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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important administrative-law cases. See, e.g., *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

"There is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (A. Hamilton) (quoting 1 Montesquieu, *The Spirit of the Laws* 181). The principal judicial power is, of course, the power to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). What would happen if the legislative and executive branches could wield this power? "They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). "Parties who cannot alter their past conduct" would then be left "to the mercy of majoritarian"—or, worse, bureaucratic—"politics." *Id.* "Unpopular groups," in particular, would likely "be singled out for this sort of mistreatment." *Id.*

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented to the brief's being filed.

Auer v. Robbins, 519 U.S. 452 (1997), brings these fears to life. It instructs the judiciary in most instances to adopt, as binding law, the executive's interpretation of its own regulations. It enables an executive agency, flush with power delegated by the legislature, to issue open-ended rules, and then to contort those rules as it sees fit. This is not a hypothetical problem. As we shall see, agencies use their *Auer* privileges to seize power, to shift policy haphazardly, to evade democratic checks and balances, and to pick on unpopular groups. Regulated entities cope as best they can. But they "have every thing to fear" from the judiciary's "union," through *Auer*, with "the other departments." The Federalist No. 78.

WLF urges the Court to overturn *Auer*.

STATEMENT OF THE CASE

James Kisor served as a Marine in the Vietnam War. He saw combat. In December 1982, contending that that combat had given him post-traumatic stress disorder (PTSD), he filed a claim for service-connected disability benefits with the Department of Veterans Affairs (VA). Pet. App. 2a. A counselor declared that Kisor displayed symptoms associated with PTSD. *Id.* A psychiatric examiner concluded, however, that Kisor suffered not from PTSD, but from a "personality disorder"—a condition that does not qualify a veteran for benefits. *Id.* at 3a. Finding insufficient evidence that Kisor suffered from PTSD, the VA Regional Office (RO) denied the claim in 1983. *Id.*

In June 2006 Kisor reasserted his claim. He submitted, among other things, (1) a new psychiatric evaluation stating that he suffers—and has suffered, since at least the 1980s—from PTSD and (2) documents confirming that he partook in combat operations in Vietnam. Pet. App. 3a-4a; J.A. 38-40. Finding that Kisor suffers from PTSD, the RO awarded benefits.

There are two main ways the VA can grant a renewed claim. First, under 38 C.F.R. § 3.156(a), the VA may "reopen" a claim to consider "new and material evidence." This is what the RO did in Kisor's case, using the new psychiatric evaluation. But when a claim is reopened under § 3.156(a), benefits accrue from the day the veteran filed the renewed claim. *Id.* § 3.400(q). The RO therefore granted Kisor benefits effective June 2006.

Second, under 38 C.F.R. § 3.156(c)(1), the VA may "reconsider" a claim if it receives or finds "relevant official service department records" that existed, but were not considered, when the claim was denied. If the VA grants benefits under § 3.156(c)(1), benefits accrue from "the date the entitlement arose or the date [the] VA received the previously decided claim, whichever is later." *Id.* § 3.156(c)(3). In Kisor's case this would shift the accrual of benefits back to December 1982, when Kisor filed his original claim.

Kisor contends that the documents confirming his combat experience are "relevant official service department records" that trigger § 3.156(c)(1). Pet. App. 12a-13a. The government disagrees. It argues that the documents are not "relevant" records, because Kisor's combat experience was not a point of

dispute when the VA denied Kisor's claim in 1983. *Id.* at 13a. The Board of Veterans' Appeals, the Veterans Court, and the Federal Circuit sided with the government.

This appeal revolves around the Federal Circuit's use of *Auer*, 519 U.S. 452, to adopt the government's reading of the word "relevant" in § 3.156(c)(1). Under *Auer* (and its predecessor, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)), a court defers to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is not "plainly erroneous or inconsistent with the regulation" itself. 519 U.S. at 461. A Federal Circuit panel concluded that the word "relevant," as used in § 3.156(c)(1), is ambiguous; and that the government's reading—under which "relevant" means, not "relevant to an element of the veteran's claim," but "relevant to the outcome of the dispute"—was neither plainly erroneous nor inconsistent with the regulation. Pet. App. 17a-19a. So the panel applied the government's narrow reading of "relevant . . . records"; declared that Kisor's documents, which confirmed his combat experience but shed no light on his PTSD, were not "relevant"; and declined to shift the accrual of benefits back to December 1982.

The full court of appeals denied rehearing *en banc*. Judges O'Malley, Newman, and Moore dissented. They based their dissent on a canon of construction not at issue in this appeal. Along the way, though, they paused to observe that "several justices of the Supreme Court recently have urged their colleagues to abandon *Auer*." Pet. App. 48a. *Auer*, they explained, "encourages agencies to write

ambiguous regulations and interpret them later," which "defeats the purpose of delegation, undermines the rule of law, and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." *Id.* at 49a (quoting Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551-52 (2003)).

SUMMARY OF ARGUMENT

"Questions of . . . *Auer* deference arise as a matter of course on a regular basis." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring). That is not a good thing. Judging from how often courts reject an agency's bid for deference—for many agencies the rejection rate is above thirty percent—*Auer* disputes arise with such frequency because agencies regularly try the limits of their authority. Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 830-31 (2015) (cataloguing agencies' *Auer* success rates).

"Common concerns about *Auer* [deference]," one defender of *Auer* contends, "have not materialized in practice." Cynthia Barmore, *An Empirical Analysis of Auer Deference in the Courts of Appeals*, 36 Yale J. on Reg.: Notice & Comment, https://perma.cc/G6WG-C863 (Sep. 13, 2016). This, however, is incorrect. All too often, an agency seeks to exploit any source of power at hand. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) ("The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its

attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.").

This brief offers concrete examples of agencies' efforts aggressively to expand, or abruptly to alter, the import of their regulations. Agencies suddenly and radically change how they interpret rules—and then seek deference for those new interpretations. Agencies seek deference for their interpretations of rules unconnected with their areas of expertise. Agencies try to stretch the meaning of rules beyond the scope even of the statutes that give agencies the power to regulate in the first place. Under the guise of rule "interpretation," agencies dodge notice-and-comment procedures, defy democratic norms, and undermine the very notion of equal justice under law.

When these abuses are challenged in court, *Auer* deference is not always the central issue. Sometimes the agency argues that its action is not even subject to judicial review. Sometimes the court concludes that the agency improperly used "interpretation" as a vehicle to create a whole new rule. What is clear, however, is that agencies try to expand their dominion at almost every turn, and that *Auer* emboldens them in their wanton arrogations of power.

Auer surely generates both costs and benefits. Sadly, however, a major cost—indeed, a ruinous cost—arises from its constant abuse. Agencies use *Auer* as cover for highhanded, unpredictable, and nakedly political behavior. *Auer*, therefore, should go.

ARGUMENT

AUER ENCOURAGES AN AGENCY TO TEST THE BOUNDARIES OF ITS POWER; TO GRAB AUTHORITY OUTSIDE ITS AREA OF EXPERTISE; TO SHIFT POSITIONS UNPREDICTABLY; TO BYPASS NOTICE-AND-COMMENT RULEMAKING; TO SPURN DEMOCRATIC LEGITIMACY; AND TO HARASS DISFAVORED GROUPS.

What follows is by no means an exhaustive review of *Auer*-fueled agency mischief. The examples below have been selected (1) to capture the conduct of a variety of distinct agencies and (2) to illustrate several distinct problems that *Auer* creates, promotes, or exacerbates.

A. The Board of Immigration Appeals.

The government frequently invokes *Auer* when defending a decision of the Board of Immigration Appeals (BIA); yet the courts reject almost forty percent of the government's interpretations of its own immigration rules. Barmore, supra, 76 Ohio St. L.J. at 830-31. This failure rate suggests that the government often uses *Auer* to defend shifting, extreme, or untenable readings of immigration regulations.

An arresting example of such *Auer* abuse appears in *Zhou Hua Zhu v. U.S. Attorney General*, 703 F.3d 1303 (11th Cir. 2013). An immigrant from China, Zhu, fathered three children while in the United States. During his removal proceeding, he contended that he would, if sent back to China, be

forcibly sterilized for violating China's one-child policy. The immigration judge (IJ) granted Zhu's application for asylum. The BIA reversed, however, in an opinion that reviewed *de novo* the IJ's findings of fact on the likelihood that China would forcibly sterilize Zhu.

The BIA's standards of review are set forth in a regulation, 8 C.F.R. § 1003.1(d)(3). The regulation states that "the Board will not engage in *de novo* review of findings of fact," and that it shall review such findings only for clear error. *Id.* The government sought *Auer* deference for the BIA's conclusion that, § 1003.1(d)(3) notwithstanding, the BIA may independently weigh evidence about the likelihood of a future event. 703 F.3d at 1308.

In issuing § 1003.1(d)(3), the Department of Justice intended to adopt the federal courts' standard of review for findings of fact. 703 F.3d at 1309-10. Yet, as *Zhu* observes, the BIA's use of *de novo* review for "future" facts "fl[ew] in the face of centuries of common-law adjudication." *Id.* at 1310. *Zhu* reviews a "wide variety of contexts" in which courts treat a prediction as a finding of fact. *Id.* at 1310-11. *Zhu* then joins four other circuits in rejecting the BIA's attempts to review findings about future events *de novo*. *Id.* at 1312-14.

Auer stands in large part on the notion that a court should defer to an agency's expertise. As *Zhu* illustrates, however, the government is not averse to using *Auer* merely to rationalize its defense of a patently unreasonable position.

B. The Department of Labor.

Some agencies struggle to interpret their regulations consistently and coherently. The Department of Labor (DoL) is a prime offender.

Consider *Christopher*, 567 U.S. 142. The Fair Labor Standards Act (FLSA)—that is, the federal wage-and-hour law—exempts from its ambit a worker "employed . . . in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). The FLSA defines a "sale" to include any "exchange" or "other disposition." *Id.* at § 203(k). In the 1930s and 1940s the DoL issued regulations that incorporated the "outside salesman" exemption.

In the late 2000s enterprising plaintiffs' attorneys began suing drug manufacturers, on behalf of pharmaceutical sales representatives, for unpaid wages under the FLSA. They argued that, because sales reps do not literally sell pharmaceuticals—they merely convince doctors to agree to prescribe them—they fall outside the "outside salesman" exemption. The DoL "had acquiesced in the sales practices of the drug industry for over seventy years," 567 U.S. at 153; but in 2009, in "an uninvited *amicus* brief" filed in an appeal, *id.* at 152, it declared that the FLSA governs pharmaceutical sales reps. It sought, in effect, to expose the pharmaceutical companies to "potentially massive liability" for "conduct that occurred well before" its "interpretation was announced." *Id.* at 156.

The DoL did not offer a consistent explanation for its new position. In the courts of appeals, it

argued that a "sale" requires a "consummated transaction." *Id.* at 154. But, apparently realizing that pharmaceutical sales reps' work satisfies this definition, it argued before this Court, in *Christopher*, that a "sale" requires a transfer of property. *Id.* This (new) new reading, however, was "flatly inconsistent" with the definition of "sale" in the FLSA itself (recall that definition's use of the term "other disposition"). *Id.* at 159. Still, the DoL sought *Auer* deference for its position. *Id.* at 154-55. Concluding that the DoL had "unfair[ly] surprised" its regulated entities, the Court declined to go along. *Id.* at 156.

The DoL's shifting approaches often bear no connection to its area of expertise. The DoL fails, in other words, to tie its about-faces "to any institutional knowledge of labor markets possessed by the Department's staff." *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012). Its "oscillation[s]" appear to arise, rather, from raw "politics." *Id.* The courts of appeals have (not surprisingly) "come together in spurning" the DoL's "gyrating agency letters." *Id.*; see also *id.* ("All that the [Obama] Department has contributed to our deliberations . . . is letting us know that it disagrees with the position taken by the Bush Department").

Again, *Auer* stands in part on the premise that agencies can apply specialized knowledge. But the DoL frequently fails to display, or use, such knowledge. See, e.g., *Indep. Training & Apprenticeship Prog. v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1034 (9th Cir. 2013) ("[T]he DOL's new interpretation is nearly as

difficult to decipher as the underlying regulation it seeks to interpret.").

C. The Environmental Protection Agency.

An agency is allowed to issue an "interpretive" rule—as opposed to a more substantive "legislative" rule—without conducting notice-and-comment procedures. 5 U.S.C. § 553(b). "But this concession to agencies was meant to be more modest in its effects than it is today." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring). Thanks to *Auer*, "agencies may now use [interpretive] rules not just to advise the public, but also to bind them." *Id.* at 1212.

The inquiry into whether an agency rule is "legislative" or "interpretive" is "quite difficult and confused." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). If maintaining democratic legitimacy were one of its principal aims, an agency would, when in doubt, conduct notice and comment. But *Auer* encourages an agency simply to proceed by diktat through a memorandum or guidance letter. An agency can argue that it is not making a new rule, but merely exercising its wide discretion to "interpret" an old one. The vaguer the regulation, of course, the more room the agency has for such "interpretation."

Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000), illustrates the point. Under the Clean Air Act, a company must obtain a permit to operate a stationary source of air pollution. The permitting process has been assigned to the States. Congress directed the EPA, however, to issue

regulations setting the minimum requirements of each State's process. The EPA issued these regulations in 1992. The regulations directed the States to ensure that each permit requires periodic monitoring of a stationary source's emissions. If a background state or federal rule already required such monitoring, incorporating that rule into the permit constituted compliance with the 1992 regulations. In 1998, however, the EPA issued a memorandum entitled "Periodic Monitoring Guidance." The memorandum ordered each State, before granting a permit, to assess whether monitoring was needed *in addition* to the monitoring required by an extant state or federal rule.

The EPA's "guidance" memorandum drastically expanded the scope of the regulations it purported to "interpret." "Nothing" in the underlying regulations, the D.C. Circuit observed, "said anything about giving State authorities a roving commission" to supplement "State and federal [monitoring] standards." 208 F.3d at 1026. The EPA had promised, moreover, in its 1992 rulemaking, that "if federal standards were found to be inadequate in terms of monitoring," it "would open [new] rulemaking proceedings." *Id.* In issuing the "guidance" memorandum, the court noted, the EPA had broken its promise. *Id.* The EPA's "guidance" memorandum was in fact a whole new rule, one the EPA had tried to issue without going through notice and comment. The court therefore set it aside. *Id.* at 1028.

Although it does not itself discuss *Auer*, *Appalachian Power* contains an incisive description of the process that *Auer* facilitates:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

208 F.3d at 1020. Skip the notice and comment, *Auer* suggests. Just issue a memo. A court might accept it as an "interpretation" owed deference.

Auer invites an agency to explore the frontiers of notice-and-comment-free "interpretive" rulemaking.

D. The Department of Education.

Auer also entices administrators to view themselves, not as trustees of authority delegated by Congress, but as philosopher kings empowered to govern as they see fit.

Take, for example, how the Department of Education (DoE) has applied Title IX. In 1972 Congress passed, and President Nixon signed, a law declaring that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681. The idea was to stop schools from applying gender quotas or excluding girls from advanced classes, after-school clubs, and the like. See Karen Blumenthal, *The Truth About Title IX*, The Daily Beast, https://perma.cc/MV6K-RQJB (June 22, 2012).

Reading the law expansively, however, the DoE has claimed for itself the power to regulate student-on-student behavior, to impose detailed codes of conduct, and to lower the burden of proof in schools' grievance hearings. See, e.g., Letter from U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, to Royce Engstrom and Lucy France, University of Montana, https://perma.cc/RU9Z-GPHJ (May 9, 2013); U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, https://perma.cc/Z99C-28TB (Apr. 4, 2011); U.S. Department of Education, *Sexual Harassment: It's Not Academic*, https://perma.cc/UG7A-RJCU (Sept. 2008).

In 2015 the DoE went a step farther, ordering schools to allow students to use the bathroom that matches their gender identity. In 1975, however, the DoE's predecessor had issued an implementing regulation governing bathrooms. A school, this

regulation says, "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Several schools argued that this regulation permits them to allocate bathroom access based solely on biological sex.

It is fanciful to suppose that in the 1970s, when Title IX was passed and the implementing regulation was issued, "sex," as used in this context, meant anything other than "biological sex." See *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting), vacated, 137 S. Ct. 1239 (2017). Still, the DoE sought *Auer* deference for its conclusion that "sex," as used in the 1975 regulation, includes gender identity. In the courts this argument yielded mixed results. Compare *G.G.*, 822 F.3d 709 (upholding the DoE's interpretation, even though it is "perhaps not the intuitive one"), with *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (rejecting the DoE's interpretation, because "it cannot be disputed that the plain meaning of the term sex," at the time of the regulation's passage, was "the biological and anatomical differences between male and female . . . as determined . . . at birth"). Clearly, though, the government's position was untenable without *Auer* deference.

The point is not that a given code of conduct, a given burden of proof, or a given bathroom policy is bad. The point, rather, is that *Auer* has helped an agency push, at every opportunity, to expand its authority. It is for the people's representatives in Congress, not unelected civil servants, to resolve

major policy disputes. Under *Auer*, however, a citizen "can perhaps be excused for thinking that it is the agency really doing the legislating." *Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

It bears noting that in 2017 the DoE rescinded its bathroom guidance. Its decrees defining "sex" to include "gender identity" did not, it wrote, "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX"; nor, it conceded, "did they undergo any formal public process." U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, https://perma.cc/2LW7-RQ26 (Feb. 22, 2017). So the DoE's policy on school bathrooms is an instance of *Auer*-enabled vacillation to boot.

E. The Federal Trade Commission.

A petition for certiorari pending before the Court, *Soundboard Association v. FTC*, Case No. 18-722 (U.S.), provides another vivid example of the sort of regulatory whiplash that can occur under *Auer*.

Congress directed the Federal Trade Commission (FTC) to issue rules for the telemarketing industry. "The Commission," it said, "shall prescribe rules prohibiting deceptive . . . or . . . abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1). Exercising its delegated authority, the FTC issued the Telemarketing Sales Rule (TSR), which, among other things, bans telemarketing calls

at odd hours. In 2008 the FTC added to the TSR some rules governing robocalls. The new rules ban most "outbound telephone call[s]" that deliver "a prerecorded message" without the recipient's written consent. 16 C.F.R. § 310.4(b)(1)(v).

"Soundboard" technology enables a telemarketer to interact with a call recipient using prerecorded clips. The telemarketer can play scripted questions and responses; but she can also enter the call and speak for herself. A telemarketing company asked the FTC whether its use of soundboard technology violated the 2008 TSR amendments. The FTC responded, in a 2009 staff opinion letter, that the amendments "do not prohibit" soundboard-assisted calls.

Over the next few years the FTC received complaints that companies were abusing soundboard technology by, for example, having telemarketers use the technology to conduct many calls at once. Rather than ban the specific abuses, however, the FTC in 2016 issued a staff opinion letter that rescinded the 2009 letter. The new letter declares that soundboard technology falls within the "plain language" of the robocall ban.

A trade group sued to enjoin enforcement of the 2016 letter. The group argued, among other things, that the letter announces a legislative rule that should have been put through notice and comment. The district court rejected this argument. The D.C. Circuit declined to reach it; it concluded that the 2016 letter—which, like most such letters, emphatically asserts a position but disclaims any binding effect—is not a final agency action subject to

review. As Judge Millett noted in dissent, however, the letter "speaks in final, conduct-altering, and compliance-demanding terms." *Soundboard Assoc. v. FTC*, 888 F.3d 1261, 1280 (D.C. Cir. 2018) (Millett, J., dissenting). The letter "leaves the soundboard industry whipsawed between abandoning its business and facing potentially ruinous enforcement actions and penalties." *Id.* at 1284.

"Businesspeople crave certainty as much as almost anything: certainty allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). Issue a reliable, stable rule and, even if it is not the rule a company would have wanted, the company will adjust. Had the FTC in 2009 interpreted its regulation to ban soundboard technology, telemarketing companies would no doubt have made do. Instead the FTC invited those companies to invest in soundboard technology, then pulled the rug from under them seven years later. The FTC could provide shifting readings of its rule, knowing that even an unreliable interpretation often enjoys *Auer* deference.

Auer invites an agency cavalierly to change the meaning of its regulations. It gives an agency the space to rotate its position 180 degrees—to "condemn[] as illegal an entire business model," 888 F.3d at 1284 (Millett, J.)—in a mere staff opinion letter.

It is no accident, moreover, that the parties in the examples we have seen include pharmaceutical companies, pollutant emitters, and telemarketers. It is when dealing with unpopular groups that an

empowered regulator will feel least obliged to act consistently and with restraint. "The pride of our legal system is its evenhandedness and fairness to all who come before it." *Id.* at 1285 (Millett, J.). The fact that *Auer* assists agencies in singling out disfavored groups for special (poor) treatment is yet another strike against it.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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