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**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The time has come for *Auer* v. *Robbins*, 519 U.S. 452 (1997), to be reconsidered and overruled—or at the very least clarified and cabined. A diverse array of *amici*—including sixteen States, seven state and local government associations, leading business groups and think tanks, and prominent legal scholars—attest to the importance of the issue and the need for this Court to resolve it. And as Judge Easterbrook explained below, this case is an ideal vehicle for addressing *Auer* because "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." App. 125.

Respondent does not meaningfully dispute that the issue is important, or frequently recurring. Her attempt to defend *Auer* on the merits only underscores why Judge Easterbrook, citing the concerns expressed by various members of this Court about *Auer*, thought it "may not be long for this world" (*ibid.*)—and that at the very least should be reconsidered after full briefing and argument. Instead, respondent's primary argument is that *Auer* is somehow not squarely presented in this case—an untenable position, as confirmed by Judge Easterbrook's opinion, which respondent simply ignores. The judges below offered irreconcilable interpretations of the regulations at issue, and the result was unquestionably dictated by *Auer*. Not only that, every case involving *Auer* necessarily involves a threshold question whether regulations are ambiguous and frequent

disputes over meaning. Respondent's lead argument thus does not call into question the propriety of review in this case.

As to respondent's objections to the interlocutory posture of this case, they should carry no weight where, as here, the petition presents "important and clear-cut issue[s] of law that [are] fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." See STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 283 (10th ed. 2013) (citing cases). Respondent cannot point to a single thing that further litigation (or percolation) would add to the resolution of the purely legal issues presented.

As Judge Easterbrook observed below, "whether *Auer* supports the Secretary's current position" in this case "is a substantial and potentially important question," separate and apart from the "antecedent issue * * * whether *Auer* is sound." App. 124; Pet. 3. The petition should be granted to consider those questions and, if not to overrule *Auer*, then at the very least to provide much-needed guidance to the lower courts on its proper application.

I. The Continued Vitality Of *Auer* Is An Exceedingly Important Issue With Immense Practical Implications.

There can be little real question that the continued vitality of *Auer* is an exceptionally important issue that only this Court can decide. App. 124-25;

Pet. 21-24. And as various *amici* explain, the issue is of great practical importance as well. See, e.g., Br. of *Amicus* Nat'l Council of Higher Educ. Loan Programs 2-6; Br. of *Amici* States 10-17. Not surprisingly, then, respondent does not seriously dispute the importance of the issue, but instead mounts a defense of *Auer* on the merits (at 16-20). That defense, however, only confirms the need for this Court to reconsider (and overrule) *Auer* after full briefing and argument. Indeed, respondent's rather surprising suggestion (at 19) that the issue is of diminishing importance because, according to respondent, courts have great "flexibility" in choosing to apply *Auer* (or not) only highlights the need for this Court to reconsider *Auer* and, if not overrule it outright, then at least clarify (and cabin) its application. See, e.g., Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine By the U.S. Courts of Appeals*, 66 ADMIN L. REV. 787, 832 (2014) ("Inconsistency and widespread confusion regarding the precise parameters of the proper analysis under [*Auer* and *Seminole Rock*] have led to conflicting interpretations and application of the doctrine by the courts of appeals.").

Respondent does not directly address the opinions by members of this Court (discussed in the petition at 14-21; 23-24) explaining why *Auer* is wrong or at a minimum ripe for reconsideration. Nor does she take on any of the scholarly criticism of *Auer* (also discussed in the petition at 17-20; 22-23). Instead, she advances four arguments why *Auer* was

rightly decided (at 16-20)—but if anything, those arguments actually make the case for re-examining *Auer* (if not overruling it outright).

The first argument—that it makes practical sense to let an agency interpret its own regulations—is hardly worth the candle. Even a "beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).

Relatedly, even assuming, as respondent asserts, that an agency is in "a superior position to determine what it intended when it issued a rule," KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994), that only explains (at most) *Seminole Rock*'s initial transgression of separation of powers. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). It cannot justify the subsequent expansion of *Seminole Rock* to command judicial deference to interpretations adopted years after a regulation was promulgated. As Justice Thomas explained, "*Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment); see also Br. of *Amici* State & Local Gov't Ass'ns 24 (arguing that this Court should grant the petition and, at the very

least, limit the doctrine to the facts of *Seminole Rock*, i.e., contemporaneous agency interpretations).[1]

Respondent's second argument—that agencies will likely draft with clarity at the outset—blinks reality. See, e.g., *Talk Am., Inc.* v. *Mich. Bell Tele. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."); *Mortgage Bankers*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment) ("The Court has even applied the doctrine to an agency interpretation of a regulation cast in such vague aspirational terms as to have no substantive content." (citing *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512-13 (1994); *id.* at 518 (Thomas, J., dissenting))).

If anything, *Auer* provides agencies a powerful incentive to engage in vague drafting, to avoid notice-and-comment by "interpreting" the vague regulations down the road, and thereby to sidestep the "pay now or pay later" rationale underlying this Court's

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[1] As Judge Posner has remarked, "[i]t is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions." *Keys* v. *Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (citing David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204).

decision in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). Pet. 6-8 & 18 n.2; Br. of *Amici* State & Local Gov't Ass'ns at 8-11; see also Br. of *Amicus* Am. Action Forum, et al. at 8-11 ("*Auer* * * * makes a mockery of the APA's key procedural safeguard—notice-and-comment rulemaking.").

Respondent's third argument—that Congress' delegation of authority to agencies avoids any separation-of-powers problem—misses the mark as well. *Auer* allows the agency both to make law *and* to interpret it. *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring). What is more, *Auer* threatens not only separation of powers but also federalism, as the *amici* States observe (at 10-17). And it is anathema to the "plain text, structure, and history of the Administrative Procedure Act." Br. of *Amicus* Am. Action Forum, et al. 6-14; Br. of *Amicus* Nat'l Ass'n of Mfrs. 8 ("Not only [is] the APA's text plain and unambiguous on this point, but the statute's legislative history also leaves no doubt that Congress intended for courts, not agencies, to exercise ultimate interpretive authority.").

Respondent's fourth argument—that *Auer* does not inexorably require courts to defer to agency interpretations in all instances—only highlights why this Court's review is needed to clarify when, if at all, *Auer* deference is appropriate. Numerous courts have bemoaned the uncertainty and inconsistency associated with this aspect of *Auer*. See Br. of *Amici* States at 6-7 (citing cases); Leske, 66 ADMIN L. REV. at 832 (same). Even the study upon which respondent relies

(at 19) makes clear that reviewing courts are much more likely to uphold agency action under *Auer*, see Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 520 (2011)—and even that cannot begin to account for the number of challenges to agency action that are never brought because, under *Auer*, the odds are never in the challenger's favor.

Respondent's attempt to justify *Auer* only confirms that its continued vitality is an exceptionally important issue worthy of this Court's review—particularly given (i) the serious practical implications of *Auer* for a diverse group of stakeholders across the Nation, ranging from states to businesses; and (ii) the confusion in the lower courts regarding when and how *Auer* should apply.

II. This Case Is Well Suited For Reconsidering *Auer*.

Perhaps because the questions presented are so undeniably important, respondent focuses her opposition on the suitability of this case as a vehicle for resolving those questions. Respondent argues, first, that the issue of *Auer* deference is not squarely presented, and second, that the interlocutory posture of this case counsels against review. The first objection is unfounded, while the second is unavailing.

First, Judge Easterbrook's opinion (which respondent does not mention) makes plain that the

issue of *Auer* deference is squarely presented here: "[T]his is one of those situations in which the precise nature of deference (*if any*) to an agency's views *may well control the outcome*." App. 125 (emphases added). Although respondent argues (at 8) that "[n]o decision in this case establishes that the regulations at issue are ambiguous," that is precisely what the controlling concurrence in this case held. App. 57-62. Because the concurrence was based solely on *Auer* deference, as Judge Easterbrook emphasized (*id.* at 124), any claim that *Auer* deference is not squarely presented borders on the absurd.

Respondent argues (at 7-8) that the Court cannot reach the question of *Auer* deference without first determining that the regulation is ambiguous. But every case involving *Auer* will necessarily involve the threshold (purely legal) question whether the regulation is ambiguous. That was true in *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), of course, and it was no obstacle to review there—and it is no obstacle to review here, either. There is no getting around the fact that one panel member thought the "unambiguous" text meant one thing, another panel member thought the "unambiguous" text meant the opposite, and the "tie" went to the agency, because the third panel member thought the

text was at least ambiguous so that *Auer* deference should apply. App. 61.[2]

Second, the interlocutory posture of a case does not counsel against review where there are "important and clear-cut issue[s] of law that [are] fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari," as the continued vitality of *Auer* and its application are here. See SHAPIRO at 283 (citing cases); see, e.g., *Nat'l Meat Ass'n* v. *Harris*, 132 S. Ct. 965, 970 (2012); *Winter* v. *NRDC*, 555 U.S. 7, 20 (2008). The Seventh Circuit's ruling presents only pure questions of law and structures the remainder of the litigation in a manner incompatible with fundamental principles of constitutional and administrative law, and settled, binding precedent of this Court. Review should occur now.

Resisting that conclusion, respondent emphasizes the lack of discovery, answers, affirmative defenses, or a ruling on class certification—but that only underscores why review is particularly appropriate now, as none of those things have any bearing on the questions presented. This Court's denial of review in *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., statement respecting the denial of certiorari), does not alter that conclusion. There, a remedies question the Fourth Circuit expressly

[2] The district court also held that the regulations unambiguously support petitioner. App. 114-18.

declined to reach was essential to this Court's determination of the question presented. *Ibid.* That is not the case here.[3]

Respondent's contention (at 13) that the eventual wind-down of the program counsels against review is also unavailing. To begin, the wind-down (which will take many years, and involve billions of dollars in student loans) has nothing to do with whether *Auer* should be reconsidered and overruled, or whether the Seventh Circuit applied *Auer* in conflict with this Court's precedents. The Seventh Circuit's ruling in this case concerning *Auer* will remain binding precedent in subsequent cases involving all manner of other regulations besides the particular ones at issue. That is why Judge Easterbrook expressed the view that the application of *Auer* in *this* case is a "substantial and potentially important issue" depending on whether *Auer* remains controlling—notwithstanding indications that "*Auer* may not be long for this world." App. 125.

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[3] Respondent argues (at 12-13) that review should be delayed pending resolution of other litigation regarding the Department of Education's "Dear Colleague" letter. But as explained in the petition (at 35), the letter was the product of *this* litigation, issued only after petitioner pointed out below that the absence of any such letter only confirmed that the Department's interpretation—announced for the first time in an *amicus* brief in this litigation—did not represent the Department's considered judgment. Resolution of the other litigation would add nothing to this Court's consideration of whether *Auer* remains good law.

III. The Court Of Appeals' Application Of *Auer* Conflicts With This Court's Precedent.

Even assuming *Auer*'s continued vitality, this Court's review is warranted because the Seventh Circuit's decision directly conflicts with both *Auer* and *Christopher*. Pet. 27-36.

First, *Auer* itself precludes the Secretary's current interpretation, which conflicts with the statute, with regulations promulgated under it, and with prior agency guidance. Pet. 27-31. Respondent, however, persists in focusing on 34 C.F.R. § 682.410(b)(5)(ii), which states that a borrower will be given an opportunity to enter into a repayment agreement on terms satisfactory to the guaranty agency before collection costs are assessed or the default is reported. But that regulation could only support the result below if a "repayment agreement on terms satisfactory to the [guaranty] agency" in § 682.410 is always the same thing as a "rehabilitation agreement" in § 682.405. For the reasons set forth in the petition (at 30-31)—but ignored by respondent—those two very different concepts from two very different regulations cannot be conflated.

Respondent does not dispute that the Secretary's interpretation conflicts with the underlying statutory scheme, which not only allows for collection costs to be collected, but also explicitly lays out the amount. See Pet. 27-29. Nor does respondent dispute that the main purpose of a rehabilitation agreement is to remove a negative report from the borrower's credit

history (Pet. 31), or that under the Secretary's interpretation, the credit report could not be made in the first place—an "absurd" result that confirms *Auer* deference has no application here. See App. 74-75 (Manion, J., dissenting). Respondent also does not dispute that the Department has acknowledged its own inconsistency by publishing on its website that "repayment agreements" and "rehabilitation agreements" are *separate* paths for a borrower in default. *Id.* at 73-74. In sum, far from supporting respondent's assertion that the regulations unambiguously favor her, the Brief in Opposition confirms the conflict between the Seventh Circuit's application of *Auer* and *Auer* itself.

Second, the Seventh Circuit's application of *Auer* conflicts with this Court's decision in *Christopher*, which precludes agency interpretations that would impose massive liability without fair warning. Pet. 32-36. Respondent asserts (at 21-22) that the Department provided the requisite fair warning through a trial-court *amicus* brief—but ignores the counterarguments already set forth in the petition (at 32-33), including the fact that the brief in that case did not even deal with the same subject matter. See also Br. of *Amicus* Nat'l Council of Higher Educ. Loan Programs 14-15 (highlighting the lack of fair notice by

pointing out that for decades, the Department has acquiesced in petitioner's interpretation).[4]

Lower courts frequently struggle with applying *Auer*—so contrary to respondent's argument (at 20), review would not be an exercise in mere error correction. See Br. of *Amici* States 6-7 (citing cases); Leske, 66 ADMIN L. REV. at 832 (same). Some circuits have even questioned whether *Auer* survived *Christensen* v. *Harris County*, 529 U.S. 576 (2000). See, e.g., *Sun Capital Partners III, LP* v. *New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013); *Keys*, 347 F.3d at 993-94. At a minimum, if *Auer* is to remain the law, courts need clarification and guidance on its application—and the petition should be granted for that reason, too. See Br. of *Amici* Philip Hamburger & Washington Legal Found. 11; Br. of *Amicus* Nat'l Ass'n of Mfrs. 13.

[4] The 1997 letter respondent mentions (at 21) likewise fails to serve as "longstanding" evidence of the Department's position. Instead, that letter grants discretion *not* to charge collection costs. App. 90-92.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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