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 STEPHEN C. CONNAKER AND THE MILITARY & VETERANS' LAW INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

WILLIAM J. BROWN, JR.
Counsel of Record
MATTHEW K. WEGNER
BROWN WEGNER LLP
SUITE 1260
2010 MAIN STREET
Irvine, California 92614
bill@brownwegner.com
(949) 705-0080
Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 6

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty. 6

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers. 11

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles. 17

CONCLUSION..... 21

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 19

Auer v. Robbins, 519 U.S. 452 (1997) 4, 5, 7, 13

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 4, 5, 7

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) 5, 14, 16

Christensen v. Harris Cty., 529 U.S. 576 (2000) .. 19

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012)..... 18

Decatur v. Paulding, 39 U.S. 497 (1840)..... 19

Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) 7, 17

Egan v. Delaware River Port Auth., 851 F.3d 263 (3d Cir. 2017) 18

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 15

FCC v. MCI Telecommunications Corp., 439 U.S. 980 (1978)..... 13

Garco Const., Inc. v. Speer, 138 S.Ct. 1052 (2018). 6

Gonzales v. Oregon, 546 U.S. 243 (2006) 19

INS v. Chadha, 462 U.S. 919 (1983) 9, 10, 20

TABLE OF AUTHORITIES
(continued)

Janus v. Am. Federation of State, Cty., and Mun. Employees, Council 31, 138 S.Ct. 2448 (2018) 18, 19

Kilbourn v. Thompson, 103 U.S. 168 (1880) 10

Marbury v. Madison, 5 U.S. 137 (1803) 6, 11, 15

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 13

Miller v. Johnson, 515 U.S. 900 (1995) 15, 18

Mistretta v. United States, 488 U.S. 361 (1989).. 10, 11

Morrison v. Olson, 487 U.S. 654 (1989)..... 8, 12

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm, 463 U.S. 29 (1983)..... 15

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 14

Payne v. Tennessee, 501 U.S. 808 (1991)..... 17, 20

Pearson v. Callahan, 555 U.S. 223 (2009) 18, 20

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) 7

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 6, 8, 14, 20

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)..... 18

Seminole Rock 12, 13

TABLE OF AUTHORITIES (continued)

Springer v. Philippine Islands, 277 U.S. 189 (1928) 11

Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50 (2011)..... 19

Talk America, Inc. v. Michigan Bell Tel. Co., 564 U.S. 50 (2011) 7

Turtle Island Restoration Network v. United States Dep't of Commerce, 878 F.3d 725 (9th Cir. 2017)..... 18

United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016)..... 14

United States v. Klein, 13 Wall. 128 (1872) 12

United States v. Nixon, 418 U.S. 683 (1974).. 11, 15

United Student Aid Funds, Inc. v. Bible, 136 S.Ct. 1607 (2016)..... 7

OTHER AUTHORITIES

1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992)..... 8, 16

Brutus, Essay XV (1788), 2 THE COMPLETE ANTI-FEDERALIST 437 (Herbert J. Storing ed. 1981) 9

John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001)..... 10

TABLE OF AUTHORITIES
(continued)

John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997) 8

Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949)8

Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) 19

The Federalist No. 47 (James Madison) (C. Kesler and C. Rossiter, ed., 2003)..... 5

The Federalist No. 48 (James Madison) 9, 10

The Federalist No. 51 (James Madison)9, 10, 12, 15

The Federalist No. 70 (Alexander Hamilton) 13

The Federalist No. 78 16

The Federalist No. 9 (Alexander Hamilton) 9

Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959)..... 9

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, Mr. Stephen C. Connaker is a Vietnam-era US Army veteran, who suffered for decades with Post Traumatic Stress Disorder and other debilitating mental ailments stemming from psychological trauma he suffered when he was nineteen years old, during his service in the Army. In April of 2007, Mr. Connaker submitted a claim for Veterans Administration benefits, but the VA issued a decision denying the claim on the ground that his ailments were not connected to his military service. The toll of the mental conditions and lack of benefits left Connaker homeless and in despair after his claim was denied.

In 2009, Mr. Connaker retained the pro bono lawyers and law students at *Amicus Curiae*, The Military & Veterans' Law Institute, to assist him in litigating his case before the VA. His counsel filed a Notice of Disagreement to appeal the decision denying his claim, which triggered a De Novo Review of his claim pursuant to 38 C.F.R. § 3.2600. In April 2010, a VA Decision Review Officer issued a decision finding that Mr. Connaker's PTSD and other mental conditions were indeed connected to his military service, awarding him a 100% disability rating, with retroactive benefits dating back to the

---

[1] This brief is filed with the consent of the parties. Counsel for Petitioner consented to the filing of this brief via electronic mail sent to counsel for *amici curiae*, and counsel for Respondent filed a blanket consent. No party, and no party's counsel, authored this brief in whole or in part. No person, other than *amicus curiae* and its counsel, paid for or made monetary contributions to fund the preparation or submission of this brief.

initial date of his claim, April 12, 2007. This entitled Mr. Connaker to significant back-pay.

Mr. Connaker is an interested person because he knows - first hand - how difficult maneuvering in the claims process of VA can be, particularly for those veterans suffering with PTSD. Mr. Connaker spent a great deal of time and effort attempting unsuccessfully to navigate his way through the VA administrative claims process without counsel. Given his complicated circumstances and the unique nature of his condition, Mr. Connaker believes he could not have succeeded in his claim without assistance of counsel. Like many veterans, such as the Petitioner in this case, Mr. Kisor, Mr. Connaker has suffered with chronic PTSD connected to his service in the military. Mr. Connaker wishes to emphasize to the Court that the award of VA benefits, and particularly the retroactive back-pay, is what allowed him to begin putting his life back together and to begin recovering from the decades of suffering. He realizes that it is a matter of good fortune that his claim was granted and that it did not take many more years. For that reason, Mr. Connaker deeply sympathizes with his fellow veterans whose VA cases face greater delays or unwarranted difficulties.

Mr. Connaker believes that Mr. Kisor suffered unnecessarily, without benefits and treatment he needed, for more than two decades. Mr. Connaker, a fellow veteran, has an abiding interest in this case. He believes it is an important opportunity for the Supreme Court to do away with interpretive deference--a systemic hurdle that provides officials

at the Veterans Administration unjust discretion to deny otherwise meritorious claims.

Amicus Curiae The Military and Veterans' Law Institute is a premiere non-profit research, academic, and clinical center at Chapman University. The Institute's legal clinic provides pro bono representation to military personnel and veterans in matters ranging from military Discharge Upgrades, Traumatic Service Group Life Insurance Appeals, and VA Benefits Appeals, as well as other matters arising under federal statutes, such as including the Service Members Civil Relief Act (SCRA) and the US Employment and Re-employment Rights Act (USERRA). In addition to direct representation of veterans and servicemembers, The Military and Veterans' Law Institute faculty also engage in scholarly research and writing. They have testified before Congress on issues ranging from military voter protections, to Guantanamo Bay, to personnel issues impacting Military members, and regularly publish opinion pieces. The Institute's founder and Executive Director, Professor Kyndra Rotunda, has published textbooks and legal practice guides for other clinics and practitioners who represent military member and veterans.

This case is of particular interest to *amici* because the outcome could affect all veterans whose eligibility for benefits is subject to administrative determinations; this naturally impacts the mission of the Military and Veterans' Law Institute and the individuals it serves. Given its mission of supporting veterans, the Military and Veterans' Law Institute has a keen interest in ensuring that veterans like

Petitioner do not have their rights abridged by judicial deference to agency interpretations that would otherwise be rejected.

The Institute's most significant struggle in representing its clients arises from the systemic uncertainty of the VA's and other administrative boards' shifting interpretations of regulations to reach results that favor the agency. Based on extensive first-hand experience representing pro bono clients who are prejudiced by random determinations and misplaced deference to agency decisions, the Institute contends that the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997) serves no good purpose. *Amici* acknowledge that other members of the regulated public, who are subject to a vast array of administrative interpretations, face similar disadvantages when challenging agencies. Affording such deference effectively enables the executive branch to usurp judicial and legislative powers--powers that the Constitution expressly assigns exclusively to the other co-equal branches. This case presents the Court with an opportunity to review this controversial standard and to restore the proper structural limits on the administrative functions.

SUMMARY OF ARGUMENT

This case asks whether the Constitution's text and structure, specifically its separation of powers principles, require or permit courts to defer to a federal administrative agency's interpretation of its own ambiguous regulations. In fact, that interpretive authority belongs primarily to the

judiciary because "the preservation of liberty requires that the three great departments of power should be separate and distinct;" and because, concomitantly, the agencies' interpretation of their own regulations is a usurpation of the judicial prerogative. The Federalist No. 47 (James Madison) (C. Kesler and C. Rossiter, ed., 2003).

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and ossified in *Auer v. Robbins*, 519 U.S. 452 (1997), violates standard separation of powers principles. Those principles are derived from the three Vesting Clauses of the Constitution allocating the limited national government's powers to a Congress, a President, and a judiciary. Deferring to an agency's interpretation of its own regulations is no less indefensible than deferring to Congress about the meaning of statutes would be. It is also a recipe for post-hoc agency gamesmanship to ensure the regulator generally wins over the regulated, the governor over the governed. This is not the scheme of separated powers the Framers envisioned.

Furthermore, by misallocating judicial power and thus threatening individual liberty, *Auer* exacerbates the extant problem of delegation of lawmaking powers to unelected executive officials. That delegation already is at the constitutional breaking point under step two of the *Chevron* doctrine. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Auer* also deprives the judiciary of its constitutionally-ensconced and rightful authority to interpret the

laws, an authority this Court has recognized for the past 215 years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Several members of this Court have in recent years acknowledged the constitutional problems with the *Auer* deference doctrine, and the doctrine should now be overruled.

ARGUMENT

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty.

Essential for the preservation of individual liberty, the Constitution's separation of powers is "a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (Scalia, J.) (emphasis in original). It is "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.*

Several members of this Court have recognized that various doctrines of deference to the unelected, unaccountable, and largely-unknown federal bureaucracy might be difficult to reconcile with the separation of powers' "high walls." *Id.* In particular, members of this Court believe that *Auer* deference is on its "last gasp." *Garco Const., Inc. v. Speer*, 138 S.Ct. 1052, 1053 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *id.* at 1052 ("*Seminole Rock* deference is constitutionally suspect."); *United Student Aid*

Funds, Inc. v. Bible, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari). Even *Auer's* author rejected the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer* that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)); John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

There is good reason for this willingness to reconsider *Auer*. The rule announced in *Seminole Rock* and confirmed in *Auer* contravenes the separation of powers—a structural feature of the federal constitution considered vital by the Framers

and Ratifiers—because it gives to the agencies the judiciary's prerogative of construing ambiguous regulations. *Auer* damages the judiciary, of course, but it also damages the Executive by setting up an inherent conflict between the President and the agencies. Ultimately, though, *Auer*'s denigration of the separation of powers injures the individual's liberty the most. In this respect, *Auer*'s sins are obvious, and no "careful and perceptive analysis" is required to observe the "important [and adverse] change in the equilibrium of power" it effectuates. *Morrison v. Olson*, 487 U.S. 654, 699 (1989) (Scalia, J., dissenting). But even if *Auer*'s threat to individual liberty somehow had rendered it just a wolf "in sheep's clothing," *id.* (Scalia, J., dissenting), the separation of powers' "high walls and clear distinctions" would still require its demise, *Plaut*, 514 U.S. at 239.

Separation of the powers of government is foundational to our constitutional system precisely because the Framers and Ratifiers of the Constitution understood well that this principle was necessary to protect individual liberty. Accordingly, the founding generation relied on the works of Baron de Montesquieu, William Blackstone, and John Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government itself. The Federalist No. 51 (James Madison), *supra at* 318; The Federalist No. 47, *supra at* 298-99; The Federalist No. 9 (Alexander Hamilton), *supra at* 67; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, by vesting the legislative authority in Congress, the executive power in the President, and the ultimate judicial responsibilities in this Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. Accepting as a given that power needed to be separated, the ratifying generation debated whether the proposed constitutional text separated power *enough*. The Federalist No. 48 (James Madison), *supra* at 305. This was a rare issue on which the federalists and the anti-federalists agreed. Even the anti-federalist Brutus noted that "[when] power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them." Brutus, Essay XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 442 (Herbert J. Storing ed. 1981). In short, the ratifying generation suffered from no agnosticism or crisis of confidence about the urgent imperative to diffuse power both horizontally (among the coordinate federal branches) and vertically (between the United States and the sovereign States).

Alarmed that just stopping one branch from exercising the powers of another would prove insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachments by another. The Federalist No. 48, *supra* at 305. Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; The Federalist No. 51 (James Madison), *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380 (1989).

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. So much so that any attempt by any branch of government to encroach on another branch's powers, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The duty falls on the judicial branch, in particular, to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. To be sure, the Constitution was designed to pit ambition against ambition and power against power. The Federalist No. 51, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). But when this structural competition of interests does not stop an encroachment, this Court is obligated to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199. Judicial engagement at

such critical moments is an imperative and a virtue, not a vice. It is a principal reason that the judiciary was created.

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers.

The judiciary, like any other branch, must jealously guard its rightful authority so that structural protection of individual liberty flourishes. *See Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928) ("the executive cannot exercise either legislative or judicial power."). The judiciary readily has done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). While each branch has its own constitutional duty to interpret and adhere to the Constitution, the judiciary cannot abdicate its own constitutional responsibility to interpret the law by giving dispositive deference to the interpretations of the other branches. *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("[T]he judicial power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The power to interpret regulations and to give authoritative effect to those interpretations is a judicial power. *Marbury*, 5 U.S. at 177. The

deference shown under *Seminole Rock* and *Auer* abdicates the judiciary's constitutional responsibility of construing regulations to the agencies. Thus, this deference cedes judicial power to the Executive; and it invites the very concentration of power that the founding generation rejected. *See* Manning at 674-75; The Federalist No. 51, *supra at* 318-19 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others"). As Dean Manning has observed, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield disproportionately large influence on the agency. *See* Manning at 675.

Additionally, *Auer* deference damages the Executive because it induces a President/agency schism, Article II's Vesting Clause notwithstanding. *See* Art. II, § 1, cl. 1 ("[t]he executive Power shall be vested in *a* President of the United States") (emphasis added); *see also Morrison*, 487 U.S. at 698-99 (Scalia, J., dissenting) (analyzing historical sources); *United States v. Klein*, 13 Wall. 128, 147 (1872) (disfavoring even "inadvertent" encroachments of one branch on another's preserve). Often, the President has little, if any, control over the interpretation given to a regulation by an agency supposedly reposed within his branch and under his Article II authority. The President's and the agency's interpretive approaches and bottom-line views on what a legal instrument means might, and often do, clash. *See*, *e.g.*, *Metro Broadcasting, Inc. v.*

FCC, 497 U.S. 547, 551 (1990) (contradictory briefs filed by the United States and the Federal Communications Commission (FCC) as to the constitutionality of the FCC's affirmative-action program); Petitioner FCC's Reply to "Brief for the United States in Opposition" at 1 n.1 (FCC brief in case construing an agency order chiding the Solicitor General and "questioning exactly what interests of the United States the Solicitor legitimately represents in this case."), *FCC v. MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (cert. denied). *Auer* creates these fissures within the Executive Branch and threatens the President's traditional dominion over his own branch.

According to the Framers and Ratifiers of our Constitution, such an intra-Executive schism disrupts the Presidency's "unity," which "is conducive to [its] energy," and its structural integrity. The Federalist No. 70 (Alexander Hamilton), *supra at* 422-23. Realizing some of the worst fears of the Framing generation, *Auer* deference has "destroyed" the Presidency's "unity" by splitting its power and "vesting" it "in two or more magistrates of equal dignity and authority." *Id.* at 423. No longer does the President get to enjoy the residual executive power that Article II vests *only* in that office. Instead, *Auer* has "[en]feeble[d]" the Presidency, a result that "implies a feeble execution of the government" itself—thus demoting it to the status of being "a bad government." *Id*. at 422. As a consequence, *Seminole Rock* and *Auer* have inflicted incalculable injury on both the judiciary and the Executive. To paraphrase Justice Scalia's

opinion for the *Plaut* Court, weak fences make weak neighbors. 514 U.S. at 240.

To be sure, Congress might be able to delegate the task of filling in scientific and technical details in a regulatory scheme to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA*, 467 U.S. at 843-44.[2] The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm*, 463

---

[2] This should be distinguished from deferring to administrative diktats that the statutory text means one thing on one day, and something completely different on another day. *Compare National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973 (2005) (upholding FCC determination that broadband internet providers were computer service providers rather than telecommunication providers under the Telecommunications Act of 1996) *with United States Telecom Ass'n v. FCC*, 825 F.3d 674, 695 (D.C. Cir. 2016), *cert. denied*, 139 S.Ct. 454 (2018) (upholding FCC's new ruling that broadband internet providers are now telecommunications providers rather than computer services providers—under the same statutory scheme).

U.S. 29, 42 (1983); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 514-15 (2009).

The ultimate power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the Executive.

From the early days of the Republic, this Court has agreed that the courts have both the power and duty to interpret the law. *See Marbury*, 5 U.S. at 177. Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to the Executive. See *Nixon*, 418 U.S. at 704.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. The Federalist No. 51, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to *exercise* that power. *Marbury*, 5 U.S. at 177. In

order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk 1 § 2, at 58 The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

Chevron deference, when applied to an agency, using its specialized expertise, to merely fill a gap in the technical details of a regulatory scheme, does not raise the same concerns for separation of powers present here. Under this original purpose of *Chevron* deference, the Court does not cede its power to interpret the law. Instead, the Court recognizes that Congress gives agencies clear policy guidance and then relies on those agencies to employ their specialized expertise (such as what level of exposure to a particular chemical is harmful) to fill in gaps in the legislative scheme. Until the agency has filled in those gaps in, the statute may not yet be complete in the sense that specialized expertise must be brought to bear on the problems that Congress sought to address. This use of agency expertise by Congress to fill in details in the regulatory scheme is not a part of the judicial function.

Once the agency has issued a regulation that carries the force of law, however, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." The Federalist No. 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the process to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the ultimate job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles.

"*Stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). For several reasons, *stare decisis* does not support retaining *Auer* and *Seminole Rock*.

First, these decisions were not well-reasoned and, as explained earlier, remain indefensible. *Seminole Rock*, Justice Scalia noted, "offered no justification whatever" for deferring to an agency's interpretation of its own regulation. *Decker*, 568 U.S. at 617-18 (Scalia, J., concurring in part and dissenting in part); *see also Janus v. Am. Federation*

of State, Cty., and Mun. Employees, Council 31, 138 S.Ct. 2448, 2479 (2018) (considering the precedent's quality of reasoning in determining whether it should be retained). *Seminole Rock* and *Auer* deference has been the subject of special criticism by members of this Court and by lower court judges struggling to understand and apply the doctrine properly. *Pearson v. Callahan*, 555 U.S. 223, 234-35 (2009) (modifying the qualified-immunity inquiry for similar reasons); *see also Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

Second, this Court's intervening decisions have removed or weakened *Auer*'s and *Seminole Rock*'s conceptual underpinnings. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989). As an initial matter, this Court now gives primacy to the salient instrument's text and structure, which has not always been the case. *Miller*, 515 U.S. at 922-23. Therefore, the agencies' views on what their regulations mean has diminished value to the Court. Moreover, this Court has abrogated *Auer*'s predicates and rendered what remains of the original deference a problematic anomaly. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (holding that *Auer* is applicable to an agency's "interpretation of ambiguous regulations [that would] impose

potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced"); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 63-64 (2011) (indicating that *Auer* proscribes agencies from issuing what effectively amounts to a new regulation); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* is applicable where the regulation simply paraphrases the statute); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* is applicable where the agency's regulation is unambiguous).

Moreover, *Auer* and *Seminole Rock* themselves are relatively recent aberrations in the historical trajectory of judicial deference. *See*, *e.g.*, *Decatur v. Paulding*, 39 U.S. 497, 515 (1840) (Marshall, C.J.); Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) (stating that the early Supreme Court's "lack of deference" to the Executive meant that "[t]he judges had to defer to the law, not the Executive's interpretation"). Erasing these anomalies will enhance the interests of continuity and stability in the law and thus the interests of *stare decisis* itself. *See Janus*, 138 S.Ct. at 2483-84. Otherwise, *stare decisis* would become an empty talisman reflexively attached to the latest authoritative judicial pronouncement, a canon decoupled from the very interests it is supposed to advance.

Third, a precedent receives weak *stare decisis* effect when: It is a constitutional (instead of statutory) case, *see Agostini v. Felton*, 521 U.S. 203, 235 (1997); it addresses the evidentiary and procedural rules facing stakeholders, not their

primary conduct engendering reliance and expectancy, *see Pearson*, 555 U.S. at 233-34; *Payne*, 501 U.S. at 828; or it is just an interpretive tool, *see Pearson*, 555 U.S. at 233-34. Because *Seminole Rock* and *Auer* deference is a constitutional matter involving the separation of powers, does "not affect the way in which parties order their affairs," and is only a tool of judicial construction, it is not entitled to *stare decisis* effect. *Id.*

Fourth, this Court most vigilantly enforces the Constitution's structural protections, including by invalidating unconstitutional practices—whether they be longstanding, *see Chadha*, 462 U.S. at 959, or of recent vintage, *see Plaut*, 514 U.S. at 240; *United States v. Lopez*, 514 U.S. 549, 551, 567-68 (1995)—because otherwise our entire constitutional structure would unravel. The Court should so enforce again here.

The most illustrative example of judicial engagement to enforce our separation of powers is *Chadha*, where this Court struck down the line-item veto practice. 462 U.S. at 959. Despite the fact that more than 200 statutes across a wide array of policy areas over at least five decades had deployed this practice, the Court held that the practice violated the Constitution's structural requirements of bicameralism and presentment. *Chadha*, 462 U.S. at 967-68 (White, J., dissenting). Nor did concern for the extraordinary "Hobson's choice" Congress would face—either having to over-delegate to the Executive or having to enact detailed statutes—deter the *Chadha* Court. *Id.* The alterations on which the *Chadha* Court insisted in response to the

Constitution's structural fortifications were necessary and worthwhile.

The structural mischief *Auer* deference induces is similar, in many respects, to the shortcut the *Chadha* Court ended. In both cases, the enforcement by this Court of the structural provisions contained in the Constitution was essential because the character of our entire federal government and the preservation of core individual liberty are imperiled when the powers are hopelessly commingled. Accordingly, this Court should restore its coordinate branches to their proper preserves by jettisoning *Seminole Rock* and *Auer* deference.

CONCLUSION

For the reasons stated in this brief and by petitioner, this Court should overrule *Seminole Rock* and *Auer,* and the judgment of the Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

WILLIAM J. BROWN, JR.
Counsel of Record
BROWN WEGNER LLP
2010 MAIN STREET, SUITE 1260
Irvine, California 92614
bill@brownwegner.com
(949) 705-0080

Counsel for Amici Curiae
Stephen C. Connaker and The Military & Veterans' Law Institute