No. 16-186

In the

Supreme Court of the United States

ARLEN FOSTER and CINDY FOSTER,

Petitioners,

v.

THOMAS J. VILSACK,
SECRETARY OF AGRICULTURE

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a civil service employee have the power to bind the judicial branch of government to the employee's understanding of the meaning and application of agency rules and guidelines?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. This includes the principle that officials who exercise the power of the United States must be principal officers, appointed by the President and confirmed by the Senate, and that the Separation of Powers that underlies the design of government in the Constitution precludes judicial deference to the Executive Branch on the meaning and application of legal norms. The Center has participated as amicus in a number of cases before this Court on these issues including *Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225 (2016); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2016); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012); and *Free Enterprise Foundation v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

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[1] Pursuant to this Court's Rule 37.2(a), amici gave all parties notice of amici's intent to file at least 10 days prior to the filing of this brief. Petitioners filed a blanket consent to all amicus briefs. Counsel for respondent consented to this brief and amici lodged a copy of the letter evidencing that consent with the Clerk of the Court.

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

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to 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 capitals. Founded in 1943 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 325,000 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 Legal Center frequently files amicus briefs in cases that will impact small businesses.

SUMMARY OF ARGUMENT

In recent cases, members of this Court have expressed significant concern over the practice of judicial deference to administrative agencies. That concern should be heightened when the courts choose to defer to the legal conclusions of civil service employees. If any deference is to be granted to an agency interpretation of its own regulations and guidelines, the

courts must be sure that it is the agency that is speaking. If the interpretation does not come through a formal process, then at the very least it must be offered by an officer or an individual whom the officer designates to speak for the agency on that subject.

In any event, the Court should put an end to judicial deference to agency interpretations of agency regulations and guidelines. Such deference vests in the agency the power of law making, execution, and judicial review – a clear violation of separation of powers. Admittedly, adherence to the constitutional mandate of separation of powers makes government less efficient. Efficiency, however, was not the goal of the constitutional design of our government. Instead, the founding generation insisted on divided power in order to protect liberty. This protection of liberty is seriously eroded by notions that the administrative agencies can bind the judicial branch on questions of the legal meaning and application of administrative rules and guidelines.

REASONS FOR GRANTING REVIEW

I. The Testimony of a Civil Service Employee on the Meaning and Application of Agency Rules and Guidelines Is Not Entitled to Deference

This case seems to demonstrate deference carried to its absurd extreme. A civil servant employee of the National Resources Conservation Service testified that the United States Department of Agriculture interprets the term "local area" in its regulations to mean an area that encompasses nearly 11,000 square miles. *Foster v. Vilsack*, 820 F.3d 330, 335 (8th Cir.

2016); USDA NRCS Land Resource Regions and Major Land Resource Areas of the United States, the Caribbean, and the Pacific Basin, USDA Handbook 296 at 150 (2006); 7 C.F.R. § 12.31. "Local area" is not a scientific term, nor is it even a term of art. The employee's interpretation in this case is not consonant with a plain language interpretation of the text of the regulation.

The lower courts never even questioned this unusual interpretation, however. They simply deferred to the testimony of this civil service employee. *Id.* The Eighth Circuit thought that deference to the agency was required because a high level of expertise was used to analyze the relevant information. *Id.* An identification of the "local area," however, is not one that requires a high level of expertise. Putting aside the question of whether a reasonable interpretation of "local area" includes an area of nearly 11,000 square miles, there is no indication that the "agency" ever made any such determination in this case.

The District Court noted that it was at best "unclear" whether the employee's testimony "represents the agency's interpretation." *Foster v. Vilsack*, 2014 WL 5512905 at *14 (D. S.D. (2014). Nonetheless, the District Court decided that the testimony should be accorded *Skidmore* "deference." *Id.*

These decisions to defer to the testimony of an employee raise serious questions that this Court should examine. Even in those cases where the Court has deferred to agency interpretations, it relied on what appeared to be the "agency's fair and considered judgment as to what the regulation" meant. *Chase Bank USA v. McCoy*, 562 U.S. 195, 209-210 (2011); *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Final decisions reached as a result of an adjudication or notice and comment rulemaking are the clearest examples of an agency's "fair and considered judgment." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This Court has sometimes even accepted statements in legal pleadings as proof of an agency's interpretation. *See Auer*, 519 U.S. at 462. But this Court has rejected interpretations offered by agency counsel. In those cases, the Court noted that Congress delegated the interpretative power to an "agency official" rather than "appellate counsel." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 627–28 (1971).

In addition to the significant issue whether Congress can delegate its lawmaking power not just to the agency itself (headed by high-ranking officers nominated by the President by and with the advice and consent of the Senate), but to unelected, unappointed agency employees, this Court should consider the significant exercise of power by the agency official when the judiciary defers to the official's interpretation of a regulation. When this Court "defers" it transfers the judicial function to the agency. The agency's view on the legal meaning and application of a regulation become binding on everyone – including the judicial branch of government. *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945). Thus, an individual in the Executive Branch to whom a court "defers" wields enormous power. Such power can, at most, only be exercised by an "officer" properly appointed and confirmed by the Senate.

Older decisions of this Court defined "principal officer" by "tenure, duration, emolument, and duties"

and required the position to be "continuing and permanent." *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *see Morrison v. Olson*, 487 U.S. 654, 672-73 (1988) (special prosecutor whose appointment is limited to a particular case is an inferior officer); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (a vice-consul with a temporary appointment to perform functions of consular office is an inferior officer); *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880) (elections officers appointed to supervise an election are inferior officers).

The question of whether a particular position in government is one that must be occupied by an "officer" focuses on whether the incumbent exercises "significant authority." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). The officer who exercises significant authority is distinguished from mere employees characterized as "lesser functionaries." *Id*., at 126, n.162.

This case concerns the testimony of a civil service employee about the meaning and application of guidelines and regulations. Admittedly, one would not normally characterize this as "significant authority" within the meaning of *Buckley*. Yet the courts below converted that testimony into the most significant type of authority imaginable. By granting deference to the employee's testimony, the Circuit Court foreclosed judicial inquiry into the legal meaning and application of agency regulations and guidelines. This Court should grant review to decide whether this is the type of power than can be exercised by a "lesser functionary" in our system of government.

II. This Court Should Re-examine its Jurisprudence of "Deference" to Executive Agencies on the Meaning of Laws and Regulations.

A. The current predicament is rooted in the deference created by *Seminole Rock* and *Auer*.

The difficulty presented in the present case is not altogether unique but rather represents an extension of the precedent set forth in *Seminole Rock* and *Auer*. In the former case, this Court determined that an agency's interpretation of its own regulations would be given "controlling weight." *Seminole Rock*, 325 U.S. at 414. Unless the agency's interpretation was plainly erroneous or inconsistent with the regulation, the Court instructed the judiciary to defer to the agency's construction of its own regulation. *Id.* Reiterated more recently in the latter case, this doctrine has since become known as *Auer* deference. *Christensen*, 529 U.S. at 588 (2000). Members of this Court have expressed doubts about the continuing validity of this doctrine. *United Student Aid Funds, Inc. v. Bible*, 136 S.Ct. 1607, 1608-09 (2016) (Thomas, J., dissenting from denial of certiorari); *Perez*, 135 S.Ct. at 1210 (Alito, J., concurring); *id*. at 1213 (Scalia, J., concurring in the judgment); *id*. at 1213 (Thomas, J., concurring in the judgment); *Decker v, Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1338 (Roberts, C.J., concurring); *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 68-69 (2011) (Scalia, J., concurring). This case demonstrates the need for a reexamination of that doctrine.

Relying on the deference granted in *Seminole Rock* and *Auer*, agencies can issue vague regulations and then proceed an on *ad hoc* basis to interpret the

meaning of the regulations in the context of specific property owners, knowing that courts will not disturb those interpretations. As a result, *Auer* deference begets the very problem that arises in the present case: namely, a court declining judicial review in favor of an agency employee's interpretation on the legal meaning and applications of rules and guidelines.

Because *Seminole Rock* and *Auer* require courts to defer to agency interpretations, agencies will naturally seek to proceed by "interpretation" rather than by rulemaking. The irony is that final rules adopted pursuant to notice-and-comment rulemaking are subject to judicial review but the "interpretation" by the agency is not. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 639 (1996).

Auer deference encourages agencies to promulgate broad ambiguous regulations that are susceptible to multiple—even conflicting—interpretations. *Talk America, Inc.*, 564 U.S. at 68-69 (Scalia, J., concurring); Manning, *supra* at 683. Interpretive rules and changes in interpretation are much easier than changing regulations through the notice-and-comment process. An agency can switch its view of the legal requirements of its regulations without the need to explain the basis for that change. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Since courts must generally defer to the interpretation, the agency escapes judicial review of its actions.

Although the Court has indicated that it will not defer to interpretation of those regulations that merely parrot statutory language, *Gonzalez v. Oregon*,

546 U.S. 243, 257-58 (2006), Professor Manning notes that *Auer* deference, in practice, has encouraged the promulgation of regulations that do little more than restate the statute. Manning, *supra* at 683. These broad and ambiguous regulations, in turn, allow agencies to escape notice-and-comment rulemaking and judicial review of substantive changes in legal rules.

B. This deference violates the constitutional separation of powers.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, ,Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959).

That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power.

James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law. *United States v. Nixon*. 418 U.S. 683, 704 (1974) ("[T]he judicial power. . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The deference shown under *Seminole Rock* and *Auer*, however, does just that by ceding judicial power to the executive. This allows the concentration of power feared by the founding generation. *See* Manning at 674-75. As Professor Manning notes, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield out-sized influence on the agency. *Id.* at 675.

The power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the executive.

CONCLUSION

This Court should grant review in this case to reconsider the doctrine of deference to administrative agencies on the judicial questions of the meaning and application of rules and guidelines. Even if the Court continues to grant some form of deference to agency interpretations, the Court should grant review in this case to consider whether a "lesser functionary," rather than an officer, can make such an interpretation on behalf of the agency.

DATED: September, 2016.

Respectfully submitted,

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