No. 18-15

IN THE
Supreme Court of the United States

JAMES L. KISOR,
Petitioner,
v.
ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE* AND INTRODUCTION

Amici Curiae are a group of unrelated business associations whose members are regularly affected by the doctrine of *Auer* deference.[1] They are listed below.

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioner's letter of consent to this brief and respondent's letter of blanket consent are both on file with Clerk.

Each *amicus* dedicates its resources to facilitating the work and livelihoods of its members—both individuals and companies—and enhancing those members' abilities to serve the public throughout the United States. Federal agencies—often more than one—pervasively regulate *amici*'s members, who repeatedly have experienced the consequences of those agencies' resort to the *Auer* doctrine. *Auer* occasionally allows welcome regulatory flexibility. But in the main, when agencies reinterpret their own regulations in a manner that fundamentally changes settled understandings, it denies the regulated public, like *amici*'s members, the certainty and predictability that they need to order their affairs.

Amici therefore have a substantial interest in this case and respectfully urge the Court to overrule or significantly narrow *Auer*. Doing so will better ensure that agencies regulate only in a clear, fair, and lawful manner consistent with the basic promises of the rule of law—and that courts do not defer to agencies when deference is not due. *Amici* include the following organizations.

1. The **National Association of Home Builders** (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80% of all new homes built in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard

the constitutional and statutory rights and economic interests of its members and those similarly situated.

2. The **American Farm Bureau Federation** (AFBF), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to represent its members.

3. The **National Association of Manufacturers** (NAM), based in Washington, D.C., is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

4. The **National Cattlemen's Beef Association** (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's food supply. NCBA works to advance the economic, po-

litical, and social interests of the U.S. cattle business and to advocate for the cattle industry's policy positions and economic interests.

5. The **National Mining Association** (NMA), based in Washington, D.C., is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing machinery, equipment, and supplies; and engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA often participates in litigation raising issues of concern to the mining community.

6. The **National Federation of Independent Business** (NFIB), based in Nashville, Tennessee, is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files *amicus curiae* briefs in cases that threaten to harm small businesses.

7. The **American Fuel & Petrochemical Manufacturers** (AFPM) is a national trade association whose members comprise virtually all United States refining and petrochemical manufacturing capacity. AFPM's members supply customers with a wide variety of products that Americans use daily in their homes and businesses. AFPM members help meet the nation's fuel and petrochemical needs, strengthen economic and national security, and support nearly three million American jobs. AFPM regularly engages in legal advocacy on issues that affect its members.

* * *

Amici echo petitioner's arguments that the Court should definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing the doctrine. As concrete examples of *Auer*'s seen and unseen harms illustrate, *Auer* is an unnecessarily harmful impediment to businesses and individuals who must rely on the language agencies choose in their rules, trusting that the rule really does mean what it says. Reining in *Auer* would ensure clearer rulemakings and create a fairer regulatory environment, to the great benefit of *amici* and their vast memberships.

SUMMARY OF ARGUMENT

The problems with the *Auer* doctrine transcend the constitutional and other legal deficiencies with which the Court is familiar, and which alone would justify overruling the case. *Amici* focus on the concrete, real-world consequences that are largely hidden from view. The way that *Auer* affects Americans in practice should remove any doubt that the Court should repudiate *Auer*.

When an agency invokes *Auer*—by name or just by deed—it claims the power to interpret the words of its own vague or ambiguous regulations, regardless of prior positions or the public's prior understanding and reliance. Casual reliance on *Auer* in the courts has a massive effect on the law, often determining enormous stakes for individuals and organizations in a variety of contexts. *Auer*'s reach spans criminal liability, costly compliance programs, civil rights, a lawful immigrant's right to remain in the United States, or, in this case, a Vietnam veteran's receipt of benefits—and countless other areas of the law.

Auer's broad sway is most stifling during routine interactions between the regulated community and federal agencies. Someone facing an agency's questionable interpretation of a regulation that the agency deems "am-

biguous" knows (or soon will learn) that *Auer* is always lurking. Given the degree of deference courts afford under *Auer*, such a person often sees little choice but to capitulate. Thus, *Auer*'s greatest force lies not in judicial decisions, but in the instances where a person does not even turn to the courts for relief.

Whether seen or hidden, the injuries *Auer* inflicts on individuals and businesses are real and significant. The Court should abandon this doctrine, which would encourage agencies to be clearer in drafting regulations and allow courts to play their proper role in interpreting the regulatory burdens imposed on the public.

ARGUMENT

Only the foolish would choose to build their house upon the sand.[2] *Auer*, however, strips that choice away from individuals and businesses by replacing the bedrock of legitimate judicial scrutiny with the mire of presumptive deference. With little or no notice, *Auer* allows agencies to drastically transform the regulatory foundation on which individuals and businesses have built their lives and livelihoods, and to do so with impunity.[3]

Under the *Auer* doctrine, the Court defers to an agency's interpretation of its own regulations, unless that interpretation is plainly erroneous or flatly inconsistent with a regulation's text. *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). An agency's interpretation of its ambiguous regulation is thus all but predestined to prevail, even when it is not obvious, practical, or otherwise legally sound, and even when it contradicts previous judicial decisions and agency guidance. The regulated community, therefore, lacks safe ground from the costly in-

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[2] See Matthew 7:24-27.

[3] Unless otherwise indicated, *amici* use "*Auer*" to refer to the current state of interpretive deference.

stability that *Auer* engenders. The examples described below, in many of which *amici* here participated, document the inequitable and unsustainable conditions that *Auer* fosters. The Court can rectify this problem by overruling or significantly narrowing *Auer*.

I. Past Judicial Decisions Show How *Auer* Unfairly And Significantly Harms Businesses And Individuals

Businesses cannot avoid uncertainty flowing from market forces, third-party actions, and other variables. But *Auer* adds an additional, unjustifiable, and especially problematic form of uncertainty. Because it allows federal agencies to alter prior regulatory interpretations without public notice or comment (and also to retroactively enforce the resulting novel positions), *Auer* can destabilize sound business decisions, creating risk that even hiring "an army of perfumed lawyers" cannot eliminate. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). As aptly stated by the late Justice Scalia, the very author of *Auer* who came to see its flaws: "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part).

A. *Auer* promotes judicial abdication that can have crippling economic consequences

The *Auer* doctrine unjustifiably bestows the power to both make and interpret the law on a single entity—the same agency that then *enforces* that law, thus concentrating all three branches' powers in a single point. As Justice Scalia put it, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning * * * . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J.,

concurring) (internal citations omitted).[4] This bestowal of power invades what has for over two centuries been "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).

By merging these powers, *Auer* can result in outcomes that impose serious economic harms on regulated entities, if not at an agency's whim, at least without an agency's careful or transparent analysis. After all, the supposed careful analysis—often after notice and comment—presumably is what generated the ambiguous regulation that requires further clarification. But the premise of ambiguity is itself often questionable. As in the *Chevron* context, with *Auer* a judge's "simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like." See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016). *Auer* deference, in other words, often flows not from natural or even reasonable interpretations, but instead from the judiciary first finding some iota of ambiguity and then yielding to any somewhat-plausible interpretation by the rules' own drafters.

The extreme deference afforded by the courts under *Auer* is all too often cost-prohibitive for the individuals and businesses who would challenge an agency's questionable interpretation. Many cases illustrate this point,

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[4] See also, *e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J.) (quoting Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("[F]oxes should not guard henhouses * * * . Those limited by a provision should not determine the nature of the limitation.").

including *Eisai, Inc.* v. *FDA*, 134 F. Supp. 3d 384 (D.D.C. 2015). The loss of potentially hundreds of millions of dollars that would come from exclusive rights over a pharmaceutical turned on the court's conclusion that strong arguments were "insufficient to compel the Court to cast aside the high level of deference that *Auer*" requires, which it felt "bound to follow * * * until the Supreme Court modifies the relevant standard." *Id.* at 394 n.2, 395. Because the court detected a modicum of regulatory ambiguity, *id.* at 394, it understood *Auer* to require disregarding arguments that the court itself credited as "substantial," "not without merit," and otherwise probative, *id.* at 395-397.

Incredibly, courts have even invoked *Auer* without identifying the ambiguous regulatory terms. For example, in *Western Massachusetts Electric Company* v. *FERC*, 165 F.3d 922 (D.C. Cir. 1999), the court allowed FERC to splice missing words into a regulation without first identifying ambiguity, frustrating a series of multi-million-dollar interconnection agreements. Sophisticated industry members (who had retained counsel) interpreted federal rules to require the agreements be submitted to state authorities, rather than FERC. *Id.* at 926. But FERC "believed" otherwise, asserted jurisdiction, and demanded that costs for the project be allocated differently than negotiated. *Ibid.* Relying on *Auer*, the court surrendered its interpretive role to FERC.

As *Eisai* and *Western Massachusetts* illustrate, *Auer* can lead courts to suspend meaningful scrutiny of agency action even when regulated individuals and businesses have the better arguments *and* will suffer great losses because of the new agency "interpretation" of its own regulation. *Auer* can also lead to a more extreme form of judicial abdication, where deference to an agency's inter-

pretation of its regulation is essentially a foregone conclusion.

For example, in *Cape Hatteras*, a district court applied *Auer* and upheld the U.S. Fish and Wildlife Service's designation of 126 linear miles of shoreline in North Carolina as critical habitat for wintering piping plovers over challenges filed by two North Carolina counties. *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115-116 (D.D.C. 2004).[5] The coastal counties, which depended on the combined annual revenue of $386 million from tourism, sued the Service to preclude the possibility of beach closures, expensive and time-consuming consultation under the Endangered Species Act, and adverse impacts on land use and recreational and commercial uses of the designated areas. *Id.* at 116.

Plaintiffs contended that the Service's adoption of mean lower water lines and vegetation lines as boundaries violated the agency's regulations prohibiting the use of "[e]phemeral reference points" (*e.g.*, trees and sand bars) to define critical habitat for the plovers. *Id.* at 125-126. The Service argued that the lines were not ephemeral because "though they may shift over time, they will always exist." *Id.* at 126. Deeming "ephemeral" to be ambiguous, the district court invoked *Auer* and ruled in favor of the agency within the span of a single paragraph.[6]

High-stakes cases like these are not uncommon. As Chief Justice Roberts explained, "[q]uestions of *Semi-*

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[5] Piping plovers spend 10 months each year on migratory routes and wintering grounds. *Cape Hatteras*, 344 F. Supp. 2d at 115.

[6] See also *Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010) (deferring to the Service's interpretation of "specific area" under *Auer* to allow a designation of a half-million acres as critical habitat for vernal pool crustaceans).

nole Rock and *Auer* deference arise as a matter of course on a regular basis." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring). This includes, of course, not just blockbuster cases, but also "smaller" ones that affect individual livelihoods. For instance, the real-world implications of agency interpretations involving critical-habitat designations can be severe for cattlemen, who are forced to fence off rivers—at great personal expense and inconvenience—to prevent livestock from wading into critical habitats. See *N.M. Cattle Growers Ass'n* v. *U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 n.3 (10th Cir. 2001) ("Due to the fencing, [a rancher] has been forced to reduce the size of his herd * * * [and] the fencing limits his access to river water which causes his significant inconvenience and financial harm." (internal quotation marks and citation omitted)). Similarly, home builders working in critical habitats are often required to set aside large percentages of their property to protect species—property that could otherwise be developed into useable home lots.

In *Mittelstadt* v. *Perdue*, a farmer acquired land in 1988 that was subject to a contract with the U.S. Department of Agriculture (USDA) under the Conservation Reserve Program (CRP), in which the farmer agreed to remove environmentally sensitive land from agricultural production in return for annual rental payments. No. 17-2447, 2019 WL 191045, at *1 (7th Cir. Jan. 15, 2019). Based on his farmland being designated as pine with "mixed hardwood," the farmer obtained a new CRP contract from 1998 to 2007. In 2007, however, the Farm Services Agency terminated the farmer's contract, finding that his property was ineligible based on an internal re-interpretation of the definition of "mixed hardwoods" (there was never a published definition of the term). *Ibid.* The Seventh Circuit recently affirmed this inter-

pretation based on the agency's "great discretion" to "tighten" the definition, citing a Seventh Circuit case applying *Seminole Rock* deference. *Id.* at *6 n.31 (citing *Paragon Health Network, Inc.* v. *Thompson*, 251 F.3d 1141, 1147 (7th Cir. 2001)).

The reluctance of judges to closely scrutinize agency interpretations due to *Auer*, perhaps for fear of reversal, has led to certainty of only one kind: a determined agency can likely get away with what it wants. Indeed, cases rejecting claims of *Auer* deference are blue-moon cases at best, signaling to the regulated public that there is not much to be gained by trying.

B. *Auer* nudges courts to acquiesce in agency actions that disrupt legitimate reliance interests

Another problem is that *Auer* lends itself to agency practices that undermine due-process principles by causing "unfair surprise" or otherwise "seriously undermin[ing] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted).

Perhaps one of the most detrimental examples of *Auer* frustrating legitimate reliance interests occurs when a deferring court overrules *its own precedent* that interpreted a straight-forward regulation. The Seventh Circuit did that in *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001). In *Whetsel*, an employee alleged that her employer was violating the Fair Labor Standards Act (FLSA) by maintaining a practice of impermissible pay deductions. The employer admitted to "isolated occasions" of deductions but claimed it was not liable because it had completed corrective measures within the "window of correction" under 29 C.F.R. § 541.118(a)(6). *Id.* at 899-900. The district court granted

summary judgment for the employer based on what most businesses would regard as a safe zone: a binding Seventh Circuit decision. *Id.* at 900. But on appeal, the Secretary of Labor filed an *amicus* brief offering an interpretation of its regulation conflicting with the Seventh Circuit's previous interpretation. That court found little more than a "modicum of support" for the Secretary's "strained" interpretation—yet quickly fell in line with *Auer* and overruled its own recent opinion. *Id.* at 902-904; but see *Moore* v. *Hannon Food Serv., Inc.*, 317 F.3d 489, 496 (5th Cir. 2003) (declining to extend *Auer* deference to the Secretary's interpretation "because § 541.118(a)(6) is unambiguous").

Another example of *Auer* causing unfair surprise is *Secretary of Labor* v. *Beverly Healthcare-Hill-View*, 541 F.3d 193 (3d Cir. 2008). In *Beverly*, the Occupational Safety and Health Administration (OSHA) cited a nursing home for failing to compensate certain employees for travel expenses and non-work time spent receiving medical treatment. An OSHA regulation required employers to ensure medical evaluations and procedures were provided to qualifying employees "at no cost." *Id.* at 195. The nursing home appealed the citations, and the Occupational Safety and Health Review Commission (the Commission) vacated them, determining that regardless of whether OSHA's interpretation of its ambiguous regulatory language "at no cost" was acceptable, the nursing home lacked fair notice because recent compliance directives were "studiously vague" and an existing guidance letter was "at odds" with OSHA's opinion letter. *Id.* at 201. On appeal—even after the Commission found its sister agency's action to be inadequate—the Third Circuit *reversed*, citing *Auer* and holding that the nursing home had fair notice from "the combination of" OSHA's opinion letter and an extra-circuit decision construing the word

"cost" under a comparable regulation. *Id.* at 205.

Recognizing this problem, the Court has attempted to pare back the *Auer* doctrine in certain circumstances by clarifying that it should not apply when an interpretation "conflicts with a prior interpretation," or is merely a "convenient litigating position" or a "*post hoc* rationalization * * * to defend past agency action against attack." *SmithKline*, 567 U.S. at 155 (internal quotation marks and citations omitted). In *SmithKline*, for example, this Court refused to afford *Auer* deference to a U.S. Department of Labor (DOL) interpretation of its regulations that would "impose potentially massive liability * * * for conduct that occurred well before that interpretation was announced." *Id.* at 155-156.

Nevertheless, lower courts have struggled to apply the lessons of *SmithKline* and have continued to read *Auer* as allowing agencies to shift interpretations with little notice; *post hoc* rationalizations to defend agency conduct to the detriment of individuals and businesses of all sizes have not diminished. For instance, the Eighth Circuit upheld USDA's interpretation of its regulations classifying a 0.8-acre portion of Arlen and Cindy Foster's farmland as wetlands, which significantly threatened the Fosters' livelihood.[7] To determine the land's status, 7 C.F.R. § 12.31(b)(2)(ii) required USDA to compare it with another site "in the local area," but USDA chose a tract over 30 miles away. The Fosters argued that "local area" meant adjacent or in close proximity, but the district court deferred to agency staff's *post hoc* testimony interpreting "local area" to mean anywhere within the *10,835 square-mile* major land resource area (larger than Massachu-

[7] Persons determined to have manipulated wetlands into a "converted wetland" may be ineligible to receive farm-program payments. *Clark* v. *U.S. Dep't. of Agric.*, 537 F.3d 934, 935 (8th Cir. 2008).

setts) in which the Fosters' farm was located. See *Foster* v. *Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *11 (D.S.D. Oct. 31, 2014). The Eighth Circuit affirmed the district court's decision. See *Foster* v. *Vilsack*, 820 F.3d 330, 332-333, 335 (8th Cir. 2016).

Just one year after *SmithKline*, the Ninth Circuit allowed a FLSA class-action suit to proceed against a family farm for conduct that DOL found acceptable just one year earlier. *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013). For decades, employers were not required to reimburse temporary guest workers for travel expenses until after their work was completed. In 2009, under a new administration, the Department issued contrary guidance that required employers to reimburse workers hired for the H-2B Program within the first week of work. DOL, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA 1 (2009). When Peri & Sons, relying on well-established industry practice, failed to pay their workers within the first week, they became the subject of a class action.

At the Ninth Circuit, DOL filed an *amicus* brief arguing that Peri & Sons was liable under the agency's new interpretation, even for expenses incurred *before* issuance of the 2009 guidance. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365), EFC 13. The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant * * * ." *Id.* at 25. Rather than applying an impartial interpretation of the DOL regulation, the Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. After this Court denied Peri & Sons' petition for a writ of certiorari, the company settled

the class action for $2.8 million. *Rivera* v. *Peri & Sons Farms, Inc.*, No. 3:11-cv-00118-RCJ-VPC (D. Nev. Dec. 15, 2015), EFC 182 ([Proposed] Order Granting Final Approval of Class and Collective Action Settlement).

As these examples illustrate, it is unclear where the regulated community can turn for safety with the *Auer* doctrine entrenched in the judicial system. Even where ostensibly dispositive past practices, agency guidance, *and* binding judicial precedent exist, just the executive branch's whisper of "*Auer*" can make it all disintegrate.

C. By saving flawed agency interpretations, *Auer* fosters the writing of unclear rules

Yet another problem with the *Auer* doctrine is that it creates perverse incentives:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Talk Am., 564 U.S. at 69 (Scalia, J., concurring). In a prior dissent (joined by Justices Stevens, O'Connor, and Ginsburg), Justice Thomas highlighted this problem with respect to regulations promulgated by the Department of Health and Human Services:

> [T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking

> process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (5-4) (Thomas, J., dissenting). What agency wouldn't prefer the guarantee of flexibility tomorrow that flows from inserting ambiguity today?

Identifying actual instances where an agency purposefully injects ambiguity into a regulation is difficult—no sensible agency would openly admit it at the time. Yet evidence shows that agencies *have* promulgated and exploited ambiguous regulations with the purpose of expanding their jurisdiction and with the practical effect of imposing additional costs and burdens on the individuals and businesses that they regulate. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends"). The U.S. Army Corps of Engineers (Corps), too, has a history of adopting and interpreting ambiguous regulations to expand Corps jurisdiction when not bound by the rigors of notice-and-comment. See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

The Corps' case-by-case interpretations of its intentionally ambiguous regulations harm individuals and businesses and, when challenged, are upheld under *Auer*. The Fourth Circuit, for example, relied on *Auer* to affirm a district court's remediation order requiring homeowners who violated the Clean Water Act (CWA) to fill in a drainage ditch that they had dug on their property and to restore it to pre-violation conditions. *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003). Why had

they dug the ditch? To obtain a sewage-disposal permit for the construction of a residential subdivision, which had previously been denied *because of* the "poorly drained" condition of their property. *Id.* at 702. When the homeowners deposited the excavated dirt alongside the ditch in regulated wetlands on their property, the government sued them for failing to obtain a permit to discharge fill materials into "navigable waters" under Section 404(a) of the CWA. *Id.* at 702, 704.

The decision centered on a broad reading of "tributary." The Corps deemed the roadside ditch a "tributary" of the Wicomico River and claimed jurisdiction because the homeowners' wetlands drained into the ditch and eventually flowed into the Wicomico River and Chesapeake Bay. *Id.* at 708. The homeowners, on the other hand, contended that the term "tributary" in the regulation could not fairly encompass all branches of a system, but only those that empty "directly into a navigable waterway." *Id.* at 710. Although the court acknowledged that the regulation in question was ambiguous due to multiple possible interpretations of "tributary," it did not determine what the best or most rational reading of the regulation was. Instead, it cited *Auer* and held that "tributary" "means what the Corps says it means." *Id.* at 709, 711.[8]

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[8] As a further example of how *Auer* leads to capricious outcomes, in November 2016, two Corps districts completed jurisdictional determinations related to two agricultural operations—one in New York, another in Illinois. Both farms have isolated waterbodies and wetlands approximately one mile from the nearest traditional navigable water. The Buffalo District found no significant nexus, and thus no jurisdiction, whereas the Chicago District found a significant nexus. See Van Noble Farms Jurisdictional Determination, available at https://www.lrb.usace.army.mil/Portals/45/docs/regulatory/JDForms/2016-11-Nov/JD-LRB-2016-01169NY.pdf?ver=2016-11-22-101257-237;

Despite concrete examples like those above, a recent article claims that no empirical evidence supports—and "some evidence" refutes—the "perverse incentives" critique of the *Auer* doctrine.[9] Using a computer program to complete a vagueness analysis of numerous economically significant rules adopted between 1982 and 2016, this article concludes that there has not been a post-*Auer* increase in the "vagueness" of regulations. Of course, assigning parameters for vagueness is inherently problematic; "virtually any phrase can be rendered ambiguous if a judge tries hard enough." Kavanaugh, *supra*, 129 Harv. L. Rev. at 2139 n.106 (quotation marks and citation omitted). This conclusion hardly undermines the perverse-incentives critique, particularly when agencies are incentivized to *find* ambiguities in the regulations they have drafted.

Past judicial decisions and scholarly articles show that these incentives are real, remain, and have concrete impacts.[10] There is also evidence that agency drafters "ag-

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Kohley Farm Jurisdictional Determination, available at https://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2016/LRC-2016-833jd.pdf.

[9] Daniel Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 85, 142 (2019).

[10] Judges and scholars have expressed serious doubt as to the wisdom and fairness of rewarding the drafting of ambiguous regulations. See, *e.g.*, *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari); *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., joined by Alito, J., concurring); John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996) (asserting that "doubts about Seminole Rock are well founded, and that the Court should replace Seminole Rock with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning").

gressively" interpret regulations when they know deference doctrines apply. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1419-20 (2017) (noting, unsurprisingly, that a majority of rule drafters responded that "a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies"). There is no reason to think drafters would not be similarly, or more, aggressive when *Auer* applies.

Ultimately, *Auer*'s effects cannot be assessed by assigning a numeric value to a regulation's "vagueness" because (1) even a small ambiguity can have disastrous results for those on the wrong side of the agency's reading, (2) deferring to the interpretation of whoever currently holds power means the ambiguity is never actually resolved, and (3) many hidden harms cannot be empirically measured. *Auer* forces courts to condone questionable regulatory interpretations to the benefit of agencies and to the detriment of the regulated community. It also threatens to inject politics into what should be an apolitical decision: what the text means. This judicial affirmation also fosters the writing of unclear regulations, regardless of the writer's intent, because *Auer* constrains courts from holding agencies accountable when they interpret poorly drafted regulations. Without that accountability, agencies lack incentive to *improve* their regulations' clarity.

The current incentive structure can actually *penalize* clarity—as when a Court finds that an unambiguous regulation is, precisely because drafted without ambiguity, *not* entitled to *Auer* deference. When that happens, an agency is essentially punished (or would understandably feel punished) for its better drafting at the outset. In *Summit Petroleum Corporation* v. *EPA*, for example,

the court rejected an invocation of *Auer* to more broadly interpret a regulation allowing aggregation of facilities as a single source if they are "contiguous or adjacent properties." 690 F.3d 733, 737, 741 (6th Cir. 2012). Because the term "adjacent" was unambiguous, EPA was held to have boxed itself in. *Ibid.* But had EPA used a vaguer term, it would have been rewarded with *Auer* deference.

Regulated individuals and businesses depend on predictable regulatory regimes, which in turn require clearly written rules. *Auer* undermines predictability by encouraging and otherwise allowing agencies to write unclear rules that can then be interpreted in myriad ways, depending on the prevailing preference. Agencies should not be rewarded for undermining regulatory clarity and stability.

D. *Auer* is inconsistent with the APA

Finally, *Auer* demonstrably offers an end-run around the Administrative Procedure Act (APA): it allows agencies to resolve ambiguity by reinterpreting regulations instead of using the APA's notice-and-comment requirements to alter them. See *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain."); *Marsh* v. *J. Alexander's LLC*, 905 F.3d 610, 637-638, 642 (9th Cir. 2018) (en banc) (Ikuta, J., joined by Callahan, J., dissenting) (lamenting how the court allowed a substantive rule to masquerade as an interpretation under *Auer*—creating one of "the worst dangers of improper *Seminole Rock* and *Auer* deference"). This eviscer-

ates the judicial role under the APA—to independently and fairly review agency actions and interpretations.

In one case, a sugarcane grower and renewable-energy company challenged Corps guidance on Prior Converted Cropland (PCC). *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fla. 2010). Joint regulations of the Corps and EPA provide that PCC falls outside the agencies' jurisdiction. 33 C.F.R. § 328.3(b)(2). The final rule adopting these regulations clearly states that land retains its PCC status regardless of use, unless abandoned. 58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993). Nevertheless, a Florida field office of the Corps circulated guidance indicating that shifting PCC to a non-agricultural use would immediately result in the land losing PCC status. This guidance substantially expanded the Corps' jurisdiction without complying with the APA's notice-and-comment process. *New Hope*, 746 F. Supp. 2d at 1284. New Hope challenged the guidance, and a district court set it aside as a substantive rule issued without following required procedures under the APA. *Ibid.*

Despite an opinion from the *New Hope* district court, the Corps continues to issue jurisdictional wetland determinations on PCC lands that are used for non-agricultural purposes, forcing landowners to accept those determinations or file suit. See, *e.g.*, *Belle Co.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014) (distinguishing *New Hope* and finding the jurisdictional determination non-reviewable), vacated 135 S. Ct. 1548. In these circumstances, owners of PCC lands must either accept the Corps' jurisdictional determination or expend significant resources to litigate the same issue in a different forum, knowing that a court could very easily invoke *Auer* as decisive.

Overcoming litigation fatigue in the face of such agen-

cy tenacity requires no small effort. In each of the ways discussed above, *Auer* only makes it easier for agencies, if they so choose, to push beyond the scope of their authorized power.

II. *AUER*'S HIDDEN HARMS ARE NO LESS REAL OR SIGNIFICANT

The reported cases discussed above illustrate how *Auer* unreasonably transfers judicial power to executive agencies and can thereby disrupt legitimate reliance interests. While these memorialized examples of *Auer*'s sting are plentiful and significant, they are eclipsed by the rarely recorded instances of *Auer*'s hidden harms.

No matter how many times lower-court judges acknowledge *Auer*'s dubious foundation, they have no choice but to surrender to this Court's precedent. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). After witnessing two decades of courts deferring under *Auer*, sometimes firsthand, members of the regulated community are keenly aware of the case's implications. Thus, even with a powerful argument that an agency's interpretation is clearly erroneous, *Auer* easily dissuades those individuals and businesses from litigating.

This *Auer*-induced chilling effect has severe consequences. First, it reflects, and perpetuates, diminished public trust that the courts will overcome their predisposition to simply defer to agencies, as opposed to holding them accountable for their unreasonable actions. Second, by forestalling legitimate challenges to agency action, *Auer*'s chilling effect eliminates a crucial check on administrative overreach; *Auer* undermines the APA's clear intent that anyone "suffering legal wrong because of

agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. § 702. And, third, this chilling effect reduces the judiciary's opportunity to effectuate its role in maintaining the separation of powers.

Amici's members are constantly subject to an ever-changing web of regulatory interpretations strewn throughout the Federal Register, policy directives, guidelines, memoranda of understanding, circulars, handbooks, and informal statements from agency staff. These myriad and often hard-to-find sources containing impermanent regulatory interpretations on a variety of matters create substantial uncertainty for *amici*'s members and force them to take risks that should not be required.

This problem is prevalent in many areas, including farming and ranching. Ordinarily, a person must either obtain a permit under CWA Section 404 to discharge dredge or fill materials into waters of the U.S. or face the risk of significant legal and financial consequences. The statute, however, exempts "normal" farming and ranching activities. See 33 U.S.C. § 1344(f)(1)(A). Although the CWA does not define the term, regulations require "normal" activities to be part of an "established (*i.e.*, on-going)" operation, and not a "new use." 33 C.F.R. § 323.4(a)(1)(ii).[11]

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[11] To this day, farmers and ranchers still have no official interpretation of what constitutes an "established (*i.e.*, on-going)" operation nor any clarity on how far back in time the operation must be "established." As a result, farmers and ranchers continue to face enforcement actions and hefty civil fines if they fail to get a CWA Section 404 permit. Many do not know if they are required to do so. And if the Corps decides to pursue an enforcement action, many farmers

Over the years, EPA and the Corps have interpreted what qualifies as "normal" or a "new use" not by giving a clear (even if multifaceted) definition after careful analysis and public comment, but through a series of regional manuals, circulars, and—troublingly—*ad hoc* enforcement actions. The agencies have been threatening farmers and ranchers with potentially ruinous civil and criminal penalties for plowing their own lands and switching between ranching and farming activities. To escape this threat, farmers and ranchers are forced to apply for costly permits. Indeed, as members of this Court have recognized, with some understatement, the burden associated with obtaining these permits "is not trivial," as the "Corps of Engineers [] exercises the discretion of an enlightened despot" and the "average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721.[12]

Equally problematic are EPA's stormwater Phase II post-construction requirements, which obligate municipalities to obtain permits for stormwater discharges. See 40 C.F.R. § 122.34(b)(5). To obtain this permit, a municipality must develop a program to control stormwater runoff from developed sites, including "best management practices (BMPs) appropriate for the community." *Ibid.* Although a municipality is in the best position to know what practices would be appropriate for its community,

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and ranchers are likely to seek quick settlements rather than resist because their economic livelihood depends on a successful grazing or growing season.

[12] In *Rapanos*, regulators informed plaintiff that the wetlands he backfilled were "waters of the United States" and that his action required a permit. Twelve years of criminal and civil litigation ensued—"for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines." 547 U.S. at 721.

EPA disagrees and routinely compels municipalities to adopt strict limitations for stormwater volume, sediment, and phosphorous concentration, even when the municipality has not independently determined or concurred that those limitations are appropriate for its community.[13] *Auer* snuffs out a municipality's hope of successfully challenging EPA's interpretation of the maddeningly vague phrase "appropriate for the community." Rather than waste money fighting a lost cause, most municipalities will reluctantly acquiesce to EPA's questionable demands.

These examples illustrate a common problem across the business world: challenges to agency interpretations are almost certainly doomed to fail. For *amici*'s members and similar businesses, time-is-money and profit margins can be razor thin. So it is hardly surprising that many entities with strong legal cases in theory simply opt not to fight in practice. As a result, many worthy cases that affect American businesses will never even be pursued, which further enshrines overreach as a permanent feature of administrative law.

III. OVERRULING *AUER* WILL NOT OVERBURDEN THE COURTS

Ultimately, there is no persuasive justification for keeping *Auer* deference as it exists today. *Decker*, 568 U.S. at 617 (Scalia, J., concurring). The two principal jus-

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[13] See, *e.g.*, General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 2.3.6, 43-47, Apr. 4 2016, https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/final-2016-ma-sms4-gp.pdf; General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in New Hampshire, 2.3.6, 46-50, Jan. 18, 2017, https://www3.epa.gov/region1/npdes/stormwater/nh/2017-small-ms4-general-permit-nh.pdf.

tifications—"special insight" and "special expertise"—are irrelevant. Regardless of whether agencies have some "special insight" into the intent or meaning behind regulations, "we are bound *by what they say*, not by the unexpressed intention of those who made them." *Id.* at 618 (emphasis in original).[14] Similarly, regardless of whether agencies possess "special expertise" in administering complex regulatory programs, interpreting policy is not synonymous with making policy, "unless one believes that the purpose of interpretation is to make the regulatory program work in a fashion that the current leadership of the agency deems effective." *Ibid.*

Neither do stare decisis concerns justify maintaining the *Auer* doctrine. As an interpretive methodology, *Auer* is broad and compulsive, straying "too far in asking the individual Justice to subordinate her authority to the Court's institutional past." *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. (forthcoming 2019) (manuscript at 9), https://ssrn.com/abstract=3312818. "The consequence * * * is that [an] administrative deference regime[] like * * * *Auer* [is] not entitled to stare decisis effect, at least as [it is] presently justified in the Court's jurisprudence." *Ibid.*; cf. also Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 155-157 (2017).

The Court's best option is to overturn *Auer* and simply give effect to regulations as written. Doing so would provide the regulated community with predictability and the confidence to challenge unreasonable agency action, knowing that courts would no longer be predisposed to

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[14] Even assuming the "special insight" rationale had some validity, which it does not, the value of that insight quickly dissipates with changing administrations and agency-employee turnover.

ruling against them at the outset of litigation. Taking this course would also give an agency "a stable background against which to write its rules and achieve the policy ends it thinks best." *Decker,* 568 U.S. at 619 (Scalia, J., concurring).

Notably, overturning *Auer* would not result in a flood of administrative law because the doctrine only applies where an agency interprets its own ambiguous regulations. With a clear rebuke of agency ambiguity, the incentive structure for agencies would shift to drafting clearer regulations and, to the extent that they cannot do so, at least to less brazen re-interpretations of regulations. In this instance, agencies who wish to see their desired outcome applied must simply write regulations that say what they mean, which they surely can do. See *Decker*, 568 U.S. at 617 (Scalia, J., concurring) (stressing that if agencies can articulate what regulations mean in legal briefs, they can do the same in the regulations themselves). When agencies do so, courts should expect *fewer* cases, not more.

Additionally, any fear that overruling the *Auer* doctrine would overburden courts with novel and unfamiliar cases lacks justification. Judges are "trained" to look for "the best reading" of legal texts—including of complicated legal texts. Kavanaugh, *supra*, 129 Harv. L. Rev. at 2153-2154; see also *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("[J]udges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language."). Indeed, federal judges must regularly interpret everything from federal patent laws to the federal criminal code. Judges are more than capable of reviewing and interpreting federal regulations and are the best-suited government officials to protect the regulated community from the "hundreds of federal agencies pok-

ing into every nook and cranny of daily life." *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

CONCLUSION

This Court should overturn or further narrow *Auer* doctrine.

Respectfully submitted.

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