No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported but available at 2016 WL 337517. The Federal Circuit's order denying rehearing en banc and the opinion dissenting from the denial (Pet. App. 44a-54a) are reported at 880 F.3d 1378.

JURISDICTION

The court of appeals entered its judgment on September 7, 2017. Pet. App. 1a. The Court granted certiorari on December 10, 2018. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

The Department of Veterans Affairs' New and Material Evidence regulation, 38 C.F.R. § 3.156, provides:

> (a) General. A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise

a reasonable possibility of substantiating the claim.

* * *

(c) Service department records.

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

* * *

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

INTRODUCTION

In *Bowles* v. *Seminole Rock & Sand Co.*, the Court announced, without supporting reasoning, that "the ultimate criterion" when construing a regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1945). The Court identified no statute, no constitutional provision, no precedent, and no underlying logic to support this rule. It was, as Justice Scalia observed, "*ipse dixit*." *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part). Yet the Court has applied the doctrine repeatedly since; in particular, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), the Court deferred to an agency interpretation first presented in an agency's *amicus* brief.

Seminole Rock-Auer deference (or simply *"Auer* deference") is a rule of judicial decisionmaking. But the effect of that rule is to vest administrative agencies with expansive lawmaking authority. If a regulation has multiple reasonable readings, an agency may make a *policy* judgment about which interpretation it prefers, rather than a judgment about the best *legal* interpretation of the regulation. Because of *Auer* deference, that agency judgment has the force of law.

Importantly, *Auer* deference affects the outcome of a case only when the agency's proffered interpretation is "*not* the fairest reading of the regulation." *Decker*, 568 U.S. at 617 (Scalia, J.). It therefore operates to displace the interpretation of the regulation that would control in the absence of this especially weighty deference doctrine.

Over the intervening years, three potential justifications for *Auer* deference have emerged. The first attempts to identify a legal basis for the doctrine: the contention that an agency's "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). The other two justifications are policy-based—assertions that an agency has "special insight into its intent" and that an agency often "possesses special expertise" regarding the technical details of a regulation. *Decker*, 568 U.S. at 618 (Scalia, J.).

These rationales lack merit. *Auer* deference is not a component of any lawmaking authority that Congress delegated to administrative agencies; on the contrary, it circumvents the limits that Congress has imposed on agency authority. Nor does *Auer* deference aid a court in understanding a regulation's meaning: not only is interpretation a legal question that courts are best equipped to resolve, but *Auer* deference permits agencies to rest on their current policy views standing alone. Finally, while agencies often possess technical knowledge, Congress has adopted procedures in the APA that specify how agencies may apply their expertise to create law.

Auer deference thus lacks any substantial legal or policy justification. But that is not the only reason why the Court should revisit and reverse the doctrine. *Auer* deference undermines the notice-and-comment procedures that Congress established in the APA to ensure public participation in rulemaking. In so doing, it enables an agency to bypass this Court's holdings regarding the limited weight given

to interpretive rules. *Auer* deference also injects intolerable uncertainty into the meaning of regulations. Finally, *Auer* deference is inconsistent with basic separation-of-powers principles that underlie our system of government.

In saying this, we are mindful that *stare decisis* is a cornerstone of the law. It requires the Court to act with caution when overruling precedent. But *Auer*'s substantial flaws constitute special justifications that warrant overturning this deference doctrine.

That is especially so because *stare decisis* applies with less force here. Because *Auer* is a judge-made rule of judicial procedure—and not the interpretation of a statute or constitutional provision—*stare decisis* has limited application. Additionally, the public has no reliance interests in the doctrine; to the contrary, *Auer* deference promotes *in*stability in administrative law. And circumstances have changed materially since 1945: the Court has never squared *Seminole Rock* with the subsequent enactment of the APA, nor with the evolution of the administrative state.

When all of these factors are weighed in the balance, the conclusion is clear: an agency should be "free to interpret its own regulations," but courts should "decide—with no deference to the agency—whether that interpretation is correct." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment).

STATEMENT

A. Legal background.

1. Seminole Rock *and* Auer.

The doctrine of deference to an agency's interpretation of its own regulation began with *Seminole Rock*. There, the Court addressed "the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188," a World War II-era price control. 325 U.S. at 411-412. The Court stated, without citation, that "[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Id.* at 413-414. The Court further concluded, without explanation, that the "ultimate criterion" for interpreting a regulation is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

Turning to the regulation at issue, the Court began by examining the plain meaning of the text, finding that it supported the government's position. 325 U.S. at 414-417. The Court then referred to a "bulletin issued" by the agency and an agency report to Congress, both of which advanced the same construction. *Id.* at 417. In view of these agency statements, the Court stated that "[a]ny doubts concerning" the government's interpretation "are removed by reference to the administrative construction." *Ibid.*

At the time, courts did not universally understand *Seminole Rock* as a watershed development. The very next year, in 1946, the Fourth Circuit rejected a broad interpretation of the ruling. It cited

Seminole Rock, together with *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), only for the proposition that agency views are "entitled to respectful consideration by [the courts] in interpreting [a] regulation." *Southern Goods Corp.* v. *Bowles*, 158 F.2d 587, 590 (4th Cir. 1946). While citing *Seminole Rock*, the court of appeals flatly rejected any binding deference rule: "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." *Ibid.*

Twenty years later, this Court returned to *Seminole Rock* in *Udall* v. *Tallman*, 380 U.S. 1 (1965). The Court referenced the "great deference" due to "the interpretation given the statute by the officers or agency charged with its administration" (*id.* at 16)—the principle known today as *Chevron* deference. With no more than a citation to *Seminole Rock*—and without elaboration—the Court concluded that, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Ibid.* The Court ultimately held that, if an agency's "interpretation is not unreasonable," courts must defer to it. *Id.* at 18.

In *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268 (1969), the Court extended *Seminole Rock* deference to an agency's private letters issued during the pendency of litigation. *Id.* at 276 & nn.22-23 (describing letters from an agency assistant secretary and chief counsel). That same year, referencing a regulation that was "not free from ambiguity," the Court applied *Seminole Rock* and found "it dispositive that the agency responsible for promul-

gating and administering the regulation has interpreted it." *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969).

While the Court analyzed the regulatory text in *Seminole Rock* and *Tallman*, this deference principle soon evolved into one of deference in the first instance, with minimal independent judicial assessment of the regulation itself. In *Ehlert* v. *United States*, 402 U.S. 99 (1971), the Court explained that it "need not take sides" about the proper construction of a term; "since the meaning of the language is not free from doubt," the Court stated that it must "regard as controlling a reasonable, consistently applied administrative interpretation." *Id.* at 105.

The Court took a similar approach in *United States* v. *Larionoff*, 431 U.S. 864 (1977), where it held that it "need not tarry * * * over the various ambiguous terms and complex interrelations of the regulations." *Id.* at 872-873. The Court stated that, under *Seminole Rock*, so long as the agency's "interpretation is not plainly inconsistent with the wording of the regulations," it is bound "to accept the Government's reading of those regulations as correct." *Ibid.*[1]

The high-water mark for *Seminole Rock* came in *Auer*, which addressed the Department of Labor's regulations regarding an employee's exemption from overtime pay. 519 U.S. at 455. The Court deferred to

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[1] The Court continued to apply *Seminole Rock* in this manner. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Stinson* v. *United States*, 508 U.S. 36, 45 (1993); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *United States* v. *Swank*, 451 U.S. 571, 589 (1981).

the position the Secretary of Labor set forth "in an *amicus* brief filed at the request of the Court." *Id.* at 461. It stated that because the regulation at issue, "the salary-basis test," "is a creature of the Secretary's own regulations, his interpretation of it is * * * controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Ibid.*

Since *Auer*, the Court has repeatedly deferred to an agency's interpretation of a regulation offered in briefs before this Court. *E.g.*, *PLIVA*, *Inc.* v. *Mensing*, 564 U.S. 604, 613 & n.3 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 208-210 & n.7 (2011); *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323, 336 (2011); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 884 (2000). It has done so even when the position the agency advances conflicts with its earlier interpretation of the same regulation. See *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 295-296 & n.7 (2009).

The Court has held that *Auer* likewise compels deference to an "internal" agency memorandum that "appears to have [been] written in response" to the litigation at issue. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). See also *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 278 (2009).

In recent years, the Court has twice narrowed the reach of *Auer* deference.

Deference is inapplicable, the Court held, when "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience

to formulate a regulation, it has elected merely to paraphrase the statutory language." *Ibid.*

In addition, when an agency's "interpretation of ambiguous regulations" would "impose potentially massive liability" on a party "for conduct that occurred well before that interpretation was announced," that is a "strong reason[] for withholding the deference that *Auer* generally requires." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012). In so concluding, the Court recognized that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Id.* at 158.

2. The Veterans Affairs regulations.

The Department of Veterans Affairs (VA) administers a benefits program for veterans who suffer from disabilities stemming from in-service injuries. See 38 U.S.C. §§ 1101-1163.

a. The United States will pay compensation benefits to a veteran for "disability resulting from personal injury suffered" by a veteran "in line of duty." 38 U.S.C. §§ 1110, 1131. Congress has delegated to the VA "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA]." *Id.* § 501(a). This authority extends specifically to "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits." *Id.* § 501(a)(1).

b. Exercising this authority, the VA has employed notice-and-comment procedures to promul-

gate regulations establishing a system for providing compensation "to a veteran because of service-connected disability." 38 C.F.R. § 3.4. In particular, VA regulations provide compensation for service-related post-traumatic stress disorder, or PTSD. *Id.* § 3.304(f). Such a claim requires (1) "medical evidence diagnosing the condition"; (2) "a link, established by medical evidence, between current symptoms and an in-service stressor"; and (3) "credible supporting evidence that the claimed in-service stressor occurred." *Ibid.*

The regulation governing the medical diagnosis element (38 C.F.R. § 3.304(f)) incorporates the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), Fifth Edition. *Id.* § 4.125(a). The DSM, in turn, states that a clinical diagnosis of PTSD rests on multiple necessary "criteria." *Diagnostic and Statistical Manual of Mental Disorders* 271 (5th ed. 2013) (*DSM-5*). The first is "[e]xposure to actual or threatened death, serious injury, or sexual violence" in one of multiple enumerated ways, including "[d]irectly experiencing the traumatic event(s)" or "[w]itnessing, in person, the event(s) as it occurred to others." *Ibid.* Identifying the "traumatic events" (which includes "exposure to war as a combatant") is thus necessary to a medical diagnosis of PTSD. *Id.* at 274.

c. Recognizing that the vast majority of veterans file disability claims without the assistance of counsel, Congress has imposed on the VA a duty to assist claimants. See 38 U.S.C. § 5103A. In particular, when a veteran asserts "a claim for disability compensation," the VA is obligated to "locate" certain government records. *Id.* § 5103A(c)(1). These include "relevant records pertaining to the claimant's active

military, naval, or air service that are held or maintained by a governmental entity," so long as the claimant has furnished the VA "information sufficient to locate such records." *Id.* § 5103A(c)(1)(A). See also 38 C.F.R. § 3.159(c) ("VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency," including a veteran's "military records.").

d. The VA has promulgated regulations governing the circumstances in which it will revisit a prior denial of a veteran's claim for benefits.

First, 38 C.F.R. § 3.156(a) allows a veteran to "reopen" a denial by "submitting new and material evidence." New evidence is defined as "existing evidence not previously submitted to agency decisionmakers." *Ibid.* And "[m]aterial evidence" is "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Ibid.* When a veteran obtains relief pursuant to this subsection, the benefits awarded are effective as of the date of the application to reopen. *Id.* § 3.400(q).

Second, 38 C.F.R. § 3.156(c) allows a veteran to seek "reconsider[ation]" of a claim by demonstrating that the VA previously erred by failing to consider official service department records in the possession of the government. In contrast to Section 3.156(a), this remedial provision does not require "new and material" evidence.

Under Section 3.156(c), the VA "will reconsider" a claim "if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." *Id.* §

3.156(c)(1). The regulation specifies that "relevant official service department records" include "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Ibid.* If the VA awards benefits "based all or in part on the records" that had previously existed but were not considered by the VA, the veteran is entitled to benefits retroactive to the date of his initial claim. *Id.* § 3.156(c)(3).

B. Factual background.

Petitioner James Kisor served on active duty in the Marine Corps from 1962 to 1966, including in the Vietnam War. Pet. App. 2a. He served with the 2nd Battalion of the 7th Marine Regiment. J.A. 21.

Petitioner fought in Operation Harvest Moon, a major battle against the Viet Cong that took place in December 1965. Pet. App. 3a & n.1. Harvest Moon was an especially deadly engagement. What was supposed to be an offensive mission became a rescue operation almost immediately; over 500 soldiers were killed in battle, including 56 U.S. Marines. See Nicholas J. Schlosser, *In Persistent Battle: U.S. Marines in Operation Harvest Moon* 18, 47 (2017).

On December 18, 1965, petitioner's company, H&S Company (J.A. 25), came under "attack[] at Ky Phu Hamlet by an estimated VC battalion." J.A. 21. Viet Cong attacked "with small arms, crew served weapons, hand grenades, and mortars." *Ibid.* Approximately a dozen members of petitioner's company died (J.A. 11), and more than one hundred Viet Cong soldiers were killed (J.A. 21). See also Jack Shulimson & Major Charles M. Johnson, *U.S. Marines In Vietnam: The Landing and the Buildup, 1965* 108-109 (2013) (recounting the "Fight at Ky Phu," including casualties sustained to H&S Company).

For petitioner, this event was deeply traumatic:

> I personally killed 2 Viet Cong snipers with my M14 rifle as their heads emerged from spider traps. This fact has tormented me during the past 41+ years. At the same time * * * one of my Marine buddies in our 2/7 Communications Platoon * * * was killed when a Viet Cong bullet ripped into his throat. I will never forget seeing his dead body. It also had a strong impact on me when * * * another Marine in my 2/7 Communications Platoon * * * was shot in the head at the same time.

J.A. 25.

As a result of his service, petitioner was awarded a Combat Action Ribbon, an award reserved for those who participate directly in active combat. J.A. 20. He also received a Presidential Unit Citation (with one bronze star), a Navy Unit Commendation, and a Vietnam Service Medal (with two bronze stars). *Ibid.*

Petitioner's combat activities have had lasting effects on him personally. Dr. Donald Davies, a psychiatrist who examined petitioner in connection with his benefits claim, explained that he suffers from repeated "flashbacks," which affect his everyday life. J.A. 31, 34. His injuries worsen "around December, because it reminds him of the Harvest Moon operation, by way of an anniversary reaction." J.A. 34. Prior to his military service, petitioner "liked to socialize and do things with other people"; now, however, petitioner "isolate[s] himself," is "social[ly] withdraw[n]," and schedules his activities "so as to encounter the fewest people." J.A. 32-34.

As the VA determined below, petitioner suffers from severe PTSD resulting from his service in Vietnam, especially his role in Operation Harvest Moon. J.A. 52. Petitioner suffers from "symptoms of recurrent explosive anger outbursts, daily intrusive thoughts, insomnia, chronic irritability, avoidance of triggers which remind him of Vietnam, suicidal ideation, anhedonia, social withdrawal and avoidance of people, and difficulty getting along with others and authority figures." *Ibid.* Altogether, the VA concluded that these injuries have caused "serious impairment in social and occupational functioning." *Ibid.* As Dr. Davies reported, petitioner's inability "to work in a formal vocational setting for over 20 years" is "a direct result of his war experiences in Vietnam." J.A. 39.

C. Proceedings below.

This action arises out of petitioner's claim for disability benefits based upon his service-connected PTSD.

1. On December 3, 1982, petitioner filed a claim with the VA Regional Office in Portland, Oregon. Pet. App. 2a, 30a. David Collier, a counselor at the Portland Veterans Center, submitted a letter describing his observations of petitioner stemming from "group and individual counseling." *Id.* at 2a. Collier identified "concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdraw[a]l." *Id.* at 2a-3a. Collier concluded that "[t]his symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder." *Id.* at 3a.

A subsequent psychiatric examination, however, suggested that petitioner suffered from "a personality disorder as opposed to PTSD." Pet. App. 3a. The

VA psychiatrist, Dr. Robin Henderson, reached this conclusion even though he admittedly "lost" a "portion of the original dictation" of petitioner's "PTSD examination." J.A. 13. Because of the lost records, Dr. Henderson could not "recall the specifics of any symptom review." *Ibid.* Instead, Dr. Henderson stated that he "recall[ed] that [he] was not impressed with the finding of post traumatic stress disorder." *Ibid.*

At the time, "[s]ervice records * * * related to [the] claimed in-service event" (38 C.F.R. § 3.156(c)(1)) that caused petitioner's PTSD were in the possession of the government. These records included petitioner's Department of Defense Form 214,[2] as well as his Combat History, Expeditions, and Awards Record.[3] Pet. App. 4a. This material "document[ed] his participation in Operation Harvest Moon." *Ibid.* See also J.A. 18-20. But the VA did not request these records or associate them with petitioner's claim file; the VA later acknowledged that these "service personnel records * * * were not requested by VA until November 2006." Pet. App. 34a-35a. See also J.A. 70.

The VA Regional Office denied petitioner's claim. Pet. App. 3a. The agency did not address petitioner's service records—because it had not obtained, or even requested, them. J.A. 15. It concluded that "post

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[2] This record is petitioner's discharge form. See J.A. 18. It confirms that petitioner served in Vietnam, and it identified the nature of his service. *Ibid.*

[3] This record is the form "NAVMC 118(9)-PD (REV. 11-55)." J.A. 19. It documents that petitioner "participated in counter-insurgency operations" and "participated in operation 'Harvest Moon.'" *Ibid.*

traumatic stress neurosis, claimed by vet" was "not shown by evidence of record." *Ibid.*

2. On June 5, 2006, petitioner asked the VA to review its prior denial of his claim. Pet. App. 4a. This time, the VA Regional Office agreed that he has PTSD stemming from his service, and it therefore reopened petitioner's claim. *Id.* at 4a-5a. But it declined to award him retroactive benefits. *Ibid.*

After petitioner made his June 2006 request, the VA requested his "[s]ervice personnel records," which the VA received sometime after November 2006. Pet. App. 34a-35a. In September 2007, the VA found that petitioner suffers from service-connected PTSD and assigned him a disability rating of 50 percent, with benefits effective as of June 5, 2006. J.A. 41.[4]

The VA relied, in part, on petitioner's "[s]ervice * * * administrative records." J.A. 41. The VA regional office concluded that, because his "service administrative records show that [he is] a combat veteran (Combat Action Ribbon recipient), service connection for posttraumatic stress disorder has been established as directly related to military service." J.A. 42.

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[4] In July 2007, Dr. Donald Davies wrote an extensive report diagnosing petitioner with PTSD. See J.A. 29-40. He concluded that the symptoms identified by both Mr. Collier and Dr. Henderson were consistent with PTSD, and thus it is "clear that the claimant was evincing symptoms of P.T.S.D. back in the 1980's." J.A. 38. Dr. Davies explained that, "at best, Dr. Robin Henderson simply misunderstood the impact of the claimant's war trauma upon him, and this may have something to do with having lost a significant part of the original P.T.S.D. examination." *Ibid.*

Petitioner filed a notice of disagreement, arguing that he is entitled to retroactive benefits and that he is more than 50 percent disabled. J.A. 45-49.

In March 2009, a decision review officer at the VA regional office determined that petitioner's proper disability rating was 70 percent. J.A. 50-55. The review officer "granted a 100 percent rating on an extraschedular basis" (Pet. App. 5a), concluding that "[e]ntitlement to individual unemployability is granted because [petitioner] is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." J.A. 54. The VA again based its decision on a range of evidence, including petitioner's "DD Form 214," as well as "records from Navy Personnel Command indicating veteran was awarded a Combat Action Ribbon." J.A. 51.

The VA, however, declined to adjust the effective date of the benefits eligibility determination. Pet. App. 5a-6a. It reasoned that "[a]t the time of the [original] decision the veteran did not have a clinical diagnosis of post traumatic stress disorder." J.A. 70. The VA did not address whether 38 C.F.R. § 3.156(c)—which provides retroactive benefits if the VA later bases an award on records that the VA earlier failed to consider—applies to petitioner.

3. In a non-precedential decision by a single Veterans Law Judge, the Board of Veterans' Appeals affirmed the regional office's denial of retroactive benefits. Pet. App. 26a-43a.

The Board recognized that the VA did not request petitioner's service records during its initial adjudication of his claim. Pet. App. 34a-35a. It thus acknowledged petitioner's argument regarding the "failure[]" of the VA to obtain "service personnel rec-

ords noting his participation in Operation Harvest Moon." *Id.* at 38a. The Board nonetheless held that this failure was not a basis for petitioner to obtain retroactive relief pursuant to 38 C.F.R. § 3.156(c). Pet. App. 39a-43a.

The Board admitted that the "service personnel records * * * fall under the purview" of the specific language of Section 3.156(c)(1)(i). Pet. App. 42a. But the Board denied petitioner retroactive benefits under Section 3.156(c) by holding that the term "relevant" includes a causation requirement. In the Board's view, "relevant" evidence is limited to material that "would suggest or better yet establish" the element of the claim that was found missing in the prior adjudication—here, "that the Veteran has PTSD as a current disability." *Ibid.* Because the Board did not believe that these records would have been "outcome determinative" of petitioner's original claim for benefits, the Board concluded that they are not "relevant." *Id.* at 42a-43a.

4. The Court of Appeals for Veterans Claims affirmed in another non-precedential decision issued by a single judge. Pet. App. 20a-25a. It restated the Board's conclusion that petitioner's "documents were not outcome determinative" and that they therefore did not qualify as "relevant" within the meaning of the regulation. *Id.* at 24a.

5. The Federal Circuit affirmed. Pet. App. 1a-19a. It acknowledged that "the heart of this appeal" is petitioner's "challenge to the VA's interpretation of the term 'relevant.'" *Id.* at 14a-15a. Citing both *Seminole Rock* and *Auer*, the court explained that it "defer[s] to an agency's interpretation of its own regulation as long as the regulation is ambiguous and the

agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." *Id.* at 15a (quotation omitted).

The government argued that the Board was correct in holding that documents qualify as "relevant" only if they relate to the cause of the prior denial. Pet. App. 13a-14a. Petitioner, by contrast, argued that the regulation contains no such causation requirement and that a record is "relevant" if it tends a prove an element of a veteran's claim. *Id.* at 12a-13a.

The court of appeals "conclude[d] that the term 'relevant' in [Section] 3.156(c)(1) is ambiguous" because "[b]oth parties insist that the plain regulatory language supports their case," and because "neither party's position" was "unreasonable." Pet. App. 17a; see also *ibid.* ("[A] regulation is ambiguous on its face when competing definitions for a disputed term seem reasonable.") (quotation omitted).

The court found it "[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." Pet. App. 15a. "This uncertainty in application suggests that the regulation is ambiguous." *Ibid.*

Ultimately, the court of appeals concluded that the VA's "interpretation does not strike [the Court] as either plainly erroneous or inconsistent with the VA's regulatory framework." Pet. App. 17a. The court thus deferred to the VA's interpretation of its own regulation. *Id.* at 17a-19a.

6. The court of appeals denied rehearing en banc (Pet. App. 44a-46a) over a three-judge dissent (*id.* at

47a-54a). The dissent noted the repeated calls to reconsider *Auer* deference by Members of this Court, circuit court judges, and academics. *Id.* at 48a-49a. Bound by *Auer* (*id.* at 49a), the dissenting judges would have held *Auer* inapplicable where, as here, the canon that a statute should be interpreted in favor of veterans' interests exists to resolve ambiguity in VA regulations. *Id.* at 50a-51a.

SUMMARY OF ARGUMENT

I. From its inception, the doctrine of deference to an agency's interpretation of its own regulation has lacked legal or policy justification. The genesis of the doctrine—*Seminole Rock*—contained no reasoning, and the proffered post hoc rationales do not support it. For three principal reasons, *Auer* deference is unjustified.

A. *Auer* is incompatible with the Administrative Procedure Act. When Congress delegates lawmaking authority to an agency, it does so on the understanding and with the command that the agency comply with the strictures of the APA. The APA, in turn, imposes safeguards on agencies' exercise of their lawmaking authority. In particular, notice-and-comment rulemaking requires notice, public participation, and agency accountability. *Auer* deference subverts this arrangement by allowing an agency to engage in subregulatory "interpretation" that binds the regulated public and the courts, but without any of the APA's procedural safeguards.

Auer is especially problematic because it gives agencies far wider latitude to issue binding rules of law than does the Court's deference doctrine under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). When Congress

delegates authority to issue binding regulations through notice-and-comment rulemaking, deference to the agency's interpretation of a statute is dependent on its adherence to that procedure. If an agency interprets a statute through some other means (such as interpretive guidance), *Chevron* deference does not apply. *Auer* deference, however, is not subject to a similar limitation: Agency interpretations of ambiguous regulations appearing in documents as informal as opinion letters and appellate briefs receive binding *Auer* deference.

B. *Auer* is a judge-made rule that destabilizes administrative law. The doctrine controls outcomes in only those cases where an agency adopts a reading of a regulation that, while reasonable, is not the *best* interpretation. Yet, when a private individual seeks to conform his or her conduct to law, all he or she can do is make a judgment about the regulation's *best* meaning. In this way, *Auer* is a permission slip for unpredictable and irregular agency action.

Auer deference is especially suspect in circumstances, like those here, where the agency has an economic interest in the outcome of the interpretive question. Deference to executive agencies rests on the premise that agencies act with impartiality when adopting rules that have the force of law. But when an agency changes the rules of the road in the context of deciding monetary claims brought against the government, those same presumptions do not obtain.

Two policy-based justifications have been offered in defense of *Auer*. One is the contention that an agency has insight into its original intent underlying a regulation. The other is that the agency has sub-

stantive policy expertise. Neither argument withstands scrutiny.

As to the first, the interpretation of a regulation is a strictly legal exercise, requiring analysis of the regulation's text and any other relevant material. Agencies have no greater capacity than courts to perform this task. What is more, *Auer* deference does not depend on the agency making a *legal* judgment; to the contrary, it gives the agency's interpretation the force of law even if policy considerations motivated the result. Thus, even if agencies had special capacity to identify the intent underlying a regulation (they do not), that still would not justify *Auer* deference.

As to the second policy justification, while agencies often possess technical expertise, Congress has articulated the ways in which agencies may bring their specialized experience to bear when making law. As it did here, Congress usually requires notice-and-comment rulemaking. *Auer* circumvents that congressional judgment.

C. *Auer* is also incompatible with separation-of-power principles. In the U.S. system of government, the one who makes the law must not also interpret it. But *Auer* deference renders an agency simultaneously a law's maker and its expositor. Overruling *Auer* is therefore necessary to restore the appropriate balance between the Executive and the Judiciary.

D. *Chevron* deference rests on agency *compliance* with the APA. *Auer* deference, by contrast, bestows the force of law on agency actions unconstrained by the APA's requirements. *Chevron* deference is therefore consistent with—and, indeed, sup-

ports—the conclusion that *Auer* and *Seminole Rock* were wrongly decided.

II. This is a rare circumstance in which overruling precedent is warranted. When examined on the merits, it is clear that both *Seminole Rock* and *Auer* are egregiously wrong. And, importantly, there are multiple additional reasons why *stare decisis* applies with appreciably less force here than it does elsewhere.

A. *Seminole Rock* was wrong when it was decided, and there are special justifications for overruling that decision and its progeny. This deference doctrine was not just badly reasoned—it had no reasoning at all. *Auer* has also proven harmful in practice.

B. *Seminole Rock* and *Auer* are not interpretations of a statute or the Constitution. Rather, they create a standard of judicial decisionmaking. *Stare decisis* does not hold the same weight with respect to such court-made rules of judicial procedure.

C. Additionally, *stare decisis* has reduced effect because there are no private reliance interests resting on *Auer*'s continued vitality. To the contrary, *Auer* undermines regulatory predictability and invites legal *in*stability. That is so because *Auer* allows an agency to change the meaning of its regulations (including reversal of pre-existing positions) in the midst of a lawsuit, regardless whether the new interpretation is the best one. *Stare decisis*—a doctrine designed to *protect* stability in the law—should not shield this erroneous doctrine from review.

D. *Stare decisis* also has less strength because circumstances have changed greatly since the Court introduced the doctrine in *Seminole Rock*. Congress

enacted the APA the year after *Seminole Rock*. While the Court has applied the doctrine repeatedly since, it has never squared *Seminole Rock* with the text and structure of the APA. The size and nature of administrative agencies have also grown and evolved since 1945. These changes provide legal and practical reasons warranting a reexamination of *Auer* deference.

III. Petitioner offers the best construction of Section 3.156(c). If the Court overrules *Auer* deference, it may wish to leave this question to the court of appeals in the first instance. Alternatively, if the Court chooses to reach the issue, petitioner should prevail in view of the regulation's plain meaning.

ARGUMENT

I. *Seminole Rock* and *Auer* are wrong.

Auer deference is a judicially-created rule of legal interpretation that instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. That doctrine bestows on agencies expansive, unreviewable lawmaking authority: When there is more than one reasonable interpretation of a regulation, *Auer* authorizes an agency to pick the interpretation it favors as a policy matter—and gives that choice the force and effect of law. "To regulated parties, the new interpretation might as well be a new regulation." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment).

Seminole Rock announced this doctrine without supplying any justification—and none exists. This deference doctrine is not just wrong as a legal matter, but it has also proven extremely harmful in practice. *Auer* deference causes agencies to circumvent

the critical requirements of the APA; it injects intolerable unpredictability into the legal system; and it is incompatible with the basic principle that the one who makes the law should not also interpret it.

A. *Auer* deference is inconsistent with the APA.

In 1946, the year after the Court decided *Seminole Rock*, Congress enacted the APA, "the fundamental charter of the administrative state." Peter H. Schuck, *Foundations of Administrative Law* 53 (2d ed. 2003). The APA's "safeguards * * * against arbitrary official encroachment on private rights" serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950). Whatever could have been said about *Seminole Rock* prior to 1946, the deference doctrine should not have survived the APA's enactment.

1. Auer *deference circumvents the APA's safeguards governing agency rulemaking.*

Auer deference is inconsistent with the text, structure, and purpose of the APA. There is no indication whatever that, in enacting a statute to carefully impose procedural checks on agency rulemaking, Congress nonetheless intended for agencies to wield substantial lawmaking authority via subregulatory action—that is, agency action that lacks the formality of notice-and-comment rulemaking.

Indeed, in *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001), the Court held that agency actions lacking requisite formality, including interpretive rules, do not warrant deference. *Auer* cannot be

reconciled with the rationale endorsed by the Court in *Mead*.

a. The Court has never assessed whether *Auer* deference can be squared with the text of the APA's judicial review provision—or the similar provisions of other statutes, modeled after the APA, that govern judicial review of various agency actions.

Section 706 of the APA provides that "the reviewing court"—not the agency—"shall * * * determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. An "agency action," in turn, "includes the whole or a part of an agency rule." *Id.* § 551(13). Section 706 similarly allocates to Article III courts the responsibility to "decide all relevant questions of law." *Id.* § 706.

Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in * * * regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J.). Given the statutory command, "it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation." Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1, 9 (1996).

The statute authorizing the Federal Circuit's review of decisions from the Court of Veterans Claims, 38 U.S.C. § 7292, contains similar language. Section 7292(d)(1) directs that "the Federal Circuit shall decide all relevant questions of law." The proper meaning of 38 C.F.R. § 3.156(c)—the dispositive question below—is plainly a "relevant question of law." Congress has allocated such determinations to an Article III court, not to the VA.

b. In addition to the judicial review provision of the APA, Congress imposed several key limitations on agency action. The requirement of notice-and-comment rulemaking (see 5 U.S.C. § 553) is among the APA's chief "safeguards." *Morton Salt*, 338 U.S. at 644. The statute demands that agencies engage in deliberative lawmaking.

Notice. An agency generally must publish a proposed rule in the Federal Register, giving the public notice of the rule it proposes to adopt and the reasons it wishes to do so. See 5 U.S.C. § 553(b), (c), (d). Publication of the agency's reasoning ensures that the agency has in fact "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," which necessarily requires providing "a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The APA precludes agencies from making law behind a curtain.

Public participation. The APA also provides the public a right to participate in the rulemaking process. Once a proposed rule is published, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Critically, the agency must give "consideration of the relevant matter presented" to it by the public, and only then may the agency adopt a final rule. *Ibid.* With these APA provisions, "Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.*

v. *Brown*, 441 U.S. 281, 316 (1979). In this way, "the notice-and-comment procedures of the Administrative Procedure Act [were] designed to assure due deliberation." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

Judicial review. After an agency adopts a regulation, the APA provides for meaningful judicial review to preclude irregular agency action. Those adversely affected by the rule may challenge it on a variety of grounds, including that the agency failed to follow the requisite process or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When, for example, there is a "lack of reasoned explication for a regulation," especially where the regulation is "inconsistent with" prior agency positions, courts properly declare a regulation unlawful. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2127 (2016).

c. *Auer* deference, by contrast, "allow[s] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212 (Scalia, J.). It enables "the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion'"—all without the notice, public participation, and agency accountability that the APA requires. *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052-1053 (2018) (Thomas, J., dissenting from the denial of certiorari).

Auer deference does not depend on any *public* statement of the agency's views—the Court has previously deferred to an "internal memorandum" (*Coeur Alaska*, 557 U.S. at 278), private letters an agency issued during the pendency of litigation (*Thorpe*, 393 U.S. at 276 & nn.22-23), and a memo-

randum "issued only to internal [agency] personnel and which the [agency] appears to have written in response to [the] litigation" (*Long Island Care*, 551 U.S. at 171).

Even if an agency invites comment on an interpretation of its own regulations, it is under no obligation to meaningfully consider—much less respond to—the data and views supplied by the public. *Auer* thus guts the public notice and public participation requirements that lie at the heart of the APA.

In addition, the substantive standards that govern the validity of the underlying agency action differ markedly. When an agency revises a regulation that interprets a statute, an unexplained change in position receives no deference. *Encino Motorcars*, 136 S. Ct. at 2127. Rather, an "agency must show that there are good reasons for the new policy." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

There are no similar limitations when the agency changes its interpretation of an ambiguous regulation. The Court has applied *Auer* deference even where the "[g]overnment's position * * * has fluctuated," without ever asking whether the government supplied *any* (much less a sufficient) rationale to support that change of position. *Kennedy*, 555 U.S. at 296 & n.7. Nor does *Auer* deference consider whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43.

Through the APA, Congress established procedural and substantive safeguards to protect the public from irregular agency lawmaking. But *Seminole Rock* and *Auer* license agencies to circumvent those safeguards when they interpret their own regula-

tions. That rule is squarely inconsistent with—and precluded by—the APA.

d. *Auer* deference is also incompatible with the Court's jurisprudence regarding interpretive rules.

The APA authorizes agencies to issue rules using procedures other than notice-and-comment rulemaking. For example, it explicitly provides for "interpretative rules" (5 U.S.C. § 553(b)(A)), which an agency may issue "to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Interpretative rules are exempt from the notice-and-comment requirement, "mak[ing] the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." *Ibid*.

"But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 135 S. Ct. at 1204 (quoting *Guernsey Mem'l Hosp.*, 514 U.S. at 99). "[I]nterpretive rules," *Mead* holds, "enjoy no *Chevron* status as a class." 533 U.S. at 232. Put another way, an interpretive rule "may 'persuade' a reviewing court, but will not necessarily 'bind' a reviewing court." *Long Island Care*, 551 U.S. at 172 (citation omitted).[5]

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[5] Congress specifically intended that result. In the Senate Report on the APA, Congress observed "that 'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion." S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *reprinted in* Administrative Procedure Act: Legislative History, S. Doc. 248, at 18 (1944 – 1946).

Auer thus creates the anomalous result that courts must give interpretive rules binding deference *if* the underlying law being interpreted is a regulation rather than a statute. For this reason, *Auer* upends "the import of interpretive rules' exemption from notice-and-comment rulemaking." *Perez*, 135 S. Ct. at 1211-1212 (Scalia, J.). "Agencies may now use [interpretive] rules not just to advise the public, but also to bind them" because "[i]nterpretive rules that command [*Auer*] deference *do* have the force of law." *Ibid.*[6]

Coeur Alaska highlights that *Auer* is incompatible with *Mead*. The Court held, in *Coeur Alaska*, that an agency interpretation was "not subject to sufficiently formal procedures to merit *Chevron* deference," but it was nonetheless entitled to *Auer* deference "because it interprets the agencies' own regulatory scheme." *Coeur Alaska*, 557 U.S. at 283-284. As a practical matter, it is immaterial whether a court applies *Chevron* or *Auer* deference—if either applies, the agency's interpretation is given the force of law. *Auer* therefore compels judicial deference to the very agency actions that *Mead* holds are ineligible for deference.

In this way, *Auer* is also inconsistent with this Court's longstanding description of the nature and effect of interpretive rules. In *Chrysler Corp.*, for ex-

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[6] As Professor Robert Anthony put it more than two decades ago, it is an "anomaly" that "the Court maintains a standard for reviewing nonlegislative *interpretations of regulations* that is separate from and systematically more accepting of the agency's position than is its standard for reviewing nonlegislative *interpretations of statutes*." Anthony, *supra*, at 5 n.11 (emphasis added).

ample, the Court explained that "[i]nterpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes *and rules* which it administers.'" 441 U.S. at 302 n.31 (emphasis added). As to the whole category of interpretive rules—which necessarily includes an agency's interpretations of its "substantive rules" (that is, its own regulations)—none "have the force and effect of law." *Ibid.* See also *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (same).

An agency's interpretation of its own regulation is, at best, an interpretive rule. Under *Chrysler Corp.*, such an interpretation does not have the force of law and therefore deserves no deference. That should answer the question presented here—*Seminole Rock* and *Auer*, which hold otherwise, are incorrect.

2. Auer *exceeds the scope of any congressional delegation of lawmaking authority.*

What is more, *Auer* deference exceeds the authority that Congress has delegated to agencies for rulemaking.

The central "premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars*, 136 S. Ct. at 2125. *Chevron* deference, the Court has said, is a component of that delegated authority. See *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

One potential justification for *Auer* might be to hitch it to this same delegation of authority; an agency's "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151. That is, *Auer* deference "presumes that * * * a delegation of rulemaking power implicitly assigns the agency a concomitant power to say what its own rules mean." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996).

This justification is not tenable, however, because it would depart dramatically from the scope of authority that Congress may be understood to have delegated, either expressly or implicitly. An agency has lawmaking authority only so far as it employs the procedures that Congress has specified.

As the Court held in *Mead*, an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference" in those circumstances in which "Congress delegated authority to the agency generally to make rules carrying the force of law," *and* "the agency interpretation claiming deference was promulgated *in the exercise of that authority*." *Mead Corp.*, 533 U.S. at 226-227 (emphasis added). That is, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue *in the particular manner adopted*." *City of Arlington*, 569 U.S. at 306 (emphasis added).

The Court therefore accords an agency interpretation *Chevron* deference when Congress has made a delegation, prescribed a means for the agency "to promulgate binding legal rules," and the agency is-

sues rules "in the exercise of that authority." *Brand X*, 545 U.S. at 980-981. Conversely, "*Chevron* deference is not warranted" in circumstances where "the agency errs by failing to follow the correct procedures" that Congress has authorized. *Encino Motorcars*, 136 S. Ct. at 2125.

Here, Congress delegated to the Secretary of Veterans Affairs authority to engage in lawmaking through notice-and-comment rulemaking. 38 U.S.C. § 501(a)(1) (authorizing the VA to adopt "*regulations* with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits") (emphasis added). Congress thus identified "the particular manner" (*City of Arlington*, 569 U.S. at 306) in which the VA may create the governing law. The VA exercised that authority by issuing extensive regulations governing veterans' claims via notice-and-comment rulemaking, including the regulation at issue here. See 38 C.F.R. §§ 3.1 to 3.2600.

It follows that Congress has not delegated to the agency authority to adopt rules regarding the procedures for proof in veterans benefits claims except by means of amending the Code of Federal Regulations through notice-and-comment rulemaking. Because *Auer* deference confers the force of law on VA interpretations issued outside of notice-and-comment rulemaking, the lawmaking that *Auer* authorizes exceeds the authority Congress has delegated to the agency. See *Mead*, 533 U.S. at 232-233 ("[T]he terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.").

To put the point differently, agency action taken without notice-and-comment cannot amend a rule that was promulgated through notice-and-comment procedures. As the D.C. Circuit explained:

> Obviously, [the agency] may for good cause, change the regulation and even its interpretation of the statute through notice and comment rulemaking, but it may not constructively rewrite the regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result.

National Family Planning & Reprod. Health Ass'n, Inc. v. *Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992). Once an agency promulgates a regulation, the APA obligates the agency to return to the notice-and-comment rulemaking process to change the meaning of that regulation or give it further content. Were it otherwise, the safeguards contained in Section 553 of the APA would be meaningless. *Seminole Rock* and *Auer* are inconsistent with that core principle.[7]

B. *Auer* injects intolerable unpredictability into agency action.

Apart from its incompatibility with the text and structure of the APA, *Auer* deference should be set aside because it is fundamentally at war with basic

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[7] The VA's own conduct evinces an awareness of this principle, as it has previously amended Section 3.156(c) through notice-and-comment rulemaking. See 70 Fed. Reg. 35,388. If the VA dislikes the results that flow from the best reading of the text that the VA itself drafted, it may undertake a new rulemaking.

principles of predictability and public notice at the heart of the APA.

When a member of the regulated public attempts to comply with the terms of a regulation, all he or she can do is make a judgment about the regulation's best interpretation. Under *Auer*, however, an agency may later endorse a different interpretation, which then has the force of law. In fact, *Auer* deference makes a difference in the outcome of a case only where an agency has chosen a reasonable interpretation of a regulation that is "*not* the fairest reading of the regulation." *Decker*, 568 U.S. at 617 (Scalia J.).

1. Auer *invites vague regulations, which limit the public's ability to conform conduct to law.*

As the Court has recognized, *Auer* "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *SmithKline Beecham Corp.*, 567 U.S. at 158 (quoting *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). 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.*, 512 U.S. at 525 (Thomas, J., dissenting).

Justice Scalia described the problem in *Perez*:

> Because the agency (not Congress) drafts the substantive rules that are the object of those

> interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. 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. The APA does not remotely contemplate this regime.

135 S. Ct. at 1212 (Scalia, J.). Accord Anthony, *supra*, at 11-12 (*Auer* deference "generates incentives 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."); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1461 (2011); Manning, *supra*, at 656.[8]

In this way, *Auer* "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J.). See also Manning, *supra*, at 669 ("*Semi-*

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[8] These concerns are not merely theoretical. A recent survey showed that two in five agency rule-drafters are reported being influenced by the *Auer* doctrine when they write regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1004, 1065-1066 (2015) (reporting results from study involving 128 participants from seven executive departments and two independent agencies). Specifically, 39 percent of agency respondents indicated that *Auer* "play[s] a role in [their] rule drafting decisions." *Id.* at 1061, 1073. Without drawing a conclusion, the study's author suggests that some rule-drafters may "attempt to avoid drafting ambiguous regulations," whereas others "may be saying they do not have to worry about being clear and precise, as they can always clarify and clean up in subsequent guidance." *Id*. at 1066-1067.

nole Rock deference disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it.").

Moreover, *Auer* deference, coupled with the capacious regulations it promotes, enable agencies to abruptly change course without engaging in notice-and-comment rulemaking. See, *e.g.*, *Gloucester Cty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."); *G.G. ex rel. Grimm* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) ("[T]he Department's interpretation of its own regulation, [Section] 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.").

Such policy shifts often occur when there is a change in Administrations. While new Administrations certainly may alter past policies, "[t]he Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *North Carolina Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). "Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow." *Ibid.* Properly construed, "the APA contemplates

what is essentially a hybrid of politics and law—change yes, but only with a measure of deliberation and, hopefully, some fair grounding in statutory text and evidence." *Ibid*.

The vague regulations that *Auer* deference invites are antithetical to the due process principles embodied in the APA and elsewhere. They disserve the public interest.

2. Auer *deference is especially suspect when the agency is self-interested.*

Auer is particularly troublesome when agencies resolve regulatory ambiguities in favor of their own pecuniary self-interest.

Courts have rightly expressed skepticism of deference in circumstances where an "agency itself [is] an interested party" and the agency offers "self-serving views." *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987). See also *Chickaloon-Moose Creek Native Ass'n, Inc.* v. *Norton*, 360 F.3d 972, 980 (9th Cir. 2004) ("[A]s an interested party to the Deficiency Agreement that stands to gain or lose depending on the outcome of this litigation, the agency should not be accorded any deference.").

Indeed, agency deference is rooted in the presumption "that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority." Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 265 (2004). Where that presumption "is shown to be incorrect," such as where the agency's "interpretation is affected by self-

interest" in the outcome of the case, deference should not apply. *Ibid*.

Additionally, "judicial deference in cases of agency self-interest" "effectively makes the agency the judge in its own cause." Armstrong, *supra*, at 268. This sort of "[j]udicial deference to self-interested governmental action also carries a particular risk of undermining public confidence in governmental fairness and impartiality." *Id*. at 282. See also Anthony, *supra*, at 9-10.

3. There is no policy-based justification for Auer *deference.*

Two policy-based explanations for *Auer* have emerged over the years. One is that "the agency, as the drafter of the rule, will have some special insight into its intent when enacting it." *Decker*, 568 U.S. at 618 (Scalia, J.) (citing *Martin*, 499 U.S. at 150-153). The other is "that the agency possesses special expertise in administering its 'complex and highly technical regulatory program.'" *Ibid.* (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). Neither contention supports the weight of *Auer*.

First, with respect to the argument that an agency has insight into what it actually meant to say in the regulation, there is no basis to conclude that an agency is better situated than a court to answer this question of law. The interpretation of a regulation turns on the relevant sources available to the public, principally the regulation's text and whatever additional materials that the agency made available in the course of the rulemaking process, including *Federal Register* publications. There is no basis to conclude that the agency, years or decades after the promulgation of a regulation, is better equipped to

resolve this legal issue. See *Decker*, 568 U.S. at 618 (Scalia, J.).[9]

What is more, even if an agency had special capacity to discern the intended meaning of the regulation itself, *Auer* deference does not depend on the agency's having done so. *Auer* does not obligate an agency to articulate what it believes to be the *best* reading of a regulation based on text and promulgation context. Rather, under *Auer*, agencies can and do make *policy* decisions regarding their preferred interpretations. *Auer* deference is not, therefore, a tool that helps ascertain the *best* reading of a regulation.

The second policy rationale for *Auer*—that an agency's policymaking expertise warrants deference to its views—"misidentifies the relevant inquiry." *Perez*, 135 S. Ct. at 1222 (Thomas., J.). "The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means," and "[j]udges are at least as well suited as administrative agencies to * * * interpret the meaning of legal texts." *Id.* at 1222-1223. While an agency may have "significant expertise" regarding the "complex and highly technical regulatory

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[9] Indeed, the Court does not give significant weight to *post*-enactment congressional materials regarding the meaning of a statute. See, *e.g.*, *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 484-485 (1997) ("'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)); *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 260 (2011) (Sotomayor, J., dissenting) ([P]ostenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress.").

program" it administers (*Thomas Jefferson Univ.*, 512 U.S. at 512), that is a justification for deferring to the regulations that the agency promulgates through notice-and-comment rulemaking. It is not a basis to confer the force of law on an agency's statements outside the procedures that the APA specifies for administrative lawmaking. See *Decker*, 568 U.S. at 618-619 (Scalia, J.).

Even if these justifications for *Auer* deference carried some weight, they merely suggest that courts should acknowledge the agency's expertise and historical role. That is the essence of *Skidmore* deference, which evaluates an agency's "body of experience and informed judgment." 323 U.S. at 140. Ultimately, under *Skidmore*, courts consider the extent to which an agency's views have the "power to persuade." *Ibid.* These policy contentions do not provide a rationale for *Auer*'s heavy weight on the scales. While courts should take due account of an agency's views and knowledge, interpretation of regulations is ultimately the role of courts—not agencies.

C. *Auer* deference is inconsistent with separation-of-powers principles.

"Given the reality that agencies engage in 'lawmaking' when they exercise rulemaking authority," deference to agencies' interpretations of their own vague regulations "contradicts the constitutional premise that lawmaking and law-exposition must be distinct." Manning, *supra*, at 654.

That premise is a foundational one. Montesquieu, whom The Federalist Papers identified as "[t]he oracle who is always consulted and cited on this subject" (The Federalist No. 47, at 301 (James Madison) (C. Rossiter ed., 1961)), explained that

"[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *Spirit of the Laws* bk. XI, at 151-152 (O. Piest ed., T. Nugent trans. 1949). Similarly, "Blackstone condemned the practice of resolving doubts about 'the construction of the Roman laws' by 'stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it.'" *Decker*, 568 U.S. at 620 (Scalia, J.) (quoting 1 William Blackstone, *Commentaries* *58).

The Framers thus repeatedly reaffirmed that "the power of making ought to be distinct from that of expounding, the laws." 2 *The Records of the Federal Convention of 1787*, at 75 (Max Farrand ed. 1966) (Elbridge Gerry). The rationale for this established maxim was then, and remains today, grounded in common sense: "The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws." *Ibid*. (Caleb Strong). See also Manning, *supra*, at 644 n.159 (collecting additional sources).

For just that reason, "our Constitution did not mirror the British practice of using the House of Lords as a court of last resort, due in part to the fear that he who has 'agency in passing bad laws' might operate in the 'same spirit' in their interpretation." *Decker*, 568 U.S. at 620 (Scalia, J.) (quoting The Federalist No. 81, at 543-544 (Alexander Hamilton) (J. Cooke ed., 1961)). "In short, a core objective of the constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a

law's meaning in particular fact situations." Manning, *supra*, at 644. Accord *Perez*, 135 S. Ct. at 1218-1219 (Thomas, J.).

The Court's separation-of-powers cases—which uniformly deny Congress a role in interpreting or executing its own enactments—confirm the constitutional commitment to the separation of law-making from law-exposition. In *INS* v. *Chadha*, 462 U.S. 919 (1983), for example, the Court struck down the one-house legislative veto, which had allowed the House of Representatives to overrule the Attorney General on matters delegated to the executive branch. See also *Metropolitan Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (Congress "may not 'invest itself or its Members with either executive power or judicial power.'").

Because *Auer*'s practical effect is to vest in a single branch the law-making and law-interpreting functions, *Auer* is incompatible with the separation-of-powers principles that animate the Constitution. See *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J.). To conclude otherwise "would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J.). See also *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (holding that the Court must "assume [that Congress] legislates in the light of constitutional limitations").

D. *Chevron* deference confirms the flaws of *Auer* deference.

The reasons why courts defer to agency actions in other contexts—most notably *Chevron* deference—

are independent of *Auer* deference. In fact, *Chevron* deference serves to highlight *Auer*'s flaws.

Chevron deference rests on congressional delegations of lawmaking authority to the agencies. See *City of Arlington*, 569 U.S. at 296; *Brand X*, 545 U.S. at 980; *Mead*, 533 U.S. at 227-230. See also pages 33-35, *supra*. As the Court held in *Mead*, *Chevron* deference attaches when an agency exercises its delegated authority in the manner that Congress prescribed, which is usually through the APA's requirement of notice-and-comment rulemaking. See *Mead*, 533 U.S. at 227-230. Agency actions *outside* the APA's protections, including agency interpretive rules and other agency interpretations, are not entitled to such deference. *Ibid*.

Chevron deference therefore promotes, rather than skirts, notice-and-comment rulemaking. When the APA's procedural safeguards are respected, judicial deference to agency interpretations of ambiguous statutory text is consistent with the APA's structure and purpose. *Auer* deference, by contrast, is not constrained by the APA's requirements. See *Decker*, 568 U.S. at 620 (Scalia, J.) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

Additionally, *Chevron* deference does not centralize the functions of law-making and law-interpreting within a single entity. See Manning, *supra*, at 639 (Under *Chevron*, "separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority to interpret the applicable legal text.").

Chevron deference is thus consistent with—and, indeed, supports—the conclusion that *Auer* and *Seminole Rock* were wrongly decided.

II. *Stare decisis* does not require the Court to retain *Seminole Rock* and *Auer*.

Although the Court "approach[es] the reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command." *South Dakota* v. *Wayfair*, *Inc.*, 138 S. Ct. 2080, 2096 (2018) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009)). The special justifications necessary to overcome *stare decisis* are present here—and *stare decisis* applies with appreciably less force in this unique context.

A. Special justifications warrant overruling *Seminole Rock* and *Auer*.

What the Court recently said in *Wayfair* applies with full force here: while *Seminole Rock* "was wrong on its own terms when it was decided," experience and practical developments have "made its earlier error all the more egregious and harmful." *Wayfair*, 138 S. Ct. at 2097.

Seminole Rock, the doctrine's origin, was "badly reasoned." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). In fact, it lacked reasoning entirely. See *Decker*, 568 U.S. at 617 (Scalia, J.) (describing *Seminole Rock* as resting on "*ipse dixit*").

Experience has shown that original error all the more serious and harmful. Indeed, *Auer* deference produces "inherent confusion," and, after being "tested by experience," *Auer* deference has proven detrimental. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989). *Auer* creates contradictory

standards for interpretive rules. See pages 31-33, *supra*. And it injects enormous unpredictability into the meaning of regulations, authorizing reversals of agency positions without notice-and-comment rulemaking. See pages 36-43, *supra*.

Auer deference is also "a direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173. In particular, its application authorizes circumvention of the APA's rulemaking requirements. See pages 26-31, *supra*.

B. *Stare decisis* applies with less force to judicially-created interpretive principles.

Stare decisis has "special force" in statutory interpretation because "Congress remains free to alter what [the Court has] done." *Patterson*, 491 U.S. at 172-173. In constitutional cases, *stare decisis* reflects the need for stability in construing the Nation's charter. See *Crawford* v. *Washington*, 541 U.S. 36, 75 (2004).

The *Auer* deference principle falls into neither category. The Court has never identified a statutory or constitutional underpinning for the doctrine—as we have explained, there is none. Although the doctrine affects a very significant transfer of power to administrative agencies, it is a court-crafted interpretive rule.

In *Pearson*, the Court explained that "[r]evisiting precedent is particularly appropriate where" it "consists of a judge-made rule" related to "the operation of the courts." 555 U.S. at 233. There, the Court overturned *Saucier* v. *Katz*, 533 U.S. 194 (2001), which required courts to address the substantive

constitutional issue before resolving a claim of qualified immunity. This rule was, *Pearson* explained, "judge made" and "implicate[d] an important matter involving internal Judicial Branch operations." 555 U.S. at 233-234. For that reason, "[a]ny change should come from this Court, not Congress." *Id*. at 234.

The Court noted that the standards employed in determining whether to adhere to *stare decisis*—such as whether the original decision was "badly reasoned" or "proved to be 'unworkable'"—are "appropriate when a constitutional or statutory precedent is challenged." *Pearson*, 555 U.S. at 234. But those standards "are out of place" for judge-made rules governing judicial decisionmaking. *Ibid*.

So too here. Because *Auer* deference is a similar procedural, "judge made" rule, *stare decisis* does not apply with the same force as in statutory and constitutional cases. See also *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995) (The "role" of *stare decisis* "is somewhat reduced * * * in the case of a procedural rule * * *, which does not serve as a guide to lawful behavior."); *Payne*, 501 U.S. at 828 (noting the decreased weight of *stare decisis* in cases "involving procedural and evidentiary rules"); *Alleyne* v. *United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

In fact, it is not clear that *stare decisis* applies at all in the context of "deference regimes," which "are more like canons of statutory construction." 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, 1765 (2010). See also Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, Tex. L. Rev. (forthcoming 2019) ("[I]nterpretive methodologies do not warrant stare decisis effect.").

Indeed, there is broad scholarly consensus that this Court's precedents make *stare decisis* considerations inapplicable in the context of interpretive principles.[10] Ultimately, it is appropriate to "characteriz[e] deference doctrines as canons of statutory construction, and not binding precedents." Raso & Eskridge, *supra*, at 1817. See also *Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J.) (questioning application of *stare decisis* to *Auer* deference); Kozel, *supra*, at 74 (contending that "*Auer* puts itself beyond the purview of stare decisis").

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[10] See, *e.g.*, Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 218 (2015) ("Notwithstanding widespread support for the doctrine of stare decisis on *substantive statutory issues*, however, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases."); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1754 (2010) ("Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation."); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863, 1875 (2008) ("Although the Supreme Court has not been explicit about whether it gives *stare decisis* effect to doctrines of statutory interpretation, examination of its statutory interpretation jurisprudence makes clear that it does not.").

C. Private reliance interests favor overruling *Seminole Rock* and *Auer*.

Stare decisis also protects the reliance interests of private parties. As one example, "when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003). By contrast, where there are no "legitimate reliance interest[s]" at stake, *stare decisis* has less force. *Wayfair*, 138 S. Ct. at 2098. See also *Pearson*, 555 U.S. at 233 (When a doctrine does "not affect the way in which parties order their affairs," abandoning past precedent is more appropriate because "a departure would not upset expectations.").

Private parties are highly unlikely to rely on *Auer*, because it does not authorize any particular result with respect to any particular rule. Indeed, one of *Auer*'s principal effects is to promote legal *in*stability. At its core, *Auer* deference gives the force of law to an agency's interpretation of a regulation adopted *after a dispute begins*. See, *e.g.*, *Coeur Alaska*, 557 U.S. at 278; *Long Island Care*, 551 U.S. at 171; *Auer*, 519 U.S. at 461; *Thorpe*, 393 U.S. at 276 & nn.22-23. That is so even if the new interpretation departs from an old one. See *Kennedy*, 555 U.S. at 296 & n.7.

Worse yet, this deference doctrine affects the outcome of a dispute only where an agency has chosen an interpretation of a regulation that, although reasonable, is not the *best* one. See *Decker*, 568 U.S. at 617 (Scalia J.). But, when structuring conduct to comply with a regulation, all a private party can do

is make a judgment about the regulation's *best* meaning.

The mischief that *Auer* creates is especially pronounced when there is a change of presidential Administrations. Cf. *North Carolina Growers' Ass'n, Inc.*, 702 F.3d at 772 (Wilkinson, J.). *Auer* enables one Administration to reverse the course set by its predecessor, altering binding rules of law based on nothing more than a brief filed in court, a letter posted on a website, or an internal memorandum sent to agency staff.

Auer deference thus strips regulations of stability; it "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties." *Perez*, 135 S. Ct. at 1221 (Thomas, J.). See also, *e.g.*, *Garco Constr.*, 138 S. Ct. at 1053 (Thomas, J.) ("While Garco was performing its obligations under the contract, the base adopted an interpretation of its access policy that" changed the terms of the contract, allowing the agency to "unilaterally modify [the] contract by issuing a new 'clarification' with retroactive effect.") (quotation omitted).

To the extent administrative agencies' interests are even relevant, they cannot assert any "*legitimate* reliance interest" in the *Auer* interpretive approach. *Wayfair*, 138 S. Ct. at 2098 (emphasis added). If *Auer* is repudiated, agencies will not be foreclosed from adopting any permissible interpretation of a regulation that they desire—or even to replace the regulatory regime entirely. All they need do is act through notice-and-comment rulemaking for their actions to have the force of law.

In sum, rather than advancing reliance interests, *Auer* deference "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J.). When, as here, an existing doctrine "itself causes uncertainty," that is a strong reason to displace it. *Lawrence*, 539 U.S. at 577.

D. The administrative state has evolved substantially since 1945.

The dramatic change in circumstances since 1945 is an additional reason why *stare decisis* should not preclude overruling *Seminole Rock* and *Auer*. See *Wayfair*, 138 S. Ct. at 2096-2097.

To begin with, *Seminole Rock*, decided in 1945, pre-dated the 1946 APA. While this Court has applied and extended *Seminole Rock* on numerous occasions since the APA's enactment, the Court has never squared the deference doctrine with the text and structure of the APA.[11]

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[11] The *Seminole Rock* era, moreover, featured the legislative veto of agency action. As Justice White observed in 1983, "[t]he prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies." *Chadha*, 462 U.S. at 967-968 (White, J., dissenting). At that time, "nearly 200" statutory provisions contained a legislative veto. *Ibid.* The statute underlying *Seminole Rock*, the Emergency Price Control Act, was itself structured to terminate "upon the date specified in a concurrent resolution by the two Houses of the Congress." Pub. L. No. 77-421 § 1(b), 56 Stat. 23, 24 (1942). When the Court decided *Seminole Rock*, direct congressional supervision of agency action was commonplace. Today, it is constitutionally forbidden.

The size and scope of the administrative state has also changed substantially since *Seminole Rock*. In 1941, the Code of Federal Regulations listed 111 different departments, bureaus, divisions, and independent agencies; today, the Federal Register identifies four times as many: 445.[12] The 1945 volume of the Federal Register contained 15,508 pages; in 2015, it contained more than five times that number: 81,402 pages.[13] In 1950, the Code of Federal Regulations spanned 9,745 pages; in 2015, it reached a mammoth 178,277 pages, nearly 20 times as large.[14] And this just scratches the surface: it is not uncommon that "[s]everal words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities." *Appalachian Power Co.,* v. *EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000). See also *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting).

Administrative agencies today "wield[] vast power and touch[] almost every aspect of daily life." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Conferring on agencies binding authority to interpret their own regulations has far broader—and much more troubling—implications now than it had when *Seminole Rock* was decided 74 years ago. These changed circum-

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[12] Compare *Final Report of Attorney General's Committee on Administrative Procedure*, U.S. Gov't Printing Office, 8 n.1 (1941), with *Agencies*, Office of the Fed. Register (captured Jan. 18, 2019), perma.cc/5KBT-WG82.

[13] *Federal Register & CFR Publications Statistics*, Office of the Fed. Register (May 2016), perma.cc/C7DG-JPRH.

[14] *Ibid.*

stances further justify reexamining *Seminole Rock* and *Auer*.

III. Section 3.156(c) entitles petitioner to retroactive benefits.

Petitioner presents the best interpretation of Section 3.156(c). He should therefore prevail on his claim for benefits retroactive to the date of his initial application.

Because the court of appeals did not independently evaluate the meaning of Section 3.156(c) (see Pet. App. 15a-17a), the Court may wish to remand for the court of appeals to do so in the first instance. See *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

If the Court reaches the issue, petitioner should prevail. Section 3.156 creates two mechanisms for the VA to revisit a past denial of disability benefits: reopening (38 C.F.R. § 3.156(a), which does not supply retroactive benefits, and reconsideration (*id.* § 3.156(c)), which does award retroactive benefits. See generally pages 12-13, *supra*. Petitioner is entitled to reconsideration.

The VA "will reconsider the claim" if three conditions are satisfied: first, the VA made an error by failing to "associate[] with the claims file" a government record that "existed" at the time of the original adjudication (38 C.F.R. § 3.156(c)(1)); second, the record is a "relevant official service department record[]" (*ibid.*); and third, the VA issues an "award * * * based all or in part on the records" that the VA previously failed to consider (*id.* § 3.156(c)(3)).

Petitioner satisfies each of Section 3.156(c)'s criteria. As to the first, petitioner's service records (in-

cluding his Combat History—Expeditions—Awards Record (J.A. 19)) existed at the time of the original adjudication. Pet. App. 34a. The VA, moreover, acknowledges that it did not consider these records because the VA never requested his file. *Id*. at 34a-35a.

As to the third, in granting petitioner benefits, the VA relied on the "evidence of record" (J.A. 52), which included petitioner's "DD Form 214," a "copy of service personnel record," and a "copy of citation for heroic participation in Operation Harvest Moon" (J.A. 51). The government admits that the VA's award was based in part on these records. See BIO 16 n.2 ("[P]etitioner's combat service was 'verified' based on the service department records.").

The only question, therefore, relates to the second element—whether these records are "relevant official service department records." The VA maintains that "official service records" qualify as "relevant" within the meaning of Section 3.156(c) only if they relate to the specific "basis" on which the original claim was denied. Pet. App. 43a. The Board of Veterans' Appeals appears to have understood Section 3.156(c) to require a counterfactual analysis: the VA must determine whether, if it had considered them, the records would have been "outcome determinative." *Id*. at 42a-43a.

There is no basis in the text for that narrow construction of "relevant." Instead, records are "relevant" if they support any element of a veteran's claim for benefits.

1. The regulation itself identifies that "relevant" is a broad term. It first states that the VA will reconsider a denied claim if it overlooked "relevant official service department records," and then goes on to ex-

plain that "[s]uch records include" "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). This provision is not conditional: records relating to a veteran's "claimed in-service event" are *per se* "relevant" for purposes of this regulation. The records here fall within this specific description. No further inquiry is necessary or appropriate.[15]

2. The ordinary meaning of the term "relevant" further supports this interpretation. In normal usage, "relevant" means "bearing upon or relating to the matter in hand." *Webster's New Twentieth Century Dictionary* 1526 (2d ed. 1967). Federal Rule of Evidence 401 holds that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

To prevail, petitioner must present "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. § 3.304(f). Because petitioner's service records make this necessary element more probable, they are "relevant" records.

3. The VA asserts that the records must be relevant to the agency's original "basis of the denial"—not to the veteran's claim generally. Pet. App. 43a.

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[15] In promulgating this rule, the VA "intend[ed] that this broad description of 'service department records' will also include unit records, such as those obtained from the Center for Research of Unit Records (CRUR) that pertain to military experiences claimed by a veteran." 70 Fed. Reg. at 35,388. As the VA explained, "[s]uch evidence may be particularly valuable in connection with claims for benefits for post traumatic stress disorder." *Ibid*. That is precisely the circumstance here.

But the VA has never identified a textual basis in the regulation for this limitation. See *id.* at 40a-43a; BIO 13-19.[16]

In fact, the text of the regulation refutes the government's contention. The reopening provision, Section 3.156(a), requires "material" evidence, which it defines as evidence that "relates to an unestablished fact necessary to substantiate the claim."

Under the VA's construction, "relevant" would mean the same thing as the defined term "material." But "where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). See also *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018) ("We usually 'presume differences in language like this convey differences in meaning.'").

This basic principle has special force here for two reasons. *First*, Section 3.156(c) specifies that it applies "notwithstanding paragraph (a) of this section." 38 C.F.R. § 3.156(c)(1). If "relevant" means the same thing as "material," then a veteran *would* have to

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[16] In any event, petitioner's service records *are* relevant to the medical diagnosis of PTSD, one element of which is the demonstrated existence of a stressor. *DSM-5*, *supra*, at 271. As the VA explains, "one cannot make a PTSD diagnosis unless the patient has actually met the 'stressor criterion,' which means that he or she has been exposed to an event that is considered traumatic." Matthew J. Friedman, *PTSD History and Overview*, Nat'l Ctr. for PTSD, U.S. Dep't of Veterans Affairs, perma.cc/38K9-FQ8N. Proof of a stressor thus does bear directly on the likelihood that he suffers from PTSD.

satisfy the requirements of Section 3.156(a) to obtain reconsideration under Section 3.156(c), rendering this disclaimer meaningless.

Second, Section 3.156(c) previously *did* contain the "new and material" standard. In 2006, the VA amended the regulation to replace it with the broader term "relevant" evidence. See 71 Fed. Reg. 52,455. In proposing the rule, the VA intentionally "remove[d] the 'new and material' requirement." 70 Fed. Reg. at 35,388. The agency's decision to change the language confirms that the term "relevant" cannot here mean "material."

4. A related statute, 38 U.S.C. § 5103A, further supports this interpretation of "relevant official service department records." Section 5103A obligates the VA to "obtain[]" "relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity"—"if relevant *to the claim*." *Id.* § 5103A(c) (emphasis added). Section 5103A thus uses the term "relevant records" to encompass all records relevant "to the claim" brought by the veteran. Congress enacted Section 5103A in 2000 (Pub. L. No. 106-475, 114 Stat. 2096), and, in 2005, the VA proposed the current Section 3.156(c)—containing the term "relevant"—against that statutory backdrop (70 Fed. Reg. 35,388).

5. This construction is also consistent with the remedial purpose of Section 3.156(c)—to protect veterans against the loss of benefits due to an error by the VA. Rather than require the veteran to construct, and prevail upon, a speculative analysis regarding the impact a VA error had on an initial denial of benefits, Section 3.156(c) makes the veteran whole

when the VA issues an award based in part on evidence that the VA erroneously failed to consider the first time.

Two established canons of construction support this conclusion. The Court has long recognized that veterans have "been obliged to drop their own affairs to take up the burdens of the nation" (*Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). In view of their service, the Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011). See also *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (applying canon in construing regulations). As the dissent to the denial of rehearing contended, this canon should resolve any remaining uncertainty. See Pet. App. 47a-54a.

In addition, legal instruments are typically construed against the drafter. Cf. Restatement (Second) of Contracts § 206 (1981). Here, the VA wrote the regulation at issue. It has the unique capacity to amend that regulation—something it has done before. See 71 Fed. Reg. 52,455. To the extent any doubt remains, the Court should construe the regulation to the financial detriment of the VA. Cf. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt."); *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970) (identifying "the general maxim that a

contract should be construed most strongly against the drafter"). If the VA wishes for a different interpretation, it may amend the regulation—subject to the requirements of the Administrative Procedure Act.

CONCLUSION

The Court should reverse the judgment entered below.

Respectfully submitted.

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