No.

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Auer v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The questions presented are:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

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The court of appeals held that "a regulation is ambiguous on its face when competing definitions for a disputed term seem reasonable." App., *infra*, 17a (quotation omitted). Here, because "neither party's position" struck the court "as unreasonable," it "conclude[d] that the term 'relevant' in [Section] 3.156(c)(1) is ambiguous." *Ibid.* The court found "[s]ignificant[]" that "[Section] 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* at 15a. "This uncertainty in application suggests that the regulation is ambiguous." *Ibid.*

The court's conclusion that the regulation is ambiguous led it to apply *Auer* deference. Quoting *Auer*, the court explained that "[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." App., *infra*, 15a. Because the court viewed Section 3.156(c)(1) as "ambiguous," "the only remaining question is whether the [VA's] interpretation of the regulation is 'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a. Based solely on this deference, the court affirmed the VA's construction of the regulation and, accordingly, affirmed the VA's denial of retroactive benefits. *Id.* at 17a-19a.

5. The court of appeals denied rehearing en banc (App., *infra*, 44a-46a) over a three-judge dissent (*id.* at 47a-54a).

The dissent first noted the repeated calls to abandon *Auer* by Members of this Court, circuit court judges, and academics. App., *infra*, 48a-49a. The dissenting judges nonetheless recognized that the lower courts have "no authority to reconsider *Auer*, of course." *Id.* at 49a.

Instead, the dissenting judges would have narrowed *Auer*, holding it inapplicable in these circumstances. In the dissent's view, the panel erred by failing to properly reconcile *Auer* with "the longstanding 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" App., *infra*, 50a (quoting *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011)). "If only one of these doctrines can prevail in a given case, the pro-veteran canon must overcome *Auer*." *Id.* at 51a. That is because *Auer* applies only when, after using the normal tools of statutory construction, a regulation remains ambiguous. *Ibid.* And "[t]he rule that interpretative doubt is to be resolved in the veteran's favor is one of those rules of statutory construction." *Ibid.* (quotation omitted). Thus, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." *Ibid.*

REASONS FOR GRANTING THE PETITION

Members of the Court have repeatedly stressed the need to revisit *Auer*. This case is an appropriate vehicle for doing so: because *Auer* was the sole basis for decision in the court of appeals, this case cleanly

presents the *Auer* question. Given the persistent confusion about *Auer*'s continued vitality manifest in the lower courts, review is warranted.

Alternatively, the Court should grant review to further narrow *Auer*. The lower courts are intractably divided as to the intersection of agency deference doctrines and substantive construction canons. At the very least, the Court should hold—as the dissenting judges below urged—that *Auer* yields to these interpretative tools.

I. The Court Should Overrule *Auer*.

The Court should definitively resolve whether courts must defer to an agency's interpretation of its own ambiguous regulation. Not only is the question of *Auer* deference important in its own right, but the frequent criticism of *Auer* deference by Members of this Court has caused substantial confusion in the lower courts. Ultimately, the Court should abandon *Auer*. And this case is a suitable vehicle for doing so.

A. *Auer*'s viability requires resolution.

1. As Justice Thomas recently observed, "[s]everal Members of this Court have said that [*Auer*] merits reconsideration in an appropriate case." *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari). Indeed, "[b]y all accounts, *Seminole Rock* deference is 'on its last gasp.'" *Ibid.* (quoting *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari)).

The criticism of *Auer* has been repeated and sustained. See, *e.g.*, *Perez* v. *Mortgage Bankers*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in

part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect."); *id.* at 1213 (Scalia, J., concurring in the judgment) (urging the Court to "abandon[] *Auer*"); *id.* at 1224 (Thomas, J., concurring in the judgment) ("By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case.").

More recently, Justice Kennedy observed that existing doctrines of agency deference warrant reconsideration. See *Pereira* v. *Sessions*, No. 17-459 (2018), slip op. 2-3 (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*."). See also *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more."). Revisiting *Auer* deference is an appropriate place to begin.

Beyond criticizing *Auer*, the Court has substantially chipped away at it, continuously narrowing its scope. See *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* does not apply where the agency's regulation is unambiguous); *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* does not apply where the regulation merely paraphrases statutory language); *Talk Am., Inc.* v. *Mich-*

igan Bell Tel. Co., 564 U.S. 50, 63-64 (2011) (signaling that *Auer* prohibits agencies from issuing a de facto new regulation); *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012) (holding that *Auer* does not apply to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced").

2. It is no surprise, then, that widespread confusion persists in the lower courts. While, as here (see, *e.g.*, App., *infra*, 49a), lower courts generally acknowledge that *Auer* remains binding in theory, its uncertain status casts a shadow over the doctrine when invoked. Whatever the Court may ultimately conclude, it is important to bring certainty to this fundamental question of administrative law.

3. Certiorari is additionally warranted because the doctrine is important. If, as we maintain, *Auer* is wrong, it is imperative that the Court correct it.

The growth of the administrative state has compounded *Auer*'s practical implications. "Because agency rules that comply with specified procedural formalities bind with the force of statutes, *Seminole Rock* has a significant impact on the public's legal rights and obligations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency In-*

terpretations of Agency Rules, 96 Colum. L. Rev. 612, 615 (1996). Indeed, the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). See also *INS* v. *Chadha*, 462 U.S. 919, 985-986 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the law-making engaged in by Congress.").

The *Auer* exemption for interpretive rulemaking "was meant to be more modest in its effects than it is today." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). The literature has shown that agencies are well aware of *Auer* deference and concede that it plays a role in their drafting of regulations. See, *e.g.*, Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 715-716 (2014) (almost 40 percent of rule drafters surveyed indicated that *Auer* specifically played a role in the drafting of regulations).

Auer "removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean * * * , the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655. Instead of promoting clarity and precision, *Auer* incentivizes agencies to promulgate vague and broad regulations, which they can later clarify through interpretive rules that are not subject to notice-and-comment procedures. See *ibid*. *Auer* is thus a doctrine that requires this Court's careful review.

B. Courts should not defer to an agency's interpretation of its own ambiguous regulation.

Auer deference is a judicially created tool that guides the construction of agency regulations. It does not rest on any constitutional or legislative footing. The Court should not hesitate to revisit and abandon *Auer* and *Seminole Rock*.

1. *Auer* deference is incompatible with due process, the "fundamental principle in our legal system * * * that laws which regulate persons or entities 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 provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act (APA), allowing agencies to skirt this fundamental legal constraint. "The [APA] contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). But *Auer* deference "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (quoting *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)).

Indeed, extending deference to informal agency interpretations "allows the agency to control the extent of its notice-and-comment-free domain." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J.). The implications are obvious and oft-observed: "To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of

gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Ibid.*

As Judge O'Malley observed below, "*Auer* 'encourag[es] agencies to write ambiguous regulations and interpret them later,' which 'defeats the purpose of delegation,' 'undermines the rule of law,' and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." App., *infra*, 49a (quoting Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551-552 (2003)). See also *SmithKline Beecham Corp.*, 567 U.S. at 158 (observing the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking").

2. *Auer* also "raises two related constitutional concerns" respecting the separation of powers. *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.).

First, *Auer* "represents a transfer of judicial power to the Executive Branch." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). The Constitution vests the judicial power of the United States with the judiciary, which requires the exercise of "independent judgment." *Ibid.* But, "[b]ecause the agency is * * * not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1219-1220. See also *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.) ("[*Auer*] undermines 'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts.").

As Justice Kennedy recently explained, agency deference "suggests an abdication of the Judiciary's proper role in interpreting federal statutes. The type of reflexive deference exhibited in some of these cases is troubling." *Pereira*, No. 17-459, slip op. 2 (Kennedy, J.). "The proper rules for interpreting [regulations] and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.* at 3.

The Federal Circuit here exhibited extraordinary and troubling judicial deference: the mere identification of two plausible, competing interpretations was the sole reason that the agency prevailed. App., *infra*, 17a. The court of appeals wholly abdicated its constitutional mandate to exercise independent judgment; it effectively delegated to the VA its authority to interpret legal texts. This is perhaps the quintessential example of a case in which judicial review has "no more substance at the core than a seedless grape." Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

Not only is *Auer* constitutionally suspect insofar as it strips power from the courts, but it also rests on faulty reasoning. Although agencies may be "better equipped than the courts" to make policy decisions, an agency "is no better equipped to read legal texts." *Garco*, 138 S. Ct. at 1053 (Thomas, J.). See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986).

Second, *Auer* "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). "When courts refuse even to decide

what the best interpretation is under the law, they abandon the judicial check." *Id.* at 1221. That is, "*Auer* deference * * * contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part). It is dangerous to "eliminat[e] the separation between the entity that creates the law and the one that interprets it." App., *infra*, 49a. In sum, *Auer* "results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'" *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.).

3. *Stare decisis* is no reason to retain *Auer* deference. To begin with, *stare decisis* likely does not apply at all, as *Auer* is merely an interpretative tool. *Mortgage Bankers*, 135 S. Ct. at 1214 n.1 (Thomas, J.). Moreover, *stare decisis* has minimal effect when, as here, there is no expectancy interest by the public in a judge-made rule concerning judicial procedure. In *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009), the Court did not hesitate to revisit the "judge made" rule of sequential decision making in the qualified immunity context, because that "protocol does not affect the way in which parties order their affairs" and thus reversing precedent "would not upset settled expectations on anyone's part." And, as in *Pearson*, "Members of this Court have also voiced criticism" of the underlying rule, as have "[l]ower court judges" bound to apply it. *Id.* at 234-235.