

NOS. 13-1041, 13-1052

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IN THE

**Supreme Court of the United States**

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY,  
SECRETARY OF THE DEPARTMENT OF LABOR, ET. AL,

*PETITIONERS,*

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

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JEROME NICKOLS, RYAN HENRY AND BEVERLY BUCK

*PETITIONERS,*

v.

MORTGAGE BANKERS ASSOCIATION, ET. AL.

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

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**AMICUS CURIAE BRIEF OF  
ADMINISTRATIVE LAW SCHOLARS  
IN SUPPORT OF THE PETITIONS**

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**QUESTION PRESENTED**

Is an agency required to use notice and comment procedures when it changes its interpretation of one of its own rules?

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are 72 law professors who have taught and written about administrative law. They are listed in the Addendum to this brief. They are submitting this brief because they believe that the D.C. Circuit made a serious error when it held that an agency may not change its own interpretation of one of its rules without using the notice and comment procedures described in section 553 of the Administrative Procedure Act (APA). That holding is inconsistent with the APA and the principle announced by this Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), that a court may not require an agency to use procedures beyond those required by statute. The D.C. Circuit's decision creates a conflict among the circuits on an important issue in administrative law. It also deprives agencies of a source of flexibility that Congress incorporated in the APA.

As the D.C. Circuit made clear in the first three paragraphs of its opinion, the issue that concerns amici was the only issue the court decided. Amici take no position on any other issue that has been raised in the underlying proceeding or that might be addressed on remand from this Court's decision.

## STATEMENT OF THE CASE

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<sup>1</sup>No person other than the named amici or their counsel authored this brief or provided financial support for it. Timely notice of an intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

Congress enacted the Fair Labor Standards Act (FLSA) in 1938. 29 U.S.C. §§201-213 (2006). The Department of Labor (DOL) is responsible for administering the FLSA. Section 213(a) (1) of FLSA exempts from the FLSA's mandatory overtime requirement "any employee employed in a bona fide executive, administrative, or professional capacity." DOL most recently revised its rules to implement section 213(a) (1) in 2004. 69 Fed. Reg. 22122-191 (Apr. 23, 2004), codified at 29 C.F.R. §541. In 2006, DOL issued an opinion letter in which it announced an interpretation of the 2004 rules. Opinion Letter FLSA2006-31. In 2010, DOL issued an Administrative Interpretation in which it withdrew its 2006 opinion letter and announced a new interpretation of its 2004 rules that is inconsistent with the interpretation it announced in 2006. U.S. Department of Labor, Administrator's Interpretation No. 2010-01.

Respondent Mortgage Bankers Association filed a complaint in the United States District Court for the District of Columbia in which it sought declaratory and injunctive relief based on its argument that the 2010 interpretation of the 2004 rule was invalid. The District Court upheld the validity of the 2010 interpretation. *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193 (D. D.C. 2012). The court held that DOL could issue the 2010 interpretation of the rule without using the notice and comment procedures because the plaintiff had not established that it had acted to its detriment in justifiable reliance on the 2006 interpretation and that the 2010 interpretation was "not inconsistent with the 2004 regulations and is not arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 210.

The Court of Appeals for the District of Columbia Circuit reversed the District Court and held that the 2010 DOL interpretation of the 2004 DOL rule was invalid because DOL did not use notice and comment procedures when it issued a new interpretation of its own rule that changed a prior interpretation of that rule. *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013). The court stated that “the only question” presented was whether a person challenging that interpretation must prove that it relied on a prior interpretation in order to trigger a requirement that an agency must use notice and comment procedures when it changed its interpretation of its rule. The court stated that reliance was not required. It held that an agency may not change any interpretation of a rule without engaging in notice and comment rulemaking. *Id.* at 967.

## REASONS FOR GRANTING THE WRIT

THE D.C. CIRCUIT, BY HOLDING THAT AN AGENCY MAY NOT CHANGE AN INTERPRETATION OF ITS OWN RULE WITHOUT USING NOTICE AND COMMENT PROCEDURES, HAS CREATED A CONFLICT AMONG THE CIRCUITS, VIOLATED THE ADMINISTRATIVE PROCEDURE ACT, AND VIOLATED THE PRINCIPLE THIS COURT ANNOUNCED IN VERMONT YANKEE .

Until 1997, it was hornbook law in every circuit that an agency may change its interpretation of one of its rules without using notice and comment procedures. That universal understanding was based on section 553 of the Administrative Procedure Act (APA). 5 U.S.C. §553. That section requires agencies to use the notice and comment procedures to issue, amend, or repeal a rule subject to specified exceptions. Section 553(b)(3)(A) provides that: “Except when notice or hearing is required by statute, this subsection does not apply – (A) to interpretative rules . . . .” That universal understanding was also based on this Court’s holding in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-47 (1978), that a court may not require an agency to use procedures beyond those required by statute or by the Constitution.

That understanding also followed logically from the reasoning and holding of this Court in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). In that

opinion, the Court concluded that Congress wanted reviewing courts to apply the same standards to issuance, amendment, and repeal of rules. *Id.* at 41. The APA's definition of "rulemaking" in 5 U.S.C. §551(5) - "agency process for formulating, amending, or repealing a rule" - further supports the conclusion that Congress also wanted agencies to use the same procedures when they issue, amend, or repeal a rule. Thus, if an agency is not required to use the notice and comment procedures to issue a rule because the rule is interpretative, it is not required to use those procedures when it amends or repeals that rule.

The D.C. Circuit's 1993 opinion in *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993), illustrates the way the universal understanding functioned in all circuits before 1997. The Mine Safety and Health Administration (MSHA) issued a rule that required mine owners and operators to report within ten days every case of occupational illness "diagnosed" in an employee. MSHA then found it necessary to interpret the term "diagnosed" as it arose in the context of a chest x-ray that arguably showed that an employee had contracted pneumoconiosis—a disease that is almost always caused by exposure to coal dust.

MSHA decided to define diagnosis with reference to the criteria used by a widely-respected public health organization for purposes of determining whether someone suffers from pneumoconiosis. That organization classified x-rays on a twelve step scale based on the concentration of opacities in the x-ray, and classified x-ray readers on a scale based on the reader's relative skill at reading

x-rays. The agency's first interpretation of the word "diagnosed," as used in its rule, relied on a particular combination of x-ray readings and x-ray readers. After some experience in applying that interpretation, the agency issued a new interpretation that relied on a different combination of x-ray readings and x-ray readers. After some experience in applying that interpretation, the agency adopted a third interpretation that relied on a third combination of x-ray readings and readers. The American Mining Congress (AMC) contended that the third interpretation was invalid because the agency did not use notice and comment rulemaking to issue it.

The D.C. Circuit rejected AMC's argument and upheld MSHA's third interpretation of "diagnosed" as that term was used in MSHA's rule. *Id.* at 1112-13. The court began with the then-universal understanding that the notice and comment procedures are not required to issue, rescind, or amend an interpretative rule. *Id.* at 1108-09. The court announced and applied a four-part test for determining whether a rule is an interpretative rule that is exempt from notice and comment procedure. The fourth part of the test was "whether the rule effectively amends a prior *legislative* rule." *Id.* at 1112 [emphasis added]. Because the court concluded that the third interpretation did not amend a legislative rule, it held that it was an interpretative rule that was exempt from notice and comment even though it obviously amended the prior two interpretative rules. *Id.* at 1112-13.

The pre-1997 universal understanding that an agency may change its interpretation of one of its

rules without engaging in notice and comment rulemaking furthers the interests of a wide range of persons affected by an agency's rules. Agencies receive many requests from regulated firms and from potential beneficiaries of the agency's rules to make public the agency's interpretations of its rules before the agency applies them in a particular case. As long as the universal understanding was in place, agencies usually responded to those requests by making their interpretations public because they knew that they could announce changes in their interpretations based on their experience with their initial interpretation without first having to engage in notice and comment rulemaking. A change in the legal environment that requires an agency to conduct a notice and comment proceeding before it announces a change in its interpretation of one of its rules would discourage agencies from making public their interpretations of their rules until they apply them in a particular case. Such a change in the legal environment would create unnecessary uncertainty for regulated firms and for the general public.

This universal understanding began to break down in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997). There the D.C. Circuit stated that an agency may not change its interpretation of a rule without using notice and comment procedures. *Id.* at 586. The statement was dicta because the court went on to uphold the interpretation at issue based on its conclusion that the new interpretation was not inconsistent with any prior interpretation. *Id.* at 588. Two years later, the D.C. Circuit relied on its dictum in *Paralyzed Veterans* as the basis for a holding that a new interpretation of

a rule was invalid because the new interpretation was inconsistent with an interpretation that the agency had announced and applied for thirty years. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033 (D.C. Cir. 1999) The court held that an agency may not adopt a new interpretation that is inconsistent with a prior interpretation in such a situation without using notice and comment procedures. In subsequent cases, the D.C. Circuit declined to apply the holding in *Alaska Professional Hunters* and distinguished it on the basis that those challenging agencies' changes in interpretations failed to show, as the petitioners in *Alaska Professional Hunters* had, that the challengers had made major changes in their behavior in "substantial and justifiable reliance on a well-established agency interpretation." *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009).

Between 1997 and 2013, the D.C. Circuit applied the dictum in *Paralyzed Veterans* sporadically. It often suggested that the dictum applied only when a petitioner can establish that it took significant actions to its detriment based on justifiable reliance on the agency's prior interpretation of the rule. The episodic and highly contingent pattern of D.C. Circuit opinions caused the author of the American Bar Association's Guide to Federal Agency Rulemaking to conclude in 2012 that the *Paralyzed Veterans* doctrine "may be on the wane" and that it required "some reliance on the settled interpretation by the challenging party." Jeffrey S. Lubbers, American Bar Association Guide to Federal

Agency Rulemaking 77-82 (5<sup>th</sup> ed. 2012).<sup>2</sup> The D.C. Circuit rejected that widespread view in its opinion in *Mortgage Bankers* by reaffirming the doctrine and denying that it is dependent on a showing that anyone acted in reliance on the prior interpretation.

All scholars and most courts have reacted critically to the *Paralyzed Veterans* doctrine. The American Bar Association Guide to Federal Agency Rulemaking cites some of the many scholarly articles that criticize the doctrine.<sup>3</sup> We are not aware of a single scholar who agrees with the doctrine. Indeed, when counsel for amici circulated a draft of this brief, not a single scholar declined to join it on the ground that the position of the D.C. Circuit below was correct. The Fifth Circuit has also adopted the doctrine, but the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits have rejected it.<sup>4</sup>

The split in the circuits is particularly problematic in this context. Because most federal statutes permit a plaintiff to file an action for declaratory or injunctive relief against a government agency in federal court in the District of Columbia Circuit, it is safe to predict that anyone who dislikes a newly-announced change in an agency interpretation of one of its own rules will follow the lead of the Mortgage Bankers Association and will file a complaint in the District of Columbia, with complete confidence that the plaintiff will prevail

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<sup>2</sup> See also Richard Pierce, I Administrative Law Treatise 454-456 (5<sup>th</sup> ed. 2010).

<sup>3</sup> See sources cited in American Bar Association Guide to Federal Agency Rulemaking, *supra*, at 78, note 8.

<sup>4</sup> See *Mortgage Bankers Ass'n v. Harris*, 720 F. 3d at 969 note 3.

notwithstanding the contrary views of most circuit courts. That predictable practice will change the legal environment in ways that will discourage agencies from announcing their interpretations of their own rules before they apply those rules if the D.C. Circuit holding in *Mortgage Bankers* is allowed to stand. The *Mortgage Bankers* doctrine will also make it more burdensome, costly, and time-consuming for agencies to change interpretations that they have previously announced, regardless of whether those changes would expand or contract regulatory scope, or strengthen or weaken regulatory substance.

## CONCLUSION

Amici urge the Court to grant the petitions in these cases in order to resolve the conflicts among the circuits that now exists with respect to this important question of federal administrative law and to hold that an agency may change an interpretation of one of its own rules without conducting a notice and comment rulemaking proceeding.

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