No. 15-861

In the Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

BRYANA BIBLE,

Respondent.

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

BRIEF OF AMICI CURIAE STATE OF UTAH AND 15 OTHER STATES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae—the States of Utah, Texas, Wisconsin, Alabama, Arkansas, Arizona, Georgia, Indiana, Kansas, Montana, Nevada, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming—submit this brief in support of Petitioner because the decision below demonstrates that this Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), have improperly increased the power of federal agencies, contrary to principles of federalism and administrative law. As Judge Easterbrook observed in an opinion concurring in denial of rehearing *en banc* of the decision below, the *Auer/Seminole Rock* doctrine of deference should be reconsidered, and this case presents an ideal vehicle for doing so. *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015). This court should grant the petition and reject the *Auer/Seminole Rock* doctrine of deference once and for all.

Amici States take seriously their obligation to defend the rights of their citizens and the interest of their citizens in state sovereignty. Chief among those at issue here are the States' interest in properly balanced federalism in the separation of powers between the federal government and the several States, as well as in the consistent and non-arbitrary application of federal regulations. In the interest of protecting citizens' rights to self-governance through state government, ensuring that federal

[1] Amici certify that they provided counsel of record for Petitioner and Respondent timely notice of their intent to file this brief. *See* SUP. CT. R. 37.2(a), 37.4.

administrative regulations are not arbitrarily applied, and to avoid a misapplication of the important doctrine of federalism, Amici States urge this Court to grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), require courts to give "controlling weight" to agency interpretations of ambiguous regulations. *Seminole Rock*, 325 U.S. at 414. There is a growing recognition by jurists and scholars, including members of this Court, that the doctrine of deference set forth in these cases raises grave separation of powers and administrative law concerns. By placing the separate powers to write and to interpret law in the same hands, this doctrine encourages vague regulations, ever shifting administrative interpretations, and arbitrary government. In light of these concerns, various members of this Court—including Justice Scalia, the author of *Auer*—have indicated their willingness to reconsider the *Auer/Seminole Rock* doctrine in an appropriate case. *See*, *e.g.*, *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *cf. Gonzales v. Oregon*, 546 U.S. 243, 256–59 (2006) (Kennedy, J.) (finding *Auer/Seminole Rock*

deference inapplicable where agency rule merely echoed open-ended statutory language).

In addition to separation of powers and administrative law concerns, the *Auer/Seminole Rock* doctrine also subverts basic principles of federalism. Affording the force of federal law—and thus the ability to preempt contrary state laws—to agency interpretations of ambiguous regulations cannot be squared with the text or spirit of the Supremacy Clause, for such interpretations are not "made in pursuance" of the Constitution as that Clause requires. *See Medellín v. Texas*, 552 U.S. 491, 523–532 (2008); *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998). In addition, the *Auer/Seminole Rock* doctrine deprives States of the protections afforded them by the political process. Although the Constitution guarantees the States a role in the composition of the federal legislature in order to ensure that their interests are heard and understood, the States lack any such role in the composition of federal agencies. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985). Finally, by allowing—indeed encouraging—agencies to evade the notice-and-comment requirements of the Administrative Procedure Act, the *Auer/Seminole Rock* doctrine deprives States of the opportunity to participate in the rulemaking process intended by that statute.

This petition presents the Court with an ideal vehicle for reconsidering the *Auer/Seminole Rock* doctrine. Not only does the case below squarely present the continued viability of this doctrine, it also provides a textbook example of the excesses and untoward effects of the doctrine in operation. This

Court should grant certiorari.

ARGUMENT

I. The Court Should Grant Certiorari to Revisit Its Holdings in *Auer v. Robbins* And *Bowles v. Seminole Rock & Sand Co.*

A. As Several Members of the Court Have Recognized, the Judicial Doctrine Requiring Deference to an Agency's Interpretations of Its Own Regulations Is Ripe for Reconsideration.

"In a democracy, the power to make the law rests with those chosen by the people." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). There is growing agreement that deferring to an agency's interpretations of its own regulations, as required by this Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), is inconsistent with this fundamental principle. Indeed, the author of *Auer* himself, Justice Scalia, has acknowledged, "while I have in the past uncritically accepted [the *Auer/Seminole Rock*] rule, I have become increasingly doubtful of its validity." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

To be sure, under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), federal courts defer, in at least some circumstances, to reasonable agency

interpretations of ambiguous statutes "because of a 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 (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996). But leaving aside the soundness of *Chevron*'s rationale, "*Auer* is not a logical corollary to *Chevron*." *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part). For even assuming that "the implication of an agency power to clarify [an ambiguous] statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations." *Id*. To the contrary, as Justice Scalia has explained, *Auer* constitutes "a dangerous permission slip for the arrogation of power." *Id.* Indeed, judicial deference to an agency's interpretation of its own regulations "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Id*. This perilous combination "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

Several other Justices have also questioned the soundness of *Auer* and *Seminole Rock*. Recognizing that these cases raise issues that go "to the heart of administrative law," Chief Justice Roberts has indicated his willingness to revisit the *Auer/Seminole*

Rock doctrine in "a case in which the issue is properly raised and argued." *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). Justice Alito has likewise indicated that he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment). And Justice Thomas has stated that "[b]y [his] best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." *Id.* at 1225 (Thomas, J., concurring in the judgment); *cf. Gonzales v. Oregon*, 546 U.S. 243, 256–59, 263–68 (2006) (Kennedy, J.) (finding *Auer/Seminole Rock* deference inapplicable but indicating that deference is inappropriate where congressional delegation of interpretive authority is doubtful). This petition presents the "appropriate case" for "explor[ing]" and "reconsider[ing]" the continued soundness of *Auer* and *Seminole Rock*.

B. The *Auer/Seminole Rock* Doctrine Has Been Roundly Criticized by the Lower Courts and Legal Scholars.

1. Lower courts likewise recognize that *Auer* "raises serious separation-of-powers and administrative law concerns." *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 676 F.3d 566, 576 n.5 (7th Cir. 2012), as amended May 9, 2012; *see also, e.g.*, *Johnson v. McDonald*, 762 F.3d 1362, 1367 (Fed. Cir. 2014) (O'Malley, J., concurring); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1291 n.8 (10th Cir. 2011). After all, *Auer* deference subverts the constitutional division of powers by allowing agencies

"to function not only as judge, jury, and executioner but to do so while crafting new rules." *Elgin Nursing & Rehab. Ctr. v. United States Dep't of Health & Human Servs.*, 718 F.3d 488, 494 (5th Cir. 2013). In addition, the *Auer/Seminole Rock* doctrine gives agencies a "perverse incentive . . . to issue ambiguous regulations." *Perez v. Loren Cook Co.*, 803 F.3d 935, 938 n.2 (8th Cir. 2015).

2. Prominent scholars have also criticized the *Auer/Seminole Rock* doctrine. In his seminal article on this issue, Professor John Manning persuasively demonstrated that judicial deference to agency interpretations of ambiguous agency regulations creates a powerful incentive for agencies not to clarify ambiguous statutes, but simply to enact ambiguous regulations. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 660–69 (1996). The end result is to deprive the regulated community of notice, to limit "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action," and to "undermine the effectiveness of external political checks on administrative agencies." *Id.* at 654. Professor Manning also highlighted the serious separation of powers concerns raised by the *Auer/Seminole Rock* doctrine. *See id.* "With administrative agencies exercising delegated lawmaking authority, as well as performing executive and adjudicative functions, it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes." *Id.* at 682 (footnote omitted). Yet the *Auer/Seminole Rock* doctrine vitiates the meaningful external check that judicial review could otherwise provide. For all of these reasons, Professor

Manning urged this Court to "abandon *Seminole Rock* deference and replace it with an independent judicial check on agency interpretations of agency rules." *Id.* at 696.

More recently, in his sweeping study of the historical origins and antecedents of the modern administrative state, Professor Philip Hamburger forcefully argued that deferring to an agency's interpretation of its own regulations amounts to an "abandonment of judicial office," an abandonment that is particularly striking given that "the Court would not defer to an act of Congress interpreting a prior act" of Congress. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 317 & n.25 (2014). Many other scholars have voiced concerns similar to those of Professors Manning and Hamburger. *See*, *e.g.*, Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647, 667 (2015) (observing that "the *Seminole Rock/Auer* doctrine has expanded from its constrained origins into an 'axiom of judicial review,' but no one has ever explained why" (footnote omitted)); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 90–91 (2015) (explaining the "sense" of various academics and Supreme Court justices "that an unreflective rule of deference has facilitated tenuous agency interpretations at the expense of fair notice and process"); Timothy H. Gray, *Manual Override?* Accardi*,* Skidmore*, and the Legal Effect of the Social Security Administration's Hallex Manual*, 114 COLUM. L. REV. 949, 966 (2014) (observing that *Auer* "has been subject to severe scholarly criticism"); Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U.

KAN. L. REV. 633, 693 (2014) (arguing "that the Court should take advantage of this time of uncertainty in the law to end the *Auer/Seminole Rock* line of cases"); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 231–32 (2013) (embracing Professor Manning's critique); James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 365 (2013) (noting that *Auer* has been "criticized for allowing self-delegation by agencies and creating improper incentives against careful rulemaking"); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 11–12 (1996) (arguing that deference to agency interpretations of agency regulations 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"); Charles J. Cooper, *Confronting the Administrative State*, 25 NAT'L AFF 96, 104 (2015) *available at* http://goo.gl/u8PQ4N (Under *Auer*, "the administrative state has executive power to enforce its laws, as it alone has interpreted them, liberated from any meaningful review by the courts and often from any meaningful control by the president. It can truly be said that, in the main pursuits of everyday life, we are ruled by a one-branch government.").

C. *Stare Decisis* Does Not Weigh Against Granting Certiorari to Revisit the *Auer/Seminole Rock* Doctrine.

Neither the reasoning of *Auer* and *Seminole Rock*, "the antiquity of the precedent, [nor] the

reliance interests at stake," counsels in favor of adhering to the doctrine set forth in these cases as a matter of *stare decisis*. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). "The first case to apply [such deference], *Seminole Rock*, offered no justification whatever" but rested solely on terse "*ipse dixit*." *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part). *Auer* uncritically extended *Chevron* deference to interpretations of agency regulations. Indeed none of this Court's cases has "put forward a persuasive justification for *Auer* deference." *Id.* Nor does the history of the *Auer/Seminole Rock* doctrine justify deference to an agency's interpretation of its own regulations. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). In all events, *stare decisis* does not exist to protect the reliance interests of government administrators in their own power, and overruling precedent that serves primarily to encourage the promulgation of ambiguous regulations and ever changing administrative interpretations hardly upsets other settled expectations.

II. The Court Should Grant Certiorari to Vindicate Constitutional Principles of Federalism.

The *Auer/Seminole Rock* doctrine is also flatly inconsistent with the federal system of government established by our Constitution and undermines the ability of States to influence federal policies that may affect their own interests and those of their citizens.

A. The *Auer/Seminole Rock* Doctrine Cannot Be Reconciled with the Supremacy Clause.

Article VI, clause 2 of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2. By ratifying the Constitution, the States thus agreed that their own laws would be preempted by federal laws enacted in the manner prescribed by the Constitution. Because the *Auer/Seminole Rock* doctrine gives the preemptive force of federal law not only to duly enacted statutes—or even formal regulations promulgated pursuant to express or implied delegations of legislative authority—but also to informal, even *ad hoc*, administrative interpretations of ambiguous regulations, it cannot be squared with the Supremacy Clause.

The Constitution requires that legislation be approved by both houses of Congress and presented to the President before it can become law. U.S. CONST. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998). The constitutional requirements of bicameralism and presentment serve essential constitutional functions and reflect the Framers' decision that the legislative power of the Federal government "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id*. at 419.

This Court has nonetheless held that state laws may be preempted not only by duly enacted statutes,

but also by "a federal agency acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988). This result may perhaps be justified where Congress has expressly or at least implicitly "delegated to the agency the authority to interpret [statutory] ambiguities 'with the force of law.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). But this theory cannot justify allowing a federal agency to displace state law based on its interpretation of an ambiguous regulation. For even if it is reasonable to assume that by charging an agency with implementing a statute, Congress has implicitly authorized that agency to resolve any ambiguities in that statute, *see, e.g.*, *Smiley*, 517 U.S. at 741, "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations." *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting).

The *Auer/Seminole Rock* doctrine requires courts to give "controlling weight" to an agency's interpretation of its own regulation unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. This doctrine has been applied even when the agency interpretation conflicts with or purports to displace state law. *See*, *e.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2574–81 (2011); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000); *Wells Fargo Bank of Texas N.A. v. James*, 321 F.3d 488, 494–95 (5th Cir. 2003). But an agency's interpretation of an ambiguous regulation—where the ambiguity is created not by

Congress, but by the agency itself—cannot plausibly be understood to be a law "made in pursuance" of the Constitution. Because the *Auer/Seminole Rock* doctrine nevertheless requires courts to give the preemptive force of law to such interpretations, it simply cannot be squared with the text or spirit of the Supremacy Clause. For our federal system of government does not permit even the President of the United States—let alone a mere administrative functionary—to arrogate to himself the power to preempt state law. *See Medellín v. Texas*, 552 U.S. 491,523–532 (2008) (holding that the President could not preempt state law absent constitutional or statutory authorization).

B. The *Auer/Seminole Rock* Doctrine Undermines the Political Protections Afforded to the States by the Constitution.

"Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). In particular, "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550–51. Perhaps most notably, the bicameralism required by Article I, Section 7, ensures that legislation must first win the approval of the Senate, "where each State received equal representation and each Senator was to be selected by the legislature of his State," before it may become a law. *Garcia*, 469

U.S. at 551. More generally, the Framers believed that because of their attachment to their individual States, legislators would "be disinclined to invade the rights of the individual States, or the prerogatives of their governments." THE FEDERALIST NO. 46, at 297 (James Madison) (Clinton Rossiter ed., 1961).

Even after the adoption of the Seventeenth Amendment, States retain their equal representation in the Senate, and Senators, as well as Representatives, are elected from specific States and have a powerful incentive to be responsive to the needs and interests of their constituents and of the States they represent. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954) ("To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

The States clearly have no analogous direct constitutional role in the composition of federal agencies. It follows that agencies have fewer institutional incentives to respect state interests or local concerns when they promulgate regulations than does Congress when it enacts statutes. And agencies have still fewer incentives to do so when they do not promulgate clear rules to resolve statutory ambiguities, but instead promulgate vague regulations and later interpret those regulations on a shifting, *ad hoc* basis. For as the link between agency action and statutory authority becomes increasingly

attenuated, the States' chances of meaningfully influencing federal policies that may directly affect their own prerogatives and the interests of their citizens becomes ever more remote. *See* Manning, *Constitutional Structure*, 96 COLUM. L. REV. at 654 (explaining that the *Auer/Seminole Rock* doctrine "undermine[s] the effectiveness of external political checks on administrative agencies").

By giving "controlling weight"—in effect, the force of law—to agency interpretations of ambiguous regulations, the *Auer/Seminole Rock* doctrine nullifies the vital political safeguards afforded the States by their close connection to the lawmaking process ordained by the Constitution.

C. The *Auer/Seminole Rock* Doctrine Allows Agencies to Circumvent the Procedural Safeguards Available to States Under the Administrative Procedure Act.

In most circumstances, the Administrative Procedure Act ("APA") requires that substantive regulations be promulgated through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. When agencies promulgate clear regulations through notice-and-comment rulemaking, States, like other interested parties, are afforded an opportunity to make their interests and views known. Indeed, States actively participate in notice-and-comment rulemaking to ensure that their interests, and those of their citizens, are understood and respected by federal agencies. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV.

953, 984–95 (2014) (discussing the role of the States and state interest groups in administrative proceedings); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 777–78 (2004) (reviewing opportunities for the States to participate in the administrative process).

The *Auer/Seminole Rock* doctrine, however, distorts the regulatory process contemplated by the APA, creating an incentive for agencies to issue—and subsequently to interpret—ambiguous regulations and thus avoid the meaningful accountability contemplated by the notice-and-comment requirements. *See, e.g.*, Manning, *Constitutional Structure*, 96 COLUM. L. REV. at 654 (explaining that the *Auer/Seminole Rock* doctrine limits "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action"). As Justice Thomas has explained, in light of *Auer* and *Seminole Rock*, "[i]t is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). In short, when courts give "controlling weight" to agency interpretations of ambiguous regulations, they sanction administrative circumvention of the APA, in effect "allow[ing] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

As a result of the *Auer/Seminole Rock* doctrine, therefore, States, like other interested parties, are

deprived of the procedural protections intended by the APA and have only limited opportunities, if any, to contribute to or influence many federal actions that may adversely affect their interests and those of their citizens.

III. This Case Provides the Court an Ideal Vehicle for Revisiting the *Auer/Seminole Rock* Doctrine.

This Petition presents the Court with an ideal vehicle for revisiting the *Auer/Seminole Rock* doctrine. Not only does the case below squarely present the continued viability of this doctrine, it also provides a textbook example of the excesses and untoward effects of the doctrine in operation.

As Judge Easterbrook observed in an opinion concurring in denial of rehearing *en banc* of the decision below, "[t]he positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome." *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015). Each member of the panel wrote separately. Judge Hamilton read the regulation on which this case turns in a manner consistent with the agency's views. Judge Manion, in dissent, read the regulation in precisely the opposite way. The third member of the panel, Judge Flaum, believed his colleagues had each "offer[ed] plausible readings of [a] complex and ambiguous regulatory scheme." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 663 (7th Cir. 2015). Indeed, he expressed significant sympathy for the reading of the regulation offered by Judge Manion in dissent. *See id.* at 661–62.

Pursuant to the *Auer/Seminole Rock* doctrine, however, "Judge Flaum thought that the court [was] required . . . to accept the agency's view [of the regulation] even though this view was announced in a brief filed as amicus curiae in this suit and contradicts some earlier statements by the [agency]." *Bible*, 807 F.3d at 841 (Easterbrook, J., concurring in denial of rehearing *en banc*).

Further, this case starkly "illuminates" the "effects" of the *Auer/Seminole Rock* doctrine. *Id.* at 841. As Judge Easterbrook explained, in this case the deference required by this doctrine "has set the stage for a conclusion that conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal." *Id.* at 841–42.

For all of these reasons, the Petition in this case presents the Court with the ideal vehicle to revisit the *Auer/Seminole Rock* doctrine.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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