No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici curiae are the States of Utah, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia. *Amici* have a pronounced interest in cases that implicate federalism and the separation of powers.

This case fits that bill. The interpretive rule from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reiterated in *Auer v. Robbins*, 519 U.S. 452 (1997), uniquely harms the States. That rule requires courts to give controlling weight to a federal agency's *ad hoc* views of its ambiguous regulations—even when those views will preempt contrary State law, or retroactively change the conditions of Spending Clause legislation. *Auer* deference thus alters the balance of federal-state power and raises serious constitutional questions.

Those problems make overruling *Auer* the only tolerable outcome here. To be sure, "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). But neither is ensuring that federal law accords States the respect due them as sovereigns. "Enough is enough." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

Alexander Hamilton once "confess[ed]" that he was "at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States" of their "residuary authorities" to govern "for local purposes."

The Federalist No. 17, at 105 (J. Cooke ed. 1961). To be fair to Hamilton, he ran his agency 150 years before *Seminole Rock* absolved agency employees who yield to that lurking urge.

Seminole Rock and *Auer*, which *amici* refer to synonymously, give federal agencies a judicially created power to bind the States to *ad hoc* interpretations of their own ambiguous regulations. "The canonical formulation of *Auer* deference is that [this Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414).

But the more recent canonical statements about *Auer* have been criticisms of it. Rightly so. Time and experience have laid bare *Auer*'s faults. *Auer* allows agencies to bind the public to informal rules adopted without following the Administrative Procedure Act's (APA) strictures. That is bad for the public; they become governed by agency caprice, with no prior notice of an agency's views (or a chance to help shape them). In contrast, it's hard to think of a better deal for regulators, who can accomplish their goals free from the hassle of complying with the APA.

Fixing those problems is reason enough to overrule *Auer*. But there is more. *Auer* creates unique problems for States that also justify ditching this deference doctrine. *Auer* upsets the Constitution's finely wrought balance of federal-state power: By giving controlling weight to informal agency action that conflicts with contrary State law, *Auer* effectively expands the extent of the Federal government's power under the

Supremacy Clause, deprives States of constitutional safeguards from Federal overreach, and undermines the States' APA protections. *Auer* also allows agencies to retroactively change the terms of federal-state agreements in Spending Clause legislation. That threatens the States with the loss of vast sums—even hundreds of millions of dollars—just because of one federal employee's change of mind.

Those problems call for abandoning *Auer* deference unless *stare decisis* considerations support retaining it. They do not. *Auer* rests on *ipse dixit*, not sound reasoning; intervening events more than confirm its flaws; and it has not—and cannot—engender any legitimate reliance interests.

The Court should overrule *Auer* and reverse the judgment below.

ARGUMENT

I. *AUER* DEFERENCE UNIQUELY HARMS THE STATES.

Amici endorse Petitioner's critiques of *Auer* deference. *See* Pet'r Br. 26-45. This brief, in turn, focuses on other theoretical flaws in *Auer* deference that harm States specifically. *Amici* also discuss real-world examples of courts deploying *Auer* deference to reach results that undermine State sovereignty.

A. *Auer* Deference Impinges on State Sovereignty.

The mischief made when an agency invokes *Auer* to authoritatively interpret its own ambiguous regulations yields at least four hardships uniquely for States. First, *Auer* deference expands the Federal

government's power to preempt State law. Second, it undermines the States' political protections built into the Constitution. Third, it undercuts the States' APA protections, which decreases the States' political checks on federal lawmaking and upsets the balance of federal-state power. Fourth, it allows agencies to retroactively change conditions governing the States' receipt of federal funds from Spending Clause legislation—something not even Congress can do.

1. State laws that conflict with valid federal laws are unenforceable. U.S. Const. art. VI, § 2. States thus have an interest in ensuring that federal law arises from constitutionally prescribed procedures. *Auer* deference impairs the States' ability to vindicate that interest.

Federal legislation becomes law after both houses of Congress approve it and the President signs it (or Congress overrides a veto). U.S. Const. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). The bicameralism and presentment requirements reflect the Framers' decision that Federal legislative power should "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 439 (internal quotation marks omitted). That sole procedure is the only legislative mechanism that the ratifying States agreed would produce "the supreme law of the land," U.S. Const. art. VI, § 2, capable of displacing conflicting state law.

Even so, this Court has held that state laws may be preempted not only by duly enacted federal statutes, but also by "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);

see also, e.g., *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Whatever that holding's vitality when *Congress* has expressly (or implicitly) "delegated to the agency the authority to interpret [statutory] ambiguities 'with the force of law,'" *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)), that theory cannot justify a federal *agency's* interpretation of its own ambiguous regulation displacing state law. For even if Congress implicitly authorizes an agency to resolve any ambiguities in a statute it implements, *see, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996), "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations," *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part).

Yet that is where *Auer* inevitably leads. State law thus gets trumped by a form of federal law at least two steps removed from any law "made in pursuance" of the Constitution's text. U.S. Const. art. I, § 7, cl. 2. *See also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (noting that "with relative ease" agencies "can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law").

That troublesome conclusion is even more puzzling given *Auer*'s incongruity with this Court's precedent about the preemptive reach of Executive action. The President cannot arrogate to himself the power to preempt state law. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008) (holding that the President cannot preempt state law absent constitutional or statutory

authorization). It must follow that the President's administrative functionaries also cannot arrogate to themselves the power to preempt state law absent constitutional or statutory authorization. After all, "[e]xecutive agencies derive their authority from Article II of the Constitution, which vests '[t]he executive power' in 'a President of the United States.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (quoting U.S. Const. art. II, § 1, cl. 1). Yet *Auer* requires courts to defer to agency action that inherently lacks statutory authorization—*even when* it preempts state law. The upshot? What *Medellin* prohibits of the principal, *Auer* expressly authorizes by his agents.

In short, *Auer* deference impinges on the bargain the States struck when they ratified the Supremacy Clause.

2. *Auer* deference also undermines the Constitution's political protections for States. "[T]he 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). Indeed, the very "composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550-51.

For example, Article I, section 7's bicameralism requirement ensures that legislation must win the approval of the Senate, "where each State received equal representation and each Senator was to be selected by the legislature of his State." *Id.* at 551 (citing U.S. Const. art. I, § 3). More generally, the Framers believed that legislators' attachment to their

individual States would make them "disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 319 (Madison) (J. Cooke ed., 1961).

Even though Senators are now elected by popular vote rather than by state legislature, U.S. Const. amend. XVII, States still retain their equal representation in the Senate. And because both Senators and Representatives are elected from specific States, they have real incentives to be responsive to their constituents' varying state-specific needs and interests. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547 (1954) ("To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

But the States lack an analogous direct constitutional role in the composition of federal agencies. To be sure, Senators exercise advice-and-consent authority when voting on the President's nominees to agency positions. U.S. Const. art. II, § 2, cl. 2. But no officials dependent on a State's political support thereafter participate in an agency's workaday activities in any way analogous to a Representative's or Senator's involvement in the House's or Senate's daily business. Agencies thus lack the same institutional incentives to respect State interests when promulgating regulations that motivate members of Congress when they enact statutes. *See Geier*, 529 U.S. at 908 (Stevens, J., dissenting) ("Unlike Congress,

administrative agencies are clearly not designed to represent the interests of States . . . .").

Auer deference further depresses the limited agency incentives to promulgate clear rules when resolving statutory ambiguities. Under *Auer*, an agency's later, *ad hoc* views of vague regulations have the same preemptive force as formal rules. The resulting incentives favoring *informal* agency action—and the concomitant attenuation between those informal acts and statutory authority—reduce the States' chances of meaningfully influencing federal regulatory policies that directly affect their interests. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996) (explaining that *Auer* "undermine[s] the effectiveness of external political checks on administrative agencies").

3. *Auer* also hampers the States' ability to invoke statutory procedures that safeguard their sovereignty. The APA requires agencies to promulgate substantive regulations through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. When agencies comply with that requirement, States can—and do—actively participate in the notice-and-comment process to shape federal regulations that accommodate their sovereign interests and concerns. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953, 984-95 (2014) (discussing the role of the States and state interest groups in administrative proceedings); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 777-78 (2004) (reviewing opportunities for the States to participate in the administrative process).

But *Auer* distorts agencies' regulatory incentives. It encourages them to issue ambiguous regulations that they can later interpret in less formal proceedings, free from the APA's formal constraints. Agencies thus can accomplish their regulatory goals *and* avoid the accountability contemplated by the APA's notice-and-comment requirements. *See, e.g.*, Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Auer* limits "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action"). Indeed, in light of *Auer*, "[i]t is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

In short, when courts give "controlling weight" to agency interpretations of ambiguous regulations, they sanction an agency's intentional circumvention of the APA, thus "allow[ing] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment). This deprives coordinate sovereigns of their statutory rights to mold state-sovereignty-protecting federal regulations through the notice-and-comment process.

4. *Auer* deference generates obvious tension with the Court's Spending Clause precedents.

Under the Spending Clause, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. &*

Hosp. v. Halderman, 451 U.S. 1, 17 (1981). That is because spending statutes are "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* And Congress's power to make those contracts "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"; that is, "[t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Thus Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

That need for clarity peaks when Congress conditions receiving federal funds on the States' agreement to relinquish their historic immunity from suit. In the Eleventh Amendment context, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This clear-statement rule recognizes "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

Auer's deference rule creates tension with those Spending Clause precedents in at least two ways. First, because those cases require *Congress* to speak clearly as to whether the States are bound to an obligation, no basis exists for courts to give binding deference to an *agency* when Spending Clause legislation "is susceptible of multiple plausible interpretations." *Sossamon v. Texas*, 563 U.S. 277, 287 (2011). Yet *Auer* requires that course. Second, courts must defer under

Auer no matter when the agency announces its *ad hoc* views. But the *Pennhurst* canon requires that Congress provide notice of the conditions "at t[he] time" the funds are received. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985). *Auer* deference may thus be the sole exception to the general rule that the federal government may not "modify past agreements with recipients by unilaterally issuing" new "guidelines" after the agreement has been consummated. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997).

B. Decisions Applying *Auer* Show Its Real-World Effects on States.

The harms described above are not hypothetical. Cases from around the Country reveal how the Federal government has deployed *Auer* deference to strike blows against State sovereignty.

1. Courts invoke *Auer* to preempt State law. For example, the Food and Drug Administration's views—expressed in a brief to this Court—about labeling requirements for generic drugs were a reason this Court held that Minnesota and Louisiana duty-to-warn laws were preempted. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 612-25 (2011). And this Court "place[d] some weight upon" the Department of Transportation's view, expressed in an *amicus* brief, about the preemptive scope of a Federal Motor Vehicle Safety Standard to hold that the standard preempted District of Columbia tort law. *Geier*, 529 U.S. at 883.

As expected, lower courts follow suit. The Ninth Circuit "accord[ed] . . . interpretational deference" to the Department of Education's views (expressed in an

appellate brief) about student-loan-servicing regulations. *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010). It ultimately held that those regulations preempted State-law claims for fraud and breach of contract, among other things, challenging some of Sallie Mae's actions when servicing student loans. *See id.* at 948-50.

Those cases involved only private parties, but State law fares no better when the State is a litigant. The Fifth Circuit rejected the Texas Banking Commissioner's arguments, and deferred instead to an Office of the Comptroller of the Currency opinion letter, to hold that OCC regulations preempted a Texas consumer-protection banking regulation. *Wells Fargo Bank of Tex. NA v. James*, 321 F.3d 488, 494-95 (5th Cir. 2003). So too in Connecticut; when that State's Banking Commissioner's arguments about the enforceability of some of Connecticut's mortgage and banking laws conflicted with an Office of Thrift Savings opinion letter, the OTS letter prevailed and Connecticut law was preempted. *State Farm Bank, F.S.B. v. Burke*, 445 F. Supp. 2d 207, 221 (D. Conn. 2006).

2. The Federal Government also routinely invokes *Auer* deference when litigating against State governments to protect the flanks its ambiguous regulations left unguarded.

For example, Massachusetts wanted to participate as a party in license-renewal proceedings for two nuclear power plants in or near its borders. *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008). It sought to ensure that the Nuclear Regulatory Commission accounted for its sovereign concerns about

the "treatment of spent fuel rods." *Id.* at 118. The First Circuit rejected the Commonwealth's request based on the NRC's "[d]ispositive" interpretation of its ambiguous rule governing who could participate in licensing proceedings, *id.* at 129, thereby forcing Massachusetts to try to present its safety concerns to the NRC through other administrative routes—ones that Massachusetts rightly feared "may not move quickly enough to address" its concerns before the NRC acted on those license renewals, *id.* at 127.

Or consider when Colorado tried to implement a Federal Communications Commission rule arising from the Telecommunications Act of 1996, a statute designed "to facilitate competition in the local telephone service market." *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1095 (10th Cir. 2011). Among the many FCC rules implementing that statute, one governs obligations between competing telephone companies based on the number of "business lines" an upstart company serves. *See id.* (citing 47 C.F.R. § 51.5). The Colorado Public Service Commission's view of what counted as a business line under the rule conflicted with the FCC's view, expressed in an *amicus* brief. *See id.* at 1101-02. The Tenth Circuit ultimately agreed with the FCC, but noted its "reluctan[ce] to afford such solicitude to an agency's amicus brief" and said it "would not necessarily reach the same result if not required to defer to the FCC." *Id.* at 1101.

Consider also how *Auer* deference nullified Arizona's efforts to discharge its duties under the Clean Air Act. That statute "giv[es] the states broad authority" to determine which sources of air pollution might contribute to visibility impairment—and how

best to reduce emissions from those sources. *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002); *see also id.* at 5 (citing 42 U.S.C. § 7491(b)(2)(A)). Arizona exercised that authority and concluded that a certain source's emissions could be managed using the best available reduction technology. But EPA disagreed, and the Ninth Circuit deferred to EPA because whether that source qualified for management by best available reduction technology depended on an interpretation of EPA rules. *Phoenix Cement Co. v. U.S. EPA*, 647 Fed. App'x 702, 704-05 (9th Cir. 2016); *see also id.* at 706-07 (Bybee, J., dissenting).

3. Finally, *Auer* deference inflicts harm on the States' fiscs. For instance, the Ohio Department of Medicaid asked the Centers for Medicare and Medicaid Services to amend its State Medicaid plan and allow reimbursements for services to juveniles who are pretrial detainees. *Ohio Dep't of Medicaid v. Price*, 864 F.3d 469, 472 (6th Cir. 2017). CMS denied Ohio's requested amendment, and the Sixth Circuit denied Ohio's petition for review. It held that the relevant CMS regulation "may inspire some doubt over whether juvenile pretrial detainees are barred from Medicaid coverage," so it deferred to CMS's interpretation excluding them. *Id.* at 477-78. So Ohio itself must continue to bear the costs for those services.

Similarly, the Court of Federal Claims invoked *Auer* to uphold the Federal Highway Administration's decision, based on its interpretation of its "Policy and Procedure Memoranda," to deny California's request for a supplemental contractual reimbursement of $13.8 million—funds California spent to acquire land near Sacramento for the construction of Interstate 5. *People*

of the State of Cal. ex rel. Dep't of Transp. v. United States, 27 Fed. Cl. 130, 135-41 (1992).

What is more, the Federal government now routinely tries to extend its *Auer* advantage well beyond state-by-state litigation and threaten multiple States' budgets at once. In one recent example, federal agencies sent a letter to State education officials in which they changed their interpretation of a statutory term in Title IX. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). The Fourth Circuit "accorded controlling weight" to the agencies' new position, *id.* at 723, even though this threatened the agencies' contracting State partners with the loss of hundreds of millions of dollars in educational funding. In another, the Ninth Circuit declined the Department of Justice's request "to give controlling construction" to its interpretation of an executive order that would have deprived counties in California of potentially billions of dollars in federal funds because they disagree with the Administration's immigration policies. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1241 (9th Cir. 2018).

II. THE COURT SHOULD OVERRULE *AUER*.

It is time to jettison *Auer*. Experience has confirmed that *Auer*'s deference rule cannot bear its own weight. And *stare decisis* considerations do not support retaining it.

A. *Auer* Was Wrongly Decided.

Auer's deference rule consistently yields results that conflict with first principles of administrative and constitutional law.

For example, where administrative law presumes that regulations "must give fair notice of conduct that is forbidden or required," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), *Auer* deference blesses *post hoc* agency action that gives the public *no* warning—let alone "fair warning"—"of the conduct a regulation prohibits or requires," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks and brackets omitted). And where the APA presumes that the public will be bound by formal rules made through notice-and-comment procedures, *see* 5 U.S.C. § 553, *Auer* deference allows an agency's informal, *ad hoc* views "not just to advise the public, but also to bind them." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). So much for the "extensive procedural safeguards" that the States secured as part of administrative law's main "working compromise." *Fox Television Stations*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

Auer also produces results that conflict with the Constitution. The Founders viewed the separation of powers as the "political truth" of "greate[st] intrinsic value." The Federalist No. 47, at 324 (Madison) (J. Cooke ed. 1961). For were the judicial power "joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." *Id.* at 326 (internal quotation marks omitted). Yet *Auer* "permit[s] the person who promulgates a law to interpret it as well." *Talk America, Inc. v. Mich. Bell Tel.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

Equally problematic, *Auer* deference contradicts longstanding constitutional presumptions under the Supremacy Clause and the Spending Clause. First, the Federal government's power to preempt State law "is an extraordinary power in a federal system" that this Court "assume[s] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *Auer*, however, upends that presumption when an agency is the lawmaker. An agency's *ad hoc* views of ambiguous regulations are the very embodiment of lawmaking "exercise[d] lightly"—yet *Auer* commands courts to credit them over contrary State law. Second, Congress must clearly state the terms it requires of States as a condition of receiving federal funds *before* the State agrees to them. *Pennhurst*, 451 U.S. at 17, 25. But *Auer* requires courts to defer to an *agency*'s after-the-fact views of those conditions—views the assenting States never could have known. Neither result is constitutionally sound; there is no justifiable basis for allowing courts to grant more slack to agencies who mount *ad hoc* attacks on State law, or revise the States' contracting conditions, than they grant to Congress.

Auer also incentivizes the creation of federal lawmaking via informal agency action. If more law is made that way—rather than in Congress or by formal regulatory proceedings—the States continue to lose the benefits of the Constitution's structural protections "designed in large part to protect the States from overreaching by Congress," *Garcia*, 469 U.S. at 550-51, and of their APA right to advocate their interests in notice-and-comment proceedings.

Those myriad problems should be fatal to *Auer*'s deference rule. A hypothetical example about the

canons of *ejusdem generis* and *noscitur a sociis* makes the point. If interpreting a text's ambiguous, general term in light of that text's more specific related or associated terms, *see Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015), consistently led to outcomes that flouted bedrock principles of constitutional and administrative law, not another year would pass before this Court would purge those canons from the United States Reports. The same fate is appropriate for *Auer* deference—a rule used to interpret an agency's informal views of ambiguous regulatory text.

B. *Stare Decisis* Considerations Do Not Save *Auer*.

As Petitioner explains, this Court may not even need to consider traditional *stare decisis* principles before jettisoning *Auer* deference because *Auer* is merely an "interpretive principle[]." Pet'r Br. 50 (citing *Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J., concurring in the judgment)).

But even if *stare decisis* applies, not one of its factors supports retaining *Auer* deference.

Far from being "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009), *Auer*'s deference rule rests solely on "*ipse dixit*," with "no justification whatsoever," *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). *Auer* did not fill that gap; it rotely applied *Seminole Rock*. *See* 519 U.S. at 461. Nor have this Court's cases since *Seminole Rock* "put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

Compounding that problem, the intervening years have created "a considerable body of new experience to consider regarding the consequences of requiring adherence to" an agency's *ad hoc* views. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). None of it bodes well. *See supra* at 3-18. Thus "developments since" *Auer* "was handed down" further confirm why this Court should abandon it. *Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

Nor can the "reliance interests at stake," *Montejo*, 556 U.S. at 792, save *Auer*'s deference rule. "[I]mportantly, *stare decisis* accommodates only legitimate reliance interests." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (internal quotation marks and brackets omitted). The federal government cannot claim any legitimate reliance interest in "enact[ing] vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring).

In short, *Auer* inhibits "the States from exercising their lawful sovereign powers in our federal system." *Wayfair*, 138 S. Ct. at 2096. "[T]he Court should be vigilant in correcting the error." *Id.*

CONCLUSION

The Court should overrule *Seminole Rock* and *Auer*.

Respectfully submitted.

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