No. 14-342

In the Supreme Court of the United States

KING COLE FOODS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under the Supplemental Nutrition Assistance Program (SNAP), a retail food store that engages in unlawful trafficking of SNAP benefits is subject to permanent disqualification from the program, but the responsible federal agency "ha[s] the discretion to impose a civil penalty * * * in lieu of disqualification" where certain minimum criteria are met. 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. 278.6(i).

The question presented is whether the court of appeals applied the correct standard of review to an agency determination that a SNAP trafficking violator has failed to satisfy the minimum eligibility criteria for a civil monetary penalty in lieu of permanent disqualification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 561 Fed. Appx. 444. The opinion and order of the district court (Pet. App. 6a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2014. A petition for rehearing was denied on June 26, 2014 (Pet. App. 49a-50a). The petition for a writ of certiorari was filed on September 23, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, to "safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 U.S.C. 2011. SNAP is administered by the Food and Nutrition Service (FNS) of the United States Department of Agriculture (USDA). 7 U.S.C. 2013(a); 7 C.F.R. 271.3. Households that receive SNAP benefits may redeem them for eligible food items from retail food stores that have been approved for participation in SNAP. 7 U.S.C. 2013(a).

a. To be authorized to accept benefits under SNAP, a retail food store must obtain approval from FNS and, once approved, must comply with various statutory and regulatory requirements. 7 U.S.C. 2018; 7 C.F.R. 278.1-278.2. A retail food store that violates those requirements is subject to disqualification from the program, a civil monetary penalty (CMP), or both. 7 U.S.C. 2021(a)(1), (b) and (c). As directed by Congress, the Secretary has promulgated regulations that govern enforcement action against retail food stores that violate program requirements. See 7 U.S.C. 2021(a)(2); 7 C.F.R. 278.6; see also 7 U.S.C. 2013(c) (conferral of general rulemaking authority).

If FNS finds that a participating retail food store has likely committed a violation, it issues a charge letter to the store that "specif[ies] the violations or actions which FNS believes constitute a basis for disqualification or imposition of a civil money penalty or fine." 7 C.F.R. 278.6(b)(1). The store may respond to the charge letter within ten days by admitting or

denying the allegations and submitting further evidence for FNS's consideration. *Ibid.* After considering this response and other available information, the FNS regional office renders an initial determination whether a violation occurred and, if so, imposes a sanction. 7 C.F.R. 278.6(c)-(e). A store may seek further administrative review, which yields a final determination by the agency. 7 U.S.C. 2023(a)(1)-(5); see 7 C.F.R. 279.1-279.5. In turn, "[i]f the store * * * feels aggrieved by such final determination, it may obtain judicial review thereof" by filing suit in a federal district court [or state court] of competent jurisdiction. 7 U.S.C. 2023(a)(13); see 7 C.F.R. 279.7. This suit "shall be a trial de novo * * * in which the court shall determine the validity of the questioned administrative action in issue." 7 U.S.C. 2023(a)(15).

b. Retail food stores are strictly prohibited from "trafficking" in SNAP benefits, including "[t]he buying * * * or otherwise effecting an exchange of SNAP benefits * * * for cash or consideration other than eligible food." 7 C.F.R. 271.2. By statute, the penalty for trafficking—even for a first-time offense—is permanent disqualification of the store from further participation in SNAP. 7 U.S.C. 2021(b)(3)(B). Nonetheless, since 1988, FNS has possessed "the discretion to impose a civil penalty * * * in lieu of disqualification" for a trafficking violation "if the Secretary determines that there is substantial evidence" that the store "had an effective policy and program in effect to prevent violations of the [statute] and [implementing] regulations."[1] *Ibid.* Additionally, before

[1] Prior to 1988, trafficking violations had been subject to a mandatory penalty of permanent disqualification. See, *e.g.*, *Kim* v.

imposing this lesser sanction, the Secretary must also determine that the store's ownership "was not aware of, did not approve of, did not benefit from, and was not involved in the conduct of the violation," and that store management was either similarly uninvolved or only "involved in the conduct of no more than 1 previous violation." 7 U.S.C. 2021(b)(3)(B)(i)-(ii).

FNS has issued regulations that define the minimum standards of eligibility for a trafficking violator to be considered for a CMP in lieu of permanent disqualification. 7 C.F.R. 278.6(i). A food store that wishes to be considered for that relief must timely request it when responding to the FNS's charge letter. 7 C.F.R. 278.6(b)(2)(ii)-(iii), 278.6(i). In its request for a CMP, the store "shall, at a minimum, establish by substantial evidence" that it fulfills four regulatory criteria. 7 C.F.R. 278.6(i). These criteria include: (1) development of an "effective compliance policy," as further defined by regulation; (2) evidence that the store's "compliance policy and program were in operation at the location where the violation(s) occurred *prior* to the occurrence of [the] violations"; (3) development of an "effective personnel training program," as further defined by regulation; and (4) evidence that firm ownership and management were not involved in, and did not benefit from, the trafficking violations. *Ibid.* Nonetheless, even where these "minimum standards of eligibility" are satisfied, the Secretary retains the discretion to impose permanent disqualification rather than a CMP. 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. 278.6; see *Bakal Bros.* v. *Unit-*

United States, 121 F.3d 1269, 1272-1273 (9th Cir. 1997) (describing statutory history); *Bakal Bros.* v. *United States*, 105 F.3d 1085, 1088-1089 (6th Cir. 1997) (same).

ed States, 105 F.3d 1085, 1088 (6th Cir. 1997); Pet. App. 28a ("[T]he authority to impose a civil monetary penalty is permissive, not mandatory.") (citations omitted).

2. Petitioner King Cole Foods, Inc. (King Cole Foods), is a corporation that operated a grocery store in Detroit, Michigan. Pet. App. 9a. Petitioner Salam Manni (Manni) is the president and part owner of King Cole Foods. *Ibid.* King Cole Foods accepted and processed SNAP benefits at its grocery store through Electronic Benefit Transfer (EBT) transactions, which typically generated the majority of the store's total sales. *Ibid.*

Between August 2010 and September 2011, federal agents undertook an investigation into the operations of King Cole Foods and related businesses. Through that investigation, federal agents gathered evidence of approximately 58 fraudulent SNAP transactions involving King Cole Foods amounting to more than $28,000. Pet. App. 13a-14a. In September 2011, federal agents executed search and seizure warrants at the grocery store, seizing EBT point-of-sale terminals, currency from the store's safe, and funds from the store's operating accounts at Bank of Michigan. *Id.* at 9a.

FNS then issued a charge letter alleging that King Cole Foods had unlawfully trafficked in SNAP benefits. Pet. App. 13a. The letter described the misconduct of several King Cole Foods employees who had participated in illicit trafficking transactions during the investigation. *Id.* at 13a-14a. The charge letter stated that the presumptive "sanction for the[se] trafficking violation(s) * * * is permanent disqualification," *id.* at 13a, but advised that the firm could

request consideration for a CMP as an alternative, *id.* at 14a. The charge letter further explained that "[i]f you request a CMP, you must meet each of the four criteria listed" in 7 C.F.R. 278.6(i). Pet. App. 14a.

In response, petitioners did not contest the allegations of trafficking, but requested that a CMP be imposed in lieu of permanent disqualification. Pet. App. 14a-15a. In their submissions, petitioners asserted that policies and procedures had been implemented to protect against trafficking, and urged that the firm's owners (including Manni) had no involvement in the violations. *Ibid.* Petitioners also argued that disqualifying it from SNAP would cause hardship to the store's customers. *Ibid.*

On November 7, 2011, FNS issued a determination that King Cole Foods had engaged in unlawful trafficking and ordered permanent disqualification from SNAP as a sanction.[2] Pet. App. 16a. The agency explained that it had considered petitioners' request for a CMP in lieu of disqualification, but determined that King Cole Foods was "not eligible for the CMP" because it had "failed to submit sufficient evidence to demonstrate that [the] firm had established and implemented an effective policy and program to prevent violations of" SNAP regulations. *Ibid.*

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[2] Three days prior to issuance of this determination, on November 4, 2011, petitioners sold the grocery store at which the violations had occurred to another company. See *United States* v. *$4,278.00*, 12-cv-10253 Docket entry No. 43, at 4 (E.D. Mich. May 30, 2014). The grocery store thereafter operated under new ownership, and is currently authorized to accept SNAP benefits. Nonetheless, this dispute has not become moot. Certain collateral consequences attach to the permanent disqualification, including the inability to participate in SNAP at other retail locations. See 7 C.F.R. 278.1(b)(3)(C)(iv).

Petitioners then sought further administrative review. Pet. App. 16a. In April 2012, the FNS issued a "Final Agency Decision" sustaining King Cole Foods' permanent disqualification from SNAP. *Id.* at 16a-17a. The agency determined that the evidence and documentation submitted by petitioners had failed to satisfy the four eligibility criteria set forth at 7 C.F.R. 278.6(i). Pet. App. 17a. As to the first three criteria—all of which relate to the development and operation of an effective compliance policy—FNS found that petitioners "provided only affidavits signed and dated after the violation occurred," and evidence of employee training that did "not pertain to the SNAP" or "cover SNAP rules and regulations." *Id.* at 17a-18a; see *id.* at 18a-19a (lack of documentation of employee training). FNS further found that there was no evidence that a compliance program was "in operation prior to the occurrence of the violations at issue." *Id.* at 18a. Finally, as to Criterion 4, the agency found "insufficient evidence" to show that "[o]wnership/[m]anagement did not benefit from SNAP trafficking." *Id.* at 20a; see 7 U.S.C. 2021(b)(3)(B) (requiring an effective compliance program to be eligible for a CMP). As petitioners failed to establish that King Cole Foods met the four minimum criteria, FNS determined it was not eligible to be considered for a CMP in lieu of permanent disqualification. Pet. App. 16a-20a; see 12-cv-12122 Docket entry No. (Dkt. No.) 1-4, at 2 (May 10, 2012).

3. Petitioners filed suit in the United States District Court for the Eastern District of Michigan seeking review of FNS's final decision. Pet. App. 20a. Petitioners continued to concede that King Cole Foods had engaged in the charged trafficking violations. *Id.*

at 24a. Nonetheless, citing 7 U.S.C. 2023(a)(15), which provides for a "trial *de novo*" on the "validity of the questioned administrative action," petitioners urged the court to undertake an independent assessment of what sanction should be imposed for those violations.[3] *Ibid.* (emphasis added).

The district court dismissed the complaint. Pet. App. 6a-48a. The court rejected petitioners' request for de novo reconsideration of the agency's choice of sanction. *Id.* at 25a-26a. Relying upon *Goldstein* v. *United States*, 9 F.3d 521 (6th Cir. 1993), the court stated that "[o]nce the trial court has confirmed" that a violation has occurred (as was undisputed here), "the court's only task is to examine the sanction imposed in light of the administrative record in order to judge whether the agency properly applied the regulations, i.e., whether the sanction is 'unwarranted in law' or 'without justification in fact.'" Pet. App. 25a-26a (quoting *Goldstein*, 9 F.3d at 523).

Applying this standard, the district court sustained the agency's determination that petitioners "failed to satisfy [the minimum criteria under 7 C.F.R. 278.6(i)] by submitting insufficient evidence to the FNS." Pet. App. 32a; see *id.* at 13a-20a, 29a-31a. In particular, the court examined the administrative record and found King Cole Foods' training program "was and

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[3] Petitioners also purported to assert constitutional claims against the United States, USDA, and certain individual defendants pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed those claims, and the court of appeals affirmed. See Pet. App. 2a-5a, 33a-48a. Those claims are not raised in the petition for a writ of certiorari and thus have been abandoned. Cf. Sup. Ct. R. 14.1(a).

still currently is inadequate." *Id.* at 29a. Citing FNS's Final Agency Decision, the district court further concluded that petitioners failed to provide evidence to support a claim that "[o]wnership/[m]anagement did not benefit from SNAP trafficking," because "when [petitioners] responded to the charge letter, they only 'note[d] . . . that the amount of the benefit was small compared to the firm's yearly gross sales.'" *Id.* at 30a-31a (citation omitted).

The district court accordingly concluded that petitioners had failed to make "any convincing argument that the FNS did not properly apply the statutes or regulations." Pet. App. 32a. The court then stated that it "lack[ed] jurisdiction" to review "the only issue that remains," which was the "severity of the sanction." *Id.* at 33a; see *id.* at 42a ("[T]he FNS choice of sanction is discretionary, and this Court cannot review the severity of the sanction imposed.").

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1a-5a. Relying upon several of its past decisions, the court of appeals upheld the district court's conclusion that it "lack[ed] jurisdiction to review the severity of the sanction" imposed by FNS. *Id.* at 3a (citing *Bakal Bros.*, 105 F.3d at 1088-1089, and *Goldstein*, 9 F.3d at 524).

ARGUMENT

Petitioners contend (Pet. 10-14) that the Sixth Circuit erred in concluding that the district court lacked jurisdiction to review the severity of the sanction, and that the decision below conflicts with the standard and scope of review in other circuits.

But the Sixth Circuit did not preclude judicial review of the threshold question whether petitioners met the minimum statutory and regulatory criteria for

an alternative sanction under 7 U.S.C. 2021(b)(3)(B) and 7 C.F.R. 278.6(i). If, as here, such criteria are not met, a court would have no occasion to review the severity of sanction imposed, because permanent disqualification is mandatory. As to this threshold eligibility question, the Sixth Circuit employs the same standard and scope of review as other circuits, and the district court in fact considered and sustained FNS's determination that King Cole Foods failed to satisfy the threshold eligibility standard. Only once the violator has established its eligibility for a CMP would the Sixth Circuit limit judicial review as to the agency's discretionary choice of sanction. But in this case petitioners failed to provide evidence showing that they qualified for a CMP, requiring permanent disqualification. Therefore, the court of appeals' conclusion that it lacked jurisdiction to review FNS's choice of sanction did not affect the resolution of this case. Further review of the unpublished decision below is not warranted.

1. The court of appeals properly affirmed the dismissal of this suit. It is undisputed that a trafficking violation occurred, and the administrative record, including petitioners' own admissions, confirms that King Cole Foods failed to meet the minimum criteria even to be eligible for a CMP under 7 C.F.R. 278.6(i). Because King Cole Foods failed to meet the regulatory or statutory criteria prerequisite to consideration for a mitigated sanction, the district court properly dismissed their claim.

Under the SNAP statute and its implementing regulations, the default penalty for trafficking is permanent disqualification from the program. See 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. 278.6(e)(1)(i). A CMP

is available in lieu of permanent disqualification only where the "*minimum* standards of eligibility" are met, including "substantial evidence" of an effective compliance program and "evidence that * * * the ownership of the store * * * did not benefit from" the violation. 7 U.S.C. 2021(b)(3)(B) (emphasis added); see 7 C.F.R. 278.6(i). Where these criteria are not met, the statute states that "disqualification * * * *shall* be * * * permanent" even for first-time offenders. 7 U.S.C. 2021(b)(3)(B) (emphasis added); see *Traficanti* v. *United States*, 227 F.3d 170, 175 n.1 (4th Cir. 2000) ("The FNS must find that store owners are permanently disqualified if owners cannot prove by substantial evidence that they had an effective program to prevent future violations.").

Petitioners have not disputed that King Cole Foods engaged in the alleged trafficking violations. Pet. App. 24a. The district court correctly concluded that FNS appropriately applied its regulations in declining to impose a CMP in lieu of permanent disqualification. *Id.* at 29a. Among other deficiencies, "King Cole Foods' training program was and still currently is inadequate," *ibid.*, and petitioners did not dispute that ownership/management benefited from the fraud, claiming only that the "amount of the benefit was small compared to the firm's yearly gross sales," *id.* at 30a-31a (quoting Dkt. No. 1-6, at 7). The petition for a writ of certiorari (Pet. 4-5) similarly fails to dispute that the ownership benefited from the fraud, asserting only that "[t]he amount alleged to have been trafficked by King Cole was less than 0.4% of its total gross revenue for each year."[4] Petitioners have iden-

[4] Many SNAP trafficking cases involve far less than the $28,000 in trafficked SNAP benefits at issue here. See, *e.g.*, *Affum* v.

tified no other basis for calling into question whether the FNS "properly appl[ied] the statutes or regulations." Pet. App. 32a.

Because petitioners did not meet the minimum statutory and regulatory criteria, they were ineligible for a discretionary CMP, and permanent disqualification was required. The court of appeals' decision affirming the dismissal of the suit was therefore correct, and does not merit further review.

2. Petitioners argue (Pet. 10-14) that the courts below erred by concluding that they lacked jurisdiction to review the agency's choice of sanction, and contend that, in this regard, the court of appeals' decision is in conflict with decisions of other courts of appeals, which generally apply the arbitrary-and-capricious standard of review. Petitioners further suggest (Pet. 14) that the agency's choice of sanction should be subject to de novo review by the federal courts.

Petitioners' argument, however, relates only to the scope and standard of judicial review of FNS's choice of sanction *after* a violator has demonstrated eligibility for a CMP. Petitioners allege no error, and point to no conflict, regarding judicial review of an agency's determination that a trafficker failed to satisfy the threshold CMP eligibility criteria under the statute,

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United States, 566 F.3d 1150, 1156 (D.C. Cir. 2009) (involving $30 in trafficked benefits); *Vasudeva* v. *United States*, 214 F.3d 1155, 1157 (9th Cir. 2000) (various undercover transactions each involving $100 or less in trafficked SNAP benefits); *Corder* v. *United States*, 107 F.3d 595, 596 (8th Cir. 1997) (three undercover transactions involving a total of $305 cash exchanged for $610 in food stamp coupons); *Freedman* v. *United States Dep't of Agric.*, 926 F.2d 252, 253 (3d Cir. 1991) (sale to an undercover agent on four occasions for a total value of $1500 in benefits exchanged for $750 in cash).

7 U.S.C. 2021(b)(3)(B), and the regulations, 7 C.F.R. 278.6(e)(1). Because FNS and the courts below determined that petitioners did not qualify for a CMP, this case would be a poor vehicle to resolve any disagreement on the scope of judicial review of FNS's choice of sanction under circumstances where (unlike here) the agency is empowered to exercise discretion. Accordingly, this Court should deny the petition for a writ of certiorari.

a. Petitioners assert that the Sixth Circuit's approach is in conflict with decisions from courts that have applied an "arbitrary and capricious standard" to review the severity of the sanction. Pet. 12 (citing *Objio* v. *United States*, 113 F. Supp. 2d 204, 208 (D. Mass. 2000);[5] *Freedman* v. *United States Dep't of Agric.*, 926 F.2d 252, 261 (3d Cir. 1991); *Traficanti*, 227 F.3d at 170; *Goodman* v. *United States*, 518 F.2d 505 (5th Cir. 1975); and *Vasudeva* v. *United States*, 214 F.3d 1155 (9th Cir. 2000)). As an initial matter, only one of those cases actually involved review of an agency decision declining to impose a CMP in lieu of permanent disqualification. See *Traficanti*, 227 F.3d at 175.[6]

Even overlooking differences in posture, the circuits, including the Sixth Circuit, have applied the

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[5] Petitioners incorrectly identify *Objio* as a decision of the First Circuit.

[6] Cf. *Goodman*, 518 F.2d at 506-507 (reviewing six-month disqualification; decision predated 1988 amendment permitting CMP in lieu of disqualification); *Vasudeva*, 214 F.3d at 1158-1159 (reviewing decision *granting* request for CMP in lieu of disqualification); *Freedman*, 926 F.2d at 254 (same); *Objio*, 113 F. Supp. 2d at 205-206 (reviewing agency decision imposing transfer penalty CMP on individual who sold a disqualified store).

same standard of review as to the threshold question of a SNAP trafficker's eligibility for a CMP. As petitioners acknowledge, the Sixth Circuit in *Goldstein* recognized that, in reviewing an agency's CMP eligibility determination, the district court should determine "'whether the agency properly applied the regulations' and whether the sanction is 'unwarranted in law' or 'without justification in fact.'" Pet. 10 (quoting *Goldstein*, 9 F.3d at 523 (citing *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186 (1973); see *American Power & Light Co.* v. *Securities and Exch. Comm'n*, 329 U.S. 90, 112-113 (1946). This standard, articulated by this Court in *Butz*, is essentially equivalent to arbitrary-and-capricious review under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See, *e.g.*, *Cross* v. *United States*, 512 F.2d 1212, 1217-1218 (4th Cir. 1975) (en banc).

That is the same test used to review CMP eligibility in the other circuits identified by petitioners. See *Traficanti*, 227 F.3d at 177-178 (Widener, J., concurring) ("[A] sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact.") (quoting *Cross*, 512 F.2d at 1218); *Goodman*, 518 F.2d at 511-512 (relying upon *Cross* for same proposition); *Objio*, 113 F. Supp. 2d at 208 ("'[A]rbitrary and capricious' standard" may be "equated" with the "'unwarranted in law or without justification in fact' standard.").[7]

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[7] Other circuits not discussed by petitioners are also in accord with this approach. See, *e.g.*, *El Tepeyac Grocery, Inc.* v. *United States*, 515 Fed. Appx. 55, 56 (2d Cir. 2013) (applying *Butz* test in reviewing choice of sanctions under Food Stamp Act); *Commonwealth of Mass., Dep't of Pub. Welfare* v. *Secretary of Agric.*, 984 F.2d 514, 525 (1st Cir.) (same), cert. denied, 510 U.S. 822 (1993);

Petitioners also contend (Pet. 12) that the Sixth Circuit is in conflict with the D.C. Circuit, which applied an "abuse of discretion standard" in *Affum* v. *United States*, 566 F.3d 1150, 1161 (2009). But that standard reflects the same approach followed by the Sixth Circuit in *Goldstein* and by the other circuits discussed above. Indeed, *Affum* expressly states that "the Secretary abuses his discretion in his choice of a penalty if his decision is either 'unwarranted in law' or 'without justification in fact' or is 'arbitrary' or 'capricious.'" *Ibid.* (citations omitted).

The district court in this case applied the *Butz* standard and determined that the regulations were properly applied, *i.e.*, that the decision was not "'unwarranted in law' or 'without justification in fact.'" Pet. App. 26a; see *id.* at 31a-32a (recognizing that the court "had jurisdiction to resolve" "whether the agency properly applied the regulations") (quotation marks omitted). The court of appeals' affirmance of that decision presents no conflict with the standard of review applied by other circuits as to the CMP eligibility determination.

b. Petitioners' suggestion (Pet. 14) that Section 2023(a)(15) authorizes de novo review of FNS's choice of sanctions is incorrect. The text of Section 2023(a)(15) must be read in light of Section 2021(b). As explained, Section 2021(b) permits, but does not require, the Secretary to impose a CMP in lieu of permanent disqualification in specified circumstances. "Congress' insertion of the 'discretion' provision into [Section] 2021(b) indicates that it intended for trial

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Haskell v. *United States Dep't of Agric.*, 930 F.2d 816, 820 (10th Cir. 1991) (same); *Nowicki* v. *United States*, 536 F.2d 1171, 1178 (7th Cir. 1976) (same), cert. denied, 429 U.S. 1092 (1977).

courts to assess whether the Secretary abused this 'discretion' in selecting the appropriate remedy." *Affum*, 566 F.3d at 1161. It is thus apparent that "the de novo provision of the Food Stamp Act" does not "call for a departure from the usual standard of review concerning sanctions." *Kulkin* v. *Bergland*, 626 F.2d 181, 184 (1st Cir. 1980); accord *Affum*, 566 F.3d at 1160-1161 ("trial de novo" provision does not yield "*de novo* review" in sanctions context).

Indeed, the legislative history of the Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*, confirms that "[t]he trial de novo as set forth in * * * [section 2023] should be limited to a determination of the validity of the administrative action, but not of the severity of the sanction." *Woodard* v. *United States*, 725 F.2d 1072, 1078 (6th Cir. 1984) (second set of brackets in original) (quoting H.R. Rep. No. 464, 95th Cong., 1st Sess., at 398 (1977)).[8]

Contrary to petitioners' contention (Pet. 12), the Eighth Circuit has not directly held otherwise, and the language in *Ghattas* v. *United States*, 40 F.3d 281, 287 (8th Cir. 1994), suggesting that de novo review applies was dictum not followed by other Eighth Circuit cases. *Ghattas* stated that "the decision whether to impose an alternative monetary sanction under [Section] 2021(b)(3)(B) must be reviewed *de novo*," *id.*

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[8] *Goodman*, 518 F.2d at 505, cited and relied upon by petitioners (Pet. 8-9), is not to the contrary. In interpreting 7 U.S.C. 2022(c) (1970), the precursor to Section 2023(a)(15), *Goodman* explained that "the scope of review of a sanction is not as broad as the scope of review of the fact of violation," and expressly held that a sanction must be upheld so long as it is not "unwarranted in law or without justification in fact." 518 F.2d at 511-512 (citation omitted).

at 287 (footnote omitted), and the court "decline[d] to follow *Goldstein*" to that extent, *ibid.* But the court's putative approval of "de novo review" was neither consistent with the outcome of that case nor necessary to its holding.

In *Ghattas*, the court held that the Secretary had committed procedural error when it declined to entertain plaintiff's untimely request for a CMP. 40 F.3d at 287. But the Eighth Circuit did not decide whether a CMP should be imposed in lieu of permanent disqualification, but rather, gave the district court discretion to remand the CMP issue for further administrative proceedings. *Ibid.* In any event, the court expressly held that it would have vacated "the permanent disqualification order in this case under the arbitrary and capricious standard as well," *id.* at 287 n.6, meaning that its approval of the "de novo standard" was dictum.

Moreover, *Ghattas* appears to be an outlier among Eighth Circuit cases. Prior to *Ghattas*, that court of appeals had followed the *Butz* standard in reviewing the agency's choice of sanctions in food stamp cases. See *Sutherlin* v. *United States Dep't of Agric.*, 747 F.2d 1239, 1239-1240 (8th Cir. 1984) (per curiam) (applying *Butz* standard and holding that "the Department did not act in an arbitrary and capricious manner" in imposing disqualification on retail food store). And since *Ghattas*, the Eighth Circuit has similarly employed an "arbitrary and capricious" standard in reviewing agency sanction decisions under Section 2023(a)(15). See *United States* v. *J & K Market Centerville, LLC*, 679 F.3d 709, 714 (2012), (holding that "the imposition of permanent ineligibility" was not "arbitrary and capricious"); see also *Corder* v.

United States, 107 F.3d 595, 596-598 (1997) (reviewing whether CMP imposed in lieu of permanent disqualification was "arbitrary and capricious" and citing *Ghattas*, but without mention of de novo review). It thus is apparent that *Ghattas*'s dictum about de novo review of discretionary sanctions decisions does not accurately summarize the law in the Eighth Circuit.[9]

In any event, here, the district court repeatedly found that petitioner had failed to put forth evidence establishing the necessary prerequisites for a CMP. See Pet. App. 16a, 29a, 32a, 40a, 42a, 46a. Thus, even if Section 2023(a)(15) entitled petitioners to a de novo judicial determination of what sanction should be imposed, the district court would be constrained to uphold permanent disqualification. See *Traficanti*, 227 F.3d at 175-176 n.1 ("The application of a de novo standard of review with respect to the imposition of a sanction also makes no difference here. * * * The FNS must find that store owners are permanently disqualified if owners cannot prove by substantial evidence that they had an effective program to prevent future violations."). Under any standard of review, therefore, the necessary outcome of this case is to sustain the agency's action.

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[9] The Eighth Circuit has applied the *Butz* standard in reviewing an agency's choice of sanctions in other contexts. See *Syverson* v. *United States Dep't of Agric.*, 666 F.3d 1137, 1140 (2012) (Packers and Stockyards Act); *Lowry* v. *Securities and Exch. Comm'n*, 340 F.3d 501, 504 (2003) (securities violations); *Valdak Corp.* v. *Occupational Safety & Health Review Comm'n*, 73 F.3d 1466, 1470 (1996) (OSHA); *Valkering, U.S.A., Inc.* v. *United States Dep't of Agric.*, 48 F.3d 305, 308-309 (1995) (Plant Quarantine Act and Federal Plant Pest Act); *Cox* v. *United States Dep't of Agric.*, 925 F.2d 1102, 1107 (Animal Welfare Act), cert. denied, 502 U.S. 860 (1991).

c. In affirming the district court's dismissal, the court of appeals relied on *Bakal Bros.* and *Goldstein* to find that it lacked "jurisdiction to review the severity of the sanction."[10] Pet. App. 3a. That conclusion was based on *Bakal Bros.*' statement that "[t]he determination of the appropriate sanction is left to the discretion of the Secretary" and "not open to judicial review." 105 F.3d at 1089 (citing *Goldstein*, 9 F.3d at 524).

Any conflict between those statements and the cases invoked by petitioners pertains to the agency's discretionary choice of sanction—a choice which is only presented if the trafficker can establish eligibility for a CMP. Here, FNS had no choice of sanction because petitioners did not qualify for a CMP. This case does not, therefore, squarely present the question of the correct scope and standard of review of the agency's choice of sanction.

Bakal Bros. itself distinguished between the Sixth Circuit's review of the agency's eligibility determination and the court's review of the agency's choice of sanction. The court in *Bakal Bros.* reviewed the agency's finding that the store owner was liable for the trafficking activities of his store clerk. 105 F.3d at 1089-1090. Moreover, because the store owner in *Bakal Bros.* failed to request a CMP, he, like petitioners, was ineligible for that alternative sanction. *Id.* at 1090.

Therefore, even if the court of appeals erred by stating that the district court "lacked jurisdiction" to

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[10] In its brief to the court of appeals, the Government argued, based on *Bakal Bros.* and *Goldstein*, that "there is no subject matter jurisdiction for a court to review the agency's penalty decision in SNAP cases." Gov't C.A. Br. 9-14.

review the severity of the sanction, Pet. App. 3a, the court of appeals nonetheless did not err in affirming the district court's judgment. Any arguable misstatement contained in the court of appeals' unpublished decision thus would not warrant this Court's review. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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