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10  
11 **THE UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 CENTER FOR FOOD SAFETY, et al. ) Case No. 3:20-cv-1537-RS  
14 )  
15 *Plaintiffs,* ) **PLAINTIFFS' MOTION FOR**  
16 ) **SUMMARY JUDGMENT**  
17 v. )  
18 )  
19 SONNY PERDUE, et al. )  
20 )  
21 ) Date: January 21, 2021  
22 ) Courtroom: 3 - 17th Floor  
23 ) Hon. Richard Seeborg  
24 )  
25 )  
26 )  
27 )  
28 )

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 21, 2021, or as soon thereafter as counsel can be heard, Plaintiffs Center for Food Safety, Swanton Berry Farms, Inc., Full Belly Farm, Inc., Durst Organic Growers, Inc., Terra Firma Farms, Inc., Jacobs Farm/Del Cabo, Inc., Long Wind Farm, Inc., OneCert, Inc., and Maine Organic Farmers and Gardeners Association, will move this Court for summary judgment on all issues raised in their March 3, 2020 Complaint, ECF No. 1.

Pursuant to Civil Local Rules 7-2 and 56-1, Plaintiffs respectfully move this Court to grant summary judgment in Plaintiffs’ favor on all claims alleged in Plaintiffs’ Complaint, on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. USDA’s June 6, 2019 letter denying a rulemaking petition which requested USDA to conduct rulemaking to exclude organic certification of hydroponic agricultural production systems under the Organic Foods Production Act (OFPA), 7 U.S.C. §§ 6501-6523, violates the plain language of OFPA’s purpose, its statutory and regulatory provisions, and is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). This Motion is based upon the pleadings and administrative record on file in this case, the concurrently-filed Motion to Complete or Supplement the Administrative Record and supporting papers therewith, the points and authorities herein, and the declarations submitted herewith.

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## INTRODUCTION

1  
2 In *The Soil and Health: A Study of Organic Agriculture*, Sir Albert Howard, regarded by many  
3 as the “father” of what we know today as organic farming, stated: “[a]ll the great agricultural  
4 systems which have survived have made it their business never to deplete the earth of its fertility  
5 without at the same time beginning the process of restoration.”<sup>1</sup> This belief, that agricultural  
6 systems should sustain and enhance the health of the soil, became the core principle of organic  
7 farming, a principle that was embedded into the Organic Foods Production Act of 1990 (OFPA), 7  
8 U.S.C. §§ 6501-6524, which established federal production standards that govern foods certified  
9 and sold as organic throughout this nation.

10 Recognizing the centrality of soil in organic farming, Congress prescribed in OFPA that all  
11 organic crop producers “shall” contain in their production plan “provisions designed to foster soil  
12 fertility.” 7 U.S.C. § 6513(b)(1). USDA’s regulations implementing OFPA (the OFPA Regulations  
13 or Regulations) embody the same principle; they require that organic producers “must” implement  
14 “soil fertility,” “crop nutrient,” and “crop rotation” practices to “maintain or improve” the health  
15 of the farm’s soil. 7 C.F.R. §§ 205.200; 205.203; 205.205. The Regulations also command that  
16 organic operations “must” engage in farming practices to strengthen the natural resources,  
17 ecological balance, and biodiversity of the operation. *See id.* §§ 205.2; 205.200; 205.203; 205.205.

18 This case concerns the failure of Defendant United States Department of Agriculture  
19 (USDA or the Agency) to abide by these mandatory production standards of OFPA. USDA  
20 violated OFPA when it issued a letter (the Petition Denial) denying a rulemaking petition (the  
21 Petition) which requested USDA to conduct rulemaking to prohibit organic certification of  
22 hydroponic systems, which are container production systems that grow crops without *any* soil. In  
23 denying the Petition, USDA unlawfully exempted soil-less hydroponic operations from OFPA’s  
24 soil fertility provisions, even though OFPA plainly requires all organic crop producers to engage in  
25 soil management. USDA also erroneously concluded that hydroponic operations’ generalized

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26 <sup>1</sup> Albert Howard, *The Soil and Health: A Study of Organic Agriculture* 35 (Univ. Press of Kentucky  
27 2006) (1945).

1 environmental benefits alone qualify them for organic certification, even though the OFPA  
 2 Regulations call for all producers to conserve natural resources and biodiversity *onsite*. As a result  
 3 of the Petition Denial, hydroponically produced products are able to obtain organic certification—  
 4 and enjoy the price premium that often comes with the Organic label—without having to comply  
 5 with OFPA’s required practice standards. In so doing, USDA’s double standard frustrates the  
 6 purpose of OFPA to create an uniform organic production program.

7 Plaintiffs include many of the nation’s oldest certified organic farms, certifiers, and organic  
 8 farming and consumer interest associations. Plaintiffs and their members’ economic, reputational,  
 9 and vocational interests are injured by USDA’s refusal to prohibit organic certification of  
 10 hydroponic operations.<sup>2</sup> Plaintiffs seek summary judgment that USDA’s Petition Denial is  
 11 arbitrary and capricious and contrary to law, in violation of OFPA and the Administrative  
 12 Procedure Act (APA). For the reasons stated below, the Court should grant summary judgment for  
 13 Plaintiffs and vacate the Petition Denial.

#### 14 RELEVANT STATUTORY AND REGULATORY BACKGROUND

##### 15 I. THE ORGANIC FOODS PRODUCTION ACT.

16 OFPA created a national organic program (the National Organic Program) to address the  
 17 “lack of consistent standards for production” of organic foods. *See* S. Rep. No. 101-357 (1990),  
 18 *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943; 7 U.S.C. § 6503(a) (establishing the National Organic  
 19 Program). Congress proclaimed that “it is time for national standards for organic production so  
 20 that farmers know the rules, so that consumers are sure to get what they pay for, and so that  
 21 national and international trade in organic foods may prosper.” 1990 U.S.C.C.A.N. at 4943; *Id.*

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22  
 23 <sup>2</sup> Plaintiffs have standing. The individual organic farm and certifier Plaintiffs have suffered  
 24 economic, reputational, and vocational injuries as a result of USDA’s Petition Denial. *See*  
 25 Chapman Decl. ¶¶ 5-8; Durst Decl. ¶¶ 7-9; Jacobs Decl. ¶¶ 5-8; Muller Decl. ¶¶ 5-11; Underhill  
 26 Decl. ¶¶ 6-9; Cochran Decl. ¶¶ 4-8; Welsch Decl. ¶¶ 5-7. Similarly, members of the organizational  
 27 Plaintiffs have experienced injury to their agricultural and consumer interests due to the Petition  
 28 Denial. *See* Alexander Decl. ¶¶ 7-12; Hanson Decl. ¶¶ 8-9; Gray Decl. ¶¶ 2-6; Lawson Decl., 6-7.  
*See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342-43 (1977); *see also Harvey v.*  
*Veneman*, 396 F.3d 28 (1st Cir. 2005) (injury to consumer interests from inconsistent organic  
 standards sufficient to confer standing under OFPA).

1 (noting that varying standards amongst different organic certification programs has “create[d]  
2 havoc for the industry”); 7 U.S.C. § 6501(1)-(2) (purpose of OFPA include: “establish national  
3 standards governing the marketing of certain agricultural products as organically produced  
4 products” and “assure consumers that organically produced products meet a consistent standard”).  
5 OFPA and the National Organic Program it established created the Organic label seen on foods  
6 sold in supermarkets and grocery stores today. 1990 U.S.C.C.A.N. at 4946 (“This legislation  
7 establishes a USDA ‘organically produced’ label—a USDA seal of approval for organic products.”)

8         As Congress explained, the Organic label represents a set of production standards that  
9 adhere to the sustainable principles embedded in organic farming. 1990 U.S.C.C.A.N. at 4946  
10 (“Organic food is food produced using sustainable production methods that rely primarily on  
11 natural materials. The ‘organically produced’ label authorized under this bill therefore *pertains to*  
12 *the production methods used to produce the food* rather than to the content of the food.”) (emphasis  
13 added). Congress outlined in OFPA three baseline production standards that foods must satisfy to  
14 be labeled and sold as organic. *See* 7 U.S.C. § 6504. These standards require that an organically  
15 produced agricultural product be produced: (1) “without the use of synthetic chemicals, except as  
16 otherwise provided [by the Act]”; (2) on land where synthetic chemicals have not been applied in  
17 the previous three years; and (3) in compliance with an organic production plan.” *Id.* § 6504  
18 (1)-(3). Congress emphasized that the last of the three standards, the requirement that an organic  
19 producer complies with the terms of an organic production plan, “is a key element” necessary to  
20 “ensure that the ‘organically produced’ label indeed signifies that the product has been produced  
21 in accordance with the requirements of this title.” 1990 U.S.C.C.A.N. at 4946; *id.* (“But defining  
22 organically grown food based on production materials and a three-year transition period alone is  
23 not sufficient. Organically grown food is produced using farming and handling systems that  
24 include site-specific farm plans.”) Accordingly, OFPA requires each organic producer to develop  
25 and follow an “organic plan” for organic agricultural production. 7 U.S.C. § 6506(2); *id.* § 6513(a).

26         Congress recognized from OFPA’s inception that the essence of organic crop production is  
27 active soil management to build soil fertility. Congress stated that “[a] crop production farm plan  
28 must detail the procedures that the farmer will follow in order to foster soil fertility [and] provide

1 for crop rotations . . . .” 1990 U.S.C.C.A.N. at 4946; *id.* (explaining that organic crop production  
2 standards “reflect[] the extent of knowledge and consensus on appropriate organic crop production  
3 methods and materials.”). Congress made fostering soil fertility a necessary condition for organic  
4 crop production, listing it as the first requirement of any organic crop production plan. *See* 7  
5 U.S.C. § 6513 (b)(1) (“Soil Fertility. – An organic plan shall contain provisions designed to foster  
6 soil fertility, primarily through the management of the organic content of the soil through proper  
7 tillage, crop rotation and manuring.”).

8 OFPA’s production standards were written with input from the organic farming  
9 community, and based on preexisting standards from state organic programs. Administrative  
10 Record (AR) at 452 (“The writing of [OFPA] was a grassroots effort.”); 1990 U.S.C.C.A.N. at 4945  
11 (OFPA “reflected the advice” of the “organic industry, as well as consumer and environmental  
12 advocacy organizations.”). OFPA tasked USDA with promulgating regulations for the National  
13 Organic Program, and to implement the Program through state and private certifiers charged with  
14 ensuring that organic producers adhered to its production standards. *See* 7 U.S.C. § 6503(a), (d);  
15 *id.* § 6514(a). The structure of bill thus reflects congressional recognition of the National Organic  
16 Program as a “partnership between [the] government and private organizations in standard setting  
17 and certification.” 1990 U.S.C.C.A.N. at 4945. A critical example of this partnership is OFPA’s  
18 National Organic Standards Board (NOSB), a fifteen-member board composed of representatives  
19 from the organic community. *Id.* § 6518(b). OFPA tasked the NOSB with “assist[ing] in the  
20 development of standards for substances to be used in organic production” and “advis[ing] [the  
21 USDA] on any other aspects of the implementation of [OFPA].” *id.* § 6518(a). USDA is required  
22 to consult with the NOSB in developing standards for the National Organic Program. *Id.* § 6503(c).

## 23 II. THE NATIONAL ORGANIC PROGRAM REGULATIONS.

24 USDA recognized the importance of soil fertility and working with natural resources in its  
25 OFPA Regulations. In the Federal Register notice<sup>3</sup> announcing the final Regulations, USDA  
26 stated that “[a] producer of an organic crop must manage soil fertility, including tillage and  
27 cultivation practices, in a manner that maintains or improves the physical, chemical, and biological

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28 <sup>3</sup> 65 Fed. Reg. 80,548, 80,559 (Dec. 21, 2000).

1 condition of the soil and minimizes soil erosion.” USDA explained that a crop producer “is  
2 required to implement a crop rotation” to address the needs of its farm operation to “maintain or  
3 improve soil organic matter content,” “manage deficient or excess plant nutrients,” and “control  
4 erosion.” *Id.* at 80,560. USDA repeated this emphasis on active soil management and crop  
5 rotation throughout the rulemaking process. *See* 65 Fed. Reg. 13,512, 13,532 (Mar. 13, 2000)  
6 (proposing regulations).<sup>4</sup>

7 The Regulations also emulate the importance of self-sustainability in organic food  
8 production systems. The Regulations define “organic production” as “[a] production system that is  
9 managed in accordance with the Act and regulations in this part to respond to site-specific  
10 conditions by integrating cultural, biological, and mechanical practices that foster cycling of  
11 resources, promote ecological balance, and conserve biodiversity.” 7 C.F.R. § 205.2.

12 Subpart C of the Regulations detail mandatory soil-based production practice requirements  
13 to improve an organic farm’s soil quality, and to promote its natural resources and biodiversity.  
14 Organic crop production “must maintain or improve the natural resources of the operation,  
15 including soil and water quality.” 7 C.F.R. § 205.200. Specifically, organic crop producers “must”  
16 engage in farming practices that address “soil fertility and crop nutrient management.” *Id.*  
17 § 205.203. The Regulations require organic crop producers to “implement tillage and cultivation  
18 practices that maintain or improve . . . the physical, chemical, and biological condition of soil,” to  
19 “manage crop nutrient and soil fertility through rotations, cover crops, and the application of  
20 plant and animal materials,” and to utilize “plant and animal materials to maintain or improve soil  
21 organic matter . . . .” *Id.* § 205.203(a)-(c). Also, organic crop producers “must implement a crop  
22 rotation” to “(a) [m]aintain or improve soil organic matter content; (b) [p]rovide for pest  
23 management in annual and perennial crops; (c) [m]anage deficient or excess plant nutrients, and  
24 (d) [p]rovide erosion control.” *Id.* § 205.205.

25 Consistent with OFPA, the Regulations require an organic farming operation to detail  
26 practices to meet these soil fertility and resource conservation requirements in an organic system  
27 plan. *Id.* § 205.201(a) (“[A]n organic system plan must meet the requirements set forth in this

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28 <sup>4</sup> This March 13, 2000 Federal Register notice is in the Administrative Record at AR29-176.

1 section for organic production or handling.”). An organic producer must satisfy all the  
2 requirements in order to sell agricultural products under the Organic label. *Id.* § 205.200.

### 3 FACTUAL AND PROCEDURAL BACKGROUND

#### 4 I. THE INCOMPATIBILITY OF HYDROPONIC SYSTEMS WITH THE PRINCIPLES 5 OF ORGANIC FARMING.

6 OFPA was created out of the organic farming movement in the United States. This  
7 movement, developed in the early 1940s, was itself a response to the industrial agricultural  
8 revolution which promoted farming with chemicals, under which farmers cultivated crops using  
9 synthetic fertilizers, and not nutrients derived naturally from the soil. *See* AR447. Consequently,  
10 the pioneers of organic farming techniques “intently focused on the life in the soil.” AR447-448.  
11 At the heart of organic farming is “the sound management of soil biology and ecology.” AR271; *see*  
12 AR451 (“The pioneers [of the organic farming movement] (Sir Albert Howard, Lady Eve Balfour,  
13 Rudolf Steiner, Jerome Irving Rodale, Aldo Leopold, William Albrecht, and others) fostered the  
14 notion that the success and sustainability of farming relies on the management of soil[] health.”).  
15 Organic farmers believed that “[h]ealthy plants, animals, and humans result from balanced,  
16 biologically active soil,” and that the goal of organic farming is to “[f]eed the soil, not the plant.”  
17 AR533. As described by a report put together by the task force (the Hydroponic Task Force)  
18 convened by USDA specifically to study whether hydroponic systems align with OFPA’s  
19 requirements, soil management is “the heart of organic production.” AR442, 464 (“Reliance on a  
20 complex soil system is the foundation of organic farming.”).

21 Organic farmers work hard to increase the complexity and biodiversity of soil. *See* AR448  
22 (“The complexity of this soil system was based on the rich diversity of life in the soil. This varied  
23 web of organisms includes bacteria, fungi, protozoa, nematodes, springtails, mites, spiders, worms,  
24 and burrowing mammals.”). The interactions of diverse soil organisms—commonly known as the  
25 soil food web—create natural nutrients and minerals (referred to as the soil organic matter)  
26 necessary for crops to flourish. *See* AR448 (“This complex system is the basis of all life on the  
27 planet.”), 465; AR1077 (diagram of soil food web). Organic farmers work the land with practices  
28 such as the use of cover crops, the application of compost and other natural manure, tilling, and

1 other activities in order to “focus on soil building” and “continually improve soil fertility.” AR802.  
2 Simply put, soil is what makes the “organic” in organic farming. AR271 (“The organic farming  
3 method derives its name from the practice of maintaining or improving the organic matter (carbon  
4 containing) content of farm soil through various methods and practices.”).

5 In stark contrast to organic farming’s emphasis on the soil, in hydroponic systems  
6 (commonly referred to as “hydroponics”), crops are not grown in soil, but in various container  
7 systems,<sup>5</sup> fed not with natural soil organic matter but prepared mineral nutrient solutions, similar  
8 to the application of fertilizers on crops in non-organic agricultural production. AR279; AR562  
9 (common hydroponic systems); AR8. As noted by the Hydroponic Task Force, whereas organic  
10 farmers feed their crops with nutrients from soil biology, hydroponic operators apply nutrients  
11 “without the need for any biology.” AR565, 562 (explaining that the growing media in hydroponic  
12 operations “does not readily decompose or contribute nutrition to the plants.”).

13 This lack of need for soil building and soil biology makes hydroponic systems particularly  
14 suitable methods for growing food where natural resources are scarce and where natural  
15 conditions are unsuitable for land-based farming. AR801. In recent years, the simplicity of this  
16 indoor, controlled growing system has been put forth as a solution to some of the challenges facing  
17 today’s food system, such as drought, lack of availability of farmland, and shortage of fresh foods  
18 in urban food deserts. *See* AR581. Commercial hydroponic operations today are typically housed  
19 in large industrial warehouses, producing a wide range of crops such as herbs, microgreens,  
20 tomatoes, peppers, berries, and edible flowers. AR390; AR499 (typical hydroponic facility).

21 Because hydroponic operations produce crops by applying nutrients or nutrient solutions  
22 rather than having such nutrients be derived naturally from the soil, whether these operations can  
23 meet the requirements of organic certification has been a subject of intense debate within the  
24 organic farming community. AR1375; AR989-990. Globally, most countries renounce hydroponic  
25 systems as organic farming. *See* AR333 (“Mexico, Canada, Japan, New Zealand, and 24 European

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26 <sup>5</sup> Hydroponics is a catch-all term that covers many different types of soil-less production systems,  
27 such as aeroponics (systems where plants are suspended in air), aquaponics (systems involving  
28 plants and aquatic species), and bioponics (systems where plants are grown in some other non-soil  
media). AR563-66.

1 countries (including Holland, England, Germany, Italy, France, and Spain) all prohibit hydroponic  
2 vegetable production to be sold as organic in their own countries.”); AR537. Yet, despite their  
3 conflict with the soil-centric focus of organic farming, and in spite of global rejection of these  
4 products as organic, USDA has refused to prohibit hydroponic operations from receiving organic  
5 certification under OFPA. As a result, hydroponically produced crops have been allowed on the  
6 market, labeled and sold with the Organic label, in wholesale and retail outlets alongside  
7 soil-grown organic fruits and vegetables without any differentiation.

8 **II. USDA’S FAILURE TO PROHIBIT ORGANIC CERTIFICATION OF**  
9 **HYDROPONIC SYSTEMS.**

10 Consideration of whether hydroponic systems can be certified organic under OFPA began  
11 even before USDA had finalized OFPA’s implementing regulations. In 1995, the NOSB  
12 considered “specialized standards” for particular production systems, including greenhouses,  
13 mushrooms, and hydroponic operations. From the beginning, members of the NOSB were  
14 concerned with the fundamental difference between hydroponic operations and soil-based organic  
15 farming. AR27-28. Ultimately, the NOSB’s recommendation (the 1995 Recommendation)  
16 specified standards for organic certification of greenhouse and mushroom operations, and—unable  
17 to come up with such standards for hydroponic systems—simply stated that hydroponic production  
18 can be certified organic if it complies with all provisions of OFPA. AR25; *see* AR674 (1995 NOSB  
19 member explaining that the recommendation was written as is because of “the general feeling that  
20 the provisions of OFPA could not be met.”).

21 Because the 1995 Recommendation predates the final Regulations, USDA did not act on  
22 it. Instead it waited for the NOSB to make a new recommendation. AR206. Discussions  
23 concerning the striking differences between hydroponic systems and the principles of organic  
24 farming ensued, with many questioning the fundamental conflict between soil-less hydroponic  
25 systems and the soil fertility requirements of OFPA. *See, e.g.*, AR247 (Testimony from NOSB  
26 member stating “[w]e have to really look at the regulation as it exists, talking about soils and the  
27 ecology of soils, and what makes organic farming organic farming. Hydroponics, if you really look  
28 at it, you do not have a soil ecology for plants, to grow plants that normally should be grown in a



1 soil with its accompanying ecology.”); AR266 (“We had an overwhelming response from the public  
2 that they did not want organic hydroponics.”); Stevenson Decl., Ex. A at 32-33<sup>6</sup> (public comment  
3 on May 22, 2008 from an organic certifier stating that “hydroponics cannot be certified because  
4 there’s no soil involved.”). The NOSB finally made its recommendation in 2010 (the 2010  
5 Recommendation), reversing its prior one-line statement and concluding that organic certification  
6 of hydroponic systems should be prohibited. The NOSB stated:

7 Observing the framework of organic farming based on its foundation of sound  
8 management of soil biology and ecology, it becomes clear that systems of crop  
9 production that eliminate soil from the system, such as hydroponics or aeroponics,  
can not be considered as examples of acceptable organic farming practices.

10 AR271-72. The 2010 Recommendation was a culmination of years of discussion and public input.  
11 AR270. The USDA acknowledged receipt of the 2010 Recommendation, and stated that the  
12 Agency “will develop a proposed rule based on the NOSB final recommendations.” AR299.

13 Instead, USDA did just the opposite. In a 2012 publication to organic crop producers,  
14 USDA unilaterally claimed that hydroponic operations can be certified organic, without any  
15 explanation as to how they can comply with OFPA. AR308. USDA then sat on the 2010  
16 Recommendation until 2015, when it convened the Hydroponic Task Force, a 16-member task  
17 force made up of representatives from both the soil-based organic farming community and the  
18 hydroponic sector, “to examine hydroponic and aquaponics practices and their alignment with the  
19 USDA organic regulations and [OFPA].” AR327. The Hydroponic Task Force published its  
20 findings, consisting of three separate subcommittee reports, in 2016. Of the three subcommittees,  
21 the subcommittee tasked with clarifying the 2010 Recommendation affirmed the 2010  
22 Recommendation’s conclusion that hydroponic operations cannot meet the soil fertility  
23 requirements of OFPA. AR441. Another subcommittee, tasked with examining the current state  
24 of hydroponic systems, also agreed with the 2010 Recommendation that sterile and inert  
25 hydroponic operations are ineligible for organic certification, but recommended that certain types

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27 <sup>6</sup> Concurrent with the present motion, Plaintiffs are also asking the Court to compel completion  
28 of the Administrative Record with missing documents that should have been produced as part of  
the Administrative Record. *See* Pls.’ Mot. Complete or Supplement Admin. R.; Stevenson Decl.,  
Exs. A-D (filed concurrently).

1 of hydroponic operations—called “organic bioponics”—may, in the subcommittee’s view, comply  
2 with OFPA’s soil health and ecological requirements. *See* AR554-555. The subcommittee proposed  
3 changes to the Regulations and additional guidance that it deemed necessary to ensure that only  
4 those “organic hydroponic systems” receive organic certification. *See* AR555.

5 USDA again took no action. USDA was well-aware that its inaction had resulted in  
6 inconsistent and confusing certification of hydroponic systems. *See* Stevenson Decl., Ex. C (survey  
7 responses from certifiers showing inconsistent certification of hydroponic operations); AR387  
8 (summarizing survey results); AR643 (letter from Senator Sanders describing “lack of consistency  
9 in the certification process” and asking for clarification). Rather than providing clarification,  
10 USDA doubled down, unilaterally stating in a web bulletin that “[c]ertification of hydroponic,  
11 aquaponic, and aeroponic operations is allowed under USDA organic regulations . . . .” AR1212.

12 USDA’s disregard for OFPA’s soil requirements has been met with outcry from the organic  
13 community. Former NOSB members, organic farming associations, consumer advocacy groups,  
14 and other organic stakeholders, urged USDA to put a moratorium on organic certification of  
15 hydroponic operations. *See* AR536-547. Their plea was joined by Senator Patrick Leahy, the drafter  
16 of OFPA. Stevenson Decl., Ex. B. at 2. Organic stakeholders told USDA that its failure to take a  
17 stance to prohibit organic certification of hydroponic operations has led to confusing organic  
18 standards and inconsistent applications, with some certifiers certifying hydroponic operations and  
19 others unwilling or unable to do so absent guidance from USDA. *See, e.g.,* Stevenson Decl., Ex. A  
20 at 9 (“[T]here’s lots of inconsistencies among certifiers in regards to how they certify hydroponic  
21 systems and this diminishes the value of the organic label.”), 55-56; Ex. B at 3-4; AR816-17  
22 (“[S]ome certifiers are certifying and some will not certify and are against it.”). They told USDA  
23 that the lack of organic standards for certifiers to evaluate and measure hydroponic operations has  
24 resulted in incidents of blatant violations of OFPA’s production standards, including its  
25 prohibition against pesticides and chemicals on organic farm sites. *See* AR1328-29 (detailing an  
26 incident where hydroponic growers applied herbicide on land to remove weeds prior to setting up  
27 hydroponic operations and obtaining organic certification). Soil-based organic farmers repeatedly  
28 reminded USDA that they invest time and resources on soil-building and soil management as part

1 of their organic certification, practices not required nor conducted by hydroponic operators. *See*,  
2 *e.g.*, Ex. A at 42; *id.* at 50 (detailing practices for soil-based farming that are not required for  
3 hydroponic operations); *id.* at 67 (describing soil management practices that are audited by a  
4 certifier); *id.* at 4-5 (same).

5 The NOSB also stressed the need for agency action. In a 2016 Resolution, the NOSB  
6 stated that “it is the will of the majority of the current members of the NOSB to prohibit  
7 hydroponic systems that have an entirely water-based substrate.” *See* AR645; *see also* AR917-945  
8 (2017 NOSB proposal defining different types of hydroponic and soil-less production systems and  
9 recommending changes to regulations based on their differences).

10 Yet, despite continued pressure from the organic community and follow-up calls from the  
11 NOSB demanding that USDA reverse its position that all hydroponic operations are eligible for  
12 organic certification, USDA still refused to act.

### 13 **III. THE RULEMAKING PETITION.**

14 Faced with USDA’s near decade-long disregard of the clear recommendations of the  
15 NOSB, the opinions of the Hydroponic Task Force, and the repeated pleas from the organic  
16 community at large, on January 16, 2019, Plaintiff Center for Food Safety submitted a rulemaking  
17 petition to USDA. The Petition highlighted the historical importance of soil in organic  
18 production and emphasized the express language in OFPA and its implementing regulations that  
19 plainly require organic production practices to foster soil fertility through management of the soil.  
20 AR5, 7, 9-10. Petitioners explained that organic certification of hydroponic operations is not  
21 permissible under OFPA. First, hydroponic operations cannot be certified organic because they do  
22 not accomplish OFPA’s statutory mandate to foster soil fertility and improve the organic matter  
23 content of the soil. AR11-12. Second, hydroponic operations violate OFPA’s mandatory  
24 requirement of consistency in organic production because hydroponic operations fail to adhere to  
25 OFPA’s soil fertility requirements. AR20. Third, hydroponic operations violate OFPA’s  
26 implementing regulations requiring improvement of soil quality, management of soil fertility, use  
27 of crop rotation practices, conservation of biodiversity, use of other soil management practices,  
28 and use of soil samples to measure compliance with OFPA. AR12-13.

1 The Petition requested that USDA conduct rulemaking to prohibit certification of  
2 hydroponic agricultural production. AR1-23. The Petition asked USDA to revoke existing organic  
3 certifications previously issued to hydroponic operations, and requested that USDA ensure that  
4 ecologically-integrated organic production practices are required for all organic certification, as  
5 defined by OFPA and its regulations. AR5. The Petition was endorsed by thirteen other organic  
6 stakeholders that included organic farmers, retailers, certifiers, and public interest and consumer  
7 interest groups. AR22-23.

#### 8 **IV. USDA’S PETITION DENIAL.**

9 By way of a letter dated June 6, 2019, USDA denied the Petition. *See* Petition Denial  
10 (AR1375-1378). USDA issued the Petition Denial without any prior notice or opportunity for  
11 public comment.

12 The four-page Petition Denial acknowledged that “[o]rganic hydroponic systems have been  
13 controversial,” AR1375, and that the NOSB had recommended that USDA prohibit organic  
14 certification of hydroponic operations. *Id.* at 1375-76. USDA also agreed that OFPA requires  
15 organic crop producers to engage in various soil-based production practices to build soil fertility,  
16 achieve ecological balance, and conserve resources and biodiversity. *Id.* at 1376-77.

17 For the very first time, USDA addressed the applicability of OFPA’s soil-centered statutory  
18 and regulatory provisions to hydroponic operations. Even though this very question had been  
19 before the USDA for more than a decade, USDA stated for the first time in the Petition Denial  
20 that, in its view, OFPA’s requirements that organic producers improve soil fertility and engage in  
21 specific soil management practices “are applicable to production systems that *do* use soil.” AR1377  
22 (emphasis in original). Prior to the Petition Denial, USDA had never publicly stated its position  
23 that hydroponic operations are completely exempt from OFPA’s soil management requirements.

24 USDA also “reaffirm[ed] the need for all organic operations, including hydroponic  
25 operations, to demonstrate compliance with the USDA regulations . . . includ[ing] requiring  
26 production systems to maintain or improve the natural resources of the operation,” and cited to  
27 hydroponic systems’ general environmental benefits to summarily conclude—without any  
28

1 explanation or elaboration—that hydroponic operations can satisfy OFPA’s regulations concerning  
2 natural resources, ecological balance, and biodiversity. AR1377.

3 In the Petition Denial, USDA insisted that hydroponic operations may be certified organic  
4 “if done in compliance with OFPA and the USDA organic regulations,” AR1376, but entirely  
5 failed to explain how or what measures certifiers must apply to ensure compliance. USDA refused  
6 the Petition’s requests that USDA engage in rulemaking to prohibit organic certification of  
7 hydroponic operations, and revoke existing certifications for hydroponic operations. AR1375-78.

### 8 STANDARD OF REVIEW

9 Summary judgment is appropriate if no genuine issue of material fact exists 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). An issue is “material” if its resolution could affect the  
12 outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

13 The APA provides interested citizens with the right to petition federal agencies such as the  
14 USDA. See 5 U.S.C. § 553(e). The APA requires agencies to respond to rulemaking petitions  
15 “within a reasonable time.” *Id.* § 555(b).

16 The APA also grants “persons suffering legal wrong because of agency action, or adversely  
17 affected or aggrieved by agency action” the right to “judicial review.” *Id.* § 702. USDA’s Petition  
18 Denial is a final agency action reviewable under the APA. See *Weight Watchers Int’l. v. Fed. Trade*  
19 *Comm’n*, 47 F.3d 990, 992 (9th Cir. 1995) (citing cases holding agencies’ denials of rulemaking  
20 petitions reviewable final agency actions under the APA); *Massachusetts v. EPA*, 415 F.3d 50, 53-54  
21 (D.C. Cir. 2005) (EPA’s denial of rulemaking petition was final agency action).

22 Under the APA, a reviewing court “shall . . . hold unlawful and set aside agency actions,  
23 findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or  
24 otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). In reviewing claims brought  
25 under the APA, a court evaluates whether the agency “examine[d] the relevant data and  
26 articulate[d] a satisfactory explanation for its action including a rational connection between the  
27 facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*,  
28 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An action is arbitrary and capricious if

1 the agency “has relied on factors which Congress has not intended it to consider, entirely failed to  
2 consider an important aspect of the problem, offered an explanation for its decision that runs  
3 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a  
4 difference in view or the product of agency expertise.” *Id.*

5 The APA also directs courts to “interpret . . . statutory provisions, and determine the  
6 meaning or applicability of an agency action,” 5 U.S.C. § 706, and “hold unlawful and set aside  
7 agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or  
8 limitations, or short of statutory right.” *Id.* § 706(2)(C). Judicial review should be “searching and  
9 careful,” and a court “must not rubber-stamp administrative decisions that . . . [are] inconsistent  
10 with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Bureau of*  
11 *Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (internal quotation  
12 marks omitted). A court reviews an agency’s interpretation of a statute it administers under the  
13 framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-  
14 43 (1984). A court will invalidate an agency’s interpretation that is contrary to the clear intent of  
15 Congress. *Id.* A court discerns congressional intent by reviewing the plain language of the statute  
16 while “exhaust[ing] all the ‘traditional tools’ of construction,” including “text, structure, history,  
17 and purpose.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9);  
18 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Similarly, a court must take  
19 into account “the text, structure, history, and purpose of [the] regulation” in reviewing an agency’s  
20 interpretation of its regulations. *Kisor*, 139 S. Ct. at 2413.

## 21 ARGUMENT

22 As discussed below, USDA’s Petition Denial violated OFPA and the APA. First, USDA’s  
23 exemption of hydroponic operations from OFPA’s soil-based statutory and regulatory commands is  
24 contradicted by the plain meaning of OFPA and its Regulations. Second, USDA’s conclusion that  
25 hydroponic operations’ generalized benefits satisfy OFPA’s specific natural resource and  
26 biodiversity conservation requirements is contrary to the Regulation and the Agency’s own  
27 interpretation, and is contradicted by the Record. Third, USDA’s Petition Denial and the double  
28 standards therein have resulted in inconsistent organic standards, in violation of OFPA.

1 **I. USDA’S PETITION DENIAL VIOLATES OFPA’S STATUTORY MANDATE THAT**  
2 **ORGANIC CROP PRODUCERS FOSTER SOIL FERTILITY.**

3 In the Petition Denial, USDA acknowledged that OFPA “impose[s] certain requirements  
4 to maintain or improve soil quality or engage in crop rotation and similar practices,” but  
5 disregarded them as allegedly inapplicable to soil-less production systems. AR1376-77. USDA is  
6 wrong. OFPA’s relevant statutory provisions, its overall scheme, and its legislative history establish  
7 that Congress intended that *all* organic crop production “shall foster soil fertility.” *Altera Corp. &*  
8 *Subsidiaries v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (“We start with the  
9 plain statutory text and, ‘when deciding whether the language is plain, we must read the words ‘in  
10 their context and with a view to their place in the overall statutory scheme.’”) (quoting *King v.*  
11 *Burwell*, 135 S. Ct. 2480, 2489 (2015)). USDA’s decision to exempt hydroponic systems from  
12 OFPA’s soil fertility mandate is impermissible and must be rejected. *Chevron*, 467 U.S. at 842 (“If  
13 the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to  
14 the unambiguously expressed intent of Congress.”).

14 **A. USDA’s Exemption for Hydroponic Systems Is Contrary to the Plain Language**  
15 **of OFPA’s Statutory Provisions Concerning Organic Crop Production.**

16 USDA’s interpretation that hydroponic production systems and other soil-less production  
17 systems are exempt from OFPA’s statutory requirement that organic crop productions foster soil  
18 fertility is contrary to the statute’s plain language.

19 First, it is a fundamental canon of statutory interpretation that the plain meaning of a  
20 statute must be based on “consideration of ‘the entire text, in view of its structure’ and ‘logical  
21 relation of its many parts.’” *Mont v. United States*, 139 S. Ct. 1826, 1833-34 (2019) (quoting A.  
22 Scalia & B. Garner, *Reading Law* 167 (1st ed. 2012)). Under OFPA, in order “[t]o be sold or  
23 labeled as an organically produced agricultural product . . . , an agricultural product *shall* . . . be  
24 produced and handled in compliance with an organic plan agreed to by the producer and handler  
25 of such product and the certifying agent.” 7 U.S.C. § 6504(3). Section 6513 of OFPA spells out  
26 the details of organic plans. The first provision of OFPA’s statutory section concerning  
27 requirements for organic crop production, entitled “Soil Fertility,” states: “[an] organic plan *shall*  
28 contain provisions designed to foster soil fertility, primarily through the management of the

1 organic content of the soil through proper tillage, crop rotation and manuring.” *Id.* § 6513(b)(1)  
 2 (emphasis added). That Congress used “shall” shows that the requirement is mandatory. See  
 3 *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“[T]he word ‘shall’ usually  
 4 connotes a requirement.”); *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001);  
 5 (“‘Shall’ means shall.”) (quoting *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837–38 (9th  
 6 Cir. 2001)).

7 Second, under the “ordinary-meaning” canon of interpretation, absent specific definitions,  
 8 words in a statute must be interpreted using “their ordinary, contemporary, common meaning.”  
 9 *Perrin v. United States*, 444 U.S. 37, 42 (1979); see generally A. Scalia & B. Garner, *supra*, at 69-77.  
 10 Neither “foster” nor “soil fertility” is defined in OFPA; thus their meaning is supplied by the  
 11 ordinary usage of the words, which can be based on dictionary definitions. *United States v. Carter*,  
 12 421 F.3d 909, 911 (9th Cir. 2005) (“[W]e follow the common practice of consulting dictionary  
 13 definitions to clarify [words’] ordinary meaning . . .”). The Merriam-Webster Dictionary defines  
 14 “foster” as “to promote the growth or development of.”<sup>7</sup> “Soil” is “firm land,” or in the agricultural  
 15 context, “the upper layer of earth that may be dug or plowed in which plants grow.”<sup>8</sup> And  
 16 “fertility” is “the quality or state of being fertile.”<sup>9</sup>

17 Thus, for crop production, in order to be certified organic, OFPA requires that the organic  
 18 crop producer *must* include in his or her organic plan for certification, management practices to  
 19 promote the growth and development of fertile soil. And OFPA requires that the organic crop  
 20 producer achieve this development “primarily through the management of the organic content of  
 21 the soil through proper tillage, crop rotation and manuring.” 7 U.S.C. § 6513(b)(1). Organic crop  
 22 producers must document these management practices in their organic plans in order to obtain  
 23 organic certification. *Id.* § 6513 (a) (certifiers “shall determine if such plans meet[] the requirements

24 \_\_\_\_\_  
 25 <sup>7</sup> *Foster*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/foster> (last visited  
 26 Sept. 15, 2020).

27 <sup>8</sup> *Soil*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/soil> (last visited Sept.  
 28 15, 2020).

<sup>9</sup> *Fertility*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/fertility> (last visited  
 Sept. 15, 2020).



1 of the programs.”); *id.* § 6504(3) (compliance with an organic plan required for something “[t]o be  
2 sold or labeled as an organically produced agricultural product.”).

3 Read as a whole, fostering soil fertility through farming practices that directly work the soil  
4 is mandatory for *all* organic crop production, soil-based or not. USDA’s interpretation that the  
5 provision only applies to soil-based organic crop production is contrary to the plain meaning of 7  
6 U.S.C. § 6513(b)(1). See *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055,  
7 1064 (9th Cir. 2016) (refusing to find agency discretion where the statutory command is “shall”).

8 **B. OFPA’s Overall Statutory Scheme Demonstrates Congressional Intent That**  
9 **Organic Crop Production Must Foster Soil Fertility.**

10 As discussed before, OFPA was created in response to differing state certification standards  
11 and the need for uniform and consistent standards for organic production. See *supra* 2-4. It is thus  
12 no surprise that in drafting OFPA, Congress mandated practices that must be met in order to  
13 market and sell one’s product under the Organic label. When Congress intended a practice or  
14 standard to be discretionary under OFPA, it did so clearly, assigning such standards with a  
15 discretionary “may”, rather than the mandatory “shall.” See, e.g., 7 U.S.C. § 6507 (providing that  
16 state organic certification programs “may contain more restrictive requirements” than those under  
17 OFPA); AR440 (Hydroponic Task Force report stating “OFPA and the NOP regulatory text did an  
18 excellent job of representing this heart of the early certification programs by using the word ‘must’  
19 or ‘shall’ (rather than ‘may’) in the sections regulating soil management.”).

20 Nothing in OFPA supports USDA’s distinction between soil-based vs. soil-less production  
21 systems. The requirements of organic production plans are set forth under 7 U.S.C. § 6513. That  
22 section differentiates amongst organic production plans for organic production and organic  
23 handling, and prescribes different standards for four different types of organic products—crops,  
24 livestock, mixed crop livestock production, and harvesting of wild crops; it does not differentiate  
25 by the type of production systems. See *id.* § 6513 (b) (crop production farm plan), (c) (livestock  
26 plan), (d) mixed crop livestock production, (e) (handling), (f) (management of wild crops). Other  
27 statutory sections are similarly divided based on the products produced, rather than by the type of  
28 production system. See, e.g., *id.* § 6508 (“Prohibited crop production practices and materials”); *id.*

1 § 6509 (“Animal production practices and materials”). There is no support for USDA’s view that  
2 the soil fertility requirement for organic crop production only applies to production systems that  
3 use soil.

4 And while Congress did contemplate the possibility of “other production and handling  
5 practices” other than those specifically enumerated under OFPA obtaining organic certification, it  
6 required that any such practice still must be consistent “with the applicable organic certification  
7 program.” *Id.* § 6512. (“If a production or handling practice is not prohibited or otherwise  
8 restricted under this chapter, such practice shall be permitted unless it is determined that such  
9 practice would be inconsistent with the applicable organic certification program.”). Hydroponic  
10 operations produce crops. The applicable organic certification program, the crop production  
11 program and the requirements therein, mandate that organic crop producers foster soil fertility.

12 Nor did Congress grant USDA the discretion to exempt hydroponic or other soilless  
13 systems under OFPA. Congress specified the types and particular instances where exemptions are  
14 allowed under OFPA. Subsection 6505(c) exempted particular types of processed foods and only  
15 *one* type of producer—small agricultural producers with annual sales of less than \$5,000, from  
16 compliance with OFPA’s production standards. *See id.* § 6505(c) (“Exemption for Processed  
17 Food”), (d) (“Small Farmer Exemption”). Congress narrowly authorized USDA to “provide for  
18 reasonable exemptions” from OFPA’s production standards for agricultural products produced by  
19 certified organic farms that “are subject to a Federal or State emergency pest or disease treatment  
20 program,” *id.* § 6506(b)(2), and to work with the NOSB to create time-limited exemptions for the  
21 use of synthetic and otherwise prohibited substances, *id.* § 6517(c). Congress did not use the word  
22 “exempt” or “exemption” in the statutory provision concerning organic plans for organic crop  
23 production. Under the canon of statutory construction, *expressio unius est exclusio alterius* (the  
24 expression of one thing implies the exclusion of another), the fact that Congress listed narrow and  
25 specific exemptions in OFPA, but failed to mention any exemptions from OFPA’s requirements  
26 for organic crop production plans, demonstrates congressional intent that no such exemptions be  
27 allowed. *Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 338 (1994)) (“[I]t is generally presumed that  
28 Congress acts intentionally and purposely when it includes particular language in one section of a

1 statute but omits it in another.”).

2 Taken together, nothing in OFPA’s statutory scheme supports USDA’s interpretation that  
 3 hydroponic operations are exempt from the soil fertility requirement of organic crop production.  
 4 *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) (“It is [ ] a fundamental  
 5 principal of statutory construction that ‘effect must be given, if possible, to every word, clause and  
 6 sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.”);  
 7 *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (courts should “interpret [a] statute ‘as a  
 8 symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious  
 9 whole.”); *see generally* A. Scalia & B. Garner, *supra*, at 174–183.

10 **C. The Legislative History Shows That the Soil Fertility Requirement Is Mandatory.**

11 That building soil fertility is a mandatory component of organic crop production is also  
 12 consistent with OFPA’s purpose and its legislative history. Congress explained that OFPA “has  
 13 been carefully written to prevent widespread exceptions or ‘loopholes’ in the organic standards.”  
 14 1990 U.S.C.C.A.N. 4656 at 4952. Congress emphasized that organic crop production plans “must  
 15 detail the procedures that the farmers will follow in order to foster soil fertility.” 1990  
 16 U.S.C.C.A.N. at 4946; *see supra* pp.2-4.

17 Senator Leahy, the introducer of OFPA, stated that the purpose of OFPA is to support  
 18 “farmers who protect the soil and water.” AR9.<sup>10</sup> In a 2016 letter to USDA requesting that USDA  
 19 prohibit organic certification of hydroponic operations, Senator Leahy explained that “[f]armers  
 20 who have advised me since before I wrote [OFPA] see soil as fundamental to organics.” Stevenson  
 21 Decl., Ex. B at 1. Similarly, members of the organic community that were instrumental in the  
 22 passage of OFPA repeatedly emphasized that building soil fertility is a mandatory aspect of organic  
 23 crop production under the statute. *See id.*, Ex. A at 9, 45-46; AR1319; AR673. Indeed, USDA itself  
 24 had noted, in its 1980 report on organic agriculture, that the basic tenets of organic agriculture  
 25

26  
 27 <sup>10</sup> *Organic Foods Production Act, The National Organic Law at 20: Sowing Seeds for a Bright Future*, S.  
 28 Hrg. 111-1027, at 5 (Sept. 15, 2010), *available at*  
[https://www.agriculture.senate.gov/imo/media/doc/111\\_1027.pdf](https://www.agriculture.senate.gov/imo/media/doc/111_1027.pdf).

1 include the firm belief that “[s]oil is the source of life.” AR533<sup>11</sup>; *see also* AR441-42 (“It is the  
2 management of the soil that is at the heart of organic production.”).

3 The Hydroponic Task Force USDA convened to help inform its decision regarding organic  
4 certification of hydroponic operations noted that “[t]he basic premise of organic farming was that  
5 agricultural soil needs continuous restoration by means of adding manure and/or compost,  
6 managing cover crops and crop residue, and adding natural rock powders. The earliest organic  
7 certification programs based their standards on this premise.” AR440, 452; AR371 (chart showing  
8 timeline of organic farming that led to the development of OFPA).

9 Taken together, the plain language of OFPA’s provisions on organic crop production ,  
10 OFPA’s purpose and its overall statutory design, as well as its legislative history, unambiguously  
11 require that, in order to obtain organic certification, all crop producers must foster soil fertility  
12 through soil management practices. USDA’s Petition Denial exempting hydroponic systems from  
13 these mandatory requirements is impermissible and must be rejected. *Chevron*, 467 U.S. at 842-43  
14 (Courts must enforce “the unambiguously expressed intent of Congress.”).

## 15 **II. USDA’S PETITION DENIAL IS CONTRARY TO THE OFPA REGULATIONS.**

16 As with statutory interpretation, the meaning of a regulation is discerned from its “text,  
17 structure, history, and purpose,” and is based on applications of traditional rules of construction.  
18 *Kisor*, 139 S. Ct. at 2415; *Amazon.com, Inc. v. Comm’r*, 934 F.3d 976, 984 (9th Cir. 2019)  
19 (“Regulations are interpreted according to the same rules as statutes, applying traditional rules of  
20 construction.”). The Supreme Court has instructed that courts should defer to an agency’s  
21 interpretation only if the regulations are “genuinely ambiguous.” *Kisor*, 139 S. Ct. at 2414.

22 OFPA’s implementing regulations unambiguously mandate that *all* organic producers must  
23 “maintain or improve” soil quality, and require all organic producers to engage in soil  
24 management practices to improve soil health. *See* 7 C.F.R. §§ 205.200, 205.203. USDA admitted  
25 that the regulations implementing OFPA “impose certain requirements to maintain or improve  
26

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27 <sup>11</sup> USDA, *Report on Organic Agriculture* 9 (1980), available at  
28 [https://pubs.nal.usda.gov/sites/pubs.nal.usda.gov/files/Report%20and%20Recommendations%20on%20Organic%20Agriculture\\_0.pdf](https://pubs.nal.usda.gov/sites/pubs.nal.usda.gov/files/Report%20and%20Recommendations%20on%20Organic%20Agriculture_0.pdf).

1 soil quality or engage in crop rotation and similar practices,” but claimed that those regulations  
2 only apply to soil-based production systems. AR1376-77. USDA’s interpretation fails.

3 **A. Organic Crop Producers “Must” Maintain or Improve Soil Quality.**

4 The OFPA Regulations detail production practices producers must meet in order to certify  
5 their products as organic. The subsection governing requirements for organic production states  
6 that “production practices must maintain or improve the natural resources of the operation,  
7 including soil and water quality” in order for a producer to label and sell his or her products under  
8 the Organic label. 7 C.F.R. § 205.200. The Regulations detail production practices that meet that  
9 command. Specifically, the applicable regulatory provision, entitled “soil fertility and crop nutrient  
10 management practice standard,” mandates that all organic producers:

11 (a) . . . *must* select and implement tillage and cultivation practices that maintain or  
12 improve the physical, chemical, and biological condition of soil and minimize soil  
erosion;

13 (b) . . . *must* manage crop nutrients and soil fertility through rotations, cover crops,  
and the application of plant and animal materials.

14 (c) . . . *must* manage plant and animal materials to maintain or improve soil organic  
15 matter content in a manner that does not contribute to contamination of crops,  
soil, or water . . . .

16 *Id.* § 205.203 (emphases added). Another provision, the “crop rotation practice standard,” requires  
17 that organic producers “*must* implement a crop rotation” so that producers may “maintain or  
18 improve soil organic matter content.” *Id.* § 205.205 (emphasis added).

19 These regulations leave no room for equivocation: To sell one’s produce as organic, one  
20 “*must*”<sup>12</sup> engage in soil fertility and crop management practices that “manage . . . soil fertility” and  
21 “maintain or improve” soil health and soil organic matter content. *See Carter*, 421 F.3d at 911;  
22 *Sec’y of Labor v. Seward Ship’s Drydock, Inc.*, 937 F.3d 1301, 1308 (9th Cir. 2019) (“A regulation  
23 should be construed to give effect to the natural and plain meaning of its words.”); *Safe Air for*  
24 *Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (“the plain meaning of a regulation  
25 governs.”) (quoting *Wards Cove Packing Corp. v. Nat’l Marine Fisheries Serv.*, 307 F.3d 1214, 1219  
26

27 \_\_\_\_\_  
28 <sup>12</sup> “Must, *Merriam-Webster.com*, <https://www.merriam-webster.com/dictionary/must> (last visited Sept. 15, 2020) (defining “must” as “be commanded or requested to”, “be required by law”).

1 (9th Cir. 2002)) (internal quotation marks omitted). Indeed, as the district court in the Eastern  
 2 District of California noted in a case concerning the meaning of “raw animal manure” in 7 C.F.R.  
 3 § 205.203(c)(1), under 7 C.F.R. § 205.203(a), “[p]roducers are to manage crop nutrients and soil  
 4 fertility through rotations, cover crops and plant and animal materials.” *Cal. Organic Fertilizers, Inc.*  
 5 *v. True Organic Products, Inc.*, No. 1:19-cv-0296 AWI EG, 2019 WL 5422919, at \*6 (E.D. Cal. Oct.  
 6 22, 2019). USDA’s interpretation that these mandatory regulatory requirements are inapplicable  
 7 to hydroponic operations is arbitrary and capricious, and contrary to law.

8 **B. The Regulatory Context and History Show That OFPA’s Soil Fertility and Crop**  
 9 **Rotation Regulations Are Mandatory.**

10 USDA’s statements leading up to the promulgation of the OFPA Regulations also  
 11 demonstrate that the regulatory provisions apply to all organic producers. In the Federal Register  
 12 notice accompanying the draft Regulations, USDA explained that “this proposal contains a  
 13 practice standard for soil fertility and crop nutrient management which describes the tillage  
 14 practices, sources, and handling restrictions for nutrients, and prohibited activities that a  
 15 production operation *must comply with*.” AR40 (emphasis added). USDA stressed that “organic  
 16 production or handling operations must comply with all applicable provisions . . . .” AR50.

17 Nor do the Regulations grant USDA discretion to exempt hydroponic operations from its  
 18 production requirements. Specifically, Part 205 of the Regulations only authorizes USDA to set up  
 19 “temporary variances” from its production standards, and only under the following circumstances:  
 20 “(1) Natural disasters declared by the Secretary; (2) Damage caused by drought, wind, flood,  
 21 excessive moisture, hail, tornado, earthquake, fire, or other business interruption; and (3) Practices  
 22 used for the purpose of conducting research or trials . . . in organic production or handling.” 7  
 23 C.F.R. 205.290(a). Permanent hydroponically produced tomatoes and lettuce, grown in large  
 24 indoor warehouses year-round and destined for supermarket shelves, do not qualify.

25 That the Regulations strictly require organic producers to adhere to soil management  
 26 practices makes perfect sense in light of OFPA’s statutory purpose. *See supra* pp. 2-4. USDA itself  
 27 had explained in the Federal Register notice for the draft Regulations that the requirement that  
 28 “an organic operation maintain or improve its soil and water quality” set forth in 7 C.F.R.

1 § 205.200 “retains the linkage between production and handling practices and the natural  
2 resources of the operation, which is a fundamental tenet of both organic production and OFPA.”  
3 AR53. USDA stressed that “a producer of an organic crop must manage soil fertility, including  
4 tillage and cultivation practices, in a manner that maintains or improves the physical, chemical,  
5 and biological condition of the soil and minimizes soil erosion.” AR50. USDA’s abandonment of  
6 its prior recognition that soil fertility is a necessary component of organic crop production is  
7 arbitrary and capricious, and contrary to the plain text of the OFPA Regulations.

8 In sum, USDA’s interpretation that hydroponic operations are exempt from OFPA’s soil-  
9 related Regulations is arbitrary and capricious and contrary to law, because USDA’s regulations  
10 implementing OFPA unequivocally require organic producers to manage soil health by engaging in  
11 certain crop production and cultivation practices. *Kisor*, 139 S. Ct. at 2415 (“If uncertainty does  
12 not exist, there is no plausible reason for deference. The regulation then just means what it  
13 means—and the court must give it effect, as the court would any law.”).

14 **III. USDA’S DETERMINATION THAT HYDROPONIC OPERATIONS SATISFY**  
15 **OFPA’S ECOLOGICAL AND CONSERVATION REGULATIONS IS ARBITRARY**  
16 **AND CAPRICIOUS.**

17 Part and parcel with organic farming’s objective of building healthy soils is its focus on a  
18 farm’s ability to maintain ecological balance and promote biodiversity. To that end, the  
19 Regulations require all organic operations “to respond to *site-specific* conditions by integrating  
20 cultural, biological, and mechanical practices that foster cycling of resources, promote ecological  
21 balance, and conserve biodiversity.” 7 C.F.R. § 205.2 (definition of “organic operation”) (emphasis  
22 added). Unlike its treatment of OFPA’s statutory and regulatory requirements that require soil  
23 fertility, USDA did not try to excuse hydroponic operations from OFPA’s resource and  
24 conservation requirements. Instead USDA summarily claimed, without any citations nor  
25 supporting evidence, that hydroponic operations can meet these requirements because hydroponic  
26 operations “can [] preserve natural resources” and “can support biological communities.” AR1377.  
27 USDA’s response is arbitrary and capricious, and contrary to law.

28 First, USDA’s reliance on the general water and land conservation benefits of hydroponic  
operations ignores that, under the Regulations, organic operations “*must* maintain or improve the

1 *natural resources of the operation*, including soil and water quality.” 7 C.F.R. § 205.200 (emphases  
2 added). The Regulations define “natural resources of the operation” as the “physical, hydrological,  
3 and biological features of a *production operation*, including soil, water, wetlands, woodlands, and  
4 wildlife.” *Id.* § 205.2 (emphasis added). Thus to be certified organic, it is not enough for an  
5 agricultural operation to achieve general environmental benefits; the operator “must” promote  
6 ecological balance and biodiversity to the agricultural site. *See id.*; *id.* § 205.200.

7         USDA’s own statements confirm this. In the preamble to the final Regulations, USDA  
8 stated that “[c]ompliance with the requirement to conserve biodiversity requires that a producer  
9 incorporate practices . . . that are beneficial to biodiversity on his or her operation.”<sup>13</sup> Cf. AR50  
10 (USDA explanation of draft Regulations that “[a]ny practice implemented in accordance with [7  
11 C.F.R. part 205] must maintain or improve the natural resources, including soil and water quality,  
12 of the operation.”). USDA’s own guidance on the regulations (NOP 5020)<sup>14</sup> also show that organic  
13 operations must demonstrate conservation benefits *to the operation itself*. *See* NOP 5020, at 3  
14 (explaining that, for sites that have both certified and non-certified operations, the natural  
15 resource and biodiversity conservation requirements can be met with conservation practices  
16 implemented on a portion of the operation “that is not certified but is adjacent to the certified  
17 land, if this practice directly benefits the certified land.”). USDA’s claim that hydroponic  
18 operations can have “general” environmental benefits reads out OFPA’s requirement that  
19 operations engage in practices that *directly benefit* the natural resources and biodiversity on lands  
20 they cultivate, and therefore it is unlawful. *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43 (action is  
21 arbitrary and capricious if agency “relied on factors which Congress has not intended it to  
22 consider” or “failed to consider an important aspect of the problem”).

23         Second, contrary to USDA’s bald assertion, the Administrative Record is replete with  
24 evidence that commercial hydroponic operations do *not* actually meet OFPA’s ecological and

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26 <sup>13</sup> Nat’l Organic Program, 65 Fed. Reg. 80,563, 80,563 (Dec. 21, 2000).

27 <sup>14</sup> Nat’l Organic Program, USDA, NOP 5020, *Guidance, Natural Resources and Biodiversity*  
28 *Conservation* (last revised Aug. 31, 2018),  
<https://www.ams.usda.gov/sites/default/files/media/NOP%205020%20Biodiversity%20Guidance%20Rev01%20%28Final%29.pdf>.



1 conservation-based requirements. See AR884 (“[Hydroponic operations] are not meeting the  
2 biodiversity [requirement.]”); AR908 (“[I]n a closed greenhouse, you are not going to find the  
3 biodiversity that you are going to find in an organic field.”); AR926 (explaining that “for a number  
4 of hydroponic systems, the principle source of fertility” is “import[ed]” from highly soluble sources  
5 such as hydrolyzed soybean meal” made in Europe and questioning the environmental costs of  
6 using such inputs); Stevenson Decl., Ex. A at 42, 62-63.

7 Members of the Hydroponic Task Force that concluded that hydroponic operations fail to  
8 meet OFPA’s mandates explained that “[hydroponic operations] use unapproved inputs,  
9 insufficient carbon and biology in these systems and there’s no nutrient cycling.” AR395-96.  
10 Significantly, the Hydroponic Task Force report recognized that, even soil-less hydroponic systems  
11 that recirculate resources grown using some organic materials do not “promote ecological balance”  
12 within the meaning of “organic production” as defined by the regulations. See AR587 (finding that  
13 such systems “do[] not align” with OFPA’s requirement that organic production “promote  
14 ecological balance” because they “may not contribute to long term ecological stability.”).

15 USDA’s blanket and unsupported assertion in the Petition Denial that hydroponic  
16 operations can meet OFPA’s definition requiring organic operations to foster cycling of resources  
17 and to promote ecological balance and biodiversity is contrary to OFPA’s regulatory requirements,  
18 and is also belied by the record. The Court should reject USDA’s conclusion that hydroponic  
19 operations comply with OFPA’s natural resource and biodiversity conservation requirements.  
20 *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43 (agency must “articulate a satisfactory explanation for its  
21 action, including a ‘rational connection between the facts found and the choice made . . . .’”).

#### 22 **IV. USDA’S PETITION DENIAL PERPETUATES INCONSISTENT ORGANIC** 23 **STANDARDS, IN VIOLATION OF OFPA.**

24 USDA’s Petition Denial and its decision to allow organic certification of hydroponic  
25 operations also violates OFPA’s purpose of establishing consistent organic production standards.  
26 See 7 U.S.C. § 6501; *supra* pp. 2-4. USDA’s Petition Denial unlawfully exempts hydroponic  
27 operations from all of OFPA’s soil management requirements, and fails to explain how and what  
28 types of hydroponic operations can satisfy OFPA’s natural resources and biodiversity conservation

1 requirements. By allowing hydroponic crops to be certified organic without meeting the same  
2 requirements for soil-based crops, USDA's Petition Denial subverts the overarching purpose of  
3 OFPA: the creation of a set of uniform organic production standards. *See* 7 U.S.C. § 6501.

4 First, USDA's Petition Denial unlawfully exempts hydroponic systems from OFPA's soil  
5 management requirements, even though OFPA commands all organic crop producers to maintain  
6 or improve soil health. *See supra* pp. 15-23. OFPA was created to ensure consistent standards of  
7 organic production applied to all organic farmers. *See supra* pp. 2-4. Yet according to the Petition  
8 Denial, a soil-grown organic tomato must be cultivated under a detailed set of soil management  
9 practices, none of which apply to a hydroponically produced one. *See, e.g.*, AR680 ("If I try to go  
10 out and feed all my crops in the field every day with a backpack sprayer of fish emulsion and kelp,  
11 my certifier would not even certify me because that wouldn't be consistent with good organic  
12 management . . ."); Stevenson Decl., Ex. A at 70 ("This land did not magically turn around  
13 through simple input substitution of organically-approved materials, but took years of compost  
14 applications, green manure, cover cropping, and proper crop rotation to be nurtured to healthy  
15 soils.").

16 Second, USDA claimed, without specifying how, that hydroponic systems can meet  
17 OFPA's conservation and biodiversity requirements based on their general environmental benefits.  
18 But the record makes clear that not all hydroponic systems are created equal. *See* AR562 ("[t]here  
19 is [a] wide variety of hydroponic systems."). The subcommittee of the Hydroponic Task Force  
20 responsible for detailing different types of hydroponic systems explained that, while "recirculating"  
21 hydroponic systems recycle the nutrient solutions used to feed the plants, there are also "open"  
22 hydroponic systems where the nutrient solution is applied and then simply "drained to waste,"  
23 with no cycling of resources. AR563. Critically, the subcommittee emphasized that, in its view,  
24 only a subset of hydroponic production systems may be capable of meeting OFPA's conservation  
25 and biodiversity goals. *See* AR581 ("Bioponic and other types of container production which rely  
26 on biological activity are in a unique category of crop production systems that allow for increased  
27 conservation of land and water resources"). And even for those systems, the subcommittee noted  
28 the inapplicability of the current soil-based regulations, and recommended additional rulemaking

1 and guidance to establish standards for organic hydroponic operation. *See, e.g.*, AR586  
2 (recommending that USDA require “recirculating systems or [systems that] account for any water-  
3 runoff”); AR593-94 (recommending that USDA adopt regulations that would require hydroponic  
4 operations to compost or reuse growing media and capture and reuse nutrient solution). Yet,  
5 whereas the regulations and guidance detail land management practices that soil-based operations  
6 can undertake to promote cycling of resources, ecological balance, and conserve biodiversity,  
7 USDA has issued no regulation nor guidance on how and what types of hydroponic operations  
8 can meet OFPA’s command that organic operations must “foster cycling of resources, promote  
9 ecological balance, and conserve biodiversity.” *See* NOP 5020, *supra* note 14, at App. A (table  
10 detailing ways for different types of organic production systems to conserve resources). USDA’s  
11 failure to clarify how hydroponic operations satisfy OFPA’s natural resources and biodiversity  
12 conservation requirements has created inconsistent organic standards.

13         This lack of clarity, from what types of hydroponic operations can be certified organic, to  
14 precisely how hydroponic operations can meet OFPA’s mandatory requirements, have already  
15 resulted in confusion around, and inconsistent application of, the organic production standards.  
16 *See supra* pp. 6-13; *see, e.g.*, Stevenson Decl., Ex. B at 3-4 (loss of certification business due to  
17 USDA’s failure to follow NOSB’s 2010 Recommendation).

18         USDA nonetheless insisted in the Petition Denial that there have been no inconsistent  
19 organic standards because USDA has consistently stated that organic certification of hydroponic  
20 operations is allowed. This is a strawman. Congress created mandatory production practice  
21 standards, and gave USDA limited discretion to exempt or deviate from such standards, for the  
22 very purpose of achieving OFPA’s goal of creating consistent national standards for organic food  
23 production. *Supra* pp 2-4. That USDA may have consistently ignored OFPA’s purposes does not  
24 render its determination to allow hydroponic operations to be certified organic without due regard  
25 for OFPA’s soil fertility and natural resources requirements lawful under OFPA.

26         Nor is it true that USDA’s position has actually been consistent. The decade-long debate  
27 concerning organic certification of hydroponic operations finds USDA repeatedly recognizing the  
28 need for further rulemaking in order to define hydroponic operations and provide standards for

1 their organic certification, but then flip-flopping to state that hydroponic operations can be  
2 certified under the existing law. *See supra* pp. 6-13. After the Hydroponic Task Force issued its  
3 report, Miles McEvoy, former deputy administrator of the National Organic Program, told the  
4 NOSB that “from our perspective, this seems like it would be a significant rulemaking action . . . .”  
5 AR701; *see, e.g.*, AR299 (stating that USDA “will develop a proposed rule based on the NOSB  
6 final recommendations”); AR920 (USDA deputy administrator told NOSB board member that  
7 “[USDA] believe[s] that hydroponics are covered under the standards. . . . But we recognize that  
8 . . . there may be additional details that need to be added . . . .”). That USDA has consistently  
9 refused to clear up confusion around organic certification of hydroponic operations does not  
10 create consistent organic standards; it does the opposite.

11 USDA’s Petition Denial authorizing organic certification of hydroponic operations has  
12 resulted in two sets of production standards for organic crop production: a detailed, onerous set of  
13 requirements for organic farmers working with the soil to grow organic crops, and no standards at  
14 all for hydroponic operators. USDA’s Petition Denial violates OFPA’s objective of establishing  
15 consistent standards of organic production. *See* 7 U.S.C. § 6501(1)-(2); *supra* pp. 2-4.

#### 16 **V. THE COURT SHOULD VACATE USDA’S PETITION DENIAL.**

17 As a result of USDA’s Petition Denial, hydroponic crop producers are being certified  
18 organic, and their produce is being marketed as identical to their soil-based organic counterpart,  
19 without having to meet OFPA’s mandatory command that *all* organic crop production must  
20 improve soil fertility and promote local ecology and biodiversity. The Court must declare that the  
21 Petition Denial’s interpretation of OFPA’s statutory and regulatory requirements authorizing  
22 organic certification of hydroponic operations is unlawful, in violation of OFPA and the APA, and  
23 vacate the Petition Denial. In light of the decade-long confusion and inconsistent application of  
24 OFPA’s requirements, the Court should instruct USDA to issue a new response in accordance  
25 with the Court’s order, within 90 days of the Court’s decision.

26 Under settled principles of administrative law, if an agency’s decision “is not sustainable on  
27 the administrative record made, then the [agency’s] decision must be vacated and the matter  
28 remanded to [the agency] for further consideration.” *Camp v. Pitts*, 411 U.S. 138, 143 (1973); 5

1 U.S.C. § 706(2)(A) (“[R]eviewing court shall . . . hold unlawful and set aside agency action . . . found  
2 to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”)  
3 (emphasis added). Where an agency has “made an error of law, . . . the case must be remanded to  
4 the agency for further action consistent with the corrected legal standards.” *PPG Indus. v. United*  
5 *States*, 52 F.3d 363, 365 (citing *Securities & Exchange Comm’n v. Chenery Corp.*, 318 U.S. 80 (1943)).

6 Thus under the APA, remand and vacatur is the presumptive and appropriate remedy for  
7 USDA’s unlawful Petition Denial. See, e.g., *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng’rs*,  
8 486 F.3d 638, 654 (9th Cir. 2007) (“[T]he normal remedy for an unlawful agency action is to ‘set  
9 aside’ the action. In other words, a court should vacate the agency’s action and remand to the  
10 agency to act in compliance with its statutory obligations.”) (internal quotation marks and citation  
11 omitted), *rev’d on other grounds sub nom. Coeur Alaska v. Se. Alaska Conserv. Council*, 557 U.S. 261  
12 (2009); *Int’l Ctr. For Tech. Assessment v. Johanns*, 473 F. Supp. 2d 9, 26 (D.D.C. 2007) (holding  
13 USDA’s petition denial contrary to the Plant Protection Act and vacating the denial with remand  
14 to USDA to issue a new response accordingly); See, e.g., *Pollinator Stewardship Council v. U.S. Envtl.*  
15 *Prot. Agency*, 806 F.3d 520, 532–33 (9th Cir. 2015); *Humane Soc’y v. Locke*, 626 F.3d 1040, 1048,  
16 1053 & n.7 (9th Cir. 2010); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL  
17 3383954, at \*10-13 (N.D. Cal. June 20, 2016) (remand and vacatur of USDA’s National Organic  
18 Program guidance on allowable compost in organic food production for violations of the APA).

19 There are “rare circumstances” in which vacatur is not required, based on equity. See  
20 *Humane Soc’y*, 626 F.3d at 1053 n.7; *Ctr. for Envtl. Health*, 2016 WL 3383954, at \*10 (“In the  
21 Ninth Circuit, remand without vacatur is the exception rather than the rule.”) (citing *Cal. Cmty.*  
22 *Against Toxics v. U.S. Envt’l Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012)). Such rare  
23 circumstances depend on the “seriousness of the agency’s errors” and “the disruptive consequences  
24 of an interim change that may itself be changed.” *Pollinator Stewardship Council*, 806 F.3d at 532.  
25 “The Ninth Circuit has only found remand without vacatur warranted by equity concerns in  
26 limited circumstances, namely serious irreparable environmental injury.” *Ctr. for Food Safety v.*  
27 *Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) (providing detailed discussion of APA vacatur  
28 standards and discussing cases); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.

1 1995) (“In the present case, concern exists regarding the potential extinction of an animal  
2 species”); *cf. Cal. Cmty. Against Toxics*, 688 F.3d at 994 (remanding without vacating because  
3 vacating could lead to air pollution, undermining the goals of the Clean Air Act).

4 Such extraordinary circumstances do not exist here. First, as to the seriousness of the  
5 agency’s errors, USDA’s Petition Denial violates the plain language and substantive requirements  
6 of OFPA, such that USDA cannot just adopt the same interpretation on remand. *Pollinator*  
7 *Stewardship Council*, 806 F.3d at 532 (considering whether “[the agency] could adopt the same rule  
8 on remand” in deciding whether to remand without vacatur). As to the second factor, “[the  
9 Court] must balance the [Agency’s] errors against the consequences of such a remedy.” *Cal. Cmty.*  
10 *Against Toxics*, 688 F.3d at 993; *Ctr. for Env’tl. Health*, 2016 WL 3383954, at\*11 (same). Here, any  
11 alleged economic harm or disruption to the hydroponic industry alone would be insufficient to  
12 warrant remand without vacatur. *See Ctr. for Env’tl. Health*, 2016 WL 3383954, at \*12-13 (in case  
13 challenging USDA’s National Organic Program Guidance, which created an exception to OFPA to  
14 allow the use of contaminated compost, holding that disruption to organic industry alone  
15 insufficient to meet defendants’ burden overcoming the default vacatur remedy).

16 Instead, vacatur of USDA’s Petition Denial would benefit the environment and protect the  
17 integrity of the Organic label by ensuring that organic producers adhere to practices that build  
18 fertile soil, and implement agricultural practices that promote ecological balance, and that  
19 conserve natural resources and biodiversity. The Court should vacate the Petition Denial, declare  
20 the rationale therein unlawful, and order USDA to issue a new response accordingly.

## 21 CONCLUSION

22 USDA has created an unlawful loophole in organic crop production. The Petition Denial  
23 impermissibly exempts hydroponic and other soil-less systems from OFPA’s statutory and  
24 regulatory requirements, and has resulted in inconsistent organic standards, eroding the very  
25 purpose of OFPA. Left alone, the Petition Denial creates a slippery slope towards inconsistent  
26 organic standards for other organic products. The Court should grant summary judgment in  
27 Plaintiffs’ favor.  
28

1 Respectfully submitted this 16th day of September, 2020.

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