No. 16-1189

In The
Supreme Court of the United States

E.I. DUPONT DE NEMOURS
AND COMPANY, et al.,
Petitioners,

v.

BOBBI-JO SMILEY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS, E.I. DUPONT DE NEMOURS AND COMPANY, et al.

ANTHONY L. FRANÇOIS*
**Counsel of Record*
JEFFREY W. MCCOY
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: alf@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, et al.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) and Pacific Legal Foundation (PLF) respectfully request leave of the Court to file this brief amicus curiae in support of Petitioners. NFIB Legal Center and PLF timely sent letters indicating their intent to file an amicus brief to all counsel of record pursuant to Rule 37.2(a). Petitioners granted consent, but Respondents withheld consent.

NFIB Legal Center is a non-profit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive Branch under the

Constitution's Separation of Powers, including cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. filed Feb. 21, 2017) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

For all the foregoing reasons, the motion of NFIB Legal Center and PLF to file a brief amicus curiae should be granted.

Dated: May 3, 2017

Respectfully submitted,

ANTHONY L. FRANÇOIS*
**Counsel of Record*
JEFFREY W. MCCOY
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: alf@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, et al.

QUESTIONS PRESENTED

1. Does the FLSA prohibit an employer from using compensation paid to employees for non-compensable, *bona fide* meal breaks that it included in their regular rate of pay as a credit against compensation owed for work time?

2. Is the agency's interpretation of a statute advanced for the first time in litigation entitled to *Skidmore* deference?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Rules of Court

Miscellaneous

INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a), National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of the Petitioners.[1]

NFIB Legal Center is a non-profit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a

---

[1] Pursuant to this Court's Rule 37.2(a), Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Petitioners provided their consent, but Respondents withheld their consent. The letters evidencing Petitioners' consent has been filed with the Clerk of the Court. Amici's motion for leave to file this brief precedes the questions presented, per this Court's Rule 37.2(b).

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

"small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. NFIB Legal Center is also the publisher of the September, 2015, report *The Fourth Branch & Underground Regulations*, available at http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf. *The Fourth Branch* includes an important discussion of agency regulation through amicus briefs, which is the practice the Petition asks the Court to address.

Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive Branch under the Constitution's Separation of Powers, including cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (S. Ct. filed Feb. 21, 2017) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act);

Sackett v. EPA, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

SUMMARY OF ARGUMENT

When federal courts apply *Skidmore* deference, they at least partially cede the judicial power to the executive, contrary to the Constitution's separation of powers and the express intent of the framers. This Court has never deferred under *Skidmore* to an agency statutory construction found only in an amicus brief. But, its decisions in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988), and *Auer v. Robbins*, 519 U.S. 452, 462 (1997), have provided the lower courts and scholars with conflicting grounds on which to decide whether to defer to agency amicus briefs, as such, under *Skidmore*. It is important for this Court to resolve this confusion because of the growing agency practice of regulation by amicus brief, which is increasingly common for the Department of Labor and could become far more common across the Administrative State if indulged by the Article III courts.

This confusion about when and how to apply *Skidmore* has caused a circuit split over how a court should treat an agency interpretation contained only in an amicus brief. Some courts grant *Skidmore* deference to agency interpretations contained in amicus briefs, while others treat the agency's amicus brief like the argument of any other litigant. This Court should grant the Petition in order to solve this circuit split, and clarify the limited use of *Skidmore*

deference. Without such a clarification, agencies will continue to regulate through amicus briefs in those appellate circuits that defer to their amicus briefs. This results in agencies being elevated over the litigants in a case, and weakens the judiciary's constitutional role in independently interpreting the law.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER AGENCY STATUTORY INTERPRETATIONS THAT DEBUT IN AMICUS BRIEFS MERIT *SKIDMORE* DEFERENCE

This Court has held that when an agency interprets a statute it is entrusted to administer, federal courts may (and in some instances must) defer to the agency's interpretation, due to agency expertise and other factors. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Skidmore* is applicable even where *Chevron* deference is not. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). *Skidmore* predates the enactment of the Administrative Procedure Act; its holding that courts should defer to agency interpretations of statutes, as well as its analysis leading to that conclusion, are unsupported by citation to any of this Court's prior precedents. 323 U.S. at 139-40; *cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) ("In setting out the approach it would

apply to the case, the Court [in *Seminole Rock*] announced—without citation or explanation—that an administrative interpretation of an ambiguous regulation was entitled to 'controlling weight.'"). Rather than basing the rule of deference on precedent, *Skidmore* was a pragmatic accommodation of the Article III courts to the demands of the then-nascent Administrative State. And while that pragmatic basis for deference stood for several decades, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-17, the realities of constitutional Separation of Powers have re-asserted themselves against deference to the executive, *Perez,* 135 S. Ct. at 1211 (Scalia, J., concurring in judgment) (calling for re-evaluation of the Court's deference framework).

In *Skidmore* the Court deferred to a Department of Labor interpretation of the Fair Labor Standards Act, given first in an interpretative bulletin circulated to employees and employers, and then in an amicus brief to the Court based on the interpretive bulletin. 323 U.S. at 137-39. Since *Skidmore*'s resuscitation in *Mead*, the Court has not ruled on whether positions taken for the first time by an agency in an amicus brief are eligible for *Skidmore* deference. *Compare Auer*, 519 U.S. at 462 (deference to agency interpretation of regulations set forth in amicus brief).

A. *Skidmore* Unconstitutionally Cedes Judicial Power to the Executive Branch

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "It is

emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Chief Justice Marshall's foundational statement of the nature of the judicial power is consonant with the view of the Framers. "The interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning of any particular act proceeding from the legislative body. . . . The courts must declare the sense of the law." The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossitor ed., 1961).

The separation of the judicial power from the legislative and executive powers is one of the key elements of our Constitution, and it functions as an important safeguard to the protection of individual liberty. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by separation of powers protect the individual as well."). This constitutional structure reflects the intent of the framers that the federal courts be independent of the executive's influence, and that no other branch has the authority to exercise the judicial power of interpreting statutes. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison). "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered

by either of the other departments." The Federalist No. 48, at 308 (James Madison).

And yet, *Skidmore* deference grants to the executive branch, at the very least,[2] a preemptive use of the judicial power in interpreting statutes. For those lower courts which afford *Skidmore* deference with little reluctance, the doctrine amounts to a complete cession of the judicial power to the executive, on terms far more favorable than *Chevron*.

Under these conditions, *Skidmore* deference unquestionably allows the executive branch to "ascertain the meaning of particular acts proceeding from the legislative body." This transfer of power to "declare the sense of the law" does more than share the legislative power with the executive. When the federal courts defer to executive interpretations of statutes under *Skidmore*, the judicial power is handed

---

[2] Depending on what flavor of *Skidmore* deference particular courts afford, the practice can range from acknowledging the merits of an agency's interpretation while comparing it to the contending litigant's, through adopting an agency's interpretation without comparison to the other party's if the court finds the agency position persuasive, all the way to simply adopting the agency position with little more than a cite to *Skidmore*, as occurred in the case below. *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 329 (3d Cir. 2016); s*ee Mead Corp.*, 533 U.S. at 228 (appropriate degree of deference "has been understood to vary with circumstances"). *See* Section II.A. below. Some federal courts appear, upon concluding that *Chevron* cannot be made applicable to a given interpretation, to reflexively resort to *Skidmore* as a backup, affording the same level of controlling deference as *Chevron* requires regardless of whether any of the factors listed in *Skidmore* or *Mead* are present. *See*, *e.g.*, *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 290 n.10 (4th Cir. 2011); *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850-51 (8th Cir. 2008).

entirely over to the executive, without even the legal fiction of congressional delegation that is said to underpin *Chevron* deference. *See Mead Corp.*, 533 U.S. at 227-28 (*Chevron* and *Skidmore* as separate bases for the general practice of deference to agency statutory interpretations); *cf. Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 493 (5th Cir. 2013) (critique of transfer to judicial power to executive under *Auer* doctrine). As a result, the executive tells the judiciary in a sometimes-binding[3] manner what the law is and means, instead of the other, constitutional, way. The effects of this application of *Skidmore* cannot be distinguished from concerns that members of the Court have raised about *Auer* deference in similar contexts. *See Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring) ("*Seminole Rock* raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches.").

The Court should accept the Petition, to cabin the "judicial-executive" by holding that agency interpretations of statutes first announced in amicus briefs are not entitled to deference.

---

[3] *Skidmore* calls for deference to agency interpretations of statutes based on "all of those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. The issue here is not what triggers deference and whether the Executive always has unilateral control of it, as it does under *Chevron* and *Brand X*, but that when *Skidmore* deference is triggered, it results in a surrender of the judicial power to the executive.

B. Judicial and Scholarly Confusion Regarding *Skidmore* and Regulation By Amicus Briefs Is Abundant

This Court's decision in *Chevron* lead judges and scholars to the conclusion that the new rubric for deference to statutory interpretations did away with the older *Skidmore* formula for deference. *Angiotech Pharmaceuticals Inc. v. Lee*, 191 F. Supp. 3d 509, 516-17 (E.D. Va. 2016); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 517 ("If the *Chevron* rule is not a 100% accurate estimate of [] congressional intent, the prior case-by-case [method] was not so either."); *see generally* Bradley G. Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. Chi. L. Rev. 447, 452-53 n.26 (2013). In *Mead*, this Court did away with that confusion, but replaced it with another: what types of agency interpretive actions are eligible for *Skidmore* deference, and how much deference is due when it is due? And, the crux of the question raised by the Petition before the Court: are agency interpretations offered for the first time in amicus briefs entitled to *Skidmore* deference?

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988) (no deference owed to agency interpretation of statute advanced for the first time as party in litigation), and *Auer*, 519 U.S. at 462 (deference to agency interpretation of regulations set forth in amicus brief), provide alternative potential resolutions to this question, but scholars and lower courts have been unable to arrive at a uniform way of viewing the choice. On the one hand, *Bowen* is good law and reflects the reality that when agencies appear

before Article III courts, they are not lawmakers or judges, but litigants. As litigants they have no superior claim to have the court accept their view of the law as any other litigant before the court. So, when filing a brief as a party in litigation, an agency gets no deference for a novel statutory interpretation. *Bowen*, 488 U.S. at 212.

On the other hand, *Auer* affirms the original holding of *Seminole Rock* that agency interpretations of their ambiguous regulations, set forth only in amicus briefs, are entitled to deference. *Auer*, 519 U.S. at 462; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). And, *Skidmore* originally afforded deference to a position in an amicus brief, but that position had been previously developed and published in an agency bulletin. 323 U.S. at 138-39.

There are independent distinctions between *Bowen* and *Auer*: (1) the government's status as a litigant in *Bowen* and as a friend of the court in *Auer*, and (2) interpretations of statutes in *Bowen* versus regulations in *Auer*. *Bowen* might also be distinguished (or not) from the case below because it deals with *Chevron* while the Petition addresses *Skidmore*. Scholars have conflated all of these distinctions to argue for *Skidmore* deference to novel statutory constructions in agency amicus briefs. Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation?* 80 U. Chi. L. Rev. at 467-68 (arguing that as a *Chevron* case, *Bowen* is inapplicable to *Skidmore* questions). But the lack of substantive difference between a party brief and an amicus brief by the government strongly suggests that *Bowen*, rather than *Auer*, answers the question presented by the Petition.

In any event, it is a question the Court should answer, as the Administrative State increasingly engages in regulation by amicus: what deference is due to agencies announcing new statutory interpretations for the first time in amicus briefs.

C. Whether Courts Should Afford *Skidmore* Deference to Agency Amicus Briefs Is an Important Question Given the Rise in Regulation by Amicus

Federal agencies regulate aspects of nearly all Americans' lives in one form or another. The all-encompassing breadth of the regulatory state is compounded by affording *Skidmore* deference to new statutory interpretations rolled out in agency amicus briefs.

For example, under the Clean Water Act, the United States Army Corps of Engineers interprets the Act's ambiguous term "waters of the United States" each time it determines whether any given property contains such "waters."[4] The Fourth Circuit holds, based on *Rapanos*, that this is a question of statutory construction, subject to *Skidmore* rather than *Chevron* deference. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290 n.10 (4th Cir. 2011); *see also id.* at 296 (citing *Rapanos*, 547 U.S. at 779-80); *but see San Francisco Baykeeper v. Cargill*

[4] It is one of the oddities of the Clean Water Act that its geographic scope, applicable to "waters" of the United States, is frequently determined by the Corps of Engineers to apply to dry land. Thus does the administrative state transmogrify privately owned land into the federal government's water, with attendant prohibitions, permitting requirements, compliance obligations, and potential civil and criminal liability.

Salt Div., 481 F.3d 700, 706 (9th Cir. 2007) (*Chevron* deference afforded to EPA interpretation of "waters of the United States"). The question of whether any particular property is covered by the Clean Water Act is complex to the point that expensive consultants and a lengthy process with the Corps of Engineers are usually necessary to arrive at an answer. *Hawkes*, 136 S. Ct. at 1811-12 (generally describing jurisdictional determinations); *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."), *aff'd*, 136 S. Ct. 1807. In *Hawkes*, this Court held that approved jurisdictional determinations are subject to judicial review under the Administrative Procedure Act. *Id.* at 1813, 1816.

But the Clean Water Act is also subject to citizen suit enforcement. 33 U.S.C. § 1365. One of the elements on which plaintiffs in such suits bear the burden of proof is whether the defendant has discharged to "waters of the United States."

If agency amicus briefs that express a statutory interpretation for the first time are entitled to *Skidmore* deference, then the Army Corps could file amicus briefs in citizens suits, on cases where it has not previously prepared or published a jurisdictional determination, and those amicus briefs would be deferred to as the agency's interpretation of the Clean Water Act on the defendant's property. This deference would necessarily deprive the defendant in the citizen suit of the ability to argue against coverage of the Clean Water Act, and unfairly tip the outcome of the litigation in favor of the citizen suit plaintiff (who would otherwise bear the burden of proving, through

expert testimony, that the defendant discharged to waters of the United States).

The Court should be concerned about the practice of regulation by amicus, since it is already well underway at the Department of Labor. Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts,* 65 Fla. L.Rev. 1223, 1245 (2013) (Department Of Labor filed 22, 23, and 43 interpretive amicus briefs on the Fair Labor Standards Act alone respectively in the Clinton, second Bush, and Obama Administrations, after average of roughly 8 such briefs per previous 8 Administrations). As *The Fourth Branch* states the concern:

> One of the most effective ways for an Administration to set federal regulatory policy without raising public awareness – and political backlash – is through strategic amicus filings, in cases between private litigants, where there is potential to establish precedential authority on a question of statutory interpretation.
>
> …
>
> Given that amicus briefs can be a particularly efficient means of influencing how the courts interpret statutes, it is easy to see why an Administration might view an aggressive amicus program as an attractive option for setting policy. Amicus briefs are far less costly to prepare than are enforcement actions, which would otherwise require agencies to bring full-fledged lawsuits against

> individuals or businesses. And amicus briefs have the added benefit – for an ideologically motivated president – of allowing an Administration to set public policy under the radar because (a) newly asserted positions need not go through the APA's notice-and-comment process, and(b) only those parties directly involved in the litigation—or closely following the case—will be aware of a federal filing.

NFIB Small Business Legal Center, *The Fourth Branch*, at 20 (Sept. 2015) (footnotes omitted).

The ability of the executive to propose novel interpretations of statutes through a practice that entirely evades public notice and input should add to the Court's concern over whether the federal courts should then defer to such amicus briefs. The Court should grant the Petition to resolve this concern and address the practice of regulation by amicus.

II

THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUITS TAKE MULTIPLE APPROACHES TO AGENCY STATUTORY INTERPRETATIONS EXPRESSED ONLY IN AMICUS BRIEFS

A. The Third Circuit's Decision To Defer to the DOL's Position Is Inconsistent With the Approach Taken in Many Other Jurisdictions

Below, the Third Circuit invited the Department of Labor to file an amicus brief, and then accorded *Skidmore* deference to the agency's argument. *Smiley,* 839 F.3d at 329. The panel deferred to the agency's interpretation of FLSA despite the fact that the DOL advanced its position for the first time in this litigation. *Id.* The Third Circuit's approach deepens a circuit split about whether, and to what extent a court should defer to agency positions advanced for the first time in litigation and only expressed in amicus briefs.[5]

The circuit courts of appeals have disagreed about how to treat agency interpretations only advanced in amicus briefs. The Sixth and Eleventh Circuits have declined to apply *Skidmore* deference to agency positions only advanced in amicus briefs. In *Smith v. Aegon Companies Pension Plan*, the Sixth

---

[5] As *E.I Dupont* states in its Petition, there are numerous examples of the circuit split on this issue, many of which were not cited in the Petition. Through this brief, NFIB Legal Center and PLF attempt to provide additional context to demonstrate the need for this Court to resolve the circuit split on this issue.

Circuit declined to apply *Skidmore* deference to the Department of Labor's "'regulation by amicus'" in an ERISA case, despite the fact that other circuits had applied such deference. 769 F.3d 922, 927 (6th Cir. 2014). Likewise, the Eleventh Circuit declined to grant *Skidmore* deference to the Department of Labor's interpretation of ERISA, although it left open the possibility that an amicus might receive deference in another case. *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1279 (11th Cir. 2012).

In contrast, other circuits have accorded *Skidmore* deference to agency positions first laid out in amicus briefs. *Matz v. Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572, 575 (7th Cir. 2001); *Ball v. Memphis Bar–B–Q Co. Inc.*, 228 F.3d 360, 365 (4th Cir. 2000); *Serricchio v. Wachovia Securities LLC*, 658 F.3d 169, 178 (2d Cir. 2011). In short, the approach towards amicus briefs filed by agencies vary wildly between circuits.

One possible explanation for these different approaches is that these courts have different understandings of what *Skidmore* deference entails. Some courts will cite the agency's amicus brief only as further support for the independent judgment of the court. *See, e.g.*, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 650 (9th Cir. 2014) ("Although we would reach the same result in the absence of the agency's brief, the government's position provides additional support for our conclusion that the FAAAA does not preempt California's meal and rest break laws."). Some courts that purportedly apply *Skidmore* do so with a great deal of skepticism. *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 498 (5th Cir. 2003) ("Ultimately, *Skidmore* analysis is of limited value in interpreting regulations, given that it stops short of

requiring deference and is likely to be invoked only when a court has already found the regulation to be unambiguous."); *see also Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 50 (2d Cir. 2012). On the other hand, some courts, like the panel below, appear to be very deferential when applying *Skidmore*. *See Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1306 (11th Cir. 2008).

This Court should grant the Petition in order to resolve this conflict. In doing so, this Court should limit *Skidmore* to interpretations developed and published outside of litigation, following its precedent in *Bowen*. Without such a clarification, the circuits will continue to take different approaches towards agency interpretations that debut in amicus briefs.

B. The Circuit's Multiple Approaches To Deference to Agency Positions in Amicus Briefs Create Different Status for Litigants

Left unresolved, this circuit split creates different statuses for similarly situated litigants, depending on the forum. In circuits where the courts defer to agency positions first advanced in amicus briefs, the agencies are elevated to a status above the litigants. In these circuits, the agencies receive more deference as an amici than they do when they are parties to a case.

Continuing to allow some circuits to defer to novel agency interpretations in amicus briefs allows the DOL, and other agencies, to selectively file where they will be granted deference. Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev.

1223, 1223 (2013) (The Secretary of Labor has been particularly aggressive in "attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation."). This approach allows agencies to advance a position for the first time in a favorable forum, and have a deferring court adopt the reasoning of the agency. Subsequently, the agency can then impose its preferred view nationwide, on the ground that it is bound by the court's deference to its interpretation. If, on the other hand, an issue arises for the first time in a non-deferring jurisdiction, the agency can refuse to file an amicus brief and wait for the topic to arise again in a more favorable jurisdiction.[6]

If the Court fails to correct the Third Circuit's approach, litigants will continue to be ambushed by previously unknown requirements under the law, revealed for the first time when the agency decides to file an amicus brief. This Court should grant the Petition to end the circuit-by-circuit disparity in approach to agency interpretation and clarify whether any deference should be afforded to an agency interpretation first announced in an amicus brief.

---

[6] *Cf. Otay Mesa Prop., L.P. v. United States Dep't of the Interior,* 144 F. Supp. 3d 35, 68 (D.D.C. 2015) (discussing circuit split over application of the National Environmental Policy Act to critical habitat designations under the Endangered Species Act). The Fish and Wildlife Service only conducts NEPA analysis for habitat designations in those circuits that require it.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

DATED: May, 2017.

Respectfully submitted,

ANTHONY L. FRANÇOIS*
**Counsel of Record*
JEFFREY W. MCCOY
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: alf@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, et al.