No. 15-861

In the

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,
v.

BRYANA BIBLE, individually
and on behalf of the proposed class,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL SHOOTING SPORTS FOUNDATION, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICI CURIAE [1]

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers operate under a clearly defined, consistent and reasonably balanced regulatory environment. Such an environment allows NAM's members to compete successfully in the global economy and to create jobs across the United States. *See* the NAM's website, http://www.nam.org/.

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[1] The parties consented to the filing of this brief after receiving 10 days notice of *amici curiae*'s intention to file, pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The National Shooting Sports Foundation, Inc. ("NSSF") is the trade association for America's firearms, ammunition, hunting, and shooting sports industry. NSSF is a non-profit, tax-exempt corporation comprised of over 13,000 federally-licensed firearms manufacturers, distributors, and retailers nationwide. NSFF's mission is to promote, protect and preserve hunting and the shooting sports. Since its founding in 1961, NSSF has been counted on to provide trusted leadership in addressing challenges faced by an industry that counts itself amongst the most regulated industries in the country. NSSF's members rely on consistent interpretation of the innumerable federal rules and regulations that govern the firearms industry to run their businesses, which generated as much as $42.96 billion in total economic activity across the country in 2014 alone. *See* NSSF's website, http://www.nssf.org

NSSF and its members are likewise concerned that the federal regulatory process operate under clear and predictable rules and standards so that its members may guide their affairs in a reliable manner with guaranteed notice and rights of participation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an ideal opportunity to overrule the deferential perspectives mandated by *Auer v. Robbins,* 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The urgency of this question is

underscored by the extraordinary deference that the court below gave to the present agency's interpretation of its own regulation in the face of conflicts with the governing statute, other regulations adopted through rulemaking, and previous agency interpretations.

The interpretation to which the court deferred was coined by the agency for the first time in an amicus curiae brief filed in this litigation – not from the measured and balanced process guaranteed by the Administrative Procedure Act ("APA"). By deferring to this *de novo* interpretation, the court below not only bypassed the APA, but also failed to exercise its own constitutional duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (per Marshall, C.J.). As a result, the court further aggrandized "the danger posed by the growing power of the administrative state" – a danger that "cannot be dismissed." *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting, joined by Alito, J. and Kennedy, J.).

Serious concerns regarding *Auer* and *Seminole Rock* deference have been voiced by the Chief Justice and other members of this Court – to the point where "[t]he bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue." *Decker v Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1339 (2013) (Roberts, C.J., concurring). Issues regarding *Auer* and *Seminole Rock* deference questions "arise as a matter of course on a

regular basis" and go to the "heart of administrative law." *Id.* Since *Decker,* concerns regarding the continued viability of *Auer* and *Seminole Rock* have also been expressed by Justice Scalia,[2] Justice Thomas,[3] and Justice Alito,[4] which suggests that both cases are ripe for reconsideration.

As regulated industries, *Amici's* members are apprehensive regarding the uncertainties that arise when courts defer to agency interpretations of their own regulations, particularly when the regulations are vague or ambiguous. Like some members of this Court, *Amici* are concerned that such deference may actually provide *disincentives* for regulatory clarity, thereby sacrificing notice and predictability in rulemaking. *See Decker,* 133 S.

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[2] *See Perez v. Mortgage Bankers Ass'n,* 135 S.Ct. 1199, 1213 (1213)(Scalia, J., concurring in the judgment)("I would therefore restore the balance originally struck by the [Administrative Procedure Act]" by "abandoning *Auer* and applying the Act as written."); *id.* at 1225 (Thomas, J. concurring in the judgment).

[3] *Id.* at 1225 (Thomas, J. concurring in the judgment)("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered[.]").

[4] *Id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment)(observing that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect[]" and "await[ing] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.").

Ct. at 1341 (Scalia, J., concurring and dissenting in part); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 552 (2003) ("[T]he problem [with the *Seminole Rock* doctrine] might be understood as an end-run around rulemaking in the extreme.").

These concerns are enhanced when, as here, the agency's interpretations are offered for the first time in *amicus curiae* briefs in litigation. Under such circumstances, the new and binding interpretations arise without "fair warning" and threaten to impose massive liability on entire industries for conduct that was lawful when it occurred. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012).

Affording deference in such situations not only undermines the regulatory certainty and reliability necessary for sound business planning, but also deprives the regulated community of its statutory and constitutional rights to notice and opportunities to be heard regarding decisions affecting their interests. Tolerating these deprivations further enhances the power of the expanding "administrative state," and contributes to growing dangers that "cannot be dismissed." The Court should therefore reconsider and overrule *Auer* and *Seminole Rock* and restore the participatory rights of the regulated community regarding agency decisions that affect their interests.

I.

AUER AND *SEMINOLE ROCK* SHOULD BE OVERRULED BECAUSE THEY CONFLICT WITH THE ADMINISTRATIVE PROCEDURE ACT.

Fostered by Congress's broad delegations of authority to administrative agencies within the Executive Branch, presidents have used their power to address and administer progressive programs to regulate broad aspects of commerce, such as antitrust and securities regulation, beginning with the many programs of Franklin Roosevelt's "New Deal."

The Administrative Procedure Act ("APA")[5] was the product of a strenuously fought political battle over the place of the agencies in the government and the future of New Deal policies. How regulations would be reviewed by the courts and how statutory programs might be maintained and enhanced, or challenged and diminished, were critical issues. Not surprisingly, given the long-term Democratic control over judicial appointments during the New Deal era, Democrats generally favored a constraining APA, enforced by non-deferential judicial review, as a method for consolidating

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[5] 5 USC §551 *et seq.* (1946)

New Deal policies against Republican attempts to adopt new policies.[6]

After a "fierce compromise," the Democrats generally prevailed in this struggle.[7] As a result, the text of the APA provides that that "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."[8] Additionally, the statute provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*[.]"[9]

Under these provisions, the APA *does not reserve any final authority for the agencies to interpret the law,* much less any decisive "lawmaking" power. The APA's commands "seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative

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[6] *See generally,* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,* 90 NW. U. L. REV. 1557, 1581–82 (1996); McNollgast, *The Political Origins of the Administrative Procedure Act,* 15 J. L. ECON. & ORG. 180, 200, 206 (1999).

[7] *See* Shepherd, *supra* note 6, 1581–82 (1996); McNollgast, *supra* note 6 at 206.

[8] 5 U.S.C. § 706 (1946) (emphasis added).

[9] *Id.* at 706(2)(emphasis added).

agencies."[10] As a result, many courts, including this Court, have stressed that the APA was forged from years of study and debate, and its language therefore should not be "lightly disregarded."[11]

Not only is the APA's text plain and unambiguous on this point, but the statute's legislative history also leaves no doubt that Congress intended for courts, not agencies, to exercise ultimate interpretive authority. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision "requires courts to determine independently all relevant questions of law, *including the interpretation of constitutional or statutory provisions.*"[12]

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[10] Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled,* 42 CONN. L. REV. 779, 788 (2010) (hereafter "Beerman").

[11] *See generally,* Beerman, at 788-789. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 523, 547–48 (1978) (noting that the APA was a legislative enactment that settled "long-continued and hard-fought contentions"); *In re Lueders,* 111 F.3d 1569, 1576 (Fed. Cir. 1997) (tracing the legislative history leading up to enactment of the APA).

[12] John F. Duffy, *Administrative Common Law in Judicial Review,* 77 TEX. L. REV. 113, 193-94 (1998) (emphasis added); *see also* McNollgast, 15 J. L. ECON. & ORG. at 200 ("[C]ourts, not agencies, are the locus of both constitutional and statutory interpretation."); Beerman, *supra* at 789.

Since the APA therefore allocates interpretive authority to the judiciary, the statute necessarily precludes a system of "judicial deference" to agencies in construing the meaning of the APA or regulations promulgated pursuant to its authority. In view of the extraordinary power and dangers of the expanding administrative state, courts should not defer to agency interpretations unless Congress has authorized them to "definitively interpret a particular ambiguity in a particular manner." *City of Arlington,* 133 S. Ct. at 1883 (Roberts, C.J., dissenting), *citing Adams Fruit Co. v. Barrett,* 495 U.S. 638, 649-50 (1990). Because of this limitation, reviewing courts must take care to ensure that administrative agencies do not exercise lawmaking authority that was never conferred.

II.

AUER AND *SEMINOLE ROCK* SHOULD BE OVERRULED BECAUSE THEY THREATEN THE CONSTITUTIONAL SEPARATION OF POWERS.

Even if *Auer* and *Seminole Rock* deference is somehow permissible under the APA, it remains fundamentally inconsistent with the structure and allocation of powers in the United States Constitution. Four Supreme Court justices (Roberts, Scalia, Thomas, and Alito) have expressed concerns about its general viability.[13]

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[13] *See generally,* Agron Etemi, *To Defer or Not to Defer: Why Chief Justice Roberts Got It Right in City of Arlington v.*

The reasoning underlying the criticism of *Auer* and *Seminole Rock* deference was expressed by Justice Scalia in his concurring and dissenting opinion in *Decker*:

> While the implication of an agency power to clarify the statute is reasonable enough, there 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. "When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949).

133 S. Ct. at 1341. With this important reference to Montesquieu, Justice Scalia squarely based his opinion on "separation of powers" principles:

> *Auer* is not a logical corollary to *Chevron* but a dangerous permission

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FCC, available at http://www.pennstatelawreview.org/penn-statim/to-defer-or-not-to-defer-why-chief-justice-roberts-got-it-right-in-city of-arlington-v-fcc/

> slip for the arrogation of power. . . In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: *He who writes a law must not adjudge its violation.*

Id. at 1341-42 (emphasis added).

Even more calls for abolishing *Auer* deference occurred in *Perez.* In *Perez,* Justices Scalia, Alito and Thomas wrote separate concurring opinions reiterating their call for abolishing this form of deference. In particular, Justice Thomas noted two recurring scenarios where *Auer* and *Seminole Rock* deference interferes with the judiciaries' constitutional duty to "exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties." *Perez,* 135 S. Ct. at 1219.

First, although "defining the legal meaning" of regulations is a singular judicial responsibility, Justice Thomas reasoned that deference "precludes judges from independently determining that meaning." *Id.* In his view, deference is an unconstitutional "transfer of the judge's exercise of interpretive judgment to an agency" that "lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of

Article III." *Id.* at 1219-20. Since the agency is "not properly constituted to exercise the judicial power under the Constitution," Justice Thomas concluded that "the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1220; *see also Chada v. Immigration and Naturalization Serv., 634 F.2d* 408, 425 (9th Cir. 1980), *aff'd sub. nom.* I.N.S. v. Chada 103 S. Ct. 2764 (1983) (defining a constitutional violation of separation of powers as an "assumption by one branch of powers that are identical to the operations of a coordinated branch" provided that the assumption "disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the government").

Second, Justice Thomas concluded that *Auer* and *Seminole Rock* deference undermines an essential judicial "check" to control the "excesses" of the legislative and executive branches of government. *Id.* Although the Constitution provides those branches with several "checks" on each other's power, the judiciary has only one – the "enforcement of the rule of law through the exercise of judicial power." *Id.* With this power, the judiciary aligns and *balances* the power of the three branches of government to maintain the constitutional equilibrium of authority necessary to preserve the rights of the people – from whom all power is derived.

Since judges are constitutionally required to decide cases and controversies within their jurisdiction, they cannot "opt out" of their

constitutional duties to "check" the power of other branches of government. *Id.* at 1221. As a result, Justice Thomas concluded that courts cannot abandon deciding legitimate cases and controversies by indulging administrative agencies with deferential review. *Id.* Otherwise, they permit "precisely the accumulation of governmental powers that the Framers warned against." *Id.*

Under this sound reasoning, deferential judicial review is a "slippery slope" that, however well intended, inevitably leads to infringements and deprivations of liberty. Although the central genius of American government lies in its *separation* of powers, that hallmark, standing alone, is insufficient to preserve and protect our freedoms. The key lies rather in *balancing* those powers – an equally important process that this Court has a constitutional duty to pursue. In that spirit, *Amici* urge the Court to confine regulatory agencies within their proper constitutional sphere by reconsidering and overruling *Auer* and *Seminole Rock.*

III.

AUER AND SEMINOLE ROCK SHOULD BE OVERRULED TO THE EXTENT THEY REQUIRE COURTS TO DEFER TO AGENCY POSITIONS TAKEN OUTSIDE THE RULEMAKING PROCESS.

The problems discussed in the arguments above are exacerbated in this case because the

agency here did not announce its new interpretation in the context of rulemaking, but rather in an *amicus curiae* brief filed in these proceedings. Recent decisions have imposed serious limits on the circumstances an agency may obtain deference to employ amicus briefs to support novel interpretations – and those cases suggest that the use of amicus briefs to coin new interpretations outside the rulemaking process may be inappropriate. The practice seems especially suspect where, as here, the novel position may significantly prejudice a regulated party.

An essential purpose of the APA is to provide for "public participation in the rulemaking process"[14] and to ensure "fairness in administrative procedures."[15] The APA therefore seeks a fundamental balance between the executive and legislative branches of government. In order for agencies to exercise broad rulemaking powers, agencies must strictly follow a procedural process crafted to guarantee the due process rights of regulated entities and the public at large.[16] To this end, the APA was established

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[14] Attorney General's Manual on the Administrative Procedure Act, Prepared by the U.S. Department of Justice, Tom C. Clark Attorney General (1947), at 5.

[15] *Id.* at 9.

[16] *See, e.g.,* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1266 (1986). ("The [APA] was a formal articulation of agency due process in return for the newly recognized powers of wide-ranging administrative intervention in the economy.")

to "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644 (1950).

This Court has applied such "checks" to allow regulated parties to avoid risks to "serious reliance interests" caused by changes in agency positions. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). Likewise, the Court has refused deference to amicus briefs when there is no fair warning that regulated industries could be subjected to extraordinary liability based on conduct that was lawful before the agency changed its interpretation. *See Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012).

Similar circumstances are involved in this case. Here, through the lens of *Auer* deference, conduct that complied with prior interpretations has been transformed into a "federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal." *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 842 (7th Cir. 2015). Such *ex post facto* lawmaking is manifestly unjust under any circumstances – but when such drastic changes are undertaken unilaterally without opportunities for public participation or comment by the regulated community, they violate the due process rights the APA was crafted to protect.

Whatever degree of deference this Court may choose to indulge administrative decisions, nothing in the APA mandates indifference to injustice – especially when the injustice arises solely as a result of the agency's interpretive artifice, as opposed to the APA's participatory process.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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