Nos. 13-1041, 13-1052

# In The Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF THE DEPARTMENT OF LABOR, ET AL.,

*Petitioners,*

v.

MORTGAGE BANKERS ASSOCIATION,

*Respondent.*

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

*Petitioners,*

v.

MORTGAGE BANKERS ASSOCIATION,

*Respondent.*

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

## CONSOLIDATED BRIEF IN OPPOSITION


SAMUEL S. SHAULSON
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178

MICHAEL W. STEINBERG
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

ALLYSON N. HO
*Counsel of Record*
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

*Counsel for Respondent Mortgage Bankers Association*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

Whether the D.C. Circuit's factbound application of its *Paralyzed Veterans* doctrine—which has been applied only three times in the last two decades to require notice and comment where an agency issues an interpretation of a regulation that squarely conflicts with the agency's prior authoritative interpretation—warrants this Court's review.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Thomas E. Perez, Secretary of Labor, and Jerome Nickols, Ryan Henry, and Beverly Buck.

Respondent is the Mortgage Bankers Association, which has no parent corporation and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES



OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

## STATEMENT

For nearly two decades, the D.C. Circuit has held that "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 [under the Administrative Procedure Act] without notice and comment," as established in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Professional Hunters Ass'n, Inc.* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (Randolph, J.).

In all that time, the D.C. Circuit has applied its *Paralyzed Veterans* doctrine only three times—including in the case at bar—to require that an agency engage in notice-and-comment rulemaking. Indeed, in this case, the D.C. Circuit pointedly took "no position on the merits" of the Department of Labor interpretation at issue, emphasizing that "[i]f the [Department] wishes to readopt the later-in-time interpretation, it is free to," but it must "conduct the required notice and comment rulemaking." App. 3a.[1]

Shortly after the petitions in this case were filed, the President directed the Secretary of Labor to accept the D.C. Circuit's invitation and "propose revisions to modernize and streamline the existing

[1] For convenience, all citations will be of the appendix attached to the government's petition.

overtime regulations." Presidential Memorandum, *Updating & Modernizing Overtime Regulations*, 79 Fed. Reg. 15,209, 15,211 (Mar. 18, 2014). Accordingly, the underlying issue in this case is or soon will be moot. This Court need not devote its limited resources to reviewing agency action when the President has directed the Secretary of Labor to review that very same action in new proposed regulations. This Court's review of the D.C. Circuit's factbound application of its *Paralyzed Veterans* doctrine is thus unwarranted.

Moreover, petitioners' claims of a circuit split are overblown, the issue arises only rarely and is of limited practical importance, and the doctrine does not appear to have unduly hampered agency decisionmaking in the nearly two decades it has been in existence. In all events, if petitioners are right about the frequency with which the question arises, then it should not be too long before a better vehicle—with no mootness problems—comes along. The petitions should be denied.

1. Under the Fair Labor Standards Act ("FLSA"), see 29 U.S.C. §§ 201-219, covered employers must pay overtime wages to an employee who works more than 40 hours per week, unless the employee is exempt. 29 U.S.C. § 207(a)(1). Section 13(a) of the FLSA expressly exempts from those overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity[,] * * * or in the capacity of outside salesman," as those terms are "defined and delimited from time to time by regulations

of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551-559]." 29 U.S.C. § 213(a)(1). These are the so-called "white-collar exemptions."

In 1940, the Department of Labor promulgated regulations defining the administrative exemption as applying to employees who, among other things, perform work "directly related to management policies or general business operations." 5 Fed. Reg. 4077 (Oct. 15, 1940). In 1949, the Department revised this requirement to provide that an administratively exempt employee is one "[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers." 14 Fed. Reg. 7705, 7706 (Dec. 24, 1949). This definition remained unchanged for over 50 years.[2]

2. In 2004, after engaging in notice-and-comment rulemaking, the Department issued revised regulations addressing various FLSA exemptions, including the administrative exemption. The 2004 regulations retained the 1949 "primary duty" test without change: an administrative exempt employee is still one whose "primary duty is the performance of

[2] The administrative exemption also requires that the employee be paid at least $455 per week (on a salary or fee basis), and that his primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200. Those requirements are not at issue in this case.

office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2).

The pertinent regulations did, however, contain a new section (29 C.F.R. § 541.203) giving examples of administratively exempt employees. Those examples included "employees in the financial services industry," whose "duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products." 29 C.F.R. § 541.203(b).

An employee "whose *primary duty* is selling financial products does not qualify for the administrative exemption." *Ibid.* (emphasis added). But as the Department repeatedly made clear in the preamble to the 2004 regulations, the administrative exemption can still apply even if employees also do some selling to consumers. See Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004).

For example, the Department noted approvingly that the Eleventh Circuit held insurance agents to be exempt employees "even though they also sold

insurance products directly to existing and new customers." *Ibid.* (citing *Hogan* v. *Allstate Ins. Co.*, 361 F.3d 621, 628 (11th Cir. 2004)). The Department also cited with approval a district-court decision holding that "selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—was not enough of a distinction to negate his exempt status." *Ibid.* (citing *Wilshin* v. *Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1377-79 (M.D. Ga. 2002)).

The Department thus explained that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." *Id.* at 22,146. Specifically, the Department confirmed that "[s]ervicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment" such that the administrative exemption applies. *Ibid.*

3. In September 2006, the Department issued an administrator opinion letter in response to respondent's inquiry regarding the status of mortgage loan officers under the new 2004 regulations. App. 70a-84a.

The opinion letter was signed by the Administrator of the Wage and Hour Division, published on the

Department's website, and held out to employers as the Department's definitive interpretation of its regulations. App. 18a, 84a.

In its opinion letter, the Department determined that mortgage loan officers typically perform administratively exempt duties. App. 83a. The Department first cited the examples provided in the 2004 regulations, noting that they specifically include "'[e]mployees in the financial services industry.'" *Id.* at 76a (citing 29 C.F.R. § 541.203(b)) (alteration in original). The Department further noted that cases cited in the preamble to those regulations hold that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to customers." *Id.* at 77a (quoting 69 Fed. Reg. at 22,146). The Department thus determined that the

> description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as 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.

*Id.* at 78a.

Therefore, "[s]imilar to the employees [in the cases cited in the 2004 preamble]—all of whom were found

to satisfy the duties requirements of the administrative exemption—the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products." App. 79a (citations omitted). The Department thus concluded that the "mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer." *Ibid.*[3]

4. Four years later, in March 2010, the Department abruptly announced that going forward, it would sharply limit the use of opinion letters and instead rely on *sua sponte* "administrator interpretations" as the Department's primary vehicle for interpreting the pertinent statutes and regulations. The first of these (the "2010 administrator interpretation") dealt with mortgage loan officers. App. 49a. It was issued with no prior notice and no opportunity for public comment.

The 2010 administrator interpretation withdrew the 2006 opinion letter—which determined that

[3] The Department further concluded that the mortgage loan officers met the other requirements for the administrative exemption, including that they exercise discretion and independent judgment with respect to matters of significance. App. 83a. Again, the Department did not address that requirement in its subsequent administrator interpretation and it is not at issue in this case.

employees who perform the typical job duties of a mortgage loan officer are administratively exempt under the FLSA—and concluded just the opposite. App. 68a-69a. The typical job duties of mortgage loan officers set forth in the administrator interpretation, however, were the exact same ones the Department relied upon in its 2006 opinion letter reaching the opposite conclusion. Compare App. 50a-51a, with App. 72a-73a.

Specifically, although the Department previously found those same job duties to constitute work "directly related to the management or general business operations of their employer or their employer's customers," App. 75a (quoting 29 C.F.R. § 541.200(a)(2)), and thus qualify for the administrative exemption, the Department now declared that those same job duties "do not relate to the internal management or general business operations of the company." *Id.* at 64a. The Department rejected what it called an "inappropriately narrow definition of sales" in the 2006 opinion, *id.* at 59a-60a n.3, and criticized what it now viewed as that opinion's "misleading assumption and selective and narrow analysis." *Id.* at 68a.

Further, in a 2010 *amicus* brief, the Department acknowledged that its recent administrator interpretation was not "merely a clarification of a regulation." Br. of *Amicus* The Department of Labor at 27, *Henry* v. *Quicken Loans, Inc.*, No. 2:04-cv-40346-SJM-MJH (E.D. Mich. Dec. 9, 2010), ECF No. 609. Rather:

> [The administrator interpretation] unambiguously represents a substantive change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.

*Id.* at 27-28. That "substantive change," in the Department's own words, "is entitled to controlling deference" under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). *Id.* at 14.

5. Respondent filed a complaint in the district court alleging that the Department violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, in issuing the 2010 administrator interpretation. App. 13a.

As relevant here, respondent's complaint relied upon the D.C. Circuit's tandem of decisions in *Paralyzed Veterans* and *Alaska Professional Hunters*, which together stand for the proposition that where, as here, "an agency has given its regulations 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." *Alaska Professional Hunters*, 177 F.3d at 1034.

The parties filed cross-motions for summary judgment. After briefing closed, three former mortgage loan officers who had sued their previous employer for overtime pay after the Department withdrew the 2006 interpretive opinion moved to intervene in this case. The district court granted the

motion, and the private-party intervenors filed their own summary-judgment brief.[4]

The district court granted summary judgment to petitioners, ruling (as pertinent here) that respondent could not rely upon *Paralyzed Veterans* because respondent could not "satisfy the reliance component of the *Paralyzed Veterans* doctrine." App. 41a-42a. In reaching that conclusion, the district court rejected respondent's argument that its members had relied heavily upon the 2006 opinion letter—and, indeed, that many of respondent's members were sued shortly after the Department withdrew that letter and came to the opposite conclusion in the 2010 administrator interpretation (just as the private-party intervenors in this case had done).

6. The D.C. Circuit reversed. Writing for a unanimous panel (Tatel, J., Brown, J., and Sentelle, S.J.), Judge Brown began by articulating the "straightforward rule" announced by the "tandem" of *Paralyzed Veterans* and *Alaska Hunters*: "'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 [under the APA] without notice and comment.'" App. 2a (quoting *Alaska Hunters*, 177

[4] Private-party intervenor Henry's overtime claim was rejected by a jury in March 2011, and that verdict was affirmed by the Sixth Circuit in 2012. *Henry* v. *Quicken Loans, Inc.*, 698 F.3d 897, 902 (6th Cir. 2012). Henry's remaining interest in this litigation—and thus his standing before this Court—is unclear.

F.3d at 1034) (alteration in original). Noting that the sole issue before the court—whether reliance is "a 'separate and independent requirement'" of the *Paralyzed Veterans* doctrine—was a "narrow one," the D.C. Circuit agreed with respondent that reliance is "just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive." *Ibid.*

Because the government had already "conceded the existence of two definitive—and conflicting—agency interpretations," and "acknowledged at oral argument" that respondent would prevail if "the only reason [courts] look to reliance is to find out if there is a definitive interpretation," App. 3a (citation and internal quotation marks omitted, alteration in original), the D.C. Circuit reversed and remanded with instructions to vacate the 2010 administrator interpretation. *Ibid.* In doing so, the panel made clear that if the Department "wishes to readopt the later-in-time interpretation, it is free to do so. We take no position on the merits of their interpretation. [The Department] must, however, conduct the required notice and comment rulemaking." *Ibid.*

The court noted that "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." App. 6a n.4 (citing government's brief "counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions"). Indeed, the court reasoned, "*Paralyzed Veterans* may very

well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

7. The private-party intervenors (but not the government) filed a petition for rehearing *en banc*. App. 85a. The D.C. Circuit denied the petition, noting that no member of the court called for a vote on the petition. *Id.* at 85a-86a. On remand, the district court issued an order vacating the 2010 administrator interpretation.

## REASONS FOR DENYING THE PETITIONS

### I. Serious Mootness Concerns Would Likely Prevent This Court From Reaching And Resolving The Question Presented

Executive action taken after the petitions were filed raises serious mootness concerns with respect to the petitions. As noted above, the President directed the Secretary of Labor to "propose revisions to modernize and streamline the existing overtime regulations." Presidential Memorandum, Updating & Modernizing Overtime Regulations, 79 Fed. Reg. 15,209, 15,211 (Mar. 18, 2014). Every indication is that the Secretary will include in the "proposed revisions" the Department's 2010 interpretation at issue in this case—just as the D.C. Circuit invited the Department to do. App. 3a ("If the Department of Labor * * * wishes to readopt the later-in-time interpretation, it is free to."). Indeed, White House officials told

reporters in advance of the President's directive that "loan officers" are among those who will be affected by the new rulemaking. Michael D. Shear & Steven Greenhouse, *Obama Will Seek Broad Expansion of Overtime Pay*, N.Y. TIMES, Mar. 11, 2014, www.nytimes.com/2014/03/12/us/politics/obama-will-seek-broad-expansion-of-overtime-pay.html?_r=0.

The underlying issue in this case is the application of the FLSA with respect to loan officers. Adoption of a new regulation to that end—through notice and comment rulemaking—obviates the need for the Department of Labor to defend its 2010 administrator interpretation. At the very least, there is a serious concern that the new rulemaking will moot the issue of the validity of the Department's 2010 administrator interpretation on the same subject. That alone militates strongly against this Court's review at this time. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 505 (9th ed. 2007) (noting that potential agency action on the underlying issue may prevent certiorari). At best, this Court would be left with two private-party intervenors challenging a rarely used D.C. Circuit doctrine that, for the reasons stated below, does not present a certworthy question.

## II. The Asserted Circuit Split Is More Theoretical Than Real

Contrary to petitioners' claims, *Paralyzed Veterans* has not caused any deep rift among the circuits. "Despite its age, few cases discuss *Paralyzed Veterans*

at length," App. 6a, and the only cases that do so were decided on other grounds. See, e.g., *United States* v. *Magnesium Corp. of Am.*, 616 F.3d 1129, 1140 (10th Cir. 2010) (Gorsuch, J.) ("[W]e have no need to wade into such deep waters to decide the appeal before us."); *Warshauer* v. *Solis*, 577 F.3d 1330, 1339 (11th Cir. 2009) ("We need not (and do not) take sides in this debate.").

Petitioners' best evidence of a split is *dicta*—the Seventh Circuit's assertion that *Paralyzed Veterans* "conflicts with the APA's rulemaking provisions, which exempt all interpretive rules from notice and comment, and with our own precedent." *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (Castillo, D.J., sitting by designation). There was no occasion for the Seventh Circuit to decide the question in that case, however, because no interpretation of an agency regulation was involved, *id.* at 556, and because the challenged agency position "did not constitute a departure from a previous position." *Id.* at 558. Thus, *Paralyzed Veterans* by its own terms did not apply, and the D.C. Circuit would not have required notice and comment either. The Seventh Circuit's decision in *Abraham Lincoln Memorial* thus does not evidence a clean split—much less an "intractable" one requiring this Court's resolution.

As the Eleventh Circuit has correctly observed, while "some tension exists" among the circuits, the cases generally "have the potential to be distinguished on their facts." *Warshauer*, 577 F.3d at 1338-39 & n.4. That is likely why the parties here

characterize the split so differently—with the private-party intervenors alleging a 5-4 split, the government claiming a 2-2 split, and *amici* asserting a 2-6 split. Careful inspection of the petitions' cited cases confirms the conclusion that the split is largely illusory. Indeed, the cases cited as conflicting with *Paralyzed Veterans* likely would have come out the same way had they been decided by the D.C. Circuit.[5]

That is because the cases cited by petitioners as evidence of a split were mostly decided on the grounds that the prior agency interpretation was either not substantially different than the later interpretation, or not definitive in the first place, so that one or more of the prerequisites to triggering notice and comment under *Paralyzed Veterans* was lacking. See, e.g., *Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 557; *Miller* v. *Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008); *Erringer* v. *Thompson*, 371 F.3d 625, 630 (9th Cir. 2004); *St. Francis Health Care Ctr.* v. *Shalala*, 205 F.3d 937, 947 (6th Cir. 2000); *Warder* v. *Shalala*, 149 F.3d 73, 82 (1st Cir. 1998);

---

[5] The D.C. Circuit's opinion in this case acknowledged the asserted split(s) but also recognized the lack of clarity. App. 5a-6a n.3 (noting that the Eleventh Circuit has identified a potential 6-2 split while the Tenth Circuit has described "a slightly different" 2-4 split) (citing *Magnesium Corp.*, 616 F.3d at 1139). As Judge Gorsuch wrote for the Tenth Circuit, "the Third, Fifth, and Sixth Circuits *apparently* adopt[ ] the D.C. Circuit's view and the First and Ninth Circuits *seemingly* tak[e] the contrary position." *Magnesium Corp.*, 616 F.3d at 1139 (emphases added).

*Chief Probation Officers of Cal.* v. *Shalala*, 118 F.3d 1327, 1337 (9th Cir. 1997); *Chai* v. *Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995). Practically none of the cases petitioners cite as conflicting with *Paralyzed Veterans* even mentions the doctrine, because it is typically not the issue. Petitioners' cited cases thus do not involve true agency "flip-flopping" that would even implicate *Paralyzed Veterans*.[6]

For example, in *Warder*, 149 F.3d at 79-82, the First Circuit did not require notice and comment on a revised interpretation of a Medicare regulation where the court "very much doubt[ed]" that the revised interpretation "added something new to [the agency's] policies." *Id.* at 82. Without a significant revision to the agency's rules, the same result would have obtained in the D.C. Circuit under *Paralyzed Veterans*.[7]

The same thing is true of *Chief Probation Officers of California*, 118 F.3d at 1327 (White, Ret. J., sitting by designation). The Ninth Circuit held in that case

---

[6] The private-party intervenors' question presented bears scant resemblance to *Paralyzed Veterans*. No court has held that agencies "are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking." See Nickols Pet. i.

[7] The same result would also have obtained in the Fifth Circuit, which has expressly approved *Paralyzed Veterans*. See *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). Like the D.C. Circuit, the Fifth Circuit holds that the APA requires an agency to engage in notice and comment only "before *substantially altering* a *well established* regulatory interpretation." *Ibid.* (emphases added).

that notice and comment were not required because there was no substantial change in the agency's interpretation—and went on to explain that interpretive rule changes sometimes require notice and comment when they modify other rules "having the force of law." *Id.* at 1333 n.6. That result is entirely consistent with *Paralyzed Veterans.*[8]

Similarly, in *St. Francis Health Care*, 205 F.3d at 947, the Sixth Circuit held that the agency's new interpretation did not require notice and comment—but that does not mean that the Sixth Circuit is implacably hostile to *Paralyzed Veterans*. The Sixth Circuit itself implicitly recognized as much in *Dismas Charities, Inc.* v. *U.S. Department of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), which expressly rejected the argument that the court's decision in *St. Francis Health Care* precluded notice and comment for *all* interpretive rules. As the Sixth Circuit put it, "once an agency gives a regulation an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed." *Ibid.*

---

[8] Another Ninth Circuit case relied upon by petitioners, *Erringer*, 371 F.3d at 625, further demonstrates the absence of a clean conflict. *Erringer* involved agency interpretations of provisions in a Medicare manual, and the Ninth Circuit held that the subsequent interpretations were consistent with a prior rule having the force of law (making them interpretive rules). *Id.* at 632. The court noted: "*Any* rule that *effectively* amends a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking." *Ibid.* (emphases added). That is the same proposition for which *Paralyzed Veterans* stands.

Again, that is entirely consistent with *Paralyzed Veterans*.[9]

Other cases cited by petitioners do not conflict with *Paralyzed Veterans* because the agency's previous interpretation lacked the definitiveness required by *Paralyzed Veterans* to trigger notice and comment. Thus in *California Speedway*, 536 F.3d at 1020, the Ninth Circuit did not require notice and comment where the agency had not bound itself to a prior definitive interpretation of the regulation at issue. *Id.* at 1031-32. That result creates no meaningful conflict with *Paralyzed Veterans*, which requires that the agency's interpretation be sufficiently definitive before any change in that interpretation must be the product of notice and comment rulemaking.[10]

---

[9] So too with the Third Circuit's decision in *SBC Inc.* v. *FCC*, 414 F.3d 486 (3d Cir. 2005). While the Third Circuit acknowledged that "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA," *id.* at 498, the court emphasized that the order at issue "did not modify or substantively change the FCC's prior interpretation of the regulation." *Id.* at 501. Thus, the APA's notice and comment requirements did not apply, nor would they have in the D.C. Circuit under *Paralyzed Veterans*.

[10] As evidence of a conflict, petitioners rely upon an alternative rationale in *California Speedway* that assumed the "interpretation constituted a change in [its] understanding of [the regulation]." *Id.* at 1033. But at best that alternative holding is little more than a theoretical disagreement with *Paralyzed Veterans*, given the Ninth Circuit's agreement with the D.C. Circuit's resolution of the "precise question" before it. *Id.* at 1024

(Continued on following page)

In sum, the split identified by petitioners is more theoretical than real. The courts of appeals are not sharply divided over *Paralyzed Veterans* (much less "intractably divided," Nickols Pet. 14), and this Court's review is therefore unwarranted.

## III. The Question Presented Arises Infrequently And Has Limited Practical Importance

As the D.C. Circuit recognized in its opinion, App. 6a, the question presented does not occur very often—much less "perpetually." Nickols Pet. 32. Thus its practical importance is decidedly limited because very rarely has *Paralyzed Veterans* led to judicial invalidation of agency action—as even petitioners' *amici* forthrightly acknowledge. *Amicus* Br. of Administrative Law Scholars 8 (noting that "[b]etween 1997 and 2013, the D.C. Circuit applied the dictum in *Paralyzed Veterans* sporadically"). This Court's review is unwarranted for that reason, too.

Indeed, by the government's own count in its briefing below, there are at most two other cases in which the D.C. Circuit has invalidated an agency's interpretive rule for lack of notice and comment: *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005), and *Alaska Professional Hunters*, 177 F.3d at 1030. Given that track record, it is hard to see how *Paralyzed Veterans* "can present a

("We agree with the D.C. Circuit and reverse the judgment of the district court.").

formidable *in terrorem* barrier for agencies." USG Pet. 20. And although the private-party intervenors speculate (at 33) that *Paralyzed Veterans* will lead agencies to "behave entirely differently," they offer nothing to suggest that has actually been the case in the nearly 20 years since Judge Silberman issued his opinion for the D.C. Circuit in *Paralyzed Veterans*. To the extent the doctrine has had the salutary effect of providing an incentive to agencies to engage in notice and comment before issuing interpretations that contradict their prior interpretations, as Judge Brown noted in her opinion for the D.C. Circuit, App. 6a n.4, that is hardly cause for concern.

Nonetheless, the government worries about the application of *Paralyzed Veterans* to the Medicare program, arguing that given the complexity of that program, the Department of Health and Human Services "should be free to revisit its interpretations expeditiously." USG Pet. 21. Yet the D.C. Circuit's sole application of *Paralyzed Veterans* in the context of that program reveals no cause for concern, as the court actually rebuffed an attempt to use *Paralyzed Veterans* to set aside a Medicare interpretation. *Monmouth Med. Ctr.* v. *Thompson*, 257 F.3d 807, 814 (D.C. Cir. 2001).

And in a district court case—which involved the Secretary's decision to apply a new cost formula retroactively to bar a non-profit medical center from seeking reimbursement for $2.4 million in services it had already rendered in prior years—the Secretary did not appeal the district court's remand of the

Secretary's decision based on *Paralyzed Veterans. Montefiore Med. Ctr.* v. *Leavitt*, 578 F. Supp. 2d 129, 133 (D.D.C. 2008). The occasional invocation of *Paralyzed Veterans* in connection with the Medicare program—apparently only twice in nearly two decades—scarcely hampers the Department's ability to administer that program.

There is simply no need for this Court to review a doctrine so sparingly applied, even if the circuits were deeply divided on the question, which they are not.

## IV. *Paralyzed Veterans* Is Correct And Consistent With This Court's Decision In *Vermont Yankee*

The government argues that *Paralyzed Veterans* "disregarded" this Court's teaching in *Vermont Yankee* that § 553 of the APA "specifies the 'maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking' proceedings." USG Pet. 16 (quoting *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). But *Paralyzed Veterans* does no such thing. It does not impose any extrinsic procedures of its own. It simply safeguards the "procedural requirements" that are at the heart of § 553: notice and opportunity for public comment.

As Judge Silberman explained in his opinion for the D.C. Circuit in *Paralyzed Veterans*:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with * * * existing regulations."

117 F.3d at 586 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)) (alterations in original).

Similarly, in *Alaska Professional Hunters*, Judge Randolph's opinion for the D.C. Circuit elaborated on the rationale underlying *Paralyzed Veterans*:

> We [in *Paralyzed Veterans*] explained why an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute. "Rule making," as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule. 5 U.S.C. § 551(5). *See Paralyzed Veterans*, 117 F.3d at 586. 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.[11]

And so an agency abrogating its own authoritative interpretation of a regulation "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing new procedural requirements not found in the APA, *Paralyzed Veterans* correctly insures that agencies comply with the APA, thereby keeping faith with *Vermont Yankee.*

---

[11] The D.C. Circuit restated its explanation in *Syncor International Corp.* v. *Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997):

> We should note, in order to be complete (although this variation is not implicated in the case before us), that an interpretative rule can construe an agency's substantive regulation as well as a statute. *See Paralyzed Veterans*, 117 F.3d at 586; *American Mining Congress* [v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1107-08 (D.C. Cir. 1993)]. In that event, the interpretative rule is, in a sense, even more binding on the agency because its modification, unlike a modification of an interpretative rule construing a statute, will likely require a notice and comment procedure. Otherwise, the agency could evade its notice and comment obligation by "modifying" a substantive rule that was promulgated by notice and comment rulemaking. *See Paralyzed Veterans*, 117 F.3d at 586.

*Paralyzed Veterans* is therefore consistent with this Court's cases, and correct besides.[12]

Charges that the *Paralyzed Veterans* doctrine limits needed agency flexibility in a manner inconsistent with this Court's decisions are thus overblown—particularly given two inherent limitations of the doctrine. First, if the previous agency determination was not definitive, *Paralyzed Veterans* will not apply. *Ass'n of Am. R.R.s* v. *Dep't of Transp.*, 198 F.3d 944, 948 (D.C. Cir. 1999). Second, if there is no "significant[ ] revis[ion]" to the rule in question, *Paralyzed Veterans* will not apply. *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 58 (D.C. Cir. 2002). Those two

---

[12] It is true enough, as petitioners' *amici* point out (at 9), that the D.C. Circuit's *Paralyzed Veterans* doctrine has not been popular in the legal academy. But *amici*'s claim that "[a]ll scholars * * * have reacted critically to the *Paralyzed Veterans* doctrine" is overblown. See, e.g., *Magnesium Corp.*, 616 F.3d at 1140 (Gorsuch, J.) (articulating academic criticisms of the doctrine and then pointing out that "[o]ther scholars take a different view" (citing Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 923 (2006))); see also Ryan DeMotte, *Note & Comment, Interpretative Rulemaking & the* Alaska Hunters *Doctrine: A Necessary Limitation on Agency Discretion*, 66 U. PITT. L. REV. 357, 373-74 (2005) (approving of *Paralyzed Veterans* and arguing that academic criticisms of the doctrine are "largely overstated").

In all events, as Judge Gorsuch correctly pointed out, "[t]he academic debate also proceeds beyond the legal realm we inhabit to the policy realm usually reserved for others, contending variously that [*Paralyzed Veterans*] does and does not promote sound policy." *Magnesium Corp.*, 616 F.3d at 1140 n.12. Those contentions, of course, should be directed at the legislature, not the courts.

limitations simply prevent capricious agency flip-flopping on established positions. They do not create insurmountable hurdles for run-of-the-mill course corrections in administration. If an issue is significant enough to warrant wholesale changes to the actual substance of a rule, it is significant enough to be considered through APA procedures. That was the point of the Act, and there is no conflict between *Paralyzed Veterans* and *Vermont Yankee* on this score.

## V. This Case Is A Poor Vehicle

Even if the question presented warranted this Court's review, this case is a poor vehicle and the petitions should be denied for that reason alone.

The highly unusual facts of this case do not lend themselves to broad review of the *Paralyzed Veterans* doctrine as a general matter. The record does not reveal why the Department completely reversed course without notice or an opportunity for public comment. Additionally, no exigent circumstances have been cited that might have explained the Department's action. Indeed, had there been some exigency, the Department could have invoked the APA's "good cause" exception to the notice and comment requirements, 5 U.S.C. § 553(b)(3)(B), and this litigation could have been entirely avoided.

The Department cited no change in the statute or the regulations. Nor did the Department cite any change in the mortgage banking industry—or in

the job duties of loan officers. Instead, the Department (under a new administration) simply considered the same question a second time and reached a completely different outcome—without any warning. Thankfully, such extreme (and unexplained) agency flip-flopping is rare. And for good reason:

> Changes in course * * * cannot be solely a matter of political winds and currents. The Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow.

*N.C. Growers' Ass'n, Inc.* v. *UFW*, 703 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring).

At the end of the day, if petitioners are right that the question presented is "perpetually recurring," then it will arise again soon enough in a better vehicle for this Court's review—and there is no reason to think future cases will evade review. The highly unusual circumstances here, however, and the serious mootness concerns make this case a poor vehicle for exploring the contours of an agency's right to change its mind.

———♦———

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL S. SHAULSON
MORGAN, LEWIS &
BOCKIUS LLP
101 Park Avenue
New York, New York 10178

MICHAEL W. STEINBERG
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue, N.W.
Washington, DC 20004

ALLYSON N. HO
*Counsel of Record*
JOHN C. SULLIVAN
MORGAN, LEWIS &
BOCKIUS LLP
1717 Main Street,
Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

*Counsel for Respondent*
*Mortgage Bankers*
*Association*