No. 16-186

In the Supreme Court of the United States

ARLEN FOSTER AND CINDY FOSTER,
Petitioners,
v.
TOM VILSACK,
Secretary of Agriculture, in his official capacity,
Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

AMICI CURIAE BRIEF OF AMERICAN FARM BUREAU FEDERATION & SOUTH DAKOTA FARM BUREAU FEDERATION IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF THE AMICI[1]

Amici are trade associations whose members make their livelihoods through farming and ranching.

The American Farm Bureau Federation (AFBF) is the nation's largest not-for-profit, voluntary general farm organization. Since 1919, AFBF has worked to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF members produce every type of agricultural crop and commodity grown in the United States, and the organization represents about six million member families through member organizations in all 50 States and Puerto Rico.

The South Dakota Farm Bureau Federation (SDFBF) is a grassroots membership organization controlled by its more than 13,000 member families, and is a member of AFBF. Petitioners Arlen and Cindy Foster are members of SDFBF.

Amici are concerned that the type of deference afforded by the courts and agencies below will make farming even more difficult and unpredictable than it already is. This deference puts courts, farmers, and the rest of the public at the mercy of closed-door lawmaking by agencies.

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[1] No counsel for any party authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person (other than the *amici curiae*, their members, or their counsel) made any such monetary contribution. Petitioners filed a blanket consent to the filing of briefs amicus curiae. Respondent's letter of consent to this filing is being submitted with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fosters face harm to their farm by the application against them, by the courts and agencies below, of an unpublished staff-level interpretation of informal agency guidance, as if that interpretation were the law. Deference of this sort effectively lets agencies make up the law in private, and then be entitled to bind courts, tribunals, and the public as they go along.

But farmers, and the public, are entitled, under the Administrative Procedure Act and Due Process Clause, to fair notice of laws that might be held against them. Farming is already highly risky and highly regulated. Farmers should not also have to worry about underground regulation by agencies with the authority to impose financially devastating penalties or to enjoin working farmers' land.

The petition for certiorari should be granted.

ARGUMENT

FARMING IS FRAUGHT WITH UNCERTAINTY

In the morning sow your seed, and at evening withhold not your hand, for you do not know which will prosper, this or that, or whether both alike will be good.

Ecclesiastes 11:6 (ESV)

Farming is fraught with uncertainties. There are the obvious environmental uncertainties: rain, wind, drought, fire. These will be with us always.

There are also market uncertainties. Farmers often make decisions about what to farm based on market conditions, but market conditions may change unpredictably between planting and

harvesting. Farmers are also part of the stream of global commerce, and their access to commodity markets is, in some measure, affected by the trade policies of every nation on earth.

Farmers also face labor uncertainties. Farming is often highly seasonal, and finding enough labor at the right times of year can mean the difference between a bountiful harvest and a crop that withers on the vine. Immigration and labor policies also directly affect many farms.[2]

Then there are the uncertainties of environmental law, which increasingly requires farmers to ask the Government for permission to farm their own land:

- Farmers' access to certain federal programs necessary to manage risk, such as federal crop insurance, is, as in this case, affected by perceived compliance with environmental requirements.
- There are also conflicts with environmental groups, under the Endangered Species Act, over access to water. (*E.g.*, *San Luis & Delta-Mendota Water Auth*. v. *Jewell*, 747 F.3d 581, 591 (9th Cir. 2014) (in "continuing war" over listed fish species, environmental groups win challenge against water diversions to farmers).)
- Where farmland has been designated as critical habitat under the Endangered Species Act, as it has across vast swathes of the country, the

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[2] *See generally* Patrick O'Brien et al., *Gauging the Farm Sector's Sensitivity to Immigration Reform via Changes in Labor Costs and Availability* (February 2014), *available* http://www.fb.org/assets/files/issues/immigration/AFBF_LaborStudy_Feb2014.pdf.

federal government directly controls farmers' land use decisions.[3]

- And every farmer should be concerned about the "arguably unconstitutionally vague" Clean Water Act,[4] whose reach the Government asserts is broad enough to subject farmers to ruinous civil or criminal penalties simply for plowing.[5]

Farmers must also be concerned with agencies' informal standards—or lack of standards. In this case, the Fosters' eligibility for benefits may turn on an unwritten interpretation of a standard contained in a circular interpreting another agency's manual on yet another statute. (Pet. 6-8.) Elsewhere, the Government asserts jurisdiction, under the Clean Water Act, over vast swaths of mostly dry land, on the basis of complicated and ever-changing technical guidelines for delineating "wetlands".[6] Even when

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[3] *See generally* Andrew J. Turner, Kerry L. McGrath, *A Wider View Of The Impacts Of Critical Habitat Designation*, 43 Envtl.L.Rep. 10678 (2013).

[4] Tr. of Oral Arg. at 18:14, *USACE* v. *Hawkes Co.*, 136 S.Ct. 1807 (2016) (No. 15-290) (Kennedy, J.).

[5] Clean Water Act regulations exclude "plowing" (broadly defined) from liability. (33 C.F.R. 323.4(a)(1)(iii)(D).) But the Government is prosecuting farmers on the theory that plowing is not really "plowing" if it creates a "furrow top and bottom". (*Duarte Nursery Inc.* v. *U.S. Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, E.D. Cal., Nov. 6, 2015, United States' Memorandum [Etc.], ECF 152 at 14.) How to plow without creating furrows the Government has not ventured to explain.

[6] To delineate wetlands, the Corps uses a 143-page national wetlands delineation manual. (U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987),

jurisdictional wetlands are exist, Government staff "don't have a standard"—yet—for which activities are legal in them.[7]

Farmers should not have to be constantly guessing about which farming activities the agencies will view as legal, and which they might prosecute.

AUER DEFERENCE ADDS UNCERTAINTY, RAISING APA AND DUE PROCESS CONCERNS

Deference of the sort at issue in this case—"second-level *Auer* deference"—only adds uncertainty. (*See* Pet. at i, citing *Auer* v. *Robbins*, 519 U.S. 452 (1997).) That is because it allows agency staff to make up new legal interpretations behind closed doors, and then spring those on a person during an adjudicatory proceeding, and insist that the court or tribunal follow along. Allowing this brand of closed-

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available at http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.) That national manual must be read in conjunction with ten regional manuals (U.S. Army Corps of Engineers, *Regional Supplements to Corps Delineation Manual*, *available at* http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx), and ever-changing lists of wetland soils (U.S. Natural Resource Conservation Service, *Lists of Hydric Soils*, *available at* http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/) and wetland plants (U.S. Army Corps of Engineers, *National Wetland Plant List, available at* http://rsgisias.crrel.usace.army.mil/NWPL/).

[7] This quote is taken from deposition testimony of James Robb, a senior project manager with the enforcement unit of the Corps' Sacramento District. It is accessible (with its surrounding testimony for appropriate context) via PACER at page 62, line 23, through page 75, line 11, of document 113, in *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, case no. 2:13-cv-2095 (E.D. Cal.).

door lawmaking to be foisted upon individuals and adjudicators violates the Administrative Procedure Act (APA), and raises serious due process concerns.

1. The APA places important limits on the ability of agency staff to make private legal interpretations binding on individuals and adjudicators.

The APA prohibits agency adjudicators from being "subject to the … direction of" investigators or prosecutors. (5 U.S.C. 554(d)(2).) Investigators or prosecutors should not be directing adjudicators in how to interpret the law.

Once an agency action proceeds to court, the APA prescribes that "the reviewing *court*" must "decide *all* relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action". (5 U.S.C. 706, emphasis added; *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("it is emphatically the province and duty of the judicial department to say what the law is").) Agencies should not be dictating the law to courts.

The APA also prohibits a person from being "adversely affected by[] a matter required to be published in the Federal Register and not so published", unless the person has "actual and timely notice". (5 U.S.C. 552(a)(1).) "[S]tatements of general policy or interpretations of general applicability formulated and adopted by the agency" must be published in the Federal Register. (*Id.*, para. (a)(1)(D).) Agencies should not be advancing against individuals generally applicable legal interpretations that have not been published in the Federal Register. And courts and tribunals should not be deferring to secret agency rules that themselves violate the APA.

2. The Due Process Clause also places important limits on rules made by agencies behind closed doors.

Due process requires that persons be given "fair notice of conduct that is forbidden or required." (*FCC* v. *Fox TV Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("[a]ll are entitled to be informed as to what the State commands or forbids").) While probably no one has actual knowledge of the entire contents of the U.S. Code and Federal Register, our system of government rests in significant part on the notion that everyone is on at least constructive notice. (*See Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-85 (1947) ("[j]ust as everyone is charged with knowledge of [statutes], … the appearance of rules and regulations in the Federal Register gives legal notice of their contents"); 44 U.S.C. 1507 (appearance in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it").)[8] Binding individuals and courts to agency legal interpretations, which are not in the Federal Register, raises serious due process concerns.

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[8] *Federal Crop Insurance Corp.* split 5-4, with a strong dissent by Justice Jackson. He thought it an "absurdity" to charge farmers, who have better things to do, with notice of everything published in the Federal Register:

> [I]t is an absurdity to hold that every farmer … knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication … , he would never need crop insurance, for he would never get time to plant any crops.

(332 U.S. at 387.)

Due process also prohibits "bias or prejudgment" in adjudications. (*Winthrow* v. *Larkin*, 421 U.S. 35, 47 (1975).) Requiring courts and tribunals to defer to one side's interpretation of the law (the agency's), effectively biases and prejudges the case against the other side (the individual's).

3. This case presents a good vehicle for resolving whether agencies may create more uncertainty by imposing their private legal interpretations on the courts, administrative tribunals, or individuals.

The case arises from the efforts of a long-time farming family, the Fosters, to maintain certain federal benefits, whose purpose is to "promote the national welfare by improving the economic stability of agriculture" (7 U.S.C. 1502(a)). Staff at the Natural Resource Conservation Service (Service) determined that the Fosters' property contains wetlands, which could adversely affect the Fosters' eligibility for those benefits. In reaching that determination, Service staff applied their unwritten interpretation of a standard contained in an agency circular, which itself was interpreting a standard contained in a manual developed by another agency (the Army Corps of Engineers) to help it implement yet another statute (the Clean Water Act). (Pet. 6-8.) Applying, to the Fosters' detriment, an unwritten interpretation violated the APA and raises due process concerns. (*See supra.*)

The Fosters then pursued an administrative appeals process. At the Director-level appeal, the adjudicator applied the rule, citing *Auer*, that an agency's interpretation is entitled to substantial deference, "unless the interpretation is plainly erroneous or clearly inconsistent with the regulation interpreted". (App. C-27.) Finding Service staff's interpretation of the circular's standard "reasonable",

the adjudicator concluded that he "must defer to [the Service's] interpretation". (App. C-27-28.) In constraining himself to Service staff's interpretation, the adjudicator effectively subjected himself to the direction of agency investigators and prosecutors, in violation of the APA, and biased and prejudged the proceeding against the Fosters, in violation of due process. (*See supra.*)

The Fosters proceeded with an APA challenge to the decision in court. The Eighth Circuit, like the agency adjudicator below, felt bound by agency staff's interpretation, concluding it was "owe[d] deference". (App. A-10.) Constraining itself to the agency's interpretation, to the detriment of the Fosters, violated the APA, which requires courts to interpret the law and which prohibits standards not published in the Federal Register from being held against people. It also effectively biased and prejudged the proceeding, in violation of due process. (*See supra.*)

The judgment below should be reversed, and the agency's wetland delineation should be set aside.

4. Every day, agencies create new legal interpretations intended to control how a myriad of laws should be applied to farmers and the rest of the regulated public. The vast majority of those interpretations are not readily available or published in the Federal Register. While agencies should be lauded for efforts to make the statutes and regulations they administer more understandable, and while agencies should be free to argue in court that its interpretations are the most persuasive, those interpretations by themselves should not carry the force of law. Yet some courts and tribunals, like in this case, feel constrained to defer to those interpretations, effectively giving them the force of

law in adjudications in which life, liberty, or property are at stake. This kind of deference is wrong.

As they tend to their land, and try to stay in compliance with the laws that *are* on the books, farmers should not also have to worry about new laws being cooked up by agencies behind closed doors. Reasonable people should not be expected to order their farms or affairs around legal interpretations they do not even have constructive notice of. The Court should take this case to put some limits on *Auer* deference, and to remove at least one source of uncertainty facing farmers and the public today.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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