No. 17-225

In the Supreme Court of the United States

GARCO CONSTRUCTION, INC., PETITIONER

v.

ROBERT M. SPEER, ACTING SECRETARY OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 856 F.3d 938. The opinions of the Armed Services Board of Contract Appeals (Pet. App. 33a-38a, 39a-80a, 81a-99a) are reported at 16-1 B.C.A. (CCH) ¶ 36,278; 15-1 B.C.A. (CCH) ¶ 36,135; and 14-1 B.C.A. (CCH) ¶ 35,512.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2017. The petition for a writ of certiorari was filed on August 7, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the authority of the United States Air Force to control access to the Malmstrom Air Force Base (Malmstrom) in central Montana, which operates "the largest missile complex in the Western Hemi-

sphere" and is one of only three Air Force bases that maintain and operate the Nation's Minuteman III intercontinental ballistic nuclear missiles. Pet. App. 2a, 44a-45a. Consistent with the sensitive nature of the nuclear-weapons systems, the Air Force has designated the base a "Protection Level 1" installation, the highest security designation for an Air Force facility. *Id.* at 45a; cf. Corrected C.A. App. (C.A. App.) 286.

Petitioner's suit arises out of an August 2006 contract for construction at the base. See Pet. App. 2a. Petitioner contends that it is entitled to additional payments under the contract because the Air Force excluded from the base certain individuals with criminal backgrounds who were employed by one of petitioner's subcontractors. Petitioner's contract claim describes the affected workers as having criminal convictions for unspecified "felony" offenses as well as for "burglary," "theft," "drug," "drug possession," and other crimes. C.A. App. 155, 160-161.

1. a. The Malmstrom Air Force Base serves as headquarters for the Air Force's 341st Missile Wing, which was formerly designated the 341st Space Wing. After the attacks of September 11, 2001, the Air Force made numerous changes to its base-access policies. C.A. App. 278. The Space Command's June 2003 supplement to Air Force Instruction 10-245 required that National Criminal Information Center (NCIC) background checks be performed as one of several "entry requirements for contractors." *Id.* at 278-279.[1] That instruction stated that such "background checks" must be

[1] The June 2003 Space Command Supplement is available at Tab 21 of the government's supplement to the appeal file (pp. 168-262), which was filed pursuant to Armed Services Board of Contract Appeals Rule 4. Cf. C.A. App. 218 (noting supplemental Rule 4 file).

performed for contractor employees, see Department of the Air Force, Air Force Instruction 10-245, Space Command Supp. 1, at 3 (June 2, 2003), and that, before any such employee "is authorized entry" to a Space Command "installation" (like Malmstrom), the worker "[s]hall have a completed NCIC and fingerprint check," unless the individual already "possess[es] a completed and valid security clearance, or favorable [National Agency Check (NAC)]" or NAC-derivative background check. *Id.* § 2.17.3.1, at 28-29. Cf. *id.* at 1 (supplemental requirements "appl[y] to Headquarters Air Force Space Command * * * and all subordinate units"). Although the Space Command's 2003 instruction stated that "temporary access" could be granted to contractors "while awaiting the results of the fingerprint check," *id.* § 2.17.3.1, at 29, and the "fingerprint requirements were [initially] waived due to the lack of an electronic fingerprint capability," C.A. App. 279, the instruction included no similar exception for NCIC background checks.

By July 2005, the Space Command's 2003 directive had been implemented locally at Malmstrom in an order, entitled 341st Space Wing Instruction 31-101 (Instruction 31-101), that was issued by the 341st Space Wing's commander. See C.A. App. 55-76, 323-354 (excerpted July 2005 order); Pet. App. 104a-106a (limited excerpt). In light of that order, a July 2005 pamphlet (341st Space Wing Pamphlet 31-103) summarized the base's security policy and procedures for contractors. See C.A. App. 49-54 (excerpted pamphlet); Pet. App. 107a-108a (limited excerpt); see also C.A. App. 53 (explaining that the pamphlet describes "general aspects" of the provisions in Instruction 31-101 governing "in-

stallation entry and exit procedures," and that Instruction 31-101 "may be made available to [contractors] upon request").

Instruction 31-101 required contractors like petitioner to submit in advance a list of employees for whom the contractor requested access to the base. Pet. App. 105a; cf. *id.* at 107a (Pamphlet 31-103). The instruction stated that personnel at the base's 911 Dispatch Center would "run the contractor names through the NCIC for *wants and warrants*." *Id.* at 105a (emphasis added); cf. *id.* at 107a-108a (Pamphlet 31-103). "After the dispatcher completes the NCIC check," the instruction continued, "[u]nfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the [commander of the 341st Security Forces Group and the commander of the 341st Security Forces Squadron]." *Id.* at 105a; cf. *id.* at 108a (Pamphlet 31-103).

By January 2006, the base had implemented the "more stringent" post-9/11 "entry procedures for contractors" by conducting "background checks * * * through the [NCIC]" and denying entry to construction workers where the NCIC check identified prior criminal history. C.A. App. 287-288 (March 2006 letter from base commander to Senator Baucus discussing the base's entry policy). Petitioner contends that, under the July 2005 base-specific policies described above, the Air Force was authorized to deny access only to "want[ed]" persons and individuals with arrest "warrants," and that the base-specific access prohibitions then in effect did not extend to individuals with criminal records who were identified during an NCIC check. See Pet. App. 7a-8a.

b. In August 2006, the United States Army Corps of Engineers awarded petitioner a contract to construct

housing units at the base. Pet. App. 2a; see C.A. App. 77-110 (excerpts from contract). The contract incorporates a generally applicable Federal Acquisition Regulation stating that contractors are "not prohibited" from employing individuals with criminal records, 48 C.F.R. 52.222-3(b). See C.A. App. 83. Under that provision, petitioner is not generally prohibited from employing such individuals, at least where they perform off-base aspects of the contract.

The contract makes clear, however, that petitioner must adhere at all times to applicable base-access policies. Pet. App. 2a-3a. Section 1001 states that "[t]he work under this Contract is to be performed at an operating Military Installation with consequent restrictions on entry and movement of nonmilitary personnel." *Id.* at 46a; see C.A. App. 100. Section 1001 further provides that petitioner "shall be responsible for compliance with all regulations and orders of the Commanding Officer of the Military Installation, respecting identification of employees, movements on installation, parking, truck entry, and all other military regulations which may affect the work." Pet. App. 46a; see C.A. App. 99. Section 1005 accordingly requires that petitioner submit a list of "all Contractor personnel" seeking access to the base and directs that "[s]ecurity requirements and procedures shall be coordinated with the 341 Security Forces Squadron." Pet. App. 46a-47a; see C.A. App. 103.

During the September 2006 pre-construction conference addressing "important issues" regarding contract performance, Air Force personnel explained to petitioner the "requirements for contractor[s] to obtain passes for access on base." C.A. App. 270-271. The Air Force explained that petitioner's list of employee names must be "sent to dispatch for background checks" and

that "[n]o one with outstanding warrants, felony convictions, or on probation will be allowed on base." *Ibid.*; see Pet. App. 47a-48a. A contracting officer instructed petitioner to review the meeting minutes and to respond in writing to identify "any discrepancies or omissions." C.A. App. 270. Petitioner did not dispute the base-entry requirements. Pet. App. 10a.

After petitioner began contract performance, one of its subcontractors, James Talcott Construction (JTC), bussed individuals from a state prison's pre-release facility to the base to work on petitioner's contract. Pet. App. 3a. The Air Force denied base entry to many of the prison-pre-release workers and to other JTC workers with criminal records. *Ibid.*

In May 2007, JTC informed petitioner and the Air Force that its employees were having difficulty accessing the base. Pet. App. 4a; see C.A. App. 111-113. After investigating the matter, Air Force personnel concluded that no contractor other than JTC had experienced similar difficulties. C.A. App. 283. In a series of communications, the parties discussed the scope of the applicable restrictions on access to the base. Pet. App. 4a; see, *e.g.*, C.A. App. 129, 136, 141, 143, 270-271, 280-281. In those discussions, JTC "acknowledged that violent criminals and sex offenders should not be granted base access." Pet. App. 4a, 10a.

c. On October 22, 2007, the commander of the 341st Space Wing, who was responsible for determining base access, issued a memorandum regarding access policies for contractor personnel. Pet. App. 4a; see C.A. App. 151-152 (memorandum); cf. *id.* at 150. The memorandum stated that, after a contractor submits its list of employees seeking base access, the base's 911 Dispatch Center must utilize the NCIC database to conduct a

"background check in accordance with Air Force directives." C.A. App. 151; see Pet. App. 4a. "Unfavorable results from the background check," the memorandum stated, "will result in individuals being denied access to the installation, including, but not limited to, individuals that are determined to fall into one or more of the following categories: those having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program." C.A. App. 151; see Pet. App. 4a-5a.[2]

2. a. A few days after the October 2007 memorandum was issued, JTC submitted to petitioner a request for equitable adjustment (REA) under petitioner's contract. C.A. App. 156-161 (letter); Pet. App. 5a. JTC asserted that it had incurred nearly $500,000 in additional expenses, and that most of those expenses had resulted from "[l]ost productivity" purportedly caused by having to use "less experienced workers" instead of more experienced individuals with criminal records. C.A. App. 157, 159. Petitioner submitted the request on JTC's behalf, and the government denied that request. *Id.* at 155, 163-164. In April 2008, the government denied petitioner's request for reconsideration. *Id.* at 170-171;

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[2] The October 2007 memorandum also revised Malmstrom's base-access policies to close a loophole that JTC had previously exploited. By hiring retired military members who then vouched for each bus carrying JTC workers from a prison pre-release center to the base, JTC had formerly "by-pass[ed] security procedures to get convict labor on to the base" without "any vetting." C.A. App. 279, 286; see Pet. App. 3a-4a (noting that a worker with a violent criminal background had entered the base from a pre-release facility and had "beat[en] his manager with a wrench"). The October 2007 memorandum stated that "[u]nder no circumstance will retired military members * * * vouch contractor personnel onto the installation utilizing their Armed Forces Identification Card." C.A. App. 152.

see *id.* at 165-169. In May 2011, petitioner submitted a pass-through certified contract claim for nearly $1.5 million on JTC's behalf. *Id.* at 174-175; see Pet. App. 92a.

b. Based on the "deemed denial" of its claim, petitioner appealed to the Armed Services Board of Contract Appeals (ASBCA or Board). Pet. App. 92a. The Board initially granted partial summary judgment to the government, holding that the government was not liable for any additional expenses JTC may have incurred after the October 2007 memorandum was issued. *Id.* at 81a-99a. The Board concluded that the "implementation of the base access policy by the October 2007 memorandum was a sovereign act and the government is not liable in damages that may have been caused from October 2007 forward." *Id.* at 97a.

After an evidentiary hearing, the Board denied the balance of petitioner's contract-claim appeal. Pet. App. 39a-80a. The Board concluded that the government was not liable for pre-October 2007 damages allegedly resulting from the denial of base access to JTC employees with criminal backgrounds because (1) the Air Force's base-access policy in Instruction 31-101 and Pamphlet 31-103 adopted in July 2005 (before petitioner's 2006 contract) was a sovereign act, *id.* at 72a-73a, and (2) that policy required a criminal "background check" for contractors seeking entry to the base and was not limited to an inquiry for only "wants" and "warrants" as petitioner argued, *id.* at 73a-75a. The Board denied reconsideration. *Id.* at 33a-38a.

3. a. The court of appeals affirmed. Pet. App. 1a-32a. As relevant here, the court concluded that the base-access policy reflected in Instruction 31-101 and Pamphlet 31-103 authorized the Air Force to conduct

background checks on JTC's employees and to deny entry to those with criminal records. *Id.* at 6a-13a.

With respect to the "standard of review" that the court of appeals should apply, petitioner stated that an agency's interpretation of its own regulation "is entitled to deference" and "is of controlling weight, unless it is plainly erroneous or inconsistent with the regulation." Pet. Corrected C.A. Br. 30. Petitioner argued that "Pamphlet 31-103 and Security Instruction 31-101 set the procedures for Base access for contractors, and such procedures were not changed until Col. Finan issued the October 2007 Memorandum." *Id.* at 35. Based on those documents' references to "wants and warrants" checks, petitioner contended that the denial of base access to JTC employees with criminal records was contrary to the plain language of Pamphlet 31-103 and Instruction 31-101. See *id.* at 32-34. Petitioner argued that "JTC, through [petitioner's] pass through claim, is entitled to damages caused by the Base's failure to follow the written Base access policy and wrongfully denying JTC's employee[s'] access to the Base," *id.* at 40. See *id.* at 31-40; Pet. App. 8a.

The court of appeals "disagree[d] with [petitioner] that the plain text of the base access policy unambiguously resolves the dispute." Pet. App. 9a. The court acknowledged that the term "'wants and warrants check,'" if viewed "in isolation," could "suggest[] a check only for wants or warrants." *Ibid.* The court explained, however, that "the surrounding language casts doubt on [petitioner's] interpretation." *Ibid.*

The court attached significance, for example, to the statement in Pamphlet 31-103 that "'[u]nfavorable results'" from an NCIC check would be scrutinized and eligibility determined "'on a case-by-case basis.'" Pet.

App. 9a (quoting C.A. App. 51). The court stated that "[t]his directive for a case-by-case analysis of unfavorable results suggests that the check is more searching than a simple check for outstanding wants or warrants. Indeed, the government introduced testimony that anyone with a want or warrant would be immediately detained" rather than scrutinized for entry to the base on a case-by-case basis. *Id.* at 9a-10a; see *id.* at 12a (explaining that an "unfavorable result" from the NCIC check included convictions, arrests, and other adverse information "that would come up on a background check") (citation omitted).

The court of appeals further concluded that "significant evidence" supported the government's position that the base-access policy authorized "a criminal background check." Pet. App. 10a. The evidence concerning the base-specific policy in question, the court explained, showed that the reference to an NCIC "wants and warrants" check was used at Malmstrom as a "synonym[]" for NCIC background checks. *Id.* at 11a (citation omitted). Petitioner's contrary view that no background checks were authorized, the court observed, would have "allow[ed] violent and sex offenders on the base," which "would have been a 'dramatic change' to the base access policy." *Id.* at 11a-12a (citation omitted). The court noted JTC's acknowledgment in 2007 that "violent criminals and sex offenders" would not "be granted base access." *Id.* at 4a, 10a. The court further explained that, when petitioner had met with Air Force personnel "around the time JTC executed [its] subcontract," the Air Force had specifically noted the "'background check[]'" requirement and the associated denial of base entry for those with criminal backgrounds, and neither

petitioner nor JTC had then disputed that understanding. *Id.* at 10a (citation omitted).

Given the "ample support for the Air Force's interpretation," the court of appeals concluded that the agency's interpretation of Pamphlet 31-103 was entitled to "controlling weight" because "the interpretation is not plainly erroneous or inconsistent with the regulation." Pet. App. 13a.

b. Judge Wallach dissented. Pet. App. 17a-32a. Judge Wallach did not disagree with the majority's analysis of Pamphlet 31-103. He instead based his dissent on his understanding of the "sovereign acts" doctrine in contract law, *ibid.*, which is not relevant to the question presented in the certiorari petition. Cf. *id.* at 7a n.2 (majority's response to dissent).

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to contract damages based on the Air Force's exclusion from the Malmstrom Air Force Base of JTC employees with criminal records. That decision does not conflict with any decision of this Court or any other court of appeals.

Petitioner argues (Pet. 14-27) that this Court should grant review to overrule its decisions in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), which hold that courts should generally defer to agencies' interpretations of their own ambiguous regulations. On several recent occasions, this Court has declined to grant review to consider whether to overrule those precedents. See p. 15 n.3, *infra* (collecting cases).

This case would be a poor vehicle for reexamining the principles announced in *Bowles* and *Auer*. The Air

Force's exclusion of JTC employees with criminal records was consistent with the most natural reading of Pamphlet 31-103 and Instruction 31-101. In the court below, moreover, petitioner specifically advocated the deferential standard that the court of appeals applied in this case. This case also involves an atypical context for application of *Bowles* and *Auer* deference principles, both because Pamphlet 31-103 and Instruction 31-101 were subject to amendment at any time without notice-and-comment rulemaking, and because resolution of the dispute ultimately turns on interpretation of the parties' contract. Further review is not warranted.

1. The court of appeals correctly held that, under the base-access policies in force when petitioner's August 2006 contract was formed, Air Force security personnel were authorized to conduct background checks on contractors seeking entry to Malmstrom and to exclude those with criminal records based on a case-by-case evaluation. Instruction 31-101 states that the names of contractor employees seeking entry to Malmstrom will be run "through the NCIC for wants and warrants" and that, after "the NCIC check" is completed, "[u]nfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis" by commanders of security components within the 341st Space Wing. Pet. App. 105a; see pp. 3-4, *supra*. That base-specific document implemented an earlier Air Force Space Command directive, which "specifie[d] requirements for background checks" for contractor employees by stating (with exceptions not relevant here) that such employees "[s]hall have a completed NCIC and fingerprint check" before being granted "authorized entry" to a Space Command installation. Department of the Air Force, Air Force Instruction 10-245,

Space Command Supp. 1 § 2.17.3.1, at 28-29 (June 2, 2003); *id.* at 3; see pp. 2-3, *supra*; see also C.A. App. 278-279. Read together, those policies required an NCIC background check for contractors seeking entry to Malmstrom, and they vested base security officers with authority to deny entry on a case-by-case basis if the NCIC check produced unfavorable results.

In the court of appeals, petitioner focused on the phrase "wants and warrants" in Pamphlet 31-103 and Security Instruction 31-101, arguing that those documents authorized "only a search for outstanding wants or warrants" and did not authorize "a search of a criminal record." Pet. App. 8a; see Pet. Corrected C.A. Br. 32-34; Pet. 4. Those documents, however, were issued against the backdrop of the Space Command's 2003 order, which required a "background check" for contractor employees in the form of an "NCIC and fingerprint check" before their entry into any Space Command installation. Air Force Instruction 10-245, Space Command Supp. 1, at 3; *id.* § 2.17.3.1, at 28-29. That order, which requires more than just a limited check for wants and warrants, independently required NCIC background checks at Malmstrom even before Pamphlet 31-103 and Instruction 31-101 were promulgated in July 2005. Security officials at Malmstrom—the only Air Force installation at which Pamphlet 31-103 and Instruction 31-101 applied—thus used the phrase "NCIC wants and warrants check" as a synonym for the type of NCIC criminal-history background check that was already mandated by the Air Force Space Command. Pet. App. 11a. Instruction 31-101's reference to "the NCIC check" performed by the base's 911 Dispatch Center (*id.* at 105a) refers to that same background check.

The directive that "[u]nfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis" after an NCIC check has been completed, Pet. App. 105a (Instruction 31-101); C.A. App. 51 (Pamphlet 31-103), confirms that understanding. As the court of appeals explained, if required background checks retrieved only information about wanted persons and individuals with warrants, "case-by-case" access determinations based on that information would make little sense. Pet. App. 9a-10a (citation omitted). Rather, Air Force security personnel would "immediately detain[]" "anyone with a want or warrant" who sought entry to the base. *Id.* at 9a. The case-by-case evaluation specified by Pamphlet 31-103 and Instruction 31-101 is thus most sensibly read to mean a case-by-case evaluation of any criminal record that the requisite NCIC check reveals.

Petitioner's contrary view cannot be squared with JTC's own "acknowledge[ment] that violent criminals and sex offenders should not be granted base access." Pet. App. 4a, 10a. Under petitioner's reading of Pamphlet 31-103 and Instruction 31-101, such offenders could not have been denied access to Malmstrom unless they were also wanted or subject to an arrest warrant. Cf. *id.* at 11a-12a. Indeed, if petitioner's understanding of those directives were correct, Air Force security personnel could not properly have barred entry to Malmstrom to a worker who had just completed a felony sentence for terrorism or espionage offenses. Such an approach would defy common sense, particularly given the nature of the military installation at issue here.

Petitioner's interpretation is also inconsistent with the minutes for petitioner's September 2006 preconstruction conference. See pp. 5-6, *supra*. Those

minutes reflect the parties' understanding at the time that any contractor employees who sought entry to the base would be subjected to "background checks" and could be denied entry based on prior criminal convictions. C.A. App. 270-271; Pet. App. 47a-48a.

2. Petitioner largely ignores the merits of the Air Force's interpretation of Instruction 31-101 and Pamphlet 31-103, focusing (Pet. 14-26) instead on the abstract question whether this Court should overrule the deference principles set forth in *Seminole Rock* and *Auer*. This Court has repeatedly denied review to consider whether to overrule those decisions.[3] For several reasons, this case would be a poor vehicle for reconsidering *Seminole Rock* and *Auer*.

a. For the reasons discussed above, the Air Force's understanding of the Malmstrom base-access policies that applied at the time of contract formation reflects "the fairest reading of the [documents] in question." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring). Petitioner asserts (Pet. 26) that the court of appeals "declined" to hold, "in the alternative, that the government would prevail even in the absence of *Auer* deference." But petitioner gave the

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[3] See, *e.g.*, *Noble Energy, Inc.* v. *Haugrud*, 137 S. Ct. 1327 (2017) (No. 16-368); *Hyosung D & P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141); *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14); *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (No. 16-273) (granting review of Questions 2 and 3 but not of Question 1); Pet. at i, *Gloucester Cnty. Sch. Bd.*, *supra* (asking in Question 1 whether "th[e] Court [should] retain the *Auer* doctrine"); *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861); *Swecker* v. *Midland Power Coop.*, 136 S. Ct. 990 (2016) (No. 15-748); *Brown* v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) (No. 14-913); *Stewart & Orchards* v. *Jewell*, 135 S. Ct. 948 (2015) (No. 14-377).

court no occasion to issue such a holding. Petitioner affirmatively endorsed the deferential standard that the court ultimately applied, stating that an agency's interpretation of its own regulation "is entitled to deference" and "is of controlling weight, unless it is plainly erroneous or inconsistent with the regulation." Pet. Corrected C.A. Br. 30. Observing that petitioner did "not challenge" that standard, Pet. App. 8a, the court of appeals determined that the Air Force's interpretation had "ample support" and was justified by "significant evidence," *id.* at 10a, 13a. In light of the court's reasoning and the most natural reading of the base-access policies, there is no evident reason to believe that the court would have reached a different result under a less deferential standard, which makes this case ill-suited to reexamining *Seminole Rock/Auer* deference principles.

b. One of petitioner's principal contentions is that deference to an agency's interpretation of its own regulation violates the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and creates perverse "incentive[s]" for agencies. Pet. 16. In petitioner's view, the principles announced in *Seminole Rock* and *Auer* enable agencies to circumvent notice-and-comment requirements by promulgating vague substantive rules, which the agencies can then effectively "rewrite" by invoking judicial deference to subsequent "interpretive rules" in a manner "unchecked by notice and comment." *Ibid.* (citation omitted); see Pet. 15-16, 20, 22-23. Whatever its merits in other contexts, however, that criticism has no application here.

Although a military order (like Instruction 31-101) that governs access to base property may have the effect of a legislative rule, Congress specifically exempted such rules from APA notice-and-comment requirement.

See 5 U.S.C. 553(a)(1) (exempting rules involving "a military * * * function of the United States"); 5 U.S.C. 553(a)(2) (separately exempting rules involving "a matter relating * * * to public property"). Thus, if a military officer wishes to "rewrite" the applicable base-access criteria, she may simply issue a new order governing access without purporting to interpret any pre-existing order. Here, after petitioner called into question the proper understanding of Malmstrom's July 2005 base-access policies, the 341st Space Wing's commander directly clarified any prior ambiguity concerning contractor access by issuing (without notice and comment) her October 2007 memorandum. Although petitioner views the October 2007 memorandum as changing the applicable base-access policy, petitioner does not contend that the Air Force was required to utilize notice-and-comment procedures before effecting that purported change, or that the October 2007 memorandum was otherwise unlawful. Cf. Pet. App. 7a n.2 (noting petitioner's "agree[ment] that the Air Force had the right to limit base access").

c. In another respect as well, this case is unlike the disputes in which questions of *Seminole Rock* and *Auer* deference have typically arisen. The ultimate question presented in this case is not whether Pamphlet 31-103 and/or Instruction 31-101 standing alone authorized the Air Force to exclude JTC employees with criminal records, but whether petitioner or JTC had a *contractual entitlement* to bring such workers onto the base. See Pet. 20. Petitioner's failure to dispute the Air Force's September 2006 explanation that "[n]o one with outstanding warrants, felony convictions, or on probation will be allowed on base," C.A. App. 271; see pp. 5-6, *supra*, and JTC's acknowledgment that "violent criminals

and sex offenders should not be granted base access," Pet. App. 4a, 10a; see pp. 6, 14, *supra*, are particularly salient evidence that the parties' agreement did not confer any such right.

d. Finally, the agency interpretation at issue has no ongoing significance beyond the present case. The October 2007 memorandum clearly specifies that the NCIC database must be used to conduct a "background check in accordance with Air Force directives," and that "[u]nfavorable results from the background check will result in individuals being denied access to the installation" based on their criminal records. C.A. App. 151; see Pet. App. 4a-5a. Petitioner therefore focuses *only* on the July 2005 base-access policies that were in effect *before* that memorandum. See Pet. App. 6a-7a. Acceptance of petitioner's contract claim would have no ongoing effect on the Air Force's authority to control access to Malmstrom.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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