IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIC TRADE ASSOCIATION, et al.,	)	
Plaintiffs,	)	**Case No. 1:17-cv-01875-RMC**
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.	)	
Defendants.	)	

BRIEF OF *AMICI CURIAE* THE STATES OF MISSOURI, ALABAMA, ARKANSAS, COLORADO, INDIANA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, WISCONSIN, AND WYOMING IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

The United States Department of Agriculture's (USDA) decision to withdraw the Organic Livestock and Poultry Practices Rule (the "Livestock and Poultry Rule") was the best result for the farmers and consumers of organic products who would have borne its high costs.

Legally, USDA did not have statutory authority to enact animal-welfare regulations about outdoor access under the guise of the Organic Foods Production Act (the "Act"). The Act imposed specific feed and medicinal production standards for "USDA certified organic" products like poultry eggs. Rather than implementing the organic standards found in the Act, the Livestock and Poultry Rule imposed new animal-welfare standards—specifically, detailed and stringent requirements for poultry to have outdoor access to vegetative soil. It did not have authority to do so. *First*, the plain meaning of "organic" shows that the Act regulates what an animal ingests, it does not regulate *other* aspects of production, such as living conditions and soil access. *Second*, the statutory context and structure confirm that Congress only intended to set food and medicinal standards. *Third*, Congress did not authorize USDA to create new animal-welfare standards; it instructed USDA to implement existing statutory standards. And *fourth*, similar statutes show that when Congress intends for USDA to set animal-welfare standards, it says so expressly.

Economically, USDA's analysis showed that the Livestock and Poultry Rule would have been a disaster for small organic farmers and consumers across the country. The Rule undercut organic farmers who relied on USDA's prior interpretations of the Act to make significant infrastructure investments—farmers who supply some 70% of organic eggs. The high cost of complying with the Rule likely would have driven many of these producers out of the organic egg business altogether, leading to estimated annual losses of $80-86 million. As producers dropped out of the organic egg market, the Rule also would have hurt the many organic feed producers who

sell their crops to support organic poultry.

As organic farmers dropped out of the business, the supply of organic eggs would have plummeted. USDA estimated that organic egg supply would have dropped 50 percent as a result of the Livestock and Poultry Rule. As supply falls, prices increase, and the resulting high prices would have hurt organic consumers and discouraged them from buying organic products. Indeed, such a significant market disruption might have crippled the growth the organic egg market has seen over the last decade. That would have been bad for everyone, even those organic farmers who were already in compliance with the Rule.

The Livestock and Poultry Rule also would have restricted market competition, while the withdrawal of the Rule leaves consumers with more options. By requiring compliance with additional animal-welfare requirements for particular types of outdoor access, the Rule would have effectively blocked the sale of eggs that are simply *organic* in the ordinary sense Congress outlined in the Act: organically fed, and free of growth promoters, hormones, and unnecessary synthetic medications. Taking that product off the market would have punished organic farmers for doing precisely what Congress asked. And it would have punished the many consumers who buy that product. If some producers want to offer organic products that also meet the Rule's stringent requirements, and other consumers want to purchase those products, they are free to do so on the open market.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae Missouri, Alabama, Arkansas, Colorado, Indiana, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Wisconsin, and Wyoming ("*Amici* States") have a strong interest in this case based on their responsibility to promote the welfare of their own consumers and organic farmers. For example, Missouri farmers

have played a significant role in the National Organic Program's success. Missouri has 302 certified organic farms, encompassing 41,078 acres. U.S.D.A, Nat'l Agric. Statistics Serv., Certified Organic Survey 2016 Summary at 3 (Sept. 2017), *available at* https://www.nass.usda.gov/Publications/Todays_Reports/reports/census17.pdf. Those farms sold organic products worth over $101 million in 2016. *Id.* Poultry accounted for a sizable portion of those sales. Missouri farmers produced about 386 million organic eggs in 2016, which generated over $70.4 million in revenue. *Id*. at 126. Missouri farmers are also major players in the egg market as a whole, producing about 3.208 billion eggs in 2016 and generating nearly $190 million in revenue. *See* U.S.D.A., Nat'l Agric. Statistics Serv., Poultry–Production & Value 2016 Summary at 12 (April 2017), *available at* http://usda.mannlib.cornell.edu/usda/nass/PoulProdVa//2010s/2017/PoulProdVa-04-28-2017.pdf.

Amici States have an interest in promoting the welfare of organic farmers and consumers of organic products in their own States. Plaintiff organizations do not adequately represent these interests. Two of the Plaintiffs are animal-welfare organizations that do not purport to represent the organic farmers the Rule would have hurt the most. *See* 2d. Amend. Compl. ¶¶ 28, 38. The third Plaintiff, the Organic Trade Association, is the lobbying organization that pushed for adoption of the Livestock and Poultry Rule "for many years." 2d. Amend. Compl. ¶¶ 21-22. And no Plaintiff purports to represent the interests of consumers. Plaintiffs tell only a small part of the story.

Amici's concerns with the Livestock and Poultry Rule were raised by many parties at the comment stage. The National Association of State Departments of Agriculture (NASDA), for instance, expressed "considerable doubt" about USDA's statutory authority, and noted significant concerns about "animal health, biosecurity, and the economic viability of organic producers" if the

Rule became effective. *See* NASDA Comment Letter (July 6, 2016), Doc. 43-4, at 5-6. A bipartisan Senate letter to Agriculture Secretary Vilsack also expressed "significant concerns regarding the [Rule's] impact on current organic poultry and egg producers as well as access and price for organic consumers." Senate Letter To Sec'y Vilsack (July 26, 2016), *available at* https://www.agriculture.senate.gov/imo/media/doc/7%2026%2016%20Letter%20to%20USDA%20re%20Organic%20Concerns.pdf. In their role as sovereign States, *amici* assert their sovereign and quasi-sovereign interests in promoting the welfare of both producers and consumers of organic products.

BACKGROUND

A. The Act. Congress passed the Organic Foods Production Act in 1990 "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. Uniform standards were needed "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." S. Rep. 101–357 (1990), 1990 U.S.C.C.A.N. 4656, 4943.

The Act sets national standards for selling or labeling agricultural and animal products as "organically produced." 7 U.S.C. § 6504. Organically produced agricultural products cannot include synthetic chemicals, inconsistent seed and plantings practices, or inconsistent soil mix-ins, poisons, or other inconsistent treatments. *See* 7 U.S.C. §§ 6504, 6508. The Act also governs processed foods that contain organic ingredients. 7 U.S.C. § 6505(c). Parallel requirements govern livestock and poultry. *See* 7 U.S.C. § 6509. Such animals may only eat organic feed and cannot be given preventative antibiotics and parasiticides. *Id*. Other standards govern animal

breeding and identification. *Id.* USDA regulations maintain a "National List" stating whether individual substances are permitted or prohibited in organic production. 7 U.S.C. § 6517. Producers who do not meet the Act's standards may not market or label their products as organic. 7 U.S.C. § 6505(a).

To implement these standards, the Act directs USDA to establish a certification program. 7 U.S.C. § 6506. It sets mandatory and discretionary procedures for that program. 7 U.S.C. § 6506(a) & (b). It governs the accreditation and management of certifying agents. 7 U.S.C. §§ 6514-6516. And it instructs organic producers to submit an "organic plan." 7 U.S.C. § 6513. States may, with the approval of USDA, establish state organic certification programs that exceed the Act's requirements. 7 U.S.C. § 6507. USDA regulations established the National Organic Program for certification in 2000.

USDA organic certification has been a success. In 2016, U.S. farms sold $7.6 billion in certified organic commodities, up 23 percent from 2015. Organic farms increased 11 percent to 14,217 and the number of certified acres increased 15 percent to 5.0 million. *See* USDA, Certified Organic Survey 2016 Summary, at Intro. V (Sept. 2017).

B. USDA's regulatory authority. Production practices for livestock and poultry are outlined in 7 U.S.C. § 6509. The Act authorizes USDA to issue implementing regulations for livestock and poultry standards in § 6509(g). The Act also instructs the National Organic Standards Board to make recommendations in § 6509(d)(2). Those provision are as follows:

> **(d) Health care**
>
> **(1) Prohibited practices**
>
> For a farm to be certified under this chapter as an organic farm with respect to the livestock produced by such farm, producers on such farm shall not--
>
> **(A)** use subtherapeutic doses of antibiotics;
>
> **(B)** use synthetic internal parasiticides on a routine basis; or
>
> **(C)** administer medication, other than vaccinations, in the absence of illness.

> **(2) Standards**
> The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.
>
> . . .
>
> **(g) Notice and public comment**
> The Secretary shall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section.

7 U.S.C. § 6509(d) & (g).

C. The Livestock and Poultry Rule. USDA first proposed the Livestock and Poultry Rule in 2016. *See* U.S.D.A., Nat'l Organic Prog.; Organic Livestock and Poultry Pracs., 81 Fed. Reg. 21,956 (April 13, 2016). USDA finalized the Livestock and Poultry Rule in January 2017. *See* U.S.D.A., Nat'l Organic Prog.; Organic Livestock and Poultry Pracs., 82 Fed. Reg. 7042 (Jan. 19, 2017).

The USDA had previously issued regulations that touched on animal-welfare and living conditions, but they looked very different. The initial rule in 2000, for example, while largely outlining USDA's new certification program, gave general direction about housing and living conditions. *See* U.S.D.A., National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000). A 2010 rule provided some additional clarification on such matters. U.S.D.A., National Organic Program, Access to Pasture (Livestock), 75 Fed. Reg. 7154 (Feb. 17, 2010).

Unlike previous regulations, the newly proposed rule focused almost entirely on animal care and living conditions and did so in detail. In general, it outlined new requirements for how organic farmers were to "treat livestock and poultry to ensure their wellbeing." 82 Fed. Reg. at 7042. To that end, the Rule included new animal care practices, *id.* at 7050-57; new avian and mammalian living condition requirements, *id.* at 7057-75; and altered slaughter and transport rules, *id.* at 7075-82. The most controversial parts of the Rule set new and detailed indoor space and

outdoor access requirements for poultry. Through its definition of "outdoor space," the Rule banned commonly used poultry "porches," which are covered and screened to protect poultry from predators or infection by wild birds. *Id*. at 7045. It also specifically required access to outdoor space with soil, at least half of which had to be "maximally covered with vegetation." *Id.*

Despite significant and bipartisan criticism, the Rule was initially finalized in January 2017. USDA eventually withdrew the Rule in March 2018 before it became effective. *See* U.S.D.A., Nat'l Organic Prog.; Organic Livestock and Poultry Pracs., 83 Fed. Reg. 10775 (Mar. 13, 2018).

ARGUMENT

Plaintiffs insist not only that USDA *can* regulate animal welfare under a statute expressly limited to organic production, they also insist that the market will be better off if USDA does so. They are wrong as a matter of law and of economics.

I. The Organic Foods Production Act does not authorize animal-welfare regulations.

Statutory interpretation "begins" and '"should end"' with unambiguous text. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The Livestock and Poultry Rule was properly withdrawn because it was based on an overbroad reading of the Act.

First, the plain text of the Act is limited to ensuring *organic* production, and organic production does not encompass animal welfare. 7 U.S.C. §§ 6503(a); 6509(a). The Act defines "organically produced" to mean "an agricultural product that is produced and handled in accordance with this chapter." 7 U.S.C. § 6502(14). A term not defined by statute takes its ordinary meaning. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018). In 1990, the ordinary meaning of "organic" was something not fed or treated with processed or synthetic

substances. *See* Merriam-Webster Collegiate Dictionary def. 3(2) at 819 (10th ed. 1993) ("[O]f, relating to, yielding, or involving the use of food produced with the use of feed or fertilizer of plant or animal origin without employment of chemically formulated fertilizers, growth stimulants, antibiotics, or pesticides."); Oxford English Dictionary def. g at 921 (2d Ed. 1989) ("Of food: produced without the use of chemical fertilizers, pesticides, etc."). As these definitions show, food is or is not "organically produced" based on what an animal eats or otherwise takes in. Because the Act's plain text is limited to ensuring *organic* production, the Act does not govern other aspects of production, such as living conditions or welfare.

Second, Congress spelled out specific livestock and poultry standards that confirm the ordinary meaning of "organic." 7 U.S.C. § 6509. Those standards are found in § 6509(c) & (d). Subsection (c) governs feed practices: it requires organically produced feed, prohibits the use of certain non-organic feed types, and prohibits the use of growth promotors and hormones. Subsection (d) sets medicinal standards by prohibiting the preventative use of antibiotics, parasiticides, or other medication in the absence of illness. Section 6509(e) applies these standards to poultry meat, eggs, and livestock dairy. The remaining subsections also do not create animal-welfare standards, *see* § 6509(a) (general rule); § 6509(b) (breeder stock); § 6509(f) (livestock identification). All these standards closely track the ordinary meaning of "organic." Nothing in § 6509 creates animal-welfare standards for livestock or poultry.

Third, Congress did not grant USDA authority to create new standards that governed animal welfare. Instead, the statute instructs USDA to "develop detailed regulations . . . to guide the implementation of the standards for livestock products provided under this section." 7 U.S.C. § 6509(g). This sentence marks the parameters of USDA authority: start with the statutory standards provided, and then determine whether the regulation "guide[s] the implementation" of

those standards. The Livestock and Poultry Rule did not "guide the implementation" of any of these standards, it enacted *new* and *different* standards. USDA's existing regulations illustrate this: livestock feed regulations are found in C.F.R. § 205.237 and livestock health care regulations in C.F.R. § 205.238. Animal welfare regulations are categorized separately in C.F.R. § 205.239 because they are not implementing regulations at all. Plaintiffs' Second Amended Complaint concedes this. It alleges that the Livestock and Poultry Rule did not implement the "livestock standards [Congress] placed in the [Act]," it "augmented" them. 2d. Amend. Compl. ¶ 71. Indeed, Plaintiffs broadly argue that USDA has authority to "enact organic livestock standards *in addition to* those specified in the original language of the [Act]." *Id.* ¶ 70 (emphasis added). That is plainly contrary to the statute's text.

Fourth, other statutes show the distinction between organic and animal-welfare standards. Had Congress wanted to instruct USDA to develop animal-welfare standards, it could have done so, as it did under the Animal Welfare Act. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 633 (2018); *Nat'l Labor Relations Bd. v. Bildisco and Bildisco*, 465 U.S. 513, 522-23 (1983); *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling."), *abrogated on other grounds*, *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). The Animal Welfare Act instructs USDA to "promulgate standards to govern the humane handling, care, [and] treatment" of animals, including requirements for housing, physical environment, and psychological well-being. 7 U.S.C. § 2143(a)(1)-(2). That Act, however, does not apply to livestock and poultry. 7 U.S.C. § 2132(g). USDA's authority under the Organic Foods Production Act is different from that Act in two ways: it is limited to implementation of existing standards rather than promulgation of new standards;

and existing standards are limited to feed-and-medicinal standards, not animal-welfare standards. Plaintiffs cannot expand the Animal Welfare Act under the guise of organic certification.

Plaintiffs' contrary reading, *see* Second Amend. Compl. ¶¶ 70-71, 206-208, is inconsistent with the statutory text and lacks a limiting principle.

They begin by suggesting § 6509(g) is "not limited to [the intake of] substances" but is an expansive "Congressional mandate . . . to create additional standards 'for the care' of livestock." *Id.* at ¶ 207. But this "for the care of" language is not found in § 6509(g) at all. It is instead borrowed from § 6509(d)(2), which instructs the National Organic Standards Board to "recommend to the Secretary standards in addition those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced." For several reasons, Plaintiffs' expansive reading cannot be squared with the statute. First, § 6509(d)(2) does not and cannot authorize the USDA to do anything. USDA's regulatory authority is governed by § 6509(g). Second, the Board cannot *sua sponte* expand USDA's authority by making broad and unrelated recommendations. Third, § 6509(d)(2) must be read in context. The Board is to make recommendations "in addition those in paragraph (1)." That limitation is naturally read to mean *similar* medicinal standards, most likely marking the difficult divide between preventative and prescriptive use of antibiotics and medications. Fourth, Plaintiffs' reading lacks any limiting principle. "Congress does not 'hide elephants in mouseholes.'" *Cyan, Inc. v. Beaver Cnty. Emp. Retirement Fund*, 138 S. Ct. 1061, 1071-72 (2018) (citation omitted). Congress would not have written an entire Act providing detailed standards relating to organic production without the use of synthetic substances, only to give USDA expansive authority to issue any standards necessary for the care of livestock. *Id.*

Plaintiffs then suggest rulemaking authority can be found elsewhere in the Act, in 7 U.S.C. § 6506(a)(11). *See* 2d. Amend. Compl. ¶¶ 220–222. If Congress intended to authorize a livestock-

and-poultry rule, it would have done so in the section governing livestock and poultry, 7 U.S.C. § 6509. A closer look at 6 U.S.C. § 6506(a)(11) shows it too does not authorize USDA to create animal-welfare standards. Section 6506(a) governs general requirements for the National Organic Program; it does not govern substantive standards. Section § 6506(a)(11) is a catch-all provision, which says the program should "require such other terms and conditions as may be determined by the Secretary to be necessary." Read in light of the ten preceding requirements, "other terms and conditions" plainly does not mean new substantive standards. At the very least, § 6506(a)(11) is discretionary, and so cannot be used as a sword to force USDA to pass new regulations.

Nor does the Act's "purposes" section authorize animal-welfare standards. *See* 2d. Amend. Compl. ¶ 107; Final Rule (Jan. 19, 2017), 82 Fed. Reg. 7042, at 7043-44 (making the contrary argument). One cannot overcome "recalcitrant statutory language" by appealing to purpose. *Cyan*, 138 S. Ct. at 1072. But even if one could, § 6501 could only authorize USDA to provide a "consistent standard" to ensure "*organically* produced products." 7 U.S.C. § 6501 (emphasis added). It says nothing about regulating other aspects of production, such as living conditions and soil access. Thus, the Act's purpose confirms its text.

II. Conflating organic and animal-welfare certification would create significant market inefficiencies which would hurt organic farmers and drive up consumer costs.

USDA's withdrawal of the Livestock and Poultry Rule was also based on sound economic analysis that cautioned against an overbroad reading of "organic" or any other drastic changes to the standards governing USDA's organic certification.

A. The Livestock and Poultry Rule would have hurt organic farmers who relied on USDA's longstanding interpretation of the Act to make significant infrastructure investments.

The Livestock and Poultry Rule would have hurt organic farmers who had made significant infrastructure investments based on USDA's longstanding interpretation of the Act. According to

USDA estimates, some 70 percent of organic eggs come from such farmers.

USDA regulations first required outdoor access about 2000. *See* 65 Fed. Reg. 80548 at 80561; C.F.R. § 205.239. At the time, some commentators pressured USDA to establish more stringent outdoor-access standards similar to those proposed by the Livestock and Poultry Rule. *See, e.g.*, 65 Fed. Reg. at 80571. But USDA chose to adopt a more flexible requirement. *Id*. at 80561. In reliance on USDA's regulations, organic farming operations invested in capital improvements that provided outdoor access using covered porches. Indeed, USDA explained that the use of porches "gained traction among producers" *precisely because* a 2002 administrative appeal decision approved it. *See* U.S.D.A., Regulatory Impact Analysis, Organic Livestock and Poultry Practices Final Rule (Jan. 2017), Doc. 43-7, at 84 ("Initial RIA"); *see Mass. Indep. Cert., Inc. v. USDA*, 486 F. Supp. 2d 105, 113 (D. Mass. 2007) (discussing 2002 Decision Letter requiring certification of operation that used poultry porches). Today, at least 70 percent of organic eggs are produced in facilities that comply with the Act's standards, but would not have complied with the Livestock and Poultry Rule. *See* U.S.D.A., Regulatory Impact Analysis, Organic Livestock and Poultry Practices Withdrawal at 12-13 (Mar. 2018) ("Withdrawal RIA").

Had the Rule gone into effect, those organic farmers would have had two bad options: stay or leave. They could have invested in selling a more expensive product that meets both organic and animal-welfare standards. But bringing aviary structures (multi-level housing systems) into compliance might have required purchasing additional real property (if available), demolishing or altering existing facilities, and building new facilities. *Id.* As the National Association of State Departments of Agriculture explained, "[c]onstructing new infrastructure" could have proved "cost-prohibitive for a number of producers, especially small-scale producers with limited access to credit." NASDA Comment Letter, Doc. 43-4, at 5. It is hard to predict which of these bad

choices producers would have made. USDA's initial regulatory impact analysis looked at a few different scenarios. The likely scenario, it later found, was that many out-of-compliance producers would have simply left the market. *See* Withdrawal RIA at 13.

Faced with these difficult choices, USDA ultimately estimated it is possible that 50 percent of organic eggs would leave the market, and instead be sold at lower non-organic prices. *Id*. USDA estimated resulting annual losses at $80-86 million based on the price for cage-free, non-organic eggs. Initial RIA at 4-5. That massive market shift would have also had negative downstream effects on *other* organic farmers. Poultry consumes about "33 percent of the corn and 56 percent of soybean meal consumed as livestock feed," and those percentages are much larger within the organic market. *See* Am. Farm. Bur. Comment Letter, Doc. 43-5, at 8. If poultry farmers stopped producing organic eggs, the price of organic feed products would also drop significantly. *Id.* And if organic farmers started selling eggs on the cage-free market instead, their eggs would flood that market, "result[ing] in a catastrophic decline in cage-free egg prices." *Id.*

When there are substantial reliance interests like these, agencies should disfavor significant regulatory changes, as USDA ultimately did here. *See, e.g., Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 887 (9th Cir. 2017) (favoring a "longstanding administrative construction" rather than a new statutory reading "when reliance interests are at stake").

Plaintiffs suggest the Livestock and Poultry Rule was necessary to create *consistent* standards for outdoor access. *See, e.g.*, Smith Dec., Doc. 16-5, at ¶¶ 5-7; Siemon Dec., Doc. 16-1, at ¶¶ 23, 27; Asoudegan Dec., Doc. 16-2, at ¶¶ 7-8. But USDA's standards are consistent. They are simply not what Plaintiffs want them to be. Organizations like the Plaintiffs have pushed USDA to adapt more stringent requirements since 2000. USDA refused to do so in 2000, and a 2002 administrative ruling said the same thing, *see Mass. Indep. Cert., Inc.*, 486 F. Supp. 2d at 113

(discussing administrative ruling). USDA's withdrawal of the Rule continued that consistent, decades-long practice.

B. The Livestock and Poultry Rule would have created a fifty-percent supply shortage for organic eggs and dramatically increased consumer prices.

The Livestock and Poultry Rule also would have led to significant supply shortages and corresponding dramatic price increases for organic eggs. These changes might have crippled the rapidly expanding organic-egg market altogether.

USDA estimated that "*50 percent* of total organic egg production" would likely have disappeared under the Rule. *See* Withdrawal RIA at 13 (emphasis added). In this scenario, organic farmers would have shifted their products to other markets because compliance with the Rule's new standards was simply too expensive. *Id.* As supply dropped fifty percent, prices would jump significantly. USDA estimated price increases of $0.62 to $1.55 per dozen. Initial RIA at 48. And even that is a conservative estimate. The American Farmer Bureau estimated prices closer to $12 a dozen, although that calculation was based on earlier figures. *See* Am. Farm Bur. Comment Letter, Doc. 43-5, at 9-10.

As prices increased, demand would have dropped significantly. *See* Initial RIA at 50. USDA estimated that *some* consumers might be willing to pay $0.16-$0.25 more per dozen for eggs from hens raised in conditions that complied with the Rule. Withdrawal RIA at 10-11. The actual cost would have been well over twice that amount. Initial RIA at 48. So even if those consumers were willing to pay slightly more than $0.25, as Plaintiffs argue, *see* 2d. Amend. Compl. ¶¶ 232-235, consumers would still have been priced out of the market. In other words, the Rule would have hurt even those organic farmers already in compliance with the Rule, because the Rule's additional compliance standards could have made organic eggs prohibitively expensive.

Withdrawing the Rule avoided these negative market effects. True, Plaintiffs express

concern that organic egg revenue decreased by about $14.5 million even though overall sales increased slightly. *See* Lee Dec., Doc. 16-4, at ¶ 8. But they offer no reason why this decrease should be attributed to the withdrawal of the Rule rather than to other market forces. At most, they suggest that decreased profit margins were caused by greater supply coming from "organic production systems that were set to be disallowed under" the Livestock and Poultry Rule. *Id*. ¶ 10. That explanation seems implausible because such facilities have been permitted for decades. Supply increases were more likely caused by supply catching up to demand after the shortages that followed the 2015 avian influenza outbreak, which claimed some 42 million chickens. *See* U.S.D.A., 2016 HPAI Preparedness and Response Plan at 3, *available at* https://www.aphis.usda.gov/animal_health/downloads/animal_diseases/ai/hpai-preparedness-and-response-plan-2015.pdf. Besides, increased supply is healthy in an expanding market, and as the Plaintiffs' declarant concedes, the organic egg market continues to grow. Lee Dec., Doc. 16-4, at ¶ 9.

C. The Livestock and Poultry Rule's overbroad reading of "organic" would have restricted free market competition, while the ordinary meaning of "organic" will lead to better consumer options and higher profits.

Finally, the Rule's overbroad reading of "organic" would have prevented fair competition on free-market terms. It would have forced farmers offering a less expensive product out of the market even though they were offering a product consumers wanted. And it would have forced some consumers to purchase a more expensive good that they did not want.

Basic economic principles dictate this conclusion. Sellers often "bundle" products (or product characteristics) in order to get buyers to buy two products when they only want one. *See* Anthony J. Tjan, *Pros and Cons of Bundled Pricing*, HARVARD BUS. REV. (Feb. 2010), https://hbr.org/2010/02/the-pros-and-cons-of-bundled-p. For instance, few people would pay $10

for a bottle of water. But when they pay for a hotel room, they often pay $10 more for the hotel room in exchange for "complimentary" bottled water. *Id*. Bundling favors sellers and hurts consumers by hiding price information, thus tricking consumers into paying an artificially high cost they would not otherwise pay. *Id.*; *see also* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945). Few transactions are lost in a competitive market—other sellers will be motivated to offer buyers each individual product. But imposing market-wide bundling hurts both sellers and consumers because it leads to fewer transactions. Sellers who can only competitively sell one product will be forced out of the market, reducing supply. And buyers who would only buy one product are forced either to purchase the bundled goods, or buy nothing at all.

The Livestock and Poultry Rule would have done just that. It imposed market-wide bundling of two separate product characteristics: *organic* certification and *animal-welfare* certification for certain types of outdoor access. By bundling these goods, the Rule would have effectively blocked the sale of eggs that are *organic* in the ordinary sense Congress outlined in the Act—eggs from hens raised only on organic feed, free of growth promoters and hormones, and free of unnecessary synthetic medications like antibiotics and parasiticides, 7 U.S.C. § 6509. If such products could not be labeled "organic," then the market price would not reflect the farmers' investment, and farmers would stop producing them. Thus, the Rule would have effectively shut down the market for eggs that were simply organic, punishing organic farmers for doing precisely what Congress asked.

Data also show that many consumers wanted the very product the Rule would have taken off the market—eggs that are organic, but do not necessarily meet the Rule's detailed standards for outdoor access. One study often cited in favor of the Rule suggested that 59 percent of

consumers were willing to pay an average of $0.25 more for eggs from hens given more outdoor access. *See* Withdrawal RIA at 10-11. That means many other consumers were not willing to pay *any* more for such eggs, and even among the 59 percent who were willing to pay, many consumers were only willing to pay a small price increase. The Livestock and Poultry Rule's drastic price increases would have prevented all these consumers from getting the product they wanted. Those who simply wanted organic eggs would be left with a choice: pay exorbitant prices for organic-and-outdoor-access eggs, or buy non-organic eggs. *See* Initial RIA at 50 (acknowledging that some consumers will end up "substituting non-organic eggs for organic eggs"). Withdrawing the Rule led to more market choices.

Plaintiffs speculate that producers whose eggs meet both organic and animal-welfare standards are worse off after USDA withdrew the Livestock and Poultry Rule. *E.g.*, Asoudegan Dec., Doc. 16-2, at ¶¶ 6-8. But those producers are selling a *different* product, and one that not all consumers demand. USDA's organic-certification program should not be captured by a market subset seeking to force out competitors, or by special-interest groups seeking to serve a different cause. *See* Am. Farm Bur. Comment Letter, Doc. 43-5 at 3 (noting that certification programs can "creep beyond the scope of their . . . mission").

The subset of sellers who currently satisfy the Rule's soil-access requirements are free to do what sellers in every market do—distinguish what they believe to be a superior product in an effort to obtain higher prices. Market competition does not create the same barriers that the Rule would have created. In addition, "[s]everal third party animal welfare certification systems embrace strong animal welfare standards" and are already established. Senate Letter to Sec'y Vilsack at 3 (July 26, 2016). For example, producers could distinguish their organic products by seeking additional certification from the Humane Heartland Program of the American Humane

Association. *See generally* http://www.humaneheartland.org (last accessed May 11, 2018). Indeed, some of Plaintiffs' affiants say this is already working. *See* Siemon Dec., Doc. 16-1, at ¶¶ 23-24 (suggesting some consumers prefer "Certified Humane" products to those only certified organic). If consumers *want* organic products that also meet the Rule's detailed animal-welfare standards, *see id.*, then producers can offer that product at a premium. To the extent consumers do not want those products, producers are free to change their practices. But that choice has nothing to do with USDA's organic-practices standards.

CONCLUSION

For the foregoing reasons, USDA's withdrawal of the Livestock and Poultry Rule was legally mandated and economically advisable. The Court should dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all parties, and a true and correct copy was further served by email on counsel for all parties.

/s/ *Julie Marie Blake*