No. 18-15

In the
Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CHANTELL AND MICHAEL SACKETT, AND DUARTE NURSERY, INC. IN SUPPORT OF PETITIONER

TODD F. GAZIANO
THOMAS A. BERRY
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
(202) 888-6881

ANTHONY L. FRANÇOIS*
**Counsel of Record*
DAMIEN M. SCHIFF
DANIEL M. ORTNER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
TFrancois@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc.

QUESTION PRESENTED

Auer v. Robbins, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that Petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that Petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The question presented is:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc., submit this brief amicus curiae in support of Petitioner James Kisor.[1] All parties have consented to the filing of this amicus brief. Amici's interest in this case derives from their various experiences with federal agency re-interpretation of regulations adopted under the Clean Water Act and related federal statutes.

Amicus Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive Branch under the Constitution's Separation of Powers, including cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony);

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[1] All parties have consented to the filling of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters").

Amici Chantell and Michael Sackett are the plaintiffs in *Sackett v. EPA*, presently pending on remand from this Court, in the U.S. District Court for the District of Idaho, case no. 2:08-cv-00185-N-EJL.[2] The Sacketts are challenging an administrative compliance order issued by the Environmental Protection Agency, which directs them to restore a home site they own near Priest Lake, Idaho, on the ground that their property contains navigable waters for which no dredge and fill permit will be issued under the Clean Water Act. *See generally*, *Sackett v. EPA*, 566 U.S. at 122. The sole issue in the Sacketts' challenge to the compliance order is whether their property contains federally protected navigable waters under the Clean Water Act. EPA defends its jurisdictional determination in part based upon its 2008 post-*Rapanos* Guidance, which purports to re-interpret the agency's regulations defining "navigable waters" under the Clean Water Act in light of this Court's fractured decision in *Rapanos,* 547 U.S. 715.

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[2] The Sacketts' case was promptly remanded from this Court back down to the district court in 2012. There, the case has been fully briefed on cross motions for summary judgment and awaiting decision since January of 2016. As the late Justice Scalia wrote in *Sackett v. EPA*, the "Sacketts . . . are feeling their way." 566 U.S. at 124. Unfortunately, they have not been able to do so very quickly.

EPA argues to the District Court below that it is obliged to defer to the post-*Rapanos* Guidance under *Auer*. A decision of this Court in favor of Petitioner in this case would likely assist the District of Idaho in ruling on the Sacketts' pending summary judgment motion.

Amicus Duarte Nursery, Inc., is a farming company in California, with an ongoing interest in the scope of the federal government's exercise of regulatory authority over farming practices under the Clean Water Act. Duarte Nursery was a petitioner in *Washington Cattlemen's Association v. EPA* in the Sixth Circuit, Case No. 15-4188, which challenged EPA's 2015 regulation defining "navigable waters" under the Clean Water Act. *See generally In re: EPA*, 803 F.3d 804 (6th Cir. 2015). Duarte Nursery, Inc., was also a respondent before this Court in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), which held that the federal district courts, rather than the Sixth Circuit, have jurisdiction over Duarte Nursery's claims. The role of the post-*Rapanos* Guidance and related agency re-interpretations of Clean Water Act regulations is an ongoing issue in both the pending litigation challenging the 2015 EPA regulation redefining "navigable waters" and EPA's ongoing effort to revise those regulations yet again.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States government, as established by the Constitution, governs a republic whose citizens' liberty is protected by the separation of law-making, law-enforcement, and law-interpretation between the

Legislative, Executive, and Judicial branches. The practical purpose of that separation is to prevent any one agency from becoming so mighty in its enforcement power that it can convert the republic into what is essentially a company town: a community with no democratically elected council, and no independent judges. In such a town, the company decides what the rules are, enforces the rules, changes the rules (through "interpretation" of them), and then tells the judges what the rules mean. All of this is done to restrict the liberty of the citizenry, and to aggrandize the power of the company.

This Court's decisions in *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* have unfortunately enabled just this conversion of our executive agencies, from a checked and balanced branch of a tripartite government, into the unchecked and dominant power in what increasingly looks and feels like an old-fashioned company town, whose citizens have to take what the company says and like it, or else.

Auer deference allows agencies to flout the Congress in two important ways. First, Congress mandates that federal agencies submit all their "rules" to Congress for review and potential disapproval before such rules are legally in effect, under the Congressional Review Act. The very types of policy memoranda, guidance documents, and adjudicative interpretations of agency regulations to which *Auer* applies are covered by the Congressional Review Act, and yet agencies routinely flout their obligation to submit those rules to Congress for review and potential disapproval. So agencies thwart effective legislative branch checks under the

Congressional Review Act, while telling the judicial branch to defer to these selfsame rules.

Auer also exacerbates the already questionable judicial practice of deference to agency regulatory interpretations of statutes under *Chevron v. NRDC*, 467 U.S. 837 (1984). *Chevron* allows agencies to bind the courts to their regulatory interpretations of ambiguous statutes, but does not require regulations to be clear. *Auer* allows agencies to regulate ambiguously and then interpret those regulations to taste later, with the expectation of forcing such re-interpretations on the courts. This second level of deference to agency law making increasingly obscures Congress' constitutional role as the lawmaker. The consequence of *Auer* is not merely the transfer of Congress' legislative power to the executive branch, but the near complete erasure of Congress' legislative power itself.

And, as numerous members of this and other courts have observed, *Auer* deference allows executive agencies to transgress on the judiciary, by taking from it the inherently judicial power to "say what the law is." This dynamic converts the judiciary from a check and balance on the executive into a rubber stamp.

Whatever the original rationale for *Auer* deference, its sad consequences for liberty and constitutional government require that this Court overturn it. It is time to end the unchecked power of the executive branch. It is time to turn the company town back into a constitutional republic, and thereby protect individual liberties, which depend on separated powers.

ARGUMENT

I

AUER TOWN—THE COMPANY TOWN THAT BETRAYS THE ORIGINAL PROMISE OF PROTECTED INDIVIDUAL LIBERTY THROUGH SEPARATION OF POWERS

"Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). The Founders believed that this division[3] was an elemental part of the design for just government. *See Myers v. United States*, 272 U.S. 52, 116 (1926) ("If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers.") (quoting James Madison, 1 Annals of Congress 581). Born of the Founders' distrust of government power, *Boumediene v. Bush*, 553 U.S. 723, 742 (2008), the separation of powers constitutes one of the Constitution's key structural protections against tyranny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny."); *Unites States v. Brown*, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was

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[3] "Aristotle's Politics contains what is commonly taken to be the original statement of the doctrine." Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 387 (1935).

obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."). The separation of powers therefore serves to protect individual liberty. *Bond v. United States*, 564 U.S. 211, 223 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers . . . ."). *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). Indeed, this liberty-protecting aspect of the doctrine has received particular emphasis in the Court's recent separation-of-powers cases. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 Yale L.J. 346, 382-83 (2016).

An important liberty-protecting part of the separation of powers as crafted by the Framers is the assignment of law-making and law-interpretation to different branches of government. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 641 (1996) ("[T]he founders took special pains to limit Congress's direct control over the instrumentalities that implement its laws."); Jonathan H. Adler, *Auer* Evasions, 16 Geo. J.L. & Pub. Pol'y 1, 14 (2018) ("The combination of the law-making and law-interpreting functions was viewed with suspicion at the time of the nation's founding because it was feared that such concentration of power facilitated the abuse of government power."). That desire had a distinguished pedigree: Montesquieu, Locke, and Blackstone all considered the separation of law-making and law-interpretation to be important in

furthering the rule of law and limiting arbitrary government.[4] Manning, *supra*, at 646-47.

Auer, however, conflicts with this aspect of the separation of powers. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (*Auer* deference "seems contrary to fundamental principles of separation of powers [because it] permit[s] the person who promulgates a law to interpret it as well."). As Dean Manning explained in his classic article on the subject, judicial deference to agency interpretation of agency rules effects the combination of law making (in the form of so-called "legislative" rules[5]) with law interpretation by requiring courts to accept agency interpretations of their own ambiguous regulations. Manning, *supra*, at 631. *Accord* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 513 (2016) ("Because interpretation may work a significant change, the agency's power to interpret—subject only to deferential review—is akin to the power to rewrite the rule. [¶] This [is a] violation of the separation between lawmaking and law elaboration . . . ."). Among the drawbacks of this

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[4] The desirability of separating law making from law interpretation has a long as well as distinguished pedigree. D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 Cambridge L.J. 80, 86 (1974) (the principle that the manorial court and not the lord himself should render judgment "was a powerful one in the Middle Ages.").

[5] "Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 476-77 (2002).

practice is the elimination of "an important incentive for adopting transparent and self-limiting rules"—presumably the very rules that would most safeguard individual liberty—"because any discretion created by imprecise, vague, or ambiguous laws inures to the very entity that created it." Manning, *supra*, at 648.

By violating the separation of powers, *Auer* deference also raises a self-dealing concern. One famous (if homely) explanation of the separation of powers is the image of a matron slicing a cake: "when considering the sharing of a cake between parties, the person who divides the cake must not be the person who chooses the desired piece of cake if there is to be a fair sharing." Michael P. Healy, *The Past, Present and Future of* Auer *Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. Kan. L. Rev. 633, 681 (2014) (citing James Harrington, *The Commonwealth of Oceana* (1656), *reprinted in* Cambridge Texts in the History of Political Thought 22, 24 (James G. Pocock ed., 1992)). Just as in a just system of home economics, so in a just administrative state: the entity making the rules should have no power to employ them in a way prejudicially beneficial to itself. Healy, *supra*, at 681 ("[A]bandoning *Auer* deference forecloses an agency from being able to make law (divide the cake) in a way that the agency itself can later apply unfairly (distributing the pieces).").

Rejecting *Auer* deference because of its inconsistency with the separation of powers does not mean that the allocation of law-making and law-interpretation to the same entity is never without some benefit. *See* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122

Yale L.J. 384, 420 (2012) ("[T]he impartiality of decisionmakers [is] one institutional good among others, to be pursued, or not, as a larger calculus of institutional optimization suggests."); Jason Marisam, *Constitutional Self-Interpretation*, 75 Ohio St. L.J. 293, 308 (2014) ("[T]he anti-self-interpretation norm trades off against competing institutional values, and self-interpretation often exists when these competing considerations plausibly outweigh the risks from self-interpretation."). But in light of the depth and breadth of the power that federal agencies wield, the costs to fairness and the rule of law—and thus to liberty—that necessarily result from combining law-making and law-interpretation in the administrative state decisively outweigh any efficiency or other gains to be derived from their conflation. *See infra* Part III. *See also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (*Auer* deference "allows the agency to control the extent of its notice-and-comment-free domain."); Manning, *supra*, at 618 ("By providing the agency an incentive to promulgate imprecise and vague rules, [*Auer* deference] undercuts important deliberative process objectives . . . , and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules."). *Cf.* Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the Seminole Rock Deference Doctrine*, 69 Admin. L. Rev. 1, 42 (2017) (reform of the current standard for deferring to agency interpretation of agency rules "would lead to positive results in our administrative state, such as increased consistency, uniformity, fairness and transparency").

Ultimately, however, any purported practical justification for *Auer* deference is beside the point. For even if the gains from *Auer* deference were significant, "beneficial effect cannot justify a rule that not only has no principled basis but contravenes [the] separation of powers." *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part). *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 12 (1996) (*Auer* deference "is a statist anachronism" and "should have no place in a system of limited government under the rule of law"). As "a dangerous permission slip for the arrogation of power," *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part), *Auer* deference frustrates the liberty-protecting aim of the separation of powers. For that reason alone, it should be abrogated.

II

AUER TOWN—NO LEGISLATORS HEEDED

A. *Auer* Is Particularly Egregious Since It Applies to Rules Even Where Agencies Violate Their Rulemaking Duties Under the Congressional Review Act

Auer deference violates separation-of-powers principles because it allows executive branch rules to avoid meaningful review by the judicial branch. This core problem with *Auer* deference is compounded by the fact that, in many cases, the very interpretation to which the judicial branch defers has also evaded statutorily mandated review by the *legislative* branch. The "interpretations" that *Auer* deference forces courts to accept are frequently issued without notice-

and-comment rulemaking procedures *and* without congressional review, the latter in violation of the Congressional Review Act. This is yet another reason why *Auer* deference must be eliminated and the outsized influence of these guidance documents must be curtailed. When documents so frequently slip through the cracks of meaningful oversight, courts should give these documents *less* authority, not more.

In 1996, Congress passed the Congressional Review Act (CRA). 5 U.S.C. § 801, *et seq.* The CRA was intended to "allow[] Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." 142 Cong. Rec. S3683 (daily ed. Apr. 18, 1996) (joint, bipartisan statement of Senate sponsors Nickles, Reid, and Stevens); 142 Cong. Rec. E575 (daily ed. Apr. 19, 1996) (identical statement by Rep. Hyde for House CRA sponsors). To that end, the CRA requires every agency issuing a rule to submit it along with a short report to the House, Senate, and Government Accountability Office (GAO) "before [the] rule can take effect." 5 U.S.C. § 801(a)(1)(A). Once a rule has been submitted, Congress may pass a joint resolution of disapproval through a streamlined legislative process. *See id.* § 802. Such a joint resolution invalidates the rule and prevents the agency from issuing a "substantially similar" one in the future. *Id.* § 801(b).

The definition of a "rule" that must be submitted to Congress is intentionally broad. *See* 5 U.S.C. § 804(c) (adopting, with limited exceptions, the definition of a "rule" appearing in 5 U.S.C. § 551); 5 U.S.C. § 551(4) (defining a "rule" in part as an "agency statement . . . designed to implement, interpret, or prescribe law or policy"); *see also* 142 Cong. Rec. S3687 (daily ed. Apr.

18, 1996) ("Documents covered . . . include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public."). The legislative sponsors of the CRA expressly chose this broad definition to address the agency practice of evading notice-and-comment procedures through the use of "guidance documents" and other more informal correspondence not published in the *Federal Register*.[6] Thus, a major purpose of the CRA was to require that such "regulatory dark matter" be submitted to Congress.

Since the passage of the CRA, study after study has confirmed that the executive branch has repeatedly failed to send many rules to the GAO to begin the congressional review process. *See, e.g.*, Cong. Research Serv., R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress* (2009),

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[6] *See* 142 Cong. Rec. S3687 (daily ed. Apr. 18, 1996) (joint, bipartisan statement of Senate sponsors Nickles, Reid, and Steven) and 142 Cong. Rec. E578 (daily ed. Apr. 19, 1996) (identical statement by Rep. Henry Hyde for House sponsors) (emphasis supplied):

> The authors intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. * * * These include guidance documents and the like. * * * *The authors are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The authors admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.*

https://www.redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf; U.S. Gov't Accountability Office, *Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation*, GAO-06-601T (2006), http://www.gao.gov/assets/120/113245.pdf; Curtis W. Copeland, *Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress* (2014), https://www.redtaperollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf. And while most of these studies have focused on rules published in the *Federal Register*, since they can be cross checked in public databases, the compliance rate for rules *not* published in the *Federal Register*, such as guidance documents, is much worse, though harder to quantify accurately. *See, e.g.*, Susan E. Dudley, *CRAzy After All These Years: Extending the Reach of the Congressional Review Act*, Forbes (Mar. 7, 2017), https://www.forbes.com/sites/susandudley/2017/03/07/crazy-after-all-these-years-extending-the-reach-of-the-congressional-review-act/#2c52e00d24b8 (noting that "thousands" of guidance documents have likely never been submitted to Congress).

It's impossible to know whether Congress would disapprove agency guidance documents at the same rate as notice-and-comment rules if the former were properly delivered for review. But when GAO opined that a Consumer Financial Protection Bureau guidance bulletin concerning discretionary pricing and indirect auto lending should have been submitted to Congress, both Houses deemed it submitted as of the date of the GAO opinion and subsequently disapproved it using the CRA procedures. President Trump signed the disapproval resolution on May 21,

2018, Pub. L. No. 115-172, which also prohibits the Consumer Financial Protection Bureau from issuing a substantially similar guidance document again without congressional authorization. *See* Alan S. Kaplinsky & Christopher J. Willis, *Congress disapproves CFPB Bulletin concerning discretionary pricing by auto dealers*, Consumer Finance Monitor (May 8, 2018), https://www.consumerfinancemonitor.com/2018/05/08/congress-disapproves-cfpb-bulletin-concerning-discretionary-pricing-by-auto-dealers/.

While the executive branch has wrongfully evaded congressional review of the vast majority of its guidance documents, the *Auer* doctrine has continued to give outsized importance to these very same informal writings. As several cases have demonstrated, the current regime of *Auer* deference has turned these documents into *de facto* amendments to the rules that agencies enact through notice-and-comment rulemaking, since courts are bound to follow any reasonable "interpretation" of a rule found in such a document.

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, for example, this Court gave determinative weight to an interpretation of an agency regulation contained in an internal EPA memorandum known as the "Regas Memorandum." 557 U.S. 261, 283-86 (2009). Because of the decisive weight given to agency interpretations under *Auer*, this single memo authored by a single EPA official effectively determined the EPA's policy regarding the regulations of "fill material" dredged up during mining. The memo at issue in *Coeur Alaska* was therefore undeniably an "interpretation[] of general applicability," just as much as any notice-and-

comment rule implementing a statute. Yet the memorandum in question had never been submitted to Congress for review, in violation of the CRA. *See* U.S. Gov't Accountability Office, https://www.gao.gov/legal/other-legal-work/congressonal-review-act?fedRuleSearch=regas&report=&agency=All&type=All&priority=All&begin_date=mm%2Fdd%2Fyyyy&end_date=01%2F21%2F2019&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2020&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=01%2F21%2F2019&searched=1&Submit=Search#database (search in GAO database of submitted rules for "Regas" returns zero results).

Similarly in *G.G. ex rel. Grimm v. Gloucester County School Bd.*, the Fourth Circuit based its decision on the application of Title IX regulations to transgender bathroom usage on a single letter, 822 F.3d 709, 718 (4th Cir. 2016) *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem. op.), which was never submitted to Congress. *See* U.S. Gov't Accountability Office, https://www.gao.gov/legal/other-legal-work/congressional-review-act?fedRuleSearch=gender+identity&report=&agency=All&type=All&priority=All&begin_date=mm%2Fdd%2Fyyyy&end_date=01%2F22%2F2019&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2020&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=01%2F22%2F2019&searched=1&Submit=Search#database (search in GAO database of submitted rules for "gender identity" returns six unrelated results). As these examples show, cases are regularly decided on the basis of *Auer* deference given to documents that have never been reviewed by Congress because the executive branch has illegally withheld them. The executive branch has thus failed to conform its procedures to acknowledge

the outsized influence and power that *Auer* deference gives to such memos.

In some cases, the internal tension in the executive's view of guidance documents has nearly reached a breaking point. In *Sackett v. EPA*, the Sacketts are challenging an EPA compliance order which asserts that their homesite is a federally protected wetland under the Clean Water Act. *See generally Sackett v. EPA*, 566 U.S. 120, 122 (2012). On remand to the district court, the case has been fully briefed on cross motions for summary judgment and awaiting decision for approximately three years. The sole issue in the Sacketts' challenge is whether their property contains navigable waters under the Clean Water Act. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on the Administrative Record at 13-24, *Sackett v. EPA*, No. 2:08-cv-00185-EJL (D. Idaho Sept. 4, 2015), ECF 103-1. A key basis on which the EPA defends its administrative determination that the Sacketts' property is a navigable water is the agency's 2008 post-*Rapanos* Guidance.[7] *See* United States' Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the United States' Cross-Motion for Summary Judgment at 7, *Sackett v. EPA*, No. 2:08-cv-00185-EJL (D. Idaho Nov. 20, 2015), ECF 105-1 (identifying and explaining the post-*Rapanos* Guidance as an interpretation of its regulation defining "adjacent" wetlands); *id.* at 9 (claiming *Auer* deference for interpretations of its regulations).

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[7] *Available at* https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents.

The post-*Rapanos* Guidance itself states that it "does not impose legally binding requirements on . . . the regulated community." Guidance at 4, n.17. And, the Guidance was never submitted to Congress for review under the Congressional Review Act. *See* Redtaperollback.com/rules (listing various agency guidance documents not submitted to Congress, in violation of the CRA); https://www.redtape rollback.com/rules/rapanos-guidance/ (post-*Rapanos* Guidance not submitted to Congress, in violation of the CRA). Despite failing to comply with the CRA's rulemaking requirements, and disclaiming any binding legal effect of the Guidance, EPA now argues to the federal courts that the Guidance demands judicial deference.

Because of *Auer* deference, the scope of documents that can effectively serve as binding amendment to agency policy is virtually limitless. For example, this Court has held that an agency interpretation is entitled to *Auer* deference even if it "is stated in a legal brief." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285, 296 n.7 (2009). Likewise, even adjudicative decisions issued by quasi-judicial executive branch bodies are treated as agency interpretations for the purposes of *Auer*. The agency interpretation at issue in this case was written in the form of a decision by the Board of Veterans' Appeals. *See Kisor v. Shulkin*, 869 F.3d 1360, 1367 n.10 (Fed. Cir. 2017) ("The Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not 'relevant' under that subsection. . . . Because the Board is part of the VA . . . the Board's interpretation of the regulation is deemed to be the agency's interpretation.") (citations omitted). When courts confer *Auer* deference to agency legal

interpretations of any form, including briefs and adjudicative decisions, those writings more clearly fall under the CRA's definition of a rule. Yet there is no evidence the executive branch has any intention of complying with the corresponding requirement to submit them to Congress under the CRA. It is a perverse outcome that the class of rules least often submitted for congressional review, and for that reason not lawfully effective under the CRA, should be accorded special deference in the courts.

To be clear, this case does not raise a legal challenge under the CRA. But the executive branch's longstanding evasion of the CRA's requirements provides evidence of the danger of giving judiciary-trumping authority to memos, letters, and even legal briefs. None of these documents are subject to notice-and-comment rulemaking, and there is no sign that the executive has any intention of granting Congress the opportunity to review these documents, even though that opportunity is required by law. This Court should do its part to rein in the proliferation of regulatory dark matter by overruling *Auer* and restore full judicial interpretation of the regulations these documents construe.

B. *Auer* Extends the Already Dubious Allowance for Delegation of the Legislative Power to the Executive

All of the various agency deference doctrines that this Court has promulgated have come under heavy fire for delegating legislative power to the executive. *Chevron* deference, for example, "risks trampling the constitutional design by affording executive agencies license to overrule a judicial

declaration of the law's meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). But *Auer* is a particularly dangerous form of deference because it allows one single branch of government to act as legislature, enforcer, and interpreter. For all of its flaws, under *Chevron* deference an agency has engaged in the interpretation of an act of Congress, which means that the law has received at least one round of interpretation by a branch of government that is distinct from the one that promulgated it before it comes before the judiciary. *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) ("Congress cannot enlarge its own power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*."). *See also* Manning, *supra*, at 639. On the other hand, with *Auer* deference, the same branch of government that has promulgated a rule is also given the ability to interpret and reinterpret its own rules with binding effect: "[a] form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people." *Gutierrez-Brizuela*, 834 F.3d at 1151. And since agencies "can also play a large role in the drafting and vetting of legislation, even before it is enacted . . . they will at times have three bites at the law-making apple." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (citing Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. (2017), *available at* https://ssrn.com/abstract =2826146 (presenting the results of extensive interviews and surveys with 20 federal agencies)).

The impact of this delegation of legislative authority to the executive is as predictable as it is problematic. "*Auer* deference further accentuates the shift of power to the executive branch by encouraging agencies to promulgate regulations vague enough to allow administrators wide latitude in deciding how to govern." *Egan*, 851 F.3d at 280 (Jordan, J., concurring). Agencies are thus prone to "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). *See* Chris Walker, Auer *Deference Inside the Regulatory State: Some Preliminary Findings*, Notice & Comment: (Sept. 14, 2016), http://yalejreg.com/nc/auer-deference-inside-the-regulatory-state-some-preliminary-findings/ (discussing results of a survey of executive lawmakers that showed that 39% took *Auer/Seminole Rock* deference into account when drafting rules); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 716 (2014) (same).

Because *Auer* places the power to create and interpret the law into a single hand, it incentivizes government gamesmanship and efforts "to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice." *Gutierrez–Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). While this Court has placed some theoretical limits on an agency's ability to reinterpret regulations when they are a "convenient litigating position" or a "post hoc rationalization[]," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), in practice these limits have done little to curtail agency aggrandizement of power. *See*,

e.g., Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa., Located on Tax ID #440002800150000000 Owned by Brown, 768 F.3d 300, 316-17 (3d Cir. 2014) (Jordan, J., dissenting) (rejecting an agency's regulatory interpretation that the agency admitted was "at odds with . . . the common understanding" of the terms of the regulation and that was adopted in a footnote "in the middle of an unrelated rulemaking" as a "reaction to the District Court's decision in [that] case"). As long as *Auer* continues to place the power to legislate and to interpret into the same hands, the tendency to use and abuse that authority will continue untrammeled.[8]

III

AUER TOWN—NO JUDGES WELCOME

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Auer* deference "pushe[s] [the judiciary] further and further away from [its] constitutional responsibility to 'say what the law is,'" *Egan*, 851 F.3d at 278, and in doing so "undermines [the court's] obligation to provide a

[8] Deference to executive agency rulemaking interpretation also "tends to the permanent expansion of the administrative state" by serving as a "veto gate[]" that precludes "any legislative effort to curtail agency overreach." *Egan*, 851 F.3d at 280 (Jordan, J., concurring) (citing Randy R. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* 212 (2016)).

judicial check on the other branches." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring). As Alexander Hamilton explained in Federalist No. 78, "[t]he interpretation of the law is the proper and peculiar province of the courts." The separation of the judicial power from the legislative and executive powers is one of the key elements of our Constitution, and it functions as an important safeguard to the protection of individual liberty. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by separation of powers protect the individual as well.").

Auer undermines the judiciary in two significant respects: First of all, "[i]t represents a transfer of judicial power to the Executive Branch." Second, "it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring).

As heirs of the legacy of the English Civil War, the Founders were keenly aware of the danger to liberty that an executive branch empowered to both interpret and enforce the law would create. *Perez*, 135 S. Ct. at 1215 (Thomas, J., concurring). The much reviled Star Chamber provided the British monarchy with the authority to conduct extrajudicial adjudication without due process of law. Philip Hamburger, *Is Administrative Law Unlawful?* 135 (2014). At the dawn of the English Civil War, Parliament abolished Star Chamber and other prerogative courts and declared that legal disputes would "have their proper remedy and redress . . . by

the common law of the land and in the ordinary course of justice." *Id.* at 138. In reliance on that legacy, the U.S. Constitution vests "[t]he judicial Power of the United States" in the Article III judiciary. The Constitution protected due process of law by ensuring "that government could bind subjects in particular instances only through the traditional processes of law, consisting of regular criminal or civil proceedings." *Id.* at 173. The guarantee that administrative actions would not be binding without full, meaningful, and independent judicial review was thus at the center of the Constitution's protections. *Auer* deference flaunts this constitutional guarantee by placing the power to legislate, enforce, and issue binding interpretation into the hands of one single branch of government. *See* The Federalist No. 48 (James Madison). "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."

The federal judiciary was carefully designed to provide an independent source of legal interpretation and adjudication free from "pressure from the political branches, the public, or other interested parties." *Perez*, 135 S. Ct. at 1218 (Thomas, J., concurring). Significantly, Article III judges were given lifetime tenure upon good behavior to insulate them from pressure to conform their opinions. In contrast, members of the legislative or executive branch are subject to democratic pressure and "may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law." *Id.* at 1219. Article III judges thus provide a vital check on the tendency to overreach or abandon the Constitution and the rule of law by vigorously interpreting and applying the

law. *See Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) ("[T]o resolve cases and controversies over past events calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be."). *Auer* improperly forces the judiciary to "abandon the judicial check," *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring) by allowing executive agencies the power to both enact regulations with "the force and effect of law," *id.* at 1219, and to interpret what those regulations mean—both as applied to specific cases via adjudication and more generally through the issuance of guidance documents and similar actions.

Supporters of *Auer* argue that providing deference does not undermine judicial authority because ultimately the courts are free to reject an agency's interpretation as unreasonable and to offer their own binding interpretations. But as Justice Scalia explained in *Perez*, this form of review is ultimately inadequate. Agencies are given wide range to interpret increasingly vague interpretations, and therefore are able "to make binding rules unhampered by notice-and-comment procedure" or meaningful judicial scrutiny. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). *Auer*'s requirement of "binding deference" is in deep tension with the independence of the judiciary and thus contrary to the structure of power established by the Constitution. Manning, *supra*, at 621. Empirical evidence shows that the employment of *Auer* has a significant impact on the degree to which courts uphold agency action William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 519 (2018) (showing that agency action is upheld 74% of the time under *Auer* compared to 58% under *Skidmore*).

Auer further undermines the role of the judiciary by granting executive agencies the power to overturn judicial judgments concerning the meaning of legislation or executive rulemaking. Under *Brand X*, agencies are entitled to deference even in the face of judicial precedent to the contrary. *See also Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) ("By *Brand X*'s own telling, this means a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' . . . but is instead subject to revision by a politically accountable branch of government."). Judicial pronouncements are thus transformed into little more than advisory opinions in contravention of Article III.

Another inadequate justification for *Auer* is that agencies are "in a better position . . . to reconstruct the purpose of particular regulations" than the judiciary. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 145 (1991). This rationale conflates the agency's power to rulemake, a legislative function delegated to the agency by congress, and the judiciary's power to provide binding legal interpretation, squarely a judicial function. *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of *rulemaking,* in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'"). While agencies may be experts in promulgating and enforcing regulatory policy, they are not experts at statutory interpretation, the provenance of the judiciary. *See Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1275 (Utah 2016) (rejecting *Auer* deference for state agencies and emphasizing

that "[w]e are in as good a position as the agency to interpret the text of a regulation that carries the force of law. In fact, we may be in a better position"). Furthermore, *Auer* has been extended to agency interpretation of rules that other agencies have promulgated, where the "interpreting" agency would be in no better position to "reconstruct" the purpose of the regulation than the judiciary. *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 696–99 (1991).

By predicating application on a threshold determination of "ambiguity," deference canons also introduce personal bias and inconsistency into the judicial process. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2139 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)). Canons of deference stymie the development and deployment of "neutral and impartial . . . interpretive rules" of construction. *Id.* at 2121.

In all of these respects, *Seminole Rock* and *Auer* impair the functioning of the judiciary and place binding judicial power in the hands of the executive branch.

CONCLUSION

For the foregoing reasons, this Court should abandon *Auer* deference.

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Respectfully submitted,

TODD F. GAZIANO
THOMAS A. BERRY
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
(202) 888-6881

ANTHONY L. FRANÇOIS*
**Counsel of Record*
DAMIEN M. SCHIFF
DANIEL M. ORTNER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
TFrancois@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc.