No. 19-1304

IN THE

Supreme Court of the United States

INDIAN RIVER COUNTY, FLORIDA, *ET AL.*,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those key ideas is the separation of powers vital to liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF believes that judicially created executive-branch deference regimes are inconsistent with bedrock separation-of-powers principles and the text, structure, and history of the U.S. Constitution. These doctrines—*Chevron*, *Auer*, *Skidmore*, *Brand X*, and the like—wrongly place a thumb on the scale of the nation's most powerful litigant (the federal government), rigging the game against the American people. Due process and basic fairness demand that

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[1] All parties consented to the filing of this brief. Petitioners and the Solicitor General's Office received timely notice. Due to an oversight, Respondent AAF Holdings, Inc. was not afforded 10 days' notice per Rule 37.2(a). AFPF sought consent from AAF on June 16, 2020; AAF graciously consented that day. No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

private litigants be on equal footing with the government in disputes in Article III courts.

AFPF believes executive-branch deference is unconstitutional and the case law creating, blessing, and expanding on such deference regimes should be abandoned. These judicially developed doctrines of administrative law have fundamentally and wrongly altered the constitutional balance of powers among the branches of government.

Lower federal courts should not be permitted to accede to federal agencies' extratextual, policy- and outcome-driven views on the scope of agency powers and should instead rigorously examine the purported source of those powers: the statutory text.

AFPF has a particular interest in this case because the decision below exemplifies a recurring problem that has become more prevalent: drive-by deference.

SUMMARY OF ARGUMENT

It is black-letter administrative law that agency powers are derived from, and limited by, duly enacted federal statutes. Article III of the U.S. Constitution tasks the Judiciary—not the Executive Branch, let alone administrative bodies—with independently and definitively interpreting federal statutes in contested cases. This reflects a key concept: the separation of powers vital to protecting our liberties. Under the separation of powers, Congress legislates, the Executive enforces the law, and the Judiciary says, once and for all, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If disputes arise between private parties and

government officials charged with enforcing the law, basic principles of due process and fairness demand that private parties be on a level playing field with the government in court. Equally imperative, federal judges—who are experts in interpreting federal statutes—should use and jealously safeguard their independent judgment as to what the law means.

But over time, judicially developed deference regimes have derailed and effectively transferred core Article III powers to unelected federal bureaucrats. Doing so has put a thumb on the scale in favor of the nation's most powerful litigant—the federal government—thereby rigging the game against the American people. For as Justice Frankfurter warned, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

These deference doctrines, including *Skidmore*, are difficult to square with the U.S. Constitution and the Administrative Procedure Act ("APA"). Instead, they result in extraconstitutional power-transfers that violate bedrock separation-of-powers principles upon which our hard-won system of checks and balances was built. Judicial deference to the Executive Branch's views of laws the Legislature wrote under *Skidmore*, as with its troubled cousins *Chevron* and *Brand X,* in effect not only cedes Article I legislative power to administrative bodies but also voluntarily surrenders core Article III powers to them as well. That is profoundly unconstitutional.

At a minimum, it is imperative that lower federal courts receive much-needed guidance that *Skidmore* does not require or authorize drive-by reflexive deference to informal agency interpretations. Instead, as with *Chevron* and *Auer*, courts must exhaust *all* traditional tools of statutory interpretation, including canons of construction, *before* considering the extent to which *Skidmore* power-to-persuade deference may apply.

As *Chevron* footnote 9 makes clear, "[t]he judiciary is the final authority on issues of statutory construction" and therefore courts must independently exhaust "traditional tools of statutory construction" before giving weight to an agency's formal interpretations of statutes. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). And as Justice Kavanaugh has explained with respect to this Court's efforts to limit the most pernicious effects of *Auer* deference to agency interpretations of their regulations, "the [*Chevron*] footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency[.]" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment).

Here, the D.C. Circuit did precisely the opposite, allowing the caboose to lead the way, by focusing first on whether the agency's interpretation was "reasonable" and in an area of the DOT's "expertise." But the Circuit rode the rails past the more important threshold question of whether the statute's text authorized DOT's actions. That elementary error of statutory interpretation has severe consequences for our constitutional order and system of checks and balances. It is also all too common.

The reason for this error is that the D.C. Circuit, along with many other lower federal courts, appear to misconstrue *Skidmore* to broadly allow agencies to bypass statutory limits on their authority based on "informal" agency documents purporting to say what the law means. All too many courts accede to agency demands for deference under *Skidmore* without first meaningfully examining the underlying source of the agency's claimed powers: the statutory text. This is so even though courts routinely defer under *Skidmore* to "informal" agency interpretations set forth in letters, memoranda, website FAQs, and the like. Worse, many Circuits grant *Skidmore* to agency litigation positions, even in disputes between private parties where the agency advances its interpretations in amicus briefs.

This case provides an ideal opportunity for this Court to clarify that *Skidmore*, no less than *Auer*, is boxed in by the *Chevron* footnote 9 principle.

ARGUMENT

I. REFLEXIVE *SKIDMORE* DEFERENCE RAILROADS THE SEPARATION OF POWERS.

Under the separation of powers, Congress legislates, the Executive enforces the law, and the Judiciary says, once and for all, "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. . . . The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). As James Madison famously wrote, "[t]he accumulation

of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47. And as Alexander Hamilton cautioned: "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." The Federalist No. 78.

"To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring). The Founders knew that "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "The Founders expected that the Federal Government's powers would remain separated—and the people's liberty secure—only if the branches could check each other. The Judiciary's checking power is its authority to apply the law in cases or controversies properly before it." *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of certiorari).

"When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United States.' . . . [T]he judicial power, as originally understood, requires a court to exercise its [independent judgment] in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring) (quoting U.S. CONST. Art. III,

§ 1). Under the separation of powers, as understood by the Founders of our Constitution, "[t]he interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning of any act proceeding from the legislative body." The Federalist No. 78 (Hamilton). At least that is how checks and balances are supposed to work.

Yet as with other sundry judicially created deference regimes, *Skidmore* transfers judicial power to the Executive. By relinquishing its power-checking function against the Executive via *Skidmore* "respect" or deference to *informal* agency interpretations in materials like letters, memoranda, and amicus briefs, the Judiciary imperils its independence and railroads the separation of powers that is vital to protect liberty. It also "creates a systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring) (cleaned up).

Empirical research "shows that *Skidmore* review is highly deferential—less so than *Chevron*, but still weighted heavily in favor of government agencies over their challengers." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1291 (2007); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (empirical study finding agency statutory interpretations prevailed 56.0% of time under *Skidmore* deference, as opposed to 38.5% under de novo review). As Professor Philip Hamburger has explained: "The danger to independent judgment arises whenever judges relinquish their judgment in any degree, and the

danger of systematic bias arises whenever judges show greater respect for the legal position of one party than that of the other." Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1202 (2016). As showcased here, *Skidmore*'s vague, totality-of-the-circumstances analysis has this unconstitutional effect, enabling a stealth *de facto* deference to federal agencies without the requisite check of analyzing the underlying source of that power: the statutory text. *Skidmore* has been misinterpreted by some lower federal courts to allow them to bypass the primary source (the statutory text) to instead consult the "cliff notes" version (here, a letter drafted in the mid-1990s by a government lawyer). *See also* Pet. 10–12, 23–25.

Judicial deference to government-created secondary sources of dubious objectivity is in serious tension with our Constitution and the APA, to say the least.[2] "In every case where an Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered." *Valent v. Comm'r of Soc. Sec.*, 918

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[2] Judicially created executive-branch deference doctrines, such as *Chevron* and *Auer* deference, raise significant constitutional concerns. *See Baldwin,* 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment) ("This Court invented [*Auer* deference], almost by accident and without any meaningful effort to reconcile it with the [APA] or the Constitution."); *id.* at 2446 n.114 ("To be sure, under [*Chevron*] . . . we sometimes defer to an agency's construction of a statute. But there are serious questions, too, about whether that doctrine comports with the APA and the Constitution." (citation omitted)).

F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting); *see also Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) (explaining *Chevron* deference "likely conflicts with the Vesting Clauses of the Constitution"). So too under *Skidmore.*[3]

Nor is such executive-branch deference deeply rooted in our history. "From the rise of the administrative agencies, beginning in the mid-to late nineteenth century through the New Deal, the Court clung tightly to both the common law and its duty to say what the law is, making 'clear that agency determinations . . . were to be paid no deference by a reviewing court.'" Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. Chi. L. Rev. 447, 453 (2013) (citation omitted). Tellingly, as Professor Hamburger has explained, under *Skidmore* "the Court defers to executive interpretations even in mere opinion letters and in Custom Service ruling letters—the sort of executive interpretations that . . . are as old as the nation and that traditionally were not binding or given any

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[3] *Skidmore* was decided in 1944, before the APA. As Professor Aditya Bamzai explained: "In his 1944 opinion in *Skidmore*, Justice Jackson remarked that there was 'no statutory provision as to what, if any, deference courts should pay to' agency interpretations of statutes. Within two years, that would change as a result of developments within the political branches that were occurring in parallel with this new jurisprudence." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 981 (2017).

special respect by the courts." Philip Hamburger, *Is Administrative Law Unlawful?*, 316 (2014); *see also* Bamzai, *The Origins of Judicial Deference*, 126 Yale L.J. at 1000 (explaining "judicial deference—as an interpretive theory practiced from the mid-twentieth century onwards and especially after the Court's opinion in *Chevron*—is an innovation.").

Yet all too often federal courts reflexively defer even to *informal* agency pronouncements. In doing so, the courts avoid the third rail and instead silently acquiesce not only to the existence of a fourth branch of government, but to the notion that the administrative branch is superior to the other three.[4] This state of affairs is profoundly unconstitutional.

It is one thing for federal courts to consider informal agency statutory interpretations to the extent they are persuasive *after* independently and rigorously examining the text, structure, and history of the statute; and exhausting all traditional tools of statutory interpretation, including canons of construction. *Cf. Chevron*, 467 U.S. at 843 n.9 (statutes); *Kisor*, 139 S. Ct. at 2415 (regulations). "Where . . . the canons supply an answer, '*Chevron* leaves the stage.'" *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1630 (2018) (citation omitted). It is quite another to bypass entirely that critical—and constitutionally required—step in the process moving instead straight to the "cliff notes" set forth in an informal agency interpretation and granting

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[4] "L'État, c'est moi," Louis XIV (purportedly), C. D. Erhard, Betrachtungen über Leopolds des Weisen Gesetzgebung in Toscana, Richter, 1791, p. 30.

deference, as happened here. Under the separation of powers, the order of operations matters. And *Skidmore* deference, like its cousins, is outcome determinative: when a court determines that it applies, the agency wins. Agencies should not be allowed to rig the game through the simple expedient of informally memorializing their preferred statutory interpretation behind closed doors in internal memoranda, Internet postings, or, as here, a letter to another agency; nor should they be allowed to claim *Skidmore* deference for interpretations announced in amicus briefs and agency litigating positions. "[J]udges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

As Judge Kethledge explained with respect to *formal* agency statutory interpretations subject to public notice and participation or, alternatively, some adversarial process in formal agency adjudications:

> *Chevron* directs courts to exhaust all the "traditional tools of statutory construction"—and there are many of them—before surrendering to some putative ambiguity and thereby allowing the Executive to exercise power belonging to another branch. . . . [A]n Article III court should not defer to an . . . agency's pronouncement of "what the law is" *unless the court has exhaustively demonstrated—and not just recited—that every judicial tool has failed.*

> But that is hardly what happens in reality. Instead, the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first. In too many cases, courts do so almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint—as if our duty were to facilitate violations of the separation of powers rather than prevent them.

Valent, 918 F.3d at 525 (Kethledge, J., dissenting).

Such "cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned" is "troubling," as this type of analysis "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). "[W]henever a federal court declares a statute ambiguous and then hands over to an executive agency the power to say what the statute means, the Executive exercises a power that the Constitution has assigned to a different branch." *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting). At the least, Article III courts should not transfer core judicial powers to federal bureaucrats lightly, "[f]or just as the separation of powers safeguards individual liberty, so too the consolidation of power in the Executive plainly threatens it." *Id*. Threshold questions like ambiguity under *Chevron* are not just perfunctory speedbumps. . . . Finding ambiguity where it does not exist—granting deference where it is not warranted—does not simply result in a nominal misallocation of power

between different branches of government. It means that policymaking is no longer undertaken where it is most accountable to the people." *Voices for Int'l Bus. & Educ., Inc. v. Nat'l Labor Relations Bd.*, 905 F.3d 770, 780 (5th Cir. 2018) (Ho, J., concurring).

These concerns apply with even greater force with respect to *Skidmore* deference to *informal* agency statutory interpretations. For instance, agencies have developed a pattern of filing amicus briefs as a mechanism of demanding controlling deference for what are, in reality, stealth regulations escaping the rigor of notice-and-comment rulemaking procedures. *Cf. E.I. Dupont de Nemours & Co. v. Smiley,* 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., statement respecting denial of certiorari) ("Should we be concerned that some agencies (including the one before us) have apparently become particularly aggressive in 'attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation'"? (quoting Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223, 1223 (2013)).

Self-serving "informal" agency interpretations should not be accorded deference more nonchalantly than *formal* agency statutory interpretations. It makes no sense that federal courts should abdicate the core judicial function of independently saying what the law is using traditional tools of statutory interpretation—a task for which federal courts have far greater expertise than federal bureaucrats—so long as the agency interpretation is announced *informally*. That cannot be, and is not, the law. Such a state of affairs would create perverse incentives for agencies to circumvent the notice-and-comment

rulemaking process; the problem of agency stealth rulemaking through "guidance" is bad enough as it is. If anything, courts should exercise more independent judgment and more skeptically analyze an agency's power claims when the putative source is a letter, website posting, or amicus brief, as opposed to a formal interpretation set forth in a regulation—not the opposite, as happened here.

II. THIS COURT SHOULD CLOSE THE THROTTLE ON "DRIVE-BY" *SKIDMORE* DEFERENCE.

"The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring). As this Court has made clear, at the least, before accepting an agency's formal statutory or regulatory interpretation courts must fully exhaust all "traditional tools" of statutory interpretation, including canons of construction. *Chevron,* 467 U.S. at 843 n.9 (statutes); *Kisor*, 139 S. Ct. at 2415 (agency regulations). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law."[5] *Kisor*, 139

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[5] The fiction that Congress uses silent or ambiguous statutes to delegate policymaking authority to federal agencies cannot be squared with the separation of powers. As Justice Thomas explained: "*Chevron* cannot be salvaged by saying instead that agencies are engaged in the 'formulation of policy.' If that is true,

S. Ct. at 2415. "The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously . . . statutory limits on agencies' authority." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

The judicial role and duty to independently exhaust traditional tools of statutory interpretation should not change based on how the agency chooses to announce its views of the law; at the least, it should not be *diminished* when the agency "informally" sets forth its legal position. However, with respect to *informal* agency interpretations "the Court has not said that *Skidmore* necessarily includes a 'step one' inquiry along the lines of *Chevron* step one." Hickman & Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. at 1280. As a result, similar to the problem of "drive-by jurisdictional rulings" that this Court addressed in *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 511 (2006), *Skidmore* deference has been applied by federal courts with little or no analysis of statutory text to grant agencies the power to informally create extratextual interpretations in documents. Addressing this problem is important because "*Skidmore* deference only makes a difference when the court would not otherwise reach the same interpretation as the agency." *E.I. Dupont de Nemours*, 138 S. Ct. at 2564 (Gorsuch, J., statement respecting denial of certiorari).

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then agencies are unconstitutionally exercising legislative Powers vested in Congress." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari) (cleaned up).

So too here. This case is a perfect example of the broader problem. It was DOT's burden to affirmatively show that it had statutory authority to allocate tax-exempt PABs to AAF. It is black-letter administrative law that an agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."). Thus, before courts can uphold agency actions, the agency must meet its burden of showing Congress has authorized their claimed powers. Importantly, "Congress need not expressly negate an agency's claimed administrative powers; [w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

DOT did not come close to meeting its burden of showing statutory authority to act, as Petitioners ably explain. *See* Pet. 4–7, 15–21. Nonetheless, conspicuously absent from the decision below is any meaningful analysis of the underlying statutory scheme purportedly authorizing DOT's actions. Instead, the court below simply "applied" *DOT's interpretation* of the statute to the record and, on this basis, found in the agency's favor. *See Indian River Cnty. v. Dep't of Transp.,* 945 F.3d 515, 531 (D.C. Cir. 2019). According to the D.C. Circuit: "When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is

reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*." *Id.* The Circuit mistakenly justified such deference primarily on the ground that an "agency's views that are within its area of expertise are entitled to a level of deference commensurate with their power to persuade." *Id.* at 532. Citing a 2005 letter DOT wrote to the IRS, the Circuit reasoned "DOT's position has not only been consistent; it is also eminently reasonable." *Id.* In the Circuit's view, "DOT's long-standing position is based on persuasive considerations that are consistent with the statute. It is therefore due deference." *Id.*

At no point, however, did the Circuit pause to meaningfully evaluate whether the actual text of the statutory scheme, let alone its structure and history, supported DOT's purported interpretation. Nowhere in the court's analysis is any meaningful application of any of the traditional tools of statutory interpretation, including canons of construction. This approach shovels more coal on the fire that is an already suspect doctrine. In *Chevron* terms, the Circuit skipped the step-one station, apparently assumed statutory ambiguity, and proceeded to step two "reasonableness" review. That was error. *See* Pet. 21–24; *see also Nasrallah v. Barr*, No. 18–1432, Slip. Op. at 9, 590 U. S. ____ (2020) ("[I]t is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President.").

As this Court explained with regard to agency interpretations of their regulations, which have the force of law:

> [A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. . . . [H]ard interpretive conundrums, even relating to complex rules, can often be solved. To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

Kisor, 139 S. Ct. at 2415. Logically, that proposition should hold true *a fortiori* with respect to *informal* agency interpretations of statutes set forth in materials that *lack the force of law*, like the letter at issue in this case.

This case provides an ideal opportunity to clarify that, at a minimum, as Judge Kethledge put it: "an Article III court should not defer to an executive agency's pronouncement of 'what the law is' unless the court has exhaustively demonstrated—and not just recited—that every judicial tool has failed." *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting). Here, the Circuit took the opposite track. *See Indian River Cnty.*, 945 F.3d at 530–33; Pet. 21–25.

This Court should also clarify that *Skidmore*, properly understood, "reaffirmed the traditional rule that an agency's interpretation of the law is 'not controlling upon the courts[.]'" *Kisor*, 139 S. Ct. at 2427 (Gorsuch, J., concurring in the judgment) (quoting *Skidmore*). Instead, *Skidmore* "liberat[es] courts to decide cases based on their independent

judgment and follow the agency's view only to the extent it is persuasive." *Id.* at 2447 (cleaned up).

III. THIS COURT SHOULD PROVIDE MUCH-NEEDED GUIDANCE THAT *SKIDMORE* DOES NOT DISPLACE BASIC PRINCIPLES OF STATUTORY INTERPRETATION NECESSARY TO PROTECT THE SEPARATION OF POWERS.

As this Court has observed, *Skidmore*'s multifaceted "approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other[.]" *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Unsurprisingly, "[t]he multi-factor *Skidmore* test has often been criticized as ambiguous and unpredictable in the results of its application." Richard J. Pierce, Jr., *Justice Scalia's Unparalleled Contributions to Administrative Law*, 101 Minn. L. Rev. Headnotes 66, 72 (2016). As Justice Scalia put it, *Skidmore* is the type of "test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test." *Mead Corp.*, 533 U.S. at 241 (Scalia, J., dissenting).

Unsurprisingly, as administrative law scholars have observed, "[i]t is apparent that the courts of appeals lack a coherent conception of how *Skidmore*'s sliding scale should function." Hickman & Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. at 1291. As they explain, "disarray . . . characterizes the courts' application of the *Skidmore* standard[.]" *Id.*; *see also* Pet. 28–30. For example, as Justice Gorsuch has noted, "[t]here is a well-defined circuit split on the question" of whether agencies can

advance interpretations of statutes for the first time in litigation and then demand deference under *Skidmore*. *E.I. Dupont de Nemours*, 138 S. Ct. at 2564 (Gorsuch, J., respecting denial of certiorari).

To date, this Court's decisions have added to the confusion. *Compare Mead Corp.*, 533 U.S. 218, *with Christensen v. Harris County*, 529 U.S. 576 (2000). *See generally* Pet. 25–28. Indeed, as prominent administrative law scholars have explained:

> [W]hile *Christensen* and *Mead* resurrected *Skidmore's* now boilerplate recitation of factors, the Court has been substantially less clear in explaining how lower courts should apply the *Skidmore* standard. Indeed, the Court's discussions of *Skidmore* in *Christensen* and *Mead* reflect surprisingly different conceptions of *Skidmore's* standard for evaluating administrative interpretations. All agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain open questions. Furthermore, just as the boundaries of *Chevron*'s domain were substantially less certain pre-*Mead*, the scope of *Skidmore*'s applicability in the post-*Mead* era is still unclear.

Hickman & Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. at 1291.

This Court's decisions also provide conflicting signals about the *Skidmore* order of operations. For instance, on the one hand, this Court has applied

Skidmore to grant *Chevron*-level deference to an informal agency interpretation without first independently examining the statutory text in isolation and exhausting traditional tools of statutory interpretation.[6] *See Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 487–88 (2004) (considering agency interpretation of statute along with statutory text and history and finding agency acted reasonably); *id.* at 517 (Kennedy, J., dissenting) ("The statute is not in any way ambiguous. As a result, our inquiry should proceed no further. Actions, however, speak louder than words, and the majority ends up giving EPA the very *Chevron* deference—and more—it says should be denied."); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393–407 (2008) (deferring to agency views without considering meaning of undefined statutory term). On the other hand, elsewhere this Court has suggested that the multi-factor *Skidmore* analysis is "unnecessary" when "the statute itself speaks clearly to the point at issue" and only comes into play when a statute is ambiguous. *Riegel v. Medtronic, Inc.,* 552 U.S. 312, 326 (2008).

Against this backdrop, federal appellate courts have grappled with the question of whether a *Chevron* step one-type threshold finding of statutory ambiguity is necessary before application of the *Skidmore* framework. *See, e.g., Catskill Mts. Chptr. of Trout*

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[6] *Cf. Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 161 (2012) ("In light of our conclusion that the DOL's interpretation is neither entitled to *Auer* deference nor persuasive in its own right, we must employ traditional tools of interpretation to determine whether petitioners are exempt outside salesmen.").

Unlimited, Inc. v. EPA, 846 F.3d 492, 509–10 (2d Cir. 2017); *id.* at 542 (Chin, J., dissenting). Some courts have also determined that it is proper to engage in *Skidmore*'s multifactor analysis to determine whether to defer to the agency's views of the law *before* independently exhausting traditional tools of statutory interpretation to say what the law is.[7] That order of operations goes the wrong way down the tracks. This fundamental misapplication of *Skidmore*, where an Article III court only independently examines the statutory text using traditional tools of statutory interpretation *after* deciding whether the agency's legal arguments are "entitled" to deference (*i.e.,* the agency wins) irreconcilably conflicts with this Court's precedent directing courts to, as a threshold matter, rigorously and independently seek to resolve any putative statutory ambiguities itself. *See Kisor*, 139 S. Ct. at 2415; *Chevron*, 467 U.S. at 843 n.9. This practice also irreconcilably conflicts with the Constitution. *See* U.S. Const. Art. III, § 1.

This Court should clarify that *Skidmore* neither permits nor requires courts to abdicate their judicial duty to independently say what the law is. *Cf. Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari) ("*Chevron* compels judges to

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[7] *See, e.g., Belt v. P.F. Chang's China Bistro, Inc.,* 401 F. Supp. 3d 512, 529–30 (E.D. Pa. 2019) ("[I]f a court determines that the agency interpretation merits neither *Auer* nor *Skidmore* deference, a court must employ 'traditional tools of interpretation' to determine the meaning of the regulation without deference to the agency interpretation."); *Sicklesmith v. Hershey Entm't & Resorts Co.*, No. 19-1675, 2020 U.S. Dist. LEXIS 32042, at *12–13 (M.D. Pa. Feb. 25, 2020) (same).

abdicate the judicial power without constitutional sanction. . . . This apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power."). *Skidmore* does not "permit[] a court to defer to an incorrect agency interpretation." *PhotoCure Asa v. Kappos*, 603 F.3d 1372, 1376 (Fed. Cir. 2010). And *Skidmore* does not displace traditional tools of statutory interpretation or otherwise fundamentally alter the judicial role. As with *Chevron* and *Auer*, a threshold finding of ambiguity after rigorously exhausting all traditional interpretive tools is a condition precedent to application of *Skidmore*. And where traditional tools supply an answer, the multi-factor analysis should get off the road. *Cf. Epic Sys. Corp.*, 138 S. Ct. at 1630.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the Petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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