

[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2013]

No. 12-5246

Corrected Copy

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MORTGAGE BANKERS ASSOCIATION,
Plaintiff-Appellant,

v.

HILDA L. SOLIS, SECRETARY OF LABOR, *et al.*,
Defendants-Appellees,

and

JEROME NICKOLS, *et al.*,
Intervenors-Appellees.

ON APPEAL FROM THE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies:

A. Parties and Amici

Mortgage Bankers Association was the only plaintiff in the district court and is the only appellant in this Court.

(1) Hilda L. Solis, Secretary of Labor, (2) Nancy Leppink, Deputy Administrator, Wage and Hour Division, Department of Labor, who were sued in their official capacities, and (3) the United States Department of Labor were the defendants in the district court, and except for Ms. Leppink, are appellees in this Court. Ms. Leppink has left the Department, and her successor, Mary Beth Maxwell, Acting Deputy Administrator, should be substituted as an appellee. *See* Fed. R. App. P. 43(c)(2).

Beverly Buck, Ryan Henry, and Jerome Nickols, who are mortgage loan officers seeking to be paid overtime compensation, intervened in the district court and are appellees in this Court.

No amici appeared in the district court, and none has appeared in this Court.

B. Ruling Under Review

The ruling under review is the order entered June 6, 2012, of the district court (Walton, J.), which is a final order granting summary judgment to the defendants. A. __. The memorandum opinion accompanying that order (A. __-__) is reported at 864 F. Supp.2d 193 (D.D.C. 2012).

C. Related Cases

This case has not previously been before this Court or any court except the district court below. Counsel for the appellees is unaware of any related case pending in this Court or any other court.

/s/ Anthony J. Steinmeyer
Anthony J. Steinmeyer

GLOSSARY

2010 AI	Administrator's Interpretation No. 2010-1
A.	Appendix
AR	Administrative Record
D.E.	District Court Docket Entry
FLSA	Fair Labor Standards Act

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ON APPEAL FROM THE DISTRICT COURT
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BRIEF FOR THE FEDERAL APPELLEES

STATEMENT OF JURISDICTION

Plaintiff-appellant Mortgage Bankers Association invoked the jurisdiction of the district court under 28 U.S.C. 1331 in this action seeking judicial review pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. 702, of an interpretive rule issued by the Department of Labor. Compl. ¶¶ 4-6, A. __. The district court entered final judgment for the defendants on June 6, 2012. D.E. 43, Order, A. __. Mortgage

Bankers filed a timely notice of appeal on August 2, 2012. D.E. 45, A. ___. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED

Under the doctrine of *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), and *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), an agency can issue one interpretive rule construing a legislative regulation without notice and comment, but the agency cannot change that initial interpretation by issuing a later interpretive rule without going through notice and comment, unless an exception applies. The issues presented are:

(1) Whether the interpretive rule of the Department of Labor challenged in this case is valid because, under an established exception to the *Paralyzed Veterans* doctrine, notice and comment are not required when the affected parties have not shown a strong “substantial and justifiable reliance” on the agency’s former interpretation.

(2) Whether *Paralyzed Veterans* and *Alaska Prof'l Hunters*, which have been severely narrowed by subsequent decisions of this Court, are inconsistent with the plain text of the APA’s rulemaking provision and

the principle of administrative law established in *Vermont Yankee* and *Fox*.

STATUTES INVOLVED

The relevant statutes, 5 U.S.C. 551(5) and 553, are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

This suit challenges the validity of Administrator's Interpretation No. 2010-1 ("2010 AI"), A. ___-___, which sets forth the Department of Labor's guidance that mortgage loan officers who work more than forty hours per week are entitled to overtime pay pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 207(a)(1). The 2010 AI concludes that mortgage loan officers do not come within the FLSA's exemption for administrative employees, 29 U.S.C. 213(a)(1), as implemented in Labor's 2004 legislative regulations, 29 C.F.R. Part 541. Mortgage Bankers alleged that the 2010 AI was procedurally and substantively invalid. Compl. ¶¶ 35-45, 46-52, A. ___-___. On cross-motions for summary judgment, the district court sustained the 2010 AI. 864 F. Supp.2d 193; D.E. 42, D.C. Opinion ("D.C. Op."), A. ___-___. The court

held that the challenged rule was procedurally valid because an exception to the *Paralyzed Veterans* doctrine applied, namely, that notice and comment were not required because Mortgage Bankers had not established its substantial and justifiable reliance upon the interpretation that the 2010 AI changed. *Id.* at 19-24, A. ___-___. The court also rejected Mortgage Bankers' argument that the 2010 AI was substantively invalid because it conflicted with Labor's 2004 legislative regulations. *Id.* at 24-26, A. ___-___. Mortgage Bankers appeals from the district court's judgment, but in this Court it challenges only the lower court's holding that the 2010 AI is procedurally valid; the merits of that rule are thus not before this Court. *See* Apt. Br. 19-56.

STATEMENT OF FACTS

1. Because Mortgage Bankers no longer contests the substantive validity of the 2010 AI, the governing provisions of the FLSA and Labor's implementing regulations and interpretive rules can be briefly described. Enacted in 1938, the FLSA generally requires that covered employers pay overtime wages to their employees who work more than forty hours per week, unless the employees are exempted by the Act

from that requirement. 29 U.S.C. 207(a)(1). FLSA section 213(a)(1) exempts “any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary * * *).”

Following public notice and comment, Labor revised the legislative regulations applicable to this case in 2004. 29 C.F.R. 541.200 - 541.204. In addition to setting out the general standards for the administrative exemption, the regulations provide examples of how the administrative exemption applies to specific categories of employees, including those in financial services. The financial services example makes clear that “an employee whose primary duty is selling financial products does not qualify for the administrative exemption.” 29 C.F.R. 541.203(b).

In the years before it issued the 2004 regulations, Labor issued two Opinion Letters addressing whether mortgage loan officers were administratively exempt. In 1999, Labor concluded in an Opinion Letter that mortgage loan officers did not qualify as exempt administrative employees. *See* Opinion Letter, 1999 WL 1002401 (May 17,

1999), AR 4-5. In response to a request to reconsider that Letter, Labor somewhat modified its position in a 2001 Opinion Letter, but still concluded that mortgage loan officers were not administratively exempt. *See* Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001), AR 6-7.

In 2006, Labor issued an Opinion Letter at the request of Mortgage Bankers, this time concluding that mortgage loan officers did qualify as exempt administrative employees. Opinion Letter FLSA 2006-31 (2006 Op. Ltr.), A. ___-___. This Letter stated that “mortgage loan officers satisfy the duties requirement under 29 C.F.R. § 541.203(b)” because “their work includes collecting and analyzing a customer’s financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.” 2006 Op. Ltr. 4-5, A. ___-___. But the Letter noted that if their primary duty were selling mortgage loans, they would not qualify for the exemption. *Id.* at 5 n.3, A. ___.

Four years later Labor issued the 2010 AI challenged in this suit. A. ___-___. In light of 5 U.S.C. 553(b)(A)’s provision that interpretive

rules are exempt from the notice-and-comment requirement, the 2010 AI was issued without that procedure. It withdrew the 2006 Opinion Letter and concluded that “employees who perform the typical job duties of a mortgage loan officer, as described” in the 2010 AI “have a primary duty of making sales for their employers and, therefore, do not qualify” for the administrative exemption, and are entitled to appropriate overtime pay. 2010 AI 1, 9, A. __, __. In reaching this determination, Labor analyzed the provisions of the 2004 regulations outlined above and numerous court decisions addressing the administrative exemption. Labor noted that these decisions distinguish between non-exempt production work, *i.e.*, “directly producing the good or service that is the primary output of a business,” and exempt administrative work, *i.e.*, “general administrative work applicable to the running of any business.” 2010 AI 3, A. __ (quotation marks omitted).

2. Mortgage Bankers, a trade association representing entities that employ mortgage loan officers (Compl. ¶ 7, A. __-__), brought this suit against the Secretary of Labor, the Deputy Administrator of its Wage and Hour Division, and the Department of Labor. It alleged that

the 2010 AI was (1) procedurally invalid because it was issued without notice and comment, and (2) substantively invalid because it conflicted with Labor's 2004 regulations. Compl. ¶¶ 35-45, 46-52, A. __-__, __-__. Three individual mortgage loan officers who are seeking overtime pay in other suits intervened in this action to support the 2010 AI. D.E. 19, 25, A. __-__, __-__. Mortgage Bankers and the government both moved for summary judgment. D.E. 4, 15, A. __, __.

3. The district court granted the government's motion. D.E. 42, D.C. Opinion ("D.C. Op."), A. __-__. The court first rejected the government's argument that the *Paralyzed Veterans* doctrine conflicts with Supreme Court case law as embodied in the combination of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). As to *Vermont Yankee*, the court held that this Court's precedents prevailed because they were decided later: "[T]his Court cannot, and will not, find that *Vermont Yankee* commands that it refuse to follow a Circuit case that was decided two decades later, and has remained good law in this Circuit for almost fifteen years." D.C. Op. 18,

A. ___. As to *Fox*, the district court noted the Supreme Court’s statement that “the APA ‘makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action,’” but it held that *Fox* “has no bearing on whether an agency must employ the notice and comment process before changing its policies” because *Fox* “implicates the APA’s arbitrary and capricious review, not its notice and comment process.” D.C. Op. 18, 19, A. ___, __ (quoting *Fox*, 556 U.S. at 515). The court, however, upheld the 2010 AI on the ground that notice and comment were not required because an exception to the *Paralyzed Veterans* doctrine applied in that Mortgage Bankers had not substantially and justifiably relied upon the 2006 Opinion Letter that the 2010 AI withdrew. D.C. Op. 19-24, A. ___-___. Finally, the court held that the 2010 AI was consistent with the 2004 regulations that it interpreted. D.C. Op. 24-26, A. ___-___.

Mortgage Bankers appeals from that final judgment (D.E. 45, A. ___. As previously noted, it limits its appeal to the issue of whether the 2010 AI is procedurally invalid under the *Paralyzed Veterans* doctrine.

SUMMARY OF ARGUMENT

In 1997, this Court announced a new rule of administrative law: an agency can issue one interpretive rule construing a legislative regulation without notice and comment, but “[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). This statement was adopted as a holding two years later in *Alaska Prof’l Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1033-1034 (D.C. Cir. 1999). Subsequent decisions of this Court have greatly narrowed the scope of the *Paralyzed Veterans* doctrine by creating various exceptions to it. *MetWest Inc. v. Sec’y of Labor*, 560 F.3d 506 (D.C. Cir. 2009), indicates that the doctrine survives now only for one class of cases, *i.e.*, those cases where the regulated parties have reasonably and substantially relied upon an agency’s prior interpretation.

Point I below will show that the district court below correctly held that the *Paralyzed Veterans* doctrine is inapplicable because on the facts

of this case the reliance interest of Mortgage Bankers and its members upon Labor's prior interpretation was not sufficient under this Court's precedents to have prevented Labor from changing that interpretation without undertaking notice-and-comment rulemaking before issuing the 2010 AI. The decision below is in accord with three precedents of this Court holding that the reliance interest in those cases did not approach the exceptionally strong reliance that was present in *Alaska Prof'l Hunters*. Mortgage Bankers argues that reliance is not a separate requirement under the *Paralyzed Veterans* doctrine, but instead is used only to determine whether or not an agency's former interpretation was firmly established. *MetWest* and two other precedents of this Court have already rejected that argument.

Point II will then consider a broader point. The *Paralyzed Veterans* doctrine, both as originally formulated and as modified in *Alaska Prof'l Hunters*, is subject to the criticism that it conflicts with the APA's rulemaking provision, which categorically exempts interpretive rules from the notice-and-comment requirement, unless a statute provides otherwise. 5 U.S.C. 553(b)(A). The doctrine can also produce different

results than the relevant Supreme Court precedents and this Court's decisions before *Paralyzed Veterans*.

Because *Paralyzed Veterans* and *Alaska Prof'l Hunters* can require notice and comment when the plain language of the APA does not, they are inconsistent with the administrative law principle announced by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). *Vermont Yankee* holds that, except in "extremely rare" circumstances, courts are "not free to impose" any "additional procedural rights" beyond those set forth in the APA. 435 U.S. at 524. *Fox* solidifies the *Vermont Yankee* rule in a manner highly relevant to this case by holding that the APA "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." 556 U.S. at 515. Indeed, this Court has recognized the inconsistency between the *Paralyzed Veterans* doctrine and the principle of administrative law applied in *Vermont Yankee*. See *Hudson v. FAA*, 192 F.3d 1031 (D.C. Cir. 1999).

Since *Alaska Prof'l Hunters*, only one decision of this Court possibly involved an instance in which a true interpretive rule was held invalid for lack of notice and comment. In the seventeen other cases in which it has addressed a *Paralyzed Veterans* claim, this Court has either (1) sustained the challenged agency action by holding that one of the exceptions to the doctrine that the Court has created applies (twelve cases), or (2) held that the challenged action was a legislative regulation or amended a legislative regulation – not a prior interpretive rule – so that notice and comment were required by Supreme Court law and this Court's precedents prior to *Paralyzed Veterans* (five cases).

These seventeen decisions have emptied the *Paralyzed Veterans* doctrine of much, if not all, of its content. In this way, the Court has brought its results, but not yet its doctrine, into accord with *Vermont Yankee* and *Fox*.

As noted above, however, *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506 (D.C. Cir. 2009), states that the *Paralyzed Veterans* doctrine survives for cases where the regulated parties have reasonably and substantially relied upon an agency's prior interpretation. *Paralyzed*

Veterans is unnecessary to protect that interest. Protecting reliance is a substantive concern, and the APA (5 U.S.C. 706(2)(A)) and the Supreme Court use a substantive test (arbitrary and capricious) to address it. That approach is consistent with the clear text of the APA, and is thus preferable to *Paralyzed Veterans*' method of dealing with the reliance interest indirectly through a procedural means (imposing notice-and-comment rulemaking).

Given this Court's treatment of the *Paralyzed Veterans* doctrine over the past fifteen years and the Supreme Court case law provided by *Fox* and *Vermont Yankee*, the full Court should consider overruling *Paralyzed Veterans* and *Alaska Hunters* in an appropriate case, and this panel can call for such a result. Overruling that doctrine will bring this Court's administrative law doctrine into harmony with the plain text of the APA.

STANDARD OF REVIEW

"This Court reviews the district court's grant of summary judgment *de novo*." *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d

771, 774 (D.C. Cir. 2002). *Accord Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1036 (D.C. Cir. 2008).

ARGUMENT

Introduction. Mortgage Bankers has abandoned the substantive argument it made in the district court that the 2010 AI is contrary to the 2004 regulations it interprets. Below Mortgage Bankers argued at length that the 2010 AI was arbitrary, capricious, and contrary to law because it conflicted with Labor's 2004 legislative regulations. *See e.g.*, D.E. 4-1, Memo. in Supp. of Plt'f's Mot. for Sum. J. ("MBA Sum. J. Memo.") 25-34; D.E. 17, Plt'f's Reply in Supp. of Its Mot. for Sum. J. ("MBA Reply Memo.") 25-35. The district court considered these arguments and rejected them. D.E. 42, D.C. Op. 24-26, A. __-__. It explicitly held that "the 2010 AI is not inconsistent with the 2004 regulations and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 27, A. __.

In this Court, Mortgage Bankers does not challenge that substantive holding, but rather argues only that the 2010 AI is procedurally invalid under the *Paralyzed Veterans* doctrine. Arguments not

raised in an appellant's opening brief are waived. *See e.g., Benkelman Tele. Co. v. FCC*, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000) (citing cases). Thus, the district court's holding that the challenged rule is substantively valid is final and not before this Court.

It is also uncontested that the 2010 AI is an interpretive rule. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979), adopts the definitions of substantive (or legislative) and interpretive rules set forth in the *Attorney General's Manual on the Administrative Procedure Act* 30, n.3 (1947): Substantive rules have "the force and effect of law," and interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," but, the Supreme Court added, they "do not have the force and effect of law." 441 U.S. at 302 n.31.

Labor entitled the 2010 AI "Administrator's Interpretation No. 2010-1," and its opening paragraph states, "the Administrator is issuing this interpretation to provide needed guidance * * *." 2010 AI 1. A similar function was previously performed by Opinion Letters,¹ which

¹ Administrator Interpretations are intended to "set forth a general interpretation of the law and regulations, applicable across-the-board

this Court held were “authoritative interpretive ruling[s].” *Nat’l Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971). “A statement seeking to interpret a statutory or regulatory term,” such as the 2010 AI, is “the quintessential example of an interpretive rule.” *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).

In the district court Mortgage Bankers agreed that the 2010 AI is an interpretive ruling; indeed, that was the premise for its claim that the 2010 AI violates the *Paralyzed Veterans* doctrine. See D.E. 4-1, MBA Sum. J. Memo. 26 (“DOL has promulgated an interpretation * * *.”); D.E. 17, MBA Reply Memo. 7 n.10 (“Defendants’ repeated statements that the AI is an ‘interpretation,’ [are] correct * * *.”). Thus, the district court correctly observed, both parties stated that the 2010 AI is

to all those affected by the provision in issue.” Opinion Letters had been provided “in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome.” Wage and Hour Division, *Rulings and Interpretations*. <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Jan. 18, 2013).

an interpretive rule, and the court agreed. D.C. Op. 14, n.7, A. ___. Mortgage Bankers does not challenge that holding in this Court.²

I.

THE DISTRICT COURT CORRECTLY HELD THAT AN ESTABLISHED EXCEPTION TO THE *PARALYZED VETERANS* DOCTRINE EXEMPTS LABOR’S CHALLENGED INTERPRETIVE RULE FROM NOTICE AND COMMENT.

MetWest Inc. v. Secretary of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009), explained that “[a] fundamental rationale of *Alaska Professional Hunters* was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.” As the district court here observed, the reliance interest there was especially strong: “people had

² *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010), held that the challenged agency action in that case was not an interpretive rule because “[t]he connection” between that provision and the “vague or vacuous” statutory term it implemented (“reasonable costs”) was “simply too attenuated to represent an interpretation of those terms as used in the statute and the regulations.” *Id.* at 495, 496 (citation and internal quotation marks omitted). The defect this Court found in *Catholic Health Initiatives* of the wide gap between a very general statute and a very specific rule is entirely absent in this case. Indeed, the FLSA, its implementing legislative regulations, and the 2010 AI interpretive rule are a model of the kind of statutory and regulatory framework that this Court prescribed.

moved to Alaska and started businesses with the understanding that an agency's regulations did not apply to an essential component of their operations due to the position the agency had taken over a 30-year period." D.C. Op. 21, A __.

Three *Paralyzed Veterans* decisions of this Court have held that lesser reliance interests were insufficient to preclude an agency from changing its interpretation without notice-and-comment rulemaking. MetWest challenged a 2003 "guidance document" of the Occupational Safety and Health Administration ("OSHA") regulating the removal of needles from reusable blood tube holders after drawing blood from patients. The Court held that an exception to the *Paralyzed Veterans* doctrine applied not only because the new guidance did not significantly revise a 1991 safety standard, but also because MetWest's reliance on the twelve-year period in which its equipment was not cited as unsafe by OSHA was not comparable to the reliance in *Alaska Prof'l Hunters*. *MetWest*, 560 F.3d at 509-519.

Similarly, this Court rejected the reliance claim made by railroads in their challenge to an interpretation of a regulation designed to

protect roadway workers from being struck by trains. The Court held that the railroads had not showed that they had relied “in any comparable way” to the showing in *Alaska Prof'l Hunters* in that they had not “made large capital expenditures” or “altered their business practices in any significant manner.” *Ass'n of Am. R.Rs. v. Dept. of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999).

Finally, *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 579-580 (D.C. Cir. 2010), held that Honeywell, the licensee of a nuclear facility, had not made a sufficient showing of reliance to succeed under *Alaska Prof'l Hunters* when the Commission denied Honeywell's request for an exemption from a certain regulatory requirement, after having granted that exemption in the two preceding years. The Court held that the Commission had given “fair warning that the appropriateness of the time-limited exemption would be reevaluated each year.” *Id.* at 580. Mindful of agencies' frequent need to be able to make interpretive changes quickly, this Court has thus confined *Alaska Prof'l Hunters'* rulemaking requirement to situations where the reliance interest of the regulated parties is exceptionally compelling.

The reliance claimed by Mortgage Bankers is far more like that held insufficient in *MetWest*, *Ass'n of Am. R.Rs.*, and *Honeywell* than that present in *Alaska Prof'l Hunters*. The district court noted that mortgage loan officers were considered exempt from overtime pay only from 2006 to 2010. D.C. Op. 23, A. __. Before issuing the September 8, 2006 Opinion Letter, Labor had consistently interpreted its administrative exemption regulations to mean that mortgage loan officers were not exempt from overtime compensation requirements. See 1999 WL 1002401 (May 17, 1999), AR 4-5; 2001 WL 1558764 (Feb. 16, 2001), AR 6-7. Labor reversed that interpretation in 2006. Less than four years later, however, Labor issued the March 24, 2010 AI, reverting to its initial interpretation and withdrawing the 2006 Opinion Letter. Three different agency interpretations in three and a half years are a stark contrast to the nearly thirty years of unbroken, uniform policy in *Alaska Prof'l Hunters*. Accordingly, reliance on the 2006-2010 interpretation was, as the district court held, "short lived given the *many* years that the parties had previously relied upon the interpretation that mortgage

loan officers were not covered by the administrative exemption.” D.C. Op. 24, A. __ (emphasis in original).

In addition, Mortgage Bankers did not show that the 2010 AI would cause a substantial change in its members’ business practices. *Id.* at 23. The new rule in *Alaska Prof’l Hunters* “would have driven Alaska’s hunting and fishing tourism operations out of business.” *Met-West*, 560 F.3d at 511. By contrast, Mortgage Bankers alleged that any additional costs of regulation “will be borne by consumers.” Compl. ¶ 34, A. __. Moreover, before 2006, employers were required by the FLSA to track the hours worked by mortgage loan officers and pay them overtime pay. Thus, the 2010 AI simply required employers to reinstitute the payment structure they had in place less than four years before.

Further, Mortgage Bankers’ members are potentially protected against liability for not paying overtime compensation to their mortgage loan officers from 2006 to 2010 by the Portal-to-Portal Act, 29 U.S.C. 259(a). This provision protects an employer from liability if it acted “in good faith in conformity with and in reliance on any written adminis-

trative * * * interpretation,” such as Labor’s 2006 Opinion Letter. *See* D.C. Op. 24, A. ___. Consistent with the Portal-to-Portal Act, the government maintains that the 2010 AI applies only prospectively.

Mortgage Bankers argues (Apt. Br. 31-35) that *MetWest* is inapplicable because in that case reliance was used only to determine that the agency’s prior practice constituted an authoritative interpretation. Mortgage Bankers contends that in this case where the 2006 Opinion Letter was unquestionably an authoritative interpretation, it could not be changed without notice and comment regardless of whether its members’ reliance on the old interpretation was less substantial than that in *Alaska Prof’l Hunters*.

The district court correctly rejected this argument (D.C. Op. 21-22, A. __-__) by focusing on the key sentence in *MetWest*: “A fundamental rationale of *Alaska Professional Hunters* was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.” 560 F.3d at 511. The most natural reading of this sentence is that “substantial and justifiable reliance” and “a well-established agency interpretation” are separate requirements, both of which must

be satisfied, not, as Mortgage Bankers argues, that reliance is used only to determine whether the agency's prior interpretation was well-established. Indeed, *MetWest* plainly construed these exceptions as two separate requirements: "Even if OSHA had interpreted [the 1991 safety standard] to permit the use of reusable blood tube holders in all circumstances, this case would still not fit within the framework of *Alaska Professional Hunters*" because of the lack of a "substantial and justifiable reliance on a well-established agency interpretation." *MetWest*, 560 F.3d at 510-511. *Ass'n of Am. R.Rs.* and *Honeywell* also construed these exceptions as the district court did, not as Mortgage Bankers does. *See Ass'n of Am. R.Rs.*, 198 F.3d at 948-950 (treating reliance and definitive interpretation as two independent requirements); *Honeywell*, 628 F.3d at 579-580 (same).

Thus, the district court correctly held that an established exception to the *Paralyzed Veterans* doctrine applies here so that notice-and-comment rulemaking was not required for Labor's 2010 AI, and the judgment should be affirmed on this ground. We nevertheless also now

turn to the broader problem with the *Paralyzed Veterans* doctrine, which should be resolved by this Court.

II.

PARALYZED VETERANS AND ALASKA PROF'L HUNTERS, WHICH HAVE ALREADY BEEN GREATLY NARROWED BY SUBSEQUENT DECISIONS, ARE INCONSISTENT WITH THE PLAIN TEXT OF THE APA'S RULEMAKING PROVISION AND THE PRINCIPLE ESTABLISHED IN VERMONT YANKEE AND FOX.

1. *Paralyzed Veterans* originally formulated its new doctrine as, “[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.” 117 F.3d at 586. This sentence has become known as the “one-bite” rule, and that is how the doctrine is being taught to the next generation of attorneys practicing administrative law: An agency gets only “one bite at the interpretational apple.” Peter L. Strauss, *et al.*, *Gellhorn and Byse's Administrative Law* 716 (10th ed. rev. 2003).

The doctrine has evolved in subsequent decisions of this Court and is now severely limited by various exceptions. As a result, the Court recently stated that the “one-bite” characterization is not an accurate

description of the current Circuit law. *MetWest Inc. v. Sec’y of Labor*, 560 F.3d 506, 511 n.4 (D.C. Cir. 2009), explicitly rejects the view that “an agency’s initial interpretation, once informally adopted, freezes the state of agency law, which cannot subsequently be altered without notice-and-comment rulemaking” (citation and internal quotation marks omitted).

Nevertheless, the “one-bite” formulation continues to be cited. Since *MetWest*, two court of appeals opinions and a dissent have quoted the one-bite sentence. *Menkes v. U.S. Dept. of Homeland Sec.*, 637 F.3d 319, 344 (D.C. Cir. 2011) (Brown, J., dissenting in part) (quoting it with approval); *Abraham Lincoln Mem. Hosp. v. Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (holding *Alaska Prof’l Hunters* “conflicts with the APA’s rulemaking provisions, which exempt all interpretive rules from notice and comment”); *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1138, 1140 (10th Cir. 2010) (declining to take sides on the issue). *Mortgage Bankers* uses the “one-bite” sentence as the major premise of its argument here. Apt. Br. 1-2, 22.

From the beginning, the one-bite formulation was subject to the criticism that it conflicted with the plain language of the APA. That is, *Paralyzed Veterans* requires notice and comment for some interpretive rules, but 5 U.S.C. 553(b)(A) categorically exempts interpretive rules from notice and comment unless some other statute requires otherwise:

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

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

5 U.S.C. 553(b)(A). Any doubt that this exemption applies to rules that change prior interpretations is removed by 5 U.S.C. 551(5), which defines “rule making” as “agency process for formulating, amending, or repealing a rule.”

Mortgage Bankers makes no claim that the sole exception to section 553(b)(A) applies in this case, that is, that some other statute required notice and comment for the 2010 AI. Section 213(a)(1) of the FLSA exempts administrative employees from the overtime pay requirement and authorizes the Secretary of Labor to define the terms of that exception in regulations “subject to the provisions of the” APA, 5

U.S.C. 551-559. Those provisions require notice and comment for legislative regulations, such as Labor’s 2004 regulations, but not for its interpretive rules, such as the 2010 AI.

The tension between *Paralyzed Veterans* and section 553(b)(A) is highlighted by Supreme Court decisions construing section 553(b)(A) according to its plain language, none of which distinguishes between an initial interpretive rule and a revised interpretive rule. *E.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (“notice-and-comment procedures, which under the Administrative Procedure Act an agency need not use when producing an ‘interpretive’ rule, 5 U.S.C. § 553(b)(A)”); *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (“Interpretive rules do not require notice and comment * * *.”); *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (“The notice-and-comment requirements * * * do not apply to ‘interpretative rules * * *.’ § 553(b)”).

Prior to *Paralyzed Veterans*, this Court construed section 553(b)(A) the same way.³ Even after *Paralyzed Veterans* declared that some

³ *E.g.*, *United Technologies Corp. v. U.S. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987) (“The APA specifically excludes ‘interpretative’ rules from its notice and comment procedures. 5 U.S.C. § 553(b)(A) (1982).”); *Nat’l Latino Media Coalition v. FCC*, 816 F.2d 785, 789 (D.C. Cir. 1987)

interpretive rules require notice and comment, this Court has continued to cite the APA's exemption in other contexts as if its plain meaning were the law of the Circuit.⁴

2. *Alaska Prof'l Hunters* described the one-bite doctrine and its justification in a different sentence that has also been widely quoted by this and other courts of appeals:

When 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 without notice and comment.

177 F.3d at 1034. This “transformation” sentence implies that the first interpretive rule transforms both itself and the legislative regulation it interprets. Under *Alaska Prof'l Hunters*, a rule loses its identity as an interpretation and becomes an essential part of the legislative regula-

(“The Administrative Procedure Act expressly states that publication of notice and opportunity for comment are not required for ‘interpretative rules’ * * *. 5 U.S.C. § 553(b)(3)(A)(1982).”).

⁴ *E.g.*, *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425-426 (D.C. Cir. 2009) (“The APA exempts from its notice-and-comment requirement ‘interpretative rules’ * * *.’ 5 U.S.C. § 553(b)(A)”); *Truckers United for Safety v. Federal Highway Admin.*, 139 F.3d 934, 938 (D.C. Cir. 1998) (“Under the APA, legislative rules are subject to notice-and-comment requirements, whereas interpretative rules are not.” (citing 5 U.S.C. 553(b))).

tion so that the resulting composite cannot be changed without notice and comment. See Richard W. Murphy, *Hunters for Administrative Common Law*, 58 Admin. L. Rev. 917, 923 (2006).⁵

That view too conflicts with the plain text of the APA's rulemaking provision because the transformation sentence is contrary to ordinary usage. If a literary critic publishes an interpretation of *Hamlet* and later offers a different interpretation, we do not say that the first interpretation has amended Shakespeare's play. There are simply two different interpretations of the same play. This principle applies as well to two different interpretations of a regulation, so long as it reasonably bears both interpretations.⁶

⁵ Of course, if either an initial or revised interpretation, in fact, transforms or otherwise amends a legislative regulation that it purports to interpret, it is invalid under the APA. *Guernsey Mem. Hosp.*, 514 U.S. at 100; *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

⁶ It might be argued that the reliance interest of the regulated parties distinguishes a literary interpretation from a legal one. We will show below, *infra* at 43-47, that the APA and Supreme Court address this reliance interest by a different and better means, *i.e.*, the substantive arbitrary-and-capricious test. Thus, the reliance interest is not a reason to reject the APA's use of ordinary English.

Section 551(5) of the APA reinforces the view that the APA follows this ordinary usage. As discussed above, section 551(5) defines “rule making” as “agency process for formulating, amending, or repealing a rule.” Reading that definition together with section 553(b)(A) makes plain that the APA exempts both initial and subsequent interpretive rules from notice and comment.

3. Both the one-bite rule and the transformation view of the *Paralyzed Veterans* doctrine differ from the Supreme Court law and this Court’s law prior to *Paralyzed Veterans*. It is well established that a legislative regulation can be amended, *i.e.*, substantively changed, only by another legislative regulation; an agency cannot avoid the notice-and-comment requirement simply by labeling the amendment an “interpretation.” See *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 100 (1995); *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005); *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1109-1110 (D.C. Cir. 1993).⁷

⁷ *Am. Mining Congress* sustained three successive rules issued without notice and comment. Because this Court upheld the third rule even though it changed the other two, *Am. Mining Congress* “necessarily held that an interpretative rule can amend a prior interpretative

Both the one-bite sentence of *Paralyzed Veterans* and the transformation sentence of *Alaska Prof'l Hunters*, however, go beyond that principle. The difference occurs when the legislative regulation will reasonably bear more than one interpretation. In that situation *Guernsey* and *Am. Mining Congress* allow the agency to adopt any of the permissible interpretations initially and then change to another one without notice and comment. By contrast, *Paralyzed Veterans* and *Alaska Prof'l Hunters* make the order of the agency's choice decisive: an agency can adopt any permissible interpretation as its first bite without notice and comment, but then it is locked in and cannot change that interpretation without notice and comment unless (as discussed below) an exception to the doctrine applies.

rule.” Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 570 (2000).

In addition, *Orengo Caraballo v. Reich*, 11 F.3d 186 (D.C. Cir. 1993), summarized Circuit law before *Paralyzed Veterans* by stating that a second interpretation requires notice and comment only where it “repudiates or is irreconcilable with a prior *legislative*” regulation. *Id.* at 196 (internal quotation marks and brackets omitted; emphasis in original). The Court noted that it had “specifically held” that even a substantive change in an agency’s interpretation of law was not subject to notice and comment where “both the old and new methods were interpretive rules.” *Ibid.*

4. Because they require notice-and-comment rulemaking when the APA does not, *Paralyzed Veterans* and *Alaska Prof'l Hunters* are not consistent with the application of the APA by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as recently reaffirmed and solidified in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). *Vermont Yankee* held that 5 U.S.C. 553 “established the maximum procedural requirements * * * impose[d] upon agencies in conducting rulemaking procedures,” and except in “extremely rare” circumstances, courts are “not free to impose” any “additional procedural rights.” *Id.* at 524.

A. In this case, the district court held that *Vermont Yankee* did not apply in its court because *Paralyzed Veterans* “was decided two decades later, and has remained good law in this Circuit for almost fifteen years.” D.C. Op. 18, A. ___. In so ruling, the district court obeyed (D.C. Op. 17, A. ___) this Court’s instruction that district courts in this Circuit are “obligated to follow controlling circuit precedent until either [this Court], sitting en banc, or the Supreme Court, overrule[s] it.” *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

B. Mortgage Bankers' appellate brief cites *Vermont Yankee* only to support the district court's holding. Apt. Br. 18. In the district court Mortgage Bankers argued that *Vermont Yankee* is not relevant for two reasons. First, Mortgage Bankers stated *Vermont Yankee* was "not addressing notice and comment." D.E. 17, MBA Reply Memo. 4. The opening paragraph of the Supreme Court's opinion, however, discussed section 553, specifically including its notice-and-comment requirement, and then, as noted, the Court held "that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." 435 U.S. at 523, 524. Thus, although notice and comment were not among the specific rulemaking procedures directly at issue in *Vermont Yankee*, the general and emphatic holdings of the Court refute Mortgage Bankers' suggestion that *Vermont Yankee* allows courts to require notice and comment despite section 553(b)(A)'s plain text to the contrary.

C. Mortgage Bankers also argued that "*Paralyzed Veterans* and its progeny do not *add* to the procedural requirements of the APA" and

thus are not inconsistent with the rule applied in *Vermont Yankee*. D.E. 17, MBA Reply Memo. 5 (emphasis in original). Mortgage Bankers based this argument on the sentence in *Paralyzed Veterans*, “That is surely why the Supreme Court has noted (in dicta) that APA rule-making is required where an interpretation ‘adopt[s] a new position inconsistent with . . . existing regulations.’” 117 F.3d at 586 (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 100 (1995)).

A leading scholar has refuted this argument. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 568 (2000). By “regulations,” *Guernsey* plainly meant legislative regulations, not interpretative rules as Mortgage Bankers would have it. “Throughout its opinion, the [Supreme C]ourt distinguished between ‘regulations’ – its shorthand synonym for legislative rules – and ‘interpretative rules.’” *Ibid.* In addition, the context makes clear that the “regulations” to which the Supreme Court referred were the two applicable legislative regulations discussed at length earlier in the *Guernsey* opinion (514 U.S. at 91-97). Thus, *Guernsey* supports merely

the non-controversial proposition that an agency can only amend a legislative rule by issuing another legislative rule. At no point in its opinion in *Guernsey*, or in any other opinion, has the Supreme Court stated that an agency cannot amend an interpretative rule by issuing an interpretative rule.

Pierce, 52 Admin. L. Rev. at 568 (footnote omitted). Especially because *Guernsey* flatly states, “Interpretative rules do not require notice and comment” (514 U.S. at 99), there was no basis for Mortgage Bankers to argue that the opposite inference should be drawn based on *Guernsey*’s use of the word “regulations.”

D. There also can be no valid argument that the *Paralyzed Veterans* doctrine is consistent with *Vermont Yankee* on the ground that *Paralyzed Veterans* is within the possible exceptions envisioned by the Supreme Court to *Vermont Yankee*. That argument would be mistaken for three reasons.

First, the Supreme Court defined the possible exceptions quite narrowly, stating that “such circumstances, if they exist, are, extremely rare” (435 U.S. at 524), and must be founded on “constitutional constraints or extremely compelling circumstances” (*id.* at 543). The Court suggested only two such circumstances, neither of which applies here:

(1) where due process requires additional procedures, or (2) where there has been “a totally unjustified departure from well-settled agency procedures of long standing.” *Id.* at 542. Mortgage Bankers does not claim either of these exceptions. In the thirty-four years since *Vermont Yankee* was decided, the Supreme Court has cited that decision in thirty-seven cases. We have not found any instance in which the Court held or any Justice suggested that an exception to *Vermont Yankee* applied.

Second, if an exception to *Vermont Yankee* is to be created, it is most unlikely to apply here. *Vermont Yankee* involved this Court’s requiring additional procedures as to which the APA is silent. *Paralyzed Veterans* imposes a notice-and-comment requirement where section 553(b)(A) expressly exempts interpretive rules from that requirement.

Third, this Court has addressed the *Paralyzed Veterans* doctrine in a wide range of programs of many different agencies. Not once has the Court suggested that its doctrine fits within an exception to *Vermont Yankee*, and Mortgage Bankers does not contend that this case does.

5. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), reaffirms and solidifies *Vermont Yankee* as inconsistent with the *Paralyzed Veterans* doctrine, which depends on drawing a distinction between initial and subsequent interpretive rules. *Fox* holds that the APA “makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action.” *Id.* at 515.

The district court correctly noted that *Fox* involved a different context, *i.e.*, “the APA’s arbitrary and capricious review, not its notice and comment process.” D.C. Op. 19, A. ___. That fact, however, does not mean that *Fox* has no bearing on this case, as Mortgage Bankers argues. Apt. Br. 18-19.

The Supreme Court’s broad and emphatic language that the APA “makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action” covers both the notice-and-comment and arbitrary-and-capricious contexts. Neither the district court nor Mortgage Bankers points to any APA provision that would support limiting *Fox*’s reasoning to only the arbitrary-and-capricious context.

6. Four months after *Alaska Hunters*, this Court first addressed *Vermont Yankee* in a *Paralyzed Veterans* case, and the Court appeared to recognize the inconsistency between them. *Hudson v. FAA*, 192 F.3d 1031 (D.C. Cir. 1999), held that the FAA's challenged action was a policy statement. The Court then held: "The APA includes no such requirement [that an agency "seek comments on its policy statement,"] and we are not at liberty to create one." 192 F.3d at 1036 (citing *Vermont Yankee*).

Section 553(b)(A) of the APA exempts both interpretive rules and policy statements from the notice-and-comment requirement without distinguishing between them. Just as *Hudson* holds that *Vermont Yankee* prohibits a court from creating a notice-and-comment requirement for a policy statement that changed the agency's prior interpretation (see 192 F.3d at 1033, 1035), *Hudson's* analysis compels the same result for interpretive rules.

7. *Alaska Prof'l Hunters* is the only clear instance in which this Court has held a true interpretive ruling invalid for lack of notice and comment. In all other cases, with one arguable exception, the Court has

limited the doctrine in two ways: (1) in twelve cases beginning with *Paralyzed Veterans* itself, the Court has created exceptions to the doctrine and has always held that an exception applies to the case before it,⁸ and (2) in five other cases the Court has held that the challenged rule was not actually an interpretation, but a legislative regulation, so that notice and comment were required by *Guernsey* and *Am. Mining Congress*.⁹ In this way the Court has conformed its *decisions* to

⁸ *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319 (D.C. Cir. 2011) (not adopting dissent's position that agency changed its position in violation of *Paralyzed Veterans*); *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 579-580 (D.C. Cir. 2010); *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509-511 (D.C. Cir. 2009); *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1038-1041 (D.C. Cir. 2008); *Transp. Wkrs. Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 475-477 (D.C. Cir. 2007); *Commodity Carriers, Inc. v. Federal Motor Carrier Safety Admin.*, 434 F.3d 604, 607 (D.C. Cir. 2006) (applying exception in the context of adjudications); *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Admin.*, 296 F.3d 1120, 1125-1128 (D.C. Cir. 2002); *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 56-58 (D.C. Cir. 2002); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 198 F.3d 944, 947-950 (D.C. Cir. 1999); *Molycorp, Inc. v. U.S. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999); *Hudson v. FAA*, 192 F.3d 1031, 1035-1037 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997).

⁹ *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 231 (2011); *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494-497 (D.C. Cir. 2010); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35, 40 (D.C. Cir. 2005); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir.

Vermont Yankee while not abandoning *Paralyzed Veterans* as its legal doctrine.

The arguable exception is *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997-998 (D.C. Cir. 2005). There EPA invited comment on a proposed monitoring rule that would have amended a legislative regulation, but then EPA adopted the inverse of that proposal and declined to amend the C.F.R. provision. Instead, it “adopted a ‘reinterpretation’ of the unamended text” of the legislative regulation. *Id.* at 997. The Court held this “surprise switcheroo” (425 F.3d at 996) violated the APA rulemaking provision because it was not a logical outgrowth of the proposed rule. To be sure, the Court held that the agency’s “flip-flop” also violated *Alaska Prof'l Hunters'* transformation sentence because the final reinterpretation was contrary not only to the proposed rule, but also to prior EPA orders. *Id.* at 997.

2000); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95-96 (D.C. Cir. 1997). In these cases, notice and comment were required by *Guernsey* and *Am. Mining Congress* because the challenged interpretation was held to be either a new legislative regulation or inconsistent with a prior legislative regulation – not inconsistent with an *Alaska Prof'l Hunters'* composite of a legislative regulation transformed by a previous interpretation.

Alaska Prof'l Hunters, however, was unnecessary to the result. The Court stated that the reinterpretation sought “to bind private parties or the agency itself with the ‘force of law.’” *Id.* at 998 (brackets and some internal quotation marks omitted). Only a legislative regulation can bind private parties with the force of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979). Thus, although EPA’s final action in *Environmental Integrity* was labeled a “reinterpretation,” it was actually an amendment to a legislative regulation, which required notice and comment under established law of the Supreme Court and this Court, without regard to *Alaska Prof'l Hunters*.

The consistency of the seventeen decisions cited above might suggest that the *Paralyzed Veterans* doctrine now describes a null class, so that, in effect, the law in this Circuit is: an agency cannot change its initial interpretation of a regulation by issuing a later interpretation without going through notice and comment unless an exception applies, but an exception always applies.

8. One of those decisions, *MetWest Inc. v. Sec’y of Labor*, 560 F.3d 506 (D.C. Cir. 2009), however, indicates that *Paralyzed Veterans*

survives for one class of cases. *MetWest* stressed the legitimate concern that an agency's informal rulemaking not unjustifiably upset reasonable reliance interests of the regulated parties. Judge Randolph, the author of both *MetWest* and *Alaska Prof'l Hunters*, explained that protecting this reliance interest was a "fundamental rationale of *Alaska Professional Hunters*" and "a crucial part of [its] analysis." 560 F.3d at 511 & n.4.

The *Paralyzed Veterans* doctrine, however, is unnecessary to protect that interest. Protecting reliance is a substantive concern, and the APA (5 U.S.C. 706(2)(A)) and the Supreme Court use a substantive test (arbitrary-and-capricious) to address it. That approach is preferable to *Paralyzed Veterans*' method of dealing with the reliance interest indirectly through a procedural means (imposing notice-and-comment rulemaking) that conflicts with the plain language of the APA. See generally, Brian J. Shearer, *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).

Fox, for example, held that the FCC had not acted arbitrarily in changing its indecency standards. The Supreme Court did not impose a new procedure when an agency changes course. Citing *Vermont Yankee*, the Court reaffirmed that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.” 506 U.S. at 513. Instead, applying the well-established arbitrary-and-capricious test, the Court held that an agency must give “a reasoned explanation” when it changes policy if “its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* at 515. *Fox* held that the FCC’s explanation in that case was adequate.

Vermont Yankee makes the same point. The Supreme Court stated that this Court was “entirely free” on remand to hold that the challenged rule was arbitrary and capricious “even though it may not hold, as it did in its previous opinion, that the rule is invalid because of the inadequacy of the agency procedures.” 435 U.S. at 536, n.14.

This Court recently followed this analysis in a *Paralyzed Veterans* case, *Honeywell Int’l, Inc. v. Nuclear Regulatory Comm’n*, 628 F.3d 568

(D.C. Cir. 2010). Honeywell challenged the denial of its application for an exemption from a regulatory requirement on the ground that the denial was inconsistent with the agency's having granted similar exemptions in the past. This Court quoted *Alaska Prof'l Hunters'* transformation sentence, but held that it did not apply because of two exceptions. *Id.* at 579-580. The Court then held that the challenged denial was arbitrary and capricious because the agency had not given an adequate explanation for its change of policy. *Id.* at 580-581. Thus, *Honeywell* stated the *Paralyzed Veterans* doctrine but based its decision on the APA and Supreme Court law, not a judicially created notice-and-comment requirement.

In the present case, the district court held that the 2010 AI is not arbitrary and capricious because Labor set forth a reasoned explanation for changing its prior interpretation. D.C. Op. 26, A. ___. That unchallenged substantive holding is now final. Moreover, in contrast to the argument of the intervening employees in this litigation, the government took the position that courts should give only prospective deference to the 2010 AI. D.E. 33, Dfts. Reply to Intervenors' Memo. 1 & n.2.

9. Further, the arbitrary-and-capricious test of the APA and the Supreme Court is a superior means of protecting reliance than this Court's *Paralyzed Veterans* doctrine. Notice-and-comment rulemaking is "long and costly[,] * * * often requir[ing] many years and tens of thousands of person hours to complete." Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 550, 551 (2000). This burdensome process may discourage agencies from reinterpreting legislative regulations when the circumstances warrant that action.

In sum, the one class of cases for which *MetWest* would preserve the *Paralyzed Veterans* doctrine is better addressed by the arbitrary-and-capricious test of the APA and the Supreme Court. Application of the *Paralyzed Veterans* doctrine as it has now evolved would most likely sustain or invalidate the same agency interpretive rules as would application of the plain text of the APA and the administrative law principle of *Vermont Yankee* and *Fox*. The difference is in the remedy. *Paralyzed Veterans* requires the burdensome and time-consuming notice-and-comment process; the APA, *Vermont Yankee*, and *Fox* lead to a remand

for a better explanation by the agency of why its proposed action is justified when balanced against any adverse effect upon the reliance interests of the regulated parties.

Thus, there is no reason for this Court to adhere to the *Paralyzed Veterans* doctrine with all its exceptions as opposed to applying the plain text of the APA, as required by *Fox* and *Vermont Yankee*. The full Court should therefore lay the *Paralyzed Veterans* doctrine to rest, a result for which this panel can call.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,748 words by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportional typeface using WordPerfect X5 and 14-point Century Schoolbook font.

/s/ Anthony J. Steinmeyer
Anthony J. Steinmeyer

CERTIFICATE OF SERVICE

I certify that on the 18th day of January, 2013, a copy of the original Brief for the Federal Appellees was filed electronically on the Court's CM/ECF system. I further certify that on this 23th day of January, 2013, a copy of the foregoing corrected Brief for the Federal Appellees was filed electronically on the Court's CM/ECF system. I understand that by operation of the Court's electronic filing system, notice of this filing will be sent to all registered parties. Parties may access this filing through the Court's system.

/s/ Anthony J. Steinmeyer
Anthony J. Steinmeyer

ADDENDUM

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ADMINISTRATIVE PROCEDURE ACT EXCERPTS

§ 551. Definitions

For the purpose of this subchapter –

* * *

(5) “rule making” means agency process for formulation, amending, or repealing a rule; * * *.

§ 553. Rule making

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

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

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

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

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

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

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

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

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

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

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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

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

(2) interpretative rules and statements of policy; or

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

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