No. 15-861

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UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

BRYANA BIBLE,

Respondents.

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

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

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QUESTION PRESENTED

Whether Auer v.

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INTEREST OF AMICI CURIAE *

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

Amici have a strong interest in apprising the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local gov--Et t82 0 TD

'check' on the political branches." Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). A brief review of Auer's practical operation illu strates Montesquieu's

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

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

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

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

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

ARGUMENT

I. AUER CREATES INCENTIVES FOR AGENCIES

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

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

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

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

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

means effectively eliminates the risk of a judicial in-

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

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

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

This case presents a particularly vivid example of the problem. When drafting its proposed rule, the Department failed to make clear two important features of its regulations, as it now construes them: First, that rehabilitation ag reements are a subset of "repayment agreement[s] on terms satisfactory to the [guarantor]." Compare 34 C.F.R. § 682.405, with id.

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

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

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

Under Chevron, an agency's statutory interpretation receives binding deference only if it carries the force of law—for example, if it is promulgated through notice and comment. Christensen, 529 U.S. at 587–88. Auer, however, creates a loophole—enabling an agency to receive binding deference to its informal interpretation of that regulation, which can then be changed if the ag ency changes its mind. Auer

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

A. Auer Short-Circuits Cooperative Federalism.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For example, in 2011, EPA proffered an expansive interpretation of the phrase "waters of the United States" under the Clean Water Act. See EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Wa-

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

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

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

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

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

C. Auer Enables Agencies to Exercise Broad Preemption Powers Without Providing States and Localities out4t wers ce En

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

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

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

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

III. THIS COURT SHOULD GRANT CERTIORARI AND ABANDON AUER AND SEMINOLE ROCK, OR AT THE VERY LEAST OVERRULE

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

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

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

Rev. 681, 702–04 (2008) ("The Court's treatment of the Chevron doctrine as just t hat—a doctrine—closely parallels the Court's treatme nt of textual canons.").

As numerous scholars have observed, "federal courts have never given stare decisis effect to interpretive methodology." Evan J. Criddle & Glen Staszewski, Against Methodological Stare Decisis , 102 Geo. L.J. 1573, 1591–95 (2014); Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism , 119 Yale L.J. 1750, 1765 (2010) ("[T]he Court does not give stare decisis effect to any statements of statutory interpretation methodology."); Raso & Eskridge, 110 Colum. L. Rev. at 1727, 1733–34 (describing "the Court's deference decisions in the form of canons of statutory construction, and certainly not as precedents entitled to stare decisis effect"); Sydney Foster, gytShould Tc .d7 G.5(o)r346 Tw [(102 Geo. 0 1 Tf 6.1.in0y nc

to Skidmore v.

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

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

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX – INTEREST OF AMICI

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

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

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

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

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

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

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

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

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

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

board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequ ntly in cases involving