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 a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit*

**BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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## QUESTION PRESENTED

This brief addresses the first question presented by the cert. petition:

What deference, if any, should federal courts show to an agency's construction of an interpretive field manual? Should federal courts defer to the agency under *Auer v. Robbins*, 519 U.S. 452 (1997), as the Eighth Circuit did below, or not, as this Court and others have done under analogous circumstances?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Regulations**



**Other Authorities**

## INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns courts' ability to check the power of the administrative state through meaningful judicial review.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Arlen and Cindy Foster are farmers in Miner County, South Dakota, where they raise cattle and grow corn, soybeans, and hay. Arlen's grandfather bought the land over a century ago, and the family has been working it ever since. A portion of this land contains a shallow depression that tends to fill with snow melt for part of the year. This "prairie pothole" is the subject of the present litigation.

Under the "Swampbuster" provisions of the Food Security Act of 1985, Pub. L. No. 99-198 (Dec. 23, 1985) (codified as 16 U.S.C. § 1301, *et seq.*), the National Resources Conservation Service (NRCS)—an

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[1] Rule 37 statement: All parties received timely notice of amicus's intent to file this brief; Petitioners filed a blanket consent, while Respondent's consent letter has been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

agency of the Department of Agriculture (USDA)—ensures that farmers aren't converting protected wetlands into farmland. Any farmer found to be doing so is ineligible for various federal programs, such as crop insurance. In making its wetland delineations, the NRCS follows USDA regulations promulgated under the statute that define "wetland" and provides necessary procedures. These regulations state that, if determination of a parcel's wetland status is not possible due to alteration of the vegetation, a similar parcel from the "local area" will be chosen to act as a proxy. 7 C.F.R. § 12.31(b)(2)(ii). "Local area" is not defined, but a 2010 field circular adopts the wetland identification methodology from the 1987 Army Corps of Engineers Wetland Delineation Manual, which uses the parallel language "adjacent vegetation."

Here, the NRCS interpreted "local area" to refer to the "major land resource area"—as defined in USDA Agriculture Handbook 296, *Land Resource Regions and Major Land Resource Areas of the United States, the Caribbean, and the Pacific Basin* (3d ed. 2006)—in which the Fosters' farm is located, covering almost 11,000 square miles. A pre-selected proxy site some 33 miles from the Fosters' farm was chosen and found to support wetland vegetation, so the relevant portion of the Fosters' land was declared a protected wetland.

The Eighth Circuit afforded broad *Auer* deference—in reality "second-level" *Auer* deference—to the NRCS interpretation of a vaguely written agency circular that interprets a vague regulation that in turn interprets a vague statute—all to get to a strained and unnatural definition of "local area." What's more, the interpretation was nonbinding on the agency and promulgated without notice to the Fosters or the pub-

lic at large. This type of second-derivative *Auer* deference violates not only the separation of powers and rule of law, but is at odds with the rule of lenity.

The lower courts are divided about the extent of *Auer*'s reach in this context. The Fifth Circuit rejects "second-level" deference where, as here, the agency interprets an earlier interpretation of a regulation rather than the regulation itself. *Elgin Nursing & Rehab. Ctr.*, 718 F.3d 488 (5th Cir. 2013). The Eighth Circuit has now joined the Sixth in allowing it. *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560 (6th Cir. 2014). Further, the correctness of *Auer* itself has been called into question by this Court and others. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

This Court should grant cert. to limit confusion among the lower courts about the constitutional status of "second-level" *Auer* deference, as well as to make it clear to administrative agencies that they cannot avoid judicial review by refusing to promulgate clear, unambiguous regulations.

## ARGUMENT

### I. AMBIGUOUS INTERPRETATIONS OF AMBIGUOUS INTERPRETATIONS—"SECOND-LEVEL" *AUER* DEFERENCE—PREVENT REGULATED PERSONS FROM KNOWING WHAT THE LAW IS

Four years ago, in *Christopher v. SmithKline Beecham Corp.*, this Court overturned the Labor Department's abrupt reinterpretation of its regulation, declining to extend *Auer* deference to "statutes and regulations which allow monetary penalties against those who violate them" and do not provide regulated persons "fair warning of the conduct [they] prohibi[t] or requir[e]." 132 S. Ct. 2156, 2167 n.15 (2012) (quoting *Diamond Roofing Co. v. Occup. Safety & Health Rev. Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)).

A properly formulated law must provide fair warning of the conduct proscribed and be publicly promulgated. These are not merely guidelines for good public administration; they are bedrock characteristics of law *qua* law. *See* Lon L. Fuller, *The Morality of Law* 33-38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law").

Other circuits have properly applied the lessons of *Christopher*—as well as the wisdom of Prof. Fuller—to second-level *Auer* deference, recognizing that to grant further levels of deference to agencies is to jump with both feet down a rabbit hole of administrative law where, eventually, deference to an interpretation of an interpretation of an interpretation could have us all believing six impossible things before breakfast under penalty of "law." The Fifth Circuit

understands, for example, that second-level *Auer* deference would "if taken to its logical conclusion . . . effectively insulate agency action from judicial review." *Elgin Nursing & Rehab. Ctr.*, 718 F.3d at 493. Moreover, "extending *Seminole Rock* and *Auer* to apply to agency interpretations of agency interpretations of agency regulations would allow agencies to punish 'wrongdoers' without first giving fair notice of the wrong to be avoided." *Id.* Thus, the Fifth Circuit rightly refused to give deference to the Department of Health and Human Services' interpretation of its interpretive manual regarding the preparation of eggs in assisted living facilities. *Id.* at 496 ("DHHS may not issue ambiguous interpretive documents and then interpret those in enforcement actions—we will not defer to that level of agency interpretation.").

The Fifth Circuit has also recently held that a Department of Homeland Security reinterpretation of employer I-9 reporting requirements violated regulated parties' right to fair notice. *Employer Solutions Staffing Group II, L.L.C. v. OCAHO*, No. 15-60173, 2016 U.S. App. LEXIS 14788 at *14–15 (5th Cir. Aug. 11, 2016) ("This rule requires that a statute or agency action 'give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.'").[2] These cases are merely some of the most recent applications of the ancient principle that the

[2] This approach can be contrasted with the Sixth Circuit's ruling in *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, where the court held that a similar interpretation by the agency in the context of Medicare reimbursement payments was entitled to "especially deferential" review. 766 F.3d at 568.

law must be knowable to be legitimate. It would be unjust to allow substantial penalties to attach when the required or prohibited conduct triggering the penalty could not have been reasonably determined by the penalized party beforehand.

The Fosters are also faced with substantial penalties without receiving fair notice.[3] While there is no abrupt change in agency policy similar to those that worried the Court in *Christopher* and the Fifth Circuit in *Employer Solutions*, the need for "reasonably clear standard[s]" is just as pertinent. The Fosters' access to various federal farm programs—as well as their potential criminal liability under the Clean Water Act, *see* Part III, *infra*—depends on a tortured interpretation of regulatory text to which they had no reasonable access before these proceedings.

Courts across the country are increasingly skeptical of *Auer* deference, and second-level *Auer* deference deserves even more skepticism. In *Gonzales v. Oregon*, this Court held that an agency's interpretation of a regulation that merely parrots the language of the operating statute is not entitled to *Auer* deference. 546 U.S. 243, 256–57 (2006). While the Court accepted *Auer*'s premise—that agencies are better at interpreting their own regulations than judges and are thus entitled to highly deferential review when doing so—it refused to extend that deference when the agency interpreted Congress's language rather than its own. The Court's opinion in *Gonzales* endorsed a

[3] Government benefits, especially those one has come to rely on, may be considered entitlements. Termination of such entitlements has long been considered a deprivation of property requiring proper notice and an opportunity to be heard before the termination takes effect. *Mathews v. Eldridge*. 424 U.S. 319 (1976).

string of lower-court rulings similarly refusing to extend deference to agency interpretations of "parroting" or "mush" regulations. *See Glover v. Std. Fed. Bank*, 283 F.3d 953 (8th Cir. 2002); *Cunningham v. Scibana*, 259 F.3d 303 (4th Cir. 2001); *Mission Group Kan. v. Riley*, 146 F.3d 775 (10th Cir. 1998); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (overruled on other grounds).

These cases stand for the idea that agencies may not promulgate vague regulations in order to save the hard decisions for ad hoc, informal, and nonbinding interpretations down the road—thus avoiding the extra effort and public scrutiny of notice-and-comment rulemaking. In the words of the D.C. Circuit, "[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" 117 F.3d at 584.

By leaving the definition of "local area" vague, and then giving it "concrete form" through an interpretation of an interpretation, the NRCS commits a similar harm to both the Fosters and the meaning of "law." The Fosters' fate hinged on an interpretation of the phrase that strains credulity and of which they received no notice. The NRCS may not define the terms in its regulations in a way that fails to provide notice to the people subject to those regulations. To do so "would render the requirements of [the APA] basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule." *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 231–32 (D.C. Cir. 1992).

## II. COURTS SHOULD BE PARTICULARLY SKEPTICAL ABOUT DEFERRING TO INTERPRETATIONS THAT DON'T BIND THE AGENCY ITSELF AND THUS ALLOW IT TO KEEP ITS REGULATIONS VAGUE

Agencies benefit by using nonbinding interpretations instead of notice-and-comment rulemaking, while the people they regulate lose. An agency can change course if something isn't working or new priorities are passed down by the White House. But making policy through interpretive statements means that ordinary people have little notice when the rules to which they are subject change. It is precisely the "flexibility" and "efficiency" aspects of agency interpretations that cause due-process concerns.

As the petition points out, there are other manuals used by USDA agencies, such as the U.S. Forest Service, which have been held to be nonbinding on the agency itself. Pet. at 23; *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 900–01 (9th Cir. 1996). Generally speaking, an agency pronouncement must have the force and the effect of law in order to bind the agency. *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("not all agency publications are of binding force"); *Schweiker v. Hansen*, 450 U.S. 785, 789–90 (1981) (holding that Social Security Administration Claims Manual was not binding on the agency); *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987) (holding that INS Operations Instructions did not bind agency "because they are not an exercise of delegated legislative power and do not purport to be anything other than internal house-keeping measures."). In all of these cases, allowing second-level *Auer* deference to the agencies' interpretations of interpretations would aggravate an

already subpar situation. Agencies would be able to bind citizens through highly attenuated and dubious diktats, but citizens would not be similarly able to bind the agency to its purported "commitments."

In dealing with this issue, the Court should take a page out of its own *Chevron* handbook. *Chevron* held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). Then in *Christensen v. Harris County*, this Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." 529 U.S. 576, 587 (2000).

Similarly, in *Auer*, this Court held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court should follow *Christensen*'s limitation on *Chevron* by placing a similar restriction on *Auer*, especially when an agency's interpretative actions are nonbinding on the agency itself. If agencies want their interpretations to have the force of law—and to have courts defer to them—they should have to go through the trouble of notice-and-comment rulemaking. If they instead want flexibility and efficiency, they shouldn't enjoy judicial deference. There's a tradeoff—such that agencies remain accountable to either the public or the courts—but if the decision below stands, agencies will get the best of both worlds (and the regulated person will get nei-

ther an opportunity to participate in rulemaking nor a proper day in court with real judicial review).

## III. SECOND-LEVEL *AUER* DEFERENCE UNDERMINES THE RULE OF LENITY

The rule of lenity is a canon of statutory interpretation holding that, when construing an ambiguously worded criminal statute, courts should resolve the ambiguity in favor of the defendant. *See*, *e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). Broad deference to agencies is in tension with the rule of lenity, leaving an open question as to which method of resolving ambiguity controls. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring) ("Unless the rule of lenity applies to agencies, *Auer* would give each agency two ways of construing criminal laws against the defendant—by resolving ambiguities in the criminal statute and by resolving ambiguities in any regulation.") The unchecked expansion of second-level *Auer* deference would only compound this problem.

While there are no criminal penalties *directly* at issue here,[4] allowing agencies two levels of *Auer* deference would mean that federal crimes could be created by agency interpretations of interpretations. This development not only creates problems for the separation of powers—"Congress, not agencies or courts, defines crimes," *id.* at 729—it creates due-process problems. "The rule of lenity fosters the con-

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[4] *But see* Pet. at 25 n.15 ("There are no criminal penalties in the Food Security Act's provisions for plowing in wetlands, but at least one farmer has been found civilly liable for the same action [plowing in wetlands] without a Corps permit under the Clean Water Act, a statute that does carry criminal penalties.")

stitutional due-process principle that no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited." 73 Am Jur 2d Statutes §188. First-level *Auer* deference is already broad enough to undermine the rule of lenity. The Court should not let that deference go further.

While the Court has not yet addressed the conflict between the rule of lenity and administrative deference, several approaches have come out of the lower courts. *See* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 38–47 (2006) (collecting cases). The Sixth Circuit in *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) and the D.C. Circuit in *United States v. McGoff*, 831 F.2d 1071, 1077, (D.C. Cir. 1987) both held that the rule of lenity displaces *Chevron* in the criminal realm. The Tenth Circuit held that the rule of lenity limits the amount of deference courts need to show agency interpretations, but does not entirely supplant *Chevron*. *NLRB v. Okla. Fixture Co.*, 332 F.3d 1284, 1292 (10th Cir. 2003) (Brisco, J., concurring). The Ninth Circuit, however, has held that *Chevron* deference is not limited at all by the rule of lenity. *Pacheco-Camancho v. Hood* 272 F.3d 1266, 1271–72 (9th Cir. 2001). The Court here has the opportunity to resolve this split and hold that administrative deference does not supplant the ancient lenity canon simply because the case is not being brought as a traditional prosecution.

First-level *Auer* deference already theoretically allows, in the words of Judge Sutton, "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter*, 736 F.3d at 733. Second-level *Auer* deference would allow any government lawyer to create

a federal crime by subsequently interpreting the terms of a footnote in an *amicus* brief. Ultimately, either level of deference runs into "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967).

Finally, although the Food Security Act does not contain criminal sanctions, that does not ensure that the Fosters or others won't get wrapped up in criminal proceedings. Under the Clean Water Act, it is a crime to dump dredged or fill materials into the "waters of the United States" (including wetlands) without a permit. 33 U.S.C. § 1319(c). The agency's interpretation of "local area" to mean "Major Resource Land Area" determines whether the Fosters' parcel is defined as wetland. Thus, whether the Fosters could potentially be prosecuted for the agricultural use of their property hangs squarely on whether the agency's interpretation stands. The Clean Water Act's criminal sanctions are so closely interconnected to the admittedly civil determinations at issue in this case that deferring to the agency's broad interpretation of "local area" effectively deprives the Fosters use of their property under threat of criminal prosecution.

The Fosters' "possibly criminal" situation is just one of myriad similar situations faced by not only landowners but regulated entities of all types. To allow the continued use of second-level *Auer* deference will only feed more citizens into administrative agencies' Kafkaesque processes.

## CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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