No. 21-1538

IN THE

Supreme Court of the United States

CLEVELAND COUNTY, NORTH CAROLINA, A/K/A CLEVELAND COUNTY EMERGENCY MEDICAL SERVICES,
Petitioners,

v.

SARA B. CONNER, individually and on behalf of all others similarly situated,
Respondents.

Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act allows an employee, who has been paid at least the required minimum wage and overtime pay at a rate that is at least one and one-half times her regular rate, to sue her employer for and recover unpaid straight-time wages earned in weeks when 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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INTEREST OF THE *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as free exercise of religion, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because executive agencies and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This

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[1] Petitioners and respondents consented to the filing of this brief after NCLA notified them on June 29, 2022, of its intent to file. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the Fourth Circuit's decision to grant "considerable deference" to the U.S. Department of Labor's ("DOL") non-binding interpretation of the Fair Labor Standards Act ("FLSA") without undertaking the basic step of determining whether that interpretation is consistent with the statutory language. Pet.App.15a-16a. The Fourth Circuit exhibited an all-too-frequent tendency among lowers courts "to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting).

SUMMARY OF THE ARGUMENT

The shorthand "*Skidmore* deference" is somewhat of a misnomer because *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), does not allow a court to truly defer, *i.e.*, subordinate its independent judgment, to an agency's non-binding interpretation of law. Rather, non-binding interpretations "are 'entitled to respect' [under *Skidmore*], but only to the extent that they are persuasive." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This Court unfailingly conducts its own statutory analysis in *Skidmore* cases to reject interpretations that justices "find … unpersuasive." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020). An independent finding of the agency's "persuasive force [thus] is a necessary precondition to

deference under *Skidmore*," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013).

Lower courts do not uniformly apply *Skidmore* in this manner. Some follow this Court's independent judgment approach and accept only non-binding agency interpretations that they deem persuasive. Many others, however, subordinate their own judicial judgment in favor of agencies' views based on the mistaken belief that *Skidmore* commands deference rather than respect. This case presents an ideal opportunity to resolve lower-court confusion on this count because the statutory circuit split here—whether unpaid "gap time"[2] violates the FLSA's overtime requirements at 29 U.S.C. § 207—is the direct result of a deeper circuit split in *Skidmore*'s application.

DOL's non-binding interpretation at 29 C.F.R. § 778.315 states unpaid gap time violates the FLSA's overtime requirement. In *Lundy v. Catholic Health System of Long Island*, the Second Circuit reasoned this non-binding interpretation "is owed [*Skidmore*] deference only to the extent it is persuasive" and concluded, based on the court's own statutory

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[2] Gap time "refers to time that is not covered by the overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the minimum wage provisions because, even though it is uncompensated, the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked." *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 243 (3d Cir. 2014) (quoting *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 (9th Cir. 1999)), quoted with alterations at Pet.App.14a.

analysis, that "it is not." 711 F.3d 106, 116 (2d Cir. 2013). The Fourth Circuit below also purported to apply *Skidmore* but granted "considerable deference" to DOL's non-binding interpretation without analyzing the statutory language or making a finding of persuasiveness. Pet.App.15a-16a. The court instead subordinated its own judgment to DOL's interpretation based solely on the interpretation's longevity and consistency with the FLSA's policy objectives. Pet.App.16a-19a.

The decision below reformulated *Skidmore*'s respect-based regime into deference akin to *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), wherein agencies rather than courts are empowered to say what the law is. Its approach to *Skidmore* thus presents the same constitutional defects as *Chevron*. By compelling judges to abdicate the "duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), the Fourth Circuit's "considerable deference" approach undermines the separation of powers. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). Moreover, when the government is a party to the case, "considerable deference" requires judges to favor the government's interpretation. That is, it tells judges to exhibit systematic bias in favor of one of the parties—the most powerful of parties. Such judicial bias violates the Fifth Amendment's Due Process Clause.

Constitutional defects here are even more pronounced than in *Chevron* because "considerable deference" to an ostensibly non-binding agency interpretation without any analysis of statutory text circumvents safeguards that limits *Chevron*'s impact. Skipping analysis of statutory text means the court below never considered whether the FLSA was ambiguous before deferring to DOL. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("If uncertainty does not exist, there is no plausible reason for deference."). And deferring to DOL's non-binding interpretation empowers DOL to say what the law is even when Congress did not delegate rulemaking authority. *See United States v. Mead Corp.*, 533 U.S. 218, 226 (2001).

Certiorari is necessary to resolve confusion regarding the proper application of *Skidmore* and to prevent *Chevron*-like constitutional abuses.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO CLARIFY *SKIDMORE*'S APPLICATION

Because *Skidmore* lived for nearly four decades in *Chevron*'s shadow, its formula based on respect and persuasiveness is often expressed in relation to *Chevron*'s more familiar deference regime. As such, jurists and scholars often use "*Skidmore* deference" as a shorthand to refer to courts' "deferring" to non-binding agency interpretations that they find persuasive. This concept is oxymoronic: adopting a position that one finds persuasive is not deference—

meaning "subordinat[ing] one's own judgment to another's"—but rather an exercise of independent judgment. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 24 n.6 (2011) (Scalia, J., dissenting) ("If one has been persuaded by another … there is no room for deferral—only for agreement.").

This Court exercises independent judgment to evaluate the persuasiveness of non-binding agency interpretations, and some appellate courts follow this practice. But other appellate courts, including the court below, apply *Skidmore* as a deference doctrine and subordinate their own judgment to non-binding agency interpretations, even if they are not persuaded.

These two incompatible approaches to *Skidmore* lie at the heart of this case. The Second Circuit in *Lundy*, 711 F.3d at 116, independently analyzed the FLSA's overtime provision and rejected DOL's gap-time interpretation as unpersuasive under *Skidmore*. The Fourth Circuit below, in contrast, ignored that statutory text and deferred to DOL without independently determining whether DOL's position was a persuasive construction of the FLSA. Pet.App.15a-19a. This divergence creates an ideal vehicle to resolve lower court confusion regarding *Skidmore*'s application. Such clarity is especially needed now because this Court's mostly silent retreat from *Chevron* has increased *Skidmore*'s prominence.

A. *Skidmore* Affords 'Respect' Rather than 'Deference' to Non-Binding Agency Interpretations

In *Skidmore*, the Court asked "what, if any deference courts should pay to the [agency]'s conclusions" regarding a statute's meaning and held such conclusions are "entitled to respect" rather than deference. 323 U.S. at 139-40. This "respect" is based on the "power to persuade" and "lack[s] power to control." *Id.* It therefore cannot be the basis for true judicial deference, which requires courts to adopt an agency's interpretation even if they disagree with it.

From the beginning, respect under *Skidmore* required independent judgment. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), for instance, this Court considered whether an employer's disability policy constituted sex discrimination under Title VII of the 1964 Civil Rights Act. Only after concluding that Title VII does not prohibit the policy based on its own statutory analysis, did the Court turn to the Equal Employment Opportunity Commission's ("EEOC") contrary guidance under *Skidmore*. *Id.* at 140. *Gilbert* refused to defer to EEOC's guidance and instead treated it with "respect" based on its "power to persuade." *Id.* (quoting *Skidmore*, 323 U.S. at 140). The Court then rejected the EEOC guidance as unpersuasive because it "conflict[ed] with … legislative history … [and] the 'plain meaning' of the language used by Congress when it enacted [Title VII]." *Id.* at 145.

This straightforward application of *Skidmore* became disfavored for a time following *Chevron* because jurists and scholars believed *Chevron* deference replaced *Skidmore*'s respect-based formula. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring) (referring to *Gilbert*'s application of *Skidmore* as "an anachronism" in "an era when our treatment of agency positions is governed by *Chevron*."); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283, 297 (1986) (declaring that *Chevron* "cast doubt upon" continuing validity of *Skidmore*"). During this period, many lower courts abandoned *Skidmore*'s respect-based analysis and granted full *Chevron* deference to agency guidance, including to DOL's non-binding interpretations of the FLSA's overtime provisions. *See Condo v. Sysco Corp.*, 1 F.3d 599, 603 (7th Cir. 1993) (granting *Chevron* deference to non-binding interpretation of § 207(a)(1)). Indeed, the Fourth Circuit itself issued precedent during this period that granted DOL's gap-time interpretation "considerable deference" using *Chevron*-like logic: "the [non-binding] interpretation of a statute by the agency charged with its enforcement ordinarily commands *considerable deference*." *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1272 n.10 (4th Cir. 1996) (emphasis added) (quoting *Watkins v. Cantrell*, 736 F.2d 933, 943 (4th Cir. 1984)).

The Supreme Court clarified in *Christensen*, 529 U.S. at 587, and *Mead*, 533 U.S. at 230-33, that judicial deference to non-binding interpretations is mistaken. Rather, *Skidmore*'s respect-based formula applies, so courts should follow non-binding

interpretations "only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140); *see also Mead*, 533 U.S. at 235 (granting a non-binding interpretation "respect proportional to its 'power to persuade'").

The Court's subsequent application of *Skidmore* continued to afford respect rather than true deference to an agency's non-binding interpretation. The Court consistently conducts its own statutory analysis to reject contrary guidance as unpersuasive. *Public.Resource.Org, Inc*., 140 S. Ct. at 1510 ("Because our precedents answer the question before us, we find any competing guidance … unpersuasive."); *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013) ("Insofar as the 2006 and 2009 documents approve of [a contrary interpretation], they lack persuasive force for the reasons discussed above."); *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (declining to follow agency interpretation because "for the reasons given and for further reasons set out below, we do not find the Attorney General's opinion persuasive"). Even where the Court agrees with agency guidance, it still first conducts its own statutory analysis and then consults the guidance for additional support. *See Kasten*, 563 U.S. at 14-15 (citing *Skidmore*, 313 U.S. at 140) ("Second, … we also give a degree of weight to [agencies'] views."); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17 (2004) ("We note finally that a 1999 Department of Labor advisory opinion accords with our comprehension.").

In short, this Court has never allowed non-binding agency guidance to obviate independent statutory analysis. But lower courts routinely misapply *Skidmore* in just that way. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1270-71 (2007) (concluding that appellate courts failed to exercise independent judgment in nearly three out of four *Skidmore* decisions).

B. *Chevron*'s Deference-Based Regime Spawned Confusion in *Skidmore*'s Application

Some appellate courts follow this Court's consistent practice of accepting only non-binding agency interpretations that persuade them. *See, e.g., Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 105-06 (2d Cir. 2019) (accepting persuasive guidance); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 n.9 (5th Cir. 2018) (rejecting unpersuasive guidance). But others do not require being persuaded and instead accept an agency's non-binding interpretation that is merely "consistent with earlier pronouncements," *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 265 (4th Cir. 2020), or is "reasonable," *Larson v. Saul*, 967 F.3d 914, 924 (9th Cir. 2020).

This confusion is largely due to *Skidmore* being revived in *Chevron*'s shadow, and as such, its respect-based standard was expressed in relation to *Chevron*'s deference-based regime. Justice Scalia's *Christensen* concurrence introduced the "so-called '*Skidmore*

deference'" as a new term in this Court's lexicon. 519 U.S at 589 (Scalia, J., concurring). The "so-called" modifier denoted that *Skidmore* is not a true deference standard because it does not allow judges to adopt agency interpretations that they find unpersuasive. Jurists and scholars nonetheless adopted the term because it fit comfortably within the then-dominant *Chevron* deference regime.

Justice Scalia warned that the concept of *Skidmore* deference "is incoherent, both linguistically and practically." *Kasten*, 563 U.S. at 24 n.6 (Scalia, J., dissenting). This is because "[t]o defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of 'Skidmore deference' to a persuasive agency position does nothing but confuse." *Id.* The First Circuit's discussion of *Skidmore* in *Doe v. Leavitt* illustrates this confusion. 552 F.3d 75, 80-81 (1st Cir. 2009). Because *Leavitt* started from the mistaken premise that *Skidmore* requires deference—*i.e.*, judicial subordination to agency judgment[3]—it reasoned that

[3] *Leavitt* supports its assertion that *Skidmore* requires deference by mischaracterizing this Court's *Christensen* decision "as requiring courts to *defer* to agency interpretations of statutes within the agency's ken 'to the extent that those interpretations have the power to persuade.'" 552 F.3d at 81 (emphasis added) (quoting *Christensen*, 529 U.S. at 587). But *Christensen* never required courts to *defer* to non-binding interpretations and instead its full quotation said such interpretations merely "are entitled to *respect* under our decision in *Skidmore* …, to the extent that those interpretations have the power to persuade." 529 U.S. at 587 (emphasis added) (quotation marks omitted).

Skidmore "must mean something more than that deference is due only when an inquiring court is itself persuaded that the agency got it right. Otherwise, *Skidmore* deference would not be deference at all." *Id.* This prioritization of deference—which *Skidmore* did not require—over the need for being persuaded is plainly inconsistent with this Court's repeated explanation that "persuasive force … is a necessary precondition to deference under *Skidmore*." *Nassar*, 570 U.S. at 361; *see also Gonzales*, 546 U.S. at 269 ("[U]nder *Skidmore*, we follow an agency's rule only to the extent it is persuasive.").

Nonetheless, many lower courts—including the Fourth Circuit below—continue to apply *Skidmore* as requiring "considerable deference" rather than respect. *See* Pet.App.15a-16a, 24a, 42a n.1. Under the Fourth Circuit's approach, courts "defer[] under *Skidmore* to a third[-party] agency's interpretation when that interpretation was 'consistent with earlier pronouncements' and its reasoning was 'thorough.'" *PDR Network*, 982 F.3d at 265 (quoting *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161 (4th Cir. 2016)). In *PDR Network*, even though "the district court disagreed with … the 2006 FCC Rule"—and thus was unpersuaded—the Fourth Circuit remanded with instructions to "examine the Rule's persuasiveness under *Skidmore* [and] the extent to which that persuasiveness requires deference." *Id.*

This Court and appellate courts that follow the independent judgment approach to *Skidmore* adopt an agency's interpretation only if they find it persuasive. *See Gonzales*, 546 U.S. at 269 (no

Skidmore deference because "we do not find the Attorney General's opinion persuasive"); *Silguero*, 907 F.3d at 327 n.9 ("Because we are unpersuaded by the DOJ's interpretation, we do not defer to it."). The concept of persuasiveness taken by courts that follow the "considerable deference" approach is quite different. They instead ask whether an agency's reasoning is "consistent" and "thorough," and thus *could* be persuasive to someone, even if the reviewing court "disagreed." *PDR Network*, 982 F.3d at 265. This concept is akin to *Chevron* Step Two, which requires judicial subordination to "a reasonable interpretation made by the administrator of an agency," even if the reviewing court disagrees. 467 U.S. at 844. Indeed, the Ninth Circuit explicitly uses *Chevron* terms to describe *Skidmore* as requiring "deference to reasonable agency construction of statutes." *Larson*, 967 F.3d at 924. Persistent divergence in how lower courts apply *Skidmore* calls out for clarification from this Court regarding whether that doctrine is rooted in, on one hand, respect and persuasion requiring independent judicial judgment, or, on the other, deference requiring judicial subordination to executive agencies.

C. This Case Is an Ideal Vehicle to Resolve *Skidmore* Confusion

The decision below creates a split between the Second and Fourth Circuits regarding the FLSA's overtime requirement at 29 U.S.C. § 207. *Compare Lundy*, 711 F.3d at 116, *with* Pet.App.14a-20a. Both circuits reviewed the same DOL interpretation of § 207 under *Skidmore* to draw opposite conclusions

regarding gap-time claims because they used irreconcilable approaches. Whereas the Second Circuit analyzed statutory text and exercised independent judgment to assess DOL's persuasiveness, the Fourth Circuit ignored text and granted "considerable deference" to DOL based on the interpretation's longevity and remedial purpose. This stark divergence presents an ideal opportunity for this Court to weigh in and clarify whether the independent judgment or "considerable deference" approach to *Skidmore* is correct.

The first point of departure between *Lundy* and the decision below is their treatment of statutory text. In *Lundy*, a Second Circuit panel that included Justice O'Connor concluded that "the text of FLSA requires only payment of minimum wages and overtime wages. It simply does not consider or afford a recovery for gap-time hours." 711 F.3d at 116 (citing 29 U.S.C. §§ 201-19). Only *after* drawing this conclusion did the *Lundy* panel turn to consider DOL's contrary gap-time interpretation at 29 C.F.R. § 778.315.

The appellate court below also recognized that "[t]he FLSA does not include language about overtime gap time." Pet.App.14a. But it refused to draw its own legal conclusion based on the absent text. Despite acknowledging that DOL's gap-time interpretation is untethered to statutory text, the court below granted "considerable deference" to it. Pet.App.15a-16a.

The Second and Fourth Circuits employed irreconcilably different standards to review DOL's

gap-time interpretation at 29 C.F.R § 778.315. *Lundy* explained such interpretation "is owed deference only to the extent it is persuasive" and therefore evaluated persuasiveness as a precondition for deference. 711 F.3d at 116. The court was unpersuaded because DOL "provides no statutory support or reasoned explanation for [its] interpretation." *Id.* at 117.

In contrast, the Fourth Circuit below did not even pay lip service to persuasiveness before granting "considerable deference" to DOL. Although it "respectfully disagree[d] with the Second Circuit's" conclusion that "DOL 'provide[d] no statutory support or reasoned explanation' for § 778.315," Pet.App.24a, the court below identified no statutory support or reasoned explanation provided by DOL. Instead, it simply adopted DOL's interpretation for two reasons that could not have persuaded an independent court.

The first is that DOL's interpretation "has remained unchanged for the past fifty-three years." Pet.App.16a-17a. But "the mere fact that the Rule is of long standing does not relieve [courts] of [their] responsibility to determine its validity." *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 (2d Cir. 1979). In *SEC v. Sloan*, for instance, this Court held that "the construction placed on the statute by the Commission, though of long standing, … [was] inconsistent with the statutory mandate." 436 U.S. 103, 118 (1978). "The first and most salient point leading [the Court] to this conclusion is the language of the statute." *Id.* at 111. Longevity is thus not a basis for an independent court to adopt an agency's interpretation in the absence of textual support.

The Fourth Circuit's second reason for following DOL's interpretation is that it "reflects the policy objective of the FLSA" as a "'remedial statute' to 'provide for the general well-being of workers.'" Pet.App.17a-19a (quoting *Monahan*, 95 F.3d at 1267). But this Court recently explained that "it is quite mistaken to assume that whatever might appear to further the statute's primary objective must be the law." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (cleaned up). As such, a court may not rely on the FLSA's "remedial purpose" to interpret its provisions because what the Act leaves unregulated is "as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Rather, courts must construe the FLSA based on "a fair reading" of its text. *Id.* Consistency with the FLSA's remedial purpose thus is not a basis for an independent court to adopt an agency's interpretation in the absence of textual support.

The court below tellingly never explicitly claimed that longevity or remedial purpose *persuaded* it that gap-time claims are cognizable under the FLSA. Nor did it characterize the standard of review as one of respect. It instead granted "considerable deference" to DOL without any mention—or finding—of persuasiveness.[4] This is perhaps unsurprising because the court's "considerable deference" standard comes from *Monahan*, 95 F.3d at 1272 n.10, cited at

[4] Other than summarizing *Lundy* as finding DOL's position "unpersuasive," Pet.App.24a, the decision below did not even contain the word "persuasive" or any variation thereof. *Id.* at 1a-34a. Nor did it contain the word "respect," which is *Skidmore*'s standard of review. *Id.*

Pet.App.15a-16a, which predates this Court's clarification in *Christensen*, 529 U.S. at 140, that non-binding interpretations "are 'entitled to respect' under [*Skidmore* rather than deference] … but only to the extent those interpretations have the 'power to persuade.'"

The *Skidmore* standard as applied in *Lundy* did not obviate analysis of the statutory text, and it required the court to independently assess the persuasiveness of an agency's interpretation. In contrast, the Fourth Circuit's *Skidmore* standard ignored statutory text and granted "considerable deference" rather than respect to an agency's interpretation based on factors that, as a matter of law, could not have persuaded an independent court in the absence of textual support. This stark contrast in interpretive approaches presents an ideal opportunity for this Court to clarify whether *Skidmore* is ultimately rooted in respect or deference.

D. The Need for Clarifying *Skidmore* Is More Pressing Given *Chevron*'s Decline

Although the Court has yet to formally abandon judicial deference to agency interpretations of statutes, its actions and statements signal that its commitment to *Chevron* is waning. Over the past decade, numerous Justices have called *Chevron* into question. Chief Justice Roberts's dissent in *City of Arlington v. FCC* questioned *Chevron*'s compatibility with the Constitution's separation-of-powers principles. 569 U.S. 290, 312-36 (2013) (Roberts, C.J.,

dissenting). Justice Kennedy described as "troubling" the "reflexive deference" exhibited by lower courts and their apparent "abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Before joining the Court, Justice Gorsuch described *Chevron* as "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). Justice Thomas agreed that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction" and thereby "undermines the ability of the Judiciary to perform its checking function on the other branches." *Baldwin*, 140 S. Ct. at 691-92 (Thomas, J., dissenting from the denial of certiorari).

In recent cases in which an administrative agency's interpretation of a federal statute was at issue, the Court applied traditional tools of statutory construction to reject the agency's interpretation without citing *Chevron*. *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *see also West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022) (failing to cite or discuss *Chevron*). Indeed, the Court has not invoked *Chevron* to uphold an agency's interpretation of a federal statute in over six years. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016).

As *Chevron* recedes, lower courts will invariably turn to *Skidmore* to fill the vacuum,

making the need to clarify that standard more urgent. This Court's retreat from *Chevron* will matter little if continued confusion leads lower courts to rely on *Skidmore* as a new justification to abdicate their judicial duty to interpret the law.

II. THE LOWER COURT'S APPLICATION OF *SKIDMORE* CREATES THE SAME CONSTITUTIONAL PROBLEMS AS *CHEVRON*

When *Skidmore* is afforded the modest scope the Court has traditionally assigned to it, it presents few constitutional difficulties. Under the independent judgment approach, courts may "follow [an agency's statutory interpretation] only to the extent it has the 'power to persuade.'" *Public.Resource.Org., Inc.*, 140 S. Ct. at 1510 (quoting *Skidmore*, 323 U.S. at 140). Nothing in the Constitution prohibits a court from adopting an agency's most persuasive statutory interpretation.

But as explained above, the Fourth Circuit adopted a far more deferential view of *Skidmore*. The appeals court gave lip service to examining "the validity of [DOL's] reasoning" in construing 29 U.S.C. § 207, Pet.App.16a, but it then concluded that it should defer to DOL's statutory construction without undertaking the most basic test of validity: whether DOL's regulation is consistent with the language of § 207. The court instead determined that *Skidmore* "deference" was warranted based solely on the longevity of DOL's regulation (adopted in 1968) and its consistency with "the policy objective of the FLSA overtime provision" of ensuring that "employers do

not mitigate or skirt the financial pressures of working their employees above the forty-hour threshold." *Id.* at 16a-17a. In other words, the Fourth Circuit authorizes a district judge to invoke *Skidmore* to uphold an agency's statutory construction even when the judge concludes that such construction is not the best reading of the statute. This atextual approach to statutory construction is constitutionally problematic and warrants the Court's review because it undermines the judiciary's role as the ultimate arbiter of the law.

A. Agency Deference Violates Article III by Requiring Judges to Abandon Their Duty of Independent Judgment

Chief Justice John Marshall famously stated that it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury*, 5 U.S. (1 Cranch.) at 177. But judges who apply the "considerable deference" form of *Skidmore* mandated by the Fourth Circuit are abandoning that duty by issuing judgments that assign controlling weight to a non-judicial entity's interpretation of a statute—even when they disagree with that interpretation.

To be clear, there is nothing wrong or constitutionally problematic when a court considers an agency's interpretation and gives it weight according to its persuasiveness. But assigning weight to the persuasiveness of an administrative agency's arguments is not the same as permitting agency determinations to override the judge's own view of the

law. As the Wisconsin Supreme Court explained, in rejecting an agency's assertion that its interpretation of a state statute was entitled to judicial deference, due weight "is a matter of persuasion, not deference" and "means giving 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (citations omitted).

The Fourth Circuit went far beyond a consideration of whether DOL's guidance document has "the power to persuade." *Skidmore*, 323 U.S. at 140. It expressly granted the guidance "considerable deference," Pet.App.15a, and thereafter upheld DOL's non-binding statutory construction without comparing it to the statutory language. Several state supreme courts have concluded that such abdication of the judicial power violates separation-of-powers provisions in their state constitutions. *Tetra Tech*, 914 N.W.2d at 48 ("Ceding judicial power to an administrative agency is, from a separation of powers perspective, unacceptably problematic."); *King v. Miss. Mil. Dep't*, 245 So.3d 404, 408 (Miss. 2018) ("[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

Until well into the twentieth century, this Court recognized its Article III duty to decide cases even when the Executive Branch disagrees with the Court's statutory interpretation. In *United States v.*

Dickson, 40 U.S. 141, 161 (1841), the Court declined to defer to a longstanding Treasury Department interpretation of a federal statute, reasoning that when the interpretation "is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a Court of justice." *Id.* at 161. Writing for the Court, Justice Story explained:

> [I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.

Id. at 162.

B. Agency Deference Denies Due Process of Law by Requiring Judges to Bias Their Decisions in Favor of One Party

A serious problem with agency deference is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by deferring to a non-judicial entity's

interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual litigant before the court denies due process of law.

DOL is not, of course, a party to this lawsuit. But unless this Court intervenes and reverses the decision below, district courts within the Fourth Circuit will be bound to enforce DOL's interpretation in future cases, even in cases in which DOL *is* a party.

This Court has held that even the appearance of potential bias toward a litigant violates the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by … bias").

Federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [them]," and they take great pride in meeting these commitments. 28 U.S.C. § 453. Nonetheless, agency-deference doctrines compel scrupulous judges who are sworn to administer justice impartially to remove the judicial blindfold and tip the scales in favor of the government's position.

Granting "considerable deference" to agency litigants whenever a disputed question of statutory interpretation arises institutionalizes a regime of systematic judicial bias. The *Tetra Tech* court recognized Wisconsin's agency-deference doctrine "deprive[d] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to an "administrative agency [that] has an obvious interest in the outcome of a case to which it is a party." 914 N.W.2d at 50. It thus concluded that "deference threatens the most elemental aspect of a fair trial"—a fair and impartial decisionmaker. *Id.* The court rejected deference to "join with the ancients in recognizing that no one can be impartial in his own case." *Id.*

Some might defend deference on the ground that other canons of construction purport to stack the deck in favor of a litigant appearing in court against the government—*e.g.*, the pro-veteran canon, the rule of lenity, or the Indian canon. But in each of those instances, the opposing litigant is simply asking the court to resolve an ambiguous statute against the party that drafted it. By resolving ambiguities against government drafters, these canons of construction encourage clear and precise drafting of veterans-benefits statutes, criminal laws, and treaties/statutes affecting Indian tribes. They therefore cannot explain or excuse a practice that weights the scales in favor of a government litigant—the most powerful of all parties to appear before a court—and that commands systematic bias in favor of the government's preferred interpretations of federal statutes.

C. The Fourth Circuit's 'Considerable Deference' Approach to *Skidmore* Weighs in the Government's Favor More than *Chevron* Deference

The Court has long understood that *Skidmore* affords to an agency's statutory interpretation less weight than when the agency is entitled to deference under *Chevron*. *See, e.g., Mead*, 533 U.S. at 234-35. Yet the Fourth Circuit's "considerable deference" approach to *Skidmore* is even more encompassing than *Chevron* deference—and thus more constitutionally problematic.

Most importantly, *Chevron* Step One cabins the scope of *Chevron* deference considerably. At Step One, "a court must exhaust all the 'traditional tools' of construction" first. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9). It thereby ascertains whether "Congress had an intention on the precise question at issue," *Chevron*. 467 U.S. at 843 n.9. If so, "that intention is the law and must be given effect," and any agency interpretation inconsistent with that law must be ignored. *Id.* By ruling that courts may bypass an analysis of the statutory language when determining whether to grant "considerable deference" under *Skidmore* to an agency's non-binding interpretation, the Fourth Circuit has eliminated this important constraint found in *Chevron* and *Kisor*.

Moreover, the Court has recognized that, before applying *Chevron*'s two-step framework, a court must make an independent inquiry into whether the character and context of the agency interpretation is

such that it merits consideration under *Chevron*. *Mead* establishes that deference to an agency is appropriate only when "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," 533 U.S. at 226-27, and supplies a nonexclusive list of factors for resolving this foundational, "*Chevron* Step Zero" question, *id.* at 230-32. The Fourth Circuit does away with Step Zero and instead directs courts to jump right into the *Skidmore* deference analysis, beginning with the assignment of "considerable deference" to "the body of experience and informed judgment of [DOL]." Pet.App.16a. In doing so, the decision below eliminates congressional delegation as a precondition for agency deference.

As discussed above, several justices have questioned whether *Chevron* deference is consistent with the obligation of Article III judges to say what the law is. *See, e.g., Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). Review is warranted because the Fourth Circuit's decision, by applying *Skidmore* in a manner that eliminates many of the constraints imposed on *Chevron* deference, has created a deference doctrine that is even more constitutionally problematic than *Chevron* itself.

CONCLUSION

The Court should therefore grant the petition for certiorari.

Respectfully submitted,

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