No. 16-186

In the
Supreme Court of the United States

ARLEN FOSTER and CINDY FOSTER,

Petitioners,

v.

THOMAS J. 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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should federal courts defer, under *Auer v. Robbins*, 519 U.S. 452 (1997), to an agency construction of an interpretative field manual ("second level *Auer* deference"), as have the Sixth Circuit and the Eighth Circuit decision below, or not, as the Fifth Circuit has held?

Does the use of a remote comparison site, preselected ten years prior and without notice to the Fosters or an opportunity to be heard, as the sole means of determining that their land supports wetland plants, violate their rights to due process of law under the Fifth Amendment?

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INTRODUCTION

The Fosters' petition for writ of certiorari is an excellent vehicle for the Court to address the scope of *Auer* deference. It presents the issue whether agency junior staff testimony, offering an interpretation of an agency regulation, is entitled to *Auer* deference. This petition also asks the important question whether an agency which has already published an interpretative field manual (which would typically be afforded *Auer* deference) should then be afforded further, or second-level, *Auer* deference when it makes subsequent statements interpreting the field manual or the regulation.[1] The Petition should be granted.

Respondent Secretary Vilsack argues in his opposition that the Fosters failed to raise the questions presented in the proceedings below, and that the Eighth Circuit is correct on the merits. Neither of these arguments is on the mark.

The Fosters forcefully and repeatedly argued below that Secretary Vilsack's interpretation of "local area" as a "major land resource area" was unreasonable, and specifically argued the Mr. Luebke's testimony to that effect was not entitled to deference. The Fosters also repeatedly argued below that the use of a predetermined reference site, known to meet all wetland criteria, illegally predetermined the outcome of the investigation of the Fosters' property.

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[1] The Court is addressing an important but different question in *Gloucester County School Board v. G.G.*, No. 16-273. In that case, the Court is considering whether *Auer* deference extends to agency opinion letters. The Fosters' petition would allow the Court to address whether agency staff testimony is entitled to *Auer* deference, particularly where the agency has previously interpreted its regulation through a published field manual.

The Eight Circuit's decision below is not correct on the merits. Mr. Luebke's testimony is not entitled to deference as an interpretation of either the agency regulation or the agency's published interpretative field manual. But deference is the only way that an MLRA could be accepted as a "local area." And it violates the basic tenet of a meaningful opportunity to be heard when the agency predecides what would otherwise be an adjudication of the facts on the ground by using a reference site that cannot possibly yield any other answer than that the Fosters' property is a wetland, no matter what evidence or argument they make in the hearing. Despite being a loosely bandied-about word these days, "rigged" is an unfortunately apt description of the process to which the Fosters were subjected.

Secretary Vilsack entirely misapprehends the first question presented. The first question is whether *Auer* extends to (a) agency staff testimony, that (b) comes subsequent in time to the agency's publication of an interpretative field manual which interprets the agency regulation. Secretary Vilsack claims, incorrectly, that the Fosters are asking whether the field manual is entitled to deference. Brief in Opposition at 12. As stated previously, that is simply not the question. And, the Secretary claims that Mr. Luebke was directly interpreting the regulation in question, and that agency field manuals have nothing to do with this case. Brief in Opposition at 12-13. But the Fosters' petition shows this is false. Pet. at 12-13, 20-21. The agency regulation, § 12.31, is the subject of the National Food Security Act Manual, published in 2010 and excerpted in the Fosters' petition at App K. It interprets the regulatory phrase "local area" as a variant of the term "adjacent." Pet. App. K-2. This 2010

Manual was in effect when Mr. Luebke testified in the Fosters' administrative appeal in 2011. App B-3. Mr. Luebke's testimony can only be understood as interpreting the Manual, not the regulation directly. Otherwise, the courts would be allowing an agency to selectively use two different interpretations of its regulations, one published in a field manual, and the other based on a junior staff member's ad hoc testimony in an adjudicatory appeal, with both (in the Secretary's view) entitled *Auer* deference, depending on which one suits the agency in a given situation.

Given this, the Secretary also fails to address the existence, scope, or importance of the circuit split described in the Fosters' petition. Pet. at 13-25. As explained there, the Fifth Circuit on one side and the Sixth and Eighth Circuits on the other are split on whether agency interpretations of their field manuals are entitled to *Auer* deference. *Id.* This case is the vehicle the Court should use to address and resolve this split of authority on the important question of the scope of *Auer* deference.

I

THE FOSTERS RAISED DEFERENCE BELOW, AND THE COURTS BELOW DECIDED THE CASE ON DEFERENCE

The first question presented to the Court addresses whether the lower federal courts were correct to defer to Mr. Luebke's testimony purporting to interpret "local area" to be an MLRA. Secretary Vilsack is wrong to argue that the Fosters did not press this claim below.

The Fosters expressly argued below that Luebke's testimony to this effect was not entitled to judicial

deference, and cited *Udall v. Tallman*, 380 U.S. 1 (1965), and *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), on that point.[2] *See* Plaintiff's Brief in Support of Vacating Defendant's Wetland Determination, Jan. 28, 2014; U.S. Dist. Ct. S.D. SD, Civ No. 13-4060, ECF # 19, at 20-22. *See also* Plaintiffs' Joint Brief In Response to Defendant's Motion and Memorandum for Summary Judgment, and Support for Plaintiff's Cross-Motion for Summary Judgment, Mar. 21, 2014; U.S. Dist. Ct. S.D. SD, Civ No. 13-4060, ECF # 25, at 2 ("The central concern in this case is . . . how much deference a court must give to an agency."); Appellants' Brief, Feb. 10, 2015; Eighth Circuit Court of Appeals, Appeal No. 14-3887, at 19 (USDA interpretation of "local area" unreasonable), 29 (same); Appellants' Reply Brief, Apr. 9, 2015, Eighth Circuit Court of Appeals, Appeal No. 14-3887, at 7-8 (arguing against Secretary Vilsack's request for deference, and that interpretation of "local area" as an MLRA is inconsistent with regulations). Consistent with the Fosters' briefing below, the district court decision explicitly recited: "Ultimately, plaintiffs argue that no deference is due to the explanation offered by Luebke." App B-28.

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[2] Given that the Fosters cited these cases below, it is odd for the Secretary to complain that they did not cite *Auer* to the court of appeal. Brief in Opposition at 13. *Udall* relies on *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), to hold that the courts were required to defer to the Secretary of the Interior's interpretation of oil and gas leases. 380 U.S. at 4. *Thomas Jefferson University* then relies on both *Udall* and *Seminole Rock* for the requirement to defer to agency interpretations of their own regulations. 512 U.S. at 512. While *Auer* is currently the customary way to refer to this type of deference, to say that the Fosters did not raise the issue because they cited *Udall* and *Thomas Jefferson University* instead of *Auer* is close to absurd.

So, Secretary Vilsack is simply wrong to say that the Fosters did not raise the issue of deference below. And to the extent that the Fosters' petition before this Court refines their arguments on this issue, this is well within the Court's traditional rule that parties before the Court can present new arguments in support of claims that have been litigated below. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Even if the Fosters had not argued below that Mr. Luebke's testimony was not entitled to judicial deference, this Court could and should review the question because both the district court and circuit court addressed this question and decided it. *See id.* (citing *U.S. v. Williams*, 504 U.S. 36, 41 (1992)).The district court held that Luebke's testimony had the "power to persuade" and was therefore entitled to deference under *Skidmore v. Swift*. App B-31. And the court of appeals also held that Luebke's testimony "established that the USDA interpreted the 'local area' referenced in § 12.31 to mean the same MLRA as the disputed reference site." App A-10.[3]

The testimony to which the courts below deferred does not provide a reasonable interpretation of the Manual (or the regulation). As explained in the Petition, at 7-8, 21, major land resource areas, as established in USDA Handbook 296, are based on regional and national agricultural and commercial considerations, not on whether every portion of the given MLRA is in the "local area" of every farm within it for purpose of determining wetland conditions on

[3] The court of appeals cited *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999), but clearly engaged in *Auer* deference. *See* Pet. at 12-13, 20-21.

those farms. *See* Handbook 296 at 1. One example from the Handbook suffices to show the absurdity of equating its major land resource areas with the "local area" of any given farm. MLRA # 133 A is described at pages 429-31 of the Handbook. It comprises portions of Alabama, Mississippi, Georgia, Florida, North and South Carolina, Virginia, Tennessee, and Louisiana. It stretches from Alexandria, Virginia, in the suburbs of the nation's capitol, at its Northeastern end, through the aforementioned states to almost the border of Kentucky in Western Tennessee. It comprises 106,485-square miles. Under Secretary Vilsack's position, a farm outside Hattiesburg, Mississippi, could be determined to contain a wetland based on conditions at a reference site at President Washington's birthplace at Mt. Vernon, Virginia.

As the Fosters stated in their Petition, perhaps the only way a court would agree, that this major land resource area is "the local area" for every farm in it, is to be required to agree under *Auer*.

II

THE COURT CAN CONSIDER THE FOSTERS' DUE PROCESS QUESTION AS AN EXCEPTIONAL CIRCUMSTANCE

The Fosters consistently argued below that the use of a predetermined reference site, known to meet all wetland criteria, effectively foreclosed any possibility that the Fosters' property would not be found to be a wetland. *See* Plaintiff's Brief in Support of Vacating Defendant's Wetland Determination, Jan. 28, 2014; U.S. Dist. Ct. S.D. SD, Civ No. 13-4060, ECF # 19, at 16-17, 19; Plaintiffs' Joint Brief In Response to

Defendant's Motion and Memorandum for Summary Judgment, and Support for Plaintiff's Cross-Motion for Summary Judgment, Mar. 21, 2014; U.S. Dist. Ct. S.D. SD, Civ No. 13-4060, ECF # 25, at 5-6; Appellants' Brief, Feb. 10, 2015; Eighth Circuit Court of Appeals, Appeal No. 14-3887, at 27; Appellants' Reply Brief, Apr. 9, 2015, Eighth Circuit Court of Appeals, Appeal No. 14-3887, at 7. Throughout their briefing below, the Fosters insisted that the use of this default site rigged the outcome and was therefore inconsistent with the regulations and a violation of the Administrative Procedures Act.

While the Fosters did not explicitly argue the Due Process Clause in their briefing below, they clearly identified the element of the procedure which violates due process: the predetermination of the outcome. Due Process requires a *meaningful* opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). A programmatic decision which predetermines a future adjudicatory action can serve as the basis for a due process claim. *See, e.g.*, *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1061 (9th Cir. 1995). The Court can and at times does, in exceptional circumstances, address issues not raised before or decided by lower courts. *U.S. v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The Fosters argue that the predetermination of the agency's investigation and determination of the existence of wetlands on their property, in a manner which completely prevented them from meaningfully contesting whether their property actually would support wetland vegetation, is such an exceptional circumstance.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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