No.

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James L. Kisor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018. On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. See *Kisor* v. *Wilkie*, No. 17a1154. This 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.

STATEMENT

This case is an attractive vehicle for the Court to reconsider a significant and recurring issue at the heart of administrative law: how much deference courts should afford an agency's interpretation of its own ambiguous regulation. That question was the only one decided below, and whether and how *Auer* deference applies is outcome-determinative here.

This case concerns the Department of Veterans Affairs' (VA) construction of its own regulation regarding veteran disability benefits. In particular, the dispute centers on the meaning of the term "relevant." The court of appeals expressly acknowledged that both petitioner and the VA advanced reasonable but irreconcilable constructions of the regulation. On that basis alone, the court found the regulation ambiguous. It then held that *Auer* resolves the case in the VA's favor.

The Court should grant review to overrule *Auer* deference in its entirety. Alternatively, the Court should conclude that *Auer* deference yields to substantive canons of construction—here, the canon that compels courts to construe ambiguities in veterans' benefit laws in the veteran's favor. The Court should then remand to allow the court of appeals to consider, in the first instance, the proper construction of the regulation at issue.

A. Legal background

1. The United States, through the VA, provides disability compensation to veterans who suffer injuries resulting from their service. The VA administers a claims-processing system for adjudicating veterans' claims. See, *e.g.*, 38 C.F.R. §§ 3.1 to 3.1010.

After the time for an appeal has elapsed, VA regulations provide two principal mechanisms by which a veteran can seek review of a previously denied claim. First, 38 C.F.R. § 3.156(a) allows a claimant to "reopen" a denial by "submitting new and material evidence." When a veteran obtains relief pursuant to this subsection, the benefits become effective on the date the application to reopen was filed. *Id.* § 3.400(q).

Second, 38 C.F.R. § 3.156(c)(1) authorizes the VA to "reconsider" a previously denied claim in the event that the "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." The regulation specifies that "[s]uch records include, but are not limited to" "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Ibid.*

Section 3.156(c)(1) therefore applies when, at the time of the VA's original decision, "relevant" documents existed but the VA failed to consider them. This provision is more favorable to veterans because it provides for a retroactive effective date for any benefits awarded. *Id.* § 3.156(c)(3) (providing that the effective date for any such award is "the date entitlement arose or the date VA received the previously decided claim, whichever is later").

2. This Court has long recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)). Veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "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)). Accordingly, "our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). For this reason, interpretative ambiguities in veterans' benefit programs are resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

3. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Court held that, in the face of an ambiguous regulation, "the ultimate criterion" is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Subsequently, in *Auer* v. *Robbins*, 519 U.S. 452, 463 (1997), the Court confirmed the broad deference due an agency's interpretation of its own ambiguous regulation.

B. Factual background and proceedings below.

Petitioner James Kisor served in the Marines during the Vietnam War. App., *infra*, 2a. In particular, he participated in Operation Harvest Moon. *Id.*

at 3a. During a search operation with his company, he came under attack by sniper fire and mortar rounds. *Ibid.* One major ambush left 13 fellow soldiers dead. *Ibid.*

1. In 1982, petitioner filed a claim with the VA for service-connected disability benefits, asserting that he suffered from post-traumatic stress disorder (PTSD). App., *infra*, 2a.

In support of this claim, petitioner included a letter from a counselor at the Portland Vet Center; the letter indicated that petitioner's symptoms of "depression, suicidal thoughts, and social withdraw[a]l" were "associated with the diagnosis of Post-Traumatic Stress Disorder." App., *infra*, 2a-3a. But a subsequent psychiatric examination suggested that petitioner suffered from "a personality disorder as opposed to PTSD." *Id.* at 3a. Ultimately, the VA denied petitioner's claim for benefits in May 1983, finding insufficient proof that he suffered from PTSD. *Ibid.*

2. In June 2006, petitioner sought review of his previously denied claim. App., *infra*, 4a. The VA granted petitioner relief, finding that he is disabled as a result of service-connected PTSD. *Id.* at 26a-43a.

In requesting relief, petitioner identified materials that existed at the time of the 1983 denial but that had not been associated with his file. App., *infra*, 4a. This included petitioner's Department of Defense Form 214, as well as his Combat History, Expeditions, and Awards Record. *Ibid.* This material "document[ed] his participation in Operation Harvest Moon." *Ibid.*

The VA granted relief pursuant to Section 3.156(a), not Section 3.156(c). App., *infra*, 4a. As a

result, the effective date of petitioner's benefits is June 5, 2006—not the 1983 effective date that he requested. *Id.* at 4a, 6a.

The VA (through the Board of Veterans' Appeals) reached this result because it found that petitioner's Form 214 and the Combat History document did not qualify as "relevant" for purposes of Section 3.156(c)(1). App., *infra*, 42a. The Board reasoned that this material did not "suggest or better yet establish that [petitioner] has PTSD as a current disability." *Ibid.* In the Board's view, records are not "relevant" when they are not "outcome determinative in that they do not manifestly change the outcome of the decision." *Id.* at 42a-43a.

3. The Court of Appeals for Veterans Claims affirmed. App., *infra*, 20a-25a. It restated the Board's conclusion that petitioner's "documents were not outcome determinative," and thus they did not qualify as "relevant" within the meaning of the regulation. *Id.* at 24a.

4. The Federal Circuit affirmed. App., *infra*, 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.

The Federal Circuit concluded that both parties offered reasonable constructions of the term "relevant" as used in Section 3.156(c)(1). App., *infra*, 17a. Petitioner, the court recognized, argued that material is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." *Id.* at 16a. In petitioner's view, the documents he provided are relevant because they "speak to the pres-

ence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry." *Ibid.* The VA, by contrast, defended the Board's narrower construction of "relevant." *Id.* at 16a-17a.

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

I. The Court Should Overrule *Auer*.

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

A. *Auer*'s viability requires resolution.

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

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

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

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

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

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

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

In *Bible* v. *United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), for example, Judge Easterbrook voted against rehearing en banc because it would not "be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world." *Id.* at 841 (Easterbrook, J., concurring in the denial of rehearing en banc). See also *Egan* v. *Delaware River Port Auth.,* 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network* v. *United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

When *Auer* is invoked as a rule of decision, courts repeatedly attach an asterisk to opinions, ex-

pressly noting that their reasoning rests on *Auer*'s potentially faulty premise. See, *e.g.*, *Diné Citizens Against Ruining Our Env't* v. *Jewell*, 2018 WL 1940992, at *26 & n.16 (D.N.M. 2018) (noting that "[a]lthough the Court shares Justice Scalia's concerns about *Auer* deference, it is, for the time being, the law of the land, and, as a federal district court, the Court must apply it"); *Occidental Fire & Cas. Co. of N.C.* v. *D'Line Logistics, Inc.*, 2017 WL 6733690, at *4 (N.D. Ill. 2017) ("[T]he court acknowledges that the validity of the *Auer* doctrine has been questioned in recent years."); *Goodson* v. *OS Rest. Servs., LLC*, 2017 WL 1957079, at *6 n.20 (M.D. Fla. 2017) (although Justice Scalia "[p]ersuasively argu[ed] that *Auer* Deference should be abandoned," "this Court remains obligated to defer to administrative pronouncements under *Auer*"); *Eisai, Inc.* v. *United States Food & Drug Admin.*, 134 F. Supp. 3d 384, 394 n.2 (D.D.C. 2015) ("*Auer* has been the target of skepticism in recent years. * * * This Court, however, is bound to follow *Auer* unless and until the Supreme Court modifies the relevant standard.").

It makes little sense for the lower courts to labor under this cloud of uncertainty. The Court should provide concrete guidance.

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

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

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

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

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

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

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

1. *Auer* deference is incompatible with due process, the "fundamental principle in our legal system * * * that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

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

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

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

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

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

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

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

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

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

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

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

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

C. This is a suitable vehicle to revisit *Auer*.

1. This case cleanly presents *Auer* deference in its most extreme form. To begin with, the sole basis of decision articulated by the court of appeals was

that the presence of two competing, reasonable constructions of the regulation obligated the court to declare the regulation "ambiguous." App., *infra*, 15a-17a. The court merely observed that "neither party's position strikes us as unreasonable." *Id.* at 17a. That is all it takes for *Auer* to apply: a "regulation is ambiguous on its face" whenever "competing definitions for a disputed term seem reasonable." *Ibid.* (quotation omitted). The panel did not offer an ounce of independent analysis as to the interpretative dispute. See *ibid.*

The decision below thus hangs entirely on the *Auer* doctrine. There is no factual dispute, nor did the panel identify any alternative ground for its holding.

This case is therefore unlike other recent petitions addressing *Auer*. In *United Student Aid Funds*, for example, the regulation was likely unambiguous. See Br. in Opp'n at 14-16, *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861). See also Br. in Opp'n at 16, *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14) ("[E]ven without such deference, [the court] had no difficulty upholding the FAA's interpretation of its regulations."). Here, however, the court of appeals' decision rests on an express finding of ambiguity.

What is more, the VA is a *party* to this litigation; in the Federal Circuit's view, the VA's *own* position—formulated during the adjudication of petitioner's claim—is decisive. The Court should be especially skeptical of *Auer* deference when an agency invokes it to resolve an adversarial proceeding in its own favor. *Auer* certainly should have no effect when the interpretation at issue advances the agency's fiscal self-interest.

Nor does this case possess any sort of vehicle defect that would preclude the Court from reaching the heart of *Auer*. In *Garco Construction*, the government opposed review in part because the regulation being construed was not itself the product of notice-and-comment procedures—and thus it did not pose a core *Auer* question. See, *e.g.*, Br. in Opp'n at 16-17, *Garco Constr. Co.* v. *Speer*, 138 S. Ct. 1052 (2017) (No. 17-225). The regulation here, 38 C.F.R. § 3.156(c)(1), was duly adopted pursuant to the APA, and thus all the concerns about an agency end-run around notice and comment apply.

There has been no policy change, moreover, that would render the underlying issue moot or unimportant. See *Garco* Br. in Opp'n at 18 (the outcome of the dispute would have "no ongoing effect on the Air Force's authority"). See also Br. in Opp'n at 19-20, *Hyosung D&P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141). And this case does not involve any special consideration—like deference to questions of military affairs—that would complicate review of *Auer*. Cf. *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (acknowledging that "the military receives substantial deference on matters of policy").

2. Review is also warranted because, under de novo review of the regulation, petitioner is substantially likely to prevail. To be sure, the proper course is for the Court to resolve the sole legal issue that governed below—*Auer* deference—and then remand for application of the proper standard to the particulars of this case. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). See also *Fitz-*

gerald v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) ("Ordinarily, 'we do not decide in the first instance issues not decided below.'"). It nonetheless bears mention that petitioner is very likely to prevail under the proper standard.

In petitioner's view, material is "relevant" for purposes of Section 3.156(c)(1) if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." App., *infra*, 13a. See also *id*. at 16a. That is to say, documents are "relevant" if they matter to the VA's decision whether to grant benefits. Because the documents at issue here "speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry," they are "relevant" as petitioner construes the regulation. *Id*. at 16a.

The VA, by contrast, advances a far narrower construction of "relevant." In the VA's view, the issue is not whether the documents are relevant to the VA's overall decision whether to grant a veteran benefits; instead, documents are "relevant" only if they directly bear on what was "in issue" during the VA's earlier decision to deny benefits. App., *infra*, 16a-17a.

For multiple reasons, petitioner offers the better construction. *First*, the regulation itself identifies that "relevant official service department records" include "records that are related to a claimed in-service event" or "injury." 38 C.F.R. § 3.156(c)(1). The materials at issue were relied on by the VA precisely because they are "related to a claimed in-service event" or "injury." The VA's narrower definition of "relevant" is therefore inconsistent with the text of Section 3.156(c)(1).

Second, the VA's construction of the term "relevant" renders it indistinguishable from "material," which Section 3.156(a) expressly defines as "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." If the VA had actually meant for Section 3.156(c)(1) to apply only to "material" evidence, it would have used that word.

Third, "relevant" is a legal term of art. Federal Rule of Evidence 401, for example, defines "relevant" as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." Whether petitioner's PTSD is attributable to an in-service stressor is undeniably a fact "of consequence in determining the action." Thus, the documents petitioner provided are "relevant" for purposes of these proceedings.

Fourth, to the extent that any doubt remains as to the proper construction of the veteran's disability program, ambiguities must be construed in petitioner's favor. 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) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). Indeed, the "solicitude of Congress for veterans is of long standing," which effectively "place[s] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 440 (quotation omitted). To the extent that there are multiple reasonable ways to construe "relevant" as used in Section 3.156(c)(1)—the conclusion reached below (App., *infra*, 15a-17a)—courts are obligated to choose the construction that favors veterans.

II. Alternatively, The Court Should Hold That *Auer* Deference Yields To Substantive Interpretative Canons.

This last point—the intersection of a substantive canon of construction and *Auer* deference—is an issue worthy of review in its own right. The federal courts of appeals are deeply divided on which interpretative tool comes first: a substantive canon of construction or deference to an agency's interpretation. The Court should grant review of this question, and, if it retains *Auer*, it should hold that deference to an agency is proper only after all other applicable canons have failed to resolve latent ambiguities.

A. The circuits are divided regarding the intersection of agency deference and substantive construction canons.

As Judge O'Malley's opinion dissenting from the denial of rehearing explained below, the question of whether a substantive canon of construction comes before or after agency deference doctrines is an important issue that has divided the circuits. App., *infra*, 50a-52a ("In a case like this one, where the agency's interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from [this Court's] precedent which interpretation should control."). Indeed, courts have acknowledged the circuit "split on which canon controls" in these circumstances. *Rancheria* v. *Hargan*, 296 F. Supp. 3d 256, 266 (D.D.C. 2017).

1. Several courts of appeals hold that substantive canons of construction should be applied *prior* to resorting to agency deference.

As the dissent below identified (App., *infra*, 52a), the **D.C. Circuit** holds that substantive interpreta-

tive tools trump agency deference doctrines. In the context of the pro-Indian canon,[1] the D.C. Circuit has held that agency deference—in particular, "*Chevron* deference"—"is not applicable." *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). The pro-Indian canon creates a mechanism to resolve ambiguities, and agencies are not exempt from that doctrine. See *ibid*.

The D.C. Circuit has applied this law with some frequency. See, *e.g.*, *Cobell* v. *Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (holding that the "normally-applicable [*Chevron*] deference was trumped by the requirement" to construe statutes "liberally in favor of the Indians"); *Massachusetts* v. *DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("As a result of this presumption, we have rejected agency interpretations of statutes that may have been reasonable in other contexts because the agency interpretation would not favor the Indians."); *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) ("Based on the special strength of this canon, we then declined to defer to DOI's interpretation of the governing statute, which had not followed the canon."); *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988) (holding that, because of the pro-Indian canon, "while we have given careful consideration to Interior's interpretation of the [statute], we do not defer to it").

Likewise, the D.C. Circuit applies the rule of lenity prior to agency deference. Because "the law of

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[1] The pro-Indian canon is closely parallel to the pro-veteran canon. Both are canons of "special strength." Compare App., *infra*, 52a, with *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (the canon of construction favoring Native Americans is one of "special strength").

crimes must be clear," "[t]here is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration." *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). In the criminal context, therefore, a court is "far outside *Chevron* territory." *Ibid.*

The D.C. Circuit's reconciliation of agency deference and substantive construction canons necessarily governs in *Auer* cases, too. In *Maniilaq Ass'n* v. *Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016), the court observed that, in the D.C. Circuit, "courts 'typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs.'" *Id.* at 248 n.4 (quoting *California Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008)). On this basis, the court concluded that "[t]here is good reason to believe that the canon trumps *Auer* deference as well." *Ibid.* The court thus applied the pro-Indian canon, rather than *Auer* deference. *Id.* at 247-248.

The **Tenth Circuit** has reached the same result. Expressly following D.C. Circuit precedent, the Tenth Circuit holds that "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997). As a result, "the canon of construction favoring Native Americans necessarily constrains the possible number of reasonable ways to read an ambiguity in the statute." *Ibid.* (alteration and quotation omitted).

The Tenth Circuit's holdings on this point are clear and unambiguous: the pro-Indian "canon of construction controls over more general rules of def-

erence to an agency's interpretation of an ambiguous statute." *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

As in the D.C. Circuit, courts have concluded that the Tenth Circuit's holding applies equally in the *Auer* context. That is, "Tenth Circuit precedent indicates that courts should not" "apply *Auer* deference to an agency's interpretation of the [statute's] promulgating regulations." *Navajo Health Found.-Sage Mem'l Hosp., Inc.* v. *Burwell*, 100 F. Supp. 3d 1122, 1175 (D.N.M. 2015). While "*Chevron* deference is distinct from *Auer* deference, the Tenth Circuit's rationale for not applying *Chevron* deference to * * * statutory provisions applies with equal force to *Auer* deference." *Ibid.*

2. Other circuits, however, disagree. To begin with, the **Federal Circuit** below applied *Auer*—not the pro-veteran canon—to resolve ambiguity. App., *infra*, 17a. Indeed, the three-judge dissent highlighted that this "case presents an ideal vehicle * * * to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction." *Id.* at 54a.

The **Ninth Circuit** likewise holds, in the context of the pro-Indian canon, that agency deference doctrines apply first. The Ninth Circuit has "declined to apply" the pro-Indian canon "in light of competing deference given to an agency charged with the statute's administration." *Haynes* v. *United States*, 891 F.2d 235, 239 (9th Cir. 1989). See also *Seldovia Native Ass'n, Inc.* v. *Lujan,* 904 F.2d 1335, 1342 (9th Cir. 1990) (observing that the court "recently rejected the application" of the pro-Indian canon in the context of agency deference).

Similarly, the Ninth Circuit concludes that agency deference applies prior to the rule of lenity. See *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1272 (9th Cir. 2001) ("To the extent that there is any ambiguity * * * , the [agency] has resolved it through a reasonable interpretation, and the rule of lenity does not apply.").

The **Second Circuit** and the **Fourth Circuit** have reached the same result in the lenity context. See *Oppedisano* v. *Holder*, 769 F.3d 147, 153 (2d Cir. 2014) (holding that the rule of lenity "does not trump *Chevron*'s requirement of deference to reasonable interpretations by administrative agencies of statutes for which they are responsible"); *Yi* v. *Federal Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we *defer* to the agency's reasonable construction of the statute.").

B. If *Auer* is maintained, the Court should require agencies to apply the substantive construction canons.

The Court has repeatedly narrowed *Auer* (see pp. 11-12, *supra*) where there exist "strong reasons for withholding the deference that *Auer* generally requires." *SmithKline Beecham Corp.*, 567 U.S. at 155. If *Auer* remains in some fashion, the Court should hold it inapplicable in the face of a substantive canon of construction.

In construing the statutes and regulations that they administer, agencies must use the ordinary tools of construction. *Auer* applies only if, after using those tools, the regulation remains ambiguous. See *Auer*, 519 U.S. at 462-463. There is no basis in law to

exempt agencies from applying substantive canons of construction—such as the veteran's solicitude canon—that govern everywhere else. It would be bizarre indeed if private litigants and courts were obligated to interpret regulations in this manner, but agencies were free to disregard these fundamental principles. To the extent *Auer* remains, it should yield to all other applicable rules of construction.

In his concurrence in *Crandon* v. *United States*, 494 U.S. 152, 177-178 (1990), Justice Scalia explained that agency deference should play little role in the construction of criminal laws, as that would "replac[e] the doctrine of lenity with a doctrine of severity." Rather, as Justice Scalia saw it, the rule of lenity—like all substantive construction canons—should take hold prior to agency deference.

As Judge O'Malley noted below in her dissent, "[w]hatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated." App., *infra*, 48a. Rather, "[w]hen these two doctrines pull in different directions, it is *Auer* deference that must give way." *Ibid.*

This conclusion, moreover, would resolve this case. As Judge O'Malley observed, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." App., *infra*, 51a.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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