UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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| ARLEN FOSTER,<br><br>Plaintiff,<br><br>v.<br><br>THE 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; and TONI SUSERI, in his official capacity as Acting South Dakota State Conservationist,<br><br>Defendants. | Case No. 4:21-cv-04081-RAL |

**PLAINTIFF'S SUPPLEMENTAL BRIEF ADDRESSING IMPACT OF *LOPER BRIGHT***

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## INTRODUCTION

*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), resulted in a dramatic shift in the judiciary's approach to statutory interpretation. In overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court ended the practice of judicial deference to agency interpretations of statutes. *Chevron* instructed federal courts to defer to an agency's reasonable interpretation of a statute if that statute was "silent or ambiguous with respect to the specific issue" at hand. 467 U.S. at 843. The reviewing court owed *Chevron* deference even if it would have reached a different conclusion had it interpreted the statute without agency guidance. *Id.* As the Court explained in *Loper Bright*, "*Chevron* turn[ed] the statutory scheme for judicial review of agency action upside down." *Loper Bright*, 603 U.S. at 399.

With *Chevron*'s demise, a court confronted with an issue of statutory interpretation must independently arrive at the "best meaning," of the statute, which is "necessarily discernible by a court deploying its full interpretive toolkit." *Loper Bright*, 603 U.S. at 408–09. In the post-*Loper* approach to statutory interpretation, "[i]t [] makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best." *Id.* at 400; *see also Union Pacific R.R. Co. v. Surface Transp. Bd.*, 113 F.4th 823, 833 (8th Cir. 2024) ("We must 'use every tool at [our] disposal to determine the best reading of the statute and resolve [any] ambiguity.'") (quoting *Loper Bright*, 603 U.S. at 400); *Quito-Guachichulca v. Garland*, 122 F.4th 732, 735 (8th Cir. 2024) ("Deference . . . is now a

relic of the past."). At issue here is the best interpretation of the Wetland Conservation provisions of the Food Security Act of 1985—colloquially known as "Swampbuster."

Swampbuster restricts how recipients of U.S. Department of Agriculture (USDA) benefits may use land containing "wetlands," 16 U.S.C. §§ 3821–3822. Specifically, it provides that farmers who drain and produce an agricultural crop on covered wetlands are ineligible for various federal agricultural benefits, subsidies, and insurance programs. *Id.* §§ 3821(a), 3821(d)(1).

Swampbuster requires the Secretary of Agriculture to notify farmers of where they can farm without risk of losing benefits by "delineating" wetlands on a certified map. As amended, the statute 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) ("Review Provision").

Plaintiff Foster argues that the best reading of this provision is that the certified wetlands delineation on his family farm remains valid and in effect until he requests review of the certification. Defendants USDA and Natural Resources Conservation Service (NRCS) disagree.

Through regulation, Defendants have limited review of wetlands certification to only two circumstances. *See* 7 C.F.R. § 12.30(c)(6) ("Review Regulation"). The agency's regulation adds words to the statutory text and provides that

> [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).

Previously, this Court applied *Chevron* deference and concluded that the Review Regulation was a permissible interpretation of the Review Provision. Doc. 47 at 17. This Court supported that decision by describing the Review Regulation as applying "mere[] restrict[ions]" on when a farmer may request review, stating that courts should "harmonize" statutory and regulatory text, and stating that the Review Regulation was "rationally related to promoting efficiency in the certification review process." *Id.* Bound by the requirements of *Chevron*, this Court did not independently analyze the text, structure, or statutory history of the Review Provision when reaching its summary judgment decision.

On May 12, 2023, the Court of Appeals for the Eighth Circuit applied *Chevron* deference and affirmed the judgment of this Court on all claims. *Foster v. USDA*, 68 F.4th 372 (8th Cir. 2023). Foster timely filed his petition for writ of certiorari seeking review of the Eighth Circuit's reliance on *Chevron*. On July 2, 2024, the Supreme Court granted Foster's petition, vacated the Eighth Circuit's judgment, and remanded for further consideration in light of *Loper Bright*. The Eighth Circuit vacated its decision and reopened the case on August 5, 2024, and on August 7, 2024, ordered supplemental briefing addressing how *Loper Bright* affects this case. On November 7, 2024, the Eighth Circuit remanded to this Court in consideration of *Loper Bright*. Doc. 60. On December 16, 2024, this Court ordered supplemental

briefing on "the impact of *Loper Bright* on the Court's summary judgment decision." Doc. 64 at 1.

After *Loper Bright*, the only permissible interpretation of the statute is the best interpretation of the statute. 603 U.S. at 400. As demonstrated below, the text, structure, and statutory history show that Foster's interpretation is the best interpretation. Because Defendants' Review Regulation is contrary to the best interpretation of the statute, this Court should hold that the Review Regulation violates Swampbuster.

## ARGUMENT

Under *Loper Bright*, the task of this Court is to determine the best reading of the Review Provision. Here, the plain language of the statute, the statutory scheme, and the statutory history prove that the Review Regulation is inconsistent with the text of Swampbuster.

### I. The *Chevron* Problem and the *Loper Bright* Framework

In overruling *Chevron*, the *Loper Bright* Court emphasized that both the Constitution and the APA require federal courts to use their independent judgment to interpret the statute and say what the law is. *Loper Bright*, 603 U.S. at 384–86, 396. Courts may no longer outsource this task to federal agencies. Therefore, after *Loper Bright*, "[i]t [] makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best." *Id.* at 400.

*Loper Bright* emphasized that *Chevron* deference was an affront to the constitutional structure that ensures the separation of powers. By requiring courts to defer to an agency interpretation of a statute, *Chevron* robbed the courts of their proper role as adjudicators. *Id.* at 400–01. While "[t]he Framers appreciated that the laws judges would necessarily apply in resolving [] disputes would not always be clear," they "also envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* at 384–85 (quoting The Federalist No. 78, p. 525 (J. Cooke ed. 1961) (A. Hamilton)). By mandating deference, *Chevron* created a system where "judicial judgment [was not] independent at all," *id.* at 386, and where agencies—not courts—had the final say.

*Chevron* deference was also contrary to the APA. *Id.* at 396 (holding that *Chevron* deference "cannot be squared with the APA"). The APA states that

> the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,

and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706. The APA's text therefore

> codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.

*Loper Bright*, 603 U.S. at 391–92. Under the APA, courts should therefore, from the start, engage in de novo review—using the "traditional tools of statutory construction"—to "resolve statutory ambiguities." *Id.* at 401.

And while an agency's interpretation of the statutory text may be a helpful aid for a court—especially when that interpretation is "issued contemporaneously with

the statute," and "consistent over time"—an agency's interpretation is only useful to the extent it is persuasive. *Loper Bright*, 603 U.S. at 394; *see also Quito-Guachichulca*, 122 F.4th at 735 ("[W]e no longer treat the government's views as controlling or even 'especially informative.'") (quoting *Loper Bright*, 603 U.S. at 402). Most importantly, the agency's interpretation cannot supersede the independent judgment of the court. *Loper Bright*, 603 U.S. at 408 ("[T]he basic nature and meaning of a statute does not change when an agency happens to be involved.").

In overruling *Chevron*, *Loper Bright* also repudiated the notion "that statutory ambiguities are implicit delegations to agencies." *Id.* at 399. As the *Loper Bright* Court noted, "an ambiguity [does not] necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question." *Id.* at 399–400. This is especially true because "many or perhaps most statutory ambiguities may be unintentional." *Id.* Indeed, courts encounter statutory ambiguities routinely in all manner of statutory interpretation cases where agencies are not involved. *Id.* And in those instances, "courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* at 400. The involvement of an agency does not change the court's obligation to interpret the statute.

To be sure, *Loper Bright* recognized there may be some instances where Congress "expressly delegate[s]" "a degree of discretion" for an agency to "give meaning to a particular statutory term." *Id.* at 394. But that does not mean that the work of the court is done. Rather, "the role of the reviewing court under the APA is,

as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* at 395. Courts are thus required to decide on the "best meaning" of the statutory text to determine if the agency acted within the bounds of its authority. *Id.* at 401 ( stating that "[t]he very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities[,]" and further reasoning "[t]hat is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.").

## II. The Review Regulation Is Inconsistent with the Best Reading of the Swampbuster Statute

### A. Swampbuster's text, structure, and statutory history confirm that review is available when requested by a farmer

After *Loper Bright*, the task of this Court is to independently determine the best reading of the Swampbuster statute and decide if the agency's' Review Regulation is consistent with Swampbuster's text. This "best meaning" is "necessarily discernible by a court deploying its full interpretive toolkit." *Loper Bright*, 603 U.S. at 408–09. That interpretive toolkit necessarily includes 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), in addition to the statute's history. *See, e.g.*, *Kisor v. Wilkie*, 588 U.S. 558, 589–90 (2019) (explaining that a "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"). Here, an analysis of the statutory text, structure, and

history shows that the Review Regulation cannot be harmonized with the plain text of Swampbuster.

First, the text contains no limits on the right to request review of a wetland certification. The operative text—which is in a subsection titled "Duration of certification," 16 U.S.C. § 3822(a)(4)—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.

*Id.* The text is notably devoid of any conditions that must be satisfied before someone may request review of a wetland certification. Indeed, the text makes clear that a wetland certification is valid only until a review request.

The NRCS's Review Regulation, however, adds several barriers to review. Now, review of a wetland certification is available

> *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) (emphasis added). This Court recognized that the Review Regulation adds steps to review, stating that the Review Regulation "restricts the circumstances in which an agency must review a final certification." Doc. 47 at 17.

The problem with the Review Regulation is that "Congress did not write the statute that way," *United States v. Naftalin*, 441 U.S. 768, 773 (1979), and the extra-textual limitations find no support in the statutory text. This Court recognized as much when it stated "the Swampbuster Act is silent on the requirements for requesting review[.]" Doc. 47 at 16. Under *Chevron*, this Court could view that silence

as an invitation for the agency to regulate, but after *Loper Bright*, it cannot. *Loper Bright* forbids a court from "presuming that statutory ambiguities are implicit delegations to agencies." 603 U.S. at 399; *see also id.* at 411 ("[S]tatutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies."); *Quito-Guachichulca*, 122 F.4th at 738 ("Adding words to unambiguous text is rarely the answer . . . [e]ven if, as the government argues, the statute *ought* to be broader."). And when it comes to statutory interpretation, "statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009).

Here, the text of Swampbuster cannot be construed to allow the agency "a degree of discretion" to "give meaning to a particular statutory term." *Loper Bright*, 603 U.S. at 394. The Review Provision does not contain an express delegation and is nothing like the statutes *Loper Bright* cited as examples of express delegations to agencies. *See id.* at 395 n.5. The examples in *Loper Bright* are statutes where Congress expressly delegated to an agency the power to define specific terms. *Id.* (discussing 29 U.S.C. § 213(a)(15) and 42 U.S.C. § 5846(a)(2)). Swampbuster, on the other hand, contains no language indicating that the agency has discretion to add any requirements for individuals who request review. 16 U.S.C. § 3822(a)(4).

Second, the agency's interpretation is inconsistent with the statutory structure. As *Loper Bright* made clear, courts must exhaust their interpretive toolkit to discern the meaning of statutory text. *Loper Bright*, 603 U.S. at 400 ("[C]ourts use every tool at their disposal to determine the best reading of the statute and resolve

the ambiguity."). This inquiry must include an analysis of the statute's structure. *See Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 441 (2019) (noting that it is a "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") (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Here, Swampbuster's structure confirms that a farmer may request review at any time and that such a request invalidates previous certifications. 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 deliberate choice to place farmers in charge of the review process. Congress explained the result of "request[] by [a] person" in 16 U.S.C. § 3822(a)(4), stating 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) (emphasis added). The use of the word "until" shows that Congress intended wetland certifications to lose their validity once a farmer requests review.

While both provisions forbid the agency "to start proceedings on [its] own initiative," showing that "[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 Institute v. Iancu*, 584 U.S. 357, 364 (2018) (interpreting provisions of patent statute), it would be a mistake to read 16 U.S.C. § 3822(a)(4) as

a mere reinforcement or restatement of the Secretary's already established inability to review certifications or delineation on his own initiative. Indeed, it is

> one of the most basic interpretive canons, that "[a] statute should be so construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]"

*Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Department of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 53 (2024) ("Proper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are 'superfluous' or 'void' of significance.").

Here, a careful analysis of the text and statutory structure shows that paragraphs (a)(4) and (a)(6) have harmonious yet distinct purposes. 16 U.S.C. § 3822(a)(6) prevents the Secretary from changing certifications on his own initiative, and 16 U.S.C. § 3822(a)(4) gives effect to the shift in balance away from the agency by explaining the result of a farmer's request for review.[1] "And '[j]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Institute*, 584 U.S. at 364 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)).

[1] This interpretation was also advanced by the United States District Court for the Northern District of Iowa. *See Branstad v. Veneman*, 212 F. Supp. 2d 976, 997 (N.D. Iowa 2002) (*Branstad III*) (stating that "pursuant to § 3822(a)(6), the Secretary may not invalidate an existing, certified wetland determination unless asked to do so by a person then affected by the determination," and then noting that "pursuant to § 3822(a)(4), a person . . .may request that the Secretary review an existing certified determination, which ends the 'validity' of the existing certified determination"); *see also infra* Section II (B).

The fact that Swampbuster also contains an appeal provision for farmers to administratively appeal adverse findings, 16 U.S.C. § 3822(a)(3), does not mean that farmers are barred from future reviews unless the NRCS already agrees that a change is warranted. Indeed, the U.S. District Court for the Northern District of Iowa analyzed Swampbuster's structure in *B & D Land and Livestock Co. v. Veneman*, 332 F. Supp. 2d 1200, 1213 (N.D. Iowa 2004), and rejected that interpretation of the statute. In *B & D Land and Livestock Co.*, the court explained that the § 3822(a)(3) appeal provision, "expressly provides for an administrative appeal process *prior to* final certification of a wetland." 332 F. Supp. 2d at 1213. Moving to § 3822(a)(4), the court explained that this section:

> expressly provides for *a second administrative challenge* to a wetland determination, *after* the final certification of the wetland has become final, when a person affected by the certification requests review of the certification by the Secretary.

*Id.* Thus, the appeal provision is not inconsistent with Foster's interpretation that § 3822(a)(4) nullifies wetland determinations and initiates new review.

Third, Swampbuster's statutory history provides additional evidence that review is available once requested. Before Congress amended Swampbuster, the statute 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 requestor, in charge of the review

process. And it expressly delegated to the agency the authority 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 Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). Now, the statute states:

> 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 effected an important change in the statute. Congress stripped the agency of any discretion to decide via regulation when review is warranted. Now, the agency must review a wetland delineation when "the person affected by the certification requests review of the certification by the Secretary." *Id.* The best—indeed, the only—reading of this language is that a certification is valid until a farmer requests review.

The Review Regulation renders the 1996 Amendment a nullity, placing farmers back where they were before Congress overhauled the review process. 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 this discretion, it could have retained the original language of the statute. *Compare* 16 U.S.C. § 3822(a)(4) (Nov. 28, 1990) *with* 16 U.S.C. § 3822(a)(4); *see also Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 189 (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)).

To the extent the Court wishes to examine Swampbuster's legislative history, that exercise is not particularly instructive. The key is not Swampbuster's "legislative history," but its statutory history. *See SAS Inst.,* 584 U.S. at 370 (stating that courts may not "defer to an agency official's preferences because we imagine some 'hypothetical reasonable legislator' would have favored that approach." Rather, courts must "give effect to the text that 535 *actual* legislators (plus one President) enacted into law.") (citation omitted); *see also Holbein v. TAW Enterprises, Inc.*, 983 F.3d 1049, 1055–56 (8th Cir. 2020) (explaining difference between statutory history and legislative history) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 653–54 (1898); *BNSF Ry. Co. v. Loos*, 586 U.S. 310, 329 (2019) (Gorsuch, J., dissenting)). Statutory history, as opposed to "unenacted legislative history" means "the record of *enacted* changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning." *BNSF*, 586 U.S. at 329 (Gorsuch, J., dissenting). And as discussed above, Swampbuster's statutory history supports Foster's reading of the Review Provision.

Congress's intentional choice to remove the agency's discretion over when review is warranted is entitled to respect, not modification. The Supreme Court has long instructed that "[i]n construing any act of legislation . . . regard is to be had . . . to the history of the law as previously existing, and in the light of which the new act must be read and interpreted." *Wong Kim Ark*, 169 U.S. at 653–54. And "[w]hen

Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren v. United States*, 593 U.S. 374, 393 (2021) (quoting *Ross v. Blake*, 578 U.S. 632, 641–42 (2016)). The 1996 amendment to Swampbuster is no exception.

The text, structure, and statutory history of Swampbuster demonstrate that NRCS does not have the authority to limit when a farmer may request a review of a certified wetlands delineation. The Review Regulation adds words to the statute that Congress did not include. Indeed, not only does it rely on authority that Congress did not delegate in the statute, it relies on an authority that Congress removed from a previous version of the statute. "The problem" with the government's interpretation is that, "we are reading a statute, not writing one." *Quito-Guachichulca*, 122 F.4th at 738. This Court should reject NRCS's interpretation of Swampbuster's Review Provision.

### B. Another District Court adopted the interpretation of the Swampbuster Statute that Foster advances here

Foster's interpretation of the Review Provision is not unprecedented. Indeed, the U.S. District Court for the Northern District of Iowa, after engaging in a comprehensive analysis of Swampbuster's Review Provision, rejected the agency's interpretation in favor of the interpretation Foster advances here. *See Branstad III*, 212 F. Supp. 2d at 997; *B & D Land & Livestock Co.*, 332 F. Supp. 2d 1200.

In *Branstad III* and *B & D Land & Livestock Co.,* the court held that a farmer may 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 & Livestock Co.*, 332 F. Supp. 2d at 1213. Specifically, in *Branstad III*, the court carefully analyzed both 16 U.S.C. § 3822(a)(4) and (a)(6) and concluded that "in light of the plain language of the statute," a person "may invalidate the existing certification by requesting review of the certification by the Secretary." *Branstad III*, 212 F. Supp. 2d at 997. As NRCS stated at oral argument at the Eighth Circuit, these two decisions adopted the same interpretation of the Review Provision that Foster advances here. *See* Eighth Circuit oral argument at 14:45, *Foster v. USDA*, 68 F.4th 372 (8th Cir. 2023) (No. 22-2729), http://media-oa.ca8.uscourts.gov/OAaudio/2023/3/222729.MP3. Both decisions thoroughly analyze the text and context of the provision before reaching their conclusions. *Branstad III*, 212 F. Supp. 2d at 997; *B & D Land & Livestock Co.*, 332 F. Supp. 2d at 1213. Although not binding authority, the reasoning in those two cases offers a more persuasive interpretation of the statute than the agency's interpretation.

### C. NRCS's inconsistency in applying the Review Regulation further counsels against upholding it

In *Loper Bright*, the Court stated that the views of the Executive Branch with respect to the interpretation of a statute may sometimes be a helpful aid for a court, especially "when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright*, 603 U.S. at 386. But even then, an agency's contemporaneous interpretation has weight only to the extent that it represents a persuasive interpretation of the statute. *Id.* at 388 ("The weight of such a judgment . . . depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, . . .

and all those factors which give it power to persuade . . . .") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

As demonstrated above, the agency's interpretation of the Review Provision is not persuasive because the agency's regulation is inconsistent with the text, structure, and history of the provision at issue. *See* Section II (A), *supra*. Moreover, not only is the agency's interpretation unpersuasive, but it also has not remained consistent over time. Although the Review Regulation was issued the same year as the 1996 Amendments to Swampbuster, the agency's application of the regulation has changed.[2] When Foster submitted the 2017 Request, NRCS directed him to "supply additional information that has not previously been considered by NRCS," Doc. 24-1 at 9. Although this requirement is not found in either the Swampbuster Statute or the Review Regulation, Foster complied with NRCS's request by submitting new expert reports about the hydrology of the purported wetland. Doc. 24-1, at 22–23.

Defendants changed course in their briefing before this Court. *See* Doc. 37 at 14–15 (Reply in Support of Federal Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment). Although Defendants confirmed that Foster provided new information in his 2020 request, Defendants argued that Foster's evidence was insufficient because the newly created data relates to the hydrology of the pool. *Id.* In short, after the suit was filed, the agency began to argue

[2] Of note, *Branstad III* was decided in 2002, only six years after the 1996 Amendments. Thus, there is not a longstanding history of one undisputed interpretation of the Review Provision since it was adopted.

that Foster had to provide a new argument about how the pool is not a wetland, rather than new information supporting an argument he had previously made.

This "new argument" requirement was also inconsistent with past agency practice. In response to Foster's 2008 review request of a wetland certification, Doc. 43-1 at 2, Resource Conservationist Karen Cameron-Howell quoted the relevant statutory provision, attached the relevant portion of the agency's Food Security Act Manual, and stated that "I think this is telling us that we can take another look at it since you are offering additional hydrology information in the form of the CD." Doc. 43-1 at 2–3. But now, NRCS has stated that additional hydrology information is not sufficient for another review.

Foster is just one example of the changing nature of the agency's interpretation of the Review Provision. Indeed, it appears that that agency did not consistently advance the present interpretation of the Review Provision until around 2016, when it adjudicated this same issue. *See Foster*, 68 F.4th at 378 (citing *In re XXXXX*, Case No. 2014E000753 (USDA June 22, 2016)). An agency interpretation finalized 20 years after the statute was amended does not warrant deferential consideration from this Court.

In short, not only has NRCS rewritten the statute, but it has also refused to follow its own policies. The agency's interpretation is unpersuasive and should not be adopted by this Court.

**D. Policy concerns cannot save the Review Regulation**

In upholding the Review Regulation, this Court also noted that the Review Regulation is "rationally related to promoting efficiency in the certification review

process." Doc. 47 at 17. But "pleas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 823 (2024) (quoting *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021)). And if Congress were concerned about agency resources, "Congress could have chosen different language." *Id.* at 853. But "[i]t did not." *Id.* Simply put, policy concerns about agency efficiency do not justify departing from the text of the statute. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) ("avoidance of unhappy consequences" is an inadequate basis for interpreting a text).

Nor should this Court be persuaded by any arguments that Foster's interpretation of the statute would lead to absurd results. Here, following the plain text of Swampbuster would not be, in a genuine sense, absurd. *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.").

Moreover, 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). 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 lacks 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, 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).

From the agency's standpoint, 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. 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 & Livestock Co.*, 332 F. Supp. 2d at 1209 (stating plaintiff 's argument and later accepting that argument).

Neither policy concerns nor arguments about absurd results merit departure from the statutory text.

## CONCLUSION

*Loper Bright* forbids courts from deferring to an agency's interpretation of a statute. This Court's summary judgment decision upheld the agency's regulation under *Chevron*. Because NRCS's review regulation conflicts with the plain text of Swampbuster, this Court should (1) vacate its prior summary judgment decision upholding the lawfulness of Review Regulation, (2) set aside the Review Regulation, and (3) direct Defendants to accept Foster's request to review the 2011 Certification.

Pursuant to D.S.D. Civ. LR 7.1C, Plaintiff Foster respectfully requests oral argument on this Supplemental Brief. Oral argument would be beneficial to the Court's consideration of the legal issues involving Swampbuster in light of *Loper Bright*. Plaintiff Foster reserves the right to file a response brief pursuant to D.S.D. Civ. LR 7.1B.

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Respectfully submitted,

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