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

REPLY BRIEF FOR PETITIONER

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities..... ii
Reply Brief for Petitioner.....1
I. No deference is warranted to the VA's construction. 1
A. *Auer* is incompatible with the APA. 1
B. *Skidmore* is most consistent with the APA.....8
II. *Stare decisis* does not justify retention of *Auer* deference. 12
III. Petitioner offers the best reading of Section 3.156(c). 17
Conclusion 25

TABLE OF AUTHORITIES

Page(s)

Cases

Accardi v. *Shaughnessy*,
347 U.S. 260 (1954) 7

Alaska Dep't of Envtl. Conservation v. *EPA*,
540 U.S. 461 (2004) 11

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 10

City of Arlington v. *FCC*,
569 U.S. 290 (2013) 1, 2, 5

Decker v. *Northwest Envtl. Def. Ctr.*,
568 U.S. 597 (2013) 13

Exxon Shipping Co. v. *Baker*,
554 U.S. 471 (2008) 13

Federal Express Corp. v. *Holowecki*,
552 U.S. 389 (2008) 11, 12

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 11

Henry Schein, Inc. v. *Archer & White Sales, Inc.*,
139 S. Ct. 524 (2019) 10

League of United Latin Am. Citizens v. *Perry*,
548 U.S. 399 (2006) 19

Lennox v. *Principi*,
353 F.3d 941 (Fed. Cir. 2003) 5

Long Island Care v. *Coke*,
551 U.S. 158 (2007) 16

Martin v. *Occupational Safety & Health Review Comm'n*,
499 U.S. 144 (1991) 4

Cases—continued

Martinez v. *Holder*,
740 F.3d 902 (4th Cir. 2014) 7

Morton v. *Ruiz*,
415 U.S. 199 (1974) 5

Nielson v. *Shinseki*,
607 F.3d 802 (Fed. Cir. 2010) 6

NLRB v. *Bell Aerospace Co.*,
416 U.S. 267 (1974) 6

NLRB v. *Curtin Matheson Sci., Inc.*,
494 U.S. 775 (1990) 6

Old Chief v. *United States*,
519 U.S. 172 (1997) 19

Pearson v. *Callahan*,
555 U.S. 223 (2009) 13

Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) 2, 3, 7, 9

SEC v. *Chenery Corp.*,
332 U.S. 194 (1947) 6

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 11

United States v. *Mead Corp.*,
533 U.S. 218 (2001) ..... *passim*

University of Tex. Sw. Med. Ctr. v. *Nassar*,
570 U.S. 338 (2013) 11

Statutes, Rules, and Regulations

5 U.S.C.
§ 551(4) 2, 5
§ 551(5) 2, 5, 7
§ 551(6) 2, 5

Statutes, Rules, and Regulations—continued

5 U.S.C.
§ 551(7) 2
§ 553 2
§ 706 4
29 U.S.C. § 160 6
38 U.S.C.
§ 101(35) 19
§ 501(a) 5
§ 5103A(c) 22
§ 5107(a) 23
§ 20.1303 7
49 Stat. 803 6
38 C.F.R. § 3.156(a) 19, 20, 21, 22
38 C.F.R. § 3.156(c) ..... *passim*
38 C.F.R. § 3.156(c)(1) 18, 20
38 C.F.R. § 3.156(c)(1)(i) 22
Fed. R. Evid. 401 ..... 19, 21
Fed. R. Evid. 403 19

Other Authorities

71 Fed. Reg. 52,455 ..... 5, 18
Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* (8th ed. 2017) 2, 7
U.S. Dep't of Veterans Affairs, *VA Achieves Historic Goal by Delivering 81,000 Appeals Decisions* (Sept. 18, 2018) 6
Webster's Third New International Dictionary (1961) 20, 21

REPLY BRIEF FOR PETITIONER

Criticism of *Auer* deference now comes from all corners. Leading immigration organizations highlight its harmful effects. NIJC & AILA Br. 21-31. The AFL-CIO agrees that "the Court should * * * discard the strong form of deference represented by *Auer*" (AFL-CIO Br. 16) and, moreover, that deference is not appropriate in this case (*id.* at 20-24). See also Nat'l Right to Work Legal Def. Found. Br. 2. Several States call for overruling *Auer*—and none defend it.

Even the United States agrees. Acknowledging that *Auer* "raises significant concerns" (U.S. Br. 12), the government now concurs with our principal argument: no deference to the agency is warranted here.

Auer deference circumvents the procedural protections that Congress established in the APA, and it transfers to agencies substantial lawmaking authority absent any congressional delegation. The Court should therefore overturn *Seminole Rock* and *Auer*.

The government instead asks the Court to adopt a diminished form of *Auer* deference—one that looks like *Skidmore* but carries *Auer*'s binding bite. Petitioner would prevail under this rule. That said, the better course is to overrule *Auer* outright. What would remain, *Skidmore*, properly respects agency expertise.

I. No deference is warranted to the VA's construction.

A. *Auer* is incompatible with the APA.

1. Binding deference (either *Chevron* or *Auer*) confers on an agency lawmaking authority, as its actions have the force of law. See Pet'r Br. 25. In *City of Ar-*

lington v. *FCC*, 569 U.S. 290 (2013), the Court unanimously agreed that two conditions are necessary for an agency to exercise this power: (1) "the agency must have received congressional authority to determine the particular matter at issue" *and* (2) the agency must act in the "particular manner" Congress specified. *Id*. at 306. See also *id*. at 321-322 (Roberts, C.J., dissenting).

The APA specifies generally-applicable "manners" by which an agency may act. An agency may promulgate a "rule," which is defined as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). A "rule" is the result of a "rule making" process. *Id*. § 551(5). See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). The APA establishes both informal notice-and-comment rulemaking (5 U.S.C. § 553) and formal on-the-record rulemaking (*id*. §§ 556-557). See Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 466 (8th ed. 2017).[1]

In two complementary lines of cases, the Court has held that an agency's entitlement to binding deference turns on whether it has used congressionally-prescribed procedures. *Auer*'s fundamental flaw is

[1] Agencies may also act through formal and informal adjudications. See Breyer, *supra*, at 457. Agency adjudications result in an "order" (5 U.S.C. § 551(7)), which excludes matter that is properly the subject of a "rule making" (*id*. § 551(6)). "Strikingly, the APA imposes no procedural requirements specific to informal adjudications." Breyer, *supra*, at 474.

that it provides agencies lawmaking authority in contravention of these settled principles. The government now agrees. U.S. Br. 19-25.

Focusing on the APA's protections in Section 553, *Perez* recognized that "interpretive rules" are an exception to the general notice-and-comment requirement. "The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." *Perez*, 135 S. Ct. at 1204. "But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Ibid.*

An agency's construction of its own ambiguous regulation is an interpretive rule, and *Perez* holds that such rules do not command binding deference. See Pet'r Br. 31-33; U.S. Chamber Br. 16-19; Prof. Merrill Br. 7-9, 14-16. *Auer* thus circumvents the APA's critical procedural protections. See Pet'r Br. 28-31. According to the government, it is "anomalous that interpretive rules about a *statute's* meaning are generally accorded no *Chevron* deference," while "interpretive rules about a *regulation's* meaning are accorded *Seminole Rock* deference." U.S. Br. 24-25.

And in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the Court emphasized that binding deference is limited to those agency actions that were "promulgated in the exercise" of the "authority" that Congress delegated. *Id.* at 226-227. *Mead* held that, where there is no "congressional intent" delegating lawmaking authority to a specific kind of agency procedure, *Chevron* does not apply. *Id.* at 227.

Auer deference, however, applies regardless whether there is any "congressional intent" delegating lawmaking authority to an agency. See Pet'r Br. 33-36. The doctrine therefore bestows power on agencies in violation of *Mead*. See U.S. Br. 19-22.

This all accords with the text of the APA. Section 706 provides that "the reviewing court"—and not the agency—"shall decide all relevant questions of law" and shall "determine the meaning * * * of the terms of an agency action." 5 U.S.C. § 706. See also Pet'r Br. 27; Prof. Merrill Br. 14-16. There is no basis to conclude that Congress silently intended for agencies, not courts, to decide these issues. See U.S. Br. 16-18.

2. The lone defender of *Auer* deference—a group of six professors—offers two main legal contentions.

a. *Amici* (Admin. Law Scholars Br. 6-8) identify *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. 144, 151 (1991), which "presume[d] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." See also *id*. at 152 (similar). But this addresses only *City of Arlington*'s first requirement. The agency must also act in the "particular manner" that Congress prescribed. *Auer* violates this principle.

b. *Amici* alternatively suggest that one "manner" for an agency to act with the force of law is via an informal adjudication. They imply that deference is warranted here because the construction of the regulation stemmed from a single ALJ's non-precedential opinion, rather than from a considered decision by VA leadership with general application. See Admin. Law

Scholars Br. 21-24 & 28 n.11. That is incorrect. See U.S. Br. 25 n.5.

First, Congress has never authorized the VA to engage in lawmaking through informal adjudication. The APA expressly disclaims adjudication as a procedure for an agency "to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4)-(7). See also *Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974) ("No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis.").

Beyond the APA's default rules, Congress specified the "particular manner" in which the VA may act. *City of Arlington*, 569 U.S. at 306. It may "prescribe all rules and regulations"—but not orders—"which are necessary or appropriate to carry out the laws administered by the Department." 38 U.S.C. § 501(a). Most relevant here, the VA may promulgate "*regulations* with respect to the nature and extent of proof and evidence" necessary "to establish the right to [veterans'] benefits." *Id.* § 501(a)(1) (emphasis added). The regulation at issue, 38 C.F.R. § 3.156(c), was promulgated expressly pursuant to Section 501(a). See 71 Fed. Reg. 52,455.

VA informal adjudications do not, accordingly, qualify for any deference, including *Chevron*. See, *e.g.*, *Lennox* v. *Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003) ("The [Board of Veterans' Appeals'] explicit interpretation of these statutes and regulations * * * is a legal

ruling to be reviewed without deference."); *Nielson* v. *Shinseki*, 607 F.3d 802, 805 (Fed. Cir. 2010).[2]

Second, the Board's decisions cannot warrant binding deference, including *Chevron*, because they are non-precedential.

In *Mead*, 533 U.S. at 232, the Court denied *Chevron* deference to an agency action that would not "naturally bind more than the parties to the ruling." The Court underscored that, when an "agency makes it clear that [an action's] binding character as a ruling stops short of third parties," and thus is "conclusive only as between" the parties directly affected, the agency cannot be understood to have "ever set out with a lawmaking pretense in mind." *Id.* at 233.

Mead observed that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year * * * is simply self-refuting." 533 U.S. at 233. So too here, where the Board of Veterans' Appeals issued 81,000 decisions in fiscal year 2018. See U.S. Dep't of Veterans Affairs, *VA Achieves Historic Goal by Delivering 81,000 Appeals Decisions* (Sept. 18, 2018), perma.cc/5AW5-3CLB. By

---

[2] Congress may provide specific agencies different authority. The governing statute in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), authorized "such rules and regulations and *such orders* as" the SEC "may deem necessary or appropriate." 49 Stat. 803, 833 (emphasis added). The SEC's flexibility "to act either by general rule or by individual order" (332 U.S. at 202) stemmed from Congress's express delegation of that power. Likewise, the National Labor Relations Act (see 29 U.S.C. § 160) at issue in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), authorized the NLRB to act through adjudications. See *NLRB* v. *Curtin Matheson Sci., Inc.*, 494 U.S. 775, 803 (1990) (Scalia, J., dissenting).

regulation, all 81,000 of these decisions are "[n]on-precedential." 38 C.F.R. § 20.1303. Such mass-produced, non-precedential agency actions do not reflect the "deliberation that should underlie a pronouncement" that has "the effect of law." *Mead*, 533 U.S. at 230. See also *Martinez* v. *Holder*, 740 F.3d 902, 910 (4th Cir. 2014).

Third, to "amend[]" a regulation, the APA obligates agencies to engage in "rule making." 5 U.S.C. § 551(5). The APA thus "mandate[s] that agencies use the same procedures when they amend * * * a rule as they used to issue the rule in the first instance." *Perez*, 135 S. Ct. at 1206. Once an agency proceeds through notice-and-comment rulemaking, it must return to rulemaking for its actions to have the force of law. See Pet'r Br. 36; *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-267 (1954); Breyer, *supra*, at 485.

* * *

Auer deference is irreconcilable with the Court's justifications (in *Perez*, *City of Arlington*, *Mead*, and elsewhere) for affording agencies binding deference.[3] And *Auer* impermissibly bestows on agencies lawmaking authority unbounded by the procedural limitations that Congress imposed in the APA to protect the regulated public. For these reasons, the Court should overrule *Seminole Rock* and *Auer*.

---

[3] *Amici* (Admin. Law Scholars Br. 27) are wrong to suggest that overturning *Auer* undermines *Chevron*. *Perez*, *City of Arlington*, and *Mead* are all consistent with *Chevron*. See, *e.g.*, Pet'r Br. 45-47; Cato Br. 8-13; Prof. Merrill Br. 12-14; Admin. Law & Fed. Reg. Profs. Br. 3-13.

B. *Skidmore* is most consistent with the APA.

Acknowledging *Auer*'s severe flaws, the United States urges a sharp retreat from *Auer*. In its view, courts must give binding deference to an agency's interpretation of its own ambiguous regulation when (1) the regulation remains ambiguous after a "searching" analysis using "all the traditional tools of construction," (2) the agency's interpretation is "reasonable," (3) the agency's interpretation "was issued with fair notice to regulated parties," (4) the interpretation "is not inconsistent with the agency's prior views," (5) it "rests on the agency's expertise," and (6) it "represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees." U.S. Br. 12.

Under this *Auer*-light approach, deference is not appropriate here. The ALJ's non-precedential decision was not "issued with fair notice to regulated parties," it does not rest on any agency "expertise," and it does not reflect "the agency's considered view." Not once does the government suggest that deference would be warranted here.

The government's new position is preferable to existing *Auer* deference. But the most sound outcome, both legally and practically, is to overturn *Auer*.

1. Dialing back *Auer* deference may reduce some of its pragmatic harms, but that does not create a legal foundation. The government's reformulated *Auer* doctrine still conflicts with the APA's procedural requirements (U.S. Br. 22-26), and it lacks congressional authorization (*id*. at 19-22). The government's statement that its new theory would "mitigate"—rather than

eliminate—"the tensions between *Seminole Rock* deference and the APA" (*id*. at 32) only confirms that the legal defects would remain.

Additionally, while the government's approach may ameliorate some of *Auer*'s policy flaws, it would introduce several problems of its own.

We agree that *Auer* is defective because binding deference attaches notwithstanding agency "inconsistency." U.S. Br. 31-33. As a remedy, the government would accord the agency's *first* interpretation binding deference, but not subsequent ones; changes would require notice-and-comment. *Ibid*. The government thus seeks to resurrect the *Paralyzed Veterans* doctrine that the Court rejected in *Perez*—that, to change an initial interpretive rule, an agency must resort to notice-and-comment. *Perez*, 135 S. Ct. at 1207-1208. As Justice Scalia recognized, while *Paralyzed Veterans* was "a courageous" "attempt to limit the mischief" of *Auer*, the proper remedy is to overturn *Auer* altogether. *Id*. at 1212 (Scalia, J., concurring in the judgment).

The government's approach would also create a race-to-interpret, where the first administration to construe a regulation would claim privileged legal status. That would be a bizarre, if not destructive, rule.

Separately, the government asserts that the public must have "fair notice" of a regulation through "familiar, official agency channels." U.S. Br. 31-33. But the government fails to specify whether that requires notice in the *Federal Register*, opportunity for public comment, and an obligation of the agency to respond. In the APA, Congress adopted specific procedures. See Pet'r Br. 26-31. The proper result is to hold agencies

to the APA as written, not to permit agencies to invent their own procedures that somewhat resemble it.

Tightening the standard for what qualifies as an "ambiguous" regulation (U.S. Br. 28-29) is neither a manageable nor sufficient solution. Because there is no objective measure, parties and courts would be left adrift as to *how much* ambiguity triggers deference. See *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) ("It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.").

Additional practical problems abound. Parties would dispute whether an agency has actually brought its "expertise" (U.S. Br. 33-34) to bear, including whether that is a factual or legal question. If factual, discovery disputes would ensue. The government, moreover, offers no standard to evaluate what constitutes "agency acquiescence." *Id.* at 31. And the distinction between an "agency's considered view" and "the views of mere field officials" (*id.* at 12) would occupy appellate lawyers for years.

More broadly, the Court already imposed the sort of limitations to *Auer* that the government envisions. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-157 (2012). But *SmithKline* did not solve *Auer*'s legal or pragmatic flaws. See Nat'l Ass'n of Home Builders (NAHB) Br. 14-16.

2. There is a better way to respect agency expertise (U.S. Br. 42-43) and to provide public guidance (*id.* at 39-44), all without transgressing the APA—*Skidmore*. See Prof. Merrill Br. 19-24; Cato Br. 15-17.

Skidmore addresses the same factors that the government now identifies. It considers whether "the agency has applied its position with consistency" (*Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008)) and the agency's "formality" of procedure and "relative expertness" (*Mead*, 533 U.S. at 228). See also *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487 (2004) (respecting views of "an expert administrator").

But *Skidmore* differs in one fundamental respect. *Auer* (including the government's diminished form) is binding deference. *Skidmore*, however, reflects an agency's "power to persuade," *not* its power to "control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). This distinction is crucial. Because it does not place a substantive thumb on the scale, *Skidmore* does not provide agencies lawmaking authority. Rather, *Skidmore* is a procedural mechanism that obligates courts to respect a coordinate branch of government, including the Executive's expertise, by giving the agency's analysis due consideration. See *Mead*, 533 U.S. at 234-235. If the court arrives at a result different from the agency, it is incumbent on the court—as a matter of inter-branch comity—to address the agency's reasoning and explain why the court disagrees.

Recent cases are illustrative. Applying *Skidmore*, the Court in *University of Texas Southwestern Medical Center* v. *Nassar*, 570 U.S. 338, 360-361 (2013), evaluated the agency's reasons and, in coming to a contrary result, explained why. See also *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006). Alternatively, in *Alaska Department of Environmental Conservation*, 540 U.S. at 487-495, while recognizing that agencies'

views do not have "dispositive force," the Court traced the agency's arguments, explained why they were persuasive, and so gave due consideration to the views of a co-equal branch.[4]

We agree with the government (at 42-43) and the Administrative Law Scholars (at 7-9) that agencies often have special expertise. Agencies can exercise that expertise in a binding way via notice-and-comment rulemaking. That provides the regulated public an opportunity to respond, negatively or favorably, to the agency's views. Outside of notice-and-comment rulemaking, an agency's expertise deserves procedural respect. If a court disagrees, the court must explain why with specificity.

The problem with *Auer* is that it permits an agency to exert its expertise in binding fashion without any participation by the regulated public. Notwithstanding their expertise, agencies sometimes get it wrong.

II. *Stare decisis* does not justify retention of *Auer* deference.

Bound by *Auer*, the court of appeals deferred to the VA. Now, the government appears to admit that no deference is warranted. The government's own approach thus requires departure from *stare decisis*—which is no doubt the correct result.

---

[4] Limited cases could suggest that *Skidmore* has substantive weight. See, *e.g.*, *Holowecki*, 552 U.S. at 403. But *Skidmore* itself, and the heartland of its progeny, confirm that the doctrine does not provide agencies "control." *Holowecki* is best understood as occupying the far end of the "spectrum of judicial responses" (*Mead*, 533 U.S. at 228) warranted.

A. Multiple "special justifications" warrant overturning *Seminole Rock* and *Auer*. See Pet'r Br. 47-48. The failure of *Seminole Rock* or its progeny to identify a meaningful legal foundation is reason enough. *Id.* at 47. So too is the clear contradiction between *Auer* and the law governing interpretive rules. *Id.* at 47-48. Additionally, *Seminole Rock/Auer* deference is a "direct obstacle" to the realization of the policies embodied in the APA. *Id.* at 48. And, as experience has proven, *Auer* deference guts predictability. *Ibid.*[5]

B. *Stare decisis* carries less weight here because *Auer* deference is a judge-made rule of construction. See Pet'r Br. 48-50.

That "Congress remains free to alter or eliminate the doctrine" (U.S. Br. 36) misses the mark. That was equally true in *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009); as the Prison Litigation Reform Act illustrates, Congress retains authority to alter rules of procedure in Section 1983 litigation. The Court nonetheless held that, in the face of a "judge made" "rule," "change should come from this Court, not Congress." *Ibid.* See also *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 507 (2008) ("[T]he judiciary [cannot] wash its

---

[5] *Auer* deference also improperly vests agencies with simultaneous authority to both issue and interpret law. See Pet'r Br. 43-45; Ctr. for Constitutional Jurisprudence Br. 3-13. The government responds by pointing to justifications for *Chevron*. U.S. Br. 45-46. But "Congress cannot enlarge its *own* power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*." *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). By contrast, "when an agency interprets its own rules—that is something else." *Ibid.* It improperly "[c]ombin[es] the power to prescribe with the power to interpret." *Ibid.*

hands of a problem it created[] simply by calling [the doctrine] legislative.").

The government's attempt to distinguish so-called primary and secondary conduct rules fails. See U.S. Br. 36-37. Evidentiary and procedural rules that do not address "primary conduct" (*ibid.*) certainly may bear on case outcomes. But these rules—like deference doctrines—do not warrant full *stare decisis* weight when, as here, the public does not rely upon them. See Pet'r Br. 49-50

C. *Stare decisis* has substantially less force because the public cannot legitimately rely on *Auer* deference; indeed, *Auer* undermines legal stability. See Pet'r Br. 51-53.

1. The United States responds that "[p]rivate parties have ordered their affairs in reasonable reliance on" *Auer* deference. U.S. Br. 37-44. But not a single regulated party appearing in this Court agrees. The lone brief defending *Auer* says nary a word about the regulated public's reliance interests, much less *stare decisis* as a whole.

Instead, *every* regulated party to opine has explained that *Auer* is at war with reliance interests because agency interpretations are not durable. An agency may shift its position via a press release, a policy memorandum posted to a website, or an *amicus* brief.

Business associations explain that *Auer* deference "nudges courts to acquiesce in agency actions that disrupt legitimate reliance interests" (NAHB Br. 12-16) and "upsets the expectations of regulated parties and deprives them of the notice provided through rulemaking" (U.S. Chamber Br. 3, 6-8). State and local

governments demonstrate that *Auer* "invites dramatic shifts in federal policy with each new administration." State & Local Gov't Ass'ns Br. 5. The American Immigration Lawyers Association states that "[t]he evils of *Auer* are most notable in their effects on the regulated public." NIJC & AILA Br. 17-20. And veterans' associations show that the "VA regularly advances interpretations that are intentionally vague, wildly unreasonable, or inconsistent with its past positions—all the while demanding that courts defer under *Auer*." Nat'l Org. of Veterans' Advocates (NOVA). Br. 10-21. More plainly: "Application of *Auer* deference to VA regulations harms veterans." Nat'l Veterans Legal Servs. Program (NVLSP) Br. 6-14.

These concerns are not theoretical. *Amici* have identified numerous examples of administrative flip-flops enabled by *Auer* deference. See, *e.g.*, State & Local Gov't Ass'ns Br. 13-19; Nat'l Right to Work Br. 6-11. They demonstrate several occasions where courts have endorsed constructions of regulations that are not the fairest reading. See, *e.g.*, NIJC & AILA Br. 17-20; U.S. Chamber Br. 8-14; NAHB Br. 12-16; Wash. Legal Found. Br. 7-19. States illustrate how *Auer* undermines their unique, sovereign interests. Utah Br. 11-15. And *amici* show how agencies have acted in intentionally opaque ways; the VA has admitted as much. See NOVA Br. 10-13; NVLSP Br. 20-27.

2. The government's fear of "unsettling decisions based on *Seminole Rock* deference" (U.S. Br. 37-41) is baseless. To start, there is no reason to fear any mass disruption in the lower courts or among the regulated public. See Cato Br. 17-19; NAHB Br. 26-29.

In any event, the government's argument—which rests on the contention that the regulated public has

reliance interests in *PLIVA*, *Chase Bank*, *Auer*, and *Long Island Care* (U.S. Br. 38)—defeats itself. Under the government's own test, *Auer* deference would not attach in any of these cases.

In each of *PLIVA*, *Chase Bank*, and *Auer*, the Court deferred to agency views expressed in briefs. That is one of the very ills the government recognizes with *Auer*. See U.S. Br. 19. (If the government's rule is meant to retain agency lawmaking-by-*amicus*-brief, it is not a retraction from *Auer* at all.)

Long Island Care v. *Coke*, 551 U.S. 158, 170-171 (2007), hit a trifecta of *Auer* flaws: the Court deferred to a non-public advisory memorandum, the memorandum was "written in response" to that litigation, and the memorandum was inconsistent with the agency's past positions. See U.S. Br. 19. The government's need to use these cases to make its public reliance argument speaks volumes.

3. The government posits that *Auer* deference, once narrowed to preclude agency flip-flops, would enhance predictability by insulating "the agency's" interpretation from judicial review. U.S. Br. 40. As the government sees it, courts will all fall in line, precluding review by this Court (*id.* at 40-42), and private parties will not have a meaningful opportunity anyway to challenge agency action (*id.* at 43-44). To the extent these arguments hold merit (earlier in its brief, at 26, the government appears to take the opposite view), the regulated public does not seek predictability in a vacuum. The public is entitled to participate in, and seek judicial review of, agency actions that impact their interests. The APA provides both predictability *and* substantive protections. That framework—and not any variation on *Auer*—should govern.

III. Petitioner offers the best reading of Section 3.156(c).

The government does not dispute that reconsideration under Section 3.156(c) has three elements: (1) the VA originally erred by failing to consider a service record in its possession; (2) the service record is "relevant"; and (3) the VA later grants an award, per the usual standards, "based" at least "in part" on the record it initially overlooked. Pet'r Br. 55.

Nor does the government deny that petitioner has satisfied the first and third elements: the VA originally erred by failing to consider his service records (Pet'r Br. 55-56), and, when the VA granted petitioner benefits, its award was "based" "in part" on those records (*id*. at 56). See also AFL-CIO Br. 23-24.

Instead, the government contends that service records are "relevant" only if they demonstrate that "the VA would have reached a different result at the time of its prior decision had it considered the additional records" (U.S. Br. 49)—and not if they are "relevant" to the veteran's claim generally. The government's two arguments are not persuasive, and they pale in comparison to our position, much of which the government disregards.

A.1. The government begins by asserting that the "matter at hand" in Section 3.156(c) is the "VA's prior decision denying the veteran's claim." U.S. Br. 49. But the government has no textual support for that contention.

The regulatory text makes plain that the "official service department records" must be "relevant" to the veteran's "*claim*." It provides:

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

38 C.F.R. § 3.156(c)(1). The triggering event, accordingly, is the VA "associat[ing] with the *claims file*" material that is an "official service department record[]" and that should have been "associated with the *claims file*" the first time. What goes into the "*claims* file"? Documents that are "relevant" to the veteran's "claim."

In promulgating the current regulation, this is precisely how the VA understood it would work: "If a newly discovered service department record is one that VA *should have received at the time* it obtained the veteran's service medical records, we believe it ordinarily would be within the scope of proposed [Section] 3.156(c)(1)." 71 Fed. Reg. 52,455 (emphasis added). A "relevant" record is one that belonged in the "claims file" at the time of the original adjudication.

Assuming, for the sake of argument, that the "official service department records" must be "relevant" to the "VA's prior decision denying the veteran's claim" (U.S. Br. 49.), these records still qualify. They bear on whether an in-service event occurred and the likelihood that petitioner suffered from PTSD—both of which were elements of the original adjudication. See Pet'r Br. 57-58 & n.16. Indeed, Dr. Davies criticized Dr. Henderson's 1983 report (on which the government solely relies, see U.S. Br. 48) because Dr. Henderson "misunderstood the impact of [petitioner's]

war trauma upon him." JA38. Petitioner's war trauma was undeniably a fact "of consequence in determining the action." Fed. R. Evid. 401. The records documenting it were thus "relevant" ones. *Ibid*.

The government argues that the service records are not "relevant" because they reveal facts that "no one disputed." U.S. Br. 48. But it is long settled that evidence is "relevant" even if "'[t]he fact to which the evidence is directed'" is not "'in dispute.'" *Old Chief* v. *United States*, 519 U.S. 172, 179 (1997) (quoting Advisory Committee's Notes on Fed. R. Evid. 401). Federal Rule of Evidence 403 exists because—and expressly recognizes that—evidence may be both "relevant" and "cumulative." (By contrast, the regulation excludes "cumulative" evidence from the meaning of the defined term "material." 38 C.F.R. § 3.156(a). See pages 20-21, *infra*.)

The government's actual contention is that the regulation's use of "relevant" should be interpreted as "dispositive." While the government studiously avoids the language now, the Board of Veterans' Appeals focused on whether the service records are "outcome determinative." Pet. App. 42a-43a. But "relevant" does not mean "dispositive" or "outcome determinative." See Pet'r Br. 57; 38 U.S.C. § 101(35) (defining "relevant evidence" as "evidence that tends to prove or disprove a matter in issue"); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 436 (2006) (distinguishing "relevant" and "dispositive").

2. The government further asserts that the "hallmark of reconsidering * * * is that the VA concludes that its prior decision on the claim was incorrect *ab initio*." U.S. Br. 49. But the government has no textual

support for this contention, either. In fact, the text explains that the "hallmark of reconsidering" (*ibid.*) is an earlier VA *procedural* error—the VA's failure to "associate[]" records in the government's possession with the "claims file." 38 C.F.R. § 3.156(c)(1).

Section 3.156(c)(3) strongly supports our argument. To trigger reconsideration, the VA's award must be "based" at least "in part" on the overlooked records. See Pet'r Br. 55. Here, the VA *did* rely on the overlooked records when it granted petitioner benefits. JA51-52. See also AFL-CIO Br. 23-24. The government admitted as much earlier. BIO 16 n.2. This confirms that the evidence is "relevant."[6]

B. Several other aspects of the regulatory text and structure require our construction.

First, the government improperly renders "relevant" identical to the "new and material evidence" standard that governs reopening under Section 3.156(a). See Pet'r Br. 57-59. "Material evidence" must relate to "an unestablished fact necessary to substantiate the claim" and may not be "cumulative []or redundant" of existing evidence. 38 C.F.R. § 3.156(a). That is the same as the government's preferred test here. See U.S. Br. 48-49. But, as we have shown, "relevant" is more expansive. See Fed. R. Evid. 401.[7]

---

[6] Section 3.156(c)(4) also bolsters our conclusion. See AFL-CIO Br. 22-23.

[7] *Webster's Third New International Dictionary* (1961) confirms that, in ordinary usage, "relevant" and "material" differ in degree. "A thing is RELEVANT when it has a connection * * * with a matter under consideration." *Id.* at 1917. "A thing is MATERIAL when it has so close a relationship with a case in hand that

The government responds that Section 3.156(a)'s "new and material evidence" standard is actually "broader" than and subsumes Section 3.156(c). U.S. Br. 51. The government alternatively contends that the different language has the same meaning. *Id.* at 51-52.

The regulation's text forecloses these arguments. It provides that a veteran may satisfy the requirements of Section 3.156(c) "*notwithstanding* paragraph (a) of this section." 38 C.F.R. 3.156(c)(1) (emphasis added). Section 3.156(c) must apply in circumstances outside the scope of Section 3.156(a), or else this "notwithstanding" clause would be meaningless.

Additionally, the VA amended "material" out of Section 3.156(c), replacing it with the broader term "relevant." See Pet'r Br. 58-59; AFL-CIO Br. 22. If the VA had actually intended for reopening to hinge on the defined concept of "material" evidence (see 38 C.F.R. § 3.156(a)), the VA would have retained that term.

We made both arguments earlier (Pet'r Br. 58-59), but the government responds to neither. For these two reasons, "relevant" must be a broader standard than "material"—a conclusion irreconcilable with the government's construction.

Nor does the government's construction meaningfully distinguish between "relevant" and "material." The government asserts that "material" evidence in Section 3.156(a) "need not suggest that the VA's prior decision on the claim was incorrect *at the time*." U.S.

---

it cannot be dispensed with without serious alteration of the case." *Ibid.*

Br. 51 (emphasis added). But that is just wordplay; under the government's view, "material" and "relevant" mean the same thing. And Section 3.156(c) is limited to "official service department records" (*ibid.*) because of the regulation's use of those specific words, not because of the term "relevant."

Our construction—not the government's—properly captures the different meaning of these words.

Second, the regulation states unequivocally that "relevant official service department records" "include" "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). That is what these records are. See Pet'r Br. 56-57 & n.15. Unable to muster a response, the government disregards our argument.

Third, current Section 3.156(c) was promulgated against the backdrop of then-recently-enacted 38 U.S.C. § 5103A(c). That statute's usage of "relevant records" accords with our construction. See Pet'r Br. 59. These two provisions dovetail: Section 5103A(c) obligates the VA to locate records to assist the veteran, and Section 3.156(c) provides the remedy when the VA errs. The government fails to explain why "relevant" should have different meanings in these related provisions.

Fourth, we showed that the pro-veteran and anti-drafter canons resolve any lingering ambiguity. See Pet'r Br. 59-61; NOVA Br. 23-29; NVLSP Br. 6-7. Once more, the government is silent.

C. The government rests heavily on its policy argument—that our construction could leave some veterans in a "*better* position" than if the VA had made

no underlying error. U.S. Br. 52. But the government fails to address this regulation's remedial nature.

The government's construction requires a counterfactual inquiry about what the VA would have done, often decades earlier, had it not made an error. Because the veteran bears the burden of proof (see 38 U.S.C. § 5107(a)), that speculative analysis is a recipe for mass under-compensation of veterans.

It is often impossible to determine with confidence the precise effect that overlooked evidence would have had on the original claim adjudication. Not only might the evidence influence the ultimate decisionmaker, but it would also be in the record for doctors and therapists to consider when they prepare their medical reports.

Moreover, when seeking reconsideration, a veteran will often present (as petitioner did here) *both* the evidence that the VA overlooked *and* new medical evidence confirming the injury. Under the government's approach, VA adjudicators would have wide discretion to reject claims for retroactive benefits by heavily weighting the new medical evidence.

These concerns are magnified by the VA's history of irrational claims administration (see Sergeant Major Jeff Howard Br. 9-13) and the "VA's penchant for unreasonable litigating positions." NOVA Br. 21-23 (summarizing alarming statistics).

As we construe it, the VA's reconsideration mechanism operates far more objectively. The veteran must show that the VA procedurally erred by failing to evaluate records the government possessed, that the records are relevant to the veteran's claim, and that, when the VA later awarded benefits (pursuant

to the traditional standards), it relied in part on the records it previously overlooked. See Pet'r Br. 55.

The government's main objection is that this construction could overcompensate some veterans, including, the government insinuates, petitioner. U.S. Br. 52. But our construction is equitable, both here and more generally.

In awarding petitioner benefits, the VA credited Dr. Davies' 2007 evaluation. JA52. In it, Dr. Davies explained that petitioner has had PTSD since around 1980 and that Dr. Henderson bungled his analysis. JA37-38. In sum, the evidence demonstrates that petitioner should have received benefits when he originally applied in 1982 *and* that the VA erred when it first adjudicated his claim.

More generally, it was reasonable for the VA to select a procedure that might overcompensate some veterans rather than one that would undercompensate many.[8] Not only is our construction true to the regulation's text, but it also evinces the VA's interest in providing a fair procedure for remedying its past errors. Our veterans deserve no less.

If the VA has since changed its view, it may amend the regulation through notice-and-comment rulemaking.

---

[8] Allocating the risk of loss this way also incentivizes the VA to avoid errors. Under the government's approach, VA errors would, in the aggregate, result in financial advantage to the government at the expense of veterans.

CONCLUSION

The Court should reverse the judgment entered below.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

MARCH 2019