No. 17-225

In the Supreme Court of the United States

GARCO CONSTRUCTION, INC.,
Petitioners,

v.

ROBERT M. SPEER, ACTING SECRETARY OF THE ARMY,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONERS

KC BRIDGES
Attorney
Counsel of Record for Petitioners

University of California, Berkeley
School of Law
Berkeley, CA 94720

QUESTIONS PRESENTED

I. Whether the doctrine requiring courts to give "controlling weight" to an agency's interpretation of its own regulations under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

II. Whether the U.S. Court of Appeals for the Federal Circuit erroneously misapplied (1) *Auer/Seminole Rock* deference and (2) the sovereign acts doctrine in this case.

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 3

a. Factual background 3

b. Procedural background 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 11

I. *AUER/SEMINOLE ROCK* DEFERENCE UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS AND STARE DECISIS DOES NOT CONTROL 11

a. *Auer/Seminole Rock* deference unconstitutionally violates the separation of powers by allowing agency interpretations to go "essentially unchecked." 11

b. Stare decisis does not compel the Court to retain *Auer/Seminole Rock* deference. 20

II. THE FEDERAL CIRCUIT'S RULING WAS ERRONEOUS. 27

a. The Federal Circuit erroneously misapplied *Auer/Seminole Rock* deference. 27

b. The Federal Circuit abused its discretion by failing to correct the ASBCA's flawed application of the sovereign acts doctrine and reweighing the ASBCA's factual findings. 33

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 2, 7, 12, 23

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 10, 30, 31

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) .... passim

Brown v. Board of Education, 347 U.S. 483 (1954) 21

Chase Bank v. McCoy, 562 U.S. 195 (2011) 28

Chevron. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) 12, 13

Christensen v. Harris County, 529 U.S. 576 (2000) 9, 27, 28, 30

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012). .... passim

City of Arlington v. FCC, 569 U.S. 290 (2013) 24, 26

Conner Bros. Constr. Co. v. Geren, 550 F.3d 1368 (Fed. Cir. 2008) 35

Davis v. Ayala, 135 S.Ct. 2187 (2015) 10, 33, 37

Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) .... passim

Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 34

Horowitz v. United States, 267 U.S. 458 (1925) 34

Janus v. Am. Fed'n of State, County, & Mun. Emps., 138 S.Ct. 2448 (2018) . 9, 21, 22

Klamath Irrigation Dist. v. United States, 635 F.3d 505 (Fed. Cir. 2011) 35

Lawrence v. Texas, 539 U.S. 558 (2003) 9, 21, 22, 23

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 2, 13, 19, 38

Martin v. OSHRC, 499 U.S. 144 (1991) 13, 31, 33

Miller v. Alabama, 567 U.S. 460 (2012) 21

National Bellas Hess. v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967) 24

Osborn v. Bank of United States, 22 U.S. 738 (1824) 14

Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199 (2015) ..... passim

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 20

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 24

Regions Hosp. v. Shalala, 522 U.S. 448 (1998) 27, 28, 29, 30

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 23

Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87 (1995) 11

South Dakota v. Wayfair, Inc., 138 S.Ct. 2080 (2018) 9, 21, 24, 25

Skidmore v. Swift & Co., 323 U.S. 134 (1944). ..... passim

Stockton East Water Dist. v. United States, 583 F.3d 1344 (Fed. Cir. 2009) 35

Talk America v. Michigan Bell Telephone Co., 564 U.S. 50 (2011) 26

Taylor v. Sturgell, 553 U.S. 880 (2008) 34

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 31, 33

Trump v. Hawaii, 138 S.Ct. 2392 (2018). 9, 20, 21, 22

United States v. Mead Corp., 533 U.S. 218 (2001) 9, 20, 23

United States v. Winstar Corp., 518 U.S. 839 (1996) 10, 35

Utah v. Strieff, 136 S.Ct. 2056 (2016) 29

Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29 (1983) 12

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 21

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007) 29

STATUTES

41 U.S.C. § 7101 34

5 U.S.C. § 553 11

5 U.S.C. § 706 12

TREATISES

Federalist No. 78 (A. Hamilton) 2, 8, 13, 14

LAW REVIEW ARTICLES

Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016) 24, 25, 26

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) .... passim

Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) 14

INTRODUCTION

This case is, on its facts, about an agency trying to avoid paying the fair market price for a construction contract—and getting away with it. On a more fundamental level, this case is about the unconstitutional framework that made judicial review of that agency's actions impossible: *Auer v. Robbins* and *Bowles v. Seminole Rock* deference.

Here is the story: James Talcott Construction, ("JTC"), Garco Construction's subcontractor, provided labor to "dozens" of projects at the Malmstrom Airforce Base ("MAFB") over the course of two decades. During that time, JTC never had a problem finding qualified, reliable workers that could access the base. But in summer 2006—*after* JTC had subcontracted with Garco to provide labor for Phase IV of a base housing project—MAFB began to deny access to JTC's crewmembers who were on probation, parole, or convicted of non-violent offenses, citing a base access policy that had never before been used to deny access to such individuals. MAFB denied entry to twenty-eight crewmembers in total, costing JTC almost $500,000 in unanticipated expenses. When Garco and JTC requested an equitable adjustment to compensate for the unanticipated costs, MAFB refused to pay. And it gets worse. After Garco and JTC requested compensation, MAFB teetered between pretending the policy had never changed, and pretending the policy had changed but before the contract was signed: two interpretations that, coincidentally, would have shielded MAFB from shelling out for the equitable adjustment.

Garco and JTC's story, while troubling, is far from unique. The administrative state boasts of hundreds of agencies and hundreds of thousands of pages of binding regulations that the public must follow on pain of sanction. And, agencies may not only create formal rules via notice-and-comment, but may also issue *interpretations* of those rules—which are just as binding on the public—without any process whatsoever.

Instead of standing vigilant of agency interpretative rules, the courts have chosen a different path: agency interpretations merit "controlling weight" unless they are "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). But the *Auer/Seminole Rock* framework cannot be reconciled with a tripartite system of government placing judge as the "intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority." Federalist No. 78, at 467 (A. Hamilton); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that it is "emphatically the province and duty of the judicial department to say what the law is."). A federal court should not have to sit idly by while an agency uses its power of "interpretation" to swindle a government contractor out of a substantial sum of money; nor should this Court continue to permit agency interpretative rules to go essentially unchecked. "Enough is enough." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., dissenting). It is time for this Court to hold that *Auer/Seminole Rock* deference is inconsistent with the Constitution.

STATEMENT OF THE CASE

a. Factual background

For over twenty years, James Talcott Construction, Inc. ("JTC") was regularly subcontracted for construction work at the Malmstrom Airforce Base ("MAFB"). App. 40. JTC carried out "dozens of projects," during which time it had "never . . . had anybody turned down that [JTC] turned in to work on [the] site." *Id.*

In summer 2006, the U.S. Army Corps of Engineers ("COE") awarded a contract to Garco Construction, Co. to build the MAFB Family Housing Project. App. 37. Garco and JTC shortly thereafter negotiated, among others, two subcontracts to provide concrete and rough framing in connection with Phase IV of the housing project—the contracts were worth $5,033,543 and $2,975,604 respectively. App. 37, 39.

The contracts contained two relevant provisions: first, they incorporated a federal regulation permitting employers to choose to employ individuals on parole, probation, and who have served their prison terms. *See* 48 CFR § 52.222-3; App. 38. Second, the contracts provided that contractors must adhere to MAFB's "base access policy." App. 2. The base access policy at the time ("the 2005 base access policy"),[1] provided that MAFB would "run the employees [*sic*] name through the National Criminal Information Center system for a wants and warrants check. Unfavorable

[1] The 2005 base access policy was the 341st Space Wing Pamphlet 31-103, 21 July 2005, Local Security Policy and Security Procedures for Contractors, which was derived from 341st Space Wing Pamphlet 31-101, 15 October 2002. *See* App. 36.

results will be scrutinized and eligibility will be determined on a case-by-case basis." App. 37.

Upon entering these contracts, JTC "did not anticipate any difficulty" finding qualified workers, and believed that the company "would have the same labor pool that [it] had had in the past" on MAFB projects. App. 40. Moreover, "MAFB allowed JTC employees with criminal records or in pre-release access to MAFB both before and after release of the [2005 base access policy]." App. 40, 52.

Shortly after commencement of Phase IV in winter 2006, however, MAFB began denying entry to some of JTC's employees on parole or probation for non-violent offenses: "totally contrary" to the prior enforcement of the 2005 policy. App. 40-43. As a result, JTC had difficulty finding "fully trained and efficient crews during the entire project." App. 42. Finding individuals who could enter the base became the "driving factor" for JTC's hiring decisions, rather than the individual's qualifications to be a member of a construction crew. *See* App. 41. JTC's owner explained that, due to the policy shift, JTC was forced to "put[] people on the job that should never have been on a construction site" and had "zero construction experience." *Id.*; *see also* App 47-48 (explaining that a "nationwide shortage" of experienced construction workers, as well as a particularly acute shortage in Montana, made finding qualified workers challenging). Thus, after more than twenty years with no incident, MAFB rebuffed twenty-eight of JTC's workers in the span of a few months. App. 48.

Because MAFB's new procedures were "impacting and delaying JTC's performance of the contract," Garco and JTC sent a letter in May 2007 to the COE to ask why individuals on probation and parole were continually being denied access to the base. App. 42. Throughout the summer, with no success, Garco and JTC attempted to gain clarity from MAFB and the COE about the policy. App. 42-45. After several months, in September of 2007, a MAFB officer told JTC that "a new policy is being worked on" to clarify the issue, and that he "wish[ed] [he] could provide more insight," but was unable. App. 45.

Finally, on October 30, 2007, MAFB released an "updated" base access policy memo ("the October 2007 memo"), which provided that MAFB could deny access to "those having outstanding wants or warrants, sex offenders, violent offenders, *those who are on probation, and those who are in a pre-release program*." App. 46-47 (emphasis added). Colonel Finan, who signed the order, candidly stated at the administrative proceedings that the policy was a "large change." App. 47.

Shortly thereafter, Garco requested an equitable adjustment to the contract for $454,266.44, which represented the additional costs incurred by JTC related to the hiring slowdown. App. 47. MAFB promptly determined the equitable adjustment request was meritless, first asserting that the October 2007 memo was a "reissue of the same restrictions as those implemented shortly after September 11, 2001." App. 48. Later, in response to Garco and JTC's Freedom of Information Act requests, the Air Force changed its story and maintained that "Col Finan's undated memorandum to all contractors concerning base access was signed in August 2006

shortly after she assumed Command." *Id.* (punctuation omitted). Both of these explanations were "incorrect[]." App. 53 n.12.

b. Procedural background

Garco sponsored a pass-through claim on behalf of JTC in the Armed Services Board of Contract Appeals ("ASBCA") requesting the equitable adjustment that MAFB denied. App. 34. The ASBCA granted summary judgment in favor of MAFB in two proceedings: first, it determined that MAFB's actions after the October 2007 memo were protected under sovereign immunity. *Id.* Second, it determined that MAFB's actions prior to the October 2007 memo were similarly protected as a sovereign act. App. 34, 59. In the second proceeding, the ASBCA explained that "JTC presented ample credible evidence that it was harmed by the Air Force's change in its enforcement of its base access policy," and that MAFB "could be liable for this damage" but for the sovereign acts defense. App. 51-52.

The ASBCA also denied Garco and JTC's motion for reconsideration, reaffirming the ASBCA's sovereign acts reasoning and rejecting Petitioners' arguments that the plain text of the base access policy only required a wants and warrants check. App. 30-32. The ASBCA explained that "it is unreasonable to adopt an interpretation [of the 2005 base access policy] that would allow an individual currently wanted by law enforcement to be allowed access to MAFB." App. 31.

The U.S. Court of Appeals for the Federal Circuit affirmed. App. 2. The Federal Circuit did not address sovereign acts, holding that Garco and JTC, through failing to challenge the ASBCA's determination that the October 2007

memo was a sovereign act, waived the argument. App 6 n.2. The Federal Circuit afforded the October 2007 memo, as an interpretation of the 2005 base access policy, "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). App. 7. The Federal Circuit rejected Garco and JTC's plain text argument, explaining that it would not be a "sensible" reading of the 2005 base access policy to find that a "wants and warrants check" did not extend to background checks. App. 8. The Federal Circuit's reasoning mirrored the ASBCA's from the motion for reconsideration: the Federal Circuit rejected a plain text reading of "wants and warrants check" because that construction, in conjunction with the text allowing for case-by-case scrutiny of unfavorable results, would open up the possibility that individuals with current wants or warrants could be allowed entry onto the base. *See* App. 8-9. Garco and JTC filed a petition for certiorari in this Court.

SUMMARY OF THE ARGUMENT

Auer/Seminole Rock deference—requiring judges to grant "controlling weight" to an agency's construction of its own regulation, unless the agency's construction is plainly erroneous or inconsistent—unconstitutionally violates the separation of powers framework established by the Constitution. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer/Seminole Rock* deference allows an agency interpretation of its own regulation to go essentially unchecked. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1219 (2015) (Thomas, J., concurring) (explaining that *Auer/Seminole Rock* deference "precludes judges from independently determining" the meaning

and scope of interpretative rules). Because it is "comparatively easier" to promulgate an interpretative rule than a formal rule, *Auer/Seminole Rock* deference incentivizes agencies to issue vague, standardless rules via notice-and-comment and then use interpretation to retroactively "clarif[y]" that rule later—at the public's expense. *Perez*, 135 S.Ct. at 1204; *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., dissenting). In this way, deference permits an agency to be the legislator, prosecutor, and adjudicator of its own vague rules: and courts must sit idly by on the sidelines, with no power to question the agency's interpretation unless it is "plainly erroneous." *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461. Such a scheme is inconsistent with the constitutional framework, which values a tripartite system of checks and balances and prizes the judiciary for its position as the protector of the individual against the powerful legislative and executive branches. *See* Federalist No. 78, at 467 (A. Hamilton).

The Court should thus overrule *Auer/Seminole Rock* deference because it is unconstitutional. The Court should not overrule *Auer/Seminole Rock* deference in a vacuum, however, because in certain situations courts may want to make use of an agency's superior position as an expert charged with carrying out the Congressional will on the ground. Thus, an existing standard of deference, *Skidmore* "respect," is an ideal replacement for *Auer/Seminole Rock*. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). Under *Skidmore*, agency interpretations are "not controlling upon the courts," but courts may still grant some weight in situations where an agency can "bring the benefit of specialized experience to bear on the subtle

questions in [a] case." *See id.* at 140; *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (applying *Skidmore* respect to agency interpretations of statutes outside of the agency's delegated authority); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 685-90 (1996) (arguing that *Skidmore*'s non-binding standard should control judicial review of agency interpretations).

Moreover, *stare decisis* does not control the outcome here. *Auer* and *Seminole Rock*, being inconsistent with the tripartite framework of the Constitution, were "gravely wrong" when decided. *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018). Furthermore, both cases were "poorly reasoned" for failing to contend with existing precedent. *See Janus v. Am. Fed'n of State, County, & Mun. Emps.*, 138 S.Ct. 2448, 2479 (2018); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Namely, *Seminole Rock* did not contend with or even cite *Skidmore*'s respect standard, despite *Skidmore* being decided just the year before. Finally, "far-reaching systemic and structural changes"—namely, the exponential and dangerous growth of administrative control over the lives of ordinary Americans—has rendered *Auer/Seminole Rock*'s "earlier error[s]" all the more "egregious and harmful." *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2097 (2018). These factors all counsel against applying *stare decisis*.

In the alternative, this Court should reverse and remand because the Federal Circuit inappropriately applied *Auer/Seminole Rock* deference in this case. The language of the regulation at issue was unambiguous, so the Federal Circuit should not have deferred. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Auer*

deference is warranted only when the language of the regulation is ambiguous.”). Moreover, several facts in this case demonstrate that MAFB’s change in interpretation was not a “fair and considered judgment,” meaning deference should have been unavailable. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Particularly, the record shows that MAFB’s ever-changing interpretations of the 2005 base access policy were nothing but a “convenient” position taken by MAFB for the self-serving purpose of avoiding paying Garco and JTC’s $500,000 requested equitable adjustment. *See id.* (explaining that no deference is due to an interpretation that is nothing more than a “convenient litigating position”).

Finally, the Federal Circuit’s decision requires reversal because the court inappropriately failed to correct the ASBCA’s flawed application of the sovereign acts doctrine and improperly revised the ASBCA’s factual findings. The Federal Circuit blindly accepted the ASBCA’s failure to hold the Government to its burden to demonstrate both that the change in the base access policy was a sovereign act, and that the “act would otherwise release the Government from liability under ordinary principles of contract law.” *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion). And, the Federal Circuit abused its discretion by reweighing the evidence and finding that the base access policy had never changed, despite the ASBCA’s clear statement that MAFB’s change in policy harmed Garco and JTC and that MAFB “could be liable” for damages but for the sovereign acts doctrine. App. 52; *Davis v. Ayala*, 135 S.Ct. 2187, 2201 (2015) (“Appellate judges cannot on the basis of a cold record easily second-guess a trial judge’s decision . . .”).

ARGUMENT

I. *AUER/SEMINOLE ROCK* DEFERENCE UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS AND STARE DECISIS DOES NOT CONTROL.

a. *Auer/Seminole Rock* deference unconstitutionally violates the separation of powers by allowing agency interpretations to go "essentially unchecked."

i. Agency Rulemaking: Doctrinal Background

Administrative rulemaking is governed by the Administrative Procedure Act ("APA"). Under the APA, agencies must comply with notice-and-comment procedures to promulgate formal rules. 5 U.S.C. § 553. Pursuant to § 553, agencies must publish notice of a proposed rule in the Federal Register; provide a meaningful opportunity for all interested and affected parties to comment on the proposal; and, after the notice-and-comment period ends, provide a "concise general statement of [the new rule's] basis and purpose" which responds to all significant issues raised during the notice-and-comment period. *See id.*; *see also Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1203 (2015) (discussing formal rulemaking procedures).

Certain forms of rulemaking, however, do not require an agency to comply with the formal notice-and-comment procedures. Importantly to this case, the APA provides that "interpretative rules" may be promulgated without notice-and-comment. *See* 5 U.S.C. § 553(b)(A). Agencies issue interpretative rules to "advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). The absence of the APA's

notice-and-comment requirement makes it "comparatively easier" for agencies to issue interpretative rules. *Perez*, 135 S.Ct. at 1204.

The APA also provides a statutory framework for judicial review of agency actions. 5 U.S.C. § 706. The APA provides that reviewing courts "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." *Id*. The reviewing court "shall" set aside agency rules found to be arbitrary and capricious. *Id*. § 706(2)(A). Under this standard, the courts assess several aspects of a rulemaking, including whether the agency relied on the factors Congress intended it to take into account, considered all important aspects of the problem, and justified its rule with sufficient evidence in the administrative record. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

Overlaying the statutory framework of review, however, are judicially-created doctrines of deference to agency interpretations of ambiguous texts. When an agency issues a rule interpreting an ambiguity in a statute that Congress charged the agency with administering, courts will defer to the agency's statutory construction, so long as it is reasonable and not in obvious conflict with the plain text. *Chevron. v. Nat'l Res. Def. Council*, 467 U.S. 837, 845 (1984). Additionally, when an agency issues a rule interpreting its own regulation, courts must give "controlling weight" to the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (re-affirming

Seminole Rock standard). In both contexts, the Court has explained that deference to agency constructions of text is appropriate because agencies, charged by Congress to carry out a specific legislative goal, have far more expertise in the subject area than judges. *See, e.g., Chevron*, 467 U.S. at 865 ("Judges are not experts in the field"); *Martin v. OSHRC*, 499 U.S. 144, 151 (1991) ("[A]pplying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives").

A key facet of *Auer/Seminole Rock* deference is that it "*compels* the reviewing court" to accept the agency's construction, "[s]o long as the agency does not stray beyond the ambiguity in the text." *Perez*, 135 S.Ct. at 1212 (Scalia. J., concurring) (emphasis in original); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 628 (1996) ("[R]eviewing courts must enforce an agency's interpretation of its own regulation unless the agency view is entirely out of bounds.").

ii. *Auer/Seminole Rock* deference violates the separation of powers by removing all independent checks on agency interpretations.

It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Federalist No. 78, at 467 (A. Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."). A "key element[]" espoused by the Framers in support of judicial review was precisely that federal, Article III judges would "exercise independent judgment" in determining the meaning and scope of laws. *Perez*, 135 S.Ct. at 1217 (2015) (Thomas, J., concurring). The judiciary, a "co-

extensive" branch of the tripartite government, acts as an "intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 818 (1824) (Marshall, C.J); Federalist No. 78, at 467 (A. Hamilton). In fact, it is the sign of a "well constructed government" when the legislative, executive, and judicial powers equally offset each other, each using its ambitions to check the other branches. *Osborn*, 22 U.S. at 818.

But in the world of agency rulemaking, it is agencies—and agencies alone—who get to say what the law is. Agencies enact the rule (legislative), enforce the rule (executive), and adjudicate disputes over the rule (judicial). *See generally* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 526 (2015) (explaining that "administrative agencies combined legislative, executive, and judicial functions in a way that effectively marginalized tripartite, constitutional government.").Those rules, whether enacted formally via notice-and-comment or informally as interpretations, function to bind the public "on pain of sanction:" after all, if the formal regulation is binding, and the interpretation of that regulation receives judicial deference, then the interpretative rule is *de facto* binding. *See Perez*, 135 S.Ct. at 1212 (Scalia, J., concurring). It is no wonder, then, that agencies frequently use interpretative rules to bypass formal rulemaking: passing an interpretative rule is a "comparatively easier" path, but still provides the agency all of the benefits of a formal rule. *Id.* at 1204.

Amidst these incentives to overuse the interpretative power, *Auer/Seminole Rock* gives agencies one more assurance: that Article III judges, when reviewing the agency's work, will not use their independent judgment to determine the rule's scope. In fact, the doctrine "precludes judges from independently determining" the meaning and scope of interpretative rules, allowing for review only in the rare, narrow circumstance that an agency's construction is plainly erroneous. *Perez*, 135 S.Ct. at 1219 (Thomas, J., concurring). Deference, then, incentivizes agencies to promulgate mush: namely, to pass vague, expansive regulations via notice-and-comment, and then use interpretative rules to "clarif[y]" the scope of the rule at a later point, at the public's expense. *See, e.g., Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., dissenting). Put simply, *Auer/Seminole Rock* deference's message to agencies could not be clearer: if an agency wants to avoid judicial review, it need only use its power of interpretation to do so.

For this reason, *Auer/Seminole Rock* deference is particularly pernicious in comparison to other doctrines of administrative deference because it removes the only available check on an agency's excesses. For example, when courts defer to an agency's interpretation of a statute passed by Congress via *Chevron*, the agency as an extension of the executive is itself acting as a check on legislature. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 696 n.138 (1996). Though deference in the *Chevron* context still dilutes the judiciary's role as a check on the executive and the legislature, "congressional lawmaking remains subject to an independent check by a

distinct branch." *Id.* *Auer/Seminole Rock* deference, on the other hand, forces the judiciary to defer to the agency, when it is the agency itself who wrote the law—there is no "independent" interpreter whatsoever. *Id.* at 696. Agency rulemaking thus "goes essentially unchecked." *Id.* at 696 n.139.[2]

Auer/Seminole Rock deference further flies in the face of the separation of powers because it requires courts to give deference even where deference's traditional justification, expertise, is wholly absent. For example, *Auer/Seminole Rock* deference was once "applied to an agency's interpretation of *another* agency's regulation." *See Perez*, 135 S.Ct. at 1214 (Thomas, J., concurring) (emphasis added). *Auer/Seminole Rock* deference in the context of textual interpretation is particularly suspicious: "Judges are at least as well suited as administrative agencies to engage in this task." *Id.* at 1222 (Thomas, J., concurring).

Garco and JTC's dispute with MAFB illustrates *Auer/Seminole Rock*'s infirmities in an unsettling way. The Federal Circuit felt compelled to grant MAFB's interpretation of the 2005 base access policy "controlling weight," despite MAFB's demonstrated lack of expertise. App. 7. The initial dispute centered on the meaning of a text: namely, the 2005 base access policy's language requiring a "wants and warrants check," as well as scrutiny of "unfavorable" results on a case-by-case basis. App. 37. The Federal Circuit, which interprets the meaning of language in statutes, regulations, and contracts on a daily basis, was far better

---

[2] It is for this reason that Petitioner maintains that this Court can overrule *Auer/Seminole Rock* deference without overruling *Chevron*.

positioned to appraise and determine the scope of that plain language. *See Perez*, 135 S.Ct. at 1222 (Thomas, J., concurring) ("Judges are at least as well suited as administrative agencies to engage in this task.").

Moreover, MAFB demonstrated at every stage in this litigation that it actually did not understand its own policy, undermining any contention that MAFB was in a better position to opine on the policy's meaning. After MAFB suddenly began to deny access to individuals without wants and warrants because they were non-violent parolees or probationers, Garco and JTC opened up communications with MAFB to resolve the issue: MAFB, far from providing a clear answer, hedged for over four months, even telling Garco and JTC at one point that it "wish[ed] [it] could offer more insight." *See* App. 42-45.

Finally, MAFB's interpretations of the 2005 base access policy, far from representing its well-reasoned and expert judgment, demonstrate that MAFB was using its interpretative power for its own self-interest. After the base finally 'clarified' its policy in the October 2007 memo, Garco and JTC requested an equitable adjustment to the contract to compensate for unanticipated costs, a total of almost $500,000. App. 47. Garco and JTC, during their bidding for the contracts, did not anticipate any difficulty finding laborers: the equitable adjustment request effectually represented what Garco and JTC would have bid, had they known the true costs ahead of time. *See* App. 40 (JTC "not anticipat[ing] any difficulty" in finding qualified labor for the contract). In an effort to avoid paying this adjustment, MAFB alternated between several interpretations, asserting on

different occasions that the October 2007 memo never existed and/or that the memo had been written before Garco and JTC's contract had been signed. *See* App. 48. Coincidentally, both of MAFB's suggested interpretations would have completely precluded Garco and JTC from succeeding on the equitable adjustment claim, raising the inference that MAFB's interpretation was no more than an attempt to have its cake and eat it too. *See infra* at 31 (explaining that MAFB received the benefit of an $8,500,000 contract for a mere $8,000,000).

In sum, MAFB did not have superior expertise to the Federal Circuit at any stage of this saga; demonstrated that its confused and changing interpretations were incentivized by its desire to avoid paying a large equitable adjustment to Garco and JTC; and got away with paying less than the fair market value for a multimillion dollar construction contract. But the Federal Circuit did not engage with any of these troubling facts; instead, the Federal Circuit felt compelled to grant "controlling weight" to MAFB's interpretation, simply because MAFB was an agency and had interpreted an agency regulation. *See* App. 7.

The dispute between Garco/JTC and MAFB is just a single example of a far-reaching, systemic problem: agencies, in an attempt to "maximiz[e] agency power," issue a formal rule and then subsequently "interpret" that rule in a way that benefits the agency. *Decker*, 568 U.S. at 620 (Scalia, J., dissenting). The public, under pain of sanction, suffers the consequences. *Id.*; *Perez*, 135 S.Ct. at 1212 (Scalia, J., concurring). And the judiciary, stymied by mandatory deference, are

powerless to exercise independent judgment and rein in the agency's excesses. *Decker*, 568 U.S. at 620 ; *Perez*, 135 S.Ct. at 1219 (Thomas, J., concurring).

"Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., dissenting). *Auer/Seminole Rock* deference is inconsistent with a tripartite system of checks and balances which allows judges to have the final say in what the law is. *Marbury*, 5 U.S. at 177. For this reason, the Court should overrule *Auer/Seminole Rock* deference as an unconstitutional violation of the separation of powers.

iii. The Court should replace *Auer/Seminole Rock* deference with the *Skidmore* "respect" standard.

No one can seriously contest that an agency's interpretation of its complex or highly technical regulations can be an extremely useful tool for the courts: agency policies are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

Thus, Petitioner does not argue that *Auer/Seminole Rock* deference should be overruled in a vacuum with nothing to replace it. Rather, Petitioner advocates that the Court adopt an existing, deferential standard of review that accommodates the need for courts to take an agency's specialized expertise into account, while simultaneously permitting courts to critically review the record and apply *de novo* interpretation of regulatory texts where the agency has overstepped or where the agency's expertise is lacking.

Skidmore "respect" is that standard. *Skidmore*, 323 U.S. at 140. In *Skidmore*, the Court held that an agency's informal interpretation of a statute advanced by the

agency in a legal brief was entitled to "respect," but was "*not* controlling upon the courts." *Id.* (emphasis added). Today, courts employ the *Skidmore* respect standard when evaluating an agency interpretation outside the context of a congressional delegation of interpretative authority. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). As *Mead* explained, *Skidmore* respect is an ideal fit where an agency can "bring the benefit of specialized experience to bear on the subtle questions in [a] case." *Id.* And several have advocated for *Skidmore* to take *Auer/Seminole Rock*'s place. *See, e.g.,* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686-90 (1996) (arguing that *Skidmore*'s non-binding standard should control judicial review of agency interpretations). *Skidmore* respect would fulfill the "minimum requirements of the separation of powers by creating an independent judicial check" while still permitting courts to take expertise into account where necessary. *Id.* at 618-19.

In sum, this Court should overrule *Auer/Seminole Rock* deference and replace it with the more searching *Skidmore* "respect" standard that courts across the country are already well-familiar with applying.

b. ***Stare decisis* does not compel the Court to retain *Auer/Seminole Rock* deference.**

Stare decisis is not an "inexorable command." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In this case, the *stare decisis* factors point towards overruling *Auer/Seminole Rock*. Both cases were "gravely wrong" when they were decided because they violate the separation of powers. *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018). Moreover, *Seminole Rock* was "poorly reasoned" because it failed

to contend with *Skidmore*, which was existing precedent at the time. *Janus v. Am. Fed'n of State, County, & Mun. Emps.*, 138 S.Ct. 2448, 2479 (2018); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Finally, "far-reaching systemic and structural changes" in the modern landscape of prolific agency involvement in the everyday affairs of millions of American has rendered *Auer/Seminole Rock*'s erroneous holdings all the more "egregious and harmful." *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2097 (2018).

i. *Auer* and *Seminole Rock* were "gravely wrong" when decided.

This Court has always proven willing to overrule prior precedent simply because the precedent is "gravely wrong" and inconsistent with the nation's fundamental values. *See, e.g., Trump v. Hawaii*, 138 S.Ct. at 2423 (overruling *Korematsu*); *Brown v. Board of Education*, 347 U.S. 483, 488 (1954) (overruling *Plessy v. Ferguson*); *Miller v. Alabama*, 567 U.S. 460 (2012) (overruling mandatory life imprisonment without parole for youth); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (overruling *Lochner*-era freedom of contract principles).

Auer and *Seminole Rock* deference fit this pattern. As described above, *Auer* and *Seminole Rock* are repugnant to the separation of powers principles that permeate every facet of our Constitution. *Supra* at 13-19. *Auer/Seminole Rock* deference stymies the judiciary's ability to pass independent judgment on binding legal rules even where agencies lack specialized expertise in the subject. *See id.* Simply put, because of the constitutional infirmities described above, *Auer* and

Seminole Rock were "gravely wrong." *Trump v. Hawaii*, 138 S.Ct. at 2423. That fact alone makes the ebb of *stare decisis* low-to-non-existent in this case.

ii. The Court should overturn *Auer* and *Seminole Rock* because both cases were "poorly reasoned."

Seminole Rock and *Auer* also do not merit the protection of *stare decisis* because both cases were "poorly reasoned." *Janus*, 138 S.Ct. at 2479. When analyzing whether a prior case is poorly reasoned, the Court looks to the robustness of the prior holding's analysis and whether the prior Court failed to take into account existing precedent that conflicted with or was contrary to the holding. For example, the Court overruled its prior holding in *Bowers v. Hardwick* that a state could criminalize same-sex sodomy because it determined that *Bowers*' reasoning "d[id] not withstand careful analysis:" precedent from "before and after [*Bowers'*] issuance contradict[ed] its central holding." *Lawrence,* 539 U.S. at 577.

Seminole Rock was poorly reasoned because it failed to contend with—in fact, failed to even give a single citation—to an existing, contradictory case: *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As described above, under *Skidmore* respect, agency interpretations of statutes outside of the agency's delegated authority are not "controlling" upon courts, though certainly constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S at 140. *Skidmore* respect, while permitting some level of deference to agency expertise, allows courts to maintain an independent judicial check over agency interpretations. *See, e.g., Mead*, 533 U.S. at 221 (agency interpretations of statutes not under its delegated authority receive *Skidmore*

respect); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686-90 (1996) (arguing that *Skidmore* respect should apply to agency interpretations of regulations).

Though *Skidmore* was factually limited to an agency interpretation of a statute advanced by the agency in a legal brief, its holding appeared to call into question, if not preclude, *Seminole Rock*'s central holding that agency interpretations of regulations would be entitled to "controlling weight." *Seminole Rock*, 325 U.S. at 414. But the Court in *Seminole Rock* did not address *Skidmore*, nor so much as provide a single citation to it. Even worse, *Seminole Rock* did not cite any other cases or authority to justify its adoption of the "controlling weight" standard. *See id.*; *see also Perez*, 135 S.Ct. at 1213 (Thomas, J., concurring) (explaining that the *Seminole Rock* court announced the "controlling weight" standard "without citation or explanation."). *Seminole Rock*'s failure to acknowledge *Skidmore* looks much like *Bowers*, which *Lawrence* overruled precisely because it failed to contend with contradictory precedent. *See Lawrence*, 539 U.S. at 577.

Moreover, when *Auer* reiterated *Seminole Rock's* holding, it gave nothing more than a conclusory citation to *Seminole Rock* and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), a similarly conclusory case. *Auer*, 519 U.S. at 461. *Auer*'s conclusory reliance on the poorly reasoned *Seminole Rock* surely does nothing to cure *Seminole Rock*'s fundamental infirmities. Because *Auer* and *Seminole Rock* were "poorly reasoned," *stare decisis* does not control this case.

iii. In the modern era of prolific federal regulation, *Auer/Seminole Rock* deference has become even more "egregious and harmful."

When *Seminole Rock* was decided, there were around 23,000 pages of federal regulations; today, over 146,000. *See* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 126 (2016). The "danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Because the modern landscape has rendered the gravely wrong and poorly reasoned *Auer* and *Seminole Rock* decisions "all the more egregious and harmful," *stare decisis* does not control here. *Wayfair*, 138 S.Ct. at 2097.

Just last term, the Court encountered and overruled a set of precedents whose origins and infirmities strikingly resemble those of *Auer* and *Seminole Rock*. *Wayfair*, 138 S.Ct. at 2094. In *Wayfair*, the Court overruled two cases—*National Bellas Hess. v. Dept. of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298, 299 (1992), which extended *National Bellas*—which had mandated that States could not collect sales taxes from companies that did not have a physical presence in the state. *Wayfair*, 138 S.Ct. at 2097. The *Wayfair* Court first recognized that both *Quill* and *National Bellas* were poorly reasoned because they ran contrary to the Commerce Clause's fundamental purpose of preventing economic nationalism. *See id.* at 2093-94.

Importantly, *Wayfair* explained that *Quill* was not only "wrong on its own terms when it was decided;" also, "the Internet revolution has made [*Quill*'s] earlier error all the more egregious and harmful." *Id.* at 2097. The Court explained the

Quill court "did not have before it the present realities of the interstate marketplace;" in 1992, only 2% of individuals had internet access, whereas by 2018 that number has increased to 89%. *Id.* The exponential growth of the Internet "changed the dynamics of the national economy," shifting much of sales towards out-of-state sources and reducing the states' ability to collect sufficient tax revenue. *Id.* The realities of the Internet age thus made the effect of *Quill*'s incorrect and poorly reasoned physical presence rule "all the more egregious and harmful," and served to bolster the Court's decision not to invoke *stare decisis*. *Id.*

Auer and *Seminole Rock*, as a pair, are strikingly similar to *National Bellas* and *Quill*. Not only do *Auer* and *Seminole Rock* raise grave constitutional questions regarding the separation of powers, *see supra* at 13-19; and not only were *Auer* and *Seminole Rock* poorly reasoned for failing to contend with major precedents, *see supra* at 22-24. But, the errors in these cases have been rendered "all the more egregious and harmful" in the wake of the modern, pullulating administrative state. *See Wayfair*, 138 S.Ct. at 2097. At the time *Seminole Rock* was decided, there were around 23,000 pages of federal regulations; today, there are at least 146,000 pages. Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 126 (2016). Moreover, the same technological growth that spurred the "Internet revolution" in *Wayfair* has also produced "high-volume, high-impact regulation," allowing agencies to cheaply and efficiently "issue rules with costs and benefits of scores of millions of dollars per year." *See id.*

Several Justices of the Supreme Court have recognized the dangerous implications of the rise of the administrative state and warned the courts to be cautious. *See City of Arlington*, 569 U.S. at 315 (2013) (Roberts, C.J., dissenting) (recognizing that the "danger posed by the growing power of the administrative state cannot be dismissed."). Agencies, with more efficient resources at their disposal than ever before, have on occasion sought to expand their influence beyond the statutes they are charged to administer. *See, e.g., Talk America v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends"). With "hundreds of federal agencies poking into every nook and cranny of daily life," people have come to question the prudence of deference doctrines. *Cf. City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) (calling into question whether an agency deserves deference when interpreting an ambiguous grant of jurisdiction).

Against this backdrop, *Auer* and *Seminole Rock* cannot stand. *Stare decisis* is not an end in itself; where prior precedent is gravely wrong, poorly reasoned, and new systemic problems render it even more harmful, it is this Court's responsibility to overrule it. This Court should reject *stare decisis* and overrule *Auer/Seminole Rock* deference.

II. THE FEDERAL CIRCUIT'S RULING WAS ERRONEOUS.

a. The Federal Circuit erroneously misapplied *Auer/Seminole Rock* deference.

In the alternative, the Court should reverse and remand because the Federal Circuit erroneously misapplied *Auer/Seminole Rock* deference. The 2005 base access policy was unambiguously limited to a "wants and warrants" check, meaning the Court should not have given any weight, let alone "controlling" weight, to the agency's contrary interpretation. *See* App. 7; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). Moreover, several facts in this case demonstrate that MAFB's change in interpretation did not reflect a "fair and considered judgment" meriting deference. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012). The Court should remand for the Federal Circuit to consider Garco and JTC's claims *de novo* without the taint of *Auer/Seminole Rock* deference.

i. The 2005 policy was unambiguous, so no deference was required.

It is a well-settled principle that, in the realm of textual interpretation, the interpreter's role is to construct what the text actually says—not what the interpreter wishes it said. As the late Justice Scalia once recognized, if a law is "improvident or ill conceived, it is not the province of this Court to distort its fair meaning (or to sanction the Executive's distortion) so that a *better* law will result." *Regions Hosp. v. Shalala*, 522 U.S. 448, 469 (1998) (Scalia, J., dissenting) (emphasis in original). Put differently, the text of a rule governs its meaning, and it is not up

to an interpreter of the text—unsatisfied with the plain meaning—to modify its meaning at will. *See id.*

Agencies thus may not, under the guise of "interpreting" a regulation, actually "create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Where an agency's construction of a regulation is inconsistent with the its unambiguous text, deference is not required because the agency's interpretation is "plainly erroneous or inconsistent." *See Chase Bank v. McCoy*, 562 U.S. 195, 211 (2011). If an agency is truly unhappy with the plain text of a regulation that was passed via notice-and-comment, it may not circumvent the APA's notice-and-comment processes by simply "interpreting" the text to say what the agency wished it had said. *See id.*

In this case, the Federal Circuit's choice to defer to MAFB's construction of the 2005 base access policy was an abuse of discretion. MAFB interpreted the base access policy as requiring a background check of all base visitors, despite the 2005 policy being limited to a "wants and warrants check." *See* App. 36, 47. But the plain language of the policy does not allow this result. A wants and warrants check, by its very language, entails a check if an individual has a want or a warrant: not if the individual is on probation, parole, or has a conviction for a prior offense. Moreover, MAFB's practice up until Phase IV of the project was to permit individuals with criminal records to work on the base. *See* App. 40, 52 (ASBCA finding of fact that MAFB permitted individuals with criminal records to work as contractors before Phase IV of the project). If the plain text of the policy included background checks

all along, it is hard to understand why the base took so long to begin using background checks to deny access to those individuals.

The Federal Circuit, compounding MAFB's error, opined that Garco and JTC's plain language argument failed because the result of the plain text would not be "sensible." App. 8. In the eyes of the Federal Circuit, the wants and warrants check *necessarily* had to extend to background checks, because otherwise, the plain text contemplated that individuals with wants and warrants may be permitted onto the base in certain circumstances. App. 8. The Federal Circuit's approach impermissibly put the "cart-before-the-horse" by looking to its desired policy outcome above the actual text. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 109 (2007) (Scalia, J., dissenting). It is not up to the Federal Circuit, as an expositor of the meaning of a regulation, to inject its own vision of what might make a policy "sensible;" instead, the Federal Circuit must construct the law as it was actually written.[3] *Regions Hosp.*, 522 U.S. at 469 (1998) (Scalia, J., dissenting).

---

[3] Moreover, both the ASBCA and the Federal Circuit were too quick to dismiss Garco and JTC's argument that the 2005 policy may have contemplated granting access to individuals with old or minor warrants. App. 8-9, 31. The ASBCA and the Federal Circuit inferred that background checks must be part of the "wants and warrants check" because otherwise, the policy would imply that certain individuals with "wants and warrants" could possibly be permitted on a case-by-case basis. *Id.* But neither considered that, in fact, the base could have originally intended to permit such a result. As a member of this Court recently recognized, almost eight million individuals in the United States currently have a warrant out for their arrest—the large majority of which are warrants for minor offenses, such as unpaid traffic tickets and walking one's dog off leash. *See Utah v. Strieff*, 136 S.Ct. 2056, 2067-68 (2016) (Sotomayor, J., dissenting). Given evidence that Montana and the nation were experiencing a "shortage" of qualified construction workers, MAFB could have intended to permit access to individuals with minor outstanding warrants or old warrants. *See* App. 48 (discussing shortage of workers). Though

Because the text was unambiguously limited to a wants and warrants check, MAFB's contrary policy merits no deference. *Christensen*, 529 U.S. at 588.

ii. MAFB's interpretation did not represent its "fair and considered judgment," meaning no deference was required.

The Federal Circuit also erred in applying *Auer/Seminole Rock* deference in the circumstances of this case, because MAFB's self-serving and ever-changing interpretation of the 2005 base access policy was not a "fair and considered judgment" deserving of deference. *SmithKline Beecham*, 567 U.S. at 155-56.

This Court has recognized that *Auer/Seminole Rock* deference is not appropriate when an agency's interpretation does not reflect that agency's fair and considered judgment of the issues. *Id.* The archetypical example is when an agency adopts a stance merely because it is a "convenient litigating position" that serves the agency's interests. *See, e.g, Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988). Additionally, an agency interpretation does not look fair and considered where the agency merely adopted a "post hoc rationalization . . . to defend past agency action against attack." *SmithKline Beecham*, 567 U.S. at 155 (punctuation and quotations omitted).

Moreover, the Court is highly suspicious of abrupt changes in policy, especially when those changes cause unfair surprise to the parties. *Id.*; *see Martin v.*

MAFB may have later changed its mind about the scope of checks it conducted on potential laborers, the Federal Circuit is bound to interpret the text of the regulation passed by notice-and-comment: not the "sensible" law that MAFB and the Federal Circuit wish had been promulgated. App. 8; *Regions Hosp.*, 522 U.S. at 469 (1998) (Scalia, J., dissenting).

OSHRC, 499 U.S. 144, 158 (1991) (identifying "adequacy of notice to regulated parties" as a relevant factor); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (explaining that an agency's interpretation merits "considerably less deference" where an agency's interpretation conflicts with its prior stances). The Court is particularly skeptical where an agency's change in interpretation results in "massive liability" to the regulated party for conduct that occurred well before the regulation was announced. *SmithKline Beecham*, 567 U.S. at 155.

In this case, MAFB demonstrated at every stage of the saga that its interpretation of the base access policy was not a fair and considered judgment. First, as discussed above, the record lends itself to the inference that MAFB's interpretation of the 2005 base access policy was motivated primarily, if not solely, by MAFB's desire to avoid paying a $500,000 equitable adjustment to Garco and JTC's contracts. *See supra* at 17-18. Put differently, MAFB wanted reliable labor at the cost of $8,000,000, *see* App. 39 ¶ 13 (rough price of JTC subcontracts), when the true cost—taking into account finding qualified, experienced construction workers in the midst of a nationwide shortage—was actually $8,500,000. *See* App. 47 (JTC's request for an equitable adjustment taking into account the unanticipated costs of labor). Much like this Court has disavowed of deference when an agency adopts a position simply because it is a convenient litigating position, this Court should also disavow of deference where an agency uses its power of "interpretation" to conveniently divest itself of potential liability and receive the benefits of a contract without paying the fair market price. *See Bowen,* 488 U.S. at 213 (1988).

Moreover, the record demonstrates that MAFB's "post hoc rationalizatio[ns]" about the scope of the base access policy had more to do with MAFB's desire to shield itself from paying the equitable adjustment than a true concern with base security. *See SmithKline Beecham*, 567 U.S. at 155 (explaining that an agency decision looks less fair and considered where the agency merely adopted "post hoc rationalization . . . to defend past agency action against attack."). In fact, Garco and JTC evinced their willingness to abide by MAFB's change in policy, and merely requested the equitable adjustment to compensate for the fact that neither Garco nor JTC had been able to properly account for the labor costs in the original bids. *See* App. 47. MAFB, far from being pleased with Garco and JTC's willingness to yield on that matter, instead continued to misinform and misrepresent the scope of its policy in an attempt to avoid financial liability. *See* App. 48 (MAFB misrepresentations about the date of the October 2007 memo).

Finally, MAFB's change in policy—erupting from thin air, without warning, and "totally contrary" to its prior practices—unfairly surprised Garco and JTC, resulting in massive liability. *SmithKline Beecham*, 567 U.S. at 155; App. 40. JTC entered into a subcontract with Garco under the impression that it would have access to the "same labor pool" that it had enjoyed for twenty years. App. 40. It was only *after* JTC and Garco entered into contract that MAFB changed its policies; and when MAFB did so, it did so without warning or notice, causing significant disruptions to JTC's fulfillment of its obligations. *See* App. 42 ("This issue is impacting and delaying JTC's performance of this contract."). Furthermore, JTC's

total costs for the project exceeded the amount it had originally anticipated under its original assumptions. App. 40. This situation thus looks troublingly like the situations of "unfair surprise" that this Court has repeatedly warned of, meaning Federal Circuit was incorrect to defer. *Martin*, 499 U.S. at 158; *Thomas Jefferson Univ.*, 512 U.S. at 515.

In sum, MAFB's interpretation of the 2005 base access policy does not look like a "fair and considered judgment" meriting deference. *SmithKline Beecham Corp.*, 567 U.S. at 155. Instead, MAFB's self-serving interpretations were promulgated to protect itself from a potential $500,000 equitable adjustment, and unfairly surprised Garco and JTC and cost a substantial amount of money. In this situation, the Federal Circuit was incorrect to defer, and this Court should remand for the Federal Circuit to conduct a *de novo* review of the 2005 base access policy.

b. The Federal Circuit abused its discretion by failing to correct the ASBCA's flawed application of the sovereign acts doctrine and reweighing the ASBCA's factual findings.

The maxim is drilled into lawyers from their first year of law school: lower courts find facts, and appellate judges explicate and articulate law. *See, e.g., Davis v. Ayala*, 135 S.Ct. 2187, 2201 (2015) ("Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision . . ."). But the Federal Circuit's decision below erroneously flipped the narrative. It blindly accepted the ASBCA's flawed application of the two-prong sovereign acts test, cursorily disposing of the entire doctrine in a footnote. App. 6 n.2. Then, to make matters worse, the court took it upon itself to reweigh the factual evidence and determine—in opposition to

the ASBCA's factual findings—that the 2005 base access policy never changed. *Compare* App. 2 (Federal Circuit stating "we conclude that there was no change to the base access policy"), *with* App. 51 (ASBCA stating "JTC presented ample credible evidence that it harmed by the Air Force's change in its enforcement of its base access policy."). The Federal Circuit's decision below was an abuse of discretion that requires reversal.

i. The Federal Circuit did not correct the ASBCA's flawed application of the two-prong sovereign acts test.

The sovereign acts doctrine, a subset of sovereign immunity, provides that the Government may not be "held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Generally, a sovereign immunity defense is jurisdictional absent a waiver. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Through the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–7109 (2012), the United States waived sovereign immunity as a jurisdictional bar to government contract disputes with private contractors. *See* App. 15-16 n.2. Thus, the Government is burdened with proving the elements of the sovereign acts doctrine as an affirmative defense. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove [an affirmative] defense . . .").

In a plurality opinion that has since been adopted by several Circuit courts, the Supreme Court articulated a two-prong test that the Government must prove to merit the sovereign act defense. *See United States v. Winstar Corp.*, 518 U.S. 839,

895-96 (1996) (plurality opinion); *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008) (recognizing that the Federal Circuit applies the two-part test from *Winstar*). First, the Government must demonstrate that its act is a truly sovereign act not "properly attributable to the Government as contractor." *Winstar*, 518 U.S. at 896. Second, the Government must show that the "act would otherwise release the Government from liability under ordinary principles of contract law." *Id.*[4] The Federal Circuit has explained that this second factor "turns on what is known in contract law as the 'impossibility' (sometimes 'impracticability') defense," requiring the Government to demonstrate that its sovereign act rendered it impossible or impracticable to fulfill the contract. *See Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009).

In this case, the Federal Circuit abused its discretion by failing to address the ASBCA's flawed understanding of the sovereign acts doctrine. The ASBCA, while appropriately recognizing the first prong of the sovereign acts test, entirely neglected the second prong and made no findings regarding impossibility or impracticability. *See* App. 24 ("The ASBCA neither made any findings as to

---

[4] To the extent that the Government tries to argue that *Winstar*'s test is inapplicable because it is a plurality opinion, the argument is unavailing: the Federal Circuit has unambiguously adopted the *Winstar* plurality as the guiding standard. *See, e.g., Conner Bros.*, 550 F.3d at 1371; *Stockton*, 583 U.S. at 1366; *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 521 (Fed. Cir. 2011). Moreover, to the extent that the Government argues that the *Winstar* test is inapposite and ought to be revisited, that argument is not properly presented here: neither party has taken that position at any point during this litigation, meaning the Government has waived its ability to raise it now.

impossibility nor referenced it at all."). The Government never raised impossibility, nor does the record provide a shred of support that fulfillment of the contract would have been impossible. *See id.* It is necessarily the Government's burden to raise sufficient evidence to support the affirmative sovereign acts defense, but in this case it did not meet its burden: the ASBCA was incorrect to hold for MAFB without making a finding on the second prong, and the Federal Circuit's failure to address the ASBCA's error is an abuse of discretion requiring reversal.

ii. The Federal Circuit abused its discretion by reweighing the evidence.

Moreover, the Federal Circuit abused its discretion by discounting ASBCA's factual findings. The ABSCA found that MAFB "change[d]" its enforcement of the base access policy. App. 51. The ASBCA explained that Garco and JTC had provided "ample credible evidence" that the ASBCA's change in policy harmed them. *Id.* The ASBCA recognized that, prior to the spring 2007, "MAFB allowed individuals with criminal records to work on base." App. 40, 52. And the ASBCA plainly indicated that, but for the shield of sovereign immunity, MAFB "could be liable" for the harm it caused by the change. App. 52. Put simply, but for the ASBCA's flawed understanding of the sovereign acts doctrine, Garco and JTC would likely have won.

But the Federal Circuit completely disregarded all of the ASBCA's factual findings. In the judgment of two members of the Federal Circuit appellate panel, "there was no change to the base access policy." App. 2. Those two appellate judges further discounted the ASCBA's finding that MAFB had previously allowed individuals with criminal records to work on the base: as discussed *supra* at 28-30,

the majority erroneously concluded that the plain language of the 2005 policy could not have permitted such a result. App. 8. The majority never even cited the ASBCA's clear finding that Garco and JTC provided "ample credible evidence" of harm. *See* App. 27 (dissenting Judge Wallach recognizing the majority's failure to take the ASBCA's finding of harm into account). Simply put, a panel of two appellate judges cannot, on the basis of the "cold record," easily second-guess a lower court's factual findings regarding the credibility and weight of the evidence. *Davis v. Ayala*, 135 S.Ct. 2187, 2201 (2015). The Federal Circuit's choice to do so here was error.

Because the Federal Circuit failed to correct the ASBCA's flawed application of the sovereign acts doctrine, and because the Federal Circuit abused its discretion in reweighing the evidence, this Court should reverse and remand.

CONCLUSION

This case is about MAFB's self-serving attempts to avoid paying a $500,000 equitable adjustment to its construction contractors. But more fundamentally, this case is about how *Auer/Seminole Rock* deference has created an environment that permits agencies to "interpret" the law in self-serving ways, at the expense of the public, without a shred of judicial review. In the wise words of the late Justice Scalia, "Enough is enough." *Decker*, 568 U.S. at 616 (2013) (Scalia, J., dissenting). This Court should not continue to condone the *Auer/Seminole Rock* framework, which requires federal courts to sit idly by while agencies use their power of "interpretation" at the expense of the citizens. Instead, the Court should return to

its roots and reaffirm that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177.

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Federal Circuit.

Respectfully submitted,

KC Bridges

Counsel of Record
225 Bancroft Way
Berkeley, CA 94720