No. 19-1304

IN THE
Supreme Court of the United States

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

v.

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

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

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Respondents do not—and cannot—defend the court of appeals' central holding that "DOT has reasonably interpreted" the phrase a "'project *which receives* Federal assistance under title 23'" to encompass projects that merely "*benefit[] from* assistance" provided to others.

Pet. App. 26a (emphasis added). The court's decision upholding a $1.15 billion bond allocation to a passenger-rail facility that never received—and is not eligible to receive—Title 23 assistance rests on deference to an agency construction respondents no longer defend.

Respondents offer alternative rationales for the bond allocation. But those rationalizations lack merit and cannot excuse the court of appeals' failure to undertake the required statutory analysis regardless. Nor can they erase the need for review. As this case illustrates, courts often fail to undertake a meaningful statutory analysis before deferring to informal agency views. Review is warranted to establish and enforce limits on *Skidmore* deference.

I. The Court Of Appeals Deferred To An Informal Agency Construction That Contradicts The Statute's Plain Meaning

A. The court of appeals' atextual construction of the statute is indefensible. Under §142(m), tax-exempt bonds must be used "to provide" a "surface transportation project which receives Federal assistance under title 23." 26 U.S.C. §142(a), (m)(1)(A). As the County explained (at 16-21), that requires the project to have actually received federal dollars under Title 23. It is not enough for a project to derive benefits from dollars spent on something else. The court of appeals, however, upheld the issuance of tax-exempt bonds to finance a passenger rail line that did not receive—and is not eligible to receive—Title 23 dollars. It deferred to DOT's atextual view that "a project which—in whole or part—*benefits from* assistance under Title 23" can be said to "'receive[] Federal assistance.'" Pet. App. 26a (emphasis added).

1. Respondents abandon any defense of the court's holding, and DOT's view, that "receives" in §142(m)

means "benefits from." Respondents instead obfuscate. The court's statement that "receives" means "benefits from," respondents claim, is "shorthand" for the idea that "the Florida Project received Title 23 assistance because one of its component parts had received such assistance." Gov't Br. in Opp. 20; see AAF Br. in Opp. 28. But the court could not have been clearer: It understood "'receives' * * * to mean * * * benefits from." Pet. App. 26a.

That understanding, moreover, reflects the construction DOT pressed below. Respondents repeatedly defended DOT's bond allocation to AAF's rail line on the ground that "receives" means "benefits from": "To *benefit* is to *receive assistance*," they argued, "and vice versa." Gov't C.A. Br. 23-24; see AAF C.A. Br. 17, 27 ("statutory requirements are satisfied if the project for which funding is sought *has benefited or will benefit* from * * * Title 23 funds") (emphasis added)). As the district court observed, the "Department * * * interpret[s] the statute to allow for PAB allocation[s] to projects based on direct benefits from Title 23 spending." Pet. App. 59a. DOT even touted that it had allocated billions in tax-exempt bonds to other facilities based on benefits derived from Title 23 spending on "nearby" or "adjacent" projects. Pet. 20; see Pet. App. 135a-136a; D. Ct. Dkt. 32-1 at 23-25 & n.10. Respondents do not deny that other allocations were based on DOT's view that "receives" means "benefits from."[1] Respondents' effort to distance themselves from that construction underscores how far it—and the decision below—departs from the statute.

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[1] While AAF quibbles (at 32 n.5) over DOT's rationale for one allocation, it cannot dispute that DOT allocated bonds to some facilities (*e.g.*, the Illinois logistics park) based on perceived benefits, Pet. 20. The facts of this case are not "unique." AAF Br. in Opp. 32 n.5.

2. Respondents' (counterfactual) suggestion that AAF's rail line actually "received Title 23 assistance because certain components of the facility * * * received" assistance is irrelevant and misleading. Gov't Br. in Opp. 18; see *id.* at 16-17, 20-21; AAF Br. in Opp. 28-29. It is irrelevant because the court below invoked *Skidmore* to uphold DOT's view that to "receive" means to "benefit from." It is wrong because, under § 142(m), bonds must be used "to provide" the "surface transportation project which receives Federal assistance." 26 U.S.C. § 142(a), (m)(1)(A). The bonds issued for AAF's rail line were not sought "to provide" the undertakings that received Title 23 assistance—highway-railway crossings. See Pet. 7-8, 17-18. To the contrary, AAF obtained bonds "for Phase II" of its rail line, C.A. App. 4564, based on benefits from funds already "invested in the * * * corridor," *id.* at 4536.

While respondents claim that the crossing upgrades are "part of a railroad 'project,'" Gov't Br. in Opp. 18; AAF Br. in Opp. 29, the bonds were not used "to provide" those upgrades. Nor did DOT's approval letter find those previously completed upgrades were part of the yet-to-be-commenced Phase II. See C.A. App. 4564. It would require an impermissible leap to assume that they were. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). That is why respondents defended the bond allocation below on the ground that "the Project received a direct benefit" from "upgrade[d] crossings," D. Ct. Dkt. 32-1 at 24; see p. 3, *supra*, not that Phase II itself "received" Title 23 funding. Whether § 142(m) requires a "minimum percentage" of bonds to be used on any portion of a qualified facility is thus irrelevant. Gov't Br. in Opp. 22-23. The bonds here were not sought "to provide" the crossings upgraded with Title 23 funds.

Attempting to label AAF's new passenger rail line a "project" that "receive[d]" assistance "under Title 23" erases careful statutory distinctions. As the County explained (at 18-20), §142(m) contemplates that the "project" must be eligible for federal dollars "under title 23." See 23 U.S.C. §101(a) (2006). AAF's rail line is not. It was allocated bonds based on benefits from federal dollars spent under 23 U.S.C. §130 (2006), which authorizes upgrades to "railway-highway crossings." It did not receive Title 23 dollars under provisions addressing "intercity * * * rail facilities." 23 U.S.C. §§601(a)(8)(C), 602 (2006). Nor did it separately qualify for bonds as a high-speed rail facility. See 26 U.S.C. §142(a)(11). Congress understood "project" in §142(m) to cover only undertakings authorized to receive funds "under Title 23"; respondents seek to add undertakings that are not.

Respondents argue that the term "project" in §142(m) is broad enough to allow DOT to allocate bonds even to facilities ineligible to receive Title 23 funds. Gov't Br in Opp. 21; AAF Br. in Opp. 21-22. But §142(m) is clear, and courts must respect statutory text and context alike. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The government disputes that facilities financed through §142(m) must be eligible for Title 23 funds because "the term 'project'" bears different meanings in "different contexts." Gov't Br. in Opp. 21-22. But that at most shows that "project" is a general term that "'must draw its meaning from its context.'" *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010). Within §142(m), "project" refers to facilities eligible for Title 23 assis-

tance. Congress required projects to receive assistance "under title 23." Pet. 19. AAF's line never did.[2]

It is thus irrelevant whether § 142(m) requires a particular "applicant" to have "receive[d]" the Title 23 dollars spent on a project. Gov't Br. in Opp. 19; see AAF Br. in Opp. 31-32. Nothing about the County's challenge hinges on who obtained the Title 23 funds used to upgrade railway-highway crossings. See Pet. 23-24. Rather, the critical fact is that DOT allocated bonds to a project that did not receive—and was not eligible to receive—federal assistance under Title 23. The court of appeals deferred to an informal DOT construction that rewrites the statute.

B. In deferring to that impermissible construction, the court of appeals did not even analyze the applicable statute. Respondents recite language from the decision below declaring DOT's view of § 142(m) to be "persuasive" and "consistent with the statutory framework." Gov't Br. in Opp. 23-24; AAF Br. in Opp. 18-22. But it is the courts' duty to say what the law is; *Skidmore* does not mean they can discharge that duty merely by quoting statutory language and declaring, without any independent analysis, that an agency's position is "persuasive" or "consistent with the statutory framework." *Skidmore* requires (or should require) courts to exercise their independent judgment about the best reading of a statute. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2427, 2447 (2019) (Gorsuch, J., concurring). Deference is appropriate "only

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[2] While the government asserts that AAF's entire rail line is eligible for funding under provisions of Title 23 that DOT did not invoke below, compare Gov't Br. in Opp. 21, with Pet. App. 24a, DOT's decision "cannot be sustained" under the government's newly minted rationale, *Chenery*, 318 U.S. at 95.

when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004).

Respondents' oppositions highlight the court of appeals' failure to employ those devices here. Unable to defend the court's conflation of the statutory term "receives" with "benefits from," respondents attempt to rewrite the decision below. But respondents cannot locate meaningful analysis of their alternative rationales in the decision. While respondents point to passages reciting the Kussy letter or making conclusory assertions, see, *e.g.*, Gov't Br. in Opp. 23-24 (citing Pet. App. 26a-27a), the decision itself undertakes no independent analysis of what terms like "project" mean or the statutory design. The problem is not that the court "fail[ed] to use the magic word 'ambiguous'" before deferring to DOT. AAF Br. in Opp. 20; see Gov't Br. in Opp. 27. The problem is that the court did not analyze the statute—its "language," "structure," and "design," *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 352-353 (2013)—in any meaningful way before deferring to DOT's countertextual view. The court abdicated the judicial role.

The government (at 25-26) tries to lay fault on the County for that error. But the County always maintained that the statute's plain language precluded *any* deference. See County C.A. Br. 12-23; C.A. Reply 6-14. It merely argued that DOT's informal construction could "at most" receive *Skidmore* (as opposed to *Chevron*) deference. County C.A. Br. 17. The court's failure to give effect to the statutory text is error under any standard.

II. The Decision Below Illustrates The Continuing Disarray Over *Skidmore*

The uncritical deference exhibited by the decision below exemplifies the widespread disarray over *Skidmore*. For that reason, too, review is warranted.

A. This Court's own decisions provide mixed guidance. Some suggest courts should search for the best reading of a statute, exhausting all traditional tools of construction, before considering an agency's views; others, such as *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 402 (2008), are quicker to defer to informal agency constructions that appear superficially reasonable. Pet. 25-28. The government does not deny there is conflict over *Skidmore*'s proper application.

AAF disagrees (at 24) that decisions like *Holowecki* can be read to permit a loose form of *Skidmore* deference, urging it "gave a full nod to the [statutory] text." But a decision does not have to "declare text irrelevant" (*ibid.*) to provide a gloss on *Skidmore* that excuses use of all the traditional tools of textual interpretation. In *Holowecki*, for example, the Court did not examine the ordinary meaning of the statutory term. See Pet. 26. Rather, it deferred to an agency view upon pronouncing it a "reasonable alternative that is consistent with the statutory framework." 552 U.S. at 402. As that decision illustrates, merely giving a "nod" to the text is different from exhausting the traditional tools of interpretation to determine the text's *best meaning*.

Citing a decision on *Chevron* deference, respondents suggest it is irrelevant whether a court finds a statute ambiguous before applying *Skidmore*. Gov't Br. in Opp. 26; AAF Br. in Opp. 20, 24. But that elides a fundamental difference between the doctrines. Under *Chevron*, a court must adopt any "permissible" agency construction

of the statute, even if it "differs" from the "best statutory interpretation," *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980, 986 (2005). Under *Skidmore*, by contrast, it remains the court's job to find the best reading of the statute—or at least it should be. See *Kisor*, 139 S. Ct. at 2427, 2447 (Gorsuch, J., concurring). An agency's views should be considered for their persuasive value "only when" statutory text "yield[s] no clear sense of congressional intent." *Gen. Dynamics*, 540 U.S. at 600.

B. AAF insists that lower courts do not disagree about what *Skidmore* entails because none actually state that agency views can "override a 'statute's unambiguous meaning.'" AAF Br. in Opp. 25. But the fact that courts do not make such statements does not preclude them from using deference doctrines to depart from clear statutory commands—as this case illustrates. The mere fact that the decision below began by "quoting the relevant [statutory] language" (AAF Br. in Opp. 17, 21) does not mean that the court employed all traditional tools of interpretation before deferring. Respondents cannot point to where the court actually undertook independent statutory analysis in its opinion.

Nor is the decision below alone in reading *Skidmore* to permit deference to agency constructions that fall far short of the most plausible statutory understanding—or even contradict statutory text. See Pet. 28-30. AAF declares (at 26 & n.4) that none of the cases cited in the petition deferred to an agency reading that "contradicted the plain text of the statute." That cannot save AAF here, even if it were true (which it is not). For none of the cited decisions employed all the traditional tools of statutory construction before deferring to informal agency views. In *Estrada-Rodriguez* v. *Lynch*, 825 F.3d 397

(8th Cir. 2016), for example, the *only* authorities the court cited in construing the relevant statutory term were prior agency decisions. See *id.* at 404-405. It did not discuss the term's ordinary meaning or the statute's structure. In *Ammex, Inc.* v. *United States*, 367 F.3d 530 (6th Cir. 2004), the court assumed the agency's views were "obviously" entitled to "deference," and faulted the challenger for failing to "identify an[] infirmity" with them. *Id.* at 535. That is the opposite of a court seeking to "'decide for [itself] the best reading'" of a statute. *Miller* v. *Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012).[3]

III. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE IMPORTANT *SKIDMORE* ISSUE PRESENTED

The court of appeals' clear departure from the statutory text under the flag of *Skidmore* renders this case an excellent vehicle for resolving the doctrinal disarray. The government offers no reason for believing that the court of appeals would have reached the "same result" absent deference. Gov't Br. in Opp. 28. Respondents' abandonment of DOT's view that a project "receives" Title 23 funding if it merely "benefits from" that funding demonstrates the court would not. See pp. 1-3, *supra*. Regardless, respondents' (erroneous) assertion that there is a potential alternative ground for the same result does not preclude review of an issue actually pressed and

[3] AAF invokes an article acknowledging that courts purport to adhere to "'unambiguous'" statutes, AAF Br. in Opp. 24, but the article further observes that courts disagree whether they must exercise "'independent judgment'" to determine a statute's meaning and "'lack a coherent conception'" of *Skidmore*, Pet. 29 n.8 (quoting article). Likewise, the fact that agencies prevail less under *Skidmore* than *Chevron* shows only that not all courts treat the doctrines as equivalent. It does not disprove the palpable confusion.

passed upon below. See, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012). Nor does it prevent this Court from providing much-needed direction about *Skidmore*. Cf. *Kisor*, 139 S. Ct. at 2423-2424. The importance of this particular case is not "exaggerate[d]." AAF Br. in Opp. 32. It concerns one of the most important issues before the federal courts—when judicial deference to informal agency interpretations of statutes is appropriate. Any debate over the precise impact of § 142(m) cannot detract from the importance of ensuring lower courts properly discharge their responsibility of saying what the law is.

The government's twice-rejected zone-of-interest argument (at 29-30) fares no better. Both the district court and the court of appeals rejected the argument—and for good reason. See Pet. App. 17a-23a, 47a-52a. The zone-of-interest test is not "especially demanding," *Clarke* v. *Secs. Industry Ass'n*, 479 U.S. 388, 399 (1987), merely requiring a party to assert an interest "arguably * * * protected or regulated by the statute," *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). A plaintiff cannot bring suit "only when [its] '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).

The County—"a local government entity whose citizens will be directly affected by the AAF Project," Pet. App. 22a—easily satisfies that permissive standard here. As the courts below explained, Congress arguably contemplated a role for local government input in § 142(m) bond allocations. Pet. App. 23a, 52a. That provision has an "integral relationship" to 26 U.S.C. § 147(f), which requires public approval of bond issues by the relevant gov-

ernmental unit. Pet. App. 19a-20a, 22a. Although the courts rejected a separate procedural challenge brought under § 147(f), Gov't Br. in Opp. 31, that section shows that Congress expected "State and local governments" to have interests relevant to bond allocations made under § 142(m), Pet. App. 52a. The court of appeals also held that the County had standing for another, independent reason. *Id.* at 20a. "[T]here is no dispute," the court observed, the County's "environmental and safety concerns are matters of the sort that DOT surely will have 'in mind'" in allocating bonds. *Ibid.* The same is true of the County's concerns over a project's authorization.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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