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 RESPONDENT OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC., IN OPPOSITION

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QUESTION PRESENTED

Whether the 2007 guidance memorandum issued by the Federal Highway Administration to its local Division Offices concerning the application of lighting standards in various federal-state agreements to the technology of digital billboards merely interpreted those standards, or instead changed those standards to such an extent that they ceased to be "consistent with customary use" as required by the Highway Beautification Act, 23 U.S.C. 131.

CORPORATE DISCLOSURE STATEMENT

Respondent Outdoor Advertising Association of America, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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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 opinion of the district court (Pet. App. 34-70) is reported at 49 F. Supp. 3d 53.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32-33) was entered on September 6, 2016. The petition for certiorari was filed on December 5, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns a guidance memorandum issued in 2007 (2007 Guidance) by the Federal Highway Administration (FHWA), a component of the Department of Transportation, to its local Division Offices. The 2007 Guidance concerned the application of lighting standards in various federal-state agreements to the technology of digital billboards. The 2007 Guidance confirmed the interpretation, already adopted by at least 31 States, that prohibitions in federal-state agreements on "flashing, intermittent, or moving" lights do not categorically prohibit all digital billboards. The 2007 Guidance also compiled criteria for digital billboard operation that had previously been approved by various Division Offices.

Almost six years later, petitioner, an advocacy organization, filed suit against FHWA and the other federal respondents, challenging the 2007 Guidance. As is most relevant here, petitioner alleged that the 2007 Guidance conflicted with the Highway Beautification Act (HBA), 23 U.S.C. 131, on the ground that digital billboards were not "consistent with customary use." Although petitioner conceded that the lighting standards in the federal-state agreements were themselves "consistent with customary use," petitioner argued that the 2007 Guidance did not merely interpret those standards but instead changed them to such an extent that they ceased to be "consistent with customary use" under the HBA. Respondent Outdoor Advertising Association of America, Inc., a trade association representing the outdoor-advertising industry, intervened in the case, and all parties moved for summary judgment.

The district court granted summary judgment to respondents, and the court of appeals unanimously affirmed. As is relevant here, the court of appeals agreed

with the district court that the 2007 Guidance merely interpreted, rather than amended, the lighting standards in the federal-state agreements. Consequently, the court of appeals rejected petitioner's contention that the 2007 Guidance changed those lighting standards to such an extent that they ceased to be "consistent with customary use" under the HBA.

Petitioner now seeks this Court's review on two questions: namely, whether FHWA's interpretation of the lighting standards in the federal-state agreements, as articulated in the 2007 Guidance, is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and whether the standard applied by the court of appeals in purportedly reviewing the validity of FHWA's interpretation conflicts with *Chevron*. Before the lower courts, however, petitioner did not challenge the 2007 Guidance as an invalid interpretation of the lighting standards themselves; petitioner argued only that the 2007 Guidance constructively amended the lighting standards, thereby bringing those standards into conflict with the "customary use" requirement of the HBA. Petitioner's questions are therefore not properly before this Court. In any event, the court of appeals' decision does not conflict with any decision of this Court or of the court of appeals. And the questions of agency deference that petitioner attempts to raise do not warrant further review, especially given the uniqueness of the federal-state-agreement system under the HBA. The petition for a writ of certiorari should therefore be denied.

1. In 1965, Congress enacted the Highway Beautification Act, 23 U.S.C. 131, which establishes a grant-in-aid condition with which States must comply in order to receive full federal highway funding. Under the HBA, the "size, lighting and spacing" of billboards along federal

highways are governed by agreements negotiated between the individual States and the Secretary of Transportation. 23 U.S.C. 131(d). The standards established by those agreements must be "consistent with customary use." *Ibid.* All 50 States entered into federal-state agreements pursuant to the HBA in the 1960s and 1970s. Pet. App. 3-4.

The HBA requires States to maintain "effective control" of outdoor advertising along federal highways, which includes ensuring that signs comply with the requirements of the applicable federal-state agreement. 23 U.S.C. 131(b); 23 C.F.R. 750.704(b). States must submit proposed regulations and enforcement procedures to FHWA for approval. See 23 C.F.R. 750.705(j). FHWA's local offices, known as "Division Offices," assess whether those regulations and procedures comply with the applicable federal-state agreement and FHWA's own regulations. See *ibid.*

With respect to "effective control," the HBA distinguishes between on-premise signs and off-premise signs. Off-premise signs are consistent with "effective control" when (1) they are located in commercial or industrial areas, and (2) their "size, lighting and spacing" accords with the terms of the applicable federal-state agreement. 23 U.S.C. 131(d); see 23 C.F.R. 750.704(a)(4)-(5), (b). Of particular relevance here, the majority of federal-state agreements contain a prohibition on the use of "flashing, intermittent, or moving" lights. Pet. App. 4.

2. Digital billboards are now a familiar sight to travelers on the federal highway system. As the name suggests, digital billboards use light-emitting diodes to display their messages, whereas non-digital billboards display a painted or printed message. Digital billboards resemble non-digital billboards in most respects, but they

differ principally in one: digital billboard technology allows for periodic rotation through a series of different static advertisements on the same advertising space. In contrast with non-digital billboards, which must be manually changed, digital billboards can be remotely reprogrammed. Pet. App. 4-5, 37.

At last count, some 44 States and over 400 localities have permitted digital billboards. Under the laws of those States and localities, digital billboards are typically allowed to display static images that rotate every six to eight seconds, with the change from one image to another occurring instantaneously. Animated images are not permitted, and many jurisdictions have enacted regulations restricting the brightness of digital billboards (particularly at nighttime). C.A. App. 22, 436.

3. As billboard technology has evolved over the years, FHWA has issued guidance memoranda to its Division Offices to assist them in applying the HBA and federal-state agreements to new technologies. In 1990, FHWA issued a memorandum to its division administrators in response to inquiries about signs with "lights, glow cubes, rotating slats, [and] moving reflective disks." Pet. App. 74. In that memorandum, FHWA stated that it "interpreted the Federal law as implemented under individual State/Federal agreements to prohibit off-premise variable message signs, irrespective of the method used to display the changing message." *Ibid.*

In 1996, however, FHWA issued a guidance memorandum (1996 Guidance) to its regional administrators to "restate [its] position concerning" changeable message signs. Pet. App. 76. In the 1996 Guidance, FHWA noted that "changes in technology require the State and FHWA to interpret the agreements with those changes in mind." *Id.* at 77. FHWA explained that "[c]hangeable message signs are acceptable for off-premise signs, regardless of

the type of technology used, if the interpretation of the State/Federal agreement allows such signs." *Ibid.* FHWA concluded that it "will concur with a State that can reasonably interpret the State/Federal agreement to allow changeable message signs if such interpretation is consistent with State law." *Ibid.*

After the 1996 Guidance, many States interpreted their federal-state agreements to permit digital billboards. Some States sought approval of their regulations from their FHWA Division Offices. By 2007, at least 22 FHWA Division Offices had approved States' digital billboard proposals as consistent with their respective federal-state agreements, and other States had permitted digital billboards without seeking express FHWA approval. A few Division Offices, however, had denied approval of state digital-billboard regulations. Pet. App. 4-5, 38; C.A. App. 531-532.

On September 25, 2007, FHWA issued the 2007 Guidance to its Division Offices. Pet. App. 78-85. In that memorandum, entitled "Guidance on Off-Premise Changeable Message Signs," FHWA affirmed that the analysis of the 1996 Guidance applied to digital billboards. *Id.* at 78, 81. FHWA stated that "[c]hangeable message signs, including [digital billboards], are acceptable for conforming off-premise signs, if found to be consistent with the [applicable federal-state agreement] and with acceptable and approved State regulations, policies and procedures." *Ibid.* FHWA explained that "[p]roposed laws, regulations, and procedures that would allow permitting [digital billboards] subject to acceptable criteria (as described below) do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various [federal-state agreements]." *Id.* at 79.

At the same time, FHWA stressed that the 2007 Guidance was intended to "provide information to assist the

Divisions in evaluating [state] proposals," not to "amend applicable legal requirements." Pet. App. 84. In the memorandum, FHWA included a list of state standards regarding duration of message, transition time, brightness, spacing, and location for digital billboards that Division Offices had previously approved, noting that such standards "will be useful in reviewing State proposals on this topic." *Id.* at 83.

4. On January 23, 2013—almost six years after the promulgation of the 2007 Guidance, and just a few months before the expiration of the limitations period for claims under the Administrative Procedure Act (APA)—petitioner, an advocacy organization, brought suit against FHWA and the other federal respondents in the District Court for the District of Columbia. As is relevant here, petitioner raised two claims: (1) that the 2007 Guidance was a substantive, rather than interpretive, rule that should have undergone notice-and-comment rulemaking under the APA; and (2) that the 2007 Guidance changed the lighting standards in the federal-state agreements to such an extent that they ceased to be "consistent with customary use" under the HBA. Respondent OAAA successfully moved to intervene as a defendant, and both sides subsequently sought summary judgment.[1]

The district court granted summary judgment to respondents on both claims. The district court first concluded that the 2007 Guidance was an interpretive rule that was not subject to the notice-and-comment-rulemaking requirements of the APA. Pet. App. 43-67. In the

[1] Respondents had moved to dismiss the complaint on the grounds that petitioner lacked standing to pursue its claims and that the 2007 Guidance was not final agency action subject to judicial review. The district court denied those motions. Pet. App. 40-41.

course of that analysis, the district court addressed petitioner's argument that, "when an interpretation runs 180 degrees counter to the plain meaning of the regulation[,] [it] gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation." *Id.* at 50 (internal quotation marks and citation omitted); see Pet. C.A. Br. 25-27; Pet. C.A. Reply Br. 22.

The district court observed that petitioner "declined to offer this argument as a more straightforward, frontal assault on the FHWA's interpretation of the [federal-state agreements] via section 706(2)(A) of APA's 'arbitrary and capricious' standard of review." Pet. App. 49. Addressing the particular argument that petitioner did raise, the court determined that FHWA's approval of digital billboards falling within the parameters set out in the 2007 Guidance was not 180 degrees counter to the prohibition on "flashing, intermittent, or moving" lights in the various federal-state agreements; to the contrary, it was a permissible interpretation of those lighting standards. *Id.* at 50-51.

The district court proceeded to conclude that the foregoing reasoning foreclosed petitioner's HBA claim. Pet. App. 67-70. The court reiterated its determination that the 2007 Guidance "construes, rather than contradicts, the existing [federal-state agreement] lighting standards." *Id.* at 67. As the court explained, petitioner's HBA claim "depend[ed] on the premise, already rejected by th[e] [c]ourt, that the Guidance does something other than interpret the [federal-state agreements]." *Id.* at 70. Because petitioner had conceded that "all [federal-state agreement] lighting provisions were established 'consistent with customary use,'" as required by the HBA, and because the court had concluded that the 2007 Guidance interpreted, rather than amended, those lighting

standards, the court found it "inescapable" that the Guidance "is similarly consistent with customary use." *Id.* at 69-70 (quoting Pet. D. Ct. Br. 24).

4. The court of appeals affirmed in relevant part. Pet. App. 1-31. As a preliminary matter, the court of appeals held that petitioner lacked standing to raise its APA claim. *Id.* at 8-23.

With regard to petitioner's HBA claim, the court of appeals noted at the outset that petitioner had explicitly disavowed any claim that the 2007 Guidance was arbitrary and capricious, but instead claimed only that it was contrary to law because it violated the HBA's "customary use" requirement. Pet. App. 24-25. Turning to the merits, the court noted that petitioner had argued that "FHWA, in issuing the Guidance, changed the [federal-state agreement] lighting standards to such an extent that those standards are no long 'consistent with customary use'" as required by the HBA, *id.* at 28 (quoting 23 U.S.C. 131(d)), on the ground that "[a]nything outside the scope of what a[] [federal-state agreement] meant at the time it was created cannot be customary use," *id.* at 29 (quoting Pet. C.A. Br. 36).

Addressing that argument, the court of appeals first observed that, "as agreements between the FHWA and individual [S]tates," the federal-state agreements had been approved by FHWA at the time of their adoption. Pet. App. 29. The court then noted that the parties had agreed that "all [federal-state agreement] lighting provisions were established consistent with customary use." *Id.* at 29-30 (quoting *id.* at 69). "Thus," the court reasoned, "so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be 'consistent with customary use.'" *Id.* at 30.

The court of appeals determined that the 2007 Guidance "construes, rather than contradicts" the federal-state agreements, echoing the district court's rejection of petitioner's argument that the FHWA's interpretation "runs 180 degrees counter to the plain meaning" of the federal-state agreements. Pet. App. 30 (quoting *id.* at 50). The court explained that the lighting standards in the federal-state agreements did not foreclose FHWA's interpretation permitting digital billboards, even if other interpretations were possible. *Ibid.* Because the 2007 Guidance merely interpreted, rather than amended, those standards, it could not be "contrary to customary use." *Id.* at 30-31.

ARGUMENT

The petition for certiorari is based on the incorrect premise that the court of appeals applied deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in determining that FHWA's authorization of digital billboards in the 2007 Guidance was a permissible construction of the lighting standards in the various federal-state agreements. In fact, the court of appeals did no such thing, because petitioner did not challenge the 2007 Guidance as an invalid interpretation of the lighting standards themselves. Instead, petitioner argued only that the 2007 Guidance's interpretation of the lighting standards constructively amended those standards, thereby bringing them into conflict with the "customary use" requirement of the HBA. Because petitioner admitted that the lighting standards themselves were consistent with customary use, the only question before the court of appeals was whether the 2007 Guidance interpreted those HBA-compliant standards or instead changed them to such an extent that they ceased to be

"consistent with customary use." That is the only question that the court of appeals actually decided, and it is not encompassed in the questions presented here.

In any event, petitioner makes no effort to allege a conflict among the courts of appeals on either of the questions presented, and the court of appeals' decision does not conflict with *Chevron* itself for the simple reason that it does not purport to apply it. And this case presents no issue of broader importance warranting this Court's review, given the uniqueness of the federal-state-agreement system under the HBA. For all of those reasons, the petition for a writ of certiorari should be denied.

A. The Decision Below Did Not Address The Questions Presented In The Petition

1. In the courts below, petitioner's primary argument was that the 2007 Guidance should have undergone notice-and-comment rulemaking under the APA. The court of appeals held that petitioner lacked standing to raise that claim, Pet. App. 8-23, and petitioner has not sought this Court's review of that holding.

Petitioner's secondary argument in the court of appeals was that the 2007 Guidance caused the lighting standards in the various federal-state agreements to conflict with the HBA's requirement that such standards be "consistent with customary use." 23 U.S.C. 131(d); see 5 U.S.C. 706(2)(A). Specifically, petitioner argued that "the 2007 Guidance's interpretation of the [federal-state agreement] lighting standard terms change[d] the [federal-state agreements] to such an extent that they are not 'consistent with customary use,' violating the HBA." Pet. C.A. Br. 35 (quoting 23 U.S.C. 131(d)). Petitioner did not dispute that the lighting standards themselves were consistent with customary use; instead, petitioner argued only that the 2007 Guidance "so alter[ed]" those standards

that they ceased to be consistent with customary use. See *id.* at 34-36. Petitioner did not raise, as an independent ground for decision, the discrete argument that the 2007 Guidance constituted an invalid interpretation of the lighting standards themselves.

The court of appeals dutifully addressed the only argument that petitioner actually advanced. Accepting petitioner's admission that the lighting standards themselves were consistent with customary use, the court reasoned that, "so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be 'consistent with customary use.'" Pet. App. 29-30. The court proceeded to reject petitioner's argument on the ground that the 2007 Guidance interpreted the lighting standards, rather than changing them to such an extent that they ceased to be consistent with customary use. *Id.* at 30-31.

2. Petitioner now presents two questions that were not part of the case in the lower courts: (1) whether FHWA's interpretation of the lighting standards, as articulated in the 2007 Guidance, is entitled to deference under *Chevron*, and (2) whether the standard applied by the court of appeals in purportedly reviewing the validity of FHWA's interpretation conflicts with *Chevron*. As discussed above, the only question pressed and passed upon was not whether FHWA validly interpreted the lighting standards themselves, but whether FHWA was engaged in interpretation at all or instead, as petitioner alleged, was changing the lighting standards to such an extent that they ceased to be "consistent with customary use" under the HBA. It is a familiar principle that this Court does not grant certiorari to address questions that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Petitioner attempts to tie the decision below to *Chevron* by noting that the court of appeals cited two cases concerning review of an agency's interpretation of an agreement requiring agency approval. See Pet. 11-12 (discussing *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. 1987)). It is true that the court of appeals stated that "[t]he [federal-state agreements], as agreements between the FHWA and individual states, were * * * approved by the FHWA as described in *Cajun Electric*." Pet. App. 29 (citation omitted). But in its actual analysis on the question whether the 2007 Guidance was "consistent with customary use" under the HBA, the court did not further discuss those cases or invoke *Chevron* deference, presumably because petitioner had conceded the federal-state agreements themselves were consistent with customary use. *Id.* at 29-30. Again, the sole question before the court of appeals was not whether FHWA validly interpreted the lighting standards themselves, but rather whether FHWA *changed* the lighting standards to such an extent that they ceased to be consistent with customary use. *Id.* at 30-31. On the latter question, petitioner seemingly has no quarrel with the court of appeals' holding.

B. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Another Court Of Appeals

Beyond the fact that the petition presents questions that were not pressed or passed upon below, it does not satisfy any of this Court's traditional criteria for certiorari. See S. Ct. R. 10. Petitioner does not even attempt to argue that the court of appeals' decision conflicts with any decision of another court of appeals; instead, petitioner asserts only that the decision below conflicts with this Court's decision in *Chevron*. See Pet. 18-20.

Petitioner seemingly contends that such a conflict exists because the court of appeals did not walk through the familiar two-step analysis of *Chevron* but instead applied an "even more deferential standard." Pet. 18. But that is only because petitioner did not challenge the validity of FHWA's interpretation of the lighting standards themselves. Again, petitioner's only argument below was that the 2007 Guidance had "change[d]" the lighting standards "to such an extent that they are not 'consistent with customary use,' violating the HBA." Pet. C.A. Br. 35. It was for that reason that the court of appeals focused on whether the 2007 Guidance had "construe[d]" or "contradict[ed]" the lighting standards, concluding that it had done only the former. Pet. App. 30-31. As a result, there is no conflict with *Chevron* here that could warrant further review.

C. The Petition Does Not Present An Important Question That Warrants The Court's Review In This Case

Finally, certiorari is not warranted in this case because the questions presented are of limited importance and would arise only in the unique context of the HBA.

Petitioner contends that *Chevron* deference should not be applied in assessing the validity of FHWA's interpretation of federal-state agreements because such deference would implicate the same policy concerns as the doctrine of *Auer* v. *Robbins*, 519 U.S. 452 (1997). See Pet. 12-14. Again, the court of appeals did not apply *Chevron* deference in deciding the discrete question before it. See pp. 11-13, *supra*.

But even if it had, the unique context of the federal-state-agreement system under the HBA does not raise the specter of an agency's "enact[ing] vague rules which give it the power, in future adjudications, to do what it pleases." Pet. 13 (quoting *Talk America, Inc.* v. *Michigan*

Bell Telephone Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). The terms of the federal-state agreements were not promulgated by FHWA fiat, but were instead negotiated between the individual States and the Secretary of Transportation. See 28 U.S.C. 131(d). Both a State and the relevant FHWA Division Office participate in the process of interpreting a federal-state agreement in light of past practice and state law.[2] And when a State has determined that the size, lighting, and spacing of signs in commercial or industrial areas is "consistent with customary use," the Secretary must defer to that determination "in lieu of controls by [the applicable federal-state] agreement." *Ibid.*

What is more, even if this case presented the question whether *Chevron* deference should be applied in assessing the validity of FHWA's interpretation of federal-state agreements, petitioner cannot show that any such question is of broader importance, because petitioner cites no case raising that question in any other context. And there is no prospect of that question arising in this particular context, because the limitations period for APA claims is six years. See 28 U.S.C. 2401(a). The time for filing a claim challenging the 2007 Guidance as an invalid interpretation of the lighting standards in the federal-state agreements—a claim that petitioner conspicuously did not make—has now long since expired.

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[2] Indeed, the 2007 Guidance itself was the product of years of input by the States. At least 22 FHWA Division Offices had approved States' digital billboard proposals as consistent with their respective federal-state agreements, and other States had permitted digital billboards without seeking express FHWA approval. Pet. App. 38; C.A. App. 531-532. The standards for duration of message, transition time, brightness, spacing, and location of digital billboards identified in the 2007 Guidance came from existing state regulations and procedures. Pet. App. 83.

In sum, because the questions presented were not pressed or passed upon below; because petitioners have not identified a conflict with any decision of this Court or another court of appeals; and because this case presents questions of limited importance, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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