No. 21-1538

In the Supreme Court of the United States

CLEVELAND COUNTY, NORTH CAROLINA,
Petitioner,

v.

SARA B. CONNER,
Respondent.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 15 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act allows an employee, who has been paid more than the required minimum wage and overtime at one and one-half times her regular rate, to sue her employer for and recover unpaid straight-time wages earned in weeks that she worked overtime.

2. Whether *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), allows courts to independently evaluate an agency's nonbinding interpretation of a statute.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

It's a concept so often repeated that it may strike as a truism: When construing a statute, a court must start with the text. But courts still sometimes can't resist the temptation to ignore the words on the page to reach desired ends. And indeed, the decision below is one more example of that mistaken indulgence. The Court should use this case to remind all courts that the tried-and-true lesson of statutory construction still holds. Text reigns.

The Fourth Circuit here paired a purposivist approach with an overreliance on agency deference to reach a result that the text of the Fair Labor Standards Act cannot sustain. The court below recognized that the Act does not "include language" permitting employees to recover for "overtime gap time." Pet.App.14a. Yet the court marched ahead anyway—repeatedly relying on its own conception of the FLSA's "purpose" to fashion a new remedy without a statutory hook. Perhaps worse still, the Court further applied something approaching blind deference to the Department of Labor's spin on the statute even while recognizing that the "only other circuit" to "squarely address" this question gave no deference to that regulation precisely because it found "no statutory support." *Id.* at 24a (citing *Lundy* v. *Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. 2013)). But the Fourth Circuit thought the "considerable deference" contemplated in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), still permitted it to rely on that interpretation.

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[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

The amici States of West Virginia, Alabama, Alaska, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, South Carolina, Texas, and Utah believe that this sort of analysis—untethered from the language of the statute—cannot and should not become the norm. Legislatures express their purpose through the words they enact into law. And notions of administrative deference must not twist and stretch federal acts to reach places that Congress never imagined. *Skidmore* deference and similar agency-forward concepts too often invite mischief from administrative agencies. They perhaps just as often lead courts astray; administrative interpretations become the star of the show, and congressional intent fades to the background. This case presents an excellent vehicle to rebalance the inquiry. Detours into purpose and ill-advised forms of administrative deference should be put to rest.

SUMMARY OF ARGUMENT

The Court should take this case and reverse the decision below for two reasons.

I. The Fourth Circuit's opinion relegates statutory text to a second-class role in statutory construction. Instead, the court focused on the FLSA's supposed purposes. That approach flips the rightful order for questions like these: Clear text should prevail over extra-textual guesses at purpose. Because the text here is plain, overtime-pay gap claims aren't viable under the FLSA. The Fourth Circuit's purposivist re-drafting of the Act usurps Congress's role, leads to unpredictable outcomes, and produces many other problems that this Court has long fought off. The case thus provides a good vehicle to remind courts once more that Congress's words matter.

II. The Fourth Circuit's opinion also reflects a rot that has been festering within the doctrine of *Skidmore* deference—serious confusion over what it is, when it applies, and how to apply it. And some decay seeps deeper than even these concerns let on. At bottom, *Skidmore* strikes at the heart of our constitutional order. Now is the time to look at whether *Skidmore* is even workable anymore. And a close look shows that the more elegant solution is to construe statutes de novo even when non-binding administrative interpretations are in play; that's the review Article III courts were meant to conduct all along.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Improperly Elevates A Statute's Purpose Over Its Text.

1. The Fourth Circuit interpreted the FLSA without paying proper attention to the relevant statute's text. One provision of the Act requires employers to pay their employees at a rate "not less" than the federal minimum wage for every hour they work. 29 U.S.C. § 206(a)(1). Another requires employers to pay their employees "at a rate not less than one and one-half times" the employees' regular pay rate for every hour over 40 hours per week. *Id.* § 207(a)(1). But no provision gives an employee a federal right to "recover unpaid straight time for a week in which they … work[ed] overtime" when the straight-time pay they *did* receive at least exceeded federal minimum wage. Pet.App.14a.

Petitioners are thus right that these "overtime-gap-time claims have no basis in the statutory text." Pet.19. The Fourth Circuit, too, acknowledged that "[t]he FLSA does not include language about overtime gap time."

Pet.App.14a; see also *id.* ("[N]o provision of the FLSA explicitly governs employee claims to recover for unpaid gap time."). For many courts, this lack of language has been reason enough to hold that overtime-pay-gap claims aren't viable under the FLSA. See, *e.g.*, *Lundy*, 711 F.3d at 117 & n.9 (rejecting contrary reading based on DOL interpretive bulletins because it had "no statutory support" and was "not grounded in the statute"); *Athan* v. *U.S. Steel*, 364 F. Supp. 3d 748, 755 (E.D. Mich. 2019) ("[T]he text of the statute is clear insofar as it does not provide a remedy [for gap-time claims]."); *Gould* v. *First Student Mgmt., LLC*, No. 16-CV-359-PB, 2017 WL 3731025, at *5 (D.N.H. Aug. 29, 2017) (finding that the text of the FLSA does not permit overtime-gap claims and rejecting overreliance on agency interpretations); *Murphy* v. *First Student Mgmt. LLC*, No. 1:16-CV-01966-DAP, 2017 WL 346977, at *4 (N.D. Ohio Jan. 24, 2017) ("Because the meaning of the statute is clear and unambiguous, the Court need not—and does not—look beyond the plain meaning of the statute itself."); *Rosario* v. *First Student Mgmt. LLC*, No. CV 15-6478, 2016 WL 4367019, at *6 (E.D. Pa. Aug. 16, 2016) ("Allowing the plaintiffs to assert an overtime gap time claim here would be to work an expansion of the congressional intent reflected in the text of the FLSA."); *Hensley* v. *First Student Mgmt., LLC*, No. CV 15-3811, 2016 WL 1259968, at *4 (D.N.J. Mar. 31, 2016) (holding that "[t]he plain language of the FLSA" rejects overtime-gap claims).

2. Left without textual support, the Fourth Circuit pushed the statute aside and instead focused its reasoning on "the purposes of the FLSA" and certain administrative interpretations. See Pet.App.23a; see also *id.* at 12a (explaining that the Fourth Circuit would "begin" its analysis with "the purposes of the FLSA"); *id.* at 23a (finding that a contrary result would "defeat the

Congressional purpose" of the Act (cleaned up)). The latter basis is problematic for many reasons. See *infra* Part II. The former one is deeply wrong, too.

The Fourth Circuit mistakenly thought that purported statutory silence licensed it to go on a hunt for purpose. But nearly a century-and-a-half ago, this Court admonished that "[c]ourts cannot supply omissions in legislation, nor afford relief because they are supposed to exist." *United States* v. *Union Pac. R. Co.*, 91 U.S. 72, 85 (1875). Nothing has changed since. See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." (cleaned up)). After all, when it comes to statutory interpretation, "it is [the courts'] duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality op.). So when a statute "says nothing about [certain types of] claims," it is generally "improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013). Silence thus begins and ends the analysis.

Starting with text in this way is a cornerstone of our legal system. The "elementary" principle that "the meaning of a statute must, in the first instance, be sought in the language" appears—rightfully—at the start of most every case involving statutory interpretation. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). Indeed, judges should "always … begin with the text of the statute." *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). But read the decision below carefully: This long-held principle appears nowhere in the opinion. Nor did the Fourth Circuit tackle "whether the statutory text is plain and

unambiguous." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Instead, it employed its passing shot mention of "silence" and then jumped straight to purpose and administrative deference.

3. But when—as here—what the text does and does not say is clear, that clarity should end the matter. In cases like this, "the sole function of the courts is to enforce [the law] according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (cleaned up). "[T]he choice" to expand or contract a statute "is not [a court's] to make." *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011). "Congress wrote the statue it wrote," and that is all courts can deal with. *Id.*

Indeed, even if there is a potential for "harsh results" or "strict" dispositions, courts are "not free to rewrite" statutes. *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). If the statute has an undesirable result, "[i]t is for Congress, not [the courts], to amend" it. *Id.* Courts are "bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction." *Richards* v. *United States*, 369 U.S. 1, 10 (1962). Whether a statute "differently conceived and framed would yield results more consonant with fairness and reason" is irrelevant. *Anderson* v. *Wilson*, 289 U.S. 20, 27 (1933). Courts "take the statute as [they] find it." *Id.*

Yet here the Fourth Circuit took up the drafting pen, anyway.

The Fourth Circuit stepped beyond its proper role and acted based on what it believed "Congress would have wanted" instead of "what Congress enacted." *Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (cleaned up). Following this method takes courts down a treacherous

path of guessing games and uncertainty. Courts should not pretend that they know the desires of legislators who passed a law. And even if they could somehow peek into one legislator's mind, it is "impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

In other words, when a court relies on purpose above all else (as the Fourth Circuit did below), it encroaches on the legislative process. The "very essence" of that process is "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987). Courts cannot identify a gap and then assume that the legislature would have chosen to fill it in the way the court believes. Such an approach would produce "little more than wild guesses." Easterbrook, *supra* at 548. Interpretations of this kind represent "a bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says." ANTONIN SCALIA & BRYAN B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 343 (2012). And practically speaking, doctrines that ignore text "lead more often" to "spurious interpretation and to completely unforeseeable and unreasonable results." Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. Rev. 538, 542 (1934). Legislative divination is not—and should not—be the way that judges treat duly enacted laws.

Congress, of course, makes many concessions and sacrifices in passing laws. After all, "[l]egislation is … the art of compromise." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). So by the time a

law is adopted, "all that is really agreed upon is the words." Josef Kohler, *Judicial Interpretation of Enacted Law*, *in* SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS 187, 196 (Bos. Book Co. 1917). Yes, a judge sitting in the quiet of chambers years later may spot something to advance the statute's seeming purpose. But omitting that something from the text may have been "the price of passage." *Henson*, 137 S. Ct. 1725. Thus, "it is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law." Laurence H. Tribe, "Comment," in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 66 (1997). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers [a] statute's primary objective must be law." *Rodriguez*, 480 U.S. at 526 (emphasis in original).

The rule holds even if everyone agrees the general purpose of a statute might counsel toward a particular (but extra-textual) result. Courts are "not free to disregard" text to "achiev[e] the general purpose" of a statute in a particular case. *Comm'r* v. *Gordon*, 391 U.S. 83, 93 (1968). Judges do not have a "roving license … to disregard clear language simply on the view that Congress must have intended something broader." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 784, 794 (2014). Rather, it is a court's job to "apply faithfully the law Congress has written." *Henson*, 137 S. Ct. at 1725. A "purposive argument simply cannot overcome the force of the plain text." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 460 (2012).

4. True, courts can use purpose in narrow places—but to bolster the text. A court might use purpose "in case of ambiguity" "to find present rather than absent elements that are essential to operation of a legislative

scheme." *Dir., Off. of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136-37 (1995). But under that view, a statute's purpose cannot be used to "*add* features that will achieve the statutory 'purposes' more effectively" in a court's eyes. *Id.* at 137 (emphasis added). Statutes propose "not only to achieve certain ends, but also to achieve them by particular means." *Id.* In ignoring this reality, the Fourth Circuit elided a key feature of our constitutional system: the "legislative battle over what those means ought to be." *Id.* A statute's purpose might also become important when "a genuine question" arises "as to the meaning of one of the requirements Congress has imposed." *Gordon*, 391 U.S. at 93. Yet notice what else is missing from the Fourth Circuit's opinion—any true suggestion that the statute presents a "genuine question" or ambiguity. Instead, the opinion proceeds to purpose simply because the panel was evidently uncomfortable with leaving a federal remedy off the table (even though state law would provide relief).

And even if the FLSA's purpose were useful here—it's not—the Fourth Circuit used it incorrectly, anyway. In its hunt for the spirit of the law, the Fourth Circuit forgot that a law's "spirit" must be "collected chiefly from its words" and not from a court's own beliefs or assumptions. *Sturges* v. *Crowninshield*, 17 U.S. 122, 202 (1819). Unless the text confirms a purpose, courts should not speculate about what the legislature would have had the law do in a given scenario. And "no legislation pursues its purposes at all costs." *Rodriguez*, 480 U.S. at 525-26. So a statute's purpose "cannot compensate for the lack of a statutory basis." *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 171 (2007).

5. This Court has "often criticized" the use of purpose as a "last resort of extravagant interpretation." *Rapanos* v. *United States*, 547 U.S. 715, 752 (2006) (plurality op.). For good reason. The Fourth Circuit took a broad concept of purpose—the idea that the FLSA was meant to protect workers from low wages and long hours, Pet.App.12a—and reasoned from there. But that chain of logic would lead courts to find a federal remedy for a plaintiff invoking the statute in just about any work-pay-related context. Nothing suggests Congress wanted that. See *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (rejecting the notion that the FLSA should be construed broadly and emphasizing that the Act gives courts "no license to give [the text] anything but a fair reading"). Laws do not always "fully address a perceived mischief." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 104 (2006). Often, legislators compromise and "accept[] half a loaf to facilitate a law's enactment." *Id.* Courts should not try to bake the other half back in.

The Court should thus grant certiorari not just to fix the acknowledged circuit split here, but also to remind courts to stay firmly focused on text.

II. The Decision Below Is The Right Vehicle To Fix The Problems With *Skidmore* Deference.

Although Petitioner's plain-text reading shows the sufficiency of de novo statutory construction, Pet.19-20, other problems with the Fourth Circuit's ruling underscore its need. Finding no succor in the text, the Fourth Circuit also tried to patch its opinion with *Skidmore* deference. But courts and scholars alike haven't been sure what to do with *Skidmore* deference for a long while. This confusion assumes many forms. And it

has now reached a point when the Court should step in to clarify just what to do about it—including whether the doctrine should disappear entirely.

A. Judicial Confusion Worsens With *Skidmore* Deference.

1. Right at the start, no one truly knows whether *Skidmore* even calls for deference to informal agency interpretations. See, *e.g.*, Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 669-70 (2014) ("The *Skidmore* regime does *not* actually involve deference by a court." (emphasis in original)). According to this Court, informal interpretations are "'entitled to respect' … but only to the extent that those interpretations have the 'power to persuade.'" *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000). Some have called this idea a doctrine of "weight." See, *e.g.*, Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012) ("'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."). Others see it as a "standard" of "pragmatic considerations." Ilaria Di Gioia, *A Tale of Transformation: The Non-Delegation Doctrine and Judicial Deference*, 51 U. BALT. L. REV. 155, 167 (2022). Whatever the label, this view of *Skidmore* implies that the agency's opinion plays a smallish role in a court's analysis—not a judicial-abdication one.

Below, the Fourth Circuit went a different direction entirely: It afforded the interpretation of the Labor Department's Wage and Hour Division Administrator

"considerable deference." Pet.App.16a. And it did so based on a Fourth Circuit case that cited pre-*Chevron* authority on the Housing and Urban Development Department's interpretation of the Fair Housing Act. See *Watkins* v. *Cantrell*, 736 F.2d 933, 943 (4th Cir. 1984) (quoting *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 107 (1979)). In practical effect, the Fourth Circuit seemed to presume that the agency's view should prevail so long as it wasn't unreasonable—a standard perhaps even more forgiving than traditional *Chevron* deference. But whatever the Fourth Circuit's approach was, it went well beyond *Skidmore*'s "respect." Worse, other courts have appeared to make the same mistake. See, *e.g.*, *Tualatin Valley Builders Supply, Inc.* v. *United States*, 522 F.3d 937, 942 (9th Cir. 2008) (purporting to apply *Skidmore* but then affording an IRS revenue procedure "significant deference").

2. Beyond this basic problem of defining *Skidmore* "deference," courts have struggled to explain when it should apply as opposed to other administrative deference doctrines. One study, for example, found that even this Court has "applie[d] [the federal deference regime] in a haphazard manner." William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 447 (2013). When trying to categorize cases by the type of deference they applied, researchers were forced do some "inventive coding," effectively inventing a new doctrine of "*Skidmore* Lite" deference to account for the wild variances in its application. *Id.*

Even after *United States* v. *Mead Corp.*, 533 U.S. 218, 234 (2001), courts have still had trouble deciding whether *Skidmore* or *Chevron* deference applies in a given case.

See, *e.g.*, Marissa Corry, Kisor*'s Chaos: Conflicting Meanings of the Clean Air Act's "Applicable Requirements" in the Fifth and Tenth Circuits*, 74 SMU L. REV. 749, 759 (2021) ("*Mead*'s revival of *Skidmore* has only added to the confusion surrounding *Chevron*."); Sam DePrimio, *Special Delivery:* Young v. United Parcel Service *Revives the Pregnancy Discrimination Act While Denying Life to EEOC Guidance*, 67 ADMIN. L. REV. 389, 397 (2015) (citing *Reno* v. *Koray*, 515 U.S. 50 (1995), as "one example of the Court applying a *Chevron* deference analysis to a fact pattern that warrants *Skidmore* deference"); *In Wilderness Watch* v. *Mainella*, 375 F.3d 1085, 1091 & n.7 (11th Cir. 2004) (applying *Chevron* after admitting that *Skidmore* applies "when, as here, the agency interpretation does not constitute the exercise of [the agency's] formal rule-making authority"). So more than a few courts decline to decide that question at all, further muddling the two concepts. See, *e.g.*, *Env't Integrity Project* v. *EPA*, 969 F.3d 529, 540 (5th Cir. 2020); *Nielsen* v. *AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014); see also Joshua Weiss, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592, 1599 (2011) (citing a "growing body of evidence" suggesting that courts do not treat *Chevron* and *Skidmore* as meaningfully different); Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 41 (2017) ("[S]ome judges take the view that *Skidmore*, at bottom, really calls for the same level of scrutiny as *Chevron*'s rationality review.").

In this case, of course, the Fourth Circuit at least purported to choose *Skidmore* over *Chevron*. But even then it landed on something much closer to *Chevron* in substance. The footnote the Fourth Circuit leaned on had "recognize[d] that there is a difference between

'regulations' … and 'official interpretations.'" *Monahan* v. *Cnty. of Chesterfield*, 95 F.3d 1263, 1273 n.10 (4th Cir. 1996). But *Monahan* also quickly emphasized substantial deference for even these informal statements. *Id.* From this decades-old footnote's discussion of deference, courts in the Fourth Circuit have fashioned a doctrine that very nearly defers automatically to longstanding agency interpretations, formal or informal. See, *e.g.*, *Koelker* v. *Mayor & City Council of Cumberland*, 599 F. Supp. 2d 624, 633 (D. Md. 2009) (relying on DOL interpretations, with no discussion of their persuasiveness, in holding that overtime-gap time must be paid under the FLSA).

3. Even when courts identify *Skidmore* as the right standard, and even when they properly characterize the weight it requires, there's still plenty of confusion about the mechanics of applying it. *Skidmore* itself "did not provide a theoretical basis for its multifactor approach," "explain why the approach was appropriate," or describe how other unlisted factors with the power to persuade might work. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 979 (2017). Lacking this foundation, courts—including this one—"[a]lmost immediately" began applying the *Skidmore* principles "inconsistently." *Id.* Among other problems, "[t]he cases reveal disparate approaches to which factors should be applied first, how the factors relate to each other, and what each factor means." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1291 (2007).

What's more, as Petitioner explains, the circuit courts have developed two competing frameworks for applying *Skidmore*. See Pet.16-19 (discussing the "independent judgment" and "sliding scale" approaches). It's not clear

how consistent these frameworks are with one another. At least according to some scholars, they could hardly be more different: Courts applying a sliding scale "are sensitive to indicia of agencies' reliability and fidelity," while the independent-judgment model "is tantamount to de novo review." Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1369 (2013). So even if litigants can foresee that *Skidmore* will apply, they are still left to guess what the net effect of that "deference" might be.

Skidmore, then, stands in a bewildering state of play. Is it deference, weight, or something else? Does it apply to all informal agency decisions, or just some? And fundamentally, how should courts apply it? The Court should grant certiorari to answer at least some of these questions with finality. It makes no sense to keep courts confused when engaging with such important concepts.

B. The Court Should Scatter The *Skidmore* Fog By Doing Away With The Doctrine.

And in truth, the Court should grant review to do more than nudge courts to more carefully apply *Skidmore*. It should go further and dispense with *Skidmore* entirely.

If one beam shines through this confusion, it's this: *Skidmore* is no good way to build a jurisprudence of statutory interpretation. It likely never was. Rather than grappling with whether and how to apply *Skidmore* deference (weight? respect? independent judgment? sliding scale?), we should put *Skidmore* to rest. And the *amici* States aren't alone in saying so. Others are on board, too. See, *e.g.*, Mot. for Leave to File Amici Brief by Pacific Legal Foundation at 5-8, *E.I. Du Pont De Nemours & Co.* v. *Smiley*, No. 16-1189 (U.S. May 3, 2017) (explaining in detail why "*Skidmore* Unconstitutionally Cedes Judicial Power to the Executive Branch"); Michael

B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in HANDBOOK ON CLASSICAL LIBERALISM 29 (Todd Henderson ed., Cambridge Univ. Press 2018), *available at* https://bit.ly/3xCFvz9 (arguing that *Skidmore* should be rejected for improperly "confer[ring] a privilege on the government"). And for good reason.

First, ending *Skidmore* deference in favor of a de novo judicial interpretation restores balance to our constitutional separation of powers. The Constitution is clear: "The judicial Power of the United States, shall be vested in" the Article III courts. U.S. CONST. art. III, § 1. The Administrative Procedure Act is clear, too: Article III courts, not Article II agencies, "shall decide all relevant questions of law." 5 U.S.C. § 706. Had the APA's enactors "wanted to require courts to give additional weight to agency expertise," they could have done so. Bamzai, *supra* at 985-86. Section 706 was in fact based on a proposed bill that had "a single, glaring difference" that ended up on the cutting room floor: "a proviso requiring that a reviewing court give 'due weight' to agency 'technical competence' and 'specialized knowledge.'" *Id.* These origin stories make clear that Congress always planned for an independent judiciary, and it was always the point. When courts compromise that commitment, it endangers the entire system.

Some might complain that de novo review is too unpredictable, while agency deference offers consistency. But a case-specific approach is a feature, not a bug, of our "strong separation of powers." Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 832 (2019). "[O]ur Constitution unambiguously … commands that the independence of the Judiciary be jealously

guarded." *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality op.). So the Court should defend it now by ending *Skidmore*. In contrast, routinely accepting the agency's view without real engagement on the substance "endow[s]" the agency's views "with force of law where Congress did not intend them to have such force." Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57 (1990). Predictability, then, comes at a steep cost.

Second, ending *Skidmore* deference will improve every part of how federal courts decide administrative cases. From the initial inquiry, to the consideration of expertise, to the leveling out of an agency's "power to persuade," *Skidmore*, 323 U.S. at 140, treating all litigants the same (instead of favoring agencies and their informal statements) will give them the "neutral forum for their disputes that they rightly expect and deserve." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring in the judgment). Take the threshold question, for starters. The same type of "multi-step, multi-factor inquiry" with which the Court recently saddled lower courts applying *Auer* deference has already burdened those same courts as they sort through *Skidmore*. *Id.* at 2447-48; see *Mead*, 533 U.S. at 235 (expanding the *Skidmore* factors to include "the merit of [the agency] writer's thoroughness, logic, and expertness, its fit with prior interpretations, and *any other sources of weight*" (emphasis added)). Indeed, "after *Kisor*, the *Skidmore* and *Auer* analyses overlap almost entirely, making it doubtful that *Skidmore* will resolve any of the issues that *Auer* has generated." Corry, *supra* at 780. Now, as a result, "lower courts may be even more uncertain about how to apply *Skidmore* compared to *Auer*," and "given the overlap between these doctrines, one could criticize

Skidmore deference for all the same reasons *Auer* has been criticized." *Id.* The Court should untie this knot.

Skidmore proponents often justify its spot on the federal deference continuum by noting that generalist judges lack the agencies' expertise. But courts have expertise in statutory interpretation. By elbowing out a text-based de novo review, *Skidmore* thus gets the calculus backwards. De novo review helps ensure a right result. Required deference to the "persuasive power" of "an agency's interpretation" does not. *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part). Judges need flexibility to do "their job of interpreting the law." *Id.* at 2426 (Gorsuch, J., concurring in the judgment). And "it is not necessary to have *Skidmore* deference to incorporate expertise" into a true de novo review: The court receives the papers from the parties, and "[i]f an agency exhibits expertise, then its actions will be more persuasive to the court than if the agency does not do so." Rappaport, *Classical Liberal Administrative Law in a Progressive World*, at 29. The same is true for a private party. See *id.* The courts "would then fulfill their duty to exercise their independent judgment about what the law *is*" by weighing the most convincing arguments. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) (emphasis in original).

By adhering to de novo judicial review of the law's meaning, "an agency" would also have a reduced "ability … to alter and amend existing law." *Gutierrez-Brizuela*, 834 F.3d at 1158. This benefit cannot be overstated. "After all, *Skidmore* deference only makes a difference when the court would not otherwise reach the same interpretation as the agency." *E.I. Du Pont De Nemours & Co.* v. *Smiley*, 138 S. Ct. 2563, 2564 (2018) (statement of Gorsuch, J., joined by Roberts, C.J., and

Thomas, J., respecting the denial of certiorari). Agencies sometimes "use [] guidance documents to circumvent accountability requirements and issue regulations without public input," but this "cause for concern" would be deflated without *Skidmore* deference there to keep it afloat. Keagan Potts, *A Solution to the Hard Problem of Soft Law*, 10 MICH. J. ENVTL. & ADMIN. L. 483, 495 (2021) (citing Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (explaining how guidance documents are subject to lesser public input and congressional and executive oversight)).

Relatedly, a system is not worth its salt if its litigants have no "assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring). And our system of government favors public participation, rather than agency heads developing policies in the dark. A federal-deference doctrine that encourages agencies to undermine both these principles is not worth keeping around. Courts should resist this kind of "sap[ping] [of] judicial power … under the federal Constitution" and "establish[ment] [of] a government of a bureaucratic character alien to our system." *Crowell* v. *Benson*, 285 U.S. 22, 57 (1932). *Skidmore* "deference" threatens that character by muddying the waters of what Article III judges consider when assessing non-binding agency interpretations. Ending *Skidmore* will go a long way to clearing things up. And along the way, it will reaffirm two key principles: A court should not interpret a statute based on either its well-intentioned notion of how to achieve the statute's "purpose" or an agency's bureaucratic gloss on how the statute should read. The Court should grant certiorari to insist lower courts heed both.

CONCLUSION

The Court should grant the Petition and reverse.

Respectfully submitted.

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