No. 18-15

IN THE

pìéêÉãÉ=`çìêí=çÑ=íÜÉ=råáíÉÇ=pí~íÉë=

JAMES L.

TABLE OF CONTENTS

Statutes

Regulations

Other Authorities

INTEREST OF AMICI CURIAE *

The following state and local government associations respectfully submit this amici curiae brief in support of petitioner:

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and st affs of the Nation's fifty States, its Commonwealths, and its Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government . CSG is a region-based forum that fosters the exc hange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international op-

pressi8tional Confere4e of State0.0005 Tc Fin002 OTc 0-13.Asates f-1.215 0 T

finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local go vernment attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only natio nal organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

Abandoning Auer will have the salutary effect of incentivizing federal agencies to use the notice-and-comment process when imposing burdens on state and local governments—almost certainly resulting in regulations that are clearer,

leveraged to achieve national objectives while remaining cognizant of state and local prerogatives—and safeguarding individual liberty all the while.

The Auer regime, however, turns collaborative federalism on its head. By demanding deference to an agency's interpretation of its own regulations, Auer provides a powerful incentive for agencies to abandon the notice-and-comment process that facilities dialogue among federal, state, and local governments. This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender. Worse still, when agencies do engage in notice-and-comment rulemaking under the Auer regime, they do so knowing that by crafting ambiguous regulations they can expand their own power to unilaterally dictate federal policy through subsequent interpretation. In this way, Auer threatens not only separation of powers but also federalism—and, ultimately, individual liberty. Auer should be overruled.

ARGUMENT

I. Cooperative Federalism Depends on Mutual Participation by Federal, State, and Local Governments.

When cooperative federalism works properly, federal, state, and local governments each contribute their unique advantages to achieving shared, national objectives. While the federal government sets nationwide policies and marshals resources, state and local governments deploy their specialized knowledge of local circumstances to implement those policies effectively, efficiently, and consistently with their own priorities. See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289 (1981) ("[T]he Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."). When cooperative federalism goes wrong, however, state and local governments become saddled with unwieldy, intrusive, and ineffectual federal programs that cost money and time already in all-too-short supply.

A. Federal Law Informs State Laws and Imposes Affirmative Obligations on State and Local Governments.

Although States are sovereign, state and local governments (and state and local laws) are deeply intertwined with federal law—including federal agency rulemakings.

First, state and local governments may be charged with "implementing purely federal law, acting as a kind of contractor for [a] federal program." Curing the Blind Spot, supra, at 1288. When invoking Congress's Spending Clause power, for instance, the federal government provides state and local governments with

funds to pursue specified p olicies, but attaches strings to those funds—requiring their use within federal standards to achieve federal policies subject to federal oversight. For example, under the Social Security Disability Insurance program, state agencies are tasked with making initial claims determinations under standards that are established solely by federal law. See id. at 1289 & n.45.

Second, state and local governments may implement their own laws subject to federal requirements and oversight—for example, where the federal government provides funding to States contingent on their enacting laws that satisfy certain minimum standards. See id. at 1288–89. There is no shortage of examples of federal programs that follow this framework: the Temporary Assistance to Needy Families program, 42 U.S.C. §§ 601–619; Medicaid, 42 U.S.C. §§ 1396–1396w-5; public housing programs, 42 U.S.C. § 1437(g); and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 –1482.

Third, state law may be implemented "side-by-side with federal law, subject to federal requirements and oversight," such as where state law provides a component of a broader federal program. Curing the Blind Spot , supra, at 1288–89. For example, the Clean Air Act, 42 U.S.C. §§ 7401– 7671q, requires States to enact and oversee "state implementation plans," which States have wide discretion to shape so long as they are deemed likely to ensure the State's compliance with national air quality standards set by the EPA. See 42 U.S.C. § 7410.

Under each of these three models, state and local governments must first know what federal law is for

cooperative federalism to work. The notice-and-comment rulemaking required by the Administrative Procedure Act ("APA"), facilitates this result by (i) ensuring that States and localities have notice of impending changes to federal policies and (ii) providing a forum in which they can seek to influence, clarify, and improve new policies. See U.S.C. § 553.

B. State and Local Governments' Participation in Agency Rulemaking Improves the Quality and Efficacy of Federal Law.

Cooperative federalism is not a one-way street. While numerous federal programs charge state and local governments with implementing federal policy, they frequently give state and local governments a voice in shaping those policies, as well. This benefits not only States and localities, but also the Federal Government, as States and localities bring new perspectives and localized knowledge to nationwide problems. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) ("[Federal actors] have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible * * * [and] hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.").

1. In 2011, the EPA and U. S. Army Corps of Engineers released proposed guidance concerning the definition of "waters of the United States" under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq.,

which expanded the waters subject to federal jurisdiction by 17 percent. See Letter Re: Dkt. No. EPA-HQ-OW-2011-0409, 3 (July 29, 2011). [1]

Amicus the National Association of Counties—which is "the only national organization that represents county governments in the United States"—suggested that the guideline be withdrawn. Id. at 1. As the Association explained, counties were "coping with shrinking budgets," and many were "laying off their staffs, delaying or cancelling capital infrastructure projects, cutting services, and fighting to keep firefighters and police on the streets." Ibid

2. In 2004, the Department of Health and Human Services proposed a rule establishing a three-year recordkeeping requirement for drug manufacturers under the Medicaid drug rebate program. After state law enforcement officials informed the Department that allowing manufacturers to destroy records after only three years would materially reduce States' ability to review such records to prosecute and deter fraud, the agency reconsidered the requirement, ultimately opting for a 10-year recordkeeping requirement. Medicaid Program: Time Limitation on Recordkeeping Requirements Under the Drug Rebate Program, 69 Fed. Reg. 508, 510 (Jan. 6, 2004).

3. In 2016, the Department of Justice proposed a rule that would have required state and local government websites to be accessible under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. See Nondiscrimination on the Basis of Disability;

RIN 1190 AA65, 1 (Oct. 7, 2016).[2] Two months later, the Department withdrew the proposed rule. See Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions , 82 Fed. Reg. 60932 (Dec. 26, 2017).

4. In 2016, the Fede ral Emergency Management Agency ("FEMA") proposed a rule that would have required States to pay a deductible before receiving federal aid to repair public infrastructure in the wake of a disaster. Establishing a Deductible for FEMA's Public Assistance Program , 81 Fed. Reg. 3082 (Jan. 20, 2016). After receiving comments from 28 States and 28 local jurisdictions, FEMA acknowledged that the proposal would impose serious "burdens, either financial or administrative, * * * [on] the States." Establishing a Deductible for FEMA's Public Assistance Program, 82 Fed. Reg. 4064, 4064, 4070 (Jan. 12, 2017). FEMA issued a supplemental notice in 2017 addressing those concerns. Ibid.

* * *

Each of these examples highlights the importance of state and local participation in formulating federal regulations. As a result of input from States and localities, federal policymaker s were able to avoid disastrous missteps while stre ngthening the bond between federal and state governments. Regrettably, however, under the Auer regime, federal agencies

[2] Available at http://static1.1 .sqspcdn.com/static/f/624306/27293532/1476719964160/ADA+Accessibility+Comments_as_filed.docx.pdf?token=fUEpD9Lf6c q0kLrEswOoG2o6%2FBk%3D.

have increasingly favored unilateral action at the expense of collaboration with state and local governments.

II. The Auer Regime Deprives State and Local Governments of the Opportunity to Participate in Federal Policy-Making.

The APA ensures collaboration between federal agencies and state and local governments by requiring agencies to promulgate substantive regulations through notice-and-comment rulemaking. See 5 U.S.C. § 553. Auer, however, dangles a tempting alternative before federal regulators. Under the Auer regime, when agencies announce new policies through purported interpretations of already-promulgated regulations, those agencies can avoid consulting with States and localities entirely.

The consequences are profound—and profoundly dangerous. Because agency interpretations of their own regulations are often announced in briefs, letters, and memoranda—rather than developed through public, deliberative, and iterative rulemaking processes—States and localities often fail to receive notice of substantive changes to interpretations of federal laws that they enforce.

Even when States and localities are aware of an agency's new interpretation, they cannot seek the clarification and elaboration that is available through notice-and-comment rulemaking—leaving them to guess as to the meaning and application of federal law. Above all, state and local governments are deprived of the opportunity to shape federal regulations—which they are often charged with enforcing—by bringing to bear their on-the-ground knowledge

and perspectives. It is no wonder that less efficacious and more onerous regulation s are often the result. And the ease with which ag encies can change policies by simply reinterpreting their own regulations means that these changes happen more frequently—upsetting settled expectations and breeding uncertainty among regulated communities.

The Auer regime thus puts state and local governments to a Hobson's choice. They can challenge ill-considered agency interpretations in court, but this is costly and time-consuming—and under Auer, courts can overturn an interpretation only if it reflects an unreasonable reading of the regulat ion. Or, assuming it is even an option, state and local governments can disengage from cooperative relationships with the federal government altogether—but risk the loss of critical financial support for important public programs. Either way, they must attempt to adjust to the new scheme while preparing contingency plans should the next court ruling or the next administration rewrite the policy yet again.

These concerns are not hypothetical. Indeed, they are becoming more acute as federal agencies exploit the advantage Auer affords them to promulgate more and more ambiguous regulations that in turn expand their capacity to act unilaterally.

1. In 2015 and 2016, the Department of Labor under President Obama issued two interpretations that expanded the scope of "joint employment" and "inde-

abused to evade wage-and-hour laws. Michael J. Lotito & Ilyse Schuman, DOL Withdraws Joint Employer and Independent Contractor Guidance ("DOL Withdraws "), (June 7, 2017).[3]

Less than a year into President Trump's Administration, the Secretary of Labor rescinded those interpretations and reverted to the prior definitions of joint employment and independent contractor status. See News Release, Office of Public Affairs, US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017).[4] The Secretary noted that any further modifications of the standards wo uld issue in Opinion Letters. DOL Withdraws , supra.

2. In January 2014, the Civil Rights Divisions of the Departments of Justice and Education issued a "Dear Colleague" letter addressing disciplinary practices in schools. The letter informed schools across the country that the Departments would investigate "public reports of racial dispar ities in student discipline," and if substantiated, those practices could be treated as a violation of federal civil-rights laws. Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014).[5]

---

[3] Available at http://www.littl er.com/publication-press/publication/dol-withdraws-joint-emp loyer-and-indepe ndent-contractor-guidance.

[4] Available at http://www.dol.go v/newsroom/releases/opa/opa20170607.

[5] Available at http://www2.ed.gov/ about/offices/list/ocr/letters/colleague-201401-title-vi.html.

Four years later, the same agencies rescinded the letter, explaining that "States and local school districts play the primary role in establishing educational policy," and that "the [former] Guidance and associated documents advance policy preferences and positions not required or contemplated by Title IV or Title VI." Dear Colleague Letter (Dec. 21, 2018).[6] It is not clear whether any States or localities were consulted before either the 2014 or 2018 guidance was issued.

See Retention & Recruitment for the Volunteer Emergency Services, at 19 (2004).[8]

4. In 2016, the Department of Commerce interpreted one of its regulations to conclude that FEMA's implementation of the National Flood Insurance Program in Oregon would jeopardize 16 endangered species, thereby compelling Oregon communities to take additional, costly measures before they would be permitted to participate in the flood insurance program. Complaint, Oregonians for Floodplan Protection et al. v. Dep't of Commerce, 1:17-cv-01179 (D.D.C. June 15, 2017).

5. The U.S. Army Corps of Engineers recently rescinded a 2009 interpretation making qualification for federal disaster assistance funds contingent on States and localities clearing levees of vegetation. Jeff Miller, Army Corps Reverses Misguided Policy Requiring Clearing Trees from Levees (Mar. 25, 2014).[9] The Corps withdrew the interpretation only after California agencies and environmental groups explained that clearing vegetation would harm endangered species, increase the risk of levee failures, and cost $7.8 billion. Ibid.

6. A 2005 Department of Labor interpretation respecting stipends offered by schools to staff who volunteer as coaches caused so many practical problems that some schools eliminated the stipends—or even athletics programs—entirely. Brief of Amici Curiae

---

[8] Available at http://www.in.gov./dhs/files/retainrecruit.pdf.

[9] Available at https://www.biol ogicaldiversity.org/news/press_releases/2014/levees-03-25-2014.html.

Nat'l Sch. Bds. Ass'n et al. at 14–19, Purdham v. Fairfax Cty. Sch. Bd ., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408).

7. An informal opinion letter issued by the Department of Education in 2016 opined that Title IX requires public schools to provide students access to bathrooms based on their gender identity rather than their biological sex. See Joint "Dear Colleague" Letter on Transgender Students (May 13, 2016).[10] This interpretation was then invoked in a suit by a student against a school district, even though, as a coalition of States explained, that interpretation was adopted after the defendant school district allegedly violated it. See Brief of Amici Curiae the State of West Virginia, 20 Other Statesin 1 0 Td 0.7smo2ot0413 Tc 0.0277 Tw 3.2005 0 Td vernorse ofKde
s
thS. Jano. 1,
2178).e Dspiate0 Td prfou 1 impblitatioas this ishe-

identify a purportedly ambiguous regulation and offer an interpretation that is not arbitrary and capricious. These are hardly meaningful constraints.

First, ambiguity is often in the eye of the beholder. See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2137 (2016) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity."). This case is a perfect example. The Federal Circuit deferred to the Veterans Board's interpretation—advanced for the first time in this very case, Pet. 14a n.10—because it believed that the term "relevant" in 38 C.F.R. § 3.156(c)(1) was "ambiguous." Id. at 15a. "In our view," the Federal Circuit held, "the regulation is vague as to the scope of the word ["relevant"], and canons of construction do not reveal its meaning." Id.

own ambiguous regulations * * * creates a risk that agencies will promulgate vague and open-ended regulations * * * *").

Second, the requirement that an interpretation not be arbitrary and capricious is similarly unhelpful to state and local governments charged with implementing shifting and onerous federal programs. To be sure, this may provide some safeguard "when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions." *Perez*, 135 S. Ct. at 1209. But even then, an interpretation will fail this standard only where it is "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461 (internal quotation marks omitted)—an exceedingly difficult standard to meet.

For similar reasons, it is no answer that "Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations." *Perez*, 135 S. Ct. at 1209. As an initial matter, safe-harbor provisions are hardly a universal feature of federal legislation. And even where they are present, they serve only to protect regulated entities from retroactive liability for noncompliance. They do nothing to relieve States and localities from the burdens of compliance on a prospective basis.[14]

---

[14] Of course, abandoning *Auer* would not require federal agencies to engage in notice-and-comment rulemaking. Agencies would still be free to issue interpretations of their regulations by other means. But courts would no longer be required to defer to those interpretations. See John F. Manning, Constitutional

Decades of experience demonstrate that Auer is fundamentally incompatible not only with separation of powers, but also with federalism. It diminishes state sovereignty by imposing costly burdens without notice to the States or the opportunity for them to be heard. It encourages th e promulgation of ambiguous regulations followed by ill-considered and protean interpretations of those regulations. And in so doing it undermines the rule of law by privileging ambiguity and uncertainty over stability and predictability. It is time to abandon Auer.

Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 668–69 (1996) ("[I]f an agency bears the risk of its own imprecision, obfuscation, or change of heart, it will have greater incentive to draft clear, straightforward rules when it chooses to engage in rulemaking.").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Federal Circuit and overrule Auer.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW