

No. 25-5343

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In the  
**Supreme Court of the United States**

KENDRICK JARRELL BEAIRD,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA AS  
AMICUS CURIAE IN SUPPORT OF NEITHER  
PARTY**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber takes no position on whether *Stinson v. United States*, 508 U.S. 36 (1993), should still govern whether courts must defer to the commentary to the Sentencing Guidelines. But the Chamber has an important interest in ensuring the Court does not answer that question by relying on any administrative-law doctrine that gives deference to agencies' interpretations of their own regulations. Such deference has a broad impact on American businesses, and this Court's recent decisions—as well as the lower courts' experience with doctrines requiring such deference—make clear that it should be jettisoned. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

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<sup>1</sup> *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

More than three decades ago, this Court held in *Stinson v. United States* that the United States Sentencing Commission’s official Commentary on the Sentencing Guidelines is “authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. 36, 38 (1993). In so holding, the Court drew an analogy to the deference then afforded to agencies’ interpretations of their own regulations under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which was later affirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). See *Stinson*, 508 U.S. at 44-45. The Court itself acknowledged that this analogy to *Auer* deference was “not precise.” *Id.* at 44.<sup>2</sup>

Since then, the Court has significantly narrowed (or overruled) its deference doctrines in the agency context. Most notably, the Court cabined *Auer* deference in *Kisor v. Wilkie*, 588 U.S. 558 (2019), and overruled *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). That evolution raises important questions about the continued validity of *Stinson*’s already imprecise analogy—and accordingly about the proper level of deference, if any, that courts should accord the Commentary.

The Chamber of Commerce takes no position on the ultimate question of whether *Stinson* “still correctly states the rule for the deference that courts

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<sup>2</sup> For simplicity, this brief refers to the deference doctrine embraced in *Seminole Rock* and *Auer* as “*Auer* deference.”

must give the commentary to the Sentencing Guidelines.” Beard Br. i. But the Chamber has an important interest in the reasoning the Court employs to answer that question, which could implicate broader issues of administrative law and agency deference that could potentially impact the Nation’s business community. To assist the Court, the Chamber makes two principal points in this brief.

*First*, the Court should be wary of resolving this case based on *Stinson*’s concededly “not precise” analogy to *Auer* deference. 508 U.S. at 44. Several important distinctions between the agency context and the Guidelines context call the analogy’s reliability into question. The Court should not assume that *Auer* deference automatically carries over to the Commission and the Guidelines. If *Stinson* deference is still proper, it should be justified from first principles rooted in the text and structure of the Sentencing Reform Act, and the Commission’s unique institutional position vis-à-vis the Judiciary.

*Second*, if the Court nevertheless concludes that the *Stinson* question turns on the continued vitality of *Auer* deference—even as refined by *Kisor*—it should hold that *Auer* is no longer good law after *Loper Bright*. *Loper Bright* held that courts must exercise independent judgment on questions of law, a duty rooted in Article III’s conception of the judicial role and codified in the APA. That principle applies with equal force to agency interpretations of their own regulations. After *Loper Bright*, *Skidmore* respect still applies, under which courts can give appropriate weight to specialized agency expertise without ceding their judicial duty to exercise independent judgment.

Deference on such interpretive questions is no longer allowed.

## ARGUMENT

### I. *STINSON'S* IMPRECISE ANALOGY TO *AUER* DEFERENCE DOES NOT PROVIDE A RELIABLE FRAMEWORK FOR RESOLVING THIS CASE

In *Stinson v. United States*, this Court held that the Commentary is “authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. 36, 38 (1993). To reach that conclusion, the Court drew an analogy to the deference then afforded to agencies’ interpretations of their own regulations under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and later *Auer v. Robbins*, 519 U.S. 452 (1997). See *Stinson*, 508 U.S. at 44-45. But the Court acknowledged that the analogy was “not precise.” *Id.* at 44. Rather than continue relying on this imprecise analogy, this Court should resolve this case by assessing whether *Stinson* deference can stand on its own footing.

Important distinctions between the agency context and the sentencing context undermine the analogy’s reliability as a guide to whether courts should defer to the Sentencing Commission’s Commentary on the Guidelines. Most notably, since this Court’s decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), the Guidelines are now advisory rather than mandatory, and appellate courts review sentences for “reasonableness” rather than strict compliance with the Guidelines or their Commentary, *Gall v. United States*, 552 U.S. 38, 46 (2007). That severely undermines the analogy to agency deference doctrines designed for binding rules. See *United States v.*

*Vargas*, 74 F.4th 673, 699 (5th Cir. 2023) (Oldham, J., concurring in part) (questioning the continued vitality of the *Auer* analogy because “the cornerstone of the *Stinson* regime is the binding nature of the Guidelines,” and “the *Booker* Court held that the Guidelines were *not* binding on federal courts”), *cert. denied*, 144 S. Ct. 828 (2024).

Other considerations specific to the Guidelines context may also affect the analogy to *Auer* deference. The Sentencing Commission “is a peculiar institution within the framework of our Government.” *Mistretta v. United States*, 488 U.S. 361, 384 (1989). As the Fourth and Fifth Circuits have noted, this unique institutional position may justify “a distinct approach” to deference. *Vargas*, 74 F.4th at 682-83 (citation omitted); *United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023); *see also United States v. Dupree*, 57 F.4th 1269, 1284-85 (11th Cir. 2023) (Grant, J., concurring in the judgment). And while the Commentary is not technically required to go through public notice, “in practice, the Commission ordinarily uses the same” notice-and-comment procedure to revise the commentary as it does to revise the Guidelines. *Dupree*, 57 F.4th at 1281 (Pryor, C.J., concurring). That distinguishes the Commentary from agency interpretations of regulations, which are often issued through sub-regulatory guidance that can be changed or withdrawn on a whim.

These distinctions may or may not be dispositive of whether *Auer* deference can reliably inform what level of deference the Commission’s Guidelines Commentary should receive. At a minimum, though, they significantly complicate the analysis. And relying on the *Auer* analogy is even more fraught

given this Court’s post-*Stinson* decisions—most importantly, *Kisor v. Wilkie*, 588 U.S. 558 (2019), and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)—directly undermining the version of deference that *Auer* embraced. *See infra* at 7-12.

Given these complications, the Chamber urges the Court not to resolve the question presented here based on *Stinson*’s “not precise” analogy to *Auer*. 508 U.S. at 44. If *Stinson* deference—or some lesser form of deference to the Commentary—is to survive, it must be justified on independent grounds, rooted in the text and structure of the Sentencing Reform Act, the nature of the Guidelines and Commentary, and the Commission’s unique institutional position vis-à-vis the Judicial branch. The Court should certainly not assume that deference doctrines from the agency context automatically carry over to the sentencing context.

## **II. AUER DEFERENCE IS NOT VIABLE AFTER *LOPER BRIGHT***

If this Court nevertheless concludes that the *Stinson* question presented here turns on an analogy to agency interpretations of their own regulations, it should hold that deference in that context is not permissible after *Loper Bright*. There, the Court rejected *Chevron* deference to agency interpretations of statutes based on its extended analysis of the inherent role of Article III courts, as reflected in Section 706 of the APA. That analysis applies with equal force to agency interpretations of their own regulations. And although *Kisor* upheld *Auer* deference on stare decisis grounds, that holding has now been fatally undermined by *Loper Bright* and

post-*Kisor* experience. Going forward, courts should exercise independent judgment when interpreting agency legal interpretations, giving *Skidmore* respect to relevant agency expertise, when appropriate, without ceding interpretive responsibility to the Executive.

### **A. *Loper Bright* Forbids Deference To Agency Interpretations Of Law**

1. In *Loper Bright*, this Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* had required courts to defer to “permissible” agency interpretations of the statutes those agencies administer, “even when a reviewing court reads the statute differently.” *Loper Bright*, 603 U.S. at 377-78; see *Chevron*, 467 U.S. at 843. *Loper Bright* held that *Chevron* deference is fundamentally incompatible with the “traditional conception of the judicial function,” under which courts have a duty to exercise independent judgment on questions of law. 603 U.S. at 395-96. It explained that this duty was rooted in Article III, reflected throughout our Nation’s history, and codified in the APA. *Id.* at 384-401.

As the Court emphasized, the Constitution assigns to the federal judiciary the responsibility to interpret the law. Article III vests the “judicial Power” in the federal courts, U.S. Const. art. III, § 1, cl. 1, and the Framers understood that “interpretation of the laws” would be “the proper and peculiar province of the courts,” *Loper Bright*, 603 U.S. at 385 (quoting *The Federalist* No. 78, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Court noted that it had “embraced the Framers’ understanding of the judicial function early on,” with Chief Justice

Marshall declaring in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* (alteration in original) (quoting 5 U.S. (1 Cranch) 137, 177 (1803)). And the Court underscored that *Marbury*’s core teaching on this point was reflected in many subsequent decisions acknowledging the Judiciary’s “solemn duty” to exercise independent judgment when declaring the meaning of federal law. *Id.* (quoting *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 162 (1841)).

The Court then held that Section 706 of the APA codified this traditional understanding of the judicial function. *Id.* at 391-96. It noted that Section 706 directs a “reviewing court” to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” *Id.* at 391 (quoting 5 U.S.C. § 706). The Court explained that Congress enacted Section 706 against the “settled pre-APA understanding that deciding [questions of law] was ‘exclusively a judicial function.’” *Id.* at 392 (quoting *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 544 (1940)). Section 706 thus “codifie[d] for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.” *Id.* at 391-92.

Applying these principles, the Court then held that *Chevron* “defies” the APA because it requires a court to “ignore, not follow, ‘the reading the court would have reached’ had it exercised its independent judgment.” *Id.* at 398-99 (quoting *Chevron*, 467 U.S. at 843 n.11). And while Article III and the APA are

perfectly consistent with giving “respect” to agency interpretations, they do not permit courts to “mechanically afford *binding* deference to agency interpretations”—which is precisely what *Chevron* required. *Id.* at 399 (citation omitted). The Court recognized that *Chevron* deference is “the antithesis of the time honored approach” embodied in the APA. *Id.*

2. *Auer* deference cannot be reconciled with *Loper Bright*. Although *Loper Bright* directly addressed agency interpretations of *statutes*, its reasoning applies with equal force to agencies’ interpretations of their own *regulations*. Deference to agency interpretations of regulations thus violates the traditional conception of the judicial role—and the APA—no less than deference to agencies’ interpretations of statutes.

*Auer* deference is inconsistent with *Loper Bright*’s conception of Article III judicial power, as understood throughout our Nation’s history. *Loper Bright* held that Article III courts have traditionally “decide[d] legal questions by applying their own judgment”—not by deferring to the Executive’s preferred reading. *Id.* at 391-92. That rule applies to the interpretation of regulations no less than the interpretation of statutes. After all, regulations have the “force and effect of law” and bind the public just like statutes. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (citation omitted). Indeed, “regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause,” *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979)—which commands that “the *Laws* of the United States . . . shall be the supreme *Law* of the Land,” U.S. Const. art. VI, cl. 2 (emphasis added).

When courts interpret regulations, they accordingly exercise the same “judicial Power” that Article III vests in them—the power “to say what the law is.” *Marbury*, 5 U.S. (1 Cranch) at 177; *see* U.S. Const. art. III, § 1, cl. 1; *Loper Bright*, 603 U.S. at 385. The “solemn duty” to exercise independent judgment in “interpret[ing] the *laws*” thus plainly applies to regulations no less than to statutes. *Dickson*, 40 U.S. (15 Pet.) at 162 (emphasis added); *see Loper Bright*, 603 U.S. at 385; *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment).

For similar reasons, *Auer* deference contradicts *Loper Bright*’s interpretation of APA Section 706. As explained above, Section 706 directs a reviewing court to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706; *supra* at 8. *Loper Bright* read this command as requiring courts to exercise independent judgment on legal questions, concluding that Section 706 “specifies that courts, not agencies, will decide ‘*all* relevant questions of law’ arising on review of agency action”—“even those involving ambiguous laws.” 603 U.S. at 392 (citation omitted).

This reasoning directly governs an agency’s interpretation of its own regulations. Again, a regulation is a “law” because it is binding on private parties. *Supra* at 9. The proper interpretation of a regulation therefore presents a “question of law” that Section 706 assigns to Article III courts. And Section 706 separately requires courts to “determine the meaning or applicability of the terms of an agency action,” 5 U.S.C. § 706—which includes an agency’s “rule making,” *id.* § 551(4)-(5), (13); *see Perez*, 575

U.S. at 110 (Scalia, J., concurring in the judgment). Deference to agency interpretation of regulations cannot be reconciled with *Loper Bright*'s view of Section 706.

3. *Auer*'s incompatibility with *Loper Bright* has not gone unnoticed. For example, the Fourth Circuit has pointed out that *Loper Bright* "calls into question the viability of *Auer* deference." *United States v. Boler*, 115 F.4th 316, 322 n.4 (4th Cir. 2024). Judge Bibas has explained that *Loper Bright* "casts doubt" on judicial deference to agencies' regulatory interpretations. *United States v. Chandler*, 114 F.4th 240, 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of reh'g en banc). And Judge Bea has echoed that sentiment as well. See *United States v. Trumbull*, 114 F.4th 1114, 1126 (9th Cir. 2024) (Bea, J., concurring in the judgment), *cert. denied*, 145 S. Ct. 1952 (2025).

Prominent academics have made the same point. Professor Squitieri notes that "*Auer* is in tension with the overall thrust of *Loper Bright*" and that "*Loper Bright* suggests that *Auer* is no longer deserving of [stare decisis] protection." Chad Squitieri, Notice & Comment, *Auer after Loper Bright*, Yale J. on Regul. (Oct. 15, 2024), <https://www.yalejreg.com/nc/auer-after-loper-bright-by-chad-squitieri/>. According to Professor Sunstein, *Loper Bright* "sits (umm, err) uneasily with *Kisor*," making it "awkward to maintain both [decisions]." Cass R. Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 Duke L.J. 1893, 1895 n.6 (2025). Professor Wright agrees: In his view, "*Auer* deference may well not withstand the logic and 'mood' of *Loper Bright*." R. George Wright, *The Loper Bright Regulatory Landscape*, 35 Ind. Int'l & Comp. L. Rev. 245, 256 (2025); see also

Shannon S. Pickrell, *Ambiguity's Final Auer: Insisting on Consistency After Loper Bright Enterprises*, 75 Emory L. J. 425, 461-65 (2026).

Meanwhile, no one—no court and no academic—has offered a persuasive way to reconcile the logic of *Loper Bright* and *Auer*. No such reconciliation is possible. *Auer* cannot be squared with *Loper Bright's* embrace of the cardinal principle that judges must exercise independent judgment when “say[ing] what the law is.” *Marbury*, 5 U.S. (1 Cranch) at 177.

### **B. *Kisor* And *Auer* Should Be Overruled**

In *Kisor*, this Court declined to overrule *Auer* deference, but the Court “c[ould not] muster even five votes to say that *Auer* is lawful or wise.” 588 U.S. at 592 (Gorsuch, J., concurring in the judgment). Instead, the majority’s decision rested on stare decisis grounds. *See id.* at 590-91 (Roberts, C.J., concurring in part). This Court’s exclusive reliance on stare decisis to reluctantly uphold *Auer* deference in *Kisor*—five years before *Loper Bright* made explicit that interpretive deference is legally unworkable—should not stay the Court’s hand a second time.

*Kisor's* stare decisis analysis rested entirely on two points. *First*, the majority emphasized that the petitioner in that case had not pointed “to changes in legal rules that make *Auer* a ‘doctrinal dinosaur.’” *Id.* at 588 (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015)). *Second*, the majority noted that the petitioner had “not claim[ed] that *Auer* deference is ‘unworkable.’” *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

Both of those factors now weigh strongly in favor of overruling both *Kisor* and *Auer*. To the extent that *Auer's* ongoing vitality bears on the *Stinson* question

presented in this case, the Court should reject any further reliance on *Auer*'s flawed deference framework.

1. *Kisor* recognized that a key factor in determining whether to overrule precedent is whether a decision remains compatible with the broader legal framework, or whether its logic has been contradicted by intervening doctrinal developments. *See id.* at 588. Stare decisis is the means by which courts “ensur[e] that the law . . . will develop in a principled and intelligible fashion.” *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (citation omitted). Preserving doctrinal rules whose premises have been overtaken by later decisions undermines that objective. *See Agostini v. Felton*, 521 U.S. 203, 235-36 (1997).

Applying this factor in *Kisor*, the majority viewed *Auer* as generally compatible with the then-current landscape of administrative law. The majority refused to overturn *Auer* because it could identify no “changes in legal rules” rendering *Auer*'s deference regime obsolete. *Kisor*, 588 U.S. at 588 (citation omitted).

Things have changed dramatically since 2019. This Court's 2024 *Loper Bright* decision is, by nearly all accounts, a landmark ruling of administrative law, reversing decades of judicial deference to agency legal interpretations. *See* 603 U.S. at 398 (describing *Chevron* as a “watershed decision”); *id.* at 479 (Kagan, J., dissenting) (describing *Chevron* as a “cornerstone of administrative law”). *Loper Bright* is precisely the type of “change[] in legal rules” that the *Kisor* majority was not able to identify in 2019.

After *Loper Bright*, this Court’s administrative-law jurisprudence now rests on the understanding that (1) it is the Judiciary’s duty to determine legal meaning through the exercise of independent judgment, and (2) the APA codified that historical understanding of the judicial role. *Auer* deference holds the opposite on both fronts. *Supra* at 9-11. The two decisions thus rest on irreconcilable understandings of the judicial role under Article III and Section 706.

Any doubt about the incompatibility of *Loper Bright* and *Auer* deference is dispelled by the starkly different interpretations of Section 706 embraced by the *Loper Bright* majority and the *Kisor* plurality. In *Kisor*, the pro-deference plurality strained to reconcile *Auer* deference with Section 706. To do so, it argued that Section 706’s instruction that courts must “determine the meaning or applicability of the terms of an agency action” allows a court to “determine the meaning” of a regulation by deferring to the agency’s reasonable interpretation. 588 U.S. at 581 (plurality).

*Loper Bright* has now squarely rejected that reading. There, the Court held that Section 706 “codifies for agency cases the unremarkable, yet elemental proposition . . . that courts decide legal questions by applying their own judgment”—a standard the Court held was incompatible with “deference” to agencies’ interpretations of legal texts. 603 U.S. at 391-92, 395. In reaching this conclusion, the Court echoed the argument Justice Gorsuch had made in his *Kisor* concurrence, criticizing the plurality: Section 706’s “unqualified command requires the court to determine legal questions—including questions about a regulation’s meaning—by

its own lights, not by those of political appointees or bureaucrats.” 588 U.S. at 604-05 (Gorsuch, J., concurring in the judgment). *Loper Bright* vindicated that view, which now represents this Court’s settled understanding of Section 706.

*Loper Bright* also rejected the *Kisor* plurality’s primary justification for both *Chevron* and *Auer* deference: the presumption that “ambiguities” in legal texts “are implicit delegations to agencies.” 603 U.S. at 399; *see Kisor*, 588 U.S. at 569-70 (plurality) (explaining that *Auer* deference is “rooted in . . . a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities” and that “the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers” (citation omitted)). *Loper Bright* called this delegation theory a “fiction” that does not “approximate reality.” 603 U.S. at 399, 404. An ambiguity, the Court explained, is “simply not a delegation of law-interpreting power” to the Executive; it is the inevitable result of “imperfection of human faculties” and the inherent limits of language. *Id.* at 399-400 (citations omitted). Resolving ambiguities therefore requires courts—not agencies—to “apply[] all relevant interpretive tools” and determine the “best” reading. *Id.* at 400, 402-03. The *Kisor* plurality’s contrary premise cannot be squared with *Loper Bright*.

In *Kisor*, the majority assessed *Auer* deference against the then-applicable doctrines of judicial review in the agency context. At the time, that approach reflected an understandable attempt to vindicate the stare decisis goal of promoting the

“evenhanded, predictable, and consistent development of legal principles.”

But the *Kisor* majority implicitly recognized that circumstances could change—and that upholding *Auer* deference might no longer be warranted if legal rules evolved to the point that *Auer* became a doctrinal outlier. That is precisely what has happened in the years since *Kisor*. *Loper Bright*'s landmark ruling has now clarified the judicial role in legal interpretation in a way that cannot be reconciled with *Kisor*. The *Kisor* majority's own reasoning now supports setting *Auer* deference aside.

2. The *Kisor* majority also declined to overturn *Auer* because the petitioner there had “not claim[ed] that *Auer* deference is ‘unworkable.’” 588 U.S. at 588 (citation omitted). But post-*Kisor* developments have shown that *Auer* deference—even as modified by *Kisor*—is indeed unworkable.

One workability problem flows from *Auer*'s reliance on a judicial finding that a rule is “genuinely ambiguous” to trigger deference to the agency in the first place. *Id.* at 574. Before *Loper Bright*, such ambiguity had likewise served as the trigger for *Chevron* deference. As this Court explained in *Loper Bright*, “[t]he defining feature of [*Chevron*'s] framework is the identification of statutory ambiguity” at the first step. 603 U.S. at 407-08.

*Loper Bright*'s stare decisis analysis expressly held that *Chevron*'s reliance on the ambiguity trigger rendered *Chevron* deference “unworkable.” *Id.* The Court explained that “the concept of ambiguity has always evaded meaningful definition.” *Id.* at 408. Because ambiguity “may have different meanings for different judges,” a rule that turns on identifying

ambiguity is “wholly ‘in the eye of the beholder’” and is bound to produce “different results in like cases,” rendering the doctrine “arbitrary in practice.” *Id.* (citations omitted); see Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2150-54 (2016) (book review). The Court therefore concluded that *Chevron*’s unworkability weighed in favor of “letting *Chevron* go.” *Loper Bright*, 603 U.S. at 407.

*Auer* suffers from the exact same defect. Under *Kisor*’s clarification of *Auer*, deference is triggered only after a court concludes that a regulation is “genuinely ambiguous.” *Kisor*, 588 U.S. at 573-74. But if—as *Loper Bright* held—ambiguity “evade[s] meaningful definition” in the context of statutory interpretation, the same must be true in the context of regulatory interpretation as well. The question “How clear is clear?” does not become any easier to answer simply because the legal text at issue is a regulation rather than a statute. Like *Chevron*, *Kisor*’s framework turns on a trigger—ambiguity—that no one has succeeded in defining with any precision and that different judges will inevitably apply in inconsistent ways.

Beyond the ambiguity trigger, *Auer* has also proven unworkable in other respects. In its effort to rehabilitate *Auer* and mitigate the tension with Section 706 and the judicial function, the *Kisor* majority reformulated *Auer* deference into a five-step inquiry. A court must (1) first determine whether the regulation is “genuinely ambiguous” after applying all the traditional tools of legal interpretation. See *Kisor*, 588 U.S. at 574. If yes, the court must (2) then ask whether the agency’s interpretation is “reasonable.” *Id.* at 575-76. And even if the first two conditions are

satisfied, the court must (3) make “an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight”—considering (3a) whether the interpretation is the agency’s “authoritative” or “official position,” (3b) whether it implicates the agency’s “substantive expertise,” and (3c) whether it reflects the agency’s “fair and considered judgment.” *Id.* at 576-79 (citations omitted). As Justice Gorsuch observed, this complicated, multi-step framework was “destined only to compound the confusion” from the beginning. *Id.* at 627 (Gorsuch, J., concurring in the judgment).

The Judiciary’s experience applying *Kisor* confirms Justice Gorsuch’s fears. In the post-*Kisor* world, appellate judges routinely—and forcefully—disagree over whether regulatory language is “genuinely ambiguous,” the threshold requirement for an agency’s interpretation to receive deference. In *Walker v. BOKF, National Association*, for example, the Tenth Circuit considered whether to defer to an interpretation of the Office of the Comptroller of the Currency addressing whether overdraft fees were “interest” or “non-interest” charges under OCC regulations. 30 F.4th 994, 998 (10th Cir.) (citations omitted), *cert. denied*, 143 S. Ct. 354 (2022). The majority purported to undertake “the rigorous inquiry required under *Kisor*” and concluded that the regulations *were* genuinely ambiguous, ultimately deferring to the OCC’s interpretation. *Id.* at 1007. But according to Judge Eid, the majority was too quick to find ambiguity and thus “cast[] aside the care and caution that the Supreme Court stressed in *Kisor*.” *Id.* at 1016 (Eid, J., dissenting). Similar examples abound. *See, e.g., Rafferty v. Denny’s, Inc.*, 13 F.4th 1166, 1180-81 (11th Cir. 2021) (majority

concluding Department of Labor regulation was “genuinely ambiguous”); *id.* at 1195-97 (Luck, J., concurring in the result) (concluding that regulation was *not* “genuinely ambiguous”); *Boler*, 115 F.4th at 323-29 (majority concluding that Sentencing Guideline was “genuinely ambiguous”); *id.* at 329-38 (Quattlebaum, J., dissenting) (concluding that Guideline was “not ambiguous”).

A recent study by Professors Hammond and Walker puts the problem in sharp relief. They reviewed nearly 1,000 judicial decisions citing *Kisor* over its first five years. See Andrew Hammond & Christopher J. Walker, *Stare Decisis and the Missing Administrability Inquiry*, 100 N.Y.U. L. Rev. 1883, 1899 (2025). Their bottom-line conclusion: “[L]ower courts have struggled to apply *Auer* deference in a consistent fashion after *Kisor*.” *Id.* at 1917.

Of particular concern, when reviewing courts ultimately defer to an agency’s regulatory interpretation—where one would expect full application of all five *Kisor* steps—courts address all five steps only 42% of the time. *Id.* at 1907-08. Meanwhile, agency-win rates “vary dramatically based on the reviewing circuit court” and agency, suggesting that outcomes depend more on which court hears a case or what agency brings a case than on any coherent application of *Kisor*’s framework. *Id.* at 1887-88. The study minces no words, concluding that “the *Kisor* approach to *Auer* deference has not been administrable in the lower courts.” *Id.* at 1917.

Faced with a doctrine that the Court could not defend on the merits, the *Kisor* majority sought a middle ground—preserving *Auer* deference while limiting its reach through a series of procedural guardrails. But adding complexity has created

problems of its own. *Kisor* has spawned inconsistency and unpredictability—the very ills stare decisis is meant to prevent. Both *Kisor* and *Auer* should be overruled.

3. Overruling *Auer* deference would promote the stare decisis ideals of uniformity and predictability across the legal system. By applying their independent judgment to the meaning of regulations—as *Loper Bright* requires for statutes—courts would follow a coherent approach to judicial review of agency action and allow for the “evenhanded” and “consistent development of legal principles” across the statutory and regulatory contexts. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Overruling *Auer* would also incentivize agencies to effectuate their intent through legislative rules adopted after notice-and-comment rulemaking, instead of relying on sub-regulatory guidance documents readily changeable without input from the public. That approach would be faithful to the core logic of the APA’s notice-and-comment requirements. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Notice-and-comment rulemaking serves this fundamental principle by allowing regulated entities to shape regulatory decisions and to understand the standards by which their conduct will be judged.

*Auer* deference, by contrast, encourages agencies to “promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’” *Christopher v. SmithKline Beecham*

*Corp.*, 567 U.S. 142, 158 (2012) (alteration in original) (quoting *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). That comes at the expense of the clarity that businesses and other regulated entities need to conform their conduct to the law. Overruling *Auer* would restore the proper balance.

**C. *Skidmore* Respect Is Consistent With *Loper Bright* And Allows Courts To Benefit From Agency Expertise**

Overturing *Auer* deference would not force courts to disregard the expertise of agencies when interpreting their own regulations. In *Loper Bright*, the Court recognized and preserved an interpretive tool—*Skidmore* respect—that courts have applied in the context of administrative interpretations of law.

Eight decades ago in *Skidmore v. Swift & Co.*, the Supreme Court suggested that courts should give “weight” to an agency interpretation based on “the thoroughness evident in its 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.” 323 U.S. 134, 140 (1944). In *Loper Bright*, the Court was careful to frame *Skidmore* as a form of “respect”—not controlling deference—based on the agency’s power to persuade. *See, e.g.*, 603 U.S. at 412-13 (“Careful attention to the judgment of the Executive Branch may help inform that inquiry.”); *id.* at 403 (“The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.”). That same interpretive tool applies to

judicial review of agency interpretations of their own regulations.

Under *Skidmore* respect, agency interpretations are not controlling, but they “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” 323 U.S. at 140. *Skidmore* thus recognizes that agency regulatory interpretations possess a “power to persuade”—and courts may accord their views “weight”—without demanding that courts treat such interpretations as binding. *Loper Bright* expressly preserved—and blessed—*Skidmore* respect. The Court emphasized that expertise “has always been one of the factors which may give an Executive Branch interpretation particular ‘power to persuade, if lacking power to control.’” 603 U.S. at 402 (quoting *Skidmore*, 323 U.S. at 140). According “due respect” to agency interpretations, the Court explained, is fully consistent with *Loper Bright*’s vision of the judicial role. *Id.* at 403. Under *Skidmore*, courts accord weight to an interpreter’s views based on its reasoning and consistency—but they retain the final word on “whether the law means what the agency says.” *Id.* at 392 (citation omitted).

The distinction between *Skidmore* respect and *Auer* deference is critical. *Skidmore* invites courts to consider and learn from an expert’s views; *Auer* requires courts to subordinate their independent judgment to those views. The first is a hallmark of careful judging; the second, an abdication of the judicial role.

*Skidmore* respect ultimately makes sense because agencies often have deep familiarity with the real-world problems that federal statutes and regulations are designed to address. Indeed, agencies often work

together with Congress to draft legislation, and they are directly responsible for drafting regulations. And as this Court has recognized, an agency's views can be "especially informative" when they rest on "factual premises within [its] expertise." *Id.* at 402 (citation omitted). In other words, sometimes the government may have a perspective that helps courts understand a regulatory framework, perhaps due to its informed and contemporaneous knowledge of the meaning of the regulation or its specialized expertise implementing a regulatory scheme. When the government's views are thoughtful and well informed, they may well be entitled to significant respect.

Federal preemption is one area where agency expertise can yield valuable insights. In *Wyeth v. Levine*, this Court noted that in prior cases, it had given "weight" to an agency's views about "how state law affects [a] regulatory scheme." 555 U.S. 555, 576-77 (2009) (listing cases). This was warranted, the Court explained, because agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 577 (citation omitted); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000).

The same principle applies across many regulatory contexts. An agency's unique understanding of a complex statutory and regulatory scheme will often prove persuasive, particularly where the agency has maintained a consistent interpretation over the years rather than shifting with changes of administration. For example, this Court has given respectful consideration to

Department of Labor bulletins interpreting ERISA provisions where the agency's view reflected "a body of experience and informed judgment." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 18 (2004) (quoting *Skidmore*, 323 U.S. at 140). Rejecting *Auer* deference will not leave courts adrift when analyzing sometimes byzantine regulatory schemes; agency interpretations will continue to provide valuable insights, so long as the authoring agencies can still justify their interpretations.

In short, recognizing agencies' "power to persuade" ensures that their expertise will properly inform a court's interpretation, while the court retains final responsibility for determining what the law means. *Skidmore* thus allows courts to benefit from practical expertise without abandoning their duty to independently determine the law's meaning. Binding deference is "simply not necessary to ensure" that courts are "well informed by subject matter expertise." *Loper Bright*, 603 U.S. at 402-03.

\* \* \*

For the reasons noted, the Court should resolve *Stinson*'s fate without relying on an imprecise analogy to *Auer* deference. That analogy was dubious at the time, and it has only grown less reliable after *Booker*, *Kisor*, and *Loper Bright*. But to whatever extent the Court believes administrative-law principles bear on the *Stinson* question, it should recognize that *Auer* deference is no longer appropriate in any context. Going forward, courts should resolve legal questions by applying their own independent judgment, just as *Loper Bright* commands.

**CONCLUSION**

The Court should resolve the question presented in a manner consistent with the principles discussed above.

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