No. 16-60448

In the United States Court of Appeals for the Fifth Circuit

EXXONMOBIL PIPELINE COMPANY,

Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, OFFICE OF PIPELINE SAFETY,

Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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[Note: The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.]

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The business community has a particular interest in the interpretation and application of the ever-growing morass of federal regulations. Businesses, moreover, rely on the federal courts to serve as an independent check on federal agency action and to ensure that federal regulations

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[*] All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

are applied against them in a fair and reasonable manner. Given the breadth of its membership, the Chamber is well positioned to explain the consequences to the business community of judicial deference to an agency's absurd interpretation of its own regulation.

More specifically, the agency here has engaged in a significant, *post hoc* revision of important regulations governing pipelines. Such a shift, if left to stand, threatens to shutter important existing pipeline infrastructure. Pipeline companies will think twice about further investments in pipeline infrastructure if they believe that courts will afford deference to pipeline regulators' dramatic, *post hoc* changes in pipeline policy under the guise of interpretation of purportedly ambiguous regulations. Given the significant role that pipelines play in transporting critical energy resources, such as oil and natural gas, from states like Texas to the rest of the country, energy consumers—and, by extension, the entire economy—would be adversely affected.

INTRODUCTION AND SUMMARY

The multi-million-dollar civil penalty imposed on Petitioner is based on a federal agency's strained interpretation of its own regulation.

In particular, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) has interpreted its performance-based regulation that instructs pipeline operators to "consider" a number of pipeline risks, 49 C.F.R. § 195.452, as a prescriptive regulation that requires that pipeline operators reach a conclusion that pipeline is susceptible to pipeline-seam failures, even when the operators have properly considered the regulatory factors and determined there were no such risks.

Petitioner argues that the company repeatedly inspected the pipeline at issue, properly considered the regulation's factors each time, and, indeed, hired the expert who had previously authored the Agency's report on such inspections to ensure that the inspections complied with the regulation and agency guidance. Despite the fact that those "considerations" concluded that there was no identified threat, Petitioner nonetheless used several inspection methods that should have identified a threat of seam failure. Under the most natural reading of the regulation, where a pipeline operator has, in fact, "considered" the relevant pipeline risks, the operator should not be subject to the civil penalties levied in this case.

For the Agency to prevail, it must claim that its regulation requiring the consideration of pipeline risks is ambiguous—asking this Court

to defer to the Agency's much more demanding interpretation of the regulation than a straightforward reading of the regulation can bear. The Agency's eggs, it would seem, have been (mis)placed in the *Auer* basket—a deference doctrine that has traditionally been understood as instructing courts to accord an agency's regulatory interpretation controlling weight "unless it is plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted); *accord Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

For the following reasons, this Court should not accord *Auer* deference to the Agency's regulatory interpretation.

I. Supreme Court precedent precludes *Auer* deference where, as here, an agency's new regulatory interpretation would impose *post hoc* civil penalties on Petitioner in a way that provides no notice and thus causes unfair surprise. Indeed, the Court should follow the longstanding canon of interpretation that any ambiguities in a law imposing civil penalties should be construed against the law's drafter (here, PHMSA).

II. There are also constitutional concerns that counsel in favor of declining to accord *Auer* deference to PHMSA's interpretation. As a practical matter, *Auer* deference consolidates in one government actor—an unelected regulator—the power to make and then execute the law. In so doing, such deference may encourage federal agencies to purposefully leave regulations ambiguous and then utilize less-formal, *post hoc* guidance, enforcement proclamations, and the like to regulate with the force of law. *Auer* deference should be applied cautiously and narrowly.

III. *Auer* deference does not just raise series constitutional concerns in the abstract; it can have tremendous negative consequences for businesses that must rely on the best reading of regulations when operating and investing in their businesses. It is imperative that the federal courts serve as an independent check on the type of arbitrary regulatory action that *Auer* deference facilities and, indeed, often encourages.

ARGUMENT

I. *Auer* Deference Does Not Apply Here, Where the Agency's Interpretation Imposes Civil Penalties Without Fair Notice

The Supreme Court's decision in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), requires this Court to not apply *Auer*

deference to the Agency's regulatory interpretation under *Christopher*'s unfair notice exception to *Auer* deference.

In *Christopher*, like here, the agency's "interpretation of ambiguous regulations [would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced." *Id.* at 2167. The *Christopher* Court had little trouble in rejecting *Auer* deference because to apply *Auer* in such circumstances "would result in precisely the kind of 'unfair surprise' against which our cases have long warned." *Id.* (citing cases). Put differently, "[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.* (quoting *Gates & Fox Co. v. OSHA*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

This Court has long recognized administrative law's fair notice requirement for civil penalties. Just last month the Court reiterated that this fair notice "rule requires that a statute or agency action 'give . . . fair warning of 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.'" *Emp'r Solutions Staffing Grp. v. Office of Chief Admin. Hearing Officer*, __ F.3d __, 2016 WL 4254370, at *5 (5th Cir. Aug. 11, 2016) (quoting *Diamond Roofing Co. v. OSHA*, 528 F.2d 645, 649 (5th Cir. 1976)); *see also* 1 Richard Pierce, *Administrative Law Treatise* § 6.11 (5th ed. 2010) ("In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule.").

Indeed, the Agency's interpretation at issue here might impose even more unfair surprise than the one in *Christopher*. Petitioner argues that only after the pipeline seam failure did the Agency attempt to re-interpret a performance-based regulation that requires consideration of certain factors into a prescriptive regulation that would require that pipeline operators reach a conclusion that pipeline is susceptible to pipeline-seam failures, even when the operators have properly considered the factors and determined there were no such risks. Such a *post hoc*, fundamental shift in regulatory obligations, which in turn imposes significant civil penalties, creates an extraordinary degree of unfair surprise.

In all events, to the extent this regulation purports to impose a civil penalty, not only should the Court reject *Auer* deference in favor of the Agency's interpretation, but it should construe any regulatory ambiguities *against* the Agency. It is well settled that "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (2012). This canon should apply with the same, if not greater, force to regulations imposing penalties. That is because "when the government means to punish, its commands must be reasonably clear. When they are not clear, the consequences should be visited on [the government,] the party more able to avoid and correct the effects of shoddy legislative [or, here, regulatory] drafting . . . ." *Id.* at 299.

This civil-penalty variant of the rule of lenity further underscores the impropriety of applying *Auer* deference in the context of agency regulatory interpretations, such as the Agency's interpretation here, that Petitioner argues emerged for the first time in an agency enforcement action to retroactively punish the subject of that action. *Cf.* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L.

Rev. 1449, 1481 (2011) ("[C]ourts ought to retain, or even strengthen, . . . the limitation on retroactive application of nonobvious regulatory interpretations. This limitation not only addresses the fair notice concern but also mitigates the incentive that [*Auer* deference] tends to create for agencies to promulgate vague regulations.").

Accordingly, this Court should interpret *de novo* the regulation at issue, and it should construe any regulatory ambiguities against the Agency.

II. *Auer* Deference to Agency Regulatory Interpretations Raises Serious Constitutional Concerns

Moreover, judicial deference to an agency's interpretation of its own regulations raises serious constitutional concerns that warrant cautious and narrow application by the courts.

Two decades ago Harvard Law Professor John Manning argued that the Supreme Court should eliminate such deference and replace *Auer* (also known as *Seminole Rock*) deference "with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). Professor Manning's foundational critique was

based on constitutional separation-of-powers concerns, and he drew on legal principles set forth by Blackstone, Locke, and Montesquieu concerning the dangerous consolidation of law-making and law-execution powers in the same government actor.

In recent years, even *Auer*'s author—Justice Scalia—had joined the call to revisit *Auer* deference, observing that "[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). Other Justices on the Supreme Court have recently joined in the chorus of constitutional criticisms of *Auer*. For example, in *Perez v. Mortgage Bankers Ass'n*, Justices Thomas and Alito joined Justice Scalia's call to revisit *Auer* deference. Justice Thomas noted that "the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in the judgment). Justice Alito, moreover, explained that "[t]he opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

Auer deference is problematic precisely because it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am. v. Mich. Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring). That is because "when an agency promulgates an imprecise rule, it leaves to *itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law." *Id.*

Moreover, this consolidation of power within a federal agency can create perverse incentives. In particular, "deferring 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." *Id.* at 69.

For these reasons, these constitutional concerns serve as a caution to lower courts to narrowly apply *Auer* deference in only those instances

clearly commanded by Supreme Court precedent. Indeed, two recent empirical studies suggest that circuit courts have already begun to cut back on *Auer* deference in light of these concerns.[1]

III. *Auer* Deference Introduces Great Uncertainty for the Business Community and Thus the National Economy

The application of *Auer* deference has real-world, substantial impacts on the Chamber's members and thus the national economy. Judicial deference to agency regulatory interpretations, especially interpretations that impose civil penalties or otherwise change the regulatory landscape, risks introducing destabilizing uncertainty for the individuals, businesses, and industries regulated by such laws. Businesses depend on clear, predictable rules when structuring their operations and investing for their businesses. An agency's *post hoc* departure from the best reading

[1] *See* Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 827 (2015) ("Between the Court's decisions in *Talk America* and *Christopher*, courts of appeals granted *Auer* deference at a rate of 82.3%. That rate dropped to 74.4% during the period between *Christopher* and *Decker*, and fell further to 70.6% since *Decker*."); William M. Yeatman, *The Simple Solution to* Auer *Problem* (Aug. 29, 2016 draft) (reviewing 1,048 circuit court decisions from 1993 through 2013 and finding that the agency-win rate under *Auer* before 2006 was 77% but dropped to 71% after that), http://ssrn.com/abstract=2831651.

of a regulation can disrupt an industry's settled expectations and investments, with profound economic consequences for the industry and, in turn, for the national economy.

For these reasons, it is imperative that the federal courts review *de novo* agency regulatory interpretations—to ensure that regulated parties have fair notice of the regulatory framework and that federal agencies do not face incentives to change the rules of the game *post hoc*, without fair notice and public input, and in a way that upsets settled expectations.

CONCLUSION

For these reasons, this Court should review *de novo* the Agency's interpretation of its own regulation at issue here.

Respectfully submitted,

September 7, 2016

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 2,414 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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