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 *AMICUS CURIAE* UTILITY AIR REGULATORY GROUP IN SUPPORT OF PETITIONER

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January 31, 2019

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INTEREST OF *AMICUS CURIAE*

The Utility Air Regulatory Group (UARG) is an *ad hoc* unincorporated association of individual electric generating companies and industry groups.[1] The members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. These facilities are extensively regulated under legislative rules promulgated by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA). UARG's purpose is to participate on behalf of its members collectively in CAA proceedings, including rulemakings, that affect the interests of electric generators, and in litigation relating to those proceedings.

The members of UARG rely on compliance with the regulatory requirements established by EPA in legislative rules under the CAA to ensure that their actions and operations do not subject them to liability. The appropriate role of courts and Executive Branch agencies with respect to the interpretation and implementation of legislative rules is important to the members of UARG. Members of UARG have a

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than UARG, its members, or their counsel made a monetary contribution intended to fund its preparation or submission.

particular interest in the validity of *Auer* v. *Robbins*, 519 U.S. 452 (1997), because, as demonstrated below, it has been cited by EPA as authority to narrow broadly-written legislative rules and retroactively impose civil liability in the billions of dollars, all under the guise of "interpreting" ambiguous rules.

SUMMARY OF ARGUMENT

Auer should be overruled because, unlike *Chevron* deference properly applied, *Auer* deference intrudes on the judiciary's Article III power to interpret the laws. Whatever other problems *Chevron* deference may have, correctly applied *Chevron* respects the constitutional line between interpretation and implementation of the laws. When Congress passes a statute, its binding meaning should be determined exclusively by judicial *interpretation*. The responsibility of Executive Branch administrative agencies is to *implement* statutes. That means agencies have discretion, where Congress has left gaps for agencies to fill, to establish policy consistent with statutory decisional standards and in compliance with statutorily prescribed procedures. A correct application of *Chevron* respects this difference between interpretation and implementation; it reserves to the judiciary the interpretation of statutory text, while giving deference only to agency rules and adjudicatory decisions that exercise delegated policy-making authority falling within the statutory bounds declared by the judiciary.

Auer deference, in contrast, fails to respect the distinction between implementation and interpreta-

tion because it gives binding deference to an agency's interpretation of ambiguous rules that carry the force of law. An "ambiguous" regulation is one where the language allows for more than one possible meaning. Black's Law Dictionary 97 (10th ed. 2014). That may be the case where there is regulatory silence on a particular question, where unclear regulatory terms have several plausible readings, or where broad language suggests intent to permit a range of outcomes. *Auer* is problematic in each of those cases, as it gives agencies the power to issue interpretations of the law that bind the judiciary.

This brief focuses on the particular problems with *Auer* in the third case: where the regulatory language suggests an intent to permit a range of outcomes consistent with the text. Good reasons may exist for an agency to write such a rule. For example, such rules can provide regulated parties flexibility in choosing how to comply, given the particular facts and circumstances that may arise. To specify one outcome from among a range of permissible outcomes is not just a purported exercise of interpretation but also is a new policy judgment to depart from the flexibility provided. In that case, *Auer* deference not only gives agencies the judicial power of binding interpretation, but it also authorizes unlawful implementation. Both results are wrong. *Auer* has been used to allow an agency to issue interpretations of rules that are given binding effect (violating the separation of powers) and to implement new policy, or change existing policy, through interpretive rules (violating the Administrative Procedure Act (APA)).

Overruling *Auer* is demanded by the checks and balances established by the Constitution, would honor the intent of Congress concerning the role of agencies under the APA, and would be consistent with decisions of this Court concerning the proper application of deference to agency discretionary policy-making.

ARGUMENT

The Court should overrule *Auer* for all the reasons stated in Petitioner's brief, but also because it blurs the distinction between interpretation and implementation of law. In particular, where rules are written to allow a range of permissible policy options, *Auer* improperly authorizes agencies to narrow those rules through interpretive statements that evade notice and comment rulemaking requirements. This brief elaborates on that problem and discusses one real-world example.

I. Congress gives Executive Branch agencies the power to bind regulated parties by implementing laws, not by interpreting them.

A critical distinction exists between implementation of the law and interpretation of the law. When Congress expressly charges an agency with execution of a statute, it delegates to that agency Congress's own authority to fill the policy gaps left in the statutory scheme, subject to certain statutory procedures and standards governing the exercise of that policy discretion. The agency may decide these unresolved matters by promulgating a legislative rule, which has the force and effect of law. See 5 U.S.C. § 551(4)

(defining "rule" as a "statement of general or particular applicability and future effect" that is designed to "implement, interpret, or prescribe law or policy"); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules . . . ."). Where authorized by statute, the agency may also develop policy through case-by-case adjudication.[2]

Interpretation of legal texts, on the other hand, is distinct from making gap-filling policy judgments. Interpretation is an act of construction—a means of resolving ambiguity in what has already been decided. See, *e.g.*, Black's Law Dictionary 943 (10th ed. 2014) (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"); *cf. Perez*, 135 S. Ct. at 1207-08 (distinguishing the act of interpreting a regulation from the act of amending it). The purpose of interpretation is not "to make the regulatory program work in a fashion that the current leadership of the agency deems effective." *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597,

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[2] Sometimes, Congress specifies the manner in which the agency may establish policy. In the case of the CAA, for example, Congress specified that the agency establish policy through programmatic rules. See 42 U.S.C. § 7601(a).

618 (2013) (Scalia, J., concurring in part and dissenting in part). That "is the purpose of *rulemaking*." *Id.* Rather, "the purpose of interpretation is to determine the fair meaning of the rule"—i.e., "[n]ot to make policy, but to determine what policy *has been made*." *Id.* (emphasis added). Interpretation is the job of the courts. Whatever might be said about Congress's power to delegate its own policy-making authority to administrative agencies that *implement* the laws, it certainly cannot delegate to agencies the courts' power to make binding *interpretation* of the laws.

The APA reflects this division of responsibility by distinguishing between legislative and interpretive rules. The APA requires notice and comment procedures for issuing legislative rules that *implement* a statute and have the force of law, but it excludes from those requirements *interpretive* rules that offer the agency's view on the meaning of a statute or regulation. 5 U.S.C. § 553(b)(A). See *Perez*, 135 S. Ct. at 1204 ("Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.") (internal quotation marks omitted). An agency may issue interpretations "to *advise* the public by explaining its interpretation of the law," but an agency may not "*bind* the public by making law" without going through notice and comment rulemaking. *Id.* at 1211 (Scalia, J., concurring in the judgment).

II. This Court's application of *Chevron* deference reflects the distinction between implementation of law and interpretation of law.

Where an agency purports to fill statutory policy gaps through legislative rulemaking, courts are tasked with reviewing the substance of that legislative rule using the two-step inquiry articulated in *Chevron*. Properly understood, *Chevron* instructs that if the statute resolves the matter, then the court is to treat the issue as a question of interpretation and not give any deference to an agency's different interpretation in the rule. *Chevron*, *U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But if the court determines that Congress delegated to the agency the policy-making authority to resolve the precise question at issue, resolution of the issue is left to agency implementation (consistent with any statutory decisional criteria identified by the court). The question then becomes whether the agency's resolution of that question "is a reasonable policy choice for the agency to make." *Id.* at 845. In other words, a policy choice authorized by statute will be upheld if not arbitrary and capricious, an abuse of discretion, or otherwise contrary to law. See 5 U.S.C. § 706(2)(A).[3]

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[3] In addition to this substantive review of the agency's policy decision, the agency action must conform with the procedural requirements of the APA, 5 U.S.C. §§ 500 *et seq.*

Chevron deference is not to be accorded to a legal interpretation of a statute provided by an agency. Rather, it applies only to agency action implementing a policy decision delegated to it by Congress. Where "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies," the Court will not second-guess "the wisdom of the agency's policy" if the resulting agency rule makes "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 865-66. See also *Michigan* v. *EPA*, 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting) (*Chevron* applies "in the context of implementing policy decisions in a technical and complex arena").

Though he has other criticisms of the case, Justice Thomas has well explained how *Chevron* can properly distinguish between implementation and interpretation. "[A]gencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all." *Id.* at 2712-13 (Thomas, J., concurring). "Instead, as *Chevron* itself acknowledged, they are engaged in the 'formulation of policy.'" *Id.* at 2713. Indeed, that has long been the view of the Executive Branch. See Attorney General's Manual on the Administrative Procedure Act 13-14 (1947) (rulemaking "is primarily concerned with policy considerations").

This distinction between implementation of policy and interpretation of law is borne out in numerous cases where this Court refused to extend *Chevron*

deference. *E.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 255-56 (2006); *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000) (refusing to apply *Chevron* deference to an agency opinion letter because it, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines," lacks the force of law); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

In *Michigan*, for example, this Court rejected as improper "interpretation" an agency's attempt to narrow, rather than simply implement, a manifestly broad statutory provision. 135 S. Ct. at 2708. Congress had directed EPA to regulate emissions of hazardous air pollutants from power plants if the agency finds such regulation "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). "Appropriate," the Court held, is a "broad and all-encompassing term," which naturally includes consideration of all relevant factors. *Michigan*, 135 S. Ct. at 2707 (internal quotation marks omitted); *id.* at 2709 ("broad reference to appropriateness encompasses *multiple* relevant factors (which include but are not limited to cost)"). Although this formulation "leaves agencies with flexibility" in deciding how they will weigh relevant factors in determining whether regulation is "appropriate," *id.* at 2707, agencies "may not entirely fail to consider an important aspect of the problem," *id.* (internal quotation marks omitted). In implementing this provision, EPA had refused to consider cost. But

because Congress intentionally wrote the provision expansively to require consideration of all relevant factors, and cost is a relevant factor, "'[t]hat congressional election settles this case.'" *Id.* at 2710 (quoting *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011)). *Chevron* did not give the agency license to undo that congressional election by purporting to narrowly interpret, rather than simply implement, the statutory instruction. *Id.* at 2707.

Chevron was never intended to lead to a wholesale abandonment by the courts of their ultimate authority and responsibility to interpret statutes. See *Chevron*, 467 U.S. at 843 n.9 (courts should employ all the "traditional tools of statutory construction" to resolve any statutory ambiguity). "[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking* power over the ambiguity at issue." *City of Arlington* v. *FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (emphasis added).

Nevertheless, many lower court judges have erroneously interpreted *Chevron* to require judicial deference to an agency's interpretation of a statute whenever the statute is deemed to be ambiguous. In these cases, judicial review ends with the courts declaring that the agency interpretation is "permissible." See, *e.g.*, *Strickland* v. *Comm'r, Me. Dep't of Human Servs.*, 48 F.3d 12, 17 (1st Cir. 1995). This application of *Chevron* raises the same separation of

powers problems regarding interpretation as are raised by *Auer*. It is also a view of *Chevron* deference that is contradicted by the *Chevron* Court's careful distinction between the judiciary's responsibility to interpret a statute and an agency's policymaking responsibility under a statute as construed by the courts.

III. *Auer* ignores the line between interpretation and legislative rulemaking.

Petitioner's brief fully illustrates the many legal and practical infirmities of *Auer* deference, but this brief focuses on one in particular: the application of *Auer* to broad language in an agency regulation that, after applying the tools of textual construction, still allows for many possible outcomes. By allowing an agency via "interpretation" to specify only one of many permissible outcomes and give that interpretation binding effect, *Auer* ignores the distinction between interpretation and implementation.

One stark example is EPA's "New Source Review" (NSR) regulations under the CAA, which define when "modifications" to an existing source make it a "new" source. Under the CAA, *new* sources of air emissions must obtain certain permits prior to construction. A company that violates these requirements is subject to civil and criminal penalties. 42 U.S.C. § 7413. Under the statute, new sources include both brand new sources and existing sources that undergo "modification." *Id.* § 7411(a)(2), (4). The CAA directs EPA to define "modification" through legislative rulemaking. *Id.* § 7601(a).

The NSR rules defining a "modification" offer general guidance and no methodology for determining whether a modification has occurred. Largely mirroring the statutory language, the NSR rules define a "modification" as: "[A] project [that]. . . causes . . . a significant emissions increase . . . . The project is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

Because permits for modifications must be obtained prior to construction, the NSR regulations require that an operator must determine preconstruction whether a project would cause a "significant emissions increase" by predicting postconstruction emissions. The rules require operators to make these predictions based on "consider[ation] [of] *all relevant information*." *Id.* § 52.21(b)(41)(ii)(*a*) (emphasis added). The rules also require that the operator exclude from this projection emissions unrelated to the project, including those due to "demand growth." *Id.* § 52.21(b)(41)(ii)(*c*). The regulations do not confine the scope of "relevant information," do not provide criteria for determining when emissions are "unrelated" to a project and must be excluded, and do not provide any methodology for making projections. *Id.* § 52.21(b)(41).[4]

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[4] The directive for an operator to consider "all relevant information" in the NSR rules, 40 C.F.R. § 52.21(b)(41)(ii)(*a*), parallels the rule concerning "relevant" records in the case at bar, 38 C.F.R. § 3.156(c)(1). In both cases, the rules are equally broad;

Furthermore, the regulations do not require that EPA verify emission projections, that an operator wait for any response before beginning construction, or that projections be treated as enforceable limits. *Id.* § 52.21(r)(6)(ii). Rather, as EPA explained, the modification determination is:

> self-implementing and self-policing. Because there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, each company . . . adopts its own interpretation. Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate.

63 Fed. Reg. 39,857, 39,861 (July 24, 1998).

In order to verify pre-construction emission projections, the NSR rules require instead that operators maintain a record of post-construction emissions of any NSR regulated pollutant and report those emissions to the relevant regulatory authority annually. 40 C.F.R. § 52.21(r)(6)(iii)-(iv). See *United States* v. *DTE Energy Co.*, 711 F.3d 643, 649 (6th Cir. 2013) ("*DTE I*") (NSR rules are "project-and-report scheme" relying upon operator application of the regulations, rather than "prior approval scheme" re-

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in neither case do the regulations attempt to narrow or confine "relevant."

lying upon agency application of the regulations). As EPA explained, the post-construction monitoring and reporting "provide[s] a reasonable means of determining whether a significant increase . . . resulting from a proposed change . . . occurs within the 5 years [or 10 years] following the change." 57 Fed. Reg. 32,314, 32,325 (July 21, 1992).

In the face of this broad regulatory language creating a flexible self-implementing program, EPA's Enforcement Office has initiated enforcement cases over the past two decades by claiming *Auer* deference for its post-hoc selection of a specific methodology for making pre-construction emission projections. "[D]espite the fact that the rules delegate calculation of the prediction to the operator . . . and contain no requirement that the operator obtain []EPA review or approval," EPA in these cases "deems both the operator's prediction and reality meaningless." *United States* v. *DTE Energy Co.*, 845 F.3d 735, 743 (6th Cir.), *cert. denied*, 138 S. Ct. 555 (2017) ("*DTE II*") (Batchelder, J., concurring in the judgment). In so doing, EPA's Enforcement Office has attempted to narrow the meaning of "relevant information" to that which fits its enforcement theories.

In the DTE litigation, for example, the EPA Enforcement Office relied on a methodology for pre-construction projections that was offered after construction was completed. This methodology "projected" increases in emissions, while the operator's pre-construction projections and the actual post-

construction emissions showed decreases. *DTE I*, 711 F.3d at 648.

Following dismissal of the enforcement action by the district court, EPA appealed to the Sixth Circuit, arguing that *Auer* required deference to its projection methodology. Opening Br. for Pl.-Appellant United States at 21, 57, *United States* v. *DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (No. 14-2274), 2014 WL 7405049. A fractured panel of the Sixth Circuit reversed, issuing three separate opinions. *DTE II*, 845 F.3d at 736-41, 741-45, 745-56. As Judge Batchelder explained, the approach advanced by EPA's Enforcement Office allowed EPA to rely upon "its own expert's preconstruction predictions," using an unpublished projection methodology, in an attempt "to force DTE to get [an NSR] construction permit (or to punish DTE for failing to get [an NSR] permit), even if []EPA's disagreement is based on debatable scientific or technical reasons and even if actual events have proven []EPA's expert's prediction wrong." *Id.* at 744 (Batchelder, J., concurring in the judgment).

The Government's position in the *DTE* litigation plainly illustrates how EPA in an enforcement action has attempted to use *Auer* to narrow, and amend through purported interpretation, a regulatory regime designed to be flexible. On their face, the NSR rules do not specify any methodology for preconstruction projections. At the time of their adoption, EPA expressly recognized that the rules allowed a multiplicity of approaches. And recognizing this potential for different approaches to projecting future

emissions, EPA made post-construction reporting of *actual* emissions the basis for NSR enforcement and compliance, avoiding debates over preconstruction projection methodologies. Yet EPA has sought to turn the regulatory flexibility created by the use of broadly-worded provisions into an ambiguity to be resolved under *Auer*. See also*, e.g., United States* v. *Ameren Missouri*, No. 4:11 CV 77 RWS, 2016 WL 728234, at *16 n.22 (E.D. Mo. Feb. 24, 2016) (holding that Government's interpretation of NSR regulations gets *Auer* deference); *United States* v. *Duke Energy Corp.*, 981 F. Supp. 2d 435, 463 (M.D.N.C. 2013) (same).

Where the tools of textual construction lead to the conclusion that a rule's language allows a range of different methods for compliance, the agency should not be permitted to revisit that policy judgment by limiting the rule to one exclusive method and then demand *Auer* deference to this "interpretation." This is true whether the law exists as statute, see *Michigan*, 135 S. Ct. at 2707, or whether it exists as legislative rule. See *Christensen*, 529 U.S. at 588 (to defer to an agency interpretation that eliminates flexibility built into the regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"). The elimination of flexibility enshrined in the regulations represents a new policy choice and thus requires the agency to employ the same procedures used to produce the prior decision: notice and comment rulemaking. See, *e.g., ExxonMobil Pipeline Co.* v. *U.S. Dep't of Transp.*, 867 F.3d 564, 575-78 (5th Cir. 2017)

(vacating portions of agency enforcement order that attempted to second-guess a regulated party, where the underlying regulation required that the party only consider various factors and did not specify the result).

The Court applied these principles in *Gonzales* v. *Oregon*, where the Court refused to give *Auer* deference to the Attorney General's attempt to narrow the meaning of a broadly worded rule through interpretation. 546 U.S. 243 (2006). The Attorney General announced that broad regulatory language defining lawful conduct could be narrowed through interpretation to exclude a specific type of conduct. *Id.* at 253-54. The Court rejected the Government's argument for deference to what was actually an attempt at implementing a new policy judgment. *Id.* at 256. Because the regulatory language "gives no indication how to decide this issue, the Attorney General's effort to decide it now [via the interpretive rule] cannot be considered an interpretation of the regulation." *Id.* at 257. In short, interpretation cannot substitute for the decision-making process established by the APA for formulating binding rules. Filling gaps or narrowing a broad regulation requires new rulemaking.

Because *Auer* deference has allowed agencies to work substantive policy changes by narrowly "interpreting" broad regulatory language that allows many possible outcomes, it should be overruled. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*,

96 Colum. L. Rev. 612, 638 (1996) (identifying the "separation of lawmaking from law-exposition" as a "crucial constitutional commitment" that *Seminole Rock* deference contradicts). Once an agency makes a decision and implements that policy choice through rulemaking, binding interpretation of that law lies with the courts alone. See, *e.g.*, 5 U.S.C. § 706 ("[T]he reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

For legislative rules that regulate conduct, the courts should simply employ the tools of textual construction and enforce rules according to their terms. The judiciary's interpretive function is first to determine whether the rule's language speaks with only one plausible meaning or is ambiguous. In the latter case, the judiciary should apply canons of construction to resolve or to narrow the scope of any ambiguity. *Cf. Chevron*, 467 U.S. at 843 n. 9 (requiring courts to apply the tools of statutory construction to narrow or resolve ambiguity at step one). Where ambiguity nevertheless remains, the courts must recognize that the rule as written allows a range of outcomes. This result preserves the courts' constitutional responsibility to "say what the law is," respects the constitutional role of the Executive Branch agencies to implement policy under decision-

al standards established by Congress, and assures compliance with the APA.

IV. Overruling *Auer* does not require overruling *Chevron*.

To overrule *Auer* does not require also overruling *Chevron*, if the latter is properly understood and applied. First, whatever other constitutional issues *Chevron* may raise, it does not intrude on the judiciary's power of interpretation in the same way as *Auer*. See *Chevron*, 467 U.S. at 865-66. In its first step, *Chevron* requires courts to exercise their traditional role of interpreting statutes to determine the degree to which Congress has already addressed the question at issue. *Id.* at 845. This includes determining the scope of policy discretion provided the agency to address an unresolved issue. See, *e.g., Prill* v. *Nat'l Labor Relations Bd.*, 755 F.2d 941, 956-57 (D.C. Cir. 1985) (setting aside agency action taken on the basis of the agency's incorrect view of the scope of its discretion under the statute); *cf. Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (agency rule must be "within the scope of the authority delegated to the agency by statute"). In its second step, *Chevron* requires courts to decide whether the agency action resolving the issue represents "a reasonable policy choice for the agency to make," *Chevron*, 467 U.S. at 845—in other words, is the result arbitrary and capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). This is consistent with separation between the judi-

ciary and the political branches, as *Chevron* itself explained:

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 865-66 (quoting *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 195 (1978)). *Auer*, on the other hand, directly intrudes on the judiciary's power of interpretation, as explained above.[5]

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[5] To the extent that any legal justification has been supplied for *Auer*, it is the faulty premise that Congress has delegated to the agency authority to construe its own regulations. See, *e.g.*, *Martin*, 499 U.S. at 151 ("we presume that the power authorita-

Second, overruling *Auer* is consistent with the animating purpose of *Chevron*: encouraging the development of policy through notice-and-comment rulemaking. *Chevron* deference is premised on Congress's delegation of authority to an agency to give content to ambiguous statutory language through legislative rules. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001). Notice-and-comment rulemaking, when properly followed, ensures that the agency proposes how it is implementing the statute, explains its rationale, considers public comments, and then promulgates the new legislative rule with prospective effect. 5 U.S.C. § 551(4). *Chevron* deference thereby serves the due process objectives of giving notice of the law to those who must comply and of constraining those who must enforce it. See Manning, 96 Colum. L. Rev. at 623-27, 638-39, 660-62.

Application of *Auer* to allow an agency to make a significant change in the meaning of a regulation years after the rule was promulgated, as was done in the NSR context, represents the antithesis of *Chevron* deference. *Chevron* deference anticipates that agencies will resolve policy delegations after providing notice and an opportunity to be heard, and that

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tively to interpret its own regulations is a component of the agency's delegated lawmaking powers"). But Congress cannot delegate what it does not possess. "[T]he Constitution invests the Judiciary, not the Legislature, with the final power to construe the law." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 325 (1992).

the agency's resolution will be subject to meaningful judicial review. Deference to shifting agency interpretations of a regulation promotes just the opposite result: vague regulations that have no fixed meaning. *Id.* at 655-60; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). This carries the risk of unfair and retroactive application of new regulatory mandates to activities completed long ago, raises due process concerns and is in direct contravention of the statutory requirement that a rule be "an agency statement of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis added). See also *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").

CONCLUSION

The Court should overrule *Auer*, and make clear that in the context of legislative rules that regulate conduct, the rule must be implemented and enforced according to its terms. Where a rule employs broad terms that allow a range of potential outcomes, an agency cannot narrow the rule—eliminating compliance options—without further notice and comment rulemaking.

Respectfully submitted,

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