No. 17-225

In the Supreme Court of the United States

GARCO CONSTRUCTION, INC.,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

A security policy at Malmstrom Air Force Base required all private contractor personnel entering the base to undergo a "wants and warrants check," with access granted on a "case-by-case basis."

The questions presented are:

1. Should a court defer to the Air Force's reasonable interpretation of its own base access policy under *Auer v. Robbins* or other deference doctrines?

2. Does the sovereign act doctrine shield the government from liability if changes to a generally applicable military base access policy create additional costs for an individual contractor?

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I. INTRODUCTION

How should a judge determine the meaning of the rules governing access to a secure military base? The petitioner, a government contractor, contends that courts owe no substantial deference to the military's own understanding of these rules. On top of that, the petitioner says that if the military changes these generally applicable security rules, it should be forced to pay damages to contractors who operate on the base. The courts below sensibly rejected these extreme and unprecedented arguments, and so should this Court.

Over ten years ago, the Army Corps awarded a contract to Garco Construction to build family housing on a nuclear missile complex in Montana. During the contract period, the Air Force denied base access to contractor employees who had been convicted of violent or sexual criminal offenses, or who were still subject to parole, probation, or incarceration. These denials were pursuant to a new base access policy, issued a year before the contract, but Garco protested the military's interpretation of this policy, and sought compensation for costs resulting from the denials of base access. The military rejected Garco's request, and that decision was affirmed by the Armed Services Board of Contract Appeals and by the Federal Circuit.

Three deeply established principles preclude Garco's damages claim. First, this Court has specifically held that rules governing access to military bases must be interpreted in light of military commanders' unequivocal authority throughout American history to exclude civilian contractors at will. Second, for more than seventy years, this Court has afforded government agencies substantial deference when they

interpret regulations within their own expertise. And third, government contractors have been prohibited since the Civil War from obtaining contract damages on the basis of the government's public and general acts as sovereign. Each of these principles independently determines the outcome of this case.

II. STATEMENT OF THE FACTS

Malmstrom Air Force Base in Great Falls, Montana maintains and operates Minutemen III intercontinental nuclear missiles. R. at 2, 37. Malmstrom is designated Protection Level 1, the highest security level in the Air Force. R. at 2, 37.

Up to at least 2002, the base did not require background checks of contractor employees, but instead only required identification information like driver's licenses. R. at 35. Around this time, contractors could "by-pass" security procedures by "having a retired military member ride on the bus and vouch for everyone on it." R. at 3. At some point, a Garco employee on "pre-release" from prison—whom the Air Force later discovered had a violent criminal record—beat his manager with a wrench. R. at 3. In 2005, the Malmstrom Base Commander issued a base access policy for contractors that provided, in pertinent part:

> A 911 Dispatcher will run the employees['] name[s] through the National Criminal Information Center ["NCIC"] system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the [Security Forces Group Commander]. (R. at 2–3.)

In August 2006, the Army Corps of Engineers awarded a contract to Garco Construction to replace housing on the base. R. at 37. The contract included numerous provisions requiring Garco to comply with base regulations, including

regarding security and entry. R. at 37–39. The contract also incorporated Federal Acquisition Regulation (FAR) § 52.222-3, which permits contractors to employ persons with past criminal convictions under certain conditions. R. at 11.

Another contractor, James Talcott Construction (JTC), had previously submitted bids to Garco for subcontract work on the project. R. at 37. On September 12th, 2006, a pre-construction conference took place which included representatives from the Air Force, Garco, and JTC. R. at 39. Minutes for this meeting show an "Air Force Briefing[]" that employee "names will be sent to dispatch for background checks . . . No one with outstanding warrants, felony convictions, or on probation will be allowed on base." R. at 39. In stipulated testimony, Garco's project manager recalled that the substance of this information, if not necessarily the exact words, was indeed communicated at the meeting. R. at 39. Two weeks after this meeting, JTC signed a subcontract agreement with Garco. R. at 39.

When JTC's work on the contract began later that year, Malmstrom denied base access to several JTC employees, and these denials continued into 2007. R. at 39, 41. A JTC manager testified at trial that JTC had been working on projects at Malmstrom for twenty years, and that employees with criminal records had been allowed onto Malmstrom in the past, including at least a few employees in September 2006. R. at 39–40. Beginning in May 2007, JTC and Garco complained to Air Force officers about base access, and this communication continued through October. R. at 42–46. JTC's manager testified at trial that employees with DUI and drug convictions were being denied base access. R. at 43. A talking paper for an Air Force meeting in

May 2007, meanwhile, stated that "[c]urrent policy prohibits sexual offenders, violent offenders, and offenders currently in the penal system (i.e. parole, probation, and pre-release) from access to the installation." R. at 43. In October 2007, the Base Commander, Colonel (now Major General) Finan, released a memorandum addressing contractor base access. This memorandum explained specifically that the security procedure involved an NCIC "background check," and that employees could be denied access for reasons including sex and violent offenses, or being on probation or in a pre-release program from prison. R. at 46–47.

In November 2007, Garco submitted to the contracting officer a Request for an Equitable Adjustment for $454,266.44 on behalf of JTC. R. at 47. JTC claimed that "changes in base policies" regarding access caused JTC to experience "increased framing labor hours and employee turnover" in addition to "substantially increased administrative costs associated with locating, processing, hiring and training personnel." The contracting officer denied the Request. R. at 48. After some further back-and-forth, Garco appealed to the Armed Services Board of Contract Appeals ("Board"). R. at 51. In a series of decisions, the Board denied the appeals, finding that the Air Force's base access denials throughout the contract period were justified by the 2005 base access policy, and also that this enforcement constituted a sovereign act. R. at 51, 55, 59. Garco appealed these decisions to the U.S. Court of Appeals for the Federal Circuit. That court affirmed the denial of the Request for an Equitable Adjustment, finding that there was no change to the Air Force's base access policy, and also that Garco had no claim for constructive acceleration of the contract. R. at

12. Judge Wallach dissented, and would have remanded the case for a determination, under the sovereign acts doctrine, of whether the Air Force's performance was "impossible" as that term is understood in contract law. R. at 26.

III. SUMMARY OF ARGUMENT

1. The Air Force's 2005 base access policy provided the Security Commander sufficient discretion to deny base access to persons with criminal backgrounds. Therefore, those denials did not constitute a "change" in the base access policy, and the military is not liable to Garco for damages.

The base access policy authorized the Security Commander to "scrutinize" "unfavorable results" resulting from a "wants and warrants check" in the "NCIC system," and provided that the Commander shall make "case-by-case" determinations regarding base access. The Air Force interpreted this policy to mean that it could run a background check in the NCIC system on contractor employees, and that the Commander possessed discretion to deny access to employees with criminal histories. The courts below accepted this interpretation, and they were correct to do so for three distinct reasons:

First, this Court's precedents regarding military authority strongly support the Air Force's interpretation. In particular, this Court has held that military base access regulations should be interpreted in light of the historic power of base commanders to exercise plenary control over base access for civilian contractors. More generally, this Court has repeatedly emphasized that courts must defer to military judgments about military operations. The meaning of a base access policy for an extremely

sensitive military base is one such area where courts should tread carefully and defer to military expertise.

Second, the Air Force's interpretation of its base access policy is deserving of *Auer* deference. The interpretation is not plainly erroneous or inconsistent with the text of the policy, and indeed is supported by ample evidence in the record. Furthermore, no exceptions to *Auer* apply. In particular, there was no "unfair surprise," because Garco and JTC were clearly informed of the military's interpretation of a security policy they had contractually agreed to comply with.

Third, even if the regulation is interpreted without substantial deference, the plain text of the policy and other evidence in the record strongly support the Air Force's interpretation. Garco's competing interpretation, by contrast, implausibly strips the Base Commander of authority to deny base access to anyone without an outstanding warrant, even, for example, a convicted serial killer serving a life sentence. And the policy's reference to the NCIC system demonstrates that the policy envisioned a background check including criminal history.

2. Even if the denial of base access to persons with criminal records constituted a change in the base access policy, the sovereign act doctrine shields the government from liability. Under this doctrine, the government is not liable to contractors when the government's "public and general acts" interfere in some way with performance of a contract, and Garco conceded below that enforcement of the base access policy was a sovereign act. That concession should end this case. Garco waived its further arguments here regarding the sovereign act doctrine. And

regardless of waiver, the government does not need to prove any additional element of "impossibility," because this is an appeal of a denial of a request for an equitable adjustment, not a breach of contract action. Furthermore, there is no reason to think that the government bore the risk of losses due to sovereign acts.

3. The Court should not overrule *Auer v. Robbins*. *Auer* recognizes the critical value of agency expertise and policymaking, and it has become a finely adjusted interpretive tool for courts in large part through this Court's recognition of particular important exceptions to the general rule. Meanwhile, critiques of *Auer* miss the mark, as there is zero evidence of *Auer*'s purported negative effects on agency behavior, and the separation-of-powers arguments against *Auer* are in radical tension with many other foundational administrative law precedents. The principle of *stare decisis*, as it has been understood by this Court in recent years, also weighs strongly against overruling *Auer*. And lastly, this case provides no real opportunity to overrule *Auer*, because the judgment below is separately compelled by principles of military deference, a plain reading of the base access policy, and the sovereign acts doctrine.

IV. ARGUMENT

1. The base access policy permitted the Air Force to deny access to contractor employees with criminal records, even if an employee had no outstanding warrant.

Garco's claim for damages is premised on the conclusion that the 2005 base access policy required the Air Force to permit base access to any contractor employees who did not have outstanding warrants. So when the Air Force denied access to employees with criminal records but no outstanding warrants, Garco argues, the Air

Force effectively changed the policy, giving Garco a prima facie case for damages under the contract. The courts below, however, accepted the Air Force's interpretation of the base access policy as allowing the Air Force to deny base access to contractor employees with criminal records, even in the absence of an outstanding warrant. There are three distinct reasons to accept the Air Force's interpretation here and affirm the Court of Appeals.

A. Well-established principles of military authority and judicial respect for military judgments urge deference to the Air Force's interpretation of its base access policy.

This Court has observed that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

In particular, this Court has emphasized this principle in the context of the inherent authority of military commanders to control access to military bases. *See Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 899 (1961); *Greer v. Spock*, 424 U.S. 828, 838 (1976). In *Cafeteria Workers*, the Court considered a challenge by a contractor employee to her exclusion, for security reasons, from a military facility where she had been working for several years. 367 U.S. at 887. The base access regulations at issue provided that "dealers or tradesmen or their agents shall not be admitted . . . except as authorized by the commanding officer" to perform one of a specific list of functions, including "to furnish supplies and services." *Id.* at 892. The Court noted that

> the meaning of the regulation need not be determined in vacuo. It is the verbalization of the unquestioned authority which commanding officers of military installations have exercised throughout our history.

Id. The Court then recounted this history, including evidence that in the year 1837, "the power of a military commanding officer to exclude at will persons who earned their living by working on military bases was even then of long standing." *Id.* Indeed, this power—"necessarily extensive and practically exclusive, forbidding entrance . . . as the public interest may demand"—had since been "expressly recognized many times." *Id.* at 893.

The Court thus interpreted the base access regulation "in the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command." *Id.* Given this history, the Court concluded that "there [could] remain no serious doubt" as to the base commander's authority to exclude the employee "upon the Security Officer's determination that she failed to meet the security requirements. . . ." *Id.* at 893-94. The Court also interpreted the text of the policy, which provided for admission "as authorized by the commanding officer" under three specific provisions, as meaning that base access was "in the commanding officer's discretion," and as "ma[king] absolute the commanding officer's power to withdraw her permission to enter . . . at any time." *Id.* at 894. The Court further held that this withdrawal of base access did not violate the Due Process Clause, and noted that while the military presumably could not deny base access on discriminatory grounds like that the employee "was a Democrat or a Methodist," this

Court saw no problem with a denial for security reasons as mild as that the employee was "garrulous, or careless with her identification badge." *Id.* at 898-99.

Cafeteria Workers controls this case. As there, the issue is whether a military base access policy gives the Security Commander authority to deny base access for security reasons. Whereas the Court there interpreted the policy's reference to the Commander's "authoriz[ation]" of contractor employees as providing "absolute" discretionary power to deny base access to individual employees, the policy here contains the more explicit provision that the Security Commander will make "case-by-case" determinations about access. *See id.* at 892, 894; R. at 37. Indeed, while the *Cafeteria Workers* Court indicated that security-based discretion encompassed denying base access on the mere basis of an employee's garrulousness, the Security Commander here is exercising a considerably narrower discretion: the denial of base access based on verified criminal history. 367 U.S. at 899; R. at 9.

The Malmstrom policy's reference to a "wants and warrants check," R. at 3, makes no difference in this context. This reference, along with the reference to "scrutin[y]" of "unfavorable results," describes the procedure that precedes the "case-by-case" eligibility determinations. R. at 3. But in *Cafeteria Workers*, too, the employee had presumably completed the necessary procedures for access—indeed she had been "authorized" to work on the base for many years—and nothing in the policy text gave the Commander explicit permission to ignore her prior compliance and revoke that access. *See* 357 U.S. at 887. Yet the Court did not imply from this omission any limitation on the Commander's "absolute" discretion. *See id.* at 894.

More importantly, however, *Cafeteria Workers* plainly requires any ambiguity in Malmstrom's base access regulation to be interpreted "in the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command." *See id.* at 893. Thus, even if the "wants and warrants" language injects some uncertainty into an otherwise-clear policy, *Cafeteria Workers* instructs that "the meaning of the regulation need not be determined in vacuo," because such regulations are "the verbalization[s] of the unquestioned authority which commanding officers of military installations have exercised throughout our history." *See id.* at 892. Garco claims that the policy prohibited the Air Force from denying base access to any contractor employee who did not have an outstanding warrant. R. at 7. But this interpretation is totally irreconcilable with the continuous, centuries-long history of base access discretion that this Court elevated and emphasized in *Cafeteria Workers*. 367 U.S. at 892–94. Malmstrom is a major, highly sensitive military base; it safeguards nuclear warheads. R. at 2. The notion that the Base Commander issued a policy, using vague terms, that severely limited her discretion to control access to this base—including for violent criminals—borders on the preposterous, especially in light of military commanders' uninterrupted power throughout US history to exclude contractors "at will," and to "forbid[] entrance . . . as the public interest may demand." *See id.* at 892-93. Especially where, as here, the base access policy explicitly reserves the Security Commander's authority to make individualized determinations, Garco's extreme and unprecedented interpretation of the policy must fail.

This Court's other precedents related to military affairs similarly call for deference to the Air Force's interpretation of its security policy—a policy whose design and purposes are central to the military's core expertise and constitutional mandate. *See Egan*, 484 U.S. at 527, 529 (holding that a military decision regarding a security clearance is a "a sensitive and inherently discretionary judgment call," and that "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment"); *North Dakota v. United States*, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to . . . military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."). Even in the First Amendment context, where *constitutional* rather than contractual rights are at stake, this Court has still instructed that courts must give substantial deference to military determinations. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

This case presents itself as a contract dispute. But the core legal issue—the meaning of a military base access policy—goes much deeper than government contracts. It would be unwise, to put it faintly, for courts to begin telling military agencies whom they must or can't allow onto their bases, to parse the words of internal military procedures in order to impose, from the courtroom, new and unprecedented restrictions on the military discretion entrusted to the Executive Branch under our Constitution. *See United States v. Apel*, 571 U.S. 359, 372 (2014) (rejecting a civilian plaintiff's proposed rule that "would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in

military operations."). The Constitution, this Court's precedents, and common sense all urge deference to the Air Force's reasonable interpretation of its base security policy.

B. *Auer* provides an additional basis for deference here, because the Air Force's interpretation of its security policy was fully consistent with the policy's text.

Beyond the essential military context of this case, this Court's longstanding practice of deference to agency interpretations of agency regulations requires deferring to the Air Force's interpretation of its base access policy. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Auer deference is the rule that when agencies interpret their own regulations, those interpretations are controlling unless they are "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. At the same time, this Court has held that deference to an agency interpretation may be inappropriate in certain circumstances, for example where the agency regulation merely parrots the language of the statute, *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); where the regulation is unambiguous, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); where there is reason to suspect the interpretation does not reflect the agency's fair and considered judgment because it conflicts with prior interpretations of the same regulation, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); or where the interpretation creates an unfair surprise for regulated parties, *id.* at 156.

In this case, the Air Force's reasonable interpretation of its base access policy compels the application of *Auer* deference. As the Court of Appeals found, the Air

Force's interpretation is neither "plainly erroneous" nor "inconsistent with the regulation." R. at 11-12. The regulation's text provides that

> A 911 dispatcher will run the employees['] names through the [NCIC] system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the [Security Forces Group Commander].

R. at 5. The Air Force interprets this policy to mean that the Security Commander has discretion to deny base access to employees on the basis of their criminal records. This interpretation is consistent with the regulation.

First, the "wants and warrants check" described by the policy plausibly, and indeed probably, refers to a background check called a "wants and warrants check" in the NCIC system. *See* R. at 10. This particular search in the NCIC system—also used for 9-1-1 operators—contains not only information about outstanding warrants, but also criminal history. R. at 10. Admittedly, the phrase "wants and warrants check," in isolation, could plausibly refer, as Garco seems to suggest, to some other check, perhaps one that retrieved solely information about outstanding warrants. The explicit reference to the NCIC system, however, makes it more likely—or at the very least, not plainly erroneous to assume—that the policy refers to what *the NCIC system* labels a "wants and warrants check." Moreover, it is not surprising that something called a "wants and warrants" check might provide more than just information about warrants. To use a simple analogy, a "title search" retrieves much more than just information about legal title: it will also typically produce information about liens, covenants, zoning ordinances, building codes, and other facts about the property. *See* Jesse Dukeminier et. al, *Property* 696 (8th ed. 2014).

Second, the policy's statement that "[u]nfavorable results will be scrutinized" plausibly refers to the review of criminal background information. The word "unfavorable" is quite vague: it means "not disposed to favor", "opposed," "contrary," or "expressing disapproval." *Unfavorable*, *Webster's Third New International Dictionary* (3d ed. 1981). Certainly, it "comfortably bears" the meaning assigned by the Air Force, since one would surely not be "disposed to favor" a prior criminal conviction when determining base access to a sensitive military facility. *See Auer*, 519 U.S. at 461. There is no reason to think the interpretation of "unfavorable results" to include criminal history is plainly erroneous, especially when it is understood that the NCIC "wants and warrants check" would produce that information.

Third, the policy's reference to "case-by-case" eligibility determinations strongly supports the Air Force's interpretation. The reference makes plain that the policy envisions the exercise of discretion. The Air Force's interpretation is consistent with that discretion: criminal histories vary widely—from old, minor misdemeanors to recent, violent felonies—and it makes perfect sense that the Commander would "scrutinize" this information before making an individualized decision. By contrast, Garco's proffered interpretation here is utterly implausible: if the only "unfavorable results" considered are outstanding warrants, then there is no need for a case-by-case determination. As the Board recognized, and testimony confirmed, an outstanding warrant for arrest is an *immediate* deal-breaker with respect to military base access. R. at 47, 55. In sum, the plain text of the policy, combined with relevant background testimony in the record, show that the Air Force's interpretation is not plainly

erroneous, and in fact is more consistent with the regulation itself than Garco's competing interpretation.

Finally, there is no reason not to apply *Auer* deference here. The regulation does not unambiguously contradict the Air Force's interpretation. *See Christensen*, 529 U.S. at 588. The phrase "wants and warrants check," as noted, is susceptible to multiple meanings depending on context, and the policy here specifically refers to the NCIC system. Furthermore, even if the phrase "wants and warrants check" referred primarily to a check for outstanding warrants, the regulation would still be ambiguous, because the other components of the regulation clearly contemplate the Commander's exercise of significant discretion over base access determinations, and such discretion would be meaningless if the only information available was about outstanding warrants.

And there was no "unfair surprise" here. *See Christopher*, 567 U.S. at 156. In *Christopher*, the Court held that a Department of Labor interpretation effected an "unfair surprise" where the agency announced in an *amicus* brief that certain pharmaceutical sales representatives were not "outside salesmen" and therefore were entitled to overtime pay. *Id.* at 153. The Court reasoned that this interpretation would "impose potentially massive liability . . . for conduct that occurred well before that interpretation was announced." *Id.* at 155-56. Furthermore, the agency had not previously appeared to consider these employees entitled to overtime pay. *Id.* at 158.

Here, by contrast, JTC was informed of the Air Force's interpretation at a meeting prior to JTC signing its subcontract agreement. R. at 39. As the Court of

Appeals noted, Garco and JTC had opportunity to object to this interpretation of the policy, and neither of them chose to do so before the contract was well underway. R. at 9, 41. Moreover, the circumstances and context here are fundamentally different from those in *Christopher*. In *Christopher*, the regulations at issue had remained "nearly identical in substance" for more than seventy years. 567 U.S. at 147-48. The interpretive issue, too, was static and binary: whether certain employees, whose jobs "ha[d] not materially changed for decades," were or were not "outside salesmen." *Id.* at 158. Here, in stark contrast, the regulatory environment is constantly shifting—which makes sense, given that this case, unlike *Christopher*, arises in the context of military security. The record shows that new security policies were being issued every few years, including in the wake of the September 11th attacks, undoubtedly reflecting shifting military judgments at a particular sensitive facility. R. at 35-36, 48. Indeed, the base access policy here was released just a year before the contract at issue was signed. R. at 36-37. And that contract included, in multiple similar provisions, requirements and warnings that the work under the contract would be subject to "restrictions on entry" based on the needs of "an operating Military Installation." R. at 38-39. In short, this is not a case of massive liability imposed retroactively based on an interpretation expressed for the first time by a distant agency in an *amicus* brief. *See Christopher*, 567 U.S. at 153. This is a case of a contractor suing the government for damages based on the contractor's alternate interpretation of a relatively new security regulation, despite being previously

informed of the military's interpretation. There are no grounds to withhold *Auer* deference here.

C. The Air Force's interpretation of the policy is the correct interpretation.

Even without applying the standard of *Auer* deference here, careful examination of the base access policy's text and context reveals that the Air Force's interpretation is "not only a plausible interpretation of the regulation; it is the most sensible interpretation the language will bear." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (looking to the "thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

To begin with, the plain text of the policy establishes the Security Forces Group Commander's broad discretion to permit or deny base access. The operative clause of the policy states that eligibility for base access will be determined "on a case-by-case basis" by the Commander. R. at 3. This provision is not qualified, and no criteria or guidelines are specified to constrain the Commander's discretion in making these "case-by-case" determinations. The only constraint in the text is procedural: that these case-by-case eligibility determinations be made after "scrutiniz[ing]" any "unfavorable results" from the NCIC "wants and warrants check."

The use of the expression "wants and warrants" is far from conclusive here. The phrase is, of course, somewhat idiomatic: the word "want" does not appear in either ordinary or legal dictionaries with its meaning here, and is partially, like

"cease and desist" or "aid and abet," an example of what Justice Scalia called the "lawyerly penchant for doublets." *King v. Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting). An outstanding "warrant" is perhaps the paradigmatic target of a "wants and warrants check," and it might be the case that some such checks are limited to a search for outstanding warrants in certain contexts, such as a routine police stop. But the surrounding text in the policy here makes clear that the phrase was not being used in this way. If the "unfavorable results" possibly produced by the check are narrowly confined to information about outstanding warrants, then how could there be any room for the "case-by-case" determinations commanded in the very next sentence? If an employee is wanted for arrest, there is nothing to make a "case-by-case determination" about. It is highly implausible to suppose that the United States Air Force, a government agency, would knowingly permit persons wanted by law enforcement to enter and work every day on a sensitive military facility. Indeed, the Board found as a matter of fact that any employee discovered to have an outstanding "want or warrant" was "immediately detained upon showing up at the [Malmstrom] gate" and "turned over to the proper authorities." R. at 47, 55.

Rather than being limited to a search for outstanding warrants, the policy contemplates a more thorough search. Not only must the search produce enough information to justify a "case-by-case determination," but the policy also demands "scrutin[y]," which means "a searching study or inquiry." *Scrutiny*, *Webster's Third New International Dictionary* (3d ed. 1981). The existence of an outstanding warrant is a binary question—there is a warrant, or there isn't; scrutiny is not required. By

contrast, an employee's criminal record may raise many questions necessitating a "searching . . . inquiry," such as the recency and nature of the criminal acts. *See id.*

Finally, as the Board recognized, Garco's interpretation of the text of the policy leads to "the absurd result that all convicted felons are to be allowed onto [the base]." R. at 55; *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations . . . which would produce absurd results are to be avoided if alternative interpretations . . . are available."). The text of the policy provides, sensibly, for "case-by-case" determinations regarding base access based on the results of a background check. Yet under Garco's interpretation, the policy prohibits the military from denying access to anyone who does not have an outstanding warrant—even if that person is, say, a violent sex offender out on parole, or a convicted serial killer serving a life sentence. JTC's manager seemingly perceived this absurdity and conceded that sex and violent offenders should not be allowed on the base. R. at 43. But Garco's interpretation of the policy's text would categorically foreclose any such common-sense limitations.

Next, even if the "wants and warrants" reference creates ambiguity in the text of the policy, evidence in the record strongly supports the Air Force's view that the policy authorized discretion to deny base access to employees with criminal records. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'") (citation omitted).

Garco focuses heavily on the contract's incorporation of Federal Acquisition Regulation (FAR) § 52.222-3, a regulation which permits government contractors to employ prisoners who participate in work training programs. As the Court of Appeals observed, however, this regulation concerns whom contractors may employ as a general matter; it says nothing about whom must be granted base access. R. at 11. Indeed, Air Force communications to JTC during the contract period drew precisely this distinction. R. at 44, 45. The distinction makes obvious sense. FAR provisions are general rules regulating procurement across the federal government. That government contracts permit the employment of prisoners hardly implies that government contracts guarantee that prisoners may perform *any* job or access *any* facility. On a project like this, there was no bar to prisoners performing off-site preparation, construction, or administrative work—any work not requiring base access. *See* R. at 11.

Garco also zooms in on another bit of external evidence: Major General Finan's stray piece of testimony that there was a "large change" to the access policy. Garco argues that since she made this remark after being shown her 2007 memorandum clarifying the policy, her remark meant that the memorandum itself in fact effected a change to the policy. But as the Court of Appeals noted, the remark in context was ambiguous as to whether she meant that the memorandum itself, or the base access policy in general, was the "large change." R. at 10-11. More importantly, the idea that the memorandum was a significant change to the policy is inconsistent with the vast bulk of Air Force testimony, including by the major general herself. R. at 11. She also

testified, for example, that the memorandum was intended only to give "guidance" on what the phrase "unfavorable results" in the 2005 policy meant. R. at 53.

In fact, the most revealing testimony in the record came not from Major General Finan, but from Michael Ward, the Chief of Security Forces Plans and Programs at Malmstrom during the time period at issue. In his testimony, Mr. Ward explained that "NCIC wants and warrants check" is a term of art which refers to a specific type of background check in the NCIC system, where "wants and warrants is what is titled out." R. at 9. In other words, "wants and warrants" is the *name* of this type of background check; it is not an exhaustive description of the background check's contents. He recounted what these contents in fact are:

> A wants and warrants check is the background check. Basically what it is, is it's the information that is loaded into the actual 9-1-1—or the NCIC system. . . . any wants or warrants, registration in the—any formal programs such as sexual offender or violent offender programs and their criminal history would be listed as well.

R. at 10. This testimony establishes, among other things, that the meaning of the policy cannot be discovered by relying on a narrow definition of the words "wants and warrants" in isolation. *See F.A.A. v. Cooper*, 566 U.S. 284, 294 (2012) (explaining that when a term is used in more than one way, courts "cannot rely on any all-purpose definition but must consider the particular context in which the term appears").

Lastly, the record reveals crucial information about a "pre-construction conference" held between Garco, JTC, and Malmstrom personnel. R. at 39. The minutes of that meeting show that the Air Force briefed the contractors that "The [employee] names will be sent . . . for background checks . . . No one with outstanding

warrants, felony convictions, or on probation will be allowed on base." R. at 39. Garco's project manager recalled that this information was stated at the meeting, and neither JTC nor Garco responded to the meeting minutes by objecting or seeking clarification about the base access policy. R. at 9. To the contrary, JTC's later communications and testimony conceded that sex offenders and violent offenders were properly denied base access. R. at 9, 43. These events belie the interpretation that the Air Force's base access policy at the time did not permit the denial of access based on criminal history.

The Air Force's interpretation of the base access policy—as permitting discretion to deny base access to employees with criminal records based on an NCIC background check—is supported by both the plain text of the policy and considerable evidence in the record. It does not require the application of deference to conclude that the Air Force did not change its base access policy, and that Garco's damages claim must therefore fail.

2. Even if the Air Force changed the base access policy, the government is still not liable for damages, because the Air Force's actions to secure a highly sensitive military installation were sovereign acts.

Under longstanding doctrine, the government is protected against damages claims when its public and general acts interfere with particular government contracts. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). In the proceedings below, the Board held and Garco conceded that the Air Force's base access policy was a "sovereign act"—an act of the government in its sovereign, rather than contractual,

capacity. Therefore, as the Board held, the military has a complete defense and is not required to compensate Garco for costs associated with the security policy. R. at 59.

A. Garco waived its arguments regarding the adequacy of the government's sovereign act defense.

In its decision below, the Board concluded that because "[t]he Air Force's enforcement of its base access policy . . . was a sovereign act," the Air Force was shielded from contract liability to Garco. R. at 59. The dissenting judge on the Court of Appeals agreed in principle that the "sovereign acts doctrine [is] an absolute bar to finding the Government liable," but thought a remand was necessary to determine whether the government's "performance [of the contract] . . . was impossible." R. at 17, 25. This argument is not available to Garco, because Garco waived it. R. at 6. On appeal, Garco not only failed to "challenge the Board's determination that the base access policy is a sovereign act," but also "failed to argue that the government did not satisfy the 'impossibility' requirement of the sovereign acts defense." R. at 6. As a result, regardless of how the Malmstrom base access policy is interpreted, the Board's holding—that the Air Force's enforcement of its base access policy was a sovereign act that shields the government from liability—must stand. Two specific considerations compel this conclusion.

First, arguments pertaining to the sovereign act doctrine can be waived. The dissenting judge in the Court of Appeals contended that "questions regarding the doctrine's application cannot be waived" because "the sovereign acts doctrine is grounded in the Government's sovereign immunity." R. at 25. But the premise in false: the sovereign act doctrine has nothing to do with sovereign immunity.

Sovereign immunity is a jurisdictional doctrine regarding the government's availability for suit. Congress waived sovereign immunity in the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109, establishing federal jurisdiction in this case. Indeed, no party contests jurisdiction here. In contrast, and as the majority in the Court of Appeals noted, the sovereign act doctrine is not jurisdictional: it is a substantive doctrine of government contract law that governs the scope of governmental liability. R. at 6 ("The sovereign acts doctrine . . . has no effect on jurisdiction; it is, instead, an affirmative defense that serves only to prevent the United States from being 'held *liable* for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.'" (quoting *Horowitz*, 267 U.S. at 461)).

While the two doctrines share a certain surface resemblance, the sovereign act doctrine has never been understood to derive from sovereign immunity. The dissent below simply asserts, without citation, that "the sovereign acts doctrine is part of the principle of sovereign immunity." R. at 25. But neither this Court's cases, nor the early cases on which this Court has relied, made any mention of—much less relied upon—the principle of sovereign immunity. Instead, all these cases enunciated principles of contract law. *See, e.g.*, *Horowitz*, 267 U.S. at 461 ("[P]ublic and general [acts of the government] cannot be deemed to . . . violate the particular contracts in which it enters.") (citation omitted); *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion) (discussing the doctrine as a "defense to liability"); *Deming v. United States*, 1 Ct. Cl. 190 (1865) ("A contract between the government and a

private party cannot be *specially* affected by the enactment of a *general* law.") (emphasis in original). Thus, a plaintiff who wishes to argue against applying the sovereign act defense must challenge it like it would any other affirmative, non-jurisdictional defense—at the time it is raised. Otherwise, under regular principles of procedure, these arguments are waived. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

Second, no circumstances here justify an exception to the general rules of waiver. It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases . . . that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Furthermore, the Court of Appeals below already held that Garco "waive[d] its right to challenge the Board's ruling by failing to raise the issue on appeal," R. at 6, and this Court has long held that such determinations are "left primarily to the discretion of the courts of appeals," *Singleton*, 428 U.S. at 121. *See, e.g.*, *State of Cal. v. Taylor*, 353 U.S. 553, 557 n.2 (1957) (refusing to entertain arguments which the Court of Appeals had determined were waived). There was no bar to Garco raising objections to the government's assertion of the sovereign act defense before the Board in the first instance, or perhaps even on appeal before the Federal Circuit. But principles of fairness, as well as of sound judicial administration, prohibit Garco from raising those objections for the first time before the United States Supreme Court.

B. The sovereign act doctrine provides a complete defense when public and general government acts impose costs on individual contractors.

Government contracts are unique. While many traditional principles of contract law apply to government contracts, these contracts are also subject to special rules arising out of "the two characters which the government possesses as a contractor and as a sovereign." *Horowitz*, 267 U.S. at 461 (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)). Among these special rules is the sovereign act doctrine—the principle that the government cannot "while sued in the one character be made liable in damages for their acts done in the other." *Id.* While the government enters out of necessity into many contracts, it is also frequently required to take actions in the public interest. Since at least the time of the Civil War, the sovereign act doctrine has protected that obligation by shielding the government from liability for "sovereign acts performed for the general good." *Id.*

This Court recognized and endorsed the doctrine in the 1925 case of *Horowitz v. United States*. *Id.* In *Horowitz*, a silk dealer entered into a contract to buy silk from the federal government, but the shipment was delayed because the U.S. Railroad Administration placed an embargo on silk shipments. *Id.* at 459-60. During the delay, the price of silk dropped, and the dealer sued the government for breach of contract. *Id.* This Court held that the sovereign act doctrine precluded recovery against the government for breach, adopting the Court of Claims' rule that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Id.* at 461.

This Court discussed the sovereign act doctrine again in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Writing for a plurality of four, Justice Souter interpreted *Horowitz* to require a two-step analysis of sovereign act claims. *Id.* at 896 (plurality opinion). First, courts must inquire whether the government act is purely "public and general," in *Horowitz*'s terms, or whether instead the act is "tainted by a governmental object of self-relief." *Id.* at 896-97. Second, if a government act is indeed "public and general," the government must also show that the act "would otherwise release the Government from liability under ordinary principles of contract law." *Id.* at 896. Concurring in the judgment, three Justices thought that the sovereign acts doctrine as expressed in *Horowitz* was best understood as functionally similar to the "unmistakability" doctrine, and therefore shielded the government from liability for its sovereign acts except in cases like *Winstar* where "it is clear from the contract in question . . . that the Government had assumed the risk of a change in its laws." *Id.* at 923-24 (Scalia, J., concurring in the judgment). Meanwhile, Chief Justice Rehnquist would have given a still broader scope to the sovereign acts doctrine, following *Horowitz* and earlier cases.[1] He argued that "a general regulatory enactment" like the embargo in *Horowitz*, and also like the legislation at issue in *Winstar*, flatly "cannot by its enforcement give rise to contractual liability on the part of the Government." *Id.* at 933 (Rehnquist, C.J., dissenting).

[1] Justice Ginsburg joined most of the Chief Justice's dissent, but not his discussion of the sovereign acts doctrine. She did not address the doctrine at all.

Here, the dissenting judge on the Court of Appeals argued that the government had not properly "carr[ied] its burden" under the sovereign act doctrine because it had not "establish[ed] that performance . . . was impossible." R. at 23-25. As discussed above, Garco has waived this argument. But in any case, the argument is mistaken.

The government does not need to show "impossibility" here. As described above, Justice Souter in *Winstar* wrote that the sovereign acts defense requires showing not only that the government's act was "public and general," but also that the "act would otherwise release the Government from liability under ordinary principles of contract law." *Winstar*, 518 U.S. at 896 (plurality opinion). In *Winstar* itself, the government was sued for breach of contract, so under the plurality's rule, the government had to prove the traditional defense to breach of contract when some external event causes a breach—the defense of impossibility. *Id.* at 904. But it is a mistake to conclude from *Winstar*'s example that the government must *always* show impossibility when asserting the sovereign acts defense. Unlike *Winstar*, this is not a breach of contract action—this is an appeal from the denial of a request for an equitable adjustment. The distinction is crucial. Whereas a breach of contract claim asserts that the government failed to perform according to the contract, an equitable adjustment is a tool which allows the government to compensate a contractor when, most commonly, the government makes changes to its specifications. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967) ("The changes clause . . . permits the Government to make changes in contract specifications. Such changes are not breaches of contract. They do give rise to claims for equitable adjustments which the

Government agrees to make, if the cost of performance is increased or the time for performance changed. But whether and to what extent an adjustment is required are questions to be answered by the methods provided in the contract itself.")

The Board was thus perfectly correct not to make a special inquiry into whether the government's performance was "impossible," because impossibility is not a required defense to a request for an equitable adjustment. Rather, it was sufficient for the government to show, and the Board to find, that the "changes" complained about by Garco were sovereign acts, and thus not changes "attributable to the Government as contractor" under the contract. *Winstar*, 518 U.S. at 896 (plurality opinion); *Horowitz*, 267 U.S. at 461 ("Whatever acts the government may do . . . so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate . . . particular contracts into which it enters with private persons.").

Furthermore, unlike in *Winstar*, there is no indication here that the contract implicitly indemnified the contractor against financial risks associated with sovereign acts. *See Winstar*, 518 U.S. at 909 (plurality opinion) (noting that the contracts at issue there contained "an allocation [onto the government] of risk of regulatory change that was essential to the contract between the parties"); *id.* at 923-24 (Scalia, J., concurring in the judgment) (arguing that the sovereign act defense is defeated only "when the Government had assumed the risk of a change in its laws"). To the contrary, the contract here provided that sovereign acts could justify a *time extension*, if Garco requested one, but "assigned the risk of adhering to Air Force regulations and orders to the contracting party." R. at 12-13.

It is unavoidable that government laws and acts aimed at a common good will sometimes create inconveniences and obstacles for individual citizens. Those whose business consists of working with the government perhaps experience these difficulties particularly acutely, but it is a reality which every citizen shares. Here, the Air Force created a base access policy in order to ensure the security of Malmstrom's nuclear warheads and the safety of Malmstrom's service members and their families. As this nation's courts have wisely held for well over a century, the government should not be made to compensate an individual contractor for the effects of such a generally applicable policy; though the policy "may work injury to some private contractors, such parties gain nothing by having the United States as their defendants." *Horowitz*, 267 U.S. at 461 (quoting *Jones*, 1 Ct. Cl. at 384). The sovereign act doctrine stands as a firm barrier to Garco's damages claim.

3. This Court should not overrule *Auer v. Robbins*.

Garco has asked this Court to overrule the deference doctrine stated in *Auer v. Robbins*. 519 U.S. 452 (1997). The Court should decline this invitation. Deference to agency interpretations of regulations is consistent with the Constitution, essential as a matter of agency administration, and deeply embedded in the nation's law. Moreover, this case does not present an opportunity to overrule *Auer*, because, as discussed elsewhere, principles of military deference, a plain reading of the base access policy, and the sovereign act doctrine all compel this Court to affirm the result below.

A. *Auer* is correct as a matter of constitutional history, constitutional structure, and social policy.

For more than seventy years, this Court has held explicitly and repeatedly that courts should defer to agency interpretations of their own regulations unless those interpretations are plainly erroneous or inconsistent with the regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Over decades, this Court, through the process of case-by-case adjudication, has shaped and modified this rule—recognizing several important exceptions, but always reaffirming the central principle. The fruit of these precedents is the modern rule of *Auer* deference, a doctrine that is both constitutional and pragmatic. Putting aside for the moment questions of *stare decisis*, there are at least five important reasons that *Auer* should not be overruled.

First, *Auer* is consistent with the Constitution. Since long before *Seminole Rock*, there appeared to be little doubt that courts giving deference to agencies' interpretations of their own regulations raised no constitutional concerns. *See United States v. Eaton,* 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution, and . . . who has the power . . . to amend them, is entitled to the greatest weight."). In recent years, however, some Justices have expressed a worry that *Auer* conflicts with the implied constitutional principle of separation of powers. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (opinion of Scalia, J.). This worry, in essence, is that "the power to write a law and the power to interpret it cannot rest in the same hands." *Id.* at 619.

Contrary to this line of argument, however, stands the edifice of American administrative law. Individual federal agencies have long performed multiple

functions, including the functions of rulemaking and adjudication. *See, e.g.*, *SEC v. Chenery Corp. ("Chenery II")*, 332 U.S. 194, 202 (1947); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). More fundamentally, this Court has repeatedly explained that, from a constitutional perspective, agency rulemaking, interpretation, and adjudication all involve the exercise of *executive* power. *See United States v. Grimaud*, 220 U.S. 506, 517 (1911); *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (Scalia, J.) ("These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'").

Moreover, the argument that the Constitution prohibits agencies from issuing a rule and later interpreting it proves far too much. This Court has on myriad occasions stressed that, beyond enforcing express statutory commands, courts should not dictate the procedures that agencies must use. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524-525 (1978). In particular, this Court has affirmed the constitutionality of agencies proceeding first with a rule, and later by specific, more detailed applications of that rule:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

Chenery II, 332 U.S. at 202. It is not overstatement to say that rejecting deference to agency interpretations of agency regulations would call into question much of the structure of the modern administrative state, which depends on a variety of tools

beyond rulemaking, including especially interpretation and adjudication, to execute Congress's commands. Indeed, it "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Id.*

And *Auer* deference in no way gives agencies more lawmaking power than the Constitution provides for. As with the related rule of *Chevron* deference, agency interpretations are subject to oversight by both Congress and the courts. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Congress, of course, has the power to legislate more specifically, either with respect to substantive law or agency procedure. Furthermore, Congress controls the scope of delegated authority to agencies, and an agency interpretation can no more exceed that delegation than an agency regulation can. *See City of Arlington*, 569 U.S. at 307. Indeed, when the law is stable, Congress is able to legislate on the clear background presumption of judicial deference expressed in doctrines like *Chevron* and *Auer*. On the other end, interpretations under *Auer* are subject to review by courts, and this Court has made clear that those interpretations must be consistent with the regulations they interpret. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015) ("Even in cases where an agency's interpretation receives Auer deference, however, it is the court that ultimately decides whether a given regulation means what the agency says."). In sum, this Court's precedents make exceedingly clear that *Auer* does not violate the separation of powers.

Second, *Auer* recognizes and utilizes the expertise and political accountability of agencies. Many, perhaps most areas of law administered by federal agencies

involve innumerable complexities and technical details. Agencies are, by intent and design, experts in the fields and laws they administer. It stands to reason then that when an agency issues a regulation, it is the agency itself that is in by far the best position, by virtue of both expertise and authorship, to interpret any subsequently discovered ambiguities in the regulation. Moreover, the interpretation of ambiguities in a regulation may require not only the exercise of expertise, but also the execution of policy. *See Chevron*, 467 U.S. at 843 (noting that agency gap-filling "necessarily requires the formulation of policy"). Agencies, housed in a political branch and accountable to the President, are plainly in a far better position than courts to determine policy.

Third, *Auer* serves important stability and clarity needs of federal administration. As this Court has noted, *Auer* ensures that if an agency interpretation of a regulation is not plainly erroneous, the regulation will be applied uniformly nationwide. *See Christopher*, 567 U.S. at 158 n. 17. It is not hard to imagine the problems for regulated parties that would arise, and that this Court would frequently need to address, if judges across the country were empowered each to interpret complex and important federal regulations according to his or her own judgment without deference to the expert agencies who authored the regulations. And it is no answer to say that agencies ought to issue less ambiguous rules, or new rules to fix the old ambiguous ones. Rulemaking is a process subject to considerable procedural, substantive, financial, and temporal restraints, and agencies are no more capable than courts of issuing rules that will avoid all ambiguity and resolve every

contingency. That is why agency interpretation—and the expertise and policymaking interpretation embodies—is so essential. This, indeed, is one justification for the basic axiom that agencies can and must use a variety of tools to administer the law. *Chenery II*, 332 U.S. at 202. And *Auer* guarantees that such interpretations, when not plainly erroneous, will control uniformly so as to impart "certainty and predictability to the administrative process." *Christopher*, 567 U.S. at 158 n. 17.

Fourth, criticisms of *Auer* rely on a parade of horribles that has zero empirical support. The primary criticism of *Auer* from a policy perspective has been that *Auer* creates a perverse incentive: "[T]he incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part). The problem, however, is that there is absolutely no evidence of this type of incentive effect. No one has pointed to any regulations that were plausibly promulgated in a purposefully vague way in order to accommodate an agency power-grab. In fact, the available evidence points strongly *against* this armchair theory of agency incentives. A recent, meticulous study shows that agencies did not write more vaguely after the *Auer* decision, and that agencies with more exposure to, or success in, *Auer*-related litigation were no more likely to write vague rules than other agencies. Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 Colum. L. Rev. 85, 142 (2019).[2] To the contrary, the study finds

[2] The study sensibly bases its analysis around the *Auer* decision because it shows that citations to the *Seminole Rock* doctrine as a whole skyrocketed after this Court's decision in *Auer*. Walters, 119 Colum. L. Rev. at 100.

that agencies have, if anything, been writing with greater clarity since *Auer*. *Id.*

Fifth and finally, *Auer* is not an overly rigid rule—it establishes a sensible presumption of deference that is subject to important exceptions. *Auer* acknowledges the crucial role that agencies must generally play in interpreting regulations, but this Court has been careful not to afford agencies deference inappropriately. As discussed previously, *Auer* does not apply in several circumstances, such as for example where the regulation is ambiguous, or where there is reason to suspect the interpretation does not reflect the agency's fair and considered judgment. *See generally Perez*, 135 S. Ct. at 1208 n.4. If and when cases arise that demonstrate clear and specific reasons not to afford *Auer* deference, this Court will be able to make those determinations. But in cases like this, where the military offers an expert interpretation of an essential security policy, and where that interpretation is consistent with the text of the policy, courts should continue to defer under *Auer*.

B. Considerations of *stare decisis* strongly counsel against overruling *Auer*.

This Court has repeatedly and forcefully emphasized that *stare decisis* is "of fundamental importance to the rule of law," *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016). For this reason, this Court has said that it will not depart from *stare decisis* without some "special justification." *Welch v. Texas Dept. of Highways*, 438 U.S. 468, 479 (1987). Last Term, this Court identified five factors that help evaluate whether such justification is present: the quality of a precedent's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on that decision. *Janus v. Am.*

Fed'n, 138 S. Ct. 2448, 2478-79 (2018). None of these factors even remotely points toward overruling *Auer*; to the contrary, each urges its reaffirmance.

With respect to reasoning, there is no one single case to consider, but rather a century of this Court's caselaw upholding and explaining the *Auer* principle. For example, on many occasions, this Court has reasoned that the fact that an agency is responsible both for promulgating and executing a regulation compels deference to agency interpretations. *See e.g., Eaton*, 169 U.S. at 343; *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969). This Court has reasoned too that the often technical and detailed nature of agency regulations are an important justification for deference. *See Thomas Jefferson Univ.*, 512 U.S. at 512.

Considering the factor of "workability," there can be no doubt that *Auer* is an straightforward and easy-to-apply rule of law. *See Christopher*, 567 U.S. at 158 n. 17. To be sure, judges considering the application of *Auer* deference must, on occasion, assess arguments that an exception to *Auer* applies. But it would be necessary to consider the issues embodied in those exceptions under any conceivable rule. And in what is likely the vast majority of cases, the sole issue that courts must consider is whether the agency interpretation is "plainly erroneous or inconsistent with the regulation." *See United States v. Larionoff*, 431 U.S. 864, 872 (1977).

Next, *Auer* is absolutely consistent with other related decisions. *Auer* bears significant similarity to the rule of *Chevron* deference, which lends a helpful clarity and consistency to administrative law as understood and practiced by lower courts and agencies. Moreover, *Auer* acts in concert with other aspects of administrative law,

such as review of agency action under the Administrative Procedure Act, in order to provide agencies with sufficient deference to do their jobs effectively while also ensuring that they comply with Congress's procedural and substantive mandates.

Lastly, the factors of "developments since the decision was handed down" and "reliance on the decision" weigh strongly in *Auer*'s favor. No developments in the federal courts or agencies have created any basis for questioning *Auer*. To the contrary, evidence suggests that *Auer* has had a salutary effect on agency rulemaking. *See* Walters, 119 Colum. L. Rev. at 142. And lower courts have mastered and employed *Auer* to efficiently and correctly resolve the countless agency cases that come before them. *Auer* deference has been the law of the land for more than seventy years, and it is a central and essential fixture of administrative law. There is no basis, under this Court's *stare decisis* precedent, for overruling it.

C. Regardless of *Auer*'s merits, this case does not provide an opportunity to overrule *Auer*, because the result below is compelled by principles of military deference, a plain reading of the regulation, and the sovereign act doctrine.

Right or wrong, *Auer* makes no difference in this case. This Court's precedent regarding respect for military determinations counsels strongly toward deferring to the Air Force's interpretation of its own base access policy. *See Dep't of Navy v. Egan*, 484 U.S. at 527. In particular, this Court has specifically held that regulations governing access to military bases must be interpreted in light of the longstanding, unquestioned, and broad authority of military commanders to permit or deny base access. *See Cafeteria Workers*, 367 U.S. at 893. Moreover, regardless of any deference, the plain text of the base access policy and the record evidence illuminating that text

compel the conclusion that the base access policy did not prohibit the Air Force from denying access to persons with criminal backgrounds. And even if the Court concluded that the base access policy did prohibit those denials, this Court's longstanding precedent regarding sovereign acts shields the Air Force from damages liability, and thus requires affirming the decision below. Were the Court to overrule *Auer* here, then, such a holding could be nothing but dicta.

This Court has granted certiorari in another case raising the question of *Auer* deference. *See Kisor v. Wilkie*, No. 18–15, 2018 WL 6439837, at *1 (U.S. Dec. 10, 2018). There is thus no need to evaluate *Auer*'s merits in this case. Simply applying the rule as it stands—or relying alternatively on the precedent and doctrines discussed above—is the appropriate course.

V. CONCLUSION

The Air Force's interpretation of its base access policy was both a quintessential exercise of its military expertise and a more than reasonable interpretation of the policy's text. Furthermore, the sovereign act doctrine prevents contractors from holding the government liable for generally applicable policies implemented to ensure the security of a highly sensitive military facility. The Court should affirm the judgment of the U.S. Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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