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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al. *Plaintiffs,* v. SONNY PERDUE, et al. *Defendants.*	Case No. 3:20-cv-1537-RS **PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINIFFS' MOTION FOR SUMMARY JUDGMENT** Date: January 21, 2021 Courtroom: 3 – 17th Floor Hon. Richard Seeborg

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INTRODUCTION

This case concerns whether the statutory and regulatory practices concerning soil health and ecology are mandatory components of growing and selling crops under the Organic label. It is not about whether soil-less hydroponic crop production may be a beneficial way of growing food in some instances, nor whether Congress intended to prohibit such operations from obtaining organic certification when it passed the Organic Foods Production Act (OFPA or the Act).[1] As detailed in Plaintiffs' Motion for Summary Judgment, Congress passed OFPA in response to the growing organic food movement in the United States by creating consistent national standards for organic food production and handling; accordingly, the Act embodied the central principle of organic farming—the management of soil health and ecology—by mandating soil fertility and ecological practices for all organic crop production. *See* Pls.' Br. 6-7, ECF No. 22.

Organic stakeholders, as well as Defendant United States Department of Agriculture (USDA or the Agency)'s own expert committees, have consistently held that these mandatory provisions apply to hydroponic crop operations seeking organic certification, and repeatedly advised the Agency to clarify how hydroponic operations can achieve compliance, and to ensure that no hydroponic operations receive certification without having done so. Each time, USDA took no action; instead, USDA sent out mixed messages via informal agency bulletins and website announcements stating that hydroponic operations can be certified organic as long as they comply with all of OFPA's requirements, while promising additional guidance and rulemaking to clarify exactly how. These unilateral pronouncements only sowed confusion, and perpetuated inconsistent standards in the organic marketplace. It was against this backdrop of regulatory incertitude and agency apathy that organic stakeholders filed the Petition to get USDA to act once and for all. It worked. The Petition Denial that led to the present litigation soon followed.

USDA cannot refute the importance of soil health to organic farming, the mandatory

[1] For this reason, the proposed Amici brief's description on the potential benefits of various hydroponic production systems is of no relevance to this Court's review. *See* Proposed Amici Br., ECF No. 25-1. Proposed Amici otherwise parrot USDA's arguments and misframing of this case as about whether Congress only intended to certify soil-cultivated crops under OFPA, rather than the applicability of OFPA's soil and ecological requirements to hydroponic operations. Proposed Amici offer no additional insight for this Court.

command of OPFA's relevant statutory and regulatory provisions, nor the opinions of its own experts. USDA nonetheless urges this Court to turn a blind eye to the plain language of OFPA and the overwhelming evidence establishing the incompatibility of hydroponic operations for organic certification. None of USDA's arguments have merit. The plain language, structure, and history of OFPA and its Regulations lead to only one conclusion: hydroponic operations, regardless of their other benefits, do not comply with the mandatory soil fertility and ecological requirements of organic certification. USDA's refusal to prohibit organic certification of hydroponic crop operations and to take actions to ensure that all certified crop producers comply with OFPA's soil and ecological requirements violates OFPA and the Administrative Procedure Act (APA). The Court should grant Plaintiffs' Motion for Summary Judgment.

ARGUMENTS

I. USDA OVERSTATES THE DEFERENCE OWED TO ITS PETITION DENIAL.

Before responding to USDA's arguments, USDA's overstatement of the level of judicial deference requires a correction. USDA's Petition Denial is reviewed under the APA, 5 U.S.C. § 706, which requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2), including when an agency's decision is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C).

First, USDA far-reachingly claims that the Petition Denial is entitled to "deference so broad as to make the process akin to non-reviewability" because the Petition included a request that USDA engage in rulemaking, citing an out-of-circuit appellate decision. Defs.' Br. 8 (citing *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992). USDA erroneously misstates the applicable standard. While an agency's refusal to take enforcement action is presumptively non-reviewable,[2] in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the seminal case concerning

[2] USDA's effort to evade judicial review does not end with misstating the reviewability of its Petition Denial. Elsewhere in its brief, USDA argues that it need not respond to the Petition's request that USDA ensure hydroponic operations can meet OFPA's mandatory ecological requirements, because in the Agency's view, any such non-compliance is more "proper[ly]"

judicial review of agency petition denials, the Supreme Court emphasized that the presumption does not extend to agency denials of rulemaking petitions. *Id.* at 527 ("There are key differences between a denial of a petition for rulemaking and an agency's decision not initiate an enforcement action."). This is because "agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" *Id.* (quoting *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987). These differences render petition denials "susceptible to judicial review." *Massachusetts*, 549 U.S. at 527-28.

The factors outlined in *Massachusetts*—the right to petition and the requirement for a public response and the presentation of legal questions—all exist here. The APA provides "interested person[s] the right" to file rulemaking petitions like the Petition filed here, 5 U.S.C. § 553(e), and requires agencies to respond to such petitions, *id.* § 555(b). Once they do, as USDA did here, that response is a final agency action that is subject to APA review. The Petition argued in the main that OFPA's statutory and regulatory texts prohibit USDA from allowing organic certification of hydroponic operations, as it is currently doing. *See* AR1-23; Pls.' Br. 11-12.

Second, USDA points out that judicial review of an agency's petition denial is "extremely limited and highly deferential," but that deferential standard is not so toothless, as USDA suggests. Defs.' Br. 8 (quoting *Compassion Over Killing v. FDA*, 849 F.3d 849 (9th Cir. 2017)). The Ninth Circuit there emphasized that "[i]n denying a petition for rulemaking, an agency must, at a minimum, clearly indicate that it has considered the potential problem identified in the petition and provide a 'reasonable explanation as to why it cannot or will not exercise discretion' to initiate rulemaking.'" *Compassion Over Killing*, 849 F.3d at 857 (quoting *Massachusetts*, 549 U.S. at 533).

Massachusetts is again instructive. There, the Supreme Court reviewed EPA's denial of a rulemaking petition that requested EPA regulate emissions of new motor vehicles' greenhouse gas emissions under the Clean Air Act. 549 U.S. at 497. After noting the deferential standard of review, the Supreme Court found EPA's petition denial violated the Clean Air Act. The Supreme

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addressed in case-by-case agency enforcement actions under OFPA, which are presumptively non-reviewable. *See Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). *See* Defs.' Br. 25.

Court explained that EPA's petition denial was largely based on the agency's erroneous interpretation of the underlying statute, and held that the denial was unlawful after analyzing the statutory language and concluding that the Clean Air Act does provide EPA the authority to regulate greenhouse gas emissions from new motor vehicles. *Id.* at 532. The Supreme Court also rejected EPA's other rationale—that it would be unwise to regulate greenhouse gas emissions due to other agency priorities, finding the agency's reasoning to be "divorced from the statutory text." *Id.* Because "EPA ha[d] offered no reasoned explanation for its refusal . . . ," the Supreme Court held that the petition denial was "arbitrary, capricious, . . . or otherwise not in accordance with the law" under the APA. *Id.* at 534 (internal quotation mark omitted).

The present case is on all fours with *Massachusetts*. Just like EPA's petition denial, USDA's Petition Denial here was largely based on the Agency's (mis)interpretation of its statutory authority under the operative statute and regulations. There, it was EPA's misinterpretation of the Clean Air Act's definition of "pollutant" as not including greenhouse gas emissions that the Supreme Court held made the petition denial arbitrary and capricious. Here, it is USDA's misinterpretation of the OFPA relevant soil standards as categorically excluding hydroponic operations that makes the Petition Denial arbitrary and capricious. *See supra* pp. 6-14. Indeed, USDA itself has repeatedly emphasized that in its view, both the Petition and USDA's reasons in the Petition Denial are "purely legal." Defs.' Opp'n Mot. Complete 3-4, ECF No. 23. Accordingly this Court's review of USDA's Petition Denial and its legal basis is not only proper, but is a necessary component of judicial review under the APA. *See* 5 U.S.C. § 706(2)(C); Pls.' Br. 13-14.

Third, and for the same reason, USDA's insistence that heightened deference is owed to USDA's technical and scientific expertise in responding to the Petition rings hollow. Defs.' Br. 8-9. Moreover, as to any factual determinations made by USDA in the Petition Denial, the Ninth Circuit has made clear that although the review is "relatively deferential to the agency factfinder," it "must still be 'searching and careful, subjecting the agency's decision to close judicial scrutiny.'" *Containerfreight Corp. v. United States*, 752 F.2d 419, 422 (9th Cir. 1985).

Any calls from USDA for "deference" must be seen through the particular lens of this case: namely, USDA has gone against its congressionally established expert advisory body and its own

appointed experts. *See Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001) (finding agency decision arbitrary and capricious where the decision ignored its own experts' advice and where no contrary recommendations existed in the record). USDA's refusal to prohibit organic certification of hydroponic operations runs counter to the technical expertise and advice of the National Organic Standards Board (NOSB), the expert committee Congress tasked with "advis[ing] [the USDA] on … the implementation of [OFPA]," 7 U.S.C. § 6518(a), as well as the recommendations of the Hydroponic Task Force, which USDA convened to study the very question of whether hydroponic systems align with OPFA, AR327. *See* Pls.' Br. 8-11. In short, USDA's own experts agree with Plaintiffs, not USDA.[3]

Finally, USDA claims *Chevron* deference applies, but it does not, precisely because USDA has failed to do what the Petition calls for: undertake a formal rulemaking.[4] Even if it did apply, recent Supreme Court decisions make clear that it is invoked only after the Court has "exhaust[ed] all the 'traditional tools' of construction," including "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984)). Still, this Court must ensure that in responding to the Petition, USDA "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action . . . ." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); Pls.' Br. 13-14. As explained below, USDA did not.

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[3] USDA emphasize subsequent NOSB actions and differences in the three Hydroponic Task Force reports, Defs.' Br. 28-29, but as Plaintiffs point out and USDA do not argue otherwise, none of the expert committees advised USDA to exempt hydroponic operations from OPFA's mandatory requirements, nor to allow wholesale certification of all hydroponic operations. Pls.' Br. 8-10.

[4] As discussed below, USDA's Petition Denial is owed only the less deferential *Skidmore*—and not *Chevron*–deference even if the Court finds ambiguity, since USDA's Petition Denial was issued without any opportunity for public comment, one of the hallmarks of a formal agency rulemaking. *See Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1183 (9th Cir. 2012). Under *Skidmore*, the Court should affirm the Petition Denial only if it "has the power to persuade," and it does not. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see infra* pp. 14-16.

II. OFPA UNAMBIGUOUSLY MANDATES THAT ALL ORGANIC CROP PRODUCERS FOSTER SOIL FERTILITY.

Beginning with the text of OFPA, Plaintiffs' Claim One raises a straightforward question of statutory interpretation: whether Congress, in enacting OFPA, required all certified organic crop producers to implement practices to foster soil fertility. If Congress so intended, then USDA lacked the authority to categorically exempt hydroponic crop producers from such soil fertility requirements, and USDA's Petition Denial is unlawful.

Tellingly, USDA declines to even attempt any argument that the text is unambiguous in their favor. Instead, USDA only insists that the statutory requirement is ambiguous, and urges the Court to skip directly to *Chevron* Step 2 to find its interpretation that OFPA's soil fertility requirement is discretionary. That request runs headlong into recent Supreme Court instruction that, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (citing *Chevron*, 467 U.S. at 843 n.9, noting it adopts the "same approach" for statutes). Only after the "legal toolkit is empty" and the "interpretative question still has no single right answer" can a court then "wave the ambiguity flag" and move to Step 2. *Kisor*, 139 S. Ct at 2415. And when "the canons supply an answer, '*Chevron* leaves the stage.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (citation omitted).

As Plaintiffs previously explained and USDA readily acknowledges, Congress passed OFPA specifically to address the lack of consistent production standards for organic foods. *See* Defs.' Br. 1-2, ECF No. 23; Pls.' Br. 2-4. USDA also recognizes that accordingly Congress set up three statutory requirements that must be met for a food to be certified organic, one of which requires that the food "be produced and handled in compliance with an organic plan." Defs.' Br. 10 (quoting 7 U.S.C. § 6504); Pls.' Br. 2-4. Nor can USDA deny that OFPA's statutory provision, titled "Organic plan," 7 U.S.C. § 6513, states under the subsection "Crop production farm plan," *id.* § 6513(b), that such a plan "*shall* contain provisions to foster soil fertility, primarily through *the management of the organic content of the soil through proper tillage, crop rotation, and manuring.*" *Id.* § 6513(b)(1) (emphases added); *see* Defs.' Br. 10. Taken together, 7 U.S.C. § 6513(b) plainly mandates that in order to receive organic certification, all organic producers must comply with organic plans; and for organic crop producers, their organic plans must include practices that

"foster soil fertility." 7 U.S.C. § 6513(b)(1); *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("[T]he word 'shall' usually connotes a requirement."); A. Scalia & B. Garner, *Reading Law* 112 (1st ed. 2012) ("*shall* is mandatory") (emphasis in original); *see* Pls.' Br. 15-17. Finally, it is also undisputed that hydroponic producers fall into this category, because they produce crops. *See* AR390. This straight-forward reading alone should seal the deal. USDA's efforts to obfuscate that conclusion fail.

A. USDA's Attempts to Dissect Section 6513 to Create Ambiguity Fail.

USDA strains to inject ambiguity in the face of section 6513's straight-forward, unequivocal statutory command that organic plans for crop production "shall . . . foster soil fertility." 7 U.S.C. § 6513(b)(1). None of USDA's attempts to create ambiguity has merit. Adopting USDA's twisted interpretations of 7 U.S.C. § 6513 would render various aspects of OFPA inapplicable to a wide range of organic crop systems. It would also lead to the absurd result whereby *no* statutory standards for organic plans, the third requirement for organic certification under OFPA, would be applicable for hydroponic producers. The Court should hold that USDA violated OFPA's mandatory requirement for organic crop producers when it issued the Petition Denial exempting hydroponic producers from the requirements of 7 U.S.C. § 6513(b).

First, USDA claims that OFPA authorized USDA to exempt hydroponic producers from its mandatory soil fertility requirements simply because OFPA does not textually prohibit hydroponic systems. Defs.' Br. 10-11. USDA's argument misstates the statutory inquiry before the Court: that Congress did not explicitly name and prohibit hydroponic production in OFPA says nothing about what soil fertility practices Congress required of organic crop producers under the Act.[5] But courts have rejected the notion that an agency is authorized to act "merely because

[5] USDA thus exaggerates when it compares the lack of explicit prohibition of hydroponic operations as "hid[ing] elephant in mouseholes." Defs.' Br. 11 (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)). Quite the opposite, courts have invoked that phrase to instances where agencies have attempted to extend, rather than limit, the reach of their regulatory authority without explicit statutory authorization. *See, e.g., Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 462 (5th Cir. 2020) (holding that Congress did not authorize defendant National Marine Fisheries Service to regulate aquaculture under its authority to regulate "fishing"). If anything, the canon supports Plaintiffs. USDA is trying to squeeze an entire new industry, hydroponic growing, into organic farming, when it does not fit. *See id.* ("The agency's argument

Congress has not expressly withheld such power." *Ethyl Corp. v. E.P.A.*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). USDA does not cite to—nor are Plaintiffs aware of any—OFPA statutory provision or legislative history that suggests that Congress was even aware of hydroponic production methods, let alone contemplated their place or the proper standards for their organic certification under OFPA. *See Martinez v. Wells Fargo Home Mortg, Inc.*, 598 F.3d 549, 553-54 n.5 (9th Cir. 2010) ("Section 8(b)'s 'silence' on the subject of overcharges does not mean that Congress's actions were ambiguous on that subject. Congress simply did not legislate at all on overcharges.").

Nor is that how *Chevron* review works. Rather, "Congress's intent can be . . . clear, without an express prohibition on taking the challenged action, but rather based on the 'design and structure of the statute as a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted); Pls.' Br. 15. The Court should reject USDA's rush to get past *Chevron* Step 1 simply because OFPA does not prohibit hydroponic systems on its face.

Second, USDA argues that Congress could not have intended to apply 7 U.S.C. § 6513(b)(1)'s soil fertility requirement to all organic operations, going on at length about the misfit of requiring organic handlers or wild crop harvesters to engage in soil fertility practices. Defs.' Br. 12-13. This argument is a strawman. Plaintiffs have never alleged that the soil fertility requirement extends to all types of organic production plans (livestock, management of wild crops), or all organic handling plans, only that it applies to all *organic crop production*—including hydroponic crop production. *See* 7 U.S.C. §§ 6513(b)-(f) (specifying in individual subsections requirements for five types of organic systems—crop production, livestock production, mixed crop livestock production, handling, and wild crop management); Pls.' Br. 17-19. The rest are apples

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here is all elephant and no mousehole. It asks us to believe Congress authorized it to create and regulate an elaborate industry the statute *does not even mention*.") (emphasis added). Hydroponic growing, whether good or bad, is not organic farming, just as aquaculture is not the same as fishing. *Id.* at 456. Just as in *Gulf Fishermens Association*, USDA's proper route is to go to Congress and ask for more authority if it wishes to include this industry under the Organic label, not to try and squeeze it into the existing framework like a round peg in a square hole. *Id.* ("If anyone is to expand the forty-year-old Magnuson-Stevens Act to reach aquaculture for the first time, it must be Congress.").

and oranges. The apples to apples comparison is the subset of organic crop producers. USDA does not dispute that hydroponic producers grow crops, and so the crop production standards should apply to them. Plaintiffs' interpretation is supported by the plain language and structure of 7 U.S.C. § 6513.

Next, USDA argues that Congress was ambiguous as to whether 7 U.S.C. § 6513(b)(1)'s mandatory soil fertility requirement applies to hydroponic operations. USDA grasps onto the fact that the text of subsection 6513(b)(1) simply refers to "an organic plan" without the phrase "crop production." Defs.' Br. 11-12. The lack of the phrase "crop production" to modify the phrase "organic plan," USDA presses, meant that Congress was ambiguous as to which type of organic plans the soil fertility requirements apply to.

Yet, the ambiguity USDA contends only exists if one ignores that the soil fertility provision is the first subsection (and requirement) under section 6513(b), which is titled "*Crop production* farm plan." 7 U.S.C. § 6513(b) (emphasis added). USDA urges the Court to do just that. Defs.' Br. 13 (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). But while as a general rule "the title of a statute . . . cannot limit the plain meaning of the text," USDA goes too far in arguing that the title of section 6513(b) has no bearing on this Court's *Chevron* analysis, for "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019); *see Fl. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (explaining that while "a subchapter heading cannot substitute for the operative text of the statute, . . . the placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermine Piccadilly's view that § 1146(a) covers preconfirmation transfers."). Here, the section title "Crop production farm plan" does not substitute nor conflict with the soil fertility requirement of subsection 6513(b)(1); it simply defines the scope of that subsection, making abundantly clear that it is applicable to all organic crop production.

Nor does Plaintiffs' claim rest entirely on the title of Section 6513(b). Rather, the organization of 7 U.S.C. § 6513 as a whole, delineating requirements of different organic plans under subheadings that describe different types of organic systems, make clear that Congress intended subsection 6513(b)(1)'s soil fertility requirement to apply to organic crop production. *See*

Pls.' Br. 17-18 (detailing subsections of 7 U.S.C. § 6513). Critically, subsection (d), titled "Mixed crop livestock production," provides that "[a]n organic plan may encompass both the crop production and livestock production requirements in subsection (b) and (c) if both activities are conducted by the same producer." 7 U.S.C. § 6513(d). "Subsection (b)" refers to the "crop production farm plan" requirements, including the soil fertility requirements; while "subsection (c)" contains requirements for organic livestock plans. *See* 7 U.S.C. §§ 6513(b)-(c). A producer of both organic crop and livestock is subject to the requirements of both plans, demonstrating that: (1) Congress intended all organic crop producers to comply with 7 U.S.C. § 6513(b)'s soil fertility requirements; and (2) section 6513 is organized by different types of organic production.

Bizarrely, after urging the Court to disregard the title of 7 U.S.C. § 6513(b), USDA relies on the title to conjures an elaborate tale as to why subsection 6513(b)(1)'s soil fertility requirement is ambiguous. According to USDA, the inclusion of the word "farm" in the heading "Crop production farm plan" demonstrates Congressional intent to exempt hydroponic producers.

USDA takes several twists and turns to complete this tale. The word "farm" is not defined under OFPA, so USDA turns to a dictionary definition of the word, which defined farm as "an area of land used for agricultural purposes," as well as "the agricultural business or enterprise operating on the land," the latter of which USDA admits would cover hydroponic operations. Still, USDA argues, without any reference to the statutory text or legislative history, that the latter, more expansive definition of the word "farm" could not have been what Congress had in mind, but rather, Congress meant "a traditional farm," a phrase not found anywhere in OFPA,[6] but which USDA creates out of thin air and self-defines—without consulting any dictionaries—as a place "where land with soil is cultivated to grow agricultural products." Defs.' Br. 14-15. As justification for why this never-mentioned phrase must be what Congress meant when it included the word "farm" in section 6513(b)'s subtitle, USDA resorts to the phrase "certified organic farm," which OFPA does define. 7 U.S.C. § 6502(4) (definition of "certified organic farm" is "a farm, or portion of a farm, or site where agricultural products or livestock are produced."). USDA does not

[6] USDA does not cite to—nor are Plaintiffs aware of—any legislative history of OFPA that includes the term.

deny that the last part of that definition, "site where agricultural products or livestock are produced," is broad enough to include hydroponic operations, but nonetheless leaps to the conclusion that because Congress did not say "site where agricultural products or livestock are produced" to modify "crop production plan" in the title of section 6513(b), and instead just used the word "farm," Congress meant the "traditional farms." Defs.' Br. 14. In other words, according to USDA, had Congress meant for subsection 6513(b)(1)'s soil fertility requirements to cover all crop production—including hydroponic production—Congress would have named section 6513(b) "Production plan for a site where agricultural crops are produced." Because Congress did not, USDA argues, the provision is ambiguous.

USDA's strained interpretation is contradicted by OFPA, and runs afoul of statutory interpretation canons. A review of OFPA reveals that Congress frequently used the word "farm" and "farming" when referring to all forms of organic production eligible for organic certification. *See, e.g.*, 7 U.S.C. § 6502 (definition of "certifying agent" includes individuals accredited "for the purpose of certifying a farm or handling operation . . ."); *id.* § 6503(d) ("[C]ertifying agents may certify a farm or handling operation . . . ."); *id.* § 6508(a) (detailing seed, seedling, and planting requirements "for a farm to be certified under this title").

To apply USDA's inference that whenever Congress used the word "farm" in isolation Congress intended to only describe this USDA-created concept of "traditional farms where land with soil is cultivated to grow agricultural products" would lead to absurd results. Starting with 7 U.S.C. § 6513, USDA's interpretation would not only render subsection (b)(1)'s requirement that organic crop producers "shall . . . foster soil fertility" inapplicable to hydroponic producers, but would also exempt any other agricultural systems where food is not grown by cultivating the soil, such as mushroom production and indoor greenhouse facilities. USDA's definition would similarly exempt hydroponic producers and these other agricultural systems from having to comply with subsection 6513(b)'s other mandatory requirements, including the requirement that hydroponic producers' organic plans "shall contain terms and conditions that regulate the application of manure to crops," *id.* § 6513(b)(2)(A); and that they may only apply raw manure to crops under certain conditions, *id.* § 6513(b)(2)(B)-(C). USDA's interpretation thus violates the

"cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 48 5 U.S. 759, 7 78 (1988); *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (same); *see generally* A. Scalia & B. Garner, *supra*, at 174–183; Pls.' Br. 18-19.

As another example, OFPA's definition of certifying agents authorizes such persons and entities to "certify[] *a farm* or handling operation" under OFPA. 7 U.S.C. § 6502(3) (emphasis added). Under USDA's limited definition, this would exclude from certification all production sites where agricultural products are not grown by cultivating the soil from organic certification, eliminating from organic certification products such as wild crops, which OFPA describes as being harvested from the land without cultivation, and for which OFPA contained its own set of harvesting standards. *See* 7 U.S.C. § 6513(f)-(f)(1) ("An organic plan for the harvesting of wild crop shall—(1) designate the area from which the wild crop will be gathered or harvested.").[7]

USDA throws several interpretations against the wall to suggest that Congress was ambiguous as to the scope of OFPA's mandatory soil fertility requirements. None sticks. USDA's attempts are contradicted by the plain language of Section 6513 of OFPA, and must be rejected.

B. OFPA's Statutory Scheme and Legislative History Demonstrate Congressional Intent that All Organic Crop Producers Comply with the Soil Fertility Mandate.

USDA fares no better in relying on OFPA's statutory scheme and legislative history. First, USDA points to 7 U.S.C. § 6512 as evincing congressional intent that a broad range of practices qualify for organic certification under OFPA. Defs.' Br. 15. But Section 6512 is not limitless. Congress provided that a "production or handling practice" that "is not prohibited or otherwise restricted" by OFPA is permitted "*unless* it is determined that such practice would be *inconsistent with the applicable organic certification program*." 7 U.S.C. § 6512 (emphases added). Since it is undisputed that hydroponic operations produce crops, hydroponic *crop* producers must comply with OFPA's requirements for organic *crop* production, which requires their organic plans to include practices that build soil fertility. *See* Pls.' Br 15-20. USDA itself has acknowledged that hydroponic producers are subject to the standards governing organic crop production. *See* AR1375

[7] So at the end of the day, the logical conclusion of USDA's twisted interpretation is that it would still overturn the Petition Denial, since according to USDA hydroponic operations are not "farms" and thus can never be certified organic. Surely even USDA does not intend for such a result.

(stating in the Petition Denial that "many operations have obtained certification by meeting the existing requirements *for organic crop production*." AR1375; AR327 (same statement in USDA's Federal Register notice announcing the formation of the Hydroponic Task Force). USDA's reliance on section 6512 as authorizing hydroponic production only works if one tunes out the latter part of section 6512, which specifically requires any unprohibited nor restricted organic practice to still comply with "the applicable organic certification program." *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 666 (2007) ("In making the threshold determination under *Chevron,* 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.' ") (citation omitted).

Second, USDA mistakenly claims that legislative history can only be used to "resolve ambiguities," Defs.' Br. 16, but the Ninth Circuit has instructed otherwise. *See Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (explaining that under *Chevron* Step One, "we examine the legislative history, the statutory structure, and 'other traditional aids' of statutory interpretation in order to ascertain congressional intent").

Third, Congress could not have spoken more directly on the critical nature of soil fertility to organic crop production. As Plaintiffs previously explained and USDA does not deny, the legislative history affirms the stated statutory purposes of OFPA: to create consistent organic production standards for organically produced food throughout the nation. *See* Pls.' Br. 19-20 (and citations therein). In a Senate report discussing OFPA, Congress underscored that these standards include strict adherence to organic plans. *See* S. Rep. No. 101-357 (1990), *reprinted in* 1990 U.S.C.C.A.N 4656, 4946 ("But defining organically grown food based on production materials and a three-year transition period alone is not sufficient. Organically grown food is produced using farming and handling systems that include site-specific farm plans."). Congress emphasized that "[t]he organic plan sets out all procedures that producers and handlers must agree to follow in order for their products to be labeled as organically produced." *Id.* Congress went on to explain that "a crop production farm plan must detail the procedures that the farmer will follow in order to foster soil fertility . . . ." I*d.*

Defendants cite to cases cautioning against overreliance on legislative history, but those

cases are inapposite. *See* Defs.' Br. 16 (citing *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1063 n.1 (9th Cir. 2016)). Although courts have cautioned against relying "solely" on legislative history as an entirely detached "statutory reference point," here the legislative history is entirely in step with OFPA's statutory language, and thus supports a conclusion that Congress intended the soil fertility requirement to be an integral component of all organic crop production, including hydroponic operations. *See* 7 U.S.C. § 6504(3) (compliance with organic plan as one of three national standards for organic production); *id.* at § 6513(b)(1).

USDA culls through the Senate report to again argue that Congress meant for the soil fertility requirements to apply to "traditional farms" only. USDA's argument again fails. As with OFPA's statutory text, the Senate report does not once use the phrase "traditional farm." Rather, a review of congressional discussions regarding OFPA in the report show that Congress used the word "farm" and "farming" broadly to encompass a variety of agricultural operations. *See, e.g.,* 1990 U.S.C.C.A.N at 4672 ("Certifying agents . . . will inspect farms and handling operations."); *id.* at 4951 ("The [NOSB] shall review all botanical pesticides used in organic farming . . . .").

Finally, USDA asks this Court to dismiss Senator Leahy's statement that the purpose of OFPA is to support "farmers who protect the soil and water" because the statement accompanied an earlier draft of OFPA, emphasizing that the ultimate definition for "certified organic farm" was different. But that the statement concerned an earlier draft of OFPA does not diminish its value in highlighting the concerns and interests that Congress intended to address in the Act. *See Hawaii ex rel. Atty. Gen. v. Fed. Emergency Mgmt. Agency*, 294 F.3d 1152, 1163 (9th Cir. 2002) (relying on legislative history from earlier drafts of the Stafford Act). Moreover, contrary to USDA's contention, that Congress ultimately included in the definition of "certified organic farm" the expansive description of "site[s] where agricultural products . . . are produced" actually *supports* that Congress intended OFPA's organic production standards to include not just "traditional farms," but all "sites" of agricultural production, including hydroponic operations.

C. USDA's Interpretation Is Impermissible Even Under *Chevron* Step Two.

Even if the Court finds that the applicability of subsection 6513(b)(1) to hydroponic crop production is "genuinely ambiguous," USDA's interpretation is nonetheless unreasonable. *Kisor*,

139 S. Ct. at 2415 ("Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' And let there be no mistake: That is a requirement an agency can fail.") (citing and quoting *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013)).

Plaintiffs have already addressed the unreasonableness of USDA's arguments above. *See supra* pp. 6-14. USDA relies on extra-circuit authorities for the simple proposition that under *Chevron* Step Two, a court should defer to an agency's construction of the term if it finds that the term is susceptible to more than one meaning. But USDA has entirely failed to demonstrate why its interpretation, that the requirement that organic plans contain provisions to foster soil fertility only applies to "traditional farms," is based on two susceptible interpretations. Rather, USDA's interpretations of OFPA's soil fertility requirements as flexible requirements inapplicable to hydroponic operations rests entirely on USDA's self-defined concept of "traditional farms" completely unmoored from OFPA's statutory text and legislative history. *See supra* pp. 6-12. Further, this interpretation would nullify OFPA's numerous production standards for a wide range of agricultural practices, eviscerating OFPA's requirement that organically produced products be produced with adherence to an organic plan. *See supra* pp. 6-12; 7 U.S.C. § 6504(3).

And *Chevron* deference is still unwarranted even if the Court accepts USDA's interpretation, since the Petition Denial was not a formal rulemaking with public notice and comment. *Montana Sulphur & Chemical Co.*, 666 F.3d at 1183; *Skidmore,* 323 U.S. at 140 (explaining that deference to the agency interpretation depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"). USDA's one-paragraph declaration in the Petition Denial that hydroponic operations are exempt from OFPA's mandatory soil requirements not only contradicts the statutory language, but also reverses the Agency's own prior position that hydroponic operations must meet all of the requirements of OFPA. See Pls.' Br. 12-13; AR1377. USDA's interpretation lacks the "power to persuade" under *Skidmore* review.

The plain language and structure of section 6513, taken together with OFPA's statutory purpose, structure, and legislative history, leads to only one reading: Congress mandated that all organic crop producers include practices to foster soil fertility in their organic plans in order to

obtain organic certification. *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) ("[A] statute may foreclose an agency's preferred interpretation . . . if its structure, legislative history, or purpose makes clear what its text leaves opaque."). USDA's interpretation must be rejected.

D. USDA's Alternative Argument Has No Merit.

USDA alternatively argues that even if the Court finds that OFPA requires all organic crop producers, including hydroponic crop producers, to comply with OFPA's soil fertility requirement, the Petition Denial is nonetheless lawful because USDA found that "some hydroponic systems" can maintain or improve soil fertility. Defs.' Br. 19. USDA's cherry-picked sentence from the Petition Denial was in response to whether hydroponic operations can meet OFPA regulations concerning cycling of resources, ecological balance, and biodiversity conversation, and thus has zero import on whether hydroponic operations can comply with 7 U.S.C. § 6513(b)(1)'s soil fertility requirement. *See* AR1377.

Nor is it of any legal relevance whether some hydroponic operations might hypothetically be capable of maintaining or improving soil fertility, for USDA's action "must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50. Here, the reason articulated by USDA in the Petition Denial is that OFPA's soil fertility provisions are only "applicable to production systems that *do* use soil." AR1376-77 (emphasis in original). *See Kisor*, 139 S. Ct. at 2417-18 (""[A] court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.'"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Because OFPA plainly requires that all organic crop producers include practices to foster soil fertility, USDA's Petition Denial exempting hydroponic producers from that statutory requirement was unlawful. *See* 5 U.S.C. § 706(2)(C) (courts should "hold unlawful and set aside agency action, findings, and conclusions" that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").

III. OFPA'S SOIL MANAGEMENT AND CROP ROTATION REGULATIONS ARE MANDATORY FOR ALL ORGANIC CROP PRODUCERS.

Recognizing the mandatory "shall" command in OFPA's section 6513—that organic crop producers must "foster . . . soil fertility" through "proper tillage, crop rotation, and manuring,"

subpart C of the Regulations requires *all* organic crop producers to engage in soil management practices—including tillage, crop rotations, cover crops, and "application of plant and animal materials," 7 C.F.R. §§ 205.203, 205.205—in order to maintain or improve soil health. *See* 7 C.F.R. § 205.200 ("[O]rganic producer or handler . . . must comply with the applicable provisions of this subpart."); *id.* ("Production practices . . . must maintain or improve the natural resources of the operation, *including soil and water quality*.") (emphasis added); Pls.' Br. 20-22.

USDA does not dispute that these regulatory commands are mandatory, but just as it had tried with OFPA's statutory requirement concerning soil fertility, USDA argues that these soil-building and crop rotation practices are inapplicable to hydroponic operations. This time, USDA hangs its hat on the word "applicable" in 7 C.F.R. § 205.200: because that section requires organic producers to "comply with the applicable provisions of [Subpart C of the Regulations]," and because dictionary definitions of the word "applicable" broadly includes, "having relevance," the regulatory requirements should be applied on a site-specific basis, and thus the soil management and crop rotation practice standards are inapplicable to hydroponic operations. Defs.' Br. 20-21.

First, deference to an agency's interpretation of its regulation is the alternative, not the default, for "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414. Thus instead of deferring to USDA's interpretation, this Court must "carefully consider the text, structure, history, and purpose of [the Regulations], in all the ways it would if it had no agency to fall back on." *Id.* at 2415. As the Supreme Court explained in *Kisor*, engaging in this thorough review "will resolve many seemingly ambiguities out of the box, without resorting to *Auer* deference." *Id.* USDA's interpretation—made on the basis of reading one regulatory provision in isolation— falls apart under this review framework.

Second, the plain text of the Regulations shows that they are applicable to organic "producers," a broad term that USDA agrees includes hydroponic operators. *See, e.g., id.* § 205.203(a) ("The producer must select and implement tillage . . . ."); *id.* § 205.203(b) ("The producer must manage crop nutrients and soil fertility . . . ."); id. § 205.205 ("The producer must implement a crop rotation . . . ."). Where a practice standard is not required, USDA indicated so expressly in the Regulations by using the word "may." *See, e.g.*, 7 C.F.R. § 205.206(b) ("Pest

problems may be controlled through mechanical or physical methods . . . ."); A. Scalia & B. Garner, *supra*, at 112 ("[M]*ay* is permissive.") (emphasis in original). Thus, USDA's contention that the word "applicable" renders all the practice standards in Subpart C of the Regulations non-binding on organic producers would nullify the regulatory command "must," and as such must be rejected. *See In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("It is [ ] a fundamental principal of statutory construction that 'effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.'").

Similarly, while the regulatory provisions give room for site-specific considerations, that consideration does not go as far as excusing entire production types—such as hydroponic operations—from compliance, as USDA suggests. For example, the regulatory provision requiring crop rotation practices also uses the word "applicable," and requires that "the producer must implement a crop rotation" to achieve "functions that are applicable to the operation," listing functions such as erosion control, pest management, soil organic matter content, and plant nutrients management. 7 C.F.R. § 205.205. But USDA explained in the Federal Register notice accompanying the final Regulations that the phrase "applicable to the operation" is intended to make clear that the exact crop rotation practice one employs can take into account site-specific environmental conditions and the actual crops being produced, but that "the final rule requires implementation of a crop rotation." 65 Fed. Reg. 80,548, 80,569 (Dec. 21, 2009).

Crucially, 7. C.F.R. § 205.200, the sole basis for USDA's interpretation, states in full:

> The producer or handler of a production or handling operation intending to sell, label, or represent agricultural products as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must comply with the applicable provisions of this subpart. Production practices implemented in accordance with this subpart must maintain or improve the natural resources of the operation, including soil and water quality. Production practices implemented in accordance with this *subpart* must maintain or improve the natural resources of the operation, *including soil and water quality*.

Id. (emphases added). The latter requirement, that production practices "maintain or improve . . . soil and water quality" is without qualification, and thus applies to all producers seeking organic certification, including hydroponic producers. *Id.*

Third, and more fundamentally, USDA's interpretation violates the basic principle of administrative law that regulations—and agencies' interpretations of them—cannot "trump an otherwise applicable statute unless the regulations' enabling statute so provides." *United States v. Maes*, 546 F.3d 1066, 1068 (9th Cir. 2008) (citing *Chevron*, 467 U.S. at 842-43); *see Decker v. Nw. Envt'l Defense Ctr.*, 568 U.S. 597, 609 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'") (citation omitted); *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018) ("[A]n agency may not promulgate a rule or regulation that renders Congress's words a nullity."). Just because 7 C.F.R. § 205.200 provides that "the producer or handler . . . must comply with the applicable provisions of this subpart" does not give USDA free reign to apply the requirements willy-nilly. Rather the range of what is "applicable" is capped by OFPA's statutory language.

Massachusetts is again illustrative. There, the Supreme Court rejected EPA's argument that EPA could decline to regulate on the basis of other agency priorities. EPA's argument had centered on the fact that the Clean Air Act leaves the authority to regulate air pollutants to EPA's "judgment." The Supreme Court disagreed, finding that the Clean Air Act limits such "judgment" to only concerns of public health and welfare. 549 U.S. at 533. In so holding, the Supreme Court emphasized that "the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." *Id.*

USDA's interpretation of "applicable" exceeds OFPA's statutory limits. Nothing in OFPA authorizes USDA to stray away from its mandatory statutory requirements. Just the opposite, OFPA tasked USDA with "establish[ing] an organic certification program for producers and handlers of agricultural products that have been produced using organic methods *as provided for in this chapter*." 7 U.S.C. § 6503(a) (emphasis added). Because OFPA unambiguously requires organic crop production to "foster soil fertility," and specifically identifies tillage, crop rotation, and application of manure as practices to meet that goal, the Regulations' requirements on the same practices are applicable—and thus must be met—by *all* organic crop producers. As with the statute, USDA's basic argument is circular and conclusory, hinging on the assumption that hydroponic producers are not traditional farmers and thus are exempt from the classification's requirements.

Tellingly, the Regulations correspond to the categories of production systems described in OFPA's statutory text. The Regulations describe practices mandated for crop production, 7 C.F.R. §§ 205.203-.206; livestock production, *id.* §§ 205.236-240; harvesting of wild crops, *id.* § 205.207; and handling, *id.* § 205.270: the same categories of production and handling systems contemplated under OFPA's statutory text. *See supra* pp. 6-12; 7 U.S.C. § 6513. Of crucial importance, the Regulations' crop production-related practice standards track OFPA's statutory requirements for organic crop production. 7 C.F.R. § 205.203 requires producers to implement tillage, and to "manage crop nutrients and soil fertility through rotations, cover crops, and application of plant and animal materials," analogous to the mandatory soil fertility requirements of 7 U.S.C. § 6513(b)(1). *See* 7 U.S.C. § 6513(b)(1) (requiring organic plans for crop production to "foster soil fertility, primarily . . . through proper tillage, crop rotation, and manuring). Section 205.203 also adheres to, and elaborates upon, the same limitations on the application of raw animal manure on crops spelled out under 7 U.S.C. § 6513(b)(2). *Compare* 7 C.F.R. 205.203(c)(1) (prohibiting raw animal manure application unless certain conditions are met) *with* 7 U.S.C. 6513(b)(2)(B)(i)-(iv) (detailing same conditions when raw manure may be used).[8]

In sum, OFPA's statutory framework, as well as the Regulations' plain text, structure, and relevant history, make clear that the Regulations' soil fertility and crop nutrient management practice standards, 7 C.F.R. § 205.203, and crop rotation practice standard, *id.* § 205.205, are applicable and mandatory requirements for hydroponic crop producers. *See* Pls.' Br. 20-22.

A. The Regulations' History Supports Plaintiffs' Interpretation.

USDA also argues that the Regulations' history supports exempting hydroponic producers. To the contrary, the regulatory history demonstrates that USDA understood OFPA requires organic crop producers to engage in practices to build soil health in order to be certified organic.

[8] Other regulatory provisions similarly track or build on OFPA's statutory requirements. *Compare, e.g.,* 7 U.S.C. § 6513(f) (requiring that wild crops be harvested: (1) from designated area for which no prohibited substances under OFPA have been applied for the three years prior to harvest, and (2) in such a manner that the harvest "will not be destructive to the environment and will sustain the growth and production of wild crop") *with* 7 C.F.R. § 205.270 (regulatory provision for "wild-crop harvesting practice standard" containing the same two requirements).

USDA grasps onto the fact that in the Federal Register notice accompanying an earlier draft of the Regulations, USDA changed the phrase "system of organic farming and handling"—a defined phrase under the Regulations intended to refer to the requirements of OFPA—to "system of organic production and handling" in order to "provide a more encompassing term, which *may come to include* such diverse activities as hydroponics, green house production, and harvesting of aquatic animals." Defs.' Br. 22 (citing 65 Fed. Reg. 13,512, 13,520 (Mar. 13, 2000)) (emphasis added). But the fact that USDA mentioned "hydroponics" in the proposal does not lend support to USDA exempting hydroponic operations from applicable organic practice standards for crop production. It merely shows that USDA contemplated that hydroponic operations "may" be eligible for organic certification, not that hydroponic operations qualify for organic certification, nor the applicable standards that would apply to such operations. Significantly, the quoted language also mentions "green house production" and "harvesting of aquatic animals" as potential production systems that may be eligible for organic certification, but USDA promulgated specific guidance for green house production based on NOSB's recommendations, and to date, despite several attempts at rulemaking, still has not finalized regulations authorizing organic certification of aquatic animals.[9] In contrast there was no rulemaking here by USDA, one way or another. The agency just *sub silencio* started allowing hydroponics facilities to be certified organic. This is what necessitated Plaintiffs to file a rulemaking petition, rather than challenge any such rulemaking or guidance directly. That USDA took further regulatory actions on these other production systems indicates that USDA did not intend for all hydroponic operations to be magically eligible for organic certification under the existing Regulations without any additional action.[10]

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[9] *See Formal Recommendation by the NOSB to the National Organic Program: Production Standards for Terrestrial Plants in Containers and Enclosures (Greenhouse)* (Apr. 29, 2010), *available at* https://www.ams.usda.gov/sites/default/files/media/NOP%20Final%20Rec%20Production%20Standards%20for%20Terrestrial%20Plants.pdf; USDA, *Guidance on Organic Aquaculture*, https://www.nal.usda.gov/afsic/organic-aquaculture (last visited Nov. 30, 2020) ("Certification of aquatic animals will not be available until new standards are complete.")

[10] For example, proposed Amici identify an organic aquaponics farm in Wisconsin that raises fish in fish tanks and utilizes nutrients from the fish waste to feed the organic crops. *See* Proposed Amici Br. 14-15. USDA's failure to undertake rulemaking to clarify how different types of hydroponic systems meet OFPA's ecological regulations allows this producer to obtain organic

In contrast to USDA's myopic focus on one inconclusive statement from USDA's March 2000 Federal Register notice for an earlier draft of the Regulations, USDA's statements accompanying the final Regulations firmly establish that USDA intended the soil fertility and crop production practice standards to apply to all organic crop producers, not just "traditional farmers," as USDA insists. In explaining the final Regulations, USDA unequivocally stated that "the final rule [] require[s] that *producers* manage crop nutrients and soil fertility through the use of crop rotations and cover crops in addition to plant and animal materials." 65 Fed. Reg. 80,548, 80,564 (Dec. 21, 2000) (emphasis added). Tracking the actual language of the relevant regulatory provisions, USDA stated that "[a] *producer of an organic crop* must manage soil fertility, including tillage and cultivation practices, in a manner that maintains or improves the physical, chemical, and biological condition of the soil and minimizes soil erosion." *Id.* at 80,559 (emphases added). USDA also stated that "[t]he *producer is required* to implement a crop rotation . . . ." *Id.* at 80,560 (emphases added). Tellingly, in discussing components of an organic plan, USDA emphasized that the Regulations require that organic system plans *must* provide "information on the frequency with which production and handling practices will be performed," which includes "information about planned crop rotation sequences, the timing of any applications of organic materials, and the timing and locations of soil tests." *Id.* at 80,558. Thus in USDA's own words, the soil fertility and crop rotation practice standards apply to *producers* of organic crops, and their organic crop system plans must detail the frequency by which the organic crop producers engaged in these practices.

B. Should the Court Find the Regulations Genuinely Ambiguous, USDA's Interpretation Is Nonetheless Unreasonable.

The Supreme Court has made clear that "not all reasonable agency constructions of those truly ambiguous rules are entitled deference." *Kisor*, 139 S. Ct. at 2414. Instead, a court still need not defer to the agency's otherwise reasonable construction if it finds that the interpretation "does not reflect an agency's authoritative, expertise-based, fair, or considered judgment. *Id.* Nor is deference owed to the Agency where the interpretation would result in "unfair surprise" to the

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certification even though there are currently no organic standards for how to raise and keep aquatic animals, *see supra* n.9.

regulated entities, such as when an agency interpretation departs from an earlier one. *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Thus, even if the Court were to conclude that the Regulations' soil fertility and crop rotation practice standards is genuinely ambiguous, USDA's interpretation would still be unreasonable. As Plaintiffs previously explained, in the Petition Denial, USDA proclaimed for the first time, without any opportunity for public comment, that the Regulations' soil fertility and crop rotation practice requirements are inapplicable to soil-less hydroponic operations. *See* Pls.' Br. 12-13. Until then, USDA had acknowledged the inability of hydroponic operations to meet OFPA's soil fertility provisions, but insisted that hydroponic operations can be certified organic so long as the certifiers ensure that they comply with all of OFPA's statutory and regulatory requirements. AR1375; *see* Stevenson Decl., Ex. D, at 6. USDA's changed interpretation alters the applicable standards for hydroponic producers seeking organic certification as well as certifying agents' understanding of the scope of the certification. By exempting hydroponic producers from OFPA's soil fertility requirements, USDA's new position also subjects non-hydroponic organic producers to a different set of requirements than hydroponic ones, creating "unfair surprise" to the regulated entities that participate in the organic marketplace.

Nor does USDA's interpretation exempting hydroponic production from the Regulations' soil fertility and crop rotations reflect the Agency's "authoritative, expertise-based" judgment. Just the opposite: as the Administrative Record demonstrates, the two expert bodies tasked with advising USDA on whether hydroponic operations can qualify for organic certification repeatedly informed USDA of their opinions that hydroponic operations cannot foster soil fertility, and recommended USDA to either prohibit organic certification of hydroponic operations, or at a minimum, engage in rulemaking to establish measurable and enforceable standards governing organic certification of hydroponic systems. *See* Pls.' Br. 8-11; AR271-72 (the 2010 NOSB Recommendation that USDA should prohibit organic certification of hydroponic operations); AR441, AR554-55 (two reports from the Hydroponic Task Force: one affirming that hydroponic systems cannot comply with OFPA's soil fertility requirements, and another recommending regulatory changes to authorize organic certification of only a subset of hydroponic production

systems). And USDA responded to these recommendations by stating that it would consider undertaking rulemaking. USDA's about-face in the Petition Denial in contravention of the specific recommendations of its experts is unreasonable.

Thus, even if the Court were to find genuine ambiguity regarding the applicability of OFPA's soil fertility and crop rotation practice standards, USDA's new proffered interpretation that they are inapplicable to hydroponic operations should still be rejected. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2020) (declining to defer to the agency's interpretation that departed from the defendant Department of Labor's prior position).

IV. USDA'S REFUSAL TO ENSURE OFPA'S ECOLOGICAL MANDATES ARE REQUIRED FOR ALL ORGANIC PRODUCTION VIOLATES OFPA.

In Plaintiffs' Motion for Summary Judgment, Plaintiffs pointed out that USDA's Petition Denial failed to establish that hydroponic operations meet OFPA's regulatory requirements that all organic operations maintain ecological balance and promote biodiversity. *See* Pls.' Br. 23-25. These Regulations specify that, to qualify as an "organic operation," an organic production system must "respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity." 7 C.F.R. § 205.2. The Regulations also require that organic operations "maintain or improve the natural resources of the operation, including soil and water quality." *Id.* § 205.200. By USDA's own definition, "natural resources of the operation" consist of the "physical, hydrological, and biological features of a production operation, including soil, water, wetlands, woodlands, and wildlife." *Id.* § 205.2. As Plaintiffs previously explained, these regulations require that the organic producer demonstrate that his or her agricultural practices promote ecological balance and biodiversity to the agricultural site itself. *See* Pls.' Br. 24.

USDA acknowledges that these regulations impose mandatory requirements on organic producers. USDA also readily admits that USDA did not conclude that hydroponic producers are meeting these ecological requirements, but only that some features of some types of hydroponic production systems may. Defs.' Br. 24; *see* AR1377. Still, USDA insists that USDA's Petition Denial was adequate, and USDA did not need to detail how hydroponic operations can comply

with these requirements, because the Petition only asked USDA to prohibit hydroponic operations from organic certification, not ensure that they comply with OFPA. Defs.' Br. 23-24.

Contrary to USDA's false assertion, in addition to asking USDA to "exclude certification of hydroponic agricultural production" based on its inability to comply with OFPA's soil fertility requirements, the Petition also asked, as a third requested action, that USDA "[e]nsure that ecologically integrated organic production practices are maintained as a requirement for organic certification as defined by OFPA and its regulations." AR5. Thus the Petition asked that even if USDA chose not to prohibit hydroponic operations from organic certification, USDA still must take action to make clear how hydroponic production systems can comply with OFPA's ecological requirements. As discussed below, USDA did take such action—in the form of a letter, but the letter was silent as to OFPA's ecological requirements.

USDA tries to hide behind the excuse that because it somehow understood the Petition as requesting USDA to categorically prohibit hydroponic production from obtaining organic certification, USDA's Petition Denial only needed to address whether a categorical prohibition is warranted. USDA's own actions taken under the Petition Denial refute this. USDA emphasized in the Petition Denial that "[i]n response to CFS' third requested action, the NOP reaffirms the need for all organic operations, including hydroponic operations, to demonstrate compliance with the USDA organic regulations. This includes requiring that production practices maintain or improve the natural resources of the operation." AR1377; *see* AR1375 (repeating the list of four requested actions sought in the Petition). And as its act of "reaffirming" that all organic operations must comply with USDA's organic regulations, USDA issued a letter on June 3, 2019 (the June 3, 2019 Letter)[11] to USDA-accredited certifiers "verifying that container systems"—including hydroponic operations—"must comply with [OFPA] and the USDA organic regulations." AR1377. But the June 3, 2019 letter made no mention of OFPA's natural resource and biodiversity conservation requirements; its focus was only on how hydroponic and other container production systems can

[11] Letter from Jennifer Tucker, Ph.D., Deputy Administrator of the National Organic Program, to USDA-Accredited Certifying Agents (June 3, 2019), *available at* https://www.ams.usda.gov/sites/default/files/media/2019-Certifiers-Container-Crops.pdf.

meet the OFPA requirement that organic food be produced on land that has been free of exposure to prohibited substances for at least three years. *See* June 3, 2019 Letter, at 3 ("This memo clarifies the legal requirements related to the three-year transition period apply to all container systems built and maintained on land."). USDA could have explained how hydroponic operations achieve compliance with OFPA's ecological requirements, but did not do so. Instead, the Petition Denial summarily concluded that some hydroponic systems "can" meet these requirements and thus "are not incompatible with the vision for organic agriculture expressed in OFPA." AR1377.

USDA tries to justify its conclusory statements by pointing fingers at Plaintiffs, citing 5 U.S.C. § 556(d)'s standard on burden of proof. Defs.' Br. 24-25. USDA misstates the relevant standard. As the Agency admits, section 556(d) applies to burden of proof in formal rulemakings and adjudications, not rulemaking petitions. Rather, USDA's Petition Response is reviewed under the APA's judicial review provision, and it is USDA who bears the burden of showing that in issuing the Petition Denial, USDA had "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation marks omitted).

The Petition more than sufficiently detailed how hydroponic operations fail to meet OFPA's mandatory command that the operations provide onsite natural resource and biodiversity conservation benefits, based on information that was already before USDA and in USDA's possession. The Petition explained that hydroponic operations encompass many types of soil-less production systems, with varying environmental benefits. *See* AR8. The Petition discussed findings and proposals by the NOSB and the Hydroponic Task Force finding that hydroponic operations lack the ability to meet the requirements that organic operations conserve resources and biodiversity onsite. *See* AR8 n. 43; *see* AR13-14, 18-19 (detailing findings by the NOSB); AR15-17 (discussing and citing to findings of the Hydroponic Task Force). These documents, many of which are included in the Administrative Record compiled by USDA,[12] directly contradict

[12] USDA excluded numerous other documents that were discussed in the Petition, and that were in the Agency's possession, in compiling the Administrative Record. Plaintiffs have moved to complete or supplement the Administrative Record to ensure that judicial review is based on the "whole record." *See* Pls.' Mot. Complete or Supplement Admin R., ECF No. 20; *Portland Audubon*

USDA's assertion that hydroponic operations can comply with OFPA's mandatory natural resource and biodiversity conservation requirements. *See* Pls.' Br. 24-25.

USDA points to nothing more than its own conclusory statements and scattered discussions in the Administrative Record that mention the potential ecological benefits of some forms of hydroponic production systems. For example, USDA argued that the Petition Denial stated that hydroponic operations "can improve soil and water quality at the sites they occupy," but that alone does not show how hydroponic operations "respond to *site-specific* conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity," as the Regulations mandate. 7 C.F.R. § 205.2.

USDA also singles out one section out of one of the three Hydroponic Task Force reports as proof that hydroponic operations can meet OFPA's mandatory ecological requirements, but that section of the report is actually narrowly focused on the potential ecological benefits of bioponics, a particular form of hydroponic production. *See* AR581. To the contrary, as Plaintiffs previously pointed out, the same Hydroponic Task Force report went on to conclude that not all forms of hydroponic production can meet the Regulations' ecological mandate, and recommended that USDA issue specific guidance to identify the specific types of hydroponic systems that can comply with the Regulations, and to clarify how hydroponic producers can demonstrate compliance. *See* Pls.' Br. 23-25; AR587-86 AR586 (recommending that USDA revise current Regulations to specify measures hydroponic operations should take to comply with the natural resource and biodiversity conservation requirements); AR593 (recommending that USDA add a "bioponic production standard"); *see Pac. Coast Fed'n of Fishermen's* Ass'n, 265 F.3d at 1038 ("NMFS does not and cannot explain adequately its disregard [of the expert opinion of its biologist].").

Nor does the 2016 summary of survey results justify USDA's conclusion that hydroponic operations can categorically meet OFPA's mandatory natural resource and biodiversity conservation requirements without additional rulemaking. The survey results merely indicate that

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Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (The "whole record" includes everything that was before the agency pertaining to the merits of its decision.).

some hydroponic operations have obtained organic certification; it says nothing about whether or how these operations are meeting OFPA's ecological requirements. In fact, the Administrative Record amply demonstrates confusion amongst organic stakeholders as to if and how hydroponic operations can comply with the Regulations, as well as potential violations of organic standards by certified hydroponic operators. *See, e.g.*, AR185 (comment during NOSB meeting noting that it is a "big task to impose on a certifier" to figure out how hydroponic operations are meeting OFPA's production requirements); AR1333 (documenting potential use of pesticides by certified organic hydroponic producers). Most significantly, USDA's own documents demonstrate that USDA was well-aware that, if the Agency were to attempt to permit hydroponic operations to be certified organic, then additional rulemaking and guidance would be necessary to ensure that hydroponic operations meet OFPA's natural resource and biodiversity conservation requirements. *See* AR701; AR920; Stevenson Decl., Ex. D, at 3-5 (USDA's Staff Brown Bag presentation detailing different types of hydroponic production systems), ECF No. 21-4; *id.* at 19 ("If hydroponic systems are allowed to be considered organic, specify: How [hydroponic systems] can integrate cultural, biological, and mechanical practices that foster cycling resources, promote ecological balance, and conserve bio-diversity."); *id.* (suggesting the need for "key components of measurable and enforceable standards" required for "organic hydroponic systems").

Unable to substantiate that hydroponic operations promote ecological balance nor conserve biodiversity, as mandated under OFPA, USDA resorts to poking holes at the record documents that Plaintiffs cited in their Motion for Summary Judgment, downplaying them as nothing but personal opinions. Defs.' Br. 27-28. As in the Petition, Plaintiffs' Motion cited to testimonies from NOSB board members, as well as findings of the Hydroponic Task Force, experts created by Congress (in the case of NOSB members) and convened by USDA itself (in the case of the Hydroponic Task Force) to advise USDA on its implementation of OFPA. These expert opinions in the Record clearly demonstrate that hydroponic production systems do not comply with OFPA's natural resource and biodiversity conservation requirements. *See supra* pp. 4-5.

USDA has failed to support its conclusion that hydroponic operations can meet OFPA's definition of "organic operation" and the Regulations' mandatory natural resource and

biodiversity conservation requirements. Its conclusion that hydroponic operations *per se* comply with OFPA's natural resource and biodiversity conservation requirements is contradicted by the Administrative Record, and must be rejected. *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.

V. THE PETITION DENIAL PERPETUATES INCONSISTENT ORGANIC STANARDS, IN VIOLATION OF OFPA.

Not only is USDA's Petition Denial arbitrary and capricious for all the reasons explained above, but also as Plaintiffs previously explained, the Petition Denial also violates OFPA in a separate and independent, but equally significant way: it violates OFPA's statutory purpose of establishing consistent organic standards. It does this in two ways: (1) the Petition Denial exempts hydroponic operations from all of OFPA's soil management requirements, with which compliance is mandatory for all other organic crop producers; and (2) the Petition Denial fails to ensure that OFPA's natural resource and biodiversity conservation requirements are equally applicable to hydroponic producers and other crop producers alike. *See* Pls.' Br. 25-28.

USDA cannot deny that one of OFPA's stated purposes is the creation of a consistent organic standard, nor does the Agency dispute the different applications of OFPA's statutory and regulatory requirements resulting from USDA's Petition Denial. Instead, USDA claims that these differences do not violate the consistent organic standards that Congress envisioned in OFPA. As detailed below, OFPA's plain language and legislative history disprove USDA's interpretation.

USDA also resorts to baseless jurisdictional arguments to prevent judicial review of Plaintiffs' Claim Four. USDA's arguments are meritless. This Court has jurisdiction to review Plaintiffs' Claim Four, and should resolve it in Plaintiffs' favor.

A. USDA's Narrow View of What Constitutes Consistent Organic Standards Under OFPA Is Unsupported by the Statute.

According to USDA, although its Petition Denial allows hydroponic crop producers to obtain organic certification without having to engage in any agricultural practices to foster soil fertility or manage the soil through tillage and crop rotations—practices that are mandated for all non-hydroponic organic crop producers, this has not resulted in inconsistent organic standards that violate OFPA's purpose. Also according to USDA, although the Petition Denial failed to ensure that hydroponic crop production can meet OFPA's ecological regulations mandating that

organic producers engage in practices to conserve resources and build biodiversity onsite—again, practices required of non-hydroponic organic crop producers, this failure does not perpetuate inconsistent organic standards. USDA's narrow view of what constitutes "consistent organic standards" under OFPA's stated purpose is squarely refuted by OFPA's plain language and legislative history, and should be rejected.

First, relying on a cherry-picked quote from a Senate Report on OFPA on differing state organic programs, USDA argues that when Congress wrote in "to assure consumers that organically produced products meet a consistent standard" as one of OFPA's three stated purposes, 7 U.S.C. § 6501(2), Congress only meant to create one national organic program and eliminate individual state organic certification programs, not to create consistent, national standards of organic production. Defs.' Br. 30.

This argument makes no sense, especially because Congress did not eliminate the possibility of different state certification programs when it passed OFPA. OFPA provides that state organic certification programs that meet OFPA's national standards may be established, and explicitly authorizes such state certification programs to "contain more restrictive requirements" than the requirements under OFPA. 7 U.S.C. §§ 6507(a)-(b) ("State organic certification program"). Tellingly, in the same Senate Report, Congress unequivocally stated, "[i]t is the Committee's intention that States may enact a State Organic Certification Program in addition to the national program." 1990 U.S.C.C.A.N at 4949. If anything, that OFPA authorizes state organic certification programs to have more stringent requirements so long as the state programs meet OFPA's requirements makes clear that Congress intended OFPA's production standards to be a floor but not a ceiling: that is, baseline standards that must be met for organic certification, which weakens USDA's claim that it had the discretion to lower that floor by exempting hydroponic producers from OFPA's soil fertility requirements.

Moreover, if eliminating different state certification programs were Congress's only concern, then that purpose would have been achieved when Congress wrote in "to establish national standards governing the marketing of certain agricultural products as organically produced products" as one of OFPA's stated purposes. 7 U.S.C. § 6501(1). There would have been

no need to reiterate as a separate provision the need to "assure consumers that organically produced products meet a consistent standard," *id.* § 6501(2). *See Nielsen*, 139 S. Ct. at 969 ("every word and *every provision* is to be given effect [and that n]one should needlessly be given an *interpretation* that causes it to duplicate another provision or to have no consequence.") (emphasis in original) (quoting A. Scalia & B. Garner, *supra*, at 174).

Second, USDA argues that Congress did not intend for all forms of organic production systems to conform to the same standards, but rather for standards to be applied on a site-specific basis. USDA resurrects its favorite strawman, that it cannot be the case that wild crop harvesting is subject to the same organic production standards as "traditional farm production." Defs.' Br. 30. It is not. OFPA's statutory scheme makes abundantly clear that Congress prescribed a different set of standards and prohibitions specific to wild crop management. *See* 7 U.S.C. § 6513(f); *supra* pp. 6-12. Similarly, OFPA's legislative history supports that Congress intended to establish consistent, baseline national standards for different categories of organic production. *See* 1990 U.S.C.C.A.N at 4943 ("[I]t is time for national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper."); *id.* at 4946 (explaining that "[m]ore details are enumerated for crop production than for live stock production").

USDA falsely claims, pointing to section 6512 of OFPA, that the consistent national standards Congress mandated include only OFPA's requirements that organic products are "produced and handled without the use of synthetic chemicals," 7 U.S.C. § 6504(1), and that any other production standards are applied on a site-specific basis, without any requirements for consistency. Defs.' Br. 30-31. But as USDA admits, Section 6504 of OFPA, entitled "National Standards for Organic Production," lays out three national standards, only one of which is the prohibition on synthetic chemicals. *See* 7 U.S.C. §§ 6504(1)-(3). Another standard requires that, other than limited exceptions specifically delineated in OFPA, organic food must be produced on land that has not been exposed to applications of synthetic chemicals or prohibited substances for three years prior to harvest. *Id.* § 6504(2). And as Plaintiffs have emphasized and USDA does not deny, the last of the three standards requires that organic food "be produced and handled in

compliance with an organic plan," *id.* § 6504(3), and the requirements of such plans for organic crop production mandate organic crop producers to foster soil fertility. USDA's narrow interpretation flies in the face of the canon against surplusage and cannot stand.

Finally, USDA props up another strawman when it suggests, without any evidentiary support, that having "total consistency among all organic producers" would dramatically reduce interstate commerce in organic foods, in contravention of the third stated purpose of OFPA "to facilitate interstate commerce in fresh and processed food that is organically produced." Defs.' Br. 31 (citing 7 U.S.C. § 6501(3)). Plaintiffs do not argue that OFPA requires total consistency across all organic participants, but as discussed *supra*, OFPA does require that organic products in the same category—be it crop, livestock, or wild crops—be subject to consistent standards within that category. Contrary to USDA's characterization, Congress explained that such consistent standards are what is necessary to facilitate interstate commerce. *See, e.g.*, 1990 U.S.C.C.A.N at 4944 (noting lack of availability of organic foods in local markets because "food chains and distributors are concerned about verifying the authenticity of organic items"). USDA's unsubstantiated argument ignores that Congress explained that a national program for organic food is necessary to "provide a level playing field for those farmers trying to operate in [the organic] market." *Id.* at 4944. Rather than "conflicting policies," having consistent national standards actually helps meet OFPA's other purpose of facilitating interstate commerce of organic foods. In short, people buy organic because they want food with integrity, and they know there is a national standard that must be met, that includes environmental benefits. *See infra* pp. 34-39 (and declarations cited therein). Creating loopholes and double standards will only lower trust in the Organic label and thus sales of organic foods. USDA has created a conflict amongst OFPA's three stated purposes where there is none.

B. Plaintiffs' Claim Four Is Ripe for Judicial Review.

USDA claims that this Court lacks jurisdiction to review Plaintiffs' allegation that USDA's Petition Denial perpetuates inconsistent organic standards because Plaintiffs did not specifically raise this claim in the Petition. USDA's argument fails, for two reasons.

First, contrary to USDA's misrepresentation, the Petition made amply clear that USDA's continued allowance of organic certification of hydroponic operations without compliance with

OFPA's mandatory requirements violates OFPA's purpose of establishing consistent organic standards. In fact, one of the Petition's arguments is titled "Continuing Violations of OFPA's Regulations Results in an Inconsistent Organic Market." AR3. The Petition stated that "[USDA has] continue[d] to allow inconsistent production standards for organic certification" by allowing hydroponic operations to be certified organic, AR4, and as USDA acknowledges, specifically requested that USDA "[e]nsure that ecologically integrated organic production practices are maintained as a requirement for organic certification as defined by OFPA and its regulations," AR4-5. *See also* AR6 ("This allowance [of organic certification of hydroponic products] results in an inconsistent and unequal marketplace[.]"); AR7 ("Hydroponic production systems violate the purpose of OFPA, as they do not meet the standards for production under the national organic program."); AR20 ("USDA's failure to issue a final rule prohibiting hydroponic production violates the stated purpose of OFPA to maintain consistency in organic production methods."). The Petition also detailed how the NOSB and the Hydroponic Task Force found that hydroponic operations cannot comply with the existing OFPA requirements. *See* AR13-19. In sum, the Petition could not have more clearly spelled out the argument that USDA's ongoing allowance of organic certification for hydroponic products—and thus USDA's subsequent Petition Denial refusing to change this practice—violates OFPA's purpose of establishing consistent organic standards. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (holding that plaintiffs had not waived their right to legal challenge where defendant U.S. Army "had independent knowledge of the very issue that concerns [p]laintiffs in this case, such that 'there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'") (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004)).

Second and more fundamentally, USDA's unfounded claim violates the well-established view in favor of allowing judicial review of agency actions under the APA. *See Bowen v. Mass.*, 487 U.S. 879, 904 (1988) (explaining that the purpose of the APA is to remove obstacles to judicial review of agency actions). The Supreme Court in *Bowen* explained that the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Id.* at 904 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967) (footnote omitted)). Only on "a showing of 'clear and

convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbot Labs.*, 387 U.S. at 140-41 (citing *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962)).

Defendants' argument does not come close to a showing of "clear and convincing evidence," let alone any evidence. Defendants do not dispute that USDA's Petition Denial is a final agency action reviewable under the APA. Nor do Defendants point to any additional administrative process that Petitioners should have exhausted before challenging USDA's violations of OFPA that would bar judicial review under the APA. *See* 5 U.S.C. § 704 ("Except as otherwise expressly required by statute, agency action otherwise final is final agency action."). There is none. OFPA contains no judicial review provision or citizens' petition provision, and while the Act does contain an administrative appeal provision, it does mandate that an aggrieved individual with a potential allegation of USDA violations of OFPA must first petition USDA before taking judicial action. *See* 7 U.S.C. § 6520; 7 C.F.R. § 205.680. That Plaintiffs chose to file the Petition before proceeding directly to Court in light of the twisted procedural history of USDA's decision-making (or lack thereof) concerning organic certification of hydroponic production does not bar Plaintiffs' right to directly challenge USDA's failure to ensure consistent organic standards in this Court. *See* Pls.' Br. 8-11. As Plaintiffs detail below, numerous courts have found jurisdiction to adjudicate challenges to USDA's administration of OFPA and the National Organic Program. *See infra* pp. 37-39. None of the plaintiffs in those cases were first required to exhaust their claim by filing a petition with USDA. *See, e.g.*, *Harvey v. Veneman*, 396 F.3d 28, 31 (1st Cir. 2005); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2015 WL 5698757 (N.D. Cal. Sept. 29, 2015). This Court has jurisdiction to review Plaintiffs' Claim Four.

C. Plaintiffs Have Standing.

Plaintiffs have standing so long as they can demonstrate they have (1) suffered an "injury-in-fact" that is (2) "fairly traceable" to the challenged conduct, and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 171 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The injury may be minimal," *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008). Organizational plaintiffs like the Center for Food Safety (CFS) and Maine Organic Farmers and Gardeners Association (MOFGA) can also establish standing to

sue through and on behalf of their members. *See, e.g.*, *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000).

USDA argues that Plaintiffs have failed to demonstrate injury traceable to the inconsistent organic standards that result from USDA's Petition Denial. According to USDA, Plaintiffs have not shown injury by "USDA's decision not to issue rules or guidance specific to hydroponic producers detailing the myriad ways that hydroponic producers may be able to [comply with OFPA's natural resource and biodiversity conservation requirements.]" Defs.' Br. 32. Defendants' attack is overly narrow and misrepresents the injury: in addition to inconsistent application of OFPA's ecological standards, Plaintiffs also alleged inconsistent organic standards that resulted from USDA's decision to exempt hydroponic producers from *all* of OFPA's soil management statutory and regulatory requirements.

Regardless, USDA's standing argument fails, because Plaintiffs have alleged more than sufficient facts to demonstrate injury that is "fairly traceable" to the inconsistent organic certification standards stemming from USDA's Petition Denial. Plaintiffs and Plaintiffs' members include many of the nation's oldest certified organic farmers, who have suffered injuries to their economic, reputational, and vocational interests as a result of USDA's Petition Denial.

For example, Plaintiff Full Belly Farm stated that it expends substantial farm labor, time, and financial investment planting cover crops, composting, and using minimized tillage for soil preparation in order to comply with the soil fertility requirements in their organic plan. Muller Decl. ¶4, ECF No. 22-9. Full Belly Farm also "car[es] for the complex environment of the farm" and complies with OFPA's requirements for promoting ecological balance and conserving biodiversity by employing agricultural practices such as "plant[ing] a variety of different crops, [and] build[ing] habitat areas for beneficial insects and wildlife." *Id.* at ¶ 7. These practices are built into Full Belly Farm's organic system plan, which costs Full Belly Farm time and labor to plan and execute. *Id.* at ¶ 8 (explaining that "soil-building, animal welfare, and environmental care" practices are built into Full Belly Farm's organic system plan, part of the requirement for Full Belly's organic certification). Other organic farmer Plaintiffs detail similar soil-building and environmental care measures that they practice on their farms in order to comply with OFPA. *See, e.g.*, Underhill Decl.

¶¶ 4-5 (Terra Firma Farm's commitment to "build[ing] the soil, provid[ing] habitat for wildlife, and conserve[ing] energy and water" to "meet[] the organic certification requirements of the NOP"), ECF No. 22-10; Durst Decl. ¶ 4, ECF No. 22-4; Jacobs Decl. ¶ 4, ECF No. 22-7; Cochran Decl. ¶ 5, ECF No. 22-3; Chapman Decl. ¶ 3, ECF No. 22-2. Similarly, organizational plaintiff MOFGA has members who are organic blueberry farmers in Maine, who incur higher costs of production than hydroponic "organic" blueberry producers who can "obtain organic certification without actually benefiting soil health and ecosystem stability." Alexander Decl. ¶¶ 10-11, ECF No. 22-1.

USDA falsely accuses Plaintiffs of basing their injuries on "speculative noncompliance" with OFPA and its regulations by hydroponic operators, rather than USDA's Petition Denial. To the contrary, as discussed above, the declarations from the certified organic farm plaintiffs detail the extra labor, time, and costs they incur to comply with OFPA's mandatory soil-building standards and ecological requirements, and how they have experienced increased price competition from hydroponically produced crops because hydroponic operators have no such compliance costs. *See, e.g.,* Muller Decl. ¶¶ 6-8; Jacobs Decl. ¶ 6; Underhill Decl. ¶¶ 5-7; Cochran Decl. ¶ 5-6; Chapman Decl. ¶ 5. Prior to the Petition Denial, there was no final agency action on this issue from USDA, only delay and confusing agency website pronouncements. The Petition put the question squarely before USDA, only USDA denied the Petition. As such, USDA's Petition Denial exempted hydroponic producers from OFPA's soil management requirements, and allowed hydroponic producers to obtain organic certification without meeting the Regulations' various natural resource and biodiversity conservation criteria.

As a result of USDA's Petition Denial, hydroponic producers are able to compete and sell their produce in the same organic marketplace, at significantly lowered costs than the costs incurred by organic farmer Plaintiffs, undercutting them. Such economic injuries resulting from government decisions are sufficient to demonstrate injury-in-fact to confer standing. "Economic actors suffer an injury in fact when agencies . . . allow increased competition against them." *See Int'l Bhd. of Teamsters v. U.S. Dep't of Transportation*, 861 F.3d 944, 950 (9th Cir. 2017) (holding that petitioners were injured by agency decision allowing new competition into the market because it made it more difficult for petitioners to profit).

USDA also entirely overlooks that the declarations detail how USDA's Petition Denial has resulted in inconsistent organic standards that dilute the meaning of the Organic label, injuring Plaintiffs and their members' reputational, vocational, and consumer interests. Plaintiff organic farmers' declarations detail how their customers choose to purchase certified organic foods because of the soil and ecological benefits, and how the lack of distinction between their organically produced crops that adhere to OFPA's soil building and ecological requirements and hydroponically produced crops not subject to the same requirements injures their reputations as certified organic farms. *See, e.g.*, Cochran Decl. ¶ 8 ("Swanton Berry Farm's customers include organic consumers who choose to purchase foods certified with the Organic label because they believe the label represents production methods that offer more ecological benefits[.]"); Chapman Decl. ¶ 7; Muller Decl. ¶ 10. Similarly, organizational Plaintiffs CFS and MOFGA have members who choose to purchase certified organic foods, paying higher prices, because they believe that the Organic label requires agricultural methods that are more beneficial to the soil and overall environment. *See, e.g.*, Lawson Decl. ¶ 8, ECF No. 22-8 (CFS member who "choose[es] to spend [her] money on organic produce to support organic farmers who build soil complexity," whose consumer interests are injured by the inability to "differentiate between soil-based and hydronic grown produce"); Gray Decl. ¶¶ 3, 5, ECF NO. 22-5; Alexander Decl. ¶ 12. Finally, certifier Plaintiff OneCert explained that the inconsistent organic standards that result from USDA's Petition Denial has injured OneCert's interest in consistent organic standards as a certifier, and consequently hurt OneCert's ability to ensure that it is complying with its duties as an organic certifier. *See* Welsch Decl. ¶ 8, ECF No. 22-11; *see Massachusetts Independent Certification, Inc. v. Johanns*, 486 F. Supp. 2d 105, 114-15 (D. Mass. 2007) (holding that plaintiff certifier had pled cognizable injury resulting from "the integrity of the organic certification being compromised.").

Courts in this district and others have repeatedly affirmed that such injuries to an organic marketplace participant (producer, consumer, or certifier)'s interests in consistent organic standards are sufficient to confer standing. In *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005), the seminal case defining the concrete interests protected by OFPA, an organic consumer and farmer challenged some of the specific measures of the original organic regulations as being "inconsistent"

with the organic standards in OFPA. *Id.* at 32-33. Like Plaintiffs here, the plaintiff alleged he had "suffered an injury in fact because the challenged regulations *weakened the integrity of the organic program and the standards it sets forth*." *Id.* at 34 (emphasis added). The First Circuit found the plaintiff had suffered a concrete and cognizable injury sufficient to establish standing, since the weakening of organic integrity "harm[ed] [plaintiff] as a consumer of organic foods because it degrades the quality of organically labeled foods." *Id.*

Consistent with *Harvey*, courts in this district have held that injuries to consumer or producer interests from inconsistent organic standards satisfy Article III's standing requirements. In one such case, the plaintiffs challenged USDA's failure to institute APA notice and comment rulemaking before altering a regulation to create a loophole that allowed organic farmers to use pesticide-contaminated compost. *See Ctr. for Envtl. Health v. Vilsack*, 2015 WL 5698757, at *7. The court held that the organizational plaintiffs had standing where their sufficiently injured members included, just like here, (1) organic consumers who had purchased organic, at higher prices, specifically for the environmental benefits and to avoid supporting pesticide-intensive agriculture; and (2) organic farmers who did not use pesticide-contaminated compost, and avoided it through increased expenditure and time, and were therefore undercut in the marketplace by other "organic" farmers that did use the contaminated compost. *Id.* (describing and discussing the submitted member declarations). Most recently, in another case currently before this Court, the plaintiffs challenged the withdrawal of an organic rule establishing animal care standards for animal livestock. *Ctr. for Envtl. Health v. Perdue*, No. 18-cv-1763-RS, 2018 WL 9662437 (N.D. Cal. August 21, 2018). There, this Court held that plaintiffs had standing because their organic consumer members "expect organically-raised animal products [to be] treated humanely," including outdoor access and space, and the withdrawal removed the marketplace consistency and assurance that the products they purchased were in fact produced with such animal care standards, undermining the integrity of the Organic label. *Id.* at *4-6. Organic consumers were not getting what they paid for, and if they wanted assurances that the "organic" product they were buying actually met the standards, they would have to undertake more expenditure and effort. *Id.* at *4. The injuries in both these cases mirror those here.

USDA's attack on Plaintiffs' standing distorts the basis of Plaintiffs' Claim Four, and completely ignores Plaintiffs' concrete and particularized economic, consumer, reputational, and vocational interests in consistent organic standards as principal participants in the organic marketplace. Because courts have repeatedly held these injuries sufficient to confer standing to allege inconsistent organic standards under OFPA, Plaintiffs have standing to pursue Claim Four.

VI. THE COURT SHOULD VACATE THE PETITION DENIAL.

USDA does not dispute that the default remedy for unlawful action under the APA is remand and vacatur, and offers no argument as to why that default remedy should not apply if the Court grants summary judgment in Plaintiffs' favor.[13] Accordingly USDA has waived any such arguments. Instead, USDA urges the Court not to adopt Plaintiffs' proposed remedy, insisting that its Petition Denial is not arbitrary and capricious, and thus does not violate the APA.

According to USDA, its cursory, four-page Petition Denial was sufficient to survive judicial review under the APA because the Petition merely asked USDA to categorically prohibit organic certification of hydroponic operations as incompatible under OFPA, and thus USDA had no obligation to "consider the wisdom of prohibiting hydroponic production" nor "develop specific standards governing organic hydroponic production." As Plaintiffs have explained and USDA itself acknowledged in the Petition Denial, the 23-page Petition did more than merely asking USDA to categorically prohibit hydroponic production under OFPA: it detailed scientific and policy determinations by the NOSB and Hydroponic Task Force, and presented information demonstrating how hydroponic operations do not satisfy OFPA's production requirements. The Petition also asked USDA to ensure that OFPA's ecological practice standards are required for all

[13] The Court can disregard the parade of economic horribles that Proposed Amici prophesized, as Plaintiffs previously explained, such economic concerns are insufficient to overcome vacatur as the presumptive remedy in APA cases. *See* Pls.' Br. 29-30 (and cases cited therein). Moreover Proposed Amici emphasize the financial investments that hydroponic producers have made to their businesses, but vacatur of the Petition Denial would not shut down these facilities nor prohibit sale of hydroponically grown products. Hydroponic producers can still sell their produce and make other lawful representations regarding the benefits of hydroponic growing. Nor is there any merit to proposed Amici's claim that vacatur of the Petition Denial would reduce the availability of organically grown produce. As the Record shows, as of 2016, there were less than 100 certified organic hydroponic operations across the nation. *See* AR387.

organic certification. *See supra* pp. 24-29. Under the APA's standard of review, USDA was required to show that the Petition Denial is rationally connected to the information before the Agency. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see supra* pp. 2-5.

Moreover, this Court's review of USDA's Petition is not limited to the APA's "arbitrary and capricious standard." Under the APA, a reviewing court must "hold unlawful and set aside": "agency actions, findings, and conclusions found to be . . . otherwise not in accordance with the law," 5 U.S.C. § 706(2)(A); as well as those that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C). Thus, if the Court concludes that USDA's interpretation of OFPA's statute or its Regulations is inconsistent with the relevant statutory or regulatory texts, or finds USDA's interpretations otherwise unreasonable, the Court must vacate the Petition Denial. *See* Pls.' Br. 28-29 (and cases cited therein).

USDA repeats its argument concerning the level of deference due to USDA's refusal to issue rulemaking, but as discussed *supra*, that deference does not render judicial review obsolete. *See supra* pp. 2-5. As the *Massachusetts* Court explained, although the agency is afforded latitude to determine the manner and timing of its rulemaking, "once [the agency] has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." 549 U.S. at 533. Thus should the Court find that USDA's Petition Denial violated OFPA or its Regulations, the appropriate remedy is (1) declaratory relief establishing that USDA's interpretation of OFPA as it applies to hydroponic production in the Petition Denial is contrary to OFPA and the Regulations, and (2) vacatur remedy, to vacate the unlawful Petition Denial and remand to USDA, to ensure that any future action USDA takes "conform[s]" to OFPA's mandates. *See id.* (vacating and remanding EPA's petition denial while explaining that, "[w]e need not and do not reach the question of whether on remand EPA must [take certain actions.] We hold only that EPA must ground its reasons for action or inaction in the statute."); Pls.' Br. 28-30.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Cross-Motion for Summary Judgment, and grant summary judgment in Plaintiffs' favor.

Respectfully submitted this 1st day of December, 2020.

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