No. 16-739

In the Supreme Court of the United States

SCENIC AMERICA, INC., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether guidance issued by the Federal Highway Administration, which concerns standards the agency's division offices should consider in determining whether digital billboards comply with federal-state agreements, amended rather than interpreted those agreements and so violated the Highway Beautification Act's requirement that the agreements be consistent with "customary use," 23 U.S.C. 131(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 836 F.3d 42. The district court's decision granting summary judgment to respondents (Pet. App. 34-70) is reported at 49 F. Supp. 3d 53. The district court's earlier decision denying respondents' motions to dismiss (C.A. App. 56-79) is reported at 983 F. Supp. 2d 170.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2016. The petition for a writ of certiorari was filed on December 5, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Highway Beautification Act of 1965 (HBA or Act), Pub. L. No. 89-285, § 101, 79 Stat. 1028

(23 U.S.C. 131), was enacted to "protect the public investment in [federally funded] highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The Act is administered by the Federal Highway Administration (FHWA), the operating administration within the U.S. Department of Transportation that is also responsible for administering federal grant-in-aid highway funding to States. See 49 U.S.C. 104; 49 C.F.R. 1.85.

The HBA specifies that federal highway funding apportioned to a State may be reduced by ten percent if the State does not maintain "effective control of the erection and maintenance * * * of outdoor advertising signs, displays, and devices" in areas adjacent to federal interstate and primary highways. 23 U.S.C. 131(b). To maintain such "effective control," a State must, among other things, enter into an agreement with FHWA, known as a federal-state agreement (FSA), that establishes standards for the "size, lighting and spacing" of off-premise signs adjoining federal interstate and primary highways in the State. 23 U.S.C. 131(d); 23 C.F.R. 750.705(b). Those standards must be "consistent with customary use," as "determined by agreement between the several States and the Secretary" of Transportation. 23 U.S.C. 131(d). Each State must also devise laws, regulations, and procedures that will implement its FSA. See 23 C.F.R. 750.705(h) and (i). The State then submits those proposed laws, regulations, and procedures, including any subsequent revisions, to FHWA for review and approval. 23 C.F.R. 750.705(j).

Within FHWA, the primary responsibility for reviewing State proposals rests with the agency's 52

Division Offices. Those Division Offices review the State's proposals and determine whether they are consistent with the Act and the State's FSA. See, *e.g.*, C.A. App. 424. If the Division Office does not concur in the proposal, the State may nonetheless implement it. If the State does so, however, it may be required to forfeit ten percent of its federal highway funding on the ground that it did not maintain "effective control" under the Act. See 23 U.S.C. 131(b) and (*l*).

During the 1960s and 1970s, all 50 States, the District of Columbia, and Puerto Rico entered into FSAs with the Secretary of Transportation. See Pet. App. 3-4. Each of those FSAs remains in effect today, generally in the same form as originally executed. Although the FSAs were individually negotiated, many of the agreements contain similar terms. As relevant here, most FSAs contain, in some form, a prohibition against signs that contain "flashing," "intermittent," or "moving" lights. *Ibid.*; see *id.* at 36-38; see also, *e.g.*, C.A. App. 134 (North Carolina FSA).

b. In the decades since the FSAs were implemented, the outdoor-advertising industry has undergone significant technological change, including through the introduction of various kinds of electronic signs. See Pet. App. 37. One kind of electronic sign, known as a "digital billboard," is a screen composed of thousands of light-emitting diodes (LEDs) that may be selectively illuminated to create a desired image. *Ibid.* Digital billboards typically "display a static advertisement that remains on the screen for a specified period of time before quickly transitioning to a different static advertisement." *Id.* at 5.

In response to this technological change, many States developed regulations and procedures to per-

mit the erection of digital billboards. Pet. App. 37. Most of those States submitted such proposals to modify their regulations to FHWA Division Offices for review and approval. See, *e.g.*, C.A. App. 422-423. Other States interpreted FHWA's existing guidance as already conveying the agency's approval of digital billboards, provided that the States' proposals were otherwise consistent with the FSAs and state law. See, *e.g.*, *id.* at 501, 531-532.

Prior to 2007, almost all FHWA Division Offices that considered the question concluded that digital billboards were consistent with their States' FSAs, including with language prohibiting "flashing," "intermittent," or "moving" lights, so long as the billboards were subject to appropriate restrictions. See C.A. App. 531-532 (noting that Division Offices had approved proposals to permit digital billboards in 22 States). However, "[t]he Division Office[s] for at least two states, Texas and Kentucky, did not permit digital billboards" because they interpreted the prohibitions against "flashing," "intermittent," or "moving" lights in their States' FSAs as categorically forbidding such billboards. Pet. App. 6.

Given those diverging interpretations, FHWA headquarters staff received requests for guidance about whether, and to what extent, digital billboards were permissible under existing laws and agreements. See Pet. App. 39. FHWA then conducted an internal review of the practices of the Division Offices, and also considered various other materials concerning digital billboards, including comments submitted by the public. *Ibid.*

In September 2007, FHWA issued an internal memorandum (Guidance) to "provide guidance to

Division offices concerning off-premise changeable message signs," including digital billboards. Pet. App. 78; see *id.* at 78-85 (full text of Guidance). The Guidance "confirm[ed] and expand[ed] on the principles set forth" in a 1996 FHWA memorandum, which had advised that new technologies were permissible to the extent that FSAs and state law were interpreted to allow them. *Id.* at 81. The Guidance explained that "[p]roposed [state] laws * * * that would allow" digital billboards do not categorically "violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs," so long as the Division Offices conclude that the States' proposals conform to "acceptable criteria" for such billboards. *Id.* at 79; see also *id.* at 81 (advising that digital billboards "are acceptable * * * if found to be consistent with the FSA and with acceptable and approved State regulations, policies and procedures").

The 2007 Guidance stated that "in reviewing State-proposed regulations" concerning digital billboards, "Divisions should consider all relevant information, including but not limited to duration o[f] message, transition time, brightness, spacing, and location, to ensure that" state proposals "are consistent with their FSA and that there are adequate standards to address safety for the motoring public." Pet. App. 82. The Guidance "identified certain ranges of acceptability that have been adopted in those States that do allow [digital billboards] that will be useful [to FHWA Division Offices] in reviewing State proposals on this topic." *Id.* at 83. For example, the Guidance observed that the "[d]uration of each display [of an advertisement] is generally between 4 and 10 seconds—8 seconds is recommended." *Ibid.* The Guidance also not-

ed "[o]ther standards that States have found helpful to ensure driver safety," including "requirements that a display contain static messages without movement such as animation, flashing, scrolling, intermittent or full-motion video." *Id.* at 84.

FHWA emphasized that the Guidance was "provid[ing] information to assist the Divisions in evaluating proposals" and was "not intended to amend applicable legal requirements." Pet. App. 84. It further affirmed that "Divisions are not required to concur with State proposed regulations * * * if the Division review determines, based upon all relevant information, that the proposed regulations * * * are not consistent with the FSA or do not include adequate standards to address the safety of the motoring public." *Id.* at 82.

2. Petitioner Scenic America, Inc., is a membership advocacy organization that "seeks to preserve and improve the visual character of America's communities and countryside." Pet. App. 2 (citation omitted). In 2013, petitioner sued the Department of Transportation, FHWA, and several federal officials seeking to set aside the 2007 Guidance. Petitioner principally claimed that the Guidance constituted a legislative rule that should have been promulgated through notice-and-comment rulemaking. Petitioner also claimed that the Guidance violated existing FSAs by "chang[ing] the FSA lighting standards to such an extent that those standards are no longer 'consistent with customary use.'" *Id.* at 28.[1] The Outdoor Advertising Association of America intervened as a defendant. *Id.* at 7.

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[1] Petitioner also alleged a procedural violation of the HBA, but it abandoned that claim on appeal. See Pet. App. 7 n.1.

a. The federal defendants and intervenor (collectively respondents here) each moved to dismiss the complaint for lack of standing and lack of final agency action. The district court observed that "both arguments present difficult and close questions," but ultimately denied the motion. 983 F. Supp. 2d at 173.

b. The parties filed cross-motions for summary judgment, and the district court entered judgment for respondents on all claims. Pet. App. 34-70.

The district court held that the Guidance was an interpretive, not legislative, rule and thus notice-and-comment rulemaking was not required for its issuance. Pet. App. 43-67. The court rejected petitioner's argument "that the Guidance is substantive because the language [in the FSAs] it professed to interpret [prohibiting 'flashing,' 'intermittent,' or 'moving' lights] did not in fact permit digital billboards." *Id.* at 49. The court noted circuit precedent holding that an interpretation that "runs 180 degrees counter to the plain meaning of the" language being interpreted may qualify as a legislative rule if it "constructively amend[s]" a regulation. *Id.* at 50 (quoting *National Family Planning & Reprod. Health Ass'n* v. *Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)). But the court concluded that it "need not trace the etymology of each word in the FSA lighting provisions to conclude that the Guidance does not contradict them." *Ibid.* As the court observed, digital billboards "could be understood neither to 'flash,' since the LEDs' brightness is limited and they must remain stationary for at least four seconds at a time, nor 'move,' since the images are static." *Id.* at 51. Similarly, the court concluded that the Guidance did not contradict the prohibition against "intermittent" lights "because the LEDs are

required to remain steady for several seconds at a time." *Ibid.*

The district court also rejected petitioner's argument that the Guidance "unlawfully establishes lighting standards for billboards that are inconsistent with 'customary use.'" Pet. App. 69. The court observed that "[t]he 'customary use' requirement" in the HBA "refers to the content of the FSAs, including their lighting standards." *Ibid.* (quoting 23 U.S.C. 131(d)). Thus, as petitioner had acknowledged in its summary-judgment briefing, "all FSA lighting provisions were established 'consistent with customary use.'" *Ibid.* (citation omitted). The court explained that petitioner's customary-use argument accordingly "depends on the premise * * * that the Guidance does something other than interpret the FSAs." *Id.* at 70. But the court had already "conclud[ed] that the document is an interpretative rule that construes, rather than contradicts, the existing FSA lighting standards." *Id.* at 67. Because the Guidance "merely interprets" existing FSAs, rather than amending them, the court held that "it is inescapable that the [Guidance] is similarly consistent with customary use." *Id.* at 70.

3. On appeal, the court of appeals rejected petitioner's claims, concluding that petitioner lacked standing to pursue its notice-and-comment claim and that its customary-use claim failed on the merits. Pet. App. 1-31.

a. The court of appeals first held that the district court lacked jurisdiction to consider petitioner's claim that the Guidance should have been issued through notice-and-comment rulemaking. Pet. App. 8-23. The court concluded that petitioner had failed to tender

any evidence demonstrating that vacatur of the Guidance would "eliminate or lessen the construction of digital billboards." *Id.* at 19. The court explained that even "absent the 2007 Guidance, states [would] remain free to pursue digital billboard construction, and Division Offices [would] remain free to permit such construction." *Id.* at 21. Because petitioner's alleged injuries stemmed from the decisions made by "third parties not directly before the court," rather than "from the FHWA's issuance of the 2007 Guidance," the court concluded that petitioner had failed to satisfy the "redressability prong of Article III standing" with respect to its notice-and-comment claim. *Id.* at 13.

b. The court of appeals also rejected petitioner's customary-use claim. Pet. App. 23-31. The court concluded that petitioner had established its standing to press that claim—"although barely"—because a ruling that the 2007 Guidance violated the statutory customary-use requirement would "effectively repudiat[e] the FHWA's interpretation of the FSAs." *Id.* at 23, 26. The court found that such a ruling would provide redress to petitioner's members by "requir[ing] the agency to subject extant billboards to either removal or an order requiring those billboards to operate in a manner that does not violate the FSAs." *Id.* at 26.

The court of appeals further concluded that the Guidance constituted "final agency action" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 26-28. The court asserted that the Guidance "marks the consummation of the FHWA's decision-making process," *id.* at 27, and that it gives rise to "legal consequences" insofar as the

court understood it to "create[] a safe harbor such that Division Offices and states may not deny a digital billboard permit for violating the FSA lighting standards where that billboard meets the timing and other requirements set forth in the Guidance," *id.* at 27-28.

Having concluded that petitioner's customary-use claim was reviewable, the court of appeals rejected that claim on the merits. Pet. App. 28-31. The court observed that "customary use" under the HBA is "determined by agreement between the several States and the Secretary [of Transportation]." *Id.* at 28 (quoting 23 U.S.C. 131(d)). The court further noted the parties' agreement that "all [existing] FSA lighting provisions were established consistent with customary use." *Id.* at 29-30 (citation omitted). "Thus, so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards," the court explained that the FHWA's "interpretation must itself be 'consistent with customary use.'" *Id.* at 30. Although petitioner had "contend[ed] that the FHWA, in issuing the Guidance, changed the FSA lighting standards to such an extent that those standards are no longer 'consistent with customary use,'" *id.* at 28, the court concluded that "the FHWA's interpretation of the FSA lighting provision was reasonable," *id.* at 30-31. The court therefore affirmed the district court's conclusion that the 2007 Guidance "'construes, rather than contradicts' the FSAs" and therefore "cannot be 'contrary to customary use.'" *Ibid.* (citation omitted).

ARGUMENT

The court of appeals' decision rejecting petitioner's customary-use argument is correct and does not conflict with any decision of this Court or of any other

court of appeals.[2] Although petitioner asks this Court to decide whether FHWA's interpretation of the FSAs is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), and, if so, whether the court of appeals' decision "conflicts with *Chevron*," Pet. 2, those questions are not presented in this case. Petitioner's argument does not require the interpretation of any statute and, as petitioner itself acknowledges (Pet. 4), the court of appeals "did not * * * apply the *Chevron* analysis." Moreover, threshold justiciability problems would preclude this Court's review of the merits in any event. Further review is not warranted.

1. The court of appeals correctly rejected petitioner's argument that "the FHWA, in issuing the Guidance, changed the FSA lighting standards to such an extent that those standards are no longer 'consistent with customary use'" within the meaning of 23 U.S.C. 131(d). Pet. App. 28.

a. Section 131(d) provides that standards for the "size, lighting and spacing" of billboards adjoining federal interstate and primary highways must be "consistent with customary use," as "determined by agreement between the several States and the Secretary" of Transportation. 23 U.S.C. 131(d). Because the statute defines "customary use" by reference to the content of the FSAs, petitioner acknowledged in the lower courts "that all FSA lighting provisions were established consistent with customary use." Pet. App. 29-30 (citation omitted); see *id.* at 69; see also Pet. C.A. Br. 36 (stating that "customary use" is

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[2] Petitioner does not seek further review of its notice-and-comment claim, which the court of appeals held must be dismissed for lack of standing. See Pet. App. 13-23.

equivalent to "the permissions and prohibitions contained in [existing] FSAs as set forth therein"). Petitioner argued that the Guidance contravened the statute because, in petitioner's view, the Guidance ran "180 degrees counter" to the meaning of the lighting standards and so amounted to a constructive amendment of those standards. Pet. C.A. Br. 25 (citation omitted); see *id.* at 29; Pet. Reply in Supp. of Mot. for Summ. J. 24 (arguing that "[t]he 2007 Guidance does not interpret th[e] [FSA lighting] provisions, but rather adds an exemption to them").[3]

The court of appeals rejected that argument. As the court explained, "so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, th[e] lighting standards [in the FSAs], that interpretation must itself be 'consistent with customary use.'" Pet. App. 30. The court then reasoned that "[a]lthough it might be possible to read the FSA lighting standards to prohibit digital billboards, those standards do not foreclose other interpretations." *Ibid.* The court ultimately concluded that "the FHWA's interpretation of the FSA lighting provisions," *id.* at 30—which contemplates that digital billboards may not violate the FSAs if "subject to acceptable criteria," *id.* at 79—is "reasonable" and

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[3] Petitioner pressed the argument that the Guidance constructively amended the lighting standards as part of its principal claim that the Guidance was a legislative rule that should have been issued pursuant to notice-and comment rulemaking. See, *e.g.*, Pet. C.A. Br. 25, 29. The lower courts understood petitioner's secondary customary-use argument likewise to "depend[] on the premise * * * that the Guidance does something other than interpret the FSAs." Pet. App. 70; see *id.* at 24, 28.

therefore reflected an interpretation of, not an amendment to, the FSAs. *Id.* at 30-31.

That conclusion was correct. The relevant FSA provisions prohibit "flashing," "intermittent," or "moving" lights, but do not define any of those terms. Those terms also do not bear any inherent technical meaning, but instead are necessarily subject to further clarification and reasonable line drawing. As the district court explained, it is permissible to conclude that a digital billboard does not "flash" if its "brightness is limited" and its light "remain[s] stationary"; that it is not "intermittent" if its light "remain[s] steady" for a sufficiently long period of time; and that it does not "move" if its "images are static." Pet. App. 50-51. That reasoning is particularly sound when considered from the perspective of a passing motorist, for whom the visual effect of a digital billboard displaying a static message substantially resembles that of a traditional sign. The Guidance thus reflects the agency's assessment that the FSAs' lighting standards should be interpreted in a pragmatic manner and in light of their purpose of "ensur[ing] the safety of the motoring public." *Id.* at 83. It is reasonable to conclude that a digital billboard that is limited to displaying "stationary messages for a reasonably fixed time" would not constitute the type of distraction that FSA lighting provisions were created to prohibit. *Id.* at 81. And the "FSAs, obviously, do not expressly forbid digital billboards," nor do they "prohibit *all* lights." *Id.* at 50. "Because the FHWA's interpretation of the FSA lighting provision was reasonable," the court of appeals correctly concluded that "the interpretation cannot be 'contrary to customary use.'" *Id.* at 30-31.

b. Petitioner's arguments to the contrary (Pet. 11-20) lack merit.

Petitioner contends (Pet. 12) that the court of appeals erred "[i]n stating that it would * * * apply *Chevron* to the FHWA's interpretation of the lighting prohibition in the FSAs." That argument misconceives the basis of the court's decision. The court did not purport to apply *Chevron* deference. Indeed, *Chevron* is a doctrine of statutory (not regulatory or contractual) interpretation, and here, the court understood the parties to agree on the meaning of the statute and to dispute only whether the Guidance interpreted, as opposed to amended, the FSAs. See Pet. App. 29-30. As petitioner observes (Pet. 11-12), the court cited its prior decisions in *Cajun Electric Power Cooperative, Inc.* v. *FERC*, 924 F.2d 1132 (D.C. Cir. 1991), and *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), which held that the Federal Energy Regulatory Commission's interpretation of a settlement agreement was "entitled to deference similar to that owed under *Chevron* where the settlement agreement had to be approved by the agency." Pet. App. 29. Contrary to petitioner's assumption, the court's passing reference to those cases does not mean that the court concluded that *Chevron* should govern here. Indeed, as petitioner acknowledges (Pet. 4), the court "did not actually apply the *Chevron* analysis." Petitioner therefore errs in stating (Pet. 9) that "[t]his case presents a unique opportunity for the Court to consider the application of *Chevron*."[4]

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[4] In its first question presented, petitioner asks this Court to decide "[w]hether treatment under *Chevron* * * * is owed" to the FHWA's interpretation of FSAs or instead "whether deference, if

Petitioner is also wrong to fault the court of appeals (Pet. 19) for "agree[ing] with the District Court's conclusion that the FHWA's interpretation of the FSA lighting standards is not one that runs 180 degrees counter to the plain meaning of the FSAs." Pet. App. 30 (citation and internal quotation marks omitted). The court of appeals made that observation in response to petitioner's assertion that the Guidance amended rather than construed the FSAs, and thereby "changed the FSA lighting standards to such an extent that those standards are no longer 'consistent with customary use.'" *Id.* at 28. To support that argument, petitioner urged the lower courts to conclude that the Guidance ran "180 degrees counter" to the language of the FSAs. *E.g.*, Pet. C.A. Br. 25; see p. 12 & note 3, *supra*; see also, *e.g.*, Pet. App. 24 (noting counsel's representations at appellate argument that "to the extent [petitioner] brought anything resembling an arbitrary-and-capricious challenge it did it through the 'back-door' of its notice-and-comment claim, specifically highlighting its argument that * * * the Guidance is a legislative rule because it is 180 degrees counter to the FSA text it alleged to be interpreting"). Petitioner cannot now assert that the court of appeals erred in reciting the formulation petitioner agreed was appropriate to determine whether FHWA had constructively amended—rather

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any, is owed under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)." Pet. i. That question is not properly presented here because the court of appeals did not address principles of *Chevron* and *Skidmore* deference and did not undertake to interpret the meaning of any statute. See *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (expressing reluctance to decide questions "without the benefit of thorough lower court opinions to guide * * * analysis of the merits" of those questions).

than merely interpreted—the FSAs. See, *e.g.*, *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment) (disapproving of "sandbagging" where a litigant "suggest[s] * * * that the trial court pursue a certain course, and later—if the outcome is unfavorable—claim[s] that the course followed was reversible error"); cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.").

Petitioner fares no better with its contention (Pet. 17) that the Guidance does not constitute a reasonable interpretation of the FSAs. Petitioner asserts (*ibid.*) that "the 2007 Guidance contradicts the FHWA's previous guidance memoranda which prohibited digital billboards," but the district court correctly explained that the Guidance was in fact "consistent with the most recent [prior] authoritative statement from the agency on the issue" because the 1996 guidance memorandum had specifically "permit[ted] changeable message signs 'regardless of the type of technology used,' so long as those signs are consistent with the applicable FSAs." Pet. App. 63, 67 (citation omitted). Petitioner is also mistaken to suggest (Pet. 17) that the FSAs' prohibition against "flashing" or "intermittent" lights unequivocally bars digital billboards. As the court of appeals recognized, "[a]lthough it might be possible to read the FSA lighting standards to prohibit digital billboards, those standards do not foreclose other interpretations." Pet. App. 30; see *id.* at 50-51 (explaining how digital billboards can be

understood to comply with the FSAs' restrictions). And petitioner is also wrong to assert (Pet. 19) that the court "did not consider whether the FHWA's interpretation of the FSAs' lighting prohibition was 'reasonable' or 'permissible.'" To the contrary, the court recognized that the customary-use claim as framed by petitioner required an inquiry into whether FHWA had "interpreted in a reasonable fashion, rather than amended, th[e] lighting standards," and the court specifically held that "FHWA's interpretation of the FSA lighting provision was reasonable." Pet. App. 30-31. Petitioner's factbound disagreement with that conclusion does not warrant this Court's review.

2. This case does not satisfy the Court's traditional criteria for granting a writ of certiorari. Petitioner does not identify any conflict with a decision of another federal court of appeals or state court of last resort. Petitioner also does not contend that the legal standard governing the interpretation of FSAs under the HBA constitutes an important question of federal law requiring this Court's immediate attention. And petitioner's suggestion (Pet. 18) that certiorari is warranted because the court of appeals' decision "conflicts" with this Court's decision in *Chevron* is misplaced because, as explained above, the court of appeals did not purport to apply *Chevron* and petitioner's claim does not require the interpretation of any statute.

Threshold justiciability problems further make this case a poor candidate for this Court's review. First, petitioner lacks standing to press its claims. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) (court must resolve issues of Article III standing before it may adjudicate the merits of a plaintiff's claims). The court of appeals concluded that petitioner

had established standing based on an injury to one of its members, Pet. App. 25, but each of the members identified by petitioner resided in a State that already permitted digital billboards even before the Guidance was issued—meaning that the Guidance necessarily could not have caused the introduction of digital billboards into the members' communities.

Petitioner likewise cannot show that the relief it requested—vacatur of the Guidance—would redress its alleged injuries. Even in the absence of the Guidance, States could continue to propose allowing digital billboards, and FHWA Division Offices could continue to approve those proposals. See Pet. App. 15 (finding that "[petitioner] has introduced no evidence into the record * * * establishing that if [the court] were to vacate the Guidance, any Division Office would respond by preventing the state it oversees from erecting digital billboards," nor that "states would successfully erect, or even seek to erect, fewer billboards"). And petitioner has not shown that, if the Guidance were vacated, FHWA would rescind its approval of digital billboards that had already been installed, or that States would require such billboards to be dismantled.

Second, the challenged Guidance is not reviewable because it does not constitute "final agency action" within the meaning of the APA, 5 U.S.C. 704. The Guidance does not represent the consummation of the agency's decisionmaking process, but rather simply provides advice about how FHWA Division Offices should approach the task of interpreting FSAs, including by identifying factors to consider when reviewing digital-billboard proposals. Pet. App. 83-84. The Guidance makes clear that the Division Offices' de-

terminations about whether to permit digital billboards in a particular State—and about whether that State's existing FSA can be interpreted to allow it—is to occur on a State-by-State, proposal-by-proposal basis. See *id.* at 82.

Moreover, the Guidance does not determine rights or obligations or give rise to legal consequences. The Guidance expressly disclaims any "intent[] to amend applicable legal requirements," Pet. App. 84, and only memorializes advice from FHWA's headquarters staff to its regional Divisions about how to manage future regulatory requests from States, without mandating that anyone do or refrain from doing anything. States remain free to prohibit digital billboards if they wish to do so, and Division Offices retain the discretion to grant or deny the States' specific proposals in turn, including on the basis that a State's proposal is inconsistent with FSA prohibitions against flashing, intermittent, or moving lights. See *id.* at 82 (emphasizing that Division Officers are not required to approve States' proposals if they are determined to be inconsistent with the FSA or fail to "include adequate standards to address the safety of the motoring public").

The court of appeals' conclusion that the Guidance constitutes final agency action misreads the agency's communication. The court mistakenly assumed that the Guidance reached a "definitive conclusion" that "the FSA's prohibition on 'flashing, intermittent or moving' lights does not prevent states from permitting digital billboards, so long as they meet certain prescribed requirements." Pet. App. 27. But the Guidance does not definitively resolve that question, and

instead "provide[s] information to assist the Divisions" in undertaking further review. *Id.* at 84.

Similarly, in finding that the Guidance carries legal consequences, the court of appeals mistakenly assumed that the Guidance "creates a safe harbor such that Division offices and states may not deny a digital billboard permit for violating the FSA lighting standards where that billboard meets the timing and other requirements set forth in the Guidance." Pet. App. 27-28; see *id.* at 18. To the contrary, the Guidance does not prevent Divisions from concluding that digital-billboard proposals violate FSA prohibitions on flashing, intermittent, or moving lights, or even purport to limit the facts that Divisions may consider in addressing that question. In fact, the Guidance expressly states that "Divisions are *not required to concur with State proposed regulations, policies, and procedures* if the Division review determines, based upon all relevant information, that the proposed regulations, policies and procedures are not consistent with the FSA or do not include adequate standards to address the safety of the motoring public." *Id.* at 82 (emphasis added); see also *id.* at 83 (listing common characteristics of state proposals "that have been approved by Divisions to date" without suggesting that those characteristics constitute a safe harbor).

Although the court of appeals correctly found that petitioner's customary-use argument lacks merit, it erred in believing that claim to be justiciable at all. This case accordingly does not present an appropriate vehicle for resolving a challenge to the Guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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