No. 15-861

IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

BRYANA BIBLE, individually and on behalf of the proposed class,

Respondent.

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

BRIEF OF PROFESSOR PHILIP HAMBURGER AND WASHINGTON LEGAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici curiae address the following question only:

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

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INTERESTS OF *AMICI CURIAE*[1]

Philip Hamburger is the Maurice and Hilda Friedman Professor of Law at the Columbia University School of Law, where his scholarship concentrates on constitutional law, administrative power, and their history. The author of dozens of law review articles and three scholarly books, including *Is Administrative Law Unlawful?* (Univ. of Chicago Press, 2014), Professor Hamburger's work has chronicled the steady aggrandizement of power by the administrative state. Professor Hamburger believes that *Auer* deference raises serious constitutional concerns, not only by abandoning the judges' constitutional office of independent judgment, but also by subjecting litigants to judicial bias, in violation of the due process of law.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for *amici* notified counsel of record for all parties of *amici*'s intention to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

accountable government, and the rule of law. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to advance its view that government agencies should not be accorded undue deference. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

Amici believe that the office enjoyed by judges under Article III of the Constitution is one of independent judgment, not deference, heightened respect, or other predisposed bias toward the most powerful of parties—the federal government. Such deference represents a dramatic departure from judicial independence, due process, and the rule of law. Even where agencies receive statutory authorization to interpret rules and regulations for their own purposes, serious constitutional questions persist about the role of judges and the specter of systematic bias.

Amici fear that if the Court allows the rule of deference announced in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), to stand, it will sanction a profound and ongoing injustice that damages its reputation. To preserve the Judiciary's legitimacy, this Court should grant the petition and use this case as the vehicle for rejecting *Auer* and *Seminole Rock* once and for all.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents a question of exceptional importance: How much deference, if any, do federal courts owe to an administrative agency's interpretation of its own regulation? The default rule announced in *Auer v. Robbins*, which requires reviewing courts "to 'decide' that the text means what the agency says," *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment), requires Article III judges to abandon their office and duty of independent judgment, and to engage in systematic bias, in violation of the Fifth Amendment's guarantee of due process of law. As shown below, this dangerous departure from judicial office and due process has profound consequences for the reputation of the judiciary and the legitimacy of the government.

When the Constitution authorized judicial power under Article III, it took for granted that judges, in line with common law ideals of judicial office, had an office or duty to exercise independent judgment about what the law is. As Chief Justice Marshall famously put it in *Marbury v. Madison*, "It is emphatically the duty of the Judicial Department to say what the law is." 5 U.S. 137, 177 (1803). It therefore must be asked how judges can defer to the interpretations or judgments of federal bureaucrats in administrative agencies. By unduly respecting or otherwise deferring to the judgment of such agencies under *Auer*, judges are abandoning their solemn duty—indeed, their very office—of independent judgment.

To make matters worse, the agency to which a court must defer under *Auer* is frequently a party to the case before the court. In such instances, *Auer* essentially requires judges to accept one litigant's argument over another's, as long as that position is not "clearly erroneous." While *Auer* precommits judges to favor one party over another, the Fifth Amendment's guarantee of due process of law requires judges not to be precommitted to any party. *Auer* therefore requires judges to adopt a systematic bias in favor of the government, in violation of the due process of law.

These constitutional questions about the role of the Judiciary in light of *Auer* should worry all Americans, but they should especially concern the justices on this Court. No amount of statutory authority can put these fundamental questions to rest. A mere statute may allow an agency to interpret laws and regulations for its own purposes, but it cannot excuse the judges from their constitutional duty to exercise their own independent judgment to "expound and interpret the rule." *Marbury*, 5 U.S. at 177. Nor can it brush aside the constitutional right of litigants to a process that is free from systematic bias.

The time has come for this Court to answer these vexing questions. *Amici* join with petitioner in asking this Court to grant certiorari.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE *AUER* REQUIRES JUDGES TO GIVE UP THEIR INDEPENDENT JUDGMENT IN VIOLATION OF ARTICLE III

In *Auer v. Robbins*, this Court held that judges must give an agency's interpretation of its own rules "controlling" weight as long as the interpretation is not "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. Such deference is even broader than that required for agency interpretations of statutes in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837, 866 (1984). Under *Auer*, for example, when a regulation interpreting an ambiguous statute contains an ambiguity, the agency's interpretation of that regulation (and by extension, its interpretation of that statute) is entitled to complete deference. This is especially problematic given that the range of documents eligible for deference under *Auer* is much broader than under *Chevron*. *See Auer*, 519 U.S. at 462.

Although administrative rules are not laws per se, many are considered binding under the Administrative Procedure Act (APA) and enjoy the force of law. *See* 5 U.S.C. § 551(4) (defining a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."). At the very least, many administrative rules give effect to statutes that bind. And when judges defer to an agency's interpretation of its own rules—those that either have the force of law or give effect to statutes

with the force of law—the judges surely must satisfy the same constitutional standard of judgment, and duty of office, as in their interpretations of statutory and common law. In stark contrast, *Auer* requires judges to abandon their constitutional office of independent judgment in favor of the Executive Branch's interpretation.

A. Under Article III, Judges Have an Office or Duty to Exercise Their Own Independent Judgment in Each Case

Article III of the Constitution vests the courts with the judicial power and protects individual judges in their "[o]ffice." U.S. Const. art. III, § 1. Whereas the judicial power of the courts centrally includes the power to hear and decide cases and controversies, a judge's office centrally is a duty to judge—to exercise independent judgment in interpreting the law of the land in each case. As Chief Justice Marshall explained in *Marbury v. Madison*, "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule." 5 U.S. at 177.

Judicial independence has been a touchstone of legitimate governance since the Middle Ages, *see* Philip Hamburger, *Law and Judicial Duty* 149-50 (2008), and has been an impediment to deference to prerogative or administrative interpretation since the early seventeenth century, when English kings demanded judicial deference to prerogative interpretations of statutes, and some leading judges rejected such deference as incompatible with their

office or duty. Although King James I demanded judicial deference to prerogative interpretations of statutes on the theory that "[t]he King being the author of the Lawe is the interpreter of the Lawe," Hamburger, *Law and Judicial Duty* 223, the judges responded that, although all judicial power was exercised in the name of the monarch, judicial power rested in the judges. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608). Unlike prerogative judges, the law judges could not defer to royal or prerogative interpretations, because they had a duty of independent judgment. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 145 (2014) ("The core of judicial office was thus the duty of independent judgment. This internal commitment distinguished the law judges from prerogative judges and … it still distinguishes them from administrative judges.").

The American colonists carried this principle with them across the Atlantic, where even before declaring their own independence from tyranny, they fought to keep judges independent of the Crown. *See* Hamburger, *Law and Judicial Duty*, 513-14 (chronicling the controversy over Chief Justice Peter Oliver). And later, in the Declaration of Independence, Thomas Jefferson identified the desire for a truly independent judiciary as a basis for seceding from the British Crown. *The Declaration of Independence* para. 3 (U.S. 1776) (objecting to judges who were "dependent on [King George's] will alone").

The quest for judicial independence was also embodied in the idea of separation of powers. The French political philosopher Montesquieu, in his famous *Spirit of the Laws*, provided the classic formulation of the separation of powers:

> Again, there is no liberty if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

Charles de Montesquieu, *Spirit of the Laws* 151-52 (O. Piest ed., T. Nugent trans. 1949) (1748). The earliest state constitutions guarded against such dangers by establishing three separate branches of government, and when the Constitutional Convention of 1787 convened, the delegates' first substantive vote was to create a new government consisting of the three branches. *See* 1 *Records of the Federal Convention of 1787* 30-31 (Max Farrand ed., Yale Univ. Press 1911). On account of the exceptions necessary for checks and balances, most state constitutions and the U.S. constitution did not rigidly guarantee the separation of powers; instead, by authorizing the three branches of government, they established separation as a "fundamental" default principle, subject to "positively enumerated" exceptions. *See* Hamburger, *Is Administrative Law Unlawful?* 331-32 (quoting St. George Tucker).

The duty of independent judgment was grounded not simply in the separation of powers but also in Article III. Judges in the common law tradition were understood to have an office of independent judgment, and the Constitution imposed this duty when it established courts with

judges. *See* U.S. Const. art. III, § 1 ("The Judges"). The Constitution also conveyed this duty when it placed the judicial power in the courts. *See ibid* ("The judicial Power of the United States"). When James Iredell in 1786 explained the duty of the judges under the "judicial power" of the North Carolina Constitution, he spoke of "[t]he duty of the power." James Iredell, *To the Public*, N.C. Gazette (Newbern) (Aug. 17, 1786). Similarly, the duty came with the judicial power of the United States.

Because of their duty of independent judgment, the judges had to reach their own judgments about interpretation. To protect the judges' independent judgment from external threats, the Constitution guaranteed them life tenure and undiminished salaries. *See* U.S. Const. art. III, § 1. Their independence, however, consisted of more than just these outward, institutional protections. Judges more basically had an internal duty to exercise their own independent judgment about the law of the land, and they therefore were not to be predisposed to any party in reaching judgments about what the law is—that is, in interpreting the law. As put by Nathaniel Gorham in the 1787 Constitutional Convention, "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them." 2 *Records of the Federal Convention of 1787* 79; *cf.* Hamburger, *Law and Judicial Duty* 507-12 (discussing internal duty of independent judgment).

This duty was what gave judicial interpretation its distinctive legal authority. As the *Federalist Papers* explained, "[t]he interpretation of laws is the proper and peculiar province of the

courts." *The Federalist* No. 78 (Alexander Hamilton). This was not to say that other Americans, including those in the Executive Branch, did not have to interpret for their own purposes, but rather that because judges interpreted in pursuit of their constitutional office of independent judgment, interpretation was peculiarly their office and thus had the authority of their office. *Cf.* Hamburger, *Law and Judicial Duty* 543-48 (discussing authority of judicial interpretation).

The duty of independent judgment was profoundly personal, and some of the nation's finest early jurists felt obliged to exercise their judgment independently not merely of the Executive, but also of their fellow justices. *See, e.g., Georgia v. Brailsford*, 2 U.S. 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties."); *United States v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, C.J.) ("[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide."); *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986) ("After all, judges are charged by statute and Constitution with deciding legal questions.").

B. *Auer* Requires Judges to Violate Article III by Abandoning Their Independent Judgment

A judge's office under Article III requires an exercise of judgment independent of the Executive's will, and the office thus leaves no room for deference, let alone obligatory deference, to an administrative body's interpretation of its own ambiguous rules. Nonetheless, *Auer* requires judges to abandon their duty of office by forgoing their own independent judgments in favor of those of the agency.

This misguided deference erodes the structural safeguards that the Framers erected as a bulwark against tyranny. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 618 (1996) ("*Seminole Rock* leaves an agency free both to write a law and then to 'say what the law is' through its authoritative interpretations of its own regulations."). Even more fundamentally, however, *Auer* deference requires the judges to give up their very office as judges.

Most inquiries into the constitutional limits on the Judiciary's reflexive deference to an agency's interpretations have tended to focus on the interplay between the legislative and executive branches (*i.e.*, questions of delegation, representative government, etc.). *See, e.g.,* Kathryn A. Watts, *Rulemaking as Legislating*, 130 Geo. L.J. 1003 (2015); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L.J. 269 (1988). And while there is good reason to view agency rulemaking and interpretation as a

form of unconstitutionally delegated lawmaking, this narrow line of inquiry fails to appreciate the judges' unique office or duty.

In other words, the judicial deference problem is separate and distinct from the agency interpretation problem. Even where agencies have statutory authorization to interpret laws and regulations for their own purposes, constitutional questions remain about the role of judges, because the Constitution gives them a duty of independent judgment in exercising their judicial office. By focusing on statutory questions of congressional authorization, as if no larger principle were at stake, federal judges fail to confront the steady erosion of their very office under Article III. Yet congressional authorization of agency interpretations can never relieve federal judges of their constitutional duty, in each case, to exercise their own independent judgment about the legal questions before them.

1. Congress may not alter the core duty of Article III judges

Even if Congress may grant agencies the power to both promulgate and interpret their own regulatory rules (by which the agencies bind the American people or give effect to binding statutes), this subdelegation of legislative power to agencies does not obviate a judge's duty under Article III to make an independent judgment of what the law is in any given case or controversy. *See* Speech of Pa. Rep. Lewis on Impeachment of the Pa. Judges, *in Respublica v. Oswald*, 1 U.S. 319, 337 n.* (1788) ("[T]he legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which

is the natural and exclusive province of the judicial branch of the government.") (emphasis added).

Federal judges enjoy their office under the Constitution, and Congress therefore cannot excuse them from their duty of independent judgment. Nor can any statutory grant of judicial-like power to executive agencies displace the constitutional duty of Article III judges to exercise their own independent judgment in cases properly within their jurisdiction. *See ibid* ("[T]he courts of justice derive their powers from the constitution, a force paramount to the legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter.").

While Congress may enumerate which types of cases and controversies the federal courts may hear, it cannot bar judges from adjudicating particular issues or considering particular arguments in cases properly before them. "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them." *Yakus v. United States*, 312 U.S. 414, 468 (1944) (Rutledge, J., dissenting); s*ee also Martin v. Hunter's Lessee*, 14 U.S. 304, 329 (1816) ("If then, it is the duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole* judicial power.") (emphasis added).

The question about whether Congress has authorized agencies to interpret the law is therefore irrelevant to the role of federal judges. The judges'

duty of independent judgment rests on constitutional foundations, and it therefore cannot be dislodged by mere congressional enactments.

2. Article III judges may not abdicate their core duty

Just as the Constitution bars Congress from interfering with the judges' office of independent judgment, so too it bars the judges from abdicating their independent judgment. *Auer* thus cannot compel Article III judges to surrender this core duty of their constitutional office.

In the context of constitutional questions, this Court already has recognized that deference to the Executive Branch's legal interpretations constitutes an "inappropriate" abdication of the judicial role. *See Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (holding that deference to the Department of Justice's opinion "surrender[s] to the Executive Branch" the role of the courts); *see also United States v. Nixon,* 418 U.S. 683, 704 (1974) (holding that judicial power cannot be shared with the Executive Branch).

Article III therefore cannot abide a judicially created dogma that requires judges to rely on the judgment of administrators in place of the judges' own independent judgment about what the law is. This independent judgment is the central constitutional duty of the judges, and by compelling federal judges to give up this function in some cases, *Auer* requires federal judges to abandon their very office as judges. *Cf. Yarborough v. Alvarado*, 541 U.S. 652, 663-64 (2004) (discussing the "substantial

element of judgment" that federal judges must exercise "when applying a broadly written rule to a specific case"). Even if Congress may task an agency with making rules that bind or give effect to binding statutes, once the meaning and application of those rules in a particular case or controversy is called into question, it is unquestionably the role of the Judiciary to "say what the law is." *Marbury*, 5 U.S. at 177. The duty of independent judgment is the very office of an Article III judge; *Auer* cannot require judges to abdicate this duty.

II. REVIEW IS WARRANTED BECAUSE, WHEN THE GOVERNMENT IS A PARTY, *AUER* REQUIRES JUDGES TO EXHIBIT SYSTEMATIC BIAS, IN VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

One of the advantages of having judges who exercise their own independent judgment is protection against bias. In sharp contrast, one of the costs of *Auer* deference is that, where the government is a party, *Auer* systematizes a precommitment in favor of the government—a bias that violates the Fifth Amendment's guarantee of due process. Although the government is not a party to this case, any delay in overturning *Auer* will have important consequences in those cases to which the government is a party. For that reason, certiorari is independently warranted to correct the systematic bias that *Auer* not only makes possible, but affirmatively requires.

A. The Fifth Amendment's Due Process Clause Bars Judges from Deciding Cases with a Predisposition in Favor of a Party or Class of Parties

The Fifth Amendment dictates that no person "shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. The Due Process Clause "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). At a bare minimum, due process requires not only impartiality in fact, but also the appearance of impartiality on the part of judges. Such impartiality and the absence of bias are "the *sine qua non* of the American legal system." *Haines v. Liggett Group*, 975 F.2d 81, 98 (3d Cir. 1992)*; see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) ("Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.").

Far beyond mere procedural "fairness," the "due process of law" historically has been understood as a requirement that government must act "through judges whose office required them to exercise independent judgment in accord with the law." Hamburger, *Is Administrative Law Unlawful*? 173. Due process thus incorporates the common law maxim that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias

his judgment, and, not improbably, corrupt his integrity." *The Federalist* No. 10 (James Madison).

This guarantee of neutrality in all judicial proceedings "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Jerrico*, 446 U.S. at 242. By "ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him," the Due Process Clause's neutrality requirement "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Ibid.*

Of course, judicial bias need not take the form of subjective personal prejudice to violate the due process of law; it also can be institutional. In other words, far from being confined to the idiosyncratic prejudices of individual judges, bias can also take the form of institutional unfairness arising from an unfair but precedential rule about judging.

It therefore is significant that all relevant circumstances "must be considered" when deciding whether judicial bias (or the appearance of it) amounts to a denial of due process. *Murchison*, 349 U.S. at 136; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (finding that due process required recusal based on "all the circumstances of this case"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–25 (1986) (accounting for various factors bearing on the risk of bias). One such

circumstance is whether the bias is personal or institutional. Personal judicial bias is bad enough, for it leaves parties subject to the caprice of an individual judge. Institutionalized judicial bias, however, is far worse, because it systematically subjects parties to bias under all judges. Where bias is institutionally imposed, it is especially pervasive and persistent.

B. When the Government is a Party, *Auer* Violates Due Process by Requiring Judges to Exhibit Systematic Bias in Favor of the Government

The institutional character of the bias imposed by *Auer* makes such deference all the more remarkable and worrisome. At bottom, it is an institutionally imposed thumb on the scales of justice—a systematic predisposition in favor of the government, even where the government itself is a party to the suit. In such a case, *Auer* deference requires judges to be systematically biased in favor of one of the parties, in violation of the due process of law.[2]

[2] Of course, nothing precludes judges from considering an executive agency's interpretation of a rule or regulation. Particularly when the agency is a party to the litigation, the judges must consider the government's legal arguments. But where the judges show greater respect for the interpretation propounded by one party than for the interpretation put forward by the other party, the judges are engaging in bias, in violation of the due process of law.

It ordinarily would be outrageous for a judge deciding a case to defer to the litigating position of one of the parties. And it would be inconceivable for that judge to do so by announcing, ahead of time, a rule under which he must reflexively accept the legal position of a party regularly appearing before his court—let alone the most powerful of parties, the government. It is therefore necessary to confront the reality that where the government is a party to the suit and the judge defers to an agency interpretation under *Auer*, they exhibit a precommitment to one of the parties.[3]

Auer deference is particularly egregious when administrative interpretations form the basis of agency proceedings for punitive fines or other penalties, which are essentially criminal in nature, and which, in many cases, substitute for criminal prosecutions. Even in those administrative cases where Congress "has indicated an intention to establish a civil penalty," this Court has inquired further "whether the statutory scheme was so

[3] All cases in which the government is a party raise this question about systematic bias. But even where, as here, all the parties are private, questions can arise about systematic bias. For example, there are many cases in which the government is not joined as a party, but private parties enforce regulatory rules against other private parties in proceedings (for fines or damages) that serve as enforcement mechanisms. In such instances, although the government is not a party, it may fairly be considered a party in interest—especially when the relevant government agency goes to the trouble of filing an *amicus* brief in support of one party on the very question at issue. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

punitive either in purpose or effect" as to transform "what was clearly intended as a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations and internal quotations omitted). When judges hearing appeals from such proceedings defer to administrative interpretations, they not only reveal a systematic bias in favor of the government, but they also turn on its head the rule of lenity and the underlying presumption that a criminal defendant is innocent until the government has proven him guilty.

Of course, executive agencies probably think that *Auer* deference has much administrative value. And although it is doubtful whether it has equal value for all agencies, it may be significantly useful for some. But where agencies create vague or ambiguous regulations, they can promulgate additional clarifying regulations, and so it is far from obvious why they need judicial deference to their interpretation of their own regulations—except to escape notice and comment. Whereas *Chevron* deference applies to regulations written within the APA's notice-and-comment framework, *Auer* deference allows agencies to evade and even contravene such procedural safeguards, often in violation of the litigants' due process rights to "fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Any value of *Auer* deference must therefore be considered in context. Whatever the utility of such deference, it is overshadowed by *Auer's* evasion of notice and comment and, even more profoundly, by its consequences for the role of the judges.

Auer deference not only requires judges to abandon their constitutional office and duty of independent judgment but also requires them to favor the legal position of one party in a case over that of the other party. It therefore is difficult to avoid the conclusion that *Auer* requires judges to engage in systematic bias, in violation of the Fifth Amendment's due process of law. The Fifth Amendment requires a judge to engage in impartial judgment, without bias toward either party. Nonetheless, where the government is a litigant, *Auer* requires judges to favor that party. *Auer* deference therefore is unconstitutional.

III. *AUER* BRINGS THE JUDICIARY INTO DISREPUTE, THEREBY UNDERMINING PUBLIC CONFIDENCE IN THE COURTS

Deference to administrative interpretation has led federal judges further astray than many of them realize. They have abandoned their office of independent judgment in accord with the law of the land, and they have engaged in systematically biased judgment in violation of the due process of law. All of this is worrisome because the independent judgment of unbiased judges is essential for political legitimacy. In all cases—but especially in those adjudicating the power of government over the people—it is crucial that Americans have confidence that judges are not predisposed against them.

Experimenting with notions of judicial deference is a dangerous game. The availability of judges who exercise their own independent and unbiased judgment, without deference, is the

foundation of Anglo-American government, in which conflicts are resolved by law rather than force, and in which conflicts about what the law requires are decided by judges. Without what John Locke called "a known and indifferent judge," John Locke, *Two Treatises of Government* 351 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690), the people will be tempted to become their own judges and take judgment into their own hands.

Although deference to administrative interpretation is only one aspect of the Judiciary's intersection with administrative power, it illustrates a broader problem with such involvement—that it compromises the Judiciary. Rather than worry about maintaining administrative power, judges should worry about preserving their own role. They should seriously ponder the unlawfulness of their deference and its consequences for them and the entire government. Under the Constitution, judges must exercise independent judgment, and they must avoid systematic bias, lest they violate due process. If they fail to meet these most basic requirements, they will squander any public respect for their office.

Judicial deference under *Auer* favors executive interpretation even though the judges would never treat congressional interpretation in this way. Accordingly, when judges defer to agency judgments about interpretation, they make a mockery of their esteemed office; they reduce it from a posture of independent judgment to a posture of bowing to power.

It is no answer to suggest that judicial deference does not conflict with judicial duty because

judges assume different roles in administrative cases than in constitutional cases. This argument is akin to saying that when the government acts through administrative power, rather than through the structures of power established by the Constitution, it should be subject to constitutional law "lite." This excuse is just another attempt to avoid confronting the conflict between judicial deference and judicial duty—as if the government could avoid the full weight of constitutional law by acting administratively. Rather than a solution, this is just another type of systematic bias.

The first Canon of judicial conduct declares: "An independent and honorable judiciary is indispensable to justice in our society." Judicial Conference of the United States, *Code of Conduct for United States Judges*, Canon 1 (2009). The commentary observes that "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." *Id.*, Canon 1, Commentary. On this reasoning, if the judges want public deference, they must avoid *Auer* deference. In the meantime, the latter "diminishes public confidence in the judiciary and injures our system of government under law." *Ibid.* The third Canon states that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party." *Id.*, Canon 3(C)(1). What is true of personal bias is also true of institutional bias. The judges cannot systematically defer to the interpretation or legal position of one of the parties

before them without undermining their reputation for justice.

Every day that *Auer* remains law, it leaves Americans with the impression that they cannot obtain impartial adjudications on administrative rules. Every day, therefore, *Auer* erodes the Judiciary's legitimacy. And this Court is well aware that these concerns are percolating through much of the bar and more broadly among Americans. *See Decker v. Nw. Env. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) ("Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases ….").

This case presents a valuable opportunity for the Court finally to reconsider *Auer* deference. *See Perez*, 135 S. Ct. at 1210-11 (Alito, J., concurring in part and concurring in judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1225 (Thomas, J., concurring in judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered."). By allowing *Auer* to stand, the Court would be leaving in place a profound and ongoing injustice that damages its reputation. To preserve the Judiciary's legitimacy, the Court should seize this opportunity to grant review and reject *Auer* and *Seminole Rock* once and for all.

CONCLUSION

For the foregoing reasons, *amici curiae* Professor Philip Hamburger and Washington Legal Foundation respectfully request that the Court grant the petition.

Respectfully submitted,

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