No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE CATO INSTITUTE, PROFESSORS JONATHAN H. ADLER, RICHARD A. EPSTEIN, AND MICHAEL W. MCCONNELL, AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Supreme Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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[1] Rule 37 statement: Both parties received timely notice of *amici*'s intent to file this brief. Petitioner consented specifically, while Respondent lodged a blanket consent with the Clerk. Further, no counsel for any party authored this brief in any part; no person or entity other than *amici* funded its preparation or submission.

authority on the relation of individual rights to government structure, as well as constitutional law and history. Before joining Stanford, he served as a judge on the U.S. Court of Appeals for the Tenth Circuit. He has also argued 15 cases in this Court.

Cause of Action Institute ("CoA Institute") is a nonprofit, nonpartisan oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA Institute works to expose and prevent government misuse of power by appearing as *amicus curiae* in federal courts. *See*, *e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing CoA brief).

This case interests *amici* because it concerns courts' ability to check the power of the administrative state through meaningful judicial review. These *amici* previously filed a brief together in *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (taking up question of whether courts should defer to an unpublished agency letter), *vacated and remanded in light of new guidance document*, 137 S. Ct. 1239 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

Overturning *Auer v. Robbins*, 519 U.S. 492 (1997), would be a modest but important check on the "the danger posed by the growing power of the administrative state." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J. dissenting).

Criticisms of *Auer* deference are well-known and have been ably aired by past and present members of

this Court. *See*, *e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring) (arguing that *Auer* deference undermines procedural safeguards for administrative policymaking); *id.* at 1213–25 (Thomas, J., dissenting) (identifying "serious constitutional questions lurking beneath" the *Auer* doctrine); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment) (noting that Justices Scalia and Thomas have offered "substantial reasons why the *Seminole Rock* doctrine may be incorrect"); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (noting "some interest in reconsidering" *Auer* deference); *id.* at 621 (Scalia, J., concurring in part and dissenting in part) (by making agencies both rule-drafter and rule-expositor, *Auer* "contravenes one of the great rules of separation of powers"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (observing that *Auer* gives agencies incentive to "maximiz[e] agency power" by "issu[ing] vague regulations" that are then re-interpreted with retroactive effect); Brett Kavanaugh, Keynote Address at the Center for the Administrative State Public Policy Conference: Rethinking Judicial Deference (June 2, 2016) ("I believe that Justice Scalia's dissent in [*Decker*] will become the law of the land.").

Lower courts have echoed these serious reservations over *Auer* deference. *See, e.g.*, *United States v. Havis*, 907 F.3d 439, 451-52 (6th Cir. 2018) (Thapar, J., concurring) (explaining that, in the criminal context "*Auer* not only threatens the separation of powers but also endangers fundamental legal precepts as well" and noting that *Auer* "deserve[s] renewed and much-needed scrutiny") (citations omitted); *Kisor v.*

Shulkin, 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O'Malley, J., dissental) ("Whatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("The doctrine of deference deserves another look."); *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring) (noting that "*Auer* may not be long for this world."); *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring) (suggesting that in an appropriate case the Supreme Court should revisit *Auer*); *Goodson v. OS Rest. Servs., LLC*, No. 5:17-cv-10-Oc-37PRL, 2017 U.S. Dist. LEXIS 71923, at *13 n.20 (M.D. Fla. 2017) (endorsing criticisms of *Auer*); *M.L. Johnson Family Props., LLC v. Jewell*, 237 F. Supp. 3d 528, 543–44 (E.D. Ky. 2017) (denying *Auer* deference in part due to separation of powers concerns); *State Case Prokop v. Lower Loup Nat. Res. Dist.*, 302 Neb. 10, 41–43 (2019) (Papik, J., concurring) (describing *Auer* as a "dubious proposition of federal law that itself may not stand the test of time.").

Amici endorse these criticisms and believe that they represent the kind of "special justification" that warrants a departure from precedent. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

To be clear, this case is important because process matters. Those who hold the reins of political power will not always be benevolent, self-restrained public servants—and the procedural safeguards that seem frustrating and counterproductive in one instance may

very well be necessary bulwarks in another. *Auer* undermines these safeguards by concentrating lawmaking and law-interpretation in regulatory agencies, in a manner that both offends separation of powers principles and facilitates procedural shortcuts. Accordingly, *Auer* deference deprives regulated entities of fair notice, which is fundamental to the integrity of the law. Similarly, *Auer* deference robs administrative policymaking of legitimacy by allowing agencies to avoid public participation in the formulation of their rules.

And overturning *Auer* would not unduly burden either courts or agencies. Absent *Auer*, a court is not required to ignore agency expertise, and this Court has established nonbinding judicial respect for agency expertise as an alternative to *Auer*. Empirical studies have shown that these two approaches don't differ significantly with respect to administrative efficiency.

In sum, this Court's precedents, while deserving respect, are not immutable. *Stare decisis* "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (cleaned up). Where earlier decisions are badly reasoned or have proven unworkable, and altering the status quo isn't disruptive, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S. 649, 665 (1944). The Court accordingly should not hesitate to overturn *Auer* because of that doctrine's harm to principles of fair and inclusive legislation and regulation, and the minimal administrative burden from disrupting underlying precedent.

ARGUMENT

I. *AUER* CONTRAVENES WELL-ESTABLISHED ADMINISTRATIVE LAW NORMS

A. *Auer* Undermines the Separation of Powers and Due Process

Auer deference "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 621 (2013) (Scalia, J., concurring in part and dissenting in part). Affording controlling deference to agency interpretations of their own regulations gives executive agencies the power both to write the regulations they are charged with enforcing and later to declare just what the ambiguous words of those regulations say—a task traditionally left to courts. In effect, *Auer* deference allows for the concentration of legislative and judicial authority into the hands of relatively unaccountable administrative agencies. In this manner, the doctrine undermines the separation of powers at the center of our constitutional structure.

In addition to contravening separation of powers principles, *Auer* deference undermines fair notice to regulated parties by encouraging procedural shortcuts. Of course, "[f]air notice" of what the law requires is a "fundamental principle" of "our legal system." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). *See also* Lon L. Fuller, *The Morality of Law* 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law"). The Administrative Procedure Act incorporates this "fundamental principle" into agency policymaking by requiring agencies,

before they make a rule, to notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision of the rule's basis and purpose. *See* 5 U.S.C. § 553(b)-(c). Through that process, those who will be subject to the interpretation are made aware of what agencies will require of them. Once an agency finalizes its interpretation, as when it promulgates a final rule, the regulated community is on notice of what the law requires and, furthermore, is assured that these requirements will not change without additional notice. See Jonathan H. Adler, *Auer Evasions*, 16 Geo. J.L. & Pub. Pol'y 1, 16 (2018) (explaining the interaction between APA procedures and principle of notice).

Auer deference violates this maxim by making it possible for administrative agencies to make changes to their regulations without abiding these procedural rules. As the dissenting justices in *Thomas Jefferson v. Shalala* warned, deferring to an agency's interpretation of its own ambiguous regulation gives agencies the opportunity to "transform by 'interpretation' what self-evidently are mere generalized [regulations]," and thereby deprive the regulated community of "adequate notice concerning the agency's understanding of the law." 512 U.S. at 519, 525 (Thomas, J., dissenting). *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 669 (1996) (arguing that such deference "disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it").

Under *Auer*, agencies can thus significantly affect regulated persons without even publishing regulatory changes, let alone allowing the public to participate

through notice-and-comment rulemaking. The doctrine allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). To appreciate how *Auer* deference vitiates procedural safeguards, consider the case after which the doctrine is named.

In *Auer*, the Labor Department set forth its regulatory interpretation in an *amicus* brief, decades after the rule's text had been promulgated. 519 U.S. at 457. Because the agency's interpretation was not offered until the litigation was well underway, the regulated parties could not have been afforded less notice or opportunity to lend input into a rule to which they were beholden. Nevertheless, the Court accepted the Labor Department's interpretation of its own regulation as if it were a disinterested party and accorded deference that imparted the force of law to that novel interpretation. *Id*. at 461.

B. *Auer*'s Distinct and Troubling Infirmities Stand Out in Comparison to *Chevron*

Auer deference is often treated as a close relative of deference to an agency's statutory interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Indeed, the two doctrines share similarities in form. They are both controlling forms of judicial deference to agency constructions of ambiguous legal texts. And the policy justifications supporting *Chevron* deference—an agency's expertise and political accountability—apply with equal force to *Auer* deference. *Id.* at 847.

Notwithstanding the facial similarities between the two doctrines, they rest on distinct legal rationales, and the difference starkly demonstrates the aforementioned problems with *Auer* deference.

Chevron, the Court has repeatedly explained, is "rooted in a background presumption of congressional intent." *City of Arlington*, 569 U.S. at 296. The presumption is that, where Congress has delegated authority to an agency to administer a statute, Congress understands and assumes "that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996). As Chief Justice Roberts explained in *King v. Burwell*, *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 135 S. Ct. 2480, 2488 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). S*ee also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

Neither *Auer* nor the precedent on which it relied, *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), provides an equivalent foundation for deference to agency interpretations of their own regulations. To the contrary, *Auer* deference cannot be understood in terms of delegation. An agency that leaves an ambiguity in a promulgated regulation does not purposely cede control to another branch. Instead, it "cedes control" to itself. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring) (observing that although

Auer "seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation . . . it is not"). Moreover, no statutory provision—in the APA or elsewhere—suggests that Congress intended to bind courts to agency interpretations of their own regulations. Congress may have the authority to delegate such power to federal agencies, but it has not done so.

In practice, the doctrines' differences also highlight the inherent problems with administering *Auer* deference. Because *Chevron* is based on a theory of delegation, agencies are not entitled to receive deference unless the Court is satisfied that a delegation exists. As articulated in *United States v. Mead Corp.*, statutory ambiguity alone is an insufficient indication of congressional intent for agencies to exercise interpretive policymaking authority. 533 U.S. 218, 227–29 (2001). More is required. Specifically, courts must be able identify "circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 229. Administrative process is central to that inquiry, such that *Chevron* is presumptively reserved for interpretations resulting from policymaking procedures like notice-and-comment rulemaking and adjudication.

Accordingly, if an agency wishes to obtain the benefits of *Chevron* deference, it must invest time and resources in developing and promulgating its interpretation. The agency must "pay now" by using agency resources to exercise delegated power to act with the force of law, or it will "pay later" when faced with more demanding judicial review. *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo.

Wash. L. Rev. 1449, 1464 (2011). As the Court has made clear, interpretations offered in opinion letters, guidance manuals, and amicus briefs are insufficient to warrant *Chevron* deference because they "lack the force of law," and Congress has not delegated agencies to bind the public in such instances. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Auer, however, is not grounded in a theory of delegation, so it does not require courts to identify congressional intent for the agency to wield interpretative lawmaking authority. As a result, this Court will apply *Auer* deference to agencies' informal interpretations that do not carry the force of law. *See Christensen*, 529 U.S. at 587–88 (recognizing that *Auer* deference would be afforded to a mere opinion letter).

Far from being an academic matter, this distinction between the two doctrines demonstrates the practical problems with *Auer* deference. Under *Auer*, an agency can choose to avoid formal procedures that impart the force of law and instead issue an advisory interpretation of its own regulation in the form of a memo. If the agency wins controlling *Auer* deference in court, then necessarily its interpretation becomes binding on the public, even though the agency originally claimed that its memo was only advisory. *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("Interpretive rules that command deference do have the force of law."). The absurd result is that avowedly non-binding interpretations gain binding effect through judicial review. In this manner, *Auer* deference gives agencies the perverse incentive to circumvent procedural safeguards. *See Decker*, 568 U.S. at 620 (Scalia, J., concurring in

part and dissenting in part) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

By affording agencies the opportunity to undermine procedural safeguards, *Auer* also undermines the constitutional norms these safeguards were designed to protect, such as fair notice. A comparison to *Chevron* illustrates the point. As explained above, the Court presumptively reserves *Chevron* deference only to statutory interpretations resulting from administrative procedures that impart the force of law. *Chevron* thus discourages procedural shortcuts. Whatever its ills, *Chevron* simply does not present the same notice concerns that *Auer* does.

The contrast between two doctrines further distinguishes the separation of powers concerns associated with *Auer*. Under the *Chevron* framework, a court discharges its duty to say what the law is by first identifying a congressional intent to delegate interpretive authority to the agency. But there is no corresponding inquiry in the *Auer* framework, so *Auer* allows for the troubling concentration of lawmaking and law-expositing powers in regulatory agencies.

To be sure, *Chevron* deference is also a controversial doctrine that past and present members of the Court have scrutinized. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *City of Arlington*, 569 U.S. 290, 312 (Roberts, C.J., dissenting) (arguing that *Chevron* is inappropriate where an agency interprets

the scope of its own statutory authority); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170–80 (10th Cir. 2015) (Gorsuch, J.) (questioning premises of *Chevron* deference). But regardless of one's views of *Chevron*, the doctrine is a model of jurisprudential salubrity compared with *Auer*.

C. Recent Legal Controversies Demonstrate *Auer* at Its Worst

This case is a typical example of how *Auer* deference subverts fair notice to regulated parties. At issue is the word "relevant" in procedural rules governing administrative adjudications before the Board of Veterans Appeals. *See* 38 C.F.R. § 3.156(c)(1). The panel below held that the regulation is not just ambiguous on its face, but that the apparent ambiguity is insoluble by resort to standard interpretive principles. *Kisor v. Shulkin*, 869 F.3d 1360, 1367–68 (Fed. Cir. 2017).

Quite sensibly, the petitioner Mr. Kisor takes "relevant" to have the same meaning as it does in the federal rules of evidence—as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." *See* Fed. R. Evid. 401(a)-(b). After all, "relevance" thus defined is a fundamental and well-known concept in civil procedure—and it is unclear why a more stringent definition would apply in an administrative adjudication.

In 2006, when the Department of Veterans Affairs promulgated amendments to its rules of procedure, it had the opportunity define or otherwise elaborate the term "relevant," but it failed to do so. *See* 71 Fed. Reg. 52455 (Sept. 6, 2006). Only on denying Mr. Kisor's claim did the Board announce its interpretation of this

ambiguous term. Plainly, the agency's method of interpretive policymaking offends principles of fair notice.

The Court was recently presented with another egregious example of how *Auer* deference encourages and facilitates the evasion of longstanding administrative law norms. *See Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (granting cert. on question of whether courts should extend deference to an unpublished agency letter), *vacated and remanded in light of new guidance*, 137 S. Ct. 1239 (2017). *Gloucester County* featured an abrupt change in longstanding agency and public understanding of what constitutes discrimination "on the basis of sex" under Title IX of the Education Amendments of 1972. *See* 20 U.S.C. § 1681; 34 C.F.R. § 106.33. Specifically, the Department of Education decided that this language should be applied to an individual's gender identity, as opposed to that individual's biological sex. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (explaining regulatory background). Had the agency taken the usual step of proposing this change through notice-and-comment rulemaking, it would have been forced to explain the reasons for the change—and the resulting rule would have been eligible for *Chevron* deference. Instead, it declared its new interpretation in letters and informal guidance documents.

Whatever the merits of the interpretation the agency sought to adopt in *Gloucester County*, it put forward its interpretation in the least responsible and transparent fashion imaginable, and then sought binding deference to its interpretation in federal court. The agency's interpretation of Title IX neither went through notice-and-comment rulemaking nor was published before the agency sought deference. It was an

informal opinion written by a relatively low-level employee and was not considered binding on the agency itself. Yet under *Auer*, the Fourth Circuit gave this unpublished, non-binding letter from a minor bureaucrat the full force of a federal statute.

Following the Fourth Circuit's ruling, federal officials in the Department of Education and the Department of Justice issued a "Dear Colleague" letter to every Title IX recipient in the country, affirming and expanding on the context of the prior letter. *See* U.S. Dep't of Justice & U.S. Dep't of Educ., Opinion Letter on Transgender Students (May 13, 2016), https://bit.ly/2kQOcUa. Again, the agencies refused to undergo any sort of rulemaking.

To be clear, *amici* continue not to take a position on the question of statutory interpretation underlying *Gloucester County*. Instead, the crucial point is that by leveraging *Auer* to avoid participatory administrative procedures, agencies achieved a major shift in policy—redefining sex discrimination—while evading their obligation to engage with the regulated community and respond to critiques and comments on the proposed interpretation. Similarly, this procedural shortcut allowed agencies to evade the political accountability that results from openly and deliberately proposing an interpretive change of such magnitude.

II. OVERTURNING *AUER* WOULD NOT BURDEN COURTS OR AGENCIES

A. If the Court Overturned *Auer*, Agencies Would Retain *Skidmore* Deference

In practice, rejecting *Auer* deference wouldn't require courts to blind themselves to agency expertise.

In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), for example, the Court didn't turn to *de novo* review after it denied binding *Auer* deference to a Labor Department regulatory interpretation due to insufficient notice. Instead, it granted the agency "a measure of deference proportional to the . . . power to persuade." *Id.* at 159 (cleaned up).

This alternative to *Auer* deference, known as *Skidmore* deference, is based on the recognition that "[t]he rulings, interpretations and opinions of [the agency], while not controlling upon the courts by reason of their authority, do constitute a body of evidence and informed judgement to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In determining the appropriate "weight" to accord the agency's interpretation, the court will consider "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

Unlike *Auer*, *Skidmore* is not controlling. Instead, courts look to the context of the agency's interpretation to determine its persuasive "weight." Whereas *Auer* is binary—either agencies get deference or they don't—*Skidmore* is akin to a spectrum of judicial respect between the poles of binding deference and *de novo* review. It is dynamic.

There is significant scholarship indicating that the *Skidmore* principle exerted a strong influence on this Court's original understanding of deference to an agency's regulatory interpretations. In granting deference to the executive agency, *Auer* relied on a 1945 decision, *Bowles v. Seminole Rock*, in which the Court

upheld the Office of Price Administration's interpretation of a price control regulation. *See* 325 U.S. at 414. Tellingly, the government's brief in *Seminole Rock* explicitly cited the *Skidmore* principle, which the Court had set forth only months before. *See* Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2006), https://bit.ly/2Rdgx2c. Instead of establishing a novel deference doctrine, "[a] closer look at *Seminole Rock* suggests an unremarkable application of the less-deferential standard of review of *Skidmore v. Swift & Co.*" Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J.L. & Pub. Pol'y 87, 88 (2018). Indeed, during the 1940s and 1950s, lower courts frequently connected *Seminole Rock* with the deference framework for an agency's interpretations under *Skidmore*. *See*, *e.g.*, Sanne H. Knudson & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 52 (2015).

To the extent these scholars are correct—and *Seminole Rock* is rooted in the non-binding *Skidmore* principle—*Auer* deviated from this Court's precedent by moving away from a *Skidmore* approach and towards a stronger form of deference. Ironically, it follows that overturning *Auer* would affirm *stare decisis* by returning the Court to its original understanding of judicial deference to agencies' regulatory interpretations.

B. Empirical Research Demonstrates the Insignificant Administrative Burden of Replacing *Auer* Deference with *Skidmore*

Like other principles of deference to agency policymaking, the *Auer* doctrine necessarily engenders some degree of administrative convenience. *See, e.g.*, *Chris-*

topher, 567 U.S. at 159 n.17 (observing that *Auer* deference makes judicial review "easier" and also imparts "certainty and predictability to the administrative process"). Due to this nexus between *Auer* deference and administrative efficiency, some scholars have claimed that overturning *Auer* could lead to chaos in courts and agencies. *See*, *e.g.*, Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 1, 29 (2018) ("overturning *Auer* might throw the validity of countless existing interpretations, many of which have induced substantial reliance interests, into question"); Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 Geo. Wash. L. Rev. 1721, 1736 (2014) (warning of the "disuniformity that could result if courts were to substitute the agency's interpretation of the regulation with their own").

Such criticisms far overstate the case. Far from roiling the practice of administrative law, the shift from *Auer* to *Skidmore* would represent a limited reform. According to a comparative study of the two doctrines before the federal courts of appeal, the government's textual interpretations currently prevail about 71 percent of the time under the *Auer* framework and about 60 percent under the *Skidmore* framework. *See* William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L. Rev. 515, 545 (2018).

From 1993 to 2013, the study estimates that replacing *Auer* with *Skidmore* deference would have resulted in merely 51 fewer agency regulatory interpretations surviving judicial review in the circuit courts, or about one interpretation per circuit court every five

years. *Id.* at 551. These results belie claims that disrupting the doctrine would lead to chaos in regulatory agencies and federal courts.

Over time, the effect would be even less disruptive, as agencies would remain free to adopt interpretations that would be eligible for *Chevron* in the interim. For example, the Department of Education reportedly plans to undergo a notice-and-comment rulemaking in lieu of the guidance document that had been at issue in *Gloucester County School Board*. *See* Erica L. Green, Katie Benner, & Robert Pear, '*Transgender' Could Be Defined Out of Existence under Trump Administration*, N.Y. Times, Oct. 21, 2018, at A1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and *Auer* overturned.

Respectfully submitted,

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