No. 19-1304

In the Supreme Court of the United States

INDIAN RIVER COUNTY, FLORIDA, ET AL.,
PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Interest on bonds issued by state or local governments to finance governmental activities generally is exempt from federal income tax, but interest on bonds issued by such governments to finance private activities generally is not exempt. 26 U.S.C. 103(a) and (b)(1). Interest on bonds issued by state and local governments to finance private activities that meet certain criteria, however, called "qualified bond[s]," is tax-exempt. 26 U.S.C. 103(b)(1), 141(e). One type of qualified bond is a bond the proceeds of which are "used to provide * * * qualified highway or surface freight transfer facilities," which are defined to include "any surface transportation project which receives Federal assistance under title 23, United States Code." 26 U.S.C. 142(a)(15) and (m)(1)(A). The statute limits the aggregate amount of bonds that may be issued for that purpose, and the Secretary of Transportation is charged with allocating such bonds. 26 U.S.C. 142(m)(2).

In this case, the Secretary authorized the allocation of bonds for the All Aboard Florida Intercity Passenger Rail Project (Florida Project), a passenger-railway project in Florida, determining that the project qualified under Section 142(m) because millions of dollars of Title 23 assistance had been expended on railroad grade crossings throughout the project corridor. The district court and the court of appeals upheld that determination as consistent with the statute. The question presented is as follows:

Whether the Secretary lawfully approved an allocation of tax-exempt bonds under 26 U.S.C. 142(m) for the Florida Project in light of the millions of dollars of Title 23 assistance expended on railroad grade crossings throughout the Florida Project corridor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 945 F.3d 515. The district court's opinion (Pet. App. 35a-115a) is reported at 348 F. Supp. 3d 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on December 20, 2019. On March 10, 2020, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 18, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Internal Revenue Code, interest on bonds that are issued by a state or local government to finance governmental activities is generally exempt from federal taxation. See 26 U.S.C. 103(a). State and local governments may also issue bonds to fund private activities, but the interest on such bonds—which the Code terms "private activity bond[s]"—ordinarily is not tax-exempt. 26 U.S.C. 103(b)(1); see Steven Maguire & Joseph S. Hughes, Cong. Research Serv., RL31457, *Private Activity Bonds: An Introduction* 1-2 (July 13, 2018). A bond is deemed a private-activity bond under the Code, and thus its interest is presumptively not tax-exempt, if either (A) more than a specified percentage of the bond's proceeds will be used for a "private business use," and more than a specified percentage of the principal or interest owed will be paid from or secured by certain private property; or (B) more than a specified amount of the bond's proceeds are used to make loans to non-governmental entities. 26 U.S.C. 141(b)(1); see 26 U.S.C. 141(a)-(c).

The Code makes an exception to the general rule denying tax-exempt status to private-activity bonds for certain bonds issued by a state or local government that satisfy additional criteria—called "qualified bond[s]." 26 U.S.C. 103(b)(1), 141(e). To be a qualified bond, a bond must fall within one of seven categories specified in 26 U.S.C. 141(e)(1), and it must also meet various additional requirements set forth in 26 U.S.C. 146 and 147. If a private-activity bond issued by a state or local government falls within one of those seven categories and meets the additional requirements, interest on the bond is tax-exempt, just like interest on state or local government bonds issued to fund governmental activities. See 26 U.S.C. 103(a) and (b)(1).

Although qualified bonds enjoy favorable federal tax treatment, a qualified bond is not an award of federal funding. The bond is issued by a state or local government to provide financing for an activity undertaken by a private developer, which is responsible for repaying the bond principal and interest. But the tax-exempt status of qualified bonds does enable state and local governments to help private developers to obtain financing at a lower cost. Because the interest on qualified bonds is not subject to federal income tax, bondholders are willing to accept lower interest rates, lowering the private developer's cost of borrowing funds. Pet. App. 5a, 45a; see Build America Bureau, U.S. Dep't of Transp., *Private Activity Bonds* (updated July 22, 2020) (DOT, *Private Activity Bonds*), https://go.usa.gov/xwnHN ("Providing private developers and operators with access to tax-exempt interest rates lowers the cost of capital significantly, enhancing investment prospects.").

b. Among the categories of qualified bonds specified in Section 141(e)(1) are "exempt facility bond[s]," 26 U.S.C. 141(e)(1)(A). To be an exempt-facility private-activity bond, at least 95% of the proceeds of the bond issue must be "used to provide" one of more than a dozen types of facilities—such as airports, certain public-education facilities, and waste-disposal facilities, 26 U.S.C. 142(a).

In 2005, Congress amended the definition of exempt-facility private-activity bonds to include an additional type of facility that qualified bonds may be used to finance: "qualified highway or surface freight transfer facilities." 26 U.S.C. 142(a)(15); see Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, Tit. XI,

Subtit. C, § 11143(a) and (b), 119 Stat. 1963-1965. Congress defined that phrase to include, among other things, "any surface transportation project which receives Federal assistance under title 23, United States Code (as in effect on the date of the enactment of this subsection)." 26 U.S.C. 142(m)(1)(A). The addition of that new type of facility for which exempt-facility bonds may be issued "reflects the Federal Government's desire to increase private sector investment in U.S. transportation infrastructure" in order to generate "new sources of money, ideas, and efficiency." DOT, *Private Activity Bonds*.

Congress established an aggregate limit of $15 billion on the total amount of exempt-facility private-activity bonds that may be issued for "qualified highway or surface freight transfer facilities." 26 U.S.C. 142(m)(2)(A). Congress empowered and directed the Secretary of Transportation to "allocate" that aggregate amount of bonds "among qualified highway or surface freight transfer facilities in such manner as the Secretary determines appropriate." 26 U.S.C. 142(m)(2)(C). As of July 2020, the Secretary has allocated more than $14.4 billion of such bonds, and more than $12.2 billion of such bonds have been issued. See DOT, *Private Activity Bonds* (listing bonds allocated and issued by project as of July 15, 2020).

c. In October 2005, two months after Congress amended Section 142 to add "qualified highway or surface freight transfer facilities" to the list of exempt facilities, the Department of Transportation communicated in a letter to the Internal Revenue Service (IRS) the Department's view of how the amended provision applies in the case of a transportation facility only *part* of which receives Title 23 funding. Pet. App. 128a-132a. The Acting Chief Counsel of the Federal Highway Administration (FHWA) within the Department explained

the agency's view that "the most reasonable reading of [the amendments] permits the proceeds of private activity bonds * * * 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. In other words, a private-activity bond's "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 (emphasis added).

In support of that reading, the Department's letter explained that the word "project" in Section 142(m)(1)(A) most naturally refers to an entire transportation facility, not to its individual subsidiary segments. Pet. App. 130a-131a. That reading, the letter noted, best accords with the statutory context. *Id.* at 131a. In particular, the word "project" appears in the definition of "'qualified highway or surface freight transfer *facilities*,'" 26 U.S.C. 142(m)(1)(A) (emphasis added), which "suggests that the Congress had a broader concept in mind" than a narrow sense of "'project'" that is used in Title 23. Pet. App. 131a.

The letter further explained that reading "project" to encompass the whole facility—and thus permitting private-activity-bond proceeds to be used on an entire facility so long as it "receives Federal assistance on some component or segment"—comports with the practical realities of transportation-facility financing. Pet. App. 130a-132a. "A [private-activity-bond] issuance for a transportation facility," the letter observed, "in many cases will be secured by a revenue stream specifically associated with that transportation facility," and thus "repayment of the [bonds] is likely to be supported by the facility as a whole, not just the sections on which

Federal assistance funds are expended." *Id.* at 132a. Reading the statute to "[l]imit[] the project activities for which [private-activity-bond] proceeds may be used," in contrast, "actually runs counter to this obvious relationship." *Ibid.*

The Department's letter additionally explained that a contrary, narrow reading of "project"—which would restrict the use of proceeds of tax-exempt private-activity bonds to only those specific project components that themselves receive federal assistance under Title 23—would "fundamentally change the way in which States implement project financing" in a way that "Congress did not intend." Pet. App. 130a. As the letter observed, State and local governments frequently receive federal Title 23 assistance for some segments of larger projects—which thereby become subject to various federal competition and other requirements—but not for other segments. *Ibid.* Reading the statute to permit private-activity bond proceeds to be used only for individual project components that receive Title 23 funding "would induce State grantees to 'sprinkle' title 23 funds to every separate project or contract of an entire facility to make full use of [private-activity bond] proceeds." *Id.* at 131a. That approach, in turn, would cause "a whole array of Federal requirements [to] apply in ways that are wholly inconsistent with the way in which the construction activities are generally administered, and extend many project specific requirements" to entire facilities. *Ibid.* That "would result," the FHWA determined, "in doing exactly what Congress indicated it did not intend to do." *Id.* at 132a; see *id.* at 131a (discussing Conference Report disclaiming such an intent).

In accordance with that interpretation of the statute, the Department of Transportation "has allocated [private-

activity bonds] to entire projects, even if only certain portions of those projects receive Federal assistance." Pet. App. 135a. Examples include freight and other rail facilities in Illinois and a commuter-rail project in Colorado. *Id.* at 135a-136a.

2. This case concerns a railroad project in Florida financed in part through private-activity bonds issued by a Florida state-government entity. In 2011, respondent AAF Holdings, LLC (AAF), announced plans to construct and operate an express passenger-railway service connecting Orlando and Miami, Florida, a heavily traveled corridor, called the All Aboard Florida Intercity Passenger Rail Project (Florida Project). Pet. App. 2a; see C.A. App. 1648-1649, 1658, 1768-1773, 4524. AAF proposed to offer 32 daily departures (16 in each direction) that would make the trip in approximately three hours. Pet. App. 8a. Phase I of the Florida Project, connecting Miami to West Palm Beach with a stop in Fort Lauderdale, is complete and began operating in January 2018. *Ibid.* Phase II, connecting West Palm Beach to Orlando, is currently under construction. *Id.* at 8a-9a.

For most of the 235-mile trip between Miami and Orlando, the new passenger trains will operate on the same tracks as existing freight service operated by the Florida East Coast Railway (Railway). Pet. App. 8a. The Railway, which until 2017 was owned by the same parent company as AAF, owns the right of way, and AAF holds a permanent, exclusive easement to develop and operate passenger-rail service over it. See C.A. App. 1715. To prepare the corridor for faster passenger trains, the Florida Project includes replacing portions of the existing tracks, installing a second set of tracks in areas where the historic second track had been removed, and installing a third track in certain locations

to allow for passing; the Florida Project also includes making safety upgrades to railroad-highway intersections, which are known as "grade crossings." Pet. App. 12a; see *id.* at 9a.

To finance a portion of the Florida Project's cost, AAF applied to the Department of Transportation for an allocation of exempt-facility private-activity bonds for qualified highway or surface freight transfer facilities, under 26 U.S.C. 142(a)(15) and (m). Pet. App. 12a, 38a-39a; see C.A. App. 4522. The bonds were to be issued by the Florida Development Finance Corporation, a Florida state agency, and sold to private investors. *Ibid.* The Florida Development Finance Corporation would loan the proceeds to AAF, which would be responsible for repaying the bonds. See Pet. App. 3a; C.A. App. 338-340, 4543, 4547.

To show that the Florida Project qualifies as a "surface transportation project which receives Federal assistance under title 23" for purposes of 26 U.S.C. 142(m)(1)(A), AAF explained that, since "[t]he planning process for All Aboard Florida started in December 2011 * * * , 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." Pet. App. 58a-59a (citation omitted). AAF submitted documentation showing that, since the Florida Project's inception, the State of Florida—which administers federal funding allocations under 23 U.S.C. 130(a)—had awarded more than $9 million in Title 23 funds for safety improvements to 72 railway-highway crossings throughout the Florida Project's rail corridor. C.A. App. 4496-4510; see Pet. App. 24a. Of that total, approximately $2.2 million was "used to upgrade 39 crossings in Phase II of the [Florida] Project." Pet. App. 24a.

The Secretary approved the allocation of exempt-facility private-activity bonds for the Florida Project. Pet. App. 12a-13a; see C.A. App. 4511-4513, 4517-4519, 4564-4566. In the course of several applications and modifications, AAF ultimately sought, and the Secretary approved, a total of $600 million in bonds for Phase I of the Florida Project and approximately $2.1 billion for Phase II. Pet. App. 12a. All of the bonds that the Secretary authorized have now been issued by the Florida Development Finance Corporation and sold to private investors. See *id.* at 12a-13a.

3. This case concerns a portion ($1.15 billion) of the Phase II allocation approved in December 2017. Pet. App. 3a, 13a. In 2018, petitioners—Indian River County and its Emergency Services District—brought this action against the Secretary, the Department, and several of its components and other officials under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, to challenge that allocation. Pet. App. 3a, 13a. AAF intervened as a defendant. *Id.* at 4a, 13a. As relevant here, petitioners alleged that the Secretary had exceeded her authority under 26 U.S.C. 142(m) by approving the bond allocation for the Florida Project. *Id.* at 13a; see C.A. App. 14-17, 92-103.[*]

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[*] Petitioners also alleged that the Department had violated 26 U.S.C. 147(f)(2)(A)(ii) by authorizing the allocation of bonds without obtaining the approval of all governmental units (including Indian River County itself) having jurisdiction over the Florida Project's area, and that it had violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, by failing to conduct a proper environmental analysis. Pet. App. 13a; see C.A. App. 54-91, 104. Those claims, however, are not at issue in this Court. Pet. 9 n.3. In addition to petitioners, two other entities—a neighboring county and a nonprofit group—were originally plaintiffs, but they subsequently settled their claims and were dismissed. Pet. App. 13a-14a.

The district court granted summary judgment for the federal defendants and AAF. Pet. App. 35a-115a. As relevant here, the court concluded that petitioners' interests "f[e]ll within the zone of interests Congress sought to protect," and they thus could bring suit. *Id.* at 47a. But it rejected their claim on the merits. *Id.* at 52a-62a.

The district court determined "that the Secretary's allocation conformed to the statutory requirements" for qualified highway or surface-freight transfer facilities under Section 142(a)(15) and (m)(1)(A) "and was a reasonable exercise of her discretion." Pet. App. 52a. "Section 142," the court explained, "defines 'qualified highway or surface freight transfer facilities' to include 'any surface transportation project which receives Federal assistance under title 23, United States Code,'" and "[t]he Secretary allocated PAB authority after concluding that the [Florida Project] fell within this definition." *Ibid.* (quoting 26 U.S.C. 142(m)(1)(A)) (brackets omitted). The court rejected petitioners' contention that "'surface transportation project' means only a highway project," a reading that would "preclude[] an allocation to any rail project." *Ibid.* It observed that, "[b]ecause Congress did not specify what 'surface transportation' means, the ordinary meaning of the phrase controls." *Id.* at 53a. The court noted that the ordinary meaning of that phrase—"'the movement of people or goods by road, train, or ship, rather than by plane'"—"plainly includes rail projects." *Ibid.* (citation omitted). And it found that "[d]efining 'surface transportation' to include rail comports with its use elsewhere in federal law" and with the statutory context. *Ibid.*; see *id.* at 53a-58a.

The district court also rejected petitioners' contention that "the [Florida Project] has not 'received Federal assistance under title 23, United States Code,' as required

by § 142(m)(1)(A)." Pet. App. 58a (brackets omitted); see *id.* at 58a-62a. That was so, petitioners asserted, because the Title 23 funding cited in AAF's exempt-facility-bond application that had been awarded since 2011 to improve railroad-highway grade crossings had been disbursed to the Railway, which owns the right of way over which AAF's trains will run, rather than to AAF. *Id.* at 59a. The court rejected that contention as unsupported by the statutory text. *Id.* at 59a-60a. It explained that "§ 142(m)(1)(A) requires that [private-activity bonds] be allocated to a "'*project* which receives Federal assistance under title 23,'" not that "the project *proponent*—here, AAF—receive Title 23 funds." *Id.* at 59a (citation omitted). The court additionally noted that nothing in the statutory text "require[s] the bond-financed project to be the *exclusive* beneficiary of [such] funds." *Ibid.* The court found that "[t]he record here supports the Secretary's conclusion that the [Florida Project] received Title 23 funding," citing the millions of dollars that had been awarded for improving railroad-highway grade crossings after AAF had begun planning the Florida Project. *Id.* at 60a.

4. The court of appeals affirmed. Pet. App. 1a-32a. Like the district court, the court of appeals concluded that petitioners' interests fall within the zone of interests protected by Section 142, *id.* at 17a-23a, but rejected their claim on the merits, *id.* at 23a-28a.

On appeal, petitioners renewed their contention that the Florida Project is ineligible for the allocation of exempt-facility private-activity bonds for qualified highway or surface-freight transfer facilities under 26 U.S.C. 142(a)(15) and (m)(1)(A) on the ground that the Florida Project had not "receive[d] Federal assistance under title 23." Pet. App. 23a (quoting 26 U.S.C. 142(m)(1)(A)).

Petitioners argued that the Title 23 funds cited in AAF's application had been awarded only for railroad-highway crossings (constructed by the Railway), not for the Florida Project in its entirety (being undertaken by AAF). *Id.* at 23a-24a. The court of appeals "f[ou]nd no merit in [that] argument." *Id.* at 24a; see *id.* at 24a-27a.

The court of appeals observed that the Department "has followed a 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. After examining the statutory text and context, the court found "no reason to question [the Department's] position." *Id.* at 26a. The court explained that the statute's text "does not require an *applicant* for [private-activity bonds] 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 (emphases added).

The court of appeals additionally found the Department's interpretation to be "eminently reasonable" in context. Pet. App. 25a. The court noted in particular the Department's explanation in its 2005 letter to the IRS, months after the enactment of the relevant statutory language, that a crabbed reading of "project" limited to individual segments of a broader undertaking would be incompatible with the realities of transportation-facility financing. As the Department had observed in 2005, it is commonplace for projects to include some segments that receive Title 23 funding and others that do not, because state and local governments "typically build some segments of the facility with Title 23 funds and other segments with state or local funds." *Id.* at 26a. The Department had explained that "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.'" *Ibid.* (quoting *id.* at 131a). The court of appeals found that reasoning "persuasive." *Ibid.*

Petitioners urged the court of appeals to reject the Department's interpretation of the statute, asserting that it was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it had been set forth in a letter to another agency, rather than in a more formal document such as a notice-and-comment regulation. Pet. App. 25a. Petitioners contended instead that any deference was governed by *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and that deference under *Skidmore* was unwarranted because (they asserted) the Department's view was unpersuasive. Pet. C.A. Corrected Br. 17. The court explained, however, that it "need not decide whether *Chevron* deference is due." Pet. App. 25a. The court found it "clear" that the Department's reading "easily survives review" without regard to *Chevron* "under *Skidmore*." *Ibid.* The court concluded that the Department's "consistent" and "long-standing" interpretation "is based on persuasive considerations that are consistent with the statute." *Id.* at 25a-26a.

"Applying that interpretation here," the court of appeals upheld the Secretary's "determin[ation] that the [Florida] Project qualified for tax-exempt [private-activity bonds] under 26 U.S.C. 142(m)." Pet. App. 24a. The court explained that "railroad grade crossings are part of a railroad 'project' on any ordinary understanding." *Ibid.* And it found that "the record adequately supports the District Court's conclusion that crossing improvements were made in contemplation of" the Florida Project. *Ibid.* The court of appeals rejected petitioners'

assertion that "the federally funded highway safety improvement projects were not *intended* to benefit the [Florida Project]." *Id.* at 27a. The court noted that the district court had rejected petitioners' contention based on the evidence, and the court of appeals determined that "[t]h[o]se findings and the District Court's conclusion are supported by the record." *Id.* at 28a.

The court of appeals also rejected petitioners' further contention that, "to qualify for [private-activity bonds] under § 142(m)(1)(A), the entire proposed [Florida] Project must be funded by Title 23." Pet. App. 27a. The court found "nothing in the statute to support th[at] interpretation." *Ibid.* It held that the Secretary had acted lawfully in "authoriz[ing] an allocation of [private-activity bonds] to a project" part of which had received Title 23 benefits, in the form of "Title 23-funded improvements to grade crossings throughout the rail line." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 15-25) that the Secretary of Transportation exceeded her authority under 26 U.S.C. 142(m) by allocating exempt-facility private-activity bonds to the Florida Project. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court and does not implicate any lower-court conflict that might warrant this Court's review. Further review is not warranted.

1. The court of appeals correctly determined that the Secretary acted lawfully in allocating exempt-facility bonds to the Florida Project under 26 U.S.C. 142(m).

a. Although interest on private-activity bonds issued by state and local governments ordinarily is not exempt from federal income tax, see 26 U.S.C. 103(b)(1), Congress has specified several categories of "qualified" private-activity bonds that retain their tax-

exempt character, 26 U.S.C. 103(b)(1), 141(e). Among those categories are exempt-facility bonds, which are bonds 95% of the proceeds of which are used to provide certain enumerated types of facilities, such as airports and waste-disposal facilities. 26 U.S.C. 141(e)(1)(A), 142(a). One of those enumerated types is "qualified highway or surface freight transfer facilities." 26 U.S.C. 142(a)(15). Congress limited the aggregate amount of exempt-facility bonds that may be issued for qualified highway or surface-freight transfer facilities to $15 billion. 26 U.S.C. 142(m)(2)(A). And Congress entrusted to the Secretary's discretion the determination of which projects should receive an allocation of such bonds, directing that the Secretary "shall allocate th[at] amount * * * in such manner as the Secretary determines appropriate." 26 U.S.C. 142(m)(2)(C).

The court of appeals correctly determined that the Secretary lawfully approved an allocation of exempt-facility bonds under Section 142(a)(15) and (m) to the Florida Project. Pet. App. 23a-28a. Petitioners have not challenged the Secretary's discretionary determination that, assuming the Florida Project is eligible for such an allocation, a portion of the $15 billion in bonds Congress has approved should be allocated for the Project, or the amounts of bonds the Secretary authorized to be allocated. Instead, petitioners contend that the Florida Project is not eligible for such an allocation at all. See Pet. 15-25. The court of appeals correctly rejected that contention. Pet. App. 23a-28a.

Congress expressly defined the term "qualified highway or surface freight transfer facilities" in 26 U.S.C. 142(a)(15) to include (*inter alia*) "any surface transportation project which receives Federal assistance under title

23, United States Code (as in effect on the date of the enactment of [subsection 142(m)])," 26 U.S.C. 142(m)(1)(A), *i.e.*, as of August 10, 2005, see SAFETEA-LU, 119 Stat. 1978. Section 142(m) does not further define "surface transportation," and as the district court explained, the ordinary meaning of that phrase "plainly includes rail projects" such as the Florida Project, an undertaking to develop a passenger railway through an existing railroad corridor. See Pet. App. 53a (quoting dictionary definition of "surface transport" as referring to "the movement of people or goods by road, train, or ship, rather than by plane"). That understanding of the phrase also "comports with its use elsewhere in federal law." *Ibid.* (collecting statutes).

In addition, as both courts below concluded, the Secretary properly determined that the Florida Project is a "project which receives Federal assistance under title 23." 26 U.S.C. 142(m)(1)(A); see Pet. App. 23a-27a, 58a-62a. Section 142(m) does not define "project," which in ordinary usage means "[a] plan or design" or "[a] planned undertaking." *Webster's New International Dictionary of the English Language* 1978 (2d ed. 1949). Consistent with that ordinary meaning, since the enactment of that language, the Department has construed "project" in Section 142(m) to encompass the entire facility for which an allocation of exempt-facility bonds is sought. Pet. App. 130a-132a; see *id.* at 24a-27a. As the Department has observed, the phrase "surface transportation project" in Section 142(m) defines a type of "facilit[y]" that exempt-facility bonds may be "used to provide." 26 U.S.C. 142(a) and (m)(1)(A); see Pet. App. 130a.

It follows from that text, as the Department has further explained, that exempt-facility bonds under Section 142(m)(1)(A) "must be used on a facility that receives Federal assistance on some component or segment." Pet. App. 130a. If one or more parts of the "surface transportation project"—*i.e.*, the facility for which a bond allocation is sought—"receive[d]" Title 23 assistance, 26 U.S.C. 142(m)(1)(A), then the project itself has necessarily received such assistance. Nothing in the statutory text requires that every single segment of the overall facility receive Title 23 funds.

As the court of appeals and the Department each determined, that straightforward reading of the language also best accords with the statutory context and history. Pet. App. 25a-26a, 130a-132a. "States and other recipients commonly fund portions of the facility or activities associated with the construction of the facility * * * , with Federal assistance under title 23, subjecting those activities to whatever Federal requirements attach to such funds." *Id.* at 130a. Other portions of a facility that do not themselves receive Title 23 assistance, in contrast, "would not be subject to Federal requirements that apply on a contract specific basis, such as Federal competition requirements" and others. *Ibid.* Nothing in the text of the 2005 amendments that enacted Section 142(m) reflects an intent to alter that settled approach. And as the Department observed, the legislative history confirms that Congress had no such intention. See *id.* at 131a. Construing "project" in accordance with ordinary usage to refer to the entire facility comports with that commonplace practice. The Secretary may allocate bonds to provide tax-exempt financing for a facility if some portion of the facility receives Title 23 assistance, even if other portions do not.

In contrast, construing "project" to refer only to an individual segment of a larger facility—and thus reading Section 142(m) to permit exempt-facility bonds only for specific segments that themselves receive Title 23 funds—would upend that settled understanding. Pet. App. 131a. As the Department observed, and the court of appeals agreed, it would "distort the longstanding way in which facilities are actually funded." *Id.* at 26a (quoting *id.* at 131a). And it would "artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities." *Ibid.* (quoting *id.* at 131a). That illogical reading of the statutory language would give state and local governments a powerful incentive to "'sprinkle' title 23 funds to every separate" component of "an entire facility," ensuring eligibility for exempt-facility bonds at the cost of extending "a whole array of Federal requirements * * * in ways that are wholly inconsistent with the way in which the construction activities are generally administered." *Id.* at 131a.

Finally, as both courts below also concluded, the Secretary properly determined that the Florida Project has received Title 23 assistance because certain components of the facility have received millions of dollars in Title 23 funds. Pet. App. 24a, 27a-28a, 58a-62a. Since AAF first announced its plans to develop the Florida Project in 2011, more than $9 million in Title 23 funds have been awarded for railroad grade crossings throughout the entire corridor, including approximately $2.2 million for areas within Phase II of the Florida Project, which is at issue here. *Id.* at 24a. As the court of appeals explained, "railroad grade crossings are part of a railroad 'project' on any ordinary understanding." *Ibid.* And based on the factual record developed in this case, both courts

below found that those "improvements were made in contemplation of the [Florida Project]." *Ibid.*; see *id.* at 27a-28a, 58a-62a. The court of appeals thus properly determined that, because a "constituent portion" of the Florida Project received Title 23 funds, *id.* at 24a, the Florida Project is eligible for exempt-facility bonds under Section 142(m).

b. Petitioners' contrary arguments lack merit. They contend (Pet. 17) that the Florida Project did not "receive[] Federal assistance under title 23," 26 U.S.C. 142(m)(1)(A), because the millions of dollars of Title 23 funds that were used for railroad grade crossings were directed to and used by AAF's then corporate affiliate (and still contractual affiliate), the Railway, not by AAF itself. The court of appeals correctly rejected that argument as unsupported by the statutory text. Pet. App. 26a-27a. As the court explained, "the statute does not require an applicant for [exempt-facility private-activity bonds] to be the direct recipient of Federal assistance under Title 23; rather, the 'project' at issue must receive assistance under Title 23." *Ibid.* So long as a component of the project was paid for with Title 23 funds, whether they were channeled to AAF or its affiliate is irrelevant.

Petitioners' contrary position rests on a mistakenly narrow reading of the term "project" in Section 142(m) as encompassing only a specific segment of a larger undertaking. They identify (Pet. 17) the dozens of railroad grade crossings made to improve the corridor as the "only * * * projects that received Title 23 funds." As explained above, however, the court of appeals correctly rejected that reading of "project," which has no foundation in Section 142(m)'s text or ordinary usage, is fundamentally incompatible with the statutory context, and

would produce needlessly disruptive practical consequences. See pp. 16-18, *supra*.

Petitioners' additional arguments (Pet. 17-21) rest on the same central misunderstanding of the statute. They assert that the Florida Project did not "'receive[]' Title 23 funding" but merely "'benefit[ted]'" from Title 23 funds directed to other undertakings, namely, the railroad grade crossings. Pet. 18 (citation omitted). But those "crossings are part of a railroad 'project' on any ordinary understanding," Pet. App. 24a—here, part of the Florida Project, the facility that the exempt-facility bonds the Secretary allocated will be "used to provide," 26 U.S.C. 142(a). Because part of the Florida Project received Title 23 assistance, the Florida Project necessarily did so. Petitioners' repeated contention that the court of appeals improperly equated "receiv[ing]" Title 23 funds with "benefit[ting] from" such funds fails for the same reason. Pet. 18 (citation omitted); see, *e.g.*, Pet. 2-3, 13, 16, 18-19. In context, the court's statements that the Florida Project "benefit[ted]" from Title 23 assistance (Pet. App. 24a, 26a-27a) are best understood as shorthand for its conclusion that the Florida Project received Title 23 assistance because one of its component parts had received such assistance. See *id.* at 24a, 26a (finding "persuasive" the Department's "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").

Similarly, petitioners assert (Pet. 17) that the Florida Project "w[as] not even *eligible* to receive Federal assistance under Title 23." As petitioners observe (*ibid.*), for purposes of Title 23 generally, "[t]he term 'project'" is defined to "mean[] any undertaking eligible for assistance under this title." 23 U.S.C. 101(a)(19); see

Pet. 17 (quoting 23 U.S.C. 101(a)(21) (2006)). And they note (Pet. 17) that Title 23 elsewhere specifies the undertakings eligible for Title 23 assistance, which they assert (*ibid.*) do not include developing railroads. Other provisions of Title 23, however, show that the Florida Project *is* eligible for certain forms of Title 23 funding. The Transportation Infrastructure Finance and Innovation Act of 1998, 23 U.S.C. 601-609, provides federal assistance for certain "projects," and for purposes of that portion of Title 23, "project" is defined to include a "project for intercity passenger bus or rail facilities and vehicles." 23 U.S.C. 601(a)(12)(C). In any event, whether the entire Florida Project as a whole is eligible for Title 23 assistance is beside the point. Petitioners do not dispute that the railroad grade crossings were eligible for and in fact received Title 23 assistance. See Pet. 17-18. They simply disagree with the Department's and the court of appeals' determinations that those crossings are part of the Florida Project.

Moreover, to the extent petitioners suggest (Pet. 17, 19) that the definition of "project" in 23 U.S.C. 101(a) should also govern Section 142(m), that suggestion lacks merit. The definitions set forth in Section 101(a) apply by their terms only to Title 23. 23 U.S.C. 101(a) (that and other listed "definitions apply" "*[i]n this title*" (emphasis added)). Nothing in Section 142(m) incorporates those Title 23 definitions. And as the Department explained when Section 142(m) was first enacted, "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. "The FHWA uses the word 'project' in many different contexts, some quite narrow and others much more expansive in meaning," and the particular context

of Section 142(m) indicates that "Congress had a broader concept in mind." *Ibid.* In addition, Section 142 itself uses the term "project" in other, different contexts that clearly do not incorporate Title 23's definition. See 26 U.S.C. 142(d)(1) (defining "'qualified residential rental projects'" as "any project for residential rental property" that meets various requirements); 26 U.S.C. 142(*l*)(1) (defining "'qualified green building and sustainable design projects'" to include "any project" so designated by the Secretary of the Treasury and the Administrator of the Environmental Protection Agency that meets various requirements). No sound basis exists to extend Title 23's specialized definition of "project" only to one subsection of Section 142 and not others.

Petitioners also argued in the court of appeals that "it is not enough that the [Florida Project] received some assistance under Title 23" and that, for the Florida Project to qualify for any exempt-facility bonds, "the entire proposed Project must be funded by Title 23." Pet. App. 27a. To the extent petitioners still press that argument, see, *e.g.*, Pet. 17, 19, 21, the court of appeals correctly rejected it. As the court explained, "there is nothing in the statute to support th[at] interpretation." Pet. App. 27a. Section 142(m) does not state that every aspect of a project—here, the Florida Project as a whole—must receive Title 23 funding for the project to be eligible for exempt-facility bonds. It states simply that the project must "receive" Title 23 assistance, which occurs when a constituent part of it receives such assistance.

Nor does Section 142(m)(1)(A)'s text require that Title 23 assistance constitute any specified minimum percentage of the project's overall cost. Cf. Pet. 20-21 (comparing amount of Title 23 assistance for railroad

grade crossings to value of bonds approved for Florida Project). Had Congress intended the definition of "qualified highway or surface freight transfer facilities" to encompass only those projects that receive a certain minimum proportion of their funding from Title 23, it easily could have done so. Notably, Section 142 does impose a percentage-based limitation on how bond proceeds are spent, by requiring that at least 95% of the net proceeds of an exempt-facility bond issue must be "used to provide" one of the enumerated types of facilities, 26 U.S.C. 142(a)—a requirement Congress reiterated for Section 142(m) specifically when it enacted that provision, see 26 U.S.C. 142(m)(3). But it does not set a minimum or maximum percentage of a project's cost that a bond issue's net proceeds—as opposed to Title 23 assistance or other sources—may or must cover.

c. Petitioners contend (Pet. 21, 25) that the court of appeals nevertheless erred by according "uncritical deference" to the Department's statutory interpretation and "abdicated [its] duty to say what the law is." See Pet. 18-25. Petitioners assert that the court misapplied this Court's precedent, including *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), by sustaining the Department's interpretation purportedly without first "construe[ing the] statutory text" or applying "traditional 'devices of judicial construction'" to ascertain the statute's meaning. Pet. 21 (citation omitted). That contention lacks merit.

The court of appeals considered the statutory text and context and found the Department's interpretation persuasive. Pet. App. 24a-27a. As the court explained, it agreed with the Department's statutory interpretation because it found that reading to be "based on persuasive considerations that are consistent with the stat-

ute." *Id.* at 26a. Petitioners challenged the Department's position that Section 142(m)(1)(A) includes a project that receives Title 23 assistance "in whole or in part," but the court found "no merit" in that challenge. *Ibid.* The court "ha[d] no reason to question [the Department's] position because the statute does not require an applicant for [exempt-facility private-activity bonds] 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. The court thus declined to impose a limitation petitioners proposed because it was not grounded in the statutory text. Similarly, the court rejected petitioners' contention that "the entire proposed Project must be funded by Title 23" to be eligible for exempt-facility bonds under Section 142(m) because it found "nothing in the statute to support th[at] interpretation." *Id.* at 27a. The court also found "persuasive" the Department's explanation that the context, including the real-world operation of transportation-facility financing, better accorded with the Department's reading of the statute. *Id.* at 26a.

The court of appeals discussed the issue of what degree of deference if any to accord to the Department's position in response to petitioners' contention that deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was unwarranted. Pet. App. 25a. Petitioners had argued that *Chevron* deference should not apply because the Department's interpretation had been set forth in a letter to the IRS rather than in a more formal document such as a regulation. *Ibid.*; see Pet. C.A. Corrected Br. 17-19. Petitioners argued that any deference to the Department's position was governed by *Skidmore*, stating that "a statutory interpretation set forth in such an informal

document does not warrant deference under *Chevron* * * * , and at most is entitled to respect only to the extent it has the 'power to persuade.'" Pet. C.A. Corrected Br. 17 (quoting *Skidmore*, 323 U.S. at 140). Petitioners contended that the Department's interpretation set forth in its 2005 letter "lacks the power to persuade" and on that basis did not merit deference. *Ibid.*

The court of appeals, however, found it unnecessary to resolve the question of which deference rubric—*Chevron* or *Skidmore*—should apply in this case. Pet. App. 25a. As it explained, the court "need not decide whether *Chevron* deference is due because it is clear on the record before [the court] that [the Department's] position easily survives review under *Skidmore*." *Ibid.* The court then summarized the principles this Court has articulated addressing *Skidmore* deference, explaining 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*," *ibid.* (citing *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399-402 (2008)), "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," *ibid.* (citing *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001)). The court of appeals then determined that the Department's interpretation was "consistent," "long standing," "eminently reasonable," and "persuasive." *Id.* at 25a-26a. And the court rejected each argument petitioners advanced to challenge that interpretation, finding that they had "no merit." *Id.* at 24a, 26a; see *id.* at 27a.

Petitioners' assertion (Pet. 21) that the court of appeals erred by "resorting to deference" under *Skidmore*

is thus unfounded. Petitioners themselves identified *Skidmore* (as opposed to *Chevron*) as the appropriate framework. The court of appeals reserved judgment on that question and assumed, as petitioners advocated, that *Skidmore* should apply and decided the appeal on that basis. The court simply disagreed with petitioners' further argument that the Department's reading should be rejected under *Skidmore*, finding that the agency's position is persuasive and therefore should be upheld. Pet. App. 25a-27a. The court did not resolve any broader questions about the scope of or prerequisites for *Skidmore* deference. The court merely applied that framework and upheld the Department's position.

Petitioners' more specific criticisms of the court of appeals' analysis lack merit. Their contention (*e.g.*, Pet. 21-22) that the court never considered the statutory text or its consistency with the Department's position is incorrect. The court began its discussion by quoting the relevant text. Pet. App. 24a. The court then found "eminently reasonable" the Department's interpretation of the statutory term "'project'" to include the entire facility, not particular constituent parts, *id.* at 25a-26a, and that "railroad grade crossings are part of a railroad 'project' on any ordinary understanding" of that term, *id.* at 24a. The court thus found "persuasive" the Department's interpretation of the text. *Id.* at 26a. And the court rejected petitioners' counterarguments because, in contrast, they had no footing in the statutory text. *Id.* at 26a-27a; see pp. 13-14, 19-22, *supra*.

Petitioners' suggestion (Pet. 21) that the court of appeals erred by considering and ultimately upholding the agency's view without first expressly "find[ing] [the statute] ambiguous" is also unfounded. So long as a court determines that the statute does not foreclose an agency's

interpretation, a court can grant *Chevron* deference to an agency interpretation without determining whether the statute clearly supports the interpretation or whether instead the statute is ambiguous and has been persuasively interpreted by the agency. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) (rejecting argument that courts always must conduct the "supposedly prior inquiry of 'whether Congress has directly spoken to the precise question at issue'" before determining whether the agency's position is "reasonable" and entitled to deference, and explaining that "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable" (citation omitted)). Petitioners identify no reason why such a finding is more necessary in the context of *Skidmore*, where (as petitioners underscore) courts apply traditional tools of interpretation—examining the statutory text and evaluating the validity of the agency's reasoning—to ascertain whether the agency's interpretation is "persuasive" and warrants deference. Pet. 22 (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006)). And here, in undertaking that analysis, the court of appeals concluded that petitioner's position had no grounding in the statutory text. The court thus clearly found that the text did not unambiguously support petitioner's interpretation.

In any event, the putative errors that petitioners assert in the court of appeals' application of *Skidmore* in this case do not warrant this Court's review. Although the court of appeals—in accepting petitioners' invitation to apply *Skidmore*—used the language of "deference," Pet. App. 26a, that label did not affect the outcome. The court stated that deference was "due" *because* the court found the Department's reading "persuasive and consistent with the statute." *Ibid.* It is thus

unclear whether the court relied on a meaningful form of deference at all. At a minimum, the court's opinion makes clear that it would have reached the same result regardless, because it was persuaded by the reasoning of the agency's interpretation—which the agency presented as a party to the appeal. "[T]his Court reviews judgments, not opinions." *Chevron*, 467 U.S. at 842. Petitioners' critiques of the court's reasoning do not warrant further review.

2. Petitioners do not assert that the court of appeals' interpretation of Section 142(m)(1)(A) as it applies here conflicts with any other decision construing or applying that provision. The government is not aware of any other appellate decision construing Section 142(m)—or, apart from suits brought challenging the Florida Project, a decision from any federal court interpreting the provision. Future litigation over the provision is unlikely, moreover, as nearly all of the $15 billion in Section 142(m) exempt-facility bonds that Congress has authorized have already been issued or allocated. See p. 4, *supra*.

Petitioners assert instead (Pet. 25-30) that review is warranted to resolve asserted inconsistency among the courts of appeals, and even among this Court's own decisions, regarding the proper application of the *Skidmore* framework. Any variation in the language of this Court's or other courts of appeals' opinions describing or applying *Skidmore* would not warrant review in this case, however, because it does not implicate the proper scope or limits of *Skidmore* deference. The court of appeals turned to the *Skidmore* framework at petitioners' urging. In applying that framework, the court did not articulate any novel or controversial understanding of *Skidmore*; its

familiar statement of the doctrine closely resembles petitioners' own description. Compare Pet. App. 25a-26a (deference appropriate because agency's position is "reasonable and consistent with the statutory framework," "persuasive," and has been "consistent[ly]" maintained and "binding on agency staff for a number of years") with, *e.g.*, Pet. 3 ("*Skidmore* instructs courts to give 'respect' to an agency position if the statute is ambiguous and the agency's position is well-founded, consistent, and persuasive" (citation omitted)). The court's invocation of *Skidmore* also had no effect on the outcome because, having found the agency's arguments "persuasive" and petitioners' arguments to lack merit, Pet. App. 26a, the court would have reached the same result irrespective of judicial deference.

Even if the court of appeals' opinion left any uncertainty on that score, this case would be an unsuitable vehicle to address any questions concerning *Skidmore* because that court's interpretation of the statute is correct. Respondents would be entitled to seek, and the Court could grant, affirmance of the judgment below on that basis. See, *e.g.*, *Dahda* v. *United States*, 138 S. Ct. 1491, 1498 (2018) (affirming on alternative ground). In that event, the Court would have no occasion to reach and resolve any issues regarding *Skidmore*, which would have no bearing on the disposition of the case.

3. This case is an unsuitable vehicle for resolving either the underlying question concerning Section 142(m) or broader issues of judicial deference for the additional reason that the decision below may be affirmed on another alternative ground: that the interests petitioners seek to advocate are not "within the zone of interests to be protected by" the statute. *Air Courier Conference of*

Am. v. *American Postal Workers Union*, 498 U.S. 517, 524 (1991).

"[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citation and internal quotation marks omitted). Although that requirement is "not 'especially demanding,'" *id.* at 130 (citation omitted), it forecloses suit "when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 225 (2012) (citation omitted). For example, "[t]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings," but such a provision would "obviously [be] enacted to protect the interests of the parties to the proceedings and not those of the reporters," and so that "company would not be 'adversely affected within the meaning' of the statute." *Air Courier Conference*, 498 U.S. at 524 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).

As the government explained below, petitioners—two local-government entities—are not plausibly within the zone of interests protected by Section 142(m). Gov't C.A. Br. 15-21. That provision provides a tax exemption to certain private-activity bonds issued by a state or local government to help finance certain transportation projects. And the particular requirements that petitioners seek to enforce limit that exemption to projects

that have received federal assistance under Title 23. That provision bears no evident connection to the purported interests that petitioners brought this suit to vindicate involving asserted public-safety and environmental concerns. See *id.* at 15-16. No sound basis exists to conclude that Congress in enacting Section 142(m) intended that one state or local-government entity may bring suit to enforce prerequisites to the federal-tax-exempt status of interest earned by an investor in a bond issued by another, different state or local-government entity.

The courts below held that petitioners nevertheless may bring suit because their interests fall within a separate provision of Title 26 that governs qualified bonds, 26 U.S.C. 147(f). That provision requires the approval of (*inter alia*) governmental units having jurisdiction over the area in which a facility funded by a private-activity bond is located. 26 U.S.C. 147(f)(2)(A)(ii). But "if more than 1 governmental unit within a State has jurisdiction over the entire area within such State in which such facility is located, only 1 such unit need approve such issue." *Ibid.* Petitioners separately asserted a claim in this case alleging a violation of Section 147(f)(2)(A)(ii). Pet. App. 13a, 62a. The district court rejected that claim on its merits, determining that approval by the State government satisfied that provision, see *id.* at 66a-74a, and petitioners did not appeal that ruling, *id.* at 15a; see also Pet. 9 n.3. In any event, whatever local-government interests that Section 147(f) protects are inapposite to Section 142(m).

Although the lower courts held that petitioners may bring suit to assert a violation of Section 142(m), respondents may defend the judgment below affirming summary judgment against petitioners' claims on the ground that petitioners' asserted injuries are not within the zone of interests protected by the statute on which their claim rests.

That additional alternative basis for affirmance provides a further reason why this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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