

1 AMY VAN SAUN (*Pro Hac Vice*)
2 GEORGE A. KIMBRELL (*Pro Hac Vice*)
3 Center for Food Safety
4 2009 NE Alberta St., Suite 207
5 Portland, Oregon 97211
6 T: (971) 271-7372
7 Emails: avansaun@centerforfoodsafety.org
8 gkimbrell@centerforfoodsafety.org

9 *Counsel for Plaintiffs*

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 CENTER FOR ENVIRONMENTAL
14 HEALTH et al.,

15 *Plaintiffs,*

16 v.

17 TOM VILSACK et al.,

18 *Defendants.*

Case No. 3:18-cv-01763-RS

**PLAINTIFFS' MOTION AND
MEMORANDUM FOR SUMMARY
JUDGMENT**

**Date: February 3, 2022
Time: 1:30 p.m.
Courtroom: 3, 17th Floor
Hon. Richard Seeborg**

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 3, 2022, or as soon thereafter as counsel can be heard, Plaintiffs Center for Environmental Health, Center for Food Safety, Cultivate Oregon, and International Center for Technology Assessment, will move this Court for summary judgment on all issues raised in their September 6, 2018 Second Amended Complaint, Dkt. 37.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2

3 NOTICE OF MOTION AND MOTION..... i

4 TABLE OF CONTENTS ii

5 TABLE OF AUTHORITIES..... iv

6 INTRODUCTION 1

7 RELEVANT STATUTORY AND REGULATORY BACKGROUND..... 2

8 FACTUAL AND PROCEDURAL BACKGROUND 3

9 I. Organic Livestock Standards History and the 2017 Organic Livestock Rule..... 3

10 II. Trump Administration Withdrawal Rule..... 6

11 STANDARD OF REVIEW..... 8

12 ARGUMENT 9

13 I. The Withdrawal Decision is Arbitrary and Capricious and Contrary to OFPA
Because USDA Has Statutory Authority for the Organic Livestock Rule..... 9

14 A. OFPA’s Plain Language is Unambiguous and Authorizes the Organic
Livestock Rule. 10

15 B. OFPA’s Legislative History Supports Plaintiffs..... 13

16 C. USDA’s 180-Degree Interpretation Reversal Further Shows the
Withdrawal Rule is Arbitrary and Capricious..... 15

17

18 II. USDA’s Economic Rationale Imposed Factors Not Intended By Congress And
Ignored Record Evidence, Rendering The Withdrawal Rule Arbitrary And
19 Capricious. 16

20 A. USDA’s “Market Failure” Requirement Relied on Factor Not
Intended by Congress and Ignored Evidence of Market Failure..... 17

21

22 B. USDA’s Determination that Costs Outweighed Benefits Failed to
Consider Important Benefits and Runs Contrary to the Record
Showing Economic Benefits of Implementation. 19

23 1. *USDA included costs, but not benefits, to broiler chicken operations.* 21

24 2. *USDA arbitrarily reduced WTP, artificially reducing benefits to
25 producers.* 22

26 3. *USDA disregarded other benefits despite evidence in record.*..... 23

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- C. USDA Retained the Withdrawal Rule Despite its 2020 Economic Analysis Negating its Economic Rationale, Without Plausible Explanation. 24
- III. USDA’s Failure to Explain Its Deviations From NOSB’s Unanimous Recommendations Is Arbitrary And Capricious..... 26
- REMEDY 28
 - I. USDA’s Violations of Law Go To Heart Of OFPA And APA. 29
 - II. Disruptive Consequences Deserve Little Weight Here As The Industry Has Known About And Urged A Return To The Organic Livestock Rule For Years... 30
- CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Federal Cases

All. for the Wild Rockies v. U.S. Forest Serv.,
907 F.3d 1105 (9th Cir. 2018) 28

Altera Corp. Subsidiaries v. Comm’r of Internal Revenue,
926 F. 3d 1061 (9th Cir. 2019) 9

Amco Prod. Co. v. Vill. of Gambell, Alaska,
480 U.S. 531 (1987) 29

California v. Bernhardt,
472 F. Supp. 3d 573 (N.D. Cal. 2020) 20, 21

California v. BLM,
277 F. Supp. 3d 1106 (N.D. Cal. 2017) 29

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 8

Chevron U.S.A., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 9, 14

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 28

City and Cnty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 18

Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 21, 24

Ctr. for Env’t Health v. Vilsack,
2016 WL 3383954 (N.D. Cal. June 20, 2016) 28, 30

Ctr. for Food Safety v. Vilsack,
734 F. Supp. 2d 948 (N.D. Cal. 2010) 30

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 8, 9, 15, 28

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 9

Federal Cases (Cont'd)	Page(s)
<i>Fed. Election Comm'n v. Akins</i> , 524 U.S. 11 (1998)	28
<i>Humane Soc'y of U.S. v. Locke</i> , 626 F.3d 1040 (9th Cir. 2010)	29
<i>Idaho Sporting Cong., Inc. v. Rittenhouse</i> , 305 F.3d 957 (9th Cir. 2002)	27
<i>Ill. Pub. Telcoms. Ass'n v. F.C.C.</i> , 752 F.3d 1018 (D.C. Cir. 2014)	18
<i>Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.</i> , 626 F.3d 84 (D.C. Cir. 2010)	28
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019)	9
<i>Mont v. United States</i> , 139 S. Ct. 1826 (2019)	12
<i>Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	8, 16, 18, 26
<i>Nat. Res. Def. Council, Inc. v. Pritzker</i> , 828 F.3d 1125 (9th Cir. 2016)	27
<i>Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005)	28
<i>Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.</i> , 524 F.3d 917 (9th Cir. 2008)	30
<i>National Ass'n of Home Builders v. E.P.A.</i> , 682 F.3d 1032 (D.C. Cir. 2012) (Garland, J.)	24, 26
<i>Org. Vill. of Kake v. USDA</i> , 795 F.3d 956 (9th Cir. 2015)	8, 15
<i>Organic Trade Ass'n v. USDA</i> , 370 F. Supp. 3d 98 (D.D.C. 2019)	26
<i>Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.</i> , 265 F.3d 1028 (9th Cir. 2001)	27

Federal Cases (Cont'd) **Page(s)**

1
2 *Perrin v. United States*,
3 444 U.S. 37 (1979) 11
4
5 *Pollinator Stewardship Council v. EPA*,
6 806 F.3d 520 (9th Cir. 2015) 29, 30
7
8 *United States v. Carter*,
9 421 F.3d 909 (9th Cir. 2005) 11
10
11 *W. Watersheds Project v. Kraayenbrink*,
12 632 F.3d 472 (9th Cir. 2011) 27
13

Federal Statutes

14 5 U.S.C. § 706(2) 8, 16, 28
15 7 U.S.C. § 6501 2, 18, 29
16 7 U.S.C. § 6503 9, 10
17 7 U.S.C. § 6503(a) 3, 10
18 7 U.S.C. § 6503(c) 3, 10
19 7 U.S.C. § 6509(d) 10, 11, 12, 13, 26
20 7 U.S.C. § 6509(g) 3, 10, 13, 17
21 7 U.S.C. § 6518(a) 3, 26

Rules

22 Fed. R. Civ. P. 56(c) 8

Regulations

23 7 C.F.R. pt. 205 2
24 7 C.F.R. § 205.2 10
25 7 C.F.R. § 205.237 3, 15
26 7 C.F.R. § 205.239 3, 4, 15
27
28

Other Authorities	Page(s)
Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993)	17
USDA, National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000).....	4, 7
USDA, National Organic Program; Access to Pasture (Livestock), 75 Fed. Reg. 7154 (Feb. 17, 2010)	3, 7, 15
Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to accompany S. 2830 together with Additional and Minority Views, S. Rep. No. 101-357, 1990 U.S.C.C.A.N. 4656 (1990).....	14
A. Scalia & B. Garner, <i>Reading Law</i> (1st ed. 2012)	11, 12, 13
Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/raise	12
Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/health%20care	12
Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/health	12
Office of Mgmt. & Budget, Office of the President, OMB Circular A-4, (2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf	20
Oxford English Dictionary, https://en.oxforddictionaries.com/definition/care ; 5 Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/care	11
USDA, <i>Statement from Agriculture Secretary Tom Vilsack on Organic Livestock and Poultry Practices Final Rule</i> (June 17, 2021), https://www.usda.gov/media/press-releases/2021/06/17/statement-agriculture-secretary-tom-vilsack-organic-livestock-and	15

INTRODUCTION

1
2 This case is about having a meaningful organic label for animal products: a label that follows
3 Congress's intent, protects the livelihoods of organic farmers that use humane husbandry practices,
4 and provides consistency and integrity to all the people who pay more for organic eggs, dairy, and
5 meat. It is about finally implementing an overwhelmingly supported rule that was unlawfully
6 withdrawn by an administration hostile to regulation of any kind. And it is about providing humane
7 conditions for organic farmed animals, eliminating the stress of too little space, no time outside, and
8 painful physical alterations.

9 After a decade of expert deliberations and public participation the U.S. Department of
10 Agriculture (USDA) promulgated the Organic Livestock and Poultry Practices Rule (Organic
11 Livestock Rule or Rule or OLPP) in early 2017. The Rule provided much needed detail and clarity
12 to the standards for care of organic livestock, including living conditions, physical alterations,
13 transport, and slaughter. For example, the Rule closed the concrete "porch" loophole exploited by
14 some "organic" producers to avoid providing meaningful outdoor access to their birds. As USDA
15 then explained, the Rule was necessary to level the playing field for organic producers complying
16 with the existing outdoor access requirement and to consistently meet consumer expectations for
17 organic animal welfare, a main Organic Foods Production Act (OFPA) purpose.

18 However, the Organic Livestock Rule is not before this Court because it was superseded by
19 another agency action: In 2018 the Trump administration withdrew the Organic Livestock Rule
20 based on two fatally flawed rationales (Withdrawal Rule), violating both OFPA and the
21 Administrative Procedure Act (APA). First, the Withdrawal Rule claimed that animal care and
22 welfare had no place in OFPA's scheme, contrary to the agency's prior own 28-year interpretation.
23 USDA's 180-degree reversal is contrary to the plain statutory language, numerous canons of
24 construction, and the legislative history. The Biden USDA now *admits* that its legal authority
25 position in the Withdrawal Rule may be incorrect. Given the existential threat that view presents to
26 a meaningful organic label, and after more than three years of litigation and delay of this crucial
27

1 Rule, the Court should instruct USDA that it has the authority to reinstate the Organic Livestock
2 Rule and hold USDA's Withdrawal Rule arbitrary and capricious and set it aside.

3 Second, USDA's economic rationale for its Withdrawal Rule is also arbitrary and capricious.
4 USDA inserted an extra-textual requirement for a "market failure" found nowhere in OFPA or
5 USDA's regulations, and then found no market failure necessitating the Organic Livestock Rule,
6 contrary to the record. Separately, USDA arbitrarily reduced the benefits in the original cost-benefit
7 analysis to conclude that costs to *some* producers (the egg and chicken operations not providing
8 outdoor access) outweighed the benefits. The administrative record also contradicts this conclusion.
9 Even when USDA took a mid-litigation stay in 2020 to clarify its cost-benefit analysis, it *still* doubled
10 down on the Withdrawal Rule, a decision divorced from the record. Finally, while costs to some
11 producers should not form a rule revocation basis, even by USDA's own metrics the economics
12 actually weigh heavily in favor of retaining the Organic Livestock Rule.

13 Third and finally, despite decades of setting organic standards based on expert National
14 Organic Standards Board (NOSB) recommendations, USDA issued its Withdrawal Rule in direct
15 opposition to the unanimous recommendations of its expert advisors. By failing to provide any
16 record explanation for this unprecedented and dramatic departure, USDA violated core principles
17 of administrative law, rendering its Withdrawal Rule unlawful. For all these reasons, the Court
18 should set aside the Withdrawal Rule, restoring the *status quo ante* and reinstating the much-needed
19 Organic Livestock Rule.

20 **RELEVANT STATUTORY AND REGULATORY BACKGROUND**

21 Congress enacted OFPA to establish a national standard for organically produced food,
22 which USDA implements through the National Organic Program. 7 U.S.C. § 6501 *et seq.*; 7
23 C.F.R. Pt. 205. OFPA has three general purposes: (1) establish national standards governing the
24 marketing of organically produced products; (2) assure consumers that organically produced
25 products meet consistent standards; and (3) facilitate interstate commerce in organically produced
26 fresh and processed food. 7 U.S.C. § 6501. Organic livestock producers, like all organic
27
28

1 operations, must be certified to use the organic label, including following an approved “organic
2 livestock plan.” *Id.* §§ 6505(a)(1)(A), 6513(a), (c); 6502(3).

3 Congress recognized that organic standards, a voluntary certification, require both
4 expertise in organic farming and input from organic stakeholders and the public. Thus, OFPA
5 directs USDA to “establish an organic certification program” providing national standards, and
6 specifically requires that USDA “shall” consult with the NOSB in developing these organic
7 standards. *Id.* § 6503(a), (c). NOSB is the expert body created “to assist in the development of
8 standards for substances to be used in organic production and to advise the Secretary on any other
9 aspects of the implementation of [OFPA].” *Id.* § 6518(a).

10 Congress set out requirements for organic livestock production in § 6509. Because the
11 organic livestock industry was still nascent when OFPA was passed, Congress specifically mandated
12 future development of standards “for the care” of livestock in addition to those statutorily
13 enumerated: first, the expert advisory body NOSB makes recommendations regarding those
14 standards, *id.* § 6509(d)(2), and then USDA promulgates detailed regulations with public hearings
15 and notice and comment. *Id.* § 6509(g).

16 FACTUAL AND PROCEDURAL BACKGROUND

17 I. Organic Livestock Standards History and the 2017 Organic Livestock Rule.

18 For decades, USDA exercised its OFPA authority to issue rules for the care of organic
19 livestock. 7 C.F.R. § 205.239 (2000); *id.* §§ 205.237; 205.239; 205.240 (2010). Since the first
20 organic regulations in 2000, USDA acknowledged that detailed standards are required to meet a
21 key OFPA purpose: to assure consumers that organically produced products meet a consistent and
22 uniform standard. *Id.*; OLPP_297.¹ The Organic Livestock Rule, developed over a decade, builds
23 on USDA’s earlier rulemakings to set standards for the care of livestock under OFPA. *Id.* The
24 2010 Access to Pasture Rule (75 Fed. Reg. 7154) clarified the pasture and grazing requirements for
25

26 ¹ Pursuant to the Court’s schedule order, Dkt. 148, Plaintiffs and Defendants will file a Joint
27 Appendix of documents cited from the administrative record by Dec. 22, 2021. For brevity and
28 readability, references to the record will omit extra zeros from the Bates numbers.

1 organic dairy cows and other ruminants; the Organic Livestock Rule is a necessary extension of
2 that level of detail and clarity to all organic livestock— especially poultry—and ensuring organic
3 standards cover entire lifecycles. OLPP_297.

4 Specifically, the Organic Livestock Rule adds new standards for livestock handling,
5 transport for slaughter, and avian living conditions, and clarifies standards covering livestock care,
6 production practices, and mammalian living conditions, furthering the OFPA purpose of
7 providing specific and consistent standards for organic animal care. OLPP_1-55 (proposed rule);
8 OLPP_257-307 (final rule). The Rule acted upon unanimous 2011 NOSB recommendations and
9 is the product of “a decade of public NOSB meetings, lengthy discussions, public comment
10 periods and consultation from organic producers, processors, consumers, and the veterinary and
11 scientific community.” OLPP_1683-4. The Rule garnered near unanimous support from major
12 and growing organic brands, organic producers, and consumers, and is emblematic of the very
13 public and participatory process enshrined in OFPA. *Id.*

14 Since the first organic rules, USDA acknowledged that animal health and welfare are
15 intertwined and overlapping. The 2000 rules required that “[t]he producer of an organic livestock
16 operation must establish and maintain livestock living conditions which accommodate the health
17 and natural behavior of animals.” 7 C.F.R. § 205.239 (2000). The first set of livestock standards
18 went on to establish “[a]nimals . . . must be maintained under conditions which provide for
19 exercise, freedom of movement, and reduction of stress . . . all physical alterations performed on
20 animals . . . must be conducted to promote the animals’ welfare and in a manner that minimizes
21 stress and pain.” 65 Fed. Reg. 80,548, 80,560 (Dec. 21, 2000).

22 Despite the first OFPA rules mandating these living conditions, the devil is in the details,
23 or in this case, the lack thereof. One of the major improvements in the Organic Livestock Rule
24 was to level the playing field among producers of organic eggs and poultry by adding details to the
25 requirements for avian outdoor access and living space. A 2010 Office of the Inspector General
26 (OIG) report “found inconsistent certification practices regarding outdoor access for poultry.”
27 OLPP_5. Outdoor access varied widely: some operations provided real pasture, or “large, open-air

1 outdoors areas,” while others provided “minimal outdoor space or use[d] screened covered
2 enclosures commonly called ‘porches’” These operations confine egg-laying hens and broiler
3 (meat) chickens indoors like conventional concentrated animal feeding operations or CAFOs.
4 OLPP_258; OLPP_297. As USDA stated, the added specificity was necessary to assure consumers
5 that organic animal products meet a consistent, uniform standard. OLPP_257.

6 Not only were the standards applied inconsistently, allowing large operations to produce
7 certified organic eggs at a lower cost, they were not ensuring that organic production met
8 consumer expectations. OLPP_258-9. As NOSB noted, consumer surveys showed that 83% of
9 consumers believed that organic eggs should come from hens that have access to the outdoors.
10 OLPP_1684. Although they have since changed their position and now *support* the Organic
11 Livestock Rule, the Country Hen started the controversy over the use of “porches” as outdoor
12 access in 2002. OLPP_REMAND_25221. When their certifier refused to sign off on this method
13 of outdoor “access,” the company appealed to USDA and won, due to the lack of space
14 requirements or well-defined guidance for poultry. *Id.* The certifier was required to certify these
15 eggs as “organic” despite the lack of meaningful outdoor access, opening the door for other
16 producers to use “porches” with no requirements for size or space. *Id.* As the company states, its
17 customers were very concerned about hens not having access to soil (pasture).
18 OLPP_REMAND_25222. Other certifiers would not allow the use of “porches” under the pre-
19 OLPP regulations, and consumers generally do not expect or desire organic eggs to come from
20 confined hens. OLPP_258; Dkt. 27-10 ¶¶ 11-12; 27-11 ¶¶ 4-6; 27-14 ¶¶ 6-9; 27-4 ¶¶ 8-10; 27-7 ¶ 6.

21 The Organic Livestock Rule clarifies outdoor access and space requirements for poultry,
22 remedying the inconsistencies and failure to meet consumer expectations about outdoor access
23 that the prior 2000 and 2010 rules failed to clearly prohibit. OLPP_297. The Rule sets outdoor
24 stocking densities and clarifies the impropriety of enclosed porches as outdoor access, directly
25 addressing the issues raised by the OIG report. OLPP_277. It also prohibited several physical
26 alterations and sets restrictions on most others. OLPP_265. Additionally, the rule includes new
27 requirements for humane transport and slaughter. OLPP_290; OLPP_292. Finally, the rule sets

1 numerous improvements to living conditions for both mammals and birds, adding significant
2 details to indoor shelter and outdoor access requirements. OLPP_272-289. These welfare
3 requirements are inextricably linked to animal health: animal welfare reinforces animal health, and
4 animal health reinforces animal welfare. OLPP_127155-65. These changes also ensure that
5 consumer expectations—that livestock and poultry products labeled as organic are raised with a
6 high level of welfare—are being met. USDA itself stressed this fix was critical in a 2017 report
7 highlighting the risk to the organic market posed by the misleading gap between what organic
8 consumers expect and the pre-OLPP reality. OLPP_131582, 131613-622.

9 **II. Trump Administration Withdrawal Rule.**

10 USDA issued the final Organic Livestock Rule on January 19, 2017, with an effective date
11 of March 20, 2018. OLPP_257. When the Trump administration took office, USDA delayed the
12 rule’s implementation three separate times, before finally withdrawing the rule altogether.
13 OLPP_313; OLPP_1737; OLPP_3679; OLPP_3681. Between the second and third delays, USDA
14 sought comment on whether it should implement, suspend indefinitely, withdraw, or further delay
15 the Rule. OLPP_1738. Of the 47,000 comments received, 99% wanted the rule implemented;
16 nevertheless, USDA delayed and ultimately withdrew the Rule on March 13, 2018, OLPP_3679;
17 OLPP_00141337, despite another 63,000 comments for the Rule, compared to just 50 comments
18 advocating withdrawal. OLPP_141337.

19 USDA premised the withdrawal on two rationales. First, despite having otherwise
20 interpreted its OFPA authority consistently since its enactment as including animal care and
21 welfare standards, the USDA for the first time claimed OFPA prohibited it from issuing the
22 Organic Livestock Rule. Specifically, USDA argued that OFPA’s mandate to USDA to promulgate
23 additional standards “for the care” of livestock *per se* cannot include the standards for handling,
24 transport, and living conditions detailed in the Rule. OLPP_141338. Second, USDA relied on an
25 economic rationale, including both an alleged lack of “material market failure to justify
26 prescriptive regulatory action,” and a new USDA cost-benefit analysis that concluded costs to a
27
28

1 small subset of producers would outweigh benefits of the Organic Livestock Rule. OLPP_3683;
2 OLPP_11341-43.

3 The original Organic Livestock Rule was based on numerous NOSB recommendations
4 made over a decade, *supra*, but in issuing the Withdrawal, USDA ignored its established norm of
5 consulting with and receiving recommendations from NOSB before issuing a rule revision,
6 including livestock standards. OLPP_141340 (noting comments that withdrawal was contrary to
7 NOSB's recommendations and stating only that USDA is free to ignore them). Prior to the
8 withdrawal rule, USDA had only ever issued new standards for livestock production practices
9 upon consulting with and receiving recommendations from NOSB. *See e.g.*, OLPP_268-269. In
10 fact, past rulemakings have consistently been based on NOSB recommendations. 65 Fed. Reg.
11 80,548 (2000 regulations, noting NOSB recommendations adopted throughout); 75 Fed. Reg.
12 7154, 7154-55, 7183 (same). In the Withdrawal Rule, USDA failed to explain why it was now
13 suddenly deviating from past practice. OLPP_141340-41. Particularly noteworthy is USDA's
14 disregard of NOSB's unanimous April 2017 vote to urge USDA not to delay the implementation
15 of the Organic Livestock Rule beyond May 19, 2017. OLPP_1733; OLPP_141340.

16 Plaintiffs filed this lawsuit challenging the Withdrawal Rule on March 21, 2018. Following
17 an order partly denying, partly granting USDA's motion to dismiss, Dkt. 34, Plaintiffs filed a
18 Second Amended Complaint. Dkt. 37. Because USDA produced an incomplete administrative
19 record, Plaintiffs were forced to file a motion to complete, which was granted. Dkts. 65, 76. At the
20 close of record production, in April 2020 USDA moved to stay pending partial remand to the
21 agency to publish a new report reviewing the economic analysis underlying both the Organic
22 Livestock Rule and the Withdrawal Rule and to solicit public comment. Dkt. 111 at 1-2. USDA
23 had already secured a 180-day remand in the sister case challenging the Withdrawal Rule. *Organic*
24 *Trade Association v. USDA*, Case No. 17-cv-1875 (D.D.C. 2017). Rather than a stay, here Plaintiffs
25 suggested a revised schedule to allow USDA to supplement the record with additional documents.
26 Dkt. 116. As Plaintiffs noted at the time, because Defendants stood ready to defend their statutory
27 interpretation rationale for the Withdrawal Rule, it was clear that no change to the Withdrawal

1 Rule would come from this limited new analysis and comment period. *Id.* at 9. On September 17,
2 2020, the USDA published its review of the Economic Analysis Report, “concluding that no
3 additional rulemaking action with respect to the [Organic Livestock] Rule is necessary.” OLPP-
4 _REMAND_30236. USDA submitted its supplemental administrative record on October 23,
5 2020. Dkts. 122-125. Following the change in administration in January 2021, Plaintiffs and
6 USDA attempted settlement negotiations which were ultimately unsuccessful, leading to this
7 current motion. Dkts. 133-148.

8 STANDARD OF REVIEW

9 Summary judgment is appropriate if there is no genuine issue of material fact and the
10 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v.*
11 *Catrett*, 477 U.S. 317, 322-23 (1986). This challenge is reviewed under the APA standards of
12 judicial review for agency actions, which require the Court to “hold unlawful and set aside”
13 decisions that are, *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in
14 accord with law,” or adopted “without observance of procedure required by law.” 5 U.S.C.
15 § 706(2). In determining whether an action is “arbitrary and capricious,” courts evaluate whether
16 the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action
17 including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs.*
18 *Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action is “arbitrary and
19 capricious if the agency has relied on factors which Congress has not intended it to consider,
20 entirely failed to consider an important aspect of the problem, offered an explanation for its
21 decision that runs counter to the evidence before the agency, or is so implausible that it could not
22 be ascribed to a difference in view or the product of agency expertise.” *Id.*

23 When an agency changes its position by rescinding prior action, it must (1) “display]
24 awareness that it is changing position,” (2) show “the new policy is permissible under the statute,”
25 (3) “believe[]” the new policy is better, and (4) provide “good reasons” for the new policy. *Org. Vill.*
26 *of Kake v. USDA*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*,
27 556 U.S. 502, 515-16 (2009)). When the new policy “rests upon factual findings that contradict

1 those which underlay its prior policy,” an agency must provide “a reasoned explanation . . . for
 2 disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox*,
 3 556 U.S. at 515-16. This framework applies to USDA’s Withdrawal Rule, which is a 180-degree
 4 reversal in position from the Organic Livestock Rule.

5 A court reviews an agency’s interpretation of a statute it administers under *Chevron U.S.A.,*
 6 *Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). A court will invalidate an
 7 agency’s interpretation that is contrary to the clear intent of Congress. *Id.* A court discerns
 8 congressional intent by reviewing the plain language of the statute while “exhaust[ing] all the
 9 ‘traditional tools’ of construction,” including “text, structure, history, and purpose.” *Kisor v. Wilkie*,
 10 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9); *FDA v. Brown & Williamson*
 11 *Tobacco Corp.*, 529 U.S. 120, 133 (2000).

12 ARGUMENT

13 I. The Withdrawal Decision is Arbitrary and Capricious and Contrary to OFPA Because 14 USDA Has Statutory Authority for the Organic Livestock Rule.

15 USDA’s decision to withdraw the Rule based on its purported lack of statutory authority,
 16 contrary to the agency’s previous decades-old position, fails because OFPA gives USDA *express*
 17 authority to set the Organic Livestock Rule’s standards for health—including the welfare and
 18 wellbeing—of organically-produced livestock. In its Withdrawal, USDA argued that it does not
 19 have authority to regulate standards other than “health care practices similar to [the use of
 20 antibiotics, parasiticides, and other medication],” OLPP_3682. This is incorrect. USDA’s authority
 21 to address animal welfare stems from at least three provisions in OFPA, including the Secretary’s
 22 general rulemaking authority, 7 U.S.C. § 6503, and more specifically the sections for animal
 23 production practices and materials, § 6509 and § 6513. OFPA’s plain language, overall scheme,
 24 and legislative history establish that Congress intended for the federal organic program to require
 25 superior animal welfare practices on certified organic farms. *Altera Corp. Subsidiaries v. Comm’r of*
 26 *Internal Revenue*, 926 F. 3d 1061, 1075 (9th Cir. 2019) (“We start with the plain statutory text and,
 27 ‘when deciding whether the language is plain, we must read the words ‘in their context and with a
 28 view to their place in the overall statutory scheme.’”) (quoting *King v. Burwell*, 135 S. Ct. 2480,

1 2489 (2015)). As USDA stated when promulgating the Rule in 2017, the action falls within
2 USDA’s purview to implement OFPA and the regulations would strengthen organic livestock
3 production with clear provisions to fulfill one of OPFA’s purposes: to assure consumers that
4 organically produced products meet a consistent and uniform standard. OLPP_258. USDA’s
5 subsequent decision to withdraw the Rule based on a purported lack of statutory authority must be
6 rejected.

7 **A. OFPA’s Plain Language is Unambiguous and Authorizes the Organic Livestock**
8 **Rule.**

9 OFPA addresses livestock standards through four provisions, which expressly give USDA
10 authority to set the Organic Livestock Rule standards, particularly when interpreted using the
11 accepted canons of statutory construction. First, § 6503 commands the Secretary to “establish an
12 organic certification program for producers and handlers of agricultural products that have been
13 produced using organic methods,” and to consult with NOSB in developing that program. 7
14 U.S.C. § 6503(a), (c).

15 Second, and most importantly, § 6509(d)(2) commands NOSB to recommend standards
16 specifically “for the care” of livestock, in addition to the enumerated provisions for livestock health
17 care. Section 6509(d)(1) lists specific “prohibited practices” for the use of animal drugs, including
18 prohibitions on routine antibiotics, synthetic internal parasiticides, or any medication, beyond
19 vaccines, in the absence of illness. *Id.* § 6509(d)(1). Then, beyond those specific animal drug
20 prohibitions, OFPA mandates NOSB to recommend “standards *in addition to* those in paragraph
21 (1) *for the care of livestock* to ensure that such livestock is organically produced.” *Id.* § 6509(d)(2)
22 (emphases added). Neither OFPA nor its regulations define “care” or “health care” (the heading of
23 § 6509(d)). *Id.* § 6502; 7 C.F.R. § 205.2.

24 Third, following NOSB recommendations for animal care, OFPA directs USDA to develop
25 detailed regulations through notice and comment to implement § 6509 livestock production
26 standards. 7 U.S.C. § 6509(g). This is the proper process by which OFPA standards are set: NOSB
27 makes recommendations based on its members’ expertise, research, and stakeholder input, and
28 USDA, with public notice and input, adopts rules. The Organic Livestock Rule was adopted

1 according to this process. OLPP_258 (OLPP provisions have significant history of USDA actions
 2 based on NOSB recommendations developed to clarify organic livestock practices, transport,
 3 slaughter, and living conditions); *see also e.g.*, OLPP_263 (aligning indoor space calculations with
 4 NOSB recommendations); OLPP_281 (same for outdoor spacing); OLPP_268 (retaining de-
 5 beaking definitions recommended by NOSB). Thus, the plain language instructs USDA to set
 6 regulations for organic methods in consultation with NOSB and after notice and comment,
 7 specifically for the care of livestock *in addition* to those enumerated.

8 Three core canons of statutory construction support Plaintiffs’ construction of OFPA and
 9 its regulations’ terms “care” or “health care” as embracing animal welfare. First, under the
 10 “ordinary meaning” canon, absent specific definitions, words in a statute must be interpreted using
 11 “their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979);
 12 *see generally* A. Scalia & B. Garner, *Reading Law* 69-77 (1st ed. 2012). The ordinary meaning of
 13 “care” is very broad, plainly encompassing living conditions beyond the mere provision or
 14 prohibition of certain animal drugs. “Care” is not defined in OFPA; thus, its meaning is supplied
 15 by the word’s ordinary usage, which can be based on dictionary definitions. *United States v. Carter*,
 16 421 F.3d 909, 911 (9th Cir. 2005) (“[W]e follow the common practice of consulting dictionary
 17 definitions to clarify [words’] ordinary meaning . . .”); *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994)
 18 (without a statutory definition Court “construe[s] a statutory term in accordance with its ordinary
 19 or natural meaning” and consulting dictionary). The dictionary defines “care” as: “[t]he provision
 20 of what is necessary for the health, welfare, maintenance, and protection of someone or
 21 something;” “[s]erious attention or consideration applied to doing something correctly or to avoid
 22 damage or risk;” “painstaking or watchful attention;” “maintenance;” and “charge or supervision.”²

23 Similarly, the plain meaning of “health,” used in the title of § 6509(d), includes wellbeing
 24 beyond just medications or illness. Health is defined as “the condition of being sound in body,
 25

26
 27 ² Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/care>; 5 Merriam-
 Webster Dictionary, <https://www.merriam-webster.com/dictionary/care>. *See also* OLPP_127167.

1 mind, or spirit” and “a condition in which someone or something is thriving or doing well.”³ The
 2 same goes for “health care,” defined as: “efforts made to maintain or restore physical, mental, or
 3 emotional well-being especially by trained and licensed professionals.”⁴ Similarly, Congress’s use of
 4 the terms “*raised* in accordance with this chapter” (§ 6509(a)) and “*raised* and handled in
 5 accordance with this chapter” (§§ 6509(e)(1), (2)(A)) belie USDA’s view stated in the Withdrawal
 6 Rule that the statute authorizes only medical care standards. (Emphasis added). “Raised” is
 7 undefined in the statute, and thus, as with “health care,” is to be understood by its dictionary
 8 definition. *F.D.I.C.*, 510 U.S. at 476. The relevant definition of raise[d] is “to breed and bring (an
 9 animal) to maturity,”⁵ thus “raise” is an exceedingly broad term that Congress did not limit. With
 10 the use of these broad, unqualified terms, OFPA contemplates the establishment of standards for
 11 bringing animals to maturity; those standards may include caring for the animal’s mental well-
 12 being, a critical aspect of an animal’s “health care.” 7 U.S.C. § 6509(d). Because health and welfare
 13 are intimately intertwined, it is completely unreasonable to claim that Congress intended USDA
 14 to regulate the food and medications of organic animals, but not how much living space or
 15 exercise they should have, as USDA does in the Withdrawal Rule. It is analogous to saying that
 16 human health is only related to the drugs we take, and not whether we get any exercise.⁶

17 Second, pursuant to the “whole text” canon, statutory words’ plain meaning must be based
 18 on “consideration of ‘the entire text, in view of its structure’ and ‘logical relation of its many
 19 parts.’” *Mont v. United States*, 139 S. Ct. 1826, 1833-34 (2019) (quoting Scalia & Garner, *supra* at

20 _____
 21 ³ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/health>.

22 ⁴ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/health%20care>.

23 ⁵ Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/raise>.

24 ⁶ Further, in rejecting the so-called “standalone animal welfare” standards in the Rule,
 25 OLPP_141338, USDA did not even attempt to address the standards dealing with physical
 26 alterations (*i.e.* surgeries to prevent future injury or illness due to crowded conditions) newly
 27 prohibited in the Rule, to explain how these practices are different from those outlined in section
 28 6509(d)(1) or how surgeries would not be included in the ordinary meaning of “health care.” Even
 if Congress *had* limited USDA to only setting standards within USDA’s newly confined
 construction of “health care,” it is still nonsensical that USDA would be able to set standards as to
 medications but not surgeries.

1 167). As outlined above, four OPFA provisions work together to require USDA to flesh out the
2 livestock care standards beyond prohibitions on certain substances in § 6509(d)(1), based on
3 NOSB recommendations and public participation. USDA cited §§ 6509(d)(2) and (g) when it
4 promulgated the Rule, explaining that “[§] 6509(d)(2) authorizes the NOSB to recommend
5 standards in addition to the OPFA provisions for livestock health care to ensure that livestock is
6 organically produced. Further, § 6509(g) directs the Secretary to develop detailed regulations
7 through notice and comment rulemaking to implement livestock production standards.”
8 OLPP_258-9. USDA’s new cramped view of its own statutory authority in the Withdrawal Rule
9 ignores this interpretive canon, claiming instead that it is limited to regulating practices just like
10 those specified in § 6509(d)(1). OLPP_141338. But when read as a whole, OPFA’s structure
11 supports the USDA’s authority to issue the Rule.

12 Third, to ignore the congressional directive in § 6509(d)(2) to adopt standards “in addition
13 to” those enumerated “for the care of livestock” would be to read that section out of existence.
14 That violates the surplusage canon, which commands that “every word and every provision is to be
15 given effect” and “[n]one should needlessly be given an interpretation that causes it to duplicate
16 another provision or to have no consequence.” Scalia & Garner, *supra* at 174. The canon prevents
17 interpretations that would render a provision pointless, *id.* at 176; instead, courts should interpret
18 a provision in a way that “leaves both provisions with some independent operation.” *Id.* But to
19 adopt USDA’s Withdrawal Rule interpretation—that the statute only allows standards restricted to
20 drugs—would render surplusage the entire provision regarding *additional* standards. Instead, this
21 provision should be given its plain, independent meaning: to allow USDA to promulgate *additional*
22 standards “for the care of livestock,” including standards that promote welfare.

23 **B. OPFA’s Legislative History Supports Plaintiffs.**

24 Beyond the OPFA’s plain text, common meaning, and statutory scheme, the context
25 supplied by lawmakers further shows that the Withdrawal Rule is arbitrary and capricious. OPFA’s
26 1990 Senate Report stated the NOSB “will best determine the necessary balance between the goal
27
28

1 of restricting livestock medications and *the need to provide humane conditions* for livestock rearing.”⁷
 2 The Senate Committee was explaining that the efficiency-maximizing, nontherapeutic drug use
 3 otherwise allowed in conventional animal agriculture was not allowable in organic, but that in
 4 some cases, medication is required for quality of life and animal welfare. 1990 U.S.C.C.A.N. 4656,
 5 4956; *see also* OLPP_141352-54. Thus, the history establishes that Congress intended for organic
 6 animals to be treated humanely, and indeed *more* humanely than conventional livestock that are
 7 deprived of healthy living conditions and instead given numerous prophylactic drugs to stave off
 8 illness. Moreover, in testimony before the NOSB in 2007, OFPA’s principal co-author stated:

9 [A]nimal health and welfare issues have always been a part of the [National Organic
 10 Program] agenda . . . when we were framing the legislation in 1989 and 1990, I can
 11 assure that *animal health and welfare issues*, as nascent as the livestock sector was in the
 12 organic then, *were on peoples’ minds*. And we saw that when we developed the livestock
 13 sector and more expertise in organic livestock management, that *animal health and
 14 welfare issues would be part and parcel to all the standards*.⁸

15 Accordingly, the whole interpretation toolkit—the plain language of the various sections,
 16 given their common meaning and taken as a whole, bolstered by the legislative history—shows that
 17 OFPA unambiguously grants USDA the authority to set standards for the living conditions,
 18 including health and welfare, of organic livestock. The inquiry ends here, and USDA’s new
 19 interpretation is entitled to no deference in the face of clear, unambiguous statutory language and
 20 congressional intent. *Chevron*, 467 U.S. at 842. But even if the statute were ambiguous—it is not—
 21 USDA’s interpretation of § 6509 as *prohibiting* the types of standards in the Organic Livestock Rule
 22 is not a reasonable or permissible reading, given the plain meaning of the terms and congressional
 23 intent, and should be rejected.
 24

25 ⁷ Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to
 26 accompany S. 2830 together with Additional and Minority Views, S. Rep. No. 101-357, at 302-303
 (1990) (emphasis added).

27 ⁸ Testimony of Kathleen Merrigan, NOSB Meeting at 201 (emphases added). For more examples
 28 of supporting legislative history, *see* OLPP_126884-5.

1 **C. USDA’s 180-Degree Interpretation Reversal Further Shows the Withdrawal Rule**
2 **is Arbitrary and Capricious.**

3 USDA interpreted its authority consistently as including livestock animal care and welfare
4 for 28 years, from OFPA’s passage in 1990 to 2018. 7 C.F.R. §§ 205.237; 205.239; 205.240.
5 Among other examples, USDA provided the exact same rationale for adopting the Access to
6 Pasture Rule in 2010: to make clear what access to pasture means in organic, to assure consumers
7 that products are consistent, and to meet their expectations that animals are allowed to graze on
8 pasture. 75 Fed. Reg. 7154. USDA then suddenly abandoned this longstanding interpretation in
9 the Withdrawal Rule. OLPP_141338 (withdrawing Rule because it “now believes OFPA does not
10 authorize the animal welfare provisions of the OLPP final rule.”). USDA was right for the first 28
11 years, not the last three; the Organic Livestock Rule *is* necessary to meet the Congressional
12 objective of ensuring consistent compliance with the organic standards. OLPP_257.

13 USDA’s 180-degree reversal is arbitrary and capricious for two reasons. First, USDA failed
14 to provide any “good reasons” for its reversal of policy and statutory interpretation in the
15 Withdrawal Rule. *Org. Vill. of Kake*, 795 F.3d at 966; *Fox*, 556 U.S. at 515-16. In its brief-like
16 federal register notice, USDA did not hide that its new reasoning is the product of a new
17 administration that was hostile towards regulation of any kind. OLPP_141338-39; OLPP_141343
18 (citing Executive Order 13771, requiring agencies to repeal two regulations for every one adopted).
19 Distaste for any regulation is not a “good reason,” especially in the face of USDA’s 28-year history
20 and all the stated reasons for the Organic Livestock Rule. *Supra*.

21 Second, under the current administration, USDA now admits that its prior rationale for
22 the Withdrawal Rule was incorrect and needs to be “reconsider[ed].” Namely, on June 17, 2021,
23 Secretary Vilsack issued a statement announcing USDA’s intent to “reconsider the prior
24 Administration’s interpretation that [OFPA] does not authorize USDA to regulate the practices
25 that were the subject of the [OLPP].”⁹

26 ⁹ USDA, *Statement from Agriculture Secretary Tom Vilsack on Organic Livestock and Poultry Practices*
27 *Final Rule* (June 17, 2021), [https://www.usda.gov/media/press-releases/2021/06/17/statement-](https://www.usda.gov/media/press-releases/2021/06/17/statement-agriculture-secretary-tom-vilsack-organic-livestock-and)
28 [agriculture-secretary-tom-vilsack-organic-livestock-and](https://www.usda.gov/media/press-releases/2021/06/17/statement-agriculture-secretary-tom-vilsack-organic-livestock-and).

1 Thus, the Withdrawal Rule was arbitrary and capricious and the Court should reject
2 USDA’s conclusion that OFPA does not provide statutory authority for the OLPP and vacate the
3 Withdrawal Rule based on this rationale. *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43 (agency must
4 “articulate a satisfactory explanation for its action, including a ‘rational connection between the
5 facts found and the choice made. . .”).

6 **II. USDA’s Economic Rationale Imposed Factors Not Intended By Congress And Ignored**
7 **Record Evidence, Rendering The Withdrawal Rule Arbitrary And Capricious.**

8 In addition to its new statutory interpretation, USDA gave a new economic rationale for
9 withdrawing the Organic Livestock Rule. USDA first impermissibly attempted to write into OFPA
10 a new market failure requirement and then found no such market failure warranting regulation,
11 contrary to the evidence of inconsistent practices resulting in products failing to meet consumer
12 expectations. Then, USDA re-calculated its cost-benefit analysis and concluded that costs
13 outweighed benefits for a subset of organic producers, requiring withdrawal, ignoring crucial
14 benefits and again contrary to the record. Finally, in 2020, USDA retained the Withdrawal Rule
15 even after finding its underlying cost-benefit analysis was flawed. *Supra*.

16 In its zeal to withdraw the overwhelmingly supported Organic Livestock Rule, USDA
17 managed to demonstrate all four types of arbitrary and capricious rulemaking outlined in *Motor*
18 *Vehicles*. 463 U.S. at 43; *supra* 8-9. First, USDA’s requirement of a “market failure” relied on a
19 factor not intended by Congress, and its determination that no failure exists ran contrary to the
20 record. Second, its determination that costs outweighed benefits failed to consider an important
21 aspect of the problem (ignored benefits) and ran contrary to the record, which shows the
22 economics *favor* adopting of the Rule. Finally, USDA’s rationale for upholding its Withdrawal
23 Rule after its 2020 Economic Report revealed fatal flaws in the economic analysis for that rule is so
24 implausible that it cannot be ascribed to a difference in view or the product of agency expertise.
25 *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43. This quintessential example of arbitrary rulemaking must
26 be set aside. 5 U.S.C. § 706(2).

1 A. **USDA’s “Market Failure” Requirement Relied on Factor Not Intended by**
2 **Congress and Ignored Evidence of Market Failure.**

3 USDA decided that a “market failure” was required, despite this factor appearing nowhere
4 in OFPA or its regulations. OLPP_141341; OLPP_141326. Then, finding no evidence of a market
5 failure in the organic industry, USDA arbitrarily relied on this purported “lack of market failure”
6 to find that the Organic Livestock rule was not justified. OLPP_141341; *see also*
7 OLPP_REMAND_29763 (stating that lack of market failure was “independent bas[i]s for the
8 Withdrawal Rule.”) First, while USDA has discretion to *consider* economic ramifications, OFPA
9 has no requirement for a market failure showing to undertake rulemaking. Second, USDA
10 completely ignored the ample evidence showing there *was* a market failure here: inconsistent
11 organic products, particularly egg and poultry products, and the failure of organic animal products
12 to meet consumer expectations, leading to a loss of trust in the organic label.

13 1. *There is no requirement for a market failure to set organic standards in OFPA.*

14 OFPA does not require USDA to find a “market failure” to set organic standards; to the
15 contrary, it mandates that following NOSB recommendations, USDA “develop detailed
16 regulations, with notice and public comment, to guide the implementation of the standards for
17 livestock products.” 7 U.S.C. § 6509(g). There is no “market failure” pre-requisite in OFPA’s plain
18 language. Instead, USDA plucked the idea of a “market failure” from Executive Order 12866:
19 “[EO] 12866 also states that ‘Federal agencies should promulgate only such regulations as are
20 required by law, are necessary to interpret the law, or are made necessary by compelling need, *such*
21 *as material failures of private markets . . .*’” OLPP_141341 (emphasis added). First, USDA’s reliance
22 on this Executive Order is misplaced: “material failure of private markets” is just *one* example of a
23 “compelling need” offered in that EO. 58 Fed. Reg. 51735. USDA completely ignores the other
24 rationales the EO lists, including the necessity to interpret the law. *Id.* Here, as USDA stated, the
25 Organic Livestock Rule was necessary to interpret OFPA’s command for standards for the care of
26 livestock and to add details to its prior regulations. OLPP_258; OLPP_297. The “compelling
27 need” here is also clear: some producers provide substandard living conditions yet benefit from the
28 organic label, leaving consumers confused and without consistent products.

1 Second and more importantly, executive orders cannot override Congressional commands.
2 *City and Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (citing *Clinton v. City*
3 *of New York*, 524 U.S. 417, 438 (1998) (“[t]here is no provision in the Constitution that authorizes
4 the President to enact, to amend, or to repeal statutes.”)); *see also Ill. Pub. Telcoms. Ass’n v. F.C.C.*,
5 752 F.3d 1018, 1023 (D.C. Cir. 2014) (Kavanaugh, J.) (holding that the D.C. Circuit would “not
6 read into the statute a mandatory provision that Congress declined to supply”). Congress was clear
7 in OFPA, there is no pre-requisite finding of a “market failure” to set organic standards. USDA’s
8 reliance on a lack of market failure “relied on factors which Congress has not intended it to
9 consider” and is therefore arbitrary and capricious. *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43.

10 2. *Even if a market failure were required, it is met here.*

11 Not only did USDA insert an extra-statutory prerequisite, but it also applied it in a manner
12 contrary to the record, which showed a clear failure of the current organic standards to ensure that
13 a primary purpose of OFPA is met: consistent products meeting consumer expectations. 7 U.S.C.
14 § 6501. USDA, OIG, and the larger organic community all recognized the problem of egg
15 operations using “porches” as their outdoor access. OLPP_257-58; OLPP_283. This created an
16 uneven playing field, where producers farming with integrity and following the requirement to
17 provide for natural livestock behaviors are undercut by confinement operations taking advantage
18 of the organic label’s price premium while producing eggs without that same effort and thus at
19 much lower cost. OLPP_297; OLPP_126887-88; OLPP_132131-32; OLPP_91099.

20 This is a market failure. OLPP_REMAND_28445-6; OLPP_REMAND_28450. Even when
21 USDA withdrew the Rule, its new Regulatory Impact Analysis (RIA) recognized that consumers
22 aware of the disparities would “seek animal welfare labels in addition to the USDA organic seal.”
23 OLPP_141326; *see also* OLPP_REMAND_28445-6 (noting existence of 12 different labels for
24 animal welfare, and that 76% of organic egg producers obtain private animal welfare certification
25 because USDA does not prohibit forced molting/break trimming or have consistent outdoor
26 access requirements). Consumers cannot tell whether the USDA federal organic label means good
27 animal welfare, and in some cases are deceived when purchasing products that are not actually

1 produced how they believe. Producers of the “same” goods are treated unequally in the market.
2 And producers who cannot communicate their practices to consumers are forced to seek out
3 additional certifications (at their own cost) and/or not collect on their investments in livestock
4 living conditions. OLPP_REMAND_28450.

5 USDA’s “let them eat cake” attitude is evident in its dismissal of this market failure of
6 producers and consumers having to resort to third-party labels—which unlike USDA Organic are
7 not publicly created or federally enforceable—to communicate their faithful compliance with the
8 spirit of organic. It is also evinced by its bald statement that “the mere fact that some organic
9 consumers care about animal welfare does not mean that the term ‘organic’ should be equated
10 with animal welfare assurances.” OLPP_141342. But consumers’ expectations not consistently
11 being met *is a market failure*, one that seriously undermines OFPA’s express purposes. The record
12 evidence bears out just how wrong USDA is in its offhand dismissal: (1) the vast majority of
13 organic consumers care about animal welfare and expect organic to ensure humane living
14 conditions; (2) most organic producers already satisfy the Rule’s standards; (3) NOSB unanimously
15 recommended the Rule’s standards; and (4) Congress intended organic standards to embrace
16 animal welfare. *Supra*. As the Inspector General found, USDA’s regulations were *not* meeting
17 OFPA’s purpose, creating a clearly compelling need for regulation. OLPP_258, 297 (OIG
18 recommended clarification due to inconsistencies in how organic certifiers treated porches).
19 USDA’s requirement—and willful ignorance—of a market failure is sufficient alone to show the
20 Withdrawal Rule was arbitrary and capricious and must be vacated.

21 **B. USDA’s Determination that Costs Outweighed Benefits Failed to Consider**
22 **Important Benefits and Runs Contrary to the Record Showing Economic**
23 **Benefits of Implementation.**

24 The other half of USDA’s economic rationale is equally arbitrary. In withdrawing the Rule,
25 USDA maintained that “costs of the OLPP Rule outweigh potential benefits.” OLPP_141341.
26 After re-calculating its original cost-benefit analysis, USDA concluded that “estimated benefits
27 *likely* were overstated in the OLPP final rule RIA. In any case, withdrawing the OLPP” saves money
28 for those producers not already in compliance. OLPP_141328 (emphasis added). USDA narrowly

1 focused on costs to a small subset of organic livestock producers, namely non-compliance egg and
2 poultry meat producers. While they account for a significant portion of the “organic” eggs sold in
3 grocery stores, this is a relatively small number of producers compared to all organic livestock
4 operations. OLPP_126891-2; OLPP_113, 118-9. And to reach its desired end, USDA both
5 mischaracterized the costs and benefits to this subgroup and ignored benefits to the organic
6 industry and organic consumers at large.

7 Initially, despite failing to quantify many of the benefits of the Rule,
8 OLPP_REMAND_28440, USDA recognized the essential benefits in the original rulemaking,
9 properly finding it was necessary. OLPP_297-99; OLPP_112-18, 189-99. As USDA recognized, the
10 current playing field is not level because actual outdoor access varies widely, despite the pre-OLPP
11 regulations requiring outdoor access and sufficient space. OLPP_297. That misleading variability
12 “sows consumer confusion about the meaning of the USDA organic label,” and the Rule resolved
13 that disparity and confusion, maintaining consumer confidence in the \$43 billion industry.
14 OLPP_298. USDA acknowledged that some of these benefits were difficult to quantify, but
15 qualitative factors are nevertheless essential to consider. *See California v. Bernhardt*, 472 F. Supp. 3d
16 573, 632 n.31 (N.D. Cal. 2020) (non-monetized, qualitative benefits must be included).¹⁰

17 After the administration change, USDA dismissed these benefits as “speculative” and re-
18 calculated the quantitative cost-benefit assessment to find costs outweighed benefits.
19 OLPP_141341. Critically, USDA reduced the “willingness to pay” (WTP) values for the changes in
20 the Rule. *Id.* USDA’s new overall calculation estimated less benefit. *Id.* USDA rejected
21 commenters’ argument that the agency failed to account for *qualitative* benefits to farm animals
22 and producers, dubbing them “uncertain” without explanation. *Id.* USDA admitted, however, that
23 even if its quantitative cost-benefit calculations were a close call, it would “choose not to regulate as
24 a policy matter” because of the lack of market failure, *supra*, and the “clear potential for additional
25 regulation to distort the market or drive away consumers,” citing nothing. *Id.* As explained above,

26 _____
27 ¹⁰ Office of Mgmt. & Budget, Office of the President, OMB Circular A-4, at 27 (2003), available at
28 <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

1 consumers and the vast majority of the industry strongly support and want this rule, so contrary to
2 USDA's unsupported statement, there is no "clear potential" for such distortions.

3 USDA in 2018, and again in 2020, failed to consider three major aspects of the cost-
4 benefit analysis. First, USDA completely ignored *benefits* from broiler (meat) chicken operations
5 complying with the Rule, despite including the *costs* to comply. Second, USDA reduced the crucial
6 value of "willingness to pay," arbitrarily tipping the cost-benefit scale away from the benefits
7 established in the record. Third, USDA ignored or dismissed numerous other benefits from the
8 Rule, such as a lucrative market for new or returning egg producers, despite the importance of
9 these benefits to the Rule.

10 1. *USDA included costs, but not benefits, to broiler chicken operations.*

11 USDA completely ignored benefits to broiler producers, despite including costs of
12 compliance with the Rule. This finger on the scale was arbitrary and capricious. *Ctr. for Biological*
13 *Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1199 (9th Cir. 2008) (holding that
14 agency failure to monetize benefits of greenhouse gas reduction in fuel economy standards was
15 arbitrary and capricious); *California v. Bernhardt*, 472 F. Supp. 3d at 616 (agency failure to monetize
16 foregone health benefits of rescinded oil and gas regulations was arbitrary).

17 USDA assumed that all broiler operations would come into compliance and assigned
18 annualized costs of \$3.5-4 million. OLPP_298. However, USDA did not add a value for benefits,
19 despite expressly recognizing and failing to correct this mistake when it adopted the New
20 Economic Report and left the Withdrawal Rule in place. OLPP_REMAND_30238. But because
21 USDA quantified the *costs* to broiler operations to comply with the Rule, it also had to quantify
22 the *benefits*. And benefit estimates were easily attainable: record studies show increased WTP for
23 higher welfare conditions for chicken meat, including lower stocking density and other
24 requirements of the Organic Livestock Rule. OLPP_REMAND_28443; OLPP_REMAND_28616;
25 OLPP_REMAND_28705; OLPP_REMAND_28661. Using USDA's own conservative estimates of
26 market adoption and increased WTP, record evidence showed that adoption of the Rule for
27 broiler operations would yield \$55 million in benefits, significantly more than the costs and

1 certainly impacting the overall cost-benefit assessment. *Id.* Regardless of the exact dollar value of
2 the benefits, giving up and using a value of \$0 was arbitrary and capricious.

3 2. *USDA arbitrarily reduced WTP, artificially reducing benefits to producers.*

4 USDA reduced the WTP value, which is the extra money that consumers will pay for eggs
5 and meat from birds who had real outdoor access. OLPP_REMAND_29766. The higher this
6 premium, the more benefit to producers and return on their investments. OLPP_33-34. As the
7 original author of USDA's economic study commented, the WTP is the most important value to
8 the cost-benefit calculation for the Rule. OLPP_REMAND_25250.

9 USDA reduced the WTP premium low and high range marks from the Final RIA estimates
10 of \$0.21 and \$0.49 and to \$0.16 and \$0.25 per dozen eggs respectively. OLPP_141341. USDA
11 relied on a single study, Heng *et al.* (2013) for these figures.¹¹ This study sampled over 900 people
12 who currently buy organic, cage-free, or conventional eggs. OLPP_REMAND_29907 (Heng
13 report); OLPP_REMAND_28440-41. But WTP is vastly different between organic and
14 conventional consumers, and USDA nonetheless used the overall WTP values for *all* consumers to
15 reduce the WTP value. The relevant consumer metric should have been *organic* egg consumers,
16 which are at top fourth percentile of WTP.¹² This sample bias led to artificially low WTP values,
17 tipping the entire cost-benefit scale. OLPP_REMAND_28441. If corrected, the values for *just*
18 organic consumers should be \$0.32-0.50 (about twice as high). OLPP_REMAND_28442 (this is
19 consistent with large body of academic literature).

20 In addition to sample bias, other economists noted that USDA's new WTP value ignored
21 the premium consumers would pay for chickens not being forced to molt,¹³ which was expressly

22
23 ¹¹ Other commenters, including the original USDA economic study author, told USDA that
reliance on a single study would skew results. OLPP_REMAND_25279.

24 ¹² Even though new consumers who did not previously purchase organic may become organic
25 consumers in response to the Rule, a large portion of the egg and poultry buyers will still be the
existing organic consumers, so using the WTP from all buyers in the Heng study was not logical or
reasonable.

26 ¹³ Chickens naturally molt their feathers annually in a process of feather loss and re-growth that
27 can take several months, during which hens may stop laying eggs completely or lay only very few

1 prohibited in the Organic Livestock Rule. OLPP_REMAND_25279-80. Adding that premium
2 back, in addition to outdoor access, also increased the WTP value. *Id.* Either way you get there,
3 USDA artificially lowered its WTP value to throw off the entire cost-benefit analysis. Finally, the
4 Heng study was from 2013, and other and more recent studies strongly support a higher consumer
5 WTP for animal welfare. *E.g.*, OLPP_REMAND_25281; OLPP_REMAND_28442. Thus, this vital
6 measure of benefits was arbitrarily reduced, skewing the entire cost-benefit analysis and artificially
7 inflating costs.

8 3. *USDA disregarded other benefits despite evidence in record.*

9 USDA completely ignored and/or failed to quantify other important benefits, such as the
10 growth opportunity for already-compliant operations. Many commenters pointed out these
11 benefits to USDA in 2020, but it swept them away without correcting the errors. *See e.g.*,
12 OLPP_REMAND_25119, 25121; OLPP_REMAND_25218; OLPP_REMAND_25272
13 (explaining that the historic growth rate of 12.7% for organic should be higher here, where
14 operations that are already compliant with the Organic Livestock Rule can increase production to
15 fill any gaps left by operations leaving the organic market for the cage-free market, without having
16 to acquire new land or economic hardship).

17 Relatedly, while USDA quantified the costs to producers to comply with the rule, it
18 mischaracterized the dynamics of those producers returning to a more lucrative organic egg market
19 (USDA originally acknowledged this problem, OLPP_151-2). Essentially, the demand for organic
20 poultry/eggs will go up post-OLPP because consumers want and are willing to pay for higher
21 welfare. Producers who cannot immediately meet OLPP standards will leave the market (USDA
22 assumed 50% adoption for eggs), and the reduced supply will lead to higher prices for a short time.
23 Fewer organic egg producers may also mean lower prices for chicken feed. That all adds up to
24 increased profits for farms that immediately comply with the Rule, creating a lucrative

25 _____
26 eggs. Forced molting, typically induced by using a low-nutrient diet, speeds up the natural molt
27 process. OLPP_266. This hastened process causes hens extreme distress resulting in increased
28 aggression and can double the mortality of the flock. Force molting also increases the probability
that hens become infected with Salmonella. OLPP_127158-59 and citation.

1 environment for operations to come into the organic program (re-entry or new entry).
2 OLPP_REMAND_28443-4. While USDA assumed non-compliant producers would simply leave
3 the organic market for good, it failed to continue the assessment and recognize the strong
4 potential for long-term equilibrium. *Id.* Despite recognizing these transition dynamics, USDA
5 arbitrarily used the unduly conservative historical growth rate (12.7%) rather than factoring in
6 these dynamics that would increase the growth rate for organic eggs and poultry. *Id.*

7 Finally, USDA also ignored other potential benefits, like the benefit to consumers of a
8 standardized organic label and not having to search out additional animal welfare labels,
9 OLPP_REMAND_28445; the benefit to all organic growers from decreased demand for cheap
10 fraudulent organic imported grain, OLPP_REMAND_25238; consistency with U.S. trade
11 partners, essential to maintaining “equivalency,” which allows for organic-labeled products to cross
12 borders, OLPP_REMAND_25723; and benefits to smaller organic operations versus large
13 operations. OLPP_REMAND_28446-7. And despite getting a mid-litigation second chance to fix
14 these errors, USDA still did not add any of these quantifiable or qualitative benefits.

15 Costs to a subset of organic producers should not equate to revoking a much-needed set of
16 standards. *National Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1039 (D.C. Cir. 2012)
17 (Garland, J.) (even where statutes require consideration of economic impacts, that “does not mean
18 that the regulation’s benefits must outweigh its costs”). But where an agency relies on cost-benefit
19 analysis as part of its rulemaking, a serious flaw in that analysis can render the rule unreasonable.
20 *Id.* In short, if USDA is going to engage in a cost-benefit analysis, it must do so in a non-arbitrary
21 way. *Ctr. for Biological Diversity*, 538 F.3d at 1199. Here, USDA’s conclusion that costs outweighed
22 benefits is unfounded, failed to consider important benefits, and runs contrary to the evidence
23 showing that the economics favor implementation of the Organic Livestock Rule.

24 **C. USDA Retained the Withdrawal Rule Despite its 2020 Economic Analysis**
25 **Negating its Economic Rationale, Without Plausible Explanation.**

26 Despite concluding that no valid cost-benefit analysis supports its Withdrawal Rule, USDA
27 doubled down on its Withdrawal Rule in 2020. The New Economic Report identified five new or

1 uncorrected errors in USDA’s cost-benefit analysis for the Withdrawal Rule.

2 OLPP_REMAND_30237. Dozens of public comments identified further errors, including missing
3 benefits. *Supra*. But rather than *correct* these errors, USDA merely affirmed the report, and
4 concluded that “no additional rulemaking action” was needed. *Id.*

5 USDA should have redone its economic analysis to correct for the errors it found—and
6 commenters identified—but instead it threw up its hands. As USDA stated in the final notice
7 continuing the Withdrawal Rule, its only purpose was to “identify errors in the previous RIAs,
8 including as to methodological choices that appeared unreasonable or inadvertent, and assess the
9 materiality of those errors. [USDA] *did not attempt to redo the cost-benefit analysis* in prior RIAs or
10 *recalculate the costs and benefits* of OLPP based on assessment of impact of errors.” *Id.* (emphases
11 added). But USDA offers no plausible explanation for retaining a Withdrawal Rule that is based
12 on a fatally flawed assessment.

13 Further, one of the main premises for the Withdrawal Rule was the Organic Livestock
14 Rule’s supposed burden to producers, but USDA’s new report and comment period pulled that
15 premise out from under USDA. Even where USDA expressly admitted to errors or gaps in its
16 assessment, it still determined “as a policy matter” to retain the Withdrawal Rule.

17 OLPP_REMAND_30238 (agreeing that assigning \$0 value to benefits to broiler operations was
18 another flaw and that Withdrawal Rule incorrectly stated that forced molting was already
19 prohibited in the standards); OLPP_REMAND_30239 (admitting that correction of sample bias
20 for WTP would affect benefits); OLPP_REMAND_30241, n.10 (noting but refusing to address
21 issue of burden to small versus large producers). The truth is that USDA was *never* going to change
22 its Withdrawal Rule during the stay: as it stated after its response to comments on the New
23 Economic Report, it still maintained it lacked statutory authority for the Organic Livestock Rule¹⁴
24 and that there is no requisite market failure. OLPP_REMAND_30242.

25 To recap, even though (1) the Report concluded that the cost-benefit analyses for the
26 Organic Livestock Rule and Withdrawal Rule are “seriously flawed” and did not produce a reliable

27 ¹⁴ A position the USDA recently announced it will reconsider, *supra*.

1 projection of costs and benefits, and (2) USDA “withdr[ew] its conclusions regarding the economic
2 impacts of the OLPP Rule,” and (3) it was USDA that stated it needed a valid cost-benefit analysis
3 for the Withdrawal Rule (OLPP_REMAND_30241) and valid economic reasons to regulate,
4 USDA *still kept the Withdrawal Rule*. This position is so implausible and so divorced from the
5 record that it cannot simply be attributed to a legitimate “difference in view or the product of
6 agency expertise.” *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43; *Nat’l Ass’n of Home Builders*, 682 F.3d
7 at 1040. The Court must find that USDA’s economic rationale for the Withdrawal Rule is
8 arbitrary and capricious and vacate.

9 **III. USDA’s Failure to Explain Its Deviations From NOSB’s Unanimous Recommendations**
10 **Is Arbitrary And Capricious.**

11 In withdrawing the Organic Livestock Rule, USDA flouted its standard practice of
12 consulting with the NOSB and following NOSB recommendations for organic livestock
13 rulemaking. And it failed to address why its decision ran counter to the years of expert advice,
14 public comment, and industry input that NOSB amassed over the past decade, rendering its
15 Withdrawal Rule arbitrary and capricious. NOSB is the expert advisory body Congress created and
16 tasked with making rulemaking recommendations to USDA for the organic standards. 7 U.S.C. §
17 6518(a). Congress specifically mandates NOSB to recommend standards for organic livestock care.
18 *Id.* § 6509(d)(2); OLPP_26. In the nearly 31 years since OFPA’s passage, USDA has only ever
19 issued new standards for livestock production practices after consulting with, and receiving
20 recommendations from, NOSB. *Supra* 7, 11. This includes every phase of the Organic Livestock
21 rulemaking process prior to withdrawal. OLPP_258. Indeed, USDA indicated it could only make
22 changes to the Rule to the extent they had been recommended by NOSB. OLPP_268-69, 273-74.

23 The final Organic Livestock Rule was the “largest and most important organic rule”
24 promulgated since 2010. *Organic Trade Ass’n v. USDA*, 370 F. Supp. 3d 98, 115 (D.D.C.
25 2019). The Rule itself was a combination of several NOSB recommendations over a
26 decade. OLPP_258. These recommendations were “the product of a decade of public NOSB
27 meetings, lengthy discussions, public comment periods and consultation from organic producers,

1 processors, consumers, and the veterinary and scientific community.” OLPP_1733-35. Even after
2 the Rule was promulgated, NOSB stood “ready to answer any additional questions” the
3 Secretary had regarding the Organic Livestock Rule. *Id.* In response to USDA’s proposal to delay
4 the Rule, NOSB unanimously voted to tell USDA to immediately implement the Rule instead. *Id.*

5 However, this time in issuing the Withdrawal Rule, USDA ignored both (1) the
6 unanimous NOSB recommendations that formed the backbone of the Organic Livestock Rule and
7 (2) NOSB’s urging that USDA implement it immediately. Most importantly, USDA failed to
8 explain anywhere in the record *why* it deviated from those expert recommendations. Indeed, the
9 only mention of NOSB was in answer to public comments, with a conclusory statement that
10 USDA is not required to consult or follow the NOSB recommendations. OLPP_141340. USDA
11 may not have been required to re-enter consultation with NOSB before issuing the Withdrawal
12 Rule, Dkt. 34 at 12, but it was nonetheless quintessentially arbitrary and capricious agency action
13 to issue the Rule while totally ignoring its expert body’s recommendations to the contrary.

14 When an agency ignores the opinion of its own experts, it points to arbitrary and
15 capricious decision-making. *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir.
16 2016) (“An agency conclusion that is in direct conflict with the conclusion of its own experts . . . is
17 arbitrary and capricious.”); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011)
18 (holding BLM decisions under both NEPA and the ESA were arbitrary and capricious because the
19 agency failed to consider relevant expert analysis); *Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Nat’l*
20 *Marine Fisheries Serv.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001) (agency acted arbitrarily and
21 capriciously by ignoring its own expert advice where no contrary recommendations existed in the
22 record); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002) (enjoining timber sale
23 where agency disregarded opinions of its own scientists). Despite NOSB’s years of expert
24 recommendations supporting the Organic Livestock Rule and its immediate implementation,
25 USDA promulgated its Withdrawal Rule in complete disregard of its expert advisory body.

26 Moreover, USDA failed to explain why it deviated from this consistent past practice,
27 making the Withdrawal Rule “arbitrary and capricious because . . . it defies the expert record

1 evidence and is unexplained.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health*
2 *Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010) (holding that agency should have explained its deviation
3 from its expert body in promulgating mining regulation). Furthermore, as explained above, *supra* 8-
4 9,15, if the agency decides to depart from decades-long past practices, such as only adopting
5 organic standards recommended by the expert advisory body NOSB, the agency must at a
6 minimum *acknowledge* the change and offer a reasoned explanation for it. *Fox*, 556 U.S. at 516.
7 Unexplained inconsistency between agency actions is “a reason for holding an interpretation to be
8 an arbitrary and capricious change from agency practice.” *Nat’l Cable & Telecomms. Ass’n v. Brand X*
9 *Internet Servs.*, 545 U.S. 967, 981 (2005). USDA failed to acknowledge that its course of action was
10 contrary to every other organic rulemaking. Because USDA did not explain its sharp departure
11 from past practice, USDA acted in an arbitrary and capricious manner.

12 REMEDY

13 By the APA’s plain text, a reviewing court “*shall . . . hold unlawful and set aside agency*”
14 actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
15 with law.” 5 U.S.C. § 706(2) (emphasis added). *See also Fed. Election Comm’n v. Akins*, 524 U.S. 11,
16 25 (1998) (“If a reviewing court agrees that the agency misinterpreted the law, it will set aside the
17 agency’s action and remand the case—even though the agency . . . might later, in the exercise of its
18 lawful discretion, reach the same result for a different reason.”) (citing *SEC v. Chenery Corp.*, 318
19 U.S. 80 (1943)); *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (explaining the “the principle
20 that agency action taken in violation of the APA ‘cannot be afforded the force and effect of law.’”).

21 Thus, vacatur and remand is the express default remedy for an agency action held contrary
22 to law, and as such, the Defendants, not Plaintiffs, carry the burden to show why another result,
23 such as remand without vacatur, is appropriate instead. *All. for the Wild Rockies v. U.S. Forest Serv.*,
24 907 F.3d 1105, 1121-22 (9th Cir. 2018) (“Presumption of vacatur” unless Defendants meet their
25 burden to show otherwise); *Ctr. for Env’t Health v. Vilsack*, 2016 WL 3383954, at *13 (N.D. Cal.
26 June 20, 2016) (finding APA violation, explaining that “given that vacatur is the presumptive
27
28

1 remedy for a procedural violation such as this, it is Defendants’ burden to show that vacatur is
2 unwarranted” and vacating the unlawful rule).

3 As such, remand *without* vacatur is only appropriate in “rare,” *Humane Soc’y of U.S. v. Locke*,
4 626 F.3d 1040, 1053 n.7 (9th Cir. 2010), or “limited” circumstances, *Pollinator Stewardship Council*
5 *v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015), and only when the agency can show that “equity
6 demands” a departure from the presumptive remedy, *id.* (quoting *Idaho Farm Bureau Fed’n v. Babbitt*,
7 58 F.3d 1392, 1405 (9th Cir. 1995)) (emphasis added). To determine if these “rare” circumstances
8 are present, courts “weigh the seriousness of the agency’s errors against the disruptive
9 consequences of an interim change that may itself be changed.” *Nat’l Fam. Farm Coal.*, 960 F.3d at
10 1144 (quoting *Pollinator*, 806 F.3d at 532). The Court should vacate the Withdrawal Rule because
11 USDA cannot carry its heavy burden to show this is one of those “rare” circumstances.

12 **I. USDA’s Violations of Law Go To Heart Of OFPA And APA.**

13 The first prong, the seriousness of USDA’s legal errors, weighs heavily in favor of vacatur.
14 Whether an error is serious is judged based on the underlying purposes of the statute. *Amco Prod.*
15 *Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542-43 (1987). For example, “[c]ourts generally only
16 remand without vacatur when the errors are minor procedural mistakes, such as failing to publish
17 certain documents in the electronic docket of a notice-and-comment rulemaking.” *California v.*
18 *BLM*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017).

19 Here, USDA committed very serious error in both of its Withdrawal Rule rationales: (1) its
20 overly constrained view of its OFPA authority flies in the teeth of the statute’s plain language,
21 common meaning, statutory scheme, basic purposes, and the agency’s own view for 28 years prior,
22 gutting OFPA’s purposes of animal care and welfare; and (2) its admittedly flawed economic
23 rationale for the withdrawal, which runs contrary to the record evidence and would allow an extra-
24 statutory factor to trump OFPA’s textual purposes. *See supra*. These errors of law cut to the core of
25 OFPA’s purposes: both to create and protect a consistent organic market, 7 U.S.C. § 6501, and to
26 establish a trustworthy label indicating humane treatment of animals. *Supra* 15. Additionally,
27 USDA’s failure to explain its disregard of the expert NOSB is also serious error. This error harms

1 Plaintiffs and their members, including the organic farmers who must continue to compete against
2 substandard and cheaper but organically labeled products, and to the organizations that must
3 divert resources away from core work to investigate harmful or dangerous practices that the Rule
4 would have prohibited. *See* Holbein and Walden Declarations, *filed concurrently*.

5 **II. Disruptive Consequences Deserve Little Weight Here As The Industry Has Known**
6 **About And Urged A Return To The Organic Livestock Rule For Years.**

7 The second prong also weighs in favor of vacatur. Consideration of potential disruptive
8 consequences *from* vacatur “is weighty only insofar as the agency may be able to rehabilitate its
9 rationale for the regulation,” *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 952 (N.D. Cal.
10 2010) (quoting *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009)), or if the agency will make
11 the *exact same* decision on remand. *Pollinator Stewardship*, 806 F.3d at 532 (inquiry is whether the
12 “same rule would be adopted on remand”). Here, USDA states that it is *not* going to even attempt
13 to “rehabilitate” the Withdrawal Rule’s rationales: it admits they are flawed and it will reconsider
14 both, which will not result in the same rule. So “disruption” from the Withdrawal Rule being
15 changed *will* occur in some fashion, meaning it cannot weigh against vacatur here. *See also Ctr. for*
16 *Env’t Health*, 2016 WL 3383954 at *11 (rejecting arguments that the organic industry would suffer
17 if guidance allowing use of contaminated compost was vacated). On the other hand, remand
18 *without* vacatur will have severe consequences on Plaintiffs. *See* Holbein and Walden Declarations.
19 The Court should vacate the Withdrawal Rule.

20 The Court should also use its equitable power to declare that USDA has authority to enact
21 the Organic Livestock Rule and that USDA’s revocation of that Rule was unlawful under OFPA
22 and arbitrary and capricious under the APA. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524
23 F.3d 917, 936 (9th Cir. 2008) (federal courts have “broad latitude in fashioning equitable relief” as
24 “necessary to remedy an established wrong”); Dkt. 37 ¶¶ 142-144 (requesting declaratory relief).

25 **CONCLUSION**

26 For all the above reasons, this Court should set aside the arbitrary Withdrawal Rule and
27 declare that USDA has the authority to issue the Organic Livestock Rule.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted this 27th day of September, 2021.

/s/ Amy van Saun
AMY VAN SAUN (*Pro Hac Vice*)
GEORGE A. KIMBRELL (*Pro Hac Vice*)
Center for Food Safety
2009 NE Alberta St., Suite 207
Portland, Oregon 97211
T: (971) 271-7372
Emails: avansaun@centerforfoodsafety.org
gkimbrell@centerforfoodsafety.org

Counsel for Plaintiffs