No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIDRE GRIMM,

Respondent.

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

BRIEF OF PROFESSORS—DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND CHRISTOPHER J. WALKER—AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RONALD A. CASS
Counsel of Record
CASS & ASSOCIATES, PC
10560 Fox Forest Drive
Great Falls, VA 22066-1743
(703) 438-7590
roncass@cassassociates.net

Counsel for Amici Curiae

January 10, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 16-273

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIDRE GRIMM,

Respondent.

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

BRIEF OF PROFESSORS—DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND CHRISTOPHER J. WALKER—AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are teachers, scholars, and former government officials who have served in a variety of positions

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

in the United States government, including positions in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions similar to that at issue in this proceeding and for reviewing agency decisions. They also, among other things, have been deeply engaged with organizations devoted to administrative law and related subjects, have taught classes and written numerous articles and books on matters implicated in one of the questions presented in this case. This brief reflects *amici*'s long-standing interests in the subject of administrative law and particularly standards for judicial review of administrative action.

SUMMARY OF ARGUMENT

This case asks if courts should give the substantial deference called for under *Auer v. Robbins*, 519 U.S. 452 (1997) (*Auer*), to interpretations of agency rules contained in an unpublished agency letter that does not carry the force of law and was adopted in the context of the dispute in which deference is sought. For anyone first encountering the issues of deference, merely stating the question would suggest an answer: surely, granting deference to such interpretations would increase agency authority beyond what is reasonably attributable to law, invite manipulation, and disserve interests in public notice and well-grounded decision-making. That answer is not just what a naïve observer would conclude; it also is consistent with this Court's past decisions and with a thoughtful understanding of the reasons for and limits on deference.

Auer deference draws on concepts associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). Indeed,

Auer's author stated: "*Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part). *Auer* interpreted the Court's earlier decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (*Seminole Rock*), as providing a basis for treating questions respecting the meaning of agency rules in similar fashion to questions respecting agency authority under statutes. See *Auer*, 519 U.S. at 461-62. Although the questions are substantially different, understanding the proper scope of *Auer* deference begins with understanding the proper scope of *Chevron* deference.

Chevron and its progeny found it reasonable in some contexts to read statutes administered by executive agencies as granting discretion to the agency charged with implementing the particular law. See, e.g., *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1995). Under the Administrative Procedure Act (APA) as well as the *Chevron* line of cases, courts using "traditional tools of statutory construction" decide the law's meaning and the ambit of administrative discretion under the law. See, e.g., 5 U.S.C. § 706; *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Chevron*, 467 U.S. at 843 n.9. Courts also check to see whether particular decisions predicated on statutory authority constitute reasonable exercises of discretion—whether a decision reasonably falls within the bounds of statutory authority. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239, 242 (2004); *Barnhart v. Walton*, 535 U.S. 212, 218-20 (2002); *Chevron*, 467 U.S. at 842-43. Apart from the change in language to its two-step test, *Chevron*'s contribution was greater willingness to read statutory ambiguity as authorizing

an agency to make discretionary policy decisions consistent with any reasonable reading of the statutory terms setting the bounds of that authority. See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1314-15 (2015) (*Rethinking*); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833 (2001); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143 (2012).

The Court has made clear, however, that this construction of statutory language does not fit all statutes or all settings. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). The fit often has turned on indications of congressional intent to commit discretion to an agency—or, more accurately, on factors that seem consistent with such an intent, even if determinate group intent is fictional—including legislative authorization for an agency to make decisions with the force of law, use of relatively formal procedures in agency decision-making, and public accessibility of determinations. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001) (*Mead*); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). In each case, the relevant question at bottom in evaluating agency action governed by statutory text is the degree of discretion committed to the agency, given the "great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it." *Mead*, 533 U.S. at 236. *Chevron* deference, in other words, is in essence a recognition of the scope of agency discretion under law,

either expressly committed by statute or inferred by courts.

Auer broadly extended *Chevron*-like deference to an agency's interpretation of its own rules. That extension occurred in a setting far different from the interpretation of a price-control regulation at issue in *Seminole Rock*. See, e.g., Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 59-65, 100 (2015). Acceptance of price control interpretations historically occurred in the context of binding agencies to follow positions communicated by agency officials as those subject to the controls sought to understand their application. *Id*., at 55-58; Helen B. Norem, *The "Official Interpretation" of Administrative Regulations*, 32 Iowa L. Rev. 697, 702-04 (1947) (cited in Knudsen & Wildermuth, *supra*). Other peculiar aspects of price control administration also may explain the initial impetus for *Seminole Rock* deference. See, e.g., Knudsen & Wildermuth, *supra*, at 61-63. *Auer* did not advert to the background context for *Seminole Rock* or explain the expansion of *Seminole Rock* deference apparently sanctioned in *Auer*, omissions that compromise *Auer*'s force.

At a minimum, the broader logic of deference to agency decisions strongly supports limiting *Auer* to settings in which agencies have been given clear discretionary authority to make particular determinations in specific ways. If the Court is inclined to continue *Auer* deference, it should condition that deference most importantly on the legislative commitment of discretionary authority. If it is inclined to find that authority implicit, rather than explicit, in statutes, the Court should give special weight to use of procedures consistent with decisions having the force

of law, with notice to affected parties, and with input and analysis that provide special reasons for deference. Those factors replicate the considerations this Court has deemed relevant to evaluating the scope of discretion conferred by law and the deference appropriate under *Chevron* and pre-*Chevron* consideration of deference to agency decisions purporting directly to implement statutory provisions. See, e.g., *Mead*, 533 U.S. at 230-34; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Reno v. Koray*, 515 U.S. 50, 61 (1995); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991). See also *Barnhart v. Walton*, 535 U.S. 212, 219-222 (2002) (consistency, limited scope of decision, and evidence of careful consideration relevant to *Chevron* deference).

In considering whether deference is merited, the Court should be even more wary of granting deference to agency constructions of their own regulations than to actions directly implementing statutory directives. Where *Chevron* deference recognizes the scope of policy discretion entrusted to administrative officials by law, *Auer* deference cannot be thought of in the same manner without the oddity (if not absurdity) of assuming that administrators enjoy freedom to grant additional degrees of discretion *to themselves*. The discretionary authority granted to the agency *by law* should not be seen as a "nested" grant of authority—akin to a set of Russian "matryoshka" dolls—with each grant containing an implicit sub-grant of further discretion, especially discretion not confined by particular process requirements providing similar indicia that the exercise of discretion was understood to be authorized by law. Understanding that, the Court has denied deference to agency interpretations of their regulations, among other occasions, "when the

agency's interpretation conflicts with a prior interpretation, see, *e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994), or when it appears that the interpretation is nothing more than a 'convenient litigating position,' *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2011).

There is particular reason for denying the strong form of deference represented by *Auer* to positions taken in an unpublished letter. This Court often has emphasized the importance of procedures that prevent "the kind of 'unfair surprise' against which our cases long have warned." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2011) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991); *National Labor Relations Board v. Bell Aerospace*, 416 U.S. 267, 295 (1974)). It also has stressed the significance of procedures, such as notice-and-comment rulemaking, that "tend[] to foster the fairness and deliberation that should underlie a pronouncement" with the effect of law. *Mead*, 533 U.S. at 230. An unpublished letter lacking the force of law meets none of those requirements.

The benefits of notice-and-comment rulemaking as a process for framing choices inherent in agency discretion to implement statutory authority—the obverse of the risks of "unfair surprise" and decisions that lack qualities of "fairness and deliberation" associated with some other procedures—have supported determinations that substantive rules with the force of law must be adopted through notice-and-comment processes and also must be amended through such processes.

See, e.g., *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1206 (2015); *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Other procedures, such as policy statements and interpretive rules, may be used to alert the public of an agency's view of the governing law and its intentions with respect to its implementation. See, e.g., *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995).

However, the use of a private letter to revise an agency's interpretation of a regulation contravenes all of the understandings supporting precedents respecting the procedures that must be used to bind parties with the force of law. Deference here cannot be justified on the ground that the agency is merely interpreting, not changing, its rule. No matter how much courts attempt to divide agency decisions *explicating* regulations from decisions *revising* regulations, this is a line that cannot readily and effectively be drawn. Indeed, the whole notion of *Auer* deference is that the agency has leeway to make that determination—whether it is explaining a prior rule or announcing a new rule—for itself.

Binding deference is especially inappropriate when a private communication effectively can change the agency's position in the proceedings for which deference is sought, a setting that raises serious due process concerns. As noted, although agency pleas for deference routinely will be coupled with assertions that the position taken merely elaborates existing policy, argument over deference to such a pronouncement inevitably is tied to concern that the letter in fact alters prior understandings of agency rules. In this setting, deference would permit self-assignment of discretionary authority outside the bounds of normally

required indicia that a statute commits that authority and without benefit of procedures specially suited to adoption and extension of rules binding private parties. In other words, it would approve the "Russian doll" version of administrative authority.

ARGUMENT

I. Deference to Agency Decisions Depends on Legal Commitment of Discretionary Authority.

A. Both the APA and *Chevron* Make Judicial Review Standards Dependent on Statutorily-Granted Discretion.

Although judicial deference to administrative determinations varies with the context and nature of the determination, deference uniformly requires legal commitment of discretionary authority to the agency in respect of the decision at issue. Deference predicated on this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997) (*Auer*), should be understood in relation to concepts associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), as well as the underlying instructions in the APA's provisions for judicial review, 5 U.S.C. §§ 701, 706.

The Administrative Procedure Act (APA), setting out the general rules governing judicial review of administrative action, directs reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 701, but excepts review "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 706. It also directs that courts are to "hold unlawful and set aside agency

actions . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), as well as actions the court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Consistent with prior practice, the text plainly assigns the law interpreting function to reviewing courts while directing the courts to respect the degree of discretion given to agencies, checking exercises of discretion for various forms of unreasonableness, not correctness. See, e.g., Cass, *Rethinking*, *supra* at 1311-14.

The degree of discretion given to an agency, of course, is not always expressly stated in the governing statutory text. The understanding, both pre- and post-APA, has been that some commitments of broad authority to an agency embody grants of discretion, and that the very breadth and ambiguity of the terms of the legal authorization for administrative action evidence that meaning.[2] See, e.g., *National Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111 (1943); *Gray v. Powell*, 314 U.S. 402 (1941); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933); Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, Administrative Law: Cases & Materials 154-58, 166-70 (7th ed. 2016); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992) (*Deference*). So, for

[2] The evidence of legislative commitment of discretion does not, of course, resolve the question whether the degree and nature of the discretion accorded violate strictures on delegation of legislative power. See, e.g., *Loving v. United States*, 517 U.S. 748, 757-58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y (issue no. 1) (2016) (forthcoming).

example, the Communications Act of 1934's assignment to the Federal Communications Commission (FCC) of authority to allocate and license radio stations in ways that serve "the public interest, convenience, and necessity," 47 U.S.C. §§ 307, 309, necessarily conveys discretionary authority. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Having framed the agency's authority in obviously broad fashion, the Congress did not need to add "and the FCC has discretion to decide what 'the public interest, convenience, and necessity' means."

That same understanding informed the Court's decision in *Chevron*. As this Court explained:

> We 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 possess whatever degree of discretion the ambiguity allows.

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1995).

B. *Chevron* Deference Has Been Denied Where Indicia of Discretionary Authority Are Absent.

Judges and scholars have offered different explanations for the manner in which courts do and should evaluate the scope of discretion. Then-judge Stephen Breyer, for example, said that courts "have looked to practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in

light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation." Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L Rev 363, 370 (1986). Justice Scalia, quoting from two court of appeals decisions, stated his approach this way:

> The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'"

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989) (quoting *Process Gas Consumers Group v. United States Dept. of Agric.*, 694 F.2d 778, 791 (D.C. Cir. 1982) (*en banc*), quoting *Constance v. Secretary of Health & Human Services*, 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)).

Despite differences in approach, the common ground for granting deference is a conclusion that the law, explicitly or implicitly, grants discretion to a given administrative official to make a particular determination within bounds set by the relevant statute. Consistent with that understanding, *Chevron*'s "Step One" determines the room for discretion under law, see, e.g., *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Chevron*, 467 U.S. at 843 n.9, while its second step assesses whether the agency has reasonably exercised that discretion, see, e.g., *Household Credit Services., Inc. v. Pfennig*, 541 U.S. 232, 239, 242 (2004); *Barnhart v. Walton*, 535 U.S. 212, 218-20 (2002); *Chevron*, 467 U.S. at 842-43.

The Court has made clear that decision on the scope of discretion left to an agency, as well as the commitment of authority to an agency more generally, depends on evidence respecting statutory meaning in particular settings. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (*Brown & Williamson*). At times, the judgment respecting the scope of authority left to an agency has turned on the consistency of a commitment of discretion to the broader statutory framework. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468-71 (2001) (*American Trucking Associations*); *Brown & Williamson*, 529 U.S. at 159-60; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994). In *American Trucking Associations*, for example, the Court found that the statute did not give the Environmental Protection Agency the discretion it asserted (to consider costs in setting air quality standards) because the statute carefully had circumscribed its discretion in companion provisions of the same act—sometimes expressly granting EPA the discretion to consider costs in setting standards, other times denying that discretion, and at times even plainly commanding EPA to consider costs, the consideration it asserted in *American Trucking Associations* was silently committed to its discretion. *American Trucking Associations,* 531 U.S. at 467-68. While administrative discretion at times is implicit in (or fairly inferred from) statutory ambiguity, discretion that is at odds with the statutory framework, history, and function will not be inferred, especially where it works a dramatic change in administrative authority and in the law's meaning. In *American Trucking*

Associations' memorable phrase, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id*. at 468.

In looking at factors that seem consistent with a congressional intent to commit discretion to an agency—recognizing that the notion of a determinate, singular, congressional intent is fictional—this Court has pointed to legislative authorization for an agency to make decisions with the force of law, agency use of relatively formal procedures in making the relevant decisions, and public accessibility of agency determinations. See, e.g., *Mead*, 533 U.S. at 229-31; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Although the cases do not uniformly find a single controlling factor for determining the scope of agency authority—and, thus, the degree to which courts should defer to an agency's decision on a particular matter—the relevant question in evaluating agency action governed by statutory text has been and should be the degree of discretion committed to the agency, given the "great variety of *ways in which the laws invest the Government's administrative arms with discretion*, and with procedures for exercising it." *Mead*, 533 U.S. at 236 (emphasis added).

As the cases above demonstrate—and as scholars across the spectrum of views on administrative law have explained—the linchpin for *Chevron* analysis, as for the APA and prior law, remains determining the scope of legally conferred discretion, either expressly committed by statute or inferred by courts. See, e.g., Cass, *Rethinking*, *supra*, at 1313; Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion:* A Comment on Levin and Rubin, 72 Chi.-Kent L. Rev. 1377, 1379

(1997); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1257 (1997); Merrill & Hickman, *supra*, at 872; Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. L. Rev. 551, 554 (2012) (*Puzzle*); Strauss, *supra*, at 1145, 1147, 1158-61, 1163.

II. If Retained, *Auer* Deference Should Only Extend to Decisions Authorized by Clear Grants of Discretion.

Although the grant of *certiorari* in this case does not extend to consideration whether to retain the *Auer* doctrine, several justices have expressed concern with at least some of the doctrine's predicates and application. See, e.g., *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in judgment); *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment); *id*. at 1213 (Thomas, J., concurring in judgment); *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring) (joined by Alito, J.); *id*. at 1339-42 (Scalia, J., concurring in part and dissenting in part); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (joined by Stevens, O'Connor, and Ginsburg, J.J.) (*Thomas Jefferson Univ.*). Even if the *Auer* doctrine is retained, this Court should reject its application to administrative determinations such as the one presented in this case. Notwithstanding some ill-chosen wording in *dicta*, the doctrine should provide considerably *less* scope for judicial deference than *Chevron*, as (i) the essential predicate for *Chevron* deference—the existence of legally committed discretion—is invariably more attenuated in the *Auer* context and (ii) concerns respecting the exercise of administrative

discretion are heightened. At a minimum, bases for denying *Chevron* deference also should preclude *Auer* deference.

A. The Critical Predicate for Deference Is More Attenuated for Interpretation of Agency Rules than for Direct Exercise of Statutorily-Granted Discretion.

Seen in the context of deference as a recognition of legally granted discretion, *Auer* deference—deference to an agency's interpretation of its own rules—seems anomalous. *Seminole Rock*, the decision that seemingly provided all the precedential support for *Auer*, see *Auer*, 519 U.S. at 461,[3] cannot bear the weight it is given. Moreover, the logic of deference to discretionary decisions, so far as the agency does not exceed the discretion given, does not extend automatically to a second level of deference when an agency follows the clearly delegated decision with another determination. Put differently, while an agency may receive deference for exercising delegated discretion, it does not have the power to decide how much discretion it should be

[3] The only other citation supporting *Auer*'s conclusion that the courts must defer to a agency's interpretation of its own rule unless "plainly erroneous or inconsistent with the regulation" was *Robertson v. Methow*, 490 U.S. 332, 359 (1989) (*Robertson*), which the *Auer* decision cited for its quotation of *Seminole Rock*. See *Auer*, 519 U.S. at 461. *Robertson*, after dealing extensively with questions relating to interpretation of the *statutory* requirements placed on agencies in respect of environmental evaluations by the National Environmental Protection Act (NEPA), 83 Stat. 852, 42 U.S.C. § 4231 et seq., briefly addresses the contention that the Forest Service violated its own regulations. The Court concluded that the agency had acted reasonably in choosing how to implement its obligations under relevant statutory provisions and its own rules. See *Robertson*, 490 U.S. at 357-59.

granted; that power rests strictly in the lawmaking branches acting through constitutionally prescribed means.

1. *Seminole Rock* Does Not Provide a Basis for Broad Deference to Agency Interpretation of Regulations.

As an initial matter, the precedent on which *Auer* rests, *Seminole Rock*, is properly understood—at most—as supporting a limited grant of deference in a specific context where the commitment of discretion to the agency to make just the sort of judgments at issue was recognized under law. See, e.g., Norem, *supra*, at 700-04; Sanne & Wildermuth, *supra*, at 59-63. First, even though the *Seminole Rock* Court announced a rule of deference to an agency's interpretation of its own regulations, it read the regulation carefully and analyzed its meaning non-deferentially. Second, even if *Seminole Rock* had been decided based on judicial deference to the administrative decision at issue, the context would weaken efforts to derive a rule of broad deference to agencies' interpretations of their own pronouncements.

Acting under authority granted by the Emergency Price Control Act of 1942, the Administrator of the Office of Price Administration adopted a general price control regulation along with regulations for particular products and industries. The regulation at issue in *Seminole Rock* was Maximum Price Regulation No. 188, 7 F.R. 5872 (July 29, 1942), respecting building products, which, among other things, specified the means for establishing the maximum price that could be charged for various products, based on prices charged in March 1942, which set the base period for the price "freeze" announced by the Administrator. See *Seminole Rock*, 325 U.S. at 413. The regulation

provided three alternative methods for calculating the price charged in March 1942, and also provided the order in which the methods would be applied. See *id*., 325 U.S. at 414-15.

In disposing of the challenge to the agency's construction of the regulation, the Court repeatedly emphasized *its own* reading of the rule. It stated, for example, "*As we read the regulation* . . . rule (i) clearly applies to the facts of this case," *id*., 325 U.S. at 415 (emphasis supplied), and "*Our reading of the language of* . . . *Maximum Price Regulation No. 188* and the consistent administrative interpretation of the phrase 'highest price charged during March 1942' . . . compel" the Court's conclusion respecting the meaning of the rule, *id*., 325 U.S. at 418 (emphasis supplied; footnote omitted). As Professor Healy observes:

> [A]lthough *Seminole Rock* has become well known to administrative lawyers for establishing the rule that a court must defer to an agency's reasonable interpretation of its own regulations, that rule of deference did not determine the result in the case. The Court itself construed the regulation and found that it provided a clear answer to the legal question.

Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Rule of Agency Interpretations of Regulations*, 62 Kansas L. Rev. 633, 639 (2014) (footnote omitted). Other scholars also have noted the absence of support for the rule announced in *Seminole Rock* and repeated in *Auer*. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 619 (1996); Sanne & Wildermuth, *supra* at 60; Matthew

Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1454 (2011).

Several aspects of *Seminole Rock*'s peculiar context also limit the rule of deference that can be extracted from the case. First, the interpretive issues respecting application of price control rules were considered in the context of wartime interventions, a context where government actions historically have received greater deference than might be given in peacetime. See, e.g., Nathaniel L. Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 L. & Contemp. Probs. 60, 61-62 (1942); Sanne & Wildermuth, *supra* at 59-60; Donald H. Wallace & Philip H. Coomes, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 L. & Contemp. Probs. 89 (1942). See also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605 (2003). Second, questions respecting deference to administrative decisions on price controls initially were presented by private parties' efforts to bind the agency to an interpretation of its rules so that those who had to obey them could count on an authoritative construction of the rules. See Norem, *supra* at 702-04; Sanne & Wildermuth, *supra* at 55-58. Those two factors may explain initial, uncritical statements binding courts to accept the agency's construction of its own rule.

Other aspects of *Seminole Rock*'s context have potentially more general application. One is that the agency interpretation in *Seminole Rock*, to the extent it received any deference, had the virtues both of having been adopted simultaneously with promulgation of Maximum Price Regulation No. 188 and having been broadly disseminated to the public. See *Seminole Rock*, 325 U.S. at 417. These facts provide reasons for

crediting the consistency of the interpretation with the regulation and also for crediting the fairness of the agency interpretation to those affected by the rule. They make the administrative decision more likely to be an explanation than a revision of the underlying rule. Finally, and less clearly different from a number of other types of cases, price control challenges generally present fact-based, technical questions that are closely interlinked with policy judgments. Those are matters especially likely to be committed to an administering agency's discretion. See, e.g., *Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 686-87 (1991); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 152-53 (1991); Stephenson & Pogoriler, *supra* at 1459.

2. Other Precedents Do Not Support Broad Judicial Deference to Agency Interpretation of Regulations.

To the extent *Auer*'s rule of deference is retained, it should be viewed as a precedent that is built on soft ground—hence, a rule to be applied narrowly, not expansively. That is true whether the basis for the well-known *Auer* statement of deference is precedent or principle.

One possible foundation for *Auer* is that *Seminole Rock* commits the Court, unless it is prepared to overturn that decision, to permit all but the most egregiously unreasonable interpretations of agency rules. That principle is not supported by the facts or reasoning of past decisions by this Court, including *Seminole Rock* and *Auer*. The decisions asserting deference to agency pronouncements generally demonstrate critical examination by the Court of the extent to which the agency's position is consistent with the Court's own reading of the regulation at issue. See,

e.g., *Auer*, 519 U.S. at 159-61; *Thomas Jefferson Univ.,* 512 U.S. at 513-14; *Robertson*, 490 U.S. at 357-59; *Seminole Rock*, 325 U.S. at 415-18.

In *Thomas Jefferson University v. Shalala*, for example, the Court, after reviewing the critical sentence in the regulation at issue, declared "[t]he meaning of this sentence is straightforward." *Thomas Jefferson Univ.*, 512 U.S. at 413. It then reviewed the sentence's meaning before announcing that the interpretation by the Secretary of Health and Human Services was consistent with the Court's reading of the rule: "The Secretary's interpretation gives full effect to both clauses of the relevant sentence." *Id*. The Court added, "The Secretary's reading is *not only a plausible interpretation of the regulation*; it is *the most sensible interpretation* the language will bear," *id*. at 514, and, for emphasis, concluded that "the Secretary's construction . . . is *faithful to the regulation's plain language*," *id*. at 518 (emphasis added). That conclusion is not incontrovertible, see *id*. at 518-24 (Thomas, J., dissenting), but it clearly does not reflect strong deference to the agency.

3. Applicable Legal Principle Also Does Not Support a Broad Rule of Judicial Deference to Agency Interpretation of Regulations.

Alternatively, *Auer*'s rule of deference may be meant simply as a straightforward extension of *Chevron*. It could, in other words, be predicated on the principle that, where the law has given the agency broad authority to make rules exercising statutorily-granted discretion and the agency has stayed within that authority, the agency should receive the same deference for its subsequent interpretation of a rule as for the adoption of a rule. This seems to be the essence

of the argument made by Professors Sunstein and Vermeule in support of *Auer*. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, at 10-13, forthcoming, U. Chi. L. Rev., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737. Sunstein and Vermeule, however, adopt a narrower version of *Auer* than the strong deference principle universally quoted from the case, borrowing emphasis from the majority decision in *City of Arlington v. Federal Communications Commission,* 133 S. Ct. 1863 (2013) (*City of Arlington*), on the courts' role in constraining agency interpretations to fit the interpreted text. See Sunstein & Vermeule, *supra*, at 12 (quoting *City of Arlington*, 133 S. Ct. at 1874).

Certainly, to the extent courts exercise the sort of critical judgment about the extent of discretion permitted to an agency and assure that the agency has not strayed outside the bounds of its discretion, as Professors Sunstein and Vermeule suppose, there is little to criticize. Indeed, as already noted, the judicial role of independent determination on the extent of administrative discretion is common ground to a wide array of scholars. See, e.g., Cass, *Rethinking*, *supra*, at 1313; Lawson, *supra*, at 1379; Levin, *supra*, at 1257; Merrill & Hickman, *supra*, at 872; Merrill, *Puzzle*, *supra*, at 554.

Yet, that exercise of independent judgment in each case is at odds with the strong statement of deference to administrative decisions that is contained in *Auer*. The question about *Auer* deference that is before this Court would be impossible to imagine if the doctrine were narrowed to the mere residue of independent judicial determination respecting agency discretion: once the courts decide that an agency has discretion

under law, the only question that remains is whether that discretion has been exercised reasonably (not abused), a question for which deference of some magnitude is implicit.

Further, the entire argument here and elsewhere (in cases and in academic debates) is over *how* to decide the scope of discretion an agency enjoys. *Chevron* states a general canon of judicial construction that permits courts to infer discretion from statutory ambiguity, with some exceptions. See *Chevron*, 467 U.S. at 843; see also *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Brown & Williamson*, 529 U.S. at 159. *Auer*, taken at face value (that is, putting aside the analytical structure of the Court's opinion), states a general rule of deference to agency rule interpretations without requiring a clear statutory grant of discretionary authority. See *Auer*, 519 U.S. at 461. In sum, the principle that Professors Sunstein and Vermeule say is "unbearably right" is not the principle announced in *Auer*.

In order to answer the question presented in this case respecting *Auer*, the Court must address two fundamental issues of principle. It must consider, first, whether and to what degree the two settings pertinent to *Chevron* and *Auer* differ and, second, whether agency own-rule interpretations are to be limited in the same way as post-*Chevron* decisions such as *Mead* and *Barnhart v. Walton* suggest—or, perversely, whether they will receive even stronger deference than the regulations they purport to construe.

The first of these issues is readily resolved. The critical issue under *Chevron* and related decisions is the scope of discretion committed by statute to agencies. Despite differences between *Chevron*'s canon

that ambiguity in a statute committed to implementation by an agency generally implies discretion to the agency (up to the boundaries of the ambiguity), see, e.g., *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1995), and other decisions' insistence on further evidence that a commitment of discretion is consistent with the relevant statutory scheme, see, e.g., *Barnhart v. Walton*, 535 U.S. 212, 218-20 (2002); *Mead*, at 230-34, the common understanding behind deference for direct statutory implementation is that *Congress* has given an agency discretion to make choices within the array of possible meanings of an instruction. *That conclusion simply is not available as a general assumption when dealing with ambiguity in agency rules because the agency cannot be deemed to have authorized itself to exercise discretion.*

Nor can the initial grant of discretion by statute be deemed to carry with it an automatic extension of discretion to resolve any ambiguity in agency rules. The discretionary authority granted to the agency should not be seen as a "nested" grant of authority—akin to a set of Russian "matryoshka" dolls—with each grant containing an implicit sub-grant of further discretion, especially discretion not confined by particular process requirements indicating that the exercise of discretion was authorized by law. The cascade of delegations that would emerge from such a "nested" approach at the very least substantially attenuates any connection between a particular exercise of discretion and the legal source of authority for the agency's discretion.

Notably, two of the justices most closely associated with consideration of deference questions over the

past several decades—frequently from different perspectives—have rejected the principle necessary to support such an extension of deference. Justice Scalia specifically rebuffed the notion that the principle underlying *Chevron* deference could salvage a rule of deference to an agency's interpretations of its own regulations. See, e.g., *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment); *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part). Justice Breyer has offered an alternative for determining the extent of deference committed to agencies, reflecting his rejection of a strong deference principle based on mere ambiguity even for cases dealing more directly with the implementation of statutory authority than is at issue in agency efforts at self-interpretation. See, e.g., *City of Arlington*, at 1875-77 (Breyer, J., concurring and concurring in judgment).

Whether this Court embraces a more sweeping, formalist approach to selecting the degree of deference to agency decisions or an approach more reliant on weighing the import of particular factors, it should reject the assumption that ambiguity in administrative regulations confers discretion to administrative interpretations. Instead, it should insist on clear evidence of a commitment of discretion for the particular decision at issue, or at least insist on facts indicating the existence of such discretion.

B. If *Auer* Applies on the Basis of Implied Authority, Deference Should Not Be Given without Strong Indicia of Discretionary Authority for the Specific Decision—Such as Authorization to Make Rules with the Force of Law, Use of Suitable Procedures (For Example, Notice-and-Comment Rulemaking), and Evidence of Fair Warning.

The remaining issue is what factors might support an inference that an agency enjoys discretion in interpretation of a regulation, and thus deference from reviewing courts. Several factors noted in past decisions could support deference as evidence that a decision should be assimilated to the underlying exercise of discretion by the agency.

The *Seminole Rock* decision, as mentioned above, reflects the Court's determination that the agency's interpretation of its rule was consistent with the Court's own independent judgment respecting that rule and also reflects the Court's appreciation of two other facts that bolster the case for deference to the agency's interpretation. The interpretation at issue was promulgated at the same time as the rule and was broadly disseminated along with the rule. See *Seminole Rock*, 325 U.S. at 417. Simultaneous adoption increases the likelihood that the interpretation is consistent with the rule. See, e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) (similar reasoning for crediting contemporaneous interpretation of statute); *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477 (1979) (same); Kevin M. Stack, *The Constitutional Foundation of* Chenery, 116 Yale L.J. 952, 1005 (2007) (general argument to same effect). Widespread dissemination

of the interpretation obviously reduces risks of unfair surprise. And the combination of simultaneity and widespread dissemination along with the rule effectively made deference to the interpretation the same as deference to the rule itself.

Seminole Rock, in other words, is the perfect, extraordinary example of a case in which the facts could permit conflating the agency's rule-making and interpretation. If the agency had appended the interpretation to the rule and disseminated it along with the rule, it would doubtless have been seen as part and parcel of the regulation. The facts of *Seminole Rock* essentially are no different from that setting.

This Court's cases elaborating the factors that support *Chevron* deference also suggest elements that indicate (or at least are consistent with) congressional intent to commit discretion to an agency—with due appreciation that the notion of a determinate, singular, congressional intent is fictional. This Court has, for example, pointed to legislative authorization for an agency to make decisions with the force of law, agency use of relatively formal procedures in making the relevant decisions, and public accessibility of agency determinations. See, e.g., *Mead*, 533 U.S. at 226-27, 229-31; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). A grant of authority to make regulations having the force of law suggests legislative commitment to the agency of a degree of discretionary judgment. See, e.g., *Mead*, 533 U.S. at 226-27. In the same vein, use of the procedures associated with "legislative rulemaking" provides a basis for concluding that the discretion granted by law is being exercised in accordance with the governing legal instruction—insofar as substantive authority routinely is coupled with process requirements for its exercise.

See, e.g., *Mead*, 533 U.S. at 230; *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). Finally, public accessibility of decisions is a *sine qua non* to treatment of decisions as having the force of law and has been a requirement long associated with core rule-of-law values. See, e.g., Ronald A. Cass, The Rule of Law in America 8 (2001); Lon Fuller, The Morality of Law 39 (rev. ed. 1969).

There is particular reason for denying the strong form of deference represented by *Auer* to positions taken in an unpublished letter lacking the force of law. An *unpublished* letter, by its very nature, risks "the kind of 'unfair surprise' against which our cases long have warned." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2011) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991); *National Labor Relations Board v. Bell Aerospace*, 416 U.S. 267, 295 (1974)).

Further, procedures, such as notice-and-comment rulemaking, that "tend[] to foster the fairness and deliberation that should underlie a pronouncement" with the effect of law, *Mead*, 533 U.S. at 230, should be just as critical when the effect of law comes from deferring to an interpretation as when it comes from deferring to a rule. See, e.g., Stephenson & Pogoriler, *supra*, at 1485-1491 (making a similar argument, focusing on formal determinations in adjudicating a rule's interpretation). That is inherent in this Court's conclusion that just as substantive rules with the force of law must be adopted through notice-and-comment proceedings so, too, must such rules be amended through notice-and-comment proceedings. See, e.g., *Perez v. Mortgage Bankers Association*, 135 S. Ct.

1199, 1206 (2015); *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Challenges to agency interpretations inevitably contest the interpretation's consistency with the rule being interpreted—essentially asserting that the rule has been amended. No matter how much courts attempt to divide agency decisions *explicating* regulations from decisions *revising* regulations, this is a line that cannot readily be drawn. Giving a private letter the strong deference associated with *Auer*, thus, is at odds with the mandate that any change to the rule be made by the same processes required for its adoption.

Binding deference is especially inappropriate when a private communication effectively can change the agency's position in the proceedings for which deference is sought, a setting that raises serious due process concerns. As already noted, agency statements in such contexts inevitably raise concerns that the letter in fact alters prior understandings of agency rules. In this setting, deference would permit self-assignment of discretionary authority outside the bounds of normally required indicia that a statute commits that authority and without benefit of procedures specially suited to adoption and extension of rules binding private parties. And it does this in exactly the sort of setting that provokes strongest concern over due process problems with an entity both writing and applying rules. See, e.g., Manning, *supra*, at 631, 639, 647-48.

Requiring clear commitment of discretion by law is preferable, but the minimum that this Court should require in respect of an agency's interpretation of its own regulation is the existence of facts providing the same indicia of authority required in decisions such as *Mead* and *Barnhart* for the particular exercise of

discretion in the particular manner at issue. Because *amici* do not believe this standard can be met in the instant case with respect to an unpublished letter issued long after the regulation it purports to interpret, adopted without the sort of process associated with determinations having the force of law, our brief is submitted in support of petitioner.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RONALD A. CASS
Counsel of Record
CASS & ASSOCIATES, PC
10560 Fox Forest Drive
Great Falls, VA 22066-1743
(703) 438-7590
roncass@cassassociates.net

Counsel for Amici Curiae

January 10, 2017