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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, NFIB SMALL BUSINESS LEGAL CENTER, THE CATO INSTITUTE, THE BEACON CENTER OF TENNESSEE, MISSISSIPPI JUSTICE INSTITUTE, AND THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulatory Group, et al. v. EPA*, 134 S. Ct. 2427 (2014), and *Murray Energy Corp. v. U.S. Department of Defense*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299). SLF also regularly files *amicus curiae* briefs with this Court regarding issues of agency overreach and deference. *See*, *e.g.*, *Flytenow v. FAA*, 137 S. Ct. 618 (2017); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm established to

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that will impact small businesses.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The Beacon Center of Tennessee is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals. The Beacon Center has a vested interest in seeing the issue presented in this brief addressed by the Court.

The Mississippi Justice Institute (MJI) is the legal arm of the Mississippi Center for Public Policy (MCPP), an independent, nonprofit, public policy organization based in Jackson, Mississippi that was founded in 1991 by a small group of concerned citizens who wanted to take action steps to protect the families of Mississippi. Over time, MCPP has grown to become a leading voice in Mississippi policy formation by informing the media and equipping the public with information and perspective to help them understand and defend their liberty. MJI was formed to represent Mississippians whose state or federal Constitutional rights have been threatened or violated. MJI also works to defend the principles and ideals of MCPP within and throughout the courts, with a particular aim toward protecting liberty and honoring Constitutional rights. This work takes many forms, including direct litigation on behalf of individuals, intervention in cases of importance to public policy, participation in regulatory and rule making proceedings, and filing *amicus* briefs to give voice to the perspective of Mississippi families and individuals in significant legal matters pending in the Mississippi and Federal courts.

The Buckeye Institute was founded in 1989 as an independent research and educational institution to formulate and promote solutions for Ohio's most pressing public-policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, including electoral reform; compiling and synthesizing data; formulating policies; and marketing those public-policy solutions for implementation in Ohio and replication across the country.

This case is of particular interest to *amici* because the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), affords the executive branch with opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and revisit the highly deferential standard set forth in *Seminole Rock/Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id*., stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature. As James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation and quotation omitted).

This case involves one such example of the executive branch's overreach and disregard for our carefully

crafted government structure, but there are many thousands of other examples affecting other industries in different ways. The government action at issue here is emblematic of a systemic problem in a system that no longer imposes any meaningful checks on executive action. This case provides an opportunity to address the doubts raised by several members of this Court as to the continued validity of *Seminole Rock/Auer*. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring).

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. Deference to an agency's interpretation of its own ambiguous regulation offends the separation of powers principles embedded in our Constitution because it enables agencies to circumvent the APA's notice-and-comment procedures. As applied to this case, *Seminole Rock/Auer* deference gives the Army license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. Accordingly, *amici* join Petitioner in asking this Court to reconsider *Seminole Rock/Auer* deference.

ARGUMENT

I. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations.

There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the Federal Register. For example, the Federal Register grew from 4,369 pages in 1993, to 49,813 pages in 2003, to 81,883 pages in 2012[2] – an increase of nearly 2,000% in just 19 years. By way of another example, from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id*.

The number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern

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[2] Karen Kerrigan & Ray Keating, *Regulation and the 'Fourth Branch of Government,'* at 1 (2014), http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf.

our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies have accumulated is startling.

Not only do agencies' exercises of legislative authority go unchecked,[3] their regulatory interpretations often receive judicial deference under *Seminole Rock/Auer*. Such deference runs afoul of the APA because it allows federal agencies to side-step notice-and-comment procedures, and runs afoul of the Constitution because it is inconsistent with separation of powers principles. These issues grow in importance with every page added to the Federal Register.

The time has come to abandon *Seminole Rock/Auer* deference and this case provides the vehicle to do so. Significantly, several members of this Court have pointed out the flaws with affording agencies such deference, suggesting it be revisited. As Justice Scalia explained, jettisoning *Seminole Rock/Auer* would leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will*

[3] The delegation doctrine has rarely been used to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

decide – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

II. This Court should reconsider the *Seminole Rock/Auer*-sanctioned practice of ceding judicial power to administrative agencies.

A. *Seminole Rock/Auer* deference is inconsistent with separation of powers principles.

As Justice Scalia noted, *Seminole Rock/Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). The Constitution contemplates that each branch of government will jealously guard its own prerogatives, thereby protecting individual liberty. With *Seminole Rock/Auer* deference, the judiciary leaves the field resulting in the removal of an indispensable check on federal agency activities.

The rise of the administrative state may have tested the limits of the Constitution's separation of powers, but it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, the APA instructs all reviewing courts to decide "all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action . . . and set aside agency

action . . . found to be . . . arbitrary, capricious, or . . . without observance of procedure required by law. . . ." 5 U.S.C. § 706.

Even so, this Court's precedents create separation of powers issues by giving federal agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461-62. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Seminole Rock/Auer* deference directly contradicts the Constitution when it hands the judicial role of interpretation to a federal agency that itself has promulgated an ambiguous regulation.

B. *Seminole Rock/Auer* deference deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

The hazard that agencies pose to the democratic process and liberty was not lost on Congress. For over 20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 38 (1950), culminating in the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring

in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment was seen as "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id*. at 103.

In notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster predictability and stability in the administrative arena and to establish a baseline against which future agency action would be measured. *Seminole Rock/Auer* deference effectively exempts agencies from the APA's notice-and-comment requirements. This undermines Congress' objectives and leaves agencies free to promulgate ambiguous regulations and later interpret

them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id*.

Rather than help secure consent of the governed, *Seminole Rock/Auer* deference relieves an agency of the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on the regulated community. Because of *Seminole Rock/Auer*, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process prescribed by the APA or to the regulated public." *Id*.; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected

parties will have adequate notice concerning the agency's understanding of the law").

Furthermore, legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

Agency actions that proceed without notice-and-comment, as in this case, put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the interpretation takes. The regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, predicated on alleged non-compliance.[4] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded

[4] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

> similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

The Armed Service's Board of Contract Appeals' interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations – the Federal Circuit's reliance on *Auer*, allows agencies to continuously change their interpretation of their regulations with the force of law. This is precisely the type of abuse Congress sought to prevent with the APA. Until this Court demands that the executive branch abide by the APA, federal agencies will continue their unconstitutional usurpation of power.

C. Members of this Court have expressed doubts about *Seminole Rock/Auer* deference.

This case presents the Court with the opportunity and ideal vehicle to reconsider the continued application of *Seminole Rock/Auer* deference. This is an issue that various Justices of this Court have said should be reexamined. The Court's 2015 decision in *Perez* only underscores the need for clarification as to what – if any – deference is owed to an agency's interpretation of its own regulations.

Writing for the majority, Justice Sotomayor explained that rules issued through the notice-and-comment process are referred to as "legislative rules"

because they have the "force and effect of law." *Perez*, 135 S. Ct. at 1203-04 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)). The plain implication is that rules pronounced outside the notice-and-comment process are entitled to little or no deference.[5] This line of analysis necessarily calls into question the judicial practice of deferring to rules pronounced through agency letters or other guidance materials, since they are developed without any transparency, opportunity for public input, or even basic assurances that the agency has thoroughly considered policy implications and alternatives.

Justices Alito, Thomas, and Scalia were more direct – each explicitly argued that it was time to reconsider the continued viability of *Seminole Rock/Auer*. Justice Alito observed that there is "an understandable concern about the aggrandizement of the power of administrative agencies" that stems, in part, from "this Court's cases holding that courts must ordinarily defer

[5] This makes sense because *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is rooted in a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). But in so doing, vesting agencies with authority to fill in ambiguous gaps, Congress is essentially vesting agencies with a limited legislative authority – which may only be exercised through the notice-and-comment process – precisely because in exercising that authority, the agency is making rules that carry the force of law. *See United States v. Mead*, 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure. . . .").

to an agency's interpretation of its own ambiguous regulations." *Id*. at 1210 (Alito, J., concurring in part and concurring in the judgment). He continued: "I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id*. at 1210-11. Similarly, Justice Thomas concluded: "By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." *Id*. at 1225 (Thomas, J., concurring in the judgment). And Justice Scalia stated that he would "restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act as written." *Id*. at 1213 (Scalia, J., concurring in the judgment). *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch J., concurring) (noting that the Supreme Court's decisions on agency deference "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Even before *Perez*, Justice Scalia expressed doubts about the validity of *Auer*. In his concurring opinion in *Talk America* he noted that he had "become increasingly doubtful of [*Auer*'s] validity[.]" 564 U.S. at 68 (Scalia, J., concurring). Accordingly, he was "comfort[ed] to know that [he] would reach the Court's result even without *Auer*." *Id*.

In *Decker*, members of the Court openly acknowledged that, under the right circumstances, it might be

time to reconsider *Seminole Rock/Auer*. In his concurring opinion, Chief Justice Roberts, joined by Justice Alito, wrote that *Seminole Rock* (and, by inference, *Auer*) raises an issue that is "a basic one going to the heart of administrative law. Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases. . . . I would await a case in which the issue is properly raised and argued." 133 S. Ct. at 1339.

Even beyond express calls to reconsider *Seminole Rock/Auer*, the limitations to its applicability illustrate the Court's struggles with it. For example, in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court found application of *Auer* deference inappropriate where an agency's interpretation is "plainly erroneous or inconsistent with the regulation" or where there are grounds to believe that an interpretation "does not reflect the agency's fair and considered judgment of the matter in question." *Id*. at 2166 (internal quotation marks omitted).

The deficiencies and harms of *Seminole Rock/Auer* deference are most evident in this case. As Petitioner explains, the Federal Circuit accepted the Board's interpretation because of *Auer*, not because of any independent finding or analysis of its own regarding the regulation at issue. The Federal Circuit's "rubber stamping" of the Board's interpretation is made even more egregious by the court's recognition that application of *Seminole Rock/Auer* must be reviewed de novo. Pet. App. 8a. Further, this case presents the classic

case of agency aggrandizement of power and the abuses that result when an agency knows that all it has to do to get a court to defer to its desired regulatory interpretation is to promulgate an ambiguous regulation at the start.

Simply stated, *Seminole Rock/Auer* deference allows lower courts to "rubber stamp" potentially defective decisions. Because such blind deference contradicts our Constitution and the APA, *amici* ask this Court to reconsider its continued validity.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amici curiae* brief, this Court should grant the petition for writ of certiorari and reverse the judgment of the Federal Court.

Respectfully submitted,

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