No. 22-90

In the Supreme Court of the United States

NGL SUPPLY WHOLESALE, L.L.C.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

BRIEF OF AMICI CURIAE OKLAHOMA, INDIANA, MONTANA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici States have a strong interest in a correct interpretation of the constitutional tenets of federalism and the separation of powers. This case threatens the balance of state and federal power by applying an administrative law standard that unreasonably confers power on agencies.

The D.C. Circuit in *Cassell v. F.C.C.*, 154 F.3d 478, 480 (D.C. Cir. 1998) announced that an agency's interpretation of its own precedent is entitled to deference. This case demonstrates that *Cassell* deference means in practice that, as long as the agency states some conclusory reason for its *departure* from precedent, the D.C. Circuit will uphold its ruling.

Because the development of *Cassell* deference raises serious threats to the balance of federal-state power, *Amici* support certiorari in this case to assess *Cassell* deference's continuing validity.[2]

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[1] Amici notified the parties of the intention to file this brief at least ten days in advance, and Amici submit this brief pursuant to Sup. Ct. Rule 37.4.

[2] Amici are in support of neither real party in interest on the merits of the underlying dispute that FERC addressed. This amicus is solely opposed to the D.C. Circuit's continued deference doctrines that appear unwarranted based on recent precedent of this Court.

SUMMARY OF ARGUMENT

I. The D.C. Circuit has created an impermissible level of deference for an agency's interpretation of its own precedent. This *Cassell* deference operates as dispositive in favor of agencies while resting on thin precedential support. Other circuits adjudicate these issues under arbitrary and capricious review without added deference.

II. This Court's precedent in *Kisor* favors overruling *Cassell* deference. *Kisor* limited deference in the context of an agency interpreting its own regulations to situations where the regulation was "genuinely ambiguous," the agency's reading was "reasonable" "reflecting a fair and reasoned judgment," and that the reading "implicated" the agency's "substantive expertise." These limitations suggest that a court must independently assess the agency's precedent—a task well-suited for a judge—rather than deferring to the agency's interpretation.

III. Whether deference to an agency's interpretation of its own precedent remains valid is important to the States. *Cassell* deference extends the power of federal agencies to preempt state regulatory efforts. Moreover, it undercuts the States' political protections inherent in the Constitution and procedural protections embodied in the APA. As a result, *Cassell* deference raises the possibility that an agency might successfully retroactively modify conditions on exercises of the Spending power.

ARGUMENT

I. THE D.C. CIRCUIT HAS ADDED A LAYER OF DEFERENCE THAT GOES BEYOND THE ORDINARY DEFERENTIAL ARBITRARY AND CAPRICIOUSNESS STANDARD.

"General principles of administrative law hold that an agency must be consistent." 32 Charles Alan Wright & Charles H. Koch, FEDERAL PRACTICE AND PROCEDURE § 8248, at 431 (2006). Indeed, predictability and stability are integral to assuring the rule of law. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18-21 (1997). The predictability and stability of federal law is especially hindered by a form of deference that greatly defers to an agency's interpretations—and reinterpretations—of its own precedent.

Any review of agency adjudications is somewhat deferential under the arbitrary and capricious standard of review. Nevertheless, the D.C. Circuit's innovation on deference has led to an automatic win rule for agencies who say anything, no matter how conclusory, in distinguishing their past precedent. A close look at other circuits shows that a proper application of the Administrative Procedure Act (APA) does not require this deferential gloss.

A. *Cassell* deference Adds a Dispositive Layer of Deference to a Court's Review of Agency Interpretation of Its Own Precedent.

Administrative law requires reasoned decision-making from agencies. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012). This Court has stated that, in the context of a rescission of a prior regulation, that the agency must provide "a *reasoned analysis* for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis added). Put more precisely, an agency must acknowledge the changing position and show that there are good reasons for the new policy. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). And when an agency is interpreting its own regulation, deference is only applied when the agency's interpretation reflects a "fair and considered judgment." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Deference to an agency's interpretation of its regulations (*Auer* deference) is rarely applied to an agency interpretation that conflicts with a previous one. *Id.* at 2418.

Through its development of *Cassell* deference, the D.C. Circuit has turned these principles of reasoned analysis on their head. *Cassell* deference arises when an appellant alleges that an agency has not followed its own precedent, while the agency argues that it distinguished or properly followed that precedent. *See Cassell*, 154 F.3d 478 at 483. In that case, certain

petitioners were challenging the Federal Communications Commission's decision to deny their request for a finder's preference for certain radio frequencies. *See id.* at 480. In order to obtain this preference, the petitioners had to establish that a third party was operating a station that was not in "substantial accordance" with FCC rules, and the FCC allegedly changed the meaning of the term in adjudicating their applications. *See id.* at 481-82. The FCC denied their applications based on its new interpretation of that term. *See id.* at 482-83. The D.C. Circuit examined the precedent at issue, but it also offered the general rule that "[a]n agency's interpretation of its own precedent is entitled to deference." *Id.* at 483.

In support of this new proposition, the D.C. Circuit cited just one case, *Inland Lakes Management, Inc. v. NLRB*, 987 F.2d 799 (D.C. Cir. 1993). *See Cassell*, 154 F.3d at 483. That case in turn traced its deference to agency interpretation of precedent to this Court's statement that an agency may "find that, although [a] rule in general serves useful purposes, peculiarities of the case before suggest that the rule not be applied in that case." *Inland Lakes Management*, 987 F.2d at 805 (quoting *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion)).

Nothing in this Court's statements in *Atchison* suggests that a court should or must defer to an agency's construction of its precedent or otherwise depart from the normal APA review. To the contrary, *Atchison* supports an interpretation that the agency must articulate good reasons for why it is distinguishing or not applying its prior precedent. This Court stated that the agency must "specify factual differences

between the cases" which only serve to distinguish the two cases "when some legislative policy makes the differences relevant to determining the proper scope of the prior rule." *Atchison*, 412 U.S. at 808. To be sure, this Court also stated that the distinctions should be "fairly and sympathetically read," but the agency must still put forth concrete reasons for why the precedent is different from the present case and adequately justify its interpretation. *Id.* at 808–811.

Cassell deference in the D.C. Circuit has evolved to mean that so long as the agency provides any reason for distinguishing or departing from precedent—no matter how terse or conclusory—the reviewing court will uphold the ruling. When *Cassell* is cited for its deference proposition in the D.C. Circuit, the agency wins every time. *See e.g. Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007); *Ceridian Corp. v. N.L.R.B.*, 435 F.3d 352, 355 (D.C. Cir. 2006); *Boca Airport, Inc. v. F.A.A.*, 389 F.3d 185, 190 (D.C. Cir. 2004); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003); *Pac. Coast Supply, LLC v. N.L.R.B.*, 801 F.3d 321, 333 (D.C. Cir. 2015); *U.S. Telecom Ass'n v. F.C.C.*, 295 F.3d 1326, 1332 (D.C. Cir. 2002). Any exception only occurs when the agency ignores that precedent has been changed and does not provide any explanation for that change whatsoever. *See Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1251 (D.C. Cir. 2004).

In order to provide reasoned answers to parties and to facilitate judicial review, agency orders should include more than a mere acknowledgement that precedent is being changed and a terse explanation for that change. Yet that bare-bones approach is all *Cassell* deference requires.

B. There Is a Circuit Split in How Courts Review Agency Distinguishment of Precedent.

As the Petitioner explains, the circuits are not uniform in how they treat an agency's interpretation of its own precedent. Pet.13-18. In some instances, *Cassell* has expanded beyond the D.C. Circuit. The Sixth Circuit has adopted *Cassell's* excessive level of deference. *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 503 (6th Cir. 2008) ("[w]hat is generally true in administrative law remains true here: An agency's interpretation of its own precedents receives considerable deference"). And since the Petition was filed, the Fourth Circuit has cited *Aburto-Rocha* approvingly. *See Tinoco Acevedo v. Garland*, No. 20-2048, 2022 WL 3268980, at *7 (4th Cir. Aug. 11, 2022).

On the other hand, there are several examples of circuits not giving *Cassell* deference to agencies when examining those agencies' own precedent for arbitrary or capricious reasoning. Petitioner correctly identifies the circuits that reject *Cassell* deference, and Amici offer a closer examination of the normal arbitrary and capricious review in those circuits to demonstrate that *Cassell* deference is an unnecessary gloss on APA review.

For example, the Third Circuit applies the normal *Atchison* review of precedent without allowing *Cassell* deference to compel a result. In *CBS Corp. v. F.C.C.*, 663 F.3d 122, 143 (3d Cir. 2011), the Third Circuit examined the FCC's precedent on actionable indecency in broadcasts. The precise question at issue was whether the FCC had changed its precedent on what qualified as fleeting or isolated material exempted from the scope of actionable indecency. *See id.* The Third

Circuit acknowledged *Cassell* deference, but stated that "deference is inappropriate where the agency's proffered interpretation is capricious." *Id.* The stated rule effectively set aside *Cassell* deference in favor of the normal arbitrary and capricious review. *See id.* Then, the Third Circuit engaged in its own thorough analysis of the FCC's precedent to determine that the agency's precedent showed uniform exemptions for fleeting or isolated material. *See id.* at 151. Under that review, the Third Circuit determined that the case before it involved a deviation from that precedent contrary to the FCC's own interpretation. *See id.*

The Third Circuit has repeatedly adhered to this approach and performed the arbitrary and capricious review discussed in *Atchison* without added deference. In *Castillo v. Attorney General United States*, 729 F.3d 296 (3d. Cir. 2013), the Board of Immigration Appeals (BIA) denied Castillo's petition to cancel his pending deportation. *Id.* at 299. His appeal hinged on the interpretation of the phrase "convicted of a crime" as used in a previous BIA decision, *In re Eslamizar*. *Id.* at 302. In Castillo's case, the BIA distinguished precedent because Castillo's conviction was predicated on a finding of guilty beyond all reasonable doubt unlike Eslamizar's conviction. *Id.* at 305. Castillo argued that *Eslamizar* required a multi-factor analysis—and not just a judgment of guilt under a "beyond all reasonable doubt" standard. *Id.* The Court conducted its own analysis of BIA precedent to determine that Castillo "offer[ed] the more persuasive interpretation" of the "difficult to understand" decision of *Eslamizar*. *Id.* at 306. It did not simply accept the agency's interpretation but instead recognized that the agency had

functionally departed from precedent by its faulty interpretation. *See id.*

The Third Circuit's approach is also evident in *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994). In that case, the Court analyzed the National Labor Relations Board's treatment of its own precedent. *See id.* at 152–154. There, in *Gartner-Harf Co.*, 308 N.L.R.B. 531, 533 n. 8 (1992), the NLRB had previously held that for two companies to be considered "alter egos" they must constitute a "single employer." *Id.* at 152. In *Stardyne*, the Board determined that two companies were alter egos without deciding whether they were a single employer. *Id.* at 143. The Board had sought to distinguish *Gartner-Harf* by stating that its treatment of alter ego and single employer concepts was extended dicta, and that *Stardyne* involves a disguised continuance of the old employer which *Gartner-Harf* did not. *Id.* at 152–153. The Court determined that it could not accept the Board's reasoning in distinguishing its prior precedent because it considered the two cases to be mutually exclusive, and that the Board's failure to "follow or repudiate its prior holding . . . was arbitrary and capricious," *Id.* at 153.

Like the Third Circuit, the First Circuit also performs arbitrary and capricious review without added deference. In *Shaw's Supermarkets, Inc. v. N.L.R.B.*, the First Circuit conducted an extensive review of the Board's precedent. 884 F.2d 34, 36 (1st Cir. 1989). The Court independently analyzed twelve previous Board decisions before ultimately deciding that the Board failed to adequately distinguish the current case from its previous determinations. *Id.* at 37–41.

While these cases show agencies arbitrarily deviating from precedent, the typical APA review also leads courts to affirm agency adjudications without needing any *Cassell* deference. For example, in *California Trucking Ass'n v. I.C.C.*, the Ninth Circuit reviewed agency precedent under arbitrary and capricious review before affirming a deviation. 900 F.2d 208, 212 (9th Cir. 1990). In *California Trucking*, the ICC ruled that certain grocery distribution centers qualified as a continuation of interstate transport and not storage in transit, subjecting the shipments to interstate rates. *See id.* at 210-211. Petitioners complained that the ICC had deviated from its own precedent on determining the nature of commerce. *See id.* at 211-212. After reviewing the relevant precedent, the Court concluded that the ICC had effectively abandoned its old standard on the nature of commerce in more recent adjudications. *See id.* at 213. Even though the agency had deviated from old precedent, however, the court was persuaded that more recent precedent adequately set a new standard on the nature of commerce. *See id.* Thus, it affirmed the agency's decision because it concluded the agency's decision to follow more recent precedent was not arbitrary or capricious. *See id.*

These cases demonstrate that the circuits are more than capable of allowing agencies the ability to change course while still requiring that they sufficiently articulate both that they are doing so and the reasons for the change. A careful examination of whether the agency decision comports with previous adjudicatory precedent is required to ensure that the agency is not impermissibly "depart[ing], sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." *NLRB v. Silver Bay Local*

Union No. 962, 498 F.2d 26, 29 (9th Cir. 1974) (citing *NLRB v. Int'l Union of Operating Eng'rs, Local 925*, 460 F.2d 589, 604 (5th Cir. 1972). Such an approach is more consistent with this Court's precedent than the D.C. Circuit's *Cassell* deference.

In contrast, the case at issue here demonstrates that the D.C. Circuit is using *Cassell* deference to reward agencies for failing to provide adequate explanations. Perhaps the most egregious deference occurs when the D.C. Circuit acknowledges a "relatively terse" decision from the FERC and then proceeds to credit it with "incorporat[ing] by reference" reasons that the FERC did not actually articulate, App.8. Indeed, the D.C. Circuit went to great lengths to credit FERC with reasoning that was not in the FERC's decision. Pet.25. It even positively noted that the agency "referenced precedent," App.8, even though the precedent was not in dispute and the entire contest was whether that precedent on jurisdiction properly applied to these facts, Pet.23-24. In short, the FERC prevailed by being conclusory in its analysis and leaving the D.C. Circuit to do the real work under *Cassell* deference.

As precedents in other circuits demonstrate, the APA does not encompass this excessive level of deference because the APA still requires adequate explanation of precedent. It is *Cassell* deference that rewards an agency on review for offering terse and unexplained reasoning. Because the D.C. Circuit receives a disproportionate share of agency review cases, Pet.18, both Petitioner and Amici would benefit from this Court reviewing the D.C. Circuit's precedent on *Cassell* deference.

II. THIS COURT'S PRECEDENT IN *KISOR* COUNSELS AGAINST SUCH DEFERENCE.

Federal administrative agencies are required to engage in reasoned decision-making. *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015). As this court has explained, "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be *scrutinized* by courts and the interested public." *Dep't of Com. v. New York*, 139 S.Ct. 2551 at 2575–76 (emphasis added). It is important that the public have "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). *Cassell* deference lessens—to the point of non-existence—the scrutiny that courts engage in, thereby minimizing the required reasoning that agencies must put forth in justifying decisions. This Court recently described the limitations on one form of agency deference: agency interpretation of its own regulations. *See Kisor v. Wilkie*, 139 S.Ct. 2400. The limitations laid out in *Kisor* illustrate why this Court should overrule *Cassell* deference.

When considering whether to apply *Auer* deference, the *Kisor* court emphasized that it was only to apply if the disputed regulation was "genuinely ambiguous" after the court "ha[d] resorted to all the standard tools of interpretation. *Id.* at 2414. The agency interpretation must be "reasonable" and "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415–2416. The agency interpretation must also "implicate its substantive expertise" and reflect a "fair and considered judgment. *Id.* at 2417. Courts must not defer to an interpretation that

creates "unfair surprise" to regulated parties, which explains why deference is only rarely given to an agency interpretation that conflicts with a previous one. *Id.* at 2417–2418.

Deferring to an agency's interpretation of its own precedent contradicts each of those limitations. This Court's guidance to lower courts to not grant *Auer* deference unless they have first exhausted all of the ordinary tools of statutory interpretation suggests that courts must conduct an independent analysis of the agency's precedent. *Kisor* contemplates that reviewing courts should first approach an interpretive question by seeking to answer it for themselves. Only once the court has failed to find an unambiguous answer can the court apply deference to the agency's own interpretation—provided that the construction meets the other limitations described in *Kisor*. *Cassell* deference, which does not require any threshold finding of ambiguity, is more reflexive than *Auer* deference and colors the reviewing court's entire precedential analysis.

Although it may seem a bit counterintuitive, the requirement that the agency's interpretation must implicate its substantive expertise, *id.* at 2417, also counsels to some extent against extending deference to an agency's interpretation of its own precedent. The *Kisor* court recognized that there are some interpretive issues that are more naturally under a court's purview. *Id.* In fact, it is hard to imagine what task courts are better suited for than that of interpreting precedent. Even assuming that agencies have a greater understanding of technical rules than judges or even that they are better situated to weigh the costs and benefits of a policy determination, there is no reason

to think that they are more capable of distinguishing precedent than courts.

Kisor's concern with "unfair surprise" and the acknowledgement that *Auer* deference is rarely granted to an agency construction that conflicts with a previous one, *id.* at 2418, shows the added importance of scrutinizing an agency's interpretation of previous precedent. Parties structure their conduct to conform with agency precedent, and it is important that it is faithfully upheld and that any departures are adequately justified. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) ("Even in the absence of any formalized doctrine of *stare decisis* or *res judicata*, an adjudicative determination will normally enter in some degree into the litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal.").

The requirement that the agency interpretation be "reasonable" and "reflect fair and considered judgment" to receive deference also cuts against deferring to an agency's interpretation of its own precedent. *Kisor*, 139 S.Ct. at 2415–2417. *Kisor* contemplates that a reviewing court will engage in a serious examination of the agency's reasoning when applying and distinguishing its own precedent. For an agency to get deference according to *Kisor*, it must carefully consider the different approaches before clearly articulating why it reached the outcome that it did. Based on the clear import of *Kisor*, an agency must do more than tersely assert that the current matter is distinguishable from a previous precedent to receive deference.

Taken together, *Kisor's* limitations present a stark contrast with how the D.C. Circuit implements *Cassell* deference. Under the principles set forth in *Kisor*, courts should not accept an agency's framing of its precedent and content themselves to merely glance for any reasons for distinguishing precedent. Rather, courts should adopt an approach like the First or Third Circuits and interpret the precedent for themselves. Because the D.C. Circuit's precedent is inconsistent with its sister circuits and with *Kisor*, and because the circuit has an outsized importance in developing administrative law, its view on *Cassell* deference deserves this Court's attention.

III. WHETHER COURT SHOULD DEFER TO AN AGENCY'S INTERPRETATION OF ITS OWN PRECEDENT IS IMPORTANT TO THE STATES.

Cassell deference poses several problems specifically for the States. First, it expands the federal government's ability to preempt state laws. Second, it undermines the States' political protections built into the Constitution and additionally guarded by the APA. Finally, it creates the possibility that an agency might retroactively change conditions regarding the States' receipt of federal funds from Spending Clause legislation.

A. *Cassell* Deference Expands the Federal Government's Ability to Preempt State Law.

The Supremacy Clause provides that "the Laws of the United States" "shall be the supreme Law of the Land." Art. VI, cl. 2. Any contradicting state law is therefore invalid. Even when Congress does not expressly preempt state law, preemption still exists where "'compliance with both state and federal law is

impossible,' or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, (1989)). And preemption results not only from acts of Congress, but also through "a federal agency acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). This Court has deferred to an agency's assertion that its broad regulatory authority extends to preempting conflicting state rules. *City of New York v. FCC*, 486 U.S. 57, 64 (1988). And the Ninth Circuit has even ruled that an agency's memorandum that it will not apply the law to deport a category of immigrants preempts a state law that denies drivers' licenses to members of that category for not being lawfully present in the United States. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017).

This preemptive authority given to federal agencies is particularly concerning with agencies that operate extensively through adjudicative action, such as the FERC. This Court has held that administrative adjudicatory orders qualify for preemptive effect. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49–50 (2003) (holding that state utility order regarding the allocation of wholesale power was preempted by an order from FERC). In *Entergy*, the FERC's determination that a company's violation of a tariff was not "unjust, unreasonable, or unduly discriminatory" precluded state regulators from attempting to recoup excess costs for state consumers. *Id.* at 44.

While allowing an agency's interpretation of ambiguous precedent to preempt state law has some

basis in precedent, *Cassell* deference is much more aggressive because it allows agencies to preempt state law through a sudden shift in their own precedent. Deference would apply equally to results affecting private litigants alone and to results bringing federal regulation in conflict with state law. *Kisor* may have blessed *Auer's* expansion of federal preemption power, but it narrowly confined that approval within strong limitations placed on implementation. *See Kisor*, 139 S.Ct. at 2414–2418. Because *Cassell* deference operates in the D.C. Circuit without those limitations, it expands the federal government's power to preempt state law to an impermissible degree.

B. *Cassell* Deference Undermines the States' Constitutional and APA Protections.

The Constitution and the APA create protections for state interests that *Cassell* deference undercuts. Aside from the limitations on federal authority inherent in the delegated nature of the Article I powers, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). In fact, the design of the federal government was structured to protect the States from federal overreach, as the States possessed a role in the selection of both the Executive and members of the legislative branches. *Id.* at 550–551. James Madison noted that "the residuary sovereignty of the States [is] implied and secured by that principle of representation in one branch of the [federal] legislature." THE FEDERALIST No. 43, at 275 (Clinton Rossiter ed., 1961). Structural limitations are of crucial importance to the States because State sovereign interests are protected primarily

through the workings of the federal government itself, rather than through concrete limitations on federal authority. *Garcia*, 469 U.S. at 551. Because members of the House of Representatives and the Senate represent either one state or portions of one state, state interests are represented in the laws Congress passes. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of National Government*, 54 COLUM. L. REV. 543 (1954).

However, the States do not enjoy such direct representation within agencies. And even when States are represented in the agency decision-making process, agencies often take little heed of interests outside their expertise. Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 717 (2008). Therefore, by further increasing the deference granted to agencies, *Cassell* deference places important policy decisions outside of the structural limitations that protect State interests.

The APA somewhat mitigates the States' concern with administrative policymaking by requiring agencies to promulgate substantive regulations through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. By engaging in notice-and-comment rulemaking, States are able to participate in the process to ensure that agencies at a minimum hear and understand the state interests involved in a decision.

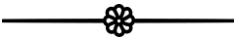
Nevertheless, deference for adjudications undermines the protections for States in rulemaking procedures. Informal rulemaking is subject to more political oversight than adjudication. *See* Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 228-29 (2009). But this avenue

for state participation is weakened by the adoption of *Cassell* deference because deference incentivizes agencies to adjust policy through distinguishing precedent rather than through formal rulemaking. Indeed, that incentive is even greater than the incentive *Auer* deference provides because *Cassell* deference's application is not limited in the same manner as *Auer* deference.

C. *Cassell* Deference Raises the Possibility That an Agency Might Retroactively Change Conditions Regarding the States' Receipt of Federal Funds from Spending Clause Legislation.

Congress possesses broad power to set terms for federal disbursements to the States. *See South Dakota v. Dole*, 483 U.S. 203, 206–207 (1987). But "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). States cannot accept conditions that they are "unaware" of or which they are "unable to ascertain." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Importantly, the funding recipient must have been aware of the requirement "at the time" it was deciding whether to accept. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562, 1570–1571 (2022).

Cassell deference poses a unique threat to the retroactive protection on Spending Clause conditions. An agency could determine that a specific action does not violate a condition—and then turn around and decide later that a similarly situated state did violate the condition. Under the *Cassell* line of cases, the agency can assert that it has distinguished the precedent and the reviewing court will grant it considerable deference. This concern is even greater than that posed by *Auer* deference. At least with *Auer*, States are theoretically protected by the fact that deference only applies when the regulation is genuinely ambiguous. *Kisor*, 139 S.Ct. at 2414. Therefore, the conditions might not be found to have been "unambiguous" as required by *Pennhurst*. No such protection can be sought through *Cassell* deference. Allowing such unchecked deference to continue unduly threatens state interests.



CONCLUSION

For the reasons stated, this Court should grant Petitioners the writ of certiorari.

Respectfully submitted,

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