Nos. 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 THE AMERICAN ACTION FORUM, CATO INSTITUTE, AND JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Action Forum is an independent, nonpartisan, nonprofit 501(c)(3) organization, dedicated to educating the public about the complex policy choices now facing the country, especially with respect to federal spending, taxes, debt, health care, education, financial services, energy, regulation, immigration, and other issues. The American Action Forum also focuses more broadly on the indispensable role that our Constitution's structure—its checks and balances, separation of powers, and limitations on federal and state government—must play in promoting sound policies at the national and state levels. The Forum's staff regularly participates in legislative, administrative, and judicial proceedings on significant legal and policy questions.

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[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP educates through various outlets, including print, broadcast, and Internet media.

The American Action Forum, Cato, and JEP are interested in restoring the constitutional separation of powers, whereby Congress alone is responsible for making law, and the regulated community can reliably order its affairs according to the most natural meaning of congressionally enacted statutes and legally promulgated regulations.

SUMMARY OF ARGUMENT

This brief addresses two additional reasons for granting certiorari that are not included in the Petition: First, *Auer* deference is incompatible with the Administrative Procedure Act. Second, the Court of Appeals expanded *Auer*'s reach by deferring to the Department of Education's current interpretation of its rule, which directly contradicts its own longstanding interpretation of the same rule.

The Court should overrule *Auer* v. *Robbins* and *Bowles* v. *Seminole Rock & Sand Co.* In addition to the constitutional problems addressed in the Petition, judicial deference to an agency's interpretation of its own rules is incompatible with the text, structure, and history of the APA. That history makes clear that Congress enacted the notice-and-comment exemption for interpretative rules because it expected interpretative rules to face more thorough judicial review than legislative rules would face. Deference to agency interpretations—especially to interpretations of agency rules—subverts the APA's legislative purpose and immunizes the least politically accountable agency action from meaningful judicial review.

Even if *Auer* were sound as a matter of constitutional and statutory law, this Court should grant the petition and reverse the lower court's decision because it expands *Auer*'s scope in violation of the doctrinal limits this Court established in *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2013), and *FCC* v. *Fox Television Stations*, 556 U.S. 502 (2009).

Not only is the Department of Education's interpretation at odds with the plain meaning of the statute and the rule it purports to interpret, but it is also directly contradicted by the Department's own longstanding interpretation of that very rule. In a 1994 regulatory guidance letter, the Department explicitly stated that collection costs—in an amount up to 18.5 percent of the outstanding debt—may be assessed on rehabilitated loans. And the Department expressly determined that such costs "will be considered 'reasonable' " under 34 C.F.R. § 682.410(b)(2)—the very provision that it now interprets to bar such costs. Notably, the Department has never acknowledged that its new interpretation departs from the interpretation offered in 1994. Indeed, the Department unreasonably contends that its new position is no different from its earlier interpretation.

The lower court transformed and expanded *Auer* in conflict with both *SmithKline* and *Fox Television Stations* by granting deference to the Education Department's unacknowledged departure from its past precedent. By deferring to the Department's changed interpretation, the decision below ignored this Court's clear instruction to withhold deference "when the agency's interpretation conflicts with a prior interpretation" or otherwise gives "reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *SmithKline*, 132 S. Ct. at 2166 (2012). In any event, by deferring to an *unacknowledged* departure from past precedent, the lower court also ignored this Court's holding that *sub silentio* departures from past interpretations are

arbitrary and capricious. *Fox Television Stations*, 556 U.S. at 515.

This Court should grant the petition and enforce the APA's limits on agencies' lawmaking power. At the very least, it should grant the petition to prevent lower courts from further eroding those limitations through expansions of *Auer*'s atextual deference doctrine that conflict with this Court's recent precedents.

ARGUMENT

The Petitioner rightly argues that *Auer* and *Seminole Rock* violate our constitutional system of separated powers and should be overruled on that ground. Petition 14–21. Deferring to an agency's interpretation of its own rule transfers legislative and judicial power to a single unelected body—absent even the minimal accountability afforded by notice-and-comment—and abdicates the judicial duty to serve as a 'check' on the political branches. *See Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).

And the Petitioner is also right to insist that the Seventh Circuit's decision violates this Court's existing deference rules because the Education Department's eleventh hour interpretation is at odds with the plain meaning of the underlying statute and regulation, Petition 27–31, and because the interpretation's retroactive application deprives the regulated community of fair warning, *id.* at 32–36.

But the Court should grant *certiorari* in this case for two additional reasons that the Petition does not directly address.

First, deference to an agency's interpretation of its own rule violates the plain text, structure, and history of the Administrative Procedure Act.

Second, the court of appeals' decision conflicts with two of this Court's recent precedents. *SmithKline* prevents uncritical deference to new agency interpretations that conflict with earlier interpretations, and *Fox Television Stations* prevents deference to unacknowledged departures from past agency precedents. The court of appeals decision defers to a new agency interpretation in violation of both rules.

I. *Auer* deference violates the Administrative Procedure Act.

Amici wholeheartedly agree that close scrutiny of the doctrine of *Auer* and *Seminole Rock* "reveals serious constitutional questions lurking beneath." *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment). But deference to an agency's interpretation of its own rule also fails under "a straightforward application of the APA." *Id.*; *see id.* at 1211–13 (Scalia, J., concurring in the judgment). No less than the constitutional ground, the statutory ground justifies overturning *Auer* and *Seminole Rock*.

A. The APA requires courts to interpret agency rules.

The APA charges courts—not agencies—with interpreting rules. *See Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (citing 5 U.S.C. § 706). This requirement is found in the very first sentence of the APA's judicial review statute: "To the extent necessary to decision and when presented,

the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, *and determine the meaning or applicability of the terms of an agency action*." 5 U.S.C. § 706 (emphasis added).[2] The term "agency action" is defined to include "an agency rule," like the one the Department of Education purports to interpret in this case. 5 U.S.C. § 701(b)(2); 5 U.S.C. § 551(13).[3]

The judicial duty to interpret agency rules is mandatory: "the reviewing court *shall* . . . determine the meaning . . . of an agency action." 5 U.S.C. § 706. Congress's intent "could not be clearer," because "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Shapiro* v. *McManus*, 136 S. Ct. 450, 454 (2015) (quoting *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)).[4]

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[2] This Court interprets § 706 according to its "plain language." *Bowen v. Massachusetts*, 487 U.S. 879, 911 (1988).

[3] *Accord* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 621 n.52 (1996) ("The instruction to 'determine the meaning of . . . an agency action' has direct application to the interpretation of regulations, as the APA defines 'agency action' to include 'the whole or a part of an agency rule.' " (quoting 5 U.S.C. § 551(13)).

[4] *See also Fed. Exp. Corp. v. Holowecki,* 552 U.S. 389, 400 (2008) ("Congress' use of a mandatory 'shall' indicates an intent to 'impose discretionless obligations.' " (quoting *Lopez v. Davis,* 531 U.S. 230, 241 (2001))); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007) ("The word 'shall' generally

Auer deference turns the APA on its head. *Auer* deference prevents courts from carrying out their obligation under the APA to "determine the meaning . . . of agency action." 5 U.S.C. § 706. Instead, unless one a few narrow exceptions applies, *Auer* requires courts to leave the meaning of the law "to another's judgment." *Perez*, 135 S. Ct. at 1220 (Thomas, J. concurring in the judgment) ("So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to 'decide' that the text means what the agency says."); *id.* at 1219–20 (Thomas, J., concurring in the judgment) (quoting 1 Samuel Johnson, Dictionary of the English Language 499 (4th ed. 1773)). This abdication of power "to say what the law is" not only violates the constitution; the APA's plain meaning also unsurprisingly forecloses it.

B. The APA's structure is incompatible with *Auer* deference.

The structure of the APA confirms its plain meaning and further demonstrates *Auer*'s incompatibility with the statute. *Auer* deference makes a mockery of the APA's key procedural safeguard—notice-and-comment rulemaking. Under the APA, agencies generally must employ notice and comment to issue regulations that bind the public. *See Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the

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indicates a command that admits of no discretion on the part of the person instructed to carry out the directive" (quoting *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)); Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 114 (2012) ("[W]hen the word *shall* can reasonably read as mandatory, it ought to be so read.").

judgment). To be sure, the APA exempts interpretive rules from notice and comment requirements. When combined with *Chevron*, this means that agencies can issue interpretations of statutes that carry the force of law without following notice-and-comment procedures. But *Auer*'s conclusion—that agencies are empowered, without notice and comment, to bind the public through interpretations of their own regulations—does not follow from either the APA's exception for interpretive rules or from *Chevron*. Rather, *Auer* converts the APA's exemption for interpretive rules into a grant of authority to agencies to do the one thing the APA surely forbids them to do: adopt binding substantive "rules unhampered by notice-and-comment procedures." *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

As members of this Court have observed, granting judicial deference to an agency interpretation unmoored from the usual rulemaking process undermines the rulemaking system. *Auer* deference empowers unelected agencies to operate outside the confines of administrative procedure, promulgating open-ended regulations through notice-and-comment rulemaking and later filling in their substantive content by "interpretation," unshackled from both notice-and-comment procedure and meaningful judicial review:

> Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely,

> leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

Perez, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

Yet that is precisely what the Department of Education did in this case. After Congress passed a statute allowing "reasonable collection costs," 20 U.S.C. § 1091a(b), the agency promulgated a regulation parroting the allowance of "reasonable costs," 34 C.F.R. § 682.410(b)(2). That vague regulatory term became a Trojan horse for stealth rulemaking—the Department's post-argument amicus brief and its invocation of *Auer* deference to bless a new substantive interpretation of "reasonable" announced by Department fiat. The Department thereby escaped notice-and-comment rulemaking and its consequent duty to justify its new binding policy in the context of a public debate.

If there were any doubt about the plain meaning of § 706, this court should favor the interpretation that gives effect to the structural safeguards of the APA, namely its clear prohibition on imposing binding substantive rules on the public without, at a minimum, adherence to the requirements of notice and comment. *See Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (applying "the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a

statute.' " (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000))).[5]

Thus the APA's judicial review provision must be interpreted (as its plain meaning demands) to require *de novo* judicial interpretation of agency rules. Any reading of § 706 that leaves room for *Auer* deference allows agencies to evade meaningful public participation in adopting substantive regulations, selectively nullifying the Act's procedural safeguards.

C. The APA's legislative history confirms Congress's intent that agency interpretations issued without notice and comment receive "plenary" judicial review.

Auer is also out of step with the APA's legislative history. Petitioner notes in the course of its constitutional argument that "the framers of the APA" understood that "the enforcement of the [APA], by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis." Petition at 16–17 (quoting S. Rep. No. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 217, 79th Congress, 1944–46 (1946) (hereinafter "APA LEGISLATIVE HISTORY").

That is an understatement. In addition to writing their preference for judicial interpretation into § 706

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[5] *See also Rice v. Minnesota & N. W. R. Co.*, 66 U.S. 358, 378–79 (1861) ("[I]n the search for [congressional intent] the whole statute must be regarded, and, if practicable, so expounded as to give effect to every part.").

itself, the APA's framers explained in detail the structural rationale for that preference: Agency interpretations must be subject to "plenary" judicial review, precisely because the APA exempts them from the safeguards of notice-and-comment rulemaking. Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *excerpted in* APA LEGISLATIVE HISTORY 18.[6]

The APA's sponsor in the Senate stressed this point: "The pending bill exempts from its procedural requirements all interpretative . . . rules," Sen. McCarran explained, "because under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review [than legislative rules are]." APA LEGISLATIVE HISTORY 313 (statement of Sen. McCarran).

The Attorney General's 1941 committee report also alluded to this consideration. Attorney General's Committee on Administrative Procedure, Final Report 27. Perhaps the committee did so at the behest of Ralph Fuchs, a committee member who raised this point in a contemporaneous article: "If the regulation is subject to challenge in all of its respects after its promulgation," he wrote in 1938, "the need for advance formalities is reduced or eliminated"; but when regulated parties are left "with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it." Ralph

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6 Properly enacted legislative rules, by contrast, would receive relaxed judicial review, and therefore justified the additional *ex ante* procedural protections. *Id.*

F. Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 271, 272 (1938).

By extending judicial deference to agencies' interpretative rules, the courts have brought about precisely the situation that the APA's framers sought to avoid: binding rules adopted without notice and comment, yet facing no meaningful judicial scrutiny, and thus "creat[ing] a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (brackets omitted) (quoting *Talk America, Inc.* v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

Indeed, in contrast to *Auer*'s modern defenders in the academy, the dangers of deference to interpretations of regulations were no less evident to contemporaneous commentators than to the APA's congressional sponsors. In 1951, just 5 years after the APA's enactment, Professor Kenneth Culp Davis—one of the leading administrative law scholars of the day—clearly anticipated the problem of mixing judicial deference with the APA's notice-and-comment exemption for interpretive rules. Citing the pre-APA case of *Seminole Rock*, Davis noted that to extend such deference to interpretative rules under the APA's framework would produce "absurd" results: "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." Kenneth C. Davis, *Administrative Law* 202 n.72 (1951) (quoting *So. Goods Corp.* v. *Bowles*, 158 F.2d

587, 590 (4th Cir. (1946)). Recognizing that he was writing at a moment when "the science of interpretation of administrative rules . . . is still in its infancy," Davis noted his expectation that the Supreme Court would intervene and do away with *Seminole Rock*. *Id.* But so far history has been otherwise. *See* Manning, 96 Colum. L. Rev. at 654–96; Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1459–66 (2011).

II. The decision below conflicts with this Court's decisions in *SmithKline* and *Fox Television Stations*.

Even if *Auer* were sound, the Court should grant the petition and reverse the decision below because its expansive interpretation of *Auer*'s scope conflicts with this Court's precedent.

When courts should and should not apply *Auer* deference is a critical question of federal law. As Judge Easterbrook observed in this case, "invocation of *Auer* deference is a frequent occurrence" in federal courts, and one that generates serious legal consequences. *Bible* v. *United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015). In this case alone, *Auer* "deference has set the stage for a conclusion that conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while this case was on appeal." *Id.* at 841–42. *But see Whitman* v. *United States*, 135 S. Ct. 352, 353 (2014) (Scalia J., statement respecting the denial of

certiorari) (this form of deference "collide[s] with the norm that legislatures, not executive officers, define crimes."). And this radical change in the law was not initiated by some deliberative administrative process, but by the lower court's request for a post-argument amicus brief.

A. *Auer* deference is unwarranted under *SmithKline*, because the Department's new interpretation conflicts with its prior interpretation.

The Department of Education's new interpretation conflicts with *SmithKline*, for all the reasons stated in the Petition and one more besides:

Auer deference is "unwarranted," under *SmithKline*, "when the agency's interpretation conflicts with a prior interpretation," so that the reviewing court has "reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *SmithKline*, 132 S. Ct. at 2166 (quotation marks omitted), *quoted in Perez*, 135 S. Ct. at 1208 n.4; *see also Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) ("An agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." (quotation marks omitted)).

As Petitioner notes, contrary to the rule announced in *SmithKline* the court of appeals extended *Auer* deference to the regulatory interpretation announced in the Department's amicus brief, notwithstanding "contemporaneous contrary statements from the Department's own website"

demonstrating that the agency's post-argument interpretation is not entitled to any deference because it does not reflect its "fair and considered judgment." Petition at 33.

Exactly right. And given Congress's clear statement that guarantors "may" charge collection costs on rehabilitated loans, 20 U.S.C. § 1078-6(a)(1)(D)(i)(II), it should come as no surprise that the Department of Education's current contrary view marks a sharp break with its prior treatment of this subject.

But evidence of the Department's unprincipled reinterpretation of its own regulation runs even deeper: In 1994, Robert Evans, the Director of the Department's Division of Policy Development sent a "Dear Guaranty Agency Director" letter confirming that collection costs may be assessed on rehabilitated loans. App. 222. The "Evans Letter" noted that the Department's prior "policy guidance" "authorized guaranty agencies to include *all* outstanding collection costs on [a] defaulted loan in the rehabilitated loan amount to be purchased" by an eligible lender under 34 C.F.R. § 682.405. App. 224 (emphasis added).

The letter also noted concerns that seem to animate the Department's current position, namely that adding *actual* collection costs to "the borrower's new loan debt would be a disincentive to a borrower attempting to resolve the default status on a loan through rehabilitation" and would increase the likelihood of future default. *Id.* The Evans Letter addressed those concerns, however, not by disallowing the recovery of costs in connection with any particular category of rehabilitated loans—as the Department

seeks to do today—but by clearly announcing a new policy to limit assessment of costs on a rehabilitated loan to "18.5 percent of the outstanding amount of principal and accrued interest on the loan at the time the agency arranges the lender purchase to rehabilitate the loan." App. 225. Thus, the Department continued to allow guarantors to charge collection costs on all rehabilitated loans, without exception, up to the 18.5 percent cap. *Accord Bible*, 799 F.3d 633, 675 (7th Cir. 2015) (Manion, J., dissenting) ("This letter contains no mention of an exception for borrowers who promptly agree to rehabilitation.").

More to the point, the Department expressly found such costs to be "reasonable" for rehabilitated loans under 34 C.F.R. § 682.410(b)(2)—the very provision that the Government now interprets to bar such costs. *See* App. 225 (declaring "the amount of collection costs that will be considered 'reasonable' under these circumstances [rehabilitation] to be an amount that does not exceed 18.5 percent."); *accord Bible*, 799 F.3d at 675 (Manion, J., dissenting) (The Evans Letter "explicitly states that collection costs on rehabilitated loans that do not exceed 18.5% of the outstanding balance and accrued interest are 'reasonable.'").[7]

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[7] In contrast to the Department's new position, the Evans Letter was fully consistent with the Department's own collection cost regulations, which unambiguously *require* guarantors to assess collection costs on defaulted loans. 34 C.F.R. § 682.410(b)(2) ("[T]he guaranty agency *shall* charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default . . . claim." (emphasis added)). The regulations make no exception for defaulted loans

There can be no doubt that the Evans Letter represents the Department of Education's earlier understanding of the meaning of its collection costs regulation. The Letter was issued only fifteen months after the Department of Education promulgated an exception to collection costs for borrowers who "enter into a repayment agreement on terms satisfactory to the [guaranty] agency," 57 Fed. Reg. 60280, 60356 (Dec. 18, 1992) (34 C.F.R. § 682.410(b)(5)(ii)(D)). If the Department of Education had interpreted this new regulation to forbid collection costs in any rehabilitation context, as the Department does now, it would certainly have said so in its 1994 letter. Instead it said the opposite. *See Bible*, 799 F.3d at 675 (Manion, J., dissenting).

Auer deference was particularly inappropriate in this case because it enables precisely the harms *SmithKline* was intended to prohibit: "massive liability . . . for conduct that occurred well before that interpretation was announced." *SmithKline*, 132 S. Ct. at 2167. By giving *Auer* deference to the Department's newly announced interpretation, notwithstanding the contrary position set forth in the Evans Letter, the court of appeals has undermined the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Id.*; *see also* Petition 32–36.

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that are subsequently rehabilitated. To the contrary, the rules expressly contemplate the assessment of collection costs on rehabilitated loans, requiring that rehabilitation agreements "inform the borrower . . . [o]f the amount of the collection costs to be added to the unpaid principal of the loan when the loan is [rehabilitated and] sold to an eligible lender." 34 C.F.R. § 682.405(b)(1)(vi)(B).

B. Deference is unwarranted under *Fox Television Stations*, because the Department has not acknowledged reversing its prior interpretation.

As this Court has held in the context of substantive regulations, stealth departures from past precedent embody the very "arbitrary and capricious" government action prohibited by the APA. *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio*."). Surely it is inappropriate to extend *Auer* deference to agency actions that are *a fortiori* arbitrary and capricious.

Yet that is exactly what the court of appeals did in this case. To this □day, the Department has never acknowledged that its new interpretation departs from the policy announced in the Evans Letter. To the contrary, the Department has brazenly argued that the Evans Letter is consistent with the interpretation it has advanced in this case. *See* Gov't Br. (7th Cir.) 22–23; *Bible*, 799 F.3d at 675 (Manion, J., dissenting) (noting the Department's citation of the letter in an "effort to provide some record that [it had] developed [its new] interpretation before Bible's lawsuit"). As Judge Manion observed, that argument is "unreasonable." *Id.* Nevertheless, without even addressing the 1994 letter or *Fox Television Stations*, the majority uncritically extended *Auer* deference to the Department's unacknowledged reversal of its prior interpretation.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted.

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