No. 19-1304

In The Supreme Court of the United States

INDIAN RIVER COUNTY, FLORIDA;
INDIAN RIVER COUNTY
EMERGENCY SERVICES DISTRICT,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; DEREK KAN, IN HIS OFFICIAL CAPACITY AS UNDER SECRETARY OF TRANSPORTATION FOR POLICY; FEDERAL RAILROAD ADMINISTRATION; PAUL NISSENBAUM, IN HIS OFFICIAL CAPACITY AS ASSOCIATE ADMINISTRATOR OF THE FEDERAL RAILROAD ADMINISTRATION; AAF HOLDINGS LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF INDIAN RIVER NEIGHBORHOOD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae, Indian River Neighborhood Association, Inc., is a Florida not-for-profit corporation. IRNA formed in 2004 when development in Indian River County was mushrooming. The County[2] had always been an "old Florida" region, far enough from the major cities to allow a unique, more rural community culture to develop. As development boomed in the early 2000s, many individuals and neighborhoods were concerned about the future and what damage unmitigated growth would cause to the County's quality of life and "old Florida" character. As a result, several neighborhoods formed IRNA. IRNA has since added new members.

IRNA is pro-business and pro-managed growth but seeks to preserve the County's quality of life and "old Florida" character. IRNA does not own land or have a profit motive. Its purpose is to protect the character of the community for future generations.

When IRNA first learned about Brightline, IRNA realized the project would negatively impact the

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[1] Jeffrey A. Lamken, for the County Petitioners, David Coburn, for Intervenor AAF, and Patrick Smith, for Respondents, DOJ et al., have all consented to the filing of this brief. Counsel for IRNA certifies that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *Amicus Curiae*, its members, or its counsel. The parties were notified ten days prior to the due date of this brief of the intention to file.

[2] IRNA will use Petitioners' acronyms and other defined terms unless stated otherwise.

community and IRNA's member neighborhoods. Over time, it became even more concerned about the potential safety impacts to be caused by thirty-two high-speed trains per day running though the downtown and local neighborhoods.

Although there had been freight train service to the area for many years, IRNA realized Brightline was different because it would provide no real benefit to the community or IRNA's members. The two nearest train depots would be in West Palm Beach and Orlando, both of which are over an hour away from the closest County lines. Thus, the project would bring environmental and safety impacts, but no economic benefit, like jobs or passenger spending in the local economy. Consequently, IRNA opposed this project from its inception.

IRNA has regularly raised numerous concerns regarding the dangers of Brightline to human safety, local historic sites, wildlife, vegetation, and the community's culture. IRNA is concerned AAF is now selling tax-exempt private activity bonds ("PABs") based on an interpretation of 23 U.S.C. § 142(m)(1)(A) that contradicts its plain language and intent. This interpretation of § 142(m)(1)(A) defies common sense and makes a mockery of the law and the proper application of judicial respect for agency interpretations under the standard set by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

If this Court applies proper rules of statutory construction to the relevant provisions, the tax-exempt interest on the PABs will be impaired and, under the

applicable bond documents, the Trustee for the PABs will be obligated to notify the bondholders of a Determination of Taxability. That would, as a practical matter, bring Phase II of Brightline to an end. As an association of local neighborhoods and citizens who will be directly impacted by this project, IRNA has a direct interest in the outcome of this case. The end of Brightline will benefit IRNA and its members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has an opportunity to clarify how the lower courts should apply the administrative deference standard it outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court should seize this opportunity as the court of appeals misapplied *Skidmore* because it failed to determine whether § 142(m)(1)(A) is ambiguous before giving deference to DOJ's interpretation of it. In addition, it rewrote the plain language of § 142(m)(1)(A) and used FERC's past receipt of title 23 assistance for railway-highway grade crossings to defer to DOJ's conclusion that Brightline "receives" federal assistance under title 23. As Petitioners explain, federal opinions in this area are inconsistent. Therefore, this case presents a unique opportunity for this Court to clarify the law of the land related to the proper application of *Skidmore* to agencies' statutory interpretations.

IRNA adopts the Petitioners' arguments on this issue and its conclusion as to the proper outcome. In this *amicus* brief, however, IRNA will demonstrate that, if this Court engages in proper and customary statutory construction, it will conclude that § 142(m)(1)(A) is not ambiguous and that its plain language does not support the PAB allocation to AAF. Indeed, that allocation was directly contrary to the plain language of the statute and the legislative intent expressed therein.

The threshold issue here is whether, under § 142(m)(1)(A), Brightline is eligible for PABs and whether the interest on those bonds is tax-exempt. The correct interpretation of § 142(m)(1)(A) carries important consequences for the proper allocation of federal dollars and for the County, IRNA, and other communities like theirs throughout the United States. If Brightline is not eligible for federal monies or tax-exempt interest on the PABs, the project will not be feasible and AAF would likely abandon it. Therefore, because the appellate court failed to interpret § 142(m)(1)(A) using the standard rules of statutory construction before giving the DOT's interpretation of that section *Skidmore* deference, the petition should be granted and this case should be resolved on the merits.

ARGUMENT

This Court should grant the petition and resolve this case on the merits. If the Court properly applies long-standing rules of statutory construction, it will

determine that Brightline did not qualify for tax-exempt PABs and the PAB allocation to AAF contravened the plain language of § 142(m)(1)(A). It also ran afoul of the expressed eligibility requirements for a qualified project under other provisions of title 23 as they existed in 2005 when § 142(m)(1)(A) was enacted. As a result, the petition should be granted.

A. DOT's Interpretation of § 142(m)(1)(A) is Neither Well Founded Nor Persuasive Given the Unambiguous Language of that Section.

The petition should be granted because the plain language of § 142(m)(1)(A)(1) establishes that Brightline was not eligible for PABs. Section 142(m)(1)(A)(1) specifically requires that any project financed through PABs "receives" title 23 federal assistance. DOT concluded, however, that AAF's passenger rail facility was eligible under § 142(m)(1)(A) because some portions of the freight rail line owned and operated by FERC had, in the past, "received" title 23 federal assistance for railway-highway grade improvements and that Brightline benefitted from those earlier enhancements. But that interpretation flies in the face of the plain language of the statute.

The term "qualified highway or surface freight transfer facilities" in § 142(m)(1)(A) means "any surface transportation project which *receives* assistance under title 23, United States Code ('as in effect on the date of the enactment of this subsection')." 23 U.S.C. § 142(m)(1)(A) (2005) (emphasis added). IRNA opposes

the notion that because the "project" had benefited from approximately nine million dollars in title 23 assistance given to FERC in the past (and not Brightline or AAF) and FERC anticipates it will receive additional monies sometime in the future, Brightline is eligible for a PAB allocation under § 142(m)(1)(A). This reading of the statute ignores its plain language and the congressional intent expressed therein. As discussed below, it is an unprecedented construction of the statute even for the DOT. Consequently, DOT's interpretation is not entitled to deference under *Skidmore*.

The appellate court relied on *Skidmore* to give deference to DOT's interpretation of § 142(m)(1)(A). But *Skidmore* merely allows courts to respect an agency's interpretation of an ambiguous statute if the agency's position is well founded, persuasive, and consistent. *Skidmore*, 323 U.S. at 140. The court of appeals completely misapplied the articulated *Skidmore* standard. Using *Skidmore*, the appellate court gave deference or respect to DOT's misguided interpretation of § 142(m)(1)(A), *i.e.*, that Brightline "benefitted from" title 23 assistance FERC had "received" in the past and that it might also benefit from the federal assistance FERC hopes to receive in the future. That interpretation flies in the face of § 142(m)(1)(A)'s plain language. Indeed, the court failed to determine whether the statute was ambiguous before deciding that DOT's interpretation was worthy of respect.

DOT's interpretation is not worthy of respect, however. Section 142(m)(1)(A) is clear and ambiguous

on its face. Throughout § 142(m), Congress consistently used the present tense when it stated that to be qualified, the project must be one that "receives" title 23 assistance. Its use of the present tense rather than the past tense, "received," or the present perfect tense "has received," was intentional and is critical to this case. *See Carr v. U.S.*, 560 U.S. 438, 447-48 (2010). As the Court stated in *Carr*, "[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Id*. (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option"); *Barrett v. United States*, 423 U.S. 212, 216 (1976) (observing that Congress used the present perfect tense to "denot[e] an act that has been completed.")). As the Court noted, the Dictionary Act also ascribes significance to verb tense. *Carr*, 560 U.S. at 448 (citation omitted). It provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . words used in the present tense include the future as well as the present." *Id*. (quoting 1 U.S.C. § 1). By implication then, the Dictionary Act provides that the present tense does not include the past. *Id.*

Thus, "receives" federal assistance means the PAB applicant is receiving funds presently and at the time of the PAB application. The fundamental flaw in DOT's

interpretation is that FERC was not currently receiving those funds when Brightline applied for a PAB allocation. Congress could not have intended that FERC's past receipt of federal assistance means that Brightline "receives" federal assistance under the meaning intended by § 142(m)(1)(A). Indeed, that tortured construction would convert an ineligible project into an eligible one, which would be an absurd result. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." (citations omitted)). Thus, a statute that defines a qualified project as one that "receives Federal assistance" should not be interpreted to encompass a separate, but related project that only "received" federal assistance in the past and not during the time of its own PAB allocation application process. *See Carr*, 560 U.S. at 448.

Under the plain language Congress used in § 142(m)(1)(A), to be qualified for a PAB allocation, the project must be an eligible surface transportation project that is currently receiving federal assistance under title 23 or is currently slated to receive guaranteed, future title 23 assistance. *See Carr*, 560 U.S. at 448 (citing 1 U.S.C. § 1). The record here does not support either scenario. The DOT's determination that Brightline qualified for a PAB allocation under § 142(m)(1)(A) because FERC's separate freight line had previously received title 23 assistance is simply not supported by the plain language of the statute.

At the time of AAF's PAB application in 2017 (D. Ct. Dkt. 51, p. 4), the record showed FERC had received $21 million in Highway Trust funds between 2005 and 2014 (D. Ct. Dkt. 51, p. 23.) No record evidence existed, however, that Brightline was also receiving federal assistance under title 23 in the form of railway-highway grade crossings in 2017 or even that Brightline (as opposed to FERC) had "received" federal assistance in the past. (D. Ct. Dkt. 51, pp. 4 & 23.) Similarly, the conclusion that title 23 investments for railway-highway grade crossings related to FERC's rail corridor that Brightline would use are anticipated in the future, but were not in the pipeline for payment, is insufficient to satisfy the congressional requirement that the project "receives" federal assistance under title 23 when the PAB allocation occurs. Therefore, DOT's interpretation of the statute is neither well founded nor persuasive. *See Skidmore*, 323 U.S. at 140. As a result, DOT's interpretation of it is not entitled to respect under *Skidmore*.

To reach the contrary conclusion, the district court improperly rewrote the statute to say the Secretary was permitted to conclude Brightline (as opposed to FERC's railway-highway crossing project) "receive[d] Federal assistance under title 23[.]" (*See* D. Ct. Dkt. 51, p. 23 (citing 23 U.S.C. § 142(m)(1)(A) (alteration added by district court)).) That rewrite, however, totally changed the statute's meaning and violated long-standing rules of statutory construction. *See Carr*, 560 U.S. at 448. The mere fact that FERC's freight railway line or at least some of the railway-highway grade

crossings along the rail corridor Brightline would use previously received some title 23 assistance does not satisfy the requirements of § 142(m)(1)(A) or the eligibility requirements for qualified PAB allocations under 23 U.S.C. §§ 601-09, the Transportation Infrastructure Finance and Innovation Program, commonly known as TIFIA, discussed, *infra*, or other potentially relevant sections of title 23.

In addition, DOT's interpretation of § 142(m)(1)(A) carries serious consequences for the allocation of a limited resource, PABs with tax-exempt interest. If DOT's construction of § 142(m)(1)(A) stands, it will lead to absurd results in the PAB allocation process. Anyone claiming even a peripheral, past benefit, whether direct or indirect, from title 23 federal assistance from crossing improvements could qualify for PABs regardless of the nature of the benefitted facility. Given the very limited availability of PABs, such a broad reading of the statute would create a free-for-all for all sorts of rail facilities that are otherwise unqualified and ineligible for title 23 assistance. For example, DOJ's expansive interpretation of § 142(m)(1)(A) might then authorize a PAB allocation for a footpath running alongside the freight line that crosses the same road where the railway-highway crossing improvements were made. Such an interpretation runs afoul of the plain language of the statute.

Title 23 defines "project" to include "an undertaking to construct a particular portion of highway . . . or any other undertaking eligible for assistance under this title." 23 U.S.C. § 101(a)(21) (2006). The word

"eligible" is key here. Section 142(a) provides a list of fifteen different types of projects that are entitled to PAB allocations. *See* 23 U.S.C. § 142(a). The only listed project under § 142(a) that could possibly apply here is § 142(a)(15), a "qualified highway or surface freight transfer facility."[3] Logic dictates that Congress must not only have intended that a project under § 142(m)(1)(A) be presently receiving federal assistance under title 23, but also that the project be "eligible" for federal assistance under title 23. Eligibility for federal assistance under title 23 is a threshold requirement.[4]

Only four sections or parts of title 23 exist that could apply to make FERC's railway-highway grade crossings or Brightline's passenger rail facility "eligible" under § 142(m)(1)(A) – §§ 130, 133(b), 148(a)(3)(B)(vi), and 601-09 as they existed when § 142(m)(1)(A) was added to the Code. IRNA will discuss §§ 601-09, commonly known as TIFIA in Part B, § 1 of this brief. None of these sections, except TIFIA, would provide title 23 eligibility to Brightline for a PAB allocation.

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[3] Brightline is not a high-speed intercity rail facility because the trains will not travel at a maximum speed exceeding 150 miles per hour. *See* 26 U.S.C. § 142(i)(1). (Petitioners' Appendix, p. 55a.)

[4] Presumably, DOT does not mean to say that Congress was required to insert into § 142(m)(1)(A) three times before the word "receives" the phrase "is eligible for and. . . . " The eligibility requirement is obvious. It makes no sense for Congress to have to express its intent in such a repetitive way. Especially when the language it did use is clear and unambiguous.

Section 133(b) specifically excludes intercity passenger rail facilities like Brightline and freight rail projects like FERC's. 23 U.S.C. § 133(b) (2005). When § 142(m) became law, the only passenger rail facility included in the exclusive list of "eligible projects" under § 133 were public mass transit projects "eligible for assistance under chapter 53 of title 49." 23 U.S.C. § 133. Brightline was not eligible under that provision. *See* 49 U.S.C. § 5309(a)(10).

In contrast, §§ 148(a)(3)(B)(vi) and 130 allow federal assistance for construction and improvement of railway-highway grade crossings like those conducted by FERC some number of years before Brightline's PAB application. *See* 23 U.S.C. §§ 130 and 148(a)(3)(B)(vi). Even DOT tacitly acknowledged in the district court that the statutory requirement that a project "receives" title 23 assistance cannot be construed so broadly as to allow DOT to bootstrap a project into PAB eligibility solely based upon an incidental and unintentional benefit from title 23 funds. (*See* D. Ct. Dkt. 51, p. 22 (citing H'rg Tr. at 64:9-23).) But to be a qualified, eligible project under § 142(m)(1)(A), any projects under §§ 130 and 148(a)(3)(B)(vi) must still be receiving federal assistance under one of those three sections at the time of the PAB allocation process. Consequently, because any monies paid under those sections were in the past, not the present, Brightline's passenger rail facility is not eligible for PABs under § 142(m)(1)(A).

Moreover, because § 133 is the only section that addresses passenger railways, it is the more specific

statute applicable to Brightline and, therefore, it should control. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment."). Although § 133 addresses railways and §§ 130 and 148(a)(3)(B)(vi) deal with railway-highway road crossings, § 133 should control because Congress expressly excluded intercity passenger railways like Brightline in that section. Also, only FERC, not Brightline, has ever received federal assistance for railway-highway grade crossings for its freight line.

The district court reasoned, however, that it was "reasonable" for DOT to conclude that Brightline's project was an eligible project and that it "receives" federal assistance under 23 U.S.C. § 130 because FERC's rail corridor, which Brightline would use, had "directly benefitted" from FERC's approximately nine million dollars in Federal Highway Trust Funds in the past. (Petitioners' Appendix, pp. 58a-62a.) Those funds were authorized under 23 U.S.C. § 130 between 2005 and 2014, some three years before Brightline's 2017 PAB-allocation application. Those funds were spent on safety improvements made at railway-highway crossings along the existing north-south railroad corridor to be used by Brightline and owned by FERC. (*Id*.) To rewrite the statute from "receives" federal assistance to "directly benefitted from" federal assistance is yet another improper revision to the statutory language chosen by Congress. *See TVA v. Hill*, 437 U.S. 153, 194-95 (1978) ("Courts are not authorized to rewrite a statute

because they might deem its effects susceptible of improvement.").

Congress could not possibly have intended that, under § 142(m)(1)(A), a project could "receive" federal assistance under such contradictory circumstances. By this "logic" about crossing improvements, FERC could have sought PAB financing of its freight corridor infrastructure improvements for its freight-train business under § 133 and likewise been determined to be qualified and eligible for PAB allocation under the same mind-boggling interpretation of § 142(m)(1)(A), even though § 133(b) expressly excludes freight-related projects. Such a construction of § 142(m)(1)(A) cannot stand. If it does, it will lead to absurd results in the PAB-allocation process. Again, anyone claiming even a peripheral, past benefit, whether direct or indirect, from title 23 federal assistance from crossing improvements could qualify for PABs regardless of the nature of the benefitted facility. Given the very limited availability of PABs, such a broad reading of the statute would create a potential for abuse and the circumvention of Congressional intent in the PAB process.

DOT's interpretation is not well founded or persuasive for another reason. DOT's own regulation, 23 C.F.R. § 646.210(b)(1), determined that railway-highway crossings have no net benefit to the railroads. Section 646.210(b)(1) reads, in pertinent part: "Projects for crossing improvements are deemed of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. § 646.210(b)(1); *see also* Railroad-Highway Grade

Crossing Handbook, https://safety.fhwa.dot.gov/hsip/xings/com_roaduser/fhwasa18040/chp4.cfm, last accessed on June 16, 2020. In other words, the intended benefit of the funds is the roadway, not the railway. In the section titled Government Agency Responsibility and Involvement, the Handbook sums up each party's responsibilities as follows:

> Although the railroads retain responsibility for the construction, reconstruction, and maintenance of the track structure and riding surface at the highway-rail intersection, their obligation for the roadway usually ends within a few inches of the outside ends of the ties that support the rails and the crossing surface. The street or highway agency has responsibility for the design, construction, and maintenance of the roadway approaches to the crossing, even though these approaches may lie within the railroad's right of way.

See https://safety.fhwa.dot.gov/hsip/xings/com_roaduser/fhwasa18040/appxa.cfm, last accessed on June 16, 2020. That the expenditure of Highway Trust Fund monies for the improvements on all the existing grade crossings within the rail corridor Brightline will use should cause such discrete highway-roadway projects to morph into a surface transportation project as contemplated by § 142(m) and limited by § 133 defies common sense. Stated differently, Brightline cannot be deemed to have benefitted from FERC's past receipt of title 23 assistance where DOT's own regulation, 23 C.F.R. § 646.210(b), provides that railway-highway grade improvements provide "no ascertainable

benefits" to the railroad. If they provide no benefit to the railroad, they cannot provide any benefit to an entity using the railroad's freight corridor. As a result, the petition should be granted because DOT's interpretation of § 142(m)(1)(A) is not well founded or persuasive and, therefore, is not entitled to *Skidmore* deference.

B. DOT's Interpretation of § 142(m)(1)(A) is not Entitled to *Skidmore* Respect Because it is not Consistent with any Long-standing Interpretation of § 142(m)(1)(A).

1. TIFIA Assistance is the Only Title 23 Assistance Available to Brightline.

Had Congress wanted to make intercity passenger rail facilities "eligible" for title 23 assistance under § 142(m)(1)(A), it knew precisely how to do it. *See* 23 U.S.C. §§ 601-09 (2005). Sections 601-09, commonly known as TIFIA, and § 142(m)(1)(A) were enacted in the same year, yet the former includes intercity passenger rail facilities like Brightline, but §§ 142(m)(1)(A), 130, 133(b), and 148(a)(3)(B)(vi) expressly do not. This statutory structure confirms that Brightline is not qualified or eligible for title 23 federal assistance without complying with TIFIA.

Section 601(a)(11) states that such a facility may be privately owned. 23 U.S.C. § 601(a)(11). Under § 601(a)(12)(C), the definition of "project" expressly includes "a project for intercity passenger . . . rail facilities and vehicles. . . ." 23 U.S.C. § 601(a)(12)(C) (2005).

This definition is significant because under § 601(a)(12)(A), a "project" is defined as "any surface transportation project eligible for Federal assistance under this title [title 23] or chapter 53 of title 49." 23 U.S.C. § 601(a)(12)(A) (2005). Therefore, § 601(a)(12)(C) indicates that when it drafted TIFIA, Congress understood that no other provision in title 23 authorized federal assistance for an intercity passenger rail facility, whether or not it is publicly owned. *See* 49 U.S.C. § 5302(a)(10) (2005) (expressly excluding intercity passenger rail from coverage under chapter 53 of title 49).

TIFIA also provides for a "federal security instrument" that backs senior private debt evidenced in this case by PABs. 23 U.S.C. §§ 601-09. TIFIA requires the senior debt to satisfy rigorous "credit worthiness standards" to ensure the debt's underlying obligations receive an investment-grade rating high enough to assure they will not be considered "junk bonds." 23 U.S.C. § 602.

Until Brightline, only two passenger rail projects were financed through PABs under § 142(m). The PABs for both projects were backed by major TIFIA assistance under title 23, however. As a result, they were required to, and did, satisfy the investment-grade criteria of § 602.

In contrast, AAF never applied for or even claimed Brightline was eligible for TIFIA assistance. If AAF had done so and satisfied all the stringent conditions that must be met to obtain federal assistance for a

privately-owned project under TIFIA, this lawsuit would not exist on the ground that there is no authority under title 23 to provide assistance to the project. That authority does exist, but only under TIFIA. Yet, AAF never applied for TIFIA assistance for its privately-owned project – ostensibly because it did not want to comply with the strict creditworthiness standards TIFIA requires.

Consequently, the court of appeal's *Skidmore*-based conclusion that DOT's evaluation of this project was consistent with its long-standing interpretation of § 142(m)(1)(A) is incorrect. (*See* D. Ct. Dkt. 51, pp. 19, 21 n.3, and 22; Petitioner's Appendix, pp. 25a-26a.) To the contrary, the only times DOT has awarded PAB allocations to railway projects (as opposed to pure roadway projects) has been where the railway project receives TIFIA assistance under 23 U.S.C. § 601(a)(12)(C), whether or not the project is privately owned. Nevertheless, DOT relied on the Declaration of Paul Baumer, which was filed related to a preliminary injunction proceeding in this case (Petitioner's Appendix, p. 135a.) In that declaration, Mr. Baumer asserts that DOT allocated $1.3 million in PABs to the Purple Line light rail project in the Maryland suburbs. DOT relied on Mr. Baumer's statement to support its interpretation of § 142(m)(1)(A) and its conclusion that Brightline was an eligible project under that section. That reliance is remarkable, however, as that project would otherwise be ineligible for PABs under § 142(m)(1)(A) without relying on TIFIA and meeting the investment-grade standards required by § 602.

Rather than proceed under TIFIA and comply with its more stringent credit-worthiness requirements, however, DOT chose to shoehorn Brightline into § 142(m)(1)(A) through § 130 instead. The problem there is that Brightline is not a qualified project eligible for federal assistance under that section without TIFIA. DOT adopted this flawed interpretation even though it is not reasonable or even remotely consistent with the plain language of § 142(m)(1)(A). Put simply, that interpretation is neither well founded nor consistent with Congressional intent as expressed by the language used in § 142(m)(1)(A).

2. Any Reliance on the Kussy Interpretation of § 142(m)(1)(A) is Misplaced.

To support its claim that § 142(m)(1)(A) is consistent with its long-standing construction of that section, DOT relied, in part, on the October 7, 2015, FHWA opinion letter submitted to the IRS by Edward V.A. Kussy, Acting Chief Counsel of FHWA. (Petitioners' Appendix, pp. 128a-132a.) DOT asserted that the Kussy letter establishes that DOT's allocation of PABs to Brightline is consistent with DOT's long-standing interpretation of projects under § 142(m)(1)(A). (*See* D. Ct. Dkt. 51, pp. 23-24; Petitioners' Appendix, pp. 25a-27a.) DOT is incorrect.

The Kussy letter opined that "the most reasonable reading . . . permits the proceeds of [PABs] authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed

even though only a portion of that facility receives Federal assistance under title 23." (D. Ct. Dkt. 51, p. 24; Petitioners' Appendix, pp. 129a-130a.) But Kussy's statement does not discuss the threshold question here: whether Brightline's project itself is qualified under § 142(m)(1)(A) because it is eligible for title 23 assistance under a relevant provision of title 23. Kussy's letter simply assumes that it is. Kussy's wording in the letter demonstrates that FHWA assumed that the entire transportation facility is an eligible title 23 project, even if only a portion is funded with federal dollars. The Kussy letter focuses only on: 1) when highway facilities are constructed under the Federal-Aid Highway Program; 2) the case where the entire highway facility is eligible for federal assistance; and 3) how to fund the particular highway projects or portions thereof. The letter draws a distinction between "highway facilities" or the "entire transportation facility" or "facility" or "portions of the facility or activities associated with the construction of the facility" characterized as a "project." (Petitioners' Appendix, p. 130a.) Yet in its conclusion, the letter unequivocally states that "PAB proceeds may be used on any *qualified* facility that *includes* a project funded with Federal-aid highway funds made available under title 23." (*Id*. at p. 132a (emphasis added).) It would be illogical to interpret that sentence to mean that an *unqualified* facility that *includes* a small part that is funded with Federal Highway Trust Fund monies is otherwise an eligible project under § 142(m)(1)(A).

The underlying assumption in Kussy's letter is that the entire facility was qualified and eligible for title 23 assistance, but that a State may choose only to fund a portion of that facility with federal funds. Kussy's concern was that, if a State wanted to fund only a portion of an entirely eligible project with title 23 assistance, the State would be compelled to "sprinkle" that federal assistance over the entire project to be eligible for that assistance under § 142(m)(1)(A). But how he tried to resolve that concern is problematic. Kussy stated:

> Also, there is no reason to assume that in amending the Internal Revenue Code, Congress intended to use precisely the same definition of "project" as is found in title 23, U.S.C. The amendment found in § 11143 of SAFE-TEA-LU uses the word "project" in the context of defining a "transportation facility." This suggests that the Congress had a broader concept in mind.

(Petitioners' Appendix, p. 131a.) Kussy further stated that:

> The real consequence of insisting on the narrowest reading of the word "project," limiting PAB proceeds only to specific projects actually subject to a funding agreement under 23 U.S.C. § 106, would distort the long-standing way in which facilities are actually funded, create needless red tape, and artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities. *This is*

> *because such a reading would induce State grantees to "sprinkle" title 23 funds to every separate project or contract of an entire facility to make full use of PAB proceeds*. . . . In other words, repayment of the PAB is likely to be supported by the facility as a whole, not just the sections on which Federal assistance funds are expended.

(*Id.* at 131a-132a (emphasis added).)

Kussy's analysis is flawed. Why shouldn't we assume that Congress intended to use the same definition of "project" as is found in title 23 *and* that it also did not mean to require that title 23 funds be "sprinkled" over the whole project before the proceeds of the entire facility could be used to repay the PABs? Using the same definition of "project" as is used in title 23 ensures that the entire facility is, indeed, qualified, and eligible.

Congress's use of the word "qualified" in § 142(m)(1)(A) cannot be ignored. Even in the case of a "highway," as opposed to an intercity passenger rail project, not all "highways" are qualified for federal assistance under title 23. Rather, 23 U.S.C. § 101(a)(5) (2005) provides: "The term 'Federal-aid highway' means a highway eligible for assistance under this chapter other than a highway classified as a local road or rural minor collector."

The Kussy letter improperly conflates "receives" with "funds" and treats those two words as if they are interchangeable. They are not. The word "receive"

means "to have (something) given or sent to one" or to "have (something) bestowed or conferred to one." The Random House College Dictionary, Revised Edition (1982), p. 1101. "Fund," on the other hand, means "to provide money (for a project or the like)." *Id*. at 535. Receiving is passive, whereas, funding is active. To interpret the Kussy letter as DOT does would be to construe it to provide the following: "PAB proceeds may be used on any qualified facility that includes a project funded with Federal-aid highway funds made available under title 23 [, even if the facility itself is *not* eligible for that federal assistance under title 23]." (*See* Petitioners' Appendix, p. 132a.) The bracketed language was not included in Kussy's conclusion and for good reason. It apparently never crossed Kussy's mind that DOT would, almost ten years later, pervert the letter's common-sense reasoning by, in effect: 1) embracing the bracketed add-on provision; and 2) extending the letter's reach to even more preposterous lengths to cover Brightline, a facility that is unqualified and ineligible to receive federal assistance under §§ 130 and 142(m)(1)(A).

Under § 142(m)(1)(A), the word "receives" unquestionably requires that the whole PAB transportation project be deemed to have received federal assistance under title 23, even though only a portion of the project is funded under title 23. As Kussy clearly stated: "Thus, we believe the most reasonable reading of § 11143 permits the proceeds of private activity bonds (PAB) authorized by this provision to be used on the *entire* transportation facility that is being financed and

constructed even though only a portion of that facility receives Federal assistance under title 23." (Petitioners' Appendix, pp. 129a-130a.) Kussy states: "In summary, our view is that PAB proceeds may be used on any qualified facility that includes a project funded with Federal-aid highway funds made available under title 23." (*Id.* at 132a.) IRNA has never disagreed with Kussy's statement – as far as it goes. Given the language used in the Kussy letter, however, it is apparent that FHWA assumed that the entire transportation facility, and not just the part thereof that receives title 23 assistance, qualifies as an eligible title 23 project.

In contrast, however, under DOT's logic, PABs could finance even reconstruction of an expressly excluded local road or rural minor collector so long as it crosses a railway line and railway-highway grade crossing improvements are funded out of Highway Trust Fund monies at some undefined point in the past. This is illogical. The Kussy letter is not consistent with DOT's tortured construction of § 142(m)(1)(A) because only the crossing improvements and not FERC's freight line as a whole is eligible to receive federal assistance under §§ 130 and 142(m)(1)(A). Thus, to qualify as a title 23 project, the entire Brightline railway would have to be an "eligible project" qualified for federal assistance under some relevant provision in title 23 thereby rendering it qualified for PABs under § 142(m)(1)(A). Brightline, however, is not an eligible or qualified project by its very nature – an intercity passenger rail facility that did not seek eligibility through TIFIA. And, FERC's prior receipt of federal

assistance for its railway-highway crossing improvements are irrelevant under the plain language Congress chose for § 142(m)(1)(A). As a result, DOT's interpretation of § 142(m)(1)(A) is not well founded, persuasive, or consistent. Consequently, that interpretation is not entitled to *Skidmore* deference, and the petition should be granted.

CONCLUSION

For the foregoing reasons and for the reasons in the petition, this Court should grant the petition and review this case on the merits.

Respectfully submitted,

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