No. _____

IN THE

Supreme Court of the United States

WILLIAM B. HUNGERFORD, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In recent years, this Court and commentators alike have expressed increasing alarm over the unbridled deference afforded to agency bureaucrats' interpretations of statutes and their own internal regulations and the harms imposed by that deference in the civil enforcement context. However, this Court has yet to address the serious dangers associated with this deference in the criminal context. Specifically, federal prosecutors routinely call agency officials to opine on the meaning of complex regulatory schemes in the course of criminal prosecutions, using that testimony as the foundation for the most serious deprivation of liberty—a criminal conviction. Courts have been slow to recognize the potential harm of this brand of testimony, as illustrated by this case.

Thus, the question presented is whether the Fifth Circuit erred in its affirmance of Petitioner William Hungerford's conviction by failing to properly account for the devastating harm of improper testimony delivered by an agency bureaucrat called by the prosecution solely to opine on the meaning and application of the complex regulatory scheme governing the EB-5 investment program.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Hungerford et al*, No. 2:18-cr-00112, U.S. District Court for the Eastern District of Louisiana. Judgment entered June 22, 2021.
- *United States v. William B. Hungerford, Jr.*, No. 21-30359, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 27, 2023 (1a-19a).

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WILLIAM B. HUNGERFORD, JR.,
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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner William Hungerford respectfully asks this Court to review the decision of the U.S. Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The Fifth Circuit issued its judgment affirming Mr. Hungerford's convictions on November 27, 2023. The Fifth Circuit's decision is attached in the Appendix.

JURISDICTION

The Fifth Circuit issued its decision November 27, 2023. App'x at 1a. The deadline for filing a Petition in this case fell on a Sunday, and the petition thus was filed the first non-holiday weekday thereafter. Thus, this petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE AND PROCEEDINGS

A. The EB-5 Visa Program.

Central to the case is the highly controversial EB-5 visa program, which purports to provide a path to permanent residency for wealthy foreign nationals who invest substantial capital in new or existing American businesses. Administered by the U.S. Citizenship and Immigration Services (USCIS), the program was intended to stimulate the U.S. economy by attracting foreign investment and generating job growth. *See, e.g.*, 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6. An exceptionally complex web of agency rules and regulations—contained in both the Code of Federal Regulations and extensive agency guidance promulgated by USCIS itself—govern the EB-5 visa program.[1]

To gain permanent residency status under EB-5 rules in place during the period at issue in this case, immigrant investors were required to invest at least $1 million of capital in a qualified business ("commercial enterprise") for at least two years and, at the completion of that period, demonstrate that the investment created at least ten jobs for American workers. USCIS permits a reduced investment ($500,000 at the time at issue here) if the foreign national's capital is aimed at economic growth in so-called "targeted employment areas"—geographic zones in rural areas or areas with high unemployment that have been deemed in greater need

[1] *See, e.g.*, *id.*; USCIS, *Policy Manual*, vol. 6, pt. G, https://www.uscis.gov/policy-manual/volume-6-part-g.

of economic investment. *See* 8 U.S.C. § 1153(b)(5)(B)(ii), (C); 8 C.F.R. § 204.6(e). To qualify, that lower capital amount must be invested in an entity that is "principally doing business" in the designated targeted employment area within the meaning of USCIS regulations. Under those regulations, an entity need not necessarily be exclusively physically located there. Instead, USCIS guidance explains that "a new commercial enterprise is 'principally doing business' in the location where it regularly, systematically, and continuously provides goods or services that support job creation."[2] A complex set of factors are considered in making that determination, described in USCIS guidance interpreting its own regulations.[3]

In 1992, Congress expanded the EB-5 program through establishment of the "Regional Center Program." That program allows investors to pool their money into USCIS-approved entities called "regional centers," which are "involved with the promotion of economic growth" of a specified region, "including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e), (m)(1). Rather than invest directly in a single business, regional centers allow foreign nationals to invest in larger-scale projects or a diverse set of projects. *Id.* Rather than administering regional centers themselves, most jurisdictions contract with private companies to operate their regional centers from afar. Before a regional center can begin operating, it must be approved by USCIS

[2] USCIS, *Policy Manual*, vol. 6, pt. G, https://www.uscis.gov/policy-manual/volume-6-part-g.
[3] *Id.*

through submission of a "Form I-924," laying out how the regional center will be structured and how it will promote growth in that area. 8 C.F.R. § 204.6(m)(3)(i)–(v).

The requirement that a foreign investor create ten American jobs becomes substantially more complicated in the regional center context, where investor money is comingled and distributed to numerous so-called "job-creating entities," i.e., portfolio projects. In that context, jobs need not be "directly" created by the business receiving capital, meaning, the investor need not show that his or her investment directly led to the hiring of ten American workers. Instead, when capital is pooled through a regional center and then disbursed to eligible entities, USCIS uses complex economic modeling that inputs capital contributed and the industry receiving funds to produce an estimate of likely job growth associated with the investment. That system credits both "direct jobs" (i.e., employees hired directly by the business receiving funds in the first instance), as well as "indirect jobs" created in the broader market by the investment.[4] And, although investor capital must initially go to businesses "principally doing business" in the designated area, USCIS regulations do not require all job growth occur within the relevant area or that all future expenditures occur there.

In other words, there is no requirement that the job-creating entities receiving capital spend that money exclusively in the targeted geographic region, i.e., hire all of its workers, purchase all of its materials, or retain all of its services there. There

[4] USCIS, *Policy Manual*, vol. 6, pt. G, https://www.uscis.gov/policy-manual/volume-6-part-g.

also is no prohibition against self-dealing in the regional center program context, meaning, there is no prohibition against the administrators of regional centers investing capital into companies they own.

B. Factual Background.

This case arose from the management of the New Orleans regional center, which was operated for years by Petitioner William Hungerford—a Maryland businessman—and his business partner Timothy Milbrath—a retired Air Force colonel.[5] Neither had any prior criminal record or other history of fraudulent behavior. Uncontroverted evidence at trail established that USCIS officials under the President George W. Bush administration approached the men to ask them to resurrect the defunct New Orleans regional center, which long had been inactive. Also uncontroverted at trial, the men (neither of which had any prior experience with the EB-5 program or immigration law generally) worked closely with USCIS officials to develop the precise structure used for the New Orleans regional center, including its fee structure and venture capital fund model. As referenced in documents submitted by the prosecution at trial and described extensively in testimony, Col. Milbrath and Mr. Hungerford met with high-ranking USCIS officials on numerous occasions from the regional center's infancy onward, to discuss how to administer and structure it. It was also uncontroverted that USCIS repeatedly reviewed and

[5] Sadly, Col. Milbrath passed away in Bureau of Prisons custody while the appeal in this case was pending.

approved the fund's structure and the various types of expenses paid to the two partners who ran and managed it. And USCIS also approved the Fund's proposed economic multiplier formula to be used for calculating the number of jobs indirectly created by each foreign national's investment—a calculation needed to successfully obtain permanent residency in exchange for their capital contributions.

A business plan approved by USCIS listed a number of potential projects already identified as possible job-creating entities for the Fund's portfolio, anticipating that a total of $31.5 million dollars could eventually be raised for Fund investments through EB-5 capital. Central to this case was one of those listed job-creating entities, "Bay-Nola-Management" or BNM, which was described to USCIS and potential investors as providing "marketing, financial management, due diligence and business analysis, and economic forecasting and analysis." The defendant's owned BNM and testified that they created it with the input of USCIS as a means of providing various necessary services to the investment fund and its portfolio projects. USCIS was aware, the defendants testified, that they would be paid through BNM for the various management services they provided to the Fund and that doing so would be permissible because BNM itself would qualify as a job-creating entity. The thinking was that, although BNM's primary office was located in Maryland rather than New Orlans, the services it would provide would be in New Orleans. No one at trial disputed that the defendants ultimately received sizable compensation through BNM over the years-long operation of the Fund. The dispute instead was whether doing so was permissible under USCIS rules.

For years, foreign investment in the New Orleans regional center—and its program structure—was approved again and again by USCIS. However, in 2010, after 31 approvals, USCIS suddenly stopped approving pending applications for investment, leaving $7.5 million of expected capital in limbo and unavailable to the Fund. In 2012, USCIS began denying investors' applications for permanent residency on the ground that the Regional Center's portfolio projects had not satisfied USCIS's job-creation requirements. Specifically, a dispute arose over whether BNM qualified as a job-creating entity principally doing business in New Orleans such that it could receive investor capital and help satisfy job-creating requirements.

By that time, the presidential administration had turned over and USCIS leadership had changed. Alejandro Mayorkas had taken over as the agency's new director, and the USCIS officials who had worked closely with the defendants and approved the structure of New Orleans regional center were no longer at the agency. Broader disputes began to swirl around USCIS's shifting views on the meaning and requirements of its own regulations. Relevant here, USCIS changed its interpretation of various regional center program rules, most notably, about how to calculate requisite job creation and where that job creation must occur. This led to hostilities between Congress and the agency, as evidenced by correspondence referenced and admitted at trial in which members of Congress expressed their dismay over USCIS's position on the location of jobs indirectly created by regional center investments.[6]

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[6] *See, e.g.*, USCIS Dir. Alejandro N. Mayorkas, Letter to Sen. Patrick Leahy (Dec. 3, 2010)

In the case of the New Orleans regional center, all 31 applications for permanent residency were ultimately denied based on the job-creation dispute. That led a number of the foreign investors to file a lawsuit against the Fund in 2012, which the parities ultimately settled.

It was not until May 25, 2018—six years after the civil suit was filed—that federal prosecutors sought a criminal indictment, largely mirroring the claims made in the civil suit. Specifically, prosecutors charged three broad, ongoing conspiracies in lieu of charging substantive counts for the wired EB-5 funds:

> **Count 1:** Conspiracy to commit mail and wire fraud through a scheme to defraud immigrant investors of their capital, in violation of 18 U.S.C. §§ 1341 and 1343;
>
> **Count 2:** Conspiracy to commit immigration fraud by "mak[ing] or caus[ing] to be made material false statements under oath and penalty of perjury" on an immigration applications or other document, in violation of 18 U.S.C. § 371 and 1546(a).
>
> **Count 3:** Conspiracy to launder the ill-gotten proceeds of the unlawful activity in alleged in Counts 1 and 2 using the structure of the various New Orleans Regional Center-related entities.

Six of the indictments 56 overt acts listed in support of those conspiracies were also charged as substantive wire fraud counts.

The prosecution's theory of guilt as to all nine counts rested on its claim that the defendants knowingly developed a fraudulent EB-5 investment fund with the specific intent to defraud investors of their committed capital investment. Central to

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(referencing the dispute and clarifying USCIS's position), *available* https://www.aila.org/aila-files/7DCCEB85-E122-43FC-AB76-1CEE84175145/10122135.pdf?169759062.

that these was the prosecution's claim that the defendants misrepresented that they would follow EB-5 program rules, but then brazenly violated those rules by channeling investor funds to a company they owned that could not receive investor capital by virtue of its location. That theory of intent necessarily relied on highly controverted views of what USCIS rules, regulations, and guidance do and do not permit.[7]

According to the prosecution at trial and again on appeal before the Fifth Circuit, USCIS rules required that any entity receiving investor funds had to "operate in New Orleans," that every penny of fund capital was required to be "used for rebuilding New Orleans after Hurricane Katrina," and that no portion of fund capital could go to "Hungerford and Milbrath and their employees in Maryland." And the prosecution argued that the men improperly received payments from investor funds, including payments for expenses and services related to their management of the venture capital fund and the fund's various investment projects. According to the prosecution, that compensation violated EB-5 rules, because (under the government's view) "every penny" of investor capital had to "go to" New Orleans and could not be "touched" by the Fund's administrators. Those alleged rules violations, the prosecution urged the jury, clearly evidenced the men's intent to defraud foreign national investors of their devoted capital and betrayed the Fund's true purpose of

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[7] A wire fraud conviction requires proof beyond a reasonable doubt that the defendant, employing false or material representations, intentionally devised a "scheme to defraud" others of their money or property for financial gain—i.e., purposefully and intentionally concocted "[a]n artful plot or plan . . . to deceive others." *United States v. Chanu*, 40 F.4th 528, 540 (7th Cir. 2022).

funneling investment dollars to Mr. Hungerford and Col. Milbrath in Maryland, rather than use the funds for approved purposes. Everyone knows the EB-5 program rules, the prosecution claimed, and the defendants' conduct clearly violated those rules, so they must have had intent to defraud.

The defense, by contrast, urged that the men developed and administered the program in good faith, relying on extensive consultation with and input from USCIS agency officials who first approached them to run the beleaguered New Orlans regional center. The defense argued that the two business partners did ultimately get paid from investor money for the various services they provided to the fund as did their company, but that compensation structure did not, contrary to the prosecution's claims, violate any USCIS regulations and in fact complied with USCIS's interpretations and guidance at the time. Thus, the case came down to knowledge and intent, with those central elements resting on the meaning and application of highly technical USCIS rules and regulations, as well as the two defendant's understanding of them. And the various changes to and UCIS's evolving interpretations of its own regulations and congressional mandates were the center of that controversy.

Despite the prosecution presenting a case that relied on the meaning of complex immigration regulations, the government did not call a single expert witness under Federal Rule of Evidence 702 and instead called only lay witnesses (also known as fact witnesses) under Rule 701. Importantly, Rule 701 prohibits lay witnesses from "expressing opinions that require[] specialized knowledge." Fed. R. Evid. 701 ("If a

witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge[.]"). Instead, if "any part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to Rule 702," then the rule governing experts, and "not Rule 701," the rule governing fact witnesses, applies. *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008).

That critical evidentiary protection was added in 2000 to crack down on the improper use of lay witnesses at trial. As the Advisory Committee explained at the time:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson.

Fed. R. Evid. 701, Advisory Committee Note (2000); *see also United States v. Conn*, 297 F.3d 548, 553 (7th Cir. 2002) ("Before the 2000 amendment to Rule 701, some courts had become more lenient in the admission of lay opinion on subjects appropriate for expert testimony. The amendment was designed to make clear that courts must scrutinize witness testimony to ensure that all testimony based on scientific, technical or other specialized knowledge is subjected to the reliability standard of Rule 702.").

The importance of the distinction between lay and expert witnesses cannot be understated. Indeed, although expert witnesses are given more leeway to provide opinion testimony than lay witnesses, the admission of such testimony is strictly guarded. Under the Rules of Evidence, the offering party must make specific showings to establish the reliability, permissibility, and relevance of the proffered testimony. *See* Fed. R. Evid. 702. And, under the Federal Rules of Criminal Procedure, the offering party must make specific disclosures about the nature of the expert and testimony to provide fair notice and opportunity for the other party to counter that testimony if appropriate. *See* Fed. R. Crim. P. 16(a)(1)(G).

In this case, the prosecution not only failed to give notice to the defense of any expert testimony, but also did not call a single USCIS official who was involved with or had any first-hand knowledge of the various events surrounding the New Orleans regional center. In fact, the prosecution declined to call any USCIS official who was even employed by the agency during the period at issue in this case. Instead, the prosecution called Jan Lyons—a "senior economic advisor for the Immigrant Investor Program" at USCIS, who began working at the EB-5 program in 2012, i.e., well after the change in administration and subsequent implementation of controversial interpretive changes.

Mr. Lyons had no personal involvement in or firsthand knowledge of any of the events related to the New Orleans regional center. Instead, the prosecution asked him to educate the jury, in great detail, about the complex web of USCIS rules and regulations governing the EB-5 program (according to his view of the law) and the

agency's procedures for carrying out that regulatory framework. In lieu of firsthand exposure to the events of the case, Mr. Lyons instead reviewed various case-related documents in preparation for his testimony, and, at prosecution prompting, opined extensively on their meaning and their permissibility under his interpretation of USCIS rules. And, for hours, he described in detail what he claimed to be numerous, indisputable EB-5 program requirements.

In doing so, Mr. Lyons essentially opined on the impropriety of the defendant's conduct and, by extension, their guilt. For example, Mr. Lyons: explained the Code of Federal Regulations governing the EB-5 program and his interpretation of those laws; expounded at great length on the application of the Code of Federal Regulations provisions and USCIS's internal views of those regulation to the facts of the case (of which he had no firsthand knowledge); stated legal tests and how the agency interprets and applies those tests; applied his interpretation of the law to the appellants' specific conduct and informed the jury how the law required them to act; and applied his interpretations of the law to thinly veiled hypotheticals, clearly intended to signal judgment that the appellants' specific conduct was unlawful.

Central to that testimony were Mr. Lyons's views on where investor funds may be spent and what it means for a business to be "principally doing business in a location," as illustrated by this exchnage:

> **Q:** How do you figure out if a project if principally doing business in a regional center area?
>
> **A:** Well, the first thing we do is we look at the address to make sure that there's an address within that job-creating area, and that shows us that they're principally doing business there. . . .

> **Q:** Just a post office box, does that count as 'principally doing business'?
>
> **A:** No.

Mr. Lyons even went so far as to call his views of the law "sacrosanct," as illustrated in the following exchange about management fees—a central dispute in the case:

> **Q.** [C]an any of my $500,000 be spent managing the fund, like a management fee?
>
> **A.** No. All of the $500,000 -- and this is really essential -- every penny of that has to go for job creation. No exceptions. . . . That $500,000 is, if you will pardon the expression, sacrosanct. That's for job creation only. The fees that they were going to charge here could only come from profits. . . .

Throughout trial, the prosecution also asked various other lay witnesses (such as foreign investors and their attorneys) to describe for the jury their understanding of highly technical and specific USCIS program rules and requirements. However, that testimony was a drop in the bucket compared to the five-hour musings of bureaucrat Jan Lyons, who provided by far the most extensive and damning testimony and whose testimony served as the prosecution's central focus. Indeed, that testimony served as the central foundation of the prosecution's theory of guilt, namely, of Col. Milbrath and Mr. Hungerford's "complete disregard" of well-known USCIS requirements as relayed by Mr. Lyons. That knowing disregard of "sacrosanct" rules, the prosecution urged, was what transformed the case from a mere "regulatory dispute" into "fraud in violation of our federal criminal laws." The prosecution's cross-examination of the defendants, who testified on their own behalves, also relied heavily on Mr. Lyons's testimony about what USCIS rules did and did not allow.

And those themes continued in the prosecution's closing arguments. Unsurprisingly, Mr. Lyons's testimony—and calls to USCIS's authority in general—were the prosecution's immediate and central focus . Additionally, in lieu of testimony from an actual USCIS official who was involved in the case, the prosecution created a fictional bureaucratic "hero" who ferreted out the defendants' alleged fraud, telling the jury:

> Let me be clear, there's a hero somewhere in that bureaucracy who just decided to do their job. That man or woman is unknown right now, but they kept asking questions: 'Where did the money go? Show us the money.' That's it. . . . Someone at the U.S. Federal Government did their job. Your taxpayer money at work. And as a result, this case has happened.

The prosecution concluded: "They messed with the wrong agency, an agency with someone actually out there [who] gives a care about what they do who discovered this. . . . They messed with the wrong agency; they messed with the wrong investors; and they messed with the wrong city."

The jury convicted both defendants on all counts.

C. Appellate Proceedings Below.

On appeal, Mr. Hungerford argued that Mr. Lyons testimony was clearly improper under the Federal Rules of Evidence—an error that was unfortunately not preserved but was facially devastating. Stunningly, on appeal, the government argued that Mr. Lyon's testimony was perfectly acceptable under Rule 701, governing lay witnesses, as it was simply akin to a fact witness who works for a particular type of business providing insight into the business's policies, practices, and procedures

and was not based on any particularly specialized or technical knowledge beyond what a layman might know.

In an opinion issued following oral argument, the Fifth Circuit affirmed. *United States v. Hungerford*, No. 21-30359, 2023 WL 8179273, at *6 (5th Cir. Nov. 27, 2023). Despite the government's denials, the court did not disagree that Mr. Lyons testimony was improper lay witness testimony under Rules 701 and 702. Instead, the court simply brushed off its importance, nothing that, because a handful of other lay witnesses (none of whom were actual agency officials) had expressed similar views in passing (and in far less detail), Mr. Lyons' testimony was without any harm. *Id*.

REASONS FOR GRANTING THE PETITION

I. In the civil context, this Court and commentators have increasingly recognized the danger of blind deference to agency interpretations of statutes and regulations.

Nearly forty years ago, this Court indicated in *Chevron v. Natural Resources Defense Council* that courts should defer to an agency's reasonable interpretation of an ambiguous statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron*—and its legacy of increasing deference to agency bureaucrats on what the law means—"has long been persuasively criticized as unconstitutional, both for violating Article III's vesting of all judicial powers in the judiciary and for violating due process."[8] Thus, this Court is rightly in the process of revisiting *Chevron* and its legacy, having already heard arguments in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* earlier this year.

Indeed, the result of *Chevron* has been "[t]he exponential growth of the Code of Federal Regulations and overregulation by unaccountable agencies." Pet. for. Writ of Cert., *Loper Bright Enterprises, Inc., v. Raimondo*, 022 WL 19770137, at *15 (Nov. 10, 2022). And "[i]t is no accident that the Code of Federal Regulation has burgeoned during the *Chevron* era." *Id.* at *31. As the Petitioner in *Loper Bright* urged:

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[8] Brief of the CATO Institute and Liberty Justice Center as *Amicus Curiae* in support of Petitioners, *Loper Bright Enterprises, Inc., v. Raimondo*, 143 S. Ct. 2429 (2022) (citing *Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Charles J. Cooper, *The Flaws of Chevron Deference*, 21 Tex. Rev. L. & Pol'y 307, 310-11 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty 475, 507 (2016); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1211 (2016)).

> In a liberty-loving Republic, one would expect the rule to be that, when there is doubt about whether the executive has authority over the governed, the tie would go to the citizenry. But *Chevron* quite literally erects the opposite rule for breaking not only ties, but anything that can be fairly deemed ambiguous. The difficulties for the citizenry take more subtle forms as well. It is perhaps a tolerable fiction that the citizenry can master the various provisions of the United States Code. But '[u]nder Chevron the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of Chevron; required to guess whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'"

Id. (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring)).

While the *Chevron* doctrine requires courts to defer to an agency's reasonable interpretation of an ambiguous *statute*, the related *Auer* doctrine applies to review of an agency's interpretation of its own ambiguous regulation.[9] That doctrine too has been the subject to immense criticism and rightfully so. In fact, critics have warned that this brand of deference poses more dangers than *Chevron*'s doctrine in the context of statutory interpretation. As Justice Thomas has observed, the Administrative Procedure Act, in theory, "guards against excesses in rulemaking by requiring notice and comment," because "[b]efore an agency makes a rule, it normally must notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement

[9] *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

of the rule's basis and purpose." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Thomas, J., concurring). However, the Act "exempts interpretive rules from these requirements." *Id*. Thus, the Act anticipates that:

> An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means.

Id.

Increasingly unbridled deference to agency bureaucrats as to their own interpretive guidance has led courts to hold that "agencies may authoritatively resolve ambiguities in regulations." *Id.* at 110 (emphasis in original) (citing *Auer,* 519 U.S. at 461). The dangerous result of that deference: "Agencies may now use these rules not just to advise the public, but also to bind them." *Id.* "After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law." *Id*.

Even Justice Scalia, who authored *Auer*, ultimately sided with its critics, lamenting, "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part). Justice Scalia rightly warned: "[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of

rulemaking, and promotes arbitrary government." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (citations omitted).

Ultimately, as scholars have observed, both *Chevron* and *Auer* deference "imbue[] the federal judiciary with institutional bias in favor of the most powerful parties (the federal bureaucracy), which violates parties' due process rights when their life, liberty, or property is at issue." Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103, 112 (2018) (citing Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016)).

II. This Court appears not to have addressed this issue in the context of criminal prosecutions, where the dangers of blind deference to agency bureaucrats is heightened.

This Court, litigants, and critics have focused in recent years on increasingly blind deference to agency interpretations of their own regulations (and that deference's attendant harms) in the civil enforcement context. But this Court appears not to have examined the harm of courts permitting criminal prosecutors to call agency bureaucrats as witnesses in order to opine on the meaning of their own regulations before juries. Guidance on how to analyze that common brand of testimony is needed.

Indeed, federal prosecutors routinely call agency bureaucrats as witnesses, asking them, as the prosecutors did in this case, to "educate" jurors on what complex regulatory statutes and provisions mean—and what that meaning says about a

particular defendant's guilt.[10] And the dangers of that practice are far worse in the criminal context—not only because the stakes are higher for the defendants involved, but also because of the lack of protective safeguards enjoyed in the civil-enforcement sphere.

Most fundamentally, *Chevron* and *Auer* still mandate at least some level of judicial oversight to ensure the reliability and soundness of the offered agency opinion. Specifically, for an agency's interpretations to have force, the law or regulation at issue must have some degree of ambiguity and, more critically, the judiciary is required to ensure that the interpretation offered is reasonable. That job in the criminal context, as this case illustrates, is passed on to the lay jury, which is ill equipped to ensure that agencies are correctly and fairly interpreting and applying complex regulatory schemes. Moreover, in the criminal context, a convenient position may simply be found with a single agency official, rather than the agency as a whole. Indeed, in this case the prosecution was given license to simply select an agency official of its choice to parrot the prosecution's selected meaning of highly controversial regulations whose meaning may fluctuate both over time and by agency official.

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[10] *See, e.g.*, *United States v. Riddle*, 103 F.3d 423, 428 (5th Cir. 1997); *United States v. El-Mezain*, 664 F.3d 467, 512 (5th Cir. 2011); *United States v. Griffin*, 324 F.3d 330, 347 (5th Cir. 2003); *United States v. Rothenberg*, 328 F. App'x 897, 902 (5th Cir. 2009); *United States v. Chikere*, 751 F. App'x 456, 460 (5th Cir. 2018).

The civil context provides another crucial backstop: this Court has limited *Auer* deference in a manner that, at least in theory, prevents punishment of entities for conduct that occurred *prior* to an agency's changed interpretation of its own rule. For example, in *Christopher v. SmithKline Beecham Corp.*, the Court held that *Auer* deference does not apply to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced." 132 S. Ct. 2156, 2167 (2012). The *Christopher* Court rejected application of *Auer* deference to agency officials in that circumstance, as it "would result in precisely the kind of 'unfair surprise' against which our cases have long warned" and "[t]o defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Id*. No such check exists in the criminal context, despite the significantly more dire due-process concerns.

Finally, separation of powers concerns in the criminal context are heightened. The prosecuting executive is permitted to cherry pick its own internal administrative agent to put forward a view of the law that is convenient to the prosecution's position. This case illustrates that concern, with the prosecution affirmatively declining to call a bureaucrat from the previous administration and instead calling a bureaucrat to serve as a mouthpiece for the agency's revised (and the prosecution's favored) interpretive positions.

III. The Fifth Circuit severely underappreciated the serious harm of the improper agency testimony in this case.

Even with the protections of Rule 702 governing the use and disclosure of expert witnesses, the above-discussed dangers should be cause for alarm in the criminal context. In this case though, the prosecution successfully evaded even those protections. By improperly failing to disclose its USCIS official as an expert—and instead smuggling in his opinions under the guise of Rule 701 lay witness testimony—the prosecution not only exposed the jury to extensive bureaucratic opining on the guilt of the defendants but did so without fair notice to the defense and necessary warnings to the jury. Pre-trial, the prosecution was never required to demonstrates to the trial judge, for example, that: (a) Mr. Lyons's scientific, technical, or other specialized knowledge would help the trier of fact to understand the evidence or to determine a fact in issue; (b) that his testimony was based on sufficient facts or data; (c) that his testimony was the product of reliable principles and methods; and (d) that his opinion reflected a reliable application of the principles and methods to the facts of the case. *See* Fed. R. Evid. 701. The prosecution also improperly evaded the detailed disclosure requirements imposed under Rule 16 of the Federal Rules of Criminal Procedure, intended to insure the defense has adequate notice of an expert's opinions so that it may be prepared to counter those opinions if appropriate. *See* Fed. R. Crim. P. 16(a)(1)(G).

Nor can the impact of the improper testimony by agency officials on juries be underestimated, as illustrated by this case. Indeed, the "lay" agency official in this case was on the stand for *five hours* for direct examination alone. Mr. Lyons was the

only USCIS official to testify, and the only witness able to speak, in the eyes of the jury at least, authoritatively and on behalf of his agency on issues like the laws governing the EB-5 program, how the agency carries out and interprets those laws, its views on various types of conduct, what is and is not permissible based on those views, and, ultimately, whether the law permitted the appellants to do what they did. Indeed, he served as USCIS's spokesperson on the matter, opining on the law and the propriety of the appellants' conduct on behalf of the agency for hours on end.

And the prosecution (recognizing the value of Mr. Lyons's bureaucratic musings) repeatedly weaponized his testimony to its benefit throughout this case. For example, the prosecutor drew upon Mr. Lyons' improper testimony to aggressively cross examine the appellants and drive home to the jury that they could not possibly have understood the regulations in the way they did and believed their actions were proper. And Lyons's improper testimony was the immediate and central focus of the prosecution's closing arguments, which repeatedly relied on his claims about USCIS regulations and summarized his view of the law with specific citation to him in particular—reminding the jury that he was "a senior economic advisor for USCIS" and transparently resting its allegation of a scheme to defraud on the fact that the appellants' broke the "simple" rules explained and applied by Lyons. In fact, the prosecution went so far as to claim that anything Lyons "didn't say" that the appellants could do was unlawful. In its rebuttal argument, the prosecution even held USCIS, as an agency, up as the hero of its story for enforcing its clear, sacrosanct rules—assuring the jury that the appellants "messed with the wrong agency." And,

tellingly, on appeal, the government continued to rely heavily on Mr. Lyons's 195 pages of testimony throughout its brief.

In other words, the Fifth Circuit wholly failed to recognize the dangers of this form of testimony in the criminal context both in general and in this case in particular. And that makes this case an ideal vehicle to address this important issue. This testimony was deeply harmful to the integrity of these criminal proceedings and, contrary to the Fifth Circuit's findings, fully outcome determinative.

CONCLUSION

Petitioner William Hungerford respectfully asks this Court to grant certiorari on the question presented.

Respectfully submitted,

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