No. 19-1304

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AAF HOLDINGS LLC

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QUESTION PRESENTED

The Internal Revenue Code authorizes the allocation of tax-exempt bonds to finance certain construction projects, including "qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(a)(15). This phrase is defined, in turn, to include "any surface transportation project which receives Federal assistance under title 23, United States Code." *Id.* § 142(m)(1)(A).

Here, applying *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the D.C. Circuit deferred to the Department of Transportation's "long-standing" and "consistent interpretation of the statute that a project 'receives assistance' for purposes of § 142(m) even if only a constituent portion was directly financed with Title 23 funds." Pet. App. 24a, 26a. Reasoning that the agency's interpretation "is based on persuasive considerations that are consistent with the statute," the court upheld the allocation of tax-exempt bonds to construct a passenger railway because Title 23 funds were "used to upgrade railway-highway crossings" along the railway's corridor, and "railroad grade crossings are part of a railroad 'project' on any ordinary understanding." *Id.*

The question presented is:

Whether the D.C. Circuit properly deferred under *Skidmore* to the Department of Transportation's interpretation of 26 U.S.C. § 142(m)(1)(A), a tax provision that has never been addressed in any other case.

CORPORATE DISCLOSURE STATEMENT

AAF Holdings LLC is not a public company and no publicly-held company has a 10% or greater ownership interest in the entity. The parent company of AAF Holdings LLC, Florida East Coast Industries, LLC, is not a public company.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
INTRODUCTION 1
STATEMENT OF THE CASE 4
I. STATUTORY AND REGULATORY BACKGROUND 4
II. FACTUAL BACKGROUND 6
A. The All Aboard Florida Project 6
B. The Department of Transportation's Allocation of Tax-Exempt Bonds to Finance the Project 8
III. PRIOR LITIGATION AND PROCEEDINGS BELOW . 10
A. Indian River County and Its Lawsuits 10
B. The District Court Decision 11
C. The D.C. Circuit Decision 12
REASONS FOR DENYING THE PETITION 16
I. THERE IS NO CONFLICT IN THE LOWER COURTS ON THE STATUTORY QUESTION DECIDED BY THE D.C. CIRCUIT 16
II. THERE IS NO CONFLICT OF AUTHORITY WITH RESPECT TO THE PROPER APPLICATION OF *SKIDMORE* DEFERENCE 16
A. The D.C. Circuit Did Not Defer to the Agency Without Considering the Statutory Text 17
B. The Decision Below Does Not Conflict with Any Decision of This Court 23

C. The Lower Courts All Agree that *Skidmore* Requires Consideration of Statutory Text 25

III. PETITIONER'S DISAGREEMENT WITH THE COURT OF APPEALS' READING OF STATUTORY TEXT DOES NOT MERIT THIS COURT'S REVIEW 27

IV. THE PETITION EXAGGERATES THE IMPORTANCE OF THE CASE 32

V. THIS CASE IS A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Department of Environmental Conservation v. EPA,
540 U.S. 461 (2004) 23

Ammex, Inc. v. United States,
367 F.3d 530 (6th Cir. 2004) 26-27

Campanale & Sons, Inc. v. Evans,
311 F.3d 109 (1st Cir. 2002) 25

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA,
846 F.3d 492 (2d Cir. 2017) 25-26

Cervantes v. Holder,
597 F.3d 229 (4th Cir. 2010) 26

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 13, 20, 24, 25

Clark v. USDA,
537 F.3d 934 (8th Cir. 2008) 26

Close v. Thomas,
653 F.3d 970 (9th Cir. 2011) 26

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 24

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 208 (2009) 20, 24

Federal Express Corp. v. Holowecki,
552 U.S. 389 (2008) 23, 24

Harmon v. Holder,
758 F.3d 728 (6th Cir. 2014) 26

Indian River Cty. v. Rogoff,
254 F. Supp. 3d 15 (D.D.C. 2017) 10

John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank,
510 U.S. 86 (1993) 23-24

Kientz v. Comm'r, SSA,
954 F.3d 1277 (10th Cir. 2020) 26

Legacy Cmty. Health Servs., Inc. v. Smith,
881 F.3d 358 (5th Cir. 2018) 26

Martin v. Comm'r, SSA,
903 F.3d 1154 (11th Cir. 2018) 26

Mendoza v. Sessions,
891 F.3d 672 (7th Cir. 2018) 26

Nahigian v. Juno-Loudoun, LLC,
677 F.3d 579 (4th Cir. 2012) 26

Nat'l R.R. Passenger Corp. v. United States,
431 F.3d 374 (D.C. Cir. 2005) 25

Orlando Food Corp. v. United States,
423 F.3d 1318 (Fed. Cir. 2005) 26

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 23

Seaview Trading, LLC v. Commissioner,
858 F.3d 1281 (9th Cir. 2017) 26

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) .... *passim*

United States v. Home Concrete & Supply, LLC,
556 U.S. 478 (2012) 20

University of Texas Southwestern Medical Center v. Nassar,
570 U.S. 338 (2013) 23

Vorchheimer v. Philadelphian Owners Ass'n,
903 F.3d 100 (3d Cir. 2018) 26

Statutes

23 U.S.C. § 101 22

23 U.S.C. § 130 .... 4, 8-9

26 U.S.C. § 142 .... *passim*

Other Authorities

Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 31-32 (2017) 25

Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1264 (2007) 24-25

U.S. Dept. of Transp., Private Activity Bonds, *available at* https://www.transportation.gov/buildamerica/financing/private-activity-bonds-pabs/private-activity-bonds (last visited Aug. 13, 2020) 32

INTRODUCTION

Respondent AAF Holdings LLC, intervenor-defendant in the proceedings below, is developing an express passenger railway line from Miami to Orlando, Florida. Petitioner Indian River County claims to be aggrieved by AAF's plan to run its passenger rail service through the County, despite the fact that AAF will use an existing rail corridor that has been in continuous operation for 125 years.[1] In an effort to thwart AAF's plan, petitioner sued to invalidate the U.S. Department of Transportation's authorization of tax-exempt private activity bonds to fund portions of the railway's development.

Petitioner's challenges were rejected by the district court and a unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit. Those courts held that the Department of Transportation properly allocated tax-exempt bonds to AAF's passenger railway under 26 U.S.C. § 142(m)(1)(a), which permits such allocations for "any surface transportation project which receives Federal assistance under title 23." Because AAF's passenger rail project has received federal assistance in the form of federally funded railroad grade-crossing improvements along AAF's right-of-way, the court of appeals affirmed the challenged allocation of tax-exempt bonds for the project.

This is the only case in which a court has interpreted the statutory provisions governing the

[1] As used herein, "petitioner" or "the County" refers to both Indian River County and the Indian River County Emergency Services District.

allocation of bonds at issue here. There is no conflict among the circuits as to their proper interpretation—and the petition does not suggest otherwise.

Instead, petitioner seeks to cast this as an instance of judicial deference run amok, arguing that the decision below is characteristic of "disarray" in the lower courts (and in this Court) on the application of deference to informal agency interpretations under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But to get there, the petition distorts what the D.C. Circuit actually held. The decision below did not hold that *Skidmore* permits a court to disregard statutory text in deferring to an informal agency interpretation. The court of appeals made clear throughout its opinion that it was properly carrying out its judicial function of interpreting the statute. The D.C. Circuit decision reasonably invoked *Skidmore* to defer to a longstanding and consistent agency position—that "a project 'receives assistance' for purposes of § 142(m) even if only a constituent portion was directly financed with Title 23 funds," Pet. App. 24a—because that agency position is "based on persuasive considerations that are *consistent with the statute*." Pet. App. 26a (emphasis added).

That decision is thus harmonious with the universal judicial consensus that *Skidmore* deference cannot apply to agency interpretations that contravene unambiguous statutory text. There simply is no "disarray"—either in this case or in other decisions—over whether *Skidmore* deference allows courts to adopt agency interpretations inconsistent with statutory text. No one thinks that they can, and petitioner does not seriously attempt to identify

appellate decisions that have made such an obvious error.

Petitioner is left with arguing that one aspect of the decision below disregards the plain text of the statute. The petition contends that the court of appeals erroneously equated the statutory phrase "receives federal assistance" with "benefits from federal assistance." *See* Pet. i. But it is not clear that the D.C. Circuit actually concluded that a project "receives" federal assistance whenever it "benefits from" such assistance, and that reasoning is not necessary to the result below. The D.C. Circuit relied on the unique factual context of this case—where federal funds were expended to improve railroad grade crossings on a right-of-way shared by corporate affiliates—to properly conclude that the AAF project "received" federal assistance under § 142(m)(1)(A). Pet. App. 27a-28a. And in any event, the narrow question of statutory interpretation that petitioner seeks to raise is simply not important enough to merit this Court's review.

In sum, petitioner cannot support its claim of "disarray," and nor can it offer the Court a good reason to take *this* case, out of the hundreds of appellate decisions that invoke *Skidmore* each year by petitioner's own count. *See* Pet. 30. This case concerns a tax exemption statute that has never previously been subject to judicial interpretation in its 15-year existence and has little fiscal importance beyond the interest paid on privately funded investments in critical public transportation projects. The Court should deny the petition.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Section 142 of the Internal Revenue Code authorizes the Secretary of Transportation to grant a federal tax exemption for interest payments on private activity bonds issued by state development agencies to finance "facilities" that fall into any of fifteen categories. 26 U.S.C. § 142(a). One of the categories is "qualified highway or surface freight transfer facilities." *Id.* § 142(a)(15). That phrase is defined to include "any surface transportation project which receives Federal assistance under title 23, United States Code . . . . " *Id.* § 142(m)(1)(A). Title 23, in turn, provides qualifying federal assistance for a number of specified programs, including, as relevant here, "the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).

Shortly after enactment in 2005, the Department of Transportation conveyed its interpretation of 26 U.S.C. §§ 142(a)(15) and (m)(1) to the Internal Revenue Service in a letter from the Federal Highway Administration's then-Acting Chief Counsel, Edward Kussy. *See* Pet. App. 128a-132a (the Kussy letter). The Kussy letter explained that "the most reasonable reading of [§ 142(m)(1)(A)] 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." *Id.* at 129a-130a. The letter provides a series of textual justifications for that interpretation, beginning with the fact that "[t]he statute references certain eligible 'facilities' as

meaning 'projects' that receive Federal assistance." *Id.* at 130a. It explains that "[t]his mixing of the words 'facilities' and 'projects' makes little sense unless one considers how the funding of transportation facilities is accomplished under the [Federal-Aid Highway Program]." *Id.* at 129a-130a.

Under the Federal-Aid Highway Program, "States and other recipients [of Title 23 dollars] commonly fund portions of the facility or activities associated with the construction of the facility," rather than funding an entire facility. *Id.* at 130a. That is the case even if the entire facility is eligible for Title 23 assistance because such funding is limited. *Id.* at 129a-130a.

The letter also explains that Congress's use of the terms "facilities" and "projects" together in § 142(m)(1) indicates that it "did not intend to fundamentally change the way in which States implement project financing." *Id.* at 130a. "[T]here 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." *Id.* at 131a. Rather, the statutory language "suggests that the Congress had a broader concept in mind." *Id.*

The letter goes on to describe how a narrower interpretation of § 142(m) would have a "real consequence" that Congress plainly did not intend:

> [I]nsisting 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 longstanding 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. By so doing, a whole array of Federal requirements would apply in ways that are wholly inconsistent with the way in which the construction activities are generally administered, and extend many project specific requirements simply because the State grantee chose to use PAB funding rather than more established funding mechanisms. This would result in doing exactly what the Congress indicated it did not intend to do.

Id. at 131a-132a. The Department has consistently adhered to these views since the letter was sent in 2005. *Id.* at 134a.

II. FACTUAL BACKGROUND

A. The All Aboard Florida Project

Respondent AAF was formed to develop and operate an express passenger rail service connecting the four largest urban centers in Southern and Central Florida: Miami, Fort Lauderdale, West Palm Beach, and Orlando (the "AAF Project" or "Project"). The passenger rail service uses an existing rail corridor that runs along Florida's east coast from Miami to Jacksonville and has been in continuous use since 1895. That rail corridor was designed to support passenger and freight operations together on shared double mainline tracks and was used in that fashion until 1968. The passenger service was then

terminated and portions of the second set of tracks were removed, but the freight service remained, and is now operated by the Florida East Coast Railway ("FECR"). C.A. App. 1639, 1715, 1800, 2052, 2453, 4523.

Through the AAF Project, passenger rail service is now being restored to the portion of the existing rail corridor between Miami and Cocoa, Florida, which measures approximately 195 miles. It will then continue west along a 40-mile segment to be constructed next to a limited-access highway system that runs to Orlando. The Project is designed to capitalize on the environmental advantages and efficiencies that modern passenger trains enjoy over other modes of transportation. C.A. App. 1644, 1768, 4523; Pet. App. 8a. AAF is funding the bulk of the improvements needed for its rail service itself; however, Title 23 funds were also used to improve the safety and capacity of railway-roadway crossings between Miami and Cocoa. C.A. App. 4536.

When the Project is fully operational, the service will connect four of the five most populous counties in Florida, comprising nearly 36% of its total population. C.A. App. 1644-45, 1768; Pet. App. 10a. The service is expected to take millions of cars off the road over time, reducing traffic congestion as well as fossil fuel use and greenhouse gas emissions. C.A. App. 1648-50, 1658. It is also expected to reduce the demand for commercial aviation in Florida, which is largely overburdened. C.A. App. 1648, 1772.

The AAF Project was conceived in 2007 and publicly announced in 2011. AAF and FECR were affiliated by related ownership at the time, and they

also became affiliated by contract. AAF obtained permanent easements from FECR which gave it a property interest in the portion of the rail corridor between Miami and Cocoa, as well as the exclusive right to improve and use that segment for the provision of passenger service. The companies also entered into a series of related agreements providing for the shared use of the existing rail infrastructure and other elements that would be upgraded or added in connection with the Project. C.A. App. 28, 4362, 4559-60, 4715. AAF and FECR remained corporate affiliates until July 2017, when FECR was sold to a third party, and they continue to be affiliated by contract. C.A. App. 28, 4559-60.

The AAF Project is being developed in two phases. C.A. App. 1639-1641, 4524. Phase I, from Miami to West Palm Beach, was completed in 2018, and passenger trains began to run. C.A. App. 4524. Phase II, from West Palm Beach to Orlando, is under construction and expected to be completed in two years. C.A. App. 4718.

B. The Department of Transportation's Allocation of Tax-Exempt Bonds to Finance the Project

In August 2014, AAF applied to the Department of Transportation for an allocation of $1.75 billion in tax-exempt private activity bonds to finance certain aspects of the Project. C.A. App. 4511, 4542; Pet. App. 12a. The application recited that the Project was a "surface transportation project that receives Federal assistance under title 23," 26 U.S.C. § 142(m)(1)(A), by virtue of its receipt of funds to eliminate the hazards of railway-highway crossings under 23 U.S.C.

§ 130. C.A. App. 4497-4510; Pet. App. 12a. In December 2014, the Department authorized the issuance of the bonds. C.A. App. 4511; Pet. App. 12a.

In 2016, AAF determined that it would be easier to complete smaller targeted offerings of private activity bonds given the prevailing market. AAF asked the Department to withdraw its allocation of $1.75 billion in private activity bonds and issue a new allocation of up to $600 million in bonds to be used exclusively for Phase I, with the possibility of a separate application for Phase II once the Project was further along. C.A. App. 4514-4516. That request was granted, and AAF later completed an offering of $600 million in bonds for Phase I. C.A. App. 4517, 4716.

On December 5, 2017, AAF applied for an allocation of $1.15 billion in tax-exempt private activity bonds to finance portions of Phase II. C.A. App. 4521, 340. As with the prior allocations, the 2017 application relied on the fact that "[t]he Project has received financial assistance under Title 23 of the U.S. Code as follows:"

> *Railway-Highway Crossing Funding*. The planning process for All Aboard Florida started in December 2011. Since then, approximately $9 million from Section 130 of U.S. Code Title 23 has been invested in the entire corridor to improve railway-highway grade crossings and prepare the corridor for growth in rail traffic. Future investments from the Section 130 program are planned for future calendar years.

C.A. App. 4536.

On December 20, 2017, the Department granted AAF's application. C.A. App. 4564. It is this allocation that is the subject of the current lawsuit. The $1.15 billion in private activity bonds have been issued in full. Pet. App. 12a-13a

III. PRIOR LITIGATION AND PROCEEDINGS BELOW

A. Indian River County and Its Lawsuits

Petitioner Indian River County is one of seven Florida counties traversed by the portion of the FECR corridor that is to be used for the Project. The Indian River County segment falls within Phase II of the Project and is roughly 21 miles in length. When the rail corridor was established in the late 1800s, the County did not exist and the area was largely unpopulated. The County was developed in large part *because* of the railroad. *See* Pet. App. 10a, 38a; AAF C.A. Br. at 10-11.

Nonetheless, the County opposes the Project, and in the past five years, has commenced no fewer than five legal proceedings relating to the Project. The first of these proceedings challenged the Department of Transportation's initial $1.75 billion allocation of tax-exempt bonds, but that case was dismissed as moot after the allocation was withdrawn in favor of smaller ones.[2]

The County filed this lawsuit in February 2018, claiming that the Secretary of Transportation exceeded her authority under § 142 when she allocated $1.15 billion in tax-exempt bonds to finance

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[2] *See Indian River Cty. v. Rogoff*, 254 F. Supp. 3d 15, 17-18, 21-22 (D.D.C. 2017).

portions of Phase II. C.A. App. 92-103. AAF intervened in support of the federal defendants. Pet. App. 13a.

B. The District Court Decision

In December 2018, the district court granted summary judgment to the federal defendants and AAF on all claims. *Id.* at 35a-115a. In relevant respect, the court concluded that "the Secretary's allocation [of private activity bonds] conformed to the statutory requirements and was a reasonable exercise of her discretion" based on the administrative record. *Id.* at 52a, 60a-62a.

In reaching that conclusion, the district court upheld the Department's longstanding view, expressed in the Kussy letter, that a project receives Federal assistance under Title 23 if any portion of the project receives Title 23 funding. *Id.* at 61a. The court concluded that the Kussy letter "reflects a reasonable assessment of congressional intent and the statutory text, and the Secretary's interpretation of § 142(m)(1)(A) in this case conforms to it." *Id.*

The district court also upheld the Secretary's application of the statute to the facts of this case. *Id.* at 60a. The court explained that "[o]ver the ten-year period from 2005 through 2014, the railway received approximately $21 million dollars in Title 23 funding, approximately 43% of which came in the three years following the commencement of AAF's planning" of the Project. *Id*. During those three years, "Florida's Department of Transportation disbursed approximately $9 million [in Title 23 funds] to account for increased rail traffic on the FECR railway"—both from the reintroduction of passenger trains and

"planned increases in FECR freight traffic as well." *Id.* The court thus determined that "[t]he record here supports the Secretary's conclusion that the project received Title 23 funding." *Id.*[3]

C. The D.C. Circuit Decision

The D.C. Circuit affirmed. *Id.* at 1a-32a. Like the district court, the court of appeals concluded that petitioner had failed to establish a transgression of 26 U.S.C. § 142(m)(1)(A). *Id.* at 23a-28a.

The D.C. Circuit began its analysis with the text of the statute: "Section 142(m)(1)(A) authorizes allocations of PABs for 'any surface transportation project which receives Federal assistance under title 23.'" *Id.* at 24a (quoting 26 U.S.C. § 142(m)(1)(A)). It then noted the Department of Transportation's "consistent interpretation," which says that "a project 'receives assistance' for purposes of § 142(m) even if

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[3] Petitioner quotes the district court's reference to "planned increases in FECR's freight traffic," Pet. 10, but notably omits the words "as well." Pet. App. 60a. The petition attempts to create the impression that the $9 million in Title 23 funds were used *solely* to accommodate planned increases in freight service, but that is not accurate. The funds were used to help prepare railway-highway crossings for *both* the reintroduction of passenger service *and* planned increases in freight service. *Id.* (citing C.A. App. 4536, 4497-4510). In fact, the "planned increases" in freight service were in part *related* to the Project, as the Complaint in this case acknowledged. *See, e.g.*, C.A. App. 22 (discussing "the areas that will be impacted by the AAF Project and *related* increases in freight rail traffic"); *id.* at 26 ("Phase II would also effect improvements to the tracks and infrastructure within the right-of-way that would *cause* the existing freight traffic to pass through at much higher speeds") (emphases added).

only a constituent portion was directly financed with Title 23 funds." *Id.* Here, "[a]bout $2.2 million of those funds were used to upgrade 39 crossings in Phase II of the Project." *Id.* And the court reasoned that "railroad grade crossings are part of a railroad 'project' on any ordinary understanding." *Id.* Because a "constituent portion" of the Project—the grade crossings—had been funded under Title 23, "[a]pplying [the agency's] interpretation here" would mean that "DOT permissibly and reasonably determined that the Project qualified for tax-exempt PABs." *Id.*

In the remainder of its analysis, the D.C. Circuit further explained the agency's "constituent portion" interpretation and its reasons for accepting that interpretation. *See id.* at 25a-27a. It first addressed the level of deference due to the Kussy letter's interpretation of § 142(m)(1)(A). Petitioner had argued against deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and instead that the court should "at most" apply *Skidmore* deference. *See* Pet.'s C.A. Br. at 17. The D.C. Circuit concluded that there was no reason to decide whether the agency's interpretation in the Kussy letter was entitled to *Chevron* deference "because it is clear on the record before us that DOT's position easily survives review under *Skidmore*." Pet. App. 25a.

The D.C. Circuit next set out its understanding of the scope of, and prerequisites for, *Skidmore* deference under this Court's case law:

> 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*. This is because an agency's views that are within its area of expertise are entitled to a level of deference commensurate with their power to persuade.

Pet. App. 25a (citing *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399-402 (2008), and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)). The court concluded that "DOT's position has not only been consistent; it is also eminently reasonable." *Id.*

The court then quoted the Kussy letter at length:

> "[T]he most reasonable reading of [§ 142(m)(1)(A)] 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." . . . [A] narrow reading of the word "project" would "distort the longstanding 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. . . . 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 26a (quoting C.A. App. 4494-95).

The D.C. Circuit found "DOT's long-standing position" to be "based on persuasive considerations that are consistent with the statute," concluding that "DOT has reasonably interpreted 'project which receives Federal assistance under title 23' to mean a project which—*in whole or part*—benefits from assistance under Title 23." *Id.* (emphasis added). "We have no reason to question this position because the statute does not require an applicant for PABs to be the direct recipient of Federal assistance under Title 23; rather, the 'project' at issue must receive federal assistance under Title 23." *Id.* at 26a-27a.

The court further rejected petitioner's argument "that it is not enough that the AAF Project received some assistance under Title 23; rather, . . . the entire proposed Project must be funded by Title 23." *Id.* at 27a. The court explained that "there is nothing in the statute to support this interpretation." *Id.*

The court likewise rejected petitioner's argument that "the federally funded highway safety improvement projects were not *intended* to benefit the AAF project." *Id.* "Assuming without deciding that such intent is required," the court held that "the District Court correctly concluded that sufficient evidence of intent was present here." *Id.*

For all these reasons, the D.C. Circuit affirmed the district court's conclusion that that the Department had reasonably construed § 142(m)(1)(A) to authorize an allocation of private activity bonds to the Project. *Id.* at 27a-28a. Petitioner declined to seek rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE LOWER COURTS ON THE STATUTORY QUESTION DECIDED BY THE D.C. CIRCUIT

As the petition appears to acknowledge, the D.C. Circuit's decision does not conflict with a decision of any other court. The decision below concerned the proper interpretation of 26 U.S.C. § 142(m)(1)(A) in the context of the bond allocation to Phase II of AAF's passenger rail project. Petitioner does not suggest that there is any division of authority on the interpretation of § 142(m)(1)(A). The petition does not point to any judicial decision outside this case that has even considered the interpretation of the relevant statutes. Nor is AAF aware of any such decision. There is thus no conflict of authority on the statutory question decided below.

II. THERE IS NO CONFLICT OF AUTHORITY WITH RESPECT TO THE PROPER APPLICATION OF *SKIDMORE* DEFERENCE

Lacking a clear division of authority, the petition instead posits broader doctrinal tension that it claims is illustrated by the lower court's decision. Specifically, petitioner contends the D.C. Circuit's decision reveals a "disarray" in the courts of appeals regarding the proper application of deference to informal administrative decisions under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Petitioner suggests the D.C. Circuit's decision typifies a strain of lower court decisions that defer to informal agency interpretations of statutes "without finding the statute ambiguous or applying (much less exhausting) traditional interpretive tools." Pet. i. The petition

contends this *Skidmore* disarray is the result of inconsistent application of *Skidmore* by this Court.

But the petition is built on a fundamental misreading of the decision below. The D.C. Circuit did not defer "without finding the statute ambiguous or applying (much less exhausting) traditional interpretive tools." *Id.* To the contrary, the D.C. Circuit repeatedly quoted the text of the statute, found that the agency's interpretation was "reasonable and consistent with the statutory framework," and rejected petitioner's arguments because they were unsupported by the text of the statute. Pet. App. 25a-27a. Nothing in the decision below supports petitioner's thesis that the three current or former chief judges of the D.C. Circuit on the panel below ignored the text of the statute—which is quoted on almost every page of the relevant section of the opinion. *See id.* at 23a-28a.

Nor is there any "disarray" in the decisions of this Court or the lower courts regarding when and how to apply *Skidmore* deference. Neither the D.C. Circuit nor other lower courts read *Skidmore* to permit the judiciary to contradict the plain language of statutes. The petition identifies no real tension in the decisions of this Court or lower courts on proper application of *Skidmore* deference. The question presented by the petition is neither implicated by the decision below nor worthy of this Court's consideration.

A. The D.C. Circuit Did Not Defer to the Agency Without Considering the Statutory Text

The petition's question presented presupposes that the D.C. Circuit deferred to the Department of

Transportation without finding any ambiguity in the statute or otherwise heeding the statutory text. But that is simply not true. There is nothing in the decision below to support petitioner's characterization of its reasoning. The decision thus does not illustrate any incoherence in the application of *Skidmore* by lower courts.

1. The petition claims that the D.C. Circuit read "*Skidmore* to sanction abandonment of statutory text." Pet. 21. But it did nothing of the sort. To the contrary, it acknowledged that an agency interpretation can receive deference only if it is "reasonable and *consistent with the statutory framework*." Pet. App. 25a (emphasis added). And it ultimately held that DOT's interpretation of the statute was "based on persuasive considerations that are *consistent with the statute*." *Id.* at 26a (emphasis added). These are the hallmarks of this Court's *Skidmore* deference doctrine.

The opinion below does not purport to sanction *Skidmore* deference to an agency interpretation at odds with an unambiguous statute. Petitioner argued below that AAF's passenger rail project had not itself "received Federal assistance under title 23" as required by 26 U.S.C. § 142(m)(1) because the rail grade crossing improvements on which AAF premised its tax-exempt bond application were made on "the pre-existing freight corridor to be utilized by the AAF project." Pet. App. 23a. But the D.C. Circuit rejected that argument, relying on the Department of Transportation's consistent, broader conception of the ambiguous term "project" found in § 142(m)(1). The D.C. Circuit read the Kussy letter, written in 2005, to

provide that "a project 'receives assistance' for purposes of § 142(m) even if only a constituent portion was directly financed with Title 23 funds." *Id.* at 24a. Based on that interpretation, the Court observed that the "railway-highway crossings on the Project corridor" were upgraded using $9 million in Title 23 funds, and about "$2.2 million of those funds were used to upgrade 39 crossings in Phase II of the Project. *Id.* Because "railroad grade crossings are part of a railroad 'project' on any ordinary understanding, and the record adequately supports the District Court's conclusion that crossing improvements were made in contemplation of the All Aboard Florida initiative," the D.C. Circuit concluded that "DOT permissibly and reasonably determined that the Project qualified for tax-exempt [private activity bonds] under 26 U.S.C. § 142(m)." *Id.*

Petitioner complains that the D.C. Circuit made no explicit finding that the statutory text is "ambiguous" before embracing the Department of Transportation's longstanding interpretation. Pet. 14. That complaint is misplaced. While the D.C. Circuit does not use the word "ambiguous," it repeatedly uses other terms that courts typically use when finding that an agency's interpretation of statutory text merits deference. The opinion below repeatedly pronounces the agency's position "permissibl[e] and reasonabl[e]," "eminently reasonable," and "based on persuasive considerations that are consistent with the statute." Pet. App. 24a-26a. A judicial determination that an agency's position is "reasonable" and "consistent with the statute" necessarily presupposes a determination that the statute is at least ambiguous (or that it

unambiguously supports the agency). An explicit declaration of ambiguity is unnecessary.

This Court said exactly that in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). Citing *Chevron* but eschewing the conventional two-step formulation, the Court said simply that the agency's "view governs if it is a reasonable interpretation of the statute." *Id.* at 218. Against the dissent's objection that the Court had skipped the critical analysis of statutory ambiguity before reaching deference, the Court defended its "omi[ssion of] the supposedly prior inquiry," explaining that "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." *Id.* at 218 n.4.

Justice Scalia elaborated on this point in a later concurring opinion: "Whether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency is clearly reasonable—and it would be a waste of time to conduct that inquiry." *United States v. Home Concrete & Supply, LLC*, 556 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted)).

Thus, the D.C. Circuit's alleged failure to use the magic word "ambiguous" in analyzing the statutory framework does not mean that it misapplied *Skidmore*. It is just as true under *Skidmore* as under *Chevron* that an agency interpretation is "permissible" or "reasonable" only if it is consistent with statutory text. Since the D.C. Circuit expressly found the agency's interpretation "permissibl[e]," "eminently reasonable," and "consistent with the

statute," its omission of an explicit finding of statutory ambiguity is of no moment.

2. Other aspects of the opinion below confirm that the D.C. Circuit did not ignore the statutory text. The court's analysis begins by quoting the relevant language: "Section 142(m)(1)(A) authorizes allocations of PABs for 'any surface transportation project which receives Federal assistance under title 23.'" Pet. App. 24a. The court then rejected *petitioner's arguments* as inconsistent with the statutory text.

First, petitioner urged that the allocation of tax-exempt bonds to AAF was impermissible because "*no* Title 23 monies were provided to AAF." Pet. 17. But here, as the court of appeals explained, that argument can only be made by disregarding the text: "[T]he statute does not require *an applicant* for PABs to be the direct recipient of Federal assistance under Title 23; rather, *the 'project'* at issue must receive assistance under Title 23." Pet. App. 26a-27a (emphasis added).

Second, petitioner also argued that, "in order to qualify for PABs under § 142(m)(1)(A), the entire proposed Project must be funded by Title 23," and not just a "constituent portion." *Id.* at 27a. As the D.C. Circuit explained, however, "there is nothing in the statute to support this interpretation." *Id.* To say that the text does not support petitioner's proposed "entire project" test is equivalent to saying that the text is consistent with its opposite—the agency's "constituent portion" test.

Third, petitioner half-heartedly suggests that the "constituent portion" test is wrong because the term

"project" must have the same meaning for purposes of the provision at issue here, 26 U.S.C. § 142(m)(1)(A), as it has in Title 23. *See* Pet. 17-19. But the agency addressed this argument in the Kussy letter endorsed by the court below, observing that "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." Pet. App. 131a. After all, Title 26 does not define the term, and Title 23's definition states expressly that it applies only when the term is used "[i]n th[at] title." 23 U.S.C. § 101(a). As the letter explains, the term "project" can have a broader or a narrower meaning depending on context, and "insisting on the narrowest reading of the word 'project'" in the context of § 142(m)(1)(A) would be senseless. Pet. App. 26a; *see id.* at 129a, 131a. Here, too, the text supports the decision below, not petitioner.

* * *

In short, the fundamental premise of the petition—that the court of appeals read *Skidmore* not to require statutory ambiguity—is simply false. The court of appeals deferred to the Department of Transportation's longstanding interpretation of 26 U.S.C. § 142(m)(1)(A) only after concluding that the agency interpretation is fully consistent with the statute and otherwise reasonable. The decision below is not evidence of any disarray in the lower courts regarding the proper application of *Skidmore* deference.

B. The Decision Below Does Not Conflict with Any Decision of This Court

Petitioner does not contend that the decision below conflicts with any decision of this Court. To the contrary, it complains that that decision below is *fully consistent* with this Court's decisions in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), and *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004). But *consistency* with this Court's decisions hardly merits a writ of certiorari.

Petitioner says that this Court should reexamine those decisions because they supposedly "can be read" to allow courts to defer to agencies under *Skidmore* without regard for statutory text. Pet. 27. In support, petitioner quotes approvingly Justice Kennedy's opinion for the Court in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), and his dissent in the *Alaska* case (Pet. 26, 27-28). Yet it was Justice Kennedy who wrote the opinion for the seven-Justice majority that deferred to the agency in *Holowecki*. That opinion cannot be read to contradict his earlier statements in *Alaska* or his later ones in *Nassar*.

Holowecki and *Alaska* did not break new ground with respect to *Skidmore* doctrine. They do not—and cannot be read to—dispense with the firmly entrenched principle that no deference is possible where an agency's position is unreasonable in light of the statutory text. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) (it is "unnecessary" to engage in *Skidmore* analysis if "the statute itself speaks clearly to the point at issue"); *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109

(1993) (no deference under *Skidmore* or *Chevron* where agency interpretation "exceeded the scope of available ambiguity"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991) (no *Skidmore* deference where agency interpretation "lack[ed] support in the plain language of the statute"). Indeed, *Holowecki* gave a full nod to the text (and related tools of statutory interpretation) when it upheld the agency's position there as "a reasonable alternative [interpretation] that is consistent with the statutory framework." *Holowecki*, 552 U.S. at 402.

There is also no support for petitioner's assertion that the court below read *Holowecki* to declare text irrelevant. The D.C. Circuit cited *Holowecki* for the uncontroversial proposition that, "[w]hen 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*." Pet. App. 25a (emphasis added). Suffice it to say, an agency's interpretation is not "reasonable and consistent with the statutory framework" if it is contrary to the text or other "traditional interpretive tools." Pet. i; *see Entergy*, 556 U.S. at 218 n.4.

The law review articles that petitioner cites (*see* Pet. 29 n.8, 31-32) also confirm that there is no pressing need for clarification of *Skidmore*. The Hickman & Krueger study excludes from its analysis "cases in which a court finds the statute's meaning plain, clear, or unambiguous" because, in such cases, "deference to an administrative interpretation is not an option." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*,

107 Colum. L. Rev. 1235, 1264 (2007). Among cases where the statute's meaning was *not* held to be plain, clear, or unambiguous, Hickman & Krueger found that agencies win under *Skidmore* only about 60% of the time and lose the other 40%—not much better than even odds. *Id.* at 1275. Another, more recent study cited by petitioner found that courts agree with agencies 77.4% of the time under *Chevron*, but only in about 56% of cases where *Skidmore* applies—though petitioner mentions only the higher win rate under *Chevron*, Pet. 32, while ignoring the more modest *Skidmore* statistic. *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 31-32 (2017). These findings hardly support petitioner's claim of widespread "abdication of the court's role." Pet. 25.

C. The Lower Courts All Agree that *Skidmore* Requires Consideration of Statutory Text

Nor is there any disarray in the decisions of other lower courts in the application of *Skidmore*, as the petition claims. Pet. 28-30. To the contrary, all courts agree that *Skidmore* deference can never override a "statute's unambiguous meaning." Pet. 28.

This is true in the D.C. Circuit. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 379 (D.C. Cir. 2005) (court "could not let stand an agency decision that deviates from the statute's unambiguous meaning"). And it is true in the decisions of every other federal court of appeals. *See, e.g.*, *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 117, 120 n.14 (1st Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 509 (2d Cir.

2017); *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 111 (3d Cir. 2018); *Nahigian v. Juno-Loudoun, LLC*, 677 F.3d 579, 587 n.6 (4th Cir. 2012); *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 374-75 & n.22 (5th Cir. 2018); *Harmon v. Holder*, 758 F.3d 728, 732 n.1 (6th Cir. 2014); *Mendoza v. Sessions*, 891 F.3d 672, 676, 680 (7th Cir. 2018); *Clark v. USDA*, 537 F.3d 934, 940 (8th Cir. 2008); *Close v. Thomas*, 653 F.3d 970, 975-76 n.3 (9th Cir. 2011); *Kientz v. Comm'r, SSA*, 954 F.3d 1277, 1281 (10th Cir. 2020); *Martin v. Comm'r, SSA*, 903 F.3d 1154, 1163 (11th Cir. 2018); *Orlando Food Corp. v. United States*, 423 F.3d 1318, 1325 (Fed. Cir. 2005). The D.C. Circuit's approach to *Skidmore* here is entirely consistent with this unanimous view that deference cannot be invoked to override a statute's plain meaning.

There is simply no merit to petitioner's claim that there is an epidemic in the lower courts of *Skidmore* deference being applied "to the virtual exclusion of the statutory text." Pet. 28. None of the cases that petitioner cites deferred to an interpretation that contradicted the plain text of the statute. Petitioner does not even attempt to show that they did.[4]

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[4] *See, e.g.*, *Cervantes v. Holder*, 597 F.3d 229, 235-36 & n.8 (4th Cir. 2010) (deferring to the agency's interpretation and explaining that the competing interpretation—grounded in legislative history—was "belied by the relevant statutory language"); S*eaview Trading, LLC v. Commissioner*, 858 F.3d 1281, 1284-87 (9th Cir. 2017) (holding, after detailed textual analysis of technical tax provisions, that the Commissioner's position was "supported by reasoning set forth in both informal and formal statements"); *Ammex, Inc. v. United States*, 367 F.3d

(Continued …)

III. PETITIONER'S DISAGREEMENT WITH THE COURT OF APPEALS' READING OF STATUTORY TEXT DOES NOT MERIT THIS COURT'S REVIEW

Denuded of its misreading of the D.C. Circuit's opinion, the petition boils down to a simple disagreement with that court's interpretation of one aspect of the relevant statutory text. In particular, petitioner takes issue with the D.C. Circuit's conclusion that DOT has reasonably interpreted "project which receives Federal assistance under title 23" to mean a project which—in whole or in part—"benefits from assistance under Title 23." *See* Pet. 2-3 (quoting Pet. App. 26a). The petition argues that the court of appeals disregarded the plain meaning of "receives Federal assistance under title 23" by equating "receives" with "benefits." Pet. 13.

Petitioner's disagreement with the D.C. Circuit's interpretation of "receives Federal assistance" does not merit this Court's review for at least two reasons.

First, the opinion below independently stands on deference to the Department of Transportation's longstanding view that a project receives the necessary federal assistance if some component part of the project is funded with Title 23 dollars. Because grade crossings that were funded with Title 23 dollars are part of AAF's passenger rail project, the statutory requirement that the project "receive" federal

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530, 535 (6th Cir. 2004) (deferring to agency's "logical" view that a sale of fuel to a car headed for the border is not a sale "for export," where plaintiff "failed to identify any infirmity" in the agency's "sensible interpretation").

assistance is satisfied. Pet. App. 24a. In light of this independent rationale, it is not clear that the D.C. Circuit equated "receives" with "benefits" as a matter of statutory interpretation, and it is even less clear that this supposed statutory interpretation was essential to its decision.

Second, apart from the fact that it simply was not critical to the decision below, the application of this statutory phrase in the unique context of this case is *sui generis*. Petitioner complains that the project has not met the "federal assistance" requirement even though it concedes that millions of Title 23 dollars were disbursed to an AAF affiliate to improve the safety and capacity of grade crossings along the shared rail corridor through which AAF's right-of-way passes. This narrow statutory issue—not considered by another federal court before or since—simply does give rise to an issue of sufficient importance to merit *certiorari*. *See* Sup. Ct. R. 10.

1. The petition argues that the critical rationale of the D.C. Circuit is that a project "receives" federal assistance as long as it "benefits" from the expenditure of federal funds. But the opinion does not place any critical emphasis on that purported rationale. Indeed, it is not readily apparent that the D.C. Circuit actually endorsed this rationale, and it is even less clear that this supposed statutory interpretation was essential to its decision.

The decision would not change in any relevant respect without the court of appeals' purported equation of "receives" with "benefits from." Earlier in its opinion, the D.C. Circuit cited three reasons for concluding that the allocation of tax-exempt bonds

was lawful. *First*, the Court endorsed the Department's longstanding view, first stated in the Kussy letter, that a project "receives assistance" within the meaning of § 142(m)(1)(A) "even if only a constituent portion was directly financed with Title 23 funds." Pet. App. 24a. *Second*, the court noted that "[a]bout $2.2 million of [the federal funds directed at upgrading rail-highway crossings on the Project corridor] were used to upgrade 39 crossings in Phase II of the Project." *Id. And finally*, the court relied on its own conclusion that "railroad grade crossings are a part of a railroad 'project' on any ordinary understanding." *Id.* "Therefore," the D.C. Circuit concluded, the Department "permissibly and reasonably determined that the [AAF] Project qualified for tax-exempt [bonds] under 26 U.S.C. § 142(m)." *Id.*

This reasoning does not depend in any way on a determination that "receives" means "benefits from." The context in which the challenged passage arises suggests that the court of appeals was not really concluding that "benefit[ting] from" federal assistance was a sufficient condition to receiving tax-exempt bonds. The immediately preceding paragraph discusses at length the Kussy letter's interpretation that a project receives the necessary assistance provided that such federal funding is provided to a component part of the project—which the court later restates as "in whole or in part." The court ultimately concludes that DOT's view "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" is "based on persuasive

considerations that are consistent with the statute" and thus "due deference." *Id.* at 26a.

The passage from the decision below cited by the petition (*see* Pet. 2-3) does not place any particular emphasis on the word "benefits" but simply reinforces the court's earlier deference to the agency's view that a project "receives" federal assistance provided that the project does so "in whole or in part." *Compare* Pet. App. 26a (endorsing DOT interpretation of a "project which receives Federal assistance under title 23" to mean "a project which—in whole or in part—benefits from assistance under title 23') *with* Pet. App. 24a ("a project 'receives assistance' . . . even if only a constituent portion was directly financed with Title 23 funds"). The challenged quote appears in response to an argument petitioner made below that AAF's project "has not received federal assistance under Title 23." *Id.* at 26a. The court concluded that it had "no reason to question" the Department's position "because the statute does not require an applicant for PABs to be the direct recipient of Federal assistance under Title 23; rather, the 'project' at issue must receive assistance under Title 23." *Id.* at 26a-27a.

Likewise, in rejecting petitioner's argument that "in order to qualify . . ., the entire proposed Project must be funded by Title 23," the court explained that "there is nothing in the statute to support this" interpretation. *Id.* at 27a. The court was not here endorsing a rule that a project need merely "benefit from" federal funding to qualify for private activity bonds. It was instead restating the core holding that a project qualifies for such bonds if any part of it was

funded with title 23 funds, which it appropriately held was the case in light of the record here.

2. Even setting aside the fact that the court of appeals did not squarely decide that a project "receives" federal assistance by merely "benefiting from" it, this statutory interpretation question simply does not merit this Court's review. This is especially true in the unique factual context of this case. As the court below reasoned (Pet. App. 27a-28a), AAF did not merely reap some incidental or attenuated benefit from Title 23 funds. Those funds were allocated to AAF's corporate affiliate FECR—as owner of the shared rail corridor through which AAF's railroad easement passes—to improve grade crossings which both AAF and FECR will use. *See* discussion, *supra*, at 6-8. And those improvements were needed because of, and motivated by, AAF's passenger rail project. *See* Pet. App. 27a-28a; C.A. App. 4536. Indeed, much of the Title 23 money was spent after the AAF project was publicly announced and formal planning for the passenger railway began. *See* Pet. App. 24a, 27a-28a ("approximately 43% of [relevant federal rail crossing improvement funding] came in the three-years following the commencement of AAF's planning").

The crux of petitioner's argument here is that *AAF* itself "had not received Title 23 funds." *See* Pet. 8, 17. Had AAF itself been cut the check and made the same improvements to the same crossings, there would be nothing left of petitioner's argument. But as the D.C. Circuit correctly observed, the statute does not require the project *sponsor* to receive the Title 23 funds; rather, "the 'project' at issue must receive assistance under Title 23." Pet. App. 27a. The fact

that Title 23 funds were disbursed to AAF's then-corporate affiliate FECR should not change the result for purposes of this Court's review of the petition.[5]

IV. THE PETITION EXAGGERATES THE IMPORTANCE OF THE CASE

Petitioner exaggerates when it pronounces this "a case with profound implications for the federal fisc." Pet. 2. Section 142(m) authorizes the Secretary of Transportation to allocate tax-exempt bonds with an aggregate face value of $15 billion to "qualified highway or surface freight transfer facilities." 26 U.S.C. § 142(m)(2); Pet. 5 n.1. Most of that $15 billion has already been allocated. *See* U.S. Dept. of Transp., Private Activity Bonds, *available at* https://www.transportation.gov/buildamerica/financing/private-activity-bonds-pabs/private-activity-bonds (last visited Aug. 13, 2020). When the balance has been doled out, § 142(m)(1)(A) will be a dead letter absent further legislative action by Congress.

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[5] The petition seeks to draw support for the purported irrationality of the court's decision by reciting two allegedly more attenuated tax-exempt bond decisions by the Department of Transportation. *See* Pet. 9, 20 (citing to an "intermodal logistics park" near Chicago and a light-rail facility in Maryland). But the Court of Appeals did not cite those projects in support of its decision or endorse the Department's decisions on those projects. Nor was there anything extraordinary about those allocations. *See* Pet. App. 135a-136a (noting, for example, the shared use trail was being upgraded with federal funds "as part of the Purple Line Project"). Those allocations also did not involve the unique facts here of affiliated companies sharing a railroad corridor. Those unreviewed and unrelated decisions do not provide a reason for this Court to review the decision in this case.

Moreover, contrary to petitioner's suggestion, the fiscal impact of this case is *not* the face value of the bonds. Pet. 8. The federal outlay here is limited to the forbearance of *federal tax revenues on the interest* paid to bondholders. The value of that tax subsidy depends on factors such as the interest rate on the bonds and the marginal tax rates of the investors who buy them. That outlay therefore varies from year to year and is only a fraction of a fraction of the face value of the bonds. It is much more proportionate to the cost of other direct federal transportation subsidies, such as Title 23 subsidies.

V. THIS CASE IS A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, this case is an exceptionally poor vehicle to resolve the question presented. The petition does not challenge the existence of *Skidmore* deference, only its application. And despite the petition's mischaracterizations, the D.C. Circuit did not misapprehend *Skidmore*. For the reasons already stated, there is no need to clarify the application of the *Skidmore* doctrine. The petition struggles mightily to create doctrinal "disarray" where it simply does not exist.

Moreover, even if the Court were inclined to reconsider the ground rules for *Skidmore* deference, this would not be the case to do so. The petition challenges a split-less interpretation of a tax exemption provision that had never previously been the subject of judicial controversy since its enactment a decade and a half ago. The decision below is also based on peculiar facts that not only support the D.C. Circuit's application of *Skidmore* deference, but also

make this case particularly ill-suited to resolve the question presented.

In short, this case does not give rise to an issue of substantial public importance to justify this Court's review. To the extent the petition raises broader challenges to *Skidmore* deference—challenges that lack foundation here—there will be other opportunities if such a re-examination were ever deemed warranted. As Petitioner itself points out, such cases arise frequently, with the courts of appeals having "invoked *Skidmore* more than 1,300 times in the [past] 19 years." Pet. 30.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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