NOTES

Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of *Alaska Hunters*

I. INTRODUCTION

Agency flexibility is a battlefield. When circumstances change or a new regime takes power, federal agencies often adjust their settled regulations to reflect new realities. There is a persistent struggle, however, between preserving this flexibility and protecting those who relied upon the previous regulations.[1] When an agency changes course, regulated entities must comply, often with little warning and at great expense.[2] In 1946, Congress passed the Administrative Procedure Act ("APA") to balance these interests by restricting when and how agencies can promulgate and change regulations.[3]

Unsurprisingly, the APA did not achieve a lasting détente.[4] Instead, it merely created new fronts on which this same conflict has continued to rage. Perhaps the most interminable of these battles is the distinction between legislative rules that require notice and comment and nonlegislative rules that do not.[5] In particular, interpretive rules (a subset of nonlegislative rules) often constitute the flash point for this larger conflict over agency flexibility.[6]

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1. *See infra* Part II.

2. *See, e.g.*, Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Alaskan guide pilots and lodge operators relied on the advice FAA officials imparted to them—they opened lodges and built up businesses dependent on aircraft, believing their flights were [in compliance].").

3. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996) ("The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force . . . .").

4. Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 162 (2001):

> [W]hile the Supreme Court has increasingly moved towards a more "hands off" approach, trusting the political process to ensure agency fairness, the D.C. Circuit has maintained a much more skeptical stance towards agency discretion. This difference in approach has created what Richard M. Thomas has characterized as "skirmishes" between the D.C. Circuit and the Supreme Court.

5. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278–79 (2010) ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules. . . . [C]ourts have labeled the distinction . . . 'tenuous,' 'baffling,' and 'enshrouded in considerable smog.' ").

6. *See* Elizabeth Williams, Annotation, *What Constitutes "Interpretative Rule" of Agency so as To Exempt Such Action from Notice Requirements of Administrative Procedure Act (5 U.S.C.A. § 553(b)(3)(a))*, 126 A.L.R. FED. 347 (1995) ("[T]he Act does not provide a definition of 'interpretative,' and courts have found the line between interpretative and substantive or legislative rules to be indistinct . . . ."); Connolly, *supra* note 4, at 155:

> One of the most persistently troubling distinctions in administrative law has been the difference between legislative rules, by which administrative agencies enact rules that have all the force of statutes, and interpretive rules, which are supposed to be

The D.C. Circuit substantially constrained agency flexibility in a line of cases starting with *Paralyzed Veterans of America v. D.C. Arena L.P.*[7] and culminating in *Alaska Professional Hunters Ass'n v. Federal Aviation Administration* ("*Alaska Hunters*").[8] Although the APA explicitly permits agencies to issue interpretive rules without notice and comment,[9] the D.C. Circuit ruled that an agency cannot change or abandon an interpretation without notice and comment.[10] The D.C. Circuit justified this gloss on the APA as necessary to protect those who "relied on . . . an authoritative departmental interpretation."[11] In *Alaska Hunters*, for example, guide pilots and lodge operators moved to Alaska and started businesses based upon guidance from the Federal Aviation Administration ("FAA") exempting them from the heightened regulations that apply to commercial air operations.[12] Allowing the FAA to change course, the court reasoned, would impose enormous hardships on pilots and operators who had relied upon the guidance.[13] In the court's view, protecting these reliance interests justified requiring notice-and-comment procedures, even though the original FAA guidance was issued without them.

Some federal courts of appeals,[14] and a plethora of academic commentators,[15] have criticized the *Alaska Hunters* doctrine[16] as

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announcements by an agency of how it interprets ambiguous language in its own legislative rules.

7. 117 F.3d 579 (D.C. Cir. 1997).

8. 177 F.3d 1030, 1034 (D.C. Cir. 1999).

9. 5 U.S.C. § 552(a)(1)(D) (2012) (stating that notice and comment is not required for "statements of general policy or interpretations of general applicability formulated and adopted by the agency").

10. *Alaska Hunters*, 177 F.3d at 1034 ("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.").

11. *Id.* at 1035.

12. *Id.*

13. *See id.* (noting that pilots and guides had already opened lodges and built businesses, believing they were in compliance, while lacking an opportunity to participate in rulemaking or argue for a special rule).

14. The First, Seventh, and Ninth Circuits reject the *Alaska Hunters* doctrine. *See* Abraham Lincoln Mem'l Hosp. v. Sebelius, 698 F.3d 536, 560 (7th Cir. 2012) ("*Alaska Professional Hunters Association, Inc.* conflicts with the APA's rulemaking provisions, which exempt all interpretive rules from notice and comment, and with our own precedent and is therefore not persuasive."); Erringer v. Thompson, 371 F.3d 625, 632 (9th Cir. 2004) ("In other words, no notice and comment rulemaking is required to amend a previous *interpretive* rule." (citing Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1088 (9th Cir. 2003))); Warder v. Shalala, 149 F.3d 73, 81 (1st Cir. 1998) ("[I]n order for notice and comment to be necessary, 'the [later] rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified.' " (quoting Chief Prob. Officers of Cal. v. Shalala, 118 F.3d 1327, 1337 (9th Cir. 1997))).

inconsistent with a plain reading of the APA and as a harmful constraint on agency flexibility. Yet the doctrine has become increasingly entrenched in the D.C. Circuit and has gained varying levels of acceptance in other circuits as well.[17] Some circuits have explicitly avoided the question altogether.[18] The Tenth Circuit, for example, seemed to criticize the doctrine in *United States v. Magnesium Corp. of America*[19] but ultimately ducked the issue, noting that merely tentative interpretations (as opposed to definite ones) could be changed or abandoned without notice and comment,[20] even

15. Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 918 (2006) ("Academic commentary on [the *Alaska Hunters* doctrine] has been scathing."); *see also, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1329 (2001) ("[I]t is difficult to justify the courts' reasoning on the basis of precedent or statutory language."); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 846 (2001) ("When the D.C. Circuit says, as it did in *Alaska Professional Hunters*, that the FAA can alter the informal but longstanding policy of its Alaska regional office only by engaging in notice-and-comment rulemaking, it stands conventional ideas about precedential systems on their head . . . ."); Connolly, *supra* note 4, at 157 ("[T]he *Alaska Hunters* doctrine is both a misreading of the relevant statute and undesirable as a policy matter . . . ."); Brian J. Shearer, Comment, *Outfoxing* Alaska Hunters*: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 AM. U. L. REV. 167, 171 (2012) ("The [*Alaska Hunters*] doctrine is in conflict with the APA, which expressly exempts all interpretive rules from notice-and-comment requirements.").

16. Connolly, *supra* note 4, at 156 ("This Note . . . names this new development the '*Alaska Hunters* doctrine' after the most sweeping case that has articulated it."). The *Alaska Hunters* doctrine is sometimes referred to as the "one-bite rule." *See, e.g.*, Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 415–16 (2012).

17. SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005) (citing Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997)) ("[I]f 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."); Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005) ("It is true that once an agency gives a *regulation* an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed."); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.").

18. United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1140 (10th Cir. 2010) ("We 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, because we conclude that Warshauer failed to satisfy even the *Alaska Professional Hunters/ Paralyzed Veterans* approach.").

19. *See Magnesium Corp. of Am.*, 616 F.3d at 1139 ("For a prescription of *how to conduct* rulemaking, we must look instead at § 553 [of the APA], which makes perfectly clear that the notice and comment procedures required for substantive (or legislative) rules just don't apply to 'interpretative rules.' ").

20. *Id.* at 1145 ("[W]e hold that EPA hasn't previously adopted a definitive interpretation of its 1991 rule. Even under the case law U.S. Magnesium asks us to follow, the Agency is at liberty to adopt without notice and comment a reasonable interpretation of that ambiguous regulation.").

under *Alaska Hunters*. In doing so, Judge Gorsuch observed in a footnote that such an escape hatch could serve as "a sort of abracadabra of administrative decisionmaking" by allowing agencies to employ "assuredly tentative" interpretations that could be changed at will.[21] The agency, of course, would still intend the interpretation to shape the behavior of regulated parties—and would likely succeed in doing so, despite the claimed tentativeness.[22]

Because this so-called abracadabra enhances agency flexibility, we might expect courts to more willingly follow *Alaska Hunters*.[23] But the opposite might be true. This gloss superficially addresses the central critique of *Alaska Hunters*: that it ossifies agency action. But incentivizing agencies to downplay the definitiveness of their interpretations threatens the very reliance interests that *Alaska Hunters* sought to protect. Which interpretations should regulated entities rely on? When can they take agency assurances at face value and when should they hold back for more definitive guidance? Courts would find themselves in the awkward position of needing to abandon a doctrine in order to protect the very interests it was intended to serve.[24] Thus, both sides of the *Alaska Hunters* debate—those who favor agency flexibility and those who favor reliance interests—should be able to agree: the time has come to abandon *Alaska Hunters*.

Regardless of whether courts continue to enforce the *Alaska Hunters* doctrine—with or without the abracadabra gloss—arbitrary-and-capricious review will still constrain agencies' ability to alter or abandon interpretive rules. Specifically, the Supreme Court's recent decision in *FCC v. Fox Television Stations, Inc.* did just that.[25] While *Fox* did not directly overturn *Alaska Hunters*, it undermined key aspects of *Alaska Hunters'* reasoning and, perhaps more importantly,

21. *Id.* at 1143 n.16.

22. *Id.*

23. While the First, Seventh, and Ninth Circuits have rejected the *Alaska Hunters* doctrine, *see supra* note 14, the Third, Fifth, and Sixth Circuits have adopted it. *See* SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005) (citing Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997)); Shell Offshore Inc. v. Babbit, 238 F.3d 622, 629 (5th Cir. 2001) ("We agree with the reasoning of the D.C. Circuit; the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation." (citing *Paralyzed Veterans of Am.*, 117 F.3d at 586)); Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005) ("It is true that once an agency gives a *regulation* an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed." (citing *Alaska Hunters*, 177 F.3d at 1033–34)).

24. *See infra* Part III.D.

25. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546 (2009).

provided a better framework for balancing the need for agency flexibility with the importance of protecting reliance interests.[26]

Part II of this Note lays out the complex landscape of administrative rulemaking and judicial deference that gave rise to the *Alaska Hunters* doctrine. Part III analyzes the doctrine's harmful effects and demonstrates that agencies could, with relative ease, circumvent its constraints through tentative rulemaking. This Part also illustrates the substantial costs that would result if agencies embrace the Tenth Circuit's gloss. Part IV argues that the *Fox* framework for arbitrary-and-capricious review strikes a better balance between the interests of agencies and regulated entities than the current *Alaska Hunters* regime (with or without the abracadabra gloss). Part V concludes.

II. RULEMAKING AND JUDICIAL REVIEW: A COMPLEX LANDSCAPE

Before analyzing the consequences of the abracadabra gloss on the *Alaska Hunters* doctrine, it is important to first survey the landscape in which the doctrine exists. The *Alaska Hunters* doctrine implicates two of the more complex and contested conflicts in administrative law. Section A of this Part explores the distinction between legislative and nonlegislative rules,[27] and the level of scrutiny courts should apply to a given agency action.[28] Section B then explains the tradeoffs that agencies confront when choosing which type of rule to issue.

A. Defining Rules and Rulemaking

What, exactly, is a "rule"? Under the APA, the better question might be, "What isn't?" The statute defines "rule" so broadly that the term encompasses any agency statement of "future effect" intended to impact law or policy.[29] Indeed, it is hard to imagine a more

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26. *See infra* Part IV.A.

27. *See* Franklin, *supra* note 5, at 278 ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules.").

28. *See id.* at 281–82.

29. 5 U.S.C. § 551(4) (2012):

> "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

encapsulating definition. The APA then describes two primary methods of rulemaking: formal and informal. Formal rulemaking—the less common variety—involves a trial-like hearing in which rules are made "on the record."[30] Informal notice-and-comment rulemaking—the more common variety—requires the agency to (1) provide notice of the proposed rule,[31] (2) give "interested persons" the opportunity to comment,[32] and (3) include a "concise general statement of [the rule's] basis and purpose."[33] A third method has emerged, however, due to the APA's exceptions to the notice-and-comment requirement. The APA explicitly exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[34] These agency actions, while still APA "rules,"[35] are even less formal than informal rules.[36]

Though notice-and-comment rulemaking was designed to be simple and efficient, all three branches of the federal government have, to varying degrees, made the process more difficult. In the decades following the passage of the APA, the D.C. Circuit led other courts in slowly expanding the procedural requirements for notice and comment.[37] In 1968, for example, the D.C. Circuit held in *Automotive Parts & Accessories Ass'n v. Boyd* that the agency's "concise general statement of . . . basis and purpose" must demonstrate "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[38] Nine years later, the D.C. Circuit held that agencies must "disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based" and then "respond to significant points raised by the public" during the notice-and-comment process.[39]

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30. *Id.* § 553(c) ("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.").

31. *Id.* § 553(b)(3) ("The notice shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.").

32. *Id.* § 553(c) ("[T]he 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.").

33. *Id.* § 553(b), (c).

34. *Id.* § 553(b)(3)(A).

35. *See supra* text accompanying note 29.

36. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1467 (1992).

37. *See* Franklin, *supra* note 5, at 282 ("In the 1960s and 1970s, federal courts of appeals—particularly the D.C. Circuit—began supplementing these three basic steps by imposing additional procedural requirements on agencies in cases governed by § 553.").

38. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

39. Home Box Office, Inc. v. FCC, 567 F.2d 9, 35–36 (D.C. Cir. 1977).

As the D.C. Circuit imposed consecutive glosses of heightened expectations, the Supreme Court eventually intervened. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Court issued a stern reminder that Congress specifically chose the procedures in the APA, and courts may not usurp legislative power by imposing additional requirements on agencies.[40]

As Professor David Franklin has noted, however, *Vermont Yankee* only spoke to lower courts; it did nothing to prevent the other two branches from imposing additional procedural requirements. Indeed, the White House mandated cost-benefit analysis and centralized review, and Congress required impact analyses for agency actions that affect small businesses, tribal governments, and several others.[41] Over time, these escalating procedural expectations have "ossifi[ed]" informal rulemaking, forcing agencies to become increasingly bureaucratic and inefficient.[42] Agencies, in turn, have responded by increasingly using interpretive rules and statements of policy, which are exempt from notice-and-comment requirements.[43]

B. Pay Me Now or Pay Me Later: The Choice Between Procedural Ease and Judicial Deference

In addition to the APA's express formal-versus-informal dichotomy, the statute implies another distinction for agency rules:[44] "legislative" rules bind with the force of law, whereas "nonlegislative" rules do not.[45] Despite their different legal consequences, however, it can be difficult to distinguish between the two. Determining whether a

40. Generally speaking, 5 U.S.C. § 553 (2012) establishes the maximum procedural requirements that Congress was willing to have the courts impose upon federal agencies in conducting rulemaking proceedings, and while agencies are free to grant additional procedural rights in the exercise of their discretion, reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. And, even apart from the APA, the formulation of procedures should basically be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 520 (1978).

41. *See generally* Franklin, *supra* note 5, at 283 (discussing the additional requirements that Congress and the President have placed on notice-and-comment rulemaking).

42. *See, e.g.*, *id.* at 283–84 (describing the rise of ossification and its impact on agency rulemaking procedures and behaviors).

43. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166–68 (2000) (noting that agencies ranging from the Food and Drug Administration to the Mine Safety and Health Administration are "avoiding 'ossification' . . . by increased use of 'interpretative rules' and 'policy statements' ").

44. *See generally* Franklin, *supra* note 5, at 282–89.

45. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1462 (2011) ("The main distinction recognized in the caselaw is that legislative rules have the force and effect of law, whereas nonlegislative rules do not.").

particular rule is legislative or nonlegislative implicates two connected inquiries: what procedures are required to promulgate a given rule, and what degree of judicial deference a rule should receive. The *Alaska Hunters* doctrine was born into this complex legal framework, so this Section attempts to clarify it.

The nature of a proposed rule carries two important legal implications. First, whether or not the proposed rule is legislative dictates the required promulgation procedure. Legislative rules, for example, must go through notice and comment because they are intended to bind with the force of law. Nonlegislative rules—including interpretive rules[46]—can be issued without these procedures because they merely explain how an agency would construe an existing statute or regulation.[47] Thus, when issuing a rule, agencies must determine its intended effect and then comply with the corresponding procedures. Choosing the wrong rulemaking procedures invites severe consequences: if an agency intends to promulgate a binding rule but forgoes notice and comment, a court will likely strike it down.[48] But notice and comment is costly and time-consuming, so agencies prefer to avoid it when issuing less binding rules.

Second, the legislative or nonlegislative nature of a proposed rule dictates the extent to which courts defer to the agency once a rule is challenged.[49] In its landmark decision *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court held that judges should completely defer to an agency's reasonable interpretation of ambiguous provisions in its organic statute.[50] While some circuits initially applied *Chevron* deference to all rules,[51] the Supreme Court

46. *Id.* ("[I]nterpretive rules and policy statements (sometimes referred to collectively as 'nonlegislative rules') can be issued without any special procedures . . . .").

47. See *supra* text accompanying notes 29–36 for a description of formal and informal rulemaking procedures.

48. *See* Pickus v. U.S. Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974) (holding a board of parole's legislative regulations invalid because they did not satisfy notice and comment requirements).

49. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (describing *Chevron* as dealing "with the problem of judicial deference to agency interpretations of law").

50. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 866 (1984); *see also id.* at 512 ("*Chevron* has proven a highly important decision—perhaps the most important in the field of an administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*."). The Court has, however, been reluctant to extend the Chevron doctrine to situations where multiple agencies promulgated a joint rule. *See* William Weaver, *Multiple-Agency Delegations & One-Agency* Chevron, 67 VAND. L. REV. 275 (2014).

51. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 553 (2000) ("[S]ome circuits, including the D.C. Circuit, have held that *Chevron* deference applies to interpretative rules as well as to legislative rules.").

in *United States v. Mead Corp.* seemed to restrict *Chevron* deference to legislative rules.[52] The Court explained that nonlegislative rules should only be afforded the weaker form of deference established in *Skidmore v. Swift & Co.*[53] Thus, after *Mead*, only a legislative rule can receive *Chevron* deference and bind the courts during judicial review.[54] A nonlegislative rule does not bind the courts, but it may nevertheless persuade through the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[55]

Given these far-reaching implications, agencies and courts must accurately distinguish legislative and nonlegislative rules. Theoretically, it should be easy: one purports to bind with the force of law, and the other merely seeks to clarify congressional or agency intent.[56] But in practice, the distinction can prove quite blurry.[57]

Take, for example, a hypothetical regulation that requires sports arenas to provide wheelchair-accessible seating with sightlines comparable to standing spectators.[58] If the implementing agency subsequently advises arenas to use the average height of American adult males to estimate the sightlines of standing spectators, the guidance seems more interpretive than binding. The specificity of the regulation leaves little room for more. But if the regulation merely requires "lines of sight comparable to those for members of the general

52. *See* United States v. Mead Corp., 533 U.S. 218, 232–34 (2001) (distinguishing precedential, generally applicable rules from individual classification rulings that still carry the "force of law"); Franklin, *supra* note 5, at 276, 280 (construing *Mead* as "presumptively disqualif[ying] nonlegislative rules from *Chevron* deference.").

53. *Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting) ("And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference."); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (deciding to treat agency judgments as persuasive guidance in light of agency experience and expertise rather than as controlling authority).

54. Of course, saying the rule binds the Court under *Chevron* assumes that (1) the statute was ambiguous and (2) that the rule embodies a reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 842–44, 866.

55. *Skidmore*, 323 U.S. at 140.

56. Stephenson & Pogoriler, *supra* note 45, at 1462 ("The main distinction recognized in the caselaw is that legislative rules have the force and effect of law, whereas nonlegislative rules do not.").

57. Franklin, *supra* note 5, at 278 (noting that consistent application of the distinction between legislative and nonlegislative rules has proven "maddeningly hard" for courts and academics alike); Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 352 (arguing that the distinction between legislative and interpretive rules has become increasingly "blurred").

58. With key differences, this hypothetical regulation bears striking resemblance to the facts in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), which I discuss in some detail below.

public,"[59] instead of standing spectators in particular, the implementing agency has more latitude. If the agency then advises arenas that "general public" means "standing spectators," the guidance starts to seem more binding, and thus more legislative. Neither version of the hypothetical legislative rule is clear on its own terms. For both versions, regulated parties need more information to properly comply. But the more vague the initial regulation, the more likely the interpretation is not actually an interpretation at all, but rather is itself a legislative rule. If, for example, the hypothetical regulation merely required "reasonable" sightlines, a subsequent rule defining "reasonable" to mean "standing spectators in the VIP section" would seem legislative indeed.

When an adversely impacted party—say, a sports arena seeking to avoid the expense of installing new seats—challenges an agency's interpretation, the reviewing court has the unenviable task of determining whether the agency intended to bind with the force of law or merely to clarify an existing regulation.[60] In ascertaining the agency's intent, courts consider the rule's text, history, context, and implementing procedures.[61] Courts will strike down an interpretation that was designed to be legally binding but did not go through notice and comment. If the agency intended to bind and complied with the notice-and-comment requirements, courts must grant *Chevron* deference to the agency's reasonable interpretations.[62] But if the agency did not intend to bind and did not go through notice and comment, courts will only consider the agency's interpretation to the extent that it persuades under *Skidmore*.[63]

Thus, under *Mead*, agencies must make an important choice: they can either accept the burdens of notice and comment, and obtain *Chevron* protection if their rules are challenged, or they can bypass notice and comment, and try to justify their rules on a case-by-case

59. *See Paralyzed Veterans of Am.*, 117 F.3d at 581 (emphasis added) (quoting 28 C.F.R. pt. 36, app. A, § 4.33.3 (1996)).

60. *See* Franklin, *supra* note 5, at 278 (highlighting the difficulty of crafting a test to identify an agency's intent).

61. *Id.*:

> Currently, courts do their best by examining the text, structure, and history of the rule, its relationship to existing statutes and rules, and the manner in which it has been enforced (if at all) in an effort to ascertain whether the rule was intended to have binding legal effect or instead was merely designed to clarify existing law or to inform the public and lower-level agency employees about the agency's intentions.

62. *See* United States v. Mead Corp., 533 U.S. 218, 229–30 (2001) (discussing the presumption of *Chevron* deference in the context of notice-and-comment rulemaking).

63. *See id.* at 234–35 (explaining *Skidmore* deference).

basis under *Skidmore*.[64] In other words, the *Mead* framework essentially forces agencies to choose between procedural ease and judicial deference.[65] Scholars have described this choice as "pay me now, or pay me later."[66]

There is yet another lingering problem with this already complicated framework. In *Bowles v. Seminole Rock & Sand Co.*[67] (and again in *Auer v. Robbins*[68]), the Supreme Court held that an agency's interpretation of its own regulation should receive "controlling weight" unless the interpretation is "plainly erroneous or inconsistent with the regulation."[69] *Seminole Rock* deference seems to apply regardless of whether or not the agency promulgated the interpretation via notice and comment.[70]

By contrast, the *Mead* framework awards *Chevron* deference to rules promulgated with notice and comment but *Skidmore* deference to rules promulgated without it, including interpretive rules.[71] While some courts have simply conflated *Chevron* and *Seminole Rock*,[72] the

64. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992).

65. Various scholars have proposed treating the pay-me-now-or-later choice as a clear indication of whether an agency intended to promulgate a legislative or nonlegislative rule. *See* Franklin, *supra* note 5, at 289–91 (noting that scholars, including John Manning, William Funk, Donald Elliott, Peter Strauss, and Jacob Gersen, have produced a "long and distinguished line of writings" in support of adopting this approach). Unfortunately, and somewhat inexplicably, courts have not taken the bait. *Id.* at 279 ("What seems just as baffling, however, is that for many years, administrative law scholars have proposed a simple solution to the problem of distinguishing between these two types of rules—and courts have failed to take them up on it."). Instead, courts have continued trying to determine what procedures are required by parsing various other indications of agency intent. *See id.*

66. *See* Elliott, *supra* note 64, at 1491:

> As in the television commercial in which the automobile repairman intones ominously "pay me now, or pay me later," the agency has a choice: It can go through the procedural effort of making a legislative rule now and avoid the burdens of case-by-case justification down the road, or it can avoid the hassle of rulemaking now, but at the price of having to engage in more extensive, case-by-case justification down the road.

67. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

68. Auer v. Robbins, 519 U.S. 452, 461 (1997).

69. *Seminole Rock & Sand Co.*, 325 U.S. at 414.

70. *See id.* (applying heavy deference to a price regulation not subject to notice-and-comment procedures).

71. United States v. Mead Corp., 533 U.S. 218, 227 (2001) ("The . . . ruling at issue here fails to qualify [for *Chevron* deference], although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.").

72. For example, Richard J. Pierce wrote that "some circuits, including the D.C. Circuit, have held that *Chevron* deference applies to interpretative rules as well as to legislative rules." Pierce, *supra* note 51, at 553. Pierce then cites *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1131 (D.C. Cir. 1997), as an example. *Id.* However, *Browner* applies *Seminole Rock* deference using the "plainly erroneous" standard and does not even cite to *Chevron*. *See* 127 F.3d at 1131 (citing *Seminole Rock & Sand Co.,* 325 U.S. at 414) ("Because EPA's interpretation of its water

Supreme Court seemed to distinguish them in *Gonzales v. Oregon*.[73] There, the Court attempted to reconcile the apparent conflict between *Chevron* and *Seminole Rock*[74] by limiting the latter to regulations that give "specificity to a statutory scheme the [agency] was charged with enforcing and [that reflect] the [agency's] considerable experience and expertise."[75] But when the regulation simply "restate[s] the terms of the statute itself," it does not warrant *Seminole Rock* deference.[76]

III. THE *ALASKA HUNTERS* DOCTRINE

While the Court's efforts have left substantial ambiguities unresolved, the *Alaska Hunters* doctrine upsets the tenuous balance between agency flexibility and judicial deference.[77] Section A of this Part recounts the origins of the *Alaska Hunters* doctrine. Section B describes the considerable criticism of the doctrine. Section C explores the extent to which agencies could circumvent the *Alaska Hunters* doctrine by embracing the abracadabra gloss envisioned by the Tenth Circuit. Section D examines the negative consequences that this choice would invite.

A. The Origins of Alaska Hunters

The intellectual basis of the *Alaska Hunters* doctrine, perhaps curiously, does not come from *Alaska Hunters* at all. Rather, the idea originated in dicta from *Paralyzed Veterans of America v. D.C. Arena L.P.*[78] The facts in *Paralyzed Veterans* will be quite familiar: the case basically concerned the arena hypothetical discussed above.[79] The Department of Justice ("DOJ") promulgated a regulation requiring

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quality standards regulations is neither 'plainly erroneous' nor 'inconsistent with the regulation,' the court must defer to the agency's interpretation . . . ." (citation omitted)).

73. Gonzales v. Oregon, 546 U.S. 243, 284 (2006) ("No one contends that the construction is 'plainly erroneous or inconsistent with the regulation,' *Bowles v. Seminole Rock & Sand Co.,* or beyond the scope of ambiguity in the statute, see *Chevron* . . . ." (citations omitted)).

74. The *Gonzalez* Court used the term "*Auer* deference." *See Gonzales*, 546 U.S. at 257–58.

75. *Id.* at 256.

76. *Id.* at 257.

77. Connolly, *supra* note 4, at 177 ("[U]nder the perverse combination of *Alaska Hunter* [sic] and *Seminole Rock*, we have the exact opposite: Agency interpretation is high-cost and inflexible, but once it is promulgated, the public has little recourse.").

78. *See* Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1033–34 (D.C. Cir. 1999) ("Our analysis of these arguments draws on *Paralyzed Veterans of America v. D.C. Arena*, in which we said: 'Once 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.' " (citations omitted)).

79. *See supra* text accompanying notes 58–60.

arenas to provide wheelchair seating with "lines of sight comparable to those for all viewing areas."[80] The DOJ initially provided no definitive guidance on how to interpret this provision[81] but indicated that it did not require sightlines over standing spectators.[82] A year later, however, the DOJ began interpreting the regulation to require those exact sightlines when it applied this standard to potential venues for the 1996 Olympic Games.[83] A year after that, the DOJ officially adopted the standing-spectator position—though without notice and comment.[84] A month later, the MCI Center, an arena in Washington, D.C., selected various floor plans that provided for wheelchair seating, some with sightlines over standing spectators and some without.[85] Wheelchair-accessibility interest groups sued, claiming the regulation required all sightlines to be over the heads of standing spectators.[86] The D.C. Circuit ultimately upheld the DOJ's change in position without notice and comment, because the agency's initial silence and unofficial indications did not constitute an actual interpretation.[87]

This main holding, however, was not the most significant part of *Paralyzed Veterans*. In dicta, the court made two important suggestions: first, the notice-and-comment requirement for rulemaking also applies to "repeals" and "amendments," and second, "allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine [the] APA."[88] An agency's initial, settled

80. *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 581 (quoting 28 C.F.R. pt. 36, app. A, § 4.33.3 (1996)). DOJ promulgated the regulation under the Americans with Disabilities Act. *Id.*

81. *Id.* ("[T]he Department did not initially express a view on whether the 'lines of sight comparable' language required sightlines over standing spectators.").

82. *Id.* ("[T]he deputy chief of the Public Access Section of the Department of Justice did say that '[t]here is no requirement of line of sight over standing spectators.' ").

83. *Id.* ("By the middle of 1993, however, . . . [the DOJ] began taking the position that 'lines of sight comparable to those for members of the general public' meant 'line[s] of sight over standing spectators.' ").

84. *Id.* at 582 ("[T]he Department published, without notice and comment, a supplement to its manual that explicitly interpreted 'lines of sight comparable' to require sightlines over standing spectators.").

85. *Id.* ("Some, but not all, of the wheelchair seating in the chosen designs would have lines of sight over standing spectators.").

86. *See id.* at 581 ("The controversy concerns whether the 'lines of sight comparable' language of Standard 4.33.3 requires wheelchair seats to afford sightlines over standing spectators.").

87. *Id.* at 587 ("We conclude . . . that the Department never authoritatively adopted a position contrary to its manual interpretation and as such it is a permissible construction of the regulation.").

88. *Id.* at 586 (quoting 5 U.S.C. § 551(5) (2012)).

interpretation, the court reasoned, becomes part of the regulation.[89] Thus, any change to that interpretation constitutes amending the rule itself, which requires notice and comment.[90]

The court arrived at this conclusion by relying on the APA's definition of rulemaking, set forth in 5 U.S.C. § 551—an "agency process for formulating, *amending*, or repealing a rule"[91]—rather than relying on § 553, which explains rulemaking procedures.[92] But the text of § 551 only addresses the scope of the term "rulemaking,"[93] while § 553 actually identifies which situations require notice and comment.[94] Seeking to ground its reasoning in more than a strained reading of the APA, the court also seized upon Supreme Court dicta in *Shalala v. Guernsey Memorial Hospital*: "APA rulemaking is required where an interpretation 'adopt[s] a new position inconsistent with . . . existing regulations.' "[95] As commentators have noted,[96] though, the context in *Shalala* strongly suggests that the Court uses "regulations" to reference binding legislative rules, which differ from nonbinding interpretive rules.[97]

89. *Id.* at 586 ("If the Department, when it promulgated the regulation, had . . . clearly adopted what the Board said, it would be hard to conclude that the Department did not subsequently 'amend' the regulation in violation of the APA."); *accord* United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1139 (10th Cir. 2010) ("The implicit reasoning appears to be this: if an agency amends its interpretation of a rule, it is effectively 'amending . . . [the] rule' itself . . . ." (quoting *Paralyzed Veterans of Am*., 117 F.3d at 579)); Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see also* Murphy, *supra* note 15, at 923 ("The court . . . [implied] that an initial interpretation *X* can become, in effect, a *part* of the substantive regulation it interprets.").

90. *Paralyzed Veterans of Am.*, 117 F.3d at 583 ("[T]he Department's change in interpretation is contrary to the Administrative Procedure Act because it circumvents section 553, which requires that notice and comment accompany the amendment of regulations."); *see* Murphy, *supra* note 15, at 923 ("[W]here the agency later abandons interpretation *X* in favor of new interpretation *Y*, it necessarily amends the underlying regulation itself—a move that requires additional legislative rulemaking.").

91. *Paralyzed Veterans of Am*., 117 F.3d at 586 (emphasis added) (quoting 5 U.S.C. § 551(5)).

92. 5 U.S.C. § 553.

93. *Id.* § 551(5).

94. *Id.* § 553.

95. *Paralyzed Veterans of Am.,* 117 F.3d at 586 (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 88 (1995)).

96. Connolly, *supra* note 4, at 166 n.64 (quoting *Shalala*, 514 U.S. at 89–90) ("Justice Kennedy, writing for the Court, repeatedly uses 'regulation' to mean a binding rule, as opposed to an interpretation: '[The case] raises significant questions respecting the interpretation of the Secretary's regulations and her authority to resolve certain . . . issues by adjudication and interpretive rules, rather than by regulations . . . .' ").

97. *See supra* Part II.

The D.C. Circuit's dicta in *Paralyzed Veterans* reappeared two years later in *Alaska Hunters*,[98] this time as a full holding. *Alaska Hunters* addressed whether hunting guides with private pilot licenses complied with FAA licensing requirements.[99] Thirty-five years before the case, FAA regional representatives had assured hunting guides in Alaska that private licenses were sufficient because the act of flying customers was only "incidental" to their profession.[100] Though no evidence suggested that FAA officials in Washington were aware of this regional interpretation,[101] the Alaskan guides relied upon the interpretation to make far-reaching life and business decisions.[102] Despite the long-standing interpretation, the FAA changed course without notice and comment, subjecting the now-established guide pilots to burdensome regulations.[103]

Drawing on the *Paralyzed Veterans* dicta, the D.C. Circuit struck down the FAA's new interpretation in *Alaska Hunters*.[104] Specifically, the court restated the *Paralyzed Veterans* dicta with one significant addition: "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."[105] The key is "definitive." In *Paralyzed Veterans*, the agency's new interpretation appeared to be valid because the original one was tentative.[106] *Alaska*

98. Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).

99. *Alaska Hunters*, 177 F.3d at 1031.

100. Beginning in 1963, the FAA, through its Alaskan Region, consistently advised guide pilots that they were not governed by regulations dealing with commercial pilots . . . . [T]he FAA's Alaskan Region concluded that these regulations did not govern guide pilots whose flights were incidental to their guiding business and were not billed separately. *Alaska Hunters*, 177 F.3d at 1031.

101. *Id.* at 1032 ("Whether FAA officials in Washington, D.C. were aware of the advice being given by their counterparts in Alaska is uncertain. No correspondence or other writing bearing on the question has surfaced.").

102. *Id.* at 1035 ("Alaskan guide pilots and lodge operators relied on the advice FAA officials imparted to them—they opened lodges and built up businesses dependent on aircraft, believing their flights were subject to part 91's requirements only.").

103. *Id.* at 1033 (citations omitted) ("In January 1998, . . . the FAA published its 'Notice to Operators' . . . announc[ing] that Alaskan guides who transport customers by aircraft to and from sites where they provide guiding services, with transportation included in the package price of the trip, henceforth must comply with the regulations [requiring commercial pilot licenses].").

104. *Id.* at 1033–34 (citation omitted).

105. *See id.* at 1034 (emphasis added).

106. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997) ("We conclude . . . that the Department never authoritatively adopted a position contrary to its manual interpretation and as such it is a permissible construction of the regulation.").

Hunters went one step farther: if the original interpretation was definitive, an agency cannot change it without notice and comment.[107]

B. The Harmful Effects of Alaska Hunters

Critics immediately targeted *Alaska Hunters*. "Scathing" academic reviews[108] attacked its form, substance, and implications. As a matter of form, the decision diverged from the APA's text.[109] Requiring an (admittedly revised) interpretive rule to go through notice and comment appears directly at odds with the APA's explicit exception for interpretive rules.[110] True, the court tried to ground its decision in § 551's definition of "rulemaking," but that effort seems forced at best.[111]

Substantively, scholars criticized the decision for favoring reliance interests over agency flexibility.[112] Congress had already codified its desired balance.[113] The APA protects reliance interests by requiring binding rules to be promulgated with notice and comment.[114] It preserves agency flexibility by exempting nonbinding interpretations and policy statements from these requirements.[115] *Alaska Hunters* shifted that balance. It favored reliance interests over agency flexibility by expanding the application of the notice-and-comment requirement and limiting an agency's ability to adjust interpretations as circumstances or political leadership change.[116] Also, because *Alaska Hunters* relied on the premise that an agency interpretation becomes part of the original rule, requiring notice and comment to change that rule transforms a nonlegislative rule into a

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107. *See Alaska Hunters*, 177 F.3d at 1034.

108. Murphy, *supra* note 15, at 918.

109. Funk, *supra* note 15, at 1329 ("[I]t is difficult to justify the courts' reasoning on the basis of precedent or statutory language.").

110. Shearer, *supra* note 15, at 171 ("The [*Alaska* Hunters] doctrine is in conflict with the APA, which expressly exempts all interpretive rules from notice-and-comment requirements.").

111. *See* Strauss, *supra* note 15, at 846.

112. Stack, *supra* note 16, at 415–16 (noting that the *Alaska Hunters* doctrine enhances predictability at the cost of excessively restricting agency flexibility); Connolly, *supra* note 4, at 172–73 ("By its very nature, a decision like *Alaska Hunters* that erects procedural barriers to changes in agency policy leaves an agency less flexible in its capacity to respond to external changes. . . . The protection for affected parties' reliance interests . . . is certainly important, but can be achieved through other, less inflexible means.").

113. *See* Shepherd, *supra* note 3, at 1558 ("The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force . . . .").

114. *See supra* text accompanying notes 31–33.

115. *See supra* text accompanying notes 34–35.

116. *See supra* text accompanying notes 101–07.

legislative rule.[117] The *Alaska Hunters* doctrine, then, has the added consequence of "contraven[ing] the [APA] by eroding the fundamental difference between binding legislative rules and non-binding . . . interpretive or policy rules."[118]

Finally, commentators decried the more far-reaching, and allegedly perverse, implications of *Alaska Hunters*. Ideally, agencies would have the flexibility to change interpretations as needed, and judicial review of such changes would protect the public's reliance interests.[119] Under this ideal framework, an ill-advised interpretation could either be changed internally by an agency or be challenged in the courts. If interpretive guidance receives excessive deference under *Seminole Rock*, however, agency flexibility remains the primary avenue to change the interpretation. By entrenching an agency's initial interpretation, the *Alaska Hunters* doctrine shields interpretations from agency review while *Seminole Rock* shields them from judicial review.[120] Thus, rather than protecting the public, *Alaska Hunters* actually does the opposite by preventing agency revision of potentially harmful interpretations.[121]

C. Circumventing Alaska Hunters*: How Definitive is Definitive?*

And then things got more complicated. Rather than applying *Alaska Hunters* as broadly as initially feared,[122] the D.C. Circuit narrowed its holding to cases in which the subsequent interpretation was a "significant revision or departure from" the original interpretation.[123] This narrowing should have strengthened the

117. Connolly, *supra* note 4, at 173 ("[I]f an interpretive rule were to be changed by notice and comment, it would become binding upon the public—in effect, it would become a legislative rule.").

118. *Id.*

119. *Id.* at 177 ("From the standpoint of both agency flexibility and public protection, an optimal regime would be one in which agencies could act relatively freely, but the public would have recourse to an independent judicial review of those actions.").

120. *Id.*

121. *Id.*:

> [I]f the public no longer faced the prospect of any agency interpretation being de facto unreviewable, there would be less concern about the need to protect the public's reliance interests. To take the *Alaska Hunters* case as an example, the Association had little chance of challenging the FAA's decision other than to try to force the agency to proceed by notice and comment rulemaking. Agency interpretation has largely prospective benefits: It encourages the agencies themselves to adopt publicly available positions and stick to them, and it allows affected parties to know ex ante what the agency's position will be in regard to an ambiguous or uncertain text.

122. *See supra* text accompanying notes 108–21.

123. Connolly, *supra* note 4, at 179.

doctrine by mitigating its harmful consequences.[124] But the attacks have continued, and the "definitive" requirement of *Alaska Hunters* has given birth to unintended offspring. Specifically, this Section will analyze how agencies could circumvent *Alaska Hunters* through the use of pretextually tentative interpretations.

In the absence of Supreme Court intervention, the circuits have sharply split over the *Alaska Hunters* doctrine. The First,[125] Seventh,[126] and Ninth[127] Circuits have rejected the doctrine, while the Third,[128] Fifth,[129] and Sixth[130] have embraced it. Most recently, in *United States v. Magnesium Corp. of America*,[131] the Tenth Circuit seemed to criticize the doctrine, though it ultimately declined to either adopt or reject it.[132] Instead, the Tenth Circuit seized upon the D.C. Circuit's "definitive" language in *Alaska Hunters*[133] and explained that the interpretation was merely tentative.[134] *Magnesium Corp.* involved a suit by the Environmental Protection Agency ("EPA") against the magnesium producer, alleging a failure to comply with various waste-handling procedures outlined in a recent interpretation of a long-standing regulation.[135] The magnesium producer explained that an earlier interpretation exempted the materials in question and therefore argued that the interpretation could not be changed without notice-and-comment procedures.[136] The Tenth Circuit reasoned, however, that the tentativeness of the original interpretation allowed

124. *Id.* ("[T]he narrowing suggested by the Association of American Railroads decision [to cases involving *significant* departures from the revised rule] would go a long way towards avoiding the difficulties predicted . . . .").

125. Warder v. Shalala, 149 F.3d 73, 81 (1st Cir. 1998) ("[I]n order for notice and comment to be necessary, 'the [later] rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified.' " (quoting Chief Prob. Officers of Cal. v. Shalala, 118 F.3d 1327, 1337 (9th Cir. 1997))).

126. Abraham Lincoln Mem'l Hosp. v. Sebelius, 698 F.3d 536, 560 (7th Cir. 2012).

127. Erringer v. Thompson, 371 F.3d 625, 632 (9th Cir. 2004) (citing Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1088 (9th Cir. 2003)).

128. SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005) (citing Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579, 586 (D.C. Cir. 1997)).

129. Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001) (citing Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

130. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005).

131. *See* 616 F.3d 1129, 1139 (10th Cir. 2010).

132. *Id.* at 1140.

133. *Id.* ("By its terms, the *Alaska Hunters* doctrine applies only to *definitive* regulatory interpretations; even under *Alaska Hunters,* an agency remains free to disavow and amend a *tentative* interpretation of one of its rules without notice and comment.").

134. *Id.* at 1145.

135. *Id.* at 1130–31.

136. *Id.*

the agency to change or abandon it without notice and comment.[137] The court termed this circumvention of the *Alaska Hunters* doctrine "a sort of abracadabra of administrative decisionmaking."[138]

If agencies can circumvent *Alaska Hunters* in this way, a simple question suddenly assumes enormous significance: what distinguishes a tentative rule from a definitive rule? Five years before *Alaska Hunters*, the Supreme Court addressed this issue in *Thomas Jefferson University v. Shalala*.[139] There, a Medicare regulation barred teaching hospitals from being reimbursed for the cost of certain educational activities.[140] The HHS Secretary later interpreted the regulation as specifically barring cost "redistribution," that is, costs that had previously been borne by educational institutions.[141] But the agency had omitted any mention of this anti-redistribution principle in an intermediary letter circulated within the agency.[142] The question was whether that omission constituted a definitive exclusion of the bar on reimbursing redistributed costs.[143] The Court held that the letter fell short of a definitive interpretation "because . . . [it] did not purport to be a comprehensive review of all conditions that might be placed on reimbursement of educational costs."[144]

How circuit courts apply this definition determines how much flexibility agencies can gain from the Tenth Circuit's abracadabra gloss. Of course, the question is unnecessary in circuits that have not adopted the *Alaska Hunters* doctrine, so this Note focuses its inquiry on the doctrine's birthplace: the D.C. Circuit. A survey of the four D.C. Circuit cases addressing this specific question since *Alaska Hunters* reveals a fairly broad definition of "tentative," or rather, a fairly demanding definition of "definitive."

When the D.C. Circuit considered this question in *Ass'n of American Railroads v. Department of Transportation*, it seemed to place a heavy thumb on the tentative-interpretation side of the scale

137. *See id.* at 1131 ("The only prior EPA interpretation U.S. Magnesium can point to is, at best, a *tentative* one. Because EPA never previously adopted a definitive interpretation, it remained free, even under the legal precedents on which U.S. Magnesium seeks to rely, to change its mind and issue a new interpretation of its own regulations without assuming notice and comment obligations.").

138. *Id.* at 1143 n.16.

139. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).

140. *Id.* at 513.

141. *Id.* 515–16.

142. *Id.*

143. *See id.* at 516 ("The intermediary letter detailed various categories and amounts of educational expenses incurred by affiliated medical schools that might be allowable to providers, but did not mention the anti-redistribution limitation.").

144. *Id.*

when the question of tentativeness was unclear.[145] Petitioners argued that a technical bulletin interpreting a safety regulation constituted "an abrupt departure" from a previously definitive agency position. Because the Federal Railroad Authority had not previously required railroads to communicate the "precise location" of construction zones along a train's route, petitioners argued that the technical bulletin should have been promulgated via notice-and-comment procedures.[146] Despite several documents demonstrating that the Railroad Authority did not require such precise notifications, the court held that "none of those documents even comes close to the express, direct, and uniform interpretation" illustrated in *Alaska Hunters*.[147]

Three years later, in 2002, the D.C. Circuit continued to tip the scale in favor of tentativeness in *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration*. There, the court held that official guidance documents did not constitute "definitive interpretations" because they were, at best, "ambiguous."[148] Similarly, in *Devon Energy Corp. v. Kempthorne*, the D.C. Circuit held that "the guidance documents were far from conclusive in what they said."[149] Indeed, the court noted, the company needed to ask clarifying questions about the meaning of the guidance more than five years after they were issued.[150] Additionally, the court noted that "the contested guidance documents did not come from sources who had the authority to bind the agency."[151]

Finally, the D.C. Circuit held in *MetWest Inc. v. Secretary of Labor* that conditional or qualified statements of agency guidance are

145. Ass'n of Am. R.R. v. Dep't of Transp., 198 F.3d 944, 949 (D.C. Cir. 1999) ("We are not at all sure what the various and sundry bits of evidence marshaled by the parties tell us about the meaning of [the challenged interpretation] . . . . We are equally underwhelmed by the agency's own evidence.").

146. *Id.* at 947.

147. *Id.* at 949.

148. Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin., 296 F.3d 1120, 1126 (D.C. Cir. 2002) ("The regulatory guidance thus offers some support for the positions of both Andrews and the FMCSA, and can only be described as-at best-ambiguous. It cannot be said to mark a definitive interpretation from which the agency's current construction is a substantial departure.").

149. Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1041 (D.C. Cir. 2008).

150. This request for clarification was made in 2002, long after the issuance of the guidance documents upon which Devon Energy had relied. It is perplexing, to say the least, that the company was seemingly confused over the propriety of its accounting practices if, in its view, the matter had been authoritatively resolved over five years earlier. *Id.* at 1039.

151. *Id.* at 1041 (rejecting claims that the interpretations were definitive).

insufficient to bind the agency.[152] Thus, explicitly stating that an action "likely violated"[153] a particular regulation "do[es] not establish [a] definitive and authoritative interpretation[ ]."[154] Rather, guidance documents promulgated by an agency "do not purport to establish such a sweeping rule."[155]

In all four cases, the adversely affected parties had relied upon—albeit to varying degrees[156]—some form of official agency guidance. And in all four cases, the D.C. Circuit allowed the agencies to change their interpretations without notice and comment. Given this rather expansive definition of "tentative," agency guidance can fall short of definitive for a myriad of reasons: "not purport[ing] to be . . . comprehensive"[157] or sweeping;[158] failing to be sufficiently "express, direct, and uniform;"[159] containing "ambiguous" terms;[160] not coming "from sources who had the authority to bind the agency;"[161] including conditional or qualified language;[162] or even just giving rise to clarifying questions from affected entities.[163]

MetWest notably suggests that whether a regulated entity substantially relied on or complied with the supposedly tentative interpretation is, in the end, not dispositive. Rather, the court looked primarily to the agency's own indications of its intent. Under this view, reliance and compliance are secondary considerations that *can*—but do not necessarily—"elevate an otherwise non-definitive

152. MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 509–10 (D.C. Cir. 2009) ("We have held that conditional or qualified statements, including statements that something 'may be' permitted, do not establish definitive and authoritative interpretations.").

153. *Id.* at 509 ("[T]he agency issued a guidance document stating that using reusable blood tube holders likely violated 29 C.F.R. § 1910.1030(d)(2)(vii).").

154. *Id.* at 509–10.

155. *Id.* at 509.

156. *See id.* at 506 (twelve years of reliance between the initial and subsequent interpretations); *Devon Energy Corp.*, 551 F.3d at 1041 (eight years of reliance between the initial and subsequent interpretations); Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin., 296 F.3d 1120 (D.C. Cir. 2002) (seven years of reliance between the initial and subsequent interpretations); Ass'n of Am. R.R.s v. Dep't of Transp., 198 F.3d 944, 949 (D.C. Cir. 1999) (two years of reliance between the initial and subsequent interpretations).

157. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 516 (1994).

158. *MetWest Inc.*, 560 F.3d at 509.

159. *Ass'n of Am. R.R.s*, 198 F.3d at 949.

160. *Darrell Andrews Trucking, Inc.*, 296 F.3d at 1126 ("The regulatory guidance thus offers some support for the positions of both Andrews and the FMCSA, and can only be described as—at best—ambiguous. It cannot be said to mark a definitive interpretation from which the agency's current construction is a substantial departure.").

161. *Devon Energy Corp.*, 551 F.3d at 1041 (rejecting claims that the interpretations were definitive).

162. *MetWest Inc.*, 560 F.3d at 509–10.

163. *Devon Energy Corp.*, 551 F.3d at 1041.

interpretation into a definitive interpretation."[164] In *Mortgage Bankers Ass'n v. Harris*, the D.C. Circuit's most recent foray into *Alaska Hunters*, the court held that reliance is not a "separate and independent requirement" to find definitiveness.[165] Rather, "[r]eliance is just one part of the definitiveness calculus."[166]

With reliance considered an optional component of definitiveness—and given the veritable grab bag of sanctioned methods to indicate tentativeness—agencies can, with little difficulty, pretextually disclaim definitiveness in order to maintain future flexibility while still directing the behavior of regulated entities.

D. The Cost of Seizing the Administrative Abracadabra

Ironically, the *Alaska Hunters* doctrine and its abracadabra gloss pose the most harm to the very interests the doctrine was designed to protect. In *Alaska Hunters*, the D.C. Circuit originally intended to protect reliance interests against the threat of excessive agency flexibility.[167] But under the abracadabra gloss, agencies can preserve their flexibility by pretextually creating the appearance of tentativeness[168] while still directing public behavior. When an agency states that a particular action "likely violate[s]"[169] one of its regulations, for example, regulated entities will usually comply. Compliance, however, is not a safe harbor: the agency can always change course.

While there has always been some confusion about which interpretations are binding,[170] agencies pretextually disclaiming definitiveness would further muddy the waters. The natural result is a public confused about which guidance is actually tentative and which is here to stay.

Consider again the facts in *Alaska Hunters*. The FAA "consistently advised guide pilots that they were not governed by the regulations dealing with commercial pilots."[171] The FAA's

164. *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 969 (D.C. Cir. 2013) ("Reliance is just one part of the definitiveness calculus.").

165. *See id.* at 967–68.

166. *Id.* at 968.

167. Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Alaskan guide pilots and lodge operators relied on the advice FAA officials imparted to them—they opened lodges and built up businesses dependent on aircraft, believing their flights were [in compliance].").

168. *See supra* text accompanying notes 156–63.

169. MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 509–10 (D.C. Cir. 2009).

170. *See supra* Part II.B.

171. *Alaska Hunters*, 177 F.3d at 1031.

consistency—in other words, the interpretation's definitiveness—precluded changing its interpretation thirty-five years later.[172] The FAA, however, could have reached into its grab bag of tricks, created the appearance of tentativeness, and—abracadabra!—its future flexibility would have been preserved.[173] Rather than assuring guide pilots that they were exempt from the regulations, the FAA could have advised them that they were likely not governed by the regulations and then later reversed its interpretation.[174] At first glance, the uncertainty inherent in this flexibility seems no worse than what existed before *Alaska Hunters*. Uncertainty exists under both regimes because the agency can change its interpretation. Prior to *Alaska Hunters*, however, the guide pilots could have at least relied upon the guidance as an accurate reflection of the agency's view at the time. The agency's ability to preserve flexibility by feigning tentativeness, however, incentivizes misrepresentations, thereby undermining the wisdom of taking the agency at its word. This compounded uncertainty makes it that much more difficult for a pilot to decide whether the agency guidance justifies the risk of establishing a business.

Alaska Hunters also jeopardizes the role of the courts in checking excessive agency flexibility. While the doctrine only applies when an interpretation is definitive,[175] the same is not true for the application of *Seminole Rock* deference, which grants "controlling weight" to an agency's interpretations of its own regulations unless the two clearly conflict.[176] Thus, by issuing tentative interpretations of its own ambiguous regulations, an agency can change those interpretations on a whim while still receiving maximum judicial deference. By enhancing flexibility, this end around *Alaska Hunters* does indeed silence critics who decry the opinion's role in ossifying agency action.[177] Rigidity, however, is only one side of the coin. Excessive agency flexibility, especially when combined with decreased judicial review, can prove severely harmful as well. Against the backdrop of incentivizing agencies to claim tentativeness, this new

172. *Id.*

173. *See supra* text accompanying notes 157–63.

174. *Cf. MetWest Inc.*, 560 F.3d at 509 (interpreting the language "likely violated" as sufficiently conditional to fall short of definitive guidance).

175. *See Alaska Hunters*, 177 F.3d at 1034.

176. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) ("But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

177. *See supra* text accompanying notes 112–16.

balance could prove far worse for reliance interests than abandoning *Alaska Hunters* altogether.

IV. THE RISE OF *FOX*, THE DECLINE OF *ALASKA HUNTERS*, AND THE FUTURE OF AGENCY FLEXIBILITY AND JUDICIAL REVIEW

Alaska Hunters, then, does not properly balance agency flexibility and reliance interests. And the ability to circumvent *Alaska Hunters* through tentative rulemaking only compounds the problem by creating perverse incentives for agencies. This Part tries to restore the balance. Specifically, it details the Supreme Court's recent gloss on arbitrary and capricious review in *FCC v. Fox Television Stations* and explores how extending this gloss to interpretive rules achieves a better balance than the *Alaska Hunters* doctrine, with or without the Tenth Circuit's gloss. Section A argues that *Fox* undermined, but did not overrule, *Alaska Hunters*. Sections B and C detail how extending the *Fox* framework to interpretive rules resolves the three harmful consequences of *Alaska Hunters*: (1) the inability of agencies to respond to changing circumstances; (2) the vulnerability of regulated parties, whose compliance is both costly and subject to agency change; and (3) the incentive for agencies to mask the true nature of their policies. Section C also argues that extending the *Fox* framework to interpretive rules would more directly align the interests of agencies with those of regulated parties and more effectively balance agency flexibility with reliance interests.

A. Outfoxing Alaska Hunters*? Exaggerated Rumors of* Alaska Hunters*' Demise*

Contrary to some claims,[178] the Supreme Court's decision in *Fox* did not overrule the *Alaska Hunters* doctrine. It did, however, substantially undermine what little justification the doctrine had left. It did so in two specific ways: first, it explicitly prescribed the general level of judicial scrutiny for changes in agency policy, and second, it constructed a clear framework for balancing agency flexibility and

178. *See* Reply Brief for the Appellant at 21, Montefiore Med. Ctr. v. Sebelius, 2009 WL 6084577 (D.C. Cir. Nov. 20, 2009) (No. 08-5489) (citations omitted) ("Our opening brief (pp. 14–15) stated that *Paralyzed Veterans* and *Alaska Hunters* were wrongly decided and are inconsistent with *FCC v. Fox Television Stations, Inc.*, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*."); Shearer, *supra* note 15, at 185 ("*Fox* overruled *Alaska Hunters sub silentio* by holding that the APA does not treat initial and subsequent agency actions differently.").

reliance interests through arbitrary-and-capricious review.[179] While the Supreme Court stopped short of applying this framework to changed interpretive rules, it is easy to imagine how such an application might work. If the *Alaska Hunters* doctrine collapses under the weight of its own collateral damage, *Fox*'s framework would achieve a more desirable balance between agency flexibility and reliance interests.

Fox involved the change of a long-standing Federal Communications Commission ("FCC") policy related to indecency findings for expletives appearing on television.[180] The old policy absolved "fleeting expletives"[181] of indecency, whereas the new policy determined that the fleeting nature of an expletive merely "weigh[s] against a finding of indecency."[182] Dissatisfied at losing this safe harbor, Fox Television Stations challenged the change in policy as arbitrary and capricious.[183] In holding that the APA permitted this change,[184] the five-to-four majority also ruled that the applicable section of the APA "makes no distinction . . . between *initial* agency action and *subsequent* agency action undoing or revising that action."[185] Some have argued that *Fox* thus overturned the *Alaska Hunters* doctrine "sub silentio."[186]

For now, however, the *Alaska Hunters* doctrine lives on. True, the Court made a sweeping statement in *Fox*—that the APA makes no

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179. Though Associate Justices Stevens and Souter have since left the Court, both dissented in *Fox*. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546 (2009). Thus, their departures should not alter the majority.

180. *Id.* at 517 ("Judged under the above described standards, the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious.").

181. *Id.* at 512 (citations omitted) ("[T]he order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise.").

182. *Id.* (citations omitted) ("Under the new policy, a lack of repetition 'weigh[s] against a finding of indecency,' but is not a safe harbor.").

183. *Id.* at 516 ("If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's 'arbitrary [or] capricious' standard.").

184. *Id.* at 520 ("[T]he agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious.").

185. *Id.* at 515 (citing 5 U.S.C. § 706(2)(A) (2012)).

186. *See* Reply Brief for the Appellant at 21, Montefiore Med. Ctr. v. Sebelius, 2009 WL 6084577 (D.C. Cir. Nov. 20, 2009) (No. 08-5489) (citations omitted) ("Our opening brief (pp. 14–15) stated that *Paralyzed Veterans* and *Alaska Hunters* were wrongly decided and are inconsistent with *FCC v. Fox Television Stations, Inc.*, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* . . . ."); Shearer, *supra* note 15, at 185 ("*Fox* overruled *Alaska Hunters sub silentio* by holding that the APA does not treat initial and subsequent agency actions differently.").

distinction between initial agency action and subsequent changes to that action.[187] But that statement cites 5 U.S.C. § 706 (the APA's scope-of-review provision that includes arbitrary-and-capricious review),[188] rather than § 553 (the procedures for rulemaking)[189] or even § 551 (the definition of "rule").[190] The Court in *Fox* does not seem to apply this principle to the procedures required to promulgate initial and subsequent agency policies. Rather, the Court seems to limit its uniform treatment of initial and subsequent agency actions to the context of judicial review. Thus, while *Fox* certainly provides a strong rationale for overturning *Alaska Hunters*, it does not actually do so, either explicitly or by implication. Moreover, the D.C. Circuit and district courts have continued applying *Alaska Hunters*, usually without even a passing reference to *Fox*.[191]

B. Why Fox *Should Extend to Interpretive Rules*

Perhaps more important than further undermining the already beleaguered *Alaska Hunters* doctrine, *Fox* clearly illustrates how the Supreme Court applies arbitrary-and-capricious review to changed agency policies.[192] Commentators have already suggested that arbitrary-and-capricious review,[193] particularly with the *Fox* gloss,

187. *Fox*, 556 U.S. at 515 (citing 5 U.S.C. § 706(2)(A)).

188. 5 U.S.C. § 706(2)(A).

189. *Id.* § 553.

190. *Id.* § 551.

191. *See, e.g.*, Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1, 13–14 (D.C. Cir. 2011) (relying on *Alaska Hunters* for the proposition that modifying rules falls within the rulemaking guidelines of the APA without mentioning *Fox*); Aera Energy LLC v. Salazar, 642 F.3d 212, 223 (D.C. Cir. 2011) (relying on *Alaska Hunters* for the proposition that a "new interpretation must 'significantly revise' the prior interpretation in order to trigger the notice-and-comment process" without mentioning *Fox*); Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 344 (D.C. Cir. 2011) (relying on *Alaska Hunters* for the proposition that definitive agency interpretations can only be modified through notice and comment without mentioning *Fox*); Cove Assocs. Joint Venture v. Sebelius, 848 F. Supp. 2d 13, 27, 29 (D.D.C. 2012) (relying on *Alaska Hunters* for the proposition that a "new interpretation must 'significantly revise' the prior interpretation in order to trigger the notice-and-comment process" with only a passing mention of *Fox*); LG Elecs. U.S.A., Inc. v. Dep't of Energy, 679 F. Supp. 2d 18, 26 (D.D.C. 2010) (relying on *Alaska Hunters* for the proposition that definitive agency interpretations can only be modified through notice and comment without mentioning *Fox*). *But see* Canonsburg Gen. Hosp. v. Sebelius, No. 09-2385 (BAH), 2013 WL 5658757, at *8 n.7 (D.D.C. Oct. 17, 2013) (citing Shearer, *supra* note 15, at 185–88) ("[T]he extent to which *Paralyzed Veterans* remains good law is decidedly unclear.").

192. *Fox*, 556 U.S. at 503. *See generally* Charles Christopher Davis, *The Supreme Court Makes It Harder to Contest Administrative Agency Policy Shifts in* FCC v. Fox Television Stations, Inc., 62 ADMIN. L. REV. 603, 609 (2010) (explaining the *Fox* construct for arbitrary and capricious review).

193. United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1144 (10th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)):

would suitably replace the *Alaska Hunters* doctrine as a balancing mechanism for agency flexibility and reliance interests.[194] Indeed, applying *Fox* to interpretive rules would be quite simple.

The *Fox* framework for arbitrary-and-capricious review would require an agency seeking to change an interpretation to satisfy two primary requirements: first, the new interpretation must be permissible under the statute or regulation, and second, there must be good reasons for the agency's new interpretation.[195] And when factual findings support the original interpretation, or when the original interpretation resulted in "serious reliance interests," the agency must "provide a more detailed justification" than merely reciting subjectively "good" reasons.[196] But the requirement to consider the original basis and the reliance interests does not reflect a higher standard for changing an interpretation than for issuing one; rather, it merely reflects the reality that changing an interpretation without considering these factors would be arbitrary and capricious.[197] The showing does not need to convince the court that the new interpretation is actually better than the old. It only needs to explain why "the agency believes it to be better."[198]

The circumstances at issue in *Alaska Hunters* helpfully illustrate how the *Fox* framework achieves a more desirable balance between agency flexibility and reliance interests. Recall that hunting guides had established airplane-dependent businesses in Alaska based upon FAA regional guidance that they were not subject to the licensing requirements for commercial pilots.[199] Prior to the *Alaska Hunters* doctrine, the exceptionally strong reliance interests of the

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> As it happens, however, there is no reason for undue alarm; at least two other layers of protection exist, even without the added aegis of *Alaska Hunters*. First, the APA itself empowers courts to review "agency action, findings, and conclusions" if they are "arbitrary and capricious, an abuse of direction, or otherwise not in accordance with law."

194. Shearer, *supra* note 15, at 171–72 ("[T]he arbitrary and capricious analysis in *Fox* . . . is more effective at limiting agency discretion than the *Alaska Hunters* doctrine.").

195. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it . . . .").

196. *Id.*:

> Sometimes [the agency] must ["provide a more detailed justification than would suffice for a new policy created on a blank slate"]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.

197. *See id.* at 515–16 ("In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

198. *Id.*

199. Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1031, 1035 (D.C. Cir. 1999).

Alaskan small-business owners were virtually unprotected. Under the doctrine, the FAA could not change its interpretation to reflect new safety concerns in a highly regulated field without complying with arduous notice-and-comment procedures. Given the life-and-death nature of flight safety and the high degree of FAA expertise, adjusting the scope of commercial pilot requirements is exactly the kind of decision Congress intended the FAA to make.[200] Under the Tenth Circuit's abracadabra gloss, the FAA could have preserved its flexibility at the cost of misdirecting vulnerable reliance interests. In sum, these various legitimate interests seem inevitably frustrated. While competing interests cannot always be satisfied, the *Fox* framework achieves a far more desirable balance.

Under the *Fox* framework, the FAA would need to demonstrate two things: the new interpretation's permissibility under the statute and good reasons for the change.[201] Here, neither party disputed the textual permissibility of extending the definition of "commercial pilots" to include "guide pilots."[202] Demonstrating that there were "good" reasons for the new interpretation, however, would prove to be the flash point for litigation. The agency would need to consider the factual basis for the original interpretation and the subsequent reliance interests at stake. Here, the factual basis would not prove a formidable obstacle, as the original interpretation was largely based on the subjective, regional conclusion that flying was "merely incidental" to the hunting guides' businesses.[203] The hunting guides' "serious reliance interests," on the other hand, would require the agency to make "a more detailed justification" of its new interpretation.[204] The FAA would not have to prove that its safety concerns outweighed the reliance interests at stake.[205] The new interpretation would be arbitrary and capricious, however, if the

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200. United States v. Mead Corp., 533 U.S. 218, 218–19 (2001):

> When Congress has explicitly left a gap for an agency to fill, there has been an express delegation of authority to the agency to elucidate a specific statutory provision by regulation, and any ensuing regulation is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that Congress views an agency's expertise as putting it "in a better position" to make related decisions).

201. *See supra* text accompanying notes 195–98.

202. *Alaska Hunters*, 177 F.3d at 1030–32.

203. *Id.* at 1031 ("The Civil Aeronautics Board, adopting the hearing examiner's opinion as its own, ruled that Marshall's flight with the hunter in search of polar bear was 'merely incidental' to his guiding business, in part because he had not billed for it separately.").

204. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

205. *See id.*

agency's showing failed to demonstrate sufficient consideration of those serious reliance interests.[206]

Thus, agencies would generally maintain the ability to act upon their expertise without undue procedural burden. But in extreme cases, when reliance interests are so strong that even a new, otherwise well-reasoned interpretation seems arbitrary and capricious, courts would still be able restrict the agency's flexibility.

C. Abracadabra No More: The End of Tentative Rulemaking Under Fox

The *Fox* framework achieves a better balance of key interests than existed before or immediately after *Alaska Hunters*. But it also alleviates the harmful effects of agencies using tentative interpretations to circumvent *Alaska Hunters*. Indeed, extending *Fox* to interpretive rules directly aligns agency incentives and reliance interests. Under *Fox*, arbitrary-and-capricious review constrains definitive and tentative agency interpretations equally.[207] Instead of looking to agency indications of definitiveness to limit future flexibility, courts would examine the extent of reliance. This shift would create two key results: first, agencies would gain nothing by pretextually disclaiming definitiveness, and second, agencies would lose flexibility when they induce excessive reliance. That is, an agency that *over*sells the definitiveness of its interpretation, inducing "serious reliance," must later "provide a *more* detailed justification" to survive arbitrary-and-capricious review.[208] Thus, under *Fox*, when an agency clearly and accurately indicates the extent to which regulated entities should rely on its interpretations, both sides win.

Extending the *Fox* framework to interpretive rules also avoids the perverse effects of combining *Seminole Rock* deference with the abracadabra gloss on *Alaska Hunters*. This perverse combination allows agencies to simultaneously increase their flexibility and decrease judicial scrutiny, both of which jeopardize the reliance interest of the regulated public. The *Fox* framework ensures judicial review of changes in agency interpretation without resorting to burdensome layers of additional procedural requirements. Agencies largely maintain their flexibility, with a carve-out for extreme cases in which particularly strong reliance interests should prevail.

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206. *See id.*

207. *See generally Fox*, 556 U.S. at 513–16 (2009) (applying arbitrary and capricious review irrespective of the definitiveness of the policy in question).

208. *See supra* text accompanying notes 192–205; *Fox*, 556 U.S. at 515 (emphasis added).

V. CONCLUSION

In the long-standing conflict between agency flexibility and reliance interests,[209] the *Alaska Hunters* doctrine has proven a particularly intractable battlefield. While the D.C. Circuit has narrowed its application, the *Alaska Hunters* doctrine continues to distort key agency incentives.

Since the case was first decided, commentators have detailed compelling justifications for overturning *Alaska Hunters*: its strained reading of the APA,[210] its apparent infringement upon congressional authority,[211] its disruption of the tenuous balance between reliance interests and agency flexibility,[212] its threat to judicial review,[213] and its inconsistency with the Supreme Court's reasoning in *Fox*.[214] While the *Alaska Hunters* doctrine has managed to survive this onslaught, its application may soon draw to a close. The Tenth Circuit recognized that agencies could circumvent the *Alaska Hunters* doctrine through the abracadabra of tentative interpretations. Four D.C. Circuit cases demonstrate the numerous methods of projecting tentativeness. A veritable grab bag of tricks, these methods allow agencies to easily create the appearance of tentativeness in order to preserve future flexibility. This perverse incentive undermines the reliability of agency guidance and endangers reliance interests without fully unshackling agency flexibility.

Persistent foes in the central struggle of modern administrative governance, agency flexibility and reliance interests have yet to reach an accord. Before *Alaska Hunters*, agency flexibility threatened reliance interests. After *Alaska Hunters*, reliance interests threatened agency flexibility. But under the abracadabra gloss, both sides lose. Hunters in Alaska cannot assess the risk of reliance, and the FAA cannot adequately respond to air-safety concerns. Perhaps the two sides of this struggle are more like warring factions. Once their interests align against the reigning authority, regime change seems inevitable. In short, the abracadabra circumvention might ultimately prove to be the gloss that broke *Alaska Hunters*' back. In its place, extending the *Fox* framework of arbitrary-and-capricious review to interpretive rules would strike a more desirable truce. By constraining definitive and tentative interpretations equally and focusing on the

209. *See supra* Part II.
210. *See* Strauss, *supra* note 15, at 846.
211. *See supra* text accompanying notes 117–18.
212. *See supra* Part III.D.
213. *See supra* text accompanying notes 119–21.
214. *See supra* text accompanying notes 178–86.

extent of reliance rather than on hints of definiteness, *Fox* would incentivize clear and accurate agency guidance to regulated entities. Under *Fox*, both sides win.

*Matthew P. Downer**

* J.D. Candidate, 2014, Vanderbilt University Law School; A.B., 2007, Harvard University. I am grateful to Lisa Bressman for sparking my interest in administrative law; Kevin Stack for guiding my early research efforts; and the editors of the *Vanderbilt Law Review*, but especially Daniel Feltham, William Marks, Terrence McKelvey, Cameron Norris, and Nathan Sanders, for their excellent comments on this Note.