No. 16-739

In The Supreme Court of the United States

SCENIC AMERICA, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; FEDERAL HIGHWAY ADMINISTRATION; GREGORY G. NADEAU, in his official capacity as Acting Administrator of the Federal Highway Administration; and, OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.,

Respondents.

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

REPLY BRIEF

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INTRODUCTION

This case presents an ideal opportunity for the Court to address the proper degree of judicial deference, if any, owed to a federal agency's interpretation of contract terms, a point on which the circuits are in conflict.

The Court of Appeals determined that treatment under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) was owed to the Federal Highway Administration's (FHWA) interpretation of terms of agreements between the FHWA and the States (FSAs), evidenced in the FHWA's guidance memorandum issued in 2007 (2007 Guidance). The decision conflicts with the Court's precedent limiting the applicability of *Chevron* treatment and implicates recent criticism of the doctrine of judicial deference expressed by members of the Court.

ARGUMENT

I. THE *CHEVRON* ISSUE WAS RAISED AND REACHED BELOW.

Respondents inaccurately argue that the *Chevron* issue Scenic America raises – namely, the degree of deference, if any, owed to the FHWA's interpretation of the prohibition against "flashing," "intermittent" and "moving" lights in the FSAs, evidenced by the 2007 Guidance – was not an issue below. Int. Resp. Br. 10-13; Fed. Resp. Br. 11. The decision of the Court of Appeals itself demonstrates otherwise, as does the record.

The Court of Appeals concluded that Scenic America lacked standing to pursue its first claim, that the 2007 Guidance constituted a legislative rule that should have been promulgated through notice-and-comment rulemaking. The Court of Appeals reached the substance of Scenic America's second claim, that the 2007 Guidance violated the FSAs by "chang[ing] the lighting standards to such an extent that those standards are no longer 'consistent with customary use.'" Pet. App. 28. In that context, the Court of Appeals credited the FHWA's interpretation of the lighting standards as "reasonable" and did so by affording (or purporting to afford) *Chevron* deference. *Id.* at 29-30.

The Court of Appeals expressly invoked and block-quoted from *Cajun Electric Power Cooperative, Inc. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991). A federal agency's interpretation of a contract "is entitled to just as much benefit of the doubt" as the agency would be accorded "in interpreting its own orders, its regulations, or its authorizing statute." Pet. App. 29 (quoting *Cajun Electric*, but omitting internal citations, including, *inter alia*, citation to *Chevron*). The Court of Appeals further invoked *Nat'l Fuel Supply Corp. v. FERC*, 811 F.2d 1563, 1569-71 (D.C. Cir. 1987), for the proposition that an agency's interpretation of a settlement agreement that was subject to agency approval was entitled to deference "similar to that owed under *Chevron*." Pet. App. 29. The Court of Appeals explained: "as long as the FHWA interpreted in a reasonable fashion, rather than amended, those lighting standards, that

interpretation must be "consistent with customary use." Pet. App. 30 (citing *Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 162 F.3d 101, 107 (D.C. Cir. 1998) (applying *Chevron* deference to agency's construction of statute which it administers)). Thus, although the issue presented to the Court concerns an agency's interpretation of a contract provision and not a statute, as the federal respondent points out, Fed. Resp. Br. 14-15, there is no escaping that the Court of Appeals invoked precedent that affords *Chevron* deference to agencies' interpretations of contract.

Nor is there any question that the degree of deference, if any, to be accorded to the FHWA's interpretation of the lighting prohibitions in the FSAs was an issue raised by the parties below. Federal respondents argued in their motion for summary judgment that deference should be accorded to the FHWA's interpretation, citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) and, significantly, *Cajun Electric*. Fed. Resp. D. Ct. Br. 31. The intervenor respondent likewise argued that deference should be accorded, also citing to *Cajun Electric*. Int. Resp. D. Ct. Br. 25-26. Scenic America, in turn, argued that deference should *not* be accorded, citing *Auer*. Pet. D. Ct. Br. 40.

On appeal, Scenic America argued against according judicial deference under *Auer* or *Chevron*. Pet. C.A. Br. 41-46. Scenic America argued that, if the Court of Appeals were to determine that the 2007 Guidance was an interpretive rule, then the FHWA's interpretation would presumptively receive a weaker brand of deference, as determined by the multifactor test set

forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. C.A. Br. 46, fn. 11. Scenic America further argued that the 2007 Guidance lacks the "power to persuade" because it lacks "the merit of its writer's thoroughness, logic and expertness" and "fit with prior interpretations," citing *U.S. v. Mead Corp.*, 533 U.S. 218, 235 (2000). Pet. C.A. Br. 47. The respondents argued that deference should be accorded to the FHWA's interpretation. *See* Fed. Resp. C.A. Br. 56 (citing *Cajun Electric* and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); Int. Resp. C.A. Br. 50 (citing *Cajun Electric*).

Thus, contrary to the respondents' contention, the issue Scenic America presents – the degree of deference, if any, owed to the FHWA's interpretation of the prohibition against "flashing," "intermittent" and "moving" lights in FSAs – was unquestionably an issue raised and reached below.

II. THE COURT OF APPEALS PURPORTED TO APPLY *CHEVRON* DEFERENCE.

The Court should reject the federal respondents' contention that the Court of Appeals made only "passing reference" to *Cajun Electric* and *National Fuel* and that such mere "passing reference" means that the Court of Appeals did not accord *Chevron* deference. Fed. Resp. Br. 14; *see also* Int. Resp. Br. 13. Accepting that contention would require the Court to imagine the Court of Appeals cited to this precedent for no reason whatsoever. That is not the case. In addressing Scenic

America's claim, that the 2007 Guidance violated the FSAs by changing the lighting standards to such an extent that those standards are no longer "consistent with customary use," the Court of Appeals reasoned that, because the lighting prohibitions in the FSAs were established "consistent with customary use" at their inception: " . . . *so long as the FHWA has merely interpreted in a reasonable fashion*, rather than amended, those lighting standards, that interpretation must itself be 'consistent with customary use.'" Pet. App. 30 (emphasis added). It is in this context that the Court of Appeals (accepting the position of respondents) relied upon *Cajun Electric* and *National Fuel*.

The respondents argue unpersuasively that the Court of Appeals cannot be faulted for agreeing with the District Court's conclusion that the FHWA's interpretation of the FSA lighting prohibitions "is not one that runs 180 degrees counter to the plain meaning of the FSAs" because it was Scenic America that posited this standard. Fed. Resp. Br. 15-16; Int. Resp. Br. 11-12. Respondents ignore that the "180 degrees" test articulated in *National Family Planning & Reproductive Health Association v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992), is an aid to determining whether the 2007 Guidance is an interpretive rather than substantive rule, and it was for this purpose that Scenic America invoked it. *See* Pet. C.A. Br. 26. Respondents also ignore the inherent circularity of the result below to which Scenic America directs the Court's attention: The 2007 Guidance is an interpretive rule because it

does not run "180 degrees" counter to the plain meaning of the FSAs; and because it does not run "180 degrees" counter to the plain meaning of the FSAs, its interpretation is "reasonable."

III. THE D.C. CIRCUIT PRECEDENT ON CONTRACT INTERPRETATION IS NOT UNIFORMLY FOLLOWED.

Ignoring Scenic America's arguments regarding the conflict the Court of Appeals' decision presents with the Court's own precedent (*see* Pet. Br. 14-16; 18-20), the federal respondents argue that this case "does not satisfy the Court's traditional criteria for granting a writ of certiorari," because Scenic America does not highlight a circuit court conflict. Fed. Resp. Br. 17. *See also* Int. Resp. Br. 13-14. The respondents also ignore that the D.C. Circuit precedent, including *National Fuel*, has not gained unanimous support among the circuits.

In *National Fuel*, the D.C. Circuit cited its disagreement with *Cincinnati Gas & Elec. Co. v. FERC*, 724 F.2d 550, 554 (6th Cir. 1984), which specifically held that "an agency's interpretation of a contract . . . may be reviewed by a court without special deference." It added that "the federal appellate courts have taken different positions" on this issue. *Nat'l Fuel*, 811 F.2d at 1568. *National Fuel* explained that two distinct views predominated concerning the issue of deference as to pure issues of law. Under the first view, where an agency's interpretation is based solely on the language of the subject agreement, a court should

give no deference to that agency's interpretation because a court may freely review an agency on all questions of law. *See id.* Under the second view, which the D.C. Circuit ultimately adopted in *National Fuel*, even where there is a question of pure law, the agency's interpretation is entitled to deference because the agency is always possessed of special expertise. *See id.* at 1568-69.

The Court of Appeals, relying on *National Fuel*, followed the second view, holding that "[b]ecause the FHWA's interpretation of the FSA lighting provision was reasonable, the interpretation cannot be contrary to customary use." *See* Pet. App. 30-31. In deferring to the FHWA's interpretation of the FSAs, despite the fact that such interpretation involved a pure question of law, the Court of Appeals took a position that stands in direct conflict to decisions of the Fourth, Fifth, and Tenth Circuits. *See, e.g.*, *Burgin v. Office of Personnel Mgmt.*, 120 F.3d 494, 497-98 (4th Cir. 1997) (holding that Office of Personnel Management's interpretation of health insurance contract was subject to de novo review because the "essential question [was] one of the interpretation of a contract's language"); *Cal. State Univ. Fullerton Found. v. Nat'l Science Found.*, 26 Fed. App'x 263, 267 (4th Cir. 2002) (holding that National Science Foundation's interpretation of grant agreement was subject to de novo review because the "essential question is one of contract interpretation"); *Institute for Tech. Dev. v. Brown*, 63 F.3d 445, 449-50 (5th Cir. 1995) (holding that Economic Development Administration's interpretation of grant agreement

was subject to de novo review because "no deference" is owed to an agency's determination of questions of law); *Davidson v. Glickman*, 169 F.3d 996, 1000 (5th Cir. 1999) (holding that Farm Services Agency's interpretation of a lease agreement was subject to de novo review "without deference to the agency's conclusions"); *Jicarilla Apache Tribe v. Fed. Energy Reg. Comm'n*, 578 F.2d 289, 292-93 (10th Cir. 1978) (holding that "great deference was not required" to review Federal Energy Regulatory Commission's interpretation of lease provisions because "the administrative interpretation" was based on "general common law principles").

Thus, while the Court of Appeals, citing *National Fuel* and its progeny, endorsed the view that courts are required to defer to an agency's reading of an agreement even where the issue simply involves the proper construction of language, (*see* Pet. App. 30-31), other circuits have held otherwise. Accordingly, the Court should reject the federal respondents' argument that this matter is not the proper subject of certiorari.[1]

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[1] Respondents give perfunctory treatment to related contentions: that Scenic America has not raised an "important question of federal law" (Fed. Resp. Br. 17) and the case presents no interest of "broader importance" "given the uniqueness of the federal-state-agreement system under the HBA" (Int. Resp. Br. 11). However, it cannot be gainsaid that the degree of judicial deference to be accorded to agency interpretations is an important question of federal administrative law, all the more so in light of the Court's evolving jurisprudence on this very point. That the issue is impactful in this particular case is evident: the FHWA's interpretation in the 2007 Guidance affects all 50 States. Nor is the issue

IV. SCENIC AMERICA HAS STANDING TO CHALLENGE THE 2007 GUIDANCE.

Contrary to the federal respondents' contention, the Court of Appeals did not err in concluding that Scenic America established standing to assert that the 2007 Guidance violated 5 U.S.C. §706(2). Fed. Resp. Br. 18. The federal respondents assert that "each member identified resided in a state that had already permitted digital billboards before the Guidance was issued," but cite no support for this argument. *Id.* In fact, the Court of Appeals had properly rejected this argument. Scenic America had offered sufficient evidence to establish a representational injury that stemmed from concrete injury suffered by "at least one of its members," a Minnesota resident, the value of whose home was negatively impacted by its proximity to a digital billboard which "generates a bright flash when its display transitions from one advertisement to another." Pet. App. 25. The Court of Appeals could well have also identified a Florida resident member, who testified to diminished quality of life and inability to sell his home negatively impacted by its proximity to a digital billboard. *See* Fed. Resp.

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that Scenic America raises narrowly germane to the "unique" FSA system, a point that is underscored by the case law cited above (as well as *Cajun Electric* and *Nat'l Fuel*) which addresses judicial deference owed to administrative contract interpretations by various agencies. Finally, that the FSA system presents a confluence of contract, regulation, statute and administrative guidance, does not diminish the worthiness of the case, but rather affords the Court an ideal opportunity to address different strands of jurisprudence regarding judicial deference.

C.A. Br. 24 (citing DE#15-17). Moreover, the digital billboards identified in the record had been erected after the 2007 Guidance. Pet. C.A. Reply Br. 12. Because the 2007 Guidance created a safe harbor that strips Division Offices of authority to reject digital billboards within the delineated range of lighting criteria, the issuance of the 2007 Guidance foreclosed the members' ability to challenge any State proposals within that range. *Id.*

The Court of Appeals also did not err in finding that Scenic America's injury "clearly caused by the [2007] Guidance, is . . . redressable." *See* Pet. App. 26. Respondents argue only that Scenic America cannot show that vacatur of the 2007 Guidance would provide redress. Fed. Resp. Br. 18. The Court of Appeals held, however, that, if it were to find in favor of Scenic America, injury would be redressed through repudiation of the 2007 Guidance, adding that "[r]epudiation would provide much more robust relief than vacatur" because repudiation of the 2007 Guidance would prohibit the FHWA from relying on the 2007 Guidance in any future rulemaking and would likewise require the FHWA "to subject extant billboards to either removal or an order requiring those billboards to operate in a manner that does not violate the FSAs." Pet. App. 26. The federal respondents' argument fails because it ignores the basis upon which the Court of Appeals determined redressability.

V. THE 2007 GUIDANCE CONSTITUTES FINAL AGENCY ACTION.

The federal respondents argue unpersuasively that the Court of Appeals erred in concluding that the 2007 Guidance constitutes final agency action. Fed. Resp. Br. 18. They contend that the 2007 Guidance "simply provides advice about how FHWA Division Offices should approach the task of interpreting FSAs and assert that the 2007 Guidance cannot possibly determine rights given that it expressly disclaims any intent to "amend applicable legal requirements," thus allowing states to "remain free to prohibit digital billboards if they wish to do so." *Id.* at 19.

The Court of Appeals properly rejected this argument. It noted that the 2007 Guidance marks the "consummation of FHWA's decision-making process" because it reaches a definitive conclusion as to the FSA's lighting prohibitions and "does not prevent states from permitting digital billboards, so long as they meet certain prescribed requirements." Pet. App. 26-27. The 2007 Guidance commands, in boldface print, as follows:

> **Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria (as described below) do not violate a prohibition against intermittent or flashing or moving lights as those terms are used in the various FSAs.**

Pet. App. 79. As Scenic America argued, this command prohibits Division Offices from rejecting state proposals that fall within the specified criteria that the 2007 Guidance announced. Pet. C.A. Reply Br. 13. Moreover, the fact that the 2007 Guidance states that the FHWA "may provide further guidance in the future" does not mean that the 2007 Guidance is not final agency action; rather, it amounts to a "boilerplate" indication that the FHWA may issue additional interpretations in the future, a fact that does not prevent the 2007 Guidance itself from being final. Pet. App. 27; *see also* Pet. C.A. Reply Br. 13-14.

Contrary to the federal respondents' related contention, Fed. Resp. Br. 19, the Court of Appeals did not err in holding that the 2007 Guidance constituted an "action from which legal consequences will flow." Pet. App. 27. Respondents incorrectly argue that the Court of Appeals "mistakenly assumed" that the 2007 Guidance creates a safe harbor such that Division Offices and the States may not deny a digital billboard permit for violating the FSA lighting standards where the billboard meets the criteria set forth in the 2007 Guidance. *See* Fed. Resp. Br. 19-20. They ignore the boldface language of the 2007 Guidance, which mandates that regulations permitting digital billboards within the criteria fashioned by the FHWA do not violate the FSA lighting prohibitions. As the Court of Appeals correctly understood, it is this language that creates a safe harbor by which Division Offices and the States can no longer "deny a digital billboard permit for violating the FSA lighting standards." Pet. App. 27. As a result,

there is no question that it "has a clear legal effect on the regulated entities here – the Division Offices and the States – and the Guidance is therefore a final agency action." Pet App. 28; *see also* Pet. C.A. Reply Br. at 14-15 (relying on *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (noting that legal consequences flowed from EPA guidance where, prior to its issuance, regional directors maintained discretion to reject alternatives for failure to comply with regulation).

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review.

Respectfully submitted,

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