No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

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

BRIEF FOR STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, California 90071

ALLYSON N. HO
Counsel of Record
KATHRYN CHERRY
BRADLEY G. HUBBARD
ELIZABETH A. KIERNAN
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[*]

The following state and local government associations respectfully submit this *amici curiae* brief in support of petitioner:

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's fifty States, its Commonwealths, and its Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The Government Finance Officers Association ("GFOA") is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public

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[*] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National School Boards Association ("NSBA") represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

Amici offer additional reasons why this Court should abandon *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Amici* have a strong interest in apprising the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local governments suffer as a result of the binding deference afforded to federal agencies' interpretations of their own regulations. Those regulations often set rules that state and local governments must follow in implementing federal policy. When those regulations can be abandoned or materially altered by agencies outside the notice-and-comment process, state and local governments are forced to adapt to rules that are often costly, disruptive, and detrimental to both federal and local interests.

Abandoning *Auer* will have the salutary effect of incentivizing federal agencies to use the notice-and-comment process when imposing burdens on state and local governments—almost certainly resulting in regulations that are clearer, more straightforward, and better informed by the local knowledge and insight of those who will be most directly affected by them. This, in turn, will strengthen (or at least not undermine) federalism and secure the benefits that flow from it.

SUMMARY OF ARGUMENT

The rule first articulated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and affirmed in *Auer* v. *Robbins*, 519 U.S. 452 (1997), "uniquely harms the states" and local governments whose laws can be preempted, shaped, or rendered ineffectual by federal law—including federal regulations. Br. of *Amici Curiae* the States of Utah *et al.* at 1, *Garco Const., Inc.* v. *Speer*, 138 S. Ct. 1052 (2018) (17-225). Specifically, the *Auer* regime encourages federal agencies to enact policies that affect state and local governments without the benefit of their specialized knowledge of local conditions—a result that seriously undermines federalism as well as separation of powers.

State and local governments are frequently charged with implementing federal policy through the federal regulatory process. Notice-and-comment rulemaking provides state and local governments with the opportunity to educate often insulated federal agencies about the practical effects of proposed policies—and to bring specialized local knowledge to bear on formulating and implementing those policies. In this way, the expertise of each level of government can be

leveraged to achieve national objectives while remaining cognizant of state and local prerogatives—and safeguarding individual liberty all the while.

The *Auer* regime, however, turns collaborative federalism on its head. By demanding deference to an agency's interpretation of its own regulations, *Auer* provides a powerful incentive for agencies to abandon the notice-and-comment process that facilities dialogue among federal, state, and local governments. This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender. Worse still, when agencies *do* engage in notice-and-comment rulemaking under the *Auer* regime, they do so knowing that by crafting ambiguous regulations they can expand their own power to unilaterally dictate federal policy through subsequent interpretation. In this way, *Auer* threatens not only separation of powers but also federalism—and, ultimately, individual liberty. *Auer* should be overruled.

ARGUMENT

I. Cooperative Federalism Depends on Mutual Participation by Federal, State, and Local Governments.

Programs and policies are often designed at the national level but implemented at the state and local levels. See Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes* ("*Curing the Blind Spot*"), 122 Yale L. J. 1280, 1288–89 (Mar. 2013).

When cooperative federalism works properly, federal, state, and local governments each contribute their unique advantages to achieving shared, national objectives. While the federal government sets nationwide policies and marshals resources, state and local governments deploy their specialized knowledge of local circumstances to implement those policies effectively, efficiently, and consistently with their own priorities. See, *e.g.*, *Hodel* v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) ("[T]he Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."). When cooperative federalism goes wrong, however, state and local governments become saddled with unwieldy, intrusive, and ineffectual federal programs that cost money and time already in all-too-short supply.

A. Federal Law Informs State Laws and Imposes Affirmative Obligations on State and Local Governments.

Although States are sovereign, state and local governments (and state and local laws) are deeply intertwined with federal law—including federal agency rulemakings.

First, state and local governments may be charged with "implementing purely federal law, acting as a kind of contractor for [a] federal program." *Curing the Blind Spot*, *supra*, at 1288. When invoking Congress's Spending Clause power, for instance, the federal government provides state and local governments with

funds to pursue specified policies, but attaches strings to those funds—requiring their use within federal standards to achieve federal policies subject to federal oversight. For example, under the Social Security Disability Insurance program, state agencies are tasked with making initial claims determinations under standards that are established solely by federal law. See *id.* at 1289 & n.45.

Second, state and local governments may implement their *own* laws subject to federal requirements and oversight—for example, where the federal government provides funding to States contingent on their enacting laws that satisfy certain minimum standards. See *id.* at 1288–89. There is no shortage of examples of federal programs that follow this framework: the Temporary Assistance to Needy Families program, 42 U.S.C. §§ 601–619; Medicaid, 42 U.S.C. §§ 1396–1396w-5; public housing programs, 42 U.S.C. § 1437(g); and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1482.

Third, state law may be implemented "side-by-side with federal law, subject to federal requirements and oversight," such as where state law provides a component of a broader federal program. *Curing the Blind Spot*, *supra*, at 1288–89. For example, the Clean Air Act, 42 U.S.C. §§ 7401–7671q, requires States to enact and oversee "state implementation plans," which States have wide discretion to shape so long as they are deemed likely to ensure the State's compliance with national air quality standards set by the EPA. See 42 U.S.C. § 7410.

Under each of these three models, state and local governments must first know what federal law *is* for

cooperative federalism to work. The notice-and-comment rulemaking required by the Administrative Procedure Act ("APA"), facilitates this result by (i) ensuring that States and localities have notice of impending changes to federal policies and (ii) providing a forum in which they can seek to influence, clarify, and improve new policies. See U.S.C. § 553.

B. State and Local Governments' Participation in Agency Rulemaking Improves the Quality and Efficacy of Federal Law.

Cooperative federalism is not a one-way street. While numerous federal programs charge state and local governments with implementing federal policy, they frequently give state and local governments a voice in shaping those policies, as well. This benefits not only States and localities, but also the Federal Government, as States and localities bring new perspectives and localized knowledge to nationwide problems. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) ("[Federal actors] have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible * * * [and] hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.").

1. In 2011, the EPA and U.S. Army Corps of Engineers released proposed guidance concerning the definition of "waters of the United States" under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*,

which expanded the waters subject to federal jurisdiction by 17 percent. See *Letter Re: Dkt. No. EPA-HQ-OW-2011-0409*, 3 (July 29, 2011).[1]

Amicus the National Association of Counties—which is "the only national organization that represents county governments in the United States"—suggested that the guideline be withdrawn. *Id.* at 1. As the Association explained, counties were "coping with shrinking budgets," and many were "laying off their staffs, delaying or cancelling capital infrastructure projects, cutting services, and fighting to keep firefighters and police on the streets." *Ibid*. An additional federal mandate would require counties to spend money they simply did not have.

Moreover, the Association explained, the guidance would subject covered waters to *all* CWA regulations—including the federal permitting process. That process, which already takes years, has resulted in "flooding of constituent and business properties" while applicants wait for approval, forcing counties to "choos[e] between public safety and environmental protection." *Id.* at 3. In light of this important information uniquely within the ken of state and local governments, the EPA engaged in a "focused outreach" program to discuss the guidance with state and local government organizations before promulgating the final rule. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37504, 37103 (June 29, 2015).

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[1] Available at http://www.naco.org/sites/default/files/documents/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

2. In 2004, the Department of Health and Human Services proposed a rule establishing a three-year recordkeeping requirement for drug manufacturers under the Medicaid drug rebate program. After state law enforcement officials informed the Department that allowing manufacturers to destroy records after only three years would materially reduce States' ability to review such records to prosecute and deter fraud, the agency reconsidered the requirement, ultimately opting for a 10-year recordkeeping requirement. *Medicaid Program: Time Limitation on Recordkeeping Requirements Under the Drug Rebate Program*, 69 Fed. Reg. 508, 510 (Jan. 6, 2004).

3. In 2016, the Department of Justice proposed a rule that would have required state and local government websites to be accessible under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq*. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 81 Fed. Reg. 28658 (May 9, 2016); see also *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460 (July 26, 2010) (first proposing rule).

State and local governments expressed support for the proposed rule's goals but voiced concerns about the cost and difficulty of implementing the rule in the manner proposed by the Department. See *Letter Re: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations,*

RIN 1190-AA65, 1 (Oct. 7, 2016).[2] Two months later, the Department withdrew the proposed rule. See *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932 (Dec. 26, 2017).

4. In 2016, the Federal Emergency Management Agency ("FEMA") proposed a rule that would have required States to pay a deductible before receiving federal aid to repair public infrastructure in the wake of a disaster. *Establishing a Deductible for FEMA's Public Assistance Program*, 81 Fed. Reg. 3082 (Jan. 20, 2016). After receiving comments from 28 States and 28 local jurisdictions, FEMA acknowledged that the proposal would impose serious "burdens, either financial or administrative, * * * [on] the States." *Establishing a Deductible for FEMA's Public Assistance Program*, 82 Fed. Reg. 4064, 4064, 4070 (Jan. 12, 2017). FEMA issued a supplemental notice in 2017 addressing those concerns. *Ibid.*

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Each of these examples highlights the importance of state and local participation in formulating federal regulations. As a result of input from States and localities, federal policymakers were able to avoid disastrous missteps while strengthening the bond between federal and state governments. Regrettably, however, under the *Auer* regime, federal agencies

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[2] Available at http://static1.1.sqspcdn.com/static/f/624306/27293532/1476719964160/ADA+Accessibility+Comments_as_filed.docx.pdf?token=fUEpD9Lf6cq0kLrEswOoG2o6%2FBk%3D.

have increasingly favored unilateral action at the expense of collaboration with state and local governments.

II. The *Auer* Regime Deprives State and Local Governments of the Opportunity to Participate in Federal Policy-Making.

The APA ensures collaboration between federal agencies and state and local governments by requiring agencies to promulgate substantive regulations through notice-and-comment rulemaking. See 5 U.S.C. § 553. *Auer*, however, dangles a tempting alternative before federal regulators. Under the *Auer* regime, when agencies announce new policies through purported interpretations of already-promulgated regulations, those agencies can avoid consulting with States and localities entirely.

The consequences are profound—and profoundly dangerous. Because agency interpretations of their own regulations are often announced in briefs, letters, and memoranda—rather than developed through public, deliberative, and iterative rulemaking processes—States and localities often fail to receive notice of substantive changes to interpretations of federal laws that they enforce.

Even when States and localities are aware of an agency's new interpretation, they cannot seek the clarification and elaboration that is available through notice-and-comment rulemaking—leaving them to guess as to the meaning and application of federal law. Above all, state and local governments are deprived of the opportunity to shape federal regulations—which they are often charged with enforcing—by bringing to bear their on-the-ground knowledge

and perspectives. It is no wonder that less efficacious and more onerous regulations are often the result. And the ease with which agencies can change policies by simply reinterpreting their own regulations means that these changes happen more frequently—upsetting settled expectations and breeding uncertainty among regulated communities.

The *Auer* regime thus puts state and local governments to a Hobson's choice. They can challenge ill-considered agency interpretations in court, but this is costly and time-consuming—and under *Auer*, courts can overturn an interpretation only if it reflects an *unreasonable* reading of the regulation. Or, assuming it is even an option, state and local governments can disengage from cooperative relationships with the federal government altogether—but risk the loss of critical financial support for important public programs. Either way, they must attempt to adjust to the new scheme while preparing contingency plans should the next court ruling or the next administration rewrite the policy yet again.

These concerns are not hypothetical. Indeed, they are becoming more acute as federal agencies exploit the advantage *Auer* affords them to promulgate more and more ambiguous regulations that in turn expand their capacity to act unilaterally.

1. In 2015 and 2016, the Department of Labor under President Obama issued two interpretations that expanded the scope of "joint employment" and "independent contractor" status under the Federal Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act, based on the theory that these work relationships were being

abused to evade wage-and-hour laws. Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance* ("*DOL Withdraws*"), (June 7, 2017).[3]

Less than a year into President Trump's Administration, the Secretary of Labor rescinded those interpretations and reverted to the prior definitions of joint employment and independent contractor status. See News Release, Office of Public Affairs, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (June 7, 2017).[4] The Secretary noted that any further modifications of the standards would issue in Opinion Letters. *DOL Withdraws*, *supra.*

2. In January 2014, the Civil Rights Divisions of the Departments of Justice and Education issued a "Dear Colleague" letter addressing disciplinary practices in schools. The letter informed schools across the country that the Departments would investigate "public reports of racial disparities in student discipline," and if substantiated, those practices could be treated as a violation of federal civil-rights laws. *Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014).[5]

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[3] Available at http://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance.

[4] Available at http://www.dol.gov/newsroom/releases/opa/opa20170607.

[5] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

Four years later, the same agencies rescinded the letter, explaining that "States and local school districts play the primary role in establishing educational policy," and that "the [former] Guidance and associated documents advance policy preferences and positions not required or contemplated by Title IV or Title VI." *Dear Colleague Letter* (Dec. 21, 2018).[6] It is not clear whether any States or localities were consulted before either the 2014 or 2018 guidance was issued.

3. In 1993, the Department of Labor issued several opinion letters reversing the Department's previous position that the FLSA did not require public entities to compensate career firefighters for time spent performing voluntary firefighting services for separate, non-profit corporations in the same geographic area. See *Wage and Hour Opinion Letter FLSA 2001-19* (Nov. 27, 2001).[7] The Department reversed course again in 2001, when the Acting Administrator of the Department's Wage and Hour Division opined that the FLSA does *not* require compensation for these volunteer services. *Ibid*. (acknowledging the shifting agency policy). The 1993 interpretation had resulted in staffing shortages as counties cut volunteer firefighters who were employed by the county in other professions to avoid paying additional compensation.

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[6] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[7] Available at https://www.dol.gov/whd/opinion/FLSA/2001/2001_11_27_19_FLSA.htm.

See *Retention & Recruitment for the Volunteer Emergency Services*, at 19 (2004).[8]

4. In 2016, the Department of Commerce interpreted one of its regulations to conclude that FEMA's implementation of the National Flood Insurance Program in Oregon would jeopardize 16 endangered species, thereby compelling Oregon communities to take additional, costly measures before they would be permitted to participate in the flood insurance program. Complaint, *Oregonians for Floodplan Protection et al.* v. *Dep't of Commerce*, 1:17-cv-01179 (D.D.C. June 15, 2017).

5. The U.S. Army Corps of Engineers recently rescinded a 2009 interpretation making qualification for federal disaster assistance funds contingent on States and localities clearing levees of vegetation. Jeff Miller, *Army Corps Reverses Misguided Policy Requiring Clearing Trees from Levees* (Mar. 25, 2014).[9] The Corps withdrew the interpretation only after California agencies and environmental groups explained that clearing vegetation would harm endangered species, increase the risk of levee failures, and cost $7.8 billion. *Ibid.*

6. A 2005 Department of Labor interpretation respecting stipends offered by schools to staff who volunteer as coaches caused so many practical problems that some schools eliminated the stipends—or even athletics programs—entirely. Brief of *Amici Curiae*

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[8] Available at http://www.in.gov./dhs/files/retainrecruit.pdf.

[9] Available at https://www.biologicaldiversity.org/news/press_releases/2014/levees-03-25-2014.html.

Nat'l Sch. Bds. Ass'n *et al*. at 14–19, *Purdham* v. *Fairfax Cty. Sch. Bd*., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408).

7. An informal opinion letter issued by the Department of Education in 2016 opined that Title IX requires public schools to provide students access to bathrooms based on their gender identity rather than their biological sex. See *Joint "Dear Colleague" Letter on Transgender Students* (May 13, 2016).[10] This interpretation was then invoked in a suit by a student against a school district, even though, as a coalition of States explained, that interpretation was adopted *after* the defendant school district allegedly violated it. See Brief of *Amici Curiae* the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine Supporting Petitioner, *Gloucester Cty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 2017 WL 167311 (U.S. Jan. 10, 2017). Despite the profound implications this interpretation would have on schools' obligations under Title IX—and thus their eligibility for federal education funding—those entities were not consulted. The Department withdrew the letter in 2017, explaining that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." See *Joint "Dear Colleague" Letter* (Feb. 22, 2017).[11]

8. In 2013, the Ninth Circuit relied on *Auer* to uphold a position advanced by the Department of Justice in an amicus brief asserting for the first time that a

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[10] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[11] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

school could fail to meet the "effective communication" requirement of the ADA, even though the school complied with the IDEA's "free and appropriate public education" requirement. See *K.M. ex rel. Bright* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013). A year later, the Department issued a "Dear Colleague" letter affirming its interpretation, again without using the notice-and-comment process. *Joint "Dear Colleague" Letter* (Nov. 12, 2014).[12]

In response, the National School Boards Association submitted to the Department roughly 30 questions left unanswered by the Dear Colleague letter—including how schools could successfully work with parents on individualized education plans if schools had to immediately meet the ADA's requirements, and how schools should judge whether an accommodation is an undue financial burden when just one communication service can cost up to $180,000 *per child*. See *NSBA Letter Re: Dear Colleague Letter Issued November 12, 2014* (Mar. 5, 2015) (inviting DOJ to join NSBA in a dialogue "[t]o avoid these potential outcomes").[13]

Had the Department promulgated its interpretation through notice-and-comment rulemaking rather than in an *amicus* brief, interested parties like NSBA would have had the opportunity to collaborate with the Department to ensure that its regulatory goals were achieved without the dislocations caused to States, localities, schools, and parents. Instead, state

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[12] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf.

[13] Available at http://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf.

and local entities were blindsided by a new interpretation that required immediate adherence, imposed significant burdens, and offered little practical guidance.

All of these interpretations had far-reaching effects on state and local governments—but none of them was promulgated with any meaningful consultation with those entities. This is not how cooperative federalism is supposed to work.

III. Auer Should Be Overruled.

Notice-and-comment rulemaking lies at the heart of the APA—yet under *Auer*, an agency's interpretation offered for the first time in an *amicus* brief or an opinion letter can have the same legal force as a properly promulgated rule. See *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J. concurring). Indeed, because "[i]nterpretive rules that command deference * * * have the force of law," *id.* at 1211–12 (Scalia, J. concurring), "[t]o regulated parties, the new interpretation might as well *be* a new regulation," *id*. 135 S. Ct. at 1221–22 (Thomas, J. concurring) (emphasis added).

Auer allows the Federal Government to run roughshod over States and localities, forcing them to fall in line or else lose vital federal funds. Worse still, it allows federal *agencies*—unelected and unaccountable—to do so without so much as consulting the impacted parties. The agency need not even explain its reasoning; an *amicus* brief, a Dear Colleague letter, or even a press release all have the power to drastically shift the relationship between federal and state governments and to impose massive new burdens on States and localities. All that the agency must do is

identify a purportedly ambiguous regulation and offer an interpretation that is not arbitrary and capricious. These are hardly meaningful constraints.

First, ambiguity is often in the eye of the beholder. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2137 (2016) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity."). This case is a perfect example. The Federal Circuit deferred to the Veterans Board's interpretation—advanced for the first time in this very case, Pet. 14a n.10—because it believed that the term "relevant" in 38 C.F.R. § 3.156(c)(1) was "ambiguous." *Id.* at 15a. "In our view," the Federal Circuit held, "the regulation is vague as to the scope of the word ["relevant"], and canons of construction do not reveal its meaning." *Id.*; but see *FCC* v. *AT&T Inc.*, 562 U.S. 397, 405 (2011) (looking beyond the abstract meaning of the term "personal" and considering its meaning "in light of the terms surrounding it").

Even if there were some objective standard by which parties could reliably evaluate the ambiguity of a regulation *ex ante*, that does not solve the underlying problem—the pronouncement of sweeping federal policies through hasty, ill-considered interpretations that can be modified or abandoned at the whim of unaccountable bureaucrats. Indeed, far from constraining agency action, *Auer*'s requirement that a regulation be ambiguous before an interpretation will be accorded deference only encourages agencies to promulgate ambiguous regulations at the outset. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) ("[D]eferring to an agency's interpretation of its

own ambiguous regulations * * * creates a risk that agencies will promulgate vague and open-ended regulations * * * *").

Second, the requirement that an interpretation not be arbitrary and capricious is similarly unhelpful to state and local governments charged with implementing shifting and onerous federal programs. To be sure, this may provide some safeguard "when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions." *Perez*, 135 S. Ct. at 1209. But even then, an interpretation will fail this standard only where it is "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461 (internal quotation marks omitted)—an exceedingly difficult standard to meet.

For similar reasons, it is no answer that "Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations." *Perez*, 135 S. Ct. at 1209. As an initial matter, safe-harbor provisions are hardly a universal feature of federal legislation. And even where they are present, they serve only to protect regulated entities from *retroactive* liability for noncompliance. They do nothing to relieve States and localities from the burdens of compliance on a *prospective* basis.[14]

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[14] Of course, abandoning *Auer* would not *require* federal agencies to engage in notice-and-comment rulemaking. Agencies would still be free to issue interpretations of their regulations by other means. But courts would no longer be required to defer to those interpretations. See John F. Manning, *Constitutional*

Decades of experience demonstrate that *Auer* is fundamentally incompatible not only with separation of powers, but also with federalism. It diminishes state sovereignty by imposing costly burdens without notice to the States or the opportunity for them to be heard. It encourages the promulgation of ambiguous regulations followed by ill-considered and protean interpretations of those regulations. And in so doing it undermines the rule of law by privileging ambiguity and uncertainty over stability and predictability. It is time to abandon *Auer*.

Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 668–69 (1996) ("[I]f an agency bears the risk of its own imprecision, obfuscation, or change of heart, it will have greater incentive to draft clear, straightforward rules when it chooses to engage in rulemaking.").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Federal Circuit and overrule *Auer*.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, California 90071

ALLYSON N. HO
Counsel of Record
KATHRYN CHERRY
BRADLEY G. HUBBARD
ELIZABETH A. KIERNAN
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

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