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*

## *AMICUS CURIAE* BRIEF OF SERGEANT MAJOR JEFF S. HOWARD (RETIRED) IN SUPPORT OF PETITIONER

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January 31, 2019

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## QUESTION PRESENTED

Whether the deference afforded to agencies in *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled and replaced with actual judicial review over agencies' interpretations of their own regulations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REGULATIONS



OTHER AUTHORITIES

## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

**Army Sergeant Major Jeff S. Howard, retired ("SGM Howard"),** is a combat veteran who gave his country nearly 26 years of dedicated service. From his time in basic training, to serving as the Department of the Army Inspector General Sergeant Major at the Pentagon, SGM Howard has been unwavering in his loyalty both to this nation and to those who have served their country in the armed forces. After retiring from active duty, SGM Howard continued to serve his fellow servicemembers by volunteering his time as a Veteran Service Officer ("VSO") for the American Legion and for Adams County, Idaho. As a VSO, SGM Howard assisted veterans with applying for disability services and compensation from the U.S. Department of Veterans Affairs ("VA") for service-connected injuries and disabilities. A substantial portion of SGM Howard's duties included laboring over the rules and regulations set forth by the VA, to ensure veterans' benefits were assigned and dispersed appropriately. SGM Howard is all too aware of the effect *Auer*

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[1] The parties have consented to the filing of this amicus curiae brief. *See* Supreme Court Rule 37.3(a). Additionally, pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or his counsel has made a monetary contribution specifically for the preparation or submission of this brief.

deference[2] has on those veterans trying to make sense of the VA's ambiguous regulations—the meaning of which the VA can change on a whim.

**Mountain States Legal Foundation ("MSLF")** is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to protect Americans' constitutional and civil liberties, as well as numerous cases seeking to ensure a limited and ethical government that allows individuals to practically and confidently act without unreasonable government action infringing on their individual rights. Because *Auer* deference is a direct threat to limited and ethical government and Americans' constitutional and civil liberties, MSLF respectfully submits this amicus curiae brief in support of Petitioner on behalf of Army Sergeant Major Jeff S. Howard (Retired).

[2] The doctrine of *Auer* deference, as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), was, in part, first established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For the convenience of this Court, *amicus* will simply refer to this doctrine as *Auer* deference for the remainder of this brief.

## STATEMENT OF THE CASE

### I. Historical Background

In 1945, this Court decided the case of *Bowles v. Seminole Rock & Sand Co.*, and in doing so, established a precedent that would have incalculable ramifications for decades to come. 325 U.S. 410 (1945). In that case, this Court stated that, when evaluating an agency's interpretation of its own regulations, the interpretation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

This Court then reaffirmed its deference to agencies in 1997, in the case of *Auer v. Robbins*. 519 U.S. 452 (1997). When examining a Department of Labor regulation, this Court reasoned that "[b]ecause the . . . test is a creature of the Secretary's own regulation," the Secretary's interpretation of that regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citations and quotations omitted). This Court inevitably found that this "deferential standard [was] easily met . . .." *Id.*

This deferential standard has become commonly known as *Seminole Rock* or *Auer* deference. Such deference led to the events of this case.

### II. Factual Background and Procedural History

James L. Kisor honorably served his country with the United States Marine Corps from 1963 to 1966. Pet. App. 2a. While serving his country Mr. Kisor was deployed to Vietnam, and specifically

participated in Operation Harvest Moon. Pet. App. 3a. Operation Harvest Moon was a particularly brutal conflict between the U.S. Armed Forces and the Viet Cong. Pet. App. 3a, n.1. Mr. Kisor's company came under direct attack and endured several contacts from sniper and mortar fire. Pet. App. 3a. Mr. Kisor was also directly affected by an ambush of his company, which resulted in the death of 13 of his fellow soldiers. Pet. App. 3a; J.A. 11, 21. Mr. Kisor was awarded a U.S. Marine Corps "Combat Action Ribbon," for his service in Vietnam. J.A. 25. All in all, it is understandable that Mr. Kisor's time while deployed in Vietnam left an unforgettable mark upon him.[3]

In 1982, Mr. Kisor filed an initial claim ("1982 Claim") with the VA Regional Office ("RO") in Portland, Oregon for disability compensation benefits due to Post-Traumatic Stress Disorder ("PTSD"). Pet. App. 2a–3a; J.A. 6–9. In 1983, Mr. Kisor underwent a psychiatric examination to evaluate his claim. Pet. App. 3a; J.A. 10–14. The examiner determined that Mr. Kisor did not suffer from PTSD, but rather diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder—neither of which can be the basis of a service-based disability compensation. Pet. App. 3a; J.A. 13. In May 1983,

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[3] "Additionally, during Operation Harvest Moon, when the Viet Cong ambushed my battalion in the village of Ky Phu, I was with H&S Company in the open paddies west of the hamlet and under a hail of incoming fire. It was then that I personally killed 2 Viet Cong snipers with my M14 rifle as their heads emerged from spider traps. This fact has tormented me during the past 41+ years." J.A. 25 (excerpt from Mr. Kisor's letter to Acting Regional Director Craig Moore of August 24, 2007).

because Mr. Kisor was not diagnosed with PTSD, the RO denied Mr. Kisor's claim, which denial became final after Mr. Kisor appealed, but failed to perfect his appeal. Pet. App. 3a; J.A. 15.

In June 2006, Mr. Kisor submitted a request to reopen his 1982 Claim with the RO. Pet. App. 4a; J.A. 16–17. Thereafter, Mr. Kisor submitted additional evidence to the RO while his request was pending (J.A. 23–26)—a July 2007 report of a psychiatric evaluation diagnosing Mr. Kisor with PTSD (J.A. 28–40); a copy of Mr. Kisor's Combat Action Ribbon Award (J.A. 27); a copy of the Official U.S. Marine Corps "After Action Report" regarding Operation Harvest Moon (J.A. 24); and a number of other, relevant documents. *See* Pet. App. 4a. In September 2007, a VA examiner formally diagnosed Mr. Kisor with PTSD, making a "Formal Finding of Information Required to Document the Claimed Stressor." Pet. App. 4a; J.A. 41–44. The RO reopened Mr. Kisor's claim, granted him a service connection for PTSD, and assigned a fifty-percent disability rating from June 5, 2006. Pet. App. 4a; J.A. 41–43. Mr. Kisor filed a Notice of Disagreement with the RO in March 2009, challenging the percent rating, and importantly, the effective date assigned to Mr. Kisor's claim. Pet. App. 5a; J.A. 45–49. The RO, in January 2010, denied Mr. Kisor's entitlement to an earlier effective date. Pet. App. 5a–6a.

Mr. Kisor appealed the RO's effective date determination to the Board of Veterans' Appeals ("Board"). Pet. App. 6a. Specifically, Mr. Kisor requested that his claim's effective date relate back to his original 1982 Claim date, not to the reopening in

2006. Pet. App. 6a. The Board rejected Mr. Kisor's arguments, but suggested that Mr. Kisor may be able to proceed under 38 C.F.R. § 3.156(c). This regulation provides that, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . .." 38 C.F.R. § 3.156(c)(1). If proceeding under this section, the VA can alter the effective date of the entitlement to "the date the entitlement arose or the date the VA received the previously decided claim, whichever is later . . .." 38 C.F.R. § 3.156(c)(3).

The Board, applying 38 C.F.R. § 3.156(c) still found that Mr. Kisor was not entitled to an earlier effective date. Pet. App. 8a. The reason? According to the Board's interpretation, the newly submitted documents were not "relevant" as contemplated by 38 C.F.R. § 3.156(c). Pet. App. 8a. The Board found that the reason for the denial of Mr. Kisor's 1982 Claim was that there was no specific finding that Mr. Kisor suffered from PTSD and that the newly submitted documents did not establish that Mr. Kisor had PTSD at the time of the original claim. Pet. App. 8a–9a. Mr. Kisor appealed this decision to the Veterans Court, which found that Mr. Kisor "failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." Pet. App. 25a.

Mr. Kisor then appealed to the United States Court of Appeals for the Federal Circuit. Pet. App. 10a. Mr. Kisor challenged, *inter alia*, the Board's

interpretation of 38 C.F.R. § 3.156(c). Pet. App. 10a. The Federal Circuit, however, was hamstrung in its review of the Board's interpretation—"As a general rule, we defer to an agency's interpretation of its own regulation as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." Pet. App. 14a–15a (citations and quotations omitted). The Federal Circuit ultimately determined that 38 C.F.R. § 3.156(c)(1) was "ambiguous as to the meaning of the term 'relevant,'" and that the "Board's interpretation [of the term 'relevant'] does not strike [the Court] as either plainly erroneous or inconsistent with the VA's regulatory framework." Pet. App. 15a, 17a. Based on those determinations, the Federal Circuit found no error in the Board's interpretation of 38 C.F.R. § 3.156(c) and affirmed the Veterans Court's affirmation of the Board's decision to deny Mr. Kisor an effective date earlier than June 2006. Pet. App. 19a.



## SUMMARY OF THE ARGUMENT

This case is about whether this Court should overturn its holdings in *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins*. But this case is also about James Kisor, a Vietnam veteran suffering from PTSD who has been made to suffer further by a Veterans Administration that refuses to speak clearly until hauled into court. It is paramount that, while in the midst of this very important legal debate over the scope of an agency's power to authoritatively interpret its own ambiguous regulations, we do not lose sight of

the very real harms that *Auer* deference continues to inflict on ordinary men and women across the country.

This brief highlights the experiences of Sergeant Major Jeff S. Howard (ret.)—a long-time former VSO and decorated veteran in his own right—who has encountered first hand the impact *Auer* has on our nation's veterans. SGM Howard worked with the VA for years to help wounded veterans obtain the medical benefits they are entitled to, and faced a never-ending series of obstacles caused by the deference doctrine: unpredictable and seemingly arbitrary changes in VA interpretations of ambiguous terms, vague, nearly incomprehensible regulatory provisions, and a severe lack of communication from VA officials.

*Auer* deference's negative impact on agency behavior is clear. Courts' reflexive deference to agency interpretations of their own regulations, even when the agency's proffered interpretation is far from the most natural or reasonable one, incentivizes agency officials to use this interpretive power as an end-run around formal policy-making. If they draft their regulations vaguely enough, then the regulations' meaning can be flexibly reinterpreted whenever politically convenient, without the hassle, delay, and expense of notice-and-comment rulemaking. And while this may be an efficient way of doing business for agency officials, it can be extremely destructive to the ordinary citizens attempting to navigate what is already a complex and confusing web of regulation. *Auer* and *Seminole Rock* deserve be overturned solely due to their legal defects, but the harm they have inflicted—and continue to inflict—on everyday Americans should never be far from our minds.

## ARGUMENT

### I. VETERAN SERVICES OFFICER SGT. MJR. HOWARD'S (RET.) EXPERIENCE WITH AGENCY VAGARIES

Throughout his 12 years as a VSO, SGM Howard had a front row seat to the tragic human consequences of *Auer* deference. His clients' struggles to obtain the medical care and benefits they deserved brought SGM Howard face-to-face with exactly the sort of agency behavior that critics of *Auer* deference have long railed against—arbitrarily shifting interpretations of regulations between different officials and at different times, vague and nearly incomprehensible regulations, and lack of proper notice of what is required under the regulations.

SGM Howard, upon becoming a VSO for both the local American Legion and Adams County, Idaho, was trained in the process of submitting claims to the VA. SGM Howard attended an annual training, organized by the VA and all of the major veterans' services organizations, comprising of 30 hours of in-depth, intensive instruction. This was the only time that VSO's, like SGM Howard, were ever able to interact directly with VA raters (the initial reviewing party on veterans' claims) and Decision Review Officers (the second-level review of veterans' claims)—even then, the interaction was often limited to lecture and limited questions. During his 12 years as a VSO, and his nearly 360 hours of training, the only time SGM Howard was explicitly informed that the VA was

changing its interpretation of a VA regulation was when the VA was forced by the courts to recognize that Agent Orange could cause ischemic heart disease for the purposes of disability benefits. What follows are a mere handful of examples from SGM Howard's career as a VSO.

SGM Howard faced near-constant roadblocks caused by vaguely drafted regulations. It was rarely clear what the requirements for having a claim approved were or what evidence was necessary for meeting those requirements. Often, each VA official SGM Howard interacted with had a different interpretation of the regulatory provision at issue, causing wildly different outcomes for similar claims with the exact same or near-identical evidence.

For example, one of SGM Howard's clients had previously been given a ten percent disability rating due to a service-related hip injury. Over the course of two years the injury became progressively worse, so he and SGM Howard submitted a rating increase request. SGM Howard presented X-rays of the veteran's hip and other evidence showing the injury had caused grinding bone-on-bone contact—worth a twenty percent disability rating, according to 38 C.F.R § 4.71a—but the claim was denied. They refiled with additional information but were denied again. Taking the regulation at its word, and not understanding the denial, they filed a third time with the veteran's doctor's recommendation for hip replacement surgery. Despite not hearing back from the VA, the veteran had run out of time and elected to go through with the surgery without VA support. Immediately after the surgery, SGM Howard resubmitted the claim with the

same evidence and, at the same time, submitted a claim for a temporary one hundred percent rating immediately following hip replacement surgery, as set forth in 38 C.F.R. § 4.71a(5054). Confusingly, the VA rater granted the veteran a temporary one hundred percent disability rating but once again denied the original rate increase—despite both claims being based on the exact same injury and evidence. Dumbfounded by the VA's determination, SGM Howard appealed the decision, on behalf of the veteran, to a Decision Review Officer ("DRO"), again, using the exact same evidence. This time, the original request that had previously been denied four times was quickly granted. It was never clear to SGM Howard or the veteran what evidence was required to satisfy the VA. The DRO came to a completely different conclusion than the rater using the exact same evidence (doing so in a fraction of the amount of time the rater took to deny the claim three times), and the raters themselves were inconsistent in their treatment of the evidence pre-and-post-surgery. It took over eight months for the veteran's claim to ultimately be approved. The VA backdated the twenty percent disability rating to the original claim date.

Vague regulations—and the wildly inconsistent interpretations from VA officials that result—were the root cause of many of the frustrations SGM Howard faced as a VSO, but even common terms that seemed clear to ordinary citizens could become sources of ambiguity in the hands of VA raters and DROs. And even as a highly trained VSO, it was extremely frustrating to point directly to what appears to be perfectly clear language in the CFR only for a rater or DRO to "interpret" the clear meaning

right out of it. Imagine what it would be like if you were approaching the regulations as a layman.

For example, another of SGM Howard's clients was a Vietnam War veteran who had suffered significant hearing loss during his service as an artilleryman. Despite the evidence presented—and a 105mm howitzer's propensity to cause hearing damage among those operating them—the VA's rater denied the veteran's claim. The rater used the fact that the veteran owned and regularly fired a .22 caliber rifle to declare that the hearing loss occurred after the veteran's service. The DRO agreed with this assessment on appeal, and it took SGM Howard showing a judge a picture of the veteran cradling a 105mm howitzer round and handing the Veterans Court judge a live .22 round to compare the two to finally get someone to see reason and approve the veteran's claim. Apart from this courtroom demonstration, absolutely no new evidence was presented. It was two-and-a-half years before SGM Howard was even able to stand before the judge. Yet again, recognizing the rater's and DRO's error, the judge backdated the benefits to the original claim date.

A third client attempted to file a claim for service-related PTSD—much like Mr. Kisor in the present litigation—and was denied due to lack of evidence of sufficient "stressors" known to cause PTSD. This was despite the fact that this veteran was a door gunner who saw service in Vietnam, and despite the fact that the veteran had been awarded the Silver Star for gallantry in action. The Silver Star is the third-highest military combat decoration that

can be awarded to a member of the United States Armed Forces, awarded for personal gallantry "above those required for all other U.S. combat decorations" other than the Medal of Honor or a Service Cross. *Description of Medals*, Department of Defense, https://valor.defense.gov/description-of-awards/ (last visited Jan. 28, 2019). Presented with the exact same evidence, a DRO almost immediately reversed the rater's decision, but the claim still took over a year to be approved.

## II. PROBLEMATIC AGENCY BEHAVIOR ENCOURAGED BY *AUER* DEFERENCE

We do not recount SGM Howard's story to this Court merely to highlight the shortcomings of the VA; the issue at hand is much more consequential. SGM Howard's story perfectly encapsulates how the near-complete agency deference set out by this Court in *Auer v. Robbins* harms those whom the agencies are supposed to help. The difficulties faced by SGM Howard and the veterans with whom he worked—confusing and vague regulatory language, ever-shifting requirements that seemed to change at a whim, and opaque processes that kept important information secret from applicants for benefits—are precisely the sorts of problems critics of *Auer* and *Seminole Rock* have been warning about for decades. *See generally*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

### A. Shifting Interpretations

One of the foremost goals of any legal system, and America's in particular, is to ensure regularity and predictability in the law. *See* Richard Fallon, *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) ("First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.") In fact, that is the primary benefit to codifying laws in the first place: writing them down provides certainty and guidance, allowing the governed to view and comprehend the principles by which they are bound. *See* THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that Americans had the opportunity to be the first nation to "establish [ ] good government from reflection and choice, [rather than being] forever destined to depend for their political constitutions on accident and force").

In an ideal system, any reasonably literate person would be able to look up a statute or regulation, read it, maybe peruse a court case or academic article to learn about the nuance and context of the language in question, and comprehend what the government is requiring of them. *Auer* deference turns that ideal on its head. *Auer* deference allows federal agencies, such as the VA, to effectively re-write their regulations on a whim under the guise of informal "interpretation." Citizens subjected to agency authority, therefore, need be knowledgeable

not only of the relevant federal statutes and regulations at play in order to understand their rights and obligations, but must also be familiar with every internal memorandum, field manual, and training document that may touch on the same topic—some of which were never formally published or even made available to the public. *See, e.g., Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016) (endorsing interpretation of environmental regulation found in internal agency field circular under *Auer* deference). Under *Auer*, "[a]ny government lawyer with a laptop could create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

This is the chief *Auer* issue SGM Howard experienced as a VSO. Whether helping veterans whose hearing had been damaged by artillery, attempting to obtain coverage for hip surgery, or getting support for a Silver Star honoree suffering from PTSD, the VA's vague regulations all but ensured that different VA officials would interpret and apply their own regulations inconsistently. As demonstrated *supra*, on any given day, a rater would deny a claim that a DRO would approve—despite those claims being identical. Occasionally, it would take the veterans court to interpret the regulation differently than the rater or DRO to allow SGM Howard to successfully get benefits for a suffering veteran. These situations were not an aberration, but rather colored the entirety of SGM Howard's career as a VSO. Imagine attempting to navigate this system without someone as experienced, educated, and dedicated as SGM Howard.

The shifting sands that SGM Howard had to traverse are not merely the end-user effect of a lack of communication from VA employees, as one can see in many large organizations, but rather are the direct and foreseeable result of a doctrine of near-complete judicial deference that, in effect, encourages agencies to repeatedly change the meanings of their regulations as convenience requires, so as to avoid the messy and time-consuming process of revising them the appropriate way through notice-and-comment rulemaking (or even better, through the long-lost art of Congressional legislation).

If for no other reason than providing for some level of certainty in the interpretation of agency regulations, this Court should overturn the precedent of agency deference as established in both *Auer* and *Seminole Rock*.

### B. Vague Regulations

As if the ever-changing nature of the VA's and other agencies' regulation was not enough, *Auer* deference has resulted in the even more insidious practice of agencies intentionally drafting ambiguous regulations. When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that "*Auer* deference plays a role in drafting" their regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN L. REV. 999, 1066 (2015). Allowing agencies to reinterpret their ambiguous rules at will, with no need for formal review processes, incentivizes them to write vague regulations—to ensure the widest range of potential meanings. As Justice Scalia—the author of *Auer v. Robbins*—observed in 2015, "giving [informal

agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

As illustrated above in Part I, *supra*, this is no mere academic concern. The vagueness with which the VA writes its regulations makes it extremely difficult for even experienced professionals, such as SGM Howard, to parse the meaning of eligibility criteria, claim reconsideration, rating percentages, and countless other VA regulations. When it comes to the many veterans who do not have the good fortune to have someone like SGM Howard in their corner, the prospect can seem hopeless.

To take an additional example, just look at the relevant regulatory language in the case at bar. The present controversy centers around the meaning of 38 C.F.R. § 3.156(c)(1), which, at the time this case was filed, read, in part:

> Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section . . . .

Even if you are able to parse the stilted and convoluted language of this section (which is representative of the surrounding sections as well) in general, the regulations provide no indication of what the term "relevant" is supposed to mean in this context. Indeed, nowhere in the regulation or previous provisions is there a definition of the term 'relevant.' Pet. App. 15a–7a. The Federal Circuit below was at a loss for what § 3.156's drafters meant by that term, stating in its denial of rehearing *en banc* that "[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable. We thus conclude that the term 'relevant' in § 3.156(c)(1) is ambiguous." *Id.* at 17a. In its Congressionally mandated amendment to the section at issue in this case earlier this year, even the VA itself has acknowledged that the language is unnecessarily unclear. *See* VA Claims and Appeals Modernization, 84 Fed. Reg. 138-01(Jan. 18, 2019) ("these implementing regulations provide *much-needed comprehensive reform* for the legacy administrative appeals process . . . .") (emphasis added). If trained lawyers and judges, as well as the United States Congress *and VA officials themselves*, are incapable of supplying definite meaning to the VA's words, what hope does the average citizen have?

In his 12 years as a VSO, SGM Howard assisted at least 300 to 400 veterans and attended approximately 360 hours of formal training in how to navigate the VA claims process. Despite this extensive training and experience, he still struggled with interpreting VA regulations. As illustrated in Part I, *supra*, getting a meritorious claim approved could easily require two or three separate rounds of

applications (regardless of whether additional evidence was needed or not) and an appeal, often taking well over a year. If trained and highly skilled professionals such as SGM Howard often need two, three, or even more bites at the apple to finally have the VA get it right, something has clearly gone very wrong.

While certainly not this Court's intent, the deference given to agencies under both *Seminole Rock* and *Auer* encourage federal agencies to promulgate these vague and unintelligible regulations so that they may swoop in with any interpretation for their regulations that serves the agencies' best interest, so long as that interpretation is not "erroneous or inconsistent." This Court should reverse its precedent set forth in both *Seminole Rock* and *Auer* in order to correct this injustice.

### C. Lack of Notice

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. *See* LON L. FULLER, THE MORALITY OF LAW 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law"). A properly formulated law must provide fair warning of the conduct prescribed or proscribed to those who may be subject to the law's requirements. These are not merely guidelines for good public administration; they are bedrock characteristics of the very concept of law. *Id.* The *Auer* doctrine contradicts this principle.

As evidenced by SGM Howard's experience with being unable to obtain information or guidance from VA raters or DROs outside of annual training events,

the VA, just like numerous other federal agencies, has almost completely abandoned the basic concept of providing citizens with adequate notice of what the citizens' legal rights and obligations are. How can one trust that the system has the answers when it is impossible to even access the system in order to ask the question? Given that it is extremely difficult to pass any legislation through Congress, and notice-and-comment rulemaking is a long and time-consuming process that can require sifting through hundreds or thousands of public comments, agencies have come to rely more and more on internal memoranda and expedient reinterpretations of old statutes and regulations in order to achieve their policy goals. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–99 (2007) (noting the shift from formal rulemakings to the use of informal guidance manuals as the primary tools of agency policy-making. "A recent study of the Food and Drug Administration . . . suggests that on average it issues at least twice as many guidances as it does rules."). What the agencies have relied on as a clever method to pass pseudo-legislation, in reality, is an insidious work around to the basic notice requirements that underly our legal system. The efficient accomplishment of a particular administration or official's policy goals should not take precedence over the fundamental right to due process of law.

The veterans SGM Howard assisted were expected to navigate a complex series of rules, requirements, and definitions that were not only mostly unknown to them, but in some cases may have been entirely *unknowable* ahead of time. The use of

informal, internal documents rather than formal rules, combined with the firewall the VA has put up between its officials and VSOs, means that veterans are forced to go into the claims process half blind, leading to the significant delays reported by SGM Howard while additional evidence that could have been requested earlier is obtained, and appeals are filed. Not only was SGM Howard not provided with the VA's interpretations of their own regulations, aside from one occasion, he was never notified when those interpretations changed. Essentially, the VA asked SGM Howard, and the veterans he worked on behalf of, to play the game without knowing the rules and reserved the right to change the rules whenever it felt like it.

This Court's goal of allowing agencies an inch in the administration of their own regulations has resulted in the agencies taking a mile to intentionally draft ambiguous regulations, alter their interpretations as they see fit, and fail to ever provide all those subject to the regulations any information about their actual meanings. This Court's precedent, as established in *Seminole Rock* and *Auer*, though well-intentioned, has resulted in an affront to the basic principles of our legal system and should be overturned.

## III. THE PERVASIVE IMPACT OF *AUER*

The purpose of this *amicus* brief has been to illuminate the harmful impacts of *Auer* deference on veterans attempting to obtain the benefits to which they are entitled; to show how the arguments Mr. Kisor is advancing before this Court will improve the lives of countless veterans, and to illustrate how even

experienced professionals have trouble navigating the tangle of vague and convoluted VA regulations this Court's *Auer* deference doctrine has allowed to metastasize.

The problem of *Auer* deference, however, extends beyond the halls of the VA to most, if not all, other federal agencies, and the struggles faced by Mr. Kisor and SGM Howard, while notable, are far from unique. *Auer* permits the Department of Labor to withhold benefits from sick coal miners, despite a Congressional authorization to do so. *See Pauly v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991). It allows the Department of Agriculture to declare family farms protected wetlands based on only the weakest of pretenses. *See Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016). And of course, it allows the VA to deny veterans needed health services. *See* Part I, *supra. C.f. Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016) (refusing to apply *Auer* deference to decision denying veteran partial knee replacement); *Vietnam Veterans of America v. Central Intelligence Agency*, 811 F.3d 1068 (9th Cir. 2015) (refusing to apply *Auer* deference to decision denying coverage for injuries resulting from chemical and biological weapons experiments on soldiers). And most people and small businesses forced to deal with administrative agencies do not have a free regulatory-guide like SGM Howard available to assist them.

There is a reason that, when a court is asked to interpret an ambiguous term in a contract, the general rule is that the ambiguous term is interpreted in the light most favorable to the non-drafting party. *Restatement (Second) of Contracts*, § 206 ("In choosing among the reasonable meanings of a promise or

agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). The comments to Section 206 of the *Restatement (Second) of Contracts* provides a good summary of the rationale:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. *Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert*. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases.

*Id.* (emphasis added). Contracts, of course, are not regulations, but the situations are analogous. There is no reason why the general rule for interpretation of private contracts should be flipped on its head whenever a federal agency of the United States government—which enjoys possibly the strongest bargaining position possible—happens to be the drafting party. The malincentives identified by the American Law Institute—and, indeed, by this Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 (1995) ("Respondents drafted an

ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.")—are equally apparent in the *Auer* context. Indeed, *Auer* deference makes less sense the wider one's perspective becomes. The common-law rule of lenity commands that ambiguities in criminal statutes be interpreted in favor of the defendant. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Skilling v. United States*, 561 U.S. 358, 410–11 (2010). This Court's void for vagueness doctrine stands for the proposition that ambiguities in criminal statutes can be enough to invalidate the statutes on First Amendment grounds. *See Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). For some reason, the only time when the general rule that ambiguities are resolved against the drafter seems not to be followed is within the *Auer* context.

This Court's doctrine of deference toward agencies interpreting their own regulations—under both *Auer* and *Seminole Rock*—causes real, significant harm to those at the receiving end of adverse vacillating agency interpretations. This is not merely an academic debate over the proper distribution of authority between branches of government, or an abstract concern over theoretical misbehavior. The application of *Auer* deference by courts changes agency behavior in measurable ways, *see* Walker, 67 STAN L. REV. at 1066, and SGM Howard's experiences with the VA illustrate how those changes in behavior translate into pain and suffering by America's veterans.

## CONCLUSION

For the foregoing reasons, this Court should overturn its precedent as established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997) and, accordingly, should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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January 31, 2019