No. 17-225

IN THE

Supreme Court of the United States

GARCO CONSTRUCTION, INC.,

Petitioner,

v.

ROBERT M. SPEER, ACTING SECRETARY OF THE ARMY,

Respondent.

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

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. A significant number of the Chamber's members are federal contractors and subcontractors. These members have a direct interest in this case because, like Petitioner Garco Construction, Inc., they face the threat that the government will attempt to change its contractual rights and obligations by changing its interpretation of applicable regulations. But the importance of the issue is not limited to government contractors. Given the ever-growing thicket of government regulations, virtually every Chamber member has at least some portion of its business

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties were timely notified of *amicus*'s intent to file this brief and consented to its filing.

regulated by federal agencies. These businesses have a strong interest in seeing the Court revisit its decisions giving deference to agencies' interpretations of their regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

INTRODUCTION AND SUMMARY OF ARGUMENT

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part). The Court "offered no justification whatever" when it adopted this interpretive rule. *Id.* And in recent years, several justices have expressed interest in reconsidering the rule because it involves an improper delegation of authority, creates incentives for agencies to adopt vague regulations, and disrupts reasonable expectations of regulated parties.[2] This case presents the opportunity for the Court to reconsider *Seminole Rock* and *Auer*. It should grant the petition and revisit those decisions.

I. The business community generally benefits from laws that are clearly written and consistently applied. When agencies adopt regulations through notice-and-comment rulemaking, businesses are giv-

[2] *See Decker*, 568 U.S. at 615 (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

en an opportunity to shape the regulatory landscape in which they operate. When the notice-and-comment rulemaking process functions properly, regulated companies receive fair notice of what conduct is required or prohibited, and are able to order their operations accordingly.

Auer deference harms the business community by encouraging agencies to adopt vague regulations that they can later interpret however they see fit. This practice upsets the expectations of regulated parties without the notice provided through formal rulemaking. When agencies adopt vague regulations, businesses must attempt to predict how the agency will interpret those regulations and also how likely the agency is to change that interpretation in the future. Businesses also have a more difficult time tracking an agency's shifting interpretations. Regulated companies cannot learn of changes to their regulatory obligations simply by reading *The Federal Register*, because the agency is just as likely to change its interpretation of a vague regulation by, for example, filing an *amicus* brief.

II. A. This Court should grant certiorari to consider whether *Seminole Rock* and *Auer* should be overruled. These decisions conflict with the Administrative Procedure Act ("APA"), violate separation-of-powers principles, and are unsupported by policy considerations. *Auer* deference conflicts with the plain language of Section 706 of the APA, which requires "the *reviewing court* [to] ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). *Auer* deference violates separation-of-powers principles because interpreting ambiguous laws is a judicial

function that courts must perform. Courts cannot delegate this authority to executive agencies. Policy considerations do not support continued adherence to *Seminole Rock* and *Auer* either. The Court has previously justified *Auer* deference based on agencies' expertise in determining the intent of ambiguous agency regulations. But an agency's policy preferences, which are always subject to change, should play no role in the purely interpretive task of deciding what an existing law means.

B. At a minimum, the Court should overrule *Seminole Rock* and *Auer* for government contract disputes. The Court has already recognized numerous circumstances where *Auer* deference does not apply, including where the agency's interpretation is "nothing more than [a] convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Where, as in this case, an agency interprets a regulation to avoid liability for breach of contract, *Auer* deference is similarly unwarranted. This exception is necessary to harmonize administrative law with government contract law, which generally provides that "the Government is to be treated like other contractors." *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (Souter, J.). Other contractors cannot unilaterally change their contractual rights and obligations by reinterpreting the applicable regulations, and neither should the government.

III. This case is a good vehicle for the Court to reconsider *Seminole Rock* and *Auer*. The Federal Circuit's decision turned on application of *Auer* and contained no alternative ground for its holding. Thus, the petition squarely and cleanly presents the

question whether *Seminole Rock* and *Auer* should be overruled.

ARGUMENT

I. *Auer* Deference Harms The Business Community By Increasing Regulatory Uncertainty.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To ensure that federal regulations comply with this fundamental principle, the APA generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Notice-and-comment rulemaking provides businesses with an important opportunity to help shape the administrative decisions that govern their industries. Every decision that a business makes—from hiring employees and opening new offices or factories to marketing and selling its products—requires an assessment of the legal implications of that decision. When notice-and-comment rulemaking is used, businesses have the opportunity to present evidence to support regulations that make sense for their industry. And even when a regulated company's views are

not reflected in the final regulations, the company still benefits from having participated in the process because it gains a better understanding of the standards by which its conduct will be judged.

Seminole Rock and *Auer* undermine the important role played by notice-and-comment rulemaking. As the Court has explained, *Auer* deference encourages agencies to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

The business community is harmed by this approach to rulemaking. When agencies promulgate vague regulations that they can interpret later in a myriad of ways, companies have difficulty predicting what conduct is required or prohibited. Under *Auer*, it is not enough for a regulated entity to hire "an army of perfumed lawyers and lobbyists" to determine the fairest reading of vague regulations or to seek guidance from the agency. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "Even if the [regulated party] somehow manage[s] to make it through this far unscathed, [it] must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Id.*

Seminole Rock and *Auer* also harm regulated companies by making it difficult to keep track of an agency's shifting views. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register, and regulated parties know that they must watch the Federal Reg-

ister for proposed rulemakings that could affect them. But tracking an agency's interpretations of vague regulations is considerably more challenging, because those interpretations could appear almost anywhere. For example, in *Auer*, the Court deferred to an agency interpretation advanced for the first time in an *amicus* brief. 519 U.S. at 461; *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). The Court also has deferred to one agency's interpretation of another agency's regulation. *See Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 696–699 (1991). The *Auer* doctrine has created a world in which businesses must scour court dockets, *amicus* briefs, agency websites, letters sent to other companies, and other agencies' policies to understand the regulatory regime that might be enforced against them.

In *Christopher*, the Court took an important step to limit *Seminole Rock* and *Auer* by refusing to defer to an agency's interpretation of ambiguous regulations that "impose potentially massive liability … for conduct that occurred well before that interpretation was announced." 567 U.S. at 155–56. But *Christopher* has not eliminated *Auer*'s adverse effects on businesses. Even after *Christopher*, courts continue to defer to agency interpretations that upset the reasonable expectations of regulated parties. For example, the Seventh Circuit recently deferred to a novel agency interpretation that made a loan guaranty agency liable for breach of contract. *See Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639, 650 (7th Cir. 2015); *see also id.* at 663 (Flaum, J., concurring in part and concurring in the judgment) (confirming that outcome depended on application of

Auer). The agency announced its interpretation for the first time in an *amicus* brief, and the court applied *Auer* deference even though the agency's interpretation was "at odds with the regulatory scheme [and] defie[d] ordinary English." *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); *see also Bible*, 799 F.3d at 663 (Manion, J., concurring in part and dissenting in part) ("Applying the Department's *post hoc* rule to USA Funds is both wrong and unjust.").

In short, *Auer* deference encourages agencies to adopt vague regulations that they can then interpret, and re-interpret, through informal interpretive guidance. This approach to rulemaking creates great uncertainty for the business community, which benefits from clear regulations that provide fair notice of what is required or prohibited.

II. *Auer* Deference Should Not Apply In This Case.

Seminole Rock and *Auer* create problems for regulated parties in all industries, undermining their settled and reasonable expectations about what agency regulations require. But, as this case demonstrates, deferring to an agency's interpretation of its regulation is particularly problematic in a government contract dispute. In this context, by changing how it interprets its regulations, an agency can unilaterally change its contractual rights and obligations. The Court should prevent the government from doing this by overruling *Seminole Rock* and *Auer*. If the Court does not overrule *Auer* entirely, it

should at a minimum limit the doctrine so that it no longer applies to government contract disputes.

A. *Seminole Rock* And *Auer* Should Be Overruled.

Seminole Rock and *Auer* cannot be reconciled with the text of the APA, defy the Constitution's separation of powers, and cannot be justified by policy considerations. They should be overruled.

1. The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring). Despite the Court's contrary holdings in *Seminole Rock* and *Auer*, the APA makes clear that it is "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

The Court has never attempted to reconcile *Auer* deference with the text of the APA. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Id.* Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. *Id.* Because *Seminole Rock* and *Auer* conflict with the APA, those decisions are not sufficiently "well reasoned" for the Court to continue following them. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

2. Even putting aside Section 706, *Seminole Rock* and *Auer* should be overruled because they violate separation-of-powers principles. By giving "con-

trolling weight" to most agency interpretations, courts "violate a fundamental principle of separation of power—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). *Auer* deference also flouts the Constitution's guarantee that cases and controversies will be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

This case demonstrates the threat to separation-of-powers principles posed by *Seminole Rock* and *Auer* because those cases effectively allowed the government to be the judge of its own contract dispute. When a regulation threatened the outcome of its dispute with Garco, the Army relied on an interpretation issued for the first time after the dispute began. Under our Constitution, one would expect a court to settle the dispute by deciding which interpretation of the regulation is correct, applying ordinary principles of contractual interpretation. But under *Auer*, the Federal Circuit deferred to the Army's self-serving interpretation. This result represents "precisely the abuse[] that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring); *see also Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (The Founders knew "that, when unchecked by independent courts exercising the job of declaring the law's meaning, execu-

tives throughout history had sought to exploit ambiguous laws as license for their own prerogative.").

3. Policy considerations do not support continued adherence to *Seminole Rock* and *Auer*. The Court has justified *Auer* deference based on agencies' purported expertise in divining the true intent of ambiguous regulations. *See, e.g.*, *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151 (1991). That flawed rationale cannot sustain the doctrine.

Policy expertise may be relevant to an agency's decision to adopt particular regulations, but that expertise is irrelevant to the purely interpretive task of resolving ambiguity in those regulations. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."). And even if the intent of the original drafter of the ambiguous regulations could be determined, that subjective intent should carry no weight. The ambiguity should instead be resolved by determining the best reading of the regulation based on the traditional tools of interpretation. *Id.* at 1222–23; *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 472–73 (1989) (Kennedy, J., concurring) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation ...."); *Zuni Pub. School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

In short, *Seminole Rock* and *Auer* should be overruled. Those decisions conflict with Section 706 of the APA, violate separation-of-powers principles, and are not supported by policy considerations.

B. At A Minimum, The Court Should Overrule *Auer* For Cases Involving Government Contract Disputes.

Even if the Court does not go so far as to overrule *Seminole Rock* and *Auer* entirely, the Court should limit the doctrine so that it no longer applies in government contract disputes. An agency's interpretations of its regulations do not receive *Auer* deference in all circumstances, and deference is particularly unwarranted where the government advances an interpretation to alter its rights and obligations under a contract with a private party.

The Court has recognized that "*Auer* deference is not an inexorable command in all cases." *Perez*, 135 S. Ct. at 1208 n.4. *Auer* deference does not apply when an interpretation "does not reflect the agency's fair and considered judgment on the matter in question," when the interpretation "is nothing more than a convenient litigating position," when the interpretation is simply a "*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," or when the interpretation causes "unfair surprise" to regulated parties. *Christopher*, 567 U.S. at 155–56 (quotation marks and citations omitted).

Auer deference is similarly unwarranted in a government contract dispute. When a contractor accuses an agency of breaching a contract, the agency

has strong incentive to defend itself by reinterpreting the governing regulation at issue to conform to its challenged conduct. By changing its interpretation of the regulations in this manner, the government can defeat a breach of contract claim premised on a regulatory violation. *Auer* deference should not apply in this situation because the government's new interpretation is "nothing more than [a] convenient litigating position." *Bowen*, 488 U.S. at 213.

Refusing to apply *Auer* deference in government contract disputes would be consistent with the Court's general treatment of the government as a contracting party. The Court has long held that "the Government is to be treated like other contractors," and that its contractual rights and obligations are determined by the same laws that apply to private parties. *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (Souter, J.); *see also Lynch v. United States*, 292 U.S. 571, 579 (1934) ("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."). For this principal to have any meaning, courts must decide contract disputes involving the government under the same rules that apply to disputes between private parties. Under those rules, no party can claim a unilateral right to reinterpret contractual or regulatory provisions. Instead, the court should apply the traditional tools of contractual interpretation.

III. This Case Is A Good Vehicle To Reconsider *Seminole Rock* and *Auer*.

This case provides a good opportunity for revisiting *Seminole Rock* and *Auer*. Unlike other recent

cases,[3] the Federal Circuit did not suggest that it would have reached the same result without applying *Auer* deference. To the contrary, the Federal Circuit expressly stated its holding as an application of *Auer* deference: "After considering the ample support for the Air Force's interpretation, we conclude that the interpretation is not plainly erroneous or inconsistent with the regulation, and we therefore must give it controlling weight." App. 13a (citing *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009)).[4]

This Court has declined to reconsider *Seminole Rock* and *Auer* in recent cases where the issue was not sufficiently briefed. *See, e.g.*, *Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case. But this is not that case."). Inadequate briefing will not be an issue here. The petition presents only the question whether *Seminole Rock* and *Auer* should be overruled, and thus the briefing will be focused on this important question "going to the heart of administrative law." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring).

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[3] *See, e.g.*, *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 453 (1st Cir. 2013) (Lynch, C.J., for an equally divided en banc court) ("We stress that *Auer* deference is not necessary to our conclusion. . . . Indeed, we would agree with the United States' interpretation even if we gave it no deference at all.").

[4] *Reizenstein* is a recent Federal Circuit decision applying *Seminole Rock* and *Auer*. 714 F.3d at 1335–36.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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