No. _____

In The

Supreme Court of the United States

PARTS GALORE L.L.C. and SOAVE ENTERPRISES L.L.C.,

Petitioners,

v.

JACQUELINE HARRISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress in 2008 amended the employment provisions of the Americans with Disabilities Act, expanding some key sections and admonishing courts to construe the Act broadly in favor of coverage. EEOC issued regulations that in places expanded the amendments' reach even further, and also purported to tell courts how to construe and apply the law.

In this ADA action, the district court granted summary judgment because plaintiff's alleged knee condition, of which she offered no supporting medical evidence, was not a physical impairment that, by plaintiff's own testimony, substantially limited a major life activity. Plaintiff appealed, and EEOC in an *amicus curiae* brief offered guidance that relied on its expanded regulations and broadened them still further, declaring categorically that ADA plaintiffs need not provide any "medical evidence" of their substantially limiting condition. The appellate court agreed and reversed.

1. Should this Court overrule *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 US. 410 (1945) and direct federal courts to stop giving deference to an agency interpretation of its own regulation except to the extent that interpretation is persuasive?

2. Should this Court overrule *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and direct courts to stop giving deference to agency regulations interpreting statutes except to the extent the regulations are persuasive?

PARTIES TO THE PROCEEDING

Parts Galore L.L.C. and Soave Enterprises L.L.C., petitioners on review, were defendants-appellees below.

Jacqueline Harrison, respondent on review, was the plaintiff-appellee below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Neither Petitioner Parts Galore L.L.C. nor Petitioner Soave Enterprises L.L.C. has a parent corporation. No publicly held company owns 10 percent or more of either Petitioner.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit:

> *Harrison v. Soave Enterprises L.L.C.*, No. 19-1176 (6th Cir. Sept. 10, 2020) (reported at 826 Fed. App'x 517)

U.S. District Court for the Eastern District of Michigan:

> *Harrison v. Soave Enterprises L.L.C.*, No. 16-cv-14084 (E.D. Mich. Jan. 23, 2019) is unreported, but available at 2019 Westlaw 216699

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Parts Galore L.L.C. and Soave Enterprises L.L.C. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

This Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) set out to reform *Auer* deference into a doctrine "not quite so tame as some might hope, but not nearly so menacing as they might fear." *Id.* at 2418. As this case shows, the beast still roars, and should be put down for good.

Congress in 2008 amended the Americans with Disabilities Act to override certain of this Court's decisions, and the Equal Employment Opportunity Commission (EEOC) revised its regulations. EEOC exceeded the new statutory language in several key areas, and also issued rules of construction and evidentiary admonishments to

courts that, if followed, would all but end summary judgment in ADA cases. Among other things, EEOC's regulations expand the statutory term "major life activities" to include several not listed in the statute, including an unlimited catchall "musculoskeletal function" – i.e., moving around. And EEOC included among its admonishments to the judiciary its view that comparison of a plaintiff's performance of a major life activity to that of the same activity by most people in the general population "usually will not require scientific, medical or statistical analysis."

In this matter, former auto-parts salvage-yard manager Jacqueline Harrison sued under the ADAAA, alleging unlawful termination relating to knee problems she says prevent her from kneeling. The district court granted Parts Galore summary judgment, finding that Harrison's alleged knee condition did not substantially limit her in any major life activity recognized under the statute. When Harrison appealed, EEOC weighed in as *amicus*, citing its own regulation's expanded list of "major life activities" and stating categorically that requiring any plaintiff to provide "medical evidence" of impairment would contradict Congress' express intent. The Sixth Circuit agreed with EEOC and reversed.

As this case shows, *Kisor* has not reigned in *Auer*. EEOC's *amicus*-brief guidance meets all the "markers" *Kisor* set down, yet the end result was a judicial ruling as far afield from Congress's handiwork as anything *Auer* ever allowed. And because the Sixth Circuit also gave deference to EEOC regulations that exceed the statute, this case additionally provides an example of *Chevron*'s infirmities. The Court should grant certiorari and scrap both doctrines.

OPINIONS AND ORDERS BELOW

1. The Sixth Circuit's September 10, 2020 opinion (App 1a) is unpublished, but may be found at 826 Fed. App'x 917. Its October 13, 2020 order denying rehearing en banc (App 31a) also is unreported.

2. The district court's January 23, 2019 opinion and order granting summary judgment (App 17a) is unreported but may be found at 2019 Westlaw 296699.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 2020. A timely petition for rehearing en banc was denied on October 13, 2020. App. 31a. Supreme Court Rule 13.1, in combination with this Court's Order of March 19, 2020, allows for 150 days within which to file a Petition for a Writ of Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely.

The district court had jurisdiction under 28 U.S.C. § 1331.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act as Amended of 2008 ("ADAAA"), EEOC regulations, and EEOC's *amicus*-brief guidance to the Sixth Circuit, are reproduced in the Appendix. App. 32a-155a.

STATEMENT OF THE CASE

I. Harrison's employment and termination

Respondent Jacqueline Harrison from 2005 to 2015 worked as Manager of a self-service used auto parts yard in Detroit run by Petitioner Parts Galore; she was similarly employed by a predecessor since the 1980s. At the yard, customers pay a $2

entry fee to access salvage vehicles and remove parts using their own tools. Harrison's job duties included inspecting the 27-acre yard and checking for improperly placed cars, holes in the fence, slacking employees, and any other problem.

According to Harrison, in 2010 or 2011 she suffered a torn ACL when she slipped while showering at home. She reported having knee surgery then to repair a torn meniscus but decided not to have the ACL repaired, a decision her doctor agreed with since she was able to function. Harrison missed two days of work for the surgery, and returned to work the following Monday with no limitations or restrictions.

In 2014, a new Regional Manager, Stephan A. "Tony" Murell, was hired, and found many problems at Harrison's yard. He instituted several changes, including requiring Harrison to randomly spot-check five vehicles each day prior to their placement in the yard, to confirm employees had properly conducted the 17-step preparation process. The spot-checks required Harrison to look under each vehicle's hood to make sure engine fluids had been drained and the battery removed, and to look beneath each vehicle to confirm its catalytic converter had been removed, which required her to kneel.

At some point, Harrison told Murrell she could not kneel to look beneath the vehicles, and asked him to buy her a mirror on an extension arm, like those used by motor-carrier police to inspect truck undersides. Murrell bought the mirror, and Harrison testified that, once equipped with it, she could perform all her job duties without limitation.

> A. I did everything. I washed windows, I scrubbed floors, I clean[ed] toilets, I picked up parts, I picked up batteries, I participated in the community and cleaned up neighborhoods, delivered turkeys. No. There was no part of my job that I could not do. [USDC RE 23-2 Harrison Dep., Page ID # 303-304].

Other than a mirror, Harrison never requested any accommodation to perform her job duties, because she didn't need one. She identified four lingering issues with her knee:

> It enables me [*sic*] from walking long distances because of the stability. I have to be careful on inclines because of the stability. I can't walk on rocks because of the stability. And I can't kneel because of that. [*Id.*, Page ID # 215].

Throughout 2015 Murrell identified several instances of intransigence and insubordination by Harrison, and believed she was not spot-checking the required five vehicles each day. Harrison denied most of the charges, though admitted confronting Murrell and criticizing him on one occasion. She claimed she had approval to delegate some of the spot checks, and did not cite her knee or any other physical limitation as preventing her from doing them. Similarly, though she weighed 300 pounds, Harrison never claimed her weight impeded her job performance, and no doctor told her she was medically obese.

On August 26, 2015, Murrell called Harrison into a meeting at the offices of Petitioner Soave Enterprises and terminated her. Harrison later claimed being told the termination was "because I can no longer do my duties because I have a torn ACL," which Murrell denies.

II. Congress expands the ADA, and EEOC expands on Congress' work.

Believing that this Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002) had unduly narrowed the ADA's coverage, Congress in 2008 amended the Act. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008) ("ADAAA"); App. 95a. The amendment redefined several key statutory terms, including "substantial limitation," "major life activity," and "being regarded as having such an impairment," though it neither amended the statutory definition of "impairment" nor criticized judicial construction of it. *See* ADAAA § 4, "Disability Defined and Rules of Construction," App. 97a-98a (codified at 42 U.S.C. § 12102). With regard to "major life activities," the amended statute set forth a non-exclusive list that Congress augmented with another non-exclusive list of "major bodily functions," the operation of which also constitute a "major life activity." 42 U.S.C. § 12102(2).

Congress also set forth detailed rules instructing how courts "shall" construe both the term "disability" as used in 42 U.S.C. § 12102(1) ("in favor of broad coverage of individuals") and "substantially limits" as used in 42 U.S.C. § 12102(1)(A)'s definition of being actually disabled ("consistent[] with the findings and purposes of" the ADAAA). ADAAA § 4(a) (codified at 42 U.S.C. § 12102(4)(A)&(B)), App. 97a; 42a. It told the judiciary the "primary object of attention" in ADA cases "should be whether entities covered under the ADA have complied with their obligations" and that the question of whether an individual's impairment is an

ADA disability "should not demand extensive analysis." ADAAA § 2(b)(5), 42 U.S.C. § 12101 (Note), App 96a, 41a. Congress also found that EEOC's original ADA regulations defining the term "substantially limits" were inconsistent with congressional intent by "expressing too high a standard," and voiced its expectation that EEOC would revise its regulations accordingly. ADAAA § 2(a)(8), (b)(6), 42 U.S.C. § 12101 (Note), App. 96a, 40a.

EEOC in September 2009 issued its Notice of Proposed Rulemaking, and its final ADAAA regulations took effect in March 2011. App. 115a. The regulations expand the statutory term "major life activities" to include several activities and bodily functions beyond those listed in the statute, including the operation of "musculoskeletal function." *See* Final Rule, 76 Fed. Reg. 16978 (Sept. 22, 2011); 29 C.F.R. § 1630.2(i)(1)(ii), App. 138a. In addition to expanding the list of "major life activities," EEOC's regulation directs that, in determining other examples of such activities, "the term 'major' shall not be interpreted strictly to create a demanding standard for disability." 29 C.F.R. § 1630.2(i)(2), citing ADAAA § 2(b)(4) (Findings and Purposes), App. 138a.

Regarding the statutory term "substantially limits," EEOC's regulation imposes nine "rules of construction," each designed to constrain judicial interpretation of the statutory language and ease a plaintiff's path to the jury. Among other things, EEOC's regulation states that "substantially limits" "shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA," and "is not meant to be a demanding standard." 29 C.F.R. §

1630.2(j)(1)(i), App. 138a. An impairment will be considered a disability if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii), App. 138a.

Chipping away at the statutory language of "substantially limits," EEOC's regulation further provides that an impairment "need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.2(j)(1)(ii), App. 138a. Echoing the amended statute's "Purposes" section while at the same time contradicting its substantive provisions, EEOC's regulation admonishes that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, *not whether an individual's impairment substantially limits a major life activity*." 29 C.F.R. § 1630.2(j)(1)(iii), App. 138a (emphasis added). "Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." *Ibid*.

Without specifying an exact level, the regulation provides that "the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA." 29 C.F.R. § 1630.2(j)(1)(iv), App. 138a. And it opines that comparing an individual's performance of a major life activity to the performance of the same activity by most people in the general population "usually

will not require scientific, medical or statistical analysis." 29 C.F.R. § 1630.2(j)(1)(v), App. 138a.

EEOC's regulations summarize that their "rules of construction" are "intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable" for everyone, and that some types of impairments "will, in virtually all cases, result in a determination coverage" under the "actually disabled" or "record of" prongs of the statutory definition. 29 C.F.R. § 1630.2(j)(3)(i)-(ii), App. 139a. And to remove any remaining doubt, the regulation explicitly lists 17 types of impairments for which it "should easily be concluded" a corresponding major life activity will be substantially limited. 29 C.F.R. § 1630.2(j)(3)(iii), App. 139a. Indeed, EEOC elsewhere advises that given its nine rules of construction, "it may often be unnecessary" to conduct *any* factual analysis, particularly with regard to the list of 17 impairments, which "should easily be found to impose a substantial limitation," requiring a "particularly simple and straightforward" assessment. *See* 29 C.F.R. § 1630.2(j)(4)(iv), App. 139a.

III. Harrison files suit, and the district court grants summary judgment.

Post-termination, Harrison filed an EEOC charge against her employer, Ferrous Processing and Trading Company – though not against Parts Galore or Soave – alleging discrimination based on her race (white), age and disability. After EEOC issued a right-to-sue letter (App. 29a), Harrison in 2016 filed her two-count complaint in this action – not against Ferrous, but against Parts Galore and Soave

(collectively, "Parts Galore"). Count I alleged termination in violation of the ADAAA, identifying as disabilities her torn ACL and "medical obesity," though she later abandoned the latter. She also alleged a Michigan-law count of weight discrimination, but did not assert the race or age discrimination complaints she brought in her EEOC charge.

Parts Galore sought summary judgment, arguing that Harrison could not establish a prima facie case of disability discrimination and neither requested nor needed any accommodation. It noted Harrison did not have a mental or physical impairment that substantially limited a major life activity, and had submitted no medical evidence to substantiate her knee condition. The district court granted summary judgment, finding that Harrison's claimed inability to kneel did not substantially limit any major life activity. App. 17a.

IV. EEOC injects itself into the case and further expands its regulatory guidance.

Harrison appealed on her ADAAA claim only, and argued that she is actually disabled under the statute because she is limited in "walking and kneeling" when compared to the general population, and also was "regarded as" being disabled. Appearing for the first time in the action, EEOC filed an *amicus* brief more than double the length of Harrison's, signed by its top legal officer and three subordinates, relying heavily and in some instances even expanding on its ADAAA regulations. App. 53a-114a.

EEOC's *amicus* brief told the Sixth Circuit Harrison's torn ACL qualified as an impairment that affects the major life activity of "musculoskeletal function,"

though that "major life activity" appears only in EEOC's regulation, not the statute. App. 74a-79a. Citing only its own regulations, EEOC advised the court that Harrison's testimony about her condition was "sufficient to satisfy the post-ADAAA relaxed standard for 'substantial limitation,' given that most people in the general population are able to kneel, walk over rocks, and walk up inclines without taking any particular caution." App. 77a, citing 29 C.F.R. § 1630.2(j). Opposing Parts Galore's argument that Harrison failed to provide corroborating evidence of her knee condition, EEOC stated categorically that the ADAAA does not require "medical evidence" and that such a "heightened" evidentiary requirement "would contradict Congress' express intent." App. 83a-87a, citing 29 C.F.R. § 1630.2(j)(1)(v). In that fashion EEOC exceeded even its own regulation, in which it left open the possibility of such corroboration being required in some cases. 29 C.F.R. § 1630.2(j)(1)(v) ([t]he comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population *usually will not* require scientific, medical or statistical analysis" (emphasis added).

Similarly, EEOC advised the appellate court there was no "heightened evidentiary burden" to provide "medical evidence" of impairment, because its regulations simply require that an impairment "affect" the "musculoskeletal" system. App. 85a, citing 29 C.F.R. § 1630.2(h). Demanding more would contravene Congress's command in the ADAAA's "findings and purposes" section that the question of whether an impairment rises to the level of disability "should

not demand extensive analysis," EEOC argued. *Id.*, citing 42 U.S.C. § 12101 (Note).

The Sixth Circuit agreed and reversed. App. 1a. On the issue of "actual disability," it cited EEOC's regulation that the terms "major" life activity" and "substantially limits" are "not meant to be a demanding standard." App. 10a, quoting 29 C.F.R. § 1630.2(i)(2) and 29 C.F.R. § 1630.2(j)(1)(i). Relying largely on the regulation directing that the term "substantially limits" be construed "broadly in favor of expansive coverage," the court found Harrison had established the first element of a prima facie case under the "actually disabled" prong, App. 12a, quoting 29 C.F.R. 1630.2(j)(1)(i). First, relying mainly on the statute's rule of construction favoring "broad coverage," the court found Harrison's testimony established that her knee condition is a "physical impairment." App. 12a-13a, citing 42 U.S.C. § 12012(4)(A). It then found her substantially limited in the major life activity of "kneeling," acknowledging that while that activity is listed in neither the statute nor the EEOC's expanded regulatory list, it "fits comfortably within" them. App. 13a, citing 42 U.S.C. § 12102(2)(A) and 29 C.F.R. § 1630.2(i)(1)(i).

Consistent with EEOC's *amicus*-brief position, the court excused Harrison from providing anything beyond her deposition testimony to corroborate her knee condition. "A plaintiff need not even tell her employer about her specific diagnosis. Rather, it is enough that a plaintiff simply tells her employer that she has certain limitations in relation to her work 'because she suffers from a disability as defined by the ADA.'" App. 10a (cleaned up), quoting *Morrissey v.*

Laurel Health Care Co., 946 F.3d 292, 300 (6th Cir. 2019). The court likewise excused Harrison from providing medical or other corroborating evidence "that the majority of the general population can kneel and does not share Harrison's physical limitation," and held that a reasonable juror could so find. App. 13a, quoting § 1630.2(j)(1)(v).

Turning to the "regarded as" prong, the court held that a reasonable jury could find that Parts Galore regarded Harrison as disabled based on her request for the mirror, and Murrell's alleged reference to her knee during her termination. It found her knee condition would constitute a "physical impairment" based on EEOC's regulatory addition of "musculoskeletal" function. App. 15a-16a, citing 29 C.F.R. § 1630.2(i)(1)(ii). It reversed summary judgment and remanded for trial.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's agreement with EEOC's *amicus* guidance, two steps beyond the statutory text, shows why *Auer* deference is inappropriate and should be scrapped.

1. Judicial deference under *Auer* "allows an agency to do exactly what this Court has always said a legislature cannot do: compel the courts to construe and apply a law on the books, not according to the judicial judgment, but according to the judgment of another branch." *Kisor*, 139 S. Ct. at 2439 (Gorsuch, J., concurring in judgment) (cleaned up), citing T. Cooley, Constitutional Limitations 95 (1868). When this Court defers to an agency interpretation that differs from what it believes to be the best interpretation of the law, it compromises its judicial independence, denies litigants "the impartial judgment that the Constitution

guarantees them," and "mislead[s] those whom [it serves] by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power." *Id.* (cleaned up), citing *Cary v. Curtis*, 3 How. 236, 253, 257, 11 L. Ed. 576 (1845) (Story, J., dissenting).

That describes this situation precisely. After Congress amended the ADA to expand certain key definitions and add a laundry list of "rules of construction" purporting to tell courts how to interpret the Act, EEOC took the ball and ran. It issued regulations that in key places exceeded the statutory text, such as its addition of "musculoskeletal" function to the statutory lists of "major life activities" and its gratuitous opinion that the question of whether an impairment "substantially limits" a major life activity "usually will not require scientific, medical, or statistical analysis." In its *amicus* brief filed after joining this litigation in tag-team fashion, EEOC went further still, interpreting and exceeding its own regulations to advise the Sixth Circuit that documentary medical evidence is not required of any plaintiff. And the Sixth Circuit effectively agreed. A system in which an administrative agency issues regulations exceeding Congressional language, then puts forth supplemental legal guidance expanding those regulations, is "no more than an exercise of raw political executive power," designed to load the dice in favor of Harrison and every other ADA plaintiff.

The courts should not be a party to that. The deference shown to an agency's interpretation of its own regulation under *Auer* – even that which survives after *Kisor* – is antithetical to our system of separated powers. The ruling below demonstrates perfectly the perils of agency deference under *Kisor*, *Auer* and

Seminole Rock. This Court should grant certiorari, overrule those cases and retire once and for all the notion of deference to an agency's interpretation of its own handiwork.[1]

2. Because EEOC's *amicus* guidance meets all the "important markers" *Kisor* laid down for application of *Auer* deference, 139 S. Ct. at 2416-18, this case squarely presents the issue of whether *Kisor* has sufficiently reformed and limited *Auer* deference so as to warrant its continued existence. First, EEOC's *amicus* guidance that "medical evidence" is required of no plaintiff was an "authoritative" and "official" position issued from the agency's top level, not merely an ad hoc statement of its views. *Id.*, 139 S. Ct. at 2416-17, citing *United States v. Mead Corp.*, 533 U.S. 218, 257-259 & n.6 (Scalia, J., dissenting). EEOC's brief was filed by the Deputy General Counsel, its top legal officer at the time, and three subordinates, as part of the agency's practice of appearing and litigating as *amicus*

[1] The circuit court's deference to EEOC's *amicus* guidance led to what appears to be its first decision recognizing an ADAAA plaintiff as "actually disabled" via an impairment that substantially limits a major life activity, without any independent corroborating evidence establishing either the substantial limitation or even the impairment's existence. In the four post-2008 cases relied upon by the Sixth Circuit's "actually disabled" analysis, there was documentary evidence or third-party testimony both supporting plaintiff's substantial limitation, and corroborating the actual impairment. *See* App. 9a-13a, citing *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 849-850 (6th Cir. 2018); *Morrissey*, 946 F.3d at 300-301 & fns. 6 & 7; *Cady v. Remington Arms Co.*, 665 F. App'x 413, 415, 417-418 (6th Cir. 2016); and *Barlia v. MWI Veterinary Supply, Inc.*, 721 Fed. App'x 439, 445-446 (6th Cir. 2018); *compare Farina v. Branford Bd. of Educ.*, 458 Fed. App'x 13, 16 (2d Cir. 2011) ("Farina failed to offer medical evidence substantiating that limitation, much less any evidence concerning whether her alleged problems were 'any worse than is suffered by a large portion of the nation's adult population.' Without such evidence, she cannot establish disability within the meaning of the ADA").

in federal ADAAA appeals. App. 53a.[2] Indeed, *Auer* itself involved a new regulatory interpretation presented for the first time in an *amicus* brief to this Court. Under those circumstances, this Court held, there was "simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. So too, here.

Second, the ADAAA falls squarely within the agency's area of substantive expertise. *Kisor*, 139 S. Ct. at 2417. Indeed, Congress specifically directed EEOC to revise its regulations in accordance with the ADAAA. ADAAA § 2(b)(6), App. 96a. This Court, too, recognizes that agency expertise. *Kisor*, 139 S. Ct at 2417 ("But more prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pate *or a disabilities office weighing the costs and benefits of an accommodation*") (emphasis added). Moreover, the regulations do not simply "parrot the statutory text," one of the reasons *Kisor* recognizes for not invoking *Auer* deference. 139 S. Ct. at 2417 & n.5. As discussed above, they *expand* Congress's text, in several respects.

Lastly, EEOC's *amicus* brief pronouncement reflects the "fair and considered judgment" *Kisor* requires before *Auer* deference may be given. 139 S. Ct. at 2417-18. It relies heavily on the agency's post-2008 regulations with regard to both the definition of "actually disabled" and the quantum of evidence needed to establish

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[2] In recent years EEOC has appeared as *amicus curiae* in several federal ADAAA appeals in addition to this one. *See Exby-Stolley v. Bd. of Cty. Commissioners*, 979 F.3d 784 (10th Cir. 2020) (en banc); *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979 (10th Cir. 2019); *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428 (9th Cir. 2018); *Baker v. Roman Catholic Archdiocese of San Diego*, 725 F. App'x 531 (9th Cir. 2018); *Barlia, supra* fn. 1,721 F. App'x 439.

that, before sailing off further into uncharted waters. App. 15a-20a, 24a-27a. It is neither a "convenient litigation position" nor a "*post hoc* rationalization advanced to defend past agency action from attack." *Kisor*, 139 S. Ct. at 2417 (cleaned up). In sum, though *Kisor* greatly cabined *Auer* deference, EEOC's *amicus*-brief interpretation of its own ADAAA regulations still falls within it. This case thus presents an excellent vehicle for determining whether such agency pronouncements should continue to receive judicial deference.

3. The workaday nature of the issues addressed by EEOC's *amicus* guidance further counsels the withholding of judicial deference. Deference to an agency's interpretation of its regulation is perhaps warranted where it concerns "a complex and highly technical regulatory program,' in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded on policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), quoting *Pauley v. BethEnergy Mines, Inc.* 501 U.S. 680, 697 (1991) (cleaned up). Not the case here, where EEOC told the court of appeals that Harrison satisfied the ADAAA's "relaxed standard for 'substantial limitation,' given that most people in the general population are able to kneel, walk over rocks, and walk up inclines without taking any particular caution." App. 77a, citing 29 C.F.R. § 1630.2(j).

Far from being a "complex and highly technical" area, EEOC's *amicus* brief simply took its own regulation – which observed that, given the various thumbs it put on the scale, proof of substantial limitation "usually will not require scientific, medical or statistical analysis," 29 C.F.R. § 1630.2(j)(1)(v) – and went the final step.

"A heightened requirement of 'medical evidence' to show an impairment would contradict Congress' express intent," it told the Sixth Circuit. App. 85a. Hardly the stuff of the split atom, or whether a new active moiety has been created by joining a previously approved moiety to lysine through a non-ester covalent bond. *Kisor*, 139 S. Ct. at 2410, citing *Actavis Elizabeth LLC v. FDA*, 625 F. 3d 760, 762-763 (D.C. Cir. 2010).

Simply put, there is no reason for a court to defer where an agency merely takes its (overreaching) regulatory instruction as to what type of evidence will and will not be required and removes all remaining limits, or adds to its list of major bodily functions ones like "musculoskeletal" that are so broad, almost no ADA plaintiff ever will fail to show herself "substantially limited."

4. This case also highlights the manner in which whatever deference survives *Kisor* continues to violate § 706 and § 553 of the Administrative Procedures Act, 5 U.S.C. §§ 706, 553. APA Section 706 instructs reviewing courts to "decide all relevant questions of law," and a court that defers to and accepts an agency's view of a regulation that is not the best one, essentially abdicates that duty and allows the agency to assume a judicial role. *Kisor*, 139 S. Ct. at 2432 (opinion of Gorsuch, J.). In this case, the Sixth Circuit did that twice. First, though it tipped its cap to 29 C.F.R. 1630.2(j)(1)(v)'s observation that the comparison of one's performance of a major life activity to that of the same major life activity by most people in the general population "usually will not require scientific, medical, or statistical analysis," it effectively adopted EEOC's *amicus*-brief guidance that requiring "medical evidence" of any plaintiff "would contradict Congress' express

intent." App. 13a, 85a. Harrison now may go to trial and establish herself as a "qualified individual with a disability" based *solely* on her uncorroborated say-so that she can't kneel and has a hard time walking over rocks and up inclines – as can no doubt be said by millions of Americans. EEOC's *amicus*-brief guidance allowed the circuit court to fashion such gossamer into an actionable claim.

Second, while the court of appeals also acknowledged the regulation's list of "major life activities" – and that it adds others beyond those set forth in the ADAAA – it accepted EEOC's *amicus*-brief invitation to add any more it wanted, finding that "[k]neeling fits comfortably within [the] list." App. 13a, citing 29 C.F.R. § 1630.2(i)(1)(i) and 42 U.S.C. § 12102(2)(A). In that sense, this case also exemplifies the second transgression of which Justice Gorsuch warned – the court allowed EEOC effectively to issue new regulations without going through the notice and comment provisions of APA § 553. *Kisor*, 139 S. Ct. at 2434 (opinion of Gorsuch, J.). EEOC literally "announced an interpretation of an existing substantive regulation without advance warning, and in pretty much whatever form it" wished, *Ibid.* The first inkling Parts Galore had of EEOC's view that requiring "medical evidence" of a claimed impairment in all cases would violate the ADA, was when the agency's surprise *amicus* brief arrived via ECF email on its counsel's computer.

5. *Auer*/*Kisor* deference here also impinged on the separation of powers. EEOC via its *amicus* brief told the Sixth Circuit it must interpret the ADAAA to mean not what the panel's three judges think it means, but what the executive agency thinks it means. *Kisor*, 139 S. Ct. at 22438-40 (opinion of Gorsuch, J.). Exactly as Justice Gorsuch warned, this meant Parts Galore was deprived of the

"wholly impartial" decisionmaker Article III requires, and instead saddled with the views of an activist agency that chose to "'press the case for the side [it] represent[s]' instead of adopting the fairest and best reading." *Id.* at 2438-40 & n.86, citing Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 390-391 (1947) and Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016). Absent deference, the Sixth Circuit might have accepted EEOC's view or rejected it, but in either event would have reached its own conclusion independently – and not deprived Parts Galore of its "right to an independent judicial determination of the law's meaning." *Id.* at 2440-41.

6. Nor is *stare decisis* a concern. For one thing, it is no longer fully accurate to refer to *Auer* or *Seminole Rock* deference – *Kisor* "has left *Auer* deference standing, but wobbly." Melone, Kisor v. Wilkie: Auer *Deference is Alive but Not So Well, Is* Chevron *Next?*, 12 N.E. U. L. Rev. 581, 627 (2020). And no significant reliance interests have formed based on the 2019 *Kisor* ruling: the toner on it has barely cooled, and lower courts appear somewhat confused as to how to apply judicial deference in its wake. Note, Auer *2.0: The Disuniform Application of* Auer *Deference After* Kisor v. Wilkie, 88 Fordham L. Rev. 2011, 2043 (2020) (early decisions post-*Kisor* cast doubt on whether it has clarified *Auer*, and issue of whether to apply deference "will continue to plague courts and litigants alike").

Finally, there is the question of whether caselaw that sets forth a doctrine for analyzing text properly may even *be* the focus of *stare decisis*. *Kisor*, 139 S. Ct. at 2443-44 (opinion of Gorsuch, J.). (*Auer*'s narrow holding about the meaning of the particular regulation at issue in that case may be entitled to *stare decisis* effect, but

it "seems doubtful" to "prescribe an interpretive methodology governing every future dispute over the meaning of every regulation"). It is especially dubious to give *Auer* that force where it undermines judicial independence, *Id.* at 2444 – as the Sixth Circuit opinion exemplifies.

7. Lastly, this case's procedural path highlights an institutional drawback of *Auer*. When Harrison filed her administrative charge of discrimination, an unimpressed EEOC issued her a right-to-sue letter. App. 29a. But once she filed suit and it was dismissed and she appealed, the prospect of an appellate opinion construing the ADAAA brought EEOC enthusiastically into the fray, plainly hoping to advance the ball for ADA plaintiffs even further than it had done with its regulations. EEOC even briefed an issue from the district court's ruling, relating to Parts Galore's status as Harrison's "employer," that Harrison's own brief did not raise. App. 88a.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting), quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). "The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *Ibid.* This case underscores that. If a statute covering millions of employer-employee relationships nationwide is to be broadened such that virtually anything constitutes a "substantially limiting" "impairment," of which no corroborating scientific, medical, or statistical evidence

need be presented, there is a process for doing that. It is that set forth in the Bicameral and Presentment Clauses, Art. I, § 7, cls. 2-3, which "prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chaudha*, 462 U.S. 919, 945-946 (1983). And it requires something more than EEOC legal staff conferencing around a table or on Zoom to determine the cases in which they will appear as *amicus*, and further expand the agency's ADAAA regulations.

8. "[E]veryone recognizes, to one degree or another, that *Auer* cannot stand." *Kisor*, 139 S. Ct. at 2443 (opinion of Gorsuch, J.). "*Auer* will someday be overruled and [] Justice Scalia's dissent in *Decker* [*v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013)] will be the law of the land." Kavanaugh, Keynote Address: Justice Scalia and Deference 19:06 (June 2, 2016), available at http://vimeo.com/169758593.

That day has arrived. "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part). The Court should grant certiorari and overrule *Kisor*, *Auer*, and *Seminole Rock*.

II. *Chevron* deference also should be ended.

1. "Under *Chevron*, courts uphold an agency's reading of a statute – even if not the best reading – so long as the statute is ambiguous and the agency's reading is at least reasonable." Fixing Statutory Interpretation, *supra*, 129 Harv. L. Rev. at 2150 citing *Chevron*, 467 U.S. at 842-844. "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in

seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." *Id.* This case presents a paradigm of that executive overreach, and separate from the Sixth Circuit's deference to EEOC's *amicus*-brief pronouncements, its crediting of the agency's ADAAA regulations give this Court an opportunity to review and eliminate *Chevron* deference.

2. Not content with how courts were interpreting the ADA's threshold inquiry of "substantially limited in a major life activity," Congress in 2008 amended the Act to broaden some of its substantive provisions and set forth a litany of admonishments to courts that they should construe the Act broadly. Congress also voiced its expectation that EEOC would craft regulations, a task the agency took up with gusto. It not only set forth its view of key statutory definitions, but went further – for instance, adding the broad term "musculoskeletal" to the list of "major bodily functions." 29 C.F.R. § 1630.2(i)(1)(ii). EEOC then impinged on the judiciary's role by promulgating several more "rules of construction," some of which dictate to courts the standards they should apply and the evidence they should allow in resolving various legal questions. *See*, *e.g.*, 29 C.F.R. § 1630.2(i)(2) ("[i]n determining other examples of major life activities, the term 'major' shall not be interpreted strictly to create a demanding standard for disability"); 29 C.F.R. § 1630.2(j)(1)(i) ("The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard"); 29 C.F.R. § 1630.2(j)(1)(iii) ("primary object" in ADA cases should be whether covered entities

have complied with their obligations and whether discrimination has occurred not whether an individual's impairment substantially limits a major life activity, an issue that "should not demand extensive analysis"); 29 C.F.R. § 1630.2(j)(1)(iv) (term "substantially limits" shall be interpreted and applied "to require a degree of functional limitation that is lower than the standard" applied pre-ADAAA); 29 C.F.R. § 1630.2(j)(1)(v) (comparison of individual's performance of a major life activity to performance of same activity by most people in the general population "usually will not scientific, medical, or statistical analysis").

By dictating to the judiciary how certain key coverage issues under the ADAAA are to be resolved, EEOC's regulatory "rules of construction" essentially load the litigation dice in favor of employees. This Court "has long held that Congress cannot 'indirectly control the action of the courts, by requiring of them a construction of the law according to its own views." *Kisor*, 139 S. Ct. at 2439 (opinion of Gorsuch, J.), citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) and T. Cooley, Constitutional Limitations 95 (1868). Congress of course was free to express its disapproval of this Court's construction of the ADA by amending the Act, which it did in 2008. 42 U.S.C. § 12101 (Note): Findings and Purposes. But it exceeded its powers in spelling out "rules of construction" dictating to courts how they are to construe and decide cases involving the definition of "disability" and "substantially limits," 42 U.S.C. § 12102(4)(A) & (B). Such mandates to rule according to legislative judgment long have been viewed as an affront to the judicial power. *Kisor*, 139

S. Ct. at 2439 n.89 (opinion of Gorsuch, J.), citing *Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L. Ed. 276 (1804). Given that, it most certainly impinges on the judicial power for an executive agency to issue regulations further dictating how courts are to construe a statute and adjudicate issues arising thereunder, as EEOC has done.

3. In *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), this Court noted that "[n]o party to these cases has asked us to reconsider *Chevron* deference." *Id.* at 1629. "[W]hether *Chevron* should remain is a question we may leave for another day." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Parts Galore is now asking. This Court should grant certiorari and overrule *Chevron*.

4. Lastly, the ruling below may be vacated on the narrower ground that it simply misreads the 2008 ADA amendments. While Congress in that enactment criticized this Court's understanding of "substantially limits a major life activity," it said nothing about judicial interpretation of the statutory term "impairment." *Richardson v. Chicago Transit Auth.*, 926 F.3d 881, 889 (7th Cir. 2019). While the Sixth Circuit focused on whether Harrison's claimed knee condition "substantially limits" her, App. 10a-13a, it completely elided the fact that Harrison has presented insufficient evidence that she even has an impairment at all, accepting her uncorroborated say-so about continuing limitations with her knee. *Id.*

The court then misread EEOC's revised regulation on "substantially limits" – stating that comparison of an individual's performance of a major life activity to that of the same activity by most people in the general population "usually will not

require scientific, medical or statistical *analysis*," *Id.* at 13 (emphasis added) – as excusing her from providing any medical *documentation* of its mere existence. That fundamentally changes the original ADA's definition of "impairment," when Congress did no such thing. *Richardson*, 926 F.3d at 889 ("…the ADAAA's legislative history explicitly states that Congress "expected that the currently regulatory definition of physical or mental impairment, as promulgated by agencies such as the EEOC…would not change")(cleaned up), citing Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008, 154 Cong. Rec. S8342-01, S8345 (Sept. 11, 2008).

Congress did not modify the statutory definition of "impairment," and "even after the ADAAA, the definition of physical impairment remains inextricably tied to a 'physiological disorder or condition.'" *Richardson*, 926 F.3d at 889, citing 29 C.F.R. § 1630.2(h)(1) and *Morris v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016). By reading the statute, along with EEOC's regulations and *amicus* guidance, to excuse Harrison from having to provide corroboration that her claimed knee condition even exists, the Sixth Circuit misapplied the law. At a minimum, this Court should vacate its ruling and remand with instructions to affirm the district court.

CONCLUSION/RELIEF REQUESTED

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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