No. 23-133

In the Supreme Court of the United States

ARLEN FOSTER, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Under the Swampbuster provisions in the Food Security Act of 1985, 16 U.S.C. 3821 *et seq.*, farmers are ineligible for certain federal financial benefits if they convert wetlands on their property into arable land for the production of agricultural commodities. The Secretary of Agriculture, acting through the National Resources Conservation Service (NRCS), is responsible for certifying whether particular farmlands contain wetlands and for delineating the boundaries of such wetlands. After NRCS has issued a final wetland certification, a farmer may rely on that certification to comply with the Swampbuster provisions, and the certification remains "valid and in effect" until either the area is no longer used for agriculture "or 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). The agency's regulations provide that a prior final certification will be reviewed "only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, 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 question presented is as follows:

Whether the court of appeals correctly rejected petitioner's contention that 16 U.S.C. 3822(a)(4) obligates NRCS to review a prior wetland certification whenever a farmer requests review, such that the agency lacks statutory authority to impose the conditions set forth in 7 C.F.R. 12.30(c)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 68 F.4th 372. The opinion of the district court (Pet. App. 15a-45a) is reported at 609 F. Supp. 3d 769.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2023. The petition for a writ of certiorari was filed on August 10, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Wetland Conservation provisions of the Food Security Act of 1985, Pub. L. No. 99-198, Tit. XII, Subtit. C, 99 Stat. 1507 (16 U.S.C. 3821 *et seq.*)—popularly known as the Swampbuster provisions, see 16 U.S.C. 3821 note—farmers who convert wetlands for

agricultural use are ineligible for certain financial benefits administered by the Secretary of Agriculture. 16 U.S.C. 3821(d)(1). Farmers who produce an agricultural commodity on such "converted wetland" in any crop year are also ineligible for specified financial benefits. 16 U.S.C. 3821(a)(1). Together, those provisions operate to discourage, but not prohibit, the conversion of wetlands into arable land for the production of agricultural commodities.

The statutory scheme defines the term "wetland" by reference to the normal presence of surface or groundwater, along with associated "hydric soils" and "hydrophytic vegetation." 16 U.S.C. 3801(27)(A)-(C); see 16 U.S.C. 3801(12) and (13). The Secretary is responsible for delineating and certifying "all wetlands located on subject land on a farm" for purposes of the Swampbuster provisions. 16 U.S.C. 3822(a)(1). The Secretary has delegated that function to the Natural Resources Conservation Service (NRCS) in the United States Department of Agriculture (USDA). 7 C.F.R. 12.6(c), 12.30(a)(3). NRCS, in turn, has developed scientifically based wetland identification procedures. See 7 C.F.R. 12.31.

Wetland delineations are subject to multiple layers of administrative and judicial review. A person may request that NRCS make a wetland delineation for subject farmland, 7 C.F.R. 12.6(c)(4)-(6), and may appeal any initial determination within NRCS, see 7 C.F.R. 12.12, 12.30(c)(2) and (3), 614.7. If the person is dissatisfied with NRCS's final determination, the person may further appeal to USDA's National Appeals Division, where the matter is assigned to a hearing officer. 7 C.F.R. 11.8(b)(2), 614.8(b)(2). A hearing officer's decision is appealable to the director of the National Appeals Division, 7 C.F.R. 11.9(a), and a final decision by

the director is reviewable in district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 7 U.S.C. 6999; 7 C.F.R. 11.13(a).

Farmers may rely on a certified wetland delineation to ensure compliance with the Swampbuster provisions. In particular, the statute provides that "[n]o person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary." 16 U.S.C. 3822(a)(6). Thus, a farmer who converts an area on his land—*e.g.*, by dredging or filling it—that is non-wetland under a wetland certification can be confident that he will not be disqualified, based on that action, from the various financial benefits specified in the Swampbuster provisions.

b. This case concerns the procedures for reviewing prior certified wetland delineations. As originally enacted, the Swampbuster provisions directed the Secretary to identify wetlands but did not expressly address revisiting or reviewing prior determinations. See Food Security Act of 1985, § 1223, 99 Stat. 1508. In 1990, Congress directed the Secretary to establish a process for periodically reviewing prior determinations. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, sec. 1422, § 1222(a)(4), 104 Stat. 3573 ("The Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate.").

In 1996, however, after farmers raised concerns about the risk of "constantly-changing delineations," Congress eliminated the provision mandating periodic review. Pet. App. 7a; see Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322(a), 110 Stat. 987-988 (16 U.S.C. 3822(a)). Congress instead provided that a delineation, once finalized,

"shall not be subject to a subsequent wetland certification or delineation by the Secretary unless requested" by the farmer under Section 3822(a)(4). 16 U.S.C. 3822(a)(6). Section 3822(a)(4), in turn, states that a final certification "shall remain valid and in effect as long as the area is devoted to an agricultural use or 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).

The agency's implementing regulations provide that a person may request review of a prior certification "only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, 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).

2. a. Petitioner owns land in Miner County, South Dakota, a portion of which is a "prairie pothole"—*i.e.*, a "shallow depression found in glaciated portions of the United States which frequently has standing water for parts or all of a growing season in years where the precipitation is normal or above average." *Foster* v. *Vilsack*, 820 F.3d 330, 332 & n.2 (8th Cir. 2016), cert. denied, 580 U.S. 1048 (2017). In 2002, petitioner sought a wetlands determination from NRCS. *Id.* at 332. In 2004, NRCS made an initial determination that the site contains a wetland. Pet. App. 18a. In 2011, after various appeals and further administrative proceedings, NRCS again determined that the site contains a wetland, and the agency delineated the boundaries of the wetland in a certified map. *Ibid.*; see *id.* at 51a-56a.

NRCS explained in its written determination that the area at issue "meets the definition of wetland" for

the Swampbuster provisions because it "has [a] predominance of hydric soils; is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and under normal circumstances does support a prevalence of such vegetation." Pet. App. 52a. NRCS also determined that the site was "*not* an Artificial Wetland," which the regulations define as a formerly nonwetland area that has come to satisfy the wetland criteria due to human activities. *Ibid.*; see 7 C.F.R. 12.2(a). Specifically, NRCS found that the existence of the wetland was not solely the result of melting snow from a tree belt on petitioner's property. *Foster* v. *Vilsack*, No. 13-4060, 2014 WL 5512905, at *15 (D.S.D. Oct. 31, 2014), aff'd, 820 F.3d 330 (8th Cir. 2016), cert. denied, 580 U.S. 1048 (2017). Among other things, the agency noted that the "soil profile" on the site "dated back to glaciation" and therefore was not the product of the tree belt, which was planted only in the 1930s. *Ibid.*

After exhausting their administrative appeals, petitioner and his spouse filed an APA action in the District of South Dakota to challenge the agency's 2011 wetland delineation. The district court upheld the wetland certification, the court of appeals affirmed, and this Court denied a petition for a writ of certiorari. 580 U.S. 1048.

b. In 2017, petitioner requested that NRCS review its 2011 determination, which the agency declined to do. Pet. App. 57a-58a. NRCS explained that, under its regulations, a person may request review "only if a natural event alters the topography or hydrology of the subject land" or if the agency concurs with the person that "an error exists in the current wetland determination." *Id.* at 58a; see 7 C.F.R. 12.30(c)(6). Petitioner had not

included any "specific information [or] data" with his request to suggest that either criterion was met here. Pet. App. 58a. NRCS informed petitioner that if he wished to request review "based on an error" in the prior delineation, he must "supply additional information that has not been previously considered by NRCS." *Ibid.*

In 2020, petitioner "submitted another request to review the 2011 certification." Pet. App. 19a. Petitioner "did not claim there had been a change to the topography or hydrology of the site." *Ibid.* But his 2020 request included the report of an engineer whom petitioner had retained to "analyz[e] the volume of snow accumulation under the tree belt." *Ibid.* The engineer opined that, in light of the tree belt, the site constituted an "artificial wetland" for Swampbuster purposes. *Ibid.*; see *id.* at 60a-64a. In response, NRCS asked petitioner's engineer to identify "any evidence that would show that the NRCS had not fully considered the tree belt at the time of the 2011 recertification decision." *Id.* at 4a. Neither petitioner nor the engineer responded to the request. *Ibid.*

NRCS declined petitioner's second request to review the 2011 wetland certification, explaining once again that petitioner had failed to meet his burden of providing data or other new information that would support doing so. Pet. App. 65a-66a. NRCS advised petitioner that the agency had "reviewed in depth" the engineering report that he had submitted and had "compared [it] to the agency record." *Id.* at 66a. But the report did not suggest that the topography or hydrology of the site had changed since 2011, that the "original determination [was] no longer reliable," or that any "error exists in the current wetland determination." *Id.* at 65a.

c. Petitioner brought this APA action in the District of South Dakota to challenge the agency's denials of his requests to review the 2011 wetland determination. See Compl. ¶¶ 6-7. Among other things, petitioner contended that the regulation specifying the circumstances in which NRCS will review a prior final wetland certification, 7 C.F.R. 12.30(c)(6), is inconsistent with the Swampbuster provisions and therefore invalid. Compl. ¶¶ 122-132. The Swampbuster provisions state that a prior certification "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). Petitioner contended that the quoted language "imposes a mandatory duty on [the agency] to conduct a review and issue a new certification every time an aggrieved party requests such a review." Pet. App. 33a.

The district court granted summary judgment to the government on all claims. Pet. App. 15a-45a. As relevant here, the court rejected petitioner's contention that the challenged regulation is inconsistent with Section 3822(a)(4). Applying *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court stated that Congress did not clearly "address any restrictions on when a party can request a review" under Section 3822(a)(4), "much less impose a nondiscretionary duty on [NRCS] to repeat the certification process whenever requested to do so by an unsatisfied party." Pet. App. 34a; see *id.* at 33a-34a (reciting the *Chevron* framework as set forth in *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013)). The court also reviewed the statutory scheme as a whole and found that nothing else addressing "how often or under what circumstances a party may request a review of a final certification." *Id.* at 34a.

Viewing the statute as "silent on the requirements for requesting review," the court upheld Section 12.30(c)(6) as setting forth reasonable conditions for reviewing a prior determination. *Id.* at 35a; see *id.* at 35a-36a.

3. The court of appeals affirmed. Pet. App. 1a-14a. Like the district court, the court of appeals applied "the two-step framework from *Chevron*." *Id.* at 5a-6a. The court "first consider[ed] the text of the statute," which states that a prior certification "'shall remain valid and in effect . . . until such time as the person affected by the certification requests review.'" *Id.* at 6a (quoting 16 U.S.C. 3822(a)(4)). The court stated that, "[o]n one hand," the text is susceptible of the interpretation 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 challenged regulation. *Ibid.* But the court also observed, "[o]n the other hand," 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" imposed by the agency as preconditions to reviewing a prior final wetland certification. *Id.* at 7a.

The court of appeals found that the first interpretation would produce "absurd results" because "farmers could unilaterally nullify wetland certifications as the NRCS makes them by filing vague and facially-meritless review requests," "without limit." Pet. App. 8a. The court also stated that such an interpretation would "render any attempted certification by the NRCS uncertain," *ibid.*, in contravention of the purpose of Section 3822(a)(4), which was adopted in 1996 to "promote certainty by preventing the NRCS from constantly changing wetland delineations." *Ibid.*; see *id.* at 7a-8a (reviewing the statutory history).

The court of appeals therefore found the statute at least somewhat "ambiguous" as to the agency's authority to impose limitations on requesting review of a prior final wetland determination. Pet. App. 8a; see *id.* at 6a (perceiving "some ambiguity" about the agency's authority to impose "procedural requirements for making effective review requests"). Turning to the second step of the *Chevron* framework, the court determined that the challenged regulation, 7 C.F.R. 12.30(c)(6), "imposes reasonable procedural requirements a farmer must follow to make an effective review request." Pet. App. 9a. Among other things, the court explained that, "from an economic perspective," the regulation "preserves agency resources by allowing the NRCS to refuse to consider facially-meritless review requests, and it promotes certainty among farmers by preventing farmers from nullifying certifications at will." *Ibid.*

DISCUSSION

The Swampbuster provisions state that a final certification delineating a wetland remains valid and in effect "until such time as the person affected by the certification requests review of the certification by" NRCS. 16 U.S.C. 3822(a)(4). In the decision below, the court of appeals held that Section 3822(a)(4) does not foreclose NRCS from imposing reasonable conditions on requesting review of a wetland determination. The court also upheld the conditions the agency has adopted in its implementing regulations, under which NRCS will review a prior determination "only if a natural event alters the topography or hydrology of the subject land to the extent that the [prior] final certification is no longer a reliable indication of site conditions, 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 decision below is correct and does not conflict with any decision of another court of appeals or this Court. Nor does it otherwise meet any of this Court's traditional criteria for granting a petition for a writ of certiorari. See Sup. Ct. R. 10. However, in rejecting petitioner's challenge to Section 12.30(c)(6), the court of appeals relied on the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), finding "some ambiguity" in the statutory scheme and upholding the challenged regulation as "reasonable." Pet. App. 6a, 9a. On May 1, 2023, this Court granted a petition for a writ of certiorari in *Loper Bright Enterprises* v. *Raimondo*, 143 S. Ct. 2429 (No. 22-451), to consider whether to overrule *Chevron* or modify it in certain respects. And on October 13, 2023, this Court granted a petition for a writ of certiorari in *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219, to review the same question presented in *Loper Bright* in parallel litigation involving the same agency rule. The Court also directed the Clerk to establish a briefing schedule to permit both cases to be argued at the January 2024 argument session. Because the court of appeals relied on *Chevron* here, it would be appropriate to hold the petition in this case pending the Court's decisions in *Loper Bright* and *Relentless* and then to dispose of the petition as appropriate in light of those decisions. See Pet. 30-32.

The petition here also seeks further review of the question whether Section 3822(a)(4) "requires [NRCS] to treat a certification as invalid and not in effect when a person affected by that certification requests review." Pet. i. To the extent petitioner seeks review of that question independently of the *Chevron* question, that other question does not warrant further review. The statutory text, purpose, and history all support the

agency's longstanding view that Section 3822(a)(4) does not foreclose the agency from imposing reasonable preconditions to review of a final wetland determination. See Gov't C.A. Br. 17-26.

Section 3822(a)(4) provides certainty for farmers by ensuring that any review of prior wetland determinations generally must originate with the farmers themselves, not the agency. The provision was a direct response to concerns with the pre-1996 scheme, in which Congress had required NRCS to establish a regulatory process for periodic review of such determinations. See Pet. App. 7a-8a; see also pp. 3-4, *supra*. But neither the statutory text nor its history suggests that Section 3822(a)(4) vests farmers with an unqualified right to compel the agency to review a prior wetland determination at any time for any reason, or for no reason at all. As the court of appeals recognized, reading the statute in that manner would "render any attempted certification by the NRCS uncertain," since farmers could simply invalidate any certification with which they were displeased by requesting review immediately after the certification became final. Pet. App. 8a.

In this case, for example, petitioner sought to compel the agency to review its 2011 wetland determination within three months of the conclusion of approximately six years of administrative and judicial proceedings concerning that determination—without identifying any error in the prior determination or any relevant facts or data that the agency had allegedly overlooked. See Pet. App. 57a; see also pp. 5-6, *supra*. Interpreting the statute to require the agency to review a prior wetland certification on demand, without any limits, would produce "absurd results," Pet. App. 8a, effectively mandating

that the agency redo its work without any relevant changes or any reason to expect a different outcome.

The government contended below—and continues to believe—that the interpretation of Section 3822(a)(4) reflected in the challenged regulation is the best interpretation "in light of the statutory text, purpose, and history," without regard to *Chevron*. Gov't C.A. Rule 28(j) Letter 2 (May 4, 2023); see Gov't C.A. Br. 17-26. Nonetheless, because the court of appeals relied on the *Chevron* framework, it would be appropriate to hold the petition here pending this Court's decisions in *Loper Bright* and *Relentless*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decisions in *Loper Bright Enterprises* v. *Raimondo*, cert. granted, No. 22-451 (May 1, 2023), and *Relentless, Inc.* v. *Department of Commerce*, cert. granted, No. 22-1219 (Oct. 13, 2013), and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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