No. 15-861

IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

BRYANA BIBLE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814

ASHLEY E. JOHNSON
Counsel of Record
JAMES C. HO
BENJAMIN D. WILSON
BRADLEY G. HUBBARD
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201
(214) 698-3100
ajohnson@gibsondunn.com

Counsel for Amici Curiae

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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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

Amici state and local government associations respectfully submit this *amici curiae* brief in support of Petitioner.[1] *Amici* offer additional reasons why this Court should grant review to reconsider and abandon *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

Amici have a strong interest in apprising the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local governments suffer as a result of affording binding deference to federal agencies' interpretations of their own ambiguous regulation. As Petitioner explained, Pet. 22–23, such deference strongly encourages agencies to promulgate vague, ambiguous regulations. Agencies can then wait until those regulations are at issue in a case to authoritatively interpret them. *Amici* seek to make the Court aware that this proliferation of ambiguous regulations detrimentally

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief compliant with Supreme Court Rule 37.2 and each has consented to the filing of this brief.

[1] A full list of the signatories to this brief and more detailed information about individual *amici* is provided in the Appendix.

impacts state and local governments by not only short-circuiting the cooperative federalism envisioned by many federal statutes but also disrupting state and local legal regimes.

Abandoning the binding deference called for by *Auer* will have the salutary effect of incentivizing federal agencies to promulgate clear, straightforward regulations through the notice-and-comment process. This, in turn, will enhance the efficacy of cooperative federalism, minimize the disruption to state and local legal regimes, and avoid—or at least limit—the risk to federalism posed by the ever-expanding authority of federal agencies.

SUMMARY OF ARGUMENT

This Court should grant review to reconsider—and abandon—the practice, sanctioned by *Auer* and *Seminole Rock*, of according binding deference to agencies' interpretations of their own regulations. This will restore to the Judicial Branch the power to define the legal meaning of a regulation and, as a result, ensure that a single agency is not making, enforcing, and interpreting the law. It will also preclude agencies from advancing *post hoc* interpretations that shift with the political tides and that are inconsistent with the originally intended, reasonable reading of their regulations.

As Members of this Court have repeatedly recognized, *Auer* is "contrary to fundamental principles of separation of powers," *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring), because it "represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a

'check' on the political branches." *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). A brief review of *Auer*'s practical operation illustrates Montesquieu's prescience: "There would be an end of everything were the same man, or the same body . . . to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, p. 152 (O. Piest ed., T. Nugent trans. 1949); *see also* The Federalist No. 47, p. 301 (J. Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

"[D]eferring to an agency's interpretation of its own ambiguous regulations . . . creates a risk that agencies will promulgate vague and open-ended regulations." *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). That is true because, under *Auer*, an agency both has no need to be clear upfront for its interpretation to ultimately prevail when the regulation is at issue in court, and has the flexibility to decide what that regulation means once its meaning is at issue in a concrete case. Unsurprisingly, agencies respond to these incentives precisely as expected.

By promulgating vague regulations, agencies render the notice-and-comment process ineffectual by sharply restricting interested parties' ability to provide meaningful input and foster deliberation. Equally importantly, such vagueness imposes unnecessary burdens on those regulated by, and who rely on, those regulations. The regulatory ambiguity

engendered by *Auer* has an especially detrimental impact on state and local governments: it curtails their ability to participate fully in cooperative federalism schemes; complicates and disrupts their legal regimes that incorporate federal guidance; and intensifies the risk to federalism posed by the ever-expanding scope of federal agency authority.

The solution to these problems is simple: Enforce the separation of powers mandated by the structure of our Constitution. Return to the judiciary the power—and the duty—to interpret the law by eliminating the binding deference currently afforded to agencies' regulatory interpretations. Force agencies to bear the burden of their ambiguity, which promotes clear, straightforward regulations. This can be accomplished by abandoning *Auer* and *Seminole Rock*.

At the very least, the Court should limit the scope of such deference to that dictated by *Seminole Rock—i.e.*, deference should be accorded only to official, well-publicized interpretations issued contemporaneously with the regulation. This approach would be consonant with this Court's recent narrowing of *Chevron*'s[2] domain. *See Christensen* v. *Harris Cty.*, 529 U.S. 576, 587–88 (2000); *United States* v. *Mead Corp.*, 533 U.S. 218, 227–34 (2001).

As set forth by Petitioner, this case presents a clear opportunity for the Court to remedy the difficulties created by *Auer* and *Seminole Rock*. The deciding vote on the Seventh Circuit panel relied explicitly on *Auer* in ruling for Respondent.

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[2] *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Review of this doctrine is especially warranted given the breadth of its application: It applies to interpretations by agencies across the Executive Branch—from EPA to IRS; from FCC to FAA. These agencies promulgate nearly 4,000 new regulations, covering 25,000 pages of the *Federal Register*, *annually*. Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register 18–19 (Cong. Research Serv., No. R43056, July 14, 2015), https://fas.org/sgp/crs/misc/R43056.pdf.

Accordingly, *amici* urge the Court to grant the petition for writ of certiorari, overrule *Auer*, and reverse the judgment of the court of appeals.

ARGUMENT

I. *AUER* CREATES INCENTIVES FOR AGENCIES TO PROMULGATE VAGUE REGULATIONS, UNDERMINING THE EFFICACY OF NOTICE-AND-COMMENT RULEMAKING.

As Members of this Court have recognized, *Auer* presents serious constitutional concerns by affording agencies the power to interpret their own regulations. *See Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."); *Mortg. Bankers*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment) ("Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns."). *Amici* agree fully with Petitioner's contention that these concerns present independent and sufficient reason to overrule *Auer*. Pet. 11–24. *Amici* submit this

brief to elucidate *Auer*'s practical consequences, which flow from permitting an agency to wield simultaneously the powers of all three branches of government.

A. *Auer* Creates Incentives to Promulgate Vague Regulations and Reduces the Burdens of Doing So.

By empowering agencies to authoritatively interpret their own vague regulations, *Auer* not only relieves agencies of the risks normally attendant to promulgating vague regulations but also creates an affirmative incentive to do so. *See Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) ("[W]hen an agency interprets its *own* rules . . . the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."); *see also Mead*, 533 U.S. at 246 (Scalia, J., dissenting) ("Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.").

1. *Auer* enables agencies to avoid the costs of ambiguity. Absent *Auer*, a court would be the ultimate arbiter of the meaning of an ambiguous regulation. In that event, an agency that promulgates a vague regulation bears the risk that a court will construe the regulation in a manner inconsistent with the agency's preferred interpretation.

Under *Auer* the opposite holds true. The ability to authoritatively tell a court what the regulation

means effectively eliminates the risk of a judicial interpretation inconsistent with the agency's preferred interpretation. *See Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says."). By freeing agencies from the burden of their own ambiguity, *Auer* eliminates both the strongest deterrent against promulgating vague regulations and one of the strongest incentives to draft with clarity. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 668–69 (1996) ("[I]f an agency bears the risk of its own imprecision, obfuscation, or change of heart, it will have greater incentive to draft clear, straightforward rules when it chooses to engage in rulemaking.").

2. *Auer* also creates an affirmative incentive for agencies to promulgate vague regulations. If a court believes the agency's regulation is unambiguous, it will construe the regulation itself, affording the agency no deference. *See Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). Because a court determines whether a regulation is vague, *Auer* encourages agencies to promulgate regulations that are almost wholly devoid of content—that are so vague and unclear that no court could conclude they are unambiguous. In that way, an agency can ensure it will have "the power, in future adjudications, to do what it pleases." *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

To be sure, an agency could attempt to be so clear in a regulation (assuming it was prepared to commit to a particular interpretation) that no court could find it ambiguous. But courts do not always agree on whether a regulation is unambiguous—or, if it is, on what it says. Here, the splintered decision of the Seventh Circuit illustrates the point: Judge Manion concluded that the "regulations unambiguously allow collection costs," Pet. App. 88, whereas Judge Hamilton concluded the regulations unambiguously required the opposite conclusion. *Id.* at 19–30. And Judge Flaum, the deciding vote, concluded the regulations were ambiguous. *Id*. at 62.

If there is a lesson for an agency in the Seventh Circuit's decision, it is that a regulation is more likely to be construed as the agency desires if that regulation is *less* clear, so that no court could find it unambiguous.

B. The Vagueness Engendered by *Auer*—Combined with Ex Post Binding Deference—Undermines the Notice-and-Comment Process.

By encouraging agencies to draft ambiguous regulations that avoid deciding contested issues, *Auer* "allows the agency to control the extent of its notice-and-comment-free domain," *Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

1. *Auer* enables an agency to promulgate a regulation without engaging substantively in the notice-and-comment process. By promulgating a regulation in terms that have "so little color of their own that they can be made to take almost any hue," Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863,

884 (1930), an agency can effectively eschew the notice-and-comment process altogether. In essence, the agency can "merely replace[] statutory ambiguity with regulatory ambiguity," *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting), and then later authoritatively resolve that ambiguity—without having to return to the notice-and-comment process. *Mortg. Bankers*, 135 S. Ct. at 1206–07.

Auer thus effectively deprives the notice-and-comment process of the deliberation and collaboration between the regulator and the interested parties that it was designed to foster. "[W]hen an agency adopts an empty regulation . . . the commenting public will have little idea—indeed, no idea—of what it will be getting until the agency gives its rule content in application." Manning, 96 Colum. L. Rev. at 662. Because the meaning of a regulation is disclosed only when the agency puts forth its *Auer*-eligible interpretation, commenters are deprived of any real opportunity to offer meaningful input during notice and comment.

This case presents a particularly vivid example of the problem. When drafting its proposed rule, the Department failed to make clear two important features of its regulations, as it now construes them: First, that rehabilitation agreements are a subset of "repayment agreement[s] on terms satisfactory to the [guarantor]." *Compare* 34 C.F.R. § 682.405, *with id.* § 682.410(b)(5)(ii)(D). Second, that when a debtor promptly enters into such an agreement, "shall charge . . . reasonable costs" means "may not charge costs." That is, rather than making explicit that a guarantor cannot charge collection costs

when a defaulted borrower complies with a *rehabilitation* agreement, the Department promulgated regulations granting discretion not to charge collection costs under a *repayment* agreement "satisfactory to the [guarantor]." For the first time on appeal during this litigation, the Department clarified what it meant—*rehabilitation* agreements are a subset of *repayment* agreements, necessarily "satisfactory to the [guarantor]," and "reasonable costs" mean "no costs." *See* Pet. App. 62, 80–81.

By failing to put forth its interpretation until its Seventh Circuit *amicus* brief, the Department rendered the notice-and-comment process nugatory. Regulated parties—like Petitioner—had no notice of this policy and certainly no opportunity to comment. *See* Pet. C.A. Resp. to Br. for Gov't as *Amicus Curiae* at 1–2 (describing the interpretation as "never before announced, for which there is no prior enforcement, no industry fact-finding, no statement of reasons, no prior notice or opportunity to comment, [and] no contemporaneous articulation of impact, effect, or policy").

2. *Auer* also enables an agency to promulgate what is—in essence—a new rule without resorting to the notice-and-comment process. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing "interpretations" to create the intended new law without observance of notice and comment procedures.'" (quoting Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 11–12 (1996)).

Under *Chevron*, an agency's statutory interpretation receives binding deference only if it carries the force of law—for example, if it is promulgated through notice and comment. *Christensen*, 529 U.S. at 587–88. *Auer*, however, creates a loophole—enabling an agency to receive binding deference to its *informal* interpretation of that regulation, which can then be changed if the agency changes its mind. *Auer* thus enables an agency to expand greatly the scope of its notice-and-comment free domain by "writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later," and then "using interpretive rules unchecked by notice and comment," to fill those gaps. *Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

At base, *Auer* enables agencies to promulgate vague regulations with impunity and then construe authoritatively those regulations. This enfeebles the notice-and-comment process while simultaneously providing agencies nearly unfettered discretion to expand the scope of their power.

II. *AUER* CREATES UNIQUE PROBLEMS FOR STATE AND LOCAL GOVERNMENTS.

Auer exposes state and local governments, like other directly regulated parties, to significant liability for conduct that had been either expressly or implicitly approved by federal regulators, because regulators can reverse course abruptly with the filing of an *amicus* brief. Pet. App. 62–63 ("[T]he Department agreed with USA Funds' interpretation . . . until the Department filed its *amicus* brief."). But *Auer* also creates unique challenges for state and local

governments. State and local governments incorporate federal guidance into their own laws. Where federal regulations are unclear, states and localities cannot clearly ascertain what their own law is to the extent that it depends on the meaning of ambiguous federal regulations. And, due to federal preemption, states and localities face questions regarding those areas where federal regulations may, without notice, preempt state and local law.

A. *Auer* Short-Circuits Cooperative Federalism.

By undermining the notice-and-comment process, *Auer* hinders state and local governments' ability to provide agencies with meaningful input—thereby short-circuiting the laudatory goals of cooperative federalism. States and localities, of course, often have specialized, localized knowledge that federal agencies lack. This is true both because states and localities are closer to their people and because federal agencies focus on issues of national concern. *See*, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) ("[Federal actors] have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible . . . [and] hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.").

Indeed, because of the unique role that states and localities play in our federal system—and the important information they possess—federal agencies are required to refrain from limiting state policy options and to consult with state and local officials

before issuing a preemptive final rule. *See* Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

Several recent examples demonstrate how regulations promulgated in the absence of state and local knowledge may lead to adverse, unintended consequences.

1. When agencies fail to seek and consider state and local input, poor outcomes obtain for those who are directly regulated.

Consider *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999), where FAA put forth an interpretation that required Alaskan private pilots who operated hunting or fishing expeditions to comply with FAA's commercial pilot standards. FAA reasoned that the pilots' flying was "transportation for hire" rather than incidental to the expeditions.

This broad interpretation created serious, adverse consequences for those engaged in organizing and leading such expeditions. As the D.C. Circuit explained, had local interests "been able to comment on the resulting [interpretation] . . ., they could have suggested changes or exceptions that would have accommodated the unique circumstances of Alaskan air carriage." *Id*. at 1035–36. In short, FAA could have avoided the adverse consequences of its interpretation by utilizing a notice-and-comment process that enabled meaningful input from states and localities.

2. A lack of localized input can also have a direct, negative impact on states and localities themselves.

For example, in 2005, the Department of Labor put forth an interpretation of its rule governing stipends paid to school staff members who served as

volunteer coaches. Under its interpretation, if a stipend exceeded 20 percent of a full-time coach's salary, the school would have to pay the volunteer coach overtime under the FLSA. DOL Op. Ltr., Wage & Hour Div., FLSA2005-51 (Nov. 10, 2005).

Many schools lacked both a clear way to gauge their compliance with this interpretation and the resources to avoid the issue by simply paying overtime. *See* Brief of *Amici Curiae* Nat'l Sch. Bds. Ass'n et al. at 14–19, *Purdham* v. *Fairfax Cty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011) (No. 10-1408). Thus, to avoid costly litigation over the vague regulation, schools eliminated either the stipends—to coaches' detriment—or the sports programs, to the students' detriment. *Id*. Had DOL utilized an effective notice-and-comment process, which facilitated input from states and localities, the unintended consequences of its interpretation could have been avoided, or at least lessened. Affected schools would have alerted DOL to the practical problems with its approach and could have helped it reach a solution that could be implemented without harming either coaches or students.

More recently, DOJ filed an *amicus* brief asserting for the first time that a school could fail to meet ADA Title II's "effective communication" requirement even though it complied with IDEA's "free and appropriate public education" requirement. *See* Brief of United States as *Amicus Curiae* at 10–12, *K.M. ex rel. Bright* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (No. 11-56259). Three years after filing that brief—and over a year after the Ninth Circuit deferred to its interpretation under *Auer*, *see K.M.*, 725 F.3d at 1100–01—DOJ issued a "Dear Colleague" letter reaffirming its interpretation, again

without utilizing the notice-and-comment process. Letter from Vanita Gupta, Acting Assistant Attorney General, DOJ Civil Rights Division et al., to Colleagues (Nov. 12, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf. DOJ's interpretation harms both students—by impairing necessary activities, services, and programs—and schools, by imposing severe administrative and financial burdens. *See* Letter from Francisco M. Negrón, Jr., General Counsel, Nat'l Sch. Bds. Ass'n (NSBA), to Vanita Gupta, Acting Assistant Attorney General, DOJ Civil Rights Division et al. (Mar. 5, 2015), https://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf (inviting DOJ to join NSBA in a dialogue "[t]o avoid these potential outcomes"). Had DOJ promulgated its interpretation through notice and comment—rather than *amicus* briefing—interested parties like NSBA would have had the opportunity to provide valuable input and feedback, which might have enabled DOJ to achieve its regulatory goals while reducing the burdens imposed on students and schools.

3. Evidence suggests that when states and localities are able to bring their localized knowledge and expertise to bear, federal regulatory outcomes are improved.

For example, in 2011, EPA proffered an expansive interpretation of the phrase "waters of the United States" under the Clean Water Act. *See* EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011). In response, state-and-local-government groups expressed

concerns that EPA had not used the notice-and-comment process and had failed to consult them regarding the federalism and preemption consequences of its interpretation. Letter from Larry E. Nakke, Exec. Dir., Nat'l Ass'n of Ctys., to Lisa P. Jackson, Adm'r, EPA, & Jo-Ellen Darcy, Assistant Sec'y for Civil Works, Army (July 29, 2011), http://www.naco.org/sites/default/files/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf. Taking into account these concerns, EPA declined to implement its interpretation. Instead, it promulgated a rule through the notice-and-comment process, which gave states and localities the opportunity to provide input. *See* Robert Meltz & Claudia Copeland, *The Wetlands Coverage of the Clean Water Act (CWA):* Rapanos *and Beyond* 12–13 (Cong. Research Serv., No. RL33263, Sept. 3, 2014), http://www.awwa.org/Portals/0/files/legreg/documents/CRSWetlandsCoverage.pdf.

Similarly, in 2005, NHTSA proposed a rule regarding crush resistance for automobile roofs. *See* Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223 (Aug. 23, 2005). Although NHTSA initially neglected to consult with relevant state and local agencies, the National Conference of State Legislatures (NCLS) prepared a report about the likely effects of the proposed rule and delivered it to the agency. The report estimated that the rule's financial burden on the states would be between $49 and $71 million annually because it would preempt certain state-law tort claims. *See* Ted R. Miller & Eduard Zaloshnja, *State, Local, and Tribal Governments' Benefits and Costs from NHTSA's Proposed Rulemaking on Roof Crush Resistance* 2 (Pac. Ins. for Research & Evaluation, Mar. 2006),

http://www.regulations.gov/#!documentDetail;D=NHTSA-2005-22143-0200. This helped persuade NHTSA to make clear in its final rule that it was not preempting state law. *See* Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements, 74 Fed. Reg. 22,348, 22,382–83 (May 12, 2009).

Likewise, in 2004, CMS proposed a rule allowing drug manufacturers to destroy records related to the Medicaid drug rebate program after three years. Forty-six state attorneys general submitted comments explaining that three years was too short because it would undermine their ability to enforce Medicaid's rebate requirements. In response to that concern, CMS increased the retention period to ten years. *See* Medicaid Program; Time Limitation on Recordkeeping Requirements under the Drug Rebate Program, 69 Fed. Reg. 508, 508–09 (Jan. 6, 2004).

In short, when agencies fail to incorporate state and local governments' specialized knowledge, citizens, and the state and local governments themselves, are often adversely impacted. When agencies accord such knowledge due regard—rather than adopting policy during litigation and without notice and comment—these adverse effects are ameliorated.

B. *Auer* Destabilizes State and Local Statutory and Regulatory Schemes that Incorporate Federal Guidance.

By incentivizing ambiguous regulations, *Auer* exposes state and local governments, which often incorporate federal regulations into their own laws, to additional challenges. First, vague regulations leave states and localities unsure about what those

regulations require. Second, because agencies can alter the meaning of their regulations without providing public notice—let alone opportunity to comment—states and localities are forced to alter their regulatory schemes in response to changes unbeknownst to them.

1. State and local governments routinely incorporate federal statutes and regulations into their own policies, laws, and regulations. Sometimes, the state is required to incorporate federal regulations. *See*, *e.g.*, *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (requiring incorporation of federal air quality standards). In other circumstances—ranging from employment regulation to banking to taxation—state regimes voluntarily incorporate federal regulations. S*ee*, *e.g.*, *See's Candy Shops, Inc.* v. *Super. Ct.*, 148 Cal. Rptr. 3d 690, 699–700 (Cal. Ct. App. 2012) (timekeeping); *Huntington Mem'l Hosp.* v. *Super. Ct.*, 32 Cal. Rptr. 3d 373, 376–78 (Cal. Ct. App. 2005) (overtime pay); *LaSalle Bank, N.A., II* v. *Shearon*, 881 N.Y.S.2d 599, 605 (N.Y. Sup. Ct. 2009) (banking); Md. Code, Tax–Gen. § 10-203 (taxation).

When regulations are broad, vague, or ambiguous, states and localities that incorporate those regulations have significant difficulty divining their meaning. That a regulation is vague—perhaps intentionally so—creates the problem. And, by incentivizing vague regulations, *Auer* makes the problem rampant. When states and localities are unsure what federal regulations mean, they cannot make informed decisions about whether to incorporate those regulations, or about how to enforce their laws that do incorporate such regulations.

2. Moreover, due to large-scale incorporation of federal regulations—some of which is required—a state's entire regulatory scheme may be upset or in need of adjustment any time a federal agency interprets its regulations. That an agency can authoritatively interpret its regulations via *amicus* brief—as the Department did here—only intensifies the problem. States and localities either run the risk of failing to realize that a federal agency has altered substantially its interpretation of its regulations, or are duty-bound to scour PACER to ensure that a filing by the United States or an agency did not authoritatively interpret a regulation in a way inconsistent with the state or local government's understanding.

That is, a state or local government may seek to apply incorporated federal regulations in good faith only to find that—unbeknownst to it—the agency had substantially altered the scope of its regulation. This leaves state and local governments in the unenviable position of administering regulations the meaning of which is both inscrutable and subject to change at any time.

C. *Auer* Enables Agencies to Exercise Broad Preemption Powers Without Providing States and Localities Either Notice or Opportunity to Comment.

Vague regulations also create a serious threat to federalism by allowing agencies to effect broad preemption of state and local law outside the confines of an effective notice-and-comment process. This not only leads to uncertainty regarding the permissible scope of state and local law but also causes states and localities to waste important resources.

Where state and federal law—including federal regulations—conflict, "state law must give way." *PLIVA, Inc*. v. *Mensing*, 131 S. Ct. 2567, 2574–77 & n.3 (2011). While preemption generally reduces state and local authority, preemption-by-vague-regulation is uniquely problematic. This is because a court—in determining whether state law is preempted—accords agencies binding deference regarding the scope of their regulations. *See*, *e.g.*, *id.* (deferring to FDA's regulatory interpretation and ruling its regulations preempted state law).

The federalism problem is clear. *See*, *e.g.*, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 912 (2000) (Stevens, J., dissenting) ("Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking . . . respects both the federalism and nondelegation principles."). It has also been recognized by the Executive. *See* Exec. Order No. 13132, 64 Fed. Reg. at 43,257 (authorizing preemption "only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law"); *id*. (requiring agencies to consult "with appropriate State and local officials" when "an agency foresees the possibility of" preemption "in an effort to avoid such a conflict"). *But see* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 Duke L. J. 2125, 2164 (2009) ("The mandate is recognized primarily in its breach.").

The power to preempt via deference creates two problems for states and localities: First, due to both the vagueness at the notice-and-comment stage and the ability to construe a vague regulation as having preemptive effect, states and localities can be wholly

deprived of the ability to have their input heard or considered. Second, states and localities face substantial legal uncertainty. They may expend significant time, effort, and resources to pass laws regulating a certain conduct in the good faith belief that the federal government does not regulate in that space, only to find that a federal agency has interpreted its ambiguous regulation to preempt all laws in that field. Such effort, of course, is wasted when federal regulations preempt state or local laws.

III. THIS COURT SHOULD GRANT CERTIORARI AND ABANDON *AUER* AND *SEMINOLE ROCK*, OR AT THE VERY LEAST OVERRULE *AUER* AND LIMIT *SEMINOLE ROCK* TO ITS ORIGINAL SCOPE.

Given the deleterious consequences that flow from investing in a single agency the powers of all three branches of government, this Court should grant certiorari to abandon *Auer* and *Seminole Rock*. The power to interpret ambiguous laws should be divested from administrative agencies and returned to the Judicial Branch.

This is an issue of grave National importance due to *Auer*'s broad applicability—it is not limited to a single statutory scheme or agency, but requires deference to the regulatory interpretations of potentially hundreds of agencies throughout the Executive Branch. *See* David E. Lewis & Jennifer L. Selin, *Sourcebook of United States Executive Agencies* 14–15 (U.S. Admin. Conf. Dec. 2012) ("there is no authoritative list of government agencies" because "what constitutes an agency under the APA is governed on a case-by-case basis"), https://www.acus.gov/

sites/default/files/documents/Sourcebook%202012%20FINAL_May%202013.pdf. And *every year* these agencies promulgate nearly 4,000 regulations, which span some 25,000 pages of the *Federal Register*. Carey, *Counting Regulations* at 18–19. As Justice White observed over thirty years ago, "[f]or some time, the sheer amount of law . . . made by the agencies has far outnumbered the lawmaking engaged in by Congress." *INS* v. *Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

1. This Court should not hesitate to abandon the deference principle espoused in *Auer* and *Seminole Rock*.

Deference—instructing courts to look to an agency's interpretation of its own regulation—is a method of interpretation, not a rule of substantive (or even procedural) law. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). It provides jurists with a method for interpreting ambiguous regulations, just as textualism, purposivism, and the use of legislative history provide methods for interpreting ambiguous statutes. *See* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 Colum. L. Rev. 1727, 1734 (2010) ("The Justices treat deference regimes like canons of statutory construction, rather than as precedents formally binding on future Courts."); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 Colum. L.

Rev. 681, 702–04 (2008) ("The Court's treatment of the *Chevron* doctrine as just that—a doctrine—closely parallels the Court's treatment of textual canons.").

As numerous scholars have observed, "federal courts have never given stare decisis effect to interpretive methodology." Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 Geo. L.J. 1573, 1591–95 (2014); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1765 (2010) ("[T]he Court does not give stare decisis effect to *any* statements of statutory interpretation methodology."); Raso & Eskridge, 110 Colum. L. Rev. at 1727, 1733–34 (describing "the Court's deference decisions in the form of canons of statutory construction, and certainly not as precedents entitled to stare decisis effect"); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863, 1874–75 (2008) ("[T]he Court has strongly suggested that doctrines of statutory interpretation do not get stare decisis effect but has not explicitly and conclusively so established."). Accordingly, *stare decisis* presents no hurdle to this Court's ability to grant certiorari and overturn *Auer* and *Seminole Rock*.

2. And, even were it bound by *stare decisis*, *amici* contend that this Court should still abandon *Auer*. This is particularly true because abandoning *Auer* does not necessitate foregoing the advantages of agency deference altogether. As *Christopher* indicates, agency interpretations that do not receive *Auer* deference are still eligible for deference pursuant

to *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Christopher*, 132 S. Ct. at 2168–69.

Moreover, to resolve many of the pragmatic problems created by *Auer*, this Court need not even wholly abandon the practice of according binding deference to agencies' regulatory interpretations. Instead, the Court could merely retrench *Auer*'s expansion of *Seminole Rock*. *Seminole Rock* deferred to an agency's interpretation that was official, well publicized, and issued concurrently with the regulation. 325 U.S. at 417. *Auer* extended that deference to an agency's interpretation first put forth in an *amicus* brief.

Restricting regulatory deference to interpretations that meet *Seminole Rock*'s requirements—those that are official, well publicized, and issued contemporaneously with the regulation—would effectively close *Auer*'s loophole. *See supra* Part I.B.2; Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 102–06 (2015).

Reining in regulatory deference in this manner is consistent with this Court's recent narrowing of *Chevron*'s scope. *See Christensen*, 529 U.S. at 587–88; *Mead*, 533 U.S. at 227–34. And this Court has indicated that similar considerations are appropriate in the *Auer* context. *Christopher*, 132. S. Ct. at 2167 (declining deference to an interpretation that "impose[s] potentially massive liability . . . for conduct that occurred well before that interpretation was announced").

* * *

As Petitioner sets forth, this case presents an ideal vehicle through which to reconsider *Auer*. And there are compelling reasons for granting the writ.

Because *Auer* applies to regulatory interpretations by agencies across the Executive Branch, its impact is extraordinarily far-reaching. Agencies promulgate regulations at a rate that is an order of magnitude greater than the rate at which Congress and the President enact laws. And this does not even begin to take account of agencies' informal regulatory interpretations that—under *Auer*—have the force and effect of law.

Accordingly, this Court should grant review to put an end to the separation-of-powers violation *Auer* authorizes, close the loophole it creates in *Chevron*'s notice-and-comment requirement, and relieve state and local governments of the unwarranted burdens imposed on them by vague, ambiguous federal regulations.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

LISA E. SORONEN
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814

ASHLEY E. JOHNSON
Counsel of Record
JAMES C. HO
BENJAMIN D. WILSON
BRADLEY G. HUBBARD
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201
(214) 698-3100
ajohnson@gibsondunn.com

Counsel for Amici Curiae

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APPENDIX

APPENDIX – INTEREST OF *AMICI*

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's fifty States, its Commonwealths, and its Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of

opportunity, leadership, and governance. Working in partnership with forty-nine state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 17,500 members are dedicated to the sound management of government financial resources.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school

board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.