No. 13-950

In the

Supreme Court of the United States

PERI & SONS FARMS, INC.,

Petitioner,

v.

VICTOR RIVERA RIVERA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, CATO INSTITUTE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, D.C. 20002

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001

KAREN R. HARNED
NFIB Small Bus. Legal Center
1201 F St., NW, Ste 200
Washington, DC 20004

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler Sch. of Law at Chapman Univ.
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amici Curiae

QUESTION PRESENTED

In *Auer v. Robbins*, 519 U.S. 452, 461 (1996), this Court ruled that an administrative agency's interpretation of their own ambiguous regulation is "controlling" when parties contest the meaning of a regulation in judicial proceedings. The Court did not, however, discuss how this ruling fit within the constitutionally-mandated principle of separation of powers. The question presented in this case is:

Should the Court reconsider the practice of ceding judicial power to administrative agencies by granting "controlling deference" to administrative agency interpretations of ambiguous regulations?

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IDENTITY AND INTEREST OF *AMICI* CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the central idea that separation of powers inherent in the constitution's structure of government is vital to protecting liberty. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus* curiae before this Court in several cases of constitutional significance, including: *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) and *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138 (2010).

The Cato Institute was established in 1977 as 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 was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus* briefs.

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing consent has been filed with the Clerk of the Court. Further, all parties were given notice of this brief more than ten days prior to the deadline for filing. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm and is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, representing about 350,000 members across the United States

SUMMARY OF ARGUMENT

Review is necessary in this case to reconsider the judicial doctrine of deference to an administrative agency's interpretation of its own ambiguous regulation. The court below concluded that it was required to defer to the administrative agency's interpretation of an ambiguous regulation, and that interpretation decided the case. *Rivera v. Peri & Sons Farm, Inc.*, 735 F.2d 892, 898-99 (9th Cir. 2013). This case squarely presents the issue of whether the judiciary is required to cede its power to interpret administrative regulations to administrative agencies.

Auer [2] deference is "contrary to [the] fundamental principles of separation of powers." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2254 (2011) (Scalia, J., concurring). The plan of government outlined in the Constitution relies on the separation of powers to protect individual liberty. To maintain the required separation, each branch of government must jealously guard its powers to prevent encroachment. This Court has recognized not only its own specific powers under this arrangement, but that is has a duty to exercise those powers.

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[2] *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

Granting controlling deference to an executive agency's interpretation of its own regulations is an abdication of that duty. Controlling deference excludes any judicial involvement in the interpretation of an agency's previously promulgated regulations. The agency is left free to view conduct occurring after the regulation was promulgated and determine in hindsight if that conduct should have been included in the scope of the regulation. Viewed from the perspective of constitutional structure, *Auer* deference amounts to an unsound allocation of power and grants agencies binding authority over judicial functions. Active and meaningful judicial review would instead provide a constitutionally required check on an agency's interpretation of its own regulations. It would also incentivize agencies to enact clear and unambiguous regulations because they then bear the burden of saying what they mean when promulgating regulations. This serves Congress's aim that agencies promulgate their rules pursuant to procedures that provide for public participation and appropriate review.

Members of this Court have continued to express doubts about *Auer* deference. Some of these doubts have led the Court to create numerous carveouts limiting the rule's applicability. These exceptions, however, do not address the fundamental concern of separation of powers. This Court should accept review in this case to reconsider *Auer* controlling deference.

ARGUMENT

I. Review Is Necessary in this Case To Preserve Separation of Powers—A Vitally Important Structural Limitation on Government Power.

Separation of powers is an essential structural feature of the Constitution and is necessary to prevent arbitrary government. The Founders did not invent this concept. They relied heavily on the writings of Montesquieu, Blackstone, and Locke for their theory about how to design government. *E.g.*, John Adams, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, (1797) Letter XXVII, vol.1 at 154 (Lawbook Exchange, Ltd. 2001) . Montesquieu explained that, "there is no liberty, if the judiciary power be not separated from the legislative and executive." Montesquieu, THE SPIRIT OF THE LAWS (1748) bk. XI, ch. 6, at 152 (Franz Neumann ed. & Thomas Nugent trans., 1949). He cautioned that if judicial power is joined with legislative power, "the life and liberty of the [governed] would be exposed to arbitrary control." Likewise, if judicial power were joined to the executive power, "the judge might behave with violence and oppression." *Id.* This, he said, "would be an end of everything." *Id.*

There was little argument during the ratification challenging the view that separation of powers needed to be an essential component in any new federal government. Even before a national constitution was ever considered, the Founding generation made sure that newly formed state governments were based on separated powers.

The Virginia Declaration of Rights in June of 1776 that insisted that "legislative and executive powers ... should be separate and distinct from the judiciary. Vir. Dec. of Rights, 1776, in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Vol. VIII at 530 (John P. Kaminski, et al. eds. 2009). The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise powers properly belonging to the other." Vir. Const. of 1776, in THE DOCUMENTARY HISTORY, *supra*, Vol. VIII at 533.

The Massachusetts Constitution of 1780 contained a similar provision, and added the purpose of separated powers "to the end it may be a government of laws, and not men." Mass. Const. of 1780, Part I, Art. XXX, in THE DOCUMENTARY HISTORY, *supra*, Vol. IV at 445.

The denial of separated powers was among the complaints against the crown listed in the Declaration of Independence. 1 Stats 1 (noting obstruction of the administration of justice and making judges "dependent on his will alone"). Justice Story notes that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government. Joseph Story, COMMENTARIES ON THE CONSTITUTION, section 519 (1833) (Little Brown & Co. 1858).

Indeed, there was no debate about whether the separation of powers would be a feature of the new government. Instead, the question was whether the proposed constitution provided sufficient separation.

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient. Such a prohibition was a mere "parchment barrier" between the branches. THE FEDERALIST No. 48 (James Madison) (Clinton Rossiter ed,. 1961) at 166. Thus, the Constitution was designed to give the members of each branch the power to resist encroachment on their powers. THE FEDERALIST No. 51, *supra* at182.

The judicial power proposed in the new Constitution did engender some controversy. During the ratification debates, the Anti-Federalists argued that the judicial branch had too much power. *E.g.*, Brutus No. XI, in DEBATE ON THE CONSTITUTION, Bernard Bailyn, ed., (Library of America, 1993) at 129; Brutus No. XII, *supra* at 171. Alexander Hamilton argued, however, that this power of judicial review was necessary to check the political branches. THE FEDERALIST No. 78, *supra*, at 287. A robust judicial power is necessary if the courts are to serve as "bulwarks" for liberty. *Id*. This requires that judges have the power to "declare the sense of the law." *Id*. [3]

From the early days of the republic, this Court has agreed that the courts have both the power and

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[3] *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 75 (Max Farrand ed., 1966) (July 21, 1787) (remarks of Elbridge Gerry); 75 (remarks of Caleb Strong) ("[T]he power of making ought to be kept distinct from the power of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken in framing the laws."); 79-80 (remarks of James Wilson) (arguing that the "evil" of mixing legislation and exposition "would be overbalanced by the advantages promised by the expedient").

duty to interpret the law. Most famously in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), this Court declared "[i]t is emphatically the province and duty of the judicial department to say what the law is."

The rise of the modern administrative state tests the limits of the Constitution's structural separation of powers. It does not, however, change the judiciary's duty to "say what the law is." Indeed, the Administrative Procedure Act (APA) instructs 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.

II. This Court Should Reconsider *Auer* in Light of the Inconsistency Between Controlling Deference and Separation of Powers.

The division of interpretive authority between courts and administrative agencies is one of the principal challenges in administrative law. This Court's precedent holds that agencies, rather than the judiciary, have the primary role in determining the meaning of ambiguous regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer*, 519 U.S., at 461-62. The *Seminole Rock* standard, commonly referred to as *Auer* deference, generally calls for controlling deference to be given to an agency's interpretation of its own ambiguous regulation. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Auer*, 519 U.S., at 461-62. The agency, not the courts, has the last word on the interpreta-

tion of those regulations. This creates separation of powers problems regardless of whether the interpretation is prospective or retrospective.

Retrospective interpretation allows the agency to issue an ambiguous regulation and then later determine what conduct should fall within the scope of the regulation. Under *Auer*, courts defer to the agency interpretation without regard to whether fair notice of the interpretation was given during the notice-and-comment process. Prospective interpretation also ignores the notice-and-comment process. Instead of following rulemaking procedures, an agency can simply issue an "interpretation" so that the ambiguous regulation now covers the conduct the agency wishes to regulate.

A. Rather than preserving the integrity of the separation of powers, *Auer* deference combines all essential governmental powers in the same body—the unelected agency.

Auer allocates the judicial role of interpretation to an agency that promulgates an ambiguous regulation. In that situation the agency combines the delegated legislative authority to promulgate a regulation, the executive power to implement the regulation, and the judicial power to interpret the regulation. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk America*, 131 S. Ct., at 2266 (Scalia, J., concurring). For when the executive and judicial powers are united in the same body, "there can be no liberty." Montesquieu, *supra*, at 151.

This merging of legislative and interpretive functions raises separation of powers concerns that are unique to *Auer*. *Auer* leaves in place no independent judicial interpreter, allowing agency action to go essentially unchecked. Indeed, in *Chase*, this concept was pushed one step further; not only was the agency action unchecked, but the Court's invitation to the agency to submit its views on the meaning of a regulation was in effect an invitation to the agency to decide the case. *Chase Bank*, 131 S. Ct., at 880 (in response to the agency's *amicus* brief, the Court determined "we need look no further in deciding this case").

Under *Auer* all essential governmental powers are combined in the same body. This arrangement contradicts the Founders commitment to the principle of separation of powers. Thus, if we are to maintain the separation of powers called for in the Constitution, the Court should grant review to reconsider whether *Auer* deference and constitutionally mandated separation of powers can coexist.

B. Judicial review does not intrude on an agency's authority to make policy determinations; agencies create when a regulation is enacted.

Auer deference has been criticized as a doctrine without a persuasive justification. Justice Scalia has noted that in the first case to apply controlling deference, *Seminole Rock*, the Court offered no justification whatsoever: "just the *ipse dixit* that 'the administrative interpretation ... becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339-40 (2013) (Scalia, J., dissenting

in relevant part). Justice Scalia further noted that subsequent cases provide only feeble explanations. *See Decker*, 133 S. Ct., at 1339-40 (2013) (Scalia, J., dissenting in relevant part).

Some cases posit that the agency, the drafter of the regulation, has some special insight into its intent when enacting the regulation. *E.g., Martin v. Occupational Safety and Health Rev. Commn.*, 499 U.S. 144, 150-53 (1991). The implied premise of this argument is that courts are looking for the agency's unexpressed intent in adopting a regulation—this is false. *Decker*, 133 S. Ct., at 1339-40 (Scalia, J., dissenting in relevant part). What is true of statutes is true of regulations: courts "do not inquire [into] what the legislature meant; [courts] ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). Whether laws are made by Congress or an administrative agency, courts are bound by the language of the laws, not by "the unexpressed intention of those who made" it. *Decker*, 133 S. Ct., at 1339-40 (Scalia, J., dissenting in relevant part). This is even more important for administrative agencies. Agencies are required to give proper notice of proposed rules and must solicit and consider comments from the public and the regulated community. 5 U.S.C. §553; *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3rd Cir. 2011). A final rule that departs too far from the published proposed rule is invalid. *See AFL-CIO v. Donovan*, 757 F.2d 330, 337-38 (DC Cir. 1985). Only the texts of the final and proposed rules are reviewed in this process. Unexpressed agency intent is irrelevant to the validity of the regulation.

The issue in the interpretation of an ambiguous regulation is quite simply "the judicial function of deciding the meaning of a legal text." *Decker*, 133 S. Ct., at 1339-40 (2013) (Scalia, J., dissenting in relevant part). The judicial role of interpretation is to determine the fair meaning of the rule: "to 'say what the law is,' not to make policy, but to determine what policy has been made and promulgated by the agency, to which the public owes obedience." *Id.* Thus, it is time for this Court "to presume that an agency says in a rule what it means, and means in a rule what it says there." *Id.*, at 1344 (Scalia, J., dissenting in relevant part).

C. Active judicial review incentivizes agencies to promulgate unambiguous regulations that give fair notice to the regulated community.

Auer's constitutional validity should be viewed in light of the incentives it supplies to an agency engaged in rulemaking. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 616-17 (1996).

Auer relieves an agency of the burden of "the imprecision that it has produced." Manning, *supra*, at 617. The burden instead falls on the regulated community. 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 U. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (*Auer* deference undermines the objective of promulgating regulations that are "clear and definite so that affected parties will have

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

Agency interpretations of the kind permitted by *Auer* eliminate any incentive to follow the congressionally mandated rule-making procedure. Sheltered by *Auer* deference, agencies are free to adopt vague regulations and then to interpret them at their convenience later. *Decker*, 133 S. Ct., at 1341 ("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.") (Scalia, J., dissenting in relevant part).

Active judicial review would return the burden back to the agency to follow the congressionally mandated notice and comment procedure to enact binding legal norms. The agency would shoulder the risk that an independent judicial interpreter might construe an ambiguous regulation differently from the agency's own understanding or preference. Thus agencies would have an incentive to promulgate clear rules that clearly describe the conduct regulated. Manning, *supra*, at 647-48; *see* also John Locke, SECOND TREATISE OF GOVERNMENT, para. 137, at 72 (1690) (C.B. MacPherson ed., 1980) (Locke argued that to avoid arbitrary government, "the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions."); A.V. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (8th ed. 1915) ("[W]herever there is discretion there is room for arbitrariness, and ... in a republic no less than under a monarchy discretionary authority on the

part of the government must mean insecurity for legal freedom on the part of its subjects.").

"[H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 133 S. Ct., at 1341-42 (2013) (Scalia, J., dissenting in relevant part).

III. Members of this Court Have Expressed Doubts about the *Auer* Deference Doctrine.

Members of this Court have signaled growing dissatisfaction with *Auer* deference. In a dissenting opinion in *Thomas Jefferson University*, Justice Thomas, joined by Justices Stevens, O'Connor, and Ginsburg, expressed concerns over the consequences of encouraging agencies to promulgate vague regulations. In particular, the dissent argued that by deferring to an agency's interpretation of a "hopelessly vague regulation," the Court enables the agency action to "replace[ ] statutory ambiguity with regulatory ambiguity." 512 U.S., at 525 (Thomas, J., dissenting). This "disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to 'resol[ve] . . . ambiguity in a statutory text.'" *Id.* (Thomas, J., dissenting) (quoting *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

Justice Scalia also acknowledged doubts about the validity of *Auer* deference in his concurring opinion in *Talk America Inc. v. Michigan Bell Telephone Co.* He explained that it is "contrary to fundamental principles of separation of powers to permit the per-

son who promulgates a law to interpret it as well." *Talk America*, 131 S. Ct., at 2266 (Scalia, J., concurring). Furthermore, this Court in *Christopher* acknowledged Justice Scalia's criticism that Auer "frustrat[es] the notice and predictability purposes of rulemaking." *Christopher*, 132 S. Ct., at 2168.

Finally in *Decker*, members of this Court openly acknowledged that under the proper circumstances it may be time to reconsider *Auer*. Justice Scalia argued that the time was right to reconsider *Auer*. *Decker*, 133 S. Ct., at 1339 (Scalia, J., dissenting in relevant part) ("[T]he circumstances of these cases illustrate *Auer*'s flaws in a particularly vivid way."). Chief Justice Roberts, who authored a concurring opinion joined by Justice Alito, also took the position that the Court should be prepared reconsider *Auer* deference. *Id.*, at 1338-39 (Roberts, C.J., concurring) ("It may be appropriate to reconsider that principle [set forth in *Bowles v. Seminole Rock* and *Auer v. Robbins*] in an appropriate case. But this is not that case [because the issue was not properly presented by the parties].")

Even beyond express calls to reconsider *Auer*, the Court's struggles with this doctrine is evinced by the numerous limitations to the rule's applicability. For example, *Auer* deference has been found inappropriate where the 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." *Christopher*, 132 S. Ct., at 2166 (internal quotation marks omitted). Circumstances that may indicate an absence of "fair and considered judgment" include the

appearance that: (1) an agency's subsequent interpretation conflicts with a previous interpretation; (2) an agency's interpretation is merely a "convenient litigating position"; or (3) an agency's interpretation is merely a "post hoc rationalization" designed to defend past agency action from attack. *Id.*, at 2166; *see Thomas Jefferson U.*, 512 U.S., at 515; *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 213 (1988).

Moreover, *Auer* does not apply to an agency's interpretation of unambiguous regulations, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), regulations that merely "parrot" statutory language, *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), to a changed agency interpretation that creates "unfair surprise," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (deferring to new interpretation that "create[d] no unfair surprise" because the agency had proceeded through notice-and-comment rulemaking), or to an "interpretation of ambiguous regulations [that would] impose potentially massive liability on [a regulated entity] for conduct that occurred well before that interpretation was announced." *Christopher*, 132 S. Ct., at 2167-68 (It is unreasonable "to require 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").

These limitations however, do not address the separation of powers problems created by *Auer*. This case presents this Court the opportunity to address these issues.

CONCLUSION

The Court should grant review of this case to reconsider the doctrine of deference to administrative agency interpretations of ambiguous regulations.

DATED: March, 2014.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave., NE
Washington, D.C.
20002

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001

KAREN R. HARNED
NFIB Small Bus. Legal Center
1201 F St., NW, Ste 200
Washington, DC 20004

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law at Chapman Univ.
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amici Curiae