Nos. 18-1161, 18-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 733,

Intervenor.

On Petition for Review and Cross-Petition for Enforcement of Orders of the National Labor Relations Board

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BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici

The parties are listed in the Brief of Petitioner/Cross-Respondent. In addition, the Chamber of Commerce of the United States of America is hereby filing a brief as *amicus curiae* in support of Petitioner/Cross-Respondent.

B. Ruling Under Review

Reference to the rulings at issue appears in the Brief of Petitioner/Cross-Respondent.

C. Related Cases

Reference to the related cases appears in the Brief of Petitioner/Cross-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. It has no parent corporation, and no company owns 10 percent or more of its stock.

STATEMENT REGARDING SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), the Chamber certifies that a separate brief is necessary to provide the perspectives of the Chamber and the businesses that it represents regarding the importance of the appropriate application of *Auer* deference. Although the Chamber understands that another group may be filing an *amicus* brief on other issues, the Chamber is unaware of any other *amicus* addressing the issue of *Auer* deference in this case.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent its members' interests before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. Given the breadth of government regulations, nearly every U.S. Chamber member has at least some portion of its business regulated by federal agency rules and regulations. These businesses have a strong interest in ensuring that the doctrine giving deference to agencies' interpretations of their regulations is properly applied and not expanded beyond its current scope. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

The U.S. Chamber has moved this Court pursuant to Federal Rule of Appellate Procedure 29(b) for permission to file this brief as *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414). When the Supreme Court announced this principle, it "offered no justification whatever." *Id.* Nonetheless, the doctrine has persisted, though the Supreme Court has carefully circumscribed its application, *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-59 (2012), with several Justices calling for it to be reconsidered, *see, e.g.*, *Garco Const., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in judgment); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring).

Under the existing framework, *Auer* deference does not apply here for several reasons. If the regulations are unambiguous, as UPS Freight argues, then *Auer* clearly cannot apply. But even if the Board could successfully argue that some of its regulations are ambiguous, *Auer* still would not apply for two reasons. *First*, the

rulings of the Acting Regional Director (and the General Counsel memorandum) cannot receive *Auer* deference because they do not bind the Board and therefore do not represent the views of the agency to which a court may defer. *Second*, the Acting Regional Director's interpretations provided no fair warning, as they were first announced in an evidentiary hearing.

Even if there were a question regarding whether *Auer* should apply, the Court should not expand the doctrine to reach the non-binding, staff-level interpretations at issue here. *Auer* harms businesses and other regulated parties by increasing uncertainty, as agencies are free to change their interpretations of regulations without input from, or notice to, affected parties. Stretching *Auer* to include the non-binding decision of a subordinate agency official with no meaningful review from the agency's principal decisionmakers would exacerbate those problems. Such an expansive approach would permit a multitude of agency officials to determine the content and meaning of federal law, forcing businesses to comb through all sorts of agency documents, memoranda, and websites to find agency interpretations.

Indeed, an expansion of *Auer* would highlight the constitutional concerns with the doctrine. *Auer* deference raises separation-of-powers concerns because interpreting ambiguous laws is a judicial function. Allowing run-of-the-mill agency officials—including staff who are not nominated by the President or confirmed by the Senate, and who are not freely removable due to civil-service protections—to

interpret ambiguities in regulations would undermine important accountability principles as well. Thus, to the extent courts continue to adhere to *Auer*, its scope should be limited to the final agency decisionmakers.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum to the Brief of Petitioner/Cross-Respondent.

ARGUMENT

I. AUER DEFERENCE DOES NOT APPLY IN THIS CASE

Auer deference "is not an inexorable command in all cases." *Perez*, 135 S. Ct. at 1208 n.4. A court may defer to an agency's interpretation of its own regulation only where, among other things, "the language of the regulation in question [is] ambiguous" and the agency has provided its "fair and considered judgment on the matter." *Huerta v. Ducote*, 792 F.3d 144, 154 (D.C. Cir. 2015) (citation omitted). Moreover, the Supreme Court has held that *Auer* deference is appropriate only if the agency's interpretation would provide parties with "fair warning of the conduct a regulation prohibits or requires." *Christopher*, 567 U.S. at 156 (citation and brackets omitted).

UPS Freight contends that there is no ambiguity in the relevant portions of the Board's rules. *See* Petitioner Br. 23. If that is so, the Board may not rely on *Auer*. *See, e.g., Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 211 (2011) ("if the text of

a regulation is unambiguous," then, "a conflicting agency interpretation . . . will necessarily be 'plainly erroneous or inconsistent with the regulation' in question'" (quoting *Auer*, 519 U.S. at 461)); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (same).

The Board may argue that certain of its regulations are ambiguous and that its interpretations are therefore entitled to *Auer* deference. The Court should reject that argument. Even if the Board identifies an ambiguous regulation, *Auer* does not apply here because the interpretations were not made by the Board, and the Acting Regional Director did not provide fair notice to UPS Freight before adopting his interpretations.

A. The Interpretations Of The Acting Regional Director And General Counsel Are Not The Agency's "Fair and Considered Judgment"

Even if the Board's rules were ambiguous, *Auer* deference would still be inappropriate. An agency's interpretation of its regulation receives deference only if the agency has brought to bear its "fair and considered judgment on the matter." *Huerta*, 792 F.3d at 154 (citation omitted). Here, however, there is no judgment, let alone a *considered* judgment, from the Board to which this Court could defer.

Auer deference depends on the reasoned judgment of the *agency*—that is, those to whom Congress delegated final decisionmaking authority. In *Auer*, the Supreme Court deferred to "the Secretary's power to resolve ambiguities in *his own*

regulations." 519 U.S. at 463 (emphasis added). And this Court has rebuffed agency claims for *Auer* deference where the record "strongly suggest[ed] … that the Secretary has in fact never grappled with—and thus never *exercised her judgment over*—the conundrum posed by the regulation's clear ambiguity." *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (emphasis added); *see also Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (holding that a "one-member, non-precedential, [Board of Immigration Appeals] order—one that does not explain its reasoning—'does not reflect the agency's fair and considered judgment on the matter in question'" (citation omitted)). Those decisions follow from the well-established principle that agency pronouncements that do not bind the agency as a whole "cannot be said to represent an 'agency' view." *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1438 (D.C. Cir. 1996); *cf. United States v. Mead Corp.*, 533 U.S. 218, 231-34 (2001) (no *Chevron* deference for U.S. Customs tariff classification rulings, which issued from "46 different Customs offices," that were subject to further agency review, and whose "binding character as a ruling stop[ped] short of third parties").

With respect to regulations promulgated by the Board, then, *Auer* deference applies only to the *Board's* interpretations of its regulations. But the Board did not interpret its rules. Instead, the Board denied review of the Acting Regional

Director's procedural rulings and did not adopt them as its own. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113 at *1 n.1 (July 27, 2017).

Without any considered input from the Board on the meaning of its rules, all that remains are the non-binding conclusions of the Acting Regional Director. Those rulings cannot constitute the "judgment" of the Board for purposes of *Auer* deference. Under the National Labor Relations Act, the Board has authority to review the rulings of the 26 Regional Directors and, as a result, "no Regional Director's actions are ever final on their own." *UC Health v. NLRB*, 803 F.3d 669, 671 (D.C. Cir. 2015) (citing 29 U.S.C. § 153(b)). In addition, a Regional Director's decision "does not bind the Board." *Corp. Exp. Delivery Sys. v. NLRB*, 292 F.3d 777, 781 (D.C. Cir. 2002). This Court should not defer to interpretations that the agency itself is free to disregard or change from one case to the next.

The same holds true for General Counsel Memorandum 15-06. That memorandum purports to provide guidance in applying the Board's rules. Like the Acting Regional Director's rulings, the General Counsel's memorandum does not bind the Board. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) ("It is of no moment, therefore, what was the General Counsel's understanding of the case law before the present decision [of the Board] issued, and the court will take no note of it."); *In Re D. R. Horton, Inc.*, 357 NLRB 2277, 2290 (2012) ("The Memorandum, which represents the then-General Counsel's advice to the Board's

Regional Offices, is not binding on the Board."), *enf. granted in part and rev'd in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1638 n.5 (2018) (Ginsburg, J., dissenting) (same). The Memorandum is therefore ineligible for *Auer* deference.

Even assuming that the Acting Regional Director's decision could come within *Auer*'s domain, deference would still be inappropriate. To receive deference, the agency must provide some cogent *reasoning* to which the Court can defer. *See Chase*, 562 U.S. at 212 ("deference is not warranted when 'there is no reasoned agency reading of the text to which we might defer'" (quoting *Smith v. City of Jackson*, 544 U.S. 228, 248 (2005) (O'Connor, J., concurring in judgment))); *L.D.G. v. Holder*, 744 F.3d 1022, 1029 (7th Cir. 2014) ("[A]n agency's 'interpretation' must actually construe provisions of that regulation; it is not enough to identify a regulation that addresses an associated matter and tack on requirements that are conjured from thin air."). Here, the Acting Regional Director offered no reasoned explanations of his interpretations of the relevant portions of the Board's rules.

B. The Acting Regional Director's Interpretations Did Not Provide Fair Notice

Permitting the Board to invoke *Auer* deference would also "undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation … requires." *Christopher*, 567 U.S. at 156 (quotation marks and

brackets omitted). The problem of unfair surprise is particularly acute in the context of an agency enforcement proceeding. *See id.* at 159 (highlighting concerns with "requir[ing] regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference").

UPS Freight did not receive fair notice here because the Acting Regional Director did not unveil his arbitrary interpretations of the Board's rules until the evidentiary hearing. Before the hearing, UPS Freight had no notice of the procedural restrictions that the Acting Regional Director would impose on UPS Freight. Instead, in an already abbreviated hearing, the Acting Regional Director announced his understanding of the Board's rules during (or in some cases after) the hearing, giving UPS Freight no time to adequately respond. This type of "unfair surprise" is "precisely the kind . . . against which [the Supreme Court] ha[s] long warned." *Id.* at 156.

That the surprise pertains to issues of procedure does not make the lack of notice any less problematic. The procedural errors in this case—including the Acting Regional Director's inadequate investigation and the refusal to permit a hearing on objections, *see* Petitioner Br. 39-42, 49-51, hindered UPS Freight's opportunity to present and argue the merits of its case. A novel agency procedural interpretation that precludes a meaningful opportunity to be heard is equally as

damaging as a new agency interpretation that imposes liability on a party. *Cf. Christopher*, 567 U.S. at 156-59. It would thus flout the Supreme Court's instruction in *Christopher* to defer to the Acting Regional Director's interpretations.

II. THE COURT SHOULD NOT EXTEND AUER DEFERENCE

For the reasons above, *Auer* deference is unwarranted under existing law. But even if precedent did not clearly preclude deference, the Court should decline to expand *Auer* to the circumstances of this case. The Supreme Court has already limited *Auer*'s domain, observing that *Auer* "frustrat[es] the notice and predictability purposes of rulemaking." *Christopher*, 567 U.S. at 158. And several Justices have even called for *Auer* to be reconsidered. *See Garco Const.*, 138 S. Ct. at 1053 (Thomas, J., dissenting from denial of certiorari) (collecting opinions). Extending *Auer* to a one-off, non-binding ruling by a subordinate agency official with no reasoned analysis by the final agency decisionmaker would exacerbate many of *Auer*'s problems, including the harms it inflicts on regulated parties and its constitutional infirmities. This Court, while bound by *Auer* despite its many flaws, should prevent the doctrine from further "metastasiz[ing]" by, at a minimum, limiting its application to final agency decisionmakers. *United Student Aid Funds,*

Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

A. Extending *Auer* Deference Would Further Harm The Business Community By Increasing Regulatory Uncertainty.

"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). To ensure that federal regulations comply with this fundamental principle, the Administrative Procedure Act generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Through notice and comment, the business community has the opportunity to weigh in on, and help shape, agency action. Businesses can provide evidence and perspective to agencies as they develop rules and regulations. That valuable input ensures that agencies consider all aspects of an issue. And notice-and-comment rulemaking gives businesses fair notice of the conduct that the agency requires or permits under its rules. A business need only monitor the Federal Register to see

what proposed rules may affect its operations and ascertain any new, final legal obligations or procedures promulgated by the agency. That certainty is critical to efficient and effective business.

Deference to non-binding, staff-level interpretations of an agency's regulations harms businesses because such deference allows agencies to define the law without any of the safeguards of notice-and-comment rulemaking. An official may interpret an agency's vague regulation with no advance notice and no input from regulated parties. In fact, *Auer* gives agencies an incentive to "promulgate vague and open-ended regulations that they can later interpret as they see fit," with regulated parties operating at the unannounced whim of an agency's (or even an subordinate official's) ever-changing policy preferences. *Christopher*, 567 U.S. at 158. Because those interpretations may arise in a broad range of agency pronouncements—many unpublished and unavailable to the public[2]—regulated parties are often left, as here, to find out the conduct required of them only by appearing in agency proceedings.

Stretching *Auer* to include non-binding opinions from subordinate agency officials will further injure businesses and regulated parties. As the doctrine stands now, businesses already must hunt through a thicket of agency amicus briefs, letters,

[2] *See, e.g.*, https://www.nlrb.gov/case/04-RC-165805 (requiring FOIA request to access Post-Election Regional Director Decision on Objections (Mar. 11, 2016)).

and websites to discover whether an agency may have imposed new obligations or procedural limitations through its interpretation of a regulation. That is bad enough when the interpretations come from a final agency decisionmaker. But extending the doctrine to allow for deference to non-binding interpretations from low-level agency officials would exponentially increase the doctrine's burden. In the context of the National Labor Relations Board, for example, the 26 Regional Directors issue many decisions each year, and it would be nearly impossible for regulated parties to keep up with the Board's regulatory landscape if they had to scour all Regional Director decisions—even those where the Board denies review with no reasoning—to stay up-to-date with the latest turn of regulatory requirements. Ascertaining the law should not be so complex.

Granting *Auer* deference to non-binding Regional Director decisions in this case would have ramifications well beyond this dispute or even Board cases in general. Other agencies would surely rely on such a ruling to apply *Auer* to non-binding informal opinions from subordinate officials—precisely the result the Supreme Court has rejected in the *Chevron* context. *See Mead*, 533 U.S. at 231-34. Countless of these officials exist across the federal bureaucracy. Yet each would have the ability to make law, requiring businesses and other regulated parties to further widen their scavenger hunt for binding law. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("an army of

perfumed lawyers and lobbyists" needed to figure out agency's understanding). Such a result serves only to aggravate the injuries from *Auer* deference and works to the detriment of the business community and other regulated parties.

B. Extending *Auer* Would Be Constitutionally Suspect

The constitutional problems with *Auer* are well documented. *See Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring) (*Auer* "undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."). By giving "controlling weight" to agency interpretations, courts "violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

Stretching *Auer*'s reach to the circumstances presented in this case would only heighten those concerns. If *any* agency official with the power to issue documents could mold ambiguous regulations to his or her preferences, the doctrine would stray even further away from the Constitution's mandate that cases and controversies be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Expanding

Auer to pronouncements of officials who are not nominated by the President or confirmed by the Senate, and who are not removable due to civil-service protections, would strip the doctrine of democratic accountability. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary."). Nothing in *Auer* countenances such an expansive application of the doctrine, and the Constitution rejects it.

C. *Auer* Should Not Be Expanded Beyond Final Decisionmakers

At a minimum, *Auer* should be confined to the final agency decisionmakers whose views reflect the considered views of the agency. *See supra* pp. 5-8; *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 840 F.2d 947, 952 (D.C. Cir. 1988) (noting concerns with deferring to agency's interpretation of regulation where interpretation "plainly lack[ed] the credentials of a position that agency heads have staked out after adjudicative or rulemaking procedures allowing a full vetting of alternatives"). Although not solving the problems catalogued above, such a limitation would avoid any further damage.

Restricting *Auer* in this way would also preserve the scant benefits of the doctrine, such as the "certainty and predictability to the administrative process" that come "once the agency has spoken to clarify the regulation." *Christopher*, 567 U.S. at 158 n.17 (citation omitted); *see also Exelon Generation Co., LLC v. Local 15,*

Int'l Bhd. of Elec. Workers, AFL-CIO, 676 F.3d 566, 578 n.6 (7th Cir. 2012), as amended (May 9, 2012) (citation omitted) (limiting *Auer* to the "congressional delegatee" would "advance the … values of administrative accountability and discipline in decisionmaking"). That negligible advantage is absent when the agency has *not* spoken, but rather a subordinate official has offered a non-binding opinion, with no reasoned input from the agency head (or heads). With respect to the Board, regulated parties cannot know whether the other 25 Regional Directors would adopt the same view as the Acting Regional Director here, or whether the Board—which can ignore Regional Director decisions—would reach the same outcome if it addressed the issues. Broadening *Auer* would not bring any "certainty and predictability to the administrative process," as each Regional Director (or other official) would have the power to impose disparate obligations on parties.

CONCLUSION

For the foregoing reasons, the Court should not apply *Auer* deference in this case, and it should grant UPS Freight's petition for review and deny the Board's cross-application of its order for enforcement.

Respectfully Submitted,

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October 22, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 3,645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of October, 2018, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Petitioner/Cross-Respondent was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system.

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