No. 23-133

In the Supreme Court of the United States

ARLEN FOSTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

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

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus American Farm Bureau Federation will address the following question that is of critical importance to its members:

Whether 16 U.S.C. § 3822(a)(4) requires respondents to treat a wetlands certification issued pursuant to the Swampbuster program as invalid and not in effect when a person affected by that certification requests review.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus American Farm Bureau Federation (AFBF) was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 States and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as an *amicus* in this and other courts.

AFBF's members and constituents include farm families whose lives are tied to their land and whose livelihoods—and ability to produce abundant and affordable food and fiber for American consumers—often depend on participation in certain U.S. Department of Agriculture (USDA) benefit programs, including commodity support payments, disaster payments, farm loans, and conservation program payments. Under the wetland conservation provisions of the Food Security Act of 1985, as amended (the Swampbuster Act), these farmers' lands may be subject to delineation and certification as wetlands by the Secretary of the USDA. Although the Swampbuster Act does not forbid farmers from converting or altering delineated wetlands on their properties for the purpose of making that land productive, the Act does effectively mandate

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[1] No party or counsel for a party authored this brief in whole or in part, and no one other than the *amicus*, its members, or its counsel funded the preparation or submission of this brief. Ten days prior to the filing of this brief, counsel of record for AFBF gave notice to counsel of record for all parties of AFBF's intent to file this brief.

compliance with its wetland conversion provisions because it authorizes the USDA to withhold all benefits (and require repayment of past benefits) in the event of a violation. Given these harsh consequences, it is essential that farmers have a robust ability to challenge a wetland delineation and certification that they believe is erroneous so that they may maximize productivity without risking the loss of essential government benefits.

The Eighth Circuit's decision incorrectly undermines this vital right of review. According to the court of appeals, the USDA was authorized to promulgate a regulation (the Review Regulation) that imposes requirements that a farmer must follow in order to make an effective review request. Going beyond mere procedural requirements for seeking review, that regulation allows a farmer to request review of a wetland certification only under certain substantive conditions, such as if a natural event alters the topography or hydrology of the land or the National Resources Conservation Service (NRCS) agrees that the current wetland determination is erroneous.[2]

Congress, however, placed no such limitations on a farmer's right of review in the Swampbuster Act. By reading congressional *silence* in the Swampbuster Act to mean statutory *ambiguity*, the Eighth Circuit abdicated its statutory interpretation responsibilities and deferred to an unlawful and very harmful administrative regulation. This Court's intervention is necessary

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[2] NRCS "is the USDA's scientific arm charged with making technical determinations about whether wetlands exist or have been converted, as well as investigating failures to comply with the Swampbuster provisions." *Boucher* v. *U.S. Dep't of Ag.*, 934 F.3d 530, 532 (7th Cir. 2019).

to rectify this important problem that has the potential to affect countless of the Nation's farmers.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant review on the important question presented by the Petition. In the Swampbuster Act, Congress provided farmers with a broad right to obtain review of a wetland certification, providing that a certification will remain effective "until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Under that plain statutory provision, Congress has imposed no limits on a farmer's ability to seek review of a wetland certification. The Review Regulation, however, states that a farmer "may request review of a certification only if a natural event alters the topography or hydrology of the subject land * * * or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). The Review Regulation runs afoul of the basic command that an agency may not read into a statute limitations or exceptions where none have been placed by Congress. See *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018).

The Eighth Circuit's decision to defer to the Review Regulation ignores this Court's plain instruction to lower courts to avail themselves of all the tools in their statutory interpretation toolkit before declaring a statute to be ambiguous and deferring to an administrative interpretation. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019). The Eighth Circuit's failure to follow this Court's mandate in this case has particularly severe consequences for countless farmers and warrants this Court's intervention.

It would be one thing for NRCS to provide procedural requirements for seeking review of a wetland certification, such as specifying the format of the request, page limitations, and general manner of filing. It is quite another for NRCS to say that it will consider review requests only if those requests assert particular, and narrow, substantive bases for review. See Pet. App. 36a (District Court acknowledged that the Review Regulation "restricts the circumstances in which an agency must review a final certification"). That sort of narrowing of the right of farmers to petition that is set forth in the Swampbuster Act is impermissible because it flatly contradicts the broad and unconditional right to petition stated in the statute, is contrary to law, and hence violates the APA. See *SAS Inst.*, 138 S. Ct. at 1355 ("the duty of an administrative agency is to follow [Congress's] commands as written, not to supplant these commands with others it may prefer"). If Congress had meant that farmers may seek review of a certification only on particular grounds, it easily could have said so: Congress could have included the limitations in the statute itself or it could have prohibited repeat requests for review unless certain conditions were satisfied. Congress did not do so, and the NRCS cannot now narrow the right to seek review because the agency does not like the broad right Congress created for farmers.

It is particularly egregious for NRCS to have imposed substantive conditions on the grounds for review requests when Congress at one time granted the agency that authority, but then *took it away*. The current statutory language replaces an earlier provision that gave the agency discretion to set the conditions for review. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 1422, 104 Stat. 3359, 3573 (Nov. 28, 1990); 16 U.S.C.

§ 3822(a)(4) (1991) ("The Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate"). Congress could hardly have been clearer that it intended to eliminate that grant of discretion to the Secretary when it replaced that provision with the command that "[a] final certification under paragraph (3) shall remain valid and in effect * * * until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). This history of the statutory text shows that Congress intended to provide a broader right of review to farmers that NRCS cannot now roll back through administrative rulemaking.

To be sure, it is inconvenient for NRCS to have to conduct successive reviews when requested. See Pet. App. 8a (deeming a scheme that allows repetitive review requests an "absurd result[]" because it undermines NRCS certifications); Pet. App. 9a ("from an economic perspective, the Review Regulation preserves agency resources"). But agency convenience cannot override plain statutory commands. The NRCS has no power to "'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 325 (2014). If NRCS does not like the broad right of review created by Congress, it can ask Congress to amend it. NRCS also controls the speed and method of its review, within limitations of due process and the APA. Here, however, NRCS simply refused to conduct a review at all unless its regulatory conditions were met. That is not among the agency's permissible options.

Furthermore, the practical risk that farmers will routinely seek successive review of certifications,

thereby repeatedly invalidating certifications, is vastly exaggerated. Certifications benefit farmers by providing a safe harbor from losing federal agricultural benefits. Farmers have an incentive to seek review only if they firmly believe—and think they can establish to NRCS's satisfaction, or on appellate review—that a certification erroneously removes land from productive use. The "absurd result" and resource drain foreseen by the Eighth Circuit fails to take this practical reality into account.

Although it would be easy enough for this Court to hold the petition for *Loper Bright*—and at a minimum it should do so—the Eighth Circuit's rote reliance on *Chevron* to defer to the Review Regulation is not, ultimately, the problem here. The problem arose in the lower courts' failure to apply the standard tools of statutory interpretation to give meaning to the Swampbuster Act's provisions. Only that failure triggered the courts' determination that the statute is ambiguous, which in turn triggered deference under *Chevron*. This case provides an excellent vehicle for the Court to address the importance of federal courts taking seriously their obligation to carefully and faithfully interpret statutory language, even if they believe the results are inefficient or otherwise unpalatable, and to explain that agency inconvenience is no reason to depart from the intent of Congress as determined by using the usual canons of statutory interpretation. The reordering of the judicial approach to the relations of Congress, executive agencies, and the federal courts that this Court is currently undertaking in order to restore the separation of powers required by our Constitution cannot be achieved solely by curtailing *Chevron* deference or explaining that agencies cannot allocate to themselves the power to decide questions of major social or economic significance. It also

requires directing the lower courts, which have displayed considerable recalcitrance in shifting authority from agencies back to Congress, that statutes must be given a fair reading and not distorted to enhance agency power. The lower courts' complicity in agencies' expansion of their authority should be halted at the threshold by requiring the courts to do what they are uniquely suited to do—apply their statutory interpretation tools to determine the meaning of Congress's enactments.

The Court should take the respondents at their word when they argued below, after the grant of certiorari in *Loper Bright*, that their "primary argument" in this case is not a plea for deference but "that the regulation is the better interpretation in light of the statutory text, purpose, and history, and that these sources do not support Plaintiff's reading of the Act." Appellees' C.A. Not. of Supp. Auth. at 2 (May 4, 2023). Addressing that issue will provide valuable guidance to the federal courts in regulatory cases and will deter lower courts from shifting from deference to farfetched statutory interpretations to preserve unwarranted agency authority.

Granting plenary review in this case is especially appropriate given the enormous practical importance of the Swampbuster legislation to America's farmers, and a Nation that depends on them for food security and to supply plentiful and affordable food, fiber, and other agricultural products. As attested to by AFBF's decades-long efforts in Congress, the agencies, and the federal courts to prevent unlawfully overbroad regulatory definitions of "waters of the United States" under the Clean Water Act, designated wetlands are ubiquitous on farmlands, and wetland designation errors are exceedingly costly to farm families. The loss

of federal agricultural benefits—which often are essential for farmers to survive annual variations in climate conditions and the vagaries of markets for their agricultural products—that can follow from erroneous Swampbuster wetland certifications is a critical issue for farmers nationwide. And review-by-request is the method by which Congress balanced NRCS's power to halt productive farming over considerable areas of land with the rights of farmers to test wetland certifications. Granting review in this case would thus address an issue of great legal and practical importance to the Nation's agricultural, food and related industries, which in 2022 amounted to $8.6 trillion in production and employed 23 million people. See Feeding the Economy (2023), https://feedingtheeconomy.com.

ARGUMENT

I. THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS THE COURTS' ROLE IN STATUTORY INTERPRETATION IN THE CONTEXT OF AN ISSUE THAT IS OF THE UTMOST IMPORTANCE TO THE NATION'S FARMERS

A. The Eighth Circuit Failed To Use The Full Toolkit Of Statutory Interpretation And As A Result Reached An Egregiously Wrong Conclusion.

Review of the Eighth Circuit's decision offers an excellent vehicle for this Court to make clear to the lower courts that they are obliged to employ all of their statutory interpretation powers to determine the meaning of congressional enactments. All too often, lower courts follow an easier path, barely undertaking any meaningful statutory interpretation before

declaring a statute ambiguous and then deferring to the agency's interpretation of the statute.

This case perfectly illustrates this all-too-common problem. The Eighth Circuit failed to apply basic principles of statutory interpretation before throwing up its hands and deferring to a self-serving and far-fetched agency interpretation that saved agency resources but obliterated a right that Congress conferred on farmers.

Congress's intent here is especially clear. Congress amended the Swampbuster Act to eliminate the agency's discretion to set conditions for review of wetland certifications. Congress substituted instead a guarantee that farmers have a broad right of review. See pp. 4-5, *supra*.

Originally, Congress granted the Secretary broad discretion over the terms of review. 16 U.S.C. § 3822(a)(4) (1991) ("The Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate"). Subsequently, it took that discretion away and replaced it with an unconditional right to obtain review. 16 U.S.C. § 3822(a)(4) ("A final certification made under paragraph (3) shall remain valid and in effect * * * until such time as the person affected by the certification requests review of the certification by the Secretary"). There is no reasonable way to read that amendment except to provide farmers with a clear and certain right to obtain review of a wetlands certification, and to restrict the ability of the agency to condition the terms of that review.

The lower courts nevertheless failed to give any weight to that significant change in the statute. Rather than see in the change a clear statement of

congressional intent, the Eighth Circuit proclaimed that the Act is silent as to the agency's authority to condition review. It acknowledged that the current statutory language *could* "reflect a Congressional intent to provide that a farmer's review request in and of itself voids a prior certification without the need to follow any procedural requirements like those enumerated in the Review Regulation." Pet. App. 6a-7a (citing 142 Cong. Rec. S3038 (daily ed. Mar. 28, 1996)). But it concluded that the statute "provides no direction as to what constitutes a proper review request and as a result may not preclude the existence of procedural requirements for making an effective review request." Pet. App. 7a. The court then purported to examine legislative history and—though it acknowledged that the amendments to the Swampbuster Act were intended to provide farmers with certainty "by allowing prior delineations of wetlands to be changed only upon request of the farmer"—it held that "[n]othing in the legislative history can be fairly read to evince a Congressional purpose to prevent the USDA from implementing a reasonable process to facilitate a farmer's ability to seek a new wetland determination." Pet. App. 8a (cleaned up). The court thus concluded that "the relevant tools of construction demonstrate" the statute to be ambiguous. Pet. App. 8a.

Noticeably missing from the court's analysis is any discussion of the "relevant tools of construction" beyond resort to a superficial consideration of "legislative history." The court did not meaningfully consider the plain language of the statute in light of the change in that language and the purposes of that change. Nor did the court offer any reasoned explanation why Congress's silence as to substantive conditions on a farmer's right to review meant the statute

was ambiguous as to the agency's authority to impose conditions rather than unambiguously broad as to a farmer's right to seek review. Rather, the court invoked the crutch of deference without rigorous application of its interpretative toolkit.

B. The Eighth Circuit's Approach Flatly Contradicts This Court's Precedent.

The Eighth Circuit's approach is in clear conflict with this Court's precedent. "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction" including the text, structure, history, and purpose of the statute. *Kisor*, 139 S. Ct. at 2415. For "*only when* that legal toolkit is empty and the interpretative question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law'" appropriate for reasonable resolution by an agency. *Ibid.* (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). In other words, the court cannot do what the Eighth Circuit did here and "wave the ambiguity flag" just because it saw arguments on both sides of the interpretative question. *Ibid.* To the contrary, "when a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation, thereby resolving any perceived ambiguity." *Shular* v. *United States*, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (internal quotation marks omitted). Here, that "best interpretation" is not a close call; the ambiguity simply is not there.

SAS Institute is particularly instructive. There, this Court examined the process by which the Patent Office conducted "inter partes review," or review by "private parties to challenge previously issued patent claims in an adversarial process before the Patent

Office that mimics civil litigation." 138 S. Ct. at 1352. The question before the Court was whether the Patent Office must resolve all the claims raised in the inter partes review, or may it choose to limit its review to a subset of the claims.

Under the inter partes review system, a party must file a petition to institute review of a patent and identify each patent challenged, the grounds for the challenge, and the evidence supporting the challenge. 138 S. Ct. at 1353 (discussing 35 US.C. §§ 311-312). The patent owner then responds, explaining why no inter partes review should be instituted, and the Director decides whether to institute the review. *Ibid.* (discussing 35 U.S.C. §§ 313-314). This Court concluded that, once the Director decides to institute the review, the agency must address every claim in the petition; it is not allowed to pick and choose what questions raised by the petition to answer. *Id.* at 1354. This conclusion was compelled by "the plain text of [35 U.S.C.] § 318(a)," which directs "[i]f an inter partes review is instituted" the agency "*shall*" issue a final decision with respect to "*any patent claim*" challenged. *Ibid.*

The Court explained that "[w]here a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." 138 S. Ct. at 1355 (citing *Soc. Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 369 (1946)). Application of that fundamental rule meant that the agency had to address the patentability of all the claims raised in the petition for inter partes review, "not just those the decisionmaker might wish to address." *Ibid.*

Relying on the plain language of the statute, the Court rejected the agency's claim that it had

discretion to determine which claims to entertain once it allowed a petition for inter partes review. 138 S. Ct. at 1355. The Court explained that the statute "envisions that a petitioner will seek an inter partes review" and "Congress chose to structure a process in which it's the petitioner, not the Director, who gets to define the contours of the proceeding." *Ibid.* (discussing 35 U.S.C. § 312(a)). Congress's "structural choices" are "presumed to be deliberate" and the Court's interpretation of the statute must account for that. *Ibid*. Further, "if Congress wanted to adopt the Director's approach it knew exactly how to do so." *Ibid*.

Finally, this Court rejected the argument that the agency's interpretation was entitled to deference because "after applying traditional tools of interpretation here, we are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands." 138 S. Ct. at 1358. While the Director believed that his interpretation permitting the agency discretion to choose which claims to address was grounded in sound policy, "policy considerations cannot create an ambiguity when the words on the page are clear." *Ibid*.

SAS Institute is a strong example of the required use of the judiciary's statutory interpretation toolkit to meaningfully consider competing interpretations and determine which is the correct reading of a statute. The Eighth Circuit ignored this process. Among other things, that court gave far too little weight to Congress's deliberate structural choices that placed the determination of whether to seek review in the hands of the farmer, just as Congress placed the question of whether to seek inter partes review in the hands of the petitioner. In both cases, the agency had

no authority to fill in "blanks" in the statute with restrictions on the process. The statutory silence was reflective of a structural choice, not an ambiguous policy choice to be left to an executive agency.

The Eighth Circuit's error is even worse considering that at least two district courts within that Circuit have properly applied the statutory construction framework to interpret Swampbuster's review provision. In *Brandstad* v. *Veneman*, 212 F. Supp. 2d 976, 994-998 (N.D. Iowa 2002), the district court provided a lengthy and in-depth discussion of the statutory changes to the review provision and other relevant parts of the Act, and concluded that the plain meaning of the statute allows a landowner to request review of a prior determination without substantive restrictions.

Similarly, in *B&D Land and Livestock Co.* v. *Veneman*, 332 F. Supp. 2d 1200, 1210 (N.D. Iowa 2004), the court rejected the agency's claim that the farmer could not obtain review under Section 3822(a)(4) of a wetland determination, explaining, after a lengthy and detailed discussion of the history, text, and structure of the statute, that the plain language gave a farmer an unrestricted right to review. In both *Brandstand* and *B&D Land &Livestock*, the courts did what this Court has instructed but what the Eighth Circuit refused to do: they employed their statutory toolkit and interpreted the Swampbuster review provision without resort to agency deference. The Eighth Circuit's deeply flawed analysis and conclusion undoes the work of those courts (and of Congress).

C. The Dire Consequences Of The Eighth Circuit's Error For American Farmers Make This Court's Review Of The Issue A Matter Of Urgency.

The consequences to farmers of this case necessitates this Court's involvement. As the USDA has explained, "[f]armers and ranchers are the backbone of America, working from sun-up to sundown, taking care of the land and livestock and providing food for their fellow citizens and the rest of the world." U.S. Dep't of Ag., *Farmers and Ranchers: The Foundation of our Nation's Nutrition Assistance Programs* (Oct. 11, 2019).[3] As one example, the agriculture supported by farmers provides "the critical link" to 15 nutrition programs the USDA offers, in 2019 supplying over $1 billion in "high quality, U.S.-grown products" that were provided to those in need across the country. *Ibid*. The USDA also recognizes that "[a]griculture is a risky business" and that USDA programs help farmers "prepare for and recover from the impacts of natural disasters and market volatility." U.S. Dep't of Ag., *Protection and Recovery*.[4] To that end, "USDA provides a suite of disaster assistance programs to help offset losses as well as crop insurance and other coverage options to help manage risk and provide a safety net." *Ibid*. These federal benefits can include "commodity support payments, disaster payments, farm loans, and conservation programs payments, to name a few." Congressional Research Serv., *Conservation Compliance and U.S. Farm Policy* Summary (Oct. 6,

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[3] Usda.gov/media/blog/2019/10/11/farmers-and-rancers-foundation-our-nations-nutrition-assitance-programs#.

[4] Farmers.gov/protection-recovery.

2016); see *id*. at 6, Table 2 (USDA Benefits Affected by Conservation Compliance).

The importance of those programs to farmers makes the consequence of violating Swampbuster's provisions severe. "The law denies eligibility" for those federal farm-assistance programs "if wetlands are converted to agricultural use." *Barthel* v. *U.S. Dep't of Ag.*, 181 F.3d 934, 936 (8th Cir. 1999); see also *Boucher* v. *U.S. Dep't of Ag.*, 934 F.3d 530, 532 (7th Cir. 2019) ("These laws condition the availability of important USDA farm program benefits on farmers' willingness to protect wetlands on their property. Farmers who convert * * * wetlands for agricultural purposes are denied those benefits.").

The Eighth Circuit's decision places restrictions on farmers' ability to obtain review of wetland certifications. As a result, farmers unable to obtain review will leave more land out of agricultural production rather than risk the drastic loss of access to important federal assistance programs. This is so even if the wetland determination was in error. This Court's intervention is necessary to address this issue of extreme importance to many of the Nation's farmers.

D. The Eighth Circuit's Approach Thoroughly Undermines The Constitution's Careful Separation Of Powers.

The continued failure of lower courts, including the lower courts here, to properly apply statutory construction principles distorts the separation of powers. Decisions like that by the Eighth Circuit are quick to find statutory ambiguity and then, under *Chevron*, to defer to the agency's interpretation.

Under the separation of powers, the "[j]udicial power" is exercised "always for the purpose of giving

effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1824). James Madison acknowledged that the legislature's enactments will often be ambiguous when he wrote that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" by the courts. The Federalist No. 37, at 183 (Madison). Alexander Hamilton envisaged "that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 404 (Hamilton). In that view, "[t]he interpretation of the laws is the proper and peculiar province of the courts" and it is the courts' job to ascertain "the meaning of any particular act proceeding from the legislative body." *Ibid*. In short, "[t]he judicial power was understood to include the power to resolve [statutory] ambiguities over time." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment).

Decisions like the Eighth Circuit's discard that allocation of power to the judiciary by pursuing a path that is all too quick to find statutory ambiguity—and thus place the proper interpretation of the law primarily in the executive agency, see *Michigan* v. *EPA*, 576 U.S. 743, 761-762 (2015) (Thomas, J., concurring). —instead of exhausting the statutory interpretation toolkit as espoused by this Court in *Kisor*. Clearly, the lower Federal courts need more direction from this Court, and urgent reminders that they must take their interpretive obligations seriously rather than

defer to self-interested agencies. A grant of certiorari here, rather than a hold for *Loper Bright*, would set the lower courts on the right path.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY REVERSE THE EIGHTH CIRCUIT'S DECISION

In the alternative to granting plenary review, this Court should exercise its authority to grant certiorari and summarily reverse the Eighth Circuit's decision because that decision was obviously wrong and is squarely foreclosed by this Court's precedent. See S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c) (11th ed. 2019); *Shoop* v. *Cassano*,142 S. Ct. 2051, 2057 (2022) (Thomas, J. dissenting).

Summary reversal is especially appropriate because this Court has already admonished the lower courts how to properly address the statutory interpretation question at issue. See *Sexton* v. *Beaudreaux*, 138 S. Ct. 2555, 2558-2559 (2018) (per curiam) (summarily reversing circuit court decision where this Court had "previously described the approach" to be employed to answer the legal question at issue) (cleaned up). In particular, this Court has directed the lower courts that they are to apply all of the statutory construction tools in their toolkit and undertake a rigorous analysis of whether a statute interpreted by an agency is ambiguous. See *Kisor*, 139 S. Ct. at 2415. Further, the Court has already illustrated the manner in which to employ that toolkit in a closely analogous context. See *SAS Inst.*, 138 S. Ct. at 1352-1358; *supra*, pp. 11-13. The lower courts' failure to undertake a meaningful effort to construe the Swampbuster Act's review provision and to give due consideration to *SAS Institute* is the result of a "plain and repetitive error"

by the courts finding a statute ambiguous too quickly and in a manner that abdicates a core judicial function. See *Parker* v. *Matthews*, 567 U.S. 37, 49 (2012) (summary reversal of appellate court decision that was based on "plain and repetitive error" in legal analysis). In these circumstances, summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted for plenary review. In the alternative, the Court should grant certiorari and summarily reverse the Eighth Circuit's decision.

Respectfully submitted.

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