No. 17-225

IN THE

Supreme Court of the United States

GARCO CONSTRUCTION, INC.,

Petitioner,

v.

ROBERT M. SPEER, ACTING SECRETARY OF THE ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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The Brief in Opposition ("BIO") does not defend *Seminole Rock/Auer* deference ("*Auer* deference") on the merits; it does not deny that *Auer* raises a litany of practical concerns; and it does not challenge the conclusion recently reached by several Justices that the Court should decide this important question. In short, the government does not contest that the issue is worthy of review.

The government instead portrays this case as a poor candidate for reexamining *Auer* deference. But there are no "vehicle" obstacles to deciding the issue in this case. The Court clearly has jurisdiction. And, in contrast to previous petitions seeking review of this issue, *Auer* deference was the basis of decision below, the question has been the focus of certiorari-stage briefing, and it will be the focus of party and amicus briefing at the merits stage.

What the government instead seems to suggest, is that this case is an imperfect vehicle because its facts may not implicate each and every troubling aspect of *Auer* deference. But this has never been the standard for granting cases raising purely doctrinal issues, particularly those cases in which the Court is reexamining precedent. The concern is misplaced in any event. As Justice Gorsuch (joined by The Chief Justice and Justice Alito) has emphasized, agency deference in the government-contracting setting is especially problematic. Accordingly, this is not just an appropriate case to reexamine *Auer*—it is an ideal one. The Court should grant the petition and decide this recurring question.

I. The government neither defends *Seminole Rock*/*Auer* deference nor denies the issue's importance.

The doctrinal problems with this anachronistic interpretative canon are well documented. *Auer* is indefensible on the merits. Petition ("Pet.") 17-23. No principle of stare decisis justifies retaining it. Pet. 23-26. And the unmatched latitude it grants agencies to interpret their own ambiguous regulations distorts administrative law in ways this Court never could have foreseen. *Auer* deference is an ill-conceived and unevenly applied interpretive canon that warrants reconsideration.

Auer is practically troubling too. It encourages agencies to bypass notice-and-comment rulemaking and rewards them for issuing vague regulations that deny fair notice to those who must comply with these directives. Pet. 15-17. This harms individuals—often the disadvantaged who lack access to the resources needed to stay abreast of unclear, ever-changing regulatory commands. Pet. 18-20. It harms States. Amicus Brief of the State of Utah *et al.* ("States Br.") 6-15. And it harms businesses operating in every sector. Amicus Brief of the Chamber of Commerce ("Chamber Br.") 5-8.

For good reason, then, several Justices have urged reconsideration of *Auer* deference. Pet. 1. Yet given the chance to defend *Auer*, the government takes a pass. It does not argue that *Auer* was rightly decided or rely on *stare decisis* to justify upholding it. Nor does the government characterize the issue as unworthy of review for other reasons.[1] In short, the government has declined

1. In passing, the government identifies petitions raising this question that have been denied. BIO 15 n.3. But because

to contest that this is an important question that the Court should settle in accordance with Rule 10(c).

II. This is an appropriate case for deciding whether to overrule *Seminole Rock*/*Auer* deference.

Given the government's implicit concession that this question is worthy of review, the only remaining issue is whether this is an appropriate case to decide it. The government's attempt to characterize this petition as a "poor vehicle," BIO 11, is misplaced for several reasons.

Foremost, none of the government's complaints raise a genuine vehicle problem. No "'difficult and close' jurisdictional issues ... would have to be settled" before reaching the deference issue. *Scenic America, Inc. v. Department of Transp.*, 138 S. Ct. 2, 3 (2017) (Gorsuch, J., respecting denial of certiorari). The question presented was the basis of decision below. Pet. 12; BIO 11. And the issue has been fully briefed at the certiorari stage and will be the focus at the merits stage. *Decker*, 568 U.S. at 615-16 (Roberts, C.J., concurring).

Rather than making arguments as to why this case is an inappropriate vehicle for deciding the issue, the government is simply of the view that this is not the *best* case to decide it. But perfection is not the measure

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this issue "goes to the heart of administrative law," it should be decided in an appropriate case. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring). In at least one of these petitions, for example, the issue may not have been squarely presented. Brief in Opposition, *United Student Aid Funds, Inc. v. Bible*, No. 15-861 (March 7, 2016). That is not a concern here. Pet. 26-27; *infra* at 7-8; Chamber Br. 13-14; States Br. 20.

of suitability for review. Regardless, the government is mistaken even accepting its premise that this issue should be settled only when the stars align. This is an ideal case to decide whether *Auer* should be overruled.

First, the government worries that a contracting case presents an unusual posture. But like any *Auer* case, the dispute turned on the proper interpretation of a controlling regulation. Pet. 12. Here, the Federal Circuit credited the government's interpretation of the regulation because that reading was not "plainly erroneous." App. 8a, 13a (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The salient features of this case thus are no different than any other raising this issue.

In fact, the circumstances of this case make it a strong candidate for review. Deference is especially pernicious in the government-contracting setting. *Scenic America,* 138 S. Ct. at 2 (Gorsuch, J., respecting denial of certiorari). To be certain, "courts sometimes defer to an agency's interpretations of statutory law under *Chevron* ... and its progeny." *Id.* "But whatever one thinks of that practice in statutory interpretation cases it seems quite another thing to suggest that the doctrine (or something like it) should displace the traditional rules of contract interpretation too." *Id.*; Chamber Br. 8-13.

Yet even if the Court eventually concludes that *Chevron* is inapplicable to contract interpretation, *Auer* deference still would leave a hole big enough to swallow the rule. As here, the contract can (and usually does) provide that it is subject to all agency regulations, which in turn set forth most of the rules governing the relationship. Pet. 5-14. Thus, excising *Chevron* from government contracting

would be a pyrrhic victory unless *Auer* is overruled. The agency still would prevail in a dispute "over the meaning of an ambiguous term in [an] agreement" even if it received no deference on its reading of the contract itself. *Cf. Scenic America*, 138 S. Ct. at 2 (Gorsuch, J., respecting denial of certiorari).

Second, the government argues that this case is a poor vehicle because the concern that *Auer* leads agencies to bypass notice-and-comment rulemaking "has no application here." BIO 16. Garco agrees that base access regulations are exempt from notice and comment under Section 553. Pet. 2-4. But as Judge Sentelle once put it: "Just so, but so what?" *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting). It is unrealistic and baseless to suggest that a case is an inappropriate vehicle for deciding a purely legal issue unless it factually implicates every criticism of the challenged doctrine.

It is unrealistic here given the sheer number of problems with *Auer*. Pet. 14-23. For example, one issue in this setting is that *Auer* allows the agency—a financially interested party—to unilaterally decide whether it owes money to its contracting partner. Pet. 19-20. But that particular due process concern may be absent in non-contracting cases. Accordingly, the government could easily say that the absence of this problem makes *those cases* poor vehicles. Simply put, if the Court awaits a petition implicating every concern *Auer* raises, it will never have the chance to decide this concededly important question.

The concern is baseless because the Court has never held a petition squarely raising a purely legal question to such a standard. Take, for example, what the Court faced in *Pearson v. Callahan*, 555 U.S. 223 (2009). There was increasing concern with the requirement that lower courts decide, for qualified immunity purposes, whether a constitutional right had been violated before deciding whether that right was "clearly established." *Saucier v. Katz*, 533 U.S. 194 (2001). While *Saucier* was subject to many attacks, two stood out. It forced rulings on constitutional issues at "the pleading stage" even though "the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." *Pearson*, 555 U.S. at 238-39. And it "encourag[ed] courts to decide unclear legal questions in order to clarify the law for the future" even though many of the decisions would be "of doubtful precedential importance" given their dependence on "uncertain assumptions about state law." *Id.* at 238.

The facts of *Pearson* did not implicate either criticism. It was decided at summary judgment, *id.* at 228-29, and liability rested on a Fourth Amendment issue that did not implicate thorny state law issues, *id.* at 228-30. Yet that did not deter the Court from granting review to revisit *Saucier*.

The Court should follow that instinct here. Like *Pearson*, this petition offers the Court an appropriate opportunity to decide an "important matter involving internal Judicial Branch operations." *Id.* at 233-34. That it may not implicate every criticism of *Auer* deference should not deter the Court from granting review.

Third, the government claims the Court should not hear this case because its interpretation of the regulation would be upheld with or without *Auer* deference. BIO 12-16. Again, though, that was not the basis of the Federal Circuit's ruling. The court below held only that the government's reading was not plainly erroneous under the deferential *Auer* standard. App 10a-13a. The *Auer* issue therefore is squarely presented, and the government does not say otherwise. That the government, on remand, may seek affirmance on an alternative ground is no basis for denying certiorari. *See, e.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016).

In fact, the government specifically argued below that it could prevail without deference. Gov't C.A. Br. 19. And when a court agrees, it frequently will say so. *See, e.g.*, *Yourman v. Giuliani*, 229 F.3d 124, 130 (2d Cir. 2000). That the Federal Circuit declined the government's invitation to decide this case without invoking *Auer* suggests it "would have reached a different result under a less deferential standard." BIO 16.[2]

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2. Oddly, the government appears to fault Garco for not asking the Federal Circuit to ignore the *Auer* framework. BIO 15-16. Garco had no choice but to accept this deferential framework's applicability given this Court's "prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). The government cannot be suggesting that Garco should have asked the Federal Circuit to ignore controlling precedent. Not only would it have been improper, there is of course no requirement for Garco to engage in this futile act. That is why, when this Court reconsiders precedent, more often than not the issue is raised for the first time on certiorari or is addressed at the Court's invitation. *Patterson v. McLean Credit Union*, 485 U.S. 617, 617-19 (1988) (collecting cases).

On that score, the Federal Circuit explained that the government's reading of the regulation was not necessarily the better one. It found "merit to Garco's argument that the plain meaning of 'wants and warrants' in isolation suggests a check only for wants and warrants." App. 9a. That is, the Federal Circuit was not convinced that the government could prevail without deference. Again, not that it matters to the Court's resolution of the question presented, but there is every indication that "deference to the agency ma[de] the difference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

That the government now defends its reading of the regulation based on an argument it never made below is telling. The government newly argues that the regulation merely "implemented an earlier Air Force Space Command directive, which 'specified requirements for background checks' for contractor employees." BIO 12-13 (citing Instruction 10-245). The reference to an "NCIC wants and warrants check," the government argues, was just a "synonym for the type of NCIC criminal-history background check that was already mandated by the Air Force Space Command." BIO 13.

But there is a reason why the government never made this argument below: the cited section of this new directive applies only to "[i]nstallation *service* contracts" and directed bases to "include measures to preclude the unmonitored presence of *cleaning* or other *service* personnel." Air Force Instruction 10-245, Space Command Supp. 1, § 2.17.3 (June 2, 2003) (emphasis added). It does not apply to Garco.

For construction contractors such as Garco, the Air Force Space Command directed bases to develop procedures to "check[] for outstanding warrants" in the NCIC so that the "Visitor Control Center and Industrial/Contractor gates" could "ensure quick and efficient processing of personnel requiring entry" via "contractor authority lists." *Id.* at § 2.16.3.2. That is precisely what Malmstrom did, Pet. 3-4, which is why the government relied below only on the Malmstrom-specific "wants and warrants" regulation to justify barring Talcott (Garco's subcontractor) employees from the base. Gov't C.A. Br. 4-5, 11-12, 16-25.

But even if the newly discovered directive had relevance here, it would not bolster the government's argument. If anything, the directive seems to require a more robust background check than the base-specific rule did. Yet it offers no guidance on who would be excluded from Malmstrom as a result of that check, unless the directive is interpreted to exclude *all* felons. But not even the government supports that reading given that the revised Malmstrom regulation excludes only those individuals with "outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program." App. 60a.

This new argument thus inevitably suffers from the same flaw as the old ones: after this dispute arose, the base made a "large change" and issued a rule reflecting a policy markedly different from the one in place when this contract was signed. App. 110a. The government, in other words, has "vividly illustrated that it can write a rule saying precisely what it means." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part);

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1723 (2017) ("[D]ifferences in language like this convey differences in meaning.").

The government thus falls back to the argument that, despite its fidelity to the text, Garco's reading is untenable because it would potentially open the base to convicted terrorists and spies. BIO 14. But that farfetched scenario could happen even under the revised regulation, which "clarified" that only sex offenders, violent criminals, and those with a want or warrant, on probation, or in a pre-release program are excluded. BIO 17. A person convicted under the Espionage Act, therefore, would not be barred by that regulation. *See, e.g.*, *United States v. Lee*, 79 F. Supp. 2d 1280, 1284 (D.N.M. 1999) ("Dr. Lee is alleged to have violated the Atomic Energy Act ... and the Espionage Act ... neither of which involves crimes of violence or narcotic drugs."). It is difficult to label Garco's reading of the regulation as absurd when the base's "clarified" rule is subject to the same line of attack.

Of course, Talcott would never have brought such an individual on the base, and any suggestion to the contrary finds no record support. The company had worked on the base for over 20 years without incident. Pet. 5. Moreover, the base has the authority to deny access to anyone it wishes at any time, and it may update the access criteria to reflect its policy priorities or to address concerns it might have with existing regulations. But what the government may not do is change the base-access rules after Garco accepts the contract, withhold payment from its subcontractor for its increased labor costs, and then hide behind deference to avoid upholding its end of the bargain. If the government believes that it can win this

dispute without deference, it can try to do so on remand if the Court overrules *Auer*.

Fourth, the government believes that review is unwarranted because this "interpretation ... has no ongoing significance beyond this case." BIO 18. Yet the agency, once challenged, can always revise the regulation and then label the backward-looking dispute insignificant. But it is the canon's retroactive effect that makes *Auer* so problematic. If agencies truly wanted to diminish this issue's significance, they would disclaim the "flexibility" *Auer* affords them to issue regulatory "clarification[s]" that have this painfully "retroactive effect." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part). It is this leverage, though, that makes it so enticing for agencies to issue "vague and open-ended regulations that they can later interpret as they see fit." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

Regardless, this issue is significant to Talcott, a small Montana business that has been fighting for nearly a decade to recover almost $500,000 from the government. Pet. 6-13. It also is significant to the countless other businesses often victimized by the retroactive "clarification" *Auer* permits. Chamber Br. 6-8. Few individuals and regulated entities can enlist "an army of perfumed lawyers and lobbyists" to "remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Especially now that these clarifications "appear almost anywhere," it is nearly impossible to "keep track of an agency's shifting views." Chamber Br. 6-7.

In the end, problems of this kind may not meet the government's definition of significant. But they do meet the Court's. Pet. 14-17. This important and recurring question of administrative law should be decided.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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