No. 11-204

In the

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
and FRANCK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP., D/B/A,
GLAXOSMITHKLINE,

Respondent.

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

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES..................................... iii

IDENTITY AND INTEREST OF AMICI CURIAE ...1

SUMMARY OF ARGUMENT.....................................2

ARGUMENT 2

I. SEPARATION OF POWERS IS ONE THE MOST IMPORTANT STRUCTURAL FEATURES OF THE CONSTITUTION.............2

II. *SEMINOLE ROCK* AND *AUER* DEFERENCE ARE NOT CONSISTENT WITH THE SEPARATION OF POWERS DESIGN OF THE CONSTITUTION..................6

A. Seminole Rock and Auer deference do not rest on the same justifications for Chevron deference..7

B. This Court Should Overrule *Seminole Rock* and *Auer* 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997)....................................... passim

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945).................................6, 7, 10, 11

Boy Scouts of America v. Dale,
530 U.S. 640 (2000)..1

Chevron USA Inc. v. Natural Resources Defense Counsel, Inc.,
467 U.S. 837 (1984)....................................... passim

Christiansen v. Harris County,
529 U.S. 576 (2000)...8, 9

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004)...1

Gonzales v. Oregon,
546 U.S. 243 (2006)..8

Hamdi v. Rumsfeld,
542 U.S. 507 (2004)..1

Marbury v. Madison,
5 U.S. (Cranch) 137 (1803) 5, 6

Martin v. Occupational Safety & Health Comm'n,
499 U.S. 144 (1991)..7

Miller v. Johnson,
515 U.S. 900 (1995)..5

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,
463 U.S. 29 (1983)...7, 9

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001)..1

Talk America, Inc. v. Michigan Bell Telephone Co., __ U.S. __, 131 S.Ct. 2254 (2011) 2

United States v. Mead Corp., 533 U.S. 218 (2001)..8

United States v. Morrison, 529 U.S. 598 (2000)..1

United States v. Nixon, 418 U.S. 683 (1974)..6

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)..1

Statutes

1 Stats 1...3

Other Authorities

Adams, John, A Defense of the Constitutions of Government of the United States of America, Letter XXVII 1797 (Lawbook Exchange, Ltd. 2001), vol. 1 4

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Brutus No. XI, in Debate on the Constitution, Bernard Bailyn, editor, (Library of America, 1993) 5

Brutus No. XII, in Debate on the Constitution, Bernard Bailyn, editor, (Library of America, 1993) 5

Federalist 48, The Federalist Papers, George W. Carey and James McClellan, editors, (Gideon ed. 2001) 4

Federalist 51, The Federalist Papers, George W. Carey and James McClellan, editors, (Gideon ed. 2001) 4, 6

Federalist 78, The Federalist Papers, George W. Carey and James McClellan, editors, (Gideon ed. 2001) 5, 10

Mass. Const. of 1780, Part I, Art. XXX, in The Documentary History of the Ratification of the Constitution, Vol. IV (Madison State Historical Society of Wisconsin, 1998)..3

Story, Joseph, Commentaries on the Constitution, 1833 (Little Brown & Co. 1858) 3

Vir. Const. of 1776, in The Documentary History of the Ratification of the Constitution, Vol. VIII (Madison State Historical Society of Wisconsin, 1998)..3

Vir. Dec. of Rights, 1776, in The Documentary History of the Ratification of the Constitution, Vol. VIII (Madison State Historical Society of Wisconsin, 1998) 3

Rules

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6...1

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the structure of government set out in the Constitution. 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 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies – that oversight requires active judicial review of the interpretation and application of ambiguous regulations.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners have filed a blanket consent and a letter from respondent evidencing consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae 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 Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Last term, Justice Scalia wrote separately in *Talk America, Inc. v. Michigan Bell Telephone Co.*, __ U.S. __, 131 S.Ct. 2254, 2266 (2011), to express concern that *Auer* deference was "contrary to fundamental principles of separation of powers." Those concerns have merit. The plan of government outlined in the Constitution relies on the separation of powers to protect individual liberty. Further, the plan relies on each branch of government to jealously guard its powers in order to prevent encroachment. This Court has recognized that it has not only specific powers under this arrangement, but also a duty to exercise those powers.

Granting "controlling deference" to an Executive agency's interpretation of its own regulations is an abdication of that duty. Unlike *Chevron* deference to an agency's regulations that are enacted pursuant to express or implied congressional delegations, the deference at issue in this case does not involve the courts in the selection of competing policy choices. Instead, active judicial review will serve Congress' aims that agencies promulgate their policies pursuant to procedures that provide for public participation and appropriate judicial review.

ARGUMENT

I. SEPARATION OF POWERS IS ONE THE MOST IMPORTANT STRUCTURAL FEATURES OF THE CONSTITUTION

There can be little debate that separation of powers was considered an essential component in the plan of government by the Framers. Even before a national constitution was ever considered, the

Founding generation made sure that newly formed state governments were based on separated powers.

In Virginia, the Fifth Revolutionary Convention approved the 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 (Madison State Historical Society of Wisconsin, 1998). 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 of the Ratification of the Constitution, 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 of the Ratification of the Constitution, 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).

This theory that separation of powers is necessary to prevent arbitrary government was not a new idea. The Framers relied heavily on the writings of Montesquieu, Blackstone, and Locke on this issue. John Adams quoted from Montesquieu's Spirit of the Laws on this point in his response to critics of the American Constitution. John Adams, A Defense of the Constitutions of Government of the United States of America, Letter XXVII 1797 (Lawbook Exchange, Ltd. 2001), vol. 1 at 154.

Indeed, there was no debate about whether the separation of powers would be a feature of the new government. Instead, the debate was whether the proposed new constitution separated those powers enough.

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." Federalist 48, The Federalist Papers, George W. Carey and James McClellan, editors, (Gideon ed. 2001) at 256. Thus, the Constitution was designed to give the members of each branch the power to resist encroachment on their powers. Federalist 51, The Federalist Papers, *supra* at 268-69. Because the three powers of government were not equal, the constitutional design does not have a pure separation of powers. To accomplish an equilibration of power, the Constitution gives each branch some limited role in the operation of the other branches. *Id.* Thus, the Executive can veto legislation and the judiciary has the power to determine the meaning of laws and whether they are consistent with the Constitution. Leaving interpretation of laws to the lawmaking

branch, according to Blackstone, is an invitation to "partiality and oppression." 1 William Blackstone, Commentaries on the Laws of England, Book 1 section 2, University of Chicago Press (1979) at 58. Sensible to this danger, the Framers vested these powers in the judicial branch.

The judicial power proposed in the new Constitution did engender some controversy. During the debates over ratification of the Constitution, the Anti-Federalists argued that the judicial branch had too much power. *E.g.*, Brutus No. XI, in Debate on the Constitution, Bernard Bailyn, editor, (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 of government. Federalist 78, The Federalist Papers, *supra*, at 405. 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.*

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

Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret

the laws to the Executive. See *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist 51, The Federalist Papers, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to exercise that power. *Marbury*, 5 U.S. at 177. In order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

II. *SEMINOLE ROCK* AND *AUER* DEFERENCE ARE NOT CONSISTENT WITH THE SEPARATION OF POWERS DESIGN OF THE CONSTITUTION

The petitioners in this action are seeking a ruling that courts must defer to an agency interpretation of an ambiguous regulation. In other words, the courts must cede their power and duty "to say what the law is" to the Executive. This argument for deference begins with this Court's ruling in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In that case, the Court considered arguments over the interpretation of a regulation regarding the General Maximum Price Regulation. There, the Court stated that the "ultimate criterion"

for meaning of a regulation is "administrative interpretation, which becomes of controlling weight unless it is plainly erroneous. *Id*. at 414. Later cases have refered to this as *Auer* deference, for the Court's later decision in *Auer v. Robbins*, 519 U.S. 452 (1997).

This rule of controlling deference was explained in *Martin v. Occupational Safety & Health Comm'n*, 499 U.S. 144 (1991). Deference was necessary, according to this Court, because application of the regulation "to complex or changing circumstances" requires an agency's "unique expertise and calls upon its policymaking prerogatives." *Id*. However, an agency's "policymaking prerogatives" are exercised at the time the regulation is written. If an agency discovers that it needs a new or different policy, its only option is to draft a new or different regulation – and then to defend that regulation as consistent with the congressional delegation. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983).

A. *Seminole Rock* and *Auer* deference do not rest on the same justifications for *Chevron* deference

The explanation in *Martin* for the deference afforded under *Seminole Rock* and *Auer* echoes some of the rationale given for deferring to agency construction of a statute under *Chevron USA Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). The Court in that case deferred to administrative interpretation of a statute where Congress had "left a gap for the agency to fill." *Id*. at 843-44. Where that is the case, the agency's decision

on the direction a regulation should take – i.e., on how to implement a statute, is a matter of policymaking that Congress has left to the agency.

In later cases, this Court distinguished agency interpretations contained in notice and comment rulemaking from those contained in guidelines and opinion letters. *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000). Deference under *Chevron* is only available where Congress has given the agency the power to issue rulings "carrying the force of law" and the interpretation at issue "was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). This limitation is based on what authority can be implied from the congressional delegation of power. The question is whether "Congress would expect the agency to be able to speak with the force of law" in addressing an ambiguity in the statute. *Id.* at 229; *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006).

Chevron deference, then, is based on either an express or implied delegation by Congress to the agency to "fill the gaps" in a statutory enactment. The existence of this gap-filling authority is indicated where Congress has granted the agency the power to issue rulings (either regulations or orders) with the "force of law." Deference is required in these instances so that courts do not substitute their own policy preferences for those of the agency tasked to administer the statute. *Chevron*, 467 U.S. at 865.

This process is far different from an agency interpretation of its own regulation. In the first place, the agency interpretation cannot be an exercise of its "policymaking" authority. Any such

authority was exercised in the promulgation of the regulation. The regulation receives deference, in part, because of the formal process undertaken to promulgate the rule. The interpretation of the regulation, however, undergoes no such process. It may be an opinion letter, as was the case in *Christiansen*, or it may be an amicus brief as in *Auer* and the instant action. In neither case, however, has the agency undertaken any formal process that would include an opportunity for public comment or for judicial review. Judicial review is particularly important when an agency changes direction, as is alleged to be the case here. *See State Farm*, 463 U.S. at 41.

Further, the agency's interpretation of its own ambiguous regulation is not part of the express or implied delegation of power from Congress. The statutory enactment may give the agency the authority to use delegated lawmaking power to issue regulations. There is, however, no implied authority to change the meaning of that regulation through an informal "interpretation."

Finally, there is no legal basis for judicial deference. Unlike the situation in *Chevron*, the Court is not inserting itself into the process for selection of a particular policy to implement Congressional intent. That procedure has already run its course and the regulation stands as the agency's choice of the policy to pursue. At issue in the interpretation of an ambiguous regulation is simply the judicial function of deciding the meaning of a legal text.

B. This Court Should Overrule *Seminole Rock* and *Auer*

As outlined above, *Chevron* deference does not raise concerns for separation of powers. Under *Chevron*, the Court does not cede its power to interpret the law because Congress has delegated a part of the lawmaking function to an administrative agency (with policy guidance). Until the agency has filled in the gaps of the law through the exercise of its delegated lawmaking power, the statute may not yet be complete in the sense that there are policy choices still to be made. These policy choices are delegated to the administrative agency – they are not part of the judicial function.

The judicial function is to say what the law is. Once the agency has issued a regulation that carries the force of law, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." Federalist 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to "partiality and oppression." It is also an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the time to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative

tools. Yet the job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

CONCLUSION

To the extent that this Court's decisions in *Seminole Rock* and *Auer* require controlling deference to an agency interpretation of a regulation, those decisions should be overruled.

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Respectfully submitted,

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