No. _____

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; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Acting Chief of the Natural Resources Conservation Service; TONY SUNSERI, in his official capacity as Acting South Dakota State Conservationist,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2011, Respondent Natural Resources Conservation Service concluded that an 8-inch-deep pool of water in the middle of Petitioner Arlen Foster's farm is a naturally occurring wetland under 16 U.S.C. § 3822 (Swampbuster). As a result of this certified wetland delineation, in the years the water appears, Foster is unable to drain it to farm that area of his land. Since 2011, Foster has hired experts who have gathered new information about the hydrology of this purported wetland. Based on this new data, Foster requested that Respondent review his previous delineation.

Swampbuster provides that a certified delineation "remain[s] 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). Despite this statutory language, Respondent applied its regulations to deny Foster's request to review the previous delineation and kept the previous delineation in place. The Eighth Circuit deferred to the agency's interpretation of Swampbuster under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and upheld the agency's denial.

The questions presented are:

1. Whether a statute that provides that a wetlands certification "remain[s] valid and in effect . . . until such time as the person affected by the certification requests review of the certification" requires an agency to treat a certification as invalid and not in effect when a person affected by that certification requests review.

2. Whether the Court should overrule *Chevron*.

LIST OF ALL PARTIES

Petitioner (plaintiff-appellant below) is Arlen Foster. The Respondents (defendants-appellees below) are the United States Department of Agriculture and its Secretary Tom Vilsack, The Natural Resources Conservation Service and its Chief, Terry Cosby, and Tony Sunseri, South Dakota State Conservationist.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Foster v. USDA, et al., No. 4:21-CV-04081-RAL, 609 F. Supp. 3d 769 (D.S.D. July 1, 2022).

Foster v. USDA, et al., No. 22-2729, 68 F.4th 372 (8th Cir. May 12, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arlen Foster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Eighth Circuit is reported at 68 F.4th 372, and is reproduced in the Appendix beginning at 1a. The opinion of the United States District Court for the District of South Dakota – Southern Division is reported at 609 F. Supp. 3d 769, and is reproduced in the Appendix beginning at 15a.

JURISDICTION

The date of the decision sought to be reviewed is May 12, 2023. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

- 16 U.S.C. § 3822(a)(4): "A final certification made under paragraph (3) 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)(6): "No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4)."

- 7 C.F.R. § 12.30(c)(6): "A person may request review of a 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."

STATEMENT OF THE CASE

A. Legal Framework

In 1985, Congress passed several statutory provisions—known today as "Swampbuster"—as part of the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. § 3801, *et seq*. Through these provisions, Congress sought to preserve wetlands by restricting how recipients of USDA agricultural benefits may use land containing wetlands. 16 U.S.C. §§ 3821–3822; *see also B & D Land and Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1190 (N.D. Iowa 2008). Swampbuster defines "wetlands" as land that combines wetland hydrology, hydric soils, and the ordinary production of plants that grow well in wet conditions. 16 U.S.C. § 3801(a)(27), *id.* § 3801(a)(12), (13). Farmers who drain wetlands and produce an agricultural crop on a wetland are ineligible to receive various federally authorized agricultural benefit programs and premium subsidies for federally authorized crop insurance programs. *Id.* § 3821(a); § 3821(d)(1).

Swampbuster's ineligibility provisions, however, do not apply to "artificial wetlands," or wetlands that are "temporarily or incidentally created as a result of adjacent development activity." 16 U.S.C.

§ 3822(b)(1)(F). Therefore, farmers may produce an agricultural commodity on artificial wetlands without risking the loss of their federal agricultural benefits.

The Secretary of Agriculture must notify farmers of where they can farm without risk of losing benefits by "delineating" wetlands on a certified map. 16 U.S.C. § 3822(a). So long as a farmer follows a certified delineation, he or she remains eligible for those benefits and subsidies covered by Swampbuster. 16 U.S.C. § 3822(a)(6). The Secretary of USDA has delegated this certification responsibility to the National Resources Conservation Service (NRCS), which is an agency of USDA. 7 C.F.R. § 12.30(a)(3).

In 1996, Congress amended Swampbuster to clarify how the NRCS was to certify wetlands. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The statute, as amended, provides that wetland certifications "remain valid and in effect . . . until such time as the person affected by the certification requests review of the certification by the Secretary" of USDA. 16 U.S.C. § 3822(a)(4). The statute places no limits or conditions on an affected person's right to request review, creating a system where an affected person may request review of a wetland certification at any time. *See id.*

On September 6, 1996, USDA and NRCS promulgated a final interim rule purporting to interpret, among other things, the Review Provision of Swampbuster. *See* 61 Fed. Reg 47,019 (Sept. 6, 1996), *codified at* 7 C.F.R. §§ 12.1–12.13 and §§ 12.30–12.34 ("Swampbuster Regulations"). The agencies "interpreted" the right to Review Provision by limiting review to only two circumstances. *See* 7 C.F.R.

§ 12.30(c)(6) ("Review Regulation"). According to the agencies' interpretation,

> [a] person may request review of a 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.

Id. (emphasis added).

B. Factual Background

Arlen Foster is a third-generation farmer in Miner County, South Dakota. Court of Appeals' Joint Appendix Vol. 1 at 7–8, ¶ 13, ¶ 19, Eighth Circuit Case no. 22-2729, docket no. 1 (filed May 5, 2021). He produces a variety of agricultural crops on his land, including corn. *Id.* at 11, ¶ 39. Farming is a family business, and the property has been in Foster's family since his grandfather purchased it in 1900. *Id.* at 8, ¶ 19.

In the 1930s, Foster's father developed a tree belt along the south edge of the farm field. App. 18a. The tree belt acts as a barrier preventing wind-driven soil erosion on Foster's field as well as surrounding farms. *Id.* The tree belt is now approximately half a mile long (running West to East along the edge of the field) and consists of 1,200–2,000 trees. Court of Appeals' Joint Appendix Vol. 1 at 8–9, ¶ 20. It is roughly 25 yards deep. *Id.*

At the time the tree belt was planted, the Soil Conservation Service (a predecessor to NRCS) encouraged planting tree belts as a conservation

measure. Court of Appeals' Joint Appendix Vol. 1 at 37, ¶ 22, docket no. 13 (filed Aug. 6, 2021). NRCS still encourages the development of these tree belts to prevent erosion, *id.* ¶ 23, and Foster intends to preserve the tree belt for that purpose.

The tree belt also affects Foster's farmland in other ways. During the winter, snow accumulates under the tree belt on Foster's field. That snow melts in the spring and drains northward adjacent to where the tree belt was developed, occasionally creating the pool shown below. App. 18a. This occasional pool is isolated from any other water body because the tree belt, not another body of water, feeds into it. Court of Appeals' Joint Appendix Vol. 1 at 9–10, ¶¶ 27–29. When it is present, it is roughly 0.8 acres and approximately 8 inches deep. *Id.* ¶ 27.

Picture of the small pool in Foster's field. *See* Court of Appeals' Joint Appendix Vol. 1 at 5, docket no. 1.

Because the small pool receives additional snow melt from the adjacent tree belt, it often takes longer to dry out than the surrounding field. In the years with higher snowfall, the pool does not dry out fast

enough to allow the use of farm equipment in and around it in time to plant a crop. App. 62a–63a. In these wetter years, Foster would need to drain the pool to speed up its "drying out" to produce an agricultural crop in the pool and the surrounding portions of the field. *Id.*

But Foster is unable to drain the pool in these wetter years. NRCS certified a wetland delineation for a portion of Foster's farm in 2004. Court of Appeals' Joint Appendix Vol. 3 at 466. Four years later, Foster requested that NRCS review that certification under 16 U.S.C. § 3822(a)(4). App. 46a–47a. That request was granted and NRCS began reviewing the 2004 delineation. Court of Appeals' Joint Appendix Vol. 3 at 355. That process took several years, as NRCS twice rescinded its initial determination and restarted the review process from scratch. Court of Appeals' Joint Appendix Vol. 8 at 1399, 1401.

In 2011, NRCS finally certified a new wetland delineation. It ultimately determined that 0.8 acres of the field is a naturally occurring wetland under Swampbuster (2011 Certification). Court of Appeals' Joint Appendix Vol. 3 at 355. Foster administratively appealed the agency's determination, but the USDA upheld the certification. *Id.* at 353. Foster then sought judicial review of the 2011 Certification, but the Eighth Circuit deferred to the agency. This Court denied Foster's petition for certiorari. *See Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017).

In 2017, Foster submitted a new request for review (2017 Request) of the 2011 certification under 16 U.S.C. § 3822(a)(4). *See* App. 57a–59a. NRCS declined to review the 2011 certification and stated it would

only do so if Foster "suppl[ied] additional information that has not previously been considered by NRCS." *Id.* at 58a. The purported requirement for additional information is found not in the text of Swampbuster, but in the agency's understanding of the regulations that purport to interpret the statute. *Id.*, App. 65a–66a (2020 letter from NRCS declining review).

In 2020, Foster submitted a new request under 16 U.S.C. § 3822(a)(4) that the agency review the 2011 certification. App. 65a–66a. Foster complied with the NRCS's extra-statutory demand that he provide new, additional information the agency had not considered. *See id.*; Court of Appeals' Joint Appendix Vol. 2 at 110–25. Specifically, the 2020 request included a technical report detailing how the tree belt affects the hydrology of the pool, *id.*, a report the agency admits it had never seen before the 2020 request. *See* App. 20a (district court quoting the affidavit of Deke Hobbick, assistant state conservationist at NRCS, who stated, "I also observed that the information submitted with the 2020 request included *newly created data* in the engineer's report and conclusions based on that data[.]" (emphasis added)). The report concluded that the wetland is not covered under Swampbuster because it is an "artificial wetland" created by the adjacent tree belt. App. 62a–64a; *see also* 16 U.S.C. § 3822(b)(1)(F) (excluding from Swampbuster coverage wetlands that are "temporarily or incidentally created as a result of adjacent development activity").

Despite providing this new information, the agency again declined to review the 2011 Certification, stating that Foster did not meet the conditions for reconsideration. App. 65a–66a. Indeed,

the agency refused to admit that Foster was entitled to administratively appeal the agency's decision to not review the certification, *id.*, and at the District Court attempted to argue that it had not even made a final decision about Foster's right to a review of the 2011 certification. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or Alternatively for Summary Judgment at 15–18, District Court case no. 4:21-cv-04081-RAL, docket no. 22 (filed Nov. 15, 2021).

As a result, for almost two decades Foster has been unable to drain the small pool of water in the years when it appears. He cannot farm his entire property without losing access to federal agricultural benefits—benefits he needs to make a living farming his land. Court of Appeals' Joint Appendix Vol. 1 at 5, ¶ 2.

C. Proceedings Below

After being denied his right to a review, Foster and his late wife Cindy[1] filed this suit in 2021. *See* Court of Appeals' Joint Appendix Vol. 1 at 4. Under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, they sought a declaration that the 2011 Certification is no longer valid or in effect because the Review Regulation is contrary to the plain text of

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[1] On January 3, 2022, Mrs. Foster passed away. *See* Suggestion of Death Upon the Record Under Rule 25(a), District Court case no. 4:21-cv-04081-RAL, docket no. 33 (filed Jan. 10, 2022). She was subsequently dismissed from the case under Federal Rule of Civil Procedure 25(a)(2). *See* Plaintiff's Unopposed Motion to Dismiss Plaintiff Cindy Foster, District Court case no. 4:21-cv-04081-RAL, docket no. 40 (filed Apr. 4, 2022); Order Granting Unopposed Motion to Dismiss Plaintiff, District Court case no. 4:21-cv-04081-RAL, docket no. 44 (filed Apr. 5, 2022).

Swampbuster. Court of Appeals' Joint Appendix Vol. 1 at 31, ¶ 147.

In November 2021, Respondents moved to dismiss or in the alternative for summary judgment, arguing that they were entitled to judgment as a matter of law on Foster's claim that the Review Regulation conflicts with the text of Swampbuster. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or Alternatively for Summary Judgment at 25–27, District Court case no. 4:21-cv-04081-RAL, docket no. 22 (filed Nov. 15, 2021). Specifically, Respondents argued that they were merely filling in statutory "silence" in Swampbuster's text regarding "how a party may request review of a final wetland certification," and therefore the conditions in the Review Regulation "are reasonable, in accord with the statute, and entitled to *Chevron* deference." *Id.* at 26. Foster responded that the Review Regulation contradicts Swampbuster because under the plain language of the statute, when a person affected by the certification requests review, the previous certification is invalidated. *See* Plaintiffs' Combined Memorandum in Support of Motion for Summary Judgment and Response to Motion to Dismiss at 19–20, District Court case no. 4:21-cv-04081-RAL, docket no. 36 (filed Jan. 10, 2022).

On July 1, 2022, the District Court granted the agencies' motion for summary judgment and denied Foster's motion for summary judgment. App. 15a–45a. Relying on this Court's articulation of *Chevron* deference from *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), it concluded that the Review Regulation did not conflict with Swampbuster because it "merely restricts the circumstances in which an agency must

review a final certification[.]" App. 36a. Therefore, *Chevron* deference was appropriate.

The Eighth Circuit affirmed. App. 1a–14a. In a short but published opinion, the panel cited *Chevron* and deferred to the agency's interpretation of Swampbuster. App. 5a–9a. It therefore held that the Review Regulation was a valid exercise of the agencies' power. App. 9a. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because the Decision Below Conflicts with This Court's Statutory Interpretation and *Chevron* Deference Precedents

"Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984)); *see also Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). A court must make a robust effort to determine the meaning of a statute before deferring to an agency's interpretation. *See Epic Systems*, 138 S. Ct. at 1630, *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2423–24 (2019) (explaining that before deferring, "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning"); *id.* at 2430 (Gorsuch, J., concurring) (explaining that judges have and should use their "interpretative toolkit, full of canons and tiebreaking rules, to reach a decision about the best

and fairest reading of the law"). And if "the canons [of statutory interpretation] supply an answer" to an "interpretive puzzle," "*Chevron* leaves the stage." *Epic Systems*, 138 S. Ct. at 1630 (quotations omitted).

The Eighth Circuit ignored this mandate. It did not attempt to apply the traditional tools of statutory interpretation to solve Swampbuster's interpretive puzzle. Instead, the Court of Appeals found ambiguity where none exists, effectively allowing the agency to rewrite the statute.

A. Contrary to This Court's Precedents, the Eighth Circuit Failed to Apply Traditional Tools of Interpretation to Discern Swampbuster's Meaning

This Court has repeatedly admonished that statutory interpretation always begins with the statutory text. *See Bartenwerfer v. Buckley*, 143 S. Ct. 665, 671 (2023) ("[W]e start where we always do: with the text of the statute.") (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021)). And "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. In ascertaining the meaning of the text, this Court has instructed courts to "employ[] traditional tools of statutory construction," *id.* at 843 n.9, including an analysis of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Here, if the Eighth Circuit had followed this Court's direction on statutory interpretation, it would

have reached a different conclusion. An analysis of Swampbuster's language, design, and statutory history demonstrates that the statute requires an agency to treat a certification as invalid and not in effect when a person affected by that certification requests review.

First, the text of Swampbuster does not limit the right to request review of a certification. The operative text is in a subsection titled "Duration of certification." 16 U.S.C. § 3822(a)(4). The text then lays out the "[d]uration," stating 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." *Id.* The text makes no mention of conditions that must be met before review is granted, and instead provides that once review is requested, the previous certification is invalidated.

The NRCS's Review Regulation, however, adds barriers to review, allowing review of a previous 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); *see also* App. 36a (opinion and order of the District Court stating that the Review Regulation "restricts the circumstances in which an agency must review a final certification[.]"). The agency's regulation, far from "giv[ing] effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, instead rewrites the statute to add conditions not present in the statute.

Despite the regulation adding restrictions on review where Congress imposed none, the courts below held that the Review Regulation is consistent with Swampbuster. App. 9a, 36a. In doing so, both courts eschewed a textual analysis for concern about "agency efficiency." *See* App. 9a, 36a. Whatever the merits of such concern as a matter of policy—which, under the Constitution's separation of powers, is for Congress, and not the agency or the courts to determine—it cannot override the plain text of the statute. *See, e.g.*, *SAS Institute*, 138 S. Ct. at 1355 ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant these commands with others it may prefer."); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Second, Swampbuster's structure confirms that affected persons may request review at any time and that such a request invalidates previous certifications. Indeed, the adjacent subsection to 16 U.S.C. § 3822(a)(4) provides that an existing "delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4)." 16 U.S.C. § 3822(a)(6). This provision reinforces Congress's deliberative choice to place affected persons in charge of the review process. In both 16 U.S.C. § 3822(a)(4) and 16 U.S.C. § 3822(a)(6) the farmer drives the review process. Neither provision allows the agency "to start proceedings on his own initiative," and "[f]rom the outset, we see that Congress chose to structure a process in which it's the

petitioner, not the Director, who gets to define the contours of the proceeding." *SAS Inst., Inc.*, 138 S. Ct. at 1355 (interpreting provisions of patent statute). "And '[j]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)).

Despite the importance of analyzing statutory structure when discerning the meaning of a statutory text, neither the District Court nor the Eighth Circuit even cited this adjacent provision. *See* App. 15a–45a (District Court Opinion and Order); 1a–14a (Eighth Circuit Opinion). This is contrary to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Third, the courts below failed to analyze Swampbuster's statutory history. This Court has often instructed that "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren*, 141 S. Ct. at 1660–61 (quoting *Ross v. Blake*, 578 U.S. 632, 641–42 (2016)). The 1996 amendment to Swampbuster is no exception. Before Congress amended Swampbuster, it provided that "[t]he Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate." Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1422, 104 Stat. 3359

(Nov. 28, 1990); 16 U.S.C. § 3822(a)(4) (Nov. 28, 1990). This framing put the agency, rather than the farmer, in charge of the review process. Indeed, the original text explicitly directed the Secretary to create a system for the review of wetland delineations.

But that all changed in 1996, when Congress amended the statute and removed the Secretary's discretion to determine when review is warranted. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The statute now reads: "A final certification made under paragraph (3) 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). This amendment affected an important change in the statute. It stripped the agency of the discretion to decide via regulation when review is warranted. The 1996 statutory language no longer authorizes the agency to deem when a review is "appropriate" and instead requires NRCS to review a wetland delineation when "the person affected by the certification requests review of the certification by the Secretary." *Id.*; *see also id.* § 3822(a)(6). With this change, Congress explicitly allowed review at any time it is requested by an affected person.

The Review Regulation effectively reverses the purpose of the 1996 amendments by placing farmers back in the position they were in before Congress overhauled the review process. Contrary to Swampbuster's plain text, under the Review Regulation, the Secretary still decides when it is appropriate to review a certified delineation. 7 C.F.R.

§ 12.30(c)(6). If Congress intended the agency to have such discretion, it could have retained the original language of the statute. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127 § 322, 110 Stat. 888 (Apr. 4, 1996). Instead, Congress removed that language and entered new language—which stripped NRCS of the authority it now asserts via regulation—demonstrating that Congress wanted farmers to determine when the agency would review a previous certified wetland delineation. *Cf. Van Buren*, 141 S. Ct. at 1661 ("Congress' choice to *remove* the statute's reference to purpose thus cuts *against* [the government's reading of the statute].") (citation omitted).

The purpose of the 1996 amendments further confirms that Congress intended to put farmers in control of when review is granted. With the amendments, Congress insulated farmers from recertification by the Secretary by placing the farmers in charge of review. 16 U.S.C. § 3822(a)(4), (a)(6). The statute therefore is a safe harbor for farmers, rather than an enforcement mechanism for the agency. *See* 142 Cong. Rec. S3037-06, S3038 (daily ed. Mar. 28, 1996) (statement of Senator Lugar, manager of the bill's conference committee: "The agreement stipulates that current wetlands delineations remain valid until a producer requests a review."); 142 Cong. Rec. S4420-01, S4420 (daily ed. Apr. 30, 1996) (colloquy between Senator Grassley and Senator Lugar discussing that "the Conference Committee intended to give farmers certainty in dealing with wetlands," and "[o]ne way of accomplishing this goal was to allow prior delineations of wetlands to be changed only upon request of the farmer").

But the courts below did not look to Swampbuster's statutory history, or the purpose of the 1996 amendments to determine the meaning of the text. *See* App. 15a–45a (District Court Opinion and Order); 1a–14a (Eighth Circuit Opinion). Instead, they skipped to the second step of *Chevron* without completing the first. *See* App. 6a–9a.

B. The Eighth Circuit Inverted *Chevron's* Framework by Using Statutory Silence to Skip to Step 2

Instead of using all the interpretive tools in its toolkit, the Eighth Circuit used purported statutory silence as a crutch. *See* App. 6a–9a. Rather than engaging in a thorough analysis of Swampbuster's text, structure, and statutory history, the Eighth Circuit allowed what the text did not say to create ambiguity in the statute where there is none. App. 9a. That is an inversion of *Chevron*'s framework. *See, e.g.*, *Bartenwerfer*, 143 S. Ct. at 671 ("[W]e start where we always do: with the text of the statute.") (quoting *Van Buren*, 141 S. Ct. at 1654). *Chevron* does not allow an agency to create procedures not mentioned in the statute merely because the statute does not explicitly forbid them. *Cf. SAS Inst.*, 138 S. Ct. at 1358 (The statute "requires the Board's final written decision to address every claim the petitioner presents for review. There is no room in this scheme for a wholly unmentioned 'partial institution' power that lets the Director select only some challenged claims for decision.").

The plain text of the Review Provision contains no conditions. 16 U.S.C. § 3822(a)(4). It does not authorize the agency to add procedural hurdles to review. *Id.* Instead, the statute lays out the "Duration

of certification" and states what events will cause the certification to no longer "remain valid and in effect." *Id.* But rather than employing traditional tools of statutory construction to discern the meaning of those terms, the Eighth Circuit focused on what the statute does not say. *See supra*, Section I-A.

Although the Eighth Circuit recognized that "by suggesting a certification is effective 'until' a farmer requests review, the statute may 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," App. 6a, it allowed the statute's lack of "direction as to what constitutes a proper review request," App. 7a, to guide it.

Giving such weight to a supposed "lack of direction" on its own would drastically expand the field of deference, contrary to this Court's warning that "statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009). That is precisely the case with Swampbuster, as demonstrated by the statutory history. As discussed above, in 1996 Congress removed the Secretary's authority to determine when a certification is entitled to review. *See supra*, Section I-A; *see also* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The Review Regulation—and the decision of the Eighth Circuit—make that amendment a nullity. *But see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have

real and substantial effect.") (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258–59 (2004)). Not only does the decision of the Eighth Circuit not give effect to Congress's amendment, but rather it actively does "what Congress had not," *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021) (per curiam), and what Congress rejected by giving the Secretary the power to determine when review is warranted. *See also* Petition for a Writ of Certiorari, *Loper Bright Enterprises v. Raimondo* (No. 22-451) at 21, *cert. granted in part* May 1, 2023 (noting the same issue with respect to a regulation of the National Marine Fisheries Service).

The Eighth Circuit also failed to follow this Court's precedents on applying *Chevron* by elevating policy considerations over statutory text. The Eighth Circuit stated that "from an economic perspective, the Review Regulation preserves agency resources[.]" App. 9a. But concern about agency resources "cannot create an ambiguity when the words on the page are clear." *SAS Inst.*, 138 S. Ct. at 1358 (citing *SEC v. Sloan*, 436 U.S. 103, 116–17 (1978)). Here, the words on the page are clear, and the Review Provision requires NRCS to review every request. 16 U.S.C. § 3822(a)(4).

Finally, the Eighth Circuit failed to follow this Court's instructions on statutory interpretation by only mentioning one canon of statutory construction: the "absurd results construction canon." App. 8a. In mentioning this canon, the court did not cite any authority applying it, but merely assumed that following the plain language of the statute would be absurd because "[t]his ability to request review would be without limit and would grant farmers the

unfettered ability to render any attempted certification by the NRCS uncertain." *Id.*

The absurdity cannon is not a get-out-of-consequences-free card. Courts apply the absurdity canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) ("avoidance of unhappy consequences" is inadequate basis for interpreting a text); *cf. Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Before disregarding the plain meaning of a constitutional provision, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."). If its use were expanded to cover policy results that an appellate panel finds merely improbable or simply bad, agencies could freely make an end run around statutory text.

Here, following the plain text of Swampbuster would not be, in a genuine sense, absurd because even if farmers attempted to "render any attempted certification by the NRCS uncertain," that uncertainty would only negatively affect the farmers themselves. As the plain text of Swampbuster lays out, a certification is to a farmer's benefit because a certification means that a farmer will not "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). In other words, if a farmer has a certification, and follows that certification, he or she cannot lose access to USDA benefits.

If a farmer does not have a certification, however, then the farmer does not have the protection of 16 U.S.C. § 3822(a)(6). The government can bring enforcement proceedings against a farmer receiving USDA benefits even before there is a certified wetlands delineation. *See* 16 U.S.C. § 3821; *Ballanger v. Johanns*, 451 F. Supp. 2d 1061, 1064 (S.D. Iowa 2006). And, certified or not certified, the agency has the burden of proving that a farmer improperly converted a wetland and is ineligible for benefits. *See Downer v. U.S. By and Through U.S. Dep't of Agric. & Soil Conservation Serv.*, 97 F.3d 999, 1009 (8th Cir. 1996) (Beam, J., concurring and dissenting) (stating that it is the burden of the agency to prove ineligibility for benefits); *Barthel v. USDA*, 181 F.3d 934, 938 (8th Cir. 1999) (favorably citing Judge Beam's concurrence in part). Thus, from the agency's standpoint, its enforcement is the same whether or not a farmer has a certification. But from the farmer's standpoint, having a certification allows the farmer to defend against the allegations by arguing that he or she followed the certification.

The Eighth Circuit's invoking of the absurdity canon further demonstrates the inadequacy of the court's statutory analysis. When the statute is read as a whole, invalidating a certification upon the request of a farmer is not absurd because the statute imposes costs on a farmer who requests a review. When a farmer requests review, and the previous certification

is invalidated, the farmer loses the protections of 16 U.S.C. § 3822(a)(6). Thus, farmers will only initiate review if they believe they have a good argument that the current certification is inaccurate and they can get a new, better certification after review. In short, "the finality of wetlands determinations is for the benefit of producers, not the USDA," *B & D Land and Livestock Co. v. Veneman*, 332 F. Supp. 2d 1200, 1209 (N.D. Iowa 2004) (stating plaintiff's argument and later accepting that argument).[2]

Rather than applying all of the various canons of statutory construction to interpret Swampbuster's Review Provision, the Eighth Circuit found ambiguity in the statute where none exists. As a result, the Eighth Circuit failed to apply this Court's precedents on how to properly apply the *Chevron* framework, and inappropriately deferred to the agency's interpretation of the statute. The Court should grant the petition to ensure that this method of statutory interpretation does not overwhelm this Court's commitment to the separation of powers.

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[2] The Eighth Circuit's brief statutory analysis is in sharp contrast to two earlier district court decisions within the Eighth Circuit that properly applied the *Chevron* framework to interpret Swampbuster's Review Provision. *See Branstad v. Veneman*, 212 F. Supp. 2d 976 (N.D. Iowa 2002) (*Branstad III*); *B & D Land and Livestock Co.*, 332 F. Supp. 2d 1200. In both cases, the District Court for the Northern District of Iowa followed Swampbuster's plain language to hold that a farmer can request a review of a certified wetlands delineation at any time and that a request invalidates the previous certification. *Branstad III*, 212 F. Supp. 2d at 997; *B & D Land and Livestock Co.*, 332 F. Supp. 2d at 1213.

II. Certiorari Should Be Granted Because the Eighth Circuit's Decision Illustrates Why *Chevron* Should Be Overruled

A. *Chevron* Is Unworkable in Practice

The opinions below in this case demonstrate the need for this Court to overrule *Chevron*. Although this Court's precedents lay out a framework for how lower courts should determine if an agency regulation is consistent with the statute, lower courts rarely conduct the robust statutory analysis this Court's precedents require. Instead, lower courts "reflexive[ely] defer[]" to agencies' interpretations of statutes. S*ee, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). *Chevron* is irrevocably broken. The time has come for this Court to overrule it.

Here, the Eighth Circuit found ambiguity in the statutory text where there was none, and elevated an agency's policy concerns over the policies adopted by Congress. App. 9a. Because of *Chevron*, the Eighth Circuit did not follow through on its judicial responsibility to interpret the statute Congress enacted. *See* App. 6a–9a; *see also* Brief of Eight Nat'l Bus. Orgs. as Amici Curiae in Support of Petitioners at 23–24, *Loper Bright Enters., Inc. v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451) (noting that in *Foster*, the Eighth Circuit deferred to the agencies' reading of the statute "despite the fact that the court possesses the ability to resolve statutory ambiguity as part of its traditional interpretative toolkit"). Instead, the panel below allowed an agency to rewrite the statute Congress enacted. *But see Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (Agencies are not permitted to "rewrite [] statute[s] from the ground up.").

Unfortunately, this case is not an isolated incident of a court using *Chevron* to sidestep a rigorous statutory analysis. S*ee, e.g.*, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (describing the "reflexive deference" of some lower courts when applying *Chevron* as "troubling"); *Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019) (dispensing with *Chevron* Step One in a single paragraph that lacks meaningful statutory analysis, and instead focusing on the statute's "silence" as a reason to immediately proceed to Step Two); *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) ("The Framers anticipated that legal texts would sometimes be ambiguous, and they understood the judicial power to include the power to resolve these ambiguities over time in judicial proceedings. The Court's decision in *Chevron*, however, precludes judges from exercising that judgment.") (internal quotations and citations omitted); *Buffington v. McDonough*, 143 S. Ct. 14, 14 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (admonishing the lower court for "bypass[ing] any independent review of the relevant statutes," before resorting to *Chevron* deference); *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (stating "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first," and criticizing the majority for not "analyz[ing] the interpretive issue," and "merely fram[ing] it"); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring) ("[F]ederal courts are now routinely told, in the name of *Chevron*, to bow down and obey the executive branch."); *Oregon Restaurant & Lodging*

Ass'n v. Perez, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the panel majority for "equat[ing] a statutes 'silence' with an agency's invitation to regulate").

Indeed, this Court has recently granted a Petition that requests this Court to overrule *Chevron*. *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (granting petition in part). There, the Petitioners laid out the issues with the National Marine Fisheries Service's (NMFS) interpretation of the 1976 Magnuson-Stevens Act (MSA), and the D.C. Circuit's reflexive deference to that interpretation. *See* Petition for a Writ of Certiorari, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451). The myriad of issues with *Chevron* deference raised by Petitioners in *Loper Bright Enterprises* are likewise reflected here.

In both *Loper Bright Enterprises* and this Petition, the lower courts deferred to the agency even though the regulation was contrary to, and in direct conflict with, statutory text, context, and history. *See* Petition for a Writ of Certiorari at 16–23, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451); *see also supra* Part I. Similarly, in both *Loper Bright Enterprises* and here, the lower courts impermissibly relied on statutory silence to justify deference. *See* Petition for a Writ of Certiorari at 26–29, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451); *see also supra* Part I. But as the Petitioner in *Loper Bright Enterprises* aptly explained, "silence does not create ambiguity," Petition for a Writ of Certiorari at 29, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451), and a deference doctrine that allows the court to find

otherwise raises serious separation of powers concerns, as "[i]t is far easier to gin up ambiguity in a statute than it is to run the gauntlet of bicameralism and presentment." *Id.* at 31.

B. *Chevron* Undermines the Constitution's Separation of Powers

It is axiomatic that Congress—and Congress alone—has the power to make or change the law. *See* U.S. Const. art. I. And administrative agencies, as creatures of the Executive Branch, have "'no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). To that end, this Court has recognized that it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regul. Grp.*, 573 U.S. at 328. But the decision of the Eighth Circuit flouts this first principle by setting precedent that administrative agencies may rewrite statutes. *See* App. 6a–9a. The Eighth Circuit's theory conflicts with both the plain text, structure, and history of Swampbuster as well as this Court's longstanding recognition that "[i]n a democracy, the power to make the law rests with those chosen by the people," *King v. Burwell*, 576 U.S. 473, 498 (2015), and not with unelected officials at administrative agencies.

The people vested Congress—and Congress alone—with the power to make law. *See* U.S. Const. art. I. By contrast, the people vested the President with the executive power to enforce those laws. *See* U.S. Const. art. II. And the people vested the

Judiciary with the power to interpret the laws Congress makes. *See* U.S. Const. art. III. The Constitution divided the government's powers this way not merely to resolve inter-branch conflicts or to ensure efficient government. Rather, the "doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Chevron flouts these principles in two crucial ways. First, it is contrary to the power of the judicial branch to interpret the law. At its core, *Chevron* deference incentivizes the judiciary to abdicate its solemn duty of the "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Unlike courts, agencies are not experts at statutory interpretation. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of *rulemaking*, in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'") (quoting *Marbury*, 5 U.S. at 177). Yet "[u]nder a broad reading of *Chevron*," like the one applied by the Eighth Circuit here, the court "outsource[d] [its] interpretive responsibilities." *Buffington*, 143 S. Ct. at 18–19 (Gorsuch, J., dissenting from denial of cert). Instead of independently engaging in a robust and independent statutory review, the Eighth Circuit's deference to the agency's interpretation of the statute "represent[ed] a transfer of judicial power to the Executive Branch" and "amount[ed] to an erosion of the judicial obligation to serve as a 'check' on the

political branches." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). This is especially problematic because in doing so, the Eighth Circuit "place[d] a finger on the scales of justice in favor of the most powerful of litigants, the federal government," effectively "turning *Marbury* on its head." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of cert). The very existence of *Chevron* deference encourages and permits these errors.

Second, *Chevron* is contrary to the power of the legislative branch to make the law. *See, e.g.*, U.S. Const. art. I. The Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). To that end, "the framers went to great lengths to make lawmaking difficult." *Id.* But that intentional design is undermined when courts invoke deference to regulations that are contrary to the statutory text. That is precisely the scenario here. Through its creative reading of Swampbuster, the agency has claimed the authority to place extra-textual limitations on when a farmer may request review, deciding for itself whether review is warranted. *Compare* 16 U.S.C. § 3822(a)(4), *with* 7 C.F.R. § 12.30(c)(6). And by reflexively applying deference without undertaking a thorough statutory analysis, the Eighth Circuit upheld a statute that not only conflicts with Congress' statutory text, but rewrites it. *But see La. Pub. Serv. Comm'n*, 476 U.S. at 376 ("As we so often admonish, only Congress can rewrite this statute.").

The serious problems *Chevron* causes have not been lost on the members of this Court. *See, e.g.*, *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of cert) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., joined by Justice Thomas & Kavanaugh, concurring in the judgment) (asserting that "there are serious questions" about whether *Chevron* "comports with the APA and the Constitution."); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., joined by Justice Thomas, dissenting) (noting "the mounting criticism of *Chevron* deference"); *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (expressing "concern" over how *Chevron* "has come to be understood and applied"); *id.* at 2129 (Alito, J., dissenting) (noting that "in recent years, several Members of this Court have questioned *Chevron*'s foundations").[3]

Finally, *Chevron* is a grave threat to individual liberty. As discussed above, it fundamentally alters the Constitution's structural protections. The separation of powers "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from

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[3] These criticisms have also been echoed by legal scholars and academics. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 Ala. L. Rev. 1 (2017); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013); 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 (2010).

whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). But if agencies are permitted to guide how statutes should be interpreted, an important check on Executive power is lost. *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016) ("[W]hen judges defer to the executive's view of the law, they display systematic bias toward one of the parties."). This is antithetical to our unique and liberty-maximizing system of government. *See, e.g.*, *Buffington*, 143 S. Ct. at 16 (Gorsuch, J., dissenting from denial of cert.) ("From the beginning of the Republic, the American people have rightly expected our courts to resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included.").

The Eighth Circuit's decision shows that *Chevron* cannot be saved, and that "[a]t this late hour, the whole project deserves a tombstone no one can miss." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of cert.). This Court should grant the Petition to overrule *Chevron*.

III. The Petition Should Be Held Pending Resolution of *Loper Bright*

This term, in *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451), this Court will likely answer the second question presented in this Petition. In light of *Loper Bright*, this Court may wish to hold the Petition until that case is resolved and, if appropriate, Grant Vacate and Remand (GVR) in light of the decision there. "[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of

developments, including our own decisions," *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam). Further, this Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (emphasis omitted).

This Petition, like the Petition in *Loper Bright Enterprises*, asks the Court to overrule *Chevron*. *See supra* Part II; Petition for a Writ of Certiorari, *Loper Bright Enterprises* (No. 22-451) at i, *cert. granted in part* May 1, 2023. If this Court decides to overrule *Chevron*, or even if it clarifies the proper application of *Chevron* deference without overruling the doctrine, this Court's decision in *Loper Bright Enterprises* will affect the Eighth Circuit's interpretation of Swampbuster and the outcome of this case. In its decision, the Eighth Circuit stated that it "appl[ied] the two-step framework from *Chevron*" to reach its holding. App. 5a–6a. If the court can no longer apply that framework, then it must apply a different analytic framework to reach its holding.

Indeed, the opinion below did not offer a non-*Chevron* justification for its holding, despite Respondents' suggestion to the court that it should do so. After this Court granted the Petition in *Loper Bright*, Respondents filed a notice of supplemental authority informing the Eighth Circuit of the grant. *See* Appellees' Notice of Supplemental Authority, Eighth Circuit Case No. 22-2729, Entry ID 5273203 (filed May 4, 2023). Appellees argued that while they "stand by [the] argument" that "the Secretary of

Agriculture's regulation at issue here should be upheld as a permissible and rational interpretation" of Swampbuster "under *Chevron*'s second step," that their "primary argument, however, remains 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." *Id.* Respondents stated that their "primary argument does not implicate the question presented in *Loper*," *id.*, but the Eighth Circuit did not adopt the agencies' "primary argument." App. 9a. Instead, the court resolved the case under *Chevron*'s second step, *id.*, and adopted the argument that implicates the question presented in *Loper Bright* Enterprises.

This petition should be held pending resolution of *Loper Bright Enterprises* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted or held in abeyance pending the disposition of *Loper Bright Enterprises*.

DATED: August 2023.

Respectfully submitted,

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