. at 524. Applying *Vermont Yankee* to a revised agency interpretation in *Fox Television*, this Court stated that "[t]he [APA] makes no distinction . . . between

initial agency action and subsequent agency action undoing or revising that action." 556 U.S. at 515. The *Paralyzed Veterans* doctrine contravenes these principles and oversteps the bounds of judicial review contemplated by Congress when it enacted the APA.

1. *Vermont Yankee*

In *Vermont Yankee*, this Court held that the D.C. Circuit erred in invalidating, on the grounds of inadequate procedures, a rule issued by the Nuclear Regulatory Commission. 435 U.S. at 525, 528-30. This Court began with the premise that the APA is "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang Sung*, 339 U.S. at 40). The Court unanimously held that the D.C. Circuit had "seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Id.* at 525. The Court reasoned that section 553 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures[,]" *id.* at 524, and noted that "reviewing courts are generally not free to impose" any "additional procedural rights." *Id.*

Scholars have read *Vermont Yankee* as a rebuke of the D.C. Circuit, which had aggrandized its own authority to establish procedures for agency action at the expense of Congress and the Executive Branch. Then-professor Scalia authored the leading commentary on *Vermont Yankee*. *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345. Justice Scalia called *Vermont Yankee* a "tongue-lashing," made in response to the D.C. Circuit's "progressive evisceration of the APA." *Id.* at 359, 400. He continued: "It does not go too far to say that the D.C. Circuit was in the process of replacing the rudimentary procedural mandates of the Act . . . with a much more elaborate, 'evolving,' court-made scheme . . . ." *Id.* at 359.

The *Paralyzed Veterans* doctrine fits comfortably within Justice Scalia's critique. Here, as in *Vermont Yankee*, the D.C. Circuit has invented a procedural rule unmoored from the text of the APA, "stray[ing] beyond the judicial province to explore the procedural format [and] impos[ing] upon the agency [the court's] own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 370 (quoting *Vt. Yankee*, 435 U.S. at 549).[10]

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[10] More recently, two prominent scholars observed that "[i]n the past several years . . . administrative law has entered a world that is, in important respects, the mirror image of the world before *Vermont Yankee*." Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law* 4 (June 29, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/

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2. *Fox Television*

This Court applied *Vermont Yankee* most recently in *Fox Television*, this time reaffirming the principle that courts may not impose requirements beyond those prescribed in the APA – even where, as here, the agency changes its position. In *Fox Television*, the Court upheld the FCC's changed interpretation of the ban on broadcasting "obscene, indecent, or profane language," 18 U.S.C. § 1464, *see Fox Television*, 556 U.S. at 502. The Second Circuit had invalidated the FCC's changed interpretation, claiming the APA requires "a more substantial explanation for agency action that changes prior policy." *Id.* at 514. But this Court rejected the Second Circuit's approach, pointing out that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515.

This case, of course, directly parallels *Fox Television*. Although *Fox Television* addressed the APA's arbitrary and capricious standard, the *Paralyzed Veterans* doctrine achieves the exact same mistaken

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sol3/papers.cfm?abstract_id=2460822. The authors note that "[t]oday, a determined subset of judges on the D.C. Circuit explicitly . . . seeks to use administrative law to push and sometimes shove policy in libertarian directions, above all through judge-made doctrines that lack solid support in the standard legal sources." *Id.* Calling the *Paralyzed Veterans* doctrine the "most flagrant[ ]" example of this trend, the scholars call for "[a] *Vermont Yankee II* . . . to inscribe into the law the principle that no abstract political theory, whatever its valence, may be elevated into a master-principle of administrative law." *Id.* at 54, 57.

result – rejected in *Fox Television* – under the guise of a procedural rule. But just as *Fox Television* recognized that the arbitrary and capricious standard does not change when applied to a revised interpretation, the APA's procedural requirements do not change when an agency modifies its informal interpretations. Notice-and-comment rulemaking is not required.

Paralyzed Veterans – and the D.C. Circuit's decision below – cannot be reconciled with *Vermont Yankee* or *Fox Television*. Whatever courts may think of the wisdom of agencies revising their informal interpretations, courts may not impose upon agencies additional procedural hurdles beyond those established by Congress. The APA authorizes courts to set aside agency action found to be "without observance of procedure *required by law*," and nothing more. *See* 5 U.S.C. § 706(2)(D) (emphasis added).

II. THE *PARALYZED VETERANS* DOCTRINE UNDERMINES THE CAREFUL BALANCE STRUCK BY CONGRESS

There are sound reasons to believe that Congress said what it meant and meant what it said when it exempted all interpretive rules from notice and comment.

The enactment of the APA followed an unprecedented ten-year period of "painstaking and detailed study and drafting." Comm. on the Judiciary, *Administrative Procedure Act*, H.R. Rep. No. 79-1989, at 241 (2d Sess. 1946). No detail passed unexamined, as

President Roosevelt's opponents and supporters sparred in "a pitched political battle for the life of the New Deal" itself. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560 (1996).

The resulting Act represented a grand legislative bargain, a painstaking balance factoring in agency flexibility, efficiency, time, and resources on the one hand, and predictability, process, notice, and participation for regulated communities on the other. As this Court recognized long ago, "[c]ourts upset that balance when they override informed choice of procedures and impose obligations not required by the APA." *Chrysler Corp.*, 441 U.S. at 313.

The *Paralyzed Veterans* doctrine upsets the APA's careful balance in two important respects. First, the doctrine ignores numerous existing safeguards, including arbitrary and capricious review, statutory safe harbors, and due process, that protect regulated communities from unfair and arbitrary shifts in agency interpretation. Second, the *Paralyzed Veterans* doctrine creates serious negative consequences Congress sought to avoid. The doctrine prevents agencies from correcting obvious mistakes, chills the informal dialogue between government and regulated groups, creates perverse incentives for agencies to issue vague regulations, and increases the costs and administrative burden on agencies, businesses, and citizens.

A. The Law Affords Numerous Checks on Arbitrary and Unfair Shifts in Agencies' Positions

Paralyzed Veterans is perhaps best understood as an expression of judicial disapproval of agency flip flops. But *Paralyzed Veterans* ignores the numerous tools in the judicial toolbox that protect regulated communities from unfair and arbitrary shifts in agency interpretation.

Ironically, once these tools are taken into account, the *Paralyzed Veterans* doctrine, by its own force, only serves to prevent agencies from correcting their own mistakes.

1. Arbitrary and capricious review

First, an agency that wishes to change its interpretation "must show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. Absent a good reason for the shift, the APA authorizes courts to strike down the revised interpretation as "arbitrary" or "capricious." *See* 5 U.S.C. § 706(2)(A); *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

To pass muster under the APA's arbitrary and capricious standard, "the agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'" *Fox Television*, 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in the judgment). Importantly, agencies must address any

reliance interests upset by the interpretive shift. *Id.* at 515 (majority opinion); *id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment).

Congress incorporated arbitrary and capricious review into the APA as the principal vehicle available to parties claiming to be harmed by an agency's changed interpretation: "Unexplained inconsistency is, *at most*, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 46-57).

2. Judicial deference

Second, courts are less likely to defer to an agency's interpretation when the agency's position has been inconsistent.

Under the familiar standard set forth in *Skidmore v. Swift*, an agency's consistency over time is one relevant factor for courts to consider when evaluating an agency's interpretation. The persuasive force of an interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its *consistency with earlier and later pronouncements*." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013) (emphasis added) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The same principle holds true when an agency seeks deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* deference is frequently not warranted "when the agency's interpretation conflicts with a prior interpretation," because such a change provides "reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) and *Auer*, 519 U.S. at 462).[11]

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[11] This Court is no stranger to cases involving shifting agency interpretations. In evaluating changed interpretations – none of which was the product of notice-and-comment rulemaking – this Court has never strayed from its multifactor, totality-of-the-circumstances analysis. *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009) (noting that a "change in interpretation alone presents no separate ground for disregarding [the] Department's present interpretation" (citations omitted)); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008) (holding that where the agency changed its interpretation, "the degree of deference might be reduced by the fact that the agency's earlier position was different"); *id.* at 338 n.8 (Ginsburg, J., dissenting) (same); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (directing courts to consider "consistency" as one factor when evaluating the persuasiveness of an agency's position when confronted with a changed interpretation); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (according "considerably less deference" to a revised agency interpretation); *Watt*, 451 U.S. at 272-73 (concluding that where an agency changed its interpretation, "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference");

(Continued on following page)

Under either standard, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (citing *Watt*, 451 U.S. at 273).

3. Consistency with the underlying regulations

Third, an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations. Thus, while agencies may replace one reasonable interpretation with another reasonable interpretation, courts must set aside as "contrary to law" any new "interpretation" that conflicts with the underlying legislative rules. *See* 5 U.S.C. § 706(2)(A); *Guernsey*, 514 U.S. at 100. Agencies may not, "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Chase*

Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142-43 (1976) (considering conflicting interpretive guidance from the agency as one factor in determining the appropriate deference to accord the agency's latest interpretation).

The *Paralyzed Veterans* doctrine stands in tension with these decisions and many others. Although an agency's shift in interpretation is *one factor* to consider in evaluating the interpretation's weight, the D.C. Circuit's per se rule makes one factor – a changed interpretation – wholly dispositive of an interpretation's validity.

Bank USA, 131 S. Ct. at 882 (citing *Christensen*, 529 U.S. at 588).[12]

4. Statutory safe harbors

Fourth, Congress has created numerous safe harbors insulating regulated communities from liability when they rely on agency interpretations that are later withdrawn.

Relevant here, section 259 of the Portal-to-Portal Act of 1947 absolves employers from liability for past violations of the FLSA if employers can show they acted in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation." 29 U.S.C. § 259(a). Such a defense, if established, "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative . . . interpretation . . . is modified or rescinded . . . ." *Id.*

Indeed, Congress has created numerous such safe harbors, especially in areas where, as here, the regulations establish legal obligations between private

[12] Relatedly, even assuming a proposed interpretation is not inconsistent with the regulations, an agency interpretation must actually *interpret* something. An agency may not issue an interpretive rule where the regulation to be interpreted is so broad, vague, or off topic that no reasonable person could ascertain the proposed interpretation beforehand. *See, e.g., Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 168-69, 171-72 (7th Cir. 1996) (Posner, C.J.).

parties enforceable through private litigation. These provisions serve to protect regulated entities that rely in good faith on informal agency guidance. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 57b-4(b); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1640(f); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(e); Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1028; Civil Rights Act, 42 U.S.C. § 2000e-12(b).

Not only do these safe harbor provisions effectively shield innocent parties from liability, they also demonstrate that Congress understood that changes in agency interpretation do happen – an understanding reflected in the plain language of the APA. That understanding stands in deep tension with *Paralyzed Veterans*. If agencies were barred from changing their interpretive rules, and only able to adopt new legislative rules with prospective effect, these statutory safe harbors would serve no purpose whatsoever.[13]

5. Due process

Fifth, due process itself provides a baseline of protection for regulated communities. "A fundamental principle in our legal system is that laws which

[13] Congress passed the Portal-to-Portal Act just one year after enacting the APA. The Portal-to-Portal Act's provision shielding employers from liability when they rely on an agency's interpretation (even if the interpretation is later revoked) reflects that Congress' understanding that the APA does not categorically prevent agencies from modifying their interpretations.

regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox Television*, 132 S. Ct. at 2317.

In *Fox Television*, this Court's second look at the FCC's new "fleeting expletives" policy, the Court held that the FCC violated due process when the agency sought to sanction two television networks for conduct that occurred before the networks had fair notice of the FCC's new policy. *Id.* at 2230.

While this Court had previously rejected the argument that the APA categorically barred the FCC from adopting its new interpretation, *see Fox Television*, 556 U.S. at 514, the Court three years later concluded that the government could not, consistent with due process, extract fines from private parties for conduct that occurred before the private parties learned of the government's new policy. *See Fox Television*, 132 S. Ct. at 2320.

* * *

The *Paralyzed Veterans* doctrine must be evaluated in context with these firmly-rooted and robust protections. Once existing protections are taken into account, the D.C. Circuit's per se rule has the unfortunate effect of invalidating, by its own force, only interpretations that are consistent with the underlying regulations, thoroughly reasoned, cognizant of the reliance interests of the regulated community, worthy of respect by the courts, and imposed after fair notice – in other words, interpretations that are valid and correct.

The DOL's present loan officer interpretation, which is consistent with the regulations and the DOL's and courts' long-standing position – is precisely such a casualty of the D.C. Circuit's misguided doctrine.

By ignoring existing protections and superimposing a one-size-fits-all procedural requirement, the D.C. Circuit sets up a false choice: require notice and comment every time agencies change their interpretations, or else allow agencies to run roughshod over regulated communities with unchecked power to change course as they see fit. But this is not reality. Existing safeguards place significant hurdles before agencies wishing to change course,[14] protect private parties when agencies do so, and demonstrate that Congress thought long and hard about the consequences of shifting executive policy – balancing common sense protections against needed agency flexibility to change course when appropriate.

Courts honor the balance struck by Congress when they apply the plain language of the APA.

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[14] It is worth noting that the DOL under the Bush administration published 355 opinion letters on its website. *See* Wage & Hour Div., U.S. Dep't of Labor, *Final Rulings and Opinion Letters*, http://www.dol.gov/whd/opinion/opinion.htm (last visited Aug. 4, 2014). Of these interpretations, the Obama administration has revoked only two.

B. The *Paralyzed Veterans* Doctrine Imposes Significant Negative Consequences Congress Sought To Avoid

The *Paralyzed Veterans* doctrine, by requiring notice and comment to modify any definitive interpretation of an agency regulation, also creates significant negative consequences. The doctrine robs agencies of an important source of flexibility, preventing agencies from correcting obvious mistakes. The doctrine also creates perverse incentives for agencies to issue vague regulations, and chills the interpretive dialogue between government, business, and citizen. The doctrine's adverse and unintended consequences ultimately increase the costs and administrative burden on agencies and regulated parties alike.

Congress recognized that agencies must retain some measure of flexibility to adapt their interpretations to ever-changing circumstances. When administering complex regulatory regimes, agencies must resort to flexible interpretive rules to address the "myriad details that are not explicitly resolved by the legislative rules." *See* Pierce, *supra*, at 553-54. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . ." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981 (citations omitted).

This Court has held that "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation

. . . of [a] regulation." *Thomas Jefferson Univ.*, 512 U.S. at 517 (citation and brackets omitted) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)). But by requiring agencies to engage in notice-and-comment rulemaking in order to modify their interpretations, the *Paralyzed Veterans* doctrine denies agencies the flexibility to correct even the most basic mistakes. Imagine, for example, that an agency issues an interpretation but realizes a month later the reasoning was erroneous. Even if no one relied on the initial interpretation, the agency cannot correct course without notice and comment. *Mortg. Bankers Ass'n*, 720 F.3d at 967-68, 970, App. 2a-3a, 9a. Imagine, as a second example, that an agency issues an initial interpretation, but that three district courts disagree with the agency's interpretation, and the agency wishes to adopt the courts' interpretation. *E.g.*, *Burlington Res. Oil & Gas Co. v. U.S. Dep't of Interior*, 21 F. Supp. 2d 1, 3, 5 (D.D.C. 1998). Must the agency continue to fall on its own sword until notice and comment is complete? *Paralyzed Veterans* suggests the agency has no choice. As a third example, imagine an agency with a number of regional offices reviews its policy at a higher level and concludes that the agency must revise an errant interpretation. The *Paralyzed Veterans* doctrine again forbids it. *See Alaska Hunters*, 177 F.3d 1030. Last, imagine that an agency advances a new interpretation for the first time before the United States Supreme Court. *E.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Christopher*, 132 S. Ct. at 2165-66;

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000). It is startling to think the Solicitor General may be violating the APA with some regularity when he presents his arguments to this Court.

In denying agencies the flexibility afforded to them under the APA, the *Paralyzed Veterans* doctrine disrespects the line drawn in the APA between legislative and interpretive rules. Congress recognized that legislative and interpretive rules both serve critical – but separate – functions in the relationship between government and citizen. While legislative rules fill statutory gaps with binding law, *see Chrysler Corp.*, 441 U.S. at 302-03 (citations omitted), interpretive rules constitute the very dialogue between citizen and government about how the government will seek to apply that law, *see, e.g.*, *Guernsey*, 514 U.S. at 99. Because interpretive rules "merely [reflect] the agency's present belief concerning the meaning" of the statutes and regulations administered by the agency, it makes sense that Congress chose not to require notice and comment as a prerequisite to issuing interpretations. *See* Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8, at 27 (1st Sess. 1941).

By effectively collapsing the distinction between legislative and interpretive rules, the *Paralyzed Veterans* doctrine threatens the interpretive dialogue, creating a powerful incentive for agencies to remain silent. Agencies subject to the D.C. Circuit's doctrine will become less transparent, hesitant to provide any informal guidance to the public for fear of having

their informal positions locked in. *Paralyzed Veterans* serves only to "muzzle any informal communications between agencies and their regulated communities – communications that are vital to the smooth operation of both government and business." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.); *cf. Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.) ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.").

At the same time, the *Paralyzed Veterans* doctrine encourages agencies considering new regulations to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher*, 132 S. Ct. at 2168 (citations omitted). Under *Paralyzed Veterans*, an agency can simply issue vague regulations followed by a slew of interpretations, ensuring that the agency's policy choices will bind future administrations. Without *Paralyzed Veterans*, agencies, knowing their interpretive choices may not last, will be encouraged to be as clear as possible in drafting the regulations themselves.

The *Paralyzed Veterans* doctrine needlessly increases the costs and administrative burden on agencies, businesses, and citizens. Notice-and-comment rulemaking is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, *supra*, at 550-51; *see*

also U.S. Gov't Accountability Office, GAO-09-205, *Federal Rulemaking* 5, 19 (2009) (concluding that notice-and-comment rulemaking takes over four years to complete on average). The doctrine has also spawned a wave of *Paralyzed Veterans* litigation, where agencies and private parties endlessly spar over whether, say, an agency enforcement manual published in 1994 conflicts with a Second Circuit amicus brief filed in 2009 – and, if so, whether any of the agency materials qualify as sufficiently "definitive" to invoke the doctrine. *See* Pet'rs' Reply in Supp. of Writ of Cert. 5-8 (citing cases invoking the doctrine).

Not surprisingly, *Paralyzed Veterans* has generated an enormous amount of negative commentary from experts in the field of administrative law. Professor Richard Pierce, widely recognized as the nation's leading administrative law scholar, has written extensively criticizing the doctrine. *See* Pierce, *supra*, at 550-51. Professor Pierce, who has been cited by this Court over forty times, also authored an amicus brief urging reversal in this case. *See* Amicus Curiae Br. of Administrative Law Scholars in Supp. of the Petitions. Seventy-two administrative law scholars signed the brief, and stated that they "are not aware of a single scholar who agrees with the doctrine." *Id.* at 9.[15]

[15] Other commentary on the *Paralyzed Veterans* doctrine has been similarly scathing. *E.g.*, Sunstein & Vermeule, *supra*,

(Continued on following page)

The *Paralyzed Veterans* doctrine's poor reception by scholars reflects the doctrine's serious negative consequences, consequences that were surely evident when Congress chose to exempt interpretive rules from the APA's notice-and-comment requirement.

III. If This Court Adopts the *Paralyzed Veterans* Doctrine, Mortgage Bankers Cannot Prevail Because the 2006 Opinion Letter Was Not the Product of Notice and Comment

Even if this Court concludes that the *Paralyzed Veterans* doctrine represents the correct interpretation of the APA, Mortgage Bankers' argument is inherently self-defeating. It is undisputed that the DOL's 2006 interpretation, which was the direct

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at 4; William Funk, *A Primer on Legislative Rules*, 53 Admin. L. Rev. 1321, 1329-30 (2001); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 Ecology L.Q. 657, 717-20 (2008); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 807-09 (2001); Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 Colum. L. Rev. 155 (2001); Brian J. Shearer, Comment, *Outfoxing* Alaska Hunters*: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 Am. U. L. Rev. 167 (2012); *see also* Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006); William S. Jordan III, *Interpretive Rules and Statements of Policy – When Do They Constitute Legislative Rules?*, 29 Admin. & Reg. L. News, Fall 2003, at 20; Michael Asimow & Robert A. Anthony, *A Second Opinion? Inconsistent Interpretive Rules*, 25 Admin. & Reg. L. News, Winter 2000, at 16.

result of Mortgage Bankers' lobbying campaign, broke with prior DOL guidance holding that mortgage loan officers do not qualify for the administrative exemption. *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999), App. 75a. At a minimum, the *Paralyzed Veterans* doctrine, assuming it exists, must be applied fairly. The doctrine should not permit a regulated party to attack selectively the agency's most recent interpretive change – particularly where, as here, that same party caused the agency to change its interpretation in the first place.[16]

[16] *Cf.* Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 467 (1993) (The word "chutzpah" is defined by the paradigmatic example of the child who murders his parents and then begs the court for mercy because he is an orphan.).

CONCLUSION

The *Paralyzed Veterans* doctrine cannot stand. The doctrine is incompatible with the Administrative Procedure Act and unfaithful to the careful balance struck by Congress. Petitioners respectfully ask this Court to reverse the court of appeals.

Respectfully submitted.

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August 2014