No. 18-15

In The
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, TEXAS PUBLIC POLICY FOUNDATION, GOLDWATER INSTITUTE, BEACON CENTER OF TENNESSEE, AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF 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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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). SLF also files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Garco Constr., Inc. v. Speer*, 583 U.S. ___ (2018); *Flytenow v. FAA*, 137 S. Ct. 618 (2017).

The Texas Public Policy Foundation (TPPF) is a nonprofit, nonpartisan research organization based in Austin, Texas, that promotes liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, TPPF has emphasized the importance of limited government, private enterprise, private property rights,

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[1] *Amici curiae* notified the parties of their intent and request to file this brief. All parties consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

and the rule of law. In accordance with its central mission, TPPF has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings, and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when a case directly implicates its or its clients' objectives. *See, e.g.*, *Flytenow*, 137 S. Ct. 618. Goldwater Institute scholars authored, and Arizona enacted, legislation ending *Chevron*-style and *Seminole Rock*/*Auer*-style judicial deference given to state administrative agency interpretations of agency regulations, or constitutional or statutory provisions. Ariz. Rev. Stat. § 12-910, *as amended by*, H.B. 2238, 53rd Legis. 2d Reg. Sess., 2018 Ariz. Legis. Serv. Ch. 180 (Apr. 11, 2018).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

The Mississippi Justice Institute (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy (MCPP) an

independent, nonprofit, public policy organization based in Jackson, Mississippi. MJI represents Mississippians when government actions threaten their state or federal constitutional rights. MJI's activities include direct litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rule making proceedings, and filing *amicus* briefs to offer unique perspectives on significant legal matters in Mississippi and federal courts.

This case is of particular interest to *amici* because the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), affords the executive branch opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and overrule the highly deferential standard set forth in *Seminole Rock/Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013)

(Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id*., stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a limited government. Addressing concerns that the proposed national government would usurp the People's power to govern themselves, James Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "administrative state with its reams of regulations would leave [the Founders] rubbing their eyes." *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation omitted).

This case involves one such example of the executive branch's overreach and disregard for our carefully crafted government structure, but there are many thousands of other examples. The government action at issue is emblematic of a systemic problem in a government that no longer imposes meaningful checks on executive action. This case provides an opportunity to

address doubts raised by several members of this Court about the continued validity of *Seminole Rock/Auer*.

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. Deference to an agency's interpretation of its own ambiguous regulation offends the separation of powers principles embedded in our Constitution because it enables agencies to circumvent the APA's notice-and-comment procedures. As applied here, *Seminole Rock/Auer* deference gives Veterans Affairs license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. *Amici* therefore join Petitioner in asking this Court to overrule *Seminole Rock/Auer* deference.

ARGUMENT

I. The Court should overrule *Seminole Rock/Auer* deference because it is inconsistent with separation of powers principles.

A. Seminole Rock/Auer deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations.

Although nobody can say for sure just how many federal agencies exist, one count put the number at "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm.*

on the Judiciary, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the Federal Register. For example, from 2008 to 2016, the Federal Register grew from 80,700 to 97,110 pages. Office of the Federal Register, *Federal Register Pages Published 1936-2017* (2017).[2] That is an increase of 20% during the tenure of just one president. And from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id*.

This growing number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies exercise is startling. What is more, courts rarely question this concentration of power. Instead, they frequently rely on *Seminole Rock/Auer* deference and abdicate their judicial interpretive power to the agencies, giving them unchecked

[2] https://www.federalregister.gov/uploads/2018/03/pagesPublished2017.pdf.

power to interpret their own rules (formal and informal). Under this theory of deference, an agency's interpretation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation[.]" *Seminole Rock*, 325 U.S. at 414. Thus, to state the obvious, *Seminole Rock/Auer* deference provides the over 400 federal departments, agencies, and sub-agencies with the means to write their own regulations, enforce their own regulations, and interpret their own regulations – essentially supplanting the legislature and the judiciary, and proclaiming themselves as supreme.

B. The power to interpret the meaning of a regulation properly belongs to the judiciary.

This concentration of power is unconstitutional. As the author of *Auer* himself later explained, *Seminole Rock/Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring). This is because the Constitution contemplates that each branch of government will jealously guard its own prerogatives, thus protecting individual liberty. But with *Seminole Rock/Auer* deference, the judiciary leaves the field, removing an indispensable check on federal agency activities.

"Political liberty . . . is there only when there is no abuse of power." 1 Charles de Secondat Montesquieu, The Complete Works of M. de Montesquieu 197 (London: T. Evans, 1777). " 'There can be no liberty where the legislative and executive powers are united in the

same person, or body of magistrates' or, 'if the power of judging be not separated from the legislative and executive powers.' "[3] The Federalist No. 47, at 299. As Montesquieu explained:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*

Montesquieu, at 199. The same is true in the reverse. If the power of the legislator joins with the judiciary, the legislator would then be the judge.

These foundational principles were front and center during the Constitutional Convention. As Charles Pinckney observed: "In a government, where the liberties of the people are to be preserved . . . the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 Max Farrand, Records of the Federal Convention of 1787, 108 (rev. ed. 1966); *see* The Federalist Nos. 47-51, at 297-322 (James Madison) (Clinton Rossiter ed., 1961)

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[3] Quoting Montesquieu in Federalist No. 47, James Madison explained that these passages "sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." The Federalist No. 47, at 300.

(explaining and defending the Constitution's structural design of separated powers).

Our Founding Fathers thus created a government of limited power, both as compared to the states and to its own branches.[4] "Separation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law." Martin H. Redish & Elizabeth J. Cisar, "*If Angels were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 451 n.8 (1991) (citing Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991)). "In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." *Id*. at 451. As Justice Frankfurter later reminded us in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the purpose of the separation of powers principles is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id*. at 629 (Frankfurter, J., concurring). This is because "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority" leads to the "accretion of dangerous power[.]" *Id*. at 594.

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[4] "In order to form correct ideas . . . it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 298.

Under these principles, any action taken by one branch of the federal government that presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to the preservation of liberty. For instance, it is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Seminole Rock/Auer* deference creates separation of powers issues and threatens individual liberty by giving federal agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461-62; *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that the Supreme Court's decisions on agency deference "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Some argue that *Seminole Rock/Auer* deference is "common sense" because an agency "is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule." 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 6.10, at 282 (3d ed. 1994). At times, this Court's rationales for *Seminole Rock/Auer* deference reflect these arguments. *See Pauley v.*

Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991) (explaining that interpretation of agency rules involves policy considerations); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (justifying deference to agency interpretations because of agency's expertise and competence to understand and explain its own rules).

Yet this deference rests on the premise that Congress has the constitutional authority to delegate to an agency the power to interpret its own regulations. While Congress *may* currently be able to vest agencies with limited legislative authority to fill ambiguous statutory gaps, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984),[5] it may *not* vest agencies with authority to interpret their own regulations. This is because under *Chevron*, Congress delegates its *own* legislative authority and not the powers constitutionally assigned to the judicial branch.[6] *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203-04 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)) (explaining that

[5] Courts have rarely used the delegation doctrine to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

[6] Underlying *Chevron* is the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996).

rules issued through the notice-and-comment process are "legislative rules"). Congress cannot delegate a power that it does not have.

By contrast, the power to interpret laws lies solely with the courts. The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."). The Constitution assigns the courts with the authority "to ascertain . . . the meaning of any particular act proceeding from the legislative body." *Id*. It follows that when an agency writes a law – whether it be through a formal rule, an opinion memorandum, or a guidance letter – it acts as a legislative body. It must also follow that, as our Framers put it, "the power of making ought to be kept distinct from that of expounding the laws." 2 Max Farrand, Records of the Federal Convention of 1787, 64 (1911). In other words, the power to interpret agency rules (both formal and informal) "belongs" to our country's judges.

While the growing administrative state tests the limits of separation of powers principles, it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *Seminole Rock/Auer* deference gives federal agencies a roadmap to usurp the role of the judiciary and unilaterally write, enforce, and interpret laws. For these reasons, this Court should overrule *Seminole Rock/Auer* and properly return the interpretive role to the courts.

II. The Court should overrule *Seminole Rock*/*Auer* deference because it deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

Despite Congress's all too frequent delegation of legislative power to federal agencies, there once was a time when Congress recognized the hazard that agencies pose to the democratic process and liberty. For over 20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 38 (1950), leading to the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

It follows then that the APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §§ 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final

Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id*. at 103.

In these notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster predictability and stability in the administrative arena and to establish a baseline against which the courts could measure future agency action. *Seminole Rock/Auer* deference undermines these objectives because it effectively exempts agencies from the APA's notice-and-comment requirements. It leaves agencies free to promulgate ambiguous regulations and later interpret them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). Further, *Seminole Rock/Auer* deference leaves agencies free "to control the extent of [their] notice-and-comment-free domain," and provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked

by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Just as there is no incentive for an agency to create airtight regulations, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process prescribed by the APA or to the regulated public." *Id*.; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law"). As a result, *Seminole Rock/Auer* deference relieves an agency of the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). And that burden instead falls on the regulated community.

In addition to shifting the burden of uncertainty to the regulated community, *Seminole Rock/Auer* deference undermines a major purpose of the APA – preserving our government structure. Legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

This is why agency actions and interpretations that proceed without notice-and-comment, like they do here, lack legitimacy and put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the interpretation takes. It follows that the regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, based on alleged non-compliance.[7] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212.

The Veterans Affairs' interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations. And the Federal Circuit's reliance on *Seminole Rock/Auer* allows agencies continuously to change their interpretations of their own regulations with the force of law. This opens the door to the type of abuse Congress sought to prevent with the APA. Until this Court demands that the executive branch abide by the APA, federal agencies

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[7] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

will continue their unconstitutional usurpation of power.

CONCLUSION

For all these reasons, and those stated by Petitioner, *amici* request that this Court overrule *Auer v. Robbins*, 519 U.S. 452, and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, and reverse the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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