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 Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do regulations issued under the Higher Education Act, 34 C.F.R. § 682.405 and 34 C.F.R. § 410, unambiguously resolve the question of whether a guaranty agency may assess collection costs against a borrower who has entered into a rehabilitation agreement with the guaranty agency within sixty days of the notice of default?

2. If the answer to the first question is no, was Judge Flaum, concurring separately in the decision below, correct to apply this Court's decisions in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), and then defer to the Department of Education's longstanding interpretation of those regulations?

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STATEMENT OF THE CASE

This case is a poor vehicle for reconsidering this Court's long-standing principles of administrative deference articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997). Petitioner United Student Aid Funds, Respondent Bryana Bible, the Department of Education, the district court, and a majority of judges on the court of appeals panel below all agree on one critical point: the relevant regulations *unambiguously* resolve the substantive question decided below, and the case can be decided without resort to deference to agency interpretation. No court has ever held to the contrary.

Thus, this case is a poor vehicle for reconsidering *Seminole Rock* and *Auer*. Like the parties, the government, and all but one judge below, a majority of this Court would likely agree that the meaning of the governing regulations can be discerned without resort to deference. If this Court is to reconsider a core tenet of administrative law, it should wait for a case where all of the Justices would likely engage the question.

Review is unwarranted for other reasons. Litigation squarely addressing the validity of the challenged regulations is pending in the District Court for the District of Columbia. *See United Student Aid Funds, Inc. v. Duncan*, 1:15–cv–01137, ECF No. 1 (D.D.C. July 16, 2015). Accordingly, review of the questions presented is premature. And, the dispute here between Petitioner and Ms. Bible presents a narrow issue involving a defunct student loan program under which no new loans have been issued for nearly six years. Finally, the

court of appeals' decision is correct and thus a decision of this Court addressing principles of administrative deference would not change the outcome.

1. Petitioner is a guaranty agency, which guarantees student loans under the Federal Family Education Loan Program ("FFELP"), which is part of the Higher Education Act ("HEA"). Pet. App. 7–8, 10. Under FFELP, private lenders made loans to students attending post-secondary institutions. *Id.*[1] The loans were guaranteed by guaranty agencies, such as Petitioner. *Id.* If a borrower defaults on a loan, the loan is transferred to the guaranty agency, which pays the private lender for the debt and then seeks payment from the borrower. *Id.* If the guaranty agency cannot obtain payment from the borrower, the loan is then transferred to the Department of Education (the "Department"), which pays the guaranty agency and seeks recovery from the borrower. *Id.*

The HEA requires, under appropriate circumstances, that a FFELP borrower who has defaulted on a loan pay "reasonable collection costs" to the guaranty agency. 20 U.S.C. § 1091(a). The HEA authorizes the Department to "prescribe such regulations as may be necessary to carry out the [Act's] purposes." 20 U.S.C. § 1082(a)(1). The regulations explain that a guarantor is required to charge "an amount equal to the reasonable collection costs incurred by the [guaranty] agency in collecting," and they specify how that amount is to be calculated. 34 C.F.R. § 682.410(b)(2). As to the

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[1] The FFELP program was discontinued in 2010. *See infra* at 13.

circumstances under which those costs may be imposed, the regulations provide:

> The guaranty agency, after it pays a default claim on a loan but *before it reports the default to a consumer reporting agency or assesses collection costs against a borrower*, shall, within the timeframe specified in paragraph (b)(6)(ii) of this section, provide the borrower with—
>
> (A) Written notice that meets the requirements of paragraph (b)(5)(vi) of this section regarding the proposed actions;
>
> (B) An opportunity to inspect and copy agency records pertaining to the loan obligation;
>
> (C) An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and
>
> (D) *An opportunity to enter into a repayment agreement on terms satisfactory to the agency*.

34 C.F.R. § 682.410(b)(5)(ii) (emphasis added).

Thus, the guaranty agency must meet the four prerequisites listed above before it may assess collection costs. Requiring that a guaranty agency wait to impose collection costs allows the borrower to challenge whether the loan is, in fact, past due or to remedy the default status before collection costs accrue. The four subparagraphs of Section 682.410(b)(5)(ii) function as a regulatory safe harbor ensuring that the assessment of collection

costs is "reasonable" as required by the HEA. *See* Pet. App. 22–23.

2. Respondent Bryana Bible obtained a FFELP loan in 2006. Pet. App. 10. Citibank was the private lender, and Petitioner was the guarantor of Ms. Bible's loan. *Id.* The form contract under which the loan was offered (the Master Promissory Note or "MPN") states that it is subject to and will be interpreted consistently with the HEA and the Department's implementing regulations. *Id*. at 10-11.

In 2012, Citibank found Ms. Bible in default on the loan. *Id.* at 11. Citibank then transferred the alleged debt to Petitioner. *Id.* Petitioner then offered Ms. Bible the chance to rehabilitate her loan by sending her a letter (the "Rehabilitation Agreement"), which represented that she owed "$0.00" in collection costs and proposed a new schedule of periodic payments for the loan. *Id.* at 11–12. Ms. Bible promptly signed and returned the Rehabilitation Agreement 18 days after the date of the letter notifying Ms. Bible of default. *Id.* at 12–13. Ms. Bible has timely made all of the payments required under her Rehabilitation Agreement. *Id*. at 14.

Even though Ms. Bible promptly entered into the Rehabilitation Agreement and made the agreed-upon payments, and even though the MPN does not allow any collection costs to be assessed in that circumstance, Petitioner assessed over $4,500 in collection costs against Ms. Bible. *Id*. at 14.

3. Ms. Bible then filed this lawsuit on behalf of herself and a proposed class of similarly situated borrowers. Ms. Bible alleged that Petitioner (1) breached its contract with her by assessing

collection costs in circumstances where costs may not be assessed; and (2) violated the Racketeer Influenced Corrupt Organizations Act ("RICO") by, among other things, inducing Ms. Bible to enter into the Rehabilitation Agreement based on the representation that her costs were "$0.00." *Id*. at 2, 12–14.

The district court granted Petitioner's motion to dismiss, finding that the HEA regulations unambiguously "require guarantors to assess collection charges to defaulting borrowers." *Id*. at 116.

Ms. Bible appealed the dismissal. Responding to an invitation from the Seventh Circuit to address the meaning of the regulations, the Department filed an amicus brief stating that the regulations unambiguously prohibit the assessment of collection costs against a borrower, like Ms. Bible, who timely agrees to rehabilitation. *Id.* at 183–219. The Department's analysis was consistent with its longstanding interpretation of the regulations. *See* Br. of the Sec'y of Educ. in *Educ. Credit Mgmt. Corp. v. Barnes*, 318 B.R. 482 (S.D. Ind. Dec. 15, 2004), 27 n.16 (filed March 14, 2002) ("[The] regulations require the guarantor to give the debtor ample warning that failure to make repayment arrangements within a 60-day 'grace' period may result in…liability for collection costs.") (citing 34 C.F.R. § 682.410(b)(5)).

The Seventh Circuit reversed, with each judge writing separately. Judge Hamilton's lead opinion concluded that the assessment of collection costs on borrowers who promptly rehabilitate their defaulted student loans was barred by the unambiguous text of the regulations themselves,

without consideration of the Department's views. Pet. App. at 19–30. Only in the alternative did Judge Hamilton find that deference to the Department's views was appropriate. *Id.* at 30–34. Concurring with the outcome reached by Judge Hamilton, Judge Flaum held that deference to the Department's reasonable interpretation of the regulations was appropriate. *Id.* at 57. Judge Manion, dissenting in relevant part, concluded that the regulations unambiguously required the assessment of the collection costs. He reached this conclusion without resort to principles of administrative deference. *Id.* at 62. The Seventh Circuit denied Petitioner's request for rehearing *en banc*, with no judge requesting an *en banc* vote. *Id.* at 120.

4. On July 10, 2015, prior to the Seventh Circuit's decision, the Department issued a "Dear Colleague Letter" describing its longstanding interpretation of the regulations.[2] In response, Petitioner filed suit against the Department, alleging that the Department's interpretation is inconsistent with the HEA and regulations and is arbitrary and capricious. That suit also maintains that the Dear Colleague Letter was promulgated in violation of the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and is impermissibly retroactive. *See Duncan*, 1:15–cv–01137, ECF No. 1. The Department's motion to dismiss that action is pending before the District Court for the District of Columbia. *Id.*, ECF No. 6.

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[2] The letter is available at https://www.ifap.ed.gov/dpcletters/attachments/GEN1514.pdf (last accessed March 3, 2016).

REASONS FOR DENYING THE WRIT

I. This Case Presents A Poor Vehicle For Revisiting *Seminole Rock* and *Auer* Because Principles Of Administrative Deference Are Not Squarely Presented, Review Is Premature, And More Suitable Vehicles Exist.

A. This Case Does Not Squarely Present the Question of the Validity of *Seminole Rock* and *Auer*.

This case does not squarely present the principal question of agency deference presented in the petition. If this Court grants review, it would first have to answer the antecedent question: whether the regulations are ambiguous. U.S. Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); Stephen M. Shapiro, et al., *Supreme Court Practice* § 6.XIII.25.(G) at 457-458 (10th ed. 2013).

Respondent is unaware of this Court ever doing what Petitioner seeks here: simply assuming that a statutory or regulatory provision is ambiguous and proceeding directly to step two of the deference analysis. Indeed, when the parties dispute the meaning of a statute or regulation, the Court first addresses its meaning, employing ordinary tools of construction, and only after finding ambiguity, turning to the deference question. *See e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555

(1980); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50 (2011).

Here, the need to first wade into the meaning of the regulations without resort to principles of administrative deference presents a serious impediment to meaningful review of the question of whether *Seminole Rock* and *Auer* should be overruled. No decision in this case establishes that the regulations at issue are ambiguous. To the contrary, of the four judges who have examined the regulations' meaning, only one deferred, and he did so based on the regulations' "complexity," without identifying any particular ambiguity. Pet. App. 57–62. Indeed, the district court and both the lead and dissenting opinions in the Seventh Circuit resolved the meaning of the regulations without considering the Department's views. *Id.* at 1–94. Nor has any court anywhere else held that the regulations are ambiguous.

Given that this Court must answer the antecedent question of whether the regulations are ambiguous, there is a heightened risk that the opinion of this Court would be fractured, disabling the Court from resolving the principal question presented. Consider the possible outcomes: some members of this Court could agree with Judge Hamilton's lead opinion and find, without resort to administrative deference, that the regulations prohibit the assessment of collection costs on borrowers in the same position as Respondent. Some could agree with Judge Manion and find that the regulations unambiguously allow assessment of collection costs. Others might believe, consistent with Judge Flaum's concurrence, that the regulations are ambiguous and that, under *Seminole Rock* and *Auer*, the Court should defer to

the Department's longstanding understanding of the regulations. The very real chance for differences of opinion on the regulations' meaning makes it unlikely that a majority of the Court will even reach the question whether *Seminole Rock* and *Auer* should be overruled.

That is reason enough to deny review and, if the Court is inclined to consider the *Seminole Rock/Auer* question, await a case in which no one disputes, or at least a court of appeals has unanimously concluded, that the relevant regulation is ambiguous. And that is especially true given that, on its own terms, the *Seminole Rock/Auer* question does not necessarily lend itself to unitary resolution. The Court might retain *Seminole Rock* and *Auer* without modification, or overrule them entirely. It might modify the doctrine by directing courts to apply *Skidmore* deference;[3] or it might simply scale back their reach.[4] To be sure, these myriad possibilities are inherent in reconsideration of *Seminole Rock* and *Auer*, but that is all the more reason to take up that question, if at all, when it is not complicated by the

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[3] *See e.g.,* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 686 (1996) (suggesting judicial evaluation of agency interpretations under the standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rather than *Seminole Rock*).

[4] *Cf. U.S. v. Mead Corp.*, 533 U.S. 218, 238 (2001) (as to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (as to *Auer*).

antecedent question of whether the regulations are ambiguous in the first place.

If this Court desires to reevaluate *Seminole Rock* and *Auer*, there will be many cases that squarely present the issue. A Westlaw search indicated that, in 2015 alone, circuit courts cited *Auer* in forty-four cases. A comprehensive study found that *Auer* and related cases have been cited by courts of appeals 351 times just since this Court's 2010 decision in *Talk America*. Cynthia Barmore, *Auer* in Action: Deference After *Talk America*, 76 Ohio St. L.J. 813, 827 (2015). If this Court wishes to reconsider *Seminole Rock* and *Auer*, a clean vehicle will present itself sooner rather than later.

B. Review Of Petitioner's Questions Would Be Premature.

Review of Petitioner's questions would be premature for two distinct reasons.

First, the lack of finality of the Seventh Circuit's judgment underscores that this case is a poor vehicle for review. Although this Court sometimes grants review of petitions from interlocutory court of appeals' rulings, "[o]rdinarily, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.I.18, at 282 (10th ed. 2013) (internal quotation marks omitted); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (*VMI*) (opinion of Scalia, J., respecting the denial of certiorari) ("We

generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

The posture of this case is anything but extraordinary, and the decision below is the antithesis of final. The court of appeals reversed the grant of a motion to dismiss, putting the case back to square one. No discovery has been taken on any issue. Petitioner has yet to file its answer, which may plead a host of affirmative defenses, including that Respondent cannot prove all elements of her RICO claim. *See* Pet. App. 42–43 (setting out the required elements of a civil RICO claim and noting that Respondent must "marshal evidence to support her [RICO] claim"). Although Petitioner and its *amici* profess concern about a large judgment, there has been no discovery regarding, much less a motion for or a ruling on, class certification.

For these reasons, the court of appeals' ruling here is a less appropriate vehicle for immediate review than the *VMI* case, where the Court denied review from an interlocutory court of appeals' ruling. There, the Fourth Circuit had issued a final decision holding that Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari, apparently on the ground that the decision was not sufficiently final because the remedy phase was ongoing. *See VMI*, 508 U.S. at 946 (opinion of Scalia, J., respecting the denial of certiorari). The Court recognized that there would be time enough to review the decision, if necessary, after the remedial portion of the case had concluded, *see id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, by contrast,

there is no decision regarding liability, let alone the appropriate remedy.

Of course, Respondent believes that a class will be certified and that she will prevail on the merits. If she does, Petitioner may appeal from the final decision and, ultimately, petition this Court on the questions on which it now seeks premature review (and on any other properly preserved federal issue). *See VMI*, 508 U.S. 946 (opinion of Scalia, J., respecting the denial of certiorari) (citing cases). Moreover, unlike *VMI*, which was *sui generis*, here, if Petitioner is correct that the issues presented are important and likely to recur, Pet. 21–24, there will be any number of appropriate future vehicles that would allow this Court to resolve the issues after entry of a final decision. *See supra* at 10 (explaining that there will be better future vehicles for resolving the *Auer* deference questions).

Second, review of Petitioner's questions would be premature because Petitioner and the Department are engaged in litigation that squarely addresses the meaning of the regulations. *See United Student Aid Funds, Inc. v. Duncan*, 1:15–cv–01137, ECF No. 1 (D.D.C. July 16, 2015). Petitioner maintains there that the Department violated the HEA and its regulations by issuing an interpretation in its Dear Colleague Letter that allegedly conflicts with the regulatory and statutory text. Department's Mot. to Dismiss in *Duncan*, ECF No. 6 (filed Sept. 28, 2015). The *Duncan* case is likely to make its way to the D.C. Circuit, and, if that court issues a decision that conflicts with the Seventh Circuit's decision that collection costs may not be assessed when a borrower timely agrees to rehabilitation, there will be a circuit split. At that point, this Court would

have another—and better—opportunity to examine *Seminole Rock* and *Auer*, as well as the proper interpretation of the relevant regulations.

In the meantime, the Court should stay its hand and allow the litigation to run its course.

C. Congress Has Replaced the Program in Question Here.

This case is also a poor vehicle for examining *Seminole Rock* and *Auer* because a decision of this Court on the meaning of the regulations will have limited impact. Congress discontinued FFELP on March 26, 2010, with the enactment of the Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111–152, § 2201, 124 Stat. 1029, 1074. The Act terminated the Department's authority to make or insure new loans under FFELP after June 30, 2010. *See* 20 U.S.C. § 1071(d). Thus, no loans of the type at issue here—a three-tiered structure with the guaranty agency in the middle—have been issued for almost six years. Although the regulations at issue in this case govern FFELP loans issued before June 30, 2010, they cover a shrinking number of loans that will eventually vanish.

II. The Result Below Is Correct.

The result below is correct because the regulations' meaning is clear using ordinary tools of construction, without resort to administrative deference. However, even if the regulations are ambiguous—which neither party contended below—then Judge Flaum was correct to apply this Court's decisions in *Seminole Rock* and *Auer* and then to adopt the Department's longstanding interpretation of its own regulations.

A. The Regulations Unambiguously Support The Result Below.

The regulations unambiguously bar assessment of collection costs where borrowers, like Respondent, have promptly entered into repayment agreements. "The guaranty agency, after it pays a default claim on a loan but *before it reports the default to a consumer reporting agency or assesses collection costs against a borrower*, shall, within the timeframe specified in paragraph (b)(6)(ii) of this section, provide the borrower with" written notice, an opportunity to inspect and copy records, an opportunity for administrative review of the loan's status, and "[a]n opportunity to enter into a repayment agreement on terms satisfactory to the agency." 34 C.F.R. § 682.410(b)(5)(ii) (emphasis added). Because the opportunity to seek administrative review of the enforceability or past-due status of the allegedly defaulted loan and to enter into a repayment agreement takes 60 days to complete, 60 days must pass before collection costs can be assessed, and none may be assessed if the borrower agrees to a repayment plan within that 60-day window. 34 C.F.R. §§ 682.410(b)(5)(ii), (iv)(B).

Prohibiting assessment of collection costs in this circumstance is appropriate because the regulations allow only the assessment of "reasonable" collection costs, and imposing collection costs on first-time defaulters who timely rehabilitate would not be "reasonable." 34 C.F.R. § 682.410(b)(2). As Judge Hamilton's lead opinion explains:

> Subparagraph (b)(5)(ii) effectively creates a safe harbor for borrowers who

> find themselves in default for the first time. When a borrower is first notified that a guaranty agency has paid a default claim on her loan, she has a 60-day window to request administrative review of the debt or to enter into a repayment agreement with the agency. *If* she does not take either action, the guaranty agency can then take collection actions against her, report her default to a consumer reporting agency, and assess collection costs against her in the amount specified by § 682.410(b)(2).

Pet. App. 23–24 (emphasis added).

Further, the regulations clearly contemplate that *rehabilitation* is a kind of *repayment* arrangement on terms satisfactory to the guaranty agency:

> A "rehabilitation" agreement is one type of authorized "repayment agreement." *See* 34 C.F.R. § 682.405(a)(2) (a loan is "rehabilitated" after the borrower has voluntarily "made and the guaranty agency has received nine of the ten payments required under a *monthly repayment agreement*") (emphasis added); *see also* 20 U.S.C. § 1078-6(a)(4) (provision authorizing loan rehabilitation refers to borrower making "scheduled repayments"); accord, Letter from Lynn B. Mahaffie, Dep't of Education, Dear Colleague Letter Gen–15–14, at 5 (July 10, 2015) ("Thus, a rehabilitation agreement is simply a specific form of a satisfactory repayment agreement.").

Pet. App. 28 n.6.

And this construction of the regulatory text is itself reasonable, practical, and sound because it encourages voluntary repayment and avoids allowing a guaranty agency to "assess collection costs against a borrower even though it was *never* forced to initiate procedures to collect the debt." *Id.* at 24–25 (quotation omitted, emphasis in original).

B. *Seminole Rock* And *Auer* Should Not Be Reexamined.

If the relevant regulations were deemed ambiguous, it would be appropriate to defer under *Seminole Rock* and *Auer*. Those decisions reflect sound principles of administrative law and should not be reconsidered.

For more than seventy years, this Court has held that an agency's interpretation of its own ambiguous regulations is controlling unless plainly erroneous or inconsistent with the regulations. *See Seminole Rock,* 325 U.S. at 414; *Auer*, 519 U.S. at 461; *see also Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50 (2011).

First, as this Court has explained, deference to an agency's reasonable construction of its own regulations allows administrators—those most familiar with the agency's day-to-day operations—to carry out their tasks economically and with a view toward the statute's practical implementation:

> Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and

> new. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Udall v. Tallman, 380 U.S. 1, 16 (1965) (internal quotations and citations omitted); *see also* Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 6.10, at 282 (3d ed. 1994) ("The agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule. Courts have significant institutional disadvantages in attempting to resolve these critical issues.").

Indeed, commentators have noted that *Auer* "cuts agencies helpful interpretive slack" where "resources are limited, and agencies must address complex issues that have unpredictable twists and turns." John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 616–17 (1996). This is especially true when the regulation "concerns 'a complex and highly technical regulatory program,'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (quotation marks omitted), such as the student loan area.

Second, although Petitioner and its *amici* maintain that deference creates disincentives for clear regulations and potential for political gamesmanship—assertions that Respondent contests—they ignore the counterweights. An agency would prefer clarity at the outset. After all, administration and enforcement of unclear

regulations is a drain on agency resources, and knowing promulgation of ambiguous regulations could result in a future administration instigating change, without notice-and-comment procedures, by issuing interpretative rules of their own. *See* Manning, 96 Colum. L. Rev. at 655. In short, an agency is best served not by deliberate ambiguity but by promulgating clear regulations and leaving little for later interpretation.

Third, deference under *Seminole Rock* and *Auer* does not offend the separation of powers or principles of administrative law. Rather, the question of deference only arises after Congress has delegated rulemaking authority to the agency. *See Chevron*, 467 U.S. at 843–44. And those rules are only given controlling weight when they are substantively lawful under the Administrative Procedure Act—that is, when they are not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The Act's demand that an agency's interpretation of its own rules be substantively lawful imposes a considerable check on agency power. As this Court recently explained:

> There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations,* and underscore again today, the APA requires an agency to provide more

> substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters."

Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Finally, as a result of constraints in deference doctrine itself, "a court is not required to give effect to an interpretative [rule]." *Batterton v. Francis*, 432 U.S. 416, 424–26 n.9 (1977). To the contrary, "*Auer* deference is not an inexorable command in all cases." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. at 1208 n.4 (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166, (2012); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, (1994)). "[I]t is the court that ultimately decides whether a given regulation means what the agency says." *Id.* Across many cases, "[v]arying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Id.* Practical experience demonstrates that the real-world significance of deference doctrines is limited. In one recent study, the authors concluded that lower federal courts upheld agency interpretations in seventy-six percent of cases where *Auer* deference was sought—a number not materially different from the seventy percent of cases where courts affirmed agency action using traditional interpretive tools. Richard J. Pierce, Jr. & Joshua Weiss, *An*

Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 515, 519 (2011).

C. Judge Flaum Correctly Applied *Seminole Rock* and *Auer* To The Facts Of This Case.

Petitioner's second question presented presupposes the propriety of judicial deference to an agency's reasonable interpretation of its own regulations—that is, it assumes the validity of *Seminole Rock* and *Auer*—and asserts only that Judge Flaum "misappl[ied] a properly stated rule of law." U.S. Sup. Ct. R. 10. It is therefore not worthy of review, particularly because, as explained above, the first question presented is not itself worthy of review. *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1779–80 (2015) (Scalia, J., dissenting) (noting that "when we do grant certiorari on a question for which there is a 'compelling reason' for our review, we often also grant certiorari on attendant questions that are not independently 'certworthy,'" but when the primary question turns out to not be worthy of consideration, the court should not "proceed[] to decide the independently 'uncertworthy' second question… we are not, and for well over a century have not been, a court of error correction.").

In any case, the Department's interpretation of the regulations was worthy of deference. As Judge Hamilton explained alternatively:

> The Secretary [of Education]'s interpretation of "reasonable collection costs"… is reasonable. The Secretary interprets "reasonable" to mean that similar costs must be assessed against

> borrowers who are at similar stages of delinquency. Under the Secretary's view, a borrower who promptly enters into a voluntary repayment agreement and complies with that agreement, thereby obviating the need for the guarantor to initiate costly debt collection procedures, is not similarly situated to someone who does not, thereby forcing the guarantor to undertake costly debt collection procedures.

Pet. App. 31; *see also* Pet. App. 61–62 (Flaum, J., concurring). In sum, the Department's interpretation—which reaches the sensible result of prohibiting the assessment of collection costs on borrowers who promptly agree to rehabilitate before collection procedures are initiated—is correct and does not warrant reexamination.

Petitioner is simply incorrect that the Department's interpretation of the regulations was sprung upon guaranty agencies without warning. The Department has consistently interpreted the regulations in the same manner as Judge Hamilton did. In a 1997 letter to an industry participant, the Department explained that the regulations provide the borrower an opportunity to enter into a repayment agreement before the guaranty agency assesses collection costs. Pet. App. 204. In a 2002 amicus brief in *Educ. Credit Mgmt. Corp. v. Barnes*, 318 B.R. 482 (S.D. Ind. Dec. 15, 2004), the Department again made clear that "the regulations…direct guarantors to charge collection costs *only* to those debtors who cause the guarantor to incur collections costs by failing to agree promptly to repay voluntarily." Pet. App. 205. The Department explained that "[the] regulations require the guarantor to give the debtor ample

warning that failure to make repayment arrangements within a 60-day 'grace' period may result in…liability for collection costs." Br. of the Sec'y of Educ. in *Barnes*, 27 n.16 (filed March 14, 2002)) (citing 34 C.F.R. § 682.410(b)(5)).[5] In short, between the Department's 2002 amicus brief and the Department's brief submitted in this case, "[b]oth [the Department's] reasoning and its conclusion have remained exactly the same." Pet. App. 33.

Finally, because the Department was appearing in this case as an amicus and not as a litigant, there is no plausible argument that the Department is simply taking a "convenient litigating position." *Christopher*, 132 S. Ct. at 2166 (quotation omitted). Rather, the Department's position reflects its disinterested, longstanding, and considered judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[5] Petitioner claims that the Department's support for the guarantor's assessment of collection costs under the particular circumstances in *Barnes* demonstrates inconsistency. That is not so, as the text of the Department's amicus brief quoted above makes clear. In *Barnes*, the borrower's rehabilitation would have occurred well outside of the 60-day safe harbor. Accordingly, the Department's support for the assessment of collection costs in *Barnes* is not inconsistent with its position in this case.

Respectfully submitted,

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