No. 16-_____

IN THE
Supreme Court of the United States

NOBLE ENERGY, INC.,

Petitioner,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 22, 2016

QUESTIONS PRESENTED

1. Whether the D.C. Circuit erred in refusing to apply the presumption that Congress intends positive law to retain common law principles absent clear evidence to the contrary, *United States v. Texas*, 507 U.S. 529 (1993), and instead deferring under *Auer v. Robbins*, 519 U.S. 452 (1997), to an agency's conclusion that its general regulations implicitly displace the common law.

2. Whether the "general" *Auer* presumption that Congress intended deference to the agency applies when this Court has recognized a specific countervailing presumption of congressional intent.

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

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioner Noble Energy, Inc. was the appellant below, and the plaintiff in the district court. Pursuant to Supreme Court Rule 29.6, petitioner Noble Energy, Inc. states that it has no parent company, and no publicly-traded company owns 10% or more of its stock.

Respondents United States Department of the Interior, Bureau of Safety and Environmental Enforcement, and Sally Jewell, in her official capacity as Secretary of the Interior, were the appellees below and the defendants in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Noble Energy, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' first decision in this case is reported at 671 F.3d 1241 and reproduced at Petition Appendix ("Pet. App.") 41a. The court of appeals' second decision in this case (Pet. App. 1a), issued after a remand to the district court and the Bureau of Safety and Environmental Enforcement, is unreported but is available at 2016 WL 3039397. The court of appeals' order denying rehearing en banc (Pet. App. 61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2016. A timely petition for rehearing was denied on June 24, 2016. Pet. App. 61a–62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq*., and the implementing regulations promulgated by the Department of the Interior's Bureau of Safety and Environmental Enforcement, 30 C.F.R. Part 250,

are reproduced in the appendix to the petition. Pet. App. 63a.

INTRODUCTION

The D.C. Circuit upheld an order of the Department of the Interior's Bureau of Safety and Environmental Enforcement ("BSEE") requiring Noble Energy, Inc. ("Noble") permanently to plug and abandon an offshore well drilled pursuant to a lease that the Government has been held to have materially breached.[1] BSEE based its decision on regulations implementing the Outer Continental Shelf Lands Act ("OCS Lands Act"), 43 U.S.C. §§ 1331, *et seq*.

But this Court has made clear that positive law is not "writ[ten] upon a clean slate," and "'courts may take it as a given that Congress has legislated with an expectation that . . . [common law] principle[s] will apply'" under that positive law. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). To that end, " '[s]tatutes which invade the common law . . . are to be read ***with a presumption favoring*** the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id*.

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[1] BSEE succeeded several predecessor agencies during an October 2011 reorganization within the Department of the Interior. *See*, *e.g.*, 76 Fed. Reg. 64,432 (Oct. 18, 2011). For ease of reference, Noble will refer to the agency responsible for ordering Noble permanently to plug and abandon the well, both before and after these name changes, as BSEE.

(emphasis added) (citations omitted). The burden to overcome the presumption is high; "[i]n order to abrogate a common-law principle, the statute must ***speak directly*** to the question addressed by the common law." *Id*. (emphasis added) (quotation marks and citations omitted).

The D.C. Circuit's decision defied these commands by disregarding the long-standing common law rule that a material breach discharges the non-breaching party's remaining obligations arising from the contract. Neither BSEE nor the D.C. Circuit identified a single provision in the OCS Lands Act or BSEE's implementing regulations that "speak[s] directly," *Texas*, 507 U.S. at 534, to the question raised in this case: whether BSEE can order Noble to plug and abandon the well notwithstanding the Government's material breach of the offshore lease that authorized the well to be drilled and imposed both the contractual and regulatory plug and abandonment requirements in the first instance. To the contrary, both BSEE's challenged order, *see* Pet. App. 36a, and the D.C. Circuit, *see* Pet. App. 48a–49a, openly concede that no such provision exists.

The D.C. Circuit nonetheless refused to apply the standard set forth in *Texas*, instead deferring to BSEE's interpretation of its regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), to preclude the *Texas* presumption. This Court's review of the D.C. Circuit's decision is necessary for three reasons. *First*, the D.C. Circuit applied the wrong standards in assessing the applicability of the *Texas* presumption, raising a conflict with decisions of this Court

and other Circuits. Indeed, the D.C. Circuit's standard for applying *Texas* effectively nullifies *Texas*. *Second*, the D.C. Circuit confused the appropriate balance of, on the one hand, "general" *Auer* deference (*i.e.*, the presumption that Congress intended deference to agency interpretations of statutes and regulations), and, on the other hand, well-established specific presumptions—like the *Texas* doctrine—about congressional intent. *Third,* even if the D.C. Circuit properly applied *Texas* and *Auer*, this Court should reconsider *Auer* in light of the serious dangers it presents to the constitutional separation of powers.

STATEMENT OF THE CASE

A. Oil And Gas Exploration On The Outer Continental Shelf, And The Government's Material Breach Of Noble's Lease.

1. Each coastal state owns the submerged lands lying within a fixed distance from its coastline, ordinarily three nautical miles. The OCS Lands Act confers on the United States jurisdiction, control, and the power of disposition over mineral resources found in the submerged lands lying seaward of state-owned submerged lands. These federal lands are known as the Outer Continental Shelf ("OCS"). *See* 43 U.S.C. §§ 1301, 1331(a), 1332.

Under the OCS Lands Act, 43 U.S.C. § 1337(b), the Secretary of the Interior is empowered to issue to the highest bidder oil and gas leases on the OCS. The OCS Lands Act authorizes the Secretary to issue regulations that "apply to all operations

conducted under a lease" "for the prevention of waste and conservation of the natural resources of the outer Continental Shelf." 43 U.S.C. § 1334(a). The Secretary has delegated most of her authority under the OCS Lands Act to BSEE and the Bureau of Ocean Energy Management. 30 C.F.R. § 250.101; *id.* § 550.101.

OCS leases grant the lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources in a prescribed geographic area of the OCS, in exchange for an up-front bonus payment, annual rentals, and royalties on any oil and gas that is ultimately produced. An OCS lessee must also pay the multi-million dollar cost of drilling exploratory wells, simply to determine whether the lease contains commercially recoverable quantities of oil and gas. *See* Court of Appeals Joint Appendix ("C.A. JA") 027, 047. Lease operations can potentially become profitable only if an OCS lessee's exploratory efforts prove successful and leasehold activities reach the production stage. *Id.*

After an exploratory well has been drilled and tested, it may be permanently "plugged and abandoned"—also called decommissioning—by, *e.g.,* placing a series of cement plugs in the borehole beneath the sea floor, with (depending upon the precise situation) wellhead (the pressure-containing component of an the oil well at the sea floor) and casings (pipe) then cut and removed to a designated depth below the sea floor. *See* 30 C.F.R. §§ 250.1715, 250.1716.

An OCS lease runs for a primary term (here, five years) and as long thereafter as oil or gas is being produced or drilling operations are being conducted. 43 U.S.C. § 1337(b)(2). However, the Secretary of the Interior by law is required to adopt regulations for the "suspension" of OCS leases, which suspends the running of the lease term. *See* 43 U.S.C. §§ 1334(a)(1), 1337(b)(5). A lessee may request a suspension from BSEE, or the agency may order a suspension. "Lessees frequently request suspensions to prevent lease expiration in the face of ongoing exploration or development activities that have not yet resulted in the production of oil in paying quantities." *Amber Res. Co. v. United States*, 68 Fed. Cl. 535, 538 (2005).

2. Lease 320, issued by the United States in 1979, is located offshore central California. Lease 320 was "issued subject to" the provisions of the OCS Lands Act and "all regulations issued pursuant to . . . [the OCS Lands Act] in the future which provide for the prevention of waste and the conservation of the natural resources of the [OCS]." C.A. JA 057, § 1; *see also* C.A. JA 058, § 10. Lease 320 further provided: "Within a period of one year after termination of this lease in whole or in part, the Lessee shall remove all devices, works, and structures from the premises . . . in accordance with all applicable regulations and orders . . . ." C.A. JA 060, § 22.

In 1985, the lessees drilled the 320 # 2 exploratory well on Lease 320. C.A. JA 029, 048. The 320 # 2 exploratory well was successful, and the Department of the Interior officially determined that well to

have discovered oil and gas in commercial quantities. With BSEE's permission, the 320 # 2 well was then plugged temporarily rather than permanently, in order to allow the lessees later to re-enter the well to perform a long-term testing program. C.A. JA 029, 048. Thereafter, Noble's predecessors requested and BSEE ordered a series of suspensions. C.A. JA 031–32, 049.

3. Noble, however, was unable to produce any of the underlying oil and gas because the United States committed a total, material breach of Lease 320 and certain other similarly situated undeveloped Pacific OCS leases by imposing, after the lease was issued, new restrictions on the lessees' operations that prevented them from exploiting the lease. *See Amber Res. Co. v. United States*, 68 Fed. Cl. 535 (2005); *Amber Res. Co. v. United States*, 73 Fed. Cl. 738 (2006); *Amber Res. Co. v. United States*, 538 F.3d 1358 (Fed. Cir. 2008).

The Government's breach arose from a lawsuit filed by the State of California alleging, among other things, that BSEE lacked the legal authority to grant requested lease suspensions unless and until BSEE affirmatively determined, in accordance with the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(c)(1), that the suspensions would be "consistent to the maximum extent practicable" with California's coastal management program. *California ex rel. Cal. Coastal Comm'n v. Norton*, 150 F. Supp. 2d 1046, 1052 (N.D. Cal. 2001). At the time the undeveloped Pacific OCS leases were issued by the United States, applicable statutes and regula-

tions did not provide a state any role with respect to suspensions requested for federal leases off their coasts. *See Amber*, 68 Fed. Cl. at 538; *see also id.* at 547 (noting the Department of the Interior "was free to grant or deny [a suspension] request").

On June 20, 2001, the district court ruled in California's favor, holding that amendments to the CZMA enacted in 1990 subjected lease suspensions to the statute's consistency review process. *See Norton*, 150 F. Supp. 2d at 1053; *see also Amber*, 68 Fed. Cl. at 547. The Ninth Circuit affirmed. *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

Although the Department subsequently purported to issue a consistency determination, the State exercised its legal authority under the CZMA to object to that determination, and the Department of the Interior never granted the requested suspensions.

The lessees filed a breach of contract lawsuit in the Court of Federal Claims. The Court of Federal Claims ruled for the lessees, holding that the 1990 CZMA amendments' imposition of new procedures and standards on the grant of lease suspensions, and the direct consequences that resulted, constituted a total, material breach of Lease 320 and other undeveloped Pacific OCS leases. *Amber*, 68 Fed. Cl. at 548–54; *Amber*, 73 Fed. Cl. 738. The Federal Circuit affirmed. *Amber*, 538 F.3d at 1362.

As a result of the material breach, the lessees were discharged from any further obligations under the leases, have no remaining interests in the leases,

and can no longer pursue exploration or production of the underlying oil or gas. *See Amber*, 68 Fed. Cl. at 540; *Amber*, 73 Fed. Cl. at 755–56; *see also* Pet. App. 44a–45a. Thus, the substantial oil and gas resources that underlie Lease 320, which were discovered as a result of the lessees' multi-million dollar exploration efforts, have reverted to the United States.

B. The Common Law Discharge Rule.

An OCS lease is a contract between the lessee and the United States. *Mobil Oil Exp. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000). "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996)). "The Restatement of Contracts reflects many of the principles of contract law that are applicable" to offshore leases. *Id.* at 608.

Section 237 of the Restatement (Second) of Contracts (1981), makes clear that the material breach of a contract discharges all of the non-breaching party's remaining obligations. This is a well-established common law legal doctrine that applies equally to the Government.[2]

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[2] *See, e.g.*, *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1550 (Fed. Cir. 1992) ("The first question is whether the [Government] materially breached the contract, thereby excus-
(...continued)

C. Proceedings Below.

1. BSEE's September 2009 Plug And Abandon Order.

By a short, one-paragraph letter order dated September 1, 2009, BSEE purported to invoke its regulatory powers under the OCS Lands Act to order Noble and its co-lessees "promptly and permanently" to plug and abandon the 320 # 2 exploratory well. In brief, the letter concluded "that there is no longer justification for maintaining the well in temporarily abandoned status" and "[t]herefore, as required by 30 CFR 250.1723, you must: promptly and permanently plug the well . . . ." Pet. App. 59a.

2. Noble's First Lawsuit.

On October 26, 2009, Noble filed suit seeking a declaratory judgment that the 2009 BSEE order was unlawful pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the OCS Lands Act, 43 U.S.C. § 1349(b)(1), and 28 U.S.C. § 1331. *See Noble Energy, Inc. v. Salazar*, 770 F. Supp. 2d 322 (D.D.C. 2011).

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ing [the private party] from all further performance," under the rule that "[u]pon material breach of a contract the non-breaching party has the right to discontinue performance of the contract."); *Thomas v. Dep't of Hous. & Urban Dev.*, 124 F.3d 1439, 1442 (Fed. Cir. 1997) ("[b]ecause the [Government's] breach of the settlement agreement is material, [the counter-party] was discharged from his contractual duty").

Noble explained that, under the doctrine set out in *United States v. Texas*, the common law principle of discharge is presumptively included in BSEE's regulations of oil and gas activities conducted pursuant to the Government's lease contracts with private parties. The district court acknowledged that under the common law discharge rule, the Government's total and material breach of Lease 320 relieved Noble of its contractual obligations under the lease permanently to plug and abandon the 320 # 2 well. *See Noble Energy*, 770 F. Supp. 2d at 330–31. But the court concluded that the parallel agency regulations "establish an independent obligation to permanently plug and abandon all exploratory wells." *Id.* at 331. Noble timely appealed.

The D.C. Circuit concluded that the sparse 2009 BSEE order left the court unable to review the agency's action "with any confidence." Pet. App. 49a. Indeed, the court did "not know . . . whether [BSEE] actually decided that the regulatory obligation to plug Well 320-2 continued post-breach." *Id.* Because "[t]here is not a word in [the 2009 BSEE order] indicating that it considered the common law doctrine of discharge" and "no hint of the agency's reasoning or the factors that it took into account," *id.*, the D.C. Circuit vacated the district court's judgment and the 2009 BSEE order, and remanded the matter to BSEE to "explain why" the plug and abandon regulations apply to Noble. *Id.* at 51a.

Senior Judge Williams wrote "separately to express doubt whether the Interior Department, on remand, will be able to offer an interpretation [of its

plug and abandonment regulations] that is both reasonable and supportive of its action here." Pet. App. 53a (Williams, J., concurring). As Judge Williams explained, Noble's argument hinges on the rule articulated in *Texas*, and the "variant of that rule that Noble needs in order to win is very narrow." *Id.* Specifically,

> that when the government behaves as a market actor, and promulgates statutes or regulations governing the relationship between it and private-sector market actors in a manner parallel to what in the private sector would be controlled by contract or the common law, the statutes or regulations are presumptively subject to the sort of implied caveats and qualifications that apply to comparable contract language or common law understandings.

Id. Because "[t]he government ventured into oil-and-gas production as a rather standard market actor" and promulgated "regulations [that] plainly function as a supplement to the lease," *Texas* instructs that "the government is subject to the normal common law rules of contract, unless a law 'speak[s] directly to the question addressed by the common law.'" *Id.* at 53a–54a (quoting *Texas*, 507 U.S. at 534). Recognizing that no BSEE regulation expressly addressed material breach or discharge, Judge Williams concluded, "[t]he question posed by this case is whether" BSEE's regulations could displace the common law "silently. The *Texas* principle suggests a negative answer." *Id.* at 55a.

3. BSEE's April 2014 Plug And Abandon Order.

After remand, BSEE issued the challenged order on April 9, 2014. Pet. App. 27a. The challenged order again purports to require Noble "to promptly and permanently plug" the 320 # 2 well "as specified by applicable regulations at 30 C.F.R. §§ 250.1700–1754." *Id.* The challenged order claims that common law principles of discharge do not apply to regulatory plug and abandonment obligations based on "the terms of the decommissioning regulations and their purpose." *Id.* at 36a.

On the first count, BSEE contended that the regulatory plug and abandon obligation is "independent" because "the regulations explicitly apply to more than just a current lessee, and the obligations extend beyond the life of the lease." *Id.* Rather, "[o]nce . . . decommissioning obligations accrue, they are binding upon lessees, former lessees, and operating rights owners until fully satisfied." *Id.* at 37a. Second, BSEE concluded that "[t]he independence of the decommissioning obligations from the lease is also fundamental to fulfilling the purposes of the regulations," which "serve to protect the environment and ensure wise stewardship of resources held in trust for the public as mandated under" the OCS Lands Act. *Id.* at 38a.

4. Noble's Second Lawsuit.

Noble promptly challenged BSEE's new order pursuant to the APA, 5 U.S.C. §§ 704 & 706(2)(A),

the OCS Lands Act, 43 U.S.C. § 1349(b)(1), and 28 U.S.C. § 1331. *See* C.A. JA 023.

Noble again relied on the *Texas* doctrine and explained that BSEE's arguments that it could nonetheless order Noble to permanently plug and abandon the 320 # 2 well demonstrated that BSEE fundamentally misunderstood this Court's decision in *Texas*, as further explained by Senior Judge Williams. The district court granted summary judgment to the Government, concluding, at bottom, that BSEE's "interpretation of the decommissioning regulations" not to incorporate the common law doctrine of discharge "is reasonable." Pet. App. 7a. Noble timely appealed.

A new panel of the D.C. Circuit rejected Noble's reliance on *Texas* and ignored the prior opinion of Senior Judge Williams. The court of appeals instead deferred under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to BSEE's determination that Noble was obligated by regulation to permanently plug and abandon the 320 #2 well despite the Government's material breach of the lease because the "regulations operate independently from any lease agreement." Pet. App. 4a. The D.C. Circuit further excused BSEE's failure to identify a statutory or regulatory provision meeting the *Texas* standard by speaking directly to the consequences of the Government's material breach, holding that *Texas* "does not apply" because "there is no conflict between the regulations and the common law of discharge." *Id.*

The D.C. Circuit denied Noble's timely petition for rehearing *en banc*. Pet. App. 61a–62a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Holding That *Texas* Only Applies To A Conflict Between The Common Law And A Regulation Conflicts With *Texas* And Other Circuit Decisions Applying *Texas*.

In *Texas*, this Court made clear that "'courts may take it as a given that Congress has legislated with an expectation that [common law] principle[s] will apply except when a statutory purpose to the contrary is evident.'" 507 U.S. at 534 (quoting *Astoria*, 501 U.S. at 108). Accordingly, "[s]tatutes . . . are to be read ***with a presumption favoring*** the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident . . . ." *Id.* (emphasis added).

The well-established common law discharge doctrine, *see supra*, directly addresses the consequences of one party's (here, the Government) material breach of a contract on the non-breaching party's (here, Noble) remaining obligations arising from the contract. *E.g.*, Restatement (Second) of Contracts § 237 (1981). "In order to abrogate [such] a common law principle," the positive law "must ***speak directly*** to the question addressed by the common law." *Texas*, 507 U.S. at 534 (emphasis added) (quotation marks and citations omitted).

1. The D.C. Circuit applied the wrong standard in refusing to apply *Texas*' presumption retaining common law principles in positive law. Rather than addressing whether the regulations "speak directly"

to whether a material breach discharges further obligations, the panel found *Texas* inapplicable because—under BSEE's interpretation of its regulations—there is no "conflict" between BSEE's regulations and the common law discharge doctrine. *See* Pet. App. 4a.

Texas contradicts the panel's proposed standard. In *Texas*, this Court applied the presumption favoring retention of the common law principle allowing recovery of prejudgment interest precisely ***because*** there was no conflict between the common law principle and the Debt Collection Act. *See Texas*, 507 U.S. at 535 (explaining that the statute "is silent as to the obligation of the States to pay prejudgment interest"). *See also*, *e.g.*, *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (finding language of Torture Victim Protection Act consistent with "surviv[al]" of common law head of state immunity from such damages).

Requiring a conflict to trigger application of *Texas* would completely nullify the *Texas* presumption—if a law conflicts with the relevant common law principle, it necessarily "speak[s] directly," *Texas*, 507 U.S. at 534 (citation omitted), to the issue addressed by the common law, and therefore displaces the common law. Thus, requiring a conflict would ensure that the common law is displaced in every

case in which *Texas* applies. That is not how other Circuits have applied *Texas*.[3]

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[3] Courts have invoked the *Texas* presumption in a wide variety of circumstances, and have consistently held that common law rules apply absent clear proof of contrary intent. *See*, *e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1323–25 (Fed. Cir. 2015) (common law laches defense presumptively included in Patent Act), *cert. granted*, 136 S. Ct. 1824 (2016); *Sachs v. Republic of Austria*, 737 F.3d 584, 596–97 (9th Cir. 2013) (Foreign Sovereign Immunities Act does not displace common law agency principles), *rev'd on other grounds*, 136 S. Ct. 390 (2015); *Exact Software N. Am., Inc. v. DeMoisey*, 718 F.3d 535, 543 (6th Cir. 2013) (statutory limitations on federal courts' supplemental jurisdiction did not abrogate jurisdiction to resolve fee disputes where statute "does not speak to fee disputes and nothing in the statute suggests that Congress meant otherwise"); *Matar v. Dichter*, 563 F.3d 9, 13–14 (2d Cir. 2009) (limited immunities established by the Foreign Sovereign Immunities Act did not abrogate the common law immunity of former foreign government officials); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15–16 (1st Cir. 2005) (Medicare Act provisions regarding the recoupment of overpayments did not displace common law claims for the recovery of monies erroneously paid from the Treasury); *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1374 (Fed. Cir. 2001) ("Absent explicit language, we will not assume that Congress meant to change the common law rights of assignees when it waived sovereign immunity as to 'claims.'"); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 128 (2d Cir. 2001) (RICO presumptively incorporates common law "revenue rule" regarding the enforcement of foreign taxes); *Kasza v. Browner*, 133 F.3d 1159, 1167–68 (9th Cir. 1998) (Resource Conservation and Recovery Act does not displace the common law privilege for state secrets with respect to plants that the President has not exempted from compliance); *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 670 (4th Cir. 1996) (common law of detinue and conversion not abrogated by Comprehensive Forfeiture Act); *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054–55 (Fed. Cir. 1993) (Debt Collection Act's offset provisions did not eliminate common law (...continued)

In practice, the D.C. Circuit's search for a conflict obscured the failure of either the court or the agency to identify any provision of the OCS Lands Act or BSEE regulations that "speak[s] directly," *Texas*, 506 U.S. at 534, to the consequences of the Government's material breach of an oil and gas lease. Instead, BSEE found displacement of the common law discharge rule to be ***implicit*** in its regulations, *see* Pet. App. 36a–40a, and the D.C. Circuit deferred to that conclusion under *Auer*. *See* Pet. App. 4a. The D.C. Circuit thus employed general *Auer* deference to nullify the specific *Texas* presumption that Congress intends to retain common law principles. *See infra* Section II.

Rather than depending upon a "conflict," the *Texas* presumption applies wherever the positive law "invade[s]" the common law. *Texas*, 507 U.S. at 534 (citation omitted). For a statute or regulation to invade the common law, the statute or regulation need only "clearly cover[] a field formerly governed by the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 & n.13 (2010); *Manoharan*, 711 F.3d at 179–80. Here, the OCS Lands Act and BSEE's regulations invade the common law, by "governing the relation-

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claim for offset). *See also Amoco Production Co. v. Fry*, 904 F. Supp. 3, 9 (D.D.C. 1995) (finding that the OCS Lands Act invades the common law), *aff'd in part and rev'd in part on other grounds*, 118 F.3d 812 (D.C. Cir. 1997); *ABN AMRO Bank N.V. v. United States*, 34 Fed. Cl. 126, 131–32 (1995) (finding that comprehensive Treasury regulations did not displace common law rule governing double forgeries).

ship between [the Government] and private-sector market actors in a manner parallel to what in the private sector would be controlled by contract or the common law." Pet. App. 53a (Williams, J., concurring).

In short, the Government has entered into the market for offshore oil and gas development "as a rather standard market actor," *id.* (Williams, J., concurring)—offering up the mineral rights on its property for lease. Had the Government been a purely private actor in this scenario, the resulting rights and obligations of the parties would be defined solely by the lease itself (the contract) and the common law of contracts. But the OCS Lands Act authorizes the Government "to sell and administer oil and gas leases," and then "empowers the [BSEE] to promulgate rules and regulations governing those leases." *Id.* 42a. The result is a lease that "is short, only four pages, shorter than many leases used in the private sector," and "[t]he regulations plainly function as a supplement to the lease . . . ." *Id.* 53a–54a (Williams, J., concurring) (internal citation omitted).

Having entered into a field otherwise governed by the common law, the *Texas* presumption applies and common law principles are retained in BSEE's regulations unless the OCS Lands Act or BSEE's regulations "speak directly to the question addressed by the common law," *Texas*, 507 U.S. at 534 (citation omitted). At least the First, Second, and Fifth Circuits have held that the Government, as the "party contending that legislative action changed settled

law[,] has the burden of showing that the legislature intended such a change." *Ashland Chem., Inc. v. Barco, Inc.*, 123 F.3d 261, 268 (5th Cir. 1997) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989)). *See also Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129 (2d Cir. 2001) (same); *Matar v. Dichter*, 563 F.3d 9, 13–14 (2d Cir. 2009) (same). And *Texas* requires the Government to demonstrate a statute or regulation that "speak[s] directly to the question addressed by the common law," before the common law will be deemed abrogated, *Texas*, 507 U.S. at 534 (citation omitted).

The D.C. Circuit erred in not finding—or requiring of BSEE—the requisite intent. BSEE and the D.C. Circuit instead acknowledged that nothing in the OCS Lands Act or regulations speaks directly to whether a plug and abandonment obligation survives the Government's material breach of the lease. *See* Pet. App. 36a; Pet. App. 48a–49a; *see also id.* 57a (Williams, J., concurring) (discharge "address[es] a specific eventuality" that the regulations do not address).[4] As Senior Judge Williams explained, the

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[4] Rather than assess BSEE's two claimed justifications for the regulations' ***implicit*** displacement of the common law by this or any standard, the D.C. Circuit simply deferred to BSEE's conclusion under *Auer* to find *Texas* inapplicable. At any rate, neither justification passes muster.

First, BSEE's appeal to "independence" is illusory. The regulation is independent of common law contract principles only if *Texas*' admonition that the regulations retain the common law (*see supra*) is ignored. Moreover, as Senior Judge Williams explained, the regulations "plainly function as a sup-

(...continued)

"[t]he *Texas* principle suggests" that BSEE's regulations could not displace the common law "silently." *Id*. at 55a (Williams, J., concurring).

The D.C. Circuit's decision finding *Texas* inapplicable is thus flatly inconsistent with the facts and standards set forth in *Texas* as well as the burden and standards recognized by other Circuits. Review now should be granted to ensure the proper applica-

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plement to the lease, and the specific [decommissioning] ones at issue here directly complement a lease provision." Pet. App. 54a (Williams, J., concurring).

Indeed, the regulatory decommissioning obligation is virtually identical to the contractual obligation that was unquestionably discharged by the Government's material breach. *Compare* C.A. JA 060, § 22 (lease term requiring lessee to conduct decommissioning operations "[w]ithin a period of one year after termination of this lease . . .") *with* 30 C.F.R. § 250.1710 ("You must permanently plug all wells on a lease within 1 year after the lease terminates."). BSEE's order pointed to the fact that the plug and abandonment obligation applies to assignees and successors, but this simply matches longstanding common law principles of assignment. *See* Restatement (Second) of Contracts § 318(3) (1981). The challenged order's observation that the regulations require decommissioning "after lease termination," adds no more support because: (1) Lease 320 itself likewise expressly requires decommissioning after lease termination, C.A. JA 060, § 22; and (2) by its very nature the act of decommissioning a well occurs only after the completion of oil or gas drilling and/or production, which itself results in lease termination

Second, the environmental importance of plugging a well is simply non-responsive to the question raised by this lawsuit. The question posed is not whether or not the 320 # 2 well should be permanently plugged and abandoned, but rather ***who*** is responsible for arranging and paying for the operation.

tion of, and preclude similar nullification of, *Texas* in the future.

2. Proper application of *Texas* is particularly critical to the functioning of the Government's many contracts with private parties. Here, for example, an oil exploration and production company willingly shoulders obligations like that of well plugging and abandonment in return for the opportunity to recoup those costs (and earn profits) through the successful development and production of the oil and gas underlying the lease. *See Mobil Oil*, 530 U.S. at 620 ("We recognize that the lease contracts . . . gave the companies rights to explore for, and to develop, oil."); *Amber*, 73 Fed. Cl. at 755–56 ("We take it as incontestable that plaintiffs' purpose in acquiring these leaseholds was to find and produce commercial quantities of oil and gas."). Displacing well-known common law consequences with *post hac* agency interpretations of broad regulations undermines the expectations of such parties accustomed to the well-known rules of the common law of contracts that otherwise govern the Government's relations with lessees.

Having failed to show any clear intent to abrogate the common law, the Government should not be permitted to deprive the lessees of their rights, reap the benefits of the lessees' exploratory efforts by gaining ownership of the resources proven to underlie the lease, and then attempt to hold the lessees to obligations they had agreed to bear for the very purpose of obtaining access to those resources. The D.C. Circuit's decision to the contrary encourages an

agency to promulgate broad and vague regulations that precisely parallel the terms of Government contracts. The Government is then insulated from the consequences of its own material breach and able, as here, to insist upon performance of the same obligations.

II. The D.C. Circuit's Use Of *Auer* To Disregard The *Texas* Presumption Conflicts With Decisions Of This Court And Other Circuits Weighing Competing Presumptions Against Deference To Agency Interpretations.

In rejecting Noble's argument that *Texas* retains the common law discharge rule in the OCS Lands Act and BSEE's regulations, the D.C. Circuit reasoned:

> BSEE has determined that the regulations operate independently from any lease agreement and impose an obligation on Noble to permanently plug Well 320-2. An agency's interpretation of its regulations is "controlling unless plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted), and BSEE's interpretation of its regulation satisfies this standard.

Pet. App. 4a. Because BSEE read its regulations to impose "a regulatory obligation independent of its contractual obligation to permanently plug Well 320-

2," the court found that "*United States v. Texas*, 507 U.S. 529 (1993), does not apply." Pet. App. 4a.

The D.C. Circuit's decision disregarding *Texas* thus depended entirely upon its deference to BSEE. Its application of *Auer*, however, cannot square with decisions of this Court or of other Circuits reconciling competing presumptions of congressional intent. Other than the decisions of the district court and D.C. Circuit in this case, no court has ever applied *Auer* deference when applying *Texas*. The general *Auer* presumption of deference to agency interpretation must give way to the specific *Texas* presumption favoring the retention of long-established common law principles unless a contrary purpose is "evident" and the regulation can be shown to "speak directly" to the question addressed by the common law. *Texas*, 507 U.S. at 534.

1. General deference to an agency interpretation of law begins with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which is "rooted in a background presumption" about congressional intent, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013) (citation omitted). Courts —

> accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to pos-

> sess whatever degree of discretion the ambiguity allows.

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996). Under this background presumption, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868.

"The rationale for [*Auer*] deference is similar to that for *Chevron*" and "is justified by the presumption that the power to authoritatively interpret the agency's own regulations is part of the lawmaking powers delegated by Congress." *Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141, 1146–47 (7th Cir. 2001); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).[5] "In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., dissenting). Accordingly, principles that apply in according deference to statutory interpretations also apply to regulatory interpretations, and vice versa. *See In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (considering scope of *Chevron* deference and citing *Martin*, 499 U.S. at 157, which involved regulatory interpretation).

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[5] Although generally known as "*Auer* deference," the doctrine began with *Seminole Rock*, 325 U.S. 410.

In other words, those presumptions that "attach[] to Congress's own work . . . should attach when Congress's delegates seek to exercise delegated legislative policymaking authority . . . ." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015). "After all, agents usually depend upon (and are limited to) the powers enjoyed by their principals." *Gutierrez-Brizuela v. Lynch*, --- F.3d ---, 2016 WL 4436309, at *2 (10th Cir. Aug. 23, 2016) (citing Restatement (Second) of Agency § 17 (1958)).

Here, "we know that, if Congress had sought," *id.*, to displace the common law discharge rule by statute, it would have needed to "speak directly" to the consequences of the Government's material breach. *See Texas*, 507 U.S. at 534 (citation omitted). Displacement by BSEE requires no less. *See Gutierrez-Brizuela*, 2016 WL 4436309, at *2 ("Neither . . . can we think of a sound reason why persons should be left in worse shape simply because they are the subjects of delegated legislative action rather than subjects of true legislative action.").

With *Auer* as with *Chevron*, therefore, *Texas* sets its own standard of decision: " '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident,'" 507 U.S. at 534 (citation omitted). In other words, while *Chevron* and *Auer* ask whether Congress has expressed "an intention on the precise question at issue," *Chevron*, 467 U.S. at 843 n.9, *Texas* "provides the framework for analyzing whether Congress expressed an inten-

tion" to displace the common law. *Mayers v. INS*, 175 F.3d 1289, 1302 (11th Cir. 1999) (applying presumption against retroactive legislation), *superseded by statute on other grounds*. And the *Texas* canon presumes retention of well-settled common law principles unless Congress "speaks directly" to the issue addressed by the common law.

The D.C. Circuit erred in deferring this inquiry to BSEE. *Texas* establishes an independent standard for determining whether a statue or regulation abrogates common law, under which *Auer* deference plays no role. *Compare Quantum Entertainment Ltd. v. U.S. Dep't of the Interior*, 714 F.3d 1338, 1342 (D.C. Cir. 2013) ("Questions of statutory retroactivity are resolved under the two-part test established by the Supreme Court in" *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and "[i]n applying this test, the court owes no deference to the [agency's] retroactivity analysis under *Chevron*). Review by this Court is necessary to settle the independence of *Texas*.

2. Even if *Texas* does not establish an independent standard for reviewing agency regulations, the D.C. Circuit still erred. The D.C. Circuit's decision illustrates confusion among the Circuits regarding the proper balancing of well-established presumptions of statutory construction against the deference doctrines of *Chevron* and *Auer*. This Court should review this case to resolve that confusion at the statutory level, and preclude *Auer* deference in these circumstances.

"Just as *Chevron* reflects a judgment that Congress generally intends to empower an agency to resolve certain statutory ambiguities," this Court has recognized a number of different interpretive presumptions that reflect a judgment as to the intent of Congress in specific circumstances. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008) (considering constitutional avoidance canon). While this Court and the Courts of Appeals have repeatedly recognized, in general, that these presumptions impact the deference accorded to agency interpretations,[6] "[h]ow and even whether to apply" such canons during the "analysis has been a matter of debate in both the judiciary and academia." *Am. Farm Bureau Fed'n v. U.S. EPA*, 792 F.3d 281,

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[6] *See, e.g.*, *Alabama Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1316 (11th Cir. 2002) (recognizing that the canon constitutional avoidance "trumps *Chevron* deference when the two are in tension"); *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) ("We may not defer" to agency interpretations "if they raise grave constitutional doubts."); *Hernandez-Carrera*, 547 F.3d at 1249 ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("Th[e] canon of constitutional avoidance trumps *Chevron* deference and we will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." (citations omitted)); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002) ("[T]he constitutional avoidance canon of statutory interpretation trumps *Chevron* deference." (citations omitted)). *See also Commonwealth of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 894–96 (D.C. Cir. 1996) (applying the "traditional presumption against the federal preemption of state rules in areas of traditional state regulation").

301 (3rd Cir. 2015) (considering impact of constitutional avoidance and federalism canons on *Chevron*).

For example, the Circuits (and occasionally this Court) differ over (1) which countervailing presumptions trump *Chevron* deference;[7] and (2) whether the countervailing presumption applies at Step One,[8] Step Two,[9] or both.[10] But no court has

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[7] *Compare Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that "*Chevron* deference is not applicable in this case" because "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'" (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)) *with Confederated Salish & Kootenai Tribes v. U.S. ex rel. Norton*, 343 F.3d 1193, 1198 (9th Cir. 2003) ("[T]his Court has held that the canon of liberal interpretation in favor of Native Americans must give way to the *Chevron* rule . . . .").

[8] *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001); *Tennessee v. FCC*, --- F.3d ---, 2016 WL 4205905, at *12 (6th Cir. Aug. 10, 2016) ("There is certainly room for the application of canons of construction to ascertain whether the first step of *Chevron* has been met."); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815–16 (9th Cir. 2016) (applying constitutional avoidance canon at Step One); *Am. Farm Bureau*, 792 F.3d at 301 ("We think the . . . interpretive canons can be used—like all 'traditional tools of statutory construction'—at the Step One stage of defining the scope of a congressional delegation . . . ." (citation omitted)); *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) ("If employment of an accepted canon of construction illustrates that Congress had a ***specific*** intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*") (quoting *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292–93 (D.C. Cir.), *aff'd by equally divided Court*, 493 U.S. 38 (1989)) (emphasis original); *Nat'l Mining Ass'n*, 512 F.3d at 711.

[9] *See Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding that canon of constitutional avoidance "is a tool for choosing (...continued)

settled the impact of the *Texas* presumption on *Chevron*.

Likewise, no court has settled the impact of *Texas* at the level subordinate to *Chevron*—an agency's interpretation of its own regulations under *Auer*. This Court's review is necessary to clarify the impact of *Texas*—and, by extension, other presumptions of congressional intent—in applying *Auer* to an agency's interpretation of its regulations implementing its congressionally-derived authority. This Court should make clear that application of the *Texas* presumption may preclude *Auer* deference and not—as the D.C. Circuit held—vice versa.

This result emerges from this Court's *Chevron* jurisprudence indicating that the impact of a countervailing presumption may resolve the question of deference at *Chevron* Step One because "[w]e only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9).

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between competing plausible interpretations of a provision" and therefore " 'has no application in the absence of . . . ambiguity'" (citations omitted)); *Olmos v. Holder*, 780 F.3d 1313, 1321 (10th Cir. 2015) (finding that constitutional avoidance canon applies at the Second Step of *Chevron*).

[10] *See Commonwealth of Mass.*, 93 F.3d at 893 (explaining that "traditional presumptions about the parties or the topic in dispute may limit the breadth of ambiguity and thus affect both the first and second steps of *Chevron*").

Where a canon of construction directs an answer to the meaning of the statute "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id*. (explaining that "a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective"). *See also Tennessee*, 2016 WL 4205905, at *12 ("Perhaps the strongest case for using a canon of construction at the first step of *Chevron* is where, as here, the canon is strong enough to act as a ***clear statement rule***, and where the canon is firmly based not only on what Congress is presumed to intend and on fundamental constitutional policy.") (emphasis added) (internal citations omitted).

When there is no ambiguity left in the statute, there is no gap for the agency to fill by regulation or regulatory interpretation and, thus, no ambit for *Auer*. In light of BSEE's and the D.C. Circuit's failure to identify any provision of the OCS Lands Act that "speak[s] directly," *Texas*, 507 U.S. at 534, to the consequences of the Government's material breach of the leases entered thereunder, 43 U.S.C. § 1337(b), the common law rule of discharge is retained and there is no gap to be filled by agency interpretation of its regulations under *Auer*.

Indeed, *Texas*' requirement of a provision that "speak[s] directly" to the question at issue precisely mirrors the *Chevron* standard itself, which asks whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842–43. *See also Auer*, 519 U.S. at 457. In other words, a review-

ing court defers to an agency "only where" the positive law does not speak directly to the issue, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007), but the common law fills the gap in positive law that does not "speak directly" to the issue covered by the common law. *Texas*, 507 U.S. at 534.

III. *Auer* Deference To Agency Interpretations Of Regulations Raises Significant Questions Of Constitutional And Administrative Law.

Even if the D.C. Circuit properly applied *Auer* to reject Noble's reliance on *Texas*, the D.C. Circuit's decision cannot stand. Rather, this Court should reconsider *Auer* deference.

This case is a proper vehicle to, in the alternative, reconsider *Auer* because deference to BSEE's interpretation of its decommissioning regulations was the sole basis of the D.C. Circuit's decision. In essence, the D.C. Circuit permitted BSEE to read its regulations—which nowhere address the consequences of the Government's material breach of the underlying lease—to satisfy *Texas*, then deferred to the agency's conclusion. The D.C. Circuit's complicity in this effective—through *Auer* deference—"transfer of the judicial power to an executive agency . . . raises constitutional concerns." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., dissenting).

1. "The theory of *Chevron* . . . is that when Congress gives an agency authority to administer a

statute . . . it implicitly accords the agency a degree of discretion, which the courts must respect, regarding the meaning of the statute." *Decker*, 133 S. Ct. at 1340–41 (Scalia, J., dissenting). "[T]here is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Id*. at 1341.

As a matter of maintaining the constitutional separation of powers, *Chevron* poses no concern because "Congress cannot enlarge its ***own*** power through *Chevron*—whatever it leaves vague in the statute will be worked out ***by someone else***." *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting). "But when an agency interprets its ***own*** rules—that is something else" because "[t]hen the power to prescribe is augmented by the power to interpret . . . ." *Id*. In addition to thus transferring judicial functions to the executive, *Auer* "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez*, 135 S. Ct. at 1217 (Thomas, J., dissenting). Therefore, "*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power." *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting).

Auer deference is particularly pernicious here. Unlike *Texas*—which rests on the presumption that " 'courts may take it as a given that ***Congress*** has legislated with an expectation that . . . [common law] principle[s] will apply,'" *Texas*, 507 U.S. at 534 (quot-

ing *Astoria*, 501 U.S. at 108) (emphasis added)—*Auer* does not vindicate any congressional intent as to the content of positive law. *See Paragon Health Network*, 251 F.3d at 1146–47 (explaining that *Auer* "is justified by the presumption that the power to authoritatively interpret the agency's own regulations is part of the lawmaking powers delegated by Congress" (citing *Martin*, 499 U.S. at 151)). Instead, *Auer* employs a presumed congressionally-sanctioned procedure to effect substantive ends.

2. Moreover, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia J., dissenting). Such erosion of predictability is evident in cases involving the *Texas* presumption generally, and Noble's case specifically. Here, Noble relied on the well-established common law rule that the Government's material breach discharged its obligations stemming from the contractual relationship. Without any regulatory provision directly addressing the consequences of the Government's material breach, the agency read its regulations to nevertheless displace long-settled expectations about the impact of a material breach. *See supra*.

And with only a sparse reference to *Auer*, the D.C. Circuit acquiesced in the interest of "deference." *See* Pet. App. 4a. That deference only encourages

the Government to avoid the well-established common law consequences of its material breach of a contract—here, discharge of Noble's remaining obligations—through the expedient of promulgating broad regulations paralleling the obligations in Government contracts. *Auer* thus authorized the D.C. Circuit's decision to erode the predictability of contractual obligations and ignore "[5 U.S.C.] § 706's directive that the 'reviewing court . . . determine the meaning or applicability of the terms of an agency action.'" *Perez*, 135 S. Ct. at 1211 (2015) (Scalia, J., dissenting) (citations omitted).

* * *

For these reasons, the Court has seen increasing calls to reconsider *Auer*. *See Perez*, 135 S. Ct. at 1210–11 (Alito, J., dissenting) (noting "substantial reasons why the *Seminole Rock* doctrine may be incorrect" and awaiting "a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [the *Auer*] principle in an appropriate case. But this is not that case."); *Christopher v. SmithKline Beechum Corp.*, 132 S. Ct. 2156, 2168 (2012) ("Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk . . . ."); *Talk Am.*, 564 U.S. at 68–69 (Scalia J., dissenting). The Court should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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September, 22 2016