No. 16-1151

IN THE

Supreme Court of the United States

THOMAS O. FLOCK, DENNIS K. THOMPSON, THOMAS H. GOODEN, C. DOUGLAS HEISLER, WALTER A. JOHNSON, AND GAYLA S. KYLE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. *Certiorari* Should Be Granted to Address the Much-Criticized Flaws in the *Skidmore*, *Chevron*, and *Mead* Deference Regimes

Respondents contend that this case is ill-suited to address problems experienced by the Circuit Courts in applying *Chevron* deference. Not so. The First Circuit's opinion demonstrates one of the fundamental deficiencies of *Chevron*: its guidelines are so accommodating that an agency can employ *Chevron* to justify unbridled action (or inaction), irrespective of actual congressional delegation. *See*, *e.g.*, Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 783 (2010) ("*Chevron* is so pliable that courts applying it can still reach any desired result . . . ."); *cf.* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1098 (2008) (analyzing Supreme Court agency decisions and noting that "the Court is wildly inconsistent in applying any of the [deference] regimes, including and especially the *Chevron* regime"). The result is the ever-expanding exercise of agency authority whose ill-defined boundaries fail to provide a meaningful check on the power of the Executive to impose its own policy preferences in lieu of those established by Congress.

The First Circuit's acquiescence to the overreach of the Federal Motor Carrier Safety Administration (FMCSA, or "the Agency") represents the latest instance of judicial approval of agency action untethered to actual congressional authorization. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir.

2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 Mich. L. Rev. (forthcoming 2017), http://ssrn.com/abstract=2808848 (finding a 25 percentage point increase in agency win rate when circuit courts apply *Chevron*).

This case presents a fitting vehicle by which the Court can refine *Chevron* jurisprudence and establish clearer limits on the scope of judicial deference to agency action. The time has long since come to set the *Chevron* doctrine aright. Nothing in Respondents' opposition brief should deter the Court from granting *certiorari* and addressing the problems the lower courts currently experience in implementing the *Skidmore*, *Chevron*, and *Mead* deference regimes.

II. The First Circuit's Superficial *Chevron* Analysis Typifies the Shortcomings of Judicial Deference to Agency Action

The Question Presented in Respondents' Brief turns the real issue presented on its head. Respondents posit that the Question Presented is whether Section 31150 "precludes" the release of information not included in the statute. Resp'ts' Br. I. The real question, however, is whether Section 31150 *authorizes* such release. Respondents' presentation of the Question Presented reflects a fundamental misunderstanding of the relationship between Congress and executive agencies. Federal agencies are not permitted to act unless authorized to do so by Congress. Pet. 19-21.

Section 31150(a) does not authorize the dissemination of reports not explicitly defined in the statute.

A. The Panel Held That Perceived Congressional Silence Results in a Delegation of Authority, Splitting with the Third, Fifth, Eleventh, and D.C. Circuits

Respondents contend that "Section 31150 is not the source of FMCSA's 'authorization' to disclose records." Resp'ts' Br. 10. Rather, they assert, without citing to any authority, that "[a]gencies frequently communicate with the public or with industry participants in carrying out their functions." *Id.* Respondents appear to argue that there exists some unspecified, ethereal authority, not found in any statute, for agencies to disclose any documents they please, in any manner they please. This assertion is, of course, untrue: "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986); Pet. 26-27.

This case turns not only on the *type* of information the Agency is authorized to disclose, but also the *manner* in which the Agency is permitted to disclose it. In theory, the data contained in Pre-Employment Screening Program (PSP) reports might be acquired under the Freedom of Information Act (FOIA), and Petitioners have never contended otherwise. All parties, however, agree that disclosure under FOIA fails to provide timely or efficient access to driver records. *See* Pet. 8 & n.2. PSP is a substantially different system with vastly different implications for drivers. The purpose of PSP is "to provide potential employers with a fast and reliable method for obtaining information about prospective employees." App. 4; Resp'ts'

Br. 5-6. The slow, cumbersome process of a FOIA request is ineffective for pre-employment screening; indeed, there is no evidence in the record that any motor carrier has ever used a FOIA request for that purpose. PSP, by contrast, provides motor carriers with electronic access to timely reports that were unavailable before Congress enacted Section 31150.

The regulatory history underlying this case demonstrates the importance of this crucial distinction. The data contained within the Motor Carrier Management Information System (MCMIS) database were originally intended to monitor companies, not people. Congress first gave the Department of Transportation the authority to establish an information system to collect and use state transportation data in 1991. *See* Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102–240, § 4003 (Dec. 18, 1991) (currently codified at 49 U.S.C. § 31106). ISTEA authorized the Secretary of Transportation to create a "clearinghouse and depository of information pertaining to" commercial motor vehicle safety, and it did not authorize the disclosure of this information. *Id.* Historically, FMCSA used this information solely for the prioritization of enforcement efforts against motor carriers, not drivers. In 2005, for the first time ever, Congress authorized the Agency to disseminate certain driver-identified information. *Safe, Accountable, Flexible, Efficient Transportation Equity Act: Legacy for Users*, Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005) (codified at 49 U.S.C. § 31150). However, aware of the unreliability of MCMIS data and the privacy concerns implicated by its dissemination, *see* Pet. 25-26, Congress imposed several limitations, restricting who may obtain and use the data, how and when PSP data may be disseminated, and, central to the instant case, what information may be disseminated. *See* 49

U.S.C. § 31150. Therefore, the appropriate inquiry is whether Section 31150 affirmatively *authorizes* the Agency to release, via PSP, records of violations not determined by the Secretary to be serious—not, as the Respondents suggest, whether Section 31150 expressly *prohibits* the Agency from doing so.[1]

The First Circuit adopted this view when it held that Section 31150—not the Privacy Act or FOIA—authorizes the disclosure of the records at issue. In fact, the panel's analysis on this point omitted any mention of the Privacy Act or FOIA. App. 8-11. The panel failed to articulate any additional authority that would authorize the Agency to release the reports at issue, nor did the panel endorse Respondents' view that an agency has inherent authority to release information. Contrary to Respondents' assertions, therefore, the panel unquestionably ruled that the fact that Section 31150 did not explicitly *prohibit* the release of additional information meant that the statute implicitly *authorized* such release. As articulated in the Petition for Writ of Certiorari, this holding squarely contradicts precedent in the Third, Fifth, Eleventh, and D.C. Circuits. Pet. 19-21 (collecting cases).

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[1] FMCSA cites *Jones v. Bock*, 549 U.S. 199, 222 (2007), for the proposition that Congress knew how to bar the release of records yet chose not to in Section 31150(a). Resp'ts' Br. at 11. But the *Jones* Court actually found that, even though Congress knew how to differentiate between the terms "action" and "claim" in a prisoner exhaustion statute, "action" effectively had the same meaning as "claim" based on the context of the law. *See* 549 U.S. at 222-24. Even if Congress "knows how to" differentiate between words, the context of the law cannot be ignored when interpreting such words. Taken in context, Congress's use of "shall" in Section 31150(a) must be interpreted as both a floor and a ceiling.

B. The Panel Conducted an Improper *Chevron* Analysis

The First Circuit shirked its responsibility to independently interpret the statute. Instead, the panel deferred to the Agency's expansive interpretation of Section 31150 based on the Agency's mission statement, countermanding the policy preference espoused by Congress when it enacted the statute. In enacting Section 31150, Congress gave potential employers seeking access to driver records access to a limited subset of those records in an expedient procedure under PSP. The Agency, however, claimed that *more is better*, and the First Circuit willingly accommodated the Agency's preference based on a broad mission statement related to highway safety.

The First Circuit's *Chevron* analysis—to the extent it conducted such an analysis—failed to apply the traditional canons of statutory construction, ignoring Congress's clear intent as established by the statute's legislative history and the history of the underlying regulatory regime. Pet. 24-27. In a troubling departure from the precedent of this Court and the other federal Circuits, the First Circuit accepted the Agency's interpretation after conducting a cursory independent inquiry into the meaning of the statute. App. 9-10. The role of the courts is to interpret the law, not to arbitrate between conflicting policy preferences between Congress and the Executive. Pet. 17-18. Nevertheless, the First Circuit ignored the canons of statutory construction and rubber stamped the Agency's policy preference in place of that established by Congress. The panel's failure to exercise independent judgment is the latest in a long line of decisions that have unduly deferred to the authority of federal agencies, turning a blind eye toward the responsibility

of the Judiciary to be the final arbiter of the law. 5 U.S.C. § 706.

III. Petitioners Did Not Consent to the Dissemination of Records That the Agency Failed to Include in Its SORNs, Nor Did Petitioners Waive Objections to the Deficiencies in the SORNs

A. Petitioners Did Not Consent to the Disclosure of the Reports at Issue

Respondents argue that the drivers' signing the consent forms cures any deficiency in the Agency's authority to disclose records beyond those specified in Section 31150(a). This argument begs the question; the records included in the crash data and inspection history for purposes of the consent form must be defined within the bounds of statutory authority granted by section 31150 and the System of Records Notices (SORNs) and Privacy Impact Assessments (PIAs) published by the Agency.

The Agency itself defined the limits on the records included in the SORNs and PIAs published prior to implementation of the PSP program. These publications indicated that the reports released to potential employers would contain only that information specifically enumerated in Section 31150(a). Pet. 10.

Similarly, FMCSA's 2010 and 2012 SORNs affirm that "FMCSA designed PSP to satisfy the requirements of 49 U.S.C. § 31150." App. 83; *see also* App. 85-87, 95, 99. These SORNs do not refer to any statutory authority that would authorize dissemination of records beyond those identified in Section 31150(a).

The consent form cannot be interpreted to include records beyond the limits of the notice to the public offered by the agency itself.

B. Petitioners Did Not Waive Their Arguments Concerning the Deficiencies of the SORNs

In a misconstruction of the proceedings, Respondents similarly contend that "Petitioners have waived" the ability to address the contents of the 2010 and 2012 SORNs by failing to raise the issue in their Petition. *See* Resp'ts' Br. 17. Directly contravening Respondents' assertion, Petitioners' Complaint identified the limitation on the SORNs imposed by Section 31150. *See* App. 136. Then, the Agency adopted a litigating position contradicting the previous understanding of the SORNs. Respondents' claim of waiver misdirects the Court away from the point that the SORNs cannot and do not authorize the dissemination of reports for which they lack authority. Stated differently, the SORNs and PIAs accurately described the range of documents that Petitioners contend are authorized for dissemination by Section 31150. Petitioners waived nothing. Moreover, the waiver claim lacks any supporting authority. The sole authority cited by Respondents is a footnote from *Cutter v. Wilkinson*, *see* Resp'ts' Br. 18, which analyzes not the content of a Complaint, but the proceedings in the Court of Appeals—as do the supporting cases cited in that footnote. *See* 544 U.S. 709, 718 n.7 (2005).

IV. The First Circuit Deferred to an Agency Litigating Position, Deepening a Circuit Split

The Circuits have long grappled with the question of whether, and to what extent, courts should defer to

agency interpretations first advanced in litigation. Five Circuits have accorded *Skidmore* deference in this context and six have denied it, including two Circuits that have done both, resulting in intracircuit splits. *See* Pet. 30-31. Without any substantive analysis, and seemingly unaware of this growing divide, the First Circuit readily granted *Chevron* deference to Respondents' interpretation of Section 31150, notwithstanding the fact that it was adopted for the first time as a defense to this suit.[2] *See* App. 10-11. This decision represents the first time that a Circuit Court has held that *Chevron* deference is appropriate in such a circumstance.

This issue is particularly salient; another Petition for a Writ of *Certiorari* pending before the court, *E.I. Du Pont de Nemours & Co. v. Smiley*, No. 16-1189, raises a similar issue, where the Third Circuit gave *Skidmore* deference to *amicus curiae* briefs submitted by the Department of Labor. The frequency with which this issue arises, coupled with the First Circuit's cavalier response to the dilemma—failing to engage in any substantive analysis—demands definitive resolution by this Court.

V. Petitioners Have Standing to Bring This Suit

Respondents contend that Petitioners did not establish Article III standing because the allegations in the Complaint show neither that their injury is "particularized" nor that their claims of future injury are

[2] As explained above, to the extent the Agency's SORNs and PIAs expressed an official position regarding the scope of the Agency's authority to disseminate reports under PSP, the Agency's pre-litigation position appears to comport with that of Petitioners. *See supra* Part III-A.

"imminent." *See Spokeo v. Robins,* 136 S. Ct. 1540, 1548 (2016). Respondents are factually and legally incorrect.[3] Petitioners did not allege injury solely from the dissemination of their PSP reports, but also from the *threat* to their economic and employment prospects from the dissemination of their personalized safety records maintained for disclosure upon request from a prospective employer. Indeed, that threat is the very purpose of PSP.

Plaintiffs' allegations of injury-in-fact meet the standard this Court set out in *Spokeo* and *Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138, 1147 (2013). The allegations demonstrate a concrete adverse effect particularized to each individual Plaintiff. Separately for each Plaintiff driver, the Complaint alleges: a detailed statement of the safety violations recorded on the driver's PSP report; that each individual PSP Report has been prepared and disseminated and is further available for dissemination to prospective motor carrier employers through a PSP records request; and that the unauthorized dissemination of non-serious safety violations has disparaged each Plaintiff driver's qualifications for employment and resulted for each in a negative economic or pecuniary impact on his ability to earn a living as a commercial motor vehicle driver. App. 121-34. The Complaint details the concrete, very real harm that the unauthorized dissemination of non-serious violations has caused, and continues to threaten, Plaintiff drivers: the disparagement of driver qualifications, App. 140, the reduced ability of individ-

[3] The First Circuit assumed without deciding Petitioners' standing for purposes of appeal, a procedure contrary to precedent from this Court. This problem was addressed previously by Petitioners. *See* Pet. 12-14.

ual driver candidates to command better compensation and benefits, *id.*, and a deterrent to apply for better jobs, *id.* at 141.

These allegations show injury that is "certainly impending," not conjectural or hypothetical. *See Spokeo,* 136 S. Ct. at 1548; *Clapper,* 133 S. Ct. at 1147. Plaintiffs' PSP reports were, in fact, disseminated; the reports are reproduced for each driver Plaintiff in the Complaint. App. 121-32. The application by any Plaintiff driver for a new job will trigger the dissemination of their PSP report, exposing the diminished driver qualifications due to the unauthorized inclusion of violations not determined by the Secretary to be serious. The circumstances here are demonstrably different from those in *Clapper*, where the argument rested on the "highly speculative fear" that the government would target the communications of non-U.S. persons with whom the respondents might communicate. 133 S. Ct. at 1148. By contrast, it is certain that Plaintiffs' PSP reports will contain the unauthorized data and that prospective employers will view the unauthorized disclosures upon dissemination of the report, diminishing Plaintiffs' economic value. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-42 (2014) (holding that an allegation of future injury is sufficient to establish standing if there is substantial risk that the harm will occur; *threatened action* by the government creates an Article III injury without the individual exposing herself to liability).

CONCLUSION

The Petitioners here are six ordinary, hardworking truck drivers who don't know a lot about *Chevron* deference. In their own lives, however, they deal with decisions very much like the one facing the Court here today. When a truck gets old and experiences poor fuel

economy and frequent breakdowns, drivers take it to the shop and decide whether to repair, rehab, or replace something that no longer serves them well. So too, here, the concept of *Chevron* deference often does not well serve its intended purpose. This Court should take this opportunity to consider the repair, rehab, or replacement of the current regime for balancing the prerogatives of both the Executive Branch and Congress in creating and implementing the laws that govern the nation. The Court should grant the Petition.

Respectfully submitted,

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