No. 04-1361

In the Supreme Court of the United States

MICHAEL FULLENKAMP, ET AL.,
PETITIONERS

v.

MIKE JOHANNS, SECRETARY OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Secretary of Agriculture's construction of a statutory cap on the amount of milk production that may qualify for federal assistance under the Milk Income Loss Contract Program, 7 U.S.C. 7982 (Supp. II 2002).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 383 F.3d 478. The memorandum and order of the district court (Pet. App. 15a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2004. A petition for rehearing was denied on January 6, 2005 (Pet. App. 40a). The petition for a writ of certiorari was filed on April 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Milk Income Loss Contract Program, 7 U.S.C. 7982,[1] establishes an income support program authorizing monthly federal payments to dairy farmers. In order to be eligible for payments under the program, a dairy farm producer must enter into a contract with the Secretary of Agriculture. 7 U.S.C. 7982(b). Once the contract is in place, a farmer is eligible for prospective monthly payments on qualifying production marketed during the period running from the first day of the month in which the contract is signed to September 30, 2005. 7 U.S.C. 7982(g)(1). Contracting farmers are also eligible for a single, retrospective, "transition" payment for qualifying production marketed during the period from December 1, 2001, to the last day of the month preceding the month in which the contract is signed. 7 U.S.C. 7982(h).

The criteria by which the amount of assistance payments is determined are set forth in three provisions of the statute: (1) 7 U.S.C. 7982(c), which sets out the general formula by which the Secretary determines the amount of assistance payments to be dispensed under the program; (2) 7 U.S.C. 7982(d), which, in defining the "payment quantity" used in Section 7982(c)'s statutory formula, specifies the amount of production that qualifies for federal assistance; and (3) 7 U.S.C. 7982(h), which provides that the formula used to determine the amount of a transition payment is the formula contained in Section 7982(c).

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[1] All references to 7 U.S.C. 7982 are to the Supplement II (2002) to Title 7 of the United States Code.

These provisions state as follows:

(c) Amount

Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary)—

(1) the payment quantity for the producer during the applicable month established under subsection (d) of this section;

(2) the amount equal to—
  (A) $16.94 per hundredweight; less
  (B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by

(3) 45 percent.

(d) Payment quantity

(1) In general

Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) Limitation

The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) of this section shall not exceed 2,400,000 pounds. For purposes of determining whether producers are producers on separate dairy operations or a single dairy operation, the Secretary shall apply the

> same standards as were applied in implementing the dairy program under section 805 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (as enacted into law by Public Law 106-387; 114 Stat. 1549A-50).
>
> * * * * *
>
> **(h) Transition rule**
>
> In addition to any payment that is otherwise available under this section, if the producers on a dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) of this section on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.
>
> * * * * *

7 U.S.C. 7982.

2. The Secretary promulgated regulations implementing these provisions on October 18, 2002. See 67 Fed. Reg. 64,454. The regulations provide, *inter alia*, that a transition payment is subject to the same 2.4 million-pound annual statutory cap on eligible production that applies to monthly payments. See 7 C.F.R. 1430.206(b)(1), 1430.207(b); see also 7 C.F.R. 1430.208(d) ("Payments under this subpart may be made to a dairy operation only up to the first 2.4 million pounds of eligible milk production per applicable fiscal year, including any year in the transition period."). The Secretary ad-

vanced several reasons for adopting this construction of the statute. First, the conference committee report accompanying the legislation expressly referred to the production cap without any distinction between monthly and transition payments. 67 Fed. Reg. at 64,456. Second, previous similar dairy price support legislation incorporated production caps limiting all production without distinction. *Ibid.* Third, and most important, a contrary interpretation would vitiate the statutory cap by permitting producers to delay entering into a contract until immediately before the end of the program, at which point they could seek an uncapped transition payment for all production that would have otherwise been subject to limitation under the monthly payment program. *Ibid.* The Secretary accordingly concluded that "the cap covers all fiscal years, including the fiscal year in which the transition period falls." *Ibid.*

3. Petitioners filed this action in the United States District Court for the Northern District of Ohio, seeking, *inter alia*, a declaratory judgment that dairy producers who are entitled to payments during the transition period are entitled to a lump-sum payment for all the milk produced and marketed during the transition period, without a cap. Petitioners also requested an injunction compelling the Secretary to modify the regulations to allow uncapped transition payments.

The district court rejected petitioners' challenge (Pet. App. 15a-39a) and upheld the regulations, applying the two-step analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Barnhart* v. *Walton*, 535 U.S. 212 (2002). The court first reasoned that Section 7982 does not unambiguously forbid the Secretary's interpretation, be-

cause Section 7982(d)(2) can be construed to cap all payments to producers, and because Section 7982(h), which authorizes the transition payments, subjects those payments to the formula set forth in Section 7982(c), which in turn incorporates the Section 7982(d) cap. Pet. App. 29a-31a. Having concluded that the statute is ambiguous, the court proceeded to step two of the *Chevron* analysis, pursuant to which a reviewing court must defer to an agency's interpretation of a statute it is charged with administering if the interpretation is reasonable. *Chevron*, 467 U.S. at 843. The court concluded that the Secretary's interpretation of the statute here is reasonable and therefore upheld the regulations. Pet. App. 31a-34a.

4. The court of appeals affirmed. Pet. App. 1a-14a. Likewise engaging in the two-step *Chevron* analysis, the court first considered the text of Section 7982 and concluded that it did not clearly indicate whether the phrase "payments under subsection (b)," which are subject to the production cap, see 7 U.S.C. 7982(d)(2), includes transition payments as well as prospective payments. Pet. App. 9a. The court further determined that "[n]either the legislative history of the statute nor the parties' explanations of how their interpretations further the purpose of the statute sufficiently clarify the ambiguity in the statutory language." *Id*. at 10a.

The court then proceeded to step two of *Chevron*, under which it must uphold the Secretary's interpretation so long as it is reasonable. Pet. App. 13a. On that point, the court held that the Secretary's interpretation is "eminently reasonable" because the statutory cap on qualifying production could easily be construed to apply to any payment authorized by the dairy farmer's con-

tract, including a transition payment, and because applying the cap to transition payments "ensures that the cap has a meaningful role in the statute." *Id.* at 13a-14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decision of any other court of appeals. Indeed, no other court of appeals has had an occasion to construe the particular statutory provision at issue here, which concerns one-time retrospective payments under a program in which even ongoing monthly payments are now scheduled to terminate on September 30, 2005. In addition, the Secretary's interpretation of the statute is not only reasonable, but is the interpretation required by its text and structure and is, in any event, the most natural reading of the statute. Further review by this Court is therefore not warranted.

1. As the Secretary argued in the court of appeals (Pet. App. 8a-9a), the conclusion that transition payments are subject to the statutory cap is not only a permissible interpretation of the statute, but also the one required by its plain text.

Subsection (b), entitled "Payments," directs the Secretary to offer to enter into contracts with dairy farmers, under which those farmers "receive payments on eligible production." See 7 U.S.C. 7982(b). Ensuing subsections provide for two types of such payments: periodic, monthly payments commencing with the month in which the contract was entered into through September 30, 2005, see 7 U.S.C. 7982(e) and (g)(1), and a lump-sum retroactive ("transition") payment for the period from December 1, 2001, through the month proceeding the month in which the contract was entered into, see 7 U.S.C. 7982(h). Subsection (c), entitled "Amount," es-

tablishes a single formula for calculating the payments "under this section," which includes subsection (h) and its provision for transition payments. 7 U.S.C. 7982(c). Indeed, subsection (h) itself provides that transition payments are to be made "in accordance with the formula specified in subsection (c)." 7 U.S.C. 7982(h). Subsection (c), in turn, provides that the "payment quantity" to be used in calculating the amount of payments is the quantity "established under subsection (d)." 7 U.S.C. 7982(c)(1). Paragraph (2) of subsection (d) contains the cap on the payment quantity. It provides that the "payment quantity" for all producers on a single dairy farm "during the months of the applicable fiscal year for which the producers receive payments under subsection (b) of this section shall not exceed 2,400,000 pounds." 7 U.S.C. 7982(d)(2). Because this cap is expressly incorporated by reference in subsection (c), and because subsection (h) expressly provides that transition payments are to be made in accordance with the formula in subsection (c), the cap is applicable to transition payment by the plain language of the statute.

Petitioners contend (Pet. 5) that the reference in 7 U.S.C. 7982(d)(2) to "payments under subsection (b)" limits the cap to periodic monthly payments made after the contract is entered into, and excludes the lump-sum retroactive payment for the transition period. But petitioners point to nothing in the Act to support that contention. They assert only that the reference to payments under subsection (b) "implies" that there are payments that are not under that subsection. That is not so. As explained above, subsection (b) provides for the Secretary to offer contracts to dairy farmers under which those farmers will receive payments on eligible produc-

tion, and it does not draw any distinction between periodic monthly payments and retroactive lump-sum payments. Moreover, subsection (h) in fact confirms that the contract is the basis for making the lump-sum transition payment, because it applies only to farmers who "enter into a contract under this section." 7 U.S.C. 7982(h). Thus, the negative implication petitioners seek to draw from the reference to "subsection (b)" in 7 U.S.C. 7982(d)(2) is without merit and cannot in any event overcome the express terms of the statute.

If there were any lingering doubt, subsection (g) further supports the Secretary's interpretation. Subsection (g), which is entitled "Duration of contract," provides that "[e]xcept as provided in * * * subsection (h)," any contract entered into "under this section" shall cover eligible production from the first month of the contract through September 30, 2005. The quoted introductory phrase makes clear that, for purposes of making the lump-sum transition payment, the period prior to the contract month is covered by the contract. That provision clearly rests on the proposition that payments under subsection (h) are payments under the contract, and thus covered by subsection (b) as well. See 7 U.S.C. 7982(g). If Congress had instead intended to limit applicability of the cap to periodic monthly payments, it would have applied the cap to "payments under subsection (e)," which pertains specifically to monthly payments, rather than to "payments under subsection (b)," which refers to payments under the contracts generally.[2]

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[2] Contrary to the petitioners' assertion and the suggestion of the court of appeals, the Secretary's interpretation does not render the reference to "subsection (b)" in subsection (d)(2) superfluous. See Pet. 6-7; Pet. App. 10a. Rather, the reference to the operative portion of

For the foregoing reasons, the plain text of Section 7982 subjects transition payments to the statutory cap. At the very least, that is the most natural reading of the statute.

2. Even if it is assumed, arguendo, that the statutory text does not compel the Secretary's conclusion, the court of appeals correctly sustained the Secretary's regulations as a reasonable interpretation of the statute. As the court explained (Pet. App. 13a), the statutory language is at least amenable to the Secretary's construction: because transition payments under subsection 7982(h) result only upon entering into a contract under subsection 7982(b), they reasonably can be considered "payments under subsection (b)" subject to the production cap in subsection 7982(d)(2). In addition, as the court of appeals also found, the Secretary's construction ensures that the statutory cap on production will have meaningful effect. Under petitioners' preferred construction, any dairy farmer could evade the cap by delaying entering into a contract until immediately prior to the program's expiration, at which point it could then seek a retroactive transition payment without regard to the statutory cap. The result would be a disbursement equivalent to the sum of the prospective monthly payments if there were no statutory cap at all. The Secretary's construction forecloses circumvention of the program in this manner and ensures that the cap, which Congress expressly wrote into the statute, serves

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Section 7982 provides without qualification for "payments" (not merely monthly payments) to a person who enters into a contract with the Secretary. The fact that Congress referred to that particular subsection, rather than to Section 7982 as a whole, renders the reference more precise, not superfluous.

a meaningful purpose. It is thus a reasonable interpretation of the statute requiring judicial deference.

3. Petitioners do not challenge the court of appeals' conclusion that the Secretary's interpretation of the statute is a reasonable one. Rather, they contend that the court of appeals misapplied *Chevron* in even reaching that point of the analysis. Petitioners' contentions are without merit and provide no basis for further review.

In *Chevron*, this Court established a two-step framework through which a court should review an agency's construction of a statute it administers. The first step requires the reviewing court to determine whether Congress has directly spoken to the question at issue. If the legislative intent 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 842-843. If, however, "the statute is silent or ambiguous with respect to the specific issue," the court must uphold the agency's action as long as it is based on a permissible construction of the statute. *Id.* at 843.

In this case, the court of appeals first found that neither the text of the statute nor its history, structure, or purpose evinced a clear congressional intent as to the precise question presented: whether transition payments are subject to the production cap. See Pet. App. 9a, 10a. The court then considered whether the Secretary's interpretation was reasonable, and deemed it "eminently" so. *Id.* at 13a.

a. Petitioners contend that the court of appeals departed from step one of *Chevron* by rejecting an interpretation required by the unambiguous text of the stat-

ute. See Pet. 12-13. This argument mischaracterizes the decision below. Contrary to petitioners' assertion, the court of appeals found textual infirmities in *both* parties' proposed interpretations of the statute. The court noted that although in its view the Secretary's interpretation rendered one phrase superfluous,[3] petitioners' proposed interpretation is not compelled by the text of the statute, because it is irreconcilable with statutory text stating that all contract payments are subject to the statutory cap and that transition payments are available only to farmers with whom the Secretary contracts. Pet. App. 9a-10a.

The court thus did not, as petitioners argue, reject the plain language of the statute. Instead, having identified problems with each party's reading of the statutory text, it found that the statute is ambiguous. The court of appeals' searching and thorough inquiry into the plain language of the statute is entirely consistent with step one of *Chevron* and other decisions of this Court. Indeed, the court of appeals complied fully with the directives of the only case petitioners cite in support of their contention that the court erred in its textual analysis. As petitioners note, *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438 (2002), instructs a reviewing court to "begin with the language of the statute," ceasing its inquiry if "the statutory language is unambiguous." Pet. 12 (quoting *Sigmon Coal Co.*, 534 U.S. at 450). The court of appeals first turned to the language of the statute, found ambiguity in the text, and accordingly continued, rather

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[3] As explained above, the court of appeals was wrong in believing that the reference to "subsection (b)" is superfluous under the Secretary's interpretation. See p. 9 n.2, *supra*.

than ceased, its analysis, thus properly conforming to the very precedent to which petitioners appeal.

b. Petitioners also contend that the court of appeals erred under *Chevron* in its consideration of the legislative history, structure, and purpose of the statute. Pet. 13. This Court has stressed that when the words of a statute are unambiguous, judicial inquiry is complete. *Connecticut Nat'l Bank* v. *Germain ex rel. O'Sullivan's Fuel Oil Co.*, 503 U.S. 249, 253-254 (1992). The Court, however, has not foreclosed resort under *Chevron* to other traditional tools of statutory construction when the text of the statute does *not*, on its face, conclusively yield a clear meaning. Indeed, the Court considered legislative history in *Chevron* itself. See 467 U.S. at 851-853, 862. Furthermore, the Court has in subsequent invocations of *Chevron* consulted legislative history and other traditional tools of statutory construction in instances where the statutory text was not dispositive. See, *e.g., General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 142-143 (2000); *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 704-708 (1995); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697-698 (1991); *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 648-650 (1990); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233-240 (1986).

Here, the court of appeals first determined that the text of the statute is unclear and only then considered legislative history and other tools of statutory construction. Its approach was thus fully consistent with the decisions of this Court.

c. Contrary to petitioners' contention (Pet. 9), there is no significant disagreement among the courts of appeals concerning the role legislative history may play in *Chevron* analysis. The courts of appeals generally recognize that courts cannot ordinarily employ legislative history under *Chevron* to support a *departure* from an interpretation that the plain language of the statute would otherwise compel. See, *e.g.*, *Succar* v. *Ashcroft*, 394 F.3d 8, 31 (1st Cir. 2005) ("[W]here the plain text of the statute is unmistakably clear on its face, there is no need to discuss legislative history."); *United Transp. Union* v. *Surface Transp. Bd.*, 183 F.3d 606, 613 (7th Cir. 1999) (unambiguous statutory text is controlling at step one of *Chevron*, without regard to legislative history); *Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1475 (11th Cir. 1997) (same).

In addition, the courts of appeals generally agree that consideration of legislative history may be appropriate at step one of *Chevron* when a statute's text does not conclusively yield a clear meaning. Indeed, many of the opinions petitioners cite support that very principle. See, *e.g.*, *Succar*, 394 F.3d at 31 (permitting legislative history to be considered at step one of *Chevron* "where appropriate to discern and/or confirm legislative intent"); *Coke* v. *Long Island Care at Home, Ltd.*, 376 F.3d 118, 127 (2d Cir. 2004) (reviewing legislative history at step one of *Chevron* where the statutory issue concerned the meaning of "a vague term with no obvious plain meaning"); *Director, OWCP Programs* v. *Sun Ship, Inc.*, 150 F.3d 288, 291 (3d Cir. 1998) (authorizing legislative history review in *Chevron* inquiry if statutory text is ambiguous); *Dominion Res., Inc.* v. *United States*, 219 F.3d 359, 365 (4th Cir. 2000) (in *Chevron* in-

quiry, legislative history is "the first tool of statutory construction a court utilizes to determine congressional intent when statutory language is unclear"); *Bolen* v. *Dengel*, 340 F.3d 300, 308 (5th Cir. 2003) (legislative history employed when construing legislative intent in first step), cert. denied, 541 U.S. 959 (2004); *Ragsdale* v. *Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000) (*Chevron* step one permits examination of legislative history when statutory language is ambiguous), aff'd, 535 U.S. 81 (2002); *American Rivers* v. *FERC*, 187 F.3d 1007, 1016 (9th Cir. 1999) (legislative history considered at step one of *Chevron* where "statutory language evinces no specific congressional directive"), opinion amended in part, 201 F.3d 1186 (9th Cir. 2000); *Seneca-Cayuga Tribe* v. *National Indian Gaming Comm'n*, 327 F.3d 1019, 1042 (10th Cir. 2003) (applying legislative history at step one where text did not indicate clear meaning), cert. denied, *Ashcroft* v. *Seneca-Cayuga Tribe*, 540 U.S. 1218 (2004); *Davis* v. *Southern Energy Homes, Inc.*, 305 F.3d 1268, 1278 (11th Cir. 2002) (looking to both text and legislative history to determine intent at step one), cert. denied, 538 U.S. 945 (2003); *American Bankers Ass'n* v. *National Credit Union Admin.*, 271 F.3d 262, 271 (D.C. Cir. 2001) (legislative history examined at step one of *Chevron* where court was "[f]aced with two plausible interpretations" of the statutory text).[4]

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[4] The Seventh Circuit has stated in dictum in a footnote that "[t]he first step of *Chevron* focuses on the text of the statute, leaving legislative history for the second step." *United States* v. *Dierckman*, 201 F.3d 915, 923 n.12 (2000). In support of that aside, the *Dierckman* court quoted *Bankers Life & Casualty Co.* v. *United States*, 142 F.3d 973 (7th Cir.), cert. denied, 525 U.S. 961 (1998), in which the court remarked that although the Seventh Circuit "has examined legislative

The decision below is consistent with those decisions of other courts of appeals. The court of appeals, after "[f]ocusing on the statutory language," determined that Congress's intent "is not stated clearly in the language of the statute." Pet. App. 10a. Only then did the court consider whether it could resolve this textual ambiguity by examining the legislative history, structure, and purpose of the statute. *Id.* at 10a-13a. Moreover, because the court below found that none of those other tools of statutory construction established a clear congressional intent on the statutory question at issue, the question whether a reviewing court may resort to legislative history at step one of the *Chevron* analysis had no bearing on the outcome of this case. The court of appeals proceeded to the second step of *Chevron*, just as it would have if it had not first considered the statute's legislative history, structure, and purpose and found them unilluminating. And at step two, the court found the Secretary's interpretation to be "eminently reasonable," a

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history during the first step of *Chevron*, we now *seem* to lean toward reserving consideration of legislative history * * * until the second *Chevron* step." *Id.* at 983 (emphasis added and citation omitted).

Petitioners also assert (Pet. 11) that the decision below is inconsistent with the Eight Circuit's decision in *United States* v. *Sabri*, 326 F.3d 937 (2003), aff'd, 541 U.S. 600 (2004). *Sabri* is completely inapposite. The Eighth Circuit there cautioned against using legislative history to justify a departure from unambiguous statutory text. *Id.* at 943. The instant case, however, concerns the use of legislative history where the court has determined that the statutory text, standing alone, is unclear. Moreover, *Sabri* concerned judicial interpretation of a criminal statute, not judicial review of an agency's decision under *Chevron*. In the context of a *Chevron* inquiry, the Eighth Circuit has sanctioned the use of legislative history at step one to discern congressional intent. See *Ragsdale*, *supra*.

determination petitioners do not dispute. Thus, not only do petitioners fail to present any circuit conflict or significant legal issue concerning the particular statute at issue here. They also fail to raise any concrete issue under *Chevron* that is of significance to this case or that would warrant this Court's review in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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