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 FOR *AMICI CURIAE* THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of *pro bono* attorneys who regularly represent immigrants.

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy

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[1] The parties have granted consent to the filing of this brief. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation and submission of this brief.

of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

With the ever-increasing use of administrative regulations to govern individual and corporate conduct and confer and/or limit rights, various rules requiring judicial deference to those regulations have also been increasingly criticized by Members of this Court, judges of the lower federal courts, and academics. The Court has sensibly responded to this groundswell of criticism by adding to its plenary docket for this Term several implicating a handful of these deference rules: *Gundy* v. *United States*, 138 S. Ct. 1260 (2018) (mem.) (No. 17-6086) (argued Oct. 2, 2018) (whether the federal Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations violates the non-delegation doctrine); *PDR Network, LLC* v. *Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 478 (2018) (mem.) (No. 17-1705) (to be argued Mar. 25, 2019) (whether the Hobbs Act requires a federal court to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act); and this case, which asks whether the Court should overrule the doctrine that makes an agency's interpretation of its own ambiguous regulation "controlling unless 'plainly erroneous or inconsistent with the regulation,'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (expanding on the standard originally articulated by *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Of the various deference rules, none has created as much mischief as the *Auer* doctrine and, therefore, of the various cases currently before the Court implicating deference to agencies, no case is as important as this one. As Petitioner has explained, *Auer* deference permits administrative "agencies to circumvent the critical requirements of the APA," adds "intolerable unpredictability into the legal system," and is "incompatible with the basic principle that the one who makes the law should not also interpret it." Pet'r Br. 25-26. *Amici* agree.

This mischief is not merely theoretical. Through "subregulatory" interpretation, agencies can change binding law "based on nothing more than a brief filed in court, a letter posted on a website, or an internal memorandum sent to agency staff." *Id.* at 21, 52; see, *e.g.*, *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s].'" (quoting *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 208 (2011))).

Part I of this brief explains why *amici* agree with Petitioner that this Court should overrule *Auer*. But Part I also articulates an alternative basis for overruling *Auer*, without overruling *Seminole Rock*. In particular, Part I explains how, read carefully, *Seminole Rock* was a straightforward application of the factors articulated by this Court months earlier in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Seminole Rock* (and its progeny for decades thereafter) recognized that courts should defer to agency interpretations only if those interpretations were valid readings of the regulation, consistent with prior agency interpretations, and took into consideration reliance interests. *Auer* should be

overruled, therefore, not because it reaffirmed *Seminole Rock*, but because it severed *Seminole Rock* deference from its original anchoring in the *Skidmore* framework that helped guarantee notice and prevent arbitrariness in rulemaking.

Part II explains the practical problems that *Auer* has wrought by compelling deference to diverse subregulatory interpretations offered in a host of different formats (from regulatory preambles to non-binding internal memoranda to non-precedential decisions from quasi-judicial adjudicators) in all kinds of regulatory contexts. This, in turn, as Part II also illustrates, has left a trap for the unwary, requiring regulated parties to hunt for relevant subregulatory guidance and, if they are lucky to find it, hope that the agency will continue to adhere to it.

Finally, because the greatest number of requests by the government for *Auer* deference come in immigration cases arising from the BIA, Part III analyzes the circumstances under which the courts of appeals will grant *Auer* deference to BIA decisions (including non-precedential, single-member decisions), and uses that analysis to illustrate why granting *Auer* deference to quasi-judicial agencies is particularly problematic.

ARGUMENT

I. THE COURT SHOULD OVERRULE *AUER* BECAUSE IT EXCEEDS *SEMINOLE ROCK* PRINCIPLES.

As Petitioner has explained, *Auer* is incompatible with the Administrative Procedure Act because it allows agencies to issue subregulatory interpretations that bind the regulated public and the courts, but without any of the APA's procedural safeguards. Pet'r Br. 26-33. As a result of that opportunity for agencies

to (sub)regulate without public notice and comment, *Auer* has also injected intolerable unpredictability by inviting the promulgation of vague regulations and then compelling judicial deference to their subsequent, less-formal clarifications. Pet'r Br. 37-40. This, in turn, has created serious separation-of-powers problems by vesting the power to interpret vague regulations in the same branch of government that promulgated them while simultaneously curtailing the courts' obligation to independently interpret the law. Pet'r Br. 43-45.

Amici agree with these rationales and believe them sufficient to overrule *Auer*. But *amici* also would like to put before the Court an alternative basis for overruling *Auer* that focuses on a key, yet largely overlooked, distinction between *Auer* and *Seminole Rock* itself.

A careful review of the doctrinal context in which *Seminole Rock* was decided reveals that it originally had a far more modest and bounded significance that this Court recognized in the decades after *Seminole Rock*, but that the *Auer* Court did not sufficiently appreciate. The real problem with *Auer* was therefore not so much that it followed or reaffirmed *Seminole Rock*, but that it took one piece of dicta from *Seminole Rock* out of its larger doctrinal and historical context. In doing so, it announced a rule of deference to agency interpretations of regulations far more sweeping, categorical, and generous than *Seminole Rock* had originally recognized.

In short, *Seminole Rock* is best read in light of the framework for according weight to agency interpretations announced by the unanimous Court just six months earlier in *Skidmore*, 323 U.S. 134. See generally Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 Geo. J. L. & Pub. Pol'y 87 (2018). On December 4, 1944, Justice Jackson, in writing for the *Skidmore*

Court, observed that courts may give weight to agency interpretations on a case-by-case basis depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. If agency interpretations (1) accorded well with the text of the regulation and demonstrated thorough reasoning and validity, (2) were consistent with prior agency determinations, and (3) provided adequate notice to regulated entities and considered their reliance interests, then courts would give those interpretations weight and defer to them. On June 4, 1945, in *Seminole Rock*, in an 8-1 decision, the Court did not silently repudiate the larger framework that it had unanimously crafted six months earlier and announce a new rule of unquestioning deference to agency interpretations. Rather, *Seminole Rock* effectively applied the *Skidmore* framework to the controversy at hand, and for decades thereafter, the Court applied that bounded *Skidmore* framework when it was asked to defer to agency interpretations of their own regulations.

Most attention to *Seminole Rock* focuses on the famous statement that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. But that statement is dicta; it did not form the basis for the Court's decision in *Seminole Rock*. Instead, the operative (though less sonorous) sentence that explained the basis for the Court's decision was: "Our reading of the language of Section 1499.163(a)(2) of Maximum Price Regulation No. 188 and the consistent administrative interpretation of the phrase 'highest price charged during March, 1942' thus compel the conclusion that

respondent's highest price charged during March for crushed stone was 60 cents per ton, since that was the highest price charged for stone actually delivered during that month." *Id.* at 418 (footnote omitted). As reflected by that explanation, the Court considered several of the *Skidmore* factors in according weight to the agency's interpretation.

The *Seminole Rock* Court first considered the validity of the agency's interpretation by carefully reading what it called "the plain words" of the text of the regulation itself: "Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Id.* at 414. The Court added that, in reading the regulation on its own, it might take into consideration "[t]he intention of Congress or the principles of the Constitution." *Id.* And the Court independently read those words of the regulation and arrived at its own judgment of what it meant: "As we read the regulation * * * rule [i] clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone." *Id.* at 415.

Only after assuring itself that the agency comported well with the regulation's text did the Court then look at the nature of the guidance documents issued by the agency. And there it focused on the consistency and notice provided by the agency's interpretations. It underlined the fact that the interpretive bulletin issued by the Administrator had come out "concurrently" with the regulation itself. *Id.* at 417. It observed that the bulletin, entitled "What Every Retailer Should Know About the General Maximum Price Regulations" was made broadly available to manufacturers, wholesalers, and retailers. *Id.* It attributed significance to the fact that the agency's position had "uniformly been taken" by the Office of Price Administration "in the

countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id*. at 417-18. And it grappled with, and disposed of as factually irrelevant, purported examples of agency inconsistency concerning its interpretation provided by the respondent in the case. *Id*. at 418 n.9.

Seminole Rock thus applied the factors laid out in *Skidmore* before according weight to the agency's interpretation of its own regulation. Despite the dicta, the Court did not blindly defer to the agency's interpretation of its own regulation. Rather, it first performed a searching, extended examination of the regulation's text on its own. *Id*. at 414-17. And when it looked at the agency's interpretation of the regulation, it credited it only because it had been consistent with prior agency statements, had been issued concurrently with the regulation itself, and had been promulgated publicly and broadly. It is then no surprise to learn that the government's brief in *Seminole Rock*, which Justice Murphy largely followed in drafting the decision, cited *Skidmore* and argued that "the language of the regulation compels the construction placed upon it by the Price Administrator" which, since the beginning, had been "consistently and repeatedly reaffirmed" in "[m]illions upon millions of individual transactions." Brief for the Petitioner, at 18, 20-21, *Seminole Rock*, 325 U.S. 410 (No. 914); see also Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the Seminole Rock Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/.

This Court's decisions in the decades after *Seminole Rock* provide additional evidence that it was not the watershed decision that it has occasionally been made out to be. In the first two decades between 1945 and

1965, the Court cited *Seminole Rock* only once (in dissent), and when the Court did cite it, the Court often indicated that it stood for the rule that agency interpretations would be accorded deference only if they were consistent with prior interpretations, complied with notice requirements, and did not interfere with reliance interests.

Specifically, Justice Reed first cited *Seminole Rock* along with several other cases in his dissent in *Peters* v. *Hobby*, 349 U.S. 331 (1955), for the proposition that a "reasonable interpretation promptly adopted and long-continued" by the President and an administrative agency should be respected by the courts. *Id.* at 355. In the next citation in *Udall* v. *Tallman*, 380 U.S. 1 (1965), the Court deferred to the Secretary of the Interior's interpretation of two executive orders, citing the fact that "the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record. While the Griffin leases and others located in the Moose Range have been developed in reliance upon the Secretary's interpretation, respondents do not claim to have relied to their detriment upon a contrary construction." *Id.* at 4. In *Ehlert* v. *United States*, 402 U.S. 99 (1971), after concluding that the regulation contained some ambiguous language, the Court cited *Seminole Rock* for the rule that that "we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such." *Id.* at 105. In *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12 (1975) (per curiam), the Court cited *Seminole Rock* and deferred to an agency interpretation because it was "supported by the wording of the regulations and is consistent with prior agency decisions." *Id.* at 14. In

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980), the Court cited *Seminole Rock* in upholding a Federal Reserve Board staff interpretation in part because the staff had "consistently construed the statute and regulations." *Id.* at 557. And in *Mullins Coal Co. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987), the Court upheld under *Seminole Rock* the Secretary of Labor's interpretation regarding the burden of proof needed to invoke a presumption of eligibility for black lung benefits, because it had been "with one exception, consistently maintained through Board decisions" and had been a "routine" feature of the standard of review in the courts of appeals. *Id.* at 159-60.

The precise date when the dicta in *Seminole Rock* came loose from the background doctrinal framework of *Skidmore* is a matter of some scholarly debate. See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 Emory L.J. 47 (2015). But as these cases indicate, this Court in *Seminole Rock* and for decades thereafter applied *Seminole Rock* deference against a background assumption that the *Skidmore* factors of validity, agency consistency, and notice must first be considered and met before a court should accord deference to agency interpretations of regulations.

In *Auer*, however, the last threads of connection between *Skidmore* and *Seminole Rock* were finally severed. The *Auer* Court quoted the dicta from *Seminole Rock* and expressly declared that to be a "deferential standard," easily met even in a case where the agency announced its interpretation of the regulation for the first time in an *amicus* brief. "Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under our jurispru-

dence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461 (citing *Seminole Rock*, 325 U.S. at 414).

The trouble with *Auer*, then, is that it ignored the preconditions that this Court had recognized in *Seminole Rock* for deferring to agency interpretations. It retained the punchline, but dropped the indispensable setup. This failing in *Auer* is not just a matter of deficient legal history, but of significant practical, real-world import because the preconditions it ignored were essential to fairness and due process in rule-making. *Auer* departed from the baseline requirement in *Seminole Rock* that courts defer to agency interpretations only when they are at least persuasive in their own right, consistent with prior agency interpretations, and have been officially and widely published, such that all regulated entities are on notice from the start. Shorn of these basic requirements, *Auer* deference liberates administrative agencies to be as arbitrary as they want to be. They can provide a binding interpretation years after a regulation is promulgated that is not the best reading of the regulation, departs sharply from previous agency interpretations, and is offered in anticipation of (or during) litigation with regulated parties who relied on a previous agency interpretation (or just the most natural reading of the regulation itself), yet still prevail in court.

Such a permission slip removes transparency and accountability from the rule-making process. Because subregulatory interpretations are not subject to the public notice and comment requirement under the APA, 5 U.S.C. § 553(b)(A), the only step along the process at which to pressure-test the soundness of these interpretations is at the judicial review stage. But *Auer* deference effectively defangs that stage, enabling

agencies to survive judicial review with a mere showing that their latest interpretation is not "plainly erroneous." Arranged thus, the rulemaking process removes the burden from agencies critical to ensuring transparency and accountability to either "pay now" at the notice or comment period or "pay later" at the judicial review stage to show that their interpretations are valid, consistent, and take reliance interests into account.

Affording deference to such subregulatory interpretations under these conditions promotes arbitrary government and tends to harm all regulated persons—corporate and individual, and among individuals, particularly our nation's immigrant community that *amici* serve.

II. THE MANY DISPARATE FORMS OF SUBREGULATORY INTERPRETATION TO WHICH *AUER* DEFERENCE APPLIES HARM THE REGULATED PUBLIC.

As Petitioner correctly observes, "*Auer* allows an agency to change the meaning of its regulations (including reversal of pre-existing positions) * * * regardless whether the new interpretation is the best one." Pet'r Br. 24. With scarcely any warning, opportunity for public participation, or political accountability, administrative agencies can change course midstream. *Id.* at 22; see also *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring in the judgment) (explaining that *Auer* deference "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties").

Amici agree. Putting aside the incentives and subjective motivations of agency rule-makers, *amici* direct this Court's attention to the profoundly harmful ways

that *Auer* deference impacts regulated entities and the public at large. *Auer* permits agencies to dramatically change the rules of the game with impunity, while members of the regulated public—individuals, small businesses, and corporations—are deprived of advance warning and regulatory stability. Under the shadow of *Auer*, entities and individuals have difficulty predicting which rules will apply when agencies issue novel, subregulatory interpretations that function as if they have the force of law. See *Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment) ("[J]udge-made doctrines of deference * * * have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking" because "[a]gencies may now use these rules not just to advise the public, but also to bind them.").

A. A strong form of *Auer* deference does not account for the many different forms of subregulatory interpretation to which courts have applied it.

Subject to two exceptions recently adopted by this Court,[2] *Auer* purports to make an agency's interpretation of its own ambiguous regulation "controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461. The Court made that broadly phrased holding in the context of resolving a dispute over the meaning of the Department of Labor's regulations regarding an employee's exemption from overtime pay. *Id.* at 455. The Court deferred to the Secretary of Labor's interpretation set forth "in an *amicus*

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[2] *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* deference is inappropriate for agency interpretation of regulation that merely parrots the statutory text), and *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012) (denying *Auer* deference to agency interpretation of regulation that failed to provide proper notice to regulated entities).

brief filed at the request of the Court" because the regulation at issue, "the salary-basis test," "is a creature of the Secretary's own regulations." *Id.* at 461. In fact, as petitioner notes (Pet'r Br. 9, 29-30), this Court has also applied *Auer* deference to an "internal" agency memorandum that "appears to have [been] written in response" to the litigation at issue, see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007); see also *Chase Bank*, 562 U.S. at 197; *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 278 (2009), and to private letters issued by an agency during the pendency of litigation, *Thorpe* v. *Hous. Auth. of Durham*, 393 U.S. 268, 276 & nn.22-23 (1969).

Together, the Court's broad phrasing in *Auer*, coupled with its willingness to defer to subregulatory interpretations of which parties subject to the regulation (no less, the public at large) lacked notice have sent a strong signal to the lower courts that subregulatory interpretations meeting the "plainly erroneous or inconsistent" standard must receive controlling deference "no matter how informal the pronouncement in which the agency advances its interpretation." *Go* v. *Holder*, 744 F.3d 604, 611 (9th Cir. 2014) (Wallace, J., concurring).

Accordingly, requests by the government for *Auer* deference have not been made just with respect to the types of subregulatory interpretations that this Court has seen. As a recent study shows, the courts of appeals have applied *Auer* to: (1) an agency's appellate litigation position embodied in its own party brief;[3]

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[3] *See, e.g., Drake* v. *FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (applying *Auer* deference to the Federal Aviation Administration's interpretation of its own regulation advanced during litigation where the position was not inconsistent with the agency's prior statements); *Bigelow* v. *Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir.

(2) so-called "non-legislative" or "publication" rules issued by agencies in letters, manuals, memoranda, handbooks, program statements, bulletins, guidance documents, and classifications;[4] (3) informal adjudications;[5] (4) non-textual interpretations;[6] (5) regulatory

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2000) (finding for the Department of Defense and giving *Auer* deference to "the interpretation advanced in the Department's brief").

[4] *See, e.g., Siskiyou Reg'l Educ. Project* v. *U.S. Forest Serv.*, 565 F.3d 545, 548, 553-54 (9th Cir. 2009) (deferring to the interpretation of a "mining-related directive" set forth in a "Memorandum to Regional Foresters" issued by the Forest Service); *Belt* v. *EmCare, Inc.*, 444 F.3d 403, 415-16 (5th Cir. 2006) (applying *Auer* deference to informal Department of Labor regulatory interpretations contained in a nonbinding opinion letter, a Field Operations Handbook, and an *amicus* brief); *Archuleta* v. *Wal-Mart Stores, Inc.* (*In re Wal-Mart Stores, Inc., Fair Labor Standards Act Litig.*), 395 F.3d 1177, 1184-85 (10th Cir. 2005) (applying *Auer* deference to the Department of Labor's opinion letters that explain how regulations related to the Fair Labor Standards Act apply in particular circumstances); *LaFleur* v. *Whitman*, 300 F.3d 256, 277 (2d Cir. 2002) (applying *Auer* deference to the Environmental Protection Agency's interpretation and application of the "Standard Industrial Classification Manual" in determining whether heightened permitting requirements applied to a municipal waste facility under the Clean Air Act).

[5] *See, e.g., Intermodel Techs., Inc.* v. *Peters*, 549 F.3d 1029, 1031 (6th Cir. 2008) (applying *Auer* deference to uphold the National Highway Traffic Safety Administration's denial of a tractor-trailer manufacturer's application for temporary exemption from a tractor-trailer safety standard).

[6] *See, e.g., Ohio Valley Envtl. Coal.* v. *Aracoma Coal Co.*, 556 F.3d 177, 213-14 (4th Cir. 2009) (applying *Auer* deference to the U.S. Army Corps of Engineers' issuance of four permits allowing coal mining operations based on a history of "consistent administrative practice" and consistent reliance on Environmental Protection Agency guidance).

preambles;[7] (6) litigation positions before administrative adjudications;[8] (7) non-precedential adjudications, such as unpublished single-member decisions of the Board of Immigration Appeals;[9] (8) precedential adjudications;[10] (9) hybrid orders,[11] and (10) briefs of non-government parties asserting an agency's prior interpretation.[12] See generally William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 536-43 (2018) (describing forms of subregulatory

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[7] *See, e.g.*, *Halo* v. *Yale Health Plan*, 819 F.3d 42, 53 (2d Cir. 2016) (applying *Auer* deference to preamble to regulation prescribing ERISA benefits claims procedures).

[8] *See, e.g., Ass'n of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998) (applying *Auer* deference to the Commissioner of the Social Security Administration's interpretation of the Coal Act where the Commissioner "consistently" interpreted the Act the same way at the administrative level).

[9] *See* Part III(A), *infra*.

[10] *See* Part III(A), *infra*; *see also, e.g., Excel Corp.* v. *U.S. Dep't of Agric.*, 397 F.3d 1285, 1296 (10th Cir. 2005) (deferring to a Department of Agriculture Judicial Officer's interpretation of a regulation under *Auer* since the interpretation was neither plainly erroneous nor inconsistent with prior determinations).

[11] *See, e.g., Pub. Lands for the People, Inc.* v. *U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012) (applying *Auer* deference to a Forest Service decision, based on a 45-day comment period, that limited motor vehicle access on certain roads in the El Dorado National Forest).

[12] *See, e.g., W. Radio Servs. Co.* v. *Qwest Corp.*, 678 F.3d 970, 984-85 (9th Cir. 2012) (applying *Auer* deference to the Federal Communications Commission's interpretation of the term "interconnection" in a suit between a commercial mobile radio service and a local carrier challenging the approval of an interconnection agreement by the Oregon Public Utilities Commission); *Wal-Mart Stores*, 395 F.3d at 1184-85 (applying *Auer* deference to the Department of Labor's opinion letters in a suit brought by pharmacists against their employer for violations of the Fair Labor Standards Act).

interpretation); *id.* at 545-46 tbl.2 (presenting data on the application of *Chevron*, *Auer*, and *Skidmore* deference to these various forms of subregulatory interpretation).

In fact, because *Auer*'s potential applicability is so pervasive, one recent empirical study counted 429 examples of the courts of appeals applying *Auer* in published (never mind unpublished) decisions between 1993 and 2013, with the government prevailing in 74% of those cases.[13] *Id.* at 519, 536 n.124. And because agency requests for *Auer* deference arise most in labor and employment and immigration cases—in particular, immigration cases arising from the BIA, see Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 830-31 & tbl.3 (2015)—the issue is of utmost important to *amici*.

B. The evils of *Auer* are most notable in their effects on the regulated public.

Precisely because *Auer* applies to so many disparate forms of subregulatory interpretation, the (sub)regulated public lacks recourse to a stable body of rules. See *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) ("Only the text of a regulation goes through the procedures established by Congress for agency rulemaking," and "it is that text on which the public is entitled to rely."). To conform their conduct,

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[13] Apparently emboldened by its success rate, the government has even claimed that one agency's interpretation of another's ambiguous regulation is entitled to deference. *See, e.g*, *L.D.G.* v. *Holder*, 744 F.3d 1022, 1028-29 (7th Cir. 2014) (rejecting the request by the Department of Justice's Office of Immigration Litigation for *Auer* deference to the interpretations by the BIA—another component of the Justice Department—of DHS's U-Visa regulations).

regulated parties often must retain experienced counsel, or at minimum comb through poorly organized government websites or have access to a legal-research database for potentially relevant guidance (assuming it is even in the public domain). Then, regulated parties must guess whether administrative officials will continue to apply those policies as political winds change. See Pet'r Br. 39 ("Such policy shifts often occur when there is a change in Administrations."). *Auer* deference thus creates myriad traps for the unwary across most—if not all—federally regulated contexts, and, as *amici* have learned from experience, particularly undermines "efficiency, fairness, and predictability" in immigration law. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015).

Consider, for instance, subregulatory interpretations concerning parole and deferred action. In November 2013 and 2014, the DHS and U.S. Citizenship & Immigration Service ("USCIS") adopted explicit subregulatory memoranda governing parole considerations for family members of individuals enlisted in the U.S. Armed Forces. See U.S. Dep't of Homeland Sec., Families of U.S. Armed Forces Members and Enlistees (2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf; U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PM-602-0091, Policy Memorandum: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under INA § 212(a)(6)(A)(i) (2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf. Although those policies remain officially in effect, see U.S. Citizenship & Immigration Servs., *Discretionary Options for Military Members, Enlistees and*

Their Families, https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families (last visited Jan. 31, 2019), Executive Branch officials have declined to apply their own subregulatory policies as written. See Tara Copp, *As Many as 11,800 Military Families Face Deportation Issues, Group Says*, Mil. Times, https://www.militarytimes.com/news/your-military/2018/04/01/as-many-as-11800-military-families-face-deportation-issues-group-says/ (Apr. 1, 2018) ("An earlier 'parole in place' program that was previously championed by Vice President Mike Pence to give relief to military families is no longer being utilized due to stricter enforcement of deportation proceedings under [President] Trump.").

As another example, consider subregulatory policy surrounding Form I-693 (a document used for reporting medical-examination results to USCIS). Under 8 U.S.C. § 1182(a)(1), any non-citizen "who is determined * * * to have a communicable disease of public health significance * * * [is] ineligible to receive visas and ineligible to be admitted to the United States." Such visa applicants and applicants for admission must submit a medical examination—using Form I-693—from a "civil surgeon." See 42 C.F.R. § 34.2(c). Before 2002, Form I-693 was considered valid, so long as it was submitted promptly; if adjudication was delayed, the form's validity was automatically extended. See U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2014-005, Policy Alert: Validity Period of the Medical Certification on the Report of Medical Examination and Vaccination Record (Form I-693) (2014), https://www.uscis.gov/policymanual/Updates/20140530-I-693Validity.pdf [hereinafter 2014 Policy Alert]. That approach was not dictated by statute or regulation, as "USCIS historically has es-

tablished the validity period [for Form I-693] by policy." U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2018-09, Policy Alert: Validity of Report of Medical Examination and Vaccination Record (Form I-693) (2018), https://www.uscis.gov/policymanual/Updates/20181016-I-693Validity.pdf. But in 2014, USCIS suddenly changed its subregulatory "policy" to make Form I-693 expire after one year—and, in doing so, the agency was not obliged to solicit public comment. See 2014 Policy Alert, *supra*. As *amici* could have predicted, adjudicative delays ensued and Form I-693's expired in numerous cases. Admission was delayed while families and businesses obtained new medical examinations (which generally cost hundreds of dollars per case). Without warning, the agency's subregulatory policy imposed significant costs on countless families and businesses.

These examples confirm that "*Auer* deference should be set aside because it is fundamentally at war with basic principles of predictability and public notice." Pet'r Br. 36-37. Regulatory deference may very well motivate those who promulgate regulations to "speak vaguely and broadly." See *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). But *Auer*'s true sin is its impact on the *regulated*, not the *regulator*. In this subregulatory world, where agency discretion eclipses fundamental fairness, rights will often rise and fall with the quality of counsel—not the merits of a case. Whatever the fate of *Chevron* and the broader administrative state, *Auer* serves only to insulate from judicial review opaque rules promulgated by unaccountable officials according to unknowable methods.

III. *AUER* DEFERENCE IS PERNICIOUS WHERE QUASI-JUDICIAL AGENCIES LIKE THE BIA INTERPRET REGULATIONS THROUGH ADJUDICATION.

Auer's flaws apply equally, if not with greater force, to quasi-judicial agencies that interpret regulations through case-by-case adjudication.[14] This Court has long recognized that, "in administrative proceedings of a quasi-judicial character," liberty must be "protected by the rudimentary requirements of fair play." *Morgan* v. *United States*, 304 U.S. 1, 14-15 (1938). Cloaked in judicial garb, however, an administrative agency can conduct binding adjudications that "change the meaning of regulations * * * without any advance notice to the parties." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment); see also *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) ("[W]hen an agency interprets its *own* rules * * * the power to prescribe is augmented by the power to interpret."). Moreover, *Auer* deference shields the agency's purported power to "say what its own rules mean" from plenary judicial review. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996).

Amici submit that this regime is incompatible with the "cherished judicial tradition embodying the basic concepts of fair play," *Morgan*, 304 U.S. at 22, particularly in the immigration context. *First*, at the most basic level, quasi-judicial agencies are not properly

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[14] The term "quasi-judicial" refers to "an executive or administrative official's adjudicative acts." *Quasi-Judicial,* Black's Law Dictionary (10th ed. 2014); *see also Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 629 (1935) (discussing Congress' authority to create quasi-legislative and quasi-judicial agencies).

constituted to exercise judicial power. *Second*, and relatedly, quasi-judicial agencies are not better equipped to interpret regulations, particularly considering fiscal and operational constraints within the Executive Branch. *Third*, the severity of deportation, as a punishment, counsels against abandoning fulsome judicial review of regulatory interpretations. *Amici* illustrate these flaws through an examination of the BIA, which underscores why subregulatory interpretation through quasi-judicial adjudication should be reviewed under traditional *Skidmore* principles.

A. Most circuits give *Auer* deference to the BIA's interpretation of ambiguous regulations.

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and its implementing regulations, 8 C.F.R. § 100.1 *et seq.*, designate the process for removing non-citizens from the United States. Generally, Immigration Judges ("IJs") conduct initial removal proceedings and the BIA reviews appeals from removal orders. See 8 U.S.C. § 1229a(a)(1), (c)(5). According to the Department of Justice ("DOJ"), the majority of BIA appeals involve orders of removal and applications for relief from removal.[15]

The BIA is a component of the DOJ's Executive Office for Immigration Review, and is considered the highest administrative body for interpreting immigration law. See Bd. of Immigration Appeals, U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual, ch. 1.2(a)-(b), https://www.justice.gov/eoir/page/file/1103051/download (last updated Oct. 16,

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[15] *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Jan. 31, 2019).

2018) [hereinafter *BIA Practice Manual*]. The BIA generally does not conduct courtroom proceedings or hear oral arguments.[16] Decisions are rendered either by a single Board Member, a three-member panel, or, rarely, the full Board. *Id.*, ch. 1.3(a). The BIA's orders are final, unless stayed, modified, rescinded, or overruled by the Board, the Attorney General, or a federal court. *Id.* ch. 1.4(d) (citing 8 C.F.R. § 1003.1(d)(7), (g)). Decisions released in "published" form constitute binding precedent for the Board and the Immigration Courts. *Id.* ch. 1.4(d)(i) (citing 8 C.F.R. § 1003.1(g)). But the vast majority of BIA decisions are unpublished and, while binding on the parties, are not considered precedent. *Id.* ch. 1.4(d)(i)-(ii).

Nearly every circuit has held that the BIA is entitled to *Auer* deference when interpreting ambiguous immigration regulations, unless "plainly erroneous or inconsistent with the regulation." See *Auer*, 519 U.S. at 461. As the Sixth Circuit has recently explained, "we * * * afford substantial deference to [the BIA's] interpretation of the INA and accompanying regulations," the latter of which "are controlling unless plainly erroneous or inconsistent with the regulation." *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018).[17]

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[16] *See* note 15, *supra*.

[17] The Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits agree. *See, e.g.*, *Gomez* v. *Lynch*, 831 F.3d 652, 655-56 (5th Cir. 2016); *Maldonado* v. *Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc); *Mansour* v. *Holder*, 739 F.3d 412, 414 (8th Cir. 2014); *Li Shan Chen* v. *U.S. Attorney Gen.*, 672 F.3d 961, 965 n.2 (11th Cir. 2011) (per curiam); *Kiorkis* v. *Holder*, 634 F.3d 924, 928 (7th Cir. 2011); *Barnes* v. *Holder*, 625 F.3d 801, 803-04 (4th Cir. 2010); *Kaplun* v. *Attorney Gen.*, 602 F.3d 260, 265 (3d Cir. 2010); *Perriello* v. *Napolitano*, 579 F.3d 135,

Consider, for example, *Zhang* v. *Holder*, 617 F.3d 650 (2d Cir. 2010). There, the Second Circuit gave *Auer* deference to the BIA's interpretation of 8 C.F.R. § 1003.2(a)—a regulation governing the Board's *sua sponte* authority to reopen final removal proceedings. In *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 660 (B.I.A. 2008), the BIA concluded that the so-called "departure bar" deprived it of jurisdiction to consider motions to reopen. *Zhang*, 617 F.3d at 652. Deferring to that legal interpretation of Section 1003.2(d), the Second Circuit held that the BIA's reading was not "plainly erroneous" and thus denied the petition for review. *Id.* The court explained that, although it was "not without flaws," the BIA's legal "construction * * * is entitled to deference." *Id.* at 655. The court also felt obliged to note that "the BIA's construction [wa]s anything but airtight," and restrained itself from "creat[ing] an exhaustive list" of concerns. *Id.* at 660. "Were we writing on a blank slate," the court emphasized, "we might reach a different conclusion." *Id.*[18]

A majority of circuits apply *Auer* deference even to unpublished single-member BIA decisions.[19] In the *Chevron* context, courts find that in issuing un-

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138 (2d Cir. 2009); *Halmenschlager* v. *Holder*, 331 F. App'x 612, 619 (10th Cir. 2009).

[18] Such reluctant deference is not unique to the immigration context. *See, e.g.*, *Qwest Corp.* v. *Colo. Pub. Utils. Comm'n,* 656 F.3d 1093, 1101 (10th Cir. 2011) (reluctantly deferring to the FCC's amicus brief even though the court "would not necessarily reach the same result if not required to defer"); *Wal-Mart Stores*, 395 F.3d at 1181-82 (deferring to the Department of Labor's definition of "salary" expressed in opinion letters even though "we may well have defined *salary* rather differently than the DOL").

[19] *See Gourzong* v. *Attorney Gen.*, 826 F.3d 132, 136 & n.2 (3d Cir. 2016) (describing split of authority and collecting cases).

published decisions, "the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to *Chevron* deference." *Martinez* v. *Holder*, 740 F.3d 902, 909-10 (4th Cir. 2014) (collecting cases); see also *Dhuka* v. *Holder*, 716 F.3d 149, 154-56 (5th Cir. 2013). Yet in the *Auer* context, many circuits find that "the BIA is entitled to significant deference when it * * * interprets an immigration regulation in a single-member, nonprecedential opinion." *Gomez* v. *Lynch*, 831 F.3d 652, 655 (5th Cir. 2016). They reason that, under *Auer*, "the agency's interpretations, even if relatively informal * * *, are given 'controlling weight.'" *Id.* at 655-56; see also *Mansour* v. *Holder*, 739 F.3d 412, 414, 417 (8th Cir. 2014) (extending "the deference afforded by * * * *Auer*" to regulatory interpretation in an "unpublished BIA decision"); *Linares Huarcaya* v. *Mukasey*, 550 F.3d 224, 227-30 (2d Cir. 2008) (per curiam) (extending *Auer* deference to an unpublished decision, despite recognizing "the potential for redundancy in the BIA's interpretation").[20]

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[20] The Ninth Circuit disagrees. *Lezama-Garcia* v. *Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (holding that a "one-member, nonprecedential, BIA order" should be given "no deference under *Auer* as an agency interpretation of a regulation"). As explained, most circuits have similarly declined to apply *Chevron* to unpublished BIA decisions. *See Joseph* v. *Holder*, 579 F.3d 827, 833 (7th Cir. 2009) (citing *Quinchia* v. *U.S. Atty. Gen.*, 537 F.3d 1312, 1314 (11th Cir. 2008); *Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007); *Garcia-Quintero* v. *Gonzales*, 455 F.3d 1006, 1012-13 (9th Cir. 2006)).

B. Affording *Auer* deference to BIA adjudications is particularly problematic.

With this essential background in mind, *amici* submit that *Auer* deference is unjustified in the immigration context for at least three fundamental reasons.[21]

1. Our constitutional system requires federal courts to "exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties." See *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment). *Auer* short-circuits that safeguard, demanding, instead, that judges defer to agency interpretations that are not plainly erroneous or otherwise inconsistent with the regulation. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). This deference doctrine therefore amounts to "a transfer of the judge's exercise of interpretive judgment to the agency." See *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment).

The BIA's exercise of quasi-judicial power is no exception. While Board Members and IJs are considered "independent" adjudicators, see *BIA Practice Manual*, ch. 1.2(c), they are, doubtless, components of the Executive Branch housed within DOJ and subject to oversight by the Attorney General. Significantly, these Executive Branch officials lack the "structural protections for independent judgment adopted by the Fram-

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[21] Prior to deciding *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that agency actions lacking requisite formality, including interpretive rules, do not warrant *Chevron* deference), the Court held that *precedential* BIA decisions interpreting the Immigration and Nationality Act would receive *Chevron* deference. *See INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). *Amici* submit that the Court may want to revisit that holding in an appropriate case. The Court need not do so here, so *amici* do not urge the Court to address the issue.

ers"—*i.e.*, Article III's life tenure and salary protections. See *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment); Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (part 2)*, The Asylumist (Oct. 5, 2016), https://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/ (explaining dismissal of BIA members due to the Attorney General's disagreement with opinions). Thus, as the most basic level, the BIA is "not properly constituted to exercise the judicial power under the Constitution," which suggests that any "transfer of interpretive judgment raises serious separation-of-powers concerns." *Perez*, 135 S. Ct. at 1220.

2. Complicated and technical regulatory matters often require expertise, along with the exercise of "judgment grounded in policy concerns." See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). This confirms that agencies—not courts—should promulgate regulations; but it says nothing about "who should interpret regulations." See *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part). Put another way: "[T]he purpose of interpretation is * * * [n]ot to make policy, but to determine what policy has been made." *Id.* Federal judges are up to that task, often more so that administrative agencies. See *Perez*, 135 S. Ct. at 1222-23 (Thomas, J., concurring in the judgment) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

Auer deference is accordingly at its nadir when regulatory interpretations do not reflect the agency's "fair and considered judgment on the matter in question."

See *SmithKline Beecham Corp.*, 567 U.S. at 155. Experience has taught that—given its crippling workload, inadequate funding, and ever-expanding backlog of cases[22]—the BIA is not sufficiently equipped to "say what its own rules mean." Manning, *supra*, at 654. Courts and commentators alike have recognized that, in the immigration context, quasi-judicial adjudication has "fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). At points, the BIA has been deciding cases at the rate of 7-10 minutes per Board Member, per case. See Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times (Jan. 5, 2003), http://articles.latimes.com/2003/jan/05/nation/na-immig5 (cited in *Kadia* v. *Gonzales*, 501 F.3d 817, 820 (7th Cir. 2007)).[23]

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[22] The backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days. U.S. Gov't Accountability Office, GAO-17-438, Immigration Courts: Actions Needed to Reduce Case Backlog and Long-Standing Management and Operational Challenges 22 (2017).

[23] Criticism of the Board has been severe. *See, e.g.*, *Cruz Rendon* v. *Holder*, 603 F.3d 1104, 1111 n.3 (9th Cir. 2010) ("We are deeply troubled by the IJ's conduct in this case, which exhibits a fundamental disregard for the rights of individuals who look to her for fairness."); *Wang* v. *Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); *Mohammed* v. *Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("Not only was the BIA's opinion an example of sloppy adjudication, it contravened considerable precedent."); *Galina* v. *INS*, 213 F.3d 955, 958 (7th Cir. 2000) ("The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases.").

Yet, despite the BIA's shortcomings (understandable as they perhaps may be), *Auer* nevertheless compels federal judges to afford significant deference to interpretations of ambiguous immigration regulations. And as previously explained, some circuits have even extended *Auer* deference to single-judge, unpublished BIA decisions. See, *e.g.*, *Gomez*, 831 F.3d at 655; *Mansour*, 739 F.3d at 414; *Linares Huarcaya*, 550 F.3d at 227-30. That practice is misguided. The BIA's informal adjudicatory processes do not live up to the "cherished judicial tradition." See *Morgan*, 304 U.S. at 22. As the Ninth Circuit correctly explained in *Lezama-Garcia* v. *Holder*, 666 F.3d 518 (9th Cir. 2011), single-member BIA orders are "non-precedential," often neglect to "explain [their] reasoning," and therefore fail to "reflect the agency's fair and considered judgment." *Id.* at 532; *Auer*, 519 U.S. at 462. Put simply: "Deference is earned; it is not a birthright." See *Kadia*, 501 F.3d at 821.

3. Deportation is a "drastic measure," comparable to "banishment of exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). And often, this "particularly severe penalty" will be more important to non-citizens than "any potential jail sentence." *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 365, 368 (2010)). Recognizing the "grave nature of deportation," this Court has taken great care when reviewing removal cases. See *Jordan* v. *De George*, 341 U.S. 223, 231 (1951) (reviewing removal provision under the void-for-vagueness doctrine); see also *Reno* v. *Flores*, 507 U.S. 292, 306 (1993) (holding that the Fifth Amendment entitles non-citizens to due process in removal proceeding); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that ambiguities in deportation provisions should be construed in favor of non-citizens). Likewise, the federal courts

have consistently tried to "promote efficiency, fairness, and predictability" in immigration law. *Mellouli*, 135 S. Ct. at 1987.

But *Auer* deference compels judges to abandon fulsome checks on the severity of deportation. See *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment) ("When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check."). As previously explained, the majority of BIA appeals concern removal orders and applications for relief from removal. The BIA's interpretation of an ambiguous regulation often will be outcome-determinative. See, *e.g.*, *Zhang*, 617 F.3d at 660 (denying petition for review, even though the BIA's interpretation of regulation was "anything but airtight"). So long as *Auer* remains good law, however, Article III judges will be all-but-powerless to "serve as a 'check'" on those who administer and enforce the immigration laws. See *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).[24]

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For these reasons, *Auer* deference should not apply where quasi-judicial agencies interpret regulations through adjudication—and particularly not with re-

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[24] When *Auer* deference applies, courts are necessarily precluded from construing regulatory ambiguities in favor of non-citizens. *See Cardoza-Fonseca*, 480 U.S. at 449. But fundamental rules of construction should overcome doctrines of administrative deference. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment) ("[R]egulations should be interpreted like any other law."); *see also Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 668-69 (2007) (invoking the surplusage canon when interpreting a regulation); *Long Island Care at Home,* 551 U.S. at 170 (invoking the general-specific canon when interpreting a regulation).

spect to "relatively informal" non-precedential interpretations offered by understaffed and underfunded agencies like the BIA. Contrast *Gomez*, 831 F.3d at 655-56. Compelling deference to such decisions places reviewing courts "in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction [that the court] affirmed as reasonable the Monday before." *Lin* v. *U.S. Dep't of Justice*, 416 F.3d 184, 190 (2d Cir. 2005); see also *Henry* v. *INS*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Applying traditional *Skidmore* principles, however, would avoid this problem. Quasi-judicial agencies like the BIA would receive deference for only carefully reasoned, long-held positions, according to the care and logical power of their decisions—not simply because of their status as quasi-judicial agency adjudicators. *Cf. SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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