Nos. 13-1041, 13-1052

# In the Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF THE DEPARTMENT OF LABOR, *ET AL.*,
*Petitioners*,

v.

MORTGAGE BANKERS ASSOCIATION, *ET AL.*,
*Respondents*.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,
*Petitioners*,

v.

MORTGAGE BANKERS ASSOCIATION,
*Respondent*.

*On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

**BRIEF FOR THE THOMAS JEFFERSON INSTITUTE FOR PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

Arthur G. Sapper
M. Miller Baker
*Counsel of Record*
Nicholas Grimmer
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

*Counsel for Amicus Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER AUTHORITIES**

## INTEREST OF AMICUS CURIAE[1]

The Thomas Jefferson Institute for Public Policy (the "Institute") is a non-profit, non-partisan public policy organization with the goal of generating policy reform proposals for government and promoting policies that facilitate economic development in Virginia. The question presented in this case involving the Administrative Procedure Act is of vital importance to every business, entity, and person in Virginia that is regulated by the federal government. The Institute submits this brief for the purpose of ensuring greater transparency and accountability on the part of federal agencies whose actions affect the economic well-being of millions of Virginians.

## SUMMARY OF THE ARGUMENT

The core of the Secretary of Labor's argument for reversing the D.C. Circuit's decision below is that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., (APA)'s requirements for notice and comment rulemaking do not apply to agency interpretative rules, because "unlike binding legislative rules, they do not have the force and effect of law." Pet. Br. at 11. The Secretary's argument, however, elides the elephant in courtroom: the deference doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997), under which interpretative rules such as the one at issue in this case have for all practical purposes attained the same force and effect of law as legislative rules.

---

[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Counsel for petitioners and respondent consented to the filing of this brief.

Inasmuch as the *Auer* doctrine confers on interpretative rules the force and effect of law characteristic of legislative rules, the APA necessarily requires that such rules not be changed except after notice and the opportunity for public comment. *See* 5 U.S.C. § 553. So long as federal courts are obligated to afford *Auer* deference to interpretative rules, the decision below should stand. Put another way, the price of reversing the decision below is the overturning of *Auer*, which the Secretary presumably is unwilling to pay.

Amicus respectfully submits that *Auer* violates the separation of powers and is inconsistent with the text and legislative history of the APA, and as discussed below, should be overruled. But as no party has called for overruling *Auer* and its continuing validity is beyond the scope of the question presented, this Court should affirm the decision below, and expressly reserve the question of *Auer's* validity for another day.

## ARGUMENT

### Inasmuch as *Auer* Required the Court of Appeals to Defer to Interpretative Rules as Much as to Legislative Rules, the Decision Below Should be Affirmed

A central pillar of the Secretary of Labor's position is that the APA's requirements for notice and opportunity for public comment do not apply to interpretive rules because they lack "the force and effect of law." Pet. Br. 11, 17, 21, 30, 33. The Secretary argues that interpretive rules "merely [reflect] the agency's present belief concerning the meaning of . . . legislative rules," *id*. at 21, and that, "unlike binding

legislative rules, they do not have the force and effect of law," *id*. at 11; *see also id.* at 21.

The Secretary is incorrect, for under decisions such as *Auer v. Robbins*, 519 U.S. 452, 461 (1997), interpretive rules have in all but name attained the same force and effect of law as legislative rules.

Under *Auer*, an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its regulation is controlling "unless an alternative reading is compelled") (quote marks omitted). Indeed, this Court will apply *Auer* deference even to agencies' interpretations of regulations adopted without notice-and-comment rulemaking or formal adjudication. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (recognizing that *Auer* deference would be afforded to a mere opinion letter interpreting a regulation if the regulation were ambiguous).[2]

---

[2] *See also Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) ("Although . . . *Christensen* . . . [held] that agency interpretations of *statutes* must derive from some formal agency action before judicial deference is due, the [Supreme] Court treated *Auer* . . . as still good law" with respect to agency interpretations of regulations) (emphasis added). Later cases held that informally-adopted agency interpretations of statutes might also receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g.*, *Barnhart v. Walton*,

*Auer* is widely considered more deferential than, and certainly at least as deferential as, the "reasonableness" test applied under *Chevron*[3] to agencies' statutory interpretations embodied in legislative rules. *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("It is sometimes said that [*Auer*] deference is even *greater* than" *Chevron* deference) (emphasis in original); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) ("Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms.") (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.").[4] As such, "[t]he only

---

535 U.S. 212, 221-22 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[4] *See also* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1343 (2001) ("[The *Auer* standard] is clearly 'strong' deference, equivalent to, if not stronger than, *Chevron* deference."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4 (interpreting Supreme Court precedent as potentially establishing "that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus greater legal force) than does a legislative rule"); *id.* at 7 n.13 (summarizing that "the judicial deference accorded agency 'interpretations' of regulations is at least as great as that accorded legislative rules"); *see also* HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 199-200 (2d ed. 2013) ("It has been suggested that the deference due an agency's interpretation of its

difference [between judicial review of legislative and interpretive rules is] whatever difference may exist (if, in practice, there is any) between 'arbitrary-or-capricious' review . . . and 'reasonableness' review. . . ." Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry,* 40 ADMIN. L. REV. 121, 134 (1988). With respect to interpretive rather than policy questions, the two inquiries appear to converge. *See Judulang v. Holder*, 132 S.Ct. 476, 483 & n.7 (2011) (noting that analysis of arbitrary or capricious under the APA "would be the same" as *Chevron* step two, which asks whether an agency's interpretation of a statute is "arbitrary or capricious in substance").

But giving interpretive rules under *Auer* at least as much deference as legislative rules confers on them "the practical force of law." Anthony, *The Supreme Court and the APA*, *supra* note 4, at 4. "In terms of their practical binding effect, . . . interpretive rules . . . [given such deference] would become virtually indistinguishable from legislative rules. . . . [A]s a practical matter, the agency would be able to bind the court and the public . . . ." Anthony, *Which Agency Interpretations Should Get Judicial Deference?*, *supra*, at 134; *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57 (1990) ("[A] practice of routine acceptance [of nonlegislative rules] would [permit agencies to] bind the public"). This effect arises because *Auer* provides the public no more recourse against an interpretative rule than against the legislative rule it

---

own regulations is similar to the *Chevron* Step Two deference afforded an agency's interpretation of its authorizing statute.").

construes; it thus impels the public to accede to the interpretive rule as if it were the legislative rule itself; as Professor Anthony explains, although interpretive rules are not supposed to "bind private parties,"

> that would be the result if *Chevron* deference were accorded to interpretive rules, since the courts would have to accept them unless they were unreasonable, very much as they must do with legislative rules. In terms of their practical binding effect, then, interpretive rules would become virtually indistinguishable from legislative rules.

Anthony, *Which Agency Interpretations Should Get Judicial Deference?*, *supra*, at 134 (1988).[5]

And quite contrary to the Secretary's argument here, this Court has, at his urging, expressly characterized the result of his reasonable interpretation of a legislative rule—in a mere charging document—as "lawmaking," the product of which must be law. *See Martin v. OSHRC*, 499 U.S. 144, 151, 153, 157 (1991) (describing the Secretary's "delegated

---

[5] *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 628 (1996) (with *Auer* deference, "[a]n agency can . . . bind the court and the parties"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 569 (2000) (opining that the D.C. Circuit's view "may have been influenced by . . . [the requirement] to confer *Chevron* deference on an interpretative rule").

lawmaking powers" and "interpretive lawmaking power").[6]

Inasmuch as *Auer* confers on interpretive rules the force and effect of law characteristic of legislative rules, such rules may not be amended except as legislative rules are, *i.e.*, after notice and opportunity for public comment. So long as the federal courts are required to afford *Auer* deference to interpretative rules—and to thereby bind courts and citizens—the D.C. Circuit's holding should stand. No other result would vindicate Congress's command that agencies make law only through notice-and-comment rulemaking. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03, 312-15 (1979). The "power to make law depends upon using the *procedure and format* that Congress has specified for making law, usually notice-and-comment." Anthony, *The Supreme Court and the APA*, *supra* note 4, at 11 n. 29 (emphasis in original).

Although *amicus* would submit that *Auer* is inconsistent with the separation of powers required by the Constitution,[7] inconsistent with Congress's intent that judicial review of interpretive rules under the APA be "plenary,"[8] and inconsistent with the text and

---

[6] *See also* Anthony, *The Supreme Court and the APA*, *supra* note 4, at 20-23 (criticizing *Martin*'s reliance on the charging document and opining that *Martin* "represents an even more abject deference . . . than acceptance of completed actions based upon agency documents that interpret regulations").

[7] *See* Manning, *supra* note 5.

[8] *See* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., 2d Sess., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46,

legislative history of the APA's judicial review provision,[9] and although *amicus* would submit that

---

S. DOC. NO. 248 ("APA LEG. HIST."), at 18 (1946) (exemption from notice and comment because, *inter alia*, "'interpretative' rules . . . are subject to plenary judicial review"); FINAL REP. OF ATT'Y GENERAL'S COMM. ON ADMIN. PROC. 27 (1941) (stating that "the courts "will be influenced though not concluded by" interpretive rules); *see also Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (administrative rulings, interpretations and opinions are "not controlling upon the courts" but may have "power to persuade"); Robert A. Anthony and Michael Asimow, *The Court's Deferences – A Foolish Inconsistency*, 26 ADM. & REG. LAW NEWS 10-11 (2000) (*Auer* "contradicts the reason" for 5 U.S.C. § 553's interpretive-rule exception—"that such rules are subject to 'plenary judicial review'").

[9] *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998). Under 5 U.S.C. § 706 courts are, without distinction between constitutional and non-constitutional questions, to decide "all" questions of law, not just whether the agency's interpretation is "plainly erroneous." 5 U.S.C. § 706. Representative Francis Walter, author of H.R. REP. NO. 79-1980 (1946), APA LEG. HIST., *supra*, at 235, and a principal APA drafter, ATT'Y GENERAL'S MANUAL ON THE APA at 5 (1947) (speaking of the "McCarran-Sumners-Walter bill"), told the House that § 706 "requires courts to determine *independently* all relevant questions of law . . . ." APA LEG. HIST., *supra,* at 370 (emphasis added). *See also* S. REP. NO. 79-752, at 30 (1945) ("[Q]uestions of law are for the courts rather than agencies to decide in the last analysis . . . ."), *reprinted in* APA LEG. HIST., *supra*, at 214; H.R. REP. NO. 79-1980, at 44 (1946), APA LEG. HIST. at 278 (same). Although it has been said that courts "do not ignore that command when we afford an agency's statutory interpretation *Chevron* deference; we respect it," *City of Arlington v. FCC*, 133 S.Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting), a court would not decide "all" questions of law, or act independently, if it treated the agency as "the authoritative interpreter," *Nat'l Cable & Telecomms. Assn. v Brand X Internet Servs.*, 545 U.S. 967, 983 (2005), or limited its

*Auer* should be overruled for the reasons stated in *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part), no party has so requested and the Court has not invited briefs on that issue. Accordingly, the judgment of the Court of Appeals should be affirmed.

## CONCLUSION

For the reasons provided above, this Court should affirm the decision below.

Respectfully submitted,

Arthur G. Sapper
M. Miller Baker
*Counsel of Record*
Nicholas Grimmer
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

*Counsel for Amicus Curiae*

---

inquiry to the reasonableness rather than the correctness of the agency's view. *See* Duffy, *supra*, at 196 (under *Chevron*, a court "does not itself *decide* the meaning of the statute; it determines only that the statute is ambiguous and then allows the agency to determine meaning") (emphasis in the original).